

Most Significant Changes to Grants Administration Under the New EDGAR

Tiffany R. Winters, Esq.
Bonnie Little Graham, Esq.
Brustein & Manasevit, PLLC

www.bruman.com

October 2015



1



What NOT To Do!



Recent OIG Findings Semiannual Reports No.70 (Oct 2014 – March 2015)

Nebraska

- The Comptroller had unlimited access to accounts that he used to write checks to himself for cash, receive duplicate compensation for work and purchased more than 200 gift cards and other items for personal use. He also created false account entries in the school's accounting system to cover up his crimes.
- From 2004 through 2010, Former Comptroller and Director of Finance embezzled some \$50,000.

Recent OIG Findings (cont.)

Wisconsin

- Over a 13-year period, the Administrative Assistant created bogus purchase orders to use school district funds for vacations and household items.
- The woman was sentenced to serve a year and a day in prison and 2 years of supervised release, and she was ordered to pay more than \$310,000 in restitution.

Recent OIG Findings (cont.)

Texas

- Former Finance Director and Comptroller had the authority to conduct wire transfers of district money without notifying anyone.
- They transferred over \$4 Million in 18 separate wire transfers to bank accounts in their names and other accounts under their control.



Recent OIG Findings (cont.)

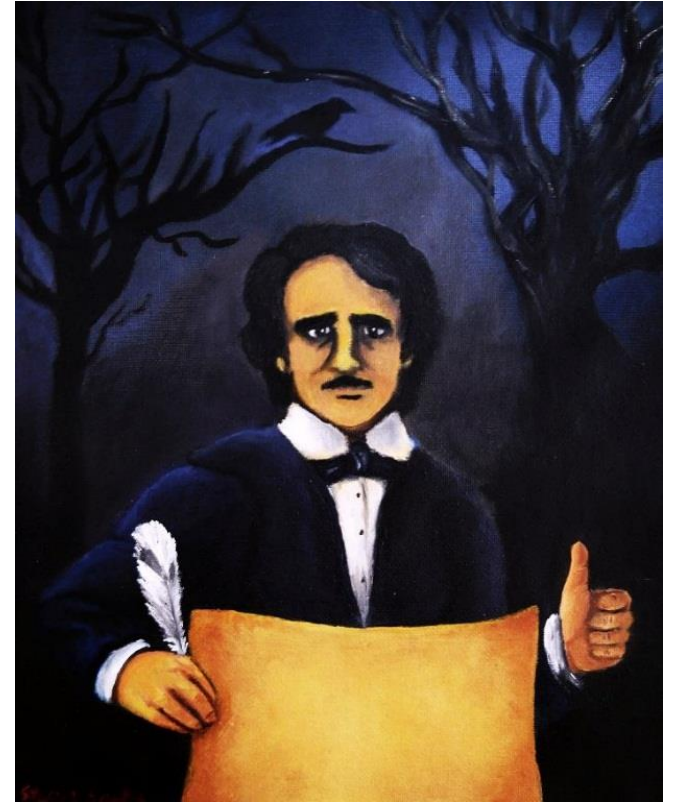
District of Columbia

- The owner of a private transportation company was charged with giving himself contracts while employed by the school, improperly earning more than \$163,000.
- After he was discharged, he schemed to obtain student lists and crated false invoices and supporting documentation for payments to his company claiming he provided transportation services to named students. He was paid over \$300,000 in error.



7

The New EDGAR



Key Parts of the NEW EDGAR

■ **Title 34**

- Part 75 – Direct Grant Programs
- Part 76 – State-Administered Programs
- Part 77 – Definitions
- Part 81 – General Education Provisions Act (GEPA)

■ **Title 2**

- Part 200 – Cost/Administrative/Audit Rules
- Part 3474 – USDE Exceptions – Adopts Part 200
- Part 3485 – Nonprocurement Debarment and Suspension
 - Incorporates 2 CFR Part 180, OMB's Guidelines on Debarment and Suspension

Prior Rules (Incorporated Into the NEW EDGAR)

- A-21 – Cost Rules – Rules – IHEs
- A-87 – Cost Rules – State / Local Gov't
- A-122 – Cost Rules – Nonprofit
- A-102 – Administrative Rules State / Local Gov't
- A-110 – Administrative Rules IHEs
- A-133 – Audit Rules

Effective Dates

- **December 26, 2014** – Direct Grants from ED
- **July 1, 2015** – State Administered Programs
- **July 1, 2017** - Procurement Rules ONLY if the **two** year grace period is utilized (but specific requirements must be met)! 200.110
 - Updated via technical corrections by COFAR at 80 FR 54407, Published on September 10, 2015.
- Indirect Cost Rates When Due For Renegotiation



EDGAR Adopts Part 200 Rules

USDE Adopts Part 200 3474.1 (pg 230)

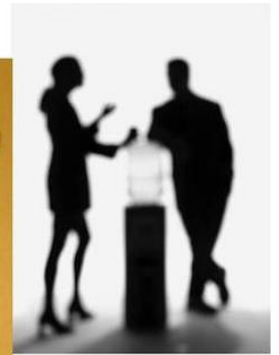
NEW: USDE Adopts Part 200 into EDGAR

- Except for 2 CFR 200.102(a) and 2 CFR 200.207(a). Thus, this part gives regulatory effect to the OMB guidance and supplements the guidance as needed for the Department.

Retention of “High Risk” Language 3474.10 (pg 230)

Clarification regarding 2 CFR 200.207.

- Retained “High-Risk” Language
 - Previously Under 74.14 and 80.12
- The Secretary or a pass-through entity may, in appropriate circumstances, designate the specific conditions established under 2 CFR 200.207 as “high-risk conditions” and designate a non-Federal entity subject to specific conditions established under §200.207 as “high-risk”.



New Certifications and Disclosures

Conflict of Interest Disclosure 200.112 (pg 112)

- The Federal awarding agency must establish conflict of interest policies for Federal awards.
- **NEW:** All non federal entities must establish conflict of interest policies, and disclose in writing any potential conflict to federal awarding agency or pass through agency in accordance with applicable Federal awarding agency policy.

Mandatory Disclosures

200.113 (pg 113)

- **NEW:** Must disclose in writing, in a timely manner:
 - All violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award.
 - Failure to make disclosures can result in remedies in 200.338 (remedies for noncompliance) including suspension and debarment.

Required Certification

200.415 (pg 148)

- **NEW:** An official authorized to legally bind the non-federal entity must certify on annual and final fiscal reports or vouchers requesting payment:
 - “By signing this report, I certify to the best of my knowledge and belief that the report is true, complete and accurate and the expenditures, disbursements and cash receipts are for the purposes and objectives set forth in the terms and conditions of the federal award. I am aware that any false, fictitious, or fraudulent information or the omission of any material fact, may subject me to criminal civil or administrative penalties for fraud, false statements, false claims, or otherwise.”



Additions to Financial Management



Financial Management Rules 200.302(b) (pg 118)

Prior Rule 80.20(b)

1. Financial Reporting
2. Accounting Records
3. Internal Control
4. Budget Control
5. Allowable Cost
6. Source Documentation
7. Cash Management

2 CFR 200.302 (b)

1. Identification of Awards (NEW)
2. Financial Reporting
3. Accounting Records (Source Docs)
4. Internal Control
5. Budget Control
6. Written Cash Management Procedures (NEW)
7. Written Allowability Procedures (NEW)

Identification of Awards 200.302(b)(1) (pg 118)

NEW: Agencies must identify all federal awards received and expended.

- CFDA Title and Number
- Federal Award I.D. #
- Fiscal Year of Award
- Federal Agency
- Pass-Through (applicable to subawards)



Financial Reporting

200.302(b)(2) (pg 118)

- Accurate, current, complete disclosure of financial results of each award in accordance with 200.327 and 200.328.
- **NEW: 200.327 Financial Reporting:** The federal awarding agency can only collect OMB approved data elements.
- **NEW: 200.328 Program Performance:** The non-Federal entity must submit performance reports at intervals required by federal agency or pass through.
- Reports must be collected with the frequency required by the Federal award, but no less than annually, no more than quarterly.

Accounting Records

200.302(b)(3) (pg 119)

■ Source Documentation Must Be Kept On:

1. Federal Awards
2. Authorizations
3. Obligations
4. Unobligated balances
5. Assets
6. Expenditures
7. Income
8. Interest **(NEW)** *(Eliminated liabilities)*

Internal Controls

200.302(b)(4) (pg 119)

Essentially same as prior 80.20(b)(3):

- Effective control over and accountability for:
 1. All funds
 2. Property
 3. Other assets
- Must adequately safeguard all assets
- Use assets solely for authorized purpose

Internal Controls

200.303 (pg 119)

- a. Non-Federal entities must establish and maintain effective internal control over the Federal award that provides reasonable assurances that the entity is managing the award in compliance with federal statutes, regs, and terms of the award.
 - **NEW:** Internal controls “should” be in compliance with:
 - The U.S. Comptroller General’s Standard for Internal Control Integrated Framework; and
 - Internal Control Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)

Internal Controls (cont.)

200.303 (pg 119)

- b. Comply with Federal statutes, regs, and the terms and conditions of the Federal awards.
- c. Evaluate and monitor the non-Federal entity's compliance with statutes, regs and the terms and conditions of Federal awards.
- d. **NEW:** Take prompt action when instances of noncompliance are identified including in audit findings.
- e. Take reasonable measures to safeguard protected personally identifiable info (PII) and other information designated or deemed sensitive



More Policies and Procedures (Document, Document, Document!)

Written Policies and Procedures under EDGAR

- Written Cash Management Procedures - 200.302(b)(6) and 200.305
- Written Allowability Procedures - 200.302(b)(7)
- Written Conflicts of Interest Policy - 200.318(c)
- Written Procurement Procedures - 200.19(c)
- Written Method for Conducting Technical Evaluations of Proposals and Selecting Recipients - 200.320(d)(3)
- Written Travel Policy - 200.474(b)



Written Cash Management Procedures 200.302(6) (pg 119)

- **NEW:** Written Procedures to implement the requirements of 200.305

Payment

200.305 (a) and (b) (pg 119)

- For states, payments are governed by Treasury – State CMIA agreements 31 CFR Part 205
 - No Change
- For all other non federal entities, payments must minimize time elapsing between draw from G-5 and disbursement (not obligation)

Payment (cont.)

200.305(b)(1)-(4) (pg 119)

- Written procedures must describe whether non-federal entity uses:
 - 1) Advance Payments (preferred)
 - Limited to minimum amounts needed to meet immediate cash needs
 - 2) Reimbursement
 - Pass through must make payment within 30 calendar days after receipt of the billing
 - 3) Working Capital Advance
 - The pass through determines that the nonfederal entity lacks sufficient working capital. Allows advance payment to cover estimated disbursement needs for initial period

Cash Management

- Cash Advance Payment Process

- Obligation
- Liquidation
- Drawdown
- Payment



This would be switched in a Reimbursement Payment Process.



- Obligation = Means orders placed for property and services, contracts and subawards made and similar transactions during a given period that require payment during the same or a future period. 200.71 (pg 104)

When Obligations Are Made

76.707 (pg 66)

Type of Obligation	When Obligation Occurs
Acquisition of Property	Date of binding written commitment
Personal Services by Employee	When services are performed
Personal Services by Contractor	Date of binding written commitment
Travel	When travel is taken
NEW: Approved Pre- Agreement Cost	On the first day of the grant or subgrant performance period.

Payment (cont.)

200.305(b)(7)-(8) (pg 121)

- Advances must be maintained in insured accounts
- Pass through cannot require separate depository accounts
- **NEW:** Accounts must be interest bearing unless:
 1. Aggregate federal awards under \$120,000
 2. Account not expected to earn in excess of \$500 per year
 3. Bank require minimum balance so high, that such account not feasible
 4. A foreign gov't or banking system prohibits or precludes interest bearing accounts.

Payment (cont.)

200.305(b)(9) (pg 121)

- **NEW:** Interest amounts up to **\$500** may be retained by non federal entity for administrative purposes
 - Currently \$100 for State and local Gov'ts
 - Currently \$250 for IHEs and Non-profits.
- **NEW:** Interest earned must be remitted annually to HHS Payment Management System.

Written Allowability Procedures 200.302(b)(7) (pg 119)

- **NEW:** Written procedures for determining allowability of costs in accordance with Subpart E – Cost Principles
 - Procedures can not simply restate the Uniform Guidance Subpart E
 - Should explain the process used throughout the grant development and budget process
 - Training tool and guide for employees

Be Adequately Documented 200.403(g) (pg 143)

To meet allowability requirements... costs must be adequately documented.



Records 76.730 (pg 68)



- A State and subgrantee shall keep records that fully show:
 - The amount of funds;
 - How funds were used;
 - Total cost of the project;
 - Share of the cost provided from other sources; and
 - Other records to facilitate an effective audit.
- References throughout new reporting requirements on financial management in 2 CFR 200.302 (performance reporting)

Methods for Collection, Transmission and Storage of Information

200.335 (pg 138)

- **NEW:** When original records are electronic and cannot be altered, there is no need to create and retain paper copies.
- When original records are paper, electronic versions may be substituted through the use of duplication or other forms of electronic media provided they:
 - Are subject to periodic quality control reviews,
 - Provide reasonable safeguards against alteration; and
 - Remain readable.

Changes to Allowability

39



Factors Affecting Allowability of Costs

200.403 (pg 143)

All Costs Must Be:

1. Necessary, Reasonable and Allocable
2. Conform with federal law & grant terms
3. Consistent with state and local policies
4. Consistently treated
5. In accordance with GAAP
6. Not included as match
7. *Net of applicable credits (moved to 200.406)*
8. Adequately documented



Prior Written Approval 200.407 (pg 144)

- **NEW:** In order to avoid subsequent disallowance:
 - Non-Federal entity may seek prior written approval of cognizant agency (for indirect cost rate) or Federal awarding agency in advance of the incurrence of special or unusual costs



Direct v. Indirect Costs

200.413(c) (pg 146)

- **NEW:** Salaries of administrative and clerical staff should be treated as “indirect” unless all of following are met:
 1. Such services are integral to the activity
 2. Individuals can be specifically identified with the activity
 3. Such costs are explicitly included in the budget
 4. Costs not also recovered as indirect



Collection of Unallowable Costs 200.410 (pg 145)

- **NEW:** Payments made for costs determined to be unallowable by either the Federal awarding agency or pass-through must be refunded (including interest) to the Federal government in accordance with instructions from the Federal agency that determined the costs are unallowable.



Selected Items of Cost

There are 55 specific items of cost!

Listed on page 94.

Starts at 200.420 (pg 150)

Selected Items of Cost Examples

- **Alcohol 200.423** (pg 151)
 - Not allowable
- **Collections of Improper Payments 200.428** (pg 152)
 - The costs incurred by the non-Federal entity to recover improper payments are allowable as either direct or indirect costs, as appropriate.



Selected Items of Cost Examples (cont.)

- **Conferences 200.432** (pg 158)
 - Prior Rule: Generally allowable
 - Includes Meals / Conferences / Travel and Family Friendly Policies
 - Allowable conference costs include rental of facilities, costs of meals and refreshments, transportation, unless restricted by the federal award
 - Conference hosts must exercise discretion in ensuring costs are appropriate, necessary and managed in manner than minimizes costs to federal award



Selected Items of Cost Examples (cont.)

- **Participant Support Costs 200.456**
 - Allowable with prior approval of the Federal awarding agency
- Participant Support Costs Defined (200.75):
 - Direct costs for items such as stipends, subsistence allowances, travel allowances and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences or training projects.

Selected Items of Cost Examples (cont.)

- **Pre-award Costs 200.458** (pg 171)
 - Those costs incurred prior to the effective date of the Federal award directly in negotiation or anticipation of the award
 - Costs must be necessary for efficient and timely performance of the scope of work
 - Allowable to the extent they would have been allowable if incurred after the effective date and ONLY with written approval from the Federal awarding agency.

Selected Items of Cost Examples (cont.)

- **Travel Costs 200.474** (pg 176)
 - Travel costs may be charged on actual, per diem, or mileage basis
 - Travel charges must be consistent with entity's written travel reimbursement policies
 - **NEW:** Travel costs must be reasonable and consistent with written travel policy / or follow GSA 48 CFR 31.205-46(a)
 - **NEW:** Grantee must retain documentation that participation of individual in conference is necessary for the project





Family Friendly Policies



Family Friendly Policies

- Conferences 200.432 (pg 158)
 - **NEW:** Costs related to identifying, but not providing, locally available dependent-care resources are allowable.



Family Friendly Policies (cont.)

- **Travel Costs 200.474** (pg 176)
 - **NEW:** Temporary dependent care costs (as defined in 26 USC 152) above and beyond regular dependent care that directly results from travel to conferences is allowable (subject to certain restrictions).
- Who is a dependent?
 - A qualifying child or relative (taxable dependent).





Time and Effort Documentation Changes?

Documentation for Personnel Expenses

200.430(i) (pg 154)

- **NEW:** Charges to Federal awards for salaries and wages must be based on records that accurately reflect the work performed.
- How staff demonstrate allocability
 - If employee paid with federal funds, then must show that the employee worked on that specific federal program cost objective
200.403(a)

Who must participate?

200.430(i)(1) and (i)(4) (pg 154, 155)

- Must be maintained for all employees whose salaries are:
 - Paid in whole or in part with federal funds
 - Used to meet a match/cost share requirement
 - NOT contractors



The Prior A-87 Rule (SEAs and LEAs)

Semi-Annual Certifications

- If an employee works on a single cost objective:
 - After the fact
 - Account for the total activity
 - Signed by employee **or** supervisor
 - Every six months (at least twice a year)

Personnel Activity Report (PAR)

- If an employee works on multiple cost objectives:
 - After the fact
 - Account for total activity
 - Signed by employee
 - Prepared at least monthly and coincide with one or more pay periods

Documentation for Personnel Expenses (cont.)

200.430(i)(1) (pg 154)

NEW: These records MUST:

1. Be supported by a system of internal controls which provides reasonable assurance charges are accurate, allowable and properly allocated;
2. Be incorporated into official records;
3. Reasonably reflect total activity for which employee is compensated;
 - Not to exceed 100%

Documentation for Personnel Expenses (cont.)

200.430(i)(1) (pg 154)

4. Encompass all activities (federal and non-federal);
5. Comply with established accounting polices and practices; and
6. Support distribution among specific activities or cost objectives.

Percentages

200.430(i)(1)(ix) (pg 154)

- **NEW:** Because practices vary as to the activity constituting a full workload, records may reflect categories of activities expressed as a percentage distribution of total activities.

Compliance

200.430(i)(2) (pg 155)

- **NEW:** For records which meet the standards, the non-federal entity will not be required to provide additional support or documentation for the work performed.
- DOL regulations for Fair Labor Standards Act must still be met (i.e. charges must be supported by records indicating the total number of hours worked each day).

Noncompliance

200.430(i)(8) (pg 155)

- For a non-Federal entity where the records do not meet these standards:
 - USDE may require personnel activity reports (PARs), including prescribed certifications or equivalent documentation that support the records as required in this section.
 - PARs are not defined!!

Reconciliation

200.430(i)(1)(viii)(C) (pg 154)

- **NEW:** All necessary adjustment must be made such that the final amount charged to the Federal award is accurate, allowable, and properly allocated.

Substitute Systems

200.430(i)(5) (pg 155)

- States, local governments and Indian tribes encouraged to adopt “substitute systems” if approved by cognizant agency for indirect cost.
 - No longer applies to nonprofits.
- Still acceptable to allocate sampled employees’ supervisors, clerical and support staffs, based on the result of the sampled employees.

Time and Effort Guidance by OCFO? (pg 269)

Does it still apply?

- It is possible to work on a single cost objective even if an employee works on more than one Federal award or on a Federal award and a non-Federal award.
- ***The key to determining whether it is a single cost objective is whether the employee's salary and wages can be supported in full from each of the Federal awards on which the employee is working or from the Federal award alone if the employee's salary is also paid with non-Federal funds.***

<http://www2.ed.gov/policy/fund/guid/gposbul/time-and-effort-reporting.html>



Closer Look at Conflicts



Conflict of Interest

200.318(c)(1) (pg 129)

- Must maintain written standard of conduct, including conflict of interest policy.
- A conflict of interest arises when any of the following has a financial or other interest in the firm selected for award:
 - Employee, officer or agent
 - Any member of that person's immediate family
 - That person's partner
 - An organization which employs, or is about to employ, any of the above or has a financial interest in the firm selected for award

Gratuities

200.318(c)(1) (pg 129)

- Must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors/ subcontractors.
- However, may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value.
- Standards of conduct must include disciplinary actions applies for violations.



Organizational Conflict of Interest

200.318(c)(2) (pg 130)

- **NEW:** If the non-federal entity has a parent, affiliate, or subsidiary organization that is not a state or local government the entity must also maintain written standards of conduct covering organizational conflicts of interest

69

Ensuring Competition



Contract Administration

200.318(b) (pg 129)

- Nonfederal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of the contract

Competition

200.319(a) (pg 130)

- All procurement transactions must be conducted with full and open competition.
 - Must have protest procedures to handle disputes
- To eliminate unfair advantage, contractors that develop or draft specifications, requirements, statement of work, and invitations for bids or RFPs must be excluded from competing for such procurements.

Competition (cont.)

200.319(b) (pg 131)

- Must prohibit the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposal, except where applicable Federal statutes expressly mandate or encourage geographic preference.
- Does not preempt state licensing laws.
- Exception: architectural and engineering services (if provides appropriate number of qualified firms).

Methods of Procurement 200.320 (pg 131)

- Method of procurement:
 - **NEW:** Micro-purchase
 - Small purchase procedures
 - Competitive sealed bids
 - Competitive proposals
 - Noncompetitive proposals

Micro-Purchase 300.320(a) (pg 131)

- **NEW:** Acquisition of supplies and services under **\$3,500** or less.
 - Threshold set by the Federal Acquisition Regulation (FAR) at 48 CFR Subpart 2.1, which were updated on October 1, 2016)
- May be awarded without soliciting competitive quotations if nonfederal entity considers the cost reasonable.
- To the extent practicable must distribute micro-purchases equitably among qualified suppliers.

Small Purchase Procedures

300.320(b) (pg 131)

- Good or service that costs \$150,000 or less
 - (NEW: Simplified Acquisition Threshold was raised under 200.88)
 - Organization may set lower threshold
- Must obtain price or rate quotes from an adequate number of qualified sources
- “Relatively simply and informal”

Noncompetitive Proposals 200.320(f) (pg 132)



- Appropriate only when:
 - The item is only available from a single source;
 - There is a public emergency that will not permit delay;
 - **NEW:** The Federal awarding agency or pass-through expressly authorizes noncompetitive proposals in response to a written request from non-Federal entity;
or
 - After soliciting a number of sources, competition is determined inadequate.

Contract Cost and Price 200.323 (pg 133)

- **NEW:** Must perform a cost or price analysis in connection with every procurement action over \$150,000, including contract modifications
- Independent estimate before receiving bids or proposals.
 - Cost analysis generally means evaluating the separate cost elements that make up the total price (including profit)
 - Price analysis generally means evaluating the total price



Suspension and Debarment 200.212 (pg 117) Appendix II(H) (pg 200)

- Cannot contract with vendor who has been suspended or debarred
 - Excluded Parties List System in the System for Award Management (SAM)
 - 2 CFR Part 180 (OMB Debarment Suspension Rules) and 2 CFR 3485 (USDE Rules)

Suspension and Debarment

2 CFR 180.300

- For contracts over \$25,000 you must verify that the person with whom you intend to do business is not excluded or disqualified.
- This MUST be done by either:
 - a. Checking SAM.gov; or
 - b. Collecting a certification from that person; or
 - c. Adding a clause or condition to the covered transaction with that person.



Computing Devices

Equipment

200.33 (pg 99)

- Equipment: tangible, nonexpendible, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit.
- Grantee may also use its own definition of equipment as long as the definition would at least include all equipment defined above.

Supplies

200.94 (pg 106)

- All tangible personal property other than equipment
 - **NEW:** Computing devices are supplies is less than \$5,000
- **NEW:** Computing devices 200.20 (pg 97)
 - Machines used to acquire, store, analyze, process, public data and other information electronically
 - Includes accessories for printing, transmitting and receiving or storing electronic information

Internal Controls

200.302(b)(4) (pg 119)

- Regardless of cost, grantee must maintain effective control and “**safeguard all assets** and assure that they are used solely for authorized purposes.”

Equipment

200.313(a) and (c)(4) (pg 127)

- **NEW:** Conditional Title vests with the non-Federal entity.
- **NEW:** Cannot encumber the property without approval of Federal agency or Pass-through agency

But

- **NEW:** When acquiring replacement equipment, may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property.

Use of Equipment

200.313(c)(1) and (2) (pg 127)

- Equipment must be used by the Non-Federal entity in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by the Federal award.
- When no longer needed, may be used in other activities with the following priority:
 1. Projects supported by Federal awarding agency
 2. Project funded by other Federal agencies
- Provided such use will not interfere with work on the original projects/programs.



86

Audit Requirements

Audit Requirements

200.501 (pg 177)

- ❑ **NEW:** Threshold increased to \$750,000
- ❑ The federal agency, OIG, or GAO may arrange for audits in addition to single audit

QUESTIONS?



88

~ Legal Disclaimer ~

This presentation is intended solely to provide general information and does not constitute legal advice. Attendance at the presentation or later review of these printed materials does not create an attorney-client relationship with Brustein & Manasevit. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.