OFFICE OF THE VICE PRESIDENT – RESEARCH AND INNOVATION

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Deidre A. Harrison
Acting Controller, Office of Federal Financial Management
Office of Management and Budget
725 Seventeenth Street NW
Washington, DC 20503

RE: University of California Comments in Response to OMB's Proposed Rule to Revise Sections of 2 CFR, Subtitle A, Chapters I and II (88 FR 69390)

Dear Ms. Harrison:

On behalf of the University of California system (UC)—comprised of ten campuses, six academic health centers, and three affiliated U.S. Department of Energy national laboratories—I write to respond to OMB's Proposed Rule to Revise Sections of 2 CFR, Subtitle A, Chapters I and II, (the Uniform Guidance or UG) published in the *Federal Register* on October 5, 2023.

UC greatly appreciates the significant and beneficial changes that OMB proposes in this latest update to the Uniform Guidance. In addition to UC's more detailed comments below, UC is especially supportive of the following proposed changes:

- Removing language in §200.340 that allows a Federal agency or pass-through entity to terminate an award "if an award no longer effectuates the program goals or agency priorities." We believe removing this language will eliminate a vague standard for award termination and serve OMB's goal of clarifying a section that could be interpreted in different ways.

- Removing ten items from the prior written approval requirements in §200.407. We believe eliminating the requirement for these prior approvals will further OMB's goal of "reducing agency and recipient burden" by reducing the amount of pro forma correspondence between awarding agencies and award recipients.

- Removing from §200.333 the simplified acquisition threshold cap for fixed amount subawards. The increased flexibility that this change would allow agencies and recipients in making programmatic and budgetary decisions will also further OMB's goal of reducing administrative burden.

- Increasing the per-unit threshold value of equipment from $5,000 to $10,000 will reduce award recipients' administrative obligations for lower-value items.

UC also respectfully submits the following comments and suggested revisions that would further effectuate OMB's stated objectives.

1) Revisions that would incorporate statutory requirements and administration priorities

§200.315 Intangible Property

UC appreciates and supports the proposed changes to paragraph (b) of this section, which lists the rights of the federal government to use research produced from a federal grant (commonly called the Federal Purpose License). In particular, UC supports the additional language relating to making works resulting from a Federal award available in agency-designated public access repositories. This language will aid federal agencies as well as award recipients in complying with the 2022 OSTP Memorandum on Ensuring Free, Immediate, and Equitable Access to Federally Funded Research.

OMB's proposed changes to this section will likely reduce the burden on researchers in complying with open access requirements. Without consistent guidelines, individual researchers are often burdened with understanding and negotiating necessary changes to their own publication agreements in order to meet public access requirements. However, most researchers do not have the legal background to understand the language publishers use in their agreements or the implications of that language. Additionally, publishers are extremely resistant to altering these agreements, especially at the request of an individual author. UC anticipates that OMB's proposed revisions will address these issues by improving clarity in agencies' documentation for grant recipients, which will in turn improve our researchers' understanding of and compliance with public access requirements. We hope that federal agencies will invoke the Federal Purpose License in their public access plans and that the proposed revisions to §200.315(b) will create further encouragement for them to do so.

To further clarify this section, UC would suggest one minor revision to the first sentence of the proposed language in paragraph (b). In particular, we suggest

> "To the extent permitted by law, the recipient or subrecipient is not prohibited from asserting or retaining rights to any copyright ~~it may own~~ in any work resulting from or acquired under the Federal award."

The language as written is somewhat vague. A "work is under copyright protection the moment it is created and fixed in a tangible form." (U.S. Copyright Office Frequently Asked Questions.) Therefore, no action is needed to assert copyright. The proposed revision clarifies that this section does not impact recipients' copyright interests.

2) Revisions that would reduce agency and recipient burden

§200.414 Indirect Costs

UC urges OMB to address what has become a persistent and widespread problem for award recipients: federal cognizant agencies' excessive delays in establishing indirect cost rates. UC campuses are regularly experiencing delays of over a year; in fact, the UC Office of the President's negotiated rate is nine years old. Not having a current rate—or even a rate agreement within the provisional period—has strained our relationships with our sponsors and has hampered our ability to recoup our actual facilities and administration costs.

As a solution, UC advocates addressing this issue in §200.414, in concurrence with COGR's recommendations outlined in their letter to OMB dated July 21, 2023. In particular, COGR suggested adding an additional subsection as follows:

> "F&A cost rates should be established within six months after the date of submission of an F&A cost rate proposal. If not established within six months, the current F&A cost rates should be extended as predetermined F&A cost rates for one additional year. If new F&A cost rates are not established after the one additional year, F&A cost rates should be established at the institution's proposed F&A cost rates (and as predetermined F&A cost rates) for a minimum of two additional years.
>
> "Fringe benefit rates should be established within six months of the date of submission of the proposal. If not established within six months, new fringe benefit rates should be established at the institution's proposed fringe benefit rates for the applicable fiscal year.
>
> "In those situations when (i)(1) and/or (i)(2) require special consideration, the Office of Management and Budget should serve as an impartial arbiter to work with the institution and the cognizant agency for indirect costs to resolve any differences."

§200.419 Cost accounting standards and disclosure statement

UC strongly supports OMB's proposal to remove the requirement that institutions of higher education (IHEs) submit a disclosure statement form (DS–2). As UC noted in our letter from March 13, 2023, the DS-2 is an expensive administrative burden that does not provide the federal government with any new or additional information. The accounting practices documented in the DS-2 are also documented in other records that universities maintain and share with federal agencies.

In response to OMB's specific questions about the impact of eliminating the DS-2 requirement, UC offers the following responses:

Q: Are there any advantages in retaining consistency and uniformity in accounting practices followed by educational institutions for both contracts under the FAR and Federal financial assistance under part 200, which are achieved through use of the DS–2?

> A: For UC, the DS-2 provides little to no advantage in maintaining consistent accounting practices. Rather, the DS-2 is merely a repository of information in which UC campuses explain how they are already complying with various rules, regulations and best practices.

Q: Does the requirement to use the DS–2 at section 200.419 help ensure that each IHE's practices used in estimating costs for a proposal are consistent with cost accounting practices used by the institution in accumulating and reporting costs or serve other functions?

> A: Completing and submitting the DS-2 does not ensure consistency in accounting practices or facilitate estimating costs. UC complies with all applicable rules and regulations, and would comply even if the DS-2 were not required. Some UC campuses do use the DS-2 to serve other functions, such as demonstrating their accounting practices to federal and non-federal sponsors.

Q: How, if at all, could removing the requirement to use the DS–2 from section 200.419 impact compliance by research universities with the requirements of 41 U.S.C. 1502 or the implementing regulations at FAR, Chapter 99 for government contracts?

A: UC does not foresee that removing the DS-2 requirement from the UG would have any impact on compliance with these federal laws and regulations. The UG does not encompass every legal requirement that UC must fulfill in order to manage its research enterprise, and in particular, the FAR imposes several other requirements on UC's research activities that the UG does not. Removing the DS-2 requirement from the UG would not cause UC to fall out of compliance with accounting requirements imposed by other regulations.

Q: To what extent would removing the requirement to use the DS–2 at section 200.419 reduce burden if the statutory and FAR-based requirements remain in effect?

A: Removing the DS-2 requirement from §200.419 would greatly reduce administrative burden for IHEs that receive only federal awards subject to the UG and no contracts subject to 41 U.S.C. 1502. Such IHEs would no longer have to fill out the DS-2 at all. Ideally, however, the DS-2 would not be required for any IHE. Therefore, UC is in support of COGR's recommendation that OMB and FAR representatives work together to modify and coordinate DS-2 requirements for IHEs to reduce administrative burden for a larger number of award recipients.

§200.1 Definitions

UC greatly appreciates OMB's recognition that the limit on indirect cost (IDC) recovery should be increased from the cap of the first $25,000 of each subaward. Increasing this limit to $50,000 as proposed would ameliorate pass-through entities' financial burden of administering subawards. However, as UC noted in our response to OMB's Request for Information of February 9, 2023, this $25,000 figure has been in place since at least 1979. See 44 Fed. Reg. 12368 (Mar. 6, 1979). According to the U.S. Bureau of Labor Statistics CPI Inflation Calculator, $25,000 in March 1979 was worth $110,197 in October 2023. This means that even with OMB's proposed increase to $50,000, pass-through entities (PTEs) will still recover less than half of the subaward administration costs that they were able to recover 44 years ago.

Paradoxically, PTEs face ever-increasing compliance requirements for the administration of subawards, requiring the development of more complex tracking systems, hiring and maintaining more subaward administrators, and investing in continuing training for those administrators. Managing subawards requires PTEs to devote significant staff time to ensuring compliance with various rules and regulations (e.g. 2 CFR §§ 200.331 – 200.333), negotiating the terms of subaward agreements, and reviewing and paying invoices. Several of UC's campuses have multi-person teams devoted to outgoing subaward administration.

While UC applauds this initial increase, we request that OMB put in place a concrete plan to reevaluate and continue to raise this amount gradually in the coming years.

Appendix III to Part 200 §C.8.

UC requests that OMB eliminate the 26% cap on administrative costs, which has not been reevaluated since it was first imposed in 1991. Of note, this cap was calculated in 1986 based on a five-year average of administrative cost reimbursement rates for all major universities. (See "Policies for the Reimbursement of Indirect Costs Need to Be Updated" 2010, United States Government Accountability Office.) Thus, universities in 2023 may only recoup the proportionate administrative costs that universities actually experienced 37 years ago. In the ensuing nearly four decades, the compliance costs of modern research have grown, and the 26% cap has not kept pace with the ever-growing body of federal regulations that govern such research. (See COGR's document "Federal Regulatory Changes, Since 1991," listing research-related federal regulations implemented or amended between 1991 and 2022.) As a result, research universities increasingly subsidize the true cost of research, which includes implementing complex federal mandates.

In addition to being insufficient to cover actual administrative costs, the 26% cap is unnecessary to ensure that universities' IDC rates represent institutions' actual administrative costs or that the rates are equitably assigned to the appropriate cost pools. All research institutions with federally-negotiated IDC rates calculate and establish their rates based on consistent and well-established methodologies. First, each of the institutions' cost pools are constructed and allocated according to Appendix III section C of the Uniform Guidance. Federal cognizant agencies then review, audit and negotiate each institution's rate calculation to ensure that IDC rates fairly reflect the real facilities and administrative costs of carrying out federal awards. This process is wholly sufficient to ensure that the federal government reimburses research institutions only for those indirect costs that are necessary to support federally-funded programs.

If OMB chooses not to eliminate the 26% administrative cap, UC would alternatively suggest adding additional cost pools to capture the currently unfunded costs of conducting research. One example of such a cost pool would be a compliance cost pool to "capture costs associated with research compliance activities required by specific regulations (e.g., human subjects, animals, technology and data security, etc.)." ("Excellence in Research: The Funding Model, F&A Reimbursement, and Why the System Works" 2019, Council on Government Relations.)

3) Revisions that would clarify guidance by addressing sections that recipients or agencies have interpreted in different ways

§200.414(c) Federal Agency Acceptance of Negotiated Indirect Cost Rates

Allowing federal agencies to impose their own IDC rates undermines the benefit of having federally-negotiated rates and causes a significant amount of confusion and administrative work. To address these problems, a federal statute or regulation should be the only mechanism for limiting IDC recovery to less than a recipient's federally-negotiated rate. To reduce this confusion and burden while maintaining limitations on IDC recovery in well-justified and exceptional cases, UC urges OMB to revise this section as demonstrated below:

> (1) The negotiated rates must be accepted by all Federal awarding agencies and pass-through entities. A Federal awarding agency may use a rate different from the negotiated rate for a class of Federal awards or a single Federal award only when required by Federal statute or regulation. Otherwise, a non-Federal entity must not be encouraged or coerced in any way by the Federal awarding agency or

> pass-through entity to waive indirect costs or charge less than the negotiated indirect cost rate.[1]" [Delete remainder of paragraph (1) and all of paragraphs (2), (3), and (4).]

Giving federal agencies the authority to unilaterally restrict IDC recovery has led to federal agencies restricting IDC recovery without adherence to the process set forth at §200.414(c). UC has encountered proposal solicitations in which the federal agency restricted IDC recovery without any "documented justification." For several specific examples, please see UC's March 13, 2023 Comments in Response to OMB's Request for Information for Revisions to 2 CFR, Subtitle A, Chapters I and II (88 FR 8480).

UC acknowledges OMB's proposed revision to allow recipients to "notify OMB of any disputes with regards to a Federal agency's application or acceptance of a federally negotiated indirect cost rate." However, we respectfully maintain that such notification would not solve the above-described problems as there would still be no enforcement or dispute resolution mechanism. Instead, UC recommends that OMB edit §200.414(c)(1) as suggested above. Without true IDC recovery, IHEs could not carry out government-funded projects and programs. Limiting IDC recovery should be a well-thought-out, documented decision that has gone through an appropriate approval process.

However, if OMB is disinclined to divest agencies of their discretion to impose their own IDC rates, UC suggests that there be some enforcement mechanism—rather than merely a notification provision—in §200.414(c) and that OMB provide a contact for non-federal entities to work with when a federal agency fails to comply with the Uniform Guidance requirements. UC would suggest adding the following language:

To §200.414(c)(2):

> "The Federal awarding agency head or delegate must notify OMB of any approved deviations, including when required by Federal statue or regulation. OMB will maintain a publicly-accessible website of all such deviations."

To the end of §200.414(c), after paragraph (4):

> "If the Federal awarding agency fails to comply with the requirements in paragraphs (1) through (4) above, non-Federal entities applying to the notice of funding opportunity may apply their federally-negotiated indirect cost rate. Non-Federal entities may contact [OMB contact] if they believe a Federal awarding agency has not complied with the requirements of this section."

§ 200.112 Conflict of interest

UC urges OMB to add much-needed clarity to this section. As explained by the Chief Financial

[1] This additional language is taken from Q-132 of the Chief Financial Officers Council's Frequently Asked Questions (May 03, 2021).

Officers Council in "2 CFR Frequently Asked Questions," §200.112 applies to procurement-related conflicts of interest (COI), not to research-related COI. See Q-18. However, §200.112 does not clearly state that it applies only to procurement COI. As a result, federal agencies have referenced §200.112 as the rationale behind creating research COI policies. See, e.g., EPA's Revised Interim Financial Assistance Conflict of Interest Policy, requiring disclosure of COI "[a]s required by . . . 200.112 . . . to prevent personal and organizational conflict of interests."

Therefore, we suggest OMB move §200.112 to the Procurement Standards section at 2 CFR §§200.317 – 200.327. Moving the COI provision to the Procurement Standards section would clarify the intended purpose of §200.112. We further suggest that OMB modify this section as follows:

> "Federal agencies must establish conflict of interest policies for Federal awards relating to how non-Federal entities expend Federal award funds under general procurement standards, as described in §200.318. . . ."

Moreover, we note that research-related COI need not be addressed in the UG, as Section 4(b) of NSPM-33 requires federal agencies to update and streamline research COI policies.

4) Revisions that would clarify guidance by rewriting applicable sections in plain English

§200.332(a) Requirements for pass-through entities

The current iteration of 200.332(a) is very confusing, and UC strongly encourages OMB to revise it so that pass-through entities can fully understand their responsibilities and easily adhere to OMB's standards. UC suggests the following changes:

> "Ensure that every subaward . . . includes the following information . . . : An approved federally recognized indirect cost rate negotiated between the subrecipient and the Federal Government. If no approved rate exists, the pass-through entity must determine the appropriate rate in collaboration with the subrecipient~~, which is either:~~.
>
> (A) If both the pass-through entity and the subrecipient agree, they may~~The~~ negotiate and~~d~~ indirect cost rate. ~~between the pass-through entity and the subrecipient; which~~This negotiated rate ~~can~~may, if both parties agree, be based on a prior negotiated rate between a different PTE and the same subrecipient. If basing the rate on a previously negotiated rate, the pass-through entity is not required to collect information justifying this rate, but may elect to do so. If the pass-through entity and the subrecipient agree to negotiate an indirect cost rate that is not based on a prior negotiated rate, the Simplified Method for Small Institutions in paragraph D of Appendix III to Part 200 may be used to develop the rate. The pass-through entity should collect reasonable information justifying any rate that it negotiates with a subrecipient.~~;~~
>
> (B) If either the pass-through entity or the subrecipient, or both, do not

> agree to negotiate an indirect cost rate, or if they are unable to agree on a rate, ~~T~~they may use the de minimis indirect cost rate."

As written, this section is unclear as to which party—the PTE or the subrecipient—has the final say in whether they will negotiate an IDC rate de novo, use a rate negotiated with a different PTE, or use the de minimis rate. Additionally, the language is unclear as to whether a pass-through entity can refuse to accept a rate previously negotiated with a different PTE. This section currently provides only that "the pass-through entity must determine the appropriate rate in collaboration with the subrecipient." This leaves unaddressed the potential situation in which one party wants to negotiate a rate de novo, use an old rate, or use the de minimis rate, and the other party disagrees.

Moreover, this section provides no rules or guidance for how a PTE should negotiate an IDC rate with a subrecipient. Since IHEs do not usually negotiate other institutions' IDC rates, parameters for doing so would be helpful. The UG already provides several guidelines for developing an IDC rate for a small institution, but these guidelines are placed in Appendix III, entirely separate from §200.332. We suggest referencing those guidelines in §200.332 to clearly point PTEs in the right direction.

Lastly, this section states that PTEs do not need to collect justifying documentation for a negotiated IDC rate when using a rate previously negotiated by another PTE. Confusingly, however, there is no mention of whether the PTE does need to collect documentation if the PTE elects to negotiate a rate de novo. We believe that for audit purposes, a PTE negotiating an IDC rate with a subrecipient should collect documentation explaining the rationale behind that rate. We suggest adding language to that effect so that PTEs fully understand their responsibilities.

Thank you for the opportunity to provide our input. UC values OMB's collaborative approach to efficiently and responsibly managing federal awards. If you have any questions concerning these comments, please contact Melissa Waver, Research Policy Manager, at Melissa.Waver@ucop.edu.

In addition to our comments, UC endorses and concurs with the comments submitted by the Council on Governmental Relations (COGR).

Sincerely,

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