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OFFICE OF THE VICE PRESIDENT – RESEARCH AND INNOVATION

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March 13, 2023

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

RE: UC Comments in Response to OMB's Request for Information for Revisions to 2 CFR, Subtitle A, Chapters I and II (88 FR 8480)

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 Request for Information for Revisions to 2 CFR, Subtitle A, Chapters I and II, published in the *Federal Register* on February 9, 2023. Responses to three of the four goals of OMB's forthcoming revision to 2 CFR are provided below. In addition to our comments, UC endorses and concurs with the comments submitted by the Council on Governmental Relations (COGR).

1) Revisions that would reduce agency and recipient burden

§200.419 Cost accounting standards and disclosure statement

Suggested revised language:
Delete paragraph (b).

Reasoning for suggested revision:
The DS-2 is an expensive administrative burden and the utility of maintaining this form is unclear. UC costing policy staff spend approximately 20 hours a year updating the DS-2 forms and about $2,000 per form on a consultant to review them for accuracy. However, auditors and federal agencies rarely use or review award recipients' DS-2s. See the 2014 COGR Survey of the Role of the DS-2, showing that for 87% of the Federal audits, the auditors did not request a DS-2.

Additionally, the accounting practices documented in the DS-2 are duplicative of other records that universities maintain. For example, universities undergo yearly external audits that evaluate compliance with OMB's cost accounting standards. Furthermore, UC and its campuses publicize their costing policies on publicly-accessible websites, and funding agencies regularly examine extramural funds invoices for appropriate spending practices.

Among all categories of recipients of federal funds, only institutions of higher education (IHEs) are required to comply with the DS-2 requirement. State, local, and tribal governments, and nonprofits are not required to fill out the DS-2, and presumably the federal government is nonetheless able to monitor and oversee these entities' use of federal funds.

Because IHEs are already accountable to federal agencies for their use of federal award funds through audits and routine invoicing review, eliminating the DS-2 requirement for IHEs would relieve significant administrative burden and result in uniform practice across all non-Federal entities without sacrificing accountability.

§ 200.1 Definitions

Suggested revised language:

> "Modified Total Direct Cost (MTDC) means . . . up to the first $75,000 of each subaward . . . .

Reasoning for suggested revision:
The limit on indirect cost (IDC) recovery should be increased from the cap of the first $25,000 of each subaward. 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 1979 is worth $109,505.86 in 2023. This means that pass-through entities (PTEs) are recovering less than a quarter 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.

UC recommends that the cap on the recovery of indirect costs be raised to $75,000 of each subaward. Since $75,000 would still be less cost recovery in real dollars for PTEs in 2023 than in 1979, we also recommend that this cap be reexamined on a routine and frequent basis.

Appendix III to Part 200 § C.8.

UC requests that OMB reconsider the 26% cap on administrative costs, which has not been reevaluated since it was first imposed in 1991. As a result, the cap has not kept pace with the increasing compliance costs of modern research and 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 since 1991.

UC respectfully refers OMB to COGR's publication "Excellence in Research: The Funding Model, F&A Reimbursement, and Why the System Works" for the rationale behind our request.

2) 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

Suggested revised language:

> (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." [Delete remainder of paragraph (1) and all of paragraphs (2), (3), and (4).]

Reasoning for suggested revision:
OMB could alleviate confusion by removing federal agencies' discretion to impose their own IDC rates. Instead, a federal statute or regulation should be the only mechanism for limiting IDC recovery to less than a recipient's federally-negotiated rate. Giving federal agencies the authority to unilaterally restrict IDC recovery has led to several instances of federal agencies restricting IDC recovery without adherence to the process set forth at § 200.414(c). Instead, UC has encountered several proposal solicitations in which the federal agency restricted IDC recovery without any "documented justification."

For example, the Department of Education's (Dept. of Ed.) 2022 notice of funding opportunity (NOA) for the Developing Hispanic-Serving Institutions Program (DHSI) states: "Indirect costs are not allowed under this program." (See p. 60 of the attached Dept. of Ed. NOA.) The NOA lacks any justification for this restriction. Upon UC inquiry, the Dept. of Ed. stated that indirect costs are not allowable under Title V of the Higher Education Act (HEA) and referenced the following language from the Federal Register notice announcing the DHSI program: "A grantee may not use an indirect cost rate to determine allowable costs under its grant." UC informed the Dept. of Ed. that we could not find any reference to an IDC limitation in Title V of the HEA. We also noted that the language in the Federal Register is not a limitation on recovering indirect costs; rather, it prohibits using the negotiated IDC rate for determining allowable costs. The Dept. of Ed. did not engage with UC further to justify or explain the IDC restriction, and UC was forced to accept the restriction so as not to forgo the opportunity to compete for funding.

Another example is the U.S. Fish and Wildlife Service 2022 solicitation for the Multistate Conservation Grant (MSCG) Program. This solicitation states: "Please note the MSCGP program has traditionally asked applicants to voluntarily cap their overhead at 20% in order to make more funds available for programmatic activity." Although not an explicit restriction on IDC recovery, the federal agency encouraged or implicitly pressured applicants to recover less than their federally-negotiated rate. Most applicants see this as a *requirement* to apply the 20% rate, despite the use of the word "voluntarily," because of the competitive nature of these awards. This solicitation contains none of the "documented justification" required by § 200.414(c).

Allowing federal agencies to unilaterally restrict IDC recovery leads to seemingly arbitrary limitations. In the above examples, UC could find no federal statutes or regulations justifying the restrictions and no evidence that these agencies made "the policies, procedures and general decision-making criteria" supporting the restrictions "publicly available." It is unclear whether the agencies' heads or delegates approved the restrictions, whether the restrictions were based on documented justification, or whether the federal awarding agency notified OMB.

Therefore, UC recommends that OMB edit § 200.414(c)(1) as indicated above to add language from FAQ-132 explicitly prohibiting agencies from improperly encouraging or coercing non-Federal entities to use a reduced rate. UC further recommends that OMB delete the remainder of §200.414(c)(1) and all of paragraphs (2), (3), and (4). Without true IDC recovery, IHEs could not carry out government-funded projects and programs. As such, 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 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 (UG) requirements. Therefore, if OMB declines the above recommendation, we 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

Suggested revised language:

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

Reasoning for suggested revision:
As explained by the Chief Financial 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. Because § 200.112 does not clearly state that it applies only to procurement COI, several 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."

Further, 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.

In addition to adding the above clarifying language, UC suggests that 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 further clarify the intended purpose of § 200.112.

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

§ 200.332(a) Requirements for pass-through entities

Suggested revised language:

> "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.
>
> (A) If both the pass-through entity and the subrecipient agree, they may negotiate an indirect cost rate. This negotiated rate 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, they may use the de minimis indirect cost rate."

Reasoning for suggested revision:
The current iteration of 2 CFR 200.332(a) is confusing for several reasons. First, it is unclear 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.

Clearly stating that both the PTE and the subrecipient must agree to negotiate a rate de novo or to use a previously-negotiated rate removes any uncertainty as to which party must make this decision and allows individual institutions to use their limited resources as they see fit. Additionally, the revised language makes clear that the de minimis rate may be used when the parties do not want to, or are unable to, negotiate a rate.

Next, 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 entirely separate from § 200.332 in Appendix III. 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, therefore, suggest adding language to that effect so that PTEs fully understand their responsibilities.

Thank you for the opportunity to provide our input. UC looks forward to continued engagement on increasing the clarity of 2 CFR and bolstering uniformity in administering federal awards. If you have any questions concerning these comments, please contact Melissa Waver, Contracts and Grants Operations Officer, at Melissa.Waver@ucop.edu.

Sincerely,

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