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OFFICE OF MANAGEMENT AND BUDGET

2 CFR Part 170

RIN 0348–AB61

Requirements for Federal Funding Accountability and Transparency Act Implementation

AGENCY: Office of Federal Financial Management, Office of Management and Budget (OMB).

ACTION: Interim final guidance to agencies with opportunity for comment.

SUMMARY: OMB is issuing interim final guidance to agencies to establish requirements for Federal financial assistance applicants, recipients, and subrecipients that are necessary for the implementation of the Federal Funding Accountability and Transparency Act of 2006, hereafter referred to as "the Transparency Act" or "the Act". This interim final guidance provides standard wording for an award term that each agency must include in grant and cooperative agreement awards it makes on or after October 1, 2010, to require recipients to report information about first-tier subawards and executive compensation under only those awards. This implementation of the requirement for reporting of subawards and executive compensation under Federal assistance awards parallels the implementation for subcontracts and executive compensation under Federal procurement contracts, which is in the Federal Acquisition Regulation.

DATES: The effective date for this interim final guidance is September 14, 2010. Comments on the interim final guidance must be received by no later than October 14, 2010.

ADDRESSES: Comments may be sent to regulations.gov, a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type "FFATA subaward reporting" (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments. Comments received by the date specified above will be included as part of the official record and considered in preparing the final guidance.

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SUPPLEMENTARY INFORMATION:

I. Background

On June 6, 2008 [73 FR 32417], the Office of Management and Budget (OMB) published proposed guidance to Federal agencies with an award term needed to implement requirements related to subaward reporting under 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" or "the Act"). The guidance was proposed for adoption in a new part 33 within title 2 of the Code of Federal Regulations (CFR).

We are adopting the interim final guidance in 2 CFR part 170, a different 2 CFR part than part 33 in which we originally proposed to adopt it in June 2008. The reason is that part 33 now is within a newly created subchapter in 2 CFR that is for OMB guidance related to pre-award responsibilities (for more information on the new 2 CFR subchapters, see the notice in today's **Federal Register** that adopts 2 CFR part 25). The content of the guidance following this preamble is better suited to another new subchapter for guidance on national policy requirements, a subchapter that includes part 170.

We received comments from 75 entities in response to the 2008 **Federal Register** notice, including: 29 State agencies and two associations of State officials; 16 institutions of higher education and an association of research universities; six nonprofit organizations and an association of nonprofits; two local governmental organizations and an association of local government officials; two commercial firms; one individual; and 14 Federal agencies. Some of the comments concerned subaward reporting under the Transparency Act but were not directly related to the content of the guidance. For example, we received comments that suggested:

- Specific data elements that either should be included in, or excluded from, the information that will be required for each subaward.
- A need for better definitions of some data elements or clarification of the information desired in some data fields.
- Using the same information technology systems for submission of data on both: (1) Subawards under Federal assistance awards subject to the Transparency Act's requirements; and (2) subcontracts that entities receiving Federal procurement contracts must submit under the Act.
- Other specific features that it would be important to include in those information technology systems.

When we received them in 2008, we referred comments that do not directly relate to the policy guidance to the appropriate Federal agency groups, including the groups that were working on the design of systems to which entities will submit data to fulfill their reporting responsibilities under the Act. As stated in the 2008 **Federal Register** notice, the data elements and other aspects of subaward reporting are separate from the policy guidance. The General Services Administration has recently published the information collections with an opportunity for public comment that provide the specific data elements required for Transparency Act reporting of subawards and executive compensation [75 FR 43165]. The Federal acquisition councils have simultaneously published for public comment their proposed information collection for subcontract reporting pursuant to the Transparency Act.

As it was proposed in 2008, the new part 33 would have required direct recipients of Federal agency awards and, with some exceptions, subrecipients at all lower tiers (if their

subawards were subject to Transparency Act reporting requirements) to have DUNS numbers and register in the CCR. Since the publication of the June 2008 proposal, OMB proposed a new part 25 to 2 CFR on February 18, 2010 [75 FR 7316]. The proposed part 25 superseded the DUNS number and CCR elements of the June 2008 notice and limited the DUNS number requirement to applicants, recipients, and first-tier subrecipients only. The preamble of the February 2010 **Federal Register** document also contained responses to the public comments on the DUNS and CCR requirements proposed in June 2008. Part 25 is being finalized in another document in this section of today's **Federal Register.** Therefore, the DUNS and CCR requirements will not be addressed further in this document. The remainder of this document addresses the portions of the 2008 proposal related to reporting of subawards, as well as the additional reporting on executive compensation that is required by the subsequent amendment to the Transparency Act. In developing the interim final policy guidance on subaward reporting, we considered:

- All comments relevant to that subject in the 2008 proposal;
- The experience gained under the guidance for, and practical implementation of, recipient reporting required by section 1512 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5, hereafter referred to as "the Recovery Act"), which we consider to be the pilot program for subaward reporting envisioned by paragraph (d)(1) of section 2 of the Transparency Act; and
- New transparency and Open Government policies put in effect since the publication of the 2008 proposal, including the amendment of the Transparency Act by section 6202 of Public Law 110–252 to require the reporting of the names and total compensation of a recipient's or subrecipient's five most highly compensated executives.

Because most aspects of this guidance were proposed in 2008, with opportunity for comment, and given the public benefits to be gained by expediting the implementation of subaward reporting under the Transparency Act, we are publishing this guidance as interim final.

The following section provides detailed responses to comments that we received on the portions of the guidance proposed in 2008 that are relevant to subaward reporting. Each response describes any revisions that we included in the interim final guidance as a result of the comment.

II. Comments, Responses, and Changes to the Guidance

A. Comments on the 2008 Federal Register Preamble

Comment: Two commenters noted that the preamble of the 2008 **Federal Register** notice missed one data element—an award title descriptive of the purpose of the funding action—when it listed the data elements that the Transparency Act specifies for Federal agencies' awards.

Response: The commenters are correct that the Act specifies the additional data element. The inadvertent omission did not affect the proposed guidance, however. The data elements were listed solely as background explanatory information in the preamble of the 2008 **Federal Register** notice.

Comment: With respect to that same list of data elements in the preamble, one commenter asked whether the inclusion of the country of the recipient and its parent entity was a typographical error. The commenter suggested that the data element likely was meant to be the *county,* rather than the *country.*

Response: Although the specifics of the data elements do not affect the guidance, the data element specified in the Transparency Act is the country, rather than the county.

B. General Comments Related to the Act and Guidance

Comment: Thirty nine commenters expressed concern that recipients and subrecipients must allocate additional resources in order to comply with the new requirements for subaward reporting. They cited the need to change business processes and systems to begin to collect data that they are not collecting now and do it electronically. They also noted the continuing need for resources to compile and report data after that initial transition period. Most of the commenters noted the fiscal impact of subaward reporting and the provision in the Transparency Act that provides for recovering the additional costs. Some State agencies expressed concern that the increased administration costs would deplete resources available for program purposes and some suggested that the new requirement is an unfunded mandate. Some institutions of higher education noted that the limitation in OMB Circular A–21 on recovery of indirect costs could prevent them from recovering those costs from their Federal awards. Some State agencies suggested that the costs should be allocable as direct program costs. A number of commenters were concerned that the added burdens of reporting could discourage some entities, especially smaller subrecipient entities, from applying for Federal grants.

Response: This guidance requires only prime grant recipients to report to the Federal Government on subawards and executive compensation. Nevertheless, we understand the administrative changes and effort that are associated with reporting on subawards. As section (d)(2)(A) of the Transparency Act provides, recipients and subrecipients are allowed "to allocate reasonable costs for the collection and reporting of subaward data as indirect costs." We will assess the overall cost impact of the new requirements on recipients and subrecipients, as well as their ability to recover the indirect costs under current limitations in statute, policy, program regulations, or practice.

Comment: Nine commenters suggested that it was premature to propose the policy guidance. Among reasons given were that we did not yet provide details about all data elements that will be required in each report of an obligating action, the definitions of the data elements, and the reporting format and procedures that will be used. A few commenters noted that the award term in the proposed guidance referred to a Web site at which entities would submit subaward data but observed that the site was not ready to receive data and had no further details on what or how to report. One commenter asked if there was an exception process when there are systems issues to be resolved.

Response: We revised the wording of the award term to further clarify that the Web site will be the source of the detailed information on what to report (*i.e.,* the specific data elements and their definitions) and how to report (*i.e.,* the formats and information technology system features). That information will be posted at the Web site before non-Federal entities are required to report data on subaward obligations. In addition, the General Services Administration's Paperwork Reduction Act information collection also provides the specific data elements required for Transparency Act reporting.

There is an important distinction to be made between the policy guidance contained in this **Federal Register** notice and the operational details on what and how to report. Under the current statute, non-Federal entities will be required to report subaward data, a basic requirement that does not depend on the specific data elements and

procedural details. The policy guidance and the award term it contains are the means for having agencies formally communicate that basic statutory requirement to recipients and subrecipients. Neither the guidance nor the award term needs to contain the operational details about the specific data elements to be reported or how to submit the data. Both need to be in place now so that agencies can use the award term to provide timely notification to recipients and subrecipients about their responsibilities.

Nonetheless, we fully recognize that the operational details also are very important. To ensure adequate opportunity for public comment, we have published the data elements and other details that affect the public. Further, we have made every effort to minimize the burden associated with Transparency Act reporting, through both pre-population of data and use of an electronic system that facilitates streamlined reporting [75 FR 43165–43166]. With respect to the question concerning the exception process, the Transparency Act does not provide for exceptions due to unresolved systems issues.

Comment: Twenty two commenters recommended delaying the January 1, 2009, date on which the Transparency Act provided that subaward reporting would begin. They stated that the implementation timeframe was not reasonable, especially since the procedures for compiling and submitting the data would not be set until after completion of a pilot that had not yet begun. Seven of the commenters also recommended that OMB grant the 18-month extension to the deadline that the Act allowed for subrecipients under awards to State, local, and tribal governments, if the Director of OMB determined that compliance would impose an undue burden for those subrecipients.

Response: A subaward reporting pilot was conducted in the Fall of 2008 to assess the burden of subaward reporting on recipients and subrecipients. The results of the pilot were mixed and showed that there were various unresolved policy and procedural issues surrounding subaward reporting. In 2009, the Recovery Act was enacted and required reporting of funds awarded to prime recipients, subrecipients and vendors. The Recovery Act reporting effort, which commenced in October 2009, served as a demonstration of subaward reporting on a governmentwide scale which is why we consider it to be the pilot program for subaward reporting envisioned by paragraph (d)(1) of section 2 of the Transparency Act. Various audits and reviews have been conducted on Recovery Act implementation. Some of the reports from those reviews are available on the Recovery.gov Web site under the "Accountability" section and include information on recipient challenges with implementing reporting requirements under the Recovery Act.

In a memorandum dated April 6, 2010 with the subject line "Open Government Directive—Federal Spending Transparency," OMB established an October 1, 2010 deadline for Federal agencies to initiate subaward reporting pursuant to the Transparency Act and provide a timeline for additional guidance to assist in meeting the goals established in the memorandum.

Comment: Three commenters pointed out that the proposed guidance did not include a detailed implementation of a Transparency Act provision that provides an exemption from the subaward reporting requirement for an entity that demonstrates to the Director of OMB that its gross income, from all sources, did not exceed $300,000 in the previous tax year. The Act provides for the exemption until the Director determines that the imposition of the reporting requirement will not place an undue burden on such entities. The commenters noted that the guidance did not disclose how to request a reporting exemption, what proofs would be required, and what evaluation factors OMB would use in granting exemptions.

Response: The award term in Appendix A to part 170 of the guidance properly includes that exception to the subaward reporting requirement. Section 2(e) of the Transparency Act allows the Director, OMB, to exempt any entity that demonstrates its gross income, from all sources, did not exceed $300,000 in the entity's previous tax year, from reporting the first-tier subaward information, until the Director determines that the imposition of the reporting requirement will not cause undue burden on the entity. The Director has exempted entities that fall under this category at this time.

Comment: Two commenters raised questions concerning the applicability of the Paperwork Reduction Act (PRA). One stated that the Transparency Act and guidance did not comply with the PRA. The other suggested that OMB could not yet provide the PRA clearance for the information collection associated with subaward reporting, because the data elements and format were not specified in the guidance proposed on 2008.

Response: As stated in the response to a previous comment, the nature of the guidance is distinct from that of the operational details. What requires PRA clearance, as correctly noted by the second commenter, are the data elements and similar details for which reporting burdens can be estimated. The General Services Administration has recently published the information collections for public comment that provide the specific data elements required for Transparency Act reporting of subawards and executive compensation [75 FR 43165]. It is not pertinent to the issuance of the guidance in this **Federal Register** notice on the basic statutory requirement to report.

Comment: With respect to the requirement to report each action under a subaward that obligates $25,000 or more in Federal funding, ten commenters recommended raising the $25,000 threshold due to the potential magnitude of the burdens, especially on small entities. The commenters suggested setting the threshold at $100,000 or more, to be parallel with their State's reporting requirement, the simplified acquisition threshold for Federal procurement contracts, or the threshold in OMB Circular A–133 at which an entity must have a single audit. One State agency asked if it could request a waiver to increase that threshold.

Response: We made no change to the threshold in the guidance. The $25,000 threshold is set by the Transparency Act and there is no provision in the statute that authorizes a waiver to increase the threshold.

Comment: Four commenters stated that the new subaward reporting requirement overlapped with at least some Federal agencies' existing requirements for reporting on subawards. As an example, one commenter cited information about subawards that applications to agencies either contain or could be amended to contain. Two non-Federal entities and one Federal agency were concerned that the existing and new requirements could be redundant, thereby unnecessarily increasing the burdens of subaward reporting. One Federal agency stated that it currently obtained information about all subawards, and not just those above the $25,000 threshold, and did not want to lose insight into the subawards below $25,000 due to the Transparency Act threshold.

Response: Relatively few Federal agency awarding offices currently obtain the details about each subaward obligation that they would need to do the reporting under the Transparency Act. Many agencies receive individual applications that identify the applicant's

intent to make a subaward of a specified amount if its application is successful. However, the actual subaward recipient may not be known at that time or, if known, the amount that a successful applicant obligates may not be the same as it originally planned and proposed, for various reasons (*e.g.,* the Federal award it receives may be for a lesser amount than it proposed or it may rebudget after receiving the award, as pertinent Federal rules allow it to do without the Federal agency's prior approval). Given that what the application describes is only a plan, it cannot serve as a definitive source of information for Transparency Act purposes. At this time, we are not asking for reporting of subaward information below the first-tier.

With respect to the relatively few Federal awarding offices that do obtain post-award data on actual subaward obligations, we are directing those agencies to 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.

Comment: Five commenters asked about the consequences of a subrecipient's noncompliance with requirements related to the Transparency Act. Two commenters expressed concern that delivery of essential services could be interrupted if awards could not be made or payments had to be suspended.

Response: After a subaward is made, the range of consequences that may result from the subrecipient's material failure to comply with a requirement related to the Transparency Act should be no different than it is for a material failure to comply with other Federal requirements. The same remedies are available to the recipient and—should the matter of a subrecipient entity's noncompliance become an issue for the Federal Government—to a Federal agency.

C. Comments Related to the Applicability of the Guidance

Comment: One commenter stated that the guidance should not apply to loan guarantees because the definition of "federal award" in the Transparency Act does not explicitly mention them. The commenter expressed concern that the requirement in the guidance for lenders, small businesses, and rural businesses to obtain DUNS numbers could be an added barrier to their participation in U.S. Department of Agriculture (USDA) rural development and Small Business Administration (SBA) programs that stimulate financing for small and rural businesses. The commenter recommended not applying the guidance to loan guarantees under those programs until a **Federal Register** notice was published, with an opportunity to comment, that proposed applying Transparency Act requirements to those programs specifically.

Response: Although the 2008 **Federal Register** notice proposed applicability of the guidance broadly to all of the types of financial assistance subject to the Transparency Act, we revised the interim final guidance to implement at this time only the reporting requirements specifically for first-tier subawards under grants and cooperative agreements in light of these public comments and concerns. We are deferring to a later date the implementation of subaward reporting under other financial assistance subject to the Act, which includes loans and loan guarantees, as well as lower-tier subawards.

We understand the legitimate concern that additional administrative requirements can have an impact on financial assistance applicants and recipients under any Federal program. However, to publish a notice that lists the hundreds of programs individually would be unnecessary and impractical.

Comment: One Federal agency suggested we make it clearer that financial assistance provided through assessed and voluntary contributions is subject to the guidance, by explicitly listing that type of assistance in the proposed definition of "Federal financial assistance subject to the Transparency Act." The definition in section 33.325 of the proposed guidance included them only implicitly, through the inclusion of a category of "other financial assistance transactions that authorize the non-Federal entities' expenditure of Federal funds."

Response: We agree and made the change to the guidance (in what now is section 170.320).

Comment: A Federal agency recommended that the guidance not apply to loans, loan guarantees, interest subsidies, and insurance that recipients provide as subawards to subrecipients. The agency stated that the Transparency Act did not explicitly identify them as subawards and their inclusion would be inconsistent with coverage of the administrative requirements for grants to and agreements with educational and other nonprofit organizations that are in 2 CFR part 215 (OMB Circular A–110).

Response: We did not revise the guidance. The Act requires OMB to "ensure that data regarding subawards are disclosed in the same manner as data regarding other Federal awards." The Transparency Act's definition of "federal award" includes types of financial assistance awards that are not subject to the administrative requirements in 2 CFR part 215, and therefore includes them both at the prime tier between Federal agencies and recipients and at lower tiers between recipients and subrecipients. While only subawards under grants and cooperative agreements need to be reported at this time, subawards under all types of Federal financial assistance subject to the Transparency Act will need to be reported at a later date.

Comment: One Federal agency expressed concern that it would be difficult to provide an actual dollar amount associated with a transfer of title to Federally owned property.

Response: We revised the definition of "Federal financial assistance subject to the Transparency Act" in that section (which now is section 170.320) to clarify that the guidance does not apply to transfers of title to Federally owned property.

Comment: One Federal agency suggested amending the proposed guidance to explicitly exclude Cooperative Research and Development Agreements (CRDAs) under 15 U.S.C. 3710a from coverage under the Transparency Act. CRDAs are instruments authorized for use between Federal laboratories and non-Federal entities for technology transfer purposes. The commenter noted that the statute permits a Federal laboratory to receive funds from a non-Federal entity under a CRDA and expressed concern that a funds transfer might be perceived as a subaward to the Federal laboratory.

Response: We agree and made a change to the definition of "Federal financial assistance subject to the Transparency Act" in that section (which now is section 170.320) of the guidance. The definition of "cooperative research and development agreement" in 15 U.S.C. 3710a excludes transactions under which Federal funds are provided to non-Federal entities. It also distinguishes CRDAs, which are not Federal financial assistance awards, from cooperative agreements under the Federal Grant and Cooperative Agreement Act in 31 U.S.C., chapter 63.

Comment: One commenter noted that the proposed guidance did not apply to a Federal agency that receives an award from another agency and asked whether it would apply to an award that a Federal agency receives from a non-Federal entity.

Response: Yes, the guidance applies. The non-Federal entity would have to report the subaward. At this time, the

non-Federal entity would not have to report lower-tier subawards. To clarify this, we revised the definition of "entity" in the award term that now is in Appendix A to part 170.

Comment: One commenter stated that it acts as a fund manager overseeing accounts for Federal agencies into which voluntary payments, court-ordered settlements, fines, and other sources of funds are deposited. It noted that the Federal agency specifies the entities to whom funds from those accounts are obligated. The commenter asked if it is the recipient in that case and the other entities are the subrecipients, or if the entities to whom it awards the funds are the prime recipients because the Federal agency makes the funding decisions.

Response: If the funds cited in the comment are available for obligation or reobligation for Federal program purposes, this situation is somewhat similar to that of a grant under which the recipient is authorized to: (1) Make loans for program purposes to subrecipients; (2) merge the funds received from those subrecipients' loan payments back into the corpus of grant funding; and (3) use those repaid funds to make new loans. In both that case and the case raised by the commenter, the non-Federal entity that manages Federal agency funds that are available for program purposes is the recipient. The entities that receive the funds that the recipient obligates or reobligates are subrecipients.

Comment: One commenter suggested not applying the reporting requirement below the first-tier of subawards under mandatory programs such as block and formula grants and other types of assistance to State, local, and tribal governments.

Response: The Transparency Act does not authorize a limitation on the reporting requirement to the first-tier of subawards. At this time, however, we are deferring to a later date the implementation of the reporting requirement below the first-tier.

Comment: Six commenters asked whether the requirements in the guidance applied to prior program announcements, awards, and subawards. One of the commenters pointed out that an applicant who already had applied in response to a previously issued announcement might have decided not to apply if it had been informed about the Transparency Act requirements prior to doing so. Others noted they would need to amend previously issued awards if the requirements applied to them.

Response: New Federal, non-Recovery Act funded grant awards and cooperative agreements with an award date on or after October 1, 2010, and resulting first-tier subawards, are subject to the reporting requirements in this guidance. New Federal grants and cooperative agreements are grants and cooperative agreements with a new Federal Award Identification Number (FAIN) as of October 1, 2010. They do not include obligating actions on or after October 1, 2010, that provide additional funding under continuing grants and cooperative agreements awarded in prior fiscal years.

D. Other Comments

Comment: Two commenters raised questions about the dates in the proposed paragraph 33.200(a)(2). One commenter asked what was meant by the effective date of the part cited in paragraph (a)(2)(i). The other commenter recommended changing the date in paragraph (a)(2)(ii). That paragraph required a Federal agency to incorporate Transparency Act requirements into a program announcement or other application instructions if awards would be made after October 1, 2008, in response to applications using those instructions. The commenter recommended changing the date to December 31, 2008.

Response: The guidance in 2 CFR part 170 is effective today, with its publication in the **Federal Register**. We revised the date in paragraph 170.200(a)(2)(ii) to October 1, 2010.

Comment: Three commenters noted that some entities may want to take advantage of the flexibility that the award term in the proposed guidance gave a recipient to either: (1) Pass the responsibility for reporting on lower-tier subawards to the subrecipients who made those subawards; or (2) do that reporting itself, which would require the recipient to collect the information from lower-tier subrecipients. One, a State agency, stated that it maintains a complete data base that should be sufficient to meet the Transparency Act requirements.

Response: We recognize the burdens associated with subaward reporting and understand that programs and organizations differ. However, prime recipients will not have the option to delegate reporting of subgrant information to their subrecipients. We believe that this may help reduce reporting burden on subaward recipients.

Comment: Six commenters asked for clarification on the meaning of the phrases "date of obligation" and "obligating action" used in the award term in the proposed section 33.220 with respect to subawards. Two commenters asked how the date of obligation would be defined for a subaward that allowed reimbursement of pre-award costs a subrecipient incurred on or after a "start date" that was prior to the date on which the subaward was signed.

Response: With respect to a subaward, an obligating action is a transaction that makes available to the subrecipient a known amount of funding for program purposes. Examples include a new subaward, an incremental funding amendment that increases the total amount of a subaward, or a quarterly allotment under a formula grant program.

We made no change to the guidance, since "obligations" is a well established term in OMB's guidance on administrative requirements for grants and agreements (2 CFR part 215 and the common rule that Federal agencies adopted to implement OMB Circular A–102). Under most Federal grants and cooperative agreements, recipients regularly report amounts of "unobligated balances" to Federal agencies on the standard financial reporting forms.

The date of obligation for a subaward is the date on which the recipient authorizes the subrecipient to incur costs against the known amount it obligates, and does so in a way that legally obliges the recipient to provide funds to cover costs that are incurred in accordance with the subaward's terms and conditions. That date usually is associated with the signature of a formal document, either the initial subaward or an amendment to it. That is distinct from the "start date" cited in the example of pre-award costs, since we assume that the subrecipient incurs those costs at its own risk, in anticipation of the subaward, and that the recipient has no legal obligation—until it signs the subaward—to provide award funds to cover those costs.

Comment: Eight commenters questioned whether the guidance required reporting of obligations or disbursements as the award amounts. One commenter recommended that recipients and subrecipients report "expenditures," the term used in the Transparency Act. Four State agencies asked how "obligations" would be determined in some programs that adjust the amount a subrecipient receives at some time after the initial obligation. One of the agencies cited the example of the school lunch program, under which the amount obligated is not known until after the subrecipient expends the funds.

Response: The guidance requires reporting of each obligation, rather than each disbursement against the amount

obligated. If a recipient obligates a specific known amount for a subaward, even if it may be adjusted later, it must report the obligation when it is made. For a program like the school lunch program, however, where the initial subaward provides the subrecipient with an open-ended authorization of unspecified amount, the obligation date corresponds to the date on which the amount of the obligation is specified. Reporting is required by the end of the month following the month in which the subaward obligation was made.

Comment: One commenter recommended revising the requirement to report each obligating action within 30 days of the date of obligation. The commenter suggested allowing reporting quarterly, semiannually, or annually.

Response: We changed the guidance and award term to require obligations to be reported no later than the end of the month following the month of the obligation. For example, if a subaward is made on October 2, 2010, the subaward information must be reported by no later than November 30, 2010.

Comment: Ten commenters requested additional clarification about the difference between a subaward, which must be reported under the Transparency Act, and procurement under an award, which is not subject to the reporting requirement.

Response: It is worth noting that recipients for many years have had to judge whether a transaction under their Federal award was a subaward or a procurement action. That is because a recipient must include different requirements in a subaward than it does in a procurement under an award, in accordance with the administrative requirements in 2 CFR part 215 (OMB Circular A 110) or the common rule implementing OMB Circular A 102. Also, when the transaction provides funds to a for-profit entity, the recipient must properly take into account whether the transaction would be more characteristic of a vendor relationship than a subrecipient under ___.210 of OMB Circular A–133. The judgments a recipient must make to decide whether a lower tier agreement is a subaward or procurement for Transparency Act reporting purposes are the same as the judgments it makes to establish which terms and conditions to include in the agreement. Prime recipients should refer to awarding agency supplemental guidance, if any, in making such a determination.

Two examples may help clarify the distinction, which is based on the purpose of the transaction between the recipient or subrecipient and the entity at the next lower tier. If the purpose of the lower-tier transaction is the same as the purpose of the substantive program supported by the Federal award at the prime tier, so that the recipient through that lower tier transaction is in effect handing a portion of the substantive program over to the lower-tier entity for performance, the lower-tier transaction is a subaward. The two examples follow:

• *Example 1: Provision of health services.* A Federal program provides funding to State agencies to deliver a variety of services for older citizens. If the State provides funds to a third party to carry out a type of service (*e.g.,* mental health services) that is authorized under the program and the State otherwise might deliver itself, the agreement is a subaward because the third party is carrying out substantive programmatic activity that is the purpose of the Federal award. If a recipient or subrecipient obtains the services of a third party to help in designing public service announcements or developing educational materials about the program—goods or services that the State or subrecipient needs to carry out the program that is the purpose of the award—that would be a procurement under the award or subaward.

• *Example 2: Research.* An agency makes an award to a university to investigate basic physics to understand why certain materials have the properties they do. To do some of the experiments, the university researchers need an instrument that does not yet exist. The university provides funding under the Federal award to a small firm to carry out a research and development project and develop an instrument. The award to the firm has the purpose of instrument development, and does not have the same purpose as the Federal award. The award to the firm is a procurement action. If the university instead made an award to the firm to perform some of the basic research on physics of materials that is the substantive program purpose of the Federal award, and the recipient determines it does not have a vendor relationship with the firm under this award as described in Sec. __.210 of the attachment to OMB Circular A–133, the award to the firm would be a subaward.

Comment: One commenter from a State agency said that it is unclear whether Medicaid is considered Federal financial assistance for the purposes of the subaward reporting requirement.

Response: There are no program exemptions under this guidance even though there are other types of exemptions which are described in the guidance. If a state makes a subaward under a grant or cooperative agreement to an entity other than an individual who is a natural person, the subaward is $25,000 or more, and no exemptions apply, the state would need to report the subaward.

Comment: Three commenters raised issues with wording in the award term in the proposed section 33.220 that related to the $25,000 reporting threshold for subawards. Two commenters asked for clarification on the meaning of "life of the subaward," as that phrase was used, both in the award term and the associated guidance to Federal agencies on use of the award term. Another commenter suggested that readers might perceive "$25,000 over the life of the subaward" to be inconsistent with "each action that obligates $25,000 or more in Federal funding." One of the commenters also suggested consistent wording to replace "a total value of $25,000" in one paragraph and "in that range" in another paragraph.

Response: With respect to the comment concerning the apparent inconsistency between "a total value of 25,000" and "each action that obligates $25,000 or more in Federal funding," it should be noted that the two phrases refer to related but different requirements addressing lower-tier subaward reporting. We have revised the interim final guidance to show that only recipient reporting of first-tier subawards will be required at this time, and therefore, the comment is no longer relevant. We have replaced the phrase "life of the subaward" with alternative wording that more clearly specifies when a recipient must include the Transparency Act reporting requirement in a subaward it makes to a subrecipient. For new Federal grants or cooperative agreements as of October 1, 2010, if the initial award is $25,000 or more, reporting of subaward information is required. If the initial award is below $25,000 but subsequent award modifications result in a total award of $25,000 or more, the award is subject to the reporting requirements, as of the date the award exceeds $25,000. If the initial award is $25,000 or more, but funding is subsequently de-obligated such that the total award amount falls below $25,000, the award continues to be subject to the reporting requirements of the Transparency Act.

Comment: One commenter asked for clarification concerning reporting requirements for incrementally funded subawards. The commenter gave as an example a subaward that a recipient expected to exceed $25,000 over the duration of the subaward, but for which

the initial obligation was less than $25,000.

Response: Each action that obligates $25,000 or more in Federal funds must be reported.

Comment: Three commenters asked whether a recipient or subrecipient would be required to report a downward adjustment in the amount of a subaward it had made previously.

Response: We made no change to the guidance. The award term that now is in section Appendix A to part 170 of the guidance refers recipients and subrecipients to the web site at which data submission instructions will be posted. Those instructions will include the specific data elements and their definitions that, as discussed in Section I of this **Federal Register** notice, have been established through a separate process under the Paperwork Reduction Act [75 FR 43165]. The instructions will address whether reporting of reductions in subaward amounts, sometimes called "deobligations," are a subcategory of obligations to be reported.

Comment: One commenter asked about the requirement to submit changed information other than subaward amounts, such as a change in subrecipient information.

Response: If the information that was reported was correct at the time it was reported and changed at a later date, there would be no need to subsequently revise the information in previously submitted reports. The updated information would be included in reports of subsequent obligations under the same subaward, however.

That is distinct from a case in which a recipient later discovers that information it reported was erroneous at the time it was reported. Questions concerning error corrections in that case are being considered by the interagency group developing the data elements and information technology systems for subaward reporting. As discussed in the response to the previous comment, the process for resolving those issues will include an opportunity for public input.

Comment: Four commenters asked how one would report subawards to recipients with multiple Federal funding sources. One commenter asked if the amount of funding from each program listed in the Catalog of Federal Domestic Assistance (CFDA) would need to be reported.

Response: Each action that obligates $25,000 or more in Federal funding would need to be separately reported. For new Federal grants or cooperative agreements as of October 1, 2010, if the initial award is $25,000 or more, reporting of subaward information is required. If the initial award is below $25,000 but subsequent award modifications result in a total award of $25,000 or more, the award is subject to the reporting requirements, as of the date the award exceeds $25,000. If the initial award exceeds $25,000 but funding is subsequently de-obligated such that the total award amount falls below $25,000, the award continues to be subject to the reporting requirements of the Transparency Act. If a single action obligates funding from multiple programs, the data submitted for that action would include the CFDA number for the program that is the predominant source of the Federal funding. If a program's funding is obligated by a separate amendment to the same subaward agreement that provides other programs' funding, however, then the data reported for each amendment to the agreement would include the CFDA number of the program that provided the funding for that amendment.

Comment: One commenter asked whether, in light of the new reporting requirements, a subrecipient would be subject to Federal audit requirements if it received $500,000 or more either from a single program or a combination of programs.

Response: The new reporting requirements under the Transparency Act do not change the audit requirements in OMB Circular A–133, section ____.200, that apply to a non-Federal entity that expends $500,000 or more in "federal awards" (which the Circular defines to include Federal financial assistance received indirectly through pass-through entities).

III. Next Steps

Federal agencies that award Federal financial assistance subject to the Transparency Act will implement the interim final guidance in 2 CFR part 170 through their regulations, internal policy guidance to awarding offices, program announcements and application instructions, and the award term that now is in section Appendix A to part 170. The General Services Administration has recently published in the **Federal Register** with an opportunity for public comment the information collections that provide the specific data elements required for Transparency Act reporting of subawards and executive compensation [75 FR 43165]. The information collections will be modified as appropriate in response to public comments and published with any other operational guidelines before recipients begin reporting data on subawards.

List of Subjects in 2 CFR Part 170

Business and industry, Colleges and universities, Cooperative agreements, Farmers, Federal aid programs, Grant programs, Grants administration, Hospitals, Indians, Insurance, International organizations, Loan programs, Nonprofit organizations, Reporting and recordkeeping requirements, State and local governments, Subsidies.

Danny Werfel,

Controller.

Authority and Issuance

■ For the reasons set forth above, the Office of Management and Budget amends 2 CFR chapter I by adding part 170 to read as follows:

PART 170—REPORTING SUBAWARD AND EXECUTIVE COMPENSATION INFORMATION

Sec.

Subpart A—General

170.100 Purposes of this part.
170.105 Types of awards to which this part applies.
170.110 Types of entities to which this part applies.
170.115 Deviations.

Subpart B—Policy

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170.300 Agency.
170.305 Award.
170.310 Entity.
170.315 Executive
170.320 Federal financial assistance subject to the Transparency Act.
170.325 Subaward.
170.330 Total compensation.
Appendix A to Part 170—Award Term

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

Subpart A—General

§ 170.100 Purposes of this part.

This part provides guidance to agencies 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".

§ 170.105 Types of awards to which this part applies.

This part applies to an agency's grants, cooperative agreements, loans,

and other forms of Federal financial assistance subject to the Transparency Act, as defined in § 170.320.

§ 170.110 Types of entities to which this part applies.

(a) *General.* Through an agency's implementation of the guidance in this part, this part applies to all entities, other than those excepted in paragraph (b) of this section, that—

(1) Apply for or receive agency awards; or

(2) Receive subawards under those awards.

(b) *Exceptions.* (1) None of the requirements in this part apply to an individual who applies for or receives an award as a natural person (*i.e.,* unrelated to any business or non-profit 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 an entity's five most highly compensated executives apply unless in the 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 the senior 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.

§ 170.115 Deviations.

Deviations from this part require the prior approval of the Office of Management and Budget (OMB).

Subpart B—Policy

§ 170.200 Requirements for program announcements, regulations, and application instructions.

(a) Each 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 program announcement, regulation, or other issuance containing instructions for applicants:

(1) Under which awards may be made that are subject to Transparency Act reporting requirements; and

(2) That either:

(i) Is issued on or after the effective date of this part; or

(ii) Has application or plan due dates after October 1, 2010.

(b) The program announcement, regulation, or other issuance must require each entity that applies and does not have an exception under § 170.110(b) to ensure they have the necessary processes and systems in place to comply with the reporting requirements should they receive funding.

(c) Federal 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.

§ 170.220 Award term.

(a) To accomplish the purposes described in § 170.100, an agency must include the award term in Appendix A to this part in each award to a non-Federal entity under which the total funding will include $25,000 or more in Federal funding at any time during the project or program period.

(b) An agency—

(1) 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 award will equal or exceed $25,000. However, the agency must subsequently amend the award to add the award term if changes in circumstances increase the total Federal funding under the award to $25,000 or more during the project or program period.

Subpart C—Definitions

§ 170.300 Agency.

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

§ 170.305 Award.

Award, for the purposes of this part, effective October 1, 2010, means a grant or cooperative agreement. On future dates to be specified by OMB in policy memoranda available at the OMB Web site, award also will include other types of awards of Federal financial assistance subject to the Transparency Act, as defined in § 170.320.

§ 170.310 Entity.

Entity has the meaning given in 2 CFR part 25.

§ 170.315 Executive.

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

§ 170.320 Federal financial assistance subject to the Transparency Act.

Federal financial assistance subject to the Transparency Act means assistance that non-Federal entities described in § 170.105 receive or administer in the form of—

(a) Grants;

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

(c) Loans;

(d) Loan guarantees;

(e) Subsidies;

(f) Insurance;

(g) Food commodities;

(h) Direct appropriations;

(i) Assessed and voluntary contributions; and

(j) Other financial assistance transactions that authorize the non-Federal entities' expenditure of Federal funds.

(b) Does not include—

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

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

(3) Any classified award; or

(4) Any award funded in whole or in part with Recovery funds, as defined in section 1512 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

§ 170.325 Subaward.

Subaward has the meaning given in paragraph e.3 of the award term in Appendix A to this part.

170.330 Total compensation.

Total Compensation has the meaning given in paragraph e.5 of the award term in Appendix A to this part.

Appendix A to Part 170—Award Term

I. Reporting Subawards and Executive Compensation.

a. *Reporting of first-tier subawards.*

1. *Applicability.* Unless you are exempt as provided in paragraph d. of this award term, you must report each action that obligates $25,000 or more in Federal funds that does not include Recovery funds (as defined in section 1512(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. 111–5) for a subaward to an entity (see definitions in paragraph e. of this award term).

2. *Where and when to report.*

i. You 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.*

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 award is $25,000 or more;

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 *http://www.ccr.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 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. *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;

iv. A domestic or foreign for-profit organization;

v. A Federal agency, but only as a subrecipient under an award or subaward to a non-Federal entity.

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

3. *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 Sec. ____ .210 of the attachment to OMB Circular A–133, "Audits of States, Local Governments, and Non-Profit Organizations").

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

4. *Subrecipient* means an entity 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.

5. *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)):

i. *Salary and bonus.*

ii. *Awards of stock, stock options, and stock appreciation rights.* Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

iii. *Earnings for services under non-equity incentive plans.* This does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.

iv. *Change in pension value.* This is the change in present value of defined benefit and actuarial pension plans.

v. *Above-market earnings on deferred compensation which is not tax-qualified.*

vi. Other compensation, if the aggregate value of all such other compensation (e.g. severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property) for the executive exceeds $10,000.

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OFFICE OF MANAGEMENT AND BUDGET

2 CFR Subtitle A, Chapter I, and Part 25

Financial Assistance Use of Universal Identifier and Central Contractor Registration

AGENCY: Office of Federal Financial Management, Office of Management and Budget.

ACTION: Final guidance.

SUMMARY: OMB is issuing guidance to Federal agencies concerning two requirements for financial assistance applicants and recipients, and one requirement for first-tier subrecipients. An agency under the guidance must require applicants other than individuals, with some specific exceptions, to have Dun and Bradstreet Data Universal Numbering System (DUNS) numbers and maintain current registrations in the Central Contractor Registration (CCR) database. An agency must require applicants and recipients of grants and cooperative agreements to comply with the DUNS number and CCR requirements by October 1, 2010 and require applicants and recipients of all other financial assistance types to comply by October 1, 2011. The guidance provides standard wording for a new award term that each agency must