



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Assistant Secretary for Financial Resources

45 CFR Part 75

RIN 0991-AC16

Health and Human Services Grants Regulation

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

ACTION: Notice of proposed rulemaking.

SUMMARY: This is a notice of proposed rulemaking to repromulgate or revise certain regulatory provisions of the Department of Health and Human Services, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards.

DATES: Comments must be submitted on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments must be identified by RIN 0991-AC16. Because of staff and resource limitations, comments must be submitted electronically to www.regulations.gov. Follow the “Submit a comment” instructions.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including personally identifiable or confidential business information that is included in a comment. Before or after the close of the comment period, the Department of Health and Human Services will post all comments that were received before the end of the comment period on

www.regulations.gov. Follow the search instructions on that Web site to view the public comments.

FOR FURTHER INFORMATION CONTACT: Richard Brundage at (202) 401-6107.

SUPPLEMENTARY INFORMATION:

This is a notice of proposed rulemaking by which the Department proposes to repromulgate provisions of 45 CFR part 75 that were set forth in a final rule published in the *Federal Register* at 81 FR 89393 (Dec. 12, 2016) (Final Rule). The Department, in a document published in this edition of the *Federal Register*, publishes its decision to exercise its enforcement discretion to not enforce the regulatory provisions adopted or amended by the Final Rule due to HHS's serious concerns about compliance with certain requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–12. In this document, the Department proposes to repromulgate some of the provisions of the Final Rule, not to repromulgate others, and to replace or modify certain provisions that were included in the Final Rule with other provisions.

I. Background

On December 26, 2013, the Office of Management and Budget (OMB) issued the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (UAR or uniform regulations) that “set standard requirements for financial management of Federal awards across the entire federal government.” 78 FR 78590 (Dec. 26, 2013). On December 19, 2014, the Department, in conjunction with OMB and other federal award-making agencies, issued an interim final rule to implement the UAR. Federal Awarding Agency Regulatory Implementation of Office of

Management and Budget’s Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Final Rule, 79 FR 75867 (Dec. 19, 2014).

On July 13, 2016, the Department issued a notice of proposed rulemaking (“NPRM”), proposing additional changes to its implementation of the UAR. 81 FR 45270 (July 13, 2016). That rule proposed changes to:

- § 75.102, concerning requirements related to the Indian Self Determination and Education Assistance Act (ISDEAA);
- § 75.300, concerning certain public policy requirements and Supreme Court cases, and § 75.101, concerning the applicability of those provisions to the Temporary Assistance for Needy Families Program (Title IV-A of the Social Security Act, 42 U.S.C. 601–19);
- § 75.305, concerning the applicability to states of certain payment provisions;
- § 75.365, concerning certain restrictions on public access to records;
- § 75.414, concerning indirect cost rates for certain grants; and
- § 75.477, concerning shared responsibility payments and payments for failure to offer health coverage to employees.

On December 12, 2016, the Department finalized all of these provisions without substantive change, except that the Department explained it was choosing not to finalize the proposed change to § 75.102 at that time.¹ (81 FR 89393) The Final Rule went into effective on January 11, 2017.

¹ The Final Rule also made a technical change not set forth in the proposed rule, amending § 75.110(a) by removing “75.355” and adding, in its place, “75.335.”

In a document published elsewhere in this edition of the *Federal Register*, the Department explains that HHS is exercising enforcement discretion regarding compliance with the Final Rule, due to serious concerns about the Final Rule's compliance with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–12. With respect to the Final Rule, the Department is concerned about whether it provided a sufficient rationale and certification that the rule would not have a significant economic impact on a substantial number of small entities,² or a sufficient final regulatory flexibility analysis at the time of publication of the Final Rule in the *Federal Register*. As a result, the Department is choosing not to enforce the provisions of the Final Rule. *See* 5 U.S.C. 608(b) and 611. However, merely because a regulation is not being enforced does not mean that it has been repealed or replaced. The Final Rule still appears in the Code of Federal Regulations. Therefore, this NPRM should be properly viewed as a proposal to modify or to repeal certain provisions in the Final Rule.

II. Summary of the Notice of Proposed Rulemaking

The Department proposes to repromulgate some (but not all) of the regulatory provisions included in the Final Rule and to issue new and amended provisions.

A. Technical correction, § 75.110.

The Department is proposing to retain, without change, § 75.110, as it corrected a typographical error in the pre-2017 rule.

B. Statutory and national policy requirements, § 75.300, and related provisions at § 75.101.

² To the extent that the Department believed that the Final Rule did not have a significant economic impact on a substantial number of small entities, the certification and statement with the factual basis for such certification was also not provided to the Chief Counsel for Advocacy of the Small Business Administration, contrary to the requirements of the Regulatory Flexibility Act. *See* 5 U.S.C. 605(b).

The Department is modifying § 75.300 and proposing not to retain § 75.101(f) from the Final Rule. This is because the Department has faced several complaints, requests for exceptions, and lawsuits concerning § 75.300(c) and (d). The Department is also currently preliminarily enjoined from enforcing § 75.300(c) in the State of Michigan as to a particular subgrantee’s protected speech and religious exercise. *See Buck v. Gordon*, No. 1:19-cv-286 (W.D. Mich. Sept. 26, 2019) (ECF No. 70) (“Defendant Azar shall not take any enforcement action against the State under 45 CFR 75.300(c) based upon [plaintiff’s] protected religious exercise . . .”). Some non-Federal entities have expressed concerns that requiring compliance with certain non-statutory requirements of those paragraphs violates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, *et seq.*, or the U.S. Constitution, exceeds the Department’s statutory authority, or reduces the effectiveness of programs, for example, by reducing foster care placements in the Title IV-E program of HHS’s Administration for Children and Families. The existence of these complaints and legal actions indicates that § 75.300(c) and (d) imposed regulatory burden and created a lack of predictability and stability for the Department and stakeholders with respect to these provisions’ viability and enforcement.

Some members of the public have submitted comments to the Department citing possible burdens created by paragraphs (c) and (d) as they were included in the Final Rule.³ To date, the Department has granted, pursuant to 45 CFR 75.102(b), one request for an exception to the application of the religious nondiscrimination requirement of §

³ *See* <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&s=75.300&dct=PS&D=HHS-OS-2017-0002>.

75.300(c).⁴ That grant of an exception has been challenged under the Administrative Procedure Act. Some Federal grantees have stated that they will require their subgrantees to comply with the non-statutory requirements of § 75.300(c) and (d), even if it means some subgrantees with religious objections will leave the program(s) and cease providing services rather than comply. The Department believes that such an outcome would likely reduce the effectiveness of programs funded by federal grants by reducing the number of entities available to provide services under these programs. The Department is also aware that certain grantees and subgrantees that may cease providing services if forced to comply with § 75.300(c) and (d) are providing a substantial percentage of services pursuant to some Department-funded programs and are effective partners of federal and state government in providing such services.

The Department accordingly proposes that § 75.300 include different provisions in paragraphs (c) and (d) than those that were included in the Final Rule. The Department takes this action as an exercise of its discretion to establish requirements for its grant programs and to establish enforcement priorities with respect to those programs.

This document proposes that paragraph (c) state, “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, to the extent doing so is prohibited by federal statute.”

The Department considers this proposed language for paragraph (c) appropriate because it affirms that HHS grants programs will be administered consistent with the

⁴ That waiver is available on the State of South Carolina’s website at <https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf>.

Federal statutes that govern the programs, including the nondiscrimination statutes that Congress has adopted and made applicable to the Department's programs, RFRA, and with all applicable Supreme Court decisions. The proposed language would provide guidance for compliance when non-statutory public policy requirements conflict with statutory requirements (*e.g.*, RFRA). Section 75.300(a) does not, on its face and standing alone, provide a clear pathway for compliance in such situations. The adoption of regulatory language that makes compliance more predictable and simpler for federal grant recipients is generally consistent with the concept of controlling regulatory costs and relieving regulatory burdens. Exec. Order No. 13771, 82 FR 9339 (Feb. 3, 2017).

This document also proposes that paragraph (d) state, "HHS will follow all applicable Supreme Court decisions in administering its award programs."

Paragraph (d) as included in the Final Rule specified two Supreme Court decisions. But the Department is committed to complying not just with those decisions, but with all applicable Supreme Court decisions and all applicable court orders. Because Federal courts issue new decisions daily, and courts often adjust, clarify, expand upon, or narrow prior holdings, the Department believes that, if its Department-wide regulations include general provisions addressing compliance with Supreme Court decisions, the regulations should do so without singling out specific cases, since it is not possible to list every applicable case, nor to change the regulations each time new decisions are issued.⁵

⁵ In this regard, the Department distinguishes between the regulations it promulgates that are generally applicable to all of the Department's activities, such as all of its grants and grant-making programs, and regulations that are promulgated to implement a particular program – and between Supreme Court decisions that are generally applicable to the federal government and those that specifically address and bind the Department (or a component of the Department) with respect to a specific program.

In light of the considerations discussed above, the Department proposes to modify paragraphs (c) and (d) to require compliance with all applicable nondiscrimination statutes and Supreme Court decisions. The Department believes the proposed language of paragraphs (c) and (d) would allow its programs to comply with all applicable laws and court decisions, to minimize disputes and litigation, and to remove regulatory barriers. OMB's UAR, at 2 CFR 200.300, does not impose specific public policy requirements beyond U.S. statutory requirements. The Department considers it appropriate for paragraph (c) to similarly focus on statutory requirements and for paragraph (d) to inform grantees that the Department complies with applicable Supreme Court decisions in administering its grant programs.

The Department does not propose to include paragraph (f) in § 75.101, which was included in the Final Rule to ensure that the specific statutory requirements of the Temporary Assistance for Needy Families Program (Title IV-A of the Social Security Act, 42 U.S.C. 601-619) governed applicable grants. This language would not be necessary under the proposed language of § 75.300(c), because the latter would already be limited to applicable statutory nondiscrimination requirements.

C. Payment, § 75.305.

The Department is proposing to repromulgate 45 CFR 75.305 as it currently appears in the Code of Federal Regulations. Because the language prior to the Final Rule applied the provisions of Treasury-State Cash Management Improvement Act agreements and default procedures codified at 31 CFR part 205 and TM 4A-2000, and such agreements may not contain specific provisions addressed by § 75.305, the Department seeks to modify the language to ensure clarity. In doing so, to the extent that the

governing provisions are silent as to the payment provisions described in the UAR, there should be no effect on states, as they had been subject to these same provisions pursuant to 45 CFR 92.21. However, the Department proposes the clarification so that all states are aware of the necessity to, for example, expend refunds and rebates prior to drawing down additional grant funds.

D. Restrictions on public access to records, § 75.365.

The Department proposes to repromulgate 45 CFR 75.365 as it currently appears in the Code of Federal Regulations. That section clarifies the limits on the restrictions that can be placed on nonfederal entities that limit public access to records pertinent to certain federal awards. That section also implements Executive Order 13,642 (May 9, 2013), and corresponding law. *See, e.g.*, <https://www.federalregister.gov/documents/2013/05/14/2013-11533/making-open-and-machine-readable-the-new-default-for-government-information>, and Departments of Labor, Health, and Human Services, and Education Appropriations Act of 2014, Public Law 113-76, Div. H, Sec. 527 (requiring “each Federal agency, or in the case of an agency with multiple bureaus, each bureau (or operating division) funded under this Act that has research and development expenditures in excess of \$100,000,000 per year [to] develop a Federal research public access policy”). Although this language was not included in subsequent appropriations acts, the Department considers it an appropriate exercise of agency discretion and implementation of the Executive Order. The proposed language would codify permissive authority for the Department’s awarding agencies to require public access to manuscripts, publications, and data produced under an award, consistent with applicable law. The Department recognizes that this provision could be

interpreted as having a financial impact on small entities. These requirements, however, have been operational since the publication of the Final Rule, and therefore grantees would not need to make any changes to their current practice in response to this rulemaking. As a result, this portion of this rulemaking, if finalized, would have no impact other than informing the public of the Department's stance on public access to manuscripts, publications, and data produced under awards.

E. Indirect (Facilities & Administration) costs, § 75.414.

The Department is proposing to repromulgate language from the Final Rule amending 45 CFR 75.414(c) as it currently appears in the Code of Federal Regulations. That provision restricted indirect cost rates for certain grants. It is long-standing HHS policy to restrict training grants to a maximum eight percent indirect cost rate. In addition to proposing to implement this limit for training grants, the Department proposes to impose this same limitation on foreign organizations and foreign public entities, which typically do not negotiate indirect cost rates, and to add clarifying language to § 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, in order to ensure that the two provisions do not conflict. In this proposed rule, the American University, Beirut, and the World Health Organization are exempted specifically from the indirect-cost-rate limitation because they are eligible for negotiated facilities and administration (F&A) cost reimbursement. This proposed restriction on indirect costs, as indicated by 45 CFR 75.101, would flow down to subawards and subrecipients. The Department recognizes that this provision could be interpreted as having a financial impact on small entities. These limits, however, have been operational since the publication of the Final Rule, and therefore grantees would not

need to make any changes to their current practice in response to this rulemaking. As a result, this portion of this rulemaking, if finalized, would have no impact other than informing the public of the Department's stance on indirect cost rates for certain grants.

F. Payments for failure to offer health coverage to employees, § 75.477.

The Department proposes to repromulgate language from the Final Rule specifying a selected item of cost for codification in the cost principles as 45 CFR 75.477, regarding shared responsibility payments by employers. The Department does not, however, propose to repromulgate a related provision from the Final Rule concerning shared responsibility payments for individuals.

In 2013, the Department announced in a program policy document that 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) were not allowable costs under a particular grant program. *See* HAB Policy Notice 13-04, at 2-3. Consistent with that policy, in 2016 in the Final Rule, 45 CFR 75.477, the Department excluded as allowable expense under a grant both payments imposed on an individual or individuals pursuant to 26 U.S.C. 5000A(b) and payments imposed on employers that fail to offer health coverage to their employees pursuant to 26 U.S.C. 4980H.

Congress subsequently reduced to \$0 the penalties or assessments imposed on individuals as a result of their failure to maintain minimum essential coverage, effective after December 31, 2018. Pub. L. 115-97, 131 Stat. 2092 (Dec. 22, 2017). Accordingly, the Department does not propose to repromulgate the provision from the Final Rule, at § 75.477(a), excluding such payments or assessments as allowable costs under an HHS

grant. Given that the penalty imposed on individuals for failure to maintain minimum essential coverage was reduced to \$0, effective after December 31, 2018, and it is possible that some individuals are still making such payments for tax year 2018, the Department seeks comment on whether to repromulgate the provision, with a sunset date to ensure that the cost of the individual penalty is excluded from allowable costs for tax years when such penalties could be imposed.

The Department does propose to repromulgate language from the Final Rule excluding, from allowable costs under an HHS grant, employer payments for failure to offer health coverage to employees as required by 26 U.S.C. 4980H. The Internal Revenue Service began to enforce the Internal Revenue Code provision in 2017, after the issuance of the Final Rule. The Department recognizes that the HHS regulatory provision – excluding such employer shared responsibility payments from allowable costs under HHS grants – could be interpreted as having a financial impact on small entities. These requirements, however, have been operational since the publication of the Final Rule, and therefore grantees would not need to make any changes to their current practice in response to this rulemaking. As a result, this portion of this rulemaking, if finalized, would have no impact other than informing the public of the Department’s stance on financing shared responsibility payments using grant funding.

III. Request for Comment

The Department seeks comment on this proposed rule, including its likely impacts as compared to the previous Final Rule. The Department is particularly interested in comments relating to the comparative effects and impact of its own enforcement

discretion, specifically were the previous Final rule to be fully enforced, as well as whether HHS were to fully exercise its enforcement discretion regarding the Final Rule.

IV. Regulatory Impact Analysis

The Department has examined the impacts of the proposed rule as required under Executive Order 12866 on Regulatory Planning and Review (Sept. 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (Jan. 18, 2011), Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), the Regulatory Flexibility Act (September 19, 1980, Pub. L. 96-354, 5 U.S.C. 601-612), section 202 of the Unfunded Mandates Reform Act of 1995 (Mar. 22, 1995, Pub. L. 104-04), Executive Order 13132 on Federalism (Aug. 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), the Assessment of Federal Regulation and Policies on Families, and the Paperwork Reduction Act of 1995.

Executive Orders 12866 and 13563 Determination

Pursuant to Executive Order 12866, the Department has designated this final rule to be economically non-significant. This rulemaking has been designated as a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget. Similarly, under Executive Order 13563, this proposed rule harmonizes and streamlines rules, and promotes flexibility by removing unnecessary burdens.

Executive Order 13771

The White House issued Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs on January 30, 2017. Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing

regulations to be repealed when the agency publicly proposes for notice and comment or otherwise promulgates a new regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. This rulemaking, while significant under Executive Order 12866, will impose de minimis costs and therefore is not anticipated to be a regulatory or deregulatory action under Executive Order 13771. Public comments will inform the ultimate designation of this proposed rule.

Regulatory Flexibility Act

The Department has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612). The RFA requires an agency to describe the impact of a proposed rulemaking on small entities by providing an initial regulatory flexibility analysis unless the agency expects that the proposed rule will not have a significant impact on a substantial number of small entities, provides a factual basis for this determination, and proposes to certify the statement. 5 U.S.C. 603(a), 605(b). If an agency must provide an initial regulatory flexibility analysis, this analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact on revenue on at least five percent of small entities. As discussed, the proposed rule would

- Require grantees to comply with applicable federal statutory nondiscrimination provisions.
- Provide that HHS complies with applicable Supreme Court decisions in administering its grant programs.
- Not re-impose the exclusion from allowable costs of the now-repealed tax imposed on individuals for failure to maintain minimum essential coverage.
- Otherwise re-promulgate the provisions of the Final Rule.

Affected small entities include all small entities which may apply for HHS grants; these small entities operate in a wide range of sections involved in the delivery of health and human services. Grantees are required to comply with applicable federal statutory nondiscrimination provisions by operation of such laws and pursuant to 45 CFR 75.300(a); HHS is required to comply with applicable Supreme Court decisions. Thus, there would be no economic impact associated with proposed sections 75.300(c) and (d). Since the individual tax for failure to comply with the individual mandate has been reduced to \$0, there would be no economic impact associated with not proposing to re-impose an allowable costs exclusion for such payments. Moreover, the provisions of the proposed rule have been operational since the publication of the Final Rule, and therefore grantees, including small entities, would not need to make any changes to their current practice in response to this rulemaking. Thus, the Department anticipates that this rulemaking, if finalized, would have no impact beyond providing information to the public. The Department anticipates that this information will allow affected entities to better deploy resources in line with established requirements for HHS grantees. As a

result, HHS has determined, and the Secretary certifies, that this proposed rule will not have a significant impact on the operations of a substantial number of small entities.

The Department seeks comment on this analysis of the impact of the proposed rule on small entities, and the assumptions that underlie this analysis.

Unfunded Mandates Reform Act

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 in 1995 dollars, updated annually for inflation. Currently, that threshold is approximately \$154 million. 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. The Department has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$154 million or more in any one year. Accordingly, the Department has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Executive Order 13132—Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments or has federalism implications. The Department has determined that this proposed rule does not impose such costs or have any Federalism implications.

Congressional Review Act

The Congressional Review Act defines a “major rule” as “any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” 5 U.S.C. 804(2). The Department has determined that this proposed rule is not likely to result in an annual effect of \$100,000,000 or more and is not otherwise a major rule for purposes of the Congressional Review Act.

Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal departments and agencies to determine whether a proposed policy or regulation could affect family well-being. If the determination is affirmative, then the Department or agency must prepare an impact assessment to address criteria specified in the law. The Department has determined that these proposed regulations will not have an impact on family well-being, as defined in the Act.

Paperwork Reduction Act of 1995

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. ch. 3506; 5 CFR part 1320 appendix A.1), the Department has reviewed this proposed rule and has determined that there are no new collections of information contained therein.

List of Subjects in 45 CFR Part 75

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

Proposed Rule

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend part 75 of title 45 of the Code of Federal Regulations 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.

§ 75.101 [Amended]

2. Amend § 75.101 by removing and reserving paragraph (f).

3. Amend § 75.300 by revising 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, to the extent doing so is prohibited by federal statute.

(d) HHS will follow all applicable Supreme Court decisions in administering its award programs.

4. In § 75.305, revise paragraph (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.

* * * * *

5. 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 limits 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) (FOIA) or controlled unclassified information pursuant to Executive Order 13556 if the records had belonged to the HHS awarding agency. The 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.

6. In § 75.414, revise paragraphs (c)(1)(i) through (iii) and 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. * * *

* * * * *

7. Revise § 75.477 to read as follows:

§ 75.477 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.

Dated: November 1, 2019.

Alex M. Azar II,

Secretary,

Department of Health and Human Services.

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