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**Uniform Guidance Technical Corrections**

Author: David Kennedy

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# COGR

an organization of research universities

## COUNCIL ON GOVERNMENTAL RELATIONS

1200 New York Avenue, N.W., Suite 750, Washington, D.C. 20005  
(202) 289-6655/(202) 289-6698 (FAX)

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October 9, 2014

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

Dear Victoria and Gil,

Thank you for your willingness to review our proposal for technical corrections to the Uniform Guidance. The premise for many of our proposed technical corrections is that it is critical that selected FAQ language from OMB's August 29<sup>th</sup> version of the FAQs be incorporated into the body of the Uniform Guidance. Since many of the FAQs represent important policy clarifications, ***COGR believes it is absolutely necessary to make the changes we have proposed.***

As you may be aware, a statement by the OIG in a recent OIG audit report highlights the importance of addressing our proposed changes:

*[The institution] agreed with our calculation ... however, [the institution] stated that the Frequently Asked Questions (FAQs) document on Proposal Preparation and Award Administration available on NSF's website indicates that grantees are not required to obtain NSF's approval ... [The institution] therefore does not agree with the questioned costs. While the responses to the FAQ's indicate that prior approval is not required from NSF ... **the FAQ responses do not represent authoritative guidance [emphasis added]** ... As the FAQ's do not override NSF policies, we have not changed our opinion on this finding and the questioned costs remain the same.*

Furthermore, because the FAQs from August 29<sup>th</sup> went through a rigorous review process by the COFAR, incorporating our recommendations would seem to be routine, and more importantly, beneficial to all stakeholders; Federal and non-Federal entities.

Finally, we request that the FAQs (both the August 29, 2014 and the February 12, 2014 versions), as well as the Preamble to the Uniform Guidance, be codified as part of 2 CFR 200. This will confirm important aspects of the policy intent of the Uniform Guidance and will help to ensure the longevity and sustainability of the Uniform Guidance.

Consequently, we request that the COFAR consider the proposed changes on the pages that follow. Please note, proposed changes are shown via ~~strikethroughs~~ for language that we believe should be deleted and underlines for language that we believe should be added.

**§ 200.112 Conflict of interest**

We recommend that the title of this section be changed to more clearly describe the intent of this section. In addition, we recommend that language from FAQ .112-1 be appended to the end of § 200.112.

*§ 200.112 Conflict of interest in procurements*

*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. This refers to conflicts that might arise around how a non-Federal entity expends funds under a Federal award. These types of decisions include, for example, selection of a subrecipient or procurements as described in section 200.318.*

**§ 200.201 Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts**

We recommend the following as an addition to section (b)(2). This is consistent with FAQ .201-2 and will confirm that fixed amount awards (and subawards) can be used in programs where an individual's salary exceeds a Federal awarding agency's salary cap.

*(b)(2) A fixed amount award cannot be used in programs which require mandatory cost sharing or match. Salary costs above a Federal awarding agency's cap are not a mandatory cost-share or match but, instead, are the result of limitations on the amount of salary costs that may be charged to the Federal award. Since these salary costs above a Federal awarding agency's cap are not a mandatory cost-share or match, a fixed amount award or subaward can be used.*

**§ 200.303 Internal controls**

We recommend adding the following as an addition to section (a). This is consistent with FAQ .303.2 and will confirm the applicability of the Green Book and COSO.

*(a) Establish and maintain effective internal control over the Federal award that provides reasonable assurance that the non-Federal entity is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. These internal controls should be in compliance with guidance such as that contained in "Standards for Internal Control in the Federal Government" issued by the Comptroller General of the United States and the "Internal Control Integrated Framework", issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO). There is no expectation or requirement that the non-Federal entity document or evaluate internal controls prescriptively in accordance with these documents or that the non-Federal entity or auditor reconcile technical differences between them. They are provided solely to alert the non-Federal entity to source documents for effective practices.*

**§ 200.306 Cost sharing or matching**

We recommend adding the following as section (k). This is consistent with FAQ .458.2 and will officially recognize the applicability of OMB M-01-06 and the treatment of Voluntary Uncommitted Cost Sharing.

(k) OMB M-01-06, dated January 5, 2001, Clarification of OMB A-21 Treatment of Voluntary Uncommitted Cost Sharing and Tuition Remission Costs, is applicable to the Uniform Guidance.

### **§ 200.307 Program income**

We recommend adding the following as section (g), which currently is included as .24(h) in Circular A-110. This is consistent with FAQ .307-1 and will confirm the stated exclusions from program income.

(g) Unless Federal awarding agency regulations or the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

### **Procurement Standards**

We recommend that the effective date be included as a Note to the header for this section.

#### ***Procurement Standards***

Note: An implementation grace period is applicable to § 200.317 through § 200.326. For the non-Federal entity's first full fiscal year that begins on or after December 26, 2014 (FY2016 for most non-Federal entities), the non-Federal entity must document whether it is in compliance with the old or new standard, and must meet the documented standard. For future fiscal years (FY2017 for most non-Federal entities), all non-Federal entities will be required to comply fully with the Uniform Guidance.

### **§ 200.318 General Procurement Standards**

We recommend adding the following to section (a). This is consistent with FAQ .320-6 and will confirm that procurement standards are applicable to Federal funds only; they are not applicable to non-Federal funds that may be recovered as indirect costs.

The non-Federal entity must use its own documented procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section. The Uniform Guidance procurement standards do not apply to procurements made in indirect cost areas. They apply to procurements for goods and services that are directly charged to a Federal award.

### **§ 200.320 Methods of Procurement**

We recommend adding the following as section (f)(5). This is consistent with FAQs .320-1 and .320-4 and will confirm that sole source justification for scientific reasons is allowable.

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*(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:*

*(1) The item is available only from a single source;*

*(2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;*

*(3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; ~~or~~*

*(4) After solicitation of a number of sources, competition is determined inadequate; or*

*(5) The procurement is necessary for scientific reasons. For example if the procurement is of special quality that is offered by only one company or only one company can deliver in the time frame required for the project, the purchase order can be made under the sole source purchase provision.*

### **§ 200.332 Fixed amount subawards**

We recommend adding the following to § 200.332. This is consistent with FAQ .332-1 and will confirm that more than one fixed amount subaward issued to the same subrecipient is allowable.

*With prior written approval from the Federal awarding agency, a pass-through entity may provide subawards based on fixed amounts up to the Simplified Acquisition Threshold, provided that the subawards meet the requirements for fixed amount awards in §200.201 Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts. It is acceptable to have more than one fixed amount subaward with the same subrecipient if necessary to complete work contemplated under a Federal 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.*

### **§ 200.400 Policy guide**

We recommend adding the following to section (f). This is consistent with FAQ .400-2 and confirms the applicability of the “dual role” of students to pre- and post-doctoral staff.

*(f) For non-Federal entities that educate and engage students in research, the dual role of students (including pre- and post-doctoral staff) as both trainees and employees contributing to the completion of Federal awards for research must be recognized in the application of these principles.*

Also we recommend adding the following to section (g). This is consistent with FAQ .400-1 and will confirm that residual funds from a fixed amount award or subaward that was determined according to the Uniform Guidance is not considered profit and can be retained by the non-Federal entity.

*(g) The 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. See also § 200.307 Program income. In the case of fixed amount awards and subawards, provided that the cost of the fixed amount award or subaward was*

determined according to the Uniform Guidance, any residual unexpended balance that remains at the end of a completed award is not profit and, therefore, can be retained by the non-Federal entity. See also § 200.401(a)(3).

### **§ 200.401 Application**

We recommend adding the following to section (a). This is consistent with FAQ .401-1 and will confirm that the cost principles are applicable only to proposing (pricing) work for fixed amount awards, and are not used as a compliance requirement for actual costs incurred.

*(a) General. These principles must be used in determining the allowable costs of work performed by the non-Federal entity under Federal awards. 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; however, these principles are not formally used as compliance requirements for actual costs incurred. The principles do not apply to*

...

### **§ 200.414 Indirect (F&A) costs**

We recommend adding the following to section (g). This is consistent with FAQ .414-2 and confirms that a one-time F&A rate extension of up to four years can be used multiple times, as long as a renegotiation has taken place between each extension request.

*(g) Any non-Federal entity that has a federally negotiated indirect cost rate may apply for a one-time extension of a 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. If an extension is granted the non-Federal entity may not request a rate review until the extension period ends. At the end of the 4-year extension, the non-Federal entity must re-apply to negotiate a rate. Subsequent one-time extensions (up to four years) are available if a renegotiation is completed between each extension request. Once there is a new negotiated indirect cost rate in effect, a non-Federal entity could request a one-time extension on that rate.*

### **§ 200.431 Compensation – fringe benefits**

On September 4, 2014, following a conference call between representatives from the COFAR and COGR, you sent an email to COGR that stated FAQ 200.431 would be retracted and that the following technical corrections will be considered for § 200.431. Our understanding from the conference call was that the COFAR agreed with our position and that we could share with the COGR membership that this technical correction is imminent. If there are further issues to be addressed, please contact COGR staff.

*(b)(3)(i) When a non-Federal entity uses the cash basis of accounting, the cost of leave is recognized in the period that the leave is taken and paid for. Payments for unused leave when an employee retires or terminates employment are allowable ~~as indirect costs~~ in the year of payment. Use of the accrual basis for accounting represents an effective practice and can be considered when charging these costs to Federal awards. However, it is permissible for non-Federal entities to use the cash basis when accounting for these costs.*

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*(e)(3) Actual claims paid to or on behalf of employees or former employees for workers' compensation, unemployment compensation, severance pay, and similar employee benefits (e.g., postretirement health benefits), are allowable in the year of payment provided that the non-Federal entity follows a consistent costing policy ~~and they are allocated as indirect costs~~. Use of the accrual basis for accounting represents an effective practice and can be considered when charging these costs to Federal awards. However, it is permissible for non-Federal entities to use the cash basis when accounting for these costs.*

### **§ 200.436 Depreciation**

We recommend making the following technical correction to section (c)(3). This will confirm that depreciation on the institutional contribution made to the cost of buildings and equipment is allowable, unless law or agreement prohibits recovery. The grammatical presentation in the original version of the Uniform Guidance was flawed and requires the following correction. This is consistent with FAQ 436-1.

*(c) Depreciation is computed applying the following rules. The computation of depreciation must be based on the acquisition cost of the assets involved ... For this purpose, the acquisition cost will exclude ...*

*(3) Any portion of the cost of buildings and equipment contributed by or for the non-Federal entity ~~or~~ where law or agreement prohibits recovery. Consequently, unless law or agreement prohibits recovery, the institutional contribution is allowable.*

### **§ 200.440 Exchange Rates**

We recommend the following to section (a). This is consistent with FAQ .440-1 and confirms the prior approval requirements when there is a change in exchange rates.

*(a) Cost increases for fluctuations in exchange rates are allowable costs subject to the availability of funding ~~and prior approval by the Federal awarding agency~~. Prior 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. The Federal awarding agency must however ensure that adequate funds are available to cover currency fluctuations in order to avoid a violation of the Anti-Deficiency Act.*

### **Appendix III. C.2. The distribution basis (also § 200.68 Modified total direct costs)**

On September 26, 2014, COGR wrote a letter to representatives from the COFAR addressing a concern with the use of the term “subcontract” in the Uniform Guidance. In a subsequent telephone call between representatives from the COFAR and COGR, you indicated that you agreed with COGR’s proposal in the September 26, 2014 letter, and that the following technical corrections proposed by COGR would be implemented. If there are further issues to be addressed, please contact COGR staff.

*Subpart A. § 200.68 Modified Total Direct Cost (MTDC).*

*MTDC means all direct salaries and wages, applicable fringe benefits, materials and supplies, services, travel, and subawards ~~and subcontracts~~ up to the first \$25,000 of each subaward ~~or subcontract~~ (regardless of the period of performance of the subawards ~~and subcontracts~~ under the award). MTDC excludes equipment, capital*

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*expenditures, charges for patient care, rental costs, tuition remission, scholarships and fellowships, participant support costs and the portion of each subaward ~~and subcontract~~ in excess of \$25,000. Other items may only be excluded when necessary to avoid a serious inequity in the distribution of indirect costs, and with the approval of the cognizant agency for indirect costs.*

*Appendix III. C.2. The distribution basis.*

*Indirect (F&A) costs must be distributed to applicable Federal awards and other benefitting activities within each major function (see section A.1, Major functions of an institution) on the basis of modified total direct costs (MTDC), consisting of all salaries and wages, fringe benefits, materials and supplies, services, travel, and subawards ~~subgrants and subcontracts~~ up to the first \$25,000 of each subaward (regardless of the period covered by the subaward). MTDC is defined in § 200.68 Modified Total Direct Cost (MTDC) ...*

Note: we suggest the Appendices applicable to other non-federal entities be reviewed to determine applicability.

### **OTHER RECOMMENDATIONS**

The following represent additional recommendations that have not been addressed between COFAR and COGR, to-date. However, we propose that the recommendations below be implemented as technical corrections that will clarify policy intent, and ultimately, be helpful to Federal and non-Federal entities.

#### **§ 200.307 Program income**

We recommend the following modification to section (e)(2). Section (e) clearly states that the “Addition” method is the appropriate treatment for program income for IHEs and nonprofit research institutions. Consequently, it would be inconsistent to require prior approval for use of this methodology.

*(e) Use of program income. If the Federal awarding agency does not specify in its regulations or the terms and conditions of the Federal award, or give prior approval for how program income is to be used, paragraph (e)(1) of this section must apply. For Federal awards made to IHEs and nonprofit research institutions, if the Federal awarding agency does not specify in its regulations or the terms and conditions of the Federal award how program income is to be used, paragraph (e)(2) of this section must apply ...*

*(2) Addition. ~~With prior approval of the Federal awarding agency,~~ Program income may be added to the Federal award by the Federal agency and the non-Federal entity. The program income must be used for the purposes and under the conditions of the Federal award.*

#### **§ 200.318 General procurement standards**

We recommend the following modification to section (c)(1). The second sentence includes a “must” which reads more logically with the word “can”. In addition, due to the highly scientific nature of the research that is conducted, IHEs are required to work with companies that could have financial conflicts of interest with university employees. In these cases, well defined procedures are put into place to effectively manage the financial conflict of interest. As a result, we have suggested the following technical correction to address this issue.

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*(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent ~~must~~ can participate in the selection, award, or administration of a contract supported by a Federal award if he or she has an unmanaged real or apparent conflict of interest. Such a conflict of interest ...*

### **§ 200.419 Cost accounting standards and disclosure statement**

In a separate letter, COGR has written to OMB and the COFAR to make the following technical correction to the section (b). In that letter, we have documented the importance for making the technical correction and will provide additional documentation, as appropriate.

(a) An IHE that receives aggregate Federal awards totaling \$50 million or more in Federal awards subject to this Part in its most recently completed fiscal year must comply with the Cost Accounting Standards Board's cost accounting standards located at 48 CFR 9905.501, 9905.502, 9905.505, and 9905.506. CAS-covered contracts awarded to the IHEs are subject to the CAS requirements at 48 CFR 9900 through 9999 and 48 CFR Part 30 (FAR Part 30).

(b) Disclosure statement. An IHE that receives aggregate ~~Federal awards~~ CAS-covered contracts totaling \$50 million or more subject to this Part during its most recently completed fiscal year must disclose their cost accounting practices by filing a Disclosure Statement (DS-2), which is reproduced in Appendix III to Part 200 -- Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Institutions of Higher Education (IHEs). With the approval of the cognizant agency for indirect costs, an IHE may meet the DS-2 submission by submitting the DS-2 for each business unit that received \$50 million or more in ~~Federal awards~~ CAS-covered contracts.

### **§ 200.430 Compensation – personal services**

Please note the following per section (h)(1)(ii); paragraph (h)(9) does not exist.

*(ii) Incidental activities. Incidental activities for which supplemental compensation is allowable under written institutional policy (at a rate not to exceed institutional base salary) need not be included in the records described in paragraph ~~(h)(9)~~ ??????? of this section to directly charge payments of incidental activities, such activities must either be specifically provided for in the Federal award budget or receive prior written approval by the Federal awarding agency.*

We recommend the following modification to section (d)(2). Under longstanding policy and practice, the FAR has deferred to OMB Circulars A-21 and A-122 to establish appropriate compensation levels, which recognizes the unique position of IHEs and nonprofit organizations to advance clinical discoveries and public health initiatives for the United States of America and the entire world. In many cases, highly compensated employees are performing the critical research to accomplish this objective. As the current language in section (d)(2) could represent a policy change that was not addressed through the public comment process, we recommend the following modification.

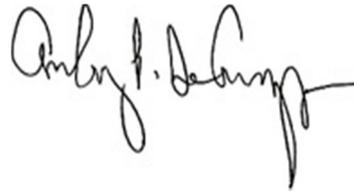
*(d)(2) The allowable compensation for certain employees ~~is~~ may be subject to a ceiling in accordance with statute. When applicable, these statutory ceilings may apply. ~~For the amount of the ceiling for cost-reimbursement contracts, the covered compensation subject to the ceiling, the covered employees, and other relevant provisions,~~*

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~~see 10 U.S.C. 324(e)(1)(P), and 41 U.S.C. 1127 and 4304(a)(16). For other types of Federal awards, other statutory ceilings may apply.~~

Thank you for your consideration. David Kennedy is the point of contact and he can be reached at (202) 289-6655, ext. 112. We look forward to addressing the topics we have raised at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Anthony P. DeCrappeo". The signature is fluid and cursive, with a long horizontal stroke at the end.

Anthony P. DeCrappeo  
President

Cc: Karen Lee, Branch Chief, OFFM