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OMB Releases Proposed Revisions to the Uniform Guidance

On January 22, 2020, the Office of Management and Budget (OMB) published proposed revisions to sections of Title 2 of the Code of Federal Regulations (CFR) Subtitle A—OMB Guidance for Grants and Agreements. OMB states that the purpose of the proposed revisions is to reduce the burden on grant recipients; provide guidance on implementing new statutory requirements; and improve federal financial assistance management, transparency, and oversight. This article focuses on key proposed revisions to the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance) located in 2 CFR part 200.

Key Proposed Changes

Some of the key proposed changes in the Uniform Guidance are as follows: (Note: The applicable 2 CFR part 200 section for the proposed change is provided parenthetically.)

- Move all definitions to a new section, 2 CFR section 200.1. Individual definitions will no longer have a separate section for each definition. (200.1)
  - New definitions include *non-discretionary award* and *notice of funding opportunity*.
  - Revised CFDA number to *assistance listing number*.
  - Revised *improper payment* to clarify that questioned costs are not an improper payment until reviewed and confirmed to be improper as defined in OMB Circular A-123, Appendix C. The definition of *questioned costs* is also amended for this proposed change.
  - Other definitions revised include *internal control over compliance requirements for federal awards, management decision, micro-purchase, oversight agency for audit, period of performance, recipient*, and *simplified acquisition threshold*.
- Clarify the meaning of *must* and *may* as they relate to the Uniform Guidance requirements. (200.101)
- Provide clarity on budget periods that relate to period of performance and

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expand the authority of federal awarding agencies to terminate awards for noncompliance. (200.211)

- Add a prohibition that prevents federal awarding agencies from including references to non-binding guidance in the terms and conditions of federal awards. (200.211)
- Add regulations for federal awarding agencies and nonfederal entities to implement "Never Contract with the Enemy" in 2 CFR part 183 for grants and cooperative agreements that are expected to exceed $50,000 within the period of performance. (200.215)
- Add a prohibition that prevents the use of government funds to enter into contracts (or extend or renew contracts) with entities that use covered technology. (200.216)
- Provide clarity on how federal awarding agencies must measure a federal award recipient's performance. (200.301)
- Add a new method, "Informal procurement methods" to the "Methods of procurement to be followed" section. The informal procurement method can be used when the value of the procurement for property or services under a federal award does not exceed the simplified acquisition threshold, as defined in 2 CFR section 200.1. (200.319)
- Add a new method that gives a nonfederal entity the responsibility for determining appropriate micro-purchase and simplified acquisition thresholds based on internal controls, an evaluation of risk, and its documented procurement procedures if its micro-purchase and simplified acquisition thresholds are different from the Federal Acquisition Regulation (FAR). (200.319)
- Add a domestic item preference for procurements under federal awards by a nonfederal entity to provide preference for the purchase of goods, products, or materials that are made in the United States. (200.321)
- Add a requirement that a pass-through entity is not required to use a de minimis indirect cost rate if the subrecipient has a federally approved rate. (200.331)
- Expand the monitoring requirement of a pass-through entity by adding that the pass-through entity is only responsible for resolving audit findings that are specifically related to their subaward. The pass-through entity is not required to address all of the subrecipient's audit findings. (200.331)
- Add that a pass-through entity may rely on the subrecipient's auditors and the cognizant agency's oversight for routine audit follow-up and management decisions. (200.331)
- Extend the final report submission and obligation liquidation periods from 90 calendar days to 120 calendar days for direct recipients and add measures that must be taken if the reports are not submitted on time. The submission periods for subawards (subrecipients submitting reports to the pass-through entity) would remain at 90 days. (200.343)
- Allow the use of the de minimis rate of 10% of modified total direct costs to all nonfederal entities (with certain exceptions). [Currently, the de minimis rate can only be used for nonfederal entities that have never received a negotiated indirect cost rate. This change would expand the use of the de minimis rate for nonfederal entities that have negotiated an indirect cost rate previously, but for some circumstances, the negotiated rates have expired (for example, due to breaks in federal relationships and grant funding, or lack of resources for preparing an indirect cost proposal).] (200.414)
- Clarify the following: the applicability and documentation requirements when a nonfederal entity elects to charge the de minimis indirect cost rate, the pass-through entity responsibilities related in indirect cost rates and audits, and the applicability of 2 CFR to FAR-based contracts. (Various)

Accessing the Proposed Revisions and Next Steps

The Federal Register notice that includes the proposed revisions to the Uniform Guidance is available at **www.federalregister.gov/documents/2020/01/22/2019-28524/guidance-for-grants-and-agreements?utm_medium=email&utm_campaign=subscription+mailing+list&utm_source=federalregister.gov**. Comments are due on or before March 23, 2020. Auditors should be alert for the release of the final revisions. Guidance on the effective date of the final changes is expected to be included in the final Federal Register release.

Practical Consideration:

A tracked changes version of the proposed revisions and other 2 CFR proposed revisions resources are available at **www.performance.gov/CAP/grants/**. You can access the tracked changes directly at **www.performance.gov/CAP/innovation-sessions/Grants-CAP-Goal-Proposed-2CFR-Revision1.pdf**.

2018 Yellow Book CPE Requirements Are Effective Now

The U.S. Government Accountability Office's (GAO) *Government Auditing Standards, 2018 Edition* (the 2018 Yellow Book), which supersedes the 2011 version of the standards, is now effective for most engagements being performed. While previous editions of this newsletter have addressed its issuance in a general way, we want to cover the continuing professional education (CPE) revisions in this edition.

Practical Consideration:

The revised Yellow Book is effective for financial audits, attestation engagements, and reviews of financial statements for periods ending on or after June 30, 2020, and for performance audits beginning on or after July 1, 2019. Remember that practitioners must meet the 2018 Yellow Book CPE requirements during the entire period to which the engagement applies, which could begin as early as July 1, 2019, for some engagements.

What Has Changed?

The 2018 Yellow Book includes a more robust and detailed chapter on competence and CPE, with added application guidance on topics such as:

- CPE subject matter categories (24-hour and 56-hour categories)
- CPE exemptions and exceptions
- Programs and activities qualifying for CPE
- Measuring and monitoring CPE

Much of this detailed application guidance was incorporated from the document *Government Auditing Standards: Guidance on GAGAS Requirements for Continuing Professional Education*. As a result, that document has been retired.

One important change to note is that the 2018 Yellow Book allows nonsupervisory auditors who charge less than 40 hours of their time annually to GAGAS engagements to be exempted by their organization from the 24-hour and 56-hour CPE requirements. In addition, new application guidance was issued related to obtaining GAGAS-specific CPE each time a new Yellow Book revision is issued.

What Has Not Changed?

The basic CPE requirement remains unchanged. Auditors who plan, direct, or perform engagement or reporting procedures for an engagement conducted in accordance with GAGAS should complete (and maintain documentation of) at least 80 hours of CPE in every two-year period (with a minimum of 20 hours in each year) as follows:

- 24 hours of CPE on subject matter directly related to the government environment, government auditing, or the specific environment in which the audited entity operates.
- 56 hours of CPE on subject matter that directly enhances the auditor's professional expertise to conduct engagements.

Auditors who charge less than 20% of their time on GAGAS engagements and are not involved in planning, directing, or reporting on the engagements may be exempted from the 56-hour CPE requirement. The audit organization is ultimately responsible for determining whether a subject or topic qualifies as acceptable for its auditors.

Overall Assessment

So, while the final version of the 2018 Yellow Book does include many revisions to the chapter on competency and CPE, it did not significantly change any of the CPE requirements that exist in the 2011 Yellow Book and many practitioners can continue to follow the same basic guidelines for Yellow Book CPE as they have in the past. However, the additional application guidance should still be reviewed.

Practical Consideration:

Auditors should consult the 2018 Yellow Book and its application guidance in Chapter 4 for more specific information regarding the CPE requirements. The revised Yellow Book can be found at **www.gao.gov/yellowbook**. The 2019 edition of *PPC's Guide to Single Audits* and the upcoming 2020 edition of *PPC's Guide to Audits of Nonprofit Organizations* (available in Spring 2020) are updated for the 2018 Yellow Book requirements.

The Risk of UBI in Gaming Activities

Background

Exempt organizations frequently rely on games of chance (e.g., bingo, pull tabs, and raffles) to generate revenue for their exempt activities. Whether this revenue is unrelated business income (UBI) depends on the type of gaming activity, how it is conducted, or whether it satisfies the statutory definition of bingo.

Bingo revenue is normally not UBI regardless of how the game is conducted. Otherwise, the general rule is that the revenue from gaming is UBI unless one of the exceptions [e.g., an activity is not regularly carried on or it relies on volunteer labor (except in North Dakota)] to UBI classification applies.

Bingo Games

There are two factors used in determining whether a game is a bingo game pursuant to IRC Sec. 513(f)(2). First, it must qualify *as any game of bingo*, referring to a specific game of chance in which numbers corresponding to preprinted numbers on a card are called out by random selection, the participants place markers over corresponding numbers on their cards, and the first person to form a preselected pattern on his or her card wins the game.

The second factor is that the game be [IRC Sec. 513(f)(2)(A)]—

- of a type in which wagers normally are made, winners generally are determined, and prizes typically are disbursed *in the presence of all players*;
- conducted where no commercial competition exists; and
- legal under state and local law.

Substance Versus Form—Instant Bingo

Instant bingo (IB) is conducted with cards that are preprinted with patterns and then covered with pull tabs. Card purchasers pull the tabs and compare the patterns under the tabs with the winning patterns printed on the card back.

In *Julius M. Israel Lodge of B'nai B'rith No. 2113* [78 AFTR 2d 96-6801 (5th Cir. 1996)], the Fifth Circuit concluded that IB does not satisfy the preliminary requirement that it be *any game of bingo* within the meaning of IRC Sec. 513(f)(2). IB involves neither a random selection of numbers by a caller nor does it require the player to participate by covering the square on his or her card that corresponds to randomly drawn numbers. A player's participation in IB is completely independent of other players and requires only the removal of pull tabs to determine whether the card is a winner.

IB also fails to satisfy the secondary requirement of IRC Sec. 513(f)(2)(A) that winners be determined in the presence of all persons placing wagers in the games. IB game winners are, in effect, determined at the time the cards are manufactured and therefore the winners are already predetermined outside the presence of other players. In contrast, the bingo cards in a traditional bingo game are not predetermined winners or losers, but rather are the conduit by which the winners may be determined in the presence of all other players.

Substance Versus Form—Standard Flash

Recently, the IRS was asked whether the game of *standard flash* qualified as traditional bingo in any respect (TAM 202002010).

The standard flash game has some of the characteristics of IB. A flash game consists of a deck of cards. All the cards in a deck must be sold and played during a single traditional bingo session. Each card has one or more tabs that are lifted to reveal numbers or symbols on the face of the card. Each card is either an *instant winner*, an *instant loser*, or a *hold card*. A player who has an instant card can immediately compare the numbers and/or symbols on the face of the card to the winning combinations of numbers and/or symbols preprinted to the back of the card to determine whether it is a winner or a loser. A hold card has a preprinted grid of numbers like a traditional bingo card. To win on a hold card, a player must match numbers from balls randomly selected by the bingo machine after all the cards are sold with those in a preselected pattern on the card.

The IRS ruled that the game of standard flash fails to meet the definition of bingo. Like IB cards, instant winning cards in standard flash are determined at the time the cards are manufactured. Winners are already predetermined outside the presence of persons placing wagers in such game. Consequently, standard flash fails to satisfy IRC Sec. 513(f)(2)(A).

An alternative theory advanced by the exempt organization in TAM 202002010 was that the game of standard flash could be bifurcated such that the revenue attributable to the hold cards could be considered exempt bingo income. The IRS rejected this argument, stating that there is no legal basis for bifurcation and noting further that as a practical matter, none of the money

received from a card purchaser could demonstrably be allocated to either the instant or the hold aspect of the game—all of the money is necessarily allocable to the full game.

The Volunteer Labor Exemption

General Guidelines. Any activity in which *substantially all* of the work is performed by unpaid volunteers is not an unrelated trade or business [IRC Sec. 513(a)(1)]. Therefore, many exempt organizations avoid UBI on their regularly carried on non-bingo gaming activities by conducting them with volunteer labor.

Although the phrase substantially all is not defined in the context of volunteer labor, other areas of exempt organization law use 85% as the definitional percentage. The IRS concurs *substantially all* means 85% of the work, as measured by the number of hours worked (IRS Pub. 3079).

Determining Compensation. Although a court ruled that the volunteer labor exemption was not available where 21% of the work performed was compensated, the Fifth Circuit did not view *de minimis* non-cash remuneration (e.g., free beverages not intended as compensation) to volunteers as compensation for purposes of the volunteer labor exception.

Compensation includes tips received by workers for their services. Consequently, if tipping is allowed, the exception for volunteer labor may not apply (IRS Pub. 3079, "Tax Exempt Organizations and Gaming"). Providing workers with goods or services at a reduced price in return for their services may also be considered compensation. In addition, the IRS asserts that the volunteer labor exception may not apply where an exempt organization sponsors pull tab games at a for-profit establishment and cards are sold by employees of the establishment.

Reimbursement of reasonable out-of-pocket expenses (e.g., travel expenses) under an accountable plan generally should not be considered compensation. However, reimbursement based on an hourly rate was held to be compensation [*Smith Dodd Businessman's Association, Inc.,* 65 TC 620 (1975)].

Practical Consideration:

The IRS has an Issue Snapshot on the volunteer labor exclusion from unrelated trade or business. It is available at **www.irs.gov**.

Refundable Credit for Small Employer Health Insurance Premiums

Basic Requirements

A health insurance tax credit is available for an organization that is exempt under IRC Sec. 501(c) and that [IRC Sec. 45R(d)]—

- employs fewer than 25 full-time equivalent (FTE) employees during its tax year. FTE employees are determined by dividing the total hours worked for all employees during the year by 2,080 (rounded down to the nearest whole number). However, the maximum hours counted for any one employee is 2,080. The hours worked by seasonal workers are not counted unless they work for the employer more than 120 days during the tax year. Leased employees are counted in calculating an employer's FTEs and annual wages [IRC Sec. 45R(e)(1)(B)].

  Note: Tax-exempt organizations under common control are treated as a single employer.

- pays annual FTE wages that average no more than $54,200 (for years beginning in 2019). This is determined by dividing the total wages paid by the number of FTE employees and rounding that number down to the nearest $1,000. Wages paid to seasonal workers that work for the employer 120 days or fewer are excluded and the worker's hours are excluded in determining the number of FTE employees.

- has a qualified health insurance plan or arrangement that requires it to pay a uniform percentage (at least 50%) of the premiums on behalf of all its employees (employees only, not families or dependent) who enroll in the plan.

Restrictions on Claiming the Credit

To claim the credit, an employer generally must purchase insurance through the Small Business Health Options Program (SHOP). In addition, an organization cannot claim the credit for 2019 if it (or a predecessor) claimed the credit for a tax year beginning before 2018 [i.e., the credit period during which the credit can be claimed is a two-consecutive-tax-year period beginning with the first year (after 2013) in which Form 8941 (Credit for Small Employer Health Insurance Premiums) was filed with a positive amount on line 12].

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Credit Amount

The credit for eligible tax-exempt employers is 35% of the amount the employer paid during the tax year to purchase qualifying health coverage for its employees [IRC Sec. 45R(g)(2)]. However, the amount of the credit cannot exceed the total amount of income and Medicare tax the employer is required to withhold from employees' wages for the year plus the employer's share of Medicare tax on the employees' wages.

For 2019, the full amount of the credit is available only to an employer with 10 or fewer FTE employees who have average annual FTE wages of less than $27,100. The credit phases out as the number of FTE employees increases from 10 to 25 or the average FTE wages increase from $27,100 to $54,200. Only nonelective employer contributions qualify, which means that employee elective contributions to the plan used by the employer to pay for the employee's coverage do not qualify for the credit.

Note: The employer's unrelated business income tax deduction for premiums it pays on behalf of its employees is reduced by the health insurance credit [IRC Sec. 280C(h)].

Claiming the Credit on the Return

The credit is claimed by attaching Form 8941 (Credit for Small Employer Health Insurance Premiums) to Form 990-T (Exempt Organization Business Income Tax Return). If Form 990-T is filed solely to claim the credit, only a few lines need to be completed, as specified in the form's instructions. "Request for 45R Credit Only" should be written across the top of the form.

Practical Consideration:

The credit is a refundable credit so that a qualifying organization benefits even though it has no unrelated business income tax. Therefore, organizations should consider filing Form 990-T if they qualify for the credit.

Tax Brief

PARKING TAX REFUNDS. As discussed in last month's *The PPC Nonprofit Update*, the "parking tax" [i.e., IRC Sec. 512(a)(7)] was retroactively repealed to inception.

In a post on its website, the IRS advises organizations that paid the parking tax for prior years to file amended Forms 990-T to claim refunds or credits. When a return is being amended as a result of the repeal of IRC Sec. 512(a)(7), include the following information at the top of page 1 of Form 990-T to expedite processing: "Amended Return—Section 512(a)(7)."