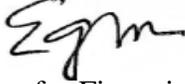




May 28, 2010

TO: Operating and Staff Divisions Heads Managing Recovery Act Programs
(see addressees below)

FROM: Ellen G. Murray 
Assistant Secretary for Financial Resources

SUBJECT: Guidance for Noncompliance with Recipient Reporting Requirements
Under Section 1512 of the American Recovery and Reinvestment Act

Recipients of Recovery Act funding are required by Section 1512 of the American Recovery and Reinvestment Act to submit a recipient report within the deadline established by the Recovery Accountability and Transparency Board. The President issued a Memorandum entitled “Combating Noncompliance with Recovery Act Reporting Requirements” that reinforces the Administration’s emphasis on accountability and requires agencies to intensify their efforts by, wherever authorized and appropriate, terminating awards, reclaiming misused funds or pursuing suspension and debarment of non-reporting grant recipients and contractors.

Each grant and contract funded by Recovery Act contains a standard term and condition requiring the recipient to submit a progress report each quarter. Additionally, the timeframes for recipient reporting are very short and rigid and do not allow for late submissions. Recipients must submit required reports within a 10 day window each quarter. Recipients that fail will be subject to sanctions as specified in the attached guidance including termination of award or possibly suspension or debarment in the most extreme cases. The Recovery Accountability and Transparency Board is closely monitoring recipients, who are not complying with the reporting requirements and will be requesting detailed information on the Department’s actions to bring non-reporting recipients into compliance.

The attached guidance describes actions to be taken against recipients classified as noncompliant with recipient reporting requirements under Section 1512 of the American Recovery and Reinvestment Act. The guidance details the criteria for determining whether noncompliant recipients will be sanctioned and actions to be taken in response to each consecutive instance of noncompliance (first, second, and third). The sanctions for noncompliance are non-negotiable; if a recipient fails to submit a report in three consecutive reporting periods and cannot be excused based on the criteria for determining whether a recipient will be sanctioned, the Operating Division/Staff Division must initiate appropriate actions specified in this guidance.

The following attachments incorporate instructions from the Presidential Memorandum, OMB guidance on noncompliant recipients, and internal Department of Health and Human Services (HHS) guidance on addressing noncompliant recipients:

Attachment A - HHS policy on noncompliant recipients, including a definition of noncompliance and general sanctions for noncompliant recipients;

Attachment B - HHS procedures for addressing noncompliant recipients, including instructions to Operating Divisions (OPDIVs) and Staff Divisions (STAFFDIVs) regarding identifying and sanctioning noncompliant recipients; and

Attachment C - Template for written notification of noncompliant status.

I am also providing you with a listing of the April 2010 recipients who are not compliant and are subject to sanctions.

Questions pertaining to this guidance document should be sent to the Margie Yanchuk in the Office of Recovery Act Coordination, margie.yanchuk@hhs.gov. Thank you for your cooperation.

Attachments

Addressees:

Administration for Children and Families
Administration on Aging
Agency for Healthcare Research and Quality
Centers for Disease Control and Prevention
Centers for Medicare and Medicaid Services
Food and Drug Administration
Health Resources and Services Administration
Indian Health Services
National Institutes of Health
Substance Abuse and Mental Health Services Administration
Office of Public Health and Science
Office of the Assistant Secretary for Administration
Office of the Assistant Secretary for Preparedness and Response
Office of the National Coordinator for Health Information Technology

cc: ARRA Coordinators
Recovery Act Technical Council

Attachment A - HHS Policy on Actions for Noncompliance with Recipient Reporting Requirements Under Section 1512 of the American Reinvestment and Recovery Act

Part A. Definition of Noncompliance

Recovery Act recipients that fail to submit a required Section 1512 recipient report within the deadline established by the Recovery Accountability and Transparency Board shall be classified as noncompliant.

However, a recipient that is unable to submit an ARRA-required recipient report on FederalReporting.gov by the deadline will not be sanctioned by HHS for noncompliance, if all three of the following conditions are met:

- (1) The recipient documents a good faith effort to submit the report electronically. Acceptable documentation includes, but is not limited to, the following:
 - a. A submission confirmation email from FederalReporting.gov;
 - b. A transcript from the FederalReporting.gov help desk indicating that it is not possible for the recipient to submit a report online or transcripts of other unresolved technical issues; or
 - c. Documentation from Dun and Bradstreet or the Central Contractor Registration (CCR) indicating that issues with Data Universal Numbering System (DUNS)/CCR cannot be resolved by the reporting deadline
- (2) The recipient is able to furnish a manual version of the recipient report¹ if requested by the Recovery Act Transparency Board; and
- (3) The recipient, in consultation with the HHS OPDIV/STAFFDIV, develops a plan to resolve the technical barriers for the next reporting quarter.

Further, if all three of the above conditions are met, the mere inability to submit the required report does not constitute a “material” or “substantial” failure to comply within the meaning of any applicable enforcement provision, such as in 45 CFR 74.62 and 92.43.

Part B. Sanctions for Noncompliance

The April 6th Presidential Memorandum entitled “Combating Noncompliance with Recovery Act Reporting Requirements,” instructs agencies to implement authorized and appropriate sanctions for noncompliance, such as suspension and debarment; reclaiming funds; and considering, initiating, and implementing punitive actions. Consistent with this memorandum, HHS prime recipients who are deemed to be noncompliant will be subject to the following sanctions, except where prohibited by law:

¹ A manual version of the report is defined as a completed Excel recipient reporting template, which is available on FederalReporting.gov.

First instance of noncompliance: The OPDIV/STAFFDIV sends a formal written notification, in accordance with HHS process requirements, to remind the recipient that reporting is mandatory and that noncompliance may result in the withholding of payment or placing the grantee on cost reimbursement, award termination, Government-wide suspension or debarment, or other remedies that are both authorized and appropriate under the particular facts and legal authorities governing the program. The template of this formal notification is enclosed as Attachment C. In the formal written notification the OPDIV/STAFFDIV may also wish to specifically identify, among potential enforcement action(s), which remedy will occur following any second and/or third instance(s) of noncompliance. The recipient will be required to provide the reason for not submitting the required report and a plan to submit a report electronically in the next reporting quarter.

Second instance of noncompliance: The OPDIV/STAFFDIV initiates an authorized and appropriate action, such as a withholding of funds or placing the grantee on cost reimbursement until the recipient submits a report electronically in the next reporting quarter, or initiates another similar action that is both authorized and appropriate under the particular facts and legal authorities governing the program. The OPDIV/STAFFDIV sends a formal written notice in accordance with HHS processes to inform the recipient of the HHS action being taken. If the recipient has already drawn down or expended all funds that were awarded, the awarding official may initiate an alternative course of action that is both authorized and enforceable, such as: (i) the inclusion into any non-competing continuation award of a special term and condition that withholds the payment of award funds, or restricts the advance payment of such funds, unless and until the recipient timely submits a report in the next reporting quarter, (ii) including the recipient's failure to comply with the reporting requirements as part of the recipient's performance record, (iii) formally elevating the instances of noncompliance within the recipient's organization or company, etc. If appropriate, the awarding official may consider obtaining OGC review of any of these or similar enforcement actions to be implemented. Some programs or awards may have unique enforcement provisions about which OPDIVs/STAFFDIVs may wish to consult OGC.

Third instance of noncompliance: The OPDIV/STAFFDIV continues to withhold funds and initiates a termination for cause (Federal assistance), termination for default (contracts), or other significant sanction that is both authorized and appropriate under the particular facts and legal authorities governing the program. The OPDIV/STAFFDIV must obtain OGC review before implementing any of these, similar or other enforcement actions for which there is an administrative appeals process. The awarding official may want to consider recommending Government-wide suspension or debarment to the HHS Debarment Official (DAS/GAPA) with OGC review. In that case, while the HHS Debarment Official is considering such a remedy in consultation with OGC, this deliberative process is internal and therefore these potential remedies should not be discussed with the recipient unless and until any final determination has been made.

In accordance with OMB May 4th memo *Holding Recipients Accountable for Reporting Compliance under the American Recovery and Reinvestment Act (M-10-17)*, all sanctions for two or more consecutive noncompliance reporting periods must be initiated within 20 business days of the date that the award is certified as noncompliant by the HHS Senior

Accountable Official (who is the HHS Deputy Secretary). Also, the OPDIVs/STAFFDIVs will be required to contact previously noncompliant recipients before the next reporting period and to increase their monitoring and surveillance of the recipients' reporting status.

C. Tracking Noncompliance

OPDIV/STAFFDIV Recipient Reporting Senior Accountable officials shall submit a certified list of noncompliant recipients to the Office of Recovery Act Coordination each quarter; four business days after the recipient reporting data are first posted on Recovery.gov. In addition, OPDIVs/STAFFDIVs will document the reasons for noncompliance provided by the recipient and the status of any sanctions that are applied through the recipient reporting tracking process such as the Master File.

Attachment B - HHS Procedures for Implementing the Policy on Noncompliant Recipients

This document provides the procedures to implement Part A. Definition of Noncompliance and Part B. Sanctions for noncompliance under Attachment A above.

Part A. Definition of Noncompliance

Procedure: Identify Noncompliant Recipients

This procedure needs to be completed before the 5th business day (certification of the missing reports) after close of the Agency Review period of the reporting quarter.

1. **Contact the Recipient:** OPDIV/STAFFDIV should contact the recipient to determine why the recipient did not report during the reporting period. This contact, either through email or verbal communication, must be documented in the award file and recorded in the OPDIV/STAFFDIV's Recovery Act Master File.
2. **Identify and Analyze Missing Reports:** Each OPDIV/STAFFDIV should evaluate the identified missing reports for the present reporting period to determine if the recipient is noncompliant, based on the criteria in Part A of Attachment A above.
3. **Provide the list of Noncompliant Recipients Subject to Enforceable Actions to ORAC:** The OPDIV/STAFFDIV shall send their certified list of Noncompliant Recipients Subject to Enforceable Actions to ORAC four business days after the end of the Agency Review period of the reporting quarter. As mandated by Section 1512 of ARRA, HHS' Senior Accountable Official will provide a certified letter to OMB identifying the "Noncompliant" recipients for the reporting period five business days after the end of the Agency Review period of the reporting quarter.

Procedure: Identify Multiple Time Noncompliant Recipients

This procedure needs to be completed before the 5th business day (certification of the missing reports) after close of the Agency Review period of the reporting quarter.

1. **Determine if the Recipient is a Multiple Time Non-Complier:** Based on the application of the definition in Part A of Attachment A above, OPDIVs/STAFFDIVs will determine if the recipient is classified as a multiple time Non-Complier. If this term applies to the recipient, the OPDIV/STAFFDIV should begin to determine the sanctions applicable to the situation based on Part B criterion of Attachment A above.
2. **Determine the Sanctions for the Recipient:** The OPDIV/STAFFDIV will determine the authorized and appropriate enforcement action(s) to sanction the multiple time noncompliant recipients.

Part B. Sanctions for Noncompliance

Procedure: First instance of Noncompliance

This procedure needs to be initiated after the validation and classification that the recipient has had a first instance of noncompliance after the close of the Agency Review period of the reporting quarter.

1. **Identify Noncompliant Recipient:** Based on the Part A criterion of Attachment A above, OPDIVs determine which recipients have committed the first instance of noncompliance.
2. **Provide Written Notification to Recipient:** Use the HHS template (Attachment C below) to provide the noncompliant recipient written notification of the potential consequences of current and continued noncompliance with the Recovery Act's Section 1512 reporting requirements.
3. **Review of Written Notification:** If the OPDIV/STAFFDIV uses the HHS template for the written notification of the first instance of noncompliance, the Office of The General Counsel (OGC) will not need to review the notification letter. The OPDIV/STAFFDIV may wish to incorporate additional facts or specifically identify, among the potential enforcement actions, which remedy is certain to occur following any second and/or third instance(s) of noncompliance. However, if an OPDIV/STAFFDIV deviates substantially from the template, the awarding official will need to send the written notification to OGC for review and approval.
4. Send the written notification to the recipient and document the official grant or contract file.
5. OPDIVs should send copies of the written notification to Office of Grants and Acquisition Policy and Accountability (OGAPA) for all notifications sent to grant and contract recipients.

Procedure: Second and Third Instances of Noncompliance

In accordance with OMB Memorandum M-10-17, procedures for consecutive noncompliance need to be initiated before the 20th business day after the submission of the missing reports to OMB. The submission of the missing reports to OMB occurs on the 5th day after the close of the Agency Review period of the reporting quarter.

1. **Identify a Second or Third Instance of Noncompliance:** Based on the Part A criterion of Attachment A above, OPDIVs determine which recipients have committed a second or multiple time instance of noncompliance.
2. Determine the authorized and appropriate actions that will be taken for these instances on noncompliance under the criteria in Attachment A, Part B, in consultation with OGC to the extent indicated in that section.
3. **Inform Recipient of Application of Authorized and Appropriate Actions:** The OPDIV/STAFFDIV sends a written notification to the recipient of the authorized and appropriate actions that will occur to remedy the noncompliance with Section

1512 of ARRA. The OPDIV/STAFFDIV will document the written notification in the official award file.

4. Take specific authorized and appropriate actions to sanction the recipient and document the official award file.
5. OPDIV/STAFFDIV will inform OGAPA of the above authorized and appropriate actions, upon request.
6. After the end of the Continuous Review period, provide an update to ORAC about the status of the actions taken.

Attachment C - Template for the First Instance of Noncompliance -- Written Notification to the Recipient

To [Recipient],

This letter is to inform you that a prime recipient report was not filed for your [grant/contract] award, [Award #/ Order # (if applicable)] for the [Program Name] in the reporting system, FederalReporting.gov of the American Recovery and Reinvestment Act (ARRA) of 2009 for the [current] Reporting Period. In accordance with the terms and conditions of your [grant/contract] award and Section 1512 of ARRA, the recipients of ARRA funding are required to report on a quarterly basis for the duration of the use of ARRA funding. Timely, comprehensive, and accurate recipient reporting must be accomplished to effectively meet the transparency and accountability objectives of the Recovery Act. Consequently, timely submission of your ARRA quarterly reports is an essential requirement and a material term and condition of your award.

A report must be filed in FederalReporting.gov for the [Next Reporting Month] Reporting Period, but can only be submitted during days 1-10 of that month, to comply with the reporting requirements of Section 1512. Because reports for the [Next Reporting Month] reporting period can only be submitted in FederalReporting.gov during the first ten calendar days of that month, any recipient that fails to submit its report during those ten days may be identified as noncompliant irrespective of any intent or attempt to submit the data following the tenth calendar day. In other words, noncompliance in any reporting period may not be cured through submission of a missing report after the final date by which it is due. A recipient that does not comply with the reporting requirement by submitting each quarterly report on a timely basis is in material violation of the terms and conditions of its award. Accordingly, the Department of Health and Human Services (HHS) [OPDIV/Grants/Contracts Officer] may impose any authorized and appropriate enforcement actions or sanctions. These may include, but are not limited to, withholding funds, withholding non-competing continuations, noting in performance or integrity information systems the recipient's failure to report, award termination, or Government-wide suspension or debarment.

Below is the key award information for the [grant/contract] that was not reported in the [current] Reporting Period. [Recipient Name] must report in [Next Reporting Month]. Your Key Award Information is:

- DUNS Number:
- Award Number:
- Order Number (if applicable):
- Award Amount:
- Award Date:

[The OPDIV/STAFFDIV may wish to incorporate additional facts or specifically identify, among the potential enforcement actions, which remedy is certain to occur following any second and/or third instance(s) of noncompliance.]

There are several steps to take before you can report in the [FederalReporting.gov](https://www.federalreporting.gov) system. Please go to [FederalReporting.gov](https://www.federalreporting.gov) or contact your HHS technical representative to request information about this process.

Awarding Official Name