Feldesman Tucker Leifer Fidell LLP has drafted the comments below in response to the Office of Management and Budget's proposal to revise parts of the Guidance for Grants and Agreements located in Title 2 of the Code of Federal Regulations.

We are sharing these comments with our clients to publicize our views on the OMB's proposal. Our clients are welcome to review our comments and, if so inclined, to draft their own comments using portions of our submission as a model.

If your organization would like to submit comments, submission instructions are as follows:

- *Comments must be submitted electronically before the comment closing date of December 4, 2023 to www.regulations.gov.*
- *In submitting comments, search for recent submissions by OMB to find docket OMB–2023–0017, which includes the full text of the proposed revisions and submit comments there.*
- *Provide clarity as to the section of the guidance that each comment is referencing by beginning each comment with the section number in brackets. For example; if the comment is on 2 CFR 200.1 include the following before the comment [200.1].*
- *The public comments received by OMB will be posted at http://www.regulations.gov and be a matter of public record. Accordingly, please do not include in your comments any confidential business information or information of a personal-privacy nature.*

Feldesman Tucker Uniform Guidance Comments, Fall 2023

Equipment-Related Thresholds:

[200.313]: We concur with increasing the acquisition value threshold relevant to the equipment definition from $5,000 to $10,000. As the definition is based upon the lesser of the recipient or subrecipient's capitalization threshold as established for financial reporting purposes or the designated amount, the increase from $5,000 to $10,000 in the designated amount will enable diverse recipients to maintain their existing policies when receiving federal awards. The updated threshold is also logical, as costs of equipment have increased considerably since the threshold was last revised.

We also concur with increasing the fair market value threshold under which equipment may be disposed of without further obligation to the federal government. The increase from $5,000 to $10,000 will significantly increase efficiency and flexibility for federal recipients and subrecipients, without creating increased risk of misuse of federal resources.

De minimis Indirect Cost Rates:

[200.414]: We concur with increasing the *de minimis* rate to fifteen percent (15%) over modified total direct costs ("MTDC"), with allowing recipients and subrecipients to elect a lower *de minimis* rate, and with modifying the definition of MTDC to permit inclusion of the first $50,000 of any one subaward in the base. The 15% over MTDC rate will make the *de minimis* rate a

more viable option for many recipients and subrecipients. Permitting recipients and subrecipients to establish a lower rate as their *de minimis* rate will create flexibility for those entities that maintain a lower indirect cost profile based upon differences in accounting methodologies. Finally, increasing the MTDC base to include the first $50,000 of a subaward will help to align use of the *de minimis* rate with increases in subrecipient oversight obligations that have occurred, and continue to grow, , since the advent of the Uniform Guidance in late 2014.

Similar to electing a lower than 15% over MTDC rate, we also encourage OMB to permit recipients and subrecipients to elect a *de minimis* rate of up to 15% over direct labor. A direct labor base is much easier for many recipients and subrecipients to manage. With the increase in the percentage to, potentially, 15%, permitting recipients and subrecipients to elect a *de minimis* rate of up to 15% over direct labor would serve as a viable methodology for many recipients and subrecipients to adequately recover their indirect costs. A direct labor base will be easier for smaller community-based non-profits to implement and will be easier for passthrough entities to oversee.

Finally, we encourage OMB to strengthen the regulatory language providing that the underlying costs comprising a *de minimis* rate are not subject to further review by stating the *de minimis* rate is a form of "predetermined" indirect cost rate.

<u>"Participant" and "Participant Support Costs" Definitions</u>:

[200.1]: We concur with the proposed addition of a "participant" definition and update to the "participant support costs" definition. The revised participant support costs definition is much clearer than the existing definition and more in line with what federal awarding agencies treat, in actual practice, as participant support costs.

We also encourage OMB to add a definition of "beneficiary" to distinguish beneficiaries, including corporate beneficiaries, from participants as well as from subrecipients. The Department of Treasury issued helpful clarifications in this area for its Coronavirus Relief Funds ("CRF") and State and Local Fiscal Recovery Fund ("SLFRF") programs, which OMB should adopt more broadly within the Uniform Guidance.

<u>Mandatory Disclosures Adding FCA Violations</u>:

[200.113]: We do not believe the addition of the of mandatory disclosure of credible evidence of violations of the civil False Claims Act ("FCA") is necessary in this section. We recognize the addition of this disclosure obligation is intended to harmonize the mandatory disclosures rule at 2 C.F.R. § 200.113 (Uniform Guidance) with the rule at 48 C.F.R. § 52.203-13 (within the Federal Acquisition Regulation ("FAR")). However, the language employed creates needless ambiguity and can arguably be (mis)read to call for disclosure well beyond that already required by the overall structure and purpose of the FCA itself. To avoid ambiguity and associated compliance difficulties and significant legal costs for grantees, any harmonization between the UG and the FAR with regard to disclosures should be complete, by providing in the language that the "credible evidence" must be evidence that an individual "*has committed*: . . . [a] violation of

Federal criminal law involving fraud, bribery . . . or gratuity; or [a] violation of the civil False Claims Act." The proposed language can be read to suggest a possible reporting obligation on *any* credible evidence that a violation *might have been* committed. The inclusion of the language utilized in the FAR—in particular the reference to commission—better incorporates the concept of a diligent internal effort, on receipt of such evidence, to determine if a violation has, in fact, occurred. Accordingly, it better aligns with the FCA itself, in particular with 31 U.S.C. § 3729(a)(1)(G), under which liability attaches to knowing avoidance or concealment of an obligation to repay money owed to the United States.

That said, an alternate, and better course would be to leave this section unrevised in consideration of pre-existing FCA obligations and the significant differences between FAR-based contracting and grants and cooperative agreements subject to the UG. As to the latter point, three issues are notable.

First, FAR-based contracts are generally performed by commercial entities in return for payment that includes profit, *i.e.*, they are commercial transactions. Grants generally provide support to governmental and nonprofit entities for the purpose of inducing them to engage in an activity that has a public purpose, and specifically prohibit the earning of any profit.

Second, FAR-based contracts provide for government payment in return for a contractor-produced deliverable. Grants are generally best-efforts agreements under which the funding agency reimburses allowable costs incurred in good-faith effort to fulfill project objectives (again, with no profit component).

Third, grants are advance pay vehicles under which compliance is carefully monitored and measured through audit, agency review, and adherence to required internal control measures implemented by recipients and subrecipients. Cost, and other, discrepancies impacting grants are generally identified through such mechanisms after-the-fact. Procurement transactions generally involve more direct requests for payment, the truth or falsity of which are more easily assessed at the time the deliverable or any accompanying certification is furnished to the government.

We recognize that it is important for grantees to report material discrepancies whenever identified, including well after-the-fact. A robust audit and disallowance structure exists for resolving such discrepancies. To the extent the FCA is implicated by a "knowing" false claim, that Act itself adequately incentivizes disclosure. Given the serious consequences of FCA liability, revising this section as proposed will likely lead to over-reporting to the OIG of matters properly resolved through existing funding agency audit and disallowance procedures.

<u>Fixed Amount Awards and Subawards</u>

[200.201]: We agree with the proposal to remove the limitation for fixed amount subawards that currently exists, *i.e.*, remove the $250,000 (simplified acquisition threshold-based) cap.

OMB has, however, proposed extremely problematic language relating to fixed amount awards at 200.201(b)(4), stating: "At the end of a fixed amount award, the recipient or subrecipient must certify in writing to the Federal agency or pass-through entity that the project was completed as

agreed to in the Federal award and *that all expenditures were incurred in accordance with § 200.403*." The emphasized language completely undermines the concept and operation of a fixed amount subaward and cannot be adopted without destroying the utility of fixed amount subawards. OMB should simply retain the current language on this point, which is that the recipient or subrecipient certify that the "project or activity was completed or the level of effort was expended."

Section 889 Compliance

[200.216]: OMB has proposed problematic language at 200.216(c), with respect to compliance with Section 889 of the 2019 National Defense Authorization Act, prohibiting grantees from using federal funds to acquire, or continue contracts for, covered telecommunications equipment. The proposed revised language states: "A recipient or subrecipient may use covered telecommunications equipment or services for their own purposes *(not program activities)* provided they are not procured with Federal funds." Although the remainder of the sentence is legally accurate, the emphasized parenthetical is not. There is no statutory prohibition against using covered telecommunications equipment or services for program activities under the portion of Section 889 applicable to federal financial assistance awards (by comparison to a broader prohibition applicable to federal procurement contracts/contractors). This parenthetical suggests grantees would have to audit all equipment and services used directly and indirectly for program activities, which would create significant burden. Moreover, this type of compliance obligation would operate as an outright barrier to participation in federal programs for smaller, community-based nonprofits. The parenthetical should be stricken from the language.

Cybersecurity Internal Controls

[202.303]: Although we have no objection to the addition of cybersecurity internal controls at 200.303(e), we recommend that OMB further clarify the pertinent criteria for "appropriate measures to safeguard information." For example, a reasonable approach would be that recipients incorporate the NIST SP 800-53 framework, which is designed to be flexible to fit each organization, or that recipients incorporate the approaches promulgated under section 405(d) of the Cybersecurity Act of 2015, however, we encourage OMB to consider, and potentially further solicit, feedback on this point from broader industry. If the internal controls are too onerous, they will operate as a barrier to participation in federal programs for smaller entities like community-based nonprofits. This would contradict OMB's stated goals of reducing the administrative burden to recipients providing wider access to federal funding opportunities. If agencies determine it would be useful to specify a specific approach to internal controls, OMB should require that the agencies give prospective recipients notice of that approach in the relevant notice of funding opportunity.

Program Income

[202.307]: OMB proposed changes to program income standards include (i) clarifying that program income must be used only for allowable costs incurred during a grant's period of performance, and (ii) that royalties from intellectual property developed under a federal award are not program income regardless of when the royalties are earned.

We do not concur that the regulatory standards for program income should be made more stringent to foreclose (i) the possibility of recipients retaining program income for use after the period of performance, and (ii) an awarding agency's ability to allow program income to be used for costs that are not technically allowable under the federal cost principles at Subpart E, so long as the costs further the purpose of the award. We recommend that OMB adopt the opposite approach on these points, instead expressly providing awarding agencies with authority to adopt appropriate program income retention and use standards that need not strictly adhere to the federal cost principles.

We concur with the clarification that royalties from intellectual property are not program income regardless of when earned. With the promulgation of the Uniform Guidance in late 2014, the revised text created ambiguity on that point.

We request two other changes to the program income standards. First, we request that the "default" program income treatment be made the "additive method" regardless of type of award. Second, we request that OMB remove the requirement of prior approval for calculation of program income based upon "net" program income rather than gross program income. Adopting both of these principles as default rules will align the background regulatory standards with the most common approaches by federal awarding agencies and reduce administrative burden.

Language Regarding Intellectual Property:

[200.315]: OMB has proposed updating intellectual property ("IP") language at § 200.315(b) to state:

> "To the extent permitted by law, the recipient or subrecipient is not prohibited from asserting any copyright it may own in any work *resulting from* or acquired under the Federal award. To the extent permitted by law, the Federal agency reserves a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes and to authorize others to do so. This includes the right to require recipients and subrecipients to make such works available through agency-designated public access repositories." (emphasis added).

Section 200.315(b) currently states:

> "The non-Federal entity may copyright any work that is subject to copyright and was *developed*, or for which ownership was acquired, *under* a Federal award. The Federal awarding agency reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so." (emphasis added)."

We ask OMB to retain the current language. Expanding the language from "developed under" to "resulting from" is likely to have the unintended consequence of some federal awarding agencies asserting license rights in works related to, but not developed under, federal awards based upon a mere "but for" test. In particular, this language may lead to some agencies pointing to the

"resulting from" language to assert that certain works of IP were only developed because of a federal award that had some incentivizing purpose for a related activity, even though the IP was developed separately from the related federal award-supported activity and so done with private funds.

Tribal Government Flexibilities:

[200.313, 200.317]: We concur with the proposed new flexibilities for Tribal Government recipients, which better recognize their sovereignty. In particular, we concur with OMB's proposals to allow Tribal Government recipients to (i) use their own internal procurement standards rather than comply with the competitive standards of the Uniform Guidance Federal Procurement Standards; and (ii) use their own internal equipment disposition standards rather than comply with the standards set forth at § 200.313(e).

Dispute Rights Language:

[200.342]: OMB has proposed clarifying the language at 2 C.F.R. § 200.342 to state: "The Federal agency or pass-through entity must maintain written procedures for processing objections, hearings, and appeals."

We concur with OMB's proposal to expressly call for federal agencies to adopt written procedures for disputes under federal awards. There is considerable inconsistency among federal awarding agencies with respect to recipient dispute rights, impeding the harmony of regulatory requirements intended through the Uniform Guidance. For example, to the best of our knowledge: (i) Department of Transportation has no administrative appeals process at all; (ii) Department of Interior has an appeals process, but does not publish it for accessibility by recipients; and (ii) The Corporation for National and Community Service ("CNCS," aka "AmeriCorps Agency") and Veterans Administration use their debt collection regulatory regimes to provide a disputes process, rather than having a specific grant dispute mechanism. By comparison, other agencies, such as Department of Labor and Department of Health and Human Services, have more formal mechanisms that are made widely known to grantees, with published opinions.

We do not concur with the portion of this section that states that pass-through entities must adopt procedures for processing objections, hearings, and appeals. To the best of our knowledge, state government agencies already provide such procedures through their state administrative law processes. For other types of recipients, especially nonprofit recipients, establishing such procedures would be burdensome, and disputes can already be handled adequately as matters of contract law and contract clauses appropriate to the circumstances and relationships.

Termination Costs:

[200.403, 200.343]: We concur with OMB's proposal to clarify at 200.403(h) that "Administrative closeout costs may be incurred until the due date of the final report(s)." However, we ask that OMB also correct 200.343, which currently states that no costs are permitted after the date of termination of an award. That language has, since the advent of the

Uniform Guidance in late 2014, been directly in conflict with the more specific language at § 200.472 addressing when, and to what extent, termination costs are allowable. At a minimum, 200.343 should start with the express caveat: "Except as otherwise provided in §§ 200.403(h) and 200.472."

Language Regarding Unallowable Indirect Costs:

[200.413]: OMB proposes adding language to 200.413(e) stating: "Unallowable costs for Federal awards must be treated as direct costs when determining indirect rates." We do not concur with this change, as it is unnecessary and illogical. There are many indirect costs which, although benefitting the projects and programs to which they would otherwise be allocated via an indirect rate, are treated as unallowable components of the indirect pool. The mere fact of exclusion from allowable costs distributed via the indirect rate should not cause those costs to be *de facto* treated as direct costs.

The current language of the Uniform Guidance at 2 C.F.R. § 200.413(e) already provides an adequate, logically correct standard, instructing that unallowable indirect costs must be treated as direct costs only when "they represent activities which: (1) Include the salaries of personnel, (2) Occupy space, *and* (3) Benefit from the non-Federal entity's indirect (F&A) costs." (emphasis added). In other words, the costs excluded from the indirect pool must be sufficiently material to logically constitute a direct cost activity that should be burdened with the indirect rate.

Finally, although we do not believe it is intended by the proposed language, the proposed language could also be misconstrued as forcing any indirect costs above administrative/indirect cost caps into a grantee's direct cost base, creating significant discrepancies impacting multiple programs.