

ALERT

# Federal Grantees' Integrity and Performance Information to Be Publically Available in FAPIIS

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July 23, 2015

Consistent with a recent trend of increased oversight, transparency and accountability of federal grantees, on July 22, 2015, the Office of Management and Budget (OMB) issued final guidance to federal agencies for the reporting and use of information concerning recipient integrity and performance. The guidance, which goes into effect on January 1, 2016, will subject the recipients of federal grants and cooperative agreements to essentially the same reporting requirements as federal contractors. Going forward, federal awarding agencies and recipients will be required to report certain information in the currently designated system, the Federal Awardee Performance and Integrity Information System (FAPIIS), to ensure that federal grants and cooperative agreements are awarded to responsible entities.

The final guidance implements Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (FY2009 NDAA), which requires the establishment of an integrity and performance system that includes government-wide data with specified information related to the integrity and performance of entities receiving federal grants and contracts. The current system, FAPIIS, which the General Services Administration intends to migrate to the System for Award Management (SAM), integrates various sources of information on the eligibility of organizations for Government awards, and serves as a centralized repository for all contractor integrity and performance information, including performance reviews, suspensions, debarments, non-responsibility determinations, terminations for default, and civil, criminal and

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## Practice Areas

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Government Contracts

administrative proceedings. FAPIIS went "live" for federal contractors in 2010. The final guidance now brings federal grant and cooperative agreement recipients into the fold. In response to comments noting that many grant recipients may also hold procurement contracts, OMB attempted to implement this reporting requirement consistently with the FAPIIS reporting already required for procurement contracts.

There are four major elements of the guidance of which recipients of federal grants and cooperative agreements should be aware:

- Federal awarding agencies must report in FAPIIS any termination of an award as the result of a material failure to comply with the award terms and conditions; any administrative agreement with a non-federal entity to resolve a suspension or debarment proceeding; and any finding that a non-federal entity is not qualified to receive a given award, if the finding is based on criteria related to the non-federal entity's integrity or prior performance under federal awards.
- Recipients that have federal contract, grant, and cooperative agreement awards with a cumulative total value greater than \$10 million must report in FAPIIS information about certain civil, criminal, and administrative proceedings that reached final disposition within the most recent five-year period and that were connected with the award or performance of a federal award. These recipients must also make semiannual disclosures regarding such proceedings.
- Federal awarding agencies, prior to making an award to a non-federal entity, must determine whether that non-federal entity is qualified to receive that particular award. In making the determination, the federal awarding agency must take into consideration any information about the entity that is in FAPIIS.
- Similar to FAPIIS records relating to procurement contracts, recipients may submit comments in FAPIIS about any information that a federal awarding agency has reported about them for consideration by federal awarding agencies in making future awards. Notices of funding opportunities and federal award terms and conditions must inform recipients of this right.

Commenting entities recommended that OMB declare that information reported in FAPIIS is not subject to disclosure under the Freedom of Information Act (FOIA). OMB declined this request, noting that after it had issued its proposed guidance, Congress amended Section 872 of the FY2009 NDAA to require public disclosure of integrity and performance information in FAPIIS, with the exception of past performance information. OMB cautioned agencies that any disclosure of information should be consistent with statutes, such as FOIA, that limit disclosure of certain information, but otherwise stated that information posted after April 15, 2011 would be publicly available.

Commenting entities also recommended that OMB clarify the "total value" of an award for the various review and reporting thresholds, including whether the thresholds included any recipient cost share or match. OMB agreed and clarified that the thresholds in the guidance are based on the federal share of federal awards and include the value of all expected funding over the period of performance of the federal award. OMB declined, in response to other comments, to require the collection of information related to state award proceedings, but noted that such collection might be required in the future.

OMB's final guidance is effective for federal awards issued on or after January 1, 2016 that meet the various thresholds set forth in the guidance and to existing awards that terminated on or after January 1, 2016 as the result of a material failure to comply with the terms and conditions of the federal award. Thus, recipients should prepare themselves and implement the necessary compliance steps to report, review and comment upon, and update information in FAPIIS relating to their receipt of federal awards.