COGR

Council On Governmental Relations

An Association of Research Institutions

March 23, 2020

Mr. Timothy F. Soltis
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The White House Office of Management and Budget

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Subject: Revisions to 2 CFR 25, 2 CFR 170, 2 CFR 183, 2 CFR 200
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Dear Mr. Soltis,

The Council on Governmental Relations (COGR) is an association of 190 research universities and affiliated academic medical centers and research institutes. Our member institutions conduct over $80 billion in research and development activities each year and play a major role in performing basic and applied research on behalf of the Federal government. We bring a unique perspective to regulatory and cost burden—COGR concerns itself with the impact of federal regulations, policies and practices on the performance of research conducted at our member institutions.

On behalf of COGR and its members, we appreciate the hard work that many federal leaders have contributed to the proposed revisions to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Part 200), as well as the updates/additions of 2 CFR Part 25, Part 170, and Part 183.

PLEASE NOTE: The comments that follow represent a collaborative effort among the COGR membership. However, under the circumstances created by the COVID-19 crisis, COGR and its members had collaboration challenges as many of our leaders were called to be on the institutional crisis-management front-line. These efforts by our leaders are ongoing and are the number one priority as encouraged by the President. We are hopeful that OMB remains flexible with our community to ensure that before final versions of 2 CFR 25, 170, 183 and 200 are released, we will have significant opportunities to engage with one another.

Our comments build upon the foundation that OMB has provided in its proposed revisions to 2 CFR Parts 25, 170, 183, and 200. As you consider our comments, we believe you will find that they have the potential to further enhance OMB's proposed revisions and make a major contribution to the President's "Results-Oriented Accountability for Grants Cross-Agency Priority Goal."

The following sections comprise the COGR Response:

(1) Appreciation and Thank You
(2) Treatment of FAQs
(3) Definitions
(4) Budget Period and Period of Performance
(5) Terms and Conditions
(6) Procurement
(7) Indirect (F&A) Costs
(8) 2 CFR Parts 25, 170, and 183
(9) Important Clarifications
(10) Going Forward

The COGR Response follows below.

(1) Appreciation and Thank You

§200.1 Micro-purchase and §200.319(a)(1) Micro-purchases

COGR RESPONSE: We are thankful for the approach OMB has taken to address micro-purchases. Many of the additions and clarifications are beneficial to our community and provide clear guidance for conducting procurement actions. For example, clarifying that non-federal entities "should" [200.319(a)(1)(i)] rather than "must" distribute micro-purchases equitability among qualified suppliers to the maximum extent practicable reduces liability to institutions when procuring items that are unique, specialized, and/or not always available from multiple vendors. Additionally, providing text for non-federal entities to use purchase cards [200.319(a)(1)(ii)] for making micro-purchases will reduce administrative burden while expediting the purchase process so that performance of the award can be fulfilled within the period of performance. Finally, the text addressing "Micro-purchase

thresholds that differ from the FAR" [200.319(a)(1)(iii)] is an important addition to this section as it allows institutions to assess and set thresholds based on their own risk-based assessments and internal controls for conducting procurement actions.

NOTE: We have made additional observations and recommendations, which are addressed later in the COGR Response—see (6) Procurement Standards.

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§200.1 Fixed amount awards.

COGR RESPONSE: The clearly delineated inclusion of "cooperative agreement" in the definition of "fixed amount awards" is a helpful change and clarifies that fixed amount awards can be applicable to both grants and cooperative agreements. The research community looks forward to working with OMB to share ideas on how fixed amount awards can be used to leverage efforts to reduce administrative burden. To be consistent with this change, **we suggest that the title for section 200.201 be changed from "Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts" to "Use of grant agreements and cooperative agreements (including fixed amount awards), and contracts."**

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§200.1 Questioned cost.

COGR RESPONSE: The additional clarification to "Questioned cost" is helpful ("Questioned costs are not an improper payment until reviewed and confirmed to be improper as defined in OMB Circular A-123 Appendix C"). As OMB works toward consistency of data elements and terminology across all federal agencies, refinement to this definition is particularly important as it relates to how audit findings are published by the federal OIG community and other federal oversight entities.

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§200.101 Applicability.

COGR RESPONSE: We appreciate the added clarity on the use of "must" versus "should" or "may" per 200.101(b)(1). This is a helpful change, allowing institutions to determine which best practices or recommended approaches indicated by "should" or "may" they find appropriate to implement.

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§200.211 Information contained in a Federal award.

COGR RESPONSE: The addition of 200.211(e), *Prohibition of including references to non-binding guidance documents,* is an important and helpful change. COGR can share with OMB examples of agency guidance we consider inappropriate implementation of agency policy. With this new language, we are optimistic OMB will intervene in these situations and require the agency to clarify that the guidance is not official policy, particularly when guidance is inconsistent with policy and the rulemaking process. Note, however, agency guidance and corresponding FAQs can provide helpful clarification to the community. ***In regard to 2 CFR 200, the July 2017 FAQs are critical and have been relied on for interpreting key sections of 2 CFR 200. COGR believes the FAQs should be incorporated into 2 CFR 200. If not, at a minimum, selected FAQs should be incorporated (see (2) Treatment of FAQs).***

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§200.301 Performance measurement

COGR RESPONSE: This section includes several helpful revisions. We especially appreciate the statement that technical performance reports (e.g., the research performance project reports) are sufficient for reporting on discretionary research awards. This clarification also was included in 200.308 Revision of budget and program plan. Further, we appreciate the clarification that federal agencies "may," rather than "should," ask the recipient to relate financial information to the performance accomplishments, as this is not always practical or informative.

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§200.331 Requirements for pass-through entities (de minimis rate)

COGR RESPONSE: We appreciation the new language under 200.331(a)(4) that states: **The pass-through entity must not require use of a de minimis indirect cost rate if the subrecipient has a federally approved rate.** This will require pass-through entities to honor the negotiated F&A rates of a subrecipient. We also appreciate that this section provides subrecipients the opportunity to use the de minimis rate in cases where the subrecipient's previously negotiated rate has expired.

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§200.331 Requirements for pass-through entities (subrecipient monitoring)

COGR RESPONSE: We are thankful for the addition of 200.331(d)(4), which begins with: **The pass-through entity is only responsible for resolving audit findings specifically related to the subaward (i.e., non-systemic) and not applicable to the entire subrecipient (i.e., systemic). If a subrecipient has a current Single Audit …** This is an important change, which seems to eliminate the ambiguity associated with a pass-through entity's responsibility for resolving the audit findings of its subrecipients. ***Note, however, minor clarifications are necessary and we have proposed these under (9) Important Clarifications.***

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§200.343 Closeout. (and 200.328 Monitoring and reporting program performance.)

COGR RESPONSE: The updates to 200.343 Closeout and 200.328 Monitoring and reporting program performance are important changes that will enhance reporting compliance. As we have maintained consistently in prior correspondences, the extra 30 days provided with the 120-day closeout period (also see 200.328(b), *Non-construction performance reports*) will result in better compliance and more accurate reporting. ***Note, however, minor clarifications are necessary and we have proposed these under (9) Important Clarifications.***

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§200.414 Indirect (F&A) costs.

COGR RESPONSE: The revision to 200.414(f) is a helpful change. Institutions, which in the past had a negotiated F&A rate, but no longer have one, now are eligible to use the *de minimis* rate of 10% of modified total direct costs (MTDC).

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§200.419 Cost accounting standards and disclosure statement.

COGR RESPONSE: The revisions made to 200.419 are helpful. Per 200.419(b)(2), this will allow institutions to implement reasonable changes to accounting practices at any point in time, without having to rely on the unrealistic 6-month approval process. ***Note, however, since the initial implementation of 2 CFR 200 in December 2014, a revised DS-2 format***

consistent with 2 CFR 200 has not been made available. This is problematic and is one of several reasons COGR has petitioned for the elimination of the DS-2. It is a redundant document that adds little value to federal oversight and compliance. While we very much support the changes to 200.419, we still urge OMB to consider eliminating the DS-2 requirement as this will result in a significant reduction in administrative burden to both research institutions and cognizant agencies.

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§200.431 Compensation – fringe benefits.

COGR RESPONSE: The revision to 200.431(g) is a helpful change and will improve the process for institutional recovery of funded pension plan costs.

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§200.465 Rental costs of real property and equipment.

COGR RESPONSE: The revisions to 200.465(d) and (e) are helpful changes and will allow institutions to be consistent with GASB and FASB requirements.

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(2) Treatment of FAQs

The addition of 200.211(e), *Prohibition of including references to non-binding guidance documents*, is an important and helpful change. However, agency guidance and corresponding FAQs still provide very helpful clarification to the community. In regard to 2 CFR 200, the July 2017 FAQs (originally published by the COFAR) are critical and are relied on for interpreting key sections of 2 CFR 200.

As such, COGR recommends that the July 2017 FAQs be codified as part of 2 CFR 200. Short of that, COGR suggests key concepts and language from the FAQs be added to the main body of 2 CFR 200. Below we have identified high priority FAQs where key language should be added into the relevant section of 2 CFR 200. And in the next section, ***(3) Definitions***, we have provided recommendations for including the FAQ as a new definition.

We are respectful of the timeline OMB has set for finalizing the revisions to 2 CFR 200. COGR believes that the treatment of the FAQs is among the high priority items to be considered before finalizing the proposed revisions, to 2 CFR 200 and we stand ready to assist OMB in this process.

FAQ Appendix III – 3 (as it refers to Voluntary Uncommitted Cost Sharing)

COGR RESPONSE: This FAQ includes the reference to "Voluntary Uncommitted Cost Sharing," or VUCS. This is an important concept and COGR recommends it be codified as a new definition under 2 CFR 200.1, Definitions. The suggested language below provides a good start point. We request further engagement with OMB to finalize a definition that incorporates additional nuances associated with cost sharing expectations and faculty effort.

Voluntary Uncommitted Cost Sharing (VUCS) is the personnel effort contributed that is over and above that which is committed in the proposal budget or award on an agreement. VUCS normally is used in connection with IHEs and other research organizations and was originally clarified in OMB Memoranda 01-06, January 5, 2001. VUCS should be treated differently from committed effort and should not be included in the organized research base for computing the F&A rate or reflected in any allocation of F&A costs. Furthermore, such effort does not need to be specifically identified through the payroll documentation requirements.

FAQ 200.33-1 Capitalization Level for Software

COGR RESPONSE: This FAQ was developed in response to concerns raised by COGR in 2016. Specifically, COGR objected to a federal interpretation that all software acquisitions > $5,000 meet the definition of equipment, which is inconsistent with GAAP. The FAQ 200.33-1 supported COGR's position. As such, the definition of Equipment per 200.1 Definitions should be updated using the following suggested language **(proposed addition shown as bold-underlined):**

Equipment means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of the capitalization level established by the non-federal entity for financial statement purposes, or $5,000. **In the case of Software, it should be treated either as equipment or as an expense in accordance with institutional polices and Generally Accepted Accounting Principles (GAAP).** See also *Capital assets*, *Computing devices*, *General purpose equipment*, *Information technology systems*, *Special purpose equipment*, and *Supplies*.

FAQ 200.112-1 Conflict of Interest

COGR RESPONSE: This FAQ is essential but also needs to be reevaluated. ***COGR's consistent position since 2013 has been to remove 200.112 from Subpart B – General Provisions, and relocate it to the Procurement Standards.*** FAQ 200.112-1 is clear that 200.112 never was intended to address potential scientific conflicts of interest. Instead, the primary intent of 200.112 is to address conflict of interest in procurement. Also, an area of FAQ 200.112-1 that has always been a concern is the reference to "subrecipients." While selection of subrecipients and potential conflicts may be a relevant discussion, this represents a broader discussion that should be addressed in forums outside of 2 CFR 200.

As OMB has proposed significant revisions to the Procurement Standards, COGR suggests that this is an opportunity to address this issue in a definitive manner. The broader issues around conflict of interest are being addressed currently by OSTP and other federal agencies and we expect that COGR will be involved in these conversations as well. Maintaining 200.112 as it currently exists provides unnecessary confusion and ambiguity, which ultimately creates unhelpful administrative burden.

COGR proposes section 200.112 be revised and incorporated in 200.317(c)(1) using the following suggested language: **The non-federal entity must maintain a conflict of interest in procurement policy as part of its institutional policies.**

***FAQ 200.303-3* Should vs Must and the Green book**

COGR RESPONSE: This FAQ should be codified as part of section 200.303(a) using the following suggested language: **There is no expectation or requirement for a non-federal entity to document or evaluate internal controls prescriptively in accordance with these three 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 best practices. Non-federal entities and their auditors should exercise judgment in determining the most appropriate and cost-effective internal controls in a given environment or circumstance to provide reasonable assurance of compliance with federal program requirements.**

FAQ 200.400-1 Fixed Amount (Awards) Subawards and Profit

COGR RESPONSE: This FAQ should be codified as part of 200.400(g) using the following suggested language: **A non-federal entity may retain an unexpended balance on its fixed amount awards and subawards. Provided that the cost of a fixed amount award was determined according to requirements specified in 2 CFR 200, any residual unexpended balance that remains at the end of a completed award is not "profit" and, therefore, can be retained - see 200.401 (a)(3).**

FAQ 200.414-8 (Also applicable to 200.331) Federally negotiated indirect cost rates – voluntary under-charging or waiving IDC

COGR RESPONSE: This FAQ should be codified as part of section 200.414(c) using the following suggested language: **A non-federal entity receiving a direct federal award can voluntarily elect to waive indirect costs or charge less than the full indirect cost rate. The election must be made solely by the non-federal entity that is eligible for indirect cost reimbursement and must not be encouraged or coerced in any way by the federal awarding agency. While a waiver in charging is permitted, a reduction is not permitted in a funding proposal when precluded by 2 CFR 200.306(a) or agency policy.**

COGR RESPONSE: In addition, this FAQ should be codified as part of section 200.331(a) using the following suggested language: **A subrecipient receiving an award from a pass-through entity can voluntarily elect to waive indirect costs or charge less than the full indirect cost rate. The election must be made solely by the subrecipient that is eligible for indirect cost reimbursement and must not be encouraged or coerced in any way by the pass-through entity.**

FAQ 200.430-3 Methods for Documenting Personnel Costs

COGR RESPONSE: This FAQ should be codified as part of section 200.430(i)(1) using the following suggested language: **There is no requirement for a non-federal entity to obtain approval from its federal oversight entity to institute new methodologies for documenting personnel costs, as long as the methodology meets the Standards for Documentation of Personnel Expenses as listed in this section.**

(3) Definitions

PROPOSED NEW DEFINITIONS:

Procurement – acquisition of property or services required under a federal award. Procurements as determined by institutional policy normally exclude subawards, travel, consultants, human subject payments, financial aid, employee reimbursements, and similar transactions.

COGR RESPONSE: The above definition is necessary and will provide helpful clarification to what constitutes a procurement action. ***Also see (6) Procurement Standards.***

Disbursement – the act of transferring funds from one entity to another entity, or from an award to an intra-institutional payee (also see Recognition of Payment below).

Recognition of Payment – For purposes of recognizing that a payment has been made, an invoice or related instrument is considered paid when the transaction is entered into the entity's accounts payable system, as specified by the entity's payment policies and procedures. The disbursement of the funds may then take place at a subsequent date within the normal course of the entity's business practices.

COGR RESPONSE: Payment is a specific term that recognizes the official action of initiating a payment of an invoice or related instrument. The lack of definition for this term has resulted in single audit findings when auditors have issued opinions stating payment can only be recognized after a check has been issued or dispersed and then has also been cleared by the bank. Incorporating this new definition will provide explicit clarity and eliminate potential audit and administrative burden that would result if institutions are required to modify their internal policies, procedures and business systems.

OBSERVATIONS ON PROPOSED REVISIONS/ADDITIONS:

OMB's New Presentation of Definitions in 200.1

COGR RESPONSE: OMB revised its approach to defined terms by deleting the reference numbers for each term. We found that the numbers are rarely used throughout the Guidance

but that without the numbers the terms are not easily identifiable as defined terms when used outside the definitions section of the document. The terms are not capitalized or highlighted, which further makes identifying defined terms difficult, especially for generic words such as *award*, *contract*, and *budget*. We request that OMB consider highlighting the specifically defined terms in some way, e.g., underlining, capitalizing, italicizing the words. A frequently used ON-LINE RESOURCE (click on this link) that would be useful is the inclusion of hyperlinks, leading from the use of a term to its definition. This would identify the word as a defined term and improve the reader's understanding of the Guidance through linkage to the definitions.

Oversight agency for audit means the federal awarding agency that provides the predominant amount of funding directly (direct funding) to a non-federal entity not assigned a cognizant agency for audit. When the direct funding represents less than 25 percent of the total funding received ~~from~~ **by** the non-Federal entity (as prime and subawards), then the Federal agency ~~with~~ **providing** the predominant amount of funding is the designated oversight agency for award. When there is no direct funding, the Federal awarding agency which is the predominant source of pass-through funding must assume the oversight responsibilities. The duties of the oversight agency for audit and the process for any reassignments are described in §200.513 (b).

COGR RESPONSE: The new language (in blue font) is confusing. Our suggested update is shown above.

Subrecipient means an entity ~~usually but not limited to non-Federal entity entities,~~ that receives a subaward from a pass-through entity to carry out part of a Federal award; but does not include an individual that is a beneficiary of such award. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency.

COGR RESPONSE: We offer the above revision to the OMB proposed revision (in blue font). This will help clarify and simplify this term for broad use. We would also like to discuss the open question of whether and under what terms and conditions non-federal entities may issue subawards to a federal agency.

Termination means the ending of a federal award, in whole or in part at any time prior to the planned end of period of performance. ~~A lack of available funds is not a termination.~~

COGR RESPONSE: COGR disagrees with this change (in blue font) and proposes that it be deleted. Lack of federal funding should trigger an orderly wind-down of the project in accordance with 200.339 Termination. COGR requests the deletion of the new language or added clarification that it is not a termination only for the purpose of evaluating a non-federal entity's record of performance.

(4) Budget Period and Period of Performance

COGR is concerned with the broad changes, throughout the proposed revisions to 2 CFR 200, concerning the use of "Budget Period" and "Period of Performance." There are a number of unintended consequences, which could impact financial compliance as well as the achievement of the actual research being conducted. ***COGR requests a discussion on our concerns with OMB leadership prior to finalizing the proposed revisions to 2 CFR 200.***

(Shown below: OMB revised definitions (in blue font) and deletion of 200.309)

Budget period means the time interval during which recipients are authorized to expend the current funds awarded and must meet the matching or cost-sharing requirement, if any.

Period of performance means the anticipated time interval between the start and end date of an initial Federal award or Renewal. See also *Budget period* and *Renewal.*

~~***§200.309 Period of performance.***~~
~~*A non-Federal entity may charge to the Federal award only allowable costs incurred during the period of performance (except as described in §200.461 Publication and printing costs) and any costs incurred before the Federal awarding agency or pass-through entity made the Federal award that were authorized by the Federal awarding agency or pass-through entity.*~~

COGR RESPONSE: The proposed revisions include several changes where the new term "budget period" has replaced "period of performance." We understand from Section *E. Standardization of Terminology and Implementation of Standard Data Elements* of the Summary that the intent of the change is to ensure that recipients are charging within the periods approved by the sponsor. Several of the clarifications are helpful, e.g., in the proposed changes to Special conditions. 200.208(2)ii; and Information contained in the

federal award 200.211(c)iii.

However, the revisions limit the recipient's flexibility to charge grants, cooperative agreements, or contracts within the sponsor-approved budget periods in a few key areas ***(see 200.402, 200.458 and 200.461 below).*** As a result, COGR would like to meet to discuss the proposed revisions to these definitions. Some ambiguities will be confusing to our community.

(Shown below: OMB revisions (in blue font) to 200.402)

§200.402 Composition and timing of costs.

(a) Total cost. The total cost of a Federal award is the sum of the allowable direct and allocable indirect costs less any applicable credits.

(b) Timing of costs. Costs must be charged to the approved budget period in which they were incurred except where noted in the specific cost principle.

COGR RESPONSE: The new section (b) appears to limit the ability of recipients of grants, cooperative agreements, and contracts to charge within the sponsor-approved budget periods. For example, if materials and supplies budgeted and purchased in one period could not be used or delivered on another budget period because of the cross-over. This is overly restrictive and is unnecessary when costs are being changed as approved by the sponsor, and within a sponsor-approved period of performance. Further, having each budget period stand on its own will result in significant burden and disruption to the research process. The language above and this idea is in direct conflict with 200.308 (e)(3), which states that the carry forward of unobligated balances into the following budget period is allowable. To allow activities to occur without interruptions, COGR requests the deletion of the new language applicable to ***(b) Timing of costs***. Any restrictions on spending across sponsor-approved budget periods should be included in terms and conditions of the award.

(Shown below: OMB revisions (in blue font) to 200.458)

§200.458 Pre-award costs.

Pre-award costs are those incurred prior to the effective date of the Federal award directly pursuant to the negotiation and in anticipation of the Federal award where such costs are

necessary for efficient and timely performance of the scope of work. Such costs are allowable only to the extent that they would have been allowable if incurred after the start date of the Federal award and only with the written approval of the Federal awarding agency. If charged to the award, these costs must be charged to the initial budget period of the award, unless otherwise specified by the Federal awarding agency.

COGR RESPONSE: As stated above, 200.308 (e)(3) provides flexibility for carry-forward of funds within the sponsor-approved budget periods. Under current requirements, any expenditure of funds beyond the amount obligated to date is at the non-federal entity's risk, making this addition an unnecessary and potentially highly burdensome as it could be interpreted to require strict accounting and reporting at the budget period level. Furthermore, where coupled with the limitations we opposed in 200.402, this would mean that each budget segment might require an unacceptable ramp-up and delay of critical research activity as supplies for that period were obtain. COGR requests the deletion of the new language. Any restrictions on spending across approved budget periods should be included in terms and conditions of the award. (Also note proposed update, "start date of the Federal award.")

(Shown below: Revisions (in blue font) to 200.461)

§200.461 Publication and printing costs.

(a) Publication costs for electronic and print media, including distribution, promotion, and general handling are allowable. If these costs are not identifiable with a particular cost objective, they should be allocated as indirect costs to all benefiting activities of the non-Federal entity.

(b) Page charges for professional journal publications are allowable where:

(1) The publications report work supported by the Federal Government; and

(2) The charges are levied impartially on all items published by the journal, whether or not under a Federal award.

(3) The non-Federal entity may charge the Federal award before closeout for the costs of publication or sharing of research results if the costs are not incurred during the period of performance of the Federal award. If charged to the award, these costs must be charged to the final budget period of the award, unless otherwise specified by the Federal awarding agency.

COGR RESPONSE: COGR objects to the revisions in this section. Publication costs have historically been allowable up until closeout of the award, meaning up to 90 days beyond the period of performance. This is acknowledged in §200.309 Period of performance, in the current version of the Guidance. This change also removes this flexibility for grantee

institutions. COGR requests the deletion of the new language or special carve-out for research awards. Also, the cost of maintaining data is closely related, and frequently part of the publication process. With the increased emphasis on open access and the need to make research data available long after the award has ended we request that, in the spirit of 201.461(b), data curation costs also be allowable up to the final date of the closeout period. This change would support federal initiatives for making research data public.

(5) Terms and Conditions

COGR has the following concerns with proposed revisions to Terms and Conditions included in Subpart C – Pre-Federal Awards Requirements.

§200.202 Program planning and design

COGR RESPONSE: This new section 200.202, which includes connection to 200.211, 200.339, 200.402, 200.458, and Appendix I, will lead to the unintended consequence of making research look like a contract agreement. ***These requirements, primarily placed on federal awarding agencies, also will result in trickled-down burden to the grantee as new performance metrics become applicable.*** These requirements will make grant agreements more akin to government procurement contracts under the FAR (Federal Acquisition Regulation), but FAR based contracts serve a completely different purpose than research assistance awards that support fundamental research and open inquiry and exploration. In addition to the increased administrative burden and associated costs, for which reimbursement is not available due to the cap on administrative cost recovery, blending research agreements with procurement agreements threatens creativity and the public benefits that innovation has provided over many decades.

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§200.204 Notices of funding opportunities (Assistance listing).

COGR RESPONSE: We are supportive of the movement away from the CFDA and to the "Assistance listing" nomenclature. However, experience dictates these types of changes, if not done thoughtfully, can cause significant disruption in grants administration. COGR hopes to participate in discussions regarding the transition plan as the government moves from the CFDA to the "Assistance listing" nomenclature.

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§200.204 Notices of funding opportunities (Terms and Conditions).

COGR RESPONSE: We request a new section be added under 204(c) which would require the funding agencies to include information about the terms and conditions directly in the funding announcement, including any deviations from the Federal awarding agency's standard terms and conditions. This information will help institutions make risk-based decisions about developing proposals where it may not be able to accept the award due to overly-restrictive terms. COGR suggests the following: **(c)(7) Applicable terms and conditions for resulting awards, including any deviations from these standard terms.**

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§200.205 Federal awarding agency review of merit of proposals.

For discretionary grants or cooperative agreements, unless prohibited by Federal statute, the Federal awarding agency must design and execute a merit review process for applications, with the objective of selecting the recipients most likely to be successful in delivering results based on the program objectives outlines in section §200.202. **Research and development projects must be selected based on scientific merit, typically through a peer-review process.**

COGR RESPONSE: COGR's suggested update is shown above. We understand that the phrase "delivering results" could be appropriate for non-research awards. However, for clarity, we recommend that the **underlined sentence** be added, which makes it clear that research and development projects must be selected based on their scientific merit, to fund the most promising and vital science.

(6) Procurement Standards

This section includes COGR's recommendations for enhancing OMB's proposed revisions to the Procurement Standards. The **COGR RESPONSE** is included.

200.1 DEFINITIONS

Proposed New Definition

Procurement means the acquisition of property or services required under a Federal award. Procurements as determined by institutional policy normally exclude subawards, travel, consultants, human subject payments, financial aid, employee reimbursements, and similar transactions.

COGR RESPONSE: The above definition is necessary and will provide helpful clarification to what constitutes a procurement action. ***Also see (2) Definitions.***

Proposed Change

Micro-purchase means a purchase of supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchases comprise a subset of a non-Federal entity's small purchases as defined in §200.319 Methods of procurement to be followed. Micro-purchase threshold means the dollar amount at or below which a non-Federal entity may purchase property or services using micro-purchase procedures (see §200.319). Generally, the micro-purchase threshold for procurement activities administered under Federal awards is not to exceed the amount set by the Federal Acquisition Regulation (FAR) at 48 CFR subpart 2.1 (unless a higher threshold is requested by the non-Federal entity and approved by the ~~cognizant agency~~ **designated federal oversight entity as defined in OMB Memorandum M-18-18; June 20, 2018).**

COGR RESPONSE: We appreciate the revised definition. In the case of institutions that have HHS CAS as their cognizant agency for indirect cost, our understanding is that the HHS Grants Policy Office is responsible for making the aforementioned approvals. We propose the above change with a reference to OMB Memorandum M-18-18. Also, the same change should be made to 319(a)(1)(iv).

Clarification request

Simplified acquisition threshold means the dollar amount below which a non-Federal entity may purchase property or services using small purchase methods (see §200.319). Non-Federal entities adopt small purchase procedures in order to expedite the purchase of items at or below the simplified acquisition threshold. The simplified acquisition threshold for procurement activities administered under Federal awards is set by the Federal Acquisition Regulation at 48 CFR subpart 2.1.

Thresholds differ from the FAR. The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk and its documented procurement procedures. States, IHEs and local governments should determine if local government laws on purchasing apply.

COGR RESPONSE: The language above is from 200.1, Definitions, and also is included under section 200.319(a)(2)(ii). The underlined section is of concern. Our understanding, as referenced in OMB Memorandum M-18-18, is the simplified acquisition threshold is set at $250,000, as authorized under the NDAA. The language above and in 200.319(a)(2) seems to suggest non-federal entities can set a threshold above $250,000. However, if this is the intent, we support the additional flexibility.

PROPOSED MODIFICATIONS

§200.317 General procurement standards

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. **Competition requirements are met when applied to broader procurement decisions, such as strategic sourcing, shared services, and similar procurement arrangements. Such agreements, where entered into through a process per §200.319, shall be considered compliant at the individual transaction level.**

COGR RESPONSE: The proposed language above was conveyed as part of FAQ 200.320-3, Methods of Procurement and Strategic Sourcing and Shared Services. Non-federal entities have relied on this FAQ and COGR proposes the language in **bold-underline** be included as an addition to 200.317(e).

(l) The procurement standards herein do not apply to procurements made in indirect cost areas. They apply only to procurements for goods and services that are directly charged to a Federal award.

COGR RESPONSE: The proposed language above was conveyed as part of FAQ 200.320-5, Methods of Procurement and Indirect Costs. In response to the FAQ asking how procurements made for indirect costs (for example: would a non-Federal entity need to follow them when hiring a plumber to fix a broken pipe in the headquarters building?) should be treated, the FAQ response was "procurement standards do not apply to procurements made in indirect cost areas." Non-federal entities have relied on this FAQ and COGR proposes the language in **bold-underline** be included as an addition to 200.317.

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§200.319 Methods of procurement to be followed

(a)(2)(i) Small purchases.

The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold. If small purchase procedures are used, price or rate quotations must be obtained from ~~an adequate number of~~ qualified sources, **using methods of obtaining price or rate quotations as determined appropriate by the non-federal entity.**

COGR RESPONSE: The language COGR has proposed in **bold-underline** is consistent with FAQ 200.320-1. Incorporating this language will allow procurement specialists to determine the most efficient method of ensuring appropriate competition and will eliminate ambiguity around how it is to be accomplished.

(b)(3) Noncompetitive procurement. There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:

(i) The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (see §200.319(a)(1));

(ii) The item is available only from a single source, **including where research requirements dictate timeliness or quality. Noncompetitive methods (single source) are allowable at IHEs and nonprofit research organizations when researchers need to acquire items from a particular source for scientific reasons (for example when a**

service or item is only available with the required quality from one source or only one source can provide the items or service in the time frame required);
(iii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
(iv) The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request, **which includes authorizing an award based on a proposal for funding specifically identifying the procurement,** from the non-Federal entity; or
(v) After solicitation of a number of sources, competition is determined inadequate.

COGR RESPONSE: The proposed language, shown in **bold-underline**, was conveyed as part of FAQ 200.320-2 Methods of Procurement - Sole Source for Research and will solidify guidance applicable to sole source procurements. In response to the FAQ asking if it was acceptable for researchers to acquire items from a particular source for scientific reasons (e.g., when a service or item is only available with the required quality from one source or only one source can provide the items or service in the time frame required), the FAQ response was "This would be a valid reason. This option is available at all dollar amounts…" Non-federal entities have relied on this FAQ and COGR proposes the above be included as an addition to 200.319(b)(3)(ii). The language in (iv) above is requested to clarify that there is no need for a redundant approval by the federal agency where approval was already sought in the funding proposal.

(b) Formal procurement methods. When the value of the procurement for property or services under a Federal financial assistance award exceeds the simplified acquisition threshold (SAT) (*Simplified acquisition threshold*), or a threshold established by a non-Federal entity, formal procurement methods are required. Formal procurement methods require following documented procedures. Formal procurement methods ~~also~~ **may** require public advertising unless a non-competitive procurement can be used in accordance with §200.318 Competition. The following formal methods of procurement are used for procurement of property or services above the simplified acquisition threshold or a value below the simplified acquisition threshold the non-Federal entity determines to be appropriate.

COGR RESPONSE: Formal advertising is not always the most effective method to distribute requests for solicitation. This should be recognized, by incorporating our suggested change, as this is a more accurate description of how IHEs and most non-federal entities solicit maximum participation in their procurement procedures. We have proposed a clarification in **bold-underline**.

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§200.323 Contract cost and price

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work. **Negotiation of profit may be considered as part of the broader negotiation of the procurement action, in which case, negotiation of profit as a separate element of the price may not be applicable. In cases where contractors refuse to share proprietary financial information, the non-federal entity may notate this, accordingly.**

COGR RESPONSE: The proposed language above will clarify when negotiation of profit is required. It also is consistent with FAQ 200.323-1, Negotiation of profit. We have proposed a clarification in **bold-underline**.

CLARIFICATION

§200.321 Domestic preferences for procurements

(a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). This term must be included in all subawards including all contracts and purchase orders for work or products under this award.

COGR RESPONSE: The reference to subawards (underlined) is of concern and requires clarification. For example, including an award term for subawards made by IHEs and nonprofit research organizations to subrecipients may not be appropriate or applicable. Our understanding is that this award term is meant to address transportation, infrastructure, and related projects. As such, 200.321 should be not applicable to IHEs and nonprofit research organizations. We request clarification.

(7) Indirect (F&A) Costs

This section includes COGR's recommendations for enhancing OMB's proposed revisions (including the requirement for OMB to address the 1.3% Utility Cost Adjustment) as they relate to the treatment of Indirect (F&A) Costs.

§200.110 Effective/applicability date.

(c) Existing negotiated indirect cost rates will remain in place until they are re-negotiated. The effective date of changes to indirect cost rates must be based upon the date that a newly re-negotiated rate goes into effect for a specific non-Federal entity's fiscal year. Therefore, for indirect cost rates and cost allocation plans, Federal awarding and indirect cost rate negotiating agencies will use the Uniform Guidance both in generating proposals for and negotiating a new rate (when the rate is re-negotiated) for non-Federal entities.

COGR RESPONSE: We believe the intent of this new section is to state that existing F&A rates should remain effective after the 2 CFR 200 proposed revisions are implemented. We agree this should be the case, though the new language is somewhat confusing and could be improved.

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§200.414 Indirect (F&A) costs.

(h) All rate agreements from non-Federal entities must be available publicly on an OMB-Designated Federal website.

COGR RESPONSE: We support transparency. However, for years HHS-Cost Allocation Services (CAS) has not made rate agreements available to the public using the rationale that rate agreements are "proprietary." Since many institutions already make their rate agreements publically available, we do not support this new language. If this language is implemented, it is critical that IHEs are consulted as to how the information will be posted. In addition, if this information is made public for IHEs and other research institutions, it should also be made public for industry and other commercial organizations. Finally, even basic concepts related to F&A cost rates, such as Modified Total Direct Cost, are regularly misunderstood, and posting F&A cost rates without any form of educational or contextual background would be irresponsible, inappropriate and likely misleading to the public.

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§200.436 Depreciation.

(c) … For the computation of depreciation, the acquisition cost will exclude.

(1) The cost of land;

(2) Any portion of the cost of buildings and equipment borne by or donated by the Federal Government, irrespective of where title was originally vested or where it is presently located;

(3) Any portion of the cost of buildings and equipment contributed by or for the non-Federal entity ~~that are already claimed as matching or~~ where law or agreement prohibits recovery;

(4) Any asset acquired solely for the performance of a non-Federal award; and

(5) Assets that were directly paid for and expensed using Federal financial assistance.

COGR RESPONSE: The new language added to (3) represents a policy change that could inappropriately restrict legitimate F&A recovery at IHEs. Often, when an IHE shares in the cost of an asset, the IHE contribution is not recognized as "matching." However, the new language could be misinterpreted to mean any IHE contribution will be treated as "matching." Furthermore, FAQ 200.436-1 states "depreciation on the institutional contribution is allowable, unless law or agreement prohibits recovery." COGR believes, as shown above, the new language per (3) should be struck in order to reflect the FAQ and allow for fair recovery of costs.

App. III, D. Simplified Method for Small Institutions(and burden reduction).

1.a. Where the total direct cost of work covered by this Part at an institution does not exceed $10 million in a fiscal year, the simplified procedure described in subsections 2 or 3 may be used in determining allowable indirect (F&A) costs.

COGR RESPONSE: We suggest increasing the threshold to $50 million. This increase would permit additional IHEs to consider the Simplified Method, reducing administrative burden for both IHEs and the federal government. COGR also is supportive of ideas that can minimize "negotiation burden" for "low-risk" rate negotiations (e.g., institutions below a certain MTDC threshold, institutions not requesting a significant rate increase, etc.). In some cases, after the F&A cost rate proposal is submitted and a federal negotiator has completed the preliminary review, a telephone negotiation could be initiated. If the federal negotiator determines that the negotiation is a "low-risk," the negotiation could be completed in a timely manner, reducing the administrative burden both for the institution and the federal government.

App. III, D. Identification and Assignment of Indirect (F&A) costs.

4.c. A utility cost adjustment of up to 1.3 percentage points may be included in the negotiated indirect cost rate of the IHE for organized research, per the computation alternatives in paragraphs (c)(1) and (2) of this section.

COGR RESPONSE: OMB is out of compliance with this section of 2 CFR 200. OMB is required to update the research square footage weighting factor "no more than annually nor less that every 5 years", yet the Uniform Guidance continues to reference July 2012 values used in determining the original factor of 2.0. On November 15, 2015, COGR provided an analysis to OMB (***see APPENDIX 1, LETTER TO OMB***) showing that the calculation of the research square footage weighting factor of 2.0 was grossly flawed and that a factor of 4.2 would be more accurate. We recommend that the factor be updated to at least 4.2.

The more accurate factor of 4.2, effectively, will permit all institutions to recover the maximum 1.3 percentage points allowed. However, we suggest rather than requiring the highly complex and burdensome process (for both institutions and federal personnel) of regularly updating the research square footage weighting factor, this section of Appendix III should be modified to simply say: **A utility cost adjustment of ~~up to~~ 1.3 percentage points ~~may~~ will be included in the negotiated indirect cost rate of the IHE for organized research, ~~per the computation alternatives in paragraphs (c)(1) and (2) of this section~~.** Eliminating the process of regularly updating the weighting factor, and consequently, eliminating the time and effort to include the calculation (and a review of the calculation by federal negotiators), will dramatically reduce administrative burden without any cost impact to the federal government.

(8) 2 CFR Parts 25, 170, and 183

2 CFR Parts 25 and 200

Requirement for the Federal Awardee Performance and integrity Information System (FAPIIS) to include information on a non-Federal entity's parent, subsidiary, or successor entities

As described in the Preamble: OMB proposes to require that prior to making a grant or cooperative agreement, agencies must consider all of the information in FAPIIS with regard

to an applicant's immediate owner or highest-level owner and predecessor, or subsidiary, if applicable. These revisions are consistent with the Federal Acquisition Regulation (FAR) final rule regarding this law published at 81 FR 11988 on March 7, 2016. OMB seeks comments and data on the following: The burden on recipients regarding the implementation of the statute, the applicability of this requirement to different types of entities (i.e., states, local governments, and tribes), the alignment of these revisions with the FAR, and any deviations from the FAR change that OMB should consider.

COGR RESPONSE: We are concerned that a federal wide implementation of this will cause excessive burden and requests that OMB consider a deviation from the rule.

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2 CFR Part 183

As described in the Preamble: To implement Never Contract with the Enemy and to reflect current practice, OMB proposes requiring Federal awarding agencies to utilize the System for Award Management (SAM) Exclusions and Federal Awardee Performance and Integrity Information System (FAPIIS) to ensure compliance before awarding a grant or cooperative agreement. The proposed revisions also require agencies to insert terms and conditions in grants and cooperative agreements regarding non-Federal entities' responsibilities to ensure no Federal award funds are provided directly or indirectly to the enemy, to terminate subawards in violation of Never Contract with the Enemy, and to allow the Federal Government access to records to ensure that no Federal award funds are provided to the enemy.

COGR RESPONSE: We want to raise the concern as to how institutions may be held responsible for any non-compliance related to award funds provided to the enemy. The same concern would apply to any subawards issued to subrecipients. We request additional information prior to implementation of such provision.

(9) Important Clarifications

Typographical Errors

COGR RESPONSE: We observed typographical errors as we did our review. We understand this was a huge undertaking and typographical errors are inevitable. We are happy to share our discoveries with OMB, at your request.

Please reinstate the use of names in referenced sections

Readers of the document reported that it was difficult to read and understand in places where other documents were referenced by number only. The following section under 200.101, Applicability, illustrates the challenge:

(c) *Federal award of cost-reimbursement contract under the FAR to a non-Federal entity.* When a non-Federal entity is awarded a cost-reimbursement contract, only Subpart D of this part, §§200.330 through 200.332 subpart E of this part and subpart F of this part are incorporated by reference into the contract, but the requirements of subparts D, E, and F are supplementary to the FAR and the contract. When the Cost Accounting Standards (CAS) are applicable to the contract, they take precedence over the requirements of this part, including subpart F of this part, which are supplementary to the CAS requirements. In addition, costs that are made unallowable under 10 U.S.C. 2324(e) and 41U.S.C. 4304(a) as described in the FAR 48 CFR subpart §31.2 and 48 CFR §31.603 are always unallowable. For requirements other than those covered in subpart D of this part, §§200.330 through 200.332, subpart E of this part and subpart F of this part, the terms of the contract and the FAR apply. Note that when a non-Federal entity is awarded a FAR contract, the FAR applies, and the terms and conditions of the contract shall prevail over the requirements of this part.

COGR RESPONSE: This effect occurs in several places in the document. Without the title of each referenced section, the reader needs to look up the sections one at a time, to understand what is being referenced or incorporated. Inclusion of the titles of the referenced sections or other materials helps the reader fully understand the section under review. Please consider reinstating the names of the sections throughout the document.

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§200.102 Exceptions.

(d) ~~On a case-by-case basis,~~ OMB encourages Federal awarding agencies to request exceptions in support of innovative program designs that apply a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. ~~OMB also encourages agencies to apply (not apple) more restrictive terms and conditions when a risk-assessment indicates it may be merited.~~ **OMB discourages agencies from applying more restrictive terms and conditions except on a case by case basis, where merited based on a risk-assessment in accordance with 200.206.**

COGR RESPONSE: The proposed new language (in blue) encourages federal agencies to apply more restrictive terms and conditions when a risk assessment indicates it may be merited. We are concerned that funding agencies are already applying more restrictive terms in what recipients see as low-risk cases. COGR recommends that restrictions should be limited to cases where the entity's risk profile points to heightened risk, per 200.206. This could help avoid arbitrary restrictions and increased administrative burden. We recommend deleting the last sentence, above, and insert the suggested change in **blue-underline.**

200.110 Effective/applicability date.

(a) The standards set forth in this part that affect the administration of Federal awards issued by Federal awarding agencies become effective once implemented by Federal awarding agencies or when any future amendment to this part becomes final.

COGR RESPONSE: We request further information about when this new guidance will be implemented to clarify when the new standards will be put into place.

200.215 Never contract with the enemy

Federal awarding agencies and non-Federal entities are subject to the regulations implementing Never Contract with the Enemy in 2 CFR part 183. These regulations affect grants and cooperative agreements that are expected to exceed $50,000 within the period of performance, are performed outside the United States, including U.S. territories, and are in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

200.215 Prohibition on certain telecommunications and video surveillance services or equipment.

Grant, cooperative agreement, and loan recipients are prohibited from using government funds to enter into contracts (or extend or renew contracts) with entities that use covered technology. See section 889 of Pub. L. 115-232 (National Defense Authorization Act 2019).

COGR RESPONSE: We recognize that both are necessary, as statutory requirements and as national policy. However, our concern is that specific inclusion of requirements, such as these, which are external to Title 2 makes Title 2 vulnerable to becoming inconsistent with those external requirements when they are revised.

200.300 Statutory and national policy requirements.

(a) The Federal awarding agency must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, Federal Law, statutory, and public policy requirements: including, but not limited to, those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination.

COGR RESPONSE: While COGR is aware of the standing of Executive Order 13798, we recommend OMB delete the language referencing "free speech" and "religious liberty," neither of which are defined under national policy, U.S. regulation, or 2 CFR 200. In the case of "free speech," note the term "protected speech" as the Supreme Court has ruled (click on this link) may be the more appropriate term as protected under the First Amendment.

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§200.331 Requirements for pass-through entities (Subrecipient Monitoring)

COGR RESPONSE: In (1) Appreciation and Thanks, we expressed our gratitude for the work OMB and other federal leaders have done with the addition of 200.331(d)(4). The proposed addition, **underlined below**, will be helpful to fully cover the applicability of this new language: **The pass-through entity is only responsible for resolving audit findings specifically related to the subaward (i.e., non-systemic) and not applicable to the entire subrecipient (i.e., systemic) or to other awards. If a subrecipient has a current Single Audit …"**

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§200.333 Retention requirements for records.

COGR RESPONSE: While OMB did not propose revisions to this section, COGR believes

there is an opportunity to reduce burden. In many cases, electronic copies of summary records are stored in repositories that are maintained for many years. But this is no longer the complete record and often excludes back up documentation regarding the relevance of the expense. This can lead to audit risk for the grantee if not addressed in the current regulation. COGR requests that OMB set a period of time, e.g., three years, after which records may no longer be audited, regardless of whether the records exist in partial form.

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§200.343 Closeout (and 200.328 Monitoring and reporting program performance).

COGR RESPONSE: In (1) Appreciation and Thanks, we expressed our gratitude for the work OMB and other federal leaders have done with the updates to 200.343 Closeout and 200.328 Monitoring and reporting program performance. As we have maintained consistently in prior correspondences, the extra 30 days provided with the 120-day closeout period (also see 200.328(b), *Non-construction performance reports*) will result in better compliance and more accurate reporting. We do have the following suggestion as it relates to the introduction of 200.343 and as reiterated in 200.343(h). The proposed addition, **underlined below**, is necessary to address where the non-federal entity is not at fault for a late submission: **If the non-Federal entity fails to complete the requirements, and after reasonable efforts have been made to correct the deficiency, the Federal awarding agency or pass-through entity will proceed to close-out the Federal award with the information available.**

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§200.339 Termination.

(a) The Federal award may be terminated in whole or in part as follows:

(1) By the Federal awarding agency or pass-through entity, if a non-Federal entity fails to comply with the terms and conditions of a Federal award;

(2) By the Federal awarding agency or pass-through entity, to the greatest extent authorized by law, if an award no longer effectuates the program goals or agency priorities; ~~for cause;~~

(3) By the Federal awarding agency or pass-through entity with the consent of the non-Federal entity, in which case the two parties must agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated; ~~or~~

(4) By the non-Federal entity upon sending to the Federal awarding agency or pass-through entity written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal awarding agency or pass-through entity determines in the case

of partial termination that the reduced or modified portion of the Federal award or subaward will not accomplish the purposes for which the Federal award was made, the Federal awarding agency or pass-through entity may terminate the Federal award in its entirety; or.
(5) By the Federal awarding agency or pass-through entity pursuant to termination provisions included in the Federal award.

(b) A Federal awarding agency should specify applicable termination provisions in its regulations and in each Federal award, consistent with this section.

COGR RESPONSE: This revision removes the standard termination "for cause" and enables an agency to terminate a project even when the recipient is successfully carrying out the approved scope of work in compliance with the sponsor's terms and conditions. ***We request that the new language in (a)(2) be deleted. In COGR's view, this provides an arbitrary mechanism for agency officials to terminate an award.*** At the same time, the language in (b) is a helpful clarification that award documents should include specific information about the termination requirements, though we suggest that "**A Federal awarding agency should specify applicable termination provisions**" should be changed to "**must specify**." Note, if the termination language is not addressed as COGR has requested, we recommend that new language be included in this section that indicates: **if an agency shifts program goals and termination proceedings are initiated, the institution should be reimbursed for all costs that cannot be cancelled, including compensation commitments that were made.**

(10) Going Forward

As we indicated in the introduction to this COGR Response, under the circumstances created by the COVID-19 crisis, COGR and its members had collaboration challenges as many of our leaders were called to be on the institutional crisis-management front-line. These efforts by our leaders are ongoing and are the number one priority as encouraged by the President.

As OMB and federal leaders begin their review of the COGR Response, and other responses submitted by the research and grantee community, we are hopeful that OMB and federal leaders create a forum where we can further discuss our comments and concerns. As you know, COGR enthusiastically welcomes all opportunities to meet with you.

In addition, during the process of requesting a 30-day extension for submitting our

comments, we were heartened by OMB's statement that you expect to be nimble going forward on how changes can be made to 2 CFR 25, 170, 183 and 200. From COGR's perspective, we would hope that this means:

1) OMB will be open to revisions on a regular (less than 5 year) basis,
2) OMB will utilize Memorandums to expedite important changes (e.g., statutory changes, changes in accounting standards, etc.),
3) OMB will address the 1.3% utility cost adjustment (UCA) immediately as OMB is currently out of compliance with 2 CFR 200, and
4) OMB will work with organizations like COGR to address the treatment of the FAQs.

This approach, going forward, also will ensure that we have the process in place to aggressively address the President's "Results-Oriented Accountability for Grants Cross-Agency Priority Goal," which is an important priority for all of us.

* * * * * * * *

We are committed to working with you to ensure that the proposed revisions reflect the best possible outcomes for the grantee community and the federal government. As has always been our position, it is essential that the goal of reducing regulatory and cost burden, without jeopardizing accountability, is achieved. Ultimately, achieving this goal will allow our community to deliver on the ultimate goal: ***The best and most effective delivery of federal programs to the public, and in the case of research institutions, strengthening the science and research enterprise.***

We would welcome the opportunity to meet with OMB to review the COGR Response. Please contact me or David Kennedy at (202) 289-6655, ext. 4, if you have questions. We look forward to addressing these comments in more detail at your earliest convenience.

Sincerely,

Wendy D. Streitz
President

Electronic copy sent to:

Gilbert Tran, OMB, Office of Federal Financial Management
Nicole Waldeck, OMB, Office of Federal Financial Management

APPENDIX 1 – LETTER TO OMB

November 13, 2015

Ms. Karen Lee
Branch Chief, Office of Federal Financial Management

Mr. Gilbert Tran
Office of Federal Financial Management

White House Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Subject: Proposed Modifications to the Utility Cost Adjustment Methodology

Dear Ms. Lee and Mr. Tran;

Thank you for your ongoing willingness to engage in discussions that will improve the implementation of the Uniform Guidance. The COGR leadership, on behalf of the COGR Membership and the research community, requests that OMB and COFAR modify the methodology for calculating the Utility Cost Adjustment (UCA) based on updated and more accurate data. 2 CFR Appendix III, section B.4.c(2)(ii)B, states that OMB will adjust the "Relative Energy Use Index" (REUI) on a periodic basis and, based on the analysis below, it is timely, appropriate, and fair for OMB to adjust the REUI effective December 26, 2015.

Generally, COGR applauds OMB and COFAR for employing the Uniform Guidance to introduce a more equitable and cost-based approach to recognize the higher utility usage in research space compared to other space on a university campus. Despite proactive initiatives to keep energy costs as low as possible, research space remains the most utility-intensive space on campus. The 24/7 nature of research space, which includes energy-intensive equipment and the maintenance of climate-controlled environments, makes the high-consumption of utilities inevitable.

Still, COGR is concerned that the approach taken by OMB and COFAR represents a cap on recoverable costs by limiting the UCA to 1.3%. While we will not address the 1.3% cap at this time, we do believe it is appropriate to address the REUI based on more recent and accurate data. This will result in a more precise measure of the weight for research laboratory space, and subsequently, a more equitable approach to allocating utility costs to research labs at all IHEs.

The REUI weighting factor defined in the Uniform Guidance was calculated as follows:

$$= \frac{\text{The average energy usage of buildings with Laboratories - taken from the Lawrence Berkeley Laboratory (LBL) benchmarking tool (http://labs21benchmarking.lbl.gov/)}}{\text{The US Department of Energy "Buildings Energy Data Book", which provides an Energy Index for Commercial Buildings (http://buildingsdatabook.eren.doe.gov/CBECS.aspx).}}$$

$$= \frac{310 \text{ kBTU/SF/YR}}{155.37 \text{ kBTU/GSF/YR}} \qquad \boxed{= 2.0}$$

The REUI weighting factor of 2.0 is then applied to research laboratory space for the purpose of allocating utility costs, resulting in more utility costs being allocated to research labs within the F&A rate calculation. The difference between the calculated F&A rate with the weighting factor applied and the calculated F&A rate without the weighting factor applied is the UCA. Per 2 CFR Appendix III, section B.4.c, a UCA up to 1.3 percentage points can be included in the negotiated indirect cost rate.

While utilization of a REUI may be a reasonable methodology for developing weighting factors associated with research laboratory utility consumption, the 2.0 weighting factor is significantly understated. COGR has worked with engineering experts from Attain LLC to assist in an analysis of this calculation and the results are described below.

1. The numerator of 310 kBTU/SF/YR used in the REUI calculation was set by the government in 2012 and should be updated to account for the following:

    - To reflect 2015 data utilizing the original filters, the numerator as of 11/13/2015 is 322 kBTU/SF/YR, as additional buildings have been added to the database.

    - The filtering criteria selected for the numerator should be adjusted in several areas. First, our understanding is that the government included both measured and estimated utility consumptions. Estimated amounts should not be utilized for this purpose as they are not actual units of measure. Only buildings with measured utility consumption should be considered valid. This filter was adjusted in the revised calculations described below.

    - One of the filtering criteria for the numerator is to specify what lab use to include in the calculation. The four lab use criteria available include Research/Development, Manufacturing, Teaching, and Combination/Others. Our understanding is that all four criteria were selected when determining the amount for inclusion in the Uniform Guidance. However, to arrive at a more pure research factor, Manufacturing and Teaching must be eliminated. This increases the numerator from 322 (see first bullet) to 333 kBTU/SF/YR.

    - Another filtering criterion for the numerator is to specify the lab area to gross area ratio. All buildings, regardless of the amount of lab space within the building, were selected in determining the current numerator. Of the 393 buildings currently in the database with a

lab use of Research/Development or Combination/Other, 227 buildings (or 58%) contain less than 50% research labs, resulting in a diluted weighting factor. Since the Uniform Guidance only allows IHEs to apply this factor to research laboratory space, the factor must be determined in a consistent manner. Calculating the factor utilizing buildings with at least 90% research laboratory space results in a more equitable factor to apply to research laboratory space. Correcting this methodology to only include buildings with predominately laboratory space results in a numerator of 414.33.

2. The denominator of 155.37 kBTU/GSF/YR used in the REUI calculation should be updated. It was taken from the US Department of Energy "Building Energy Data Book", which provides an Energy Index for Commercial Buildings, and was last updated in 2003. This does not take into account the energy saving technology implemented over the past 12 years. Furthermore, when determining this amount, the filters that were chosen to yield that energy density were not appropriate. Definitions in the "Buildings Energy Data Book" state that:

> Buildings on education campuses for which the main use is not classroom are included in the category relating to their use. For example, administration buildings are part of "Office", dormitories are "Lodging", and libraries are "Public Assembly".

Our understanding is that the filters used by OMB only included classroom buildings. The "Buildings Energy Data Book" defines classrooms as buildings with the main use as classrooms. There are other room types that make up a campus. The "Building Energy Data Book" directs the user of the database to include other types of buildings in the filters to model a university campus. Therefore, office buildings have been included in the group of buildings selected from the database. Clearly, non-research laboratory space on a college or university campus that normally is included in F&A research rates also includes office space. Therefore, the appropriate filters for building type should include "College" under "Education" and "Mixed Use" and "Professional" under "Office". The result is a denominator of 99.22 kBTU/GSF/YR.

3. Utilizing the adjusted amounts for the REUI calculations prescribed in the Uniform Guidance, the REUI research weighting factor should be determined as follows:

$$= \frac{414.33 \text{ kBTU/SF/YR}}{99.22 \text{ kBTU/GSF/YR}} \qquad \boxed{= 4.2}$$

The tools utilized for determining the numerator and denominator rely on the user choosing the appropriate specific data and filtering criteria in order to obtain a fair and equitable REUI.

The analysis above supports that a more representative REUI should be established. While it is unfortunate that the first wave of IHEs that have submitted proposals to establish a "first-time" UCA have been subjected to the flawed 2.0 REUI, COGR is encouraged by OMB's willingness to correct those sections of the Uniform Guidance that require recalibration. Clearly, this is one of those sections. And, because OMB and the COFAR adeptly included language in 2 CFR Appendix III, section B.4.c(2)(ii)B allowing for the periodic adjustment of the REUI, we are encouraged that we can work with you to make the necessary update to the REUI.

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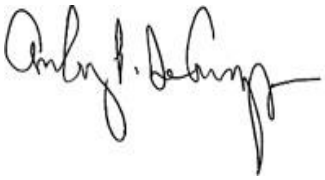
We propose that the REUI weighting factor for research laboratory space be increased from 2.0 to a more fair and accurate factor of 4.2. While an alternative approach of allowing each IHE to determine its own, internal REUI may be the most equitable approach, we recognize this would distract from the intent of simplifying the UCA methodology. Consequently, implementation of the 4.2 factor is a satisfactory solution. The adjustment to 4.2 should be made effective for F&A proposals submitted using FY2015 data.

Thank you for your consideration. We would like to schedule a meeting with OMB representatives and representatives from the Cognizant Agencies for Indirect Costs, either in person or via conference call, to discuss the process for establishing the updated REUI. We also can include technical experts, as appropriate.

Please contact me or David Kennedy at (202) 289-6655, ext. 112. We look forward to addressing this issue in more detail at your earliest convenience.

Sincerely,



Anthony P. DeCrappeo
President, COGR

Cc: Arif Karim, Director, Cost Allocation Services
Program Support Center, Department of Health and Human Services

Debbie Rafi, Director University Business Affairs
Office of Naval Research