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Via email and electronic filing through <http://www.regulations.gov>

Sylvia Mathews Burwell, Director
Victoria Collin, Policy Analyst
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Attention: Office of Federal Financial Management “Grant Reform” – OMB-2013-0001

Dear Director Burwell and Ms. Collin:

The Brennan Center for Justice at New York University School of Law writes to support the proposed guidance entitled “Reform of Federal Policies Relating to Grants and Cooperative Agreements: Cost Principles and Administrative Requirements (Including Single Audit Act)” (“Grant Audit Guidance”) issued by the Office of Management and Budget (“OMB”) on February 1, 2013 in furtherance of Executive Order 13,520 on “Reducing Improper Payments.”¹

The Brennan Center is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice.² The Brennan Center’s Justice Program seeks to ensure a rational, efficient, effective, and fair criminal justice system. As part of that mission, we seek to ensure that any government funds, particularly federal government grants, earmarked for criminal justice purposes are efficiently and effectively used to improve public safety while also protecting individual rights. We have a special interest in grants administered through the U.S. Department of Justice, specifically the Edward Byrne Memorial Justice Assistance Grant (“Byrne JAG”) program, which provides grants to state and local governments for various criminal justice needs.³ We appreciate the opportunity to provide comments on this proposed guidance.

¹ Reform of Federal Policies Relating to Grants and Cooperative Agreements: Cost Principles and Administrative Requirements (Including Single Audit Act), 78 Fed. Reg. 7,282 (proposed Feb. 1, 2013); *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-02-01/pdf/2013-02113.pdf>; Exec. Order No. 13,520, 74 Fed.Reg. 62,201 (2009); *available at* <http://www.gpo.gov/fdsys/pkg/FR-2009-11-25/pdf/E9-28493.pdf>.

² This letter does not represent the opinions of NYU School of Law.

³ The Byrne JAG Program provides states, tribes, and local governments with critical funding necessary to support a range of program areas including law enforcement, prosecution and courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology

We support OMB's goal of implementing a streamlined guidance for federal grant administration to increase efficiency and effectiveness. The Grant Reform Guidance would increase accountability of grant recipients and improve the transparency of federal dollars, thereby ensuring the most efficient use of public funds and maximizing taxpayer dollars. We support the proposed audit language in Subchapter G, which provides clear and mandatory instructions for federal agencies and grant recipients concerning the audit process. These provisions impose rigorous audit requirements in order to reduce waste, fraud, and abuse in federal grant programs.

We have a specific interest in the Grant Audit Guidance's provisions pertaining to performance measurements in the grant award process throughout Subchapter B, particularly in the sections entitled "Agency Review of Merit of Proposals and Risk Posed by Applicants" and "Specific Conditions for Individual Recipients." Those sections confer unnecessarily vast discretion to agencies, and we recommend that they mandate more accountability and transparency. For example, section 205 provides that a federal agency reviewing an application need not consider an applicant's history of failing to meet performance expectations when assessing risk. Section 207 provides that a federal agency may consider an applicant's failure to meet expected performance goals when determining whether to impose specific conditions on the award, but the agency retains great discretion in imposing any conditions. Taken together, sections 205 and 207 allow federal agencies to effectively eliminate past performance measurements as a consideration in award determinations. OMB should mandate that agencies incorporate past performance into award decisions unless there are exigent circumstances. A history of failure to meet performance goals and expectations may indicate a potential of waste, fraud, or abuse in awards to the same applicant, and may indicate funds are not being used for stated or intended goals. For example, a history of failure to meet performance goals and expectations may demonstrate that the grantee does not understand what the award purpose is or how best to utilize funds to achieve that goal. Without federal agencies addressing this potential issue through award decisions, an applicant may perpetually receive federal funds without ever achieving the intended statutory goals for awards.

Additionally, the Grant Audit Guidance merely encourages federal agencies to condition awards on specific performance expectations, rather than requiring that recipients meet them. For example, section 404 provides that federal agencies must include clear performance goals, indicators, and milestones in federal award notices. However it allows federal agencies to define performance goals, which may range from merely submitting technical performance reports to meeting specific performance goals. By allowing agencies to determine when specific performance goals appropriately apply to an award, the Grant Audit Guidance gives federal agencies an opportunity to side-step performance measures altogether, allowing recipients to direct grant funds in various ways, which may or may not meet intended statutory goals for awards.

Performance measurements help to evaluate the effectiveness of federal award programs by providing data on how often grantees meet award purposes. Measuring the effectiveness of a program ultimately increases accountability and allows for a more nuanced understanding of

improvement, and crime victim and witness initiatives. *See* Bureau of Justice Assistance, Justice Assistance Grant (JAG) Program, available at https://www.bja.gov/ProgramDetails.aspx?Program_ID=59.

whether the funding to any specific grantee was well spent. Deepened understandings in effectiveness allow federal agencies to make more appropriate award decisions in the future. Further, effective performance measures allow policymakers to make informed decisions regarding the effectiveness of certain programs, as a whole. The Grant Audit Guidance should require that agencies determine specific performance goals for all awards, unless a particular award meets a provided exception (i.e., discretionary awards). According to the U.S. Government Accountability Office, performance measures should be “linked to agency goals and missions; be clearly stated; include measureable targets; and be objective, reliable, and balanced.”⁴ Requiring specific performance goals as conditions to all federal awards helps ensure funds are directed to stated and approved purposes, thereby increasing efficiency and effectiveness of federal grants and ensuring that the public receives the most value from its tax dollars.

The Grant Audit Guidance also encourages performance report best practices, rather than requiring specific report information and methodology that support expected performance goals. For example, sections 502 and 505 encourage the collection of detailed performance information in performance reports to promote program effectiveness and to aid agencies and pass-through recipients in managing recipient performance expectation progress. OMB should instead require detailed information collections, rather than merely encourage them. Simply encouraging best practices allows federal agencies and award recipients to avoid seeking or providing details in performance reports. Details on recipient performance cut waste, fraud, and abuse of federal funding.

The Grant Audit Guidance provides specific and mandatory requirements for audit procedures. OMB should undertake a separate guidance implementing the same rigor, accountability, and transparency in performance measurements for federal grants. Such a proposed guidance should streamline and mandate specific performance goals and reporting requirements to ensure accountability and transparency in all aspects of grant spending.

This new guidance should require federal agencies to uniformly:

- Consider an applicant’s history of meeting performance expectations when assessing applicant risk before making grant award decisions and when determining whether to impose specific conditions on an award;
- Condition awards on specific performance goals when making award decisions and evaluating use of grant dollars;
- Issue specific performance metrics for each federal grant that recipients must meet to demonstrate the funds were used to accomplish grant goals, conduct annual evaluations of recipients’ performance based on these metrics, and condition grants on whether recipients meet such performance measurements;
- Collect detailed information in performance reports on where and how federal grant dollars are being spent that measure grant goals and missions;

⁴ U.S. Gov’t Accountability Office, GAO 12-1016, Grants to State and Local Governments: An Overview of Federal Funding Levels and Selected Challenges (2012), available at <http://www.gao.gov/assets/650/648792.pdf>.

- Publish performance reports on a publicly accessible and searchable website, like federalreporting.gov, recovery.gov, or usaspending.gov;
- Make these performance measurements consistent with and work in conjunction with the cost principles and uniform requirements of the Grant Audit Guidance;
- Consider whether these performance measurements should work in tandem with the existing assessments on cost factors under the Government Performance and Results Modernization Act.

We recognize the difficulty involved in creating a streamlined uniform guidance for all federal grants to improve program efficiency and effectiveness. However, we urge OMB to expand its efforts to increase the rigor of performance measurements for all federal grants, thereby requiring increased accountability, transparency, effectiveness, and efficiency in all aspects of federal grant spending.

Respectfully submitted,



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