



December 4, 2023

MEMORANDUM

To: Steven Mackey, Policy Analyst
Office of Federal Financial Management
Office of Management & Budget, Executive Office of the President

From: Kate Hudson & Meredith Asbury, Association of American Universities
Deborah Altenburg, Association of Public and Land-grant Universities

Subject: *OMB Guidance for Grants and Agreements*
88 FR 69390, Doc. No. 2023-21078

On behalf of the Association of American Universities (AAU) and the Association of Public and Land-grant Universities (APLU), we appreciate the opportunity to provide comments on the above-referenced proposed OMB Guidance for Grants & Agreements. Our member universities represent a significant portion of the U.S. academic research enterprise and are substantial recipients of federal research funding. In addition to our comments offered here, our associations also align ourselves and endorse the more detailed and technical comments submitted by COGR.

For purposes of clarity, we will provide our comments in the order in which provisions appear in the Uniform Guidance.

200.1 – Definitions – Indirect Cost

We acknowledge and appreciate OMB's efforts to streamline and simplify terms used throughout the uniform guidance to increase understanding and readability. However, we are concerned that 'indirect cost' is too simplistic of a term to define facilities and administrative costs (also known as F&A). We believe that 'facilities and administrative costs' more accurately describes the two types of indirect costs universities incur as part of their partnership with the federal government to support federally funded research – cost reimbursements for research facilities and those for the administrative support of research. The term 'indirect costs' is often interpreted as 'overhead costs' and therefore suggests these are not real and essential costs for conducting research. In fact, it was for this very reason that in its May 1996 revision of the Cost Principles for Educational Institutions (OMB Circular A-21) the OMB replaced 'indirect costs' with 'facilities and administrative costs.'

Recommendation: *In the final guidance, we urge OMB to consider adding language that clarifies that 'facilities and administrative costs' is the more accurate term when discussing the costs of research that have previously been called 'indirect'.*

200.1 – Definitions – Key Personnel

We appreciate the term ‘key personnel’ has been added to the definitions section of the revised guidance. However, the definition included here is not aligned with executive branch guidance contained elsewhere including National Security Presidential Memorandum 33 (NSPM-33). As drafted, the definition in the proposed uniform guidance states this would be “any individuals (including employees and contractors) working under a federal award that are designated in the Federal award as being particularly integral or meaningful to the program.” In the NSPM-33 definition, key personnel is defined as “principal investigators (PIs) and other senior/key personnel seeking or receiving Federal research and development funding (i.e., extramural funding) and researchers at Federal agency laboratories and facilities (i.e., intramural researchers, whether or not federally employed), including Government-owned, contractor-operated laboratories and facilities.”¹ Providing consistent, standard definitions is important for avoiding confusion and maintaining compliance.

Recommendation: We recommend OMB aligning the revised definition to tie the key personnel to “individuals seeking or receiving federal funding” to more closely parallel the NSPM-33 key personnel definition or otherwise acknowledge any inconsistencies with the definition contained in the guidance that might otherwise lead to confusion.

200.100 – Purpose (Cost Principles)

In the revised guidance, the statement of purpose has removed language which states, “cost principles are designed to provide that Federal awards bear their **fair share** of cost under these principles except where restricted or prohibited by statute.” AAU and APLU are extremely concerned with the removal of this language. The federal government relies on universities to conduct research in the national interest yet performing this research on behalf of federal agencies incurs a variety of expenses that would not otherwise exist for universities.

Universities are already not fully reimbursed by the federal government for the costs incurred for conducting research sponsored by the federal government which has resulted in increasing institutional support for the research they conduct. In fact, since 2015 institutional support that colleges and universities provide to support research and development conducted by their faculty has grown faster than any other sector, including the federal government.² And, while the total share contributed by colleges and universities to support academic R&D increased from 21% in 2012 to 25% in 2021, the federal government’s share declined from 61% in 2012 to 55% in 2021.³ The increase in institutional support for the R&D they conduct is due in part to the rising unreimbursed research costs associated with compliance with increased federal research regulations and reporting requirements in areas such as human subject and lab animal

¹ NSPM-33 Implementation Guidance, January 2022 <https://www.whitehouse.gov/wp-content/uploads/2022/01/010422-NSPM-33-Implementation-Guidance.pdf>

² NSF, National Center for Science and Engineering Statistics 2023, National Patterns of R&D Resources: 2020-21 Data Update

³ Academic Research & Development, Funding Sources of Academic R&D, Science and Engineering Indicators, October 2023, <https://nces.nsf.gov/pubs/nsb202326/funding-sources-of-academic-r-d>

protections, environmental health and safety, export control compliance, and ensuring research security and integrity. Despite the increasing administrative expense for compliance, the amount universities can be reimbursed from the government for these costs, unlike other sectors like industry, has been capped at a flat rate of 26 percent. Universities must therefore subsidize compliance costs from their own financial resources. This is the *only* sector that conducts government research with such an administrative cap.

Recommendation: *It is important that the federal government maintain its commitment to bear the fair share in the costs supporting research conducted on its behalf at universities. We therefore urge OMB to restore this important statement in the final guidance.*

200.102 – Exceptions; 200.105 – Effect on Other Issuances; 200.107 OMB Responsibilities

AAU and APLU were encouraged by provisions within the 21st Century Cures Act⁴ enacted in 2016 to identify potential efficiencies for regulatory oversight and compliance. This included efforts to reduce administrative work associated with the regulation of federally funded research while maintaining equivalent protections and oversight. One of the recommendations authorized by the Act was to establish the Research Policy Board (RPB) to be overseen and administered by OMB, which is intended to allow researchers and university representatives with strong knowledge of the regulations and their impact on research to engage in regular discussions with federal agency officials to ensure the effectiveness and efficiency of existing and proposed regulations, policies, and guidance. The RPB is intended to advise the federal government on the effects of federal research regulations and reporting requirements and recommend ways to modify, streamline, and harmonize them. As conceived by the National Academies, the RPB would also prospectively advise on proposed rules and draft policies and guidance. As it relates to the uniform guidance, the RPB can help OMB ensure effective, efficient, and consistent implementation of policies and exceptions to policies within a single agency or between agencies.

Recommendation: *AAU and APLU continue to support the establishment of the RPB at OMB to address implementation challenges and provide the research community with consistent and efficient policies.*⁵

200.315 – Intangible Property

We are concerned about revisions to this section, as there is potential for interpretations that are not consistent with the rights of patent and copyright owners. Specifically, in 200.315(a), the proposed new definition of “encumbrance” creates an implication that federal approval would be required for patent and copyright owners to license their works. The requirement of such an approval would conflict with the Bayh-Dole Act and the regulations in Title 37 of the Code of Federal Regulations for federally funded inventions. Although 200.315(c) seems to attempt to

⁴ Pub.L. 114-255 <https://www.govinfo.gov/content/pkg/PLAW-114publ255/pdf/PLAW-114publ255.pdf>

⁵ Association of American Universities, Association of Public and Land-grant Universities, and Council on Governmental Relations. (2017, April 26). Letter to OMB Director on Research Policy Board Mandate. Associations Send Letter to OMB Director on Research Policy Board Mandate. Association of American Universities. <https://www.aau.edu/key-issues/associations-send-letter-omb-director-research-policy-boardmandate>.

clarify by stating that recipients are subjects to applicable regulations in Title 37, it does not resolve the conflict created in 200.315(a) for approval of encumbrances.

Recommendation: *We urge OMB to preserve the original text from 2 CFR 200.315(a) and (c) to avoid interpretations that contradict the rights and privileges afforded to recipients under Bayh-Dole regulations for patents and copyrights.*

Additionally, we request clarification or more information about the intent of the proposed change to 200.315(b). The previous version stated in the affirmative that recipients are permitted to copyright any works, while the proposed version states this provision in the negative whereby “recipients are not prohibited from asserting any copyright.” Providing reasoning or the intent for such a change would be helpful to avoid misinterpretations of this provision.

Recommendation: *We urge OMB to clarify 200.315(b) and confirm that this revised language is an accurate update reflecting that copyright automatically comes into being upon fixation, and that authors and researchers do not need to place notice (or otherwise be required to seek federal approval) on a work to receive copyright protection.*

200.316 – Property Trust Relationship

Similar to our concerns with the previous section on intangible property, we have substantial concerns about potential conflicts with the Bayh-Dole Act and Title 37 regulations that are implied in 200.316 as well, both in previous versions of 2 CFR 200 and in the proposed revisions.

Recommendation: *We urge OMB to delete this section entirely, or if not deleted, clarify and definitively state that this section does not supersede government-wide regulations in 37 CFR Part 401.*