March 23, 2020

Timothy F. Soltis, Deputy Controller
White House Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

RE: Comments to Proposed Revisions to 2 CFR 25, 2 CFR 170, 2 CFR 200
OMB-2019-0005

Dear Deputy Controller Soltis:

On behalf of the Native American Finance Officers Association (NAFOA), we are pleased to provide comments to the proposed revisions to the Office of Management and Budget (OMB) Uniform Guidance published in the Federal Register on January 22, 2020 as Docket Number: 2019-OMB-0005 and Document Number: 2019-28524.

NAFOA represents 120 tribal governments concerning tribal financial management and economic development. In the past, NAFOA has provided comments to OMB on the importance of addressing tribal concerns as it relates to the Uniform Guidance. We welcome the opportunity to continue to contribute these comments as OMB engages in periodic updates of the Uniform Guidance.

NAFOA has actively worked toward an acceptable solution for inclusion that would seek parity with other governments, protect certain tribal assets, and ensure a level of suitability for participation. NAFOA has convened meetings with tribal professionals and diverse professionals from the accounting and grants management nexus to develop these recommendations.

On the whole, we are generally supportive of the updates to the Uniform Guidance proposed and we have concerns and oppositions to certain aspects of the revisions as outlined below:

5. Revise § 25.200 to read as follows:

§ 25.200
Requirements for Notice of Funding Opportunities, Regulations, and Application Instructions.

NAFOA believes the need for transparency should be balanced with the practical and adverse impacts of the program being affected. By expanding the definition of “Federal financial assistance in 2 CFR Part 25 and 2 CFR part 170 to include loans, insurance, contributions, and direct
appropriations OMB may inadvertently reduce the positive impacts of these programs.\(^1\) Most notably by requiring System for Awards Management (SAM) registration for loan and loan guarantee programs will add regulatory burdens that may negatively impact Bank, CDC, Credit Union, and Non-Bank Lenders who qualify for participation under 25 CFR 103.10.

Indian tribes are some of the most underbanked and underserved communities in the United States. Access to credit is severely limited and to ensure credit is flowing to Indian Country the Federal Government has made different loan programs and loan guarantee programs that have supported real and positive change in their communities. As an example, the programs outlined below will be severely impacted by the requirement for loans and loan guarantees to be subject to SAM registration because SAM registration would fall on the Lender, i.e. bank, to register.

**Indian Loan Guarantee Program**

The Indian Loan Guarantee Program has guaranteed more than $1,000,000,000 in loans. It was created by the Indian Financing Act of 1974 to help Indian tribes and individuals establish and expand Indian-owned businesses, and to encourage self-sufficiency.

One of the programs the Indian Loan Guarantee Program has helped includes the financing of the Indian Pueblo Cultural Center in Albuquerque, NM with a loan guarantee on multiple loans since 1987. In another instance, the loan guarantee program helped the Navajo Nation in Arizona expand wireless telecommunications on their reservation through a $23.5 million guaranteed loan to serve an underserved communication need across the vast 27,000 square miles of Diné Bikéyah, or Navajoland. Their reservation is larger than ten of the fifty United States and without the Indian Loan Guarantee Program there would be less access to mobile telecommunications.

NAFOA understands the need to register for SAM as a grantee applying for a grant or contract because they are the entity that will work on the program goals. However, under the Indian Loan Guarantee Program, the Indian tribe is not the principal that submits and requests a loan guarantee. The lender submits an application request for a guarantee. Under normal business conditions, if a tribe cannot find reasonable terms and conditions for a loan they would either have to accept the unreasonable terms or go without access to capital. This is not optimal for the lender and the borrower.

Under this program, the tribe works with the lender on a long checklist of due diligence to evaluate the project. Once that is complete, the lender submits the loan guarantee application request to the Division of Capital Investment in the Indian Energy and Economic Development (IEED) of the U.S. Department of the Interior, Bureau of Indian Affairs. It is a one-page form with a series of documents prudent lenders will have already collected from the borrower, i.e. the tribe, during the due diligence. It usually takes around thirty (30) days to receive an answer. This program provides up to ninety-percent (90%) of an eligible loan and is a crucial and important resource for Indian tribes. The program has a default rate of less than two (2) percent and rivals some of the most prudent and successful financial institutions. We must continue to support this program.

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\(^1\) P. 3771, 85 FR 3766
Currently, lenders do not have to have a SAM account for this program and adding that requirement may decrease the appetite by the lender to pursue this program. If less lenders are able to easily fill-out the application, many requests for loan guarantees will go unfunded and the program will become less effective. IEED has made significant steps to streamlining their process and this may add another unnecessary step.

**Section 184 Loan Guarantee Program**

The Section 184 Loan Guarantee Program is similar in structure to the Indian Loan Guarantee Program as it requires the tribe to work with a participating lender and the lender submits a pre-approval to Housing and Urban Development (HUD) for approval. In this instance the lender will have to register with SAM as well.

The Section 184 Indian Home Loan Guarantee Program is a home mortgage product specifically designed for American Indian and Alaska Native families, Alaska villages, tribes, or tribally designated housing entities. Congress established this program in 1992 to facilitate homeownership and increase access to capital in Native American Communities. Section 184 is synonymous with home ownership in Indian Country.

With Section 184 financing, borrowers can get into a home with a low down-payment and flexible underwriting. Section 184 loans can be used both on and off native lands, for new construction, rehabilitation, purchase of an existing home, or refinance.

The Office of Loan Guarantee within HUD’s Office of Native American Programs, guarantees the Section 184 home mortgage loans made to Native borrowers. The loan guarantee assures the lender that its investment will be repaid in full in the event of foreclosure.

The borrower applies for the Section 184 loan with a participating lender, and works with the tribe and Bureau of Indian Affairs if leasing tribal land. The lender then evaluates the necessary loan documentation and submits the loan for approval to HUD’s Office of Loan Guarantee.

Currently, lenders do not have to have a SAM account for this program and adding that requirement may decrease the appetite by the lender to pursue this program. If less lenders are able to easily fill-out the application, many requests for Section 184 Loan Guarantees will go unfunded and the program will become less effective.

**Tribal Energy Loan Guarantee Program**

The Tribal Energy Loan Guarantee Program (TELG) is a partial loan guarantee program that can guarantee up to $2 billion in loans to support economic opportunities for tribes through energy development projects and activities. Under this solicitation, DOE can guarantee up to 90 percent of the unpaid principal and interest due on any loan made to a federally recognized Indian tribe or Alaska Native Corporation for energy development. It is similar in nature to the other loan guarantee programs, but notably does require SAM registration for the applicants. It is still the
format where, “Lenders as Applicants” meaning an application may be submitted exclusively by a financial institution or tribal lender that meets the qualifications of a “Lead Lender.”

NAFOA has received comments that the program needs to be simplified and this is one area, we believe, that has a negative impact on the ability for lenders to meet the needs of the application with a labyrinth of compliance and reporting formats.

NAFOA requests further tribal consultation on the impact of adding the SAM registration requirement for Indian loans, loan guarantee, and insurance programs that will have a severe impact on tribal entities. If the regulatory burden is imposed on the lenders they may not service these products anymore and will further increase the credit deserts within Indian Country.

17. Add § 25.333 to subpart C to read as follows: § 25.333 Highest Level Owner.

Highest level owner has the meaning given in 2 CFR 200.1.

NAFOA would like further clarification on the type of information needed to support inclusion of Highest Level Owner. Tribal governments and their enterprises support their community and are not for the benefit of a singular person. In some cases, the tribal governing body may change for a variety of reasons which are most often political elections and/or retirement.

NAFOA would like clarification on how this would affect Indian tribes when deciding on which information is required to list the tribe as Highest Level Owner when appropriate. Since the Indian tribal governing body would convene for the benefit of the tribe does this mean each tribal council member will have to put forth their name and personal identification despite not being the owner in the traditional sense?

NAFOA recommends the ability to use the name of the Indian tribe as the Highest Level Owner without the need to input individual identification of specific tribal council members, i.e. personal social security numbers. The tribe will not change, but the tribal council members may change. For example, if an Indian tribe had listed a person Tribal Council Member ABC as highest-level owner and Tribal Council Member ABC departed their position then the tribe would have to notify the grantors of the change. Is there a time limit for the change? How will this be documented?

As a result, to reduce burden and favor simplicity we encourage OMB to allow for this flexibility to simply list the Indian tribal government as Highest Level Owner in applicable cases, i.e. over the appropriate tribal subsidiary or tribal enterprise, without the need for sharing personally identifiable information that would require frequent updates.

18. Revise § 25.335 to read as follows: § 25.335 Indian Tribe (or “Federally recognized Indian Tribe”).

Indian Tribe (or “Federally recognized Indian Tribe”) has the meaning given in 2 CFR 200.1.

2 p. 80, FEDERAL LOAN GUARANTEES FOR TRIBAL ENERGY DEVELOPMENT PROJECTS Solicitation, Number: 89303018RLP000005 OMB Control Number: 1910-5134
NAFOA supports, with amendments found below, the intent of the changes to provide more clarity on where to find the official list of federally recognized Indian tribes.

Original:
“See annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services.”

Amended:
“See annually published by the U.S. Department of the Interior, Bureau of Indian Affairs, Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs.

This is the name that is used consistently in the Federal Register where the Notice is published.3

50. Revise § 200.101 to read as follows:
§ 200.101 Applicability.

NAFOA recommends the following § 200.101(i) to be updated to reflects its statutory name by replacing “to” with “for” to read: “Temporary Assistance for Needy Families.”

Original:
“(i) Temporary Assistance to Needy Families (title IV-A of the Social Security Act, 42 U.S.C. 601-619);”

Amended:
(i) Temporary Assistance for Needy Families (title IV-A of the Social Security Act, 42 U.S.C. 601-619);

72. Revise the newly redesignated § 200.319 to read as follows:
§ 200.319 Methods of Procurement to be Followed.

It is our sincere hope OMB will continue to update the Uniform Guidance to provide parity with state and local governments by reviewing all instances where references to “state and local government laws and regulations” are made and ensuring “tribal law and regulations” are included in those exceptions or references. In instances where “state or tribal law” is appropriate we support that inclusion. Many tribes have adopted their own laws and regulations and in some cases are stricter than the Uniform Guidance, e.g. Procurement thresholds or accounting standards.

NAFOA recommends additional attention be paid to any updates to include parity on these fronts. For example, on item seventy-two (72) there are inconsistencies with application of the full, “State, local, or tribal laws or regulations.” Where it precludes tribes and limits it to only “State” or “State and Local.”

It is reassuring that the phrase, “State, local, or tribal laws or regulations” is included in § 200.319

3 See 85 FR 5462
Methods of Procurement to be Followed (a)(1)(iii) in references to micro-purchases thresholds that differ from FAR and (a)(2)(ii) on simplified acquisition thresholds that differ from the FAR. However, when revising the references to other sections of the Uniform Guidance, they were not updated as well and this leaves an asymmetric burden on tribal governments’ ability to comply with their own laws and regulations. For example, in that same area of § 200.319(a)(1)(iv) it makes reference to § 200.520 Criteria for a Low-Risk Auditee which does not include tribes fully. We’ve copied § 200.520 Criteria for a Low-Risk Auditee (b) here:

(b) The auditor's opinion on whether the financial statements were prepared in accordance with GAAP, or a basis of accounting required by state law, and the auditor's in relation to opinion on the schedule of expenditures of Federal awards were unmodified.

NAFOA recommends revision to § 200.520 Criteria for a Low-Risk Auditee (b) by including “or tribal” after “state” and before “law” to read, “or a basis of accounting required by state or tribal law.” This will ensure tribes that have opted via tribal law to follow a particular basis of accounting may utilize fully their own laws. In many instances tribes transcend state boundaries and are in multiple states. How would a tribe in such an instance comply with the requirements if one state or multiple had divergent laws on this issue? By inserting “or tribal law” in this instance clarity would be provided for both auditors and tribes. NAFOA will continue to support the ability for tribes to utilize their own laws and regulations.

95. Amend § 200.414 by revising paragraphs (a), (c)(4), and (f) and adding paragraph (h) to read as follows:

§ 200.414 Indirect (F&A) Costs.

NAFOA supports the flexibility given in § 200.414 Indirect (F&A) Costs (f) by the removal of, “that has never received a negotiated indirect cost rate” to allow entities the flexibility of using a de minimis rate of ten (10) percent of modified total direct costs (MTDC) which may be used indefinitely. In addition, we support the clarity provided that, “No documentation is required to provide proof of costs that are covered under the de minimus indirect cost rate.” This will ensure programs are providing their full attention to completing stated program goals and activities and reduction of compliance burden on all entities affected.

NAFOA is fervidly opposed to the addition of § 200.414 Indirect (F&A) Costs (h) requiring, “All rate agreements from non-Federal entities must be available publicly on an OMB-Designated Federal website.”

NAFOA in a May 2013 Comment Letter to Docket ID: OMB-2013-0001 relating to the streamlining and improving financial reporting, cost principals, and administrative requirements for federal grants and cooperative agreements reported the following on Section 712 regarding publishing of single audit reporting package to the Federal Audit Clearinghouse:

4 NAFOA recognizes there may be other areas not enumerated in this letter where inconsistencies exist and hopes OMB will continue to update this in a timely manner in consultation with tribes and tribal organizations.
The need for disclosure and transparency should be balanced with the practical and adverse impacts that full financial disclosures would have on the federal-trust relationship, current laws and regulations, and the manner in which governments generate revenue.

Section 712 of the proposed regulations of the Notice raises significant concern for tribal leadership. The proposal represents a shift in federal policy and conflicts with existing federal-Indian policy, a federal statute, and at least one other regulation. Under the proposed regulation, tribes will be required to submit their full reporting and financial audit package and make it available for public inspection. Currently, tribes submit data collection forms to the Federal Audit Clearinghouse. These forms include the required disclosure of federal awards and financial information without making sensitive financial information available to other governments, the public, and competitors. Tribes have made it very clear that OMB should consider at the very least, continuing the existing practice for tribal governments of data collection forms and not move toward public disclosure of sensitive financial information. [emphasis added]

The statutory conflict to the OMB proposed regulations is with the Indian Self-Determination and Education Assistance Act (ISDEAA). In Section 5 of ISDEAA, there is a provision mandating that “reports and information [be made] available to the Indian people served or represented by such recipient as and in a manner determined to be adequate by the appropriate Secretary.” Additionally, under 25 USC § 450c, there is a requirement that single-agency audit reports be filed. This law and subsequent regulation provides for accountability and transparency to the people served by the program while ensuring agency accountability. Contrary to OMB proposed guidance, the law and regulations provide specifically that information be made available only to the funded population (Indians) and the agency providing funding.

There is no indication that funding needs to be made available to the public. In fact, under the ISDEAA model agreement, [25 U.S.C. §450l(b), and Section 1(b)(7)], there is the intent stated that records of the tribal government or tribal organization...shall not be considered Federal records for purposes of chapter 5 of Title 5, United States Code [Administrative Procedures Act, including FOIA]. Furthermore, ISDEAA provides that any disagreement over reporting requirements shall be subject to ISDEAA’s declination criteria under ISDEAA, Section 102. This clarifies that OMB does not have unilateral capacity to fundamentally change reporting and records-sharing requirements without potentially triggering a contract dispute process for a protesting tribe or tribal organization [25 U.S.C. §450c(f)(3)]. [emphasis added]

The proposed Section 712 in the Notice states that “Unless restricted by law or regulation, the auditee shall make copies [of its full reporting and financial audit package] available for public inspection.” We urge OMB to reconsider the
application of section 712 as it applies to Indian tribes and tribal organizations since it conflicts with existing statute and regulations.

Beside the legal conflicts, the provision related to tribal financial disclosures also impedes the federal trust relationship in a few significant ways that would change how tribes operate and report.

The federal-Indian relationship has been established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. Tribes ceded hundreds of millions of homeland acreage to help build this Nation. In return, the United States promised to provide for the health, education, and welfare of Indian people as well as to respect tribal cultures and ways of life. Many of these promises are now codified in federal laws, such as the Indian Self-Determination and Educational Assistance Act, the Indian Health Care Improvement Act, and dozens of others. [emphasis added]

The public has a very limited understanding of the federal-Indian policy or how tribes operate, let alone an understanding of how to interpret financial statements. Opening the financial disclosures of tribal governments also opens up the misinterpretation of the federal-Indian trust relationship to public and political mechanisms. We have already seen this occur recently when a high profile tribe received federal funds for government services and was the subject of media attention for doing so. This attention made federal funding for tribal services a political matter. The reality was much different than portrayed in the media, since the tribe had financial considerations not apparent, including debt exceeding revenue and was unable to provide services. Even if they were, the public should not be making these determinations or using external and changing criteria to test federal programs for tribes.

In addition to misinterpretation and making tribal funding political, there is the risk of placing tribes at a competitive disadvantage when negotiating with other governments and competing with external business enterprises by disclosing what may be proprietary information. The federal government, in its trustee role, should be ensuring tribes have an equal footing during negotiations and ensuring financial information remains proprietary in the same manner as competing interests. [emphasis added]

Further consultation is needed on this issue, especially considering its importance to tribes and the limited time tribes have had to react to the inclusion of this section in the Notice. The initial Notice, released in 2012, did not contain Section 712.

NAFOA ardently believes requiring, “All rate agreements from non-Federal entities must be available publicly on an OMB-Designated Federal website” is contrary to the spirit of the Indian
Self-Determination and Education Assistance Act of 1975 (Public Law 93-638) as it relates to records of Indian tribal governments for the reasons stated above.

Our original comments in May 2013 were centered on the reporting of the single audit reporting package for public inspection in the Federal Audit Clearinghouse website and § 200.414 Indirect (F&A) Costs (h) deals with one aspect of the total reporting package—the indirect cost rates. In the Single Audit reporting package indication of a negotiated indirect cost rate or use of a de minimus indirect cost rate is usually found in the notes to the Schedule of Expenditures of Federal Awards (SEFA) or in the Summary of Significant Accounting Policies.

As a result we urge OMB to reconsider the addition § 200.414 Indirect (F&A) Costs (h) as it applies to Indian tribes and tribal organizations since it conflicts with existing statute and regulations.

Furthermore, at multiple times through this notice OMB has made it clear that the U.S. Constitution is important and we agree because it forms the basis for the ISDEAA and federal Indian law overall. This would provide contrary impetus to include the U.S. Constitution as made clear by OMB proposal numbers: 53, 54, 57, 81, and 83 which place the U.S. Constitution first among the list of federal statutes, regulations, or award documents.

In the event OMB continues to require public inspection of all rate negotiations we request § 200.414 Indirect (F&A) Costs (h) to read as follows:

“Unless prohibited by the U.S. Constitution, Federal statutes, or regulations all rate agreements from non-Federal entities must be available publicly on an OMB-Designated Federal website.”

NAFOA remains committed to ensuring tribal inclusion on critical issues related to economic development and financial management. We strongly recommend OMB take full consideration of the measures referenced above and to take consideration of the unique status of tribal governments. We urge the OMB to carefully consider all comments received by tribal governments and tribal organizations.

Thank you for the opportunity to submit comments and we look forward to a continued dialogue on these and other issues as they may arise. For further clarification or comments please contact Emery Real Bird at (202) 945-7750 or at Emery@nafoa.org.

Respectfully Submitted,

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