Federal agencies must implement sections 4, 5, and 6 by February 3, 1979. OMB's intent in issuing guidance is to promote consistent implementation of the Act. Section 8 of the Act requires OMB to conduct a study of Federal assistance relationships and provide a report to Congress no later than February 1980. This will focus on developing a better understanding of alternative mechanisms for implementing Federal assistance programs and on determining the feasibility of developing a comprehensive system of guidance for Federal assistance programs. In undertaking the study, OMB is required by the Act to consult and, to the extent practicable, involve representatives of the executive agencies, Congress, General Accounting Office, State and local governments, other recipients, and interested members of the public. A draft plan outlining the proposed scope of the study was published in the Federal Register on June 23, 1978, for comment. Comments on the draft plan are due to OMB by August 23, 1978.

FOR FURTHER INFORMATION CONTACT:

DAVID R. LEUTHOLD, Budget and Management Officer.

SUMMARY OF MAJOR COMMENTS ON THE DRAFT GUIDANCE AND THE OMB RESPONSE:

The Act authorizes the Director of OMB to issue supplementary interpretative guidelines to promote consistent and efficient use of contracts, grants, and cooperative agreements. On May 19, 1978, OMB published a proposed draft of the guidance in the Federal Register for comment.

Numerous comments were received from Federal agencies and others. The majority of the comments suggested ways for improving the clarity of the draft and many of these improvements are reflected in the final guidance. Some comments dealt with aspects or potential effects of the Act itself that are beyond the scope of this guidance. There were also comments or suggestions that could not be used in revising the guidance, but which will be considered during the study.

A summary of the more important substantive comments about specific parts of the draft proposal along with the OMB response to them follow:

**A. OMB Interpretation of the Act.**


   **Comment.** One agency pointed out that there are a number of types of transactions that are not covered by the Act, such as the sale, lease, license, and other authorizations to use Federal property, when not for the purpose of support or stimulation.

   **Response.** This guidance was amended to reflect this fact. OMB cannot agree with this interpretation, since Pub. L. 95-224 specifically repeals the Grants Act and requires that the appropriate legal instrument be based on the character of the specific transaction (i.e., procurement or assistance) rather than on a functional activity or class of recipient.

2. Interpretation of specific provisions of the Act.

   **Comment.** There were several comments about the clarity of the guidance interpreting subsection 4(2) of the Act, which allows the use of contracts "whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate."

   **Response.** The guidance was revised by including a direct quote from the legislative history, and by stating that in all transactions based on this subsection of the Act, procurement contracts must be used.

   **Comment.** One comment was received expressing the opinion that subsection 7 had to be changed to allow the agencies to use procurement contracts, grants, and cooperative agreements as provided for in the Act unless otherwise prohibited, should be interpreted as replacing the Grants Act. The OMB responded that the OMB has the general authority to use grants for funding research.

   **Response.** OMB cannot agree with this interpretation, since Pub. L. 95-224 specifically repeals the Grants Act and requires that the appropriate legal instrument be based on the character of the specific transaction (i.e., procurement or assistance) rather than on a functional activity or class of recipient.

B. Distinguishing between procurement and assistance.

1. Basic determinations.

   **Comment.** Although a major purpose of the Act is to distinguish between procurement and assistance, several observers indicated they did not feel the OMB draft guidance was in sufficient detail. One comment was made that the guidance should stress the principal purpose of a transaction as being the most important determinant. Two comments requested that agencies be guided to use grants for research funding.

   **Response.** In most cases, agencies will have no trouble distinguishing between procurement and assistance. Where the distinction is hard to make, OMB believes that the agency mission and intent must be the guide, and that more detailed criteria would not be useful. The suggestion that emphasis be placed on the principal purpose was followed. The request to guide the agencies to use grants for fund research is not consistent with the Act. OMB will continue to work with the agen-
cies to promote consistency in agency determinations on procurement and assistance distinctions.

B. 2. Assistance awards to for-profit organizations.

Comment. Some of the comments indicated confusion over whether the Act authorizes assistance awards to for-profit organizations.

Response. A subsection was added that indicates assistance awards may be made to for-profit organizations if the awards are consistent with sections 4, 5, and 6 of the Act.

C. Characterization of grants and cooperative agreements.

Comment. There were several expressions of concern that cooperative agreements, as a new class of assistance, might lead to greater Federal involvement, particularly in research projects.

Response. The guidance has been revised to state that nothing in this Act can be interpreted as a basis for increasing Federal involvement beyond that authorized by program statutes.

D. Agency decision structure for selection of instruments.

Comment. It was pointed out that the guidance, as drafted, would not apply to the organization and processes of some agencies.

Response. The guidance was rewritten to convey the original intent but to be less restrictive on how agencies should follow it.

E. Administrative requirements for grants and cooperative agreements.

Comment. There were a number of comments about whether or not these requirements should apply to cooperative agreements. It was also pointed out that some of these requirements do not now apply to some classes of recipients, such as for-profit organizations.

Response. The legislative history specifically indicates that OMB Circular A-102 is part of the existing system of guidance, and the creation of the cooperative agreement instrument should not lead to a bypass of this initial step. The point about the limited applicability of some of the administrative requirements has been included in the final guidance. OMB will consider the question of administrative requirements as they relate to grants and cooperative agreements during the study required by section 8 of the Act.

F. Specific guidelines for grants.

1. Distinction between grants and subsidies.

Comment. Several comments were received that the draft guidance on this point was inadequate.

Response. The distinction between grants, which are covered under section 5 of the Act, and subsidies, which are not, will have to be included in the section 8 study. Accurate coverage is not possible at this time, so this paragraph has been removed from the guidance.

L. Agency records and OMB reporting requirements.

Comment. There were numerous comments that both of these sections impose a considerable burden on the agencies.

Response. One purpose of the Act is to provide Congress with more information on the operations of Federal assistance programs. OMB is trying to keep the burden to a minimum, consistent with this purpose. These sections are to give the agencies an early indication of the type of information that will be needed.

GUIDANCE TO THE FEDERAL AGENCIES

The transmittal memorandum from the Director of OMB to the heads of Federal agencies and the attached guidance follow.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

From: James T. McIntyre, Jr.

Subject: OMB Guidance for Implementing the Federal Grant and Cooperative Agreement Act.

The Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224) requires that by February 3, 1979, Federal agencies use procurement contracts to acquire property or services for the direct benefit or use of the Federal Government and that cooperation agreements to transfer money, property, services, or anything of value to recipients accomplish a Federal purpose of stimulation or support authorized by statute.

The act authorizes the Office of Management and Budget to issue supplementary interpretative guidelines to promote consistent and efficient implementation of sections 4, 5, and 6. Subsection 10(d) authorizes the Director to except individual transactions or programs from the act's provisions.

In addition, section 8 of the act requires OMB to conduct a study of Federal assistance relationships and submit a report to Congress in 2 years.

The guidelines that follow are based on OMB authorizations under sections 8, 9, and 10(d).

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A. OMB Interpretation of the Act.

B. Distinguishing between procurement and assistance.

C. Characterization of grants and cooperative agreements.

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D. Agency decision structure for selection of instruments.
E. Administrative requirements for grants and contracts.
F. Specific guidelines for grants.
G. Specific guidelines for cooperative agreements.
H. Assistance transactions involving only non-monetary transfers.
I. OMB exception policy.
J. OMB exception procedures.
K. Joint funding under grants and cooperative agreements.
L. Agency records.
M. OMB reporting requirements.

GUIDANCE

A. OMB INTERPRETATION OF THE ACT

1. **General purposes of the Act.** OMB views the Federal Grant and Cooperative Agreement Act as an important opportunity to review, improve, and simplify the broad array of Federal assistance relationships. It sees the Act's objective of Federal consistency for various types of relationships coinciding with the President's goal of making Federal program actions more understandable and predictable. Agencies should give serious consideration to the policy implications of the Act's provisions, particularly Sections 4, 5, and 6, pertaining to the use of contracts, grants, and cooperative agreements as these involve the essence of the way agencies perform fundamental functions.

This Act does not cover all possible relationships that may exist between Federal agencies and others. For example, the sale, lease, license, and other authorizations to use Federal property, when not for the purpose of support or stimulation, are not within the scope and intent of Pub. L. 95-224 or this guidance.

2. **Ordinary implementation of sections 4, 5, and 6.** These sections of the Act require agencies to use contracts for all procurement actions, and grants or cooperative agreements to transfer money, property, services, or anything of value to recipients to accomplish a Federal purpose of stimulation or support authorized by statute. Subsection 10(b) says:

Nothing in this Act shall be construed to render void or invalid any existing contract, grant, cooperative agreement, or other contract, grant, or cooperative agreement entered into up to one year after the date of enactment of this Act.

The legislative history clearly indicates that Congress intended this provision to provide one year for orderly implementation of sections 4, 5, and 6. The Act was signed February 3, 1978. Agencies have until February 3, 1979, to implement these sections in accordance with the OMB guidelines.

3. **Interpretation of specific provisions of the Act.** To promote consistency, agencies should interpret subsections 4(2), 7(a), and 7(b) of the Act as follows:

a. Subsection 4(2) allows the use of contracts "whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate."

b. **Subsection 7(a).**

Notwithstanding any other provision of the law, each executive agency authorized by law to enter into contracts, grants or cooperative agreements, or similar arrangements is authorized and directed to enter into and use types of contracts, grant agreements, or cooperative agreements as required by this Act.

If, prior to the passage of the Act, an agency was authorized to use one or more of the three instruments—procurement contracts, grants, or cooperative agreements—to accomplish a public purpose of stimulation or support, such an agency should continue to use those instruments until the Federal Procurement Regulation, and other procurement regulations authorized by law, govern policy and procedures regarding procurement contracts. Section 4 of this guidance includes a reporting requirement for procurement transactions based on subsection 4(2).

c. **Subsection 7(b).**

The authority to make contracts, grants, and cooperative agreements for the conduct of basic or applied research at nonprofit institutions of higher education, or at nonprofit organizations who primary purpose is the conduct of scientific research shall include discretionary authority, when it is deemed by the head of the executive agency to be in furtherance of the objectives of the Act, to stipulate conditions as deemed appropriate, title to equipment or other tangible personal property purchased with such funds.

The Act repeals the Grants Act, Pub. L. 85-534, which authorized the use of grants for scientific research. This provision expands this authority to other classes of property and applies to procurement contracts and cooperative agreements as well as grants.

B. **DISTINGUISHING BETWEEN PROCUREMENT AND ASSISTANCE**

1. **Basic determinations.** While one of the major objectives of the Act is to distinguish between procurement and assistance relationships, neither term is specifically defined. Section 4 requires use of a procurement contract when the principal purpose is acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government. Sections 5 and 6 require the use of grants or cooperative agreements when the principal purpose is the transfer of money, property, services, or anything of value to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use by the Federal Government.

Agencies should interpret the language of sections 5 and 6 which call for the use of grants or cooperative agreements to "accomplish a public purpose of support or stimulation authorized by Federal statute" as including but not restricted to traditional assistance transactions. Thus, for example, where an agency authorized to support or stimulate research decides to enter into a transaction where the principal purpose of the transaction is to stimulate or support research, it is authorized to use either a grant or a cooperative agreement. Conversely, if an agency is not authorized to stimulate or support research, or the principal purpose of a transaction funding research is to produce something for the government's own use, a procurement transaction must be used. Until the Federal Acquisition Regulation is published, the Federal Procurement Regulation, the Armed Services Procurement Regulation, and other procurement regulations authorized by law govern policy and procedures regarding procurement contracts.

2. **Assistance awards to for-profit organizations.** Subject to the requirements of sections 4, 5, and 6 of the Act, assistance awards must be made to for-profit organizations when deemed by the agency to be consistent with legislative intent and program purposes.

3. **When to decide on the use of procurement or assistance instruments.** Any public notice, solicitation, or request for applications or proposals should indicate whether the intended relationship will be one of procurement or assistance.

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C. Characterization of Grants and Cooperative Agreements

1. Anticipated substantial involvement during performance. The basic statutory criterion for distinguishing between grants and cooperative agreements is that for the latter, "substantial involvement is anticipated between the executive agency and the recipient during performance of the contemplated activity" (emphasis added). To insure consistent determinations, all agencies should use only this criterion when deciding to use either a grant or a cooperative agreement.

(a) Anticipated substantial Federal involvement is a relative rather than an absolute concept. The examples that follow in (b) and (c) are not meant to be a checklist or to be considered as individual determinants. Rather, they are to illustrate the general policy that:

(1) When the terms of an assistance instrument indicate the recipient can expect to run the project without agency collaboration, participation, or intervention as long as it is run in accordance with the terms of the assistance instrument, substantial involvement in the project is anticipated.

(2) When the instrument indicates the recipient can expect agency collaboration or participation in the management of the project, substantial Federal involvement is anticipated.

(b) As a guide to making these determinations, anticipated substantial involvement during performance does not include:

(1) Agency approval of recipient plans prior to award.

(2) Normal exercise of Federal stewardship responsibilities during the project period such as site visits, performance reporting, financial reporting, and audit to insure that the objectives, terms, and conditions of the award are accomplished.

(3) Unanticipated agency involvement to correct deficiencies in project or financial performance from the terms of the assistance instrument.

(4) General statutory requirements understood in advance of the award such as civil rights, environmental protection, and provision for the handicapped.

(5) Agency review of performance after completion.

(6) General administrative requirements, such as those included in OMB Circulars A-21, A-95, A-102, A-110, and FMC 74-4.

(c) Conversely, anticipated involvement during performance would exist and, depending on the circumstances, could be substantial, where the relationship includes, for example:

(1) Agency power to immediately halt an activity if detailed performance specifications (e.g., construction specifications) are not met. These would be provisions that go beyond the suspension remedies of the Federal Government for nonperformance as in OMB Circulars A-102 and A-110.

(2) Agency review and approval of one stage before work can begin on a subsequent stage during the period covered by the assistance instrument.

(3) Agency review and approval of substantive provisions of proposed subgrants or contracts. These would be provisions that go beyond existing procurement standards and source procurement.

(4) Agency involvement in the selection of key recipient personnel. (This does not include assistance instrument provisions for the handi capped.

(5) Agency and recipient collaboration or joint participation.

(6) Agency monitoring to permit specified kinds of direction or redirection of the work because of interrelationships with other projects.

(7) Substantial, direct agency operational involvement or participation in the atypical prior to award to insure compliance with such statutory requirements as civil rights, environmental protection, and provision for the handicapped. Such participation would exceed that normally anticipated under (b)(4), above.

(8) Highly prescriptive agency requirements prior to award limiting recipient discretion with respect to scope of services offered, organizational structure, methods of operation, and other management processes, coupled with close agency monitoring or operational involvement during performance over and above the normal exercise of Federal stewardship responsibilities to ensure compliance with these requirements.

2. OMB policy on substantial involvement. Agencies should limit Federal involvement in assisted activities to the minimum consistent with program requirements. Nothing in this Act should be construed as authorizing agencies to increase their involvement beyond that authorized by other statutes.

3. How technical assistance and guidance relate to substantial involvement. The practice of some agencies of providing technical assistance, advice, or guidance to recipients of financial assistance does not constitute substantial involvement if:

(a) It is provided at the request of the recipient, or

(b) The recipient is not required to follow it, or

(c) The recipient is required to follow it, but it is provided prior to the start of the assisted activity and the recipient understood this prior to the financial assistance award.

4. What to do if grants or cooperative agreements do not fit program requirements. There may be a few cases of assistance programs covered by section 5 or 6 of the Act where neither a grant nor a cooperative agreement is suitable. In such cases, an OMB exception should be requested in accordance with sections I and J below.

5. Competition for assistance awarded. Consistent with the purposes of Pub. L. 95-224, agencies are encouraged to maximize competition among all types of recipients in the award of grants or cooperative agreements, in consonance with program purposes.

D. Agency decision structure for selection of instruments

The determinations of whether a program is principally one of procurement or assistance, and whether substantial Federal involvement in procurement or assistance will normally occur are basic agency policy decisions. Agency heads should insure that these general decisions for each program are either made or reviewed at a policy level. A determination that a program is principally one of procurement or assistance does not preclude the use of any of the types of instruments when appropriate for a particular transaction. Congress intended the Act to allow agencies flexibility to select the instrument that best suits each transaction. Agencies should insure that all transactions covered by the Act are consistent with their basic policy decisions for each program.

E. Administrative requirements for grants and cooperative agreements

Present administrative requirements such as OMB Circulars A-21, A-95, A-102, and A-110 apply to both grants and cooperative agreements involving the transfer of Federal funds. Some of these administrative requirements apply to specific classes of recipients such as State and local governments. This guidance does not extend the coverage of these requirements to instruments with other recipient classes such as for-profit organizations. These
administrative requirements will not apply to General Revenue Sharing or Anti-Recession Fiscal Assistance Grants administered by the Treasury Department.

Each cooperative agreement should include an explicit statement of the nature, character, and extent of anticipated Federal involvement. These statements must be developed with care to avoid unnecessarily increasing Federal liability under the assistance instrument.

II. ASSISTANCE TRANSACTIONS INVOLVING ONLY NONMONETARY TRANSFERS

1. Types of assistance included. Sections 5 and 6 apply to transactions that transfer “property, services, or anything of value, which could include consultation, technical assistance, information, and data. This section of the guidance applies to agencies and programs that provide such types of nonmonetary assistance apart from fund transfers.

2. Applicability of administrative standards. Section E above stated that existing administrative standards (e.g., OMB Circulars A-95, A-102, A-110) apply to grants and cooperative agreements involving grant funds. Agencies are encouraged, however, to use these standards where appropriate, and in some cases, their use is required for nonmonetary transfers. For example, a donation of a parcel of land to a local government is the type of Federal action covered by Part II of A-95, but other administrative standards may not apply.

3. OMB exception for nonmonetary assistance. OMB exempts programs and transactions providing nonmonetary assistance from the provisions of section 5 of the Act. Existing agency practices for providing nonmonetary assistance where no Federal involvement in the assisted activity is anticipated should continue. Thus a formal grant instrument is not required to provide surplus property, consultation, or data. Where substantial Federal involvement in the assisted activity is anticipated, however, a cooperative agreement is required as indicated in section 6 of the Act. Agencies engaged in the provision of nonmonetary assistance will be asked to report on these activities under section M below.

I. OMB EXCEPTION POLICY

1. General. Section 10(d) authorizes the Director of OMB to:

   a. Exceptions to OMB Circulars A-95, A-102, and A-110, where applicable.
   b. Other exceptions to OMB Circulars A-95, A-102, and A-110, where appropriate.
   c. Other exceptions to OMB Circulars A-95, A-102, and A-110, where necessary.

2. Statement of Federal involvement. Each cooperative agreement must include an explicit statement of the nature, character, and extent of anticipated Federal involvement. These statements must be developed with care to avoid unnecessarily increasing Federal liability under the assistance instrument.

III. WAIVER OF ADMINISTRATIVE STANDARDS

1. General. OMB is responsible for most of the administrative standards that apply to assistance programs. Agencies should follow these standards. The circulars that establish these standards presently provide procedures for granting of waivers. If the standards appear unsuitable to a particular situation, requests for waivers should be sent to the OMB office responsible for the circular or the responsible agency if not OMB (e.g., for GSA uniform relocation provisions). Requests for waivers to financial management circulars should be addressed to John Lordan, Chief, Financial Management Branch, OMB, Room 6002, NEOB, Washington, D.C. 20503.

IV. OMB EXCEPTION PROCEDURES

A request for an OMB exception under this Act should be addressed to Deputy Associate Director for Intergovernmental Affairs, Room 9025, NEOB, Washington, D.C. 20503. It should include:

1. A statement on whether the exception is requested for a complete program or an individual transaction.
2. An explanation of why an exception is requested, including statutory, agency policy, or other reasons.
3. A statement of what the agency will do if an exception is not granted and what the implications would be if this action were taken.
4. An indication of how the agency will handle the situation if the OMB exception expires before there are any changes to either this Act or agency statutes.

V. JOINT FUNDING UNDER GRANTS AND COOPERATIVE AGREEMENTS

Subsection 10(c) of the Act specifically provides for projects funded under the Joint Funding Simplification Act that include more than one type of assistance relationship. Thus a project with some components funded by grants and others by cooperative agreements is entirely permissible. Agencies should view this Act as providing the opportunity and authority to participate in joint funded projects in order to enter into relationships to serve the best interests of the participating agencies programs.
L. AGENCY RECORDS

Both Congress and OMB view this Act as a preliminary step toward long-range overhaul of Federal assistance activities. The requirement for agencies to implement sections 4, 5, and 6 in one year is, in large part, to begin the systematic gathering of data about Federal assistance relationships. Agencies should anticipate that congressional committees, the General Accounting Office, and OMB will be asking extensive questions about the effects of implementing these sections. While the questions may vary from agency to agency, they can reasonably be expected to deal with operating experience for a year or more after full implementation. Agencies should develop systems of records that would allow them to answer questions such as:

1. How many financial grants have been awarded in accordance with section 5 of the Act? What was the dollar volume and what classes of recipients were involved (e.g., State governments, universities, hospitals, individuals)?
2. For which programs did the agency decide to use grants exclusively? Why?
3. How many financial assistance cooperative agreements have been awarded in accordance with section 6 of the Act? What was the dollar volume and what classes of recipients were involved?
4. For which programs did the agency decide to use cooperative agreements exclusively? What are the nature and reason for the agency involvement?
5. For which programs were both grants and cooperative agreements used? What were the criteria for determining the instrument used?
6. What types of nonmonetary assistance transfers were made as grants? What types as cooperative agreements?
7. What was the agency's experience in implementing sections 4, 5, and 6? How did it contribute to improved projects, management, or intergovernmental relations? What problems has the Act presented that can be expected to continue?

M. OMB REPORTING REQUIREMENTS

The experience of the agencies in making decisions necessary to implement sections 4, 5, and 6 of the Act will be important to the study required by section 6. In addition, to the more general questions about the feasibility of a comprehensive system of guidance for assistance activities, the report to Congress must include a summary of the effects of sections 4, 5, and 6. For these reasons, agencies are to provide by March 1, 1979, a report to OMB that includes the following:

1. Distinguishing between procurement and assistance:
   a. What types of activities did the agency have trouble making the distinction between procurement and assistance? Why?
   b. On what basis were the issues resolved?
2. Use of procurement contracts:
   a. What activities formerly funded through grants or other assistance instruments will now be handled with procurement contracts?
   b. What is the anticipated dollar volume of these procurement contracts?
   c. What is expected to be the impact of this shift on the agency?
   d. Who will be the principal recipients of these contracts?
   e. What is expected to be the impact on the recipients?
3. Agency decisions on when to use grants or cooperative agreements:
   a. Describe the process by which the agency decided which programs would use:
      (1) Only grants.
      (2) Only cooperative agreements.
      (3) Both grants and cooperative agreements.
   b. Which programs, as listed in the Catalog of Federal Domestic Assistance, will fall into each of the above three categories? For those in category 3 what is the expected mix in terms of total dollars and numbers of transactions?
   c. What programs not listed in the Catalog of Federal Domestic Assistance will fall into each of the three categories? For those in category 3 what is the expected mix in terms of total dollars and numbers of transactions?
   d. What is the anticipated first-year dollar volume of the programs in each of the three categories?
4. Nonmonetary assistance transfers:
   a. What were the types and dollar value of nonmonetary transfers made by the agency using grant instruments?
   b. How do these grant instruments compare with monetary grant instruments?
   c. What were the types and dollar value of nonmonetary transfer made under the OMB exception that did not use grant instruments?
   d. How would the agency have treated these transfers had not OMB granted the exception?
   e. What were the types and dollar value of nonmonetary transfers made through cooperative agreements?
   f. What was the agency's experience with this use of cooperative agreements?
5. Overall evaluation of the Act:
   a. What elements of the Act are contributing to improved program performance and administration?
   b. What elements of the Act are particularly troublesome? Why?
   c. What proposals would the agency make for revising the Act?