March 13, 2023

VIA ELECTRONIC SUBMISSION

Steven Mackey
Policy Analyst
Office of Federal Financial Management
Office of Management and Budget
Executive Office of the President
https://www.regulations.gov/

***RE*: Humentum Response to OMB Request for Information, published at 88 FR 8480-81.**

Dear Mr. Mackey:

On behalf of Humentum, I write in response to the Office of Management and Budget (OMB) Request for Information (RFI), document number 2023-02158, published at 88 FR 8480-81 (February 9, 2023).

Humentum works to make global development more equitable, resilient, and accountable. We do this by unlocking the strategic power of operating models for social good, focusing on practical solutions to improve the effectiveness of institutional architecture, funding and financial systems, people and culture, and risk and compliance processes among donors, international non-governmental organizations (INGOs), and national non-governmental organizations (NNGOs). We seek a development and humanitarian assistance landscape that is more locally-driven on behalf of our over 270 member organizations from across the globe. These comments represent the input and expertise of our members.

The following recommendations for OMB consideration are divisible by section of the code for ease of reference. The proposed changes to 2 CFR, parts 1 and 2, are responsive to at least one of the four questions posed by OMB in the RFI, which seeks input that will: 1) reduce administrative burdens; 2) rectify inconsistent implementation of Federal financial assistance because of varied interpretation among Federal agencies; 3) clarify and make more precise the language; and/or 4) improve the language through the employment of consistent terms.

2 CFR 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards

200.1, Definitions – Participant Support Costs

"Participant Support Costs means direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences, or training projects." 200.432, Conferences, provides a detailed definition of conferences and treatment of allowable/unallowable costs associated with such events. However, "training projects," as included in the definition of Participant Support Costs is not defined or mentioned anywhere else in 2 CFR 200. This creates confusion with Federal awarding agencies as to what training projects are, and when they need to be considered part of Participant Support Costs. We ask that OMB clarify by either providing a definition of "training projects" or removing the term to ensure clarity. More broadly, there is widespread confusion among implementing partners about when and where participant support costs are applicable, which should be remedied in any revision of the section.

200.1, Definitions- Subaward

Because 2 CFR is not clear on what constitutes a "subaward," federal awarding agencies often impose excessive requirements and restrictions upon recipients and subrecipients, which only compounds their administrative burden. In 2 CFR 200.1 Definitions, Subaward is "an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract."

Elsewhere in 2 CFR 200.1 Definitions, Federal financial assistance is clearly defined to omit contracts, under which profit for goods or services may be incurred. Furthermore, 2 CFR 200.331 Subrecipient and contractor determinations is clear that a subaward "creates a federal assistance relationship with the subrecipient." Finally, 2 CFR 200.308(c) (6) states that "recipients must request prior approvals from Federal awarding agencies for… the subawarding, transferring or contracting out of any work under a federal award." This means that contracting out work under the award is possible, and that it requires prior funder approval, but it does not make clear that contracting out work under the award constitutes a "subaward". In the context of Federal financial assistance prime awards, the preponderance of regulatory language points to subawards being assistance instruments under assistance prime awards. Yet, the final sentence in the definition of subaward introduces a vagary that has frequently been cited by Federal agreement officers and grants officers to indicate that contracts, where the recipient is procuring services to in some way carry out the work of the award, are "subawards".

To reduce the confusion, and to ease administrative burden, the following changes should be made in 2 CFR 200 with respect to what constitutes a "subaward": At 2 CFR 200.1, the final sentence in the definition of subaward should be removed to read as follows: "Subaward means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a federal program." OMB should also consider revising the language of 2 CFR 200.308(c)6 to remove the prior approval requirement for contracting out work under the award so that it reads "recipients must request prior approvals from Federal awarding agencies for… the subawarding out of any work under a federal award." Alternatively, if OMB wants to maintain that work can be contracted out work under the award, then the language at 2 CFR 200.331(b) should be revised to accommodate this interpretation by reading: "Contractors. A contract is for the purpose of obtaining goods and services for the non-Federal entity's own use and creates a procurement relationship with the contractor, who may or may not perform work under the award as part of the contract."

Finally, OMB should clarify under 200.102(c) that federal agencies may apply less restrictive requirements when making fixed amount awards or approving fixed amount subawards under 2 CFR 200.333.

200.1, Definitions- Prior Approval

As we have in our prior submissions to OMB on the definition of "prior approval," we recommend that it be rewritten to state: "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." The current language has led to varied interpretations across and within federal agency agreement officers and, as a result, an unnecessary burden on implementing partners.

200.101, Applicability of Cost Principles

The chart stating, “The following portions of this Part...are not applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts,” indicates that food commodities grants are not subject to the requirements of 2 CFR 200, Part E – Cost Principles. However, this is not clear later in 200.401 Application, where exceptions to the guiding principles are listed, including others from the chart, but not food commodities grants or cooperative agreements. This inconsistency needs to be reconciled. As it stands, it is unclear why the Cost Principles would not apply to those types of awards. For instance, is it because they are governed by other regulations or because requirements for American-produced commodities prohibit application of the principles? It is further unclear whether Part E would apply in the case of a grant or cooperative agreement with a commodities component, such as an RFSA.

200.111, English Language

In the years since the last revision of 2 CFR, there has been a global call for more equitable, inclusive, and locally-driven development and humanitarian assistance. Federal agencies, such as the US Agency for International Development (USAID), have renewed their commitment to locally-led development, setting agency-wide funding targets for local implementing partners. Consistent with this, Federal agencies like USAID have acknowledged the need for their funding solicitations to be written in languages beyond English alone. Humentum recommends that the English Language requirement be revised to permit the publication of solicitations and the receipt of proposals in languages other than English, where publishing in English alone creates unnecessary linguistic barriers to prospective local partners’ access to and implementation of US funding to advance development and humanitarian assistance objectives of the United States. Similarly, Humentum recommends that OMB work with federal agencies administering foreign assistance funding to provide an official translation of 2 CFR 200 in the predominate languages of French, Spanish, and Arabic, at a minimum.

200.306, Cost Sharing or Matching

Various Federal agencies treat the term “matching” as separate and distinct from “cost sharing,” even though the terms are used interchangeably in this section. This creates confusion in determining what requirements apply to funds contributed additionally to Federal award funds. We request OMB choose one term – cost sharing –and eliminate the term “matching” throughout this section to ensure consistency and clarity in application of cost share requirements under Federal awards.

200.308, Revision of Budget and Program Plans

There are several ambiguities in 2 CFR 200.308, as written, which we recommend be addressed in the revision. These include:

2 CFR 200.308(c)(2) – It is unclear, as written, whether the ability of an implementing partner to initiate a one-time, 12-month extension on an award is intended to require agency approval. The regulations only state that it is a notification requirement, but federal agencies have interpreted this to require approval. To reconcile the difference in the language and its interpretation, the language should be revised to make it explicit that notification is all that is required.

2 CFR 200.308 (c), (h): The definitions of “non-construction” and “construction” awards are unclear. For instance, does a “non-construction award” consist of projects whose sole or primary objective is other than construction, but which may have construction as one of multiple activities? Alternatively, is it a project which has no construction activities? Several US agencies have interpreted this section as applying to non-construction portions of a project budget, with 2 CFR 200.308 (h) also applying to the construction portions

of the budget of the *same* award. US agencies fail to distinguish between non-construction and construction awards. This should be clarified to address the discrepancy in interpretations.

2 CFR 200.308 (c)(5): There is significant confusion among implementing partners about when "The transfer of funds budgeted for participant support costs to other categories of expense" applies. This should be clarified.

2 CFR 200.308 (c) (6): Some US Agencies interpret this section to require prior approval of a specific sub-recipient or a change in sub-recipient, when this is not clearly stated. This provision only states that the transfer of work under the award requires approval – not the entity to whom the work is being transferred. This should be clarified. More generally, clause C of 200.308 is applied inconsistently across Federal agencies. For instance, some agencies loosely define when something is "funded in the approved Federal award" whereas others employ a very strict interpretation, requiring prior approval for even small expenses that are considered under "contracting" of any work – such as low-value consultancies. Humentum asks that OMB clarify what requires prior approval by defining "what is described in the application and funded in the approved Federal award to err on the side of less burden for implementing partners and less need to seek prior approvals under assistance funding generally.

2 CFR 200.308 (e): We believe that this section accidentally removed the ability of funding agencies to waive requirements in 200.308 (c) and should be rectified.

200.312(c), Federally Owned and Exempt Property

Prior to the 2014 revisions, this section applied to "Federally owned exempt property" per Circular A-122. Once incorporated into 2 CFR 200, however, "federally owned" was removed. As written, it can be interpreted to mean that title to all property purchased under an award remains with the Federal Agency, unless the award states otherwise (which contradicts 313(a)). This should be rectified accordingly.

200.332 (1)(ii), Requirements for Passthrough Entities

This section should clarify that the requirement to secure a unique entity identifier (UEI) applies only to first tier subrecipients (e.g., subrecipients of recipients).

200.344, Closeout

There is significant confusion among donor agencies and implementing partners alike about both the timeframe of, and the allowable activities and expenses during, an agreement closeout period.

The language at 200.344 currently states that the "recipient must submit, no later than 120 calendar days after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award." Perceiving this timeframe as optional, however, many Federal agencies provide less time (e.g., 90 days). We ask that this language be revised to clarify that Federal agencies must provide a deadline of 120 calendar days following the end date of the period of performance.

Moreover, 200.344 requires non-federal entities to incur costs beyond the approved period of performance and budget period to finalize mandatory reporting and close the award in accordance with Federal awarding agency requirements. Because this reporting is required by the Federal awarding agency as part of the Federal award, Humentum asks that OMB revise 200.403, Factors Affecting Allowability of Costs, which states in pertinent part "Except where otherwise authorized by statute, costs must meet the following criteria in order to be allowable under Federal awards...(h) Costs must be incurred during the approved budget

period." We ask that OMB revise 200.403 to clarify that those costs incurred during the 120-calendar day reporting period to comply with mandatory reporting are allowable.

Doing so is consistent in spirit with 200.461, Publication and Printing Costs, which allows non-Federal entities to incur allowable costs beyond the approved period of performance if for publication or sharing of research results. Specifically, 200.461 states that "the non-Federal entity may charge the Federal award during closeout for the costs of publication or sharing of research results if the costs are not incurred during the period of performance of the Federal award. If charged to the award, these costs must be charged to the final budget period of the award, unless otherwise specified by the Federal awarding agency." If it is allowable to incur costs beyond the performance period to publish or print research related to the Federal award, so too should it be allowable to incur costs to deliver mandated closeout reporting requirements per 200.344 which cannot be completed before the period of performance ends. These costs are required of all non-Federal entities and create a substantial financial burden when deemed unallowable. If left unchanged, the current language leaves non-Federal entities to subsidize the Federal award with their own unrestricted reserves to fulfill mandatory award requirements. Many, and particularly local, partners do not have the financial ability to float these costs. By maintaining the status quo, OMB will be working at cross-purposes with this administration's localization agenda and institutionalizing a significant barrier to new and local partners to the Federal government.

200.345, Post Closeout Adjustments and Continuing Responsibilities

Humentum asks that this provision be clarified to indicate that close-out is pending NICRA finalization. Many awards cannot be fully closed within the currently proscribed 12-month period, given the time it takes for NICRA rate finalization.

200.401, Application

The language in 2 CFR 200.401, Application, implies that for-profit organizations should adhere to the cost principles provided in the FAR, 48 CFR 31.2. However, 2 CFR 200.101, Applicability, states that Subpart E (the cost principles) applies to for-profit entities. We ask that any revision address this discrepancy.

200.411, Adjustment of Previously Negotiated Indirect Costs Rates Containing Unallowable Costs

Pursuant to 2 CFR 200.411(c) and (d), once a recipient receives a revised negotiated indirect cost rate agreement, they should be communicating to the awarding agency the new final rate and then reconcile the indirect cost, which could result in returning funds, or withdrawing funds if there is budget availability. Despite this, implementers have experienced discrepancies in execution, with some Federal donor agencies not permitting implementing partners to reconcile past years, stating that they can only apply the rate in the time following notification to the awarding agency. Please clarify 200.411 on its application to explicitly permit prior year rate reconciliation.

200.413, Direct Costs

The requirement that salaries and administration costs be explicitly included in the budget or have prior written approval of the Federal awarding agency is overly restrictive of assistance awards. If the other criteria under 2 CFR 200.413(c) are met, budget flexibility and other award requirements should govern. In addition, there is a misunderstanding as to what comprises administrative and clerical staff (may differ from one organization to another). Having a definition or examples would help.

200.414, Indirect (F&A) Costs

Some Humentum members expressed concern that there is a misunderstanding that pass-through entities (PTEs) and Sub-recipients can charge rates other than NICRA if they want to do so, because the regulations do not specifically state that they cannot (other than those required by Federal Statue or regulation or when approved by the Federal awarding Agency head/delegation). We recommend that OMB add language to address this misunderstanding, clarifying that PTEs, sub-awardees, and Federal Agencies must all accept the NICRA rate.

Where deviations are allowed, this should be included in a deviation from the NICRA letter. For instance, USAID's Indirect Cost Rate Guide for Non-Profit Organizations stipulates that a grantee opting to use a rate lower than NICRA is required to provide a written acknowledgement to USAID. We suggest that 2 CFR 200.414 (c) be revised to include pass-through entities. The revised language would read as follows: 1) The negotiated rates (NICRA rates) must be accepted by all Federal awarding agencies, sub-awardees, and pass-through entities.

Moreover, because Federal agencies are permitted to deviate from 2 CFR 200 at their discretion when applying these sections to their non-US based partners, some agencies restrict non-US based partners from capturing more than an 8 percent indirect cost rate (e.g., DHHS/CDC). This enshrines inequity, creating unnecessary barriers to local entities who find that the cost of doing business with a federal agency is too high as they are prevented from recovering all costs, direct and indirect alike, associated with an award. This is another example of the current lack of uniformity in the Uniform Guidance, and an impediment to the administration's localization agenda. At a minimum, the regulations should be revised to stipulate that all implementing partners, regardless of location, should benefit from the same de minimis rate of 10 percent if they have not yet established a NICRA with the Federal government. Further, those non-US based entities with a NICRA rate should never be forced by any US government agency to accept anything less than their full NICRA.

On a larger scale, the de minimis rate should be revisited to be more in line with the true indirect costs of implementing partners, as it does not represent anywhere near full cost recovery for entities doing business with the US. More pointedly, it enshrines a level of unacceptable inequity among those who may be the best positioned and skilled to partner with the US to advance its development and humanitarian assistance objectives.

200.425, Audit Services

In certain countries across the world, the single audit requirements are oftentimes difficult or nearly impossible to comply with. In many instances, this is because local firms lack experience and expertise in these kinds of audits. Humentum recommends that OMB include the option, when the single audit requirements cannot be met, that a waiver be made available, and that the entity instead complete an audit in compliance with international standards.

200.431, Compensation, Fringe Benefits

In many countries across the globe, severance is mandatory under local law at the conclusion of employment. This section should clarify applicability and allowability under the regulations.

200.470, Taxes (Including Value Added Tax)

While tax exemptions are available in many countries based on a bilateral agreement between the US and the hosting country, there are significant challenges when the bilateral agreements and exemptions are not

respected in practice. In other cases, there are lengthy delays in reimbursement, which negatively impact affect performance (leading to a large receivable balance). We recommend that OMB discuss this issue with the federal agencies administering foreign assistance funding and draft language to allow related charges to be made to awards after a certain timeframe, and that any credits that come later to be reimbursed back to the awarding Agency.

2 CFR 25 – Universal Identifier and System for Award Management

2 CFR 25, General

The current requirement for subrecipients to obtain the universal entity identifier (UEI), as codified in the regulations and as implemented by agencies, poses an unreasonable administrative burden on recipients, subrecipients, and the agencies themselves. This could be alleviated by incorporating consistent language and by adopting several requirement changes in the regulations at 2 CFR 25 and 2 CFR 170.

First, we recommend that OMB align the terminology used to describe "direct" subawards in 2 CFR 25, with the terminology used in 2 CFR 170 Appendix A. By amending the language at 2 CFR 25.100(a) ("Purposes of this Part") to read "The unique entity identifier as a universal identifier for Federal financial assistance applicants, as well as recipients and their first-tier subrecipients, and;". In parallel, the language at 2 CFR 170.100 ("Purposes of this Part") could be amended to read "This part provides guidance to Federal awarding agencies on reporting Federal awards to establish requirements for recipients' reporting of information on first-tier subawards and executive total compensation, as required by the Federal Funding Accountability and Transparency Act (FFATA) of 2006 (Pub. L. 109-282), as amended by section 6202 of Public Law 110-252, hereafter referred to as "the Transparency Act."

Second, Humentum advocates for the establishment of a threshold below which recipient and subrecipient organizations are automatically exempt from the requirement to obtain a UEI. This could be achieved by amending the regulation at 2 CFR 25.110(c)(2)(ii) to omit the highly burdensome requirement for agencies to perform a risk analysis for each case-by-case exemption decision they wish to make (if they are so inclined). 2 CFR 25.110(c)(2)(ii) could be amended to read: "For an organization applying for or receiving a federal award or subaward valued at less than..."

Third, we recommend that OMB align the threshold requiring recipients and subrecipients to obtain UEIs to the threshold requiring recipient first-tier subaward reporting at 2 CFR 170. Presently, Appendix A to Part 170 requires recipients to, in paragraph a. ("Reporting of first-tier subawards") "report each action that equals or exceeds $30,000 in Federal funds for a subaward to a non-Federal entity or Federal agency". The $25,000 threshold asserted in 2 CFR 25.110(c)(2)(ii) should be increased to reflect the amount in 2 CFR 170, currently $30,000.

Fourth, we recommend OMB consider raising and aligning the 2 CFR 25 threshold requiring the UEI and the 2 CFR 170 threshold requiring first-tier subaward reporting. The respective thresholds, currently at $25,000 (with agency exemption) and $30,000, respectively, should be raised to at least $50,000 to ease the administrative burden. However, we urge OMB to consider raising them to align with the Small Procurement Threshold defined in the FAR (presently defined as $250,000).

Fifth, we recommend that OMB explicitly tie the exceptions to the UEI requirement at 2 CFR 25 to those to the recipient first-tier subaward reporting requirement at 2 CFR 170, so than any exception to the

requirement for a subrecipient to obtain a UEI under 2 CFR 25 would equate to an exception to report under 2 CFR 170, and vice versa. This could be achieved by adding a new paragraph to 2 CFR 25.110 ("Exceptions to this part"), most likely between current paragraphs (b) and (c) that reads: "Exceptions for subrecipients. Subrecipients exempt from the recipient first-tier subrecipient reporting requirements by exception provided at 2 CFR170.110 are exempt from the requirements of this part." This could be achieved by adding language to paragraph b. of 2 CFR 170.110 ("Exceptions to which this part applies"): "(4) The recipient first-tier subaward reporting requirements of this part do not apply to subawards that are exempt from the universal identifier requirement by exception provided at 2 CFR 25.110."

25.105, Purpose of this Part

Increasingly, Federal agency representatives have maintained that 2 CFR 25 requirements to 1) obtain a UEI; and/or 2) register in SAM.gov extend to a recipient's contractors engaged through a procurement mechanism. Yet, 2 CFR 25 never mentions requirements for contractors engaged through procurement mechanisms. Further, Subpart C – Recipient Requirements of Subrecipients – solely refers to Subrecipients as defined in 2 CFR 200.1, which differs from the definition of Contractors in 2 CFR 200.1. We ask that OMB make it clear that 2 CFR 25 does not extend to contractors engaged by Recipients through procurement mechanisms, consistent with the definitions provided in 2 CFR 200.1.

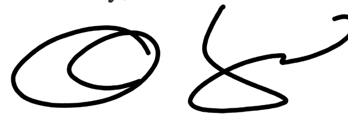
25.100, Exceptions to this Part

We request OMB revise the language to allow for a blanket exception for all 1) foreign organizations 2) receiving an award or subaward 3) performed outside the United States 4) valued less than $30,000 (or one of the above-proposed higher threshold amounts) 5) if no subawards are anticipated, without requiring Recipients or Subawardees to request an additional approval for use of the exception.

Thank you for your consideration of these comments. As you have read, our recommended revisions emphasize bringing greater precision and clarity to 2 CFR, while also seeking to dismantle the barriers to locally-driven development. I look forward to continued dialogue with OMB regarding these proposed changes.

Please direct any questions or follow-up to Cynthia Smith, Director of Government Relations, Humentum cynthia.smtih@humentum.org.

Sincerely,



Dr. Christine Sow
President & Executive Director

CS/cms