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COGR FAQs on Uniform Guidance

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COUNCIL ON GOVERNMENTAL RELATIONS
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June 26, 2014

Victoria Collin
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Office of Federal Financial Management
White House Office of Management and Budget
725 17th Street, NW
Washington, DC 20005

Dear Victoria and Gil,

The Council on Governmental Relations (COGR) appreciates your continued willingness to receive input from COGR and all stakeholders from the grant recipient community. ***The proposed FAQs, with answers***, that we have provided in this letter will help to support a smooth implementation of the OMB Uniform Guidance. Note, ***FAQs applicable to Procurement and Fringe Benefits are not addressed in this letter*** – COGR provided a request for action in a separate letter, dated June 17, 2014, to Karen Lee. In addition, comments that we have raised in regard to ***Closeouts are not addressed*** and we will raise this discussion in a separate forum.

Our understanding is that you will share our input with the COFAR at an upcoming meeting. If there are questions on any of our proposed FAQs, we are happy to provide additional clarification. Thank you for your ongoing outreach and we look forward to working with you as you plan release of additional FAQs this summer.

Sincerely,

David Kennedy
COGR

Cc: Karen Lee, Branch Chief, OFFM

200.110 EFFECTIVE/APPLICABILITY DATE

Background: *The Implementation date of key provisions still is uncertain. The following proposed FAQs will provide clarification in selected areas.*

Q1: I am a Principal Investigator at my institution and will submit a proposal prior to 12/26/14 which, if awarded, will be funded after 12/26/14. My sponsored projects office is uncertain if I can include, for example, the costs of administrative support and computing devices in my proposal budget. Doing so would be consistent with the Uniform Guidance but may be inconsistent with the DS-2 that we have filed with our cognizant agency. Can I include costs in my proposal budget that are consistent with the Uniform Guidance but may be inconsistent with the institution's current DS-2?

A1: Yes. OMB will provide guidance to the agencies and the audit community that states costs that are allowable under the Uniform Guidance can be included in proposal budgets prior to 12/26/14. Non-Federal entities that are required to maintain an up-to-date DS-2 should begin making the applicable changes to their DS-2s as soon as practical and submit their DS-2s to their cognizant agencies for review. For the two years after the effective date of the Uniform Guidance, recipients will not be penalized for variances between their approved DS-2 and their actual charging practices, provided that such variances were undertaken to enable conformance to the Uniform Guidance. Further, OMB will review other changes to the Uniform Guidance that could necessitate a change to the DS-2 and will issue guidance on a case-by-case basis.

Q2: I am a Principal Investigator and have an award with three more years of expected funding. Normally I would keep the same account number for all five years, with the incremental funding for each year added as it comes in. Do I have to keep my funding subject to the old OMB Circulars in a separate account from the funding awarded after the Uniform Guidance goes into effect? Or can I just assume that the new rules apply as soon as I get my first post-Uniform Guidance increment of funds? Can I apply those rules to any residual balance of old funds as well as the new monies?

A2: The new rules apply as of the Federal award date (see 200.39) to the first funding increment issued after 12/26/14. Recipients are not obligated to segregate or otherwise track old funds and new funds but may do so at their discretion. For example, a recipient may track the old funds and continue to apply the award flexibilities to the funding awarded under the old rules (e.g., local ability to issue fixed price subawards, recipient determination of the need to incur administrative and clerical salaries based on major project classification, etc.). For administrative convenience, recipients have the option to apply the Uniform Guidance to the entire award as of the Federal award date of the first increment received after 12/26/14.

Q3: What is the effective date for applying the Uniform Guidance to F&A rates?

A3: For F&A rates that are to become effective after 12/26/14, the rules included in the Uniform Guidance should be used. This would include, for example, the use of utility weighting factors when allocating utility costs and the exclusion of participant support costs from the modified total direct cost base. Consequently, F&A rate proposals submitted prior to 12/26/14 to establish F&A rates effective after 12/26/14 should include additional documentation, when practicable, to demonstrate the impact on the proposed F&A rates.

200.112 CONFLICT OF INTEREST

Background: *The proposed FAQ will confirm that this section refers solely to business and procurement conflicts. This is consistent with conversations we have had with the COFAR in previous meetings.*

Q: Section 200.112 states “The Federal awarding agency must establish conflict of interest policies for Federal awards. The non-Federal entity must disclose in writing any potential conflict of interest to the Federal awarding agency or pass through entity in accordance with applicable Federal awarding agency policy.” Section 200.318 describes a conflict of interest in further detail as it relates to a procurement action. Are the conflict of interest policy and disclosure requirements described in Section 200.112 applicable only to the type of conflict of interest described in Section 200.318?

A: Yes, the conflict of interest policy and disclosure requirements of Section 200.112 are referring only to conflicts of interest related to a procurement action as described in Section 200.318.

200.112 USE OF GRANT AGREEMENTS (INCLUDING FIXED AMOUNT AWARDS), COOPERATIVE AGREEMENTS, AND CONTRACTS

Background: *Fixed amount awards and subawards are important funding instruments that support many public policy goals for a diverse group of non-Federal entities. The proposed FAQs will help to assure that these funding instruments continue to be effectively used without creating unintended administrative burden.*

Q1: Section 200.201(b)(1) states that fixed amount awards and subawards can be used when there is a “specific” project scope and “adequate cost, historical or unit price data is available” to assure that the recipient or subrecipient will “realize no increment above actual cost.” What standards will an agency use (or should pass-through entities use) when deciding when a project scope is “specific” and what constitutes “adequate” cost, historical, or unit price data?

A1: The wording in this section was not intended to create a new, higher standard. Fixed amount (fixed price) award are appropriate when the work that is to be performed can be priced with a reasonable degree of certainty. Samples of appropriate mechanisms to establish an appropriate price include the investigator's and the institution's past experience with similar types of work and/or similar types of costs; and/or the ability to obtain price estimates (e.g., bids, quotes, catalog pricing, etc.) for significant cost elements.

Q2: Section 200.201(b)(2) states that a fixed amount award (or subaward) cannot be used in programs that require a mandatory cost-share or match. Please confirm that an institution's need to cover salary costs that exceed an agency's salary cap does not constitute "mandatory cost-sharing" for the purpose of determining whether a fixed amount award or subaward can be used?

A2: Salary costs above an agency's cap are not a mandatory cost-share or match but, instead, are the result of limitations on reimbursement. Since these salary costs above an agency's cap are not a mandatory cost-share or match, a fixed amount award or subaward can be used.

Q3: Section 200.201(b)(3) states: "The non-Federal entity must certify in writing to the Federal awarding agency or pass-through entity at the end of the Federal award that the project or activity was completed or the level of effort was expended. If the required level of activity or effort was not carried out, the amount of the award must be adjusted." What reporting and documentation requirements should the non-Federal entity provide to the awarding agency?

A3: The funding agency or pass-through entity may dictate the form or format required to certify completion or that the level of effort was expended. If no format is specified, the recipient should certify completion to the funding agency (or the subrecipient should certify to the pass-through entity) as a part of the closeout process. Consistent with section 200.308(c)(3), a reduction of more than 25% of the level of effort must be reported to the agency and would require an adjustment. In other cases where an adjustment is necessary, typical mechanisms would include basing the adjustment on the percentage of completed work, actual costs incurred to date, or on another documented basis.

200.307 PROGRAM INCOME (and definition, 200.80)

Background: *The proposed FAQ will confirm that the statutory requirements under the Bayh-Dole Act (35 USC 202(c)(7)) supersede any described treatments of license fees and royalties per sections 200.80 and 200.307(f). This is consistent with conversations we have had with the COFAR in previous meetings.*

Q: According to the Bayh-Dole Act (35 USC 202(c)(7)), for nonprofit organizations (e.g., IHEs, Nonprofit research institutions, other research performers), a portion of the license fees and

royalties on patents and copyrights are required to be returned to the inventor and the balance is to be used for education and research. Therefore, should the income from license fees and royalties be excluded from the definition of program income?

A: Yes, income from license fees and royalties should be excluded from the definition of program income. U.S. law or statute takes precedent over the Uniform Guidance.

200.313 EQUIPMENT

Background: *New terms or context (“conditional title”, “use”, “Federal participation”) raise the concern of expensive revisions to institutional IT for property and related systems. The proposed FAQs will clarify that IT system revisions are not expected.*

Q1: Section 200.313(a) of the guidance specifies that title for equipment acquired under a Federal award will vest upon acquisition in the non-Federal entity as a “conditional title”. This is new terminology for those non-Federal entities that have followed Circular A-110. What is meant by “conditional title” and will this affect how non-federal entities have historically accounted for equipment ownership?

A1: There is no change intended in the Uniform Guidance for how non-Federal entities should account for equipment ownership. The concept of “conditional title” always has been in effect, and simply means that equipment ownership vests in the non-Federal entity at the time of acquisition and that it is contingent on meeting the requirements for use, management, and disposition of the equipment as required in section 200.313.

Q2: Section 200.313(d)(1) of the guidance specifies the attributes that must be maintained in the property records of the non-Federal entity. For non-Federal entities that have followed Circular A-110, there are two changes:

- “percentage of Federal participation in the project costs” (Uniform Guidance) versus “information from which one can calculate the percentage of Federal participation in the cost of the equipment” (A-110. .34(f)(1)(vi)), and
- “the location, use and condition of the property” (Uniform Guidance) versus “location and condition of the equipment and the date the information was reported” (A-110. .34(f)(1)(vii)).

Are non-Federal entities expected to change the attributes of their property records and ultimately be required to implement costly changes to their existing equipment inventory systems?

A2: No. The expectations for the attributes of property records are not changed and non-Federal entities are not expected to change their equipment inventory systems or the data

elements contained in those systems, if they are in compliance with the current requirements in Circular A-110. In the examples referenced above:

- “the percentage of Federal participation in the project costs” is referring only to the percentage of Federal participation in the cost of the specific equipment item, identical to the requirement in Circular A-110, and
- “the location, use and condition of the property” is referring to an indicator in the property records that the specific equipment item is active and linked with the appropriate federal award, identical to the requirement in Circular A-110.

The requirements for property records have not changed in the Uniform Guidance. The requirements for property records are meant to ensure that the non-Federal entity maintains an equipment inventory system that demonstrates the non-Federal entity has an effective system of controls to account for and track equipment that has been acquired with Federal funds.

200.330 SUBRECIPIENT AND CONTRACTOR DETERMINATIONS (and MTDC definition, 200.68)

Background: *Confirmation is needed that contractor (vendor) agreements exceeding \$25k are subject to F&A. Longstanding guidance has required F&A rates to be developed under the premise that all contractor agreements (at all dollar levels) are subject to F&A.*

Q: Historically, only subrecipient agreements over \$25,000 have been considered an MTDC exclusion (per 200.93, Subrecipient means a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program). Is the MTDC exclusion for “subcontracts over \$25,000” intended to include contractor agreements (for goods and services) awarded under Federal assistance awards?

A: No, the MTDC exclusion definition is meant to include subrecipient agreements as defined in 200.93 only. Contractor agreements (for goods and services) awarded under Federal assistance awards are not part of the MTDC exclusion definition. Notwithstanding the definition of "subcontract" used in the Federal Acquisition Regulations for Federal contracts, the term "subcontract" in the Uniform Guidance and incorporated into its MTDC definition is not intended to include contractor agreements for goods and services.

200.400 POLICY GUIDE (Definition of Profit)

Background: *The proposed FAQ will clarify that an unexpended balance that remains at the end of a fixed price award does not represent profit.*

Q: Section 200.400(g) states that a non-Federal entity may not “earn or keep any profit resulting from Federal financial assistance, unless expressly authorized by the terms and

conditions of the Federal award.” Does that mean that a recipient or subrecipient cannot retain any unexpended balance on its fixed price/fixed amount awards and subawards?

A: Section 200.401 states that “these principles also must be used by the non-Federal entity as a guide in the pricing of fixed-price contracts and subcontracts where costs are used in determining the appropriate price.” Provided that the cost of a fixed price award was priced using these principles, any residual unexpended balance that remains at the end of a completed award is not “profit” and, therefore, can be retained.

200.430 COMPENSATION – PERSONAL SERVICES

Background: *The proposed FAQ will provide more assurance for those non-Federal entities that are contemplating a change in their processes for documenting payroll charges that changes are allowable and can be implemented when the non-Federal entity complies with the requirements in section 200.430.*

Q: Section 200.430(a) states that “Costs of compensation are allowable to the extent that they satisfy the specific requirements of this Part and that the total compensation for individual employees: (1) Is reasonable ... (2) Follows an appointment made in accordance with a non-Federal entity’s laws / or rules or written policies ... (3) Is determined and supported as provided in paragraph (i) ... Standards for Documentation of Personnel Expenses, when applicable.”

What processes do non-Federal entities need to follow to be authorized to change their current systems for documenting payroll charges? Can non-Federal entities make incremental changes that reduce burden but maintain the spirit of their current processes? For those institutions that are required to file a DS-2, what is the role of the DS-2 in this process?

A. Changes to the process through which payroll charges are documented are allowable and can be implemented when the non-Federal entity complies with standards defined in paragraph (i) Standards for Documentation of Personnel Expenses, and when these standards are inherent in the current internal control environment and are substantiated as part of the annual single audit per 200.501 (formerly, OMB A-133 audit). When non-Federal entities have disclosed their current process in a DS-2, any change will require a corresponding change in the DS-2. In most cases, this simply means that the non-Federal entity would revise its current DS-2 and provide a high level summary of the processes that meet paragraph (i). Non-Federal entities can develop solutions that meet the requirements in paragraph (i) and reduce the burden related to their current process whether they be incremental or more significant, including complete elimination of current systems. OMB is committed to reviewing changes in the Uniform Guidance that could necessitate changes to the DS-2, including changes on how an institution documents payroll charges, and will issue

guidance on a case-by-case basis whether those changes require approval by the institution's cognizant agency.

200.436 DEPRECIATION

Background: FAQ IV-1 attempts to clarify section 200.436(c)(3). However, the Uniform Guidance remains unclear and may suggest that an institutional contribution, made in addition to a contribution of Federal funds, is unallowable for recovery. Disallowance would be a major change in Federal policy and would create a disincentive to accept assistance for the construction of buildings and major equipment.

Q: Section 200.436(c)(3) states the following is excluded from the acquisition cost of the asset: "Any portion of the cost of buildings and equipment contributed by or for the non-Federal entity, or where law or agreement prohibits recovery." This would suggest that the depreciation on the institutional/matching/cost sharing contributions to construction and major instrumentation is unallowable for recovery. FAQ IV-1 clarifies that this qualification is limited to instances of cost sharing or matching, but the language remains unclear, and could be interpreted inappropriately to reverse longstanding Federal policy allowing institutions to recover through their F&A rates their contributions to construction projects and instrumentation partially funded through Federal awards, unless prohibited by law or agreement. Is depreciation on the institutional contribution allowable, even in cases of cost sharing or matching?

A: Yes, depreciation on the institutional contribution is allowable, unless law or agreement prohibits recovery. The following technical correction to 200.436(c)(3) should be applied:

Any portion of the cost of buildings and equipment contributed by or for the non-Federal entity ~~, or~~ where law or agreement prohibits recovery.

OTHER PROPOSED FAQs:

Q1: 200.110 Effective / applicability date. My institution will receive new awards (and new funding increments) after 12/26/14 that include subawards with no F&A for the subrecipient. Is my institution required to give up some of the direct costs to comply with the 10% de minimus F&A rule?

A1: The pass-through entity has the option to offer the subrecipient either the F&A rate included in the competitive proposal/previously issued subaward or to grant an F&A rate based on the Uniform Guidance. For new subawards (ones that were neither identified in a previously submitted competitive proposal nor already included in an active award) it is expected that the rules contained in the Uniform Guidance will be followed.

Q2: 200.331 Requirements for pass-through entities. This section states that pass-through entities are expected to honor a subrecipient's negotiated F&A rate agreement, or use a 10% MTDC de minimus rate, or negotiate an F&A rate with the subrecipient. Is it acceptable to require a subrecipient to accept a rate lower than 10% MTDC via negotiation, or in lieu of their negotiated F&A rate? If a subrecipient requests to establish a rate via negotiation, does the pass-through entity have to establish the rate via negotiation?

A2: If the subrecipient already has a negotiated F&A rate with the Federal government, the negotiated rate must be used. It also is not permissible for pass-through entities to force or entice a proposed subrecipient without a negotiated rate to accept less than the de minimus rate. Pass-through entities may, but are not required, to negotiate a rate with a proposed subrecipient who asks to do so.

Q3: 200.331 Requirements for pass-through entities. What should I do if my pass-through entity won't honor my institution's negotiated F&A rate agreement? My sponsored projects office told me that privity rules won't let us approach the Federal agency directly and my pass-through entity has told me to take it or leave it.

A3: OMB will issue guidance at a later date after further review with stakeholders.

Q4: 200.332 Fixed amount subawards. My institution has a fixed price subaward issued on an active award and it is over the \$150k Simplified Acquisition Threshold (SAT); it will continue to be active after 12/26/14. Instead of modifying the subaward, can I give my subrecipient a new fixed price subaward to cover just this year's funding so I can stay below the SAT?

A4: Since subawards were determined in 2000 to not be procurement actions, it is acceptable to have more than one fixed amount subaward with the same subrecipient if necessary to complete work contemplated under an award. It is expected, however, that each fixed amount subaward will have its own distinct statement of work and be priced for the work and deliverables that will be due under that subaward, and that prior approval of the funding agency is required for each subaward issued under funding received after 12/26/14, as outlined in 200.332. Recipients having special circumstances, including an unanticipated need to increase a fixed price subaward above the SAT, should consult with their funding agency for guidance on how to complete the planned scope of work with the least amount of administrative burden.

Q5: 200.401 Application. This section states that cost principles do not apply to capitation awards, scholarships, fellowships, traineeships, other fixed amounts, and fixed amount awards. However, section 200.400 states that cost principles must be used in the pricing of fixed-price contracts and subcontracts where costs are used in determining the appropriate

price. Can you clarify the application of the cost principles to fixed-price and fixed-rate awards and subawards?

A5: The cost principles apply when proposing (pricing) the work that will be performed, but do not apply to the actual costs incurred during the life of the award or subaward. In other words, the recipient and the Federal agency, or the pass-through entity and the subrecipient, will use the principles to establish the amount that should be paid for the work to be performed. Once the price is established and the fixed amount/fixed price award or subaward is issued, payments are based on achievement of milestones (e.g., per patient, per procedure, per assay, or per milestone) and not on the actual costs incurred.

Q6: 200.413 Direct costs. I have an assistance award that qualifies as a major project or activity and I'm directly charging administrative costs to it. When I receive incremental funding on my project next spring, I understand I am going to now need prior written approval from the agency to continue charging those costs to the new incremental funds. If I list my intention to continue charging those costs in my next continuation progress report and the agency issues my award without making any mention of my request, does that count as prior written approval?

A6: Yes, that would be considered prior written approval.

Q7: 200.414 Indirect (F&A) costs. Section 200.414(g) allows any non-Federal entity that has a Federally negotiated indirect cost rate to apply for a one-time extension of its current negotiated indirect cost rates for a period of up to four years. This extension will be subject to the review and approval of the cognizant agency for indirect costs. Are there any documentation requirements that must be submitted? Are non-Federal entities eligible for multiple four-year extensions?

A7: The intent of allowing for rate extensions is to minimize the administrative burden for the non-Federal entity. As such, documentation requirements to support a four-year rate extension should be kept to a minimum and are subject to OMB review. A non-Federal entity can apply for a one-time extension (up to four years) on its most current negotiated rate. Subsequent one-time extensions (up to four years) are available if a more detailed F&A rate proposal is completed between each extension request. For example, the following would be allowable: 4-year extension thru FY20, a new F&A rate proposal to negotiate rates for FY21-FY23, and a new one-time extension thru FY27 based on the most current negotiated rate.

Q8: 200.415 Required certifications. This section requires certain financial reports and payment requests to be signed by someone who is "authorized to legally bind the non-Federal entity." Was this language intended to limit approval of these transactions to only

those with the “legal authority” per the recipient’s articles of incorporation, or can that authority be internally delegated?

A8: This authority can be internally delegated.

Q9: 200.440 Exchange rates. This section requires agency prior approval for fluctuations in exchange rates (for international projects). How can prior approval be obtained when the exchange rate may fluctuate on a daily basis as expenditures occur?

A9: Approval of exchange rate fluctuations are required only when the change results in the need for additional Federal funding, or the increased costs results in the need to significantly reduce the scope of the project.

Q10: 200.458 Pre-award costs. I want to request pre-award spending in October 2014 for my award that will be funded soon after the Uniform Guidance goes into effect. How can I make sure the costs I incur will be allowed on my grant?

A10: All pre-award spending is incurred at the award recipient’s risk, since the terms and conditions of the award are not yet known. In the event that a recipient allows a cost that subsequently is not allowed by that agency’s implementation plan, that cost must be removed unless the agency agrees in writing to grant a retroactive approval for that cost in that circumstance.

Q11: Appendix III to Part 200. Section B.4.c, Operation and maintenance expense, includes guidance on the allocation of utility expenses. All IHEs now are eligible to receive up to a 1.3% utility cost adjustment on the institution’s F&A rate. Some of the direction for the allocation utility expense is not clear and could create uncertainty when an institution negotiates their F&A rate with its cognizant agency. If there is a disagreement in interpretation, how should this situation be resolved?

A11: Sections C.11.f, g, and h of Appendix III include processes and procedures for ensuring an objective and fair negotiation of rates. When there are areas of disagreement, IHEs and the cognizant agency should follow the processes and procedures described in sections C.11.f, g, and h, and further work toward resolving disagreements in a collaborative manner. OMB should be consulted when there are questions applicable to the interpretation of the Uniform Guidance.