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AND PROCUREMENT REFORM
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Good morning Chairman Lankford, Ranking Member Connolly, and members of the Committee. My name is Natalie Keegan and I am an analyst in American federalism and emergency management policy with the Congressional Research Service. Thank you for the opportunity to testify this morning on improving oversight and accountability in federal grant programs.

Federal grant-in-aid programs, also commonly referred to as “federal grant programs” or “federal domestic assistance programs,” transfer money, property, services, or other items of value to assist eligible recipients accomplish purposes authorized by Congress. For the purposes of my testimony today, federal grant programs include entitlement grants, formula grants, and discretionary grants. Entitlement grants provide funding for grantees who meet specific statutory requirements. Formula grants use allocation formulas established in statute to award funds. Discretionary grants are awarded through a competitive process administered by the federal grantor agencies. My testimony will include general observations concerning agency activities in the administration of federal grants. Specifically, I will discuss challenges to transparency in the pre-award phase of grants administration and whether the level of agency discretion influences the need for transparency.

Congressional Oversight of Federal Grants

Congress often pursues oversight of federal grants through the authorization and appropriations processes, and through investigative oversight to gather information on the administration and effectiveness of a federal grant program. Congress also exercises oversight through the federal grant application process. It is useful to view Congressional oversight of grants in two overarching phases; pre-award and post-award.

Pre-award oversight activities may include grant program authorizations and appropriations, determinations of eligibility and eligible activities, review of announcements of funding availability, and review of panel scorings of eligible applications. Post-award oversight activities may include audits, reporting requirements, and prevention and investigation of waste, fraud, and abuse.

While recent Congressional debate has involved post-award activities, particularly recipient and agency reporting requirements, consideration of congressional oversight of pre-award activities may provide insight into improving oversight and accountability in federal grants.

Pre-Award Oversight of Federal Grants

Congressional authorization of federal grant programs began in 1862 with the authorization of The Morrill Land Grant Act of July 2, 1862, to establish land-grant colleges.¹ Since that time,

¹ U.S. Congress, House Committee on Post Office and Civil Service, Subcommittee on Census and Population, *Federal*

there has been dramatic growth in federal assistance programs.² Currently, there are 2,123 congressionally authorized federal domestic assistance programs.³ Five federal agencies administer 1,165 of these programs. Federal outlays for grants to state and local governments have grown from \$136 billion in constant (FY2010) dollars in 1940 to \$608 billion in 2010.⁴

Congress exercises control over federal grants through the authorization process which generally establishes key components of the grant program, including the funding allocation methodology, program eligibility, and congressional objectives. The allocation of federal grant funds is typically based on either statutory formula, agency discretion, or a combination of the two. In some cases, Congress establishes a formula for distributing funds that provides minimum allocations to primary grant recipients. In other cases, the formula establishes the percentage of funds that go to each grant recipient. The authorizing statute establishes the terms and conditions for the particular grant program. Federal agencies implement the statutory requirements in their regulations and incorporate them in grant agreements. A grant program may authorize a range of eligible activities. Congress may limit the grant project eligibility by narrowing the range of activities to address specific categories of projects. These types of grants are known as categorical grants. Congress may also choose to provide greater flexibility in the range of eligible grant activities by authorizing a block grant. Block grants allow recipients, predominately states, to fund a broad range of activities within more general policy areas such as community development or law enforcement.

The authorizing legislation also determines the level of federal agency discretion in administering the grant program. Federal agency discretion plays a critical role in the degree of transparency in federal grant program administration.

Mechanisms for Achieving Transparency: Pre-Award Process

For the purposes of this testimony, transparency is defined as the availability of information captured or created during the administration of the grant program. For some grant administration activities, transparency is analyzed from the perspective of the grant applicant and is measured by the clarity and conciseness of the information. In other cases, transparency is analyzed from the congressional perspective and is measured by the ability of Congress to conduct oversight. For grant applicants, lack of transparency may result in wasted resources pursuing a federal grant. For agencies, lack of transparency may result in an inability to assess internal controls. For Congress, lack of transparency may result in the inability to measure the efficiency, effectiveness, and economy of federal grant programs.

Establishing and Defining Criteria for Evaluation: What Information is Available

Federal agencies have discretion in determining the evaluation criteria for discretionary grants. Discretionary grants are awarded through a competitive process. The evaluation criteria used to prioritize the grant applications varies across programs and agencies. While agencies are required to provide evaluation criteria in the Notice of Funds Availability (NOFA) published in the Federal

Formula Grants-In-Aid Programs That Use Population As A Factor In Allocating Funds, committee print, 94th Congress, 1st Sess., 94-6 (Washington: GPO, 1975), p. 4.

² U.S. Office of Management and Budget, *Managing Federal Assistance in the 1980s*, Mar. 1980, p. 18.

³ Catalog of Federal Domestic Assistance, April 11, 2011, at www.cfda.gov.

⁴ U.S. Office of Management and Budget, *Total Outlays for Grants to State and Local Governments by Function, Agency, and Program: 1940 – 2010*, (Washington: GPO, 2012), at <http://www.whitehouse.gov/omb/budget/Historicals>.

Register, the description generally does not include a concise list of the factors, and the weighted values of the factors, in the evaluation criteria.

Announcement of Funding Availability

The grantor agency publishes a NOFA in the Federal Register for each grant program. The NOFA provides application deadlines, eligibility information and grant evaluation criteria. Transparency in the award process begins with the clarity and conciseness of the information in the NOFA. Lack of clarity in the evaluation criteria may cause some applicants to provide insufficient information in the grant application, which would reduce the likelihood of the application receiving a grant award. Yet some agencies do not provide the evaluation information in a clear and concise manner.⁵

Establishing and Defining Formulas: Determining How Much is Awarded

Congress establishes the allocation methodology in the authorizing legislation for entitlement and formula grants. While the allocation methodology may provide the factors to be included in the formula, the agencies have discretion in determining what sources of information are used to assign a value to the factor. There is currently no single source providing information on the factors, weight of the factors in the overall formula, and acceptable sources of information for each factor. This was not always the case.

Impact of the Discontinuation of the Formula Report to the Congress

The Administrator of GSA is responsible for maintaining and providing wide access to a computerized information system on domestic assistance programs, and preparing, publishing, and distributing the most current information available through the catalog of federal domestic assistance programs each year.⁶ GSA currently maintains the federal assistance information database that is publically accessible through www.cfda.gov. At one time, the GSA Administrator was also required to transmit to specified congressional committees the following information:

- Specification of each formula governing eligibility for assistance or the distribution of assistance under each program;
- Description of all data and statistical estimates used to carry out each formula; and
- Identification of the sources of such data and estimates.

In response to this mandate, GSA developed a report, *Formula Report to the Congress*, which it provided to Congress on an annual basis. GSA defined formula as, “any prescribed method employing objective data or statistical estimates for making individual determinations among recipients of federal funds either in terms of eligibility or actual funding allocations that can be written in the form of either a closed mathematical statement, or an iterative procedure or algorithm which can be written as a computer program.”⁷

The report was discontinued as a result of the Federal Reports Elimination and Sunset Act of 1995.⁸ The *1999 Formula Reports to the Congress* was the final report provided to Congress.

⁵ U.S. Government Accountability Office, *Runaway and Homeless Youth Grants: Improvements Needed in the Grant Award Process*, GAO-10-335, May 2010, at <http://www.gao.gov/new.items/d10335.pdf>.

⁶ P.L. 98-169.

⁷ U.S. General Services Administration, *1999 Formula Report to the Congress*. This report is no longer in print but is available from CRS upon request.

⁸ P.L. 104-66. Federal reports that were not specifically identified as exempted from the provisions of the act were discontinued.

The *Formula Report to the Congress* was a potentially useful grants oversight tool because it could be used to conduct policy analysis such as evaluating the use of population factors in federal grant programs.⁹ There is no other comparable federal report that provides this level of detail on federal grant formulas.

Establishing and Defining Eligible Activities: What Gets Funded

The degree to which federal agency discretion influences eligible activities varies depending on the type of grant program. As mentioned earlier, when Congress authorizes a federal grant program, the eligible activities may be broad or specific depending on the statutory language in the grant authorization. When grant funds are distributed through a competitive process, the administering federal agency officials exercise discretion in the selection of grant projects to be awarded funding within the range of eligible activities set forth by Congress.

Reviewing Applications: Determining Who and What Gets Funded

Grantor agencies have discretion in determining what information obtained during the screening and peer review process is disclosed. Grant applications are screened for eligibility, completeness, and timely submission. Grant applications that meet all of these requirements are then given further consideration. For some agencies, this may include a peer review. Some federal agencies utilize a panel of experts to review and score grant applications based on established criteria published in the NOFA. Some agencies contract out the review panel process, while others utilize internal program specialists. Potential criticism of review panels include a possible conflict of interest when a member of the panel has a professional or financial interest in selecting one grant project over another, ineffective implementation of the panel recommendations when projects are selected by agency officials regardless of the panel scores, and lack of uniformity in the procedures used to establish and implement review panels.

The disclosure of information obtained during the screening and review process varies from agency to agency. For example, some agencies provide the number of applicants and number of applications awarded on the agency website. Other agencies do not. Most agencies do not publish the review panel scores used to make final award decisions. Additionally, agency officials have discretion to make award decisions that do not exactly align with the review panel scores. While agency officials often must provide written justification when deviating from the review panel scores when making award decisions, the justification is an internal control and is seldom made publically available.

Oversight of federal agency grants administration activities is limited by the lack of transparency in the award process. Without knowledge of the individual application scores, it is impossible to determine the appropriateness of award decisions. When specific programs are investigated by the Government Accountability Office (GAO) or the agency's Office of Inspector General, the scores can be ascertained. However, on occasion, these investigations have found that grant award decisions were not predicated on the review panel scores. The following IG findings provide examples of discretion in the peer review process.

Department of Justice, Juvenile Justice Grants

In September 2009, the Inspector General of DOJ reported on an investigation into the awarding of juvenile justice grants.¹⁰ There was media and congressional interest in the awarding of these

⁹ CRS Report RL30358, *Population Factors Used in Federal Assistance Programs*, by James R. Riehl.

¹⁰ U.S. Department of Justice, Office of Inspector General, *Procedures Used by the Office of Juvenile Justice and Delinquency Prevention to Award Discretionary Grants in Fiscal Year 2007*, Audit Report 09-24, April 2009.

grants prior to the IG involvement. In January 2008, a trade journal, *Youth Today*, reported that grants awarded under the National Juvenile Justice Program were not awarded competitively and that the administrator of the Office of Juvenile Justice and Delinquency Prevention (OJJDP), J. Robert Flores, had hand-picked the grant recipients.¹¹ On June 19, 2008, the House Committee on Oversight and Government Reform held a hearing titled, *Examining Grantmaking Practices at the Department of Justice*.¹² In his opening statement, then Chairman Henry A. Waxman indicated that while the Committee acknowledges that Administrator Flores has discretion in awarding federal grants, “he has an obligation to make these decisions based on merit, facts, and fairness.”¹³ The DOJ IG findings concurred with the discretion held by the administrator to select the grant award recipients, but stated that by not taking the review board recommendations into consideration, the administrator wasted agency resources.¹⁴ Further, the IG found that, “the absence of earmarks in FY2007, coupled with a lack of applicable grant selection rules, gave the Office of Justice Programs considerable latitude in determining the organizations that should receive awards.”¹⁵ The IG recommended that DOJ implement peer review protocols that include consensus calls to discuss and mediate disparate peer review results and require at least three peer reviewers on each panel.¹⁶

Department of Education

In September 2006, the ED IG presented a report of the investigation of the composition of expert review panels utilized in awarding the Reading First grant to determine whether the panels were selected in accordance with the No Child Left Behind Act (NCLB), whether the panel members were screened for conflict of interest, whether the panel appropriately documented its decisions, and whether the panel reviewed the applications in accordance with established criteria. The IG concluded that ED did not select the review panel in compliance with the requirements in NCLB, the screening process for panel members to evaluate the risk of conflict of interest was not effective, that ED awarded grants without documentation, that the panel approved the selection criteria, and that ED did not follow its own guidance for a peer review process.¹⁷ The IG recommended that the agency develop internal management policies and procedures that address when legal advice will be sought from the Office of General Counsel (OGC). Further, the IG recommended that the agency rely on an internal advisory committee to determine whether the implementation of the Reading First program harmed the federal interest and assess a course of action to resolve the issues identified. The IG recommended that the internal advisory committee be comprised of representatives from other ED programs, the OGC, and the Department’s Risk Management Team.

¹¹ Patrick Boyle, “For Juvenile Justice, A Panel of One,” *Youth Today: The Newspaper on Youth Work*, December/January 2008, p.6.

¹² U.S. Congress, House Committee on Oversight and Government Reform, *Examining Grantmaking Practices at the Department of Justice*, 110th Cong., 2nd session, June 19, 2008 (Washington: GPO, 2008).

¹³ *Ibid*, p. 3.

¹⁴ U.S. Department of Justice, Office of Inspector General, *Procedures Used by the Office of Juvenile Justice and Delinquency Prevention to Award Discretionary Grants in Fiscal Year 2007*, Audit Report 09-24, April 2009, p. v. According to the IG report, DOJ paid a contractor more than \$500,000 to oversee and conduct peer reviews of grant proposals.

¹⁵ *Ibid*, p. iv.

¹⁶ *Ibid*, p. 42.

¹⁷ U.S. Department of Education, Office of Inspector General, *Final Inspection Report*, ED-OIG/I13-F0017, Sept. 2006.

Disclosing Proprietary or Confidential Information: What Will Be Disclosed

Disclosure is a key element of transparency. Disclosing information obtained by the agency in the screening and evaluation phase of grants administration, is tempered by the limitations some agencies impose on the disclosure of propriety information. This is particularly true for applications that were unsuccessful in seeking federal funding. Some agencies have established policies and procedures that will allow disclosure of information contained in a proposal that was not selected for funding only with the consent of the grant application.¹⁸ Even when funds have been awarded, there are safeguards to protect proprietary or privileged information, including patentable ideas, trade secrets, or privileged or confidential information where the disclosure of which may harm the grant recipient.¹⁹ Additionally, some grant programs may fund projects that require a degree of confidentiality. For example, the preparedness grants administered by the Department of Homeland Security fund homeland security prevention and protection activities. Disclosure of the nature of terrorist preparedness activities may pose a threat to national security since it would also provide insight into what types of activities are currently not being undertaken. Disclosure of grant application information must be balanced with measures to ensure protection of proprietary or privileged information while still achieving the goals of transparency.

Concluding Observations

Federal agencies exercise discretion in a variety of ways when selecting recipients of federal grants. While there is general guidance in the OMB Circulars such as Circular A-110 which contain language that certain federal grants should be awarded on a competitive basis, this guidance is superseded by the statutory language in the authorizing legislation. Further, the interpretation of what constitutes “competitive” is often left to the federal administering agencies, as highlighted in the IG report concerning Administrator Flores and the DOJ Juvenile Justice grants. At times, the statutory language concerning allocation of federal grants creates tension by requiring the timely distribution of grant funds while also requiring selection of projects in a competitive manner.

Some agencies resolve this tension by using language in the regulations or the grant program guidance that gives priority consideration to projects that are able to be undertaken within a short period of time. This regulatory or guidance language may result in projects that may be more competitive to be passed over in favor of projects that are less competitive but more developed at the time applications are accepted. As highlighted by the examples above, the award process for federal grants lacks uniformity within and across federal agencies. This is due, in part, to the complexity and variation of the statutory language in grant authorizations. The variation may also be due to the uniqueness of the objectives of the grant programs.

An examination of the activities agencies undertake in the administration of federal grants, and the level of discretion exercised during those activities, can inform the oversight decisions. Further examination may be necessary to determine whether increased agency discretion warrants increased transparency.

I thank you for the opportunity to testify and would be happy to answer any questions the committee may have.

¹⁸ The National Science Foundation, Proposal and Award Policies and Procedures Guide, October 2010, p. I-4.

¹⁹ Ibid.