COGR
an organization of research institutions

COUNCIL ON GOVERNMENTAL RELATIONS
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March 16, 2016

Mr. David Mader
Controller
White House Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Subject: *Open Items per 2 CFR Part 200*

Dear Mr. Mader:

At your request, we are submitting this letter on behalf of the Council on Governmental Relations (COGR) and its members. We appreciate your time at the recent COGR meeting in Washington D.C. and your willingness to engage on the important and outstanding issues regarding implementation of 2 CFR 200. This letter, based on the February 13, 2015 response to Docket Number OMB - 2014-0006 (and other letters that have followed), as well as comments made during the February 25th COGR meeting, represent those issues that COGR believes still need to be addressed in order to bring the necessary closure to the Uniform Guidance implementation.

We are encouraged that OMB and the COFAR have expressed an interest in reviewing these remaining issues. Further, we are optimistic that each of these can be addressed in the context of "policy clarification", rather than "policy change". As we understand it, framing these items as policy clarification can facilitate the process for making updates to 2 CFR 200. As we shared with you at the February 25th meeting, COGR is formalizing its "Year 1 Assessment" of the Uniform Guidance implementation, and a commitment by OMB and the COFAR to address the items raised in this letter is a positive development. Furthermore, resolving these items in a timely manner will further elevate the overall, excellent work completed by OMB and the COFAR over the past four years.

As has been our position in all of our correspondences with you, the recommendations we are making will:

1) Reduce administrative cost and burden and/or prevent an increase,
2) Support and be consistent with the audit and accountability standards that have been established, and
3) Reinforce equity and fairness across all non-Federal entities.

All of the items we have proposed are a priority for the research community. However, we have presented this list in an order, which we believe, captures the fine balance between urgency and realistic expectation. Addressing each, in a thoughtful, timely, and collaborative manner, will continue to the partnership approach that has been established to-date.

1) Procurement Standards, § 200.317 - § 200.326

We are hopeful and encouraged that OMB is reviewing the broad research community position on implementation of the procurement standards. The January 20, 2016 letter from COGR set forth specific examples of administrative burden created by 2 CFR 200.317-326 and corresponding recommendations (including the grantee exemption process, common sense improvements the CFR, and an increase in the micro-purchase threshold) to mitigate burden while remaining compliant with the intent of the procurement standards.

2) Conflict of Interest, § 200.112

We appreciate that OMB published FAQ .112-1 that stated section 200.112 was not meant to refer to "*scientific conflicts of interest that might arise in the research community*." The Uniform Guidance was never an appropriate place to address scientific conflict of interest, and your willingness to clarify this has helpful to the community. However, FAQ .112-1 remains problematic by incorporating a "*selection of a subrecipient*" into the FAQ. In many discussions with representatives from OMB and the COFAR, our understanding is the intent of section 200.112 was meant to address conflicts specific to procurement actions, not the selection of subrecipients.

COGR requests that FAQ .112-1 be modified by eliminating the reference to "*selection of a subrecipient*". In addition, we recommend the following Technical Correction (as underlined) be made to section 200.112. By emphasizing that this section is applicable to procurements only will eliminate any ambiguity and confusion created by FAQ .112-1. Furthermore, by emphasizing that grantees disclose conflicts that have been identified, rather than referring to a nebulous and unrealistic expectation to disclose potential conflicts, would be consistent with how federal agencies and the research community have historically managed conflict of interest.

To date, several federal agencies have released conflict of interest policies pursuant to 200.112. COGR remains concerned that agencies will continue to release unique policies, resulting in inconsistency and lack of harmonization. When this occurs, we will address any concerns with each agency, as well as addressing this with OMB. However, an immediate, effective solution will be to modify FAQ .112-1, as COGR has suggested, and to make the following Technical Correction.

> *§200.112 Conflict of interest in procurements.*
>
> *The Federal awarding agency must establish conflict of interest policies addressing procurement conflicts that arise between the non-federal entity and its contractors expending funds under a Federal Award. The non-Federal entity must disclose any conflict of interest in procurement that it has identified to the Federal awarding agency or pass-through entity in accordance with applicable Federal awarding agency policy.*

3) Utility Cost Adjustment, Appendix III to Part 200

The COGR request made in its November 13, 2015 letter to OMB is an example of where OMB and the COFAR could make a Technical Correction or issue an FAQ, both of which would be fully consistent with publishing a helpful policy clarification. In the November 13th letter, COGR demonstrated the REUI weighting factor for research laboratory space should be increased from 2.0 to a more fair and accurate factor of 4.2. Importantly, OMB and the COFAR included language in 2 CFR Appendix III, section B.4.c(2)(ii)B that allows for the periodic adjustment of the REUI. Consequently, COGR believes this is an issue that can be addressed immediately and painlessly and which would represent a fair outcome.

4) DS-2 Requirement, § 200.419

Per OMB-2013-0001, Proposed Uniform Guidance (February 1, 2013), OMB and the COFAR took the position that the DS-2 should be eliminated. Unfortunately, OMB and the COFAR reinstated the DS-2 requirement in the Final Uniform Guidance (December 26, 2013), with the rationale being: *"Some commenters responded favorably that this would reduce a source of administrative burden, but others were concerned, stating that this disclosure statement was a critical tool to mitigating waste, fraud, and abuse and opposed its elimination."*

COGR believes OMB and the COFAR was incorrect in its policy assessment to reinstate the DS-2 requirement. At that time, we provided you with justifications and data suggesting that the DS-2 could be eliminated without compromising the important objective of mitigating waste, fraud, and abuse of Federal funds. Our October 10, 2014 letter to OMB documented those reasons for eliminating the DS-2 requirement. And upon your request for data, we provided you with a COGR survey that showed for 87% of the total Federal audits conducted over the past five years (1,048 of 1,204 Federal audits surveyed), a DS-2 was not requested.

It is clear to many that the DS-2 is not a critical compliance document; instead, it simply is a transposition of accounting policies and practices that already are documented in the official policies and practices of the institution. We also believe it is inappropriate to require only IHEs to be subject to the DS-2 requirement. We note that all other recipients, including State, Local, and Tribal governments, and Nonprofits are excluded from this requirement.

While COGR's position will remain that the DS-2 should be eliminated, at a minimum, the DS-2 approval process requires a policy clarification. The approval process, per 200.419(2), states: *An IHE must file amendments to the DS-2 to the cognizant agency for indirect costs six months in advance … An IHE may proceed with implementing the change only if it has not been notified by the Federal cognizant agency for indirect costs that either a longer period will be needed for review or there are concerns with the potential change within the six months period*. At least one cognizant agency for indirect costs has indicated they do not have the resources to approve changes in a timely manner. As such, there is no recourse for an IHE if the cognizant agency simply notifies them within six months that more time is needed to review their request, and there is no limit on how long an IHE must wait for their DS-2 to be reviewed. In effect, an IHE may be prohibited from making practical and administratively sound changes in accounting practice (e.g., payroll documentation system, treatment of fringe benefits, etc.) for an extended period of time because of approval bottlenecks at the cognizant agency for indirect costs.

Therefore, we propose that OMB replace sections 200.419(b)(1) and (2) with the sections below. This is consistent with FAQs that OMB has provided and will eliminate most of the ambiguity that has surrounded the DS-2 requirement. Furthermore, section § 200.419(b)(5) should be deleted; specifically, a compliant change in a cost accounting practice would not require approval, therefore, section (b)(5) no longer would be applicable.

> *(b) Disclosure statement …*
>
> *(1) The DS-2 must be submitted to the cognizant agency for indirect costs. The initial DS-2 and revisions to the DS-2 must be submitted in coordination with the IHE's F&A rate proposal, unless an earlier submission is requested by the cognizant agency for indirect costs. IHEs with CAS-covered contracts or subcontracts meeting the dollar threshold in 48 CFR 9903.202-1(f) must submit their initial DS-2 or revisions no later than prior to the award of a CAS-covered contract or subcontract.*
>
> *(2) An IHE is responsible for maintaining an accurate DS-2 and complying with disclosed cost accounting practices. Changes to cost accounting practices that comply with 2 CFR Part 200 do not require approval of the cognizant agency for indirect costs. Only those cost accounting changes that deviate from 2 CFR Part 200 require approval by the cognizant agency for indirect costs, in accordance with section § 200.102(b) of the Uniform Guidance.*

Under this policy clarification, if a change in accounting practice is allowed or is consistent with the Uniform Guidance, the IHE can make a change in accounting practice without approval. If the proposed change is a deviation from 2 CFR 200, then the change must be approved by the cognizant agency for indirect costs. While COGR requests that we continue to work with OMB and the cognizant agencies for indirect cost to consider opportunities for further minimizing the burden associated with the DS-2 requirement (with a goal of eliminating the DS-2 requirement all together), the proposed policy clarification would confirm that IHEs are allowed to implement practical and administratively sound changes in accounting practices in a timely manner.

5) Requirements for pass-through entities and the Safe Harbor, § 200.331

New rules and requirements applicable to subrecipient monitoring by pass-through entities rank as one of the top areas where new administrative burden has been created.

In the February 2015 COGR comment letter to OMB, we indicated that "the cumulative impact of these [subrecipient monitoring] changes means that many of our institutions will add staff/FTEs to comply with the new requirements specified in §200.331(d)." More recently, it was noted in the AAU-COGR-Yale Survey of Compliance Concerns that the 51 participating institutions averaged 2.8 FTE devoted to subrecipient monitoring, at a cumulative cost for just those institutions of over $7.5M, and some institutions may have to add FTEs to comply with 200.331(d). We will continue to use the AAU-COGR-Yale Survey of Compliance Concerns as a baseline for demonstrating the negative impact of 200.331(d).

As a reasonable offset to the burden created by 200.331(d), COGR continues to advocate for OMB to approve an audit "Safe Harbor", which would eliminate duplicative monitoring activities that add burden without enhancing the compliance environment. As we proposed in the February 2015 comment let to OMB, we recommend that the following clarification be added to 200.331(d), and cross-referenced to 200.521(c), as specified in the Audit Requirements:

> *If a pass-through entity confirms that a proposed subrecipient has a current Single Audit report posted in the Federal Audit Clearinghouse and has not otherwise been excluded from receipt of Federal funding (e.g., has been debarred or suspended), the pass-through entity may rely on the subrecipient's auditors and cognizant agency oversight for routine audit follow-up and management decisions. Such reliance does not eliminate the obligation of the pass-through entity to issue subawards that conform to agency and award-specific requirements and to manage risk through ongoing subaward monitoring.*

The Safe Harbor does not eliminate the obligation for a pass-through entity to properly flow down terms and conditions of the Federal award. It would not eliminate ongoing monitoring to ensure adherence to the conditions of an award (including achievement of performance goals and proper use of Federal funds) and it would not eliminate the need to take corrective action if it detects unallowable costs or problematic performance. However, we believe the impact of this change would be significant – in the AAU-COGR-Yale survey, the 51 institutions had 8,409 federally-funded subawards with subrecipients subject to the A-133 audits. This represents 70% of their total federal subaward volume.

Adoption of this change would have the following advantages:

- Improve program performance. Specifically, subawards could be finalized in a more timely manner, which will allow research collaboration between scientists to begin early in the project. A frequent complaint of investigators now is the slow issuance of subawards. The need to conduct an audit review/ subrecipient risk assessment prior to subaward issuance contributes significantly to the slow release of subaward documents.

- Allow pass-through entities to devote their limited subrecipient monitoring resources to high-impact monitoring activities, including life-of-project activities involving program performance monitoring, adherence to award terms, and financial tracking. This change also supports the federal government's expressed interest in outcome-based performance management.

- Provides more bandwidth for pass-through entities to take on the additional requirements imposed in the Uniform Guidance, including risk-based reviews of the increased number of non-Single Audit subrecipients arising from the change in audit threshold from $500,000 to $750,00; more specific F&A requirements, programmatic report tracking obligations, and adherence to prompt payment obligations. It should be noted that these new requirements are unfunded mandates for many institutions, as their administrative costs already routinely exceed the 26% administrative cap on F&A.

- Eliminate the need for the federal government to create non-federal entity access to the audit management decisions already issued by the federal government. Currently, although non-federal access to federal management decisions is included as a risk-assessment tool that is intended to be available to non-federal entities, no such access currently exists.

- Eliminate redundant paperwork exchanges and reviews that do not add value. At the present time, pass-through entities cannot properly take advantage of work already performed by auditors and the federal government. In addition, the current requirements add burden for subrecipients since they are required to provide documents and undergo separate reviews by every pass-through entity with whom they do business, in addition to the audits or agency reviews they undergo during their normal course of business.

In prior conversations, OMB has shared an interest in pursuing an audit Safe Harbor. We are prepared to work with you to implement this immediately.

6) Subawards to For-Profit Entities and F&A Rates

It's not uncommon that a non-federal entity receiving financial assistance decides to issue a subrecipient agreement to a for-profit entity for research services in which outcomes cannot be accurately predicted or priced. In these scenarios, according to the 2 CFR 200.400(g), profit cannot be recovered under financial assistance agreements and often for-profit entities consider rate information to be proprietary, alleviating any possible solution to negotiate a rate with the subrecipient or perform a cost/price analysis.

We ask that OMB clarify its expectations for arriving at a negotiated rate with for-profit entities in these situations when a 10% deminimis rate (per 2 CFR 200.414) is not acceptable to the for-profit entity. As agencies are already performing their due diligence in proposal consideration, we recommend the issuance of the award to the grantee to constitute acceptance of an F&A rate for a for-profit entity, and that this satisfy the cost/price analysis requirements under 2 CFR 200.323, already a long accepted practice in fixed price contracting. In effect, the prime recipient should not be subject to any audit responsibilities of the for-profit entity's F&A rate. This could be clarified in an FAQ and COGR is willing to work with OMB and the COFAR, as appropriate, to develop the FAQ.

7) Research Terms and Conditions (RTCs) and Grants Closeout, § 200.343

We recommend that OMB advocate for all Federal agencies to adopt common research terms and conditions. NSF, NIH, USDA NIFA, NIST, NOAA, DOE, FAA, EPA and NASA are in the process of creating common RTCs, though other agencies have opted out. As agencies opt out, the result is less harmonization and greater agency variance, which will increase administrative burden as institutions are forced to comply with an array of different terms and conditions across multiple funding agencies.

We use 2 CFR 200.343, Closeout, as an example where common RTCs can serve as a model for true uniformity and helpful standardization. Several federal agencies are in the process of standardizing a 120-day financial closeout model under the premise that this will enhance compliance and timely reporting by reducing the need to file revisions to the Federal Financial Report (FFR). More important, as the President pursues his "National Cancer Moonshot", which inevitably will require active collaboration between institutions and their principal investigators, a standardized 120-day financial closeout model across all federal agencies will ensure that important collaboration between researchers is not arbitrarily diminished due to the current, artificial 90-day standard.

While we recognize that an update to 2 CFR 200.343(a) and (b) to implement a 120-day, rather than a 90-day standard, would constitute more than a technical correction to the Uniform Guidance, we will continue to use this example as one where a commitment by OMB and COFAR could have a powerful impact on both reducing burden and advancing the President's agenda.

8) Incorporating the Preamble and FAQs into 2 CFR Part 200

The Final Rule (Fed. Reg. Vol. 78, No. 248) published on December 26, 2013 included a 20+ page preamble that described the framework and overall intent of 2 CFR 200. However, the preamble was not codified, and we believe that crucial clarifications and nuances were lost. This preamble helped describe the landscape of 2 CFR 200, serving as both historical and prospective reference for agencies and grantees. As agencies continue to develop implementation plans and administer federal funding, it is essential they keep in mind the spirit of uniformity, streamlining, and reduced burden. The preamble repeatedly notes these concepts:

- … *"This reform of OMB guidance will reduce administrative burden for non-Federal entities receiving Federal awards while reducing the risk of waste, fraud, and abuse…" (78590)*
- … *"The goal…..streamline our guidance for Federal awards to ease administrative burden…" (78590)*
- … *"The revised rules set standard requirements (*emphasis added) *for financial management of Federal awards across the entire Federal government." (785900)*
- *"This guidance follows OMB's commitment to making government more accountable to the American people while eliminating requirements that are unnecessary and reforming those requirements that are overly burdensome." (78591)*
- *"….make compliance less burdensome for recipients and reduce the number of audit findings that result more from unclear guidance than actual noncompliance." (78591)*

We believe that the preamble provides a crucial umbrella for cohesive policy development among agencies, to which without this important introduction included in the CFR, many agencies could develop policies outside the scope and intent of 2 CFR 200 (e.g., see next section, agency deviations).

In addition to incorporating the preamble, COGR strongly encourages the codification of COFAR's frequently asked questions document (FAQs), most recently published in September 2015. Though the FAQs have been published by COFAR on their publically available website and should be consulted in conjunction with 2 CFR 200 during any audit process, any clarification outside of the codification may be disregarded if an auditor does not agree the FAQs are authoritative, leaving grantees in a difficult situation to navigate. The FAQs include several important clarifications (e.g., .110-6, .112-1, .318-1, .320-2, etc.), and if these are not codified as technical corrections to the 2 CFR 200, at a minimum, the FAQs should be codified.

9) Cost Sharing and F&A Rate Deviations, § 200.306 and § 200.414

In a September 24, 2015 letter to OMB, COGR described the ongoing situations of deviations related to vague cost sharing requests and/or F&A rates. COGR provided a number of examples by various agencies where funding announcements encouraged or required cost sharing absent criteria necessary for scoring the applications or have specified lower F&A rates. We continue to address these issues independently as they arise and have had some success where agencies have removed or re-written the requirements to meet the regulatory intent of 2 CFR 200.306 and 200.414. We will continue to provide you with examples as they occur while enlisting your persistent support to achieve consistency across federal agencies and institutes.

10) Establish an OMB Ombudsman

Since COGR's response to the June 2011 Request for Information (RFI) from NIH (*Input on Reduction of Cost and Burden Associated with Federal Cost Principles for Educational Institutions (OMB Circular A-21)*), we have advocated that OMB establish an official position that can serve as an Ombudsman to the grantee community.

Specifically, it is imperative for the grantee community to have a mechanism to appeal to OMB those decisions or actions by agencies that: 1) are not in compliance with the Uniform Guidance (e.g., see 200.306 and 200.414 above), 2) have been interpreted by an agency in a manner that requires OMB engagement, or 3) require special consideration due to other circumstances. Establishment of an Ombudsman will maximize accountability and transparency between the grantee community, the federal agencies, and OMB, and further, will establish a formal process where ambiguities and disputes in policy application and interpretation are effectively resolved.

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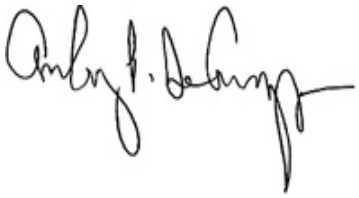
Thank you for your willingness to review these open items per 2 CFR Part 200. Please contact me or David Kennedy at (202) 289-6655 at your earliest convenience, and we look forward to addressing these items in more detail.

Sincerely,



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