

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

#### 2 CFR Part 1403

[4334–63 167DOI02DM DS62400000  
DLSN00000.000000 DX62401]

RIN 1090–AB11

#### Financial Assistance Interior Regulation

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule establishes the Financial Assistance Interior Regulation (FAIR). The FAIR supplements the OMB *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Omni-Circular), which was adopted by the Department of the Interior (Department) on December 19, 2014. This proposed rule would consolidate the Department's financial assistance regulations and policies derived from the OMB Omni-Circular.

**DATES:** Submit comments on or before April 8, 2016.

**ADDRESSES:** You may submit comments on the rulemaking through the Federal eRulemaking Portal at <http://www.regulations.gov>. Please use Regulation Identifier Number (RIN) 1090–AB08 in your message. Follow the instructions on the Web site for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Mr. James McCaffery, Deputy Director, Office of Acquisition and Property Management, Department of the Interior, 1849 C Street NW., Mail Stop 4262 MIB, Washington, DC 20240; telephone (202) 513–0695; or email [James\\_McCaffery@ios.doi.gov](mailto:James_McCaffery@ios.doi.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On December 26, 2013, the Office of Management and Budget (OMB) published its *Uniform Administrative Requirements, Cost Principles, and*

*Audit Requirements for Federal Awards* (referred to as the “Omni-Circular,” 78 FR 78590). The Omni-Circular provided a government-wide framework for Federal awards management; and streamlined administrative requirements, cost principles, and audit requirements for Federal awards including grants and cooperative agreements.

The Omni-Circular required Federal agencies to promulgate regulations implementing the policies and procedures applicable to Federal awards by December 26, 2014. On December 19, 2014, the Department published a final rule to adopt the OMB Omni-Circular in full as 2 CFR 1402, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* [79 FR 75867]. Subsequently, on December 22, 2014, the Department issued memoranda to supplement the following provisions of the OMB Omni-Circular: (1) Indirect Cost Rates for Federal Financial Assistance Awards and Agreements; (2) Conflict of Interest and Mandatory Disclosures for Financial Assistance; (3) Financial Assistance Application and Merit review Processes; and (4) Financial Assistance Awards for For-Profit Entities, Foreign Public Entities, and Foreign Organizations.

When the Omni-Circular became effective, it superseded many of the Department's existing financial assistance policies. The Department adopted the Omni-Circular in full and has addressed the Department's unique statutory requirements. The Department's adoption of the Omni-Circular is codified at 2 CFR part 1402. The Department intends to add supplemental rules or regulations for financial assistance through the establishment of the Financial Assistance Interior Regulation (FAIR). The FAIR will be codified at 2 CFR part 1403.

**Invitation to Comment:** This action represents an administrative simplification and is not intended to make any substantive changes to 2 CFR part 200 policies and procedures. In soliciting comments on these actions, the Department therefore is not seeking to revisit substantive issues resolved during the development and finalization of the Omni-Circular.

##### II. Effect on Prior Issuances

All Department of the Interior non-regulatory program manuals, handbooks and other materials that are inconsistent with 2 CFR part 200 and 2 CFR parts 1400 and 1402 are superseded, except to the extent that they are (1) required by statute; or (2) authorized in accordance with Omni-Circular Section 200.101, *Applicability*.

Except to the extent inconsistent with the regulations in all existing Department of the Interior regulations in 25 CFR parts 23, 27, 39, 40, 41, 256, 272, 278, and 276; 30 CFR parts 725, 735, 884, 886, and 890; 36 CFR parts 60, 61, 63, 65, 67, 72, and 800; 43 CFR parts 26 and 32; and 50 CFR parts 80, 81, 82, 83, and 401 are not superseded by these regulations; nor are any information collection approvals for financial assistance forms that have been granted under the Paperwork Reduction Act.

##### III. Required Determinations

**1. Regulatory Planning and Review** (*Executive Orders 12866 and 13563*). Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs has determined that this proposed rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866, calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, where these approaches are relevant, feasible, and consistent with regulatory objectives.

**2. Regulatory Flexibility Act.** This proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Department of the Interior generally does not award grants to small businesses. The vast majority of Interior grants are awarded to States, local governments, and not-for-profit institutions.

**3. Small Business Regulatory Enforcement Fairness Act.** This proposed rule is not a major rule under

the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule does not have an annual effect on the economy of \$100 million or more. The Department generally does not award grants to small businesses. This proposed rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This proposed rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This proposed rule establishes regulations for the Department of the Interior financial assistance. The Department's financial assistance is typically offered to States, local governments and not-for-profit institutions. It would not affect business relationships, employment, investment, productivity, innovations, or the ability of U.S.-based enterprises to compete internationally.

**4. Unfunded Mandates Reform Act.** This proposed rule (1) does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year; (2) does not have a significant or unique effect on State, local, or tribal governments, or the private sector (3) does not impose requirements on State, local, or tribal governments; and (4) is a reorganization of existing requirements and does not impose any new regulations. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

**5. Takings (E.O. 12630).** Under the criteria in section 2 of E.O. 12630, this proposed rule does not have significant takings implications. It does not impose any obligations on the public that would result in a taking. A takings implication assessment is not required.

**6. Federalism (E.O. 13132).** Under the criteria in section 1 of E.O. 13132, this proposed rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. It would not substantially and directly affect the relationship between the Federal and state governments. A Federalism summary impact statement is not required.

**7. Civil Justice Reform (E.O. 12988).** This proposed rule complies with the requirements of E.O. 12988. Specifically, this rule (1) meets the criteria of section 3(a) of this E.O. requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize

litigation; and (2) meets the criteria of section 3(b)(2) of this E.O. requiring that all regulations be written in clear language and contain clear legal standards.

**8. Consultation with Indian tribes (E.O. 13175).** The Department strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 and have determined that it has no substantial direct effect on Federally recognized Indian tribes and that consultation under the Department's tribal consultation policy is not required. This rule does not apply to tribal awards made in accordance with the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638, 88 Stat. 2204), as amended. However, this rule does apply to discretionary grants or cooperative agreements awarded to Tribes pursuant to Sec. 9 of Pub. L. 93-638 when mutually agreed to by the Secretary of the Interior and the tribal organization involved.

**9. Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*** Information collected in the financial assistance application process will be collected and managed in accordance with Omni-Circular section 200.206, *Standard application requirements*. However this rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**10. National Environmental Policy Act.** This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required.

**11. Effects on the Energy Supply (E.O. 13211).** This proposed rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

**12. Plain Language.** We are required by section 1(b)(12) of E.O. 12866 and section 3(b)(1)(B) of E.O. 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must (1) be logically organized;

(2) use the active voice to address readers directly; (3) use common, everyday words and clear language rather than jargon; (4) be divided into short sections and sentences; and (5) use lists and tables wherever possible. If you feel that we have not met these requirements, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

#### List of Subjects in 2 CFR Part 1403

Financial assistance, Grant administration, Grant programs.

For the reasons set forth in the preamble, the Department of the Interior proposes to amend 2 CFR chapter XIV by adding part 1403 to read as follows:

#### PART 1403—FINANCIAL ASSISTANCE INTERIOR REGULATION

Sec.

- 1403.100 What is the purpose of this part?
- 1403.101 To whom does the Financial Assistance Interior Regulation (FAIR) apply?
- 1403.102 Does the FAIR include any exceptions to OMB guidance?
- 1403.103 Does the Department have any other policies or procedures award recipients must follow?
- 1403.104–1403.110 [Reserved].
- 1403.111 What terms do I need to know?
- 1403.112 What is conflict of interest?
- 1403.113 What are mandatory disclosures for financial assistance?
- 1403.114–1403.203 [Reserved]
- 1403.204 What is the financial assistance application and merit review process?
- 1403.205 [Reserved]
- 1403.206 What are the FAIR requirements for domestic for-profit and foreign entities?
- 1403.207 What specific conditions apply?
- 1403.208–1403.400 [Reserved]
- 1403.401 What are the policies, procedures, and general decision-making criteria for deviations from negotiated indirect cost rates?
- 1403.402–1403.999 [Reserved]

**Authority:** 5 U.S.C. 301; 2 CFR part 200.

#### § 1403.100 What is the purpose of this part?

The Financial Assistance Interior Regulation (FAIR) serves as the regulatory structure for the Department's financial assistance regulations that implement or supplement the OMB Omni-Circular, 2 CFR part 200.

#### § 1403.101 To whom does the Financial Assistance Interior Regulation (FAIR) apply?

The FAIR applies to all the Department of the Interior grant-making organizations and to any non-Federal entity that applies for, receives, operates, or expends funds from a Department Federal financial assistance award, cooperative agreement or grant.

**§ 1403.102 Does the FAIR include any exceptions to OMB Guidance?**

The FAIR does not apply to tribal awards made in accordance with the Indian Self-Determination and Education Assistance Act (Public Law 93–638, 88 Stat. 2204), as amended. However, the FAIR does apply to discretionary grants or cooperative agreements awarded to Tribes pursuant to section 9 of Public Law 93–638 when mutually agreed to by the Secretary of the Interior and the tribal organization involved. The FAIR applies to all financial assistance awards within the Department, except where otherwise provided by Statute. Grants Officers must document statutory exceptions in the official award file.

**§ 1403.103 Does the Department have any other policies or procedures award recipients must follow?**

Award recipients must follow bureau/office program specific policies and procedures and applicable government-wide requirements. In the event that a bureau's or office's specific policies and procedures conflict with 2 CFR part 200 or this part, the bureau/office will adhere to the provisions of 2 CFR part 200 and this part unless the policy/procedures are required by law.

**§ 1403.104–1403.110 [Reserved]**

**§ 1403.111 What terms do I need to know?**

(a) *Conflict of interest* is any relationship or matter which might place the recipient, its employees, and/or its subrecipients in a position of conflict, real or apparent, between their responsibilities under the agreement and any other interests. Conflicts of interest also include, but are not limited to, direct or indirect financial interests, personal relationships, and business relationships including positions of trust in outside organizations, consideration of future employment arrangements with a different organization, or decision-making affecting the award that would cause a reasonable person with knowledge of the relevant facts to question the impartiality of the Recipient and/or recipient's employees and subrecipients in the matter.

(b) *Discretionary Federal financial assistance* means Federal awards including grants and cooperative agreements that are awarded at the discretion of the agency.

(c) *Employment* means:

- (1) In any capacity, even if otherwise permissible, by any applicant or potential applicant for a Federal financial assistance award;
- (2) Employment within the last 12 months with a different organization

applying for some portion of the award's approved project activities and funding to complete them OR expected to apply for and to receive some portion of the award; and/or

(3) Employment with a different organization of any member of the organization employee's household or a relative with whom the organization's employee has a close personal relationship who is applying for some portion of the award's approved project activities and funding to complete them, OR expected to apply for and to receive some portion of the award.

*Non-Federal entity* means a State, local government, Indian tribe, institution of higher education, or nonprofit organization that carries out a Federal award as a recipient or subrecipients.

(d) *Personal relationship* means a Federal award program employee's spouse and/or dependent children, or other members of an employee's household, which may compromise or impair the fairness and impartiality of the Proposal Evaluator and Advisor and Grants Officer in the review, selection, award, and management of a financial assistance award.

(e) *Recipient* means a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program. The term recipient does not include subrecipients.

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

**§ 1403.112 What is conflict of interest?**

(a) Non-Federal entities must disclose in writing any potential conflict of interest to the Department awarding agency or pass-through entity and the Department's Office of Inspector General in accordance with 2 CFR 200.112, *Conflict of interest*. Proposal evaluators and advisors, including members of evaluation committees, must render impartial, technically sound, and objective assistance and advice to protect the integrity of the proposal evaluation and award selection process. A Federal employee is prohibited from participating in his or her government capacity in any particular matter when the employee, his or her spouse, minor child, outside business associate, or a person or organization with whom the employee is negotiating or has an arrangement for

prospective employment, has a financial interest in the particular matter (see 18 U.S.C. 208).

(b) Employees are prohibited from having a direct or indirect financial interest that conflicts substantially or appears to conflict substantially with his or her government duties and responsibilities (see 5 CFR 2635.402 and 5 CFR 2635.502). Employees are also prohibited from engaging in, either directly or indirectly, a financial transaction resulting from or primarily relying on information obtained through his or her government employment (see 5 CFR 2635.702 and 5 CFR 2635.703). In addition, 43 CFR 20.401–403 contains other regulations concerning conflicts of interest involving employees of specific bureaus and offices. Employee Responsibility and Conduct Regulations for the Department are contained in 43 CFR part 20, 5 CFR 2634, 5 CFR 2635, and 5 CFR 2640.

(c) With the exception of contracting personnel, proposal evaluators and advisors are not required to file a Statement of Employment and Financial Interest (DI–210) unless they occupy positions identified in 5 CFR 2634.202 and 5 CFR 2634.904. Therefore, upon receipt of a Memorandum of Appointment, each proposal evaluator and advisor must sign and return a Conflict of Interest Certificate to the Grants Officer or official responsible for the review. If an actual or potential conflict of interest exists, the appointee may not evaluate or provide advice on a potential applicant's proposal until the conflict has been resolved with the servicing Ethics Counselor. Signed certificates from all proposal evaluators and advisors must be retained in the master file for the Funding Opportunity Announcement.

(d) During the evaluation process, each proposal evaluator and advisor must assure that there are no financial or employment interests which conflict or give the appearance of conflicting with his or her duty to evaluate proposals impartially and objectively. Examples of situations which may be prohibited or represent a potential conflict of interest may include, but are not limited to:

- (1) Financial interest, including ownership of stocks and bonds, in a firm which submits, or is expected to submit, an application in response to the funding opportunity;
- (2) Outstanding financial commitments to any applicant or potential applicant;
- (3) Employment in any capacity, even if otherwise permissible, by any applicant or potential applicant;

(4) Employment within the last 12 months by any applicant or potential applicant;

(5) Any non-vested pension or reemployment rights, or interest in profit sharing or stock bonus plan, arising out of the previous employment by an applicant or potential applicant;

(6) Employment of any member of the immediate family by any applicant or potential applicant;

(7) Positions of trust that may include employment, past or present, as an officer, director, trustee, general partner, agent, attorney, consultant, or contractor;

(8) A close personal relationship that may include a spouse, dependent child or member of the proposal evaluator's household that may compromise or impair the fairness and impartiality of the proposal evaluator or advisor and grants officer during the proposal evaluation and award selection process, and the management of an award; and

(9) Negotiation of outside employment with any applicant or potential applicant.

(e) Each proposal evaluator and advisor must immediately disclose in writing to the Grants Officer or the individual responsible for the review as soon as it becomes known that an actual or potential conflict of interest exists. The Grants Officer must obtain the assistance of the servicing Ethics Counselor in order to reach an opinion or resolution. A record of the disposition of all conflict of interest situations must be included in the award file.

(f) All Department financial assistance awards must include the following term and condition prohibiting recipient, recipient employee and subrecipient conflicts of interest:

#### Conflict of Interest

The recipient must establish safeguards to prohibit its employees and subrecipients from using their positions for purposes that constitute or present the appearance of a personal or organizational conflict of interest. The recipient is responsible for notifying the Grants Officer in writing of any actual or potential conflicts of interest that may arise during the life of this award. Conflicts of interest include any relationship or matter which might place the recipient or its employees in a position of conflict, real or apparent, between their responsibilities under the agreement and any other outside interests. Conflicts of interest may also include, but are not limited to, direct or indirect financial interests, close personal relationships, positions of trust in outside organizations, consideration of future employment arrangements with a different organization, or decision-making affecting the award that would cause a reasonable person with knowledge of the relevant facts

to question the impartiality of the recipient and/or recipient's employees and subrecipients in the matter.

The Grants Officer and the servicing Ethics Counselor will determine if a conflict of interest exists. If a conflict of interest exists, the Grants Officer will determine whether a mitigation plan is feasible. Mitigation plans must be approved by the Grants Officer in writing. Failure to resolve conflicts of interest in a manner that satisfies the government may be cause for termination of the award.

Failure to make required disclosures may result in any of the remedies described in 2 CFR 200.338, including suspension or debarment (see also 2 CFR part 180).

#### **§ 1403.113 What are mandatory disclosures for financial assistance?**

The non-Federal entity or applicant for a Federal award must disclose in writing, in a timely manner, 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. Failure to make required disclosures can result in any of the remedies described in 2 CFR 200.338 (see also 2 CFR part 180 and 31 U.S.C. 3321). A non-Federal entity or applicant for a the Department award must disclose, in a timely manner, in writing to the Department awarding agency or pass-through entity, and to the Department's Office of Inspector General, all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award.

#### **§ 1403.114–1403.203 [Reserved]**

#### **§ 1403.204 What is the financial assistance application and merit review process?**

(a) This merit review process does not apply to instruments such as intra- and inter-agency agreements, international agreements (excluding grants and cooperative agreements with foreign recipients), memoranda of understanding or agreement, cooperative research and development agreements, concession contracts, permits, or fixed price awards.

(b) This merit review process must be described or incorporated by reference in the applicable funding opportunity announcement (see 2 CFR part 200 appendix I and 2 CFR 200.203). It is also important for the Department's bureaus and offices to create review systems for discretionary programs that are noncompetitive that consider statutory or regulatory provisions, a business evaluation, risk assessment, and other applicable government-wide pre-award considerations.

(c) *Actions required*—(1) *Competition in grant and cooperative agreement awards*. Maximum competition in grant

and cooperative agreement awards is expected in awarding discretionary funds, unless otherwise directed by Congress. When grants and cooperative agreements are awarded competitively, the Department requires that the competitive process be fair and impartial, that all applicants be evaluated only on the criteria stated in the announcement, and that no applicant receive an unfair competitive advantage. Synopses of all announcements for open competition, and all modifications/amendments to announcements for open competition, must be posted on Grants.gov ([www.grants.gov](http://www.grants.gov)).

(2) *Independent objective evaluation of financial assistance applications and proposals*. Announcements and competitions for assistance and agreements must provide for an objective and unbiased process for reviewing applications submitted in response to the announcement and for selecting applicants for award. This requires a comprehensive, impartial, and objective examination of applications based on the criteria contained in the announcement by individuals who have no conflicts of interest with respect to the competing proposal/applications or applicants. Bureaus and offices must exercise due diligence to ensure that applications are reviewed and evaluated by qualified reviewers; applications are scored on the basis of announced criteria; consideration is given to the level of applicant risk and past performance; applications are ranked; and funding determinations are made. Awarding officials must check the System for Award Management (SAM) immediately prior to award to verify that the awardee is not suspended, debarred or otherwise ineligible at the time of award. The SAM review must include a review of the recipient organization's name and principal staff.

(3) *Evaluation and Selection Plan for Funding Opportunity Announcements*. Bureaus and offices must develop an Evaluation and Selection Plan in concert with the Funding Opportunity Announcement (FOA) to ensure consistency, and to outline and document the selection process. The Evaluation and Selection Plan should be finalized prior to the release of the FOA. An Evaluation and Selection Plan is comprised of five basic elements:

(i) Merit review factors and sub-factors;

(ii) A rating system (e.g., adjectival, color coding, numerical, or ordinal);

(iii) Evaluation standards or descriptions which explain the basis for

assignment of the various rating system grades/scores;

- (iv) Program policy factors; and
- (v) The basis for selection.

(4) *Basic review standards.* Bureaus and offices must initially screen new applications/proposals to ensure that they meet the following standards before they are subjected to a detailed evaluation utilizing a merit review process. The review system should include three phases: initial screening, threshold review and a merit review. Bureaus and offices may remove an application from funding consideration if it does not pass the Basic Eligibility Screening.

(5) *Basic eligibility screening.* The initial stage is to consider the timeliness of the application submission, applicant eligibility, and completeness of the documents submitted for review. All applications should be screened to ensure that:

- (i) The application meets the requirements of the applicable funding opportunity;
- (ii) The applicant meets the eligibility requirements detailed in the funding opportunity;
- (iii) The applicant entity and principal investigator/key personnel are not suspended, debarred, or otherwise described as ineligible in the System for Award Management; and
- (iv) The application contains a properly executed Standard Form (SF)-424, *Application for Financial Assistance*, SF-424B or SF-424D, *Assurances*, *Detailed Budget Review Sheets*; and, if applicable, the SF-LLL, *Disclosure of Lobbying*.

(6) *Completeness.* Bureaus and offices may return applications/proposals that are incomplete or otherwise fail to meet the requirements of the Grants.gov FOA to the sender to be corrected or modified/supplemented by the sender. Until the application/proposal meets the above requirements, it shall not be given detailed evaluation. Bureaus and offices may use discretion to determine the length of time for applicants to resolve application deficiencies.

(7) *Timeliness.* In a competitive review process, bureaus and offices shall consider the timeliness of the application submission. Applications that are submitted beyond the announced deadline date shall be removed from the review process.

(8) *Threshold screening.* Bureaus and offices are responsible for screening applications and proposals for the adequacy of the budget and compliance with statutory and other requirements. The SF-424 and Detailed Budget Worksheets must be reviewed in accordance with Department of the

Interior policy on *Financial Assistance Cost Reviews*. Bureaus and offices must also consider risk thresholds at this stage of the process. Elements to be considered include organization; single audit submissions, past performance; availability of necessary resources, equipment, or facilities; financial strength and management capabilities; procurement procedures; or procedures for selecting and monitoring subrecipients or sub-vendors, if applicable.

(9) *Merit review evaluation screening.* This is the final review stage where the technical merit of the application/proposal is reviewed. In the absence of a program rule or statutory requirement, program officials should develop criteria that include all aspects of technical merit. Bureaus and offices should develop criteria that are conceptually independent of each other, but all-encompassing when taken together. While criteria will vary, the basic criteria should focus reviewers' attention on the project's underlying merit (*i.e.*, significance, approach, and feasibility). The criteria should focus not only on the technical details of the proposed project but also on the broader importance or potential impact of the project. The criteria should be easily understood. If the criteria are susceptible to varying interpretations, reviewers will use their own interpretation. Program policy factors may be used during the selection process to provide for consideration of factors that are important to the fulfillment of agency program objectives.

#### **§ 1403.205 [Reserved]**

#### **§ 1403.206 What are the FAIR requirements for domestic for-profit and foreign entities?**

The Omni-Circular and the Department's FAIR Omni-Circular supplement apply to 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 obligations of the United States or the statute or regulations of a foreign government (see definitions in 2 CFR 200.46 and 2 CFR 200.47).

(a) *Requirements for domestic for-profit entities.* (1) Section 1403.207 contains standard award terms and conditions that bureaus and offices must always apply to for-profit entities; and terms and conditions that bureaus and offices may apply to for-profit entities. Bureaus and offices must always incorporate into awards to domestic for-

profit organizations the award terms and conditions that always apply, either directly or by reference.

(2) Bureaus and offices may apply the administrative guidelines in 2 CFR part 200 subparts A through D; the cost principles at 48 CFR part 1, subpart 31.2; and the procedures for negotiating indirect costs detailed in section 1403.401 of the FAIR, to domestic for-profit entities

(3) Depending on the nature of a particular program, offices and bureaus may alternatively develop program-specific administrative guidelines for domestic for-profits based on the requirements in 2 CFR part 200 subparts A through D, but may not apply more restrictive requirements than the requirements in 2 CFR part 200 subparts A through D unless approved by OMB through a request to the Director, Office of Acquisition and Property Management.

(b) *Requirements for foreign entities.* Section 1403.207 of the FAIR contains standard award terms and conditions for foreign entities that include terms and conditions that bureaus and offices must always apply to foreign entities; and terms and conditions that bureaus and offices may apply to foreign entities. Bureaus and offices must always incorporate the terms and conditions that always apply to awards to foreign entities, either directly or by reference. All applicable award terms and conditions apply unless the foreign recipient provides conclusive evidence to the Departmental grant making program, and the program agrees, that application of a particular requirement is inconsistent with the international obligations of the United States or the laws or regulations of a foreign government to which the recipient is subject.

(c) *Restrictions on foreign awards.* Bureaus and offices must not fund projects in countries determined by the U.S. Department of State to have provided support for acts of international terrorism (see <http://www.state.gov/j/ct/list/c14151.htm> for more information), and are therefore subject to sanctions that restrict U.S. foreign assistance and other financial transactions, without proper licenses administered by the U.S. Department of the Treasury, Office of Foreign Asset Controls (see <http://www.treasury.gov/resourcecenter/sanctions/Pages/default.aspx> for more information).

(d) *Method of payment for foreign awards.* Foreign recipients must not register in or be paid through the Department of the Treasury's Automated Standard Application for Payments (ASAP). Foreign recipients

with bank accounts in the United States are paid by Electronic Funds Transfer (EFT) through the Automated Clearing House (ACH). Foreign recipients with bank accounts outside of the United States are paid electronically through the Department of the Treasury's International Treasury Services (ITS) system. The Debt Collection Improvement Act of 1996 requires that all Federal agency payments be made electronically. However, Treasury regulations do allow for some exceptions, including or certain foreign entities. Refer to Department of the Interior guidance on Electronic Funds Transfer Waiver Process at <https://www.doi.gov/sites/doi.gov/files/migrated/pam/programs/acquisition/upload/DIAPR-2012-06-Amendment-1-Electronic-Funds-Transfer-Waiver-Process-2.pdf> for more information.

(e) *Requirements for award terms and conditions.* Bureau and office award terms and conditions must be managed in accordance with the requirements in 2 CFR 200.210.

#### § 1403.207 What specific conditions apply?

(a) *Mandatory award terms and conditions for domestic for-profit entities.* The award terms and conditions in:

- (1) 2 CFR part 25, Universal Identifier and System for Award Management;
- (2) 2 CFR part 170, Reporting Subawards and Executive Compensation;
- (3) 2 CFR part 175, Award Term for Trafficking in Persons;
- (4) 2 CFR part 1400, Government-wide Debarment and Suspension (Non-procurement);
- (5) 2 CFR part 1401, Requirements for Drug-Free Workplace (Financial Assistance); and
- (6) 43 CFR part 18, New Restrictions on Lobbying, always apply to domestic for-profit entities.

(b) Submission of an application for financial assistance also represents the applicant's certification of the statements in 43 CFR part 18, appendix A, Certification Regarding Lobbying.

(c) The terms and conditions of 41 U.S.C. 4712, Pilot Program for Enhancement of Recipient and Subrecipient Employee Whistleblower Protection, apply to all awards issued after July 1, 2013 and shall remain in effect until January 1, 2017.

(d) Bureaus and offices shall include the terms and conditions of 41 U.S.C. 6306, Prohibition on Members of Congress Making Contracts with the Federal Government, 41 U.S.C. 6306; and Executive Order 13513, *Federal Leadership on Reducing Text Messaging*

while Driving, in all awards to domestic for-profit entities.

(e) *Whistleblower protection clause.* Recipients must insert the following clause in all subawards and contracts related to the prime award that are over the Simplified Acquisition Threshold:

All awards and related subawards and contracts over the Simplified Acquisition Threshold, and all employees working on applicable awards and related subawards and contracts, are subject to the whistleblower rights and remedies in accordance with the pilot program on award recipient employee whistleblower protections established at 41 U.S.C. 4712 by section 828 of the *National Defense Authorization Act for Fiscal Year 2013* (Pub. L. 112-239).

(f) Recipients, their subrecipients and contractors that are awarded contracts over the Simplified Acquisition Threshold related to an applicable award, shall inform their employees, in writing, in the predominant language of the workforce, of the employee whistleblower rights and protections under 41 U.S.C. 4712.

(g) *Discretionary award terms and conditions for domestic for-profit entities.* The award terms and conditions in 2 CFR part 200, subparts A through E; and 48 CFR part 1, subpart 31.2, *Contracts with Commercial Organizations*, apply only when the Federal program specifically incorporates them into a for-profit recipient's notice of award.

(f) *Indirect cost rates.* For information on indirect cost rate negotiations, contact the Interior Business Center (IBC) Indirect Cost Services Division by telephone at (916) 566-7111 or by email at [ics@ibc.doi.gov](mailto:ics@ibc.doi.gov). Visit the IBC Indirect Cost Services Division Web site at [http://www.doi.gov/ibc/services/Indirect\\_Cost\\_Services/index.cfm](http://www.doi.gov/ibc/services/Indirect_Cost_Services/index.cfm) for more information.

(g) *Mandatory award terms and conditions for foreign public entities.* (1) The award terms and conditions in 2 CFR part 25, *Universal Identifier and System for Award Management*; 2 CFR part 170, *Reporting Subawards and Executive Compensation*; 2 CFR part 175, *Award Term for Trafficking in Persons* (applicable to private entity subrecipients of foreign public entities); 2 CFR part 1401, *Requirements for Drug-Free Workplace* (Financial Assistance); and 43 CFR part 18, *New Restrictions on Lobbying*, always apply to all foreign public entities (see definition in 2 CFR 200.46) and foreign organizations (see definition in 2 CFR 200.47). Submission of an application for financial assistance also represents the applicant's certification of the statements in 43 CFR

part 18, appendix A, *Certification Regarding Lobbying*.

(2) Bureaus and offices must also include the terms and conditions of 41 U.S.C. 6306, *Prohibition on Members of Congress Making Contracts with Federal Government*; and Executive Order 13513, *Federal Leadership on Reducing Text Messaging While Driving*, in awards to foreign public entities.

(h) *Discretionary award terms and conditions for foreign public entities and foreign organizations.* (1) The award terms and conditions in 2 CFR part 200 subparts A through E apply to foreign public entities and foreign organizations only when the Federal program specifically incorporates them into a foreign recipient's notice of award. Foreign public entities are also subject to the requirements specific to States, with the following exceptions:

(2) State payment procedures in 2 CFR 200.305(a) do not apply. Foreign public entities must follow the payment procedures in 2 CFR 200.305(b)).

(3) The requirements of 2 CFR part 6 200.321, *Contracting with Small and Minority Businesses, Women's Business Enterprises, and Labor Surplus Area Firms*; and 2 CFR 200.322, *Procurement of Recovered Materials*, do not apply.

(4) Foreign non-profit organizations (see definition in 2 CFR 200.70) are subject to the requirements specific to domestic non-profit organizations.

(5) Foreign institutions of higher education (IHEs) (institutions located outside the United States that meet the definition in 20 U.S.C. 1001) are subject to requirements specific domestic to IHEs.

(i) *Cost principles.* Foreign public entities are subject to the cost principles in 48 CFR part 1, subpart 31.2. Foreign hospitals (*i.e.*, a facility licensed as a hospital under the law of any foreign governmental entity or a facility operated as a hospital by a foreign public entity) are subject to the cost principles in 45 CFR part 74, appendix E.

(j) *Indirect costs.* (1) The provisions of 2 CFR part 200, appendix IV, *Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Nonprofit Organizations*, apply to foreign non-profit organizations.

(2) The provisions of 2 CFR part 200 appendix VII, *States and Local Government and Indian Tribe Indirect Cost Proposals*, apply to foreign public entities. Foreign for-profit entities may contact the Interior Business Center (IBC) Indirect Cost Services by telephone at (916) 566-7111 or by email at [ics@ibc.doi.gov](mailto:ics@ibc.doi.gov), or visit the IBC Indirect Cost Services Web site at <http://www.doi.govgov/ibc/services/>

*Indirect Cost Services/index.cfm* for more information.

(3) The provisions of 45 CFR part 74, appendix E, *Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals*, apply to foreign hospitals. The U.S. Department of Health and Human Services (HHS) is the cognizant agency for indirect costs for foreign hospitals. Visit the HHS Cost Allocation Services Web site at <https://rates.psc.gov/> for more information.

(4) Indirect costs for institutes of higher education are negotiated with HHS in accordance with 2 CFR part 200 appendix III, *Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Institutions of Higher Education (IHEs)*. Visit the HHS Cost Allocation Services Web site at <https://rates.psc.gov/> for more information.

(5) The applicable standard award terms and conditions will apply unless the recipient provides conclusive evidence for an exception. In granting the exception, the bureau/office agrees that the application of a particular requirement is inconsistent with the international obligations of the United States or the laws or regulations of a foreign government to which the recipient is subject. Such case-by-case exceptions are allowable under 2 CFR 200.102(b).

(6) The immunities provided to public international organizations under the International Organizations Immunities Act (22 U.S.C. 288–288f) are not considered waived unless they are expressly waived in writing by an authorized official at the organization. Signing the SF-424 Assurances or accepting an award does not constitute an express waiver of such immunities. The SF-424 Assurances form also states that “certain of these assurances may not be applicable to your project or program.” For a list of public international organizations awarded immunities under the International Organizations Immunities Act (see the U.S. Department of State’s Foreign Affairs Manual (FAM), at 9 FAM 41.24, Exhibit I).

#### § 1403.208–1403.400 [Reserved]

#### § 1403.401 What are the policies, procedures, and general decision-making criteria for deviations from negotiated indirect cost rates?

(a) The provisions of 2 CFR 200.414(c) require Federal agencies to accept federally negotiated indirect cost rates. Federal agencies may use a rate different from the negotiated rate for a class of awards or a single Federal award only when required by Federal statute or regulation, or when approved by a

Federal awarding agency head or delegate based upon documented justification described within 2 CFR 200.414(c)(3). In addition, the Department accepts indirect cost rates that have been reduced or removed voluntarily by the proposed recipient of the award, on an award-specific basis. The following policies, procedures and general decision-making criteria apply for deviations from negotiated indirect cost rates for financial assistance programs and agreements.

(1) *Distribution basis.* For all deviations to the Federal negotiated indirect cost rate, including statutory, regulatory, programmatic, and voluntary, the basis of direct costs against which the indirect cost rate is applied must be:

(i) The same base identified in the recipient’s negotiated indirect cost rate agreement, if the recipient has a federally negotiated indirect cost rate agreement; or

(ii) The modified total direct cost (MTDC) base, in cases where the recipient does not have a federally negotiated indirect cost rate agreement or, with prior approval of the Awarding Agency, when the recipient’s federally negotiated indirect cost rate agreement base is only a subset of the MTDC (such as salaries and wages) and the use of the MTDC still results in an overall reduction in the total indirect cost recovered. The MTDC is the base defined by 2 CFR 200.68.

(iii) In cases where the recipient does not have a federally negotiated indirect cost rate agreement, under no circumstances will the Department use a modified rate based upon Total Direct Cost or other base not identified in the federally negotiated indirect cost rate agreement or defined within 2 CFR 200.68. The purpose of this restriction is to ensure that the reduced rate is applied against a base that does not include any potentially distorting items (such as pass-through funds, subcontracts in excess of \$25,000, and participant support costs); and is based on the requirements outlined in 2 CFR 200.68; 2 CFR 200.414(f); 2 CFR part 200 appendix III, section C.2.; 2 CFR part 200 appendix IV, section B.3.f.; and appendix VII, section C.2.c.

(2) *Indirect cost rate deviation required by statute or regulation.* In accordance with 2 CFR 200.414(c)(1), a Federal agency must use a rate other than the Federal negotiated rate where required by Federal statute or regulation. For such instances within the Department, the official award file must document the specific statute or regulation that required the deviation.

(3) *Indirect cost rate reductions used as cost-share.* Instances where the recipient elects to use a rate lower than the federally negotiated indirect cost rate, and uses the balance of the unrecovered indirect costs to meet a cost-share or matching requirement required by the program and/or statute, are not considered a deviation from 2 CFR 200.414(c), as the federally negotiated indirect cost rate is being applied under the agreement in order to meet the terms and conditions of the award.

(4) *Programmatic indirect cost rate deviation approval process.* The following requirements apply for review, approval, and posting of programmatic indirect cost rate waivers:

(5) *Program qualifications.* Programs that have instituted a program-wide requirement and governance process for deviations from federally negotiated indirect cost rates may qualify for a programmatic deviation approval.

(6) *Deviation requests.* Deviation requests must be submitted by the responsible senior program manager to the Department Office of Acquisition and Property Management. The request for deviation approval must include a description of the program, and the governance process for negotiating and/or communicating to recipients the indirect cost rate requirements under the program. The program must make its governance documentation, rate deviations, and other program information publicly available.

(7) *Approvals.* Programmatic deviations must be approved, in writing, by the Director, Office of Acquisition and Property Management. Approved deviations will be made publicly available along with the governance documentation for the program.

(8) The following programs are approved to use an indirect cost rate that deviates from the federally negotiated indirect cost rate agreements:

- (i) Cooperative Fish and Wildlife Research Unit (CRU) Program;
- (ii) Cooperative Ecosystem Studies Unit (CESU) Program; and
- (iii) Land Buy-Back Program for Tribal Nations.

(9) *Voluntary indirect cost rate reduction.* On an award-specific basis, an applicant and/or proposed recipient may elect to reduce or eliminate the indirect cost rate applied to costs under that award. The election must be voluntary and cannot be required by the awarding official, funding opportunity announcement, program, or other non-statutory or non-regulatory requirements. For these award-specific and voluntary reductions, the Department can accept the lower rate

provided the official file clearly documents the recipient's voluntary election.

(10) *Unrecovered indirect costs.* In accordance with 2 CFR 200.405, indirect costs not recovered due to deviations to the federally negotiated rate are not allowable for recovery via any other means.

(b) [Reserved]

**§ 1403.402–1403.999 [Reserved]**

Dated: January 20, 2016.

**Kristen J. Sarri,**

*Principal Deputy Assistant Secretary—Policy, Management and Budget.*

[FR Doc. 2016–02039 Filed 2–5–16; 8:45 am]

BILLING CODE 4334–63–P

**OFFICE OF PERSONNEL  
MANAGEMENT**

**5 CFR PART 250**

**RIN 3206–AL98**

**Personnel Management in Agencies**

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management is issuing proposed regulations that introduce updated systems and regulatory definitions for managing human resources in the Federal Government. The rulemaking also proposes to reduce and clarify the reporting procedures that agencies are required to follow, creates a data-driven review process (HRStat); and describes workforce planning methods that agencies are required to follow.

Additionally, the proposed regulation aligns Strategic Human Capital Management to the Government Performance and Results Act Modernization Act of 2010 (Pub. L. 111–352). It also sets forth the new Human Capital Framework (HCF), which replaces the Human Capital Assessment Accountability Framework (HCAAF).

**DATES:** Comments must be received on or before April 8, 2016.

**ADDRESSES:** You may submit comments, identified by RIN number 3206–AL98, using any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Mail:* Veronica Villalobos, Principal Deputy Associate Director, Employee Services, Office of Personnel Management, Room 7460, 1900 E Street NW., Washington, DC 20415.

**FOR FURTHER INFORMATION CONTACT:** For information contact Jan Chisolm-King

by email at [janet.chisolm-king@opm.gov](mailto:janet.chisolm-king@opm.gov) or by telephone at (202) 606–1958.

**SUPPLEMENTARY INFORMATION:** The Office of Personnel Management (OPM) is issuing proposed regulations to revise 5 CFR part 250, subpart B, Strategic Human Capital Management and 5 CFR part 250, subpart C, Employee Surveys.

5 CFR part 250, subpart B, implements the requirements of 5 U.S.C. 1103(c) and the Chief Human Capital Officers Act (CHCO Act). Section 1103(c)(1) requires OPM to design a set of systems, including appropriate metrics, for assessing the management of human capital by Federal agencies and to define those systems in regulation. Section 1103(c)(2) requires OPM to define the systems in regulations and include standards addressing a series of specified topics. Subpart B of part 250 of title 5, Code of Federal Regulations, contains those regulations. Subpart B also provides an avenue for Chief Human Capital Officers (CHCOs) to carry out their required functions under 5 U.S.C. 1402(a).

Current regulations implement 5 U.S.C. 1103(c) by adopting the systems currently comprising the Human Capital Assessment and Accountability Framework (HCAAF) to constitute the systems required by 5 U.S.C. 1103(c)(1) and to provide the systems definitions and standards required by 5 U.S.C. 1103(c)(2). The HCAAF is a framework that integrates four human capital systems—Strategic Planning and Alignment, Talent Management, Performance Culture, and Evaluation. These systems define practices for the effective and efficient management of human capital and support the steps involved in the planning and goal setting, implementation, and evaluation of human capital policies, programs, and initiatives in the Federal Government.

**Proposed August 2011 Regulations**

In August, 2011, OPM issued proposed regulations (FR Doc No: 2011–19844) that sought to make several changes to the regulatory definitions related to the strategic management of human capital. The current regulations implement 5 U.S.C. 1103(c) by adopting the systems comprising the Human Capital Assessment and Accountability Framework (HCAAF) to constitute the systems required by 5 U.S.C. 1103(c)(1) and to provide the systems definitions and standards required by 5 U.S.C. 1103(c)(2). Having the HCAAF written into regulation makes it difficult to keep current. OPM concluded in 2011, as it does again today, that it would be more effective to provide definitions in the regulations that establish broad,

overarching concepts, and to treat some of the system-specific material in the framework as guidance that is subject to change as Federal human capital management evolves. This removal of the HCAAF from the stated regulation into guidance would allow OPM to refresh aspects of the framework, without requiring a change to the specific regulations, thereby encouraging flexibility and adaptability. An additional change in the earlier proposal was the elimination of the requirement for the Strategic Human Capital Plan (SHCP) and Human Capital Management Report (HCMR) to reduce the burden of reporting requirements for the agencies.

In addition, the earlier proposed regulation would have clarified requirements imposed by two separate legal authorities. In the past, there was some confusion regarding whether agencies must establish separate accountability systems in order to satisfy the statutory requirements of 5 U.S.C. 1103(c)(2)(F) and any requirement OPM previously imposed under Civil Service Rule X (5 CFR 10.2). The proposed regulations were expected to make clear that the requirements of these two legal authorities are satisfied by the establishment of the Human Capital Accountability System (HCAS) set forth in section 250.205 of the proposed regulation.

**Recent Developments**

OPM did not make the proposed regulation final because of several developments that required additional changes to what had been written in the proposed regulation. One major change was the enactment of the Government Performance and Results Act Modernization Act of 2010 (Pub. L. 111–352), and the issuance of the Diversity and Inclusion Executive Order (E.O. 13583).

*The Government Performance and Results Act (GPRAMA) Modernization Act (GPRAMA)*

Before the enactment of GPRAMA, agencies were required to develop Strategic Human Capital Plans that identified human capital (HC) strategies and resources that support agency missions and strategic goals. Under GPRAMA, agency strategic HC plans are no longer required; however, agencies must now integrate the human capital strategies and resources within their agency strategic plan. Human Capital Management Reports (HCMRs) also were eliminated. Implementation guidance for GPRAMA states that CHCOs will address in their Annual Performance Plan, “how performance