FDP RESEARCH TERMS AND CONDITIONS WORKING GROUP (INSTITUTIONAL MEMBERS ONLY)

**OBSERVATIONS ON THE DRAFT RESEARCH TERMS AND CONDITIONS**

This document is also available at: <http://sites.nationalacademies.org/PGA/fdp/PGA_153526>.

1. **Bravo!**

The FDP Research Terms and Conditions working group noted many areas in the draft Research Terms and Conditions (“RTCs”) that provide positive change. We believe the updated RTCs also serve to improve clarity about federal expectations, enhance understanding, and reduce the likelihood of confusion or disagreement about potential meaning. We are delighted with these changes and wish to call out some of them as excellent examples of improvements. We sincerely thank the Federal RTC Workgroup for its efforts in this regard:

* **200.210 INFORMATION CONTAINED IN A FEDERAL AWARD –** We applaud the confirmation that the submission of performance reports meets the requirement to “demonstrate the outcomes achieved by the project.”
* **200.211 PUBLIC ACCESS TO FEDERAL AWARD INFORMATION –** We appreciate the clear acknowledgement that the award is intended for unclassified, publically releasable research, with no classified information access expected nor any expectation for classified results.
* **200.301 PERFORMANCE MEASUREMENT –** This section notes that research awards already have a standard information collection method for performance that does not relate financial information to performance data, and therefore no requirement exists to relate financial information to performance data.
* **200.306 COST SHARING OR MATCHING –** We enthusiastically support the use of unrecovered IDC as part of cost sharing or matching without prior approval*.*
* **200.307 PROGRAM INCOME –** We appreciate the language clarification acknowledging Bayh-Dole and confirming thatrecipients have no obligation to the Federal awarding agency with respect to program income earned from license fees and royalties. In addition, we support the language that no scholarship, fellowship, training grant, or other funding agreement made primarily to a recipient for educational purposes will contain any provision giving the Federal awarding agency rights to inventions made by the recipient.
* **200.308 REVISION OF BUDGET AND PROGRAM PLANS –** We support the clarification that cost-sharing is defined as: “The approved budget includes…costs…that the recipient and the Federal awarding agency formally agree upon as cost sharing…” (Emphasis added). This narrows and clarifies the scope of what cost sharing is auditable. In addition, we appreciate the inclusion of the wording “or approved modification thereto” in the section for a change in the scope or objectives of the project. Finally, we also appreciate the clear language clarifying that continuation years and options years are not subject to pre-award limitations or approvals, and that the default treatment for RTC awards is that automatic carryforward will apply.
* **200.313 EQUIPMENT** – We noted the nice clarification that this language applies to both equipment purchased or fabricated. We support the incorporation of clear language regarding the obligation that equipment acquired under an award will, upon agency request, be transferred if an award is moved to another institution.
* **200.343 CLOSEOUT –** We wholeheartedly and enthusiastically thank you for inclusion of the 120 day closeout period for all reports—financial, performance, and other reports (equipment, small business, etc.).

1. **Federal Agency Inclusion**

While we are delighted to see that nine federal agencies (Commerce, DOE, EPA, NASA, NSF, DHHS, USDA, DOT, and Homeland Security) have at least some portion of their agency participating in the federal Research Terms and Conditions, ***we believe that the other federal research agencies should also endorse and participate in this effort. We strongly encourage OMB, COFAR and OSTP to push hard for federal-wide participation in these terms and conditions. In addition, we believe that all award-making components of an agency should participate***. As written, it appears that only some parts of Commerce (NOAA and NIST), one component of DHHS (NIH), one component of USDA (NIFA), and one component of DOT (FAA) intend to participate. This obligates researchers and research administration staff, as well as local data management systems, to track and manage multiple sets of terms and conditions for a single agency’s assistance awards, and reduces the overall effectiveness that consistent use of a single set of terms and conditions offers. Instead of streamlining, it appears that the regulatory burden will actually be increased in this regard when compared to the previous research terms and conditions, since the previous research terms and conditions were adopted for federal-wide use in 2008.

1. **Appendices and Agency-Specific Requirements**

We note that none of the appendices (*Prior Approval Matrix (Appendix A), Subaward Requirements Matrix (Appendix B) and National Policy Requirements Matrix (Appendix C)* has been included in draft form for comment. ***We believe that all appendices and Agency-Specific Requirements should be provided for comment prior to any finalization of the Research Terms and Conditions, and that agencies should carefully consider recipient comments prior to implementing deviations from the standard terms and conditions.***  Based on existing Uniform Guidance implementations, we believe that there are deviations which may – or may not – be purposeful or necessary. For instance, the [USDA NIFA Terms and Conditions](http://nifa.usda.gov/resource/nifa-general-terms-and-conditions-grants-and-cooperative-agreements) (12/14) require prior written approval for “change in a key person specified in the **application** or the award” (emphasis added). Another example is 200.462 Rearrangement and reconversion costs, page 31, which states that prior approval is required, but actual requirements may vary by agency (examples: [NIH](http://grants.nih.gov/grants/policy/nihgps/HTML5/section_7/7.9_allowability_of_costs_activities.htm#Alteration_and_Renovation) and [NSF](http://www.nsf.gov/pubs/policydocs/pappguide/nsf16001/aag_5.jsp#VC1)). A question has also been raised about whether a component unit of an agency (for example, an NIH institute or center) will be permitted to impose its own individualized requirements; release of a draft agency-specific requirements for comment would either eliminate this concern or would allow for appropriate input to be considered.

1. **Technical Corrections**

The Research Terms and Conditions draft is dated June 4, 2015. Since then, technical corrections to the Uniform Guidance have been issued. The sections in this draft document that have had technical corrections include: 200.110, 200.210, 200.211, 200.300, 200.305, 200.308, 200.318, and 200.320. ***Most of the technical corrections are minor; regardless, they should be incorporated.*** Of the sections noted, the most substantive correction appears to be to 200.110 to incorporate that the grace period for procurement is for two additional fiscal years after 12/26/14.

1. **200.17 CLUSTER OF PROGRAMS**

The work group is concerned about the confusion likely to arise with the inclusion of language that all awards subject to the RTCs are to be classified “Research and Development” and listed as such on the SEFA. We recognize that NSF has previously adopted this approach and NIH has recently adopted it as well. ***Clarification in some of the areas noted below is needed if all awards are to be classified R&D.*** Issues with positive and negative impacts include:

* SEFA: Awards that are under the RTCs will be listed as “Research” but that same type of award from a different part of that agency not under the RTCs may end up being listed in a different section of the SEFA based on where the CFDA directs it should go. This adds burden to institutions in preparing their SEFAs: institutions will need to have a field in their data systems that indicates that an award is or is not subject to RTCs, rather than just sorting by CFDA number.
* SUBAWARD ISSUANCE: Since it is obligatory under the UG that pass-through entities notify their subrecipients whether the subaward is R&D, it is helpful to know that all subawards issued under the RTCs will be considered research.
* STIPENDS: Stipends (as opposed to salaries) should normally not be included in research awards. If all awards will be considered “research”, it is likely that this will increase audit questions related to inclusion of stipends even if the award purpose is training or if a research award has a training component. We do not recommend that clarification be accomplished via FAQ given that IGs/auditors do not uniformly agree that FAQs are authoritative.
* IP RIGHTS: The Program Income section (200.207) states that there should be no IP rights to the federal agencies granted under fellowships or training grants, but how will this work in these awards if they are considered research?
* NSF HERD SURVEY: How does this impact the NSF HERD Survey? Will those who complete the survey understand the change and will the change be incorporated in the directions for the NSF survey, or will classifications be inconsistent?
* PERFORMANCE MEASUREMENT: One clear benefit of having all awards classified as research is that the performance progress report is deemed to satisfy the information collection requirement without resorting to performance information being compared to financial progress.

1. **200.110 EFFECTIVE/APPLICABILITY DATE**

While we understand that the rollout of the Research Terms and Conditions will be listed in each agency’s implementation plan, ***we strongly encourage a consistent approach across all agencies, and that any implementation plan not be imposed globally without a modification of each award.*** We recommend an approach that involves a clear understanding for agencies, grantees, and auditors of the point in time at which the new terms and conditions apply for each award.

1. **200.112 CONFLICT OF INTEREST**

We note that the draft RTCs are silent on Conflict of Interest, and we believe this is a missed opportunity for consistency. We understand that this is a difficult discussion given the vastly different COI policies imposed by NIH, NSF and EPA – to name just a few – but would suggest that the position that each agency may impose its own requirements should be considered only as a short-term action plan, since it detracts from streamlining goals. This topic offers an opportunity for common sense and leadership – for example, ***the FDP could opt to pilot streamlined processes (such as eliminating travel disclosures from the NIH COI policy, or elimination of at-time-of-proposal-time disclosures) and be able to demonstrate that adequate stewardship of Federal funds is able to be maintained***. ***In addition, the content of OMB FAQ .112-2 should be added directly to these terms and conditions.***

1. **200.211 PUBLIC ACCESS TO FEDERAL AWARD INFORMATION**

As noted above, we endorse the clarity added in this section, but ***we would also ask that any notification process to the agency of potentially classifiable information require the involvement of the institutional official as well as the PI.*** For example, the language of 200.211(b) could be changed to the “Principal Investigator, via his or her Institutional Official, should promptly notify the awarding agency’s program official …”

1. **200.300 NATIONAL POLICY REQUIREMENTS**

We object to inclusion of the statement, “should an applicable national requirement be missing from the matrix, recipients and subrecipients are nevertheless responsible for compliance with applicable national policy requirements.” While similar language existed in the old research terms and conditions, the Uniform Guidance added new language that clarifies the role of a federal agency, saying (emphasis added): “The Federal awarding agency must communicate to the non-Federal entity all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the Federal award.” It is inappropriate to negate this clearly articulated role of the Federal government by shifting the obligation to recipients to comply with a regulation that has not been imposed. However, we recognize that sometimes a requirement may be inadvertently overlooked and downstream corrective action is necessary and appropriate. ***We suggest replacing the existing language with wording to the effect that once an omission of a requirement has been identified, the federal agency will modify the award to include the additional requirement, and both the agency and the recipient will work together to achieve compliance as quickly as feasible.***

1. **200.307 PROGRAM INCOME**

As indicated above, we support the language that no scholarship, fellowship, training grant, or other funding agreement made primarily to a recipient for educational purposes will contain any provision giving the Federal awarding agency rights to inventions made by the recipient. However, no one seeking clarification on this topic would think to look for this statement about IP rights on fellowships, scholarships, and training grants in the Program Income clause. ***This term should either be moved or cross-linked to Section 200.315 Intangible Property.***

1. **200.318 GENERAL PROCUREMENT STANDARDS**

***Rather than referring to an OMB FAQ (not universally acceptable to IGs/auditors), it would be optimal if the language would indicate directly that equipment screening is not required.***

1. **200. 320 METHODS OF PROCUREMENT TO BE FOLLOWED**

***Rather than referring to an OMB FAQ (not universally acceptable to IGs/auditors), please add language that dictates the conditions under which sole source procurement is justified for research awards.***

1. **200.332 FIXED AMOUNT SUBAWARDS**

There is a need for added clarity about whether or not prior written approval is needed for fixed amount subawards and for fixed amount subawards exceeding the Simplified Acquisition Threshold. At the present time, the RTCs for 200.332 refer the reader to 200.407, which in the UG version, indicates that prior agency approval is needed; however, in the Research Terms and Conditions section for 200.407, prior approval is waived unless an Agency-Specific requirement mandates approval. ***We believe the intent here is to waive prior approval for fixed amount subawards unless the agency-specific requirements dictate otherwise,*** ***but an added reference to ensure the reader is directed to the Research Terms and Conditions 200.407 waived prior approvals section would be appreciated.***

The second issue relates to fixed amount subawards exceeding the Simplified Acquisition threshold. Is prior approval waived for these or not? ***This can be clarified by adding the following underlined language in the RTC 200.407 waived prior approval language section on subawards that “Unless otherwise specified in the Agency-Specific Requirements, the non-Federal (pass-through entity) may provide subawards based on fixed amounts at any dollar amount, provided that the subawards meet the definition for fixed amount subawards in 200.201.”***

1. **200.407 PRIOR WRITTEN APPROVAL**

In general, this section is excellent. However, the reference to prior approval being waived for 200.412 Direct costs, paragraph (c) referencing the waiver of prior approval to direct charge the salaries of administrative and clerical staff contains a circular reference that still needs resolution. Specifically, 200.413 says, “(c) The salaries of administrative and clerical staff should normally be treated as indirect (F&A) costs. Direct charging of these costs may be appropriate only if all of the following conditions are met:

(1) Administrative or clerical services are integral to a project or activity;

(2) Individuals involved can be specifically identified with the project or activity;

(3) Such costs are explicitly included in the budget or have the prior written approval of the Federal awarding agency; and

(4) The costs are not also recovered as indirect costs.

***The language in 200.407 should be modified to read that prior approval is waived to direct charge the salaries of administrative and clerical staff provided that all of the conditions of 200.412(c), (1), (2) and (4) are met.***

1. **200.439 EQUIPMENT AND OTHER CAPITAL EXPENDITURES**

The language in the research terms clarification on page 37 only specifically addresses part (b)(2). Part (b)(3) is addressed in a clarification on page 30, which states that “Capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life are unallowable as a direct cost except with the prior written approval of the Federal awarding agency, or pass-through entity.” This is a major change from the June 2011 version of the Research Terms and Conditions, which in #27(a)(1)(iii) & (b)(2) allowed “as direct charges capital expenditures for improvements to equipment that materially increases the equipment's value or useful life." If the clarification on (b)(3) were to remain as is, it would create new burden. ***We recommend that the clarification on page 30 be modified and limited to “capital expenditures for improvements to land or buildings” and that, consistent with the June 2011 RTCs, the clarification on page 37 be expanded to allow capital expenditures for improvements for equipment.***

1. **200.456 PARTICIPANT SUPPORT COSTS**

The language regarding prior approvals needed for participant support costs needs additional clarification or cross-referencing. Section 200.456 regarding participant support costs directs the reader to see 200.407 where we learn that prior approval to add participant support costs is waived. But section 200.308 still requires agency approval to rebudget out of participant support costs to other categories of expenses.  ***It would be helpful if these sections could be cross-listed, or better yet, that the rules regarding use of participant support costs under RTC awards all be listed in a single location.***