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DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 75

RIN 0991-AC06

Health and Human Services Grants Regulation

AGENCY: Department of Health and Human Services; Office of the Assistant Secretary for Financial Resources, Division of Grants, Office of Grants Policy, Oversight, and Evaluation.

ACTION: Final rule.

SUMMARY: This final rule makes changes to the Department of Health and Human Services' (HHS) adoption of the Office of Management and Budget's (OMB) ("Uniform Administrative Requirements") published on December 19, 2014 and the technical amendments published by HHS on January 20, 2016. HHS codified the OMB language, with noted modifications as explained in the preamble to the December promulgation. The HHS-specific modifications to the Uniform Administrative Requirements adopted prior regulatory language that was not in conflict with OMB's language, and provided additional guidance to the regulated community. Unlike all of the other modifications to the Uniform Administrative Requirements, these additional changes, although based on existing law or HHS policy, were not previously codified in regulation. HHS sought comment on these proposed changes in a notice of proposed rulemaking published on July 13, 2016. This final rule implements these regulatory changes. It also corrects one typographical error that was recently discovered in the most recent promulgation of the Uniform Administrative Requirements.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Quadira Dantro, MSHS, CRA at (202) 260-6825.

SUPPLEMENTARY INFORMATION:

Background:

This final rule makes changes to the HHS's adoption of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards published on December 19, 2014 (79 FR 75871) and the technical amendments published by HHS on January 20, 2016 (81 FR 3004). HHS codified the OMB language, with noted modifications, in 45 CFR part 75. Unlike all of the other modifications to the Uniform Administrative Requirements, these additional changes, although based on existing law or HHS policy, were not previously codified in regulation. This final rule implements these regulatory changes.

HHS received 24 relevant comments on the notice of proposed rulemaking, half of which were strongly supportive of the proposed rule. HHS addresses all of the comments below.

A. Nondiscrimination Provisions

Comment:

HHS received twelve comments on these provisions, all of which were strongly supportive of the codification of the nondiscrimination provisions in HHS awards and the recognition of same-sex marriages. Several of these supportive comments also provided additional areas for consideration specifically regarding the definition of discrimination on the basis of sex. Collectively, the comments indicated that HHS should define discrimination on the basis of sex explicitly to

include discrimination on the basis of sex stereotyping, gender identity, sexual orientation, pregnancy, intersex traits, and the presence of atypical sex characteristics.

Response:

HHS appreciates the comments received, and thanks commenters for their positive reactions and helpful suggestions. For the time being, HHS does not believe it is necessary to add additional categories to the list of non-merit based factors. We note that the determination whether a factor is merit-based for purposes of applying the prohibition will depend on the nature of the particular grant at issue. HHS has therefore decided not to amend the nondiscrimination language proposed in 45 CFR 75.300.

Comment:

One comment urged HHS and its partner federal agencies to broadly construe age discrimination protections to support young people as well as older Americans. The comment noted that while many age discrimination laws are enacted with older adults in mind, it is important to recognize the stigmatization of young people and adolescents, particularly in the healthcare arena.

Response:

HHS agrees that young people and adolescents should have access to health care and services free from discrimination. No alterations of the regulatory text are necessary to implement these protections. We note that, while employment laws enforced by the Equal Employment Opportunity Commission apply to applicants and employees forty or older, youth have additional rights under other federal, state, or local laws. The Age Discrimination Act of 1975 (Age Act), for instance, prohibits discrimination against young people and older Americans on the basis of age in federally funded programs and activities. In some cases, the Age Act permits age

distinctions that reasonably take into account age as a factor necessary to the normal operation or the achievement of any statutory objective. State and local discrimination laws may offer broader protection.

Comment:

One commenter indicated that HHS should specify that the nondiscrimination provisions included in §75.300(c) flow down to subawards.

Response:

HHS notes that the provisions of 45 CFR part 75 already address the flow down of requirements. 45 CFR 75.101(b)(1) stating that the terms and conditions of Federal awards flow down to subawards to subrecipients unless a particular section of this part or the terms and conditions of the Federal award specifically indicate otherwise.

Comment:

Several commenters noted that the provisions of §75.300(c) do not apply to funding under the Temporary Assistance for Needy Families Program (TANF) (title IV-A of the Social Security Act, 42, U.S.C. 601-619). These commenters suggested that HHS should provide additional guidance to TANF grantees on nondiscrimination.

Response:

HHS appreciates the importance of continued education on the full scope of nondiscrimination obligations. The Administration for Children and Families shares this commitment.

B. Indirect cost rates

Comment:

HHS received three comments regarding the proposed eight percent cap on indirect cost rates for foreign organizations. Notably, HHS did not receive any comments that objected to the

imposition of the same eight percent cost cap on indirect cost rates for training grants. The comments received suggested that the proposed provision was in conflict with §75.414(f), and that HHS should instead adopt a ten percent cap on indirect cost rates for these organizations.

Response:

A non-Federal entity that has never received an indirect cost rate that is a foreign organization or foreign public entity, or that would conduct a training grant, would be limited to the eight percent modified total direct cost rate as articulated in §75.414(c)(3). Commenters indicated that this limitation conflicts with §75.414(f), which would permit an entity that had never received an indirect cost rate to charge a de minimis rate of ten percent.

HHS agrees that this is inconsistent, and has added clarifying language to paragraph (f) to ensure that there is no conflict.

C. Indian Self Determination and Education Assistance Act

Comment:

HHS received numerous comments, both through the regulations.gov portal and separately through the HHS Office of Intergovernmental and External Affairs, on the proposed language clarifying that applicability of certain provisions of the Uniform Administrative Requirements to contracts and compacts awarded pursuant to the Indian Self Determination and Education Assistance Act (ISDEAA). The comments received requested additional tribal consultation on these issues.

Response:

The Department is in the process of conducting this tribal consultation, and will proceed as appropriate after that consultation has concluded. The regulatory language from the notice of proposed rulemaking is not included in this final rule.

D. Other Issues

HHS received no comments on the portions of the notice of proposed rulemaking suggesting changes to the proposed language regarding same-sex spouses, marriages, and households, payment provisions as applied to states, public access to records, or shared responsibility payments. Consequently, HHS is finalizing the regulatory language without modification. In addition, HHS is amending one provision to correct a typographical error that was inadvertently included in the most recent promulgation of the Uniform Administrative Requirements, so that the HHS promulgation matches the OMB guidance as intended.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 3506; 5 CFR 1320 Appendix A.1), HHS reviewed this final rule and determined that there are no new collections of information contained therein.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires that an agency provide a final regulatory flexibility analysis or to certify that the rule will not have a significant economic impact on a substantial number of small entities. This final rule aligns 45 CFR part 75 with various regulatory and statutory provisions, implements Supreme Court decisions, and codifies long-standing policies thus clarifying and enhancing the provisions in HHS's interim final guidance issued December 19, 2014, and amended on January 20, 2016. In order to ensure that the public receives the most value, it is essential that HHS grant programs function as effectively and efficiently as possible, and that there is a high level of accountability to prevent waste, fraud, and abuse. The additions provide enhanced direction for the public and will not have a significant economic impact beyond HHS's current regulations.

Executive Order 12866 Determination

Pursuant to Executive Order 12866, HHS has designated this final rule to be economically non-significant. This rule is not being treated as a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) (2 U.S.C. 1532) requires that covered agencies prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires covered agencies to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. HHS has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, HHS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Executive Order 13132 Determination

HHS has determined that this final rule does not have any Federalism implications, as required by Executive Order 13132.

List of Subjects in [45 CFR Part 75](#)

Accounting, Administrative practice and procedure, Cost principles, Grant programs, Grant programs-health, Grants administration, Hospitals, Indians, Nonprofit organizations reporting and recordkeeping requirements, State and local governments.

Dated: November 25, 2016.

Sylvia M. Burwell,

Secretary,

Department of Health and Human Services.

For the reasons set forth in the preamble, part 75 of title 45 of the Code of Federal Regulations is amended as follows:

**PART 75--UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND
AUDIT REQUIREMENTS FOR HHS AWARDS**

1. The authority citation for 45 CFR part 75 continues to read as follows:

Authority: 5 U.S.C. 301.

2. Amend § 75.101 by adding paragraph (f) to read as follows:

§ 75.101 Applicability.

* * * * *

(f) Section 75.300(c) does not apply to the Temporary Assistance for Needy Families Program (title IV-A of the Social Security Act, 42 U.S.C. 601-619).

§ 75.110 [Amended]

3. Amend § 75.110(a) by removing “75.355” and adding, in its place, “75.335”.

4. Amend § 75.300 by adding paragraphs (c) and (d) to read as follows:

§ 75.300 Statutory and national policy requirements.

* * * * *

(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.

(d) In accordance with the Supreme Court decisions in United States v. Windsor and in Obergefell v. Hodges, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.

5. Revise § 75.305(a) to read as follows:

§ 75.305 Payment.

(a)(1) For states, payments are governed by Treasury-State CMIA agreements and default procedures codified at 31 CFR part 205 and TFM 4A-2000 Overall Disbursing Rules for All Federal Agencies.

(2) To the extent that Treasury-State CMIA agreements and default procedures do not address expenditure of program income, rebates, refunds, contract settlements, audit recoveries and

interest earned on such funds, such funds must be expended before requesting additional cash payments.

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6. Revise § 75.365 to read as follows:

§ 75.365 Restrictions on public access to records.

Consistent with § 75.322, HHS awarding agencies may require recipients to permit public access to manuscripts, publications, and data produced under an award. However, no HHS awarding agency may place restrictions on the non-Federal entity that limit public access to the records of the non-Federal entity pertinent to a Federal award identified in §§ 75.361 through 75.364, except for protected personally identifiable information (PII) or when the HHS awarding agency can demonstrate that such records will be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) or controlled unclassified information pursuant to Executive Order 13556 if the records had belonged to the HHS awarding agency. The Freedom of Information Act (5 U.S.C. 552) (FOIA) does not apply to those records that remain under a non-Federal entity's control except as required under § 75.322. Unless required by Federal, state, local, or tribal statute, non-Federal entities are not required to permit public access to their records identified in §§ 75.361 through 75.364. The non-Federal entity's records provided to a Federal agency generally will be subject to FOIA and applicable exemptions.

7. In § 75.414, add paragraphs (c)(1)(i) through (iii) and revise the first sentence of paragraph (f) to read as follows:

§ 75.414 Indirect (F&A) costs.

* * * * *

(c) * * *

(1) * * *

(i) Indirect costs on training grants are limited to a fixed rate of eight percent of MTDC exclusive of tuition and related fees, direct expenditures for equipment, and subawards in excess of \$25,000;

(ii) Indirect costs on grants awarded to foreign organizations and foreign public entities and performed fully outside of the territorial limits of the U.S. may be paid to support the costs of compliance with federal requirements at a fixed rate of eight percent of MTDC exclusive of tuition and related fees, direct expenditures for equipment, and subawards in excess of \$25,000; and,

(iii) Negotiated indirect costs may be paid to the American University, Beirut, and the World Health Organization.

* * * * *

(f) In addition to the procedures outlined in the appendices in paragraph (e) of this section, any non-Federal entity that has never received a negotiated indirect cost rate, except for those non-Federal entities described in paragraphs (c)(1)(i) and (ii) and section (D)(1)(b) of appendix VII to this part, may elect to charge a de minimis rate of 10% of modified total direct costs (MTDC) which may be used indefinitely.* * *

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8. Add § 75.477 to read as follows:

§ 75.477 Shared responsibility payments.

(a) *Payments for failure to maintain minimum essential health coverage.* Any payments or assessments imposed on an individual or individuals pursuant to 26 U.S.C. 5000A(b) as a result of any failure to maintain minimum essential coverage as required by 26 U.S.C. 5000A(a) are not allowable expenses under Federal awards from an HHS awarding agency.

(b) *Payments for failure to offer health coverage to employees.* Any payments or assessments imposed on an employer pursuant to 26 U.S.C. 4980H as a result of the employer's failure to

offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan are not allowable expenses under Federal awards from an HHS awarding agency.

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