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M-13-01

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Jeffrey D. Zients

Deputy Director for Management *J. Zients*

SUBJECT: Guidance for Agencies on Transfers from the Spectrum Relocation Fund for Certain Pre-Auction Costs

This memorandum provides guidance for Federal agencies seeking transfers from the Spectrum Relocation Fund (SRF) for certain pre-auction costs. The availability of the SRF for such costs is a result of new authorities provided by the Middle Class Tax Relief and Job Creation Act of 2012 (Title VI, Subtitle G, of P.L. 112-96) (Tax Relief Act).

The SRF was created in 2004 by the Commercial Spectrum Enhancement Act (CSEA) to streamline the process through which Federal entities can recover the costs associated with relocating their spectrum-dependent systems from spectrum bands that were authorized to be auctioned under the Federal Communications Commission's (FCC) competitive bidding procedures. OMB administers the SRF and approves transfers to agencies, in consultation with the National Telecommunications and Information Administration (NTIA).

The Tax Relief Act amended the CSEA to, among other things, expand the types of costs for which eligible Federal agencies can be funded or reimbursed from the SRF. The changes will permit agencies to receive funds for costs associated with planning for FCC auctions and relocations, spectrum sharing, the use of alternative technologies, the replacement of existing government-owned equipment with state-of-the-art systems, and the research, engineering studies and economic analyses conducted in connection with spectrum sharing arrangements, including coordination with auction winners. Other improvements to the CSEA are aimed at facilitating better transparency, coordination, and predictability for bidders in FCC spectrum auctions through, for example, a new requirement that NTIA publish agencies' spectrum transition plans on NTIA's website at least 120 days before the commencement of the corresponding FCC auction. Agencies can manage classified information consistent with section 6703 of the Tax Relief Act, [47 U.S.C. § 921].

The Tax Relief Act included new statutory provisions that make any transfer from the SRF to an eligible Federal entity conditional on: (1) the entity's submission of a transition plan; (2) the approval of the transition plan by a newly created Technical Panel; and (3) the publication of the plan on NTIA's website. The three-member Technical Panel will be comprised of appointees representing OMB, NTIA, and the FCC. The Act also requires OMB to: (a) determine, in consultation with NTIA, whether the costs and the timelines for relocation or sharing are appropriate; (b) provide the specified Congressional committees notification and a detailed plan

describing specifically how the sums transferred from the SRF will be used to pay relocation or sharing costs; and (c) wait 30 days from submitting the plan to Congress to make the funds available.

The transition plan for any Federal entity seeking payments for eligible pre-auction costs must also provide for sharing, coordination, and access to relevant classified information when necessary. If any pre-auction funds are to be transferred prior to a scheduled auction, OMB must include specific certifications in the Congressional notification. The statute also imposes a \$10 million cap on the amount of transfers for costs incurred to prepare for relevant spectrum auctions and sharing before the enactment of the Tax Relief Act.

NTIA will be adopting new regulations for the Code of Federal Regulations (CFR) and will be revising Annex O of the NTIA Manual of Federal Regulations and Procedures for Federal Radio Frequency Management to implement the changes to the CSEA from the Tax Relief Act. The CFR regulations are subject to OMB approval and will govern the operation of the new Technical Panel and the workings of any dispute resolution boards that would be called on to adjudicate disputes, should any arise, between non-Federal users and Federal entities during the transition period. NTIA's revisions to Annex O of the manual will implement provisions related to the contents of agency transition plans, and the publication and protection thereof, among other things.

Allowable Pre-Auction Costs

Within the activities that may receive support from the SRF, the Tax Relief Act created a new category of allowable pre-auction planning and research costs that may, in certain circumstances, be funded prior to the commencement of the FCC auction for the applicable eligible frequencies. These costs must be related to "pre-auction estimates or research, as such costs are described in section 113(g)(3)(A)(iii) [47 U.S.C. § 923(g)(3)(A)(iii)]", which are:

(iii) the costs of research, engineering studies, economic analyses, or other expenses reasonably incurred in connection with--

(I) calculating the estimated relocation or sharing costs that are provided to the Commission pursuant to paragraph (4)(A);

(II) determining the technical or operational feasibility of relocation to 1 or more potential relocation bands; or

(III) planning for or managing a relocation or sharing arrangement (including spectrum coordination with auction winners);

OMB's expectation is that any pre-auction costs will have a clear and direct connection to an FCC auction in the next two or three years for the bands identified in the Tax Relief Act or paired with those bands. These pre-auction activities will provide benefits through lower costs to maintain essential agency missions or higher auction bids by, for example, providing greater certainty for auction bidders. In requests for funding from the SRF, agencies should be prepared to provide evidence of their incurred pre-auction costs and, pursuant to the applicable statutory provisions, the benefits from the activities proposed to receive support from the SRF. Agencies should also provide an estimate of future pre-auction costs. However, agencies should be aware

that all transfers from the SRF can only take place after an agency's transition plan is approved by the technical panel created by the Tax Relief Act.

Before pre-auction costs are allowed, the Tax Relief Act also requires that the transition plan submitted by the eligible Federal entity must provide:

(I) to the fullest extent possible, for sharing and coordination of eligible frequencies with non-Federal users, including reasonable accommodation by the eligible Federal entity for the use of eligible frequencies by non-Federal users during the period that the entity is relocating its spectrum uses (in this clause referred to as the 'transition period');

(II) for non-Federal users to be able to use eligible frequencies during the transition period in geographic areas where the eligible Federal entity does not use such frequencies;

(III) that the eligible Federal entity will, during the transition period, make itself available for negotiation and discussion with non-Federal users not later than 30 days after a written request therefor; and

(IV) that the eligible Federal entity will, during the transition period, make available to a non-Federal user with appropriate security clearances any classified information (as defined in section 798(b) of title 18, United States Code) regarding the relocation process, on a need-to-know basis, to assist the non-Federal user in the relocation process with such eligible Federal entity or other eligible Federal entities.

OMB expects that NTIA's revised Annex O will have agency transition plans include the provisions set forth above. OMB also expects that the Technical Panel will find that any transition plan that identifies pre-auction costs but omits these provisions is insufficient.

Pre-Auction Planning Activities before Enactment of the Tax Relief Act

Under the Tax Relief Act, OMB is allowed to transfer up to \$10 million in total to all Federal agencies for authorized pre-auction costs incurred between June 28, 2010, and February 22, 2012 (the date of enactment). OMB expects that NTIA's revised Annex O will have agency transition plans include a break out of any such costs incurred during this time period. Also, agencies should provide their OMB contact an accounting of eligible costs incurred between the aforementioned dates by January 31, 2013. Agencies should be prepared to provide evidence that any reported costs meet the definition of allowable pre-auction costs and were incurred in connection with a planned auction. OMB will consider requests for SRF transfers from this time period, subject to fulfillment of the statutory conditions of SRF transfers, and until \$10 million is transferred from the fund for these purposes.

Special Certification Requirements for Pre-Auction Transfers

The Tax Relief Act also requires that OMB make two additional certifications to Congress for transfers that occur before an auction. These certifications are:

(I) funds transferred before an auction will likely allow for timely implementation of relocation or sharing, thereby increasing net expected auction proceeds by an amount not less than the time value of the amount of funds transferred; and

(II) the auction is intended to occur not later than 5 years after transfer of funds.

OMB expects to certify that an auction is intended to occur within five years for frequencies that were specifically identified in the Tax Relief Act that contain Federal agency spectrum assignments or will likely be paired with such spectrum. For all other eligible frequencies, OMB will need to rely on the FCC's notification to NTIA regarding the date for a forthcoming auction pursuant to the statute.

As a first step in justifying an OMB certification that amounts transferred prior to an auction will increase net expected bids by at least the time value of the amount transferred, agencies should calculate the time value of requested pre-auction funds. This will provide one necessary data point in the agency justification of how a transfer of funding prior to an auction will increase the value of the expected auction proceeds by at least the amount of the transfer. Agencies should use the following formula to determine the time value of the funds requested for transfers.

$$\text{Time Value} = \text{Amount Requested} * (1 + \text{Treasury Interest Rate})^{\text{years expected until auction}}$$

In calculating the formula, agencies should use OMB's economic assumptions for annual interest rates for Treasury bonds with maturities comparable to the years until an auction, as estimated by the FCC.

After an agency calculates the time value of the amount requested, it should describe how the activities supported by the requested funds will increase the eligible frequency's value by at least the time value of the funds to be transferred. The description should consider the drivers of potential auction value, as affected by the funded activities. This could include the value of the frequency and the effect on it of greater information transparency, the auction date acceleration and its effect on the time value of sale proceeds that is likely to occur because of the pre-auction activity, the population that could use the spectrum, or the contiguous bandwidth freed. OMB will use this information to determine the net present value of requested pre-auction transfers, and confirm the eligibility of the expenditures for SRF reimbursement.

Questions about this memorandum should be addressed to your agency's OMB representative.

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Sent: Tuesday, November 20, 2012 8:05 PM
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Cc: DL-OMB-ALL
Subject: M-13-01 Guidance for Agencies on Transfers from the Spectrum Relocation Fund for Certain Pre-Auction Costs

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