



March 23, 2020

VIA ELECTRONIC SUBMISSION

Mr. Timothy F. Soltis
Deputy Controller
U.S. Office of Management and Budget (OMB)
Washington, DC 20503
www.regulations.gov

RE: Comments on OMB Notice of Proposed Revision, OMB-2019-0005, as published at 85 Fed.Reg. 3766-3809 (January 22, 2020).

Dear Mr. Soltis:

Humentum respectfully submits the following comments in response to Federal Register Notice of Proposed Revision: Sections of Title 2 of the Code of Federal Regulations (CFR) Subtitle A—OMB Guidance for Grants and Agreements (“Notice”), as published at 85 Fed.Reg. 3766-3809 (January 22, 2020).

Humentum is a non-profit social enterprise dedicated to advancing the operational excellence of the global development sector. Humentum’s 300 organization network members are among the largest and most productive implementers of foreign assistance globally. On our membership’s behalf, Humentum undertakes targeted outreach and advocacy with donor agencies in the United States and United Kingdom. In the US, these agencies include the US Agency for International Development (USAID) and US Department of State (USDOS), among others. In this work, we identify obstacles to the effective implementation of foreign assistance, articulate our member’s first-hand experiences, and propose dialogue and solutions that enable positive change.

Humentum enjoys over 40 years of experience working on behalf of the global development sector. The result of a 2017, merger of legacy organizations InsideNGO, MANGO, and LINGOS, Humentum (as legacy InsideNGO, hereinafter referred to as “Humentum”) participated in OMB’s two-step review and comment process that led to issuance of 2 CFR § 200, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal*

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Awards. Humentum submitted comments to OMB on April 30, 2012, and May 31, 2013, respectively, on behalf of its membership. With Humentum’s input, OMB adopted policies that have since simplified Federal assistance management and reduced burden on Federal agencies, recipients, and subrecipients.

Following full implementation of 2 CFR § 200 on December 26, 2014, Humentum was gratified that an additional opportunity was offered for non-Federal entities to engage with OMB. In its December 19, 2014, Federal Register announcement, OMB solicited additional comments on the final regulation for submission by February 17, 2015. At that time, Humentum submitted additional recommended clarifications and improvements in nine policy areas. Further, based on OMB’s responses to frequently asked questions submitted by Federal assistance stakeholders, Humentum notified OMB and the Council on Financial Assistance Reform (COFAR) on February 3, 2016, of what it believed to be a flaw in 2 CFR § 200.308. This flaw limited the authority of Federal agencies to waive certain administrative and cost-related prior approval requirements for recipients other than research grantees, enabling such recipients to perform under so-called “expanded authorities.” Because we are uncertain whether these recommendations were considered in OMB’s review, as stipulated in 2 CFR § 200.109 and which resulted in OMB’s January 22, 2020 notice, we are resubmitting them for your consideration together with the following comments in response to the January 22, 2020, notice. We believe that by revisiting those earlier submissions as we request, OMB can make further needed policy improvements that will advance its objectives of risk management, burden reduction, and emphasis on performance.

Moreover, **Humentum respectfully submits the following comments in response to the January 22, 2020, OMB proposal to amend and/or add to 2 CFR §§ 200, 25, 170 and 183.**

I. RESPONSES TO OMB PROPOSED AMENDMENT OF 2 CFR § 200

DEFINITIONS—Proposed 2 CFR § 200.1—The abandonment of the existing numbering system for the definitions section of the regulation appears to have no important purpose except to accommodate the fact that there will be more than 100 definitions in the revised regulation. Including all terms and their definitions alphabetically under a single subpart (200.1) will make it harder for Federal agencies and non-Federal entities to read, understand, and utilize the terms. The intent of OMB to “facilitate future additions to this section” can be met by utilizing lower case lettering for each term and definition.”

Proposed 2 CFR § 200.1 or Proposed 2 CFR § 200.407—The absence of a simple definition of the term “prior approval” in 2 CFR 200 continues to introduce uncertainty and burden into Federal assistance management. When OMB consolidated its administrative Circulars A-102 and A-110 and its cost principles Circulars A-21, A-87, and A-122, it dropped definitions that, taken together, had provided effective guidance to Federal agencies, pass-through entities, recipients, subrecipients and independent auditors about when awarding agency advance permission was needed in order to take certain administrative and financial steps. Humentum believes that re-introduction of a dispositive definition would reduce much subsequent dispute about allowability or allocability. Accordingly, we suggest the following, crafted from the letter or intent of previous OMB policy documents: “Prior approval means written approval by an authorized official

evidencing prior consent. Where an item of cost or an administrative action requiring prior approval is specified in the approved project narrative or budget of an award, approval of the project narrative or budget constitutes prior written approval.”

Proposed 2 CFR § 200.1 — Definition — “Fixed amount award”—The inclusion of the term “cooperative agreement” would introduce the concept of “substantial involvement” into fixed amount awards. Doing so counters the benefit of a fixed amount award as a less complex and simpler award instrument. We recommend that no reference to cooperative agreements be made in the definition.

NON-AUTHORITATIVE GUIDANCE—Proposed 2 CFR § 200.211(e)—Humentum strongly supports the intent of Executive Order 13891 with respect to the prohibition against the inclusion of non-authoritative guidance in the terms and conditions of an assistance award. Many Humentum members have experienced such inclusions and have had little recourse until now. However, in order to allow non-Federal entities to be able to differentiate between such provisions and those that can be legitimately imposed, OMB should include a reference in this regulatory section to the fact that the Executive Order has required each Federal agency to publish a listing of such guidance on its website. The actual terms and conditions of each direct Federal award should then require a restatement of the prohibition and identify the Federal agency website where the listing is published. Finally, in order to foster better cooperation and trust with non-Federal entities, OMB should also encourage Federal agencies to engage in review and comment about such guidance even when the economic impact is less than \$100 million.

In addition, OMB should clarify the future applicability (or lack thereof) of the Frequently Asked Questions previously issued under the auspices of the Council on Financial Assistance Reform (COFAR). Since these policies were not issued following any review and comment of the type contemplated in the executive order and the impact of the policies, in many cases, affects all or significant portion of the \$700 billion in Federal assistance funds awarded annually, such a clarification is warranted.

PERIOD OF PERFORMANCE—Proposed 2 CFR § 200.1—OMB’s explanation in the January 22, 2020, preamble of proposed terms associated with time periods related to award performance is confusing. If implemented as proposed, coupled with the removal of the current section 2 CFR § 200.309, the policies appear to further complicate relatively simple concepts that need to be understood by all parties. Humentum suggests that the following regime be adopted: (1) that the term “period of performance” be used for the entire duration for which a Federal award is programmatically approved; and (2) that the “budget period” be designated as the initial or subsequent period for which Federal funds are actually obligated to a recipient or subrecipient by a Federal awarding agency or pass-through entity during the period of performance. As presented in the proposed regulation to apply to the utilization of award amounts by the non-Federal entity, the term “financial obligations” then makes sense in that it differentiates commitments made by awarding agencies from those made by recipients or subrecipients.

PERFORMANCE RELATED SECTIONS—Proposed 2 CFR § 200.200, 2 CFR § 200.211 and 2 CFR § 200.301— OMB is proposing enhanced policies related to structuring of Federal assistance award solicitations (on grants.gov, award agreements, and implementation plans to

emphasize evidence-based performance indicators and outputs). While Humentum supports use of these merit-based criteria to help guide decision-making concerning whether awards should be made and continued, Federal agencies should also be instructed to include evidence about the programmatic and organizational need for the assistance as an additional criterion for consideration about whether a project or program is worthy of Federal assistance, stimulation, or support.

PROHIBITION ON CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT – 2 CFR § 200.216 – The Humentum-member community appreciates OMB’s invitation to provide “feedback on the feasibility, burden, programmatic impact, and cost associated with implementing this requirement.” As per OMB’s encouragement: “to provide relevant data on the impacts of this proposed change and suggestions on how to support implementation of this prohibition,” Humentum predicts adverse effects of this prohibition and practical recommendations to support implementation of this prohibition. The listed equipment below is manufactured by the listed producers and their affiliates and widely used worldwide, including in the US and by its ally states. The prohibition, in its current form, will prohibit recipients from buying any services from chains of providers and affiliates in the following areas/fields: (1) mobile networks; (2) internet service; and (3) radio and TV stations. The inability to buy these services will have an extreme, adverse effect on programmatic impact by significantly limiting access to and use of modern age communication technologies. It will cause the delivery of vital programmatic interventions and tools, such as radio and mobile broadcasting to communities and program participants, unfeasible, if not impossible, to achieve. For example, if implemented as proposed, there would be locations in the world where we would no longer have available mobile telecommunication options. Even if the above-referenced equipment were not as widely adopted as it is, it is beyond a USG-implementer’s ability to deploy effective compliance programs in assessing, flowing-down, monitoring, and enforcing the anticipated rules. Accordingly, Humentum recommends that the prohibition be suspended from the current release and be thoroughly assessed from the operational compliance angle adequate to the scale of adoption of such equipment included in the scope. In the interim, we propose awarding Federal Agencies include agreement-specific prohibitions based on materiality of new procurements of telecommunication equipment and services above the simplified acquisition threshold, and that this be jointly evaluated with implementing partners on a case by case basis.

PROCUREMENT—Proposed 2 CFR § 200.319—Humentum welcomes the clarifications that are being introduced into the regulation to align with statutory authority about dollar thresholds for micro-purchase and small purchase transactions. Humentum respectfully suggests that, if future statutory enactments like those contained in National Defense Authorization Acts, affect policies contained in 2 CFR § 200, OMB move quickly to propose corresponding regulatory changes. Such a step will reduce confusion within the Federal assistance and independent auditor communities, particularly as it relates to effective implementation dates.

DOMESTIC PREFERENCE IN PROCUREMENTS—Proposed 2 CFR § 200.321—The proposed regulatory provision should fully align with the texts of the two executive orders cited. It should also make clear that compliance with statutory and regulatory authority on procurement preferences such as that contained in the Foreign Assistance Act and in various appropriation statutes is consistent with this provision.

INDIRECT COST RECOVERY—Proposed 2 CFR § 200.414(h)—Humentum opposes OMB’s proposal to require that all indirect cost rate agreements negotiated by Federal cognizant agencies be collected and displayed on a public website. The nature of such agreements is that they often contain financial and other information about the affected non-Federal entity that is proprietary. As such, that information is to be excluded from disclosure to the general public under the Freedom of Information Act, 5 USC § 552(b)(4).

Proposed 2 CFR § 200.414(f)--Humentum appreciates the clarification that non-Federal entities that elect use of the *de minimis* indirect cost rate are not required to provide proof of costs that are covered under that rate.

Proposed 2 CFR § 200.331(a)(4)(i and ii)—OMB’s proposal to require that, if no Federally negotiated indirect cost rate exists, a pass-through entity must accept either a rate it negotiates with a subrecipient or a rate that is negotiated with another pass-through entity will, in our view, still lead to problems. The scenario envisioned in 2 CFR § 200.331(a)(4)(ii) might work in some domestic situations where, for example, one state agency negotiates a rate for subrecipient and another state agency in the same state relies on it. However, in a much more common scenario, the two pass-through entities involved will have no relationship with one another and limited, if any, reasons to rely on the decisions of another. For this reason, we believe that it would be appropriate to add language in both of these cited subsections that would establish (perhaps by a certification) that the pass-through entity relied on the procedures contained in Appendices III-VII of 2 CFR § 200 in conducting its review of the indirect cost proposal of the subrecipient and arriving at the rate to which it agreed.

CLOSE-OUT—2 CFR § 200.343—Humentum understands that there has been considerable pressure on executive branch agencies to achieve more timely close-outs. However, the proposal to extend the time frames for recipient and subrecipient close-outs fails to address some underlying reasons why close-outs do not occur within established (or even extended) time frames. Further, it introduces the sanction of reporting about delinquent close-out by a recipient on the Federal Awardee Performance and Integrity Information System (FAPIIS). Doing so shifts responsibility for slow close-outs where it often does not belong. The experience of many Humentum members is that they are unable to fully close out an award until after they receive their final indirect cost rates from their **Federal** cognizant agency for indirect cost. That cognizant agency is often a part of the same Federal agency as the awarding unit that is seeking to accomplish a timely close-out. The related difficulty is that such cognizant agency clings to the provisional/final indirect cost rate regime in accordance with protracted procedures under 2 CFR § 200, Appendix IV rather than considering whether the fixed rate with carry forward approach that is also permitted under those procedures might be just as appropriate. Humentum is troubled by the fact that the revised section on close-out contains a series of close-out steps that a non-Federal entity “must” take and for which sanctions are invoked if not. However, the steps which a Federal agency or pass-through entity “must” take in the process seem based on the assumption that the non-Federal entity is always at fault. One possible solution to this problem that OMB should explore is adapting the procedure for “quick close-out” that is permitted under Federal contracts (pursuant to 48 CFR § 42.708).

In addition, OMB should fill a problematic policy gap and explicitly state either in this section or by adding a section in Subpart E of 2 CFR § 200 that the costs of conducting close-out activities including, but not limited to, preparation of financial and performance reports and determining disposition of grant acquired property are allowable if they are incurred during the normal 90 or 120 day periods following the end of the requisite performance periods or during any authorized extension. This clarification would address a policy question that our members have had to ask literally hundreds of times during the past five years.

TERMINATION—2 CFR § 200.339(a)(2)—This proposed section introduces new and inappropriate criterion for termination of an assistance award (i.e., “when an award no longer effectuates the program goals or agency priorities.”). Humentum opposes the addition of this language because it could invite a significant degree of arbitrariness into termination decision-making. It is one thing to assert that a recipient or subrecipient is to be terminated for acting in a manner contrary to the agreed-upon terms and conditions of an award since those were arrived at after programmatic and administrative due diligence by the awarding agency. However, this proposed language is akin to termination for the convenience of the government which is available in Federal contracts but has never been introduced into Federal assistance transactions. Federal agencies have plenty of tools available to end an award without resorting to the one proposed.

COMPOSITION AND TIMING OF COSTS—2 CFR § 200.402(b)—We recommend that the phrase “or with approval of an authorized official of the Federal awarding agency or pass-through entity” be added at the end of this section.

ADDITIONAL COMMENTS RELATED TO 2 CFR § 200

In its January 22, 2020, announcement, OMB only solicited comments about the sections of 2 CFR §200 that it proposed to revise. However, Humentum believes that if OMB is truly serious about reducing burden and stepping away from what it calls “antiquated processes to monitor compliance,” it should be willing to address policies that remain in the regulation and that recipient experience has shown to be duplicative and intrusive. Humentum believes that OMB should also address and fill policy gaps that lead to protracted confusion and wasted effort.

2 CFR § 200.308—As noted in the attached letter to OMB on February 17, 2015, and the attached follow-up notification sent to the COFAR on February 3, 2016, concerning the presentation of this portion of the regulation, Humentum believes that there is a need for clarification about administrative and cost related prior approvals. The first of these is mentioned above and represents a defect in the regulation. It relates to the mis-numbering of listed prior approvals that may be waived by Federal awarding agencies under 2 CFR § 200.308(e). As can be concluded from a review of OMB’s prior policy on this subject (contained for instance in 2 CFR § 215.26(c)), Federal agencies were permitted to waive all prior approvals on the list now presented in 2 CFR § 200.308(c) except for a change in scope and the need for more Federal funds. OMB’s presentation in the current section of 2 CFR § 200.308 represents a retreat from a policy that allowed for Federal agency award flexibility and for the elimination of low value accountability steps of the type that OMB has identified as “antiquated” in the preamble to its current proposal.

2 CFR § 200.305—Labeling this section as “Federal payment” raises the question of whether OMB is trying to distance itself from regulating payment of Federal funds to subrecipients. While advance payment continues, under 2 CFR § 200.305(b)(1), to be the preferred method for payment of non-Federal entities (defined elsewhere as recipients and subrecipients), the experience of some of our members is that some pass-through entities refuse to provide cash in advance either because it is inconvenient for them to do so or they misunderstand that the concept of cost reimbursement in assistance programs has nothing to do with when the cash shows up. To remedy this situation, Humentum recommends that this variation of the language which appears at the end of 2 CFR § 200.305(b)(4) be introduced at the end of 2 CFR § 200.305(b)(3). That is: “The reimbursement method of payment must not be used by the pass-through entity if the reason for using this method is unwillingness or inability of the pass-through entity to provide timely advance payments to the subrecipient to meet the subrecipient’s actual cash needs.”

2 CFR § 200.327, 2 CFR § 200.331(a)(3)—Taken together, these two sections continue to invite some pass-through entities to impose more frequent and more detailed financial reporting requirements on subrecipients than those that are imposed by Federal agencies on those same entities when they are direct recipients of grants or cooperative agreements. Such excessive reporting is often justified using the language contained in 2 CFR § 200.331(a)(3)—that is “in order for the pass-through entity to meet its own responsibility to the Federal awarding agency...” Arguably, this rationale is valid when the pass-through entity needs data reported sooner in order to prepare its quarterly financial and performance reports to the Federal government in a timely manner. However, the idea that subrecipient reports are needed more often or in greater detail (such as by object class category of expense) is fully challengeable. OMB should introduce language in one of these sections that (as a best practice) discourages pass-through entities from the practice of more frequent and more detailed financial reporting. Language derived from OMB’s Common Rule issued pursuant to its Circular A-102 could effectively address this situation — “Pass-through entities are not required to use the Federal Financial Report or such future OMB-approved governmentwide data elements...in gathering financial information from subrecipients. However, pass-through entities should not impose more frequent or detailed reports on subrecipients.”

II. RESPONSES TO OMB PROPOSED CHANGES TO 2 CFR § 25

2 CFR § 25.110(b)(ii)—The Universal Identifier Number and System for Award Management requirements clearly apply to those receiving subawards directly from recipients, pursuant to 2 CFR § 25.110(a)(2). Also, the waiver authority of 2 CFR § 25.110(b)(ii) exists for a foreign entity receiving a subaward of less than \$100,000. However, it appears that if that foreign entity subrecipient is, in turn, making subawards, the waiver authority would be precluded. Given the complexity of program designs involving multiple lower tier entities, Humentum believes that OMB should clarify when, in such scenarios, waiver authority is precluded. We also urge OMB to consider allowing the waiver authority to be exercised based on a higher dollar threshold, such as the Simplified Acquisition Threshold which is used elsewhere in Federal assistance management policies. The comment immediately below suggests a further improvement.

2 CFR § 25.110(c)(2)(ii)—This section states that the exemption must be determined by the Federal awarding agency on a case-by-case basis while using a risk-based approach and does not apply if subawards are anticipated. It would be helpful if the Federal awarding agency were to be provided with the option of providing a blanket exemption if the circumstances in the country of program implementation warrant. A case-by-case determination has the potential to be administratively burdensome as, for example, USAID has determined in its regulation on source and nationality of commodities and services that it finances (22 CFR § 228). That model which allows for blanket waivers seems particularly attractive in the case of obtaining universal identifier numbers. We further recommend that the restriction if subawards are anticipated be removed because personal safety of local subrecipients' staff and clients in high risk area may be affected.

2 CFR § 25.110(c)(3)—OMB states in this proposed regulation that use of a generic identifier number should be “rare.” In Humentum’s view, this language will further serve to discourage Federal agencies that deal with projects conducted outside the United States from exercising their discretion to exempt a foreign organization from the requirements to obtain a unique entity identifier or to register with SAM. Humentum’s members are a large part of the cohort that has experienced considerable difficulty with these requirements which were largely crafted with domestic recipients and subrecipients in mind. The difficulties of meeting these requirements for entities outside of the United States remain.

2 CFR § 25.200(b)(2)—The applicability of this section to nonprofit organizations that perform internationally like Humentum’s members is not clear. Such organizations do not have “immediate” or “highest level” owners and have organizational relationships with branches and field offices that do not correspond to the model that OMB is presenting here. It appears that OMB is relying on policies contained in the Federal Acquisition Regulation (FAR) that are much more in line with situations affecting commercial entities than those involving non-profit ones. Further clarification is warranted since the exemptions discussed in the regulation are most likely to be considered for organizations performing internationally.

III. RESPONSES TO OMB PROPOSED CHANGES TO 2 CFR § 170

2 CFR § 170.220 and 2 CFR § 170, Appendix A—While Humentum supports OMB’s proposals to (1) raise the dollar threshold for subaward reporting to \$30,000 and (2) preclude the need for the provision in awards in which there is no possibility that Federal funding will exceed \$30,000, our members have pointed out that this change is unlikely to bring about significant change in alleviating administrative burdens. Accordingly, we propose increasing the threshold to \$50,000.

IV. RESPONSES TO OMB PROPOSED NEW REGULATION AT 2 CFR § 183

Preamble (85 Fed.Reg. 3771)—OMB explains that although the statutory authority for the Never Contract with the Enemy Act (with the exception of access to records) expired in December 2019, there is a current proposal for extension. Further, since the requirement as enacted applies to both procurement and assistance, OMB explains that it will coordinate with the “procurement community” before issuing final guidance. These two situations introduce further unknowns into

the policymaking process. Humentum is concerned that, with these unknowns, any final guidance may not be subject to the level of scrutiny that the current rulemaking requires. Accordingly, we urge OMB to republish any final guidance in the Federal Register on an interim final basis pursuant to the Administrative Procedure Act (APA). Doing so would allow for additional comments from affected parties such as our members who are recipients of grants and cooperative agreements from the US Departments of State and Health and Human Services, as well as USAID – the agencies for which Congress specifically sought to provide an effective tool to quickly cut off funds flowing to enemies of the United States.

General comment concerning 2 CFR §183—Humentum represents organizations that are the most likely recipients of grants and cooperative agreements that will be affected by this proposed regulation. Accordingly, we are concerned about the clarity of the term “in support of a contingency operation” and about how the determination is to be made that a person or entity is actively opposing the United States or coalition forces involved in such operations. We request that OMB add more specific language that will help organizations like our members identify situations under which the provisions of the regulation would be applicable. We also suggest that the decision to preclude future funding discussed in proposed 2 CFR § 183.15(d)(1) is a harsh measure that should only be implemented in extreme cases where good faith due diligence is absent.

2 CFR § 183.35—Definitions—An explicit statement in Senate Report 113-216 (Never Contract with the Enemy Act) mandates that the process for promulgating regulations governing the enforcement clause to be included in all covered Federal awards will include “an opportunity for the public to comment on the definition of the ‘due diligence’ required by the bill.” However, OMB’s proposal contains no definition of this important term. This is particularly troublesome since the determination of failure by a non-Federal entity is grounds for the Federal awarding agency to take enforcement actions under 2 CFR §183.15, as proposed. We regard this oversight as a clear defect in the proposed regulation and urge OMB to develop the necessary definition and to subject it to review and comment of the type contemplated in the Senate Report.

2 CFR § 183, Clause 1—The proposed provision that would require a non-Federal entity to check the list of prohibited/restrictive sources in the System for Award Management (SAM) on a monthly basis is excessive and burdensome and does not take into account variations in the length of the performance periods of lower tier awards. We suggest that the language be revised to require such checking to occur “periodically during the applicable performance period.”

Humentum appreciates the opportunity to review the proposed regulations and to offer our comments. OMB indicates it has solicited feedback from the broader Federal financial assistance community in developing the pending proposals. Moving forward, Humentum encourages OMB to engage our network in any such dialogue.

Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Christine K. Sow', with a stylized flourish at the end.

Dr. Christine K. Sow
President and CEO

CKS/cms/bl

Cc: Humentum Members