



October 14, 2010

Ms. Marguerite Pridgen  
Office of Federal Financial Management  
Office of Management and Budget  
725 17<sup>th</sup> Street, NW  
Washington, DC 20503

Re: RIN 0348-AB61  
OMB Interim Final Guidance, "Requirements for Federal Funding Accountability and Transparency Act Implementation" (75 FR 55663)

Dear Ms. Pridgen:

The Aerospace Industry Association (AIA) appreciates the opportunity to comment on the interim final guidance, "Requirements for Federal Funding Accountability and Transparency Act Implementation" published in the *Federal Register* on September 14, 2010 (75 FR 55663). While we recognize that this guidance seeks to implement a provision of law, for reasons addressed below, we believe the guidance to be excessively burdensome in its implementation of the Federal Funding Accountability and Transparency Act of 2006, as amended by section 6202 of the Government Funding Transparency Act of 2008 (FFATA). We recommend that OMB seek appropriate legislative relief from the Congress for these FFATA requirements.

### **General Comments**

The interim final guidance amends 2 CFR Part 170 to require that recipients report to a public database first-tier subaward data and the total compensation of the five most highly compensated executives of the recipient and first-tier subrecipient(s).

AIA members have serious reservations regarding the interim final guidance and the underlying statute. While we support the goals of increasing transparency in government and providing taxpayers with greater insight as to how their tax dollars are spent, we believe the interim final guidance and underlying statute are overly broad and fail to address serious national security issues associated with this mandate. Additionally, the burdens of accumulating and reporting the required data are significant and will result in increased costs to the U.S. Government. We believe the interim final guidance is excessively burdensome to recipients and first-tier subrecipients and extraordinarily difficult to implement. We recognize that some of the deficiencies with the interim final guidance, but not all of them, are due to requirements imposed by the statute.

Our major concerns with the interim final guidance are presented below. We also have specific concerns that are presented in Attachment A to this letter. All of these concerns underscore why we believe the interim final guidance should be substantially rewritten.

## **National Security**

Implementing the interim final guidance could disclose U.S. national defense technologies, capabilities and key sources of those technologies and capabilities with pinpoint accuracy for those wanting to cause harm to the United States. Merely exempting classified awards from this interim final guidance is, by itself, inadequate protection of our nation's security interests and needs. A system that offers complete disclosure of non-classified award data, including first-tier subrecipients, will facilitate the exploitation of that data anywhere in the world and create added risks to not only recipients and first-tier subrecipients, but also the multitude of missions being carried out by recipients and first-tier subrecipients on behalf of the U.S. Government.

The reporting requirement created by FFATA is also at obvious conflict with the significant and ongoing efforts throughout the U.S. Government to protect "sensitive but unclassified information". The U.S. Government is currently considering means to protect "sensitive but unclassified information" from cyber intrusion. This FFATA interim final guidance, however, seeks to make public on the worldwide web information on first-tier subrecipients that could very well be considered "sensitive but unclassified." For example, from an internet connection anywhere in the world, an individual could assemble information on key technologies or areas of interest in a particular technology or material that is the subject of a grant or cooperative agreement award. This information is not necessarily "classified," but is certainly "sensitive" with respect to the interests of the United States. Given the significant and well-recognized threat this represents, it is difficult to understand why the U.S. Government would work on one hand to protect this data, and on the other hand work to publish that same data under FFATA. If for no other reason, OMB should seriously consider revising the interim final guidance to avoid this obvious and most serious threat to national security.

## **Administrative Burdens**

The interim final guidance will add significant and excessive administrative burdens on recipients to develop, implement, and maintain a system that can be used to populate the U.S. Government's reporting website. We believe OMB's estimated "annual reporting burden" is significantly understated.

The Federal Register (75 FR 43165) includes an estimate of the burden of the interim final guidance, but in our opinion does not address the significant amount of time required for recipients to collect all required data elements for each first-tier subrecipient as well as the executive compensation information. The estimated paperwork burden also does not recognize the very significant burden created by the requirement to maintain the first-tier subaward data over the life of the reported first-tier subawards. It is not unusual for large awards to have many first-tier subawards, and for those subawards to continue for several years. The burden of reporting and maintaining the first-tier subaward data should be obvious, but has not been considered in development of this interim final guidance.

Finally, if uploading subaward data to the website is a manual process whereby an individual is required to type responses to each of the required elements, this further adds to the administrative burdens on recipients.

## Executive Compensation Reporting for Public Companies

The interim final guidance calls for reporting the names and total compensation for each of the five most highly compensated executives for the recipient's and first-tier subrecipient's preceding completed fiscal year. Publicly traded companies are exempt from these reporting requirements if the public already has access to executive compensation information through reports filed with the SEC or IRS. Based on the February 27, 2008 hearing before the House of Representatives, Subcommittee on Government Management, Organization and Procurement<sup>1</sup>, it is clear that Congress does not intend for publicly traded companies to be the focus of the FFATA executive compensation reporting requirements implemented in this interim final guidance. Rather, the FFATA was amended in 2008 to require these listings because of the ability of privately held companies to evade disclosure of compensation levels of their most highly-paid executives -- even when these companies derive most or all of their income from U.S. Government contracts. The FFATA, thus, sought "to align the disclosure requirements for Government contactors with existing requirements for publicly traded companies and nonprofit corporations."<sup>2</sup> The FFATA requirements were never intended to impose new disclosure obligations on publicly traded companies, whose top executives' compensation already is publicly disclosed.<sup>3</sup>

In addition, Congress sought to require disclosure of the highest paid executives of the combined company, rather than a larger number of mid-tier executives whose particular business unit may be awarded an individual grant or cooperative agreement. Congress was conscious of the burdens this legislation could impose if applied more broadly. Congressman Murphy, one of the sponsors of the executive compensation amendment to the FFATA, was asked about potential anti-competitive effects of release of executive compensation on smaller businesses, and stated during a committee hearing that, "We are really getting at private companies that operate and look like some of the bigger public companies that provide that information."<sup>4</sup>

Finally, the interim final guidance and recently-issued CCR Guidance, when read literally, have introduced significant confusion into the publicly traded company exemption, and could be interpreted to greatly expand the numbers and levels of publicly traded company employees potentially subject to the public reporting requirement. Language in the interim final guidance and accompanying CCR Guidance implies that the listing of the five most highly compensated executives should apply at the level of the specific CCR record (DUNS number) for each covered grant and cooperative agreement. It is common for large commercial aerospace and defense companies to have many affiliates and separate site locations, each of which may be awarded U.S. Government grants and cooperative agreements. A single large company may have hundreds of CCR registrations, each with at least one, and in some cases multiple, DUNS numbers. Thus, as applied to these public companies, the interim final guidance and CCR Guidance might be interpreted to require public disclosure of compensation of the 5 most highly compensated at a particular site where a grant or cooperative agreement was awarded and, thus, at a level far below the most highly compensated executives of the

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<sup>1</sup> Hearing Before the House of Representatives, Subcommittee on Government Management, Organization, and Procurement (Feb. 27, 2008) 110-101.

<sup>2</sup> *Id.* at 7.

<sup>3</sup> *Id.* at 73. ("We already have this information with regard to profit and executive compensation when it comes to public companies.")

<sup>4</sup> *Id.* at 73.

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publicly traded combined company. Moreover, as applied to private companies, the interim final guidance could fail to achieve Congress' fundamental intent by resulting in disclosure of mid- to lower-level employees' compensation but not that of the most highly compensated executives in the corporate group as a whole. We have proposed in Attachment A to this letter specific changes to the language of the interim final guidance and to the CCR User's Guide to remove any ambiguity that the disclosure applies only to the highest paid executives of the combined company.

### **Comments and Questions for Clarification**

Attachment A to this letter addresses additional significant areas of concern and highlights areas requiring necessary clarifications in the interim final guidance. We request OMB address these comments and questions, in addition to our other comments, prior to issuance of any final guidance.

### **Conclusion**

For the reasons set forth above, the AIA member associations ask that the interim final guidance be significantly revised since it is excessively burdensome to recipients and first-tier subrecipients and is functionally unworkable. We recognize that some of the deficiencies with the interim final guidance are due, in some part, to the excessive and burdensome requirements imposed by the FFATA. We recommend that OMB seek appropriate amendments to the FFATA from the Congress.

Thank you for the opportunity to provide these comments. We would welcome any additional opportunity to discuss them further with you. If you have any questions, please contact Susan Tonner of AIA, who serves as our project officer for these comments, at 703-358-1087, or [susan.tonner@aia-aerospace.org](mailto:susan.tonner@aia-aerospace.org).

Sincerely,



Richard K. Sylvester  
Vice President  
Acquisition Policy

Attachment

## Attachment A

### Questions/Comments for Clarification of the Interim Final Guidance:

**Reporting of Information:** The reporting requirements conflict with the requirements of many Agency “disclosure of information” policies. Agencies often require prior written approval of the Agency before disclosing to the public the funding agency and any information regarding the award or program. The interim final guidance must clarify if such preapproval requirement applies to the information made publicly available under this guidance, and if it is, provide additional time to obtain such Agency clearance prior to reporting.

**Executive Compensation for Prime Recipients and First-Tier Subrecipients:** Publicly traded companies operate under strict SEC disclosure rules, including public reporting of their most senior executives’ compensation. These SEC reports already include compensation information for the company, including the Parent and wholly owned subsidiaries and affiliates. As such, businesses covered by this SEC reporting qualify for the public company exemption expressly outlined in the interim final guidance. However, the interim final guidance and recently-issued CCR Guidance when read literally, have introduced significant confusion into the public company exemption, and could be interpreted to greatly expand the numbers and levels of company employees potentially subject to the public reporting requirement as noted in our letter above.

To remedy this ambiguity, the interim final guidance, Appendix A to Part 170, Award term paragraph I (b)(1)(ii) should be amended to include the following bracketed and double-underlined language:

(ii) The public does not have access to information about the compensation of the [five most highly compensated] executives [of the recipient, including all affiliates] through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78 m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.”

A similar language change should be made to the first-tier subrecipient portion of executive compensation reporting requirement (Appendix A to Part 170, Award Term, paragraph I(c)(iii)). Our suggested language changes for first-tier subrecipient executive compensation reporting are again bracketed and double-underlined, while proposed deletions are stricken:

(iii) The public does not have access to information about the compensation of the [five most highly compensated] executives [of the first-tier subrecipient, including all affiliates] through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78 m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.”

To further simplify executive compensation reporting requirements of first-tier subrecipients, we urge the OMB to impose the duty of reporting executive compensation upon the first-tier subrecipient itself, rather than the recipient. The information is within the control of the first-tier subrecipient and the reporting obligation should rest there also. Registration in CCR and reporting of executive compensation in CCR will facilitate the pre-population of FSRS and simplify FFATA first-tier subrecipient reporting. Moreover, as first-tier subrecipient's fiscal years end, they could end up reporting different amounts to the same recipient depending on the timing of first-tier subawards, causing confusion.

If the interim final guidance stands as written, the U.S. Government should require the first-tier subrecipient, rather than the recipient, be responsible for reporting at [www.fsrs.gov](http://www.fsrs.gov) or in CCR the executive compensation of its five most highly compensated executives. Recipients should be able to rely in good faith on first-tier subrecipient's reporting of their executive compensation.

We believe that this recommended change to the interim final guidance has the benefit of providing a simple solution, and one that focuses on Congress' intent to exempt the highest paid executives of public companies from additional disclosure requirements beyond those already imposed by the SEC and IRS. In addition, this change is consistent with the guidance issued by OMB in regard to Recovery funding.<sup>5</sup>

In addition, the interim final guidance inappropriately deviates from the statute by expanding the group of recipient personnel whose compensation may be reported. The statute is limited to "officers," while the interim final guidance at 2 CFR 170.315 covers "officers, managing partners or any other employees in management positions." The interim final guidance should be revised to be consistent with the statute and have the disclosure be of the five most highly compensated officers of the company.

It is most important that the CCR Guidance and CCR executive compensation questions precisely track to the language of the award term as revised above by defining the recipient and first-tier subrecipient's executive compensation data to mean the Parent organization, all branches, and all affiliates worldwide. This change would clearly reflect the intent of Congress as noted above, and would align with the noted SEC and IRS guidance.

**Modification of Grants and Cooperative Agreements to incorporate Final Guidance:** The final guidance should allow grants and cooperative agreements awarded with the interim final guidance to be modified, without consideration, to incorporate the final guidance. The burden of reporting will be significant. Having two separate reporting schemes, one for grants and cooperative agreements awarded under the interim final guidance and another for grants and cooperative agreements awarded under the final guidance, would be even more burdensome.

**Recipients and First-Tier Subrecipients located outside the US.** The interim final guidance makes no mention of recipients or first-tier subrecipients located outside the U.S. In this regard, we have two comments/recommendations. First, if a recipient or first-tier subrecipient located outside the U.S. is awarded a grant or cooperative agreement, will that recipient be required to

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<sup>5</sup> Director OMB Memorandum for Heads of Departments and Agencies (M-09-21) states: "Under this Guidance, sub-recipients that receive all or a portion of Recovery funding from a prime recipient may be delegated the responsibility by the prime recipient to report information into the central reporting solution at [www.FederalReporting.gov](http://www.FederalReporting.gov). This Guidance does not provide for such a delegation to vendors. The policy regarding delegation of reporting by the prime recipient is further described in Section 2.3 of this Guidance."

make the Executive Compensation disclosure, and will that recipient be required to use CCR or some other means? Will the same definition of “total compensation” apply (including the reference to the Financial Accounting Standards)? Will “total compensation” need to be reported in dollars or the relevant currency? If the recipient or first-tier subrecipient already discloses its executive compensation to a regulatory agency in its home country, will that disclosure meet the exemption in place of the disclosures to SEC and IRS in FAR 52.204-10 (c)(2)? Is there a list of acceptable international substitutes for the SEC/IRS requirements? Will reporting be consistent with local laws with regard to the disclosure of such information (e.g., the European Union Privacy Directives)? We recommend that FFATA reporting requirements not apply when the award is being made to an entity located outside the U.S. for performance that will take place entirely outside the U.S.

Second, if a “first tier subaward” is awarded to a subrecipient located outside the U.S. and the work will be performed entirely outside the U.S., does the first tier subrecipient reporting requirement apply to that entity? There are elements of the subrecipient reporting that would be problematic for such first-tier subrecipients (for example, DUNS; relevant currency of the award amount; Congressional district; NAICS). We recommend that first-tier subrecipients be exempted from the reporting requirement if the first-tier subrecipient will be awarded to a company located outside the U.S. for performance entirely outside the U.S.

### **Award Term Comments**

- Award Term paragraph I. (a) (3) is unclear with regard to what must be reported. Recommending reword to clarify: “You must report the information specified at <http://www.fsr.gov> for each applicable obligating action.”
- Award Term paragraph I. (b)(1) uses the term “preceding completed fiscal year” and paragraph I (b)(1)(ii) uses the term “preceding fiscal year”, but neither reference mentions that this is the recipient’s fiscal year, not the Government fiscal year. Paragraph I (c) uses the term “subrecipient’s preceding completed fiscal year.” Recommend all citations be revised to reference the Recipient’s or subrecipient’s (as applicable) preceding completed fiscal year.
- Award Term paragraph I. (c)(2) is written as direction to the recipient, but requires the recipient to report first-tier subrecipient executive total compensation... “i. to the recipient.” Paragraph (c)(2) should require the recipient to report on the first-tier subrecipient’s executive compensation.
- Award Term paragraph I. (c)(2) should tell the recipient where to report the first-tier subrecipient’s executive compensation ([www.fsr.gov](http://www.fsr.gov)).
- Award Term paragraph I. (c)(2) does not state that the requirement to report on first-tier subawards does not apply to first-tier subawards less than \$25,000.

### **Additional comments on the Interim Final Guidance**

- We note that the FFATA reporting for both grants, cooperative agreements (at 2 CFR 170) and FAR-based procurements (at FAR 4.14) will use the same systems (CCR, FSR) for reporting. For this and other reasons, it is essential that the reporting requirements contained in 2 CFR 170 and FAR 4.14 be the same in every possible respect. Aligning the requirements will minimize the cost of implementation for contractors and recipients, simplify the reporting for those entities that have both grants, cooperative agreements and FAR-based contracts, and will improve compliance with the requirements. In reviewing the interim

final guidance, we note that OMB has closely paralleled the FAR interim final guidance and greatly appreciate that work.

- 2 CFR 170.110. This section of the interim final guidance allows individual Agencies to create additional implementation guidance. Agencies should be cautioned that this guidance would require grant and cooperative agreement recipients to make changes to their business systems to accommodate the collection and reporting of the required data. These systems changes must accommodate both the 2 CFR170 grant and cooperative agreement guidance and the FAR 4.14 requirements for contracts and subcontracts. Any additional Agency requirements must fit within the common parameters set by 2 CFR170 and FAR 4.14. Inconsistent requirement will create additional complexity and expense.
- We note that 2 CFR 170.110 (b)(3) uses the term “senior” executive. Elsewhere in the guidance only the term “executive” is used. The word “senior” should be deleted.
- 2 CFR 170.320 includes a subparagraph “(b) Does not include...” however, there is no subparagraph (a).
- 2 CFR 170.320(b)(3) states that the interim final guidance does not apply to “any classified award”. However, no definition of a “classified award” is provided. We recommend using the same definition as that contained in FAR 2.101. We also recommend adding language to the final guidance commentary making it clear that a grant or cooperative agreement may be a classified grant or cooperative agreement even though the grant or cooperative agreement document itself is unclassified.
- The interim final guidance does not consistently address exemptions to the guidance. For example:
  - 2 CFR 170.110 states that award to individuals are exempt.
  - 2 CFR 170.220 states that Appendix A Award term only applies to awards greater than \$25,000.
  - 2 CFR 170.320 (b) states that technical assistance, transfers of title to property, classified awards and ARRA awards are exempt.
  - Appendix A to Part 170, Award Term, paragraph (d) is entitled “Exemption”, but only addresses the exemption for certain reporting for entities with gross income less than \$300,000.

We recommend the exemptions be consolidated in one place and consistently referenced throughout the guidance.

- It is AIA’s understanding that the FSRS system will be prepopulated with data on the recipient grant or cooperative agreement from the FPDS system. The purpose of prepopulating the data is to reduce the reporting burden on recipients. It has been the experience of AIA companies that the FPDS data is not always accurate. The final guidance should make clear that correction of the FPDS data that is prepopulated into FSRS is the responsibility of the contracting officer and not the recipient.
- We note that the companion FAR rule implementing FFATA includes a requirement at FAR 52.204-10, paragraph (b) that contractors advise subcontractors that the information provided by subcontractors will be made available to the public. We recommend the 2 CFR 170 guidance similarly require recipients to advise first-tier subrecipients that their data will be made available to the public.