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Be Careful of Your Broadband Wishes: Compliance Requirements For BTOP-And BIP-Award Grantees

Daniel Margolis

**BE CAREFUL OF YOUR BROADBAND WISHES:
COMPLIANCE REQUIREMENTS FOR BTOP- AND BIP-
AWARD GRANTEES**

by

Daniel Margolis*

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA).¹ Among the many goals outlined in the ARRA is funding to the Department of Agriculture and the Department of Commerce to expand broadband access to rural and unserved parts of the United States. The total allocation of \$7.2 billion is jointly shared by these two departments under two programs. The Department of Commerce, through the National Telecommunications and Information Administration (NTIA), will administer a grant program, which is entitled the “Broadband Technology Opportunities Program” (BTOP), while the Department of Agriculture, through the Rural Utilities Service (RUS), will administer a grant/loan program, to be known as the “Broadband Initiatives Program” (BIP). On July 1, 2009, NTIA and RUS jointly issued the first of two Notices of Funding Availability (NOFAs) detailing the rules, application procedures, and scoring criteria for participation in the programs.

**I
BROADBAND INITIATIVES PROGRAM**

The ARRA appropriated to and authorized RUS to spend \$2.5 billion to provide loans, grants, and combinations thereof to pay for broadband

* Daniel J. Margolis holds a B.A. in Communications from Temple University, *magna cum laude* and a J.D. from New York Law School. He is an associate in the Washington, D.C. office of Garvey Schubert Barer.

¹ American Recovery and Reinvestment Act of 2009, Pub. L. No 111-5, 123 Stat. 115, (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf, [hereinafter ARRA].

infrastructure projects in rural America.² Approximately \$2 billion will be provided in the form of grants while the balance will be used to provide up to \$7 billion in loans. The monies will support projects to serve areas that are at least 75% “rural” and that lack sufficient access to high-speed broadband service. For purposes of the first NOFA, broadband service means “two-way data transmission with advertised speeds of at least 768 kbps downstream and at least 200 kbps upstream to end users.”³ A “rural” area is defined as any area that “is not located within: (1) a city, town or incorporated area that has a population of more than 20,000 inhabitants; or (2) an urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants.”⁴ An application for infrastructure in areas that are at least 75% rural must first be reviewed and denied by RUS before the application is eligible for BTOP funding.⁵

The BIP program will support infrastructure projects in three categories: last-mile remote area projects, last-mile non-remote area projects, and middle-mile projects.⁶ A “remote area” is an unserved rural area 50 miles from the limits from a non-rural area.⁷ The last-mile remote area projects will provide broadband services directly to end users in remote areas.⁸ Last-mile non-remote area projects may cover both non-remote and remote areas.⁹ Middle-mile projects will connect at least two points, without rendering services to the premise or end users, but

² *See id.*, Title 1.

³ Department of Commerce, Notice of Funds Availability and Solicitation of Applications, 74 Fed. Reg. 33104, 33107 (July 9, 2009, *available at* <http://www.broadbandusa.gov/files/BB%20NOFA%20FINAL%2007092009.pdf>, [hereinafter NOFA]).

⁴ *Id.* at 33109.

⁵ NOFA, *supra* note 3, at 33114.

⁶ *See id.* at 33106.

⁷ *Id.* at 33109.

⁸ *Id.* at 33198.

⁹ *See* NOFA, *supra* note 3.

must be capable of bringing broadband service to eligible service areas.¹⁰ Approximately \$2.4 billion was allocated to the first NOFA.¹¹ Up to \$1.2 billion is available for last-mile projects, with \$400 million in grants and \$800 million in loan or loan/grant combinations. Another \$800 million will be available for loans or loan/grant combinations for middle-mile projects.¹²

The BIP grants will fund applications proposing to serve areas that are exclusively remote, unserved, or rural.¹³ BIP loan and loan/grant combination awards will be used to provide funding to applicants proposing to serve non-remote and underserved rural areas.¹⁴ The size of the grant portion of any loan/grant combination award will be determined by the applicant, but may not exceed the amount of the loan portion of the award.¹⁵ RUS will favor applications that propose a higher percentage of loan funds, and will permit applications requesting up to 100% loan funding.¹⁶

A. Priorities and Scoring

Under the ARRA, 75% of a BIP-funded area must be “rural” and lack sufficient access to high-speed broadband service to facilitate rural economic development.¹⁷ Additionally, priority will be given to projects that:

- Give end users a choice of providers;

¹⁰ *Id.* at 33114.

¹¹ *See id.*

¹² *Id.* at 33109.

¹³ NOFA, *supra* note 3 at 33106.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ NOFA, *supra* note 3, at 33105.

- Serve the highest proportion of rural residents that lack access to broadband service;
- Are projects of current or former RUS borrowers; and
- Are fully funded and ready to start once the ARRA funding is received.¹⁸

BIP applications will be scored on a 100-point scale, with 25 points allocated equally to the project’s purpose, benefits, viability and budget, and sustainability.¹⁹

II BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM

The BTOP program is administered by NTIA, which plans to award up to \$1.6 billion in grants in the first round.²⁰ The largest portion of funding, up to \$1.2 billion, will go to broadband infrastructure.²¹ These funds will be used for projects delivering broadband services through last or middle-mile facilities to unserved and underserved areas.²² Areas composed of one or more contiguous census blocks, where at least 90 percent of households in the proposed funded service area lack access to broadband, are considered “unserved.”²³ For last-mile projects, areas are “underserved” if they are composed of one or more contiguous census blocks where: 1) no more than 50% of households in the proposed funded area have access to broadband; or 2) no service provider advertises broadband speeds of at least 3 Mbps downstream in the proposed funded area; or 3) the rate of subscribership for the proposed service area is 40% of households or less.²⁴ For middle-mile projects, an area is “underserved” if it is composed of one or more contiguous census

¹⁸ *Id.* at 33106.

¹⁹ *See id.* at 31118-19.

²⁰ *Id.* at 33110.

²¹ NOFA, *supra* note 3 at 33110.

²² *Id.* at 33111.

²³ *Id.* at 33130.

²⁴ *Id.* at 33131.

blocks where one interconnection point terminates in a census block area(s) that qualifies as “unserved” or “underserved” for last-mile projects.²⁵

BTOP will also fund other non-infrastructure programs. NTIA has allocated up to \$50 million to fund projects that expand computer center capacity at entities that permit the public to use these computer centers, including community colleges and public libraries.²⁶ NTIA has also allocated up to \$150 million, under its Sustainable Broadband Adoption program, to fund innovative projects that promote broadband demand, including projects that focus on broadband education, awareness, training, access, equipment, or support, particularly among vulnerable populations, including the low-income, unemployed, and aged.²⁷

In order to be qualify for BTOP funding, an applicant must be an eligible entity, submit a complete application along with all supporting documents, demonstrate that its project can be substantially completed within three years of the date of the grant issuance, advance one or more of the five BTOP statutory purposes, provide matching funds of at least 20% toward the eligible project costs (unless granted a waiver), document that its project would not be implemented during the grant period but for the federal grant, and demonstrate that its budget is reasonable.²⁸

Additionally, if the project is for broadband infrastructure, the proposal must:

1. Propose to offer two-way data transmission with advertised speeds of at least 768 Kbps downstream and at least 200 Kbps upstream to end users or sufficient capacity in a middle-mile project to support the same speeds to end users;

²⁵ NOFA, *supra* note 3 at 33130.

²⁶ *Id.* at 33110.

²⁷ *Id.*

²⁸ *Id.* at 33116.

2. Enable NTIA to determine that the proposed project is technically feasible, including the submission of a system design and project timeline certified by a professional engineer for any project requesting over \$1 million;
3. Demonstrate the ability of the project to be sustained beyond the funding period;
4. Commit to the BTOP program's non-discrimination and interconnection obligations, which requires the project to:
 - Adhere to the Federal Communication Commission's (FCC) Internet Policy Statement regarding net-neutrality;
 - Not favor some lawful applications and content over others;
 - Describe and display any network management policies;
 - Connect to the public Internet and not be an entirely private closed network; and
 - Offer physical interconnection for the exchange of traffic;
5. For last-mile infrastructure projects, provide service to the entire territory of each census block included in the funded service area, unless the application provides a reasoned explanation as to why providing coverage for an entire census block is infeasible.²⁹

B. BTOP Application Review Process

The BTOP application review consists of a two-step process, which begins after an application has been determined to meet basic eligibility factors, including completeness. In the first step, the application is evaluated by three independent expert reviewers, who score the applications against the evaluation criteria. BTOP applications will be awarded up to 100 points total, up to 30 points for the project purpose, 25 points for project benefits, 25 points for project viability and 20 points for project budget and sustainability. The three independent scores will then be averaged.³⁰ Only the most highly qualified applications will advance to the second phase.

²⁹ NOFA, *supra* note 3 at 33110.

³⁰ NOFA, *supra* note 3 at 33107.

The second phase of the application review is a “due diligence” phase. NTIA will ask applicants to submit additional information to substantiate the representations made in the application. The type of information requested will depend on the type of funding that the applicant seeks. NTIA will then review the addition information, compare it to the underlying application, and award it up to five points based on the supplemental information’s consistency with the application. Inconsistencies may result in dismissal.³¹

Once applications have successfully completed phase two of the application process, the states will be asked to make recommendations concerning the allocation of funds for qualifying projects in or affecting each individual state. Other service providers will be given a chance to demonstrate that the areas described in the applications are not truly “unserved” or “underserved.”³²

III POST-AWARD GRANT COMPLIANCE

A. Audit, Reporting, and Record-keeping Requirements

Because the monies available under these programs are federal grants, they are administered by federal agencies, two in this case, each with numerous layers of regulatory compliance requirements. NTIA, responsible for grants administered under BTOP, is an agency operating under the auspices of the Department of Commerce (DOC).³³ Accordingly, grants are subject to the same federal regulations that any other grant would be subject to from a DOC sub-agency as well as the specific award terms that are applicable to ARRA monies. These federal rules and regulations specify that grant recipients and sub-recipients have in place accounting standards, financial management systems to separately account for federal funds received, written procedures for minimizing the number of draw-downs, for procurement, and for

³¹ *Id.* at 33107.

³² *Id.* at 33107.

³³ See National Telecommunications and Information Administration: About NTIA, <http://www.ntia.doc.gov/about.html> (last visited Jan. 10, 2009).

property management.³⁴ Federal regulations require that funds received by grantees are expended within 30 days and that the granting agency review and approve any changes to a project's budget or key personnel before the changes are made.³⁵ Additionally, strict cost principles govern what costs are permitted to be covered by grant monies. Finally, under the ARRA, quarterly financial and technical reports are required to be submitted to the granting agency.³⁶

The DOC grants are subject to the administrative guidelines set forth in parts 14 and 24 of Title 15 of the U.S. Code of Federal Regulations.³⁷ The DOC Pre-Award Notification Requirements sets forth the federal policies and procedures to all DOC grants,³⁸ including the pre-award screening requirements for management capabilities, financial condition, and fiscal responsibility applicable to all grantees. It establishes the administrative requirements and cost principles applicable to any line item for which federal funding is sought. It also subjects grantees to federal audits and accounting requirements for all projects that receive federal funding, as well as to principals regarding program debarment, suspension, drug-free workplace, and lobbying regulations. Finally, all documentation submitted to the granting agency is susceptible to Freedom of Information Act disclosure.³⁹

Further regulations that are applicable to DOC grants are contained in the various circulars published by the Office of Management and

³⁴ See generally, OFFICE OF MGMT. & BUDGET, CIRCULAR A-110, UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS (as amended Sept. 30, 1999), available at <http://www.whitehouse.gov/omb/rewrite/circulars/a110/a110.html> [hereinafter A-110].

³⁵ See generally 7 C.F.R. § 3015 (2009); 7 C.F.R. § 3016 (2009); and 7 C.F.R. § 3019 (2009).

³⁶ See ARRA, *supra* note 1, § 1512 (c).

³⁷ See 15 C.F.R. § 14 (1998); 15 C.F.R. § 24 (1998).

³⁸ Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements, 73 Fed. Reg. 7696 (Feb 11, 2008), available at edocket.access.gpo.gov/2008/pdf/E8-8581.pdf [hereinafter DOC Requirements].

³⁹ *Id.*

Budget.⁴⁰ Circular A-133 establishes the audit guidelines for state, local, and tribal governments as well as for non-profit corporations.⁴¹ NTIA will propound formal audit guidelines for for-profit entities, though they have not yet been officially released, and RUS has already done so for BIP projects.⁴²

OMB Circular A-110 establishes the uniform administrative regulations that apply to grant recipients.⁴³ It generally sets forth the standards for obtaining consistency and uniformity among granting agencies in how grants are administered to institutions of higher education, hospitals, and other non-profit organizations.⁴⁴ It sets forth the pre-award notification requirements and post-award compliance requirements for grant and sub-grant recipients. Pre-award notification requirements generally include screenings for management, financial condition and overall responsibility of the grantee, the grantee is compliant with the administrative and cost principle requirements, that the grantee understands and consents to audit oversight, that the grantee states that it is not subject to debarment or suspension in any other federal grant program, that the grantee attests that it complies with drug-free workplace requirements, that the grantee complies with strict lobbying policies, and that the grantee consents to all submitted documentation being subject to the Freedom of Information Act.⁴⁵ These requirements are similarly propounded to state, local, and tribal

⁴⁰ See generally, White House Office of Management and Budget, Grants Management Circulars, http://www.whitehouse.gov/omb/rewrite/GRANTS/grants_circulars.html.

⁴¹ See generally, OFFICE OF MGMT. & BUDGET, CIRCULAR A-133, AUDITS OF STATES, LOCAL GOVERNMENTS, AND NON-PROFIT ORGANIZATIONS (as amended June 27, 2003), available at <http://www.whitehouse.gov/omb/rewrite/circulars/a133/a133.html> [hereinafter A-133].

⁴² See NOFA, *supra* note 3, at 33122; 7 C.F.R. § 1773.4 (2001). As of the date of publication, NTIA has not yet posted its NTIA BTOP Program Specific Audit Requirements for For-Profit Entities. When it becomes available, it will be posted at <http://www.broadbandusa.gov/compliance.htm>.

⁴³ See A-110, *supra* note 34.

⁴⁴ See *id.*

⁴⁵ See *id.*

governments via OMB Circular A-102.⁴⁶ Within both of these circulars, regulations are established that require that the regulations applicable to grantees flow down to sub-grantees of federal funds.⁴⁷

The terms that are contained in the OMB circulars establish strict procurement standards that are consistent with the Office of Federal Procurement Policy Act Amendments of 1983.⁴⁸ Specifically, the standards require that grantees establish codes of conduct for employees participating in any contracting. There must be safeguards against conflicts of interest, which exist where a recipient employee, officer or agent, or any immediate family member, partner or organization that employs or is about to employ one, has a financial or other interest in the firm selected for an award.⁴⁹ Further, it establishes that grantees and sub-grantees may not solicit or accept gratuities or favors from contractors, potential contractors, or subcontractors.⁵⁰ Award recipients must have these procurement procedures in writing, must competitively bid out each subcontract that receives federal funding, and must sufficiently document the basis for any contractor selection, including the justification for not using a competitive bidding process, if a competitive bidding process is not used, and a full cost and price analysis.⁵¹

Applicants are required to submit various reports over the life of their funded project.⁵² These financial reports are established by the terms and conditions found in each grant award. Recipients must manage and monitor any and all award sub-recipients to ensure that the sub-recipient

⁴⁶ OFFICE OF MGMT. & BUDGET, NORWOOD JACKSON, CIRCULAR A-102, GRANTS AND COOPERATIVE AGREEMENTS WITH STATE AND LOCAL GOVERNMENTS (as amended Aug. 29, 1997), available at http://www.whitehouse.gov/omb/circulars_a102/.

⁴⁷ See *id.*; A-110, *supra* note 34.

⁴⁸ 41 U.S.C. §§ 403-438 (1974), amended by Act of Dec. 1, 1983, Pub. L. 98-191, 97 Stat. 1325.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See ARRA, *supra* note 1, §§ 1512, 1553.

also complies with reporting and audit requirements.⁵³ All records that pertain to a grant award must be kept for 3 years following the submission of the final expenditure report unless there is a pending audit, pending litigation, or other claim against the award.⁵⁴ Grantees and sub-grantees must also be aware that each granting agency's Inspectors General will have unrestricted access to any and all documentation and is able to subpoena and interview any federal grantee's personnel.⁵⁵

Cost principles are established for different types of entities in different locations. Educational institutions' cost principles are set forth in OMB Circular A-21.⁵⁶ State and local governments' cost principles are found in OMB Circular A-87.⁵⁷ Non-profit entities' cost principles are found in OMB Circular A-122⁵⁸ and the cost principles for commercial organizations are set forth in Part 31 of Title 48 of the Code of Federal Regulations.⁵⁹ Generally, the documents establish that allowable costs are those that are reasonable and necessary, that are allocable relative to the benefits received and that they must be given consistent treatment through the application of those generally accepted accounting principles appropriate to the circumstances.

A cost may be considered reasonable if the nature of the goods or services acquired or applied, and the amount involved therefore, reflect

⁵³ See 15 C.F.R. § 14.53 (2009); 15 C.F.R. §§ 24.40-24.44 (2009).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See OFFICE OF MGMT. & BUDGET, CIRCULAR A-21 COST PRINCIPLES FOR EDUCATIONAL INSTITUTIONS (as amended May 10, 2004), *available at* http://www.whitehouse.gov/omb/circulars/a021/a21_2004.pdf.

⁵⁷ See OFFICE OF MGMT. & BUDGET, CIRCULAR A-87 COST PRINCIPLES FOR STATE, LOCAL, AND INDIAN TRIBAL GOVERNMENTS (as amended May 10, 2004), *available at* http://www.whitehouse.gov/omb/circulars/a087/a87_2004.pdf.

⁵⁸ See OFFICE OF MGMT. & BUDGET, CIRCULAR A-122 COST PRINCIPLES FOR NON-PROFIT ORGANIZATIONS (as amended May 10, 2004), *available at* http://www.whitehouse.gov/omb/assets/omb/circulars/a122/a122_2004.pdf [hereinafter A-122].

⁵⁹ See 48 C.F.R. § 31.2 (2009).

the action that a prudent person would have taken under the circumstances prevailing at the time the decision to incur the cost was made.⁶⁰ A cost is allocable to a particular cost objective (i.e., a specific function, project, sponsored agreement, department, or the like) if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received or another equitable relationship.⁶¹ Direct costs are those costs that can be identified specifically with a particular sponsored project, or that can be directly assigned to such activities relatively easily with a high degree of accuracy; these can include personnel, travel, equipment, materials and supplies, or other contracts.⁶² Indirect costs are costs that “cannot be readily identified with a single cost objective but may have common or joint objectives.”⁶³ These costs can include general administrative costs, salaries and expenses, personnel administration, accounting costs, fringe-benefit costs, office space rent costs, or other types of maintenance.⁶⁴

To ensure compliance with programmatic rules and grant regulations, numerous certifications and assurances must be made to the granting agency both at the time of the grant application and at the time of the grant award. The applicant makes these certifications and assurances to the granting agency, and range in topic from employment and wage requirements to compliance with environmental regulations. The DOC requires that any recipient of grant monies under a DOC grant must comply with and require each of its contractors and subcontractors employed in the completion of the contract to comply with all applicable statutes, regulations, executive orders, OMB circulars, terms and conditions, and approved applications.⁶⁵ As part of the DOC’s consolidations of these requirements, the DOC has issued a document

⁶⁰ See A-122, *supra* note 58 at 6.

⁶¹ See *id.* at 7.

⁶² *Id.* at 8-9.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See DOC Requirements, *supra* note 38.

setting forth the standard terms and conditions that must be complied with.

Numerous federal acts and regulations apply to federally funded projects. ARRA-funded projects are required to adhere to each of these acts and regulations. The regulations covering wage requirements ensure that all laborers and mechanics employed by contractors and subcontractors on ARRA-funded projects must be paid wages at rates not less than those prevailing on projects of similar character in the same locality as determined by the Secretary of Labor.⁶⁶ These requirements, from the Davis-Bacon Act, must be contained in contracts and subcontracts that are federally supported and in excess of \$2,000 for any construction, alteration, or repair of infrastructure.⁶⁷ The regulations promulgated by the National Environmental Policy Act⁶⁸ and the National Historic Preservation Act⁶⁹ must also be followed.⁷⁰ Each has its own regulatory compliance process applicable to any construction or infrastructure project and all permitting must be completed prior to any BTOP or BIP project's approval.

The ARRA also establishes its own internal reporting requirements. On June 22, 2009, Peter Orszag, Director of the Executive Office's Office of Management and Budget, released OMB Guidance Document M-09-21.⁷¹ The memorandum set forth guidance on how Section 1512

⁶⁶ See ARRA, *supra* note 1, § 1606

⁶⁷ See 40 U.S.C. §§ 3141-3148 (2007).

⁶⁸ See 42 U.S.C. §§ 4321-4346 (2007).

⁶⁹ See 16 U.S.C. § 470 (2007).

⁷⁰ See ARRA, *supra* note 1, § 1609; See also, 36 C.F.R. § 800 (2004). The National Historic Preservation Act of 1966 requires that any federally funded, licensed or permitted project consider the nation's historic resources. 16 U.S.C. § 470f (1966). ARRA is a federal program that provides such funding. This review process is one that identifies significant historic properties so that impacts caused from government-assisted actions can be avoided, minimized or mitigated. This review applies to all ARRA applicants.

⁷¹ PETER R. ORSZAG, WHITE HOUSE OFFICE OF MANAGEMENT AND BUDGET, IMPLEMENTING GUIDANCE FOR THE REPORTS ON USE OF FUNDS PURSUANT TO THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (June 22, 2009), *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-21.pdf.

of the ARRA would be implemented. Section 1512 of the ARRA required that the financial reports submitted by ARRA grant recipients provide information on four substantive questions.⁷² First, § 1512 required that grantees provide information on who is receiving grant monies and how much money was received by each grantee, including whether the monies received have gone to sub-grantees or other sub-award recipients. Second, information would describe what projects were being funded with ARRA funds. Third, reports need to provide the completion status of projects funded under ARRA. Finally, reports must provide what impact the projects have had on job creation and retention. Prime recipients must report under § 1512 quarterly, starting September 30, 2009, and within ten days of the conclusion of each quarter. These reports are then made available to the public within 30 days of their submission to the OMB online reporting repository.⁷³

Beyond the reporting requirements set forth in the ARRA, the first NOFA released jointly by NTIA and RUS established its own additional project-dependent reporting requirements.⁷⁴ For applicants proposing infrastructure projects, information regarding uses of funds, finances, broadband deployment and speeds, network management, interconnection, prices, and subscriptions will need to be provided to NTIA or RUS.⁷⁵ For public computing center grant recipients, regarding uses of funds, technology and services offered, and customers served, as well as for sustainable adoption grant recipients, information regarding the use of funds, the technologies and services offered, the individuals served, and broadband users generated.⁷⁶

Entities that violate any of the above terms and conditions are subject to a variety of sanctions by the NTIA and RUS. The granting agency may impose additional special award conditions or suspend any payments to the grantee under the award. Additionally, the award may be

⁷² See ARRA, *supra* note 1, § 1512.

⁷³ *Id.*

⁷⁴ NOFA, *supra* note 3 at 33124

⁷⁵ *Id.* at 33125.

⁷⁶ *Id.*

terminated, the grantee may become subject to debarment or program suspension, and the granting agency may de-obligate itself from the award and seek to recover any awarded funds.

Grantees must also understand that, by accepting federal funds, they become subject to agency audits. The granting agency's Inspector General may subject the awardee to cost and compliance audits as well as ongoing performance audits.⁷⁷ Single or program-specific audits may be performed under the grants by specific governmental agencies or may be referred to outside non-government entities. Specific audits may cover any number of topics, including, but not limited to, an awardee's financial management systems, matching or in-kind contributions, project scope or budget revisions, procurement practices, property-management practices, sub-recipient monitoring, financial- and performance-reporting compliance, reporting of program income, or cost-management compliance.

Additionally, pursuant to the Single Audit Act, as amended, and as implemented by OMB Circular A-133, if a grantee receives \$500,000 or more in federal funds, the grantee is required to have an annual audit completed by a certified public accountant and to have the results of the audit submitted to the federal government's Federal Audit Clearinghouse.⁷⁸ As implemented by the OMB circular, these single audit reports become publicly available once filed with the clearinghouse. Although these audit requirements do not currently apply to for-profit ARRA recipients, program-specific guidelines are currently being developed for those entities not already covered. For-profit entities receiving BIP loans or grants less than \$500,000 are still subject to federal reporting requirements under Section 1773 of Title 7.⁷⁹ The guidelines established require RUS grantees to have an annual audit conducted by an independent firm, with the first audit being completed

⁷⁷ See U.S. DEPARTMENT OF COMMERCE AMERICAN RECOVERY AND REINVESTMENT ACT AWARD TERMS (2009), *available at* <http://oam.ocs.doc.gov/docs/ARRA%20DOC%20Award%20Terms%20Final%205-20-09PDF.doc.pdf>; See also A-133, *supra* note 41 at § 215.

⁷⁸ See A-133, *supra* note 41.

⁷⁹ See 7 C.F.R. § 1773 (2009).

within 12 months from the first advance of the BIP loan or grant.⁸⁰ The audit results must be submitted electronically within 120 days of the close of any 12-month audit period.⁸¹ The audits must be completed by a CPA in accordance with the Generally Accepted Government Auditing Standards.⁸² All documentation that is reviewed or prepared by any auditor must be made available to RUS' OIG upon request.⁸³ Finally, for BIP awards, RUS' Inspector General shall have a "reasonable opportunity, at all times during business hours and upon prior notice, to have access to and the right to inspect the broadband system and any other property encumbered by the mortgage or security agreement, and any or all books records accounts invoices contracts leases payrolls timesheets cancelled checks statements and other documents, electronic or paper of every kind belonging to or in the possession of the awardee or ... pertaining to its property or business including its subsidiaries if any and to make copies or extracts therefrom."⁸⁴

IV CONCLUSION

In light of these requirements, applicants must strongly consider whether it is worth while for them to either accept any grant of an award that they may be granted from the first round, or to consider whether it makes business sense to participate in any additional round of grant funding. These additional burdens that accompany any federal grant increase the overall cost of any program and ultimately may outweigh the benefit that might be received from the underlying federal grant and long outlive any grantee's award.

⁸⁰ 7 C.F.R. § 1773.3 (2010).

⁸¹ *Id.*

⁸² *Id.*

⁸³ 7 C.F.R. § 1773.10 (2010).

⁸⁴ *See* NOFA, *supra* note 3 at 33122.