



**Comments for OMB April 3 Interim Guidance
on Implementation of the Recovery Act (M-09-15)**

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Steering Committee

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The Coalition for an Accountable Recovery, a politically diverse coalition concerned about transparency and accountability regarding government spending, is submitting these comments on OMB's memo issued on April 3, 2009, "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009." If implemented, we believe that the comments in this document will help OMB establish a Recovery Act spending tracking system that will provide the unprecedented level of transparency and accountability in federal spending articulated by President Barack Obama when he signed the act into law:

And we expect you, the American people, to hold us accountable for the results. And that's why we've created Recovery.gov -- a web site so that every American can go online and see how this money is being spent and what kind of job is being created, where those jobs are being created. We want transparency and accountability throughout this process.

– President Barack Obama, Feb. 17, 2009

We believe the Obama administration has made significant progress in the two months since the act was signed into law. The interim guidance is an example of this process. At the same time, we hope that further progress can be made.

Toward a Recovery Act Funding and Performance Tracking System

The reporting system described in these comments should essentially trace to the greatest extent possible the flow of federal Recovery Act funds from the source to the ultimate end users and the impact on the economy those funds had at every step in the process.

Although the American Recovery and Reinvestment Act of 2009 (Recovery Act) defines "recipient" as "any entity that receives Recovery Act funds directly from the Federal Government...other than an individual; and includes a State that receives recovery funds," OMB should, in its guidance, expand this definition to include any entity, excluding individuals, that receives Recovery Act funds over \$25,000, whether those funds are received directly from the federal government or from another entity that received Recovery Act funds. Our comments that follow assume "recipient" to mean the expanded definition described above.

Key to maintaining visibility of funds is the proper identification of Recovery Act dollars and recipients of those dollars as such. Data on its use of the funds from recipients should be collected directly by the federal government. And by being able to match reporting data to each recipient, the federal government and the public would have a clear picture of who is receiving Recovery Act money, how much they are getting, and what they are doing with it. Equally important are the means by which this reporting occurs: data must be transmitted in such a way so as to maximize access to as much amount of unfiltered data as possible.

Information flows from agencies to OMB should take place through publicly visible channels. Machine readable feeds represent an ideal way to accomplish this. Through feeds, the public can obtain important disclosures directly from the source, that is, directly from the agency officials who manage grants and other spending programs. Feeds enable decentralization of disclosure, and offer greater transparency because information flows can take place within public view, and not hidden behind many layers of bureaucracy that may delay, filter, or even distort this reporting.

Sub-Award Reporting

Recommendation: *OMB should require all recipients of Recovery Act funds over \$25,000, regardless of how many layers removed from the initial federal disbursement that receipt is, to submit a report on the use of those funds identical to that of Sec. 1512 of the Recovery Act. OMB should also provide a projected date or timeframe of when this multi-tier sub-award reporting will be required.*

As mentioned above, it is of primary importance that all recipients and sub-recipients, regardless of how many layers removed from the initial federal disbursement should be required to report to the system for any Recovery Act money over \$25,000. A change by OMB of its definition of “recipient” to include this description would resolve our concerns. But even if such a redefining of recipient does not occur, OMB should be clear that the rules that apply to prime awardees also apply to all tiers of sub-awardees. Without a policy that requires all recipients of Recovery Act funds, regardless of their level of sub-award (i.e. 1st-, 2nd-, 3^r-tier, etc.), transparency will be substantially restrained. A *de minimis* threshold will eliminate unnecessary reporting by very small subcontractors or suppliers.

Current reporting requirements apply to prime non-federal awardees only, but they are also responsible for “reporting on their use of funds as well as any sub-awards (i.e., sub-grants, subcontracts, etc.) they make.” These requirements are problematic for two reasons:

1. Recovery Act funding remains visible only to the first tier of sub-awards. For large projects, it is likely that there will be several tiers of sub-awarding. Limiting reporting requirements to only the first two layers will obscure basic information -- such as to whom the money went and on how that entity employed it -- on billions of dollars of Recovery Act spending.
2. Sub-awardees do not themselves report on their use of the funds; the prime recipient has responsibility to report on any sub-awards made, hiding from the public much of the details on Recovery Act activities by state hired contractors. Although spending and

performance information (such as jobs data) may be included in state government reports, performance information of those contractors will not be available to the public, nor will any information on Recovery Act funds that were used to hire sub-contractors.

We are greatly encouraged that Sec. 2.10 of the April 3 guidance states that “OMB plans to expand the reporting model in the future to also obtain...information [on awardees beyond first-level awards], once the system capabilities and processes have been established.” However, OMB should include a timeframe in which it believes that this will occur.

Collecting Reports Directly from Recipients

Recommendation: *OMB should require all recipients of Recovery Act funds over \$25,000, regardless of how many layers removed from the initial federal disbursement that receipt is, to report on their use of Recovery Act funds to the central collection system currently under development by OMB.*

Sec. 2.14 of the April 3 guidance states that OMB is “moving aggressively” to develop a central collection system for recipient reports. Agencies are to instruct recipients to begin submitting recipient reports (those specified in Sec. 1512 of the Recovery Act) on Oct. 10 of this year, and that they “should assume the central system capability will be online and available no less than 45 days before the October 10th, 2009, statutory quarterly reporting deadline.” However, the guidance remains unclear about which recipients will report which data. By requiring this first-hand reporting, recipient data will likely be more accurate, comprehensive and timely.

Recipient Registration

Recommendation: *OMB should require all recipients of Recovery Act funds who are required to report on the use of those funds to register with the Central Contractor Registration (CCR) and obtain an entity identification code (similar to, but not necessarily a DUNS number). OMB should be clear that this registration is required of state contractors and grant awardees who receive Recovery Act funds. Additionally, OMB should require that CCR registrants be responsible for maintaining current and accurate information within the database.*

All recipients of Recovery Act funds should register with the central reporting system prior to receipt of Recovery Act awards. The April 3 OMB interim guidance would require first-tier sub-awardees (i.e., grantees) to register with CCR; however, first-tier subcontractors of prime contractors would not. This registration will significantly abet OMB’s central collection for recipient reports. By excluding subcontractors and additional tiers of sub-awardees from CCR registration, potentially thousands of recipients of Recovery Act funds would not be identified as such. If OMB expanded its definition of “recipient” to include all tiers of sub-awardees and required all recipients to register with CCR, CAR would have no concerns with this area of OMB’s guidance.

Sec. 5.19 addresses grants and cooperative agreements, and states that first-tier sub-awardees should obtain DUNS numbers and should register with the Central Contractor Registration (CCR). There is no equivalent requirement for sub-awardees of prime contractors in Sec. 6 of

the guidance. Additionally, the Interim Final Guidance for Federal Financial Assistance contained in Appendix 9 states that first-tier sub-recipients must register with CCR, while the Interim Federal Acquisition Regulations in Appendix 8 states that “First-tier subcontractors are not required to register in the Central Contractor Registration (CCR) as a consequence of this rule.” The April 3 OMB interim guidance appears to be saying that sub-awardees of non-contract awards are required to register with CCR, but sub-contractors of prime contractors are not, hiding myriad Recovery Act fund awardees from the public and the federal government.

Moreover, as CAR has stressed in previous communications, an accurate entity identification system is essential. This means that company and parent company ownership need to be regularly updated to ensure accuracy and companies merge or get bought out. CAR recommends that recipients of the federal funds (whether directly or through sub-awards) must ensure that their information in the CCR is accurate.

We remain concerned that OMB has implicitly condoned the use of the DUNS number as the vehicle for entity identification. The DUNS number is owned by a private company, which may have significant implications for future government disclosure decisions.

Jobs and Other Program Performance Data

Recommendation: *OMB should require all recipients – not just prime recipients – of Recovery Act funds to report on the number of jobs sustained or created by projects undertaken by that recipient. These estimates should also be made available to the public via the Internet.*

Employment data (and other required data as specified in Sec. 1512 of the Recovery Act) will be collected by federal agencies from prime recipients only. Prime recipients are responsible for “reporting on their use of funds as well as any sub-awards (i.e., sub-grants, subcontracts, etc.) they make.” In cases in which a federal agency gives money to a state, the state would be required to report employment data on each project that the state has undertaken with those Recovery Act funds. Aggregation of employment data by prime recipient will hinder transparency and accountability obscuring the performance of individual organizations that receive Recovery Act funds.

Recommendation: *OMB should require that recipients report, along with number of full-time equivalents (FTEs), number of hours employed for a project.*

The guidance states that recipients are to report a brief description and an estimate of the jobs created or retained. Job creation and retention figures are to be based on aggregate hours worked converted into a figure for full-time-equivalent (FTE) positions. Yet it leaves it up to each recipient to determine how many hours equal a FTE, which will lead to substantial inconsistencies. It would be advisable to require recipients to report the aggregate hours figure as well as the FTEs, so that analysts can make valid comparisons.

Recommendation: *OMB should require that recipients report not just FTEs used for a given project, but information on the quality of jobs created or retained.*

It is encouraging that the procedures for employment reporting include the collection of data on the types of jobs created (“job titles or broader labor categories”), but it is disappointing that the guidance does not also provide for gathering information on the *quality* of those jobs, especially wage levels and availability of health coverage. Without such information, it will not be possible to safeguard against the use of Recovery Act funds to create substandard jobs. And, to protect sensitive information, recipients should publicly report only aggregate and average data to measure personal information such as wages and demographics.

Recommendation: *OMB should work with agencies to ensure that sufficient and relevant performance data are collected. CAR will offer its recommendations for performance measurement criteria in the near future. However, OMB should set a short timeframe within which agencies and OMB agree upon which performance criteria will be established.*

The guidance, in Sec. 2.8, enumerates a dozen elements that must be included in program-specific plans. One of these elements is “expected quantifiable outcomes consistent with the intent and requirements of the legislation.” The guidance also notes that the terms in conditions that are to accompany Recovery Act grant awards leaves “significant discretion to Federal agencies” on how and what performance data awardees must report as part of their quarterly recipient reports.

By leaving these data collection requirements to the federal agencies, it is not certain that all federal agencies will obtain data necessary to measure the impact of Recovery Act projects. While flexibility and discretion with respect to measuring each agency’s programs is desirable, OMB should engage immediately federal agencies to quickly devise their Recovery Act performance data requirements to ensure that sufficient, relevant, and comparable data are collected from the beginning. The public should also be consulted on the performance data to be collected.

OMB should also be clear that the requirements for performance data collection will follow Recovery Act funds so that any level of sub-awardee must collect the performance data specified by the agency for the project.

State-Level Reporting

If OMB adopts CAR’s recommendations for who would be required to report on Recovery Act funds use, the OMB guidance in Sec. 2.17 would be irrelevant, and our recommendations below could subsequently be ignored.

Recommendation: *OMB should require that recipients of Recovery Act funds through state agencies, including state-level contractors, report on the acquisition and use of those funds to a federal central reporting system, rather than allowing states to transmit data to the federal agencies.*

In Sec. 2.17, the guidance states that Federal agencies “should provide States the flexibility to determine the optimal approach for collecting and transmitting” recipient reporting data. A state would be allowed to either “create a central point of contact responsible for transmitting”

recipient reports required of awardees of Recovery Act funds awarded by the state. “Alternatively, a State may prefer to have individual State agencies or recipients separately report to the Federal government rather than relying on a single point of contact to consolidate the information centrally for transmission.”

This flexibility in State-level reporting unfortunately creates the opportunity for a loss in data fidelity. A state that opts to gather Recovery Act reports from its agencies into a single collection point could allow Governors to refine the reports to reflect a “better” assessment of the use of Recovery Act funds. A system in which every entity that receives Recovery Act funds report directly to a federal central reporting system would greatly reduce the opportunity for data alteration.

RFPs, Contracts, Bids, and Waivers

Recommendation: OMB should require that all Recovery Act RFPs, contracts (with redactions, if needed), including those granted by States and local authorities, and bids on those contracts be posted online. And, if permissible by law, the threshold for contract information posting should be lowered to \$200,000.

Recommendation: Because Recovery Act funds are federal, RFPs issued at the State and local level should be made available on Grants.gov and FedBizOpps.gov (as federal grant and contract RFPs are available) to extend the potential pool of contract bidders and grant applicants to as many groups as possible.

The OMB guidance issued on Feb. 18 (m-09-10) required agencies to post to the agency website and to Recovery.gov summaries of contracts or orders (or modifications to an existing contract or order) over \$500,000 or of any contract was not fixed-priced and competitively awarded. The April 3 interim guidance makes no mention of how this is to be accomplished. We also strongly urge OMB to modify the Feb. 18 guidance to include the full contract language, not just summaries, along with proposal requests, bids. In addition, the RFP should also be disclosed. Without access to RFPs, bids, and all of the language of attendant awarded contracts, it will be difficult for outside stakeholders to assess the performance of any contractor using Recovery Act funds. If there is a justifiable need for portions of the contract to not be disclosed, then redaction of that section is preferable to withholding the entire contract.

OMB should require that all bids be made available online, but if this presents a confidentiality problem, CAR would be satisfied if OMB adopted the guidelines surrounding disclosures of bids as articulated in the Strengthening Transparency and Accountability in Federal Spending Act of 2008 (S. 3077) as introduced in the 110th Congress by Sen. Barack Obama.

Because billions of dollars of federal Recovery Act funds will be awarded through state and local governments, notice of those contracts should be advertised as widely as possible to ensure that many potential bidders are aware of such projects. OMB should require that state and local governments report to the federal government as quickly as possible any Recovery Act project RFPs they may be offering. Additionally, OMB should specify how those RFPs and contracts or grant awards be transmitted to the federal government. CAR recommends employing the under-

development central reporting system to allow these local authorities to report their RFPs and contracts.

Recommendation: *OMB should post any waivers on requirements of awards or contracts online.*

The Recovery Act places certain restrictions on the use of Recovery Act funds, but it also allows federal agencies to grant waivers to such restrictions under some circumstances. For example, the Buy American provision, Sec. 1605, of the act requires that certain materials and manufactured goods employed in Recovery Act projects be made in America. The title also allows exceptions to this requirement for certain reasons, but the agency head granting the waiver “shall publish in the Federal Register a detailed written justification as to why the provision is being waived.” OMB should require that requests for Buy American waivers and any other waivers to Recovery Act spending be posted online along with the contract for which the waiver was sought. To make requested waivers accessible for public comment, notification of waiver requests are currently posted at the Federal Register. This same information needs to be made accessible to the public through Recovery.gov, and be able to be sorted and filtered by certain characteristics (state, date of waiver request, etc.). Interested parties should be also able to register for immediate email alerts for when a waiver is requested.

Most importantly, implementation language of transparency in the Recovery Act should be reconsidered so that penalties are in place when a requested waiver is not made accessible for public review and comment. Currently there are no such penalties for any entity that chooses to not make waiver requests available to the public.

Recommendation: *OMB should post contracts and loan or grant awards, including those made by states and local authorities, online in a searchable, sortable, and machine-readable format. Contracts and loan or grant awards should also be indexed for ease of browsing.*

Although the Feb. 18 OMB guidance specified that summaries of contracts be posted online, it did not specify how those contracts should be posted. In addition to adopting CAR’s recommendation that full contract (and grant and loan agreements) be posted on line, those contracts should be searchable, sortable, and easily transmitted from Recovery.gov to other computer systems. Without the ability of simple and advanced search by various unique identifiers, key terms, categories, geographic reference and even full text, users will not be able to locate contracts that may be of interest to them. By not allowing users to filter, sort, and download contracts by various criteria (like place of performance, dollar value, name of contract winner, etc.), transparency of contracts will be sustainably hindered.

Weekly Financial and Activity Reports

Recommendation: *OMB should require that agencies include additional data in their Weekly Financial and Activity Reports, including indicating how much each state is receiving and how much is for direct grants, contracts, loans, or other financial assistance; and whether the funding is discretionary or mandatory.*

Appendix 1 of the April 3 interim guidance indicates the data fields specified for the Weekly Financial and Activity Reports from the federal agencies in the Feb. 18 guidance would be revised by April 7. However, those revised specifications are currently available on the MAX website, which is accessible only by personnel within the federal government. If OMB's revision does not require agencies to report the following on their Weekly Financial and Activity Reports, CAR recommends that OMB should require agencies to report for each program:

- How much each state is receiving in Recovery Act funds
- How much is for Direct grants, contracts, loans, or other financial assistance
- Whether the funding is discretionary or mandatory

Data Feeds

Data feeds are to the Web what wire services are to newspapers: continuous streams of (structured) information feeding into the same destination. Data feeds using standardized formats can be combined, aggregated, filtered, compared and republished immediately and automatically. Data feeds are publicly visible when persistently published on web sites according to conventions making them easy to find and reliable to repeated access.

Although CAR believes that recipient reports (Sec. 1512 reports) should be available in a data feed format (such as Atom), our comments here are limited to data feeds of data supplied by the federal government.

Recommendation: *OMB should require that federal agencies, including CCR, FederalReporting.gov, and Recovery.gov, providing Recovery Act funding information make available feeds to the public for their data.*

While the OMB interim guidance stipulates that federal agencies provide their data in a feed format (OMB prefers Atom), it remains silent on whether other Recovery Act-related websites should provide similar feeds. Without these feeds, a significant portion of Recovery Act spending will remain largely obscured. OMB guidance should specify the conventions and formats for publishing aggregated data feeds on federal web sites recognized as the primary portals for public access to the aggregated Sec. 1512 reporting requirements.

Recommendation: *OMB should be more specific about the content, structure, and location of federal agency data feeds. OMB should require that federal agencies, including CCR, FederalReporting.gov, and Recovery.gov, publish a "data catalog" of the structured data and data feeds collected and available from their web sites.*

In order to make feeds work as a decentralized and effective tool for transparency, OMB must be much more forceful in requiring their implementation. OMB needs to issue more specific technical guidance to agencies, especially addressing issues outlined below. A recent report by University of California, Berkeley researchers offer detailed guidance¹. This report is available open access and carries a Creative Commons copyright license so that it can be freely reused and adapted by OMB. Its recommendations include the following:

¹ Erik Wilde, Eric C. Kansa, and Raymond Yee, "Proposed Guideline Clarifications for American Recovery and Reinvestment Act of 2009" (March 16, 2009). *School of Information*. Paper 2009-029 at <http://repositories.cdlib.org/ischool/2009-029>

- Feeds should be easy to find. A transparency measure is not effective if it is hidden or remains obscure. Directories of feeds and guidelines for where to publish feeds should be developed.
- Feeds need to conform to common, open standards (valid Atom).
- Feeds need to clearly indicate links to retrieve relevant, structured reporting data. This structured data should be in an open XML-format uniformly applied by each agency.
- Feeds need to archive data so that they not only deliver current information, but also make old entries and associated data easy to retrieve.

OMB's recommendation that agencies publish Recovery-related web pages using the location convention of "agencyname.gov/recovery" has made it easy for the public to find each agency's recovery information. A similar recommendation of publishing a single page, tabular index to the data feeds available on the web site will make it easy for the public to find and access the data feeds. This page could be located at "agencyname.gov/recovery/data" and should also link to descriptive meta-data about the feeds. The notion of a data catalog has been used by the city of Washington, DC to organize dozens of municipal data feeds.

Recommendation: *OMB should include the reference Recovery Act Architecture Package document as an appendix to the guidance.*

Both the Feb. 18 and April 3 Guidance documents refer to an additional document called Recovery Act Architecture Package whose purpose is "to support shared understanding of technical requirements and solution approaches across all stakeholders." This document should be included as an appendix to the OMB guidance or otherwise be made publicly available, as stakeholders in the outcomes of the Recovery Act include not just federal agencies but citizens as well.

Compliance

Neither the OMB interim guidance nor the Recovery Act itself enumerate the consequences for federal agencies or Recovery Act funds recipients that do not comply with the requirements set forth by OMB or the act. To ensure that these parties adhere to the rules and guidelines of Recovery Act funds reporting, OMB should state what penalties or other enforceable consequences federal agencies or recipients will face should they fall out of compliance. Without an enforcement mechanism, the implementation of transparent and accountable expenditure process will be threatened.