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**DEPARTMENT of DEFENSE**

**Office of the Secretary**

**2 CFR Parts 1103, 1104, and 1125**

**[DOD-2016-OS-0048]**

**RIN 0790-AJ45**

**Revised Interim Implementation of Governmentwide Guidance for Grants and Cooperative Agreements**

**AGENCY:** Office of the Secretary, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** This notice of proposed rulemaking (NPRM) is the first of a sequence of six NPRM documents in this issue of the Federal Register that collectively establish for DoD grants and cooperative agreements an updated interim implementation of Governmentwide guidance on administrative requirements, cost principles, and audit requirements for Federal awards. This NPRM removes a part of the DoD Grant and Agreement Regulations (DoDGARs) and replaces it with a new DoDGARs part containing a revised interim implementation of the guidance and establishes seven subchapters within DoD's chapter of the Grants and

Agreements title of the Code of Federal Regulations. The purpose of this NPRM is to provide an organizing framework for the DoDGARs to make it easier for users of the regulations to locate the content that they need.

**DATES:** To ensure that they can be considered in developing the final rule, comments must be received at either the web site or mailing address indicated below by [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments identified by docket number, or by Regulatory Information Number (RIN) and title, by either of the following methods:

The Web site: *http://www.regulations.gov*. Follow the instructions at that site for submitting comments.

*Mail:* Department of Defense, Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, ATTN: Box 24, Alexandria, VA 22350-1700.

*Instructions:* All submissions must include the agency name and docket number or RIN for this *Federal Register* document. The general policy for comments and other submissions from the public is to make the submissions available for public viewing on the Internet at *http://www.regulations.gov* without change

(i.e., as they are received, including any personal identifiers or contact information).

**FOR FURTHER INFORMATION CONTACT:** Wade Wargo, Basic Research Office, telephone 571-372-2941.

**SUPPLEMENTARY INFORMATION:**

**I. Executive Summary**

**A. Purpose of the Regulatory Action**

*1. The need for the regulatory action and how the action meets that need*

The Department of Defense Grant and Agreement Regulations (DoDGARs) need to be updated. Much of the updating is required to implement Office of Management and Budget guidance to Federal agencies on administrative requirements, cost principles, and audit requirements applicable to Federal grants, cooperative agreements, and other assistance instruments (2 CFR part 200). DoD established an interim implementation of that guidance at 2 CFR part 1103 in December 2014, pending needed updates to the DoDGARs.

The current regulatory action, which is in this NPRM and five additional NPRMs immediately following it in this issue of the *Federal Register*, implements the OMB guidance as it applies

to general terms and conditions of DoD grants and cooperative agreements. It thereby takes a major step toward the needed updating of the DoDGARs.

## *2. Legal authorities for the regulatory action*

There are two statutory authorities for this NPRM:

- 10 U.S.C. 113, which establishes the Secretary of Defense as the head of the Department of Defense; and

- 5 U.S.C. 301, which authorizes the head of an Executive department to prescribe regulations for the governance of that department and the performance of its business.

### **B. Summary of the Major Provisions of the Regulatory Action**

The six NPRMs propose to establish eleven new DoDGARs parts and make conforming changes to existing DoDGARs parts. This NPRM, the first of the six, proposes a new part 2 CFR part 1104 to serve as the central hub to direct DoD Components on the portions of the DoDGARs that apply to DoD grants and cooperative agreements for various pre-award, time-of-award, and post-award purposes, pending completion of the remaining updates to the DoDGARs that are needed to fully implement the OMB guidance. It also proposes to remove the interim implementation of the guidance published in December 2014 at 2 CFR part 1103, as that

implementation is superseded by the proposed 2 CFR part 1104. As described more fully in Section II.C of this Supplementary Information section, the other five NPRMs following this one propose:

- A new 2 CFR part 1120 to establish a standard format for organizing the content of DoD Components' grant and cooperative agreement awards;

- New 2 CFR parts 1126, 1128, 1130, 1132, 1134, 1136, and 1138 to standardize the organization and, to the extent practicable, the wording of the administrative requirements portion of the general terms and conditions of awards to types of recipients covered by the OMB guidance in 2 CFR part 200;

- A new 2 CFR part 1122 to standardize the organization and, to the extent practicable, the wording of the national policy requirements portion of the general terms and conditions of awards to all types of recipients;

- A new 2 CFR part 1108 with definitions of terms used in the other new DoDGARs parts proposed in this regulatory action; and

- Conforming changes to portions of the DoDGARs in title 32 of the CFR, including the removal of the DoD implementations of

OMB Circulars A-110 and A-102 in 32 CFR parts 32 and 33, respectively, as both of those OMB circulars were superseded by the new OMB guidance in 2 CFR part 200.

### **C. Costs and Benefits**

By increasing uniformity in the form and content of awards across DoD, the regulatory action in the six NPRMs benefit both recipient entities who receive awards from multiple DoD Component awarding offices and auditors of DoD awards. The standard format should enable them to more easily and quickly find requirements in different offices' awards, as any particular requirement should appear in a standard location. Standard wording and use of plain language should reduce the time that otherwise would be spent reading and interpreting the offices' differently worded terms and conditions for the same requirements. Based on comments DoD has received from recipients since it established the DoDGARs in the 1990s, we expect that the standard format, standard wording for general terms and conditions, and use of plain language would lessen administrative burdens for recipients and improve both transparency and ease of compliance.

These changes also benefit offices within DoD that are responsible for post-award administration of grants and cooperative agreements made by DoD Components' awarding offices.

Having greater uniformity in the location and wording of terms and conditions, and having those terms and conditions written in plain language, will enable them to more quickly find and more easily understand requirements within different offices' awards that are relevant to their compliance monitoring functions.

The uniformity across DoD that is promoted by this regulatory action also should help to lessen administrative burdens and costs for recipients, thereby providing added benefits by increasing the productivity of the defense programs supported by the awards. While it is difficult to quantify the amount by which burdens and associated costs will be reduced, it is pertinent to note that benefits of establishing, for the first time, a uniform implementation of OMB guidance, national policy requirements, and DoD policy through general terms and conditions extend to more than 15,000 obligating actions each year that:

- Are taken by 100 awarding offices located across the United States and abroad that are under the Departments of the Army, Navy, and Air Force and 11 other DoD Components.
- Provide support to various types of recipients, including institutions of higher education, nonprofit organizations, States, local governments, and for-profit entities.

- Provide \$4-6 billion to carry out diverse programs, including defense research, support to States for the National Guard, and economic assistance to communities impacted by defense downsizing or costs associated with education of military dependents.

The following portion of this Supplementary Information section provides additional background information and a more complete overview of the six NPRMs.

## **II. Additional background and overview of the six NPRMs**

This NPRM removes a part of the DoD Grant and Agreement Regulations (DoDGARs) that DoD adopted on December 19, 2014, as its interim implementation of the guidance, pending completion of more extensive updates to the DoDGARs needed to implement the guidance on a longer-term basis. It replaces that part with a new DoDGARs part containing a revised interim implementation of the guidance.

The revised implementation in the new part incorporates ten other proposed new DoDGARs parts. Those ten other new parts, proposed in NPRM documents following this one, do several things. First, they provide standard wording of general terms and conditions governing administrative requirements for DoD grant and cooperative agreement awards to educational,

nonprofit, and governmental entities subject to the Governmentwide guidance. Second, they provide standard wording for general terms and conditions addressing national policy requirements for DoD grant and cooperative agreement awards to all types of entities. Third, they establish a standard format for DoD grant and cooperative agreement awards. Finally, they establish a central DoDGARs part with definitions of terms used in those regulations.

In conjunction with establishing the revised implementation of the Governmentwide guidance, this NPRM proposes to establish seven subchapters within DoD's chapter of the Grants and Agreements title of the Code of Federal Regulations. The purpose of the proposed subchapters is to provide an organizing framework for the DoDGARs to make it easier for users of the regulations to locate the content that they need.

#### **A. Background on the DoDGARs**

The DoDGARs are the rules on which DoD Component awarding offices rely as the primary source of requirements governing their award and administration of grants and cooperative agreements. While the regulations are intended to primarily address DoD Components, direction to DoD Components in the DoDGARs impacts requirements for DoD award recipients and is

used by auditors and others outside the DoD when carrying out their responsibilities related to DoD awards.

When DoD established the DoDGARs in the 1990s, it did so in part as an integrated and comprehensive regulatory implementation of pertinent Governmentwide guidance. The pertinent guidance that the DoDGARs implemented at that time included the administrative requirements in OMB Circulars A-110 and A-102 and, as they applied to grants and cooperative agreements, the cost principles in OMB Circulars A-21, A-87, and A-122, and the single audit requirements in OMB Circular A-133.

To fully meet its needs, DoD established some portions of the DoDGARs to address awards that were outside the scope of the Governmentwide guidance. For example, it established a DoDGARs part to address grant and cooperative agreement awards to for-profit entities and another part to address Technology Investment Agreements, which include assistance awards other than grants and cooperative agreements. For optimal effectiveness, those additional portions of the DoDGARs were interconnected with portions that implemented Governmentwide guidance in OMB circulars.

**B. Background on the DoDGARs implementation of the new Governmentwide guidance**

On December 26, 2013, the Office of Management and Budget (OMB) issued updated Governmentwide guidance on grants and cooperative agreements in 2 CFR part 200, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards." The new guidance merged content previously contained in OMB Circulars A-110, A-102, A-21, A-87, A-122, and A-133 that DoD had implemented in the DoDGARs. In superseding those circulars, the new guidance altered the organization and content of those circulars in ways that necessitated significant updating of the DoDGARs.

As the guidance called for Federal agencies' regulatory implementations to be in effect within 12 months--i.e., by December 26, 2014--DoD adopted a rule on December 19, 2014, to implement the new guidance on an interim basis, pending the more comprehensive update to the DoDGARs that was needed but would take longer to put in effect.

DoD is proposing the rules contained in the sequence of NPRMs in this issue of the *Federal Register* as the first major portion of the needed updates to the DoDGARs. That updating enables recipients, DoD Components, and others who use the DoDGARs to begin to benefit from these updates without delay,

while DoD finishes preparing the additional rules to be proposed for public comment, as needed to complete its implementation of the guidance and make other updates to the DoDGARs.

This first set of updates to the DoDGARs focuses on the establishment of:

- A standard award format for DoD grants and cooperative agreement awards; and
- Standard wording for general terms and conditions of awards, including: (1) administrative requirements for awards to types of recipients subject to 2 CFR part 200; and (2) national policy requirements for awards to all types of entities. The proposed terms and conditions are written in plain language. The associated regulatory text with proposed prescriptions for DoD Components' use of the standard wording provides limited flexibility to vary from the standard wording when appropriate.

**C. Overview of the six NPRMs in This Issue of the *Federal Register***

1. *The proposed 2 CFR part 1104 as the successor to 2 CFR part 1103*

The DoD is proposing to remove 2 CFR part 1103, the rule it adopted in December 2014 as its initial interim implementation

of the Governmentwide guidance in 2 CFR part 200, and replace it with a new 2 CFR part 1104. The proposed part 1104 serves as the central hub to direct DoD Components' use of the other ten new parts that the documents following this one in this issue of the *Federal Register* propose for adoption in chapter XI of 2 CFR, as well as parts of the DoDGARS that will remain for the time being in subchapter C, chapter I of title 32 of the CFR. This document also proposes to subdivide chapter XI of title 2 of the CFR into seven subchapters corresponding to subject matter areas into which the proposed new DoDGARS parts will be organized.

## 2. *Standard Award Format*

The document immediately following this one in this issue of the *Federal Register* proposes a new 2 CFR part 1120 to establish a standard format for DoD Components' grant and cooperative agreement awards, as discussed in Section I.C of this Supplementary Information section.

## 3. *General Terms and Conditions Addressing Administrative Requirements*

The third document in this sequence of NPRMs in this issue of the *Federal Register* proposes seven new parts of the DoDGARS that collectively establish a standard organization of articles

of general terms and conditions addressing administrative requirements for awards to educational, nonprofit, and governmental entities subject to the guidance in 2 CFR part 200, as well as standard wording for the content of those articles. Administrative requirements are those in areas such as recipient program and financial management; property administration; recipient procurement procedures; and reporting. They include implementation of cost principles through terms and conditions addressing allowable costs, as well as audit requirements. The seventh of the proposed new parts addresses requirements for recipients concerning subawards, including the administrative and national policy requirements that flow down to subrecipients at lower tiers below DoD awards.

#### *4. General Terms and Conditions Addressing National Policy Requirements*

The fourth in the sequence of six NPRM documents proposes a new 2 CFR part 1122 on national policy requirements. National policy requirements are those in areas such as nondiscrimination, the environment, and labor standards that originate in Federal statutes, Executive orders, or regulations. The proposed new part specifies a standard organization of general terms and conditions addressing national policy requirements into four articles. It also provides standard

wording of terms and conditions for national policy requirements that are commonly applicable to DoD Components' grants and cooperative agreements. This standard format and wording are for DoD Components' awards to all types of recipient entities, including for-profit and other entities not subject to the Governmentwide guidance in 2 CFR part 200 to the extent that the national policy requirements apply to them.

#### 5. *Definitions*

The fifth NPRM in this sequence proposes a new 2 CFR part 1108 with definitions of terms to be used throughout all portions of the DoDGARs in chapter XI of title 2 of the CFR other than the portion containing regulations implementing specific national policy requirements that provide their own definitions of terms. Examples of the latter regulations are DoD implementations of nonprocurement suspension and debarment, lobbying, and drug-free workplace requirements.

#### 6. *Conforming amendments to parts of the DoDGARs in Title 32 of the CFR*

The final NPRM in this sequence removes two existing parts of the DoDGARs in subchapter C, chapter I of title 32 of the CFR. The two parts removed are 32 CFR part 32, which was the DoD implementation of the 1993 issuance of OMB Circular A-110,

and 32 CFR part 33, which was DoD's adoption of the common rule implementing OMB Circular A-102. The parts are proposed for removal because OMB's issuance of the new Governmentwide guidance in 2 CFR part 200 superseded both of those circulars. That final NPRM in this issue of the Federal Register also proposes amendments to other parts of the DoDGARs that will remain for now in title 32 of the CFR, in order to: (1) conform them to the proposed new DoDGARs parts in Title 2 of the CFR that are described in sections II.C.1 through 5 of this Supplementary Information section; and (2) update other outdated references and make other minor changes that are needed.

### **III. Future steps**

DoD will complete the remaining needed updates of the DoDGARs in a subsequent set of proposals for public comment. Those proposals will focus on portions of the DoDGARs that specify pre-award and time-of-award requirements for DoD Component awarding offices and post-award requirements for DoD administering offices. All portions of the DoDGARs remaining in chapter I, subchapter C of title 32 of the CFR will be relocated at that time to chapter XI of title 2 of the CFR, with any updating that may be needed.

#### **IV. Regulatory Analysis**

*Executive Order 12866, "Regulatory Planning and Review," and Executive Order 13563, "Improving Regulation and Regulatory Review"*

Executive Order 12866, as supplemented by Executive Order 13563, directs each Federal agency to: propose regulations only after determining that benefits justify costs; tailor regulations to minimize burdens on society, consistent with achieving regulatory objectives; maximize net benefits when selecting among regulatory approaches; specify performance objectives, to the extent feasible, rather than the behavior or manner of compliance; and seek the views of those likely to be affected before issuing a notice of proposed rulemaking, where feasible and appropriate. The Department of Defense has determined that a regulatory implementation of 2 CFR part 200 that includes standard wording of general terms and conditions for DoD Components' grant and cooperative agreement awards will maximize long-term benefits in relation to costs and burdens for recipients of those awards. In providing--for the first time--uniformity across research and other awards, the approach will benefit institutions of higher education and other types of recipients that receive awards from diverse defense programs and numerous DoD Component awarding offices. The Department

informally consulted representatives of the most affected recipient community during development of this regulatory proposal. This rule has been designated a "significant regulatory action" under section 3(f) of Executive Order 12866, although not an economically significant one. Accordingly, the rule has been reviewed by OMB.

*Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) (2 U.S.C. 1532) requires that a Federal agency prepare a budgetary impact statement before issuing a rule that includes any Federal mandate that may result in the expenditure in any one year by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in 1995 dollars, updated annually for inflation. In 2015, that inflation-adjusted amount in current dollars is approximately \$146 million. The Department of Defense has determined that this proposed regulatory action will not result in expenditures by State, local, and tribal governments, or by the private sector, of that amount or more in any one year.

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires an agency that is proposing a rule to provide a regulatory flexibility analysis or to certify that the rule will not have a significant economic impact on a substantial number of small entities. The Department of Defense certifies that this proposed regulatory action will not have a significant economic impact on substantial number of small entities beyond any impact due to provisions of it that implement OMB guidance at 2 CFR part 200.

### *Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; 5 CFR part 1320, appendix A.1) (PRA), the Department of Defense has determined that there are no new collections of information contained in this proposed regulatory action.

### *Executive Order 13132, "Federalism"*

Executive Order 13132 establishes certain requirements that an agency must meet when it proposes a regulation that has Federalism implications. This proposed regulatory action does not have any Federalism implications.

### **List of Subjects in 2 CFR Parts 1103, 1104, and 1125**

Business and Industry, Colleges and universities, Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Small business, State and local governments.

Accordingly, under the authority of 5 U.S.C. 301 and 10 U.S.C. 113, 2 CFR chapter XI is proposed to be amended as follows:

**PART 1103—[REMOVED]**

1. Part 1103 is removed.
2. Subchapter A to chapter XI, consisting of parts 1100 through 1109, is added to read as follows:

**Subchapter A -- General Matters and Definitions**

**PARTS 1100-1103—[RESERVED]**

**PART 1104—REVISED INTERIM IMPLEMENTATION OF GOVERNMENTWIDE  
GUIDANCE FOR GRANTS AND COOPERATIVE AGREEMENTS**

Sec.

1104.1 Purpose of this part.

1104.100 Format of DoD Components' grant and cooperative agreement awards.

1104.105 Regulations governing DoD Components' general terms and conditions.

1104.110 Regulations governing DoD Components' award-specific terms and conditions.

1104.115 Regulations governing DoD Components' internal procedures.

1104.120 Definitions.

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

**§1104.1 Purpose of this part.**

This part provides an update to the DoD interim implementation of OMB guidance in 2 CFR part 200. It supersedes the initial interim implementation of that guidance that DoD adopted in 2 CFR part 1103 on December 19, 2014.

**§1104.100 Format of DoD Components' grant and cooperative agreement awards.**

DoD Components must conform the format of new grant and cooperative agreement awards to the standard format specified by part 1120 of the DoD Grant and Agreement Regulations (2 CFR part 1120). The standard format provides locations within the award for:

(a) General terms and conditions, including the administrative and national policy requirements discussed in §1104.105(a) and (b), respectively.

(b) Any award-specific terms and conditions discussed in §1104.110.

**§1104.105 Regulations governing DoD Components' general terms and conditions.**

(a) *Administrative requirements.* On an interim basis pending completion of the update of the DoD Grant and Agreement Regulations to implement Office of Management and Budget (OMB) guidance published in 2 CFR part 200, the following regulatory provisions govern the administrative requirements to be included in general terms and conditions of DoD Components' new awards:

(1) The provisions of parts 1126 through 1138 of the DoD Grant and Agreement Regulations (2 CFR parts 1126 through 1138, which comprise subchapter D of this chapter) govern the administrative requirements to be included in the general terms and conditions of DoD Components' new grant and cooperative agreement awards to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.

(2) Part 34 of the DoD Grant and Agreement Regulations (32 CFR part 34) governs the administrative requirements to be included in general terms and conditions of DoD Components' new grant and cooperative agreement awards to for-profit entities.

(b) *National policy requirements.* Part 1122 of the DoD Grant and Agreement Regulations (2 CFR part 1122) governs the national policy requirements to be included in DoD Components' new grant and cooperative agreement awards to all entities.

**§1104.110 Regulations governing DoD Components' award-specific terms and conditions.**

On an interim basis pending completion of the update of the DoD Grant and Agreement Regulations to implement Office of Management and Budget (OMB) guidance published in 2 CFR part 200:

(a) The guidance in 2 CFR part 200 governs administrative requirements to be included in any award-specific terms and conditions used to supplement the general terms and conditions of a new grant or cooperative agreement award to an institution of higher education, nonprofit organization, State, local government, or Indian tribe.

(b) Part 34 of the DoD Grant and Agreement Regulations (32 CFR part 34) governs the administrative requirements to be included in any award-specific terms and conditions of DoD Components' new grant and cooperative agreement awards to for-profit entities.

**§1104.115 Regulations governing DoD Components' internal procedures.**

On an interim basis pending completion of the update of the DoD Grant and Agreement Regulations to implement Office of Management and Budget (OMB) guidance published in 2 CFR part 200, DoD Components' internal pre-award, time-of-award, and post-award procedures will continue to comply with requirements in parts 21 and 22 of the DoD Grant and Agreement Regulations (32 CFR parts 21 and 22).

**§1104.120 Definitions.**

(a) *DoD Grant and Agreement Regulations* means the regulations in chapter I, subchapter C of title 32, Code of Federal Regulations, and chapter XI of title 2, Code of Federal Regulations.

(b) *Other terms.* See part 1108 of the DoD Grant and Agreement Regulations for definitions of other terms used in this part.

**PARTS 1105-1109—[RESERVED]**

3. Subchapter B to chapter XI, consisting of parts 1110 through 1119, is added and reserved to read as follows:

**Subchapter B—[RESERVED]**

**PARTS 1110-1119-[RESERVED]**

4. Subchapter C to chapter XI, consisting of parts 1120 through 1125, is added to read as follows:

**Subchapter C—Award Format and National Policy Terms and Conditions for All Grants and Cooperative Agreements**

**PART 1120-1124-[RESERVED]**

**PART 1125-[TRANSFERRED TO SUBCHAPTER C]**

5. Part 1125 is transferred to subchapter C.

6. Subchapter D to chapter XI, consisting of parts 1126 through 1140, is added to read as follows:

**Subchapter D—Administrative Requirements Terms and Conditions for Cost-Type Grant and Cooperative Agreement Awards to Nonprofit and Governmental Entities**

**PART 1126-1140-[RESERVED]**

7. Subchapter E to chapter XI, consisting of parts 1141 through 1155, is added and reserved to read as follows:

**Subchapter E-[RESERVED]**

**PART 1141-1155-[RESERVED]**

8. Subchapter F to chapter XI, consisting of parts 1156 through 1170, is added and reserved to read as follows:

**Subchapter F—[RESERVED]**

**PART 1156—1170—[RESERVED]**

9. Subchapter G to chapter XI, consisting of parts 1171 through 1199, is added and reserved to read as follows:

**Subchapter G—[RESERVED]**

**PART 1171—1199—[RESERVED]**

Dated: October 19, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of  
Defense.

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