Compliance with the New OMB Uniform Guidance in Federally-Funded International Projects

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Introductions

• Bill Ferreira & Marta Thompson
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  – Specialize in sponsored projects and international programs.

• Marjorie Forster, University of Maryland-Baltimore
  – Assistant Vice President, Research and Global Health Initiatives.
  – Deep experience in cross-border programs.
Agenda

• Background and context
• Overview of new OMB Uniform Guidance (UG)
• Cost allowability in international projects
  – Value added taxes
  – Exchange rates
  – Housing allowances and personal living expenses
  – Severance payments to foreign nationals
  – Relocation costs
  – Security costs
  – Administrative and clerical salaries
• Administrative compliance in international projects
  – Procurement
  – Conflicts of interest
  – Subrecipients versus contractors
  – Subawards to foreign entities
  – Audit requirements
Background & Context
Background & Context

- Growth in sponsored projects complexity
  - E.g., multi-site projects
- Growth in volume of sponsored projects
  - E.g., U.S. and non-U.S. sponsors, industry sponsors
- Growth in research constituents
  - E.g., multiple departments, disciplines
- Sponsors demanding lower cost, greater efficiency
- Numerous and diverse areas of potential noncompliance
- Risks of noncompliance are high
- Federal and state law empowers whistleblowers
- INTERNATIONAL ENGAGEMENT IS A PRIORITY
Background & Context

• **Spectrum of International Projects**
  – Education/Training ➔ Technical Assistance ➔ Clinical Trials
  – Lower cost & risk ➔ Higher cost & risk

• **Why is public health research going global?**
  – Perceived lower cost.
  – Ideal study populations.
  – Tremendous need (e.g., Africa).
  – Foreign governments make attractive investments.
  – Sponsors encourage foreign collaboration.
  – Prestige.
Background & Context

Types of Sponsored Projects

- HIV/AIDS care, treatment, drug delivery (e.g., PEPFAR).
- Capacity building, health systems, and consulting.
- Collaborations with foreign universities, hospitals, nonprofits, companies, and governments.
- Clinical trials.

Sources of funding

- U.S. government (e.g., NIH, CDC, HRSA, USAID, State Dept.).
- European Union (Horizon 2020, Framework Programme).
- Industry (e.g., pharmaceuticals).
- United Nations, World Bank, IMF.
- Gates Foundation and other charities.
Background & Context

Figure 1. U.S. Global Health Funding: FY2001-FY2014 Request
(current U.S. millions of dollars)

Source: Created by CRS from appropriations legislation and data received from the Office of Management and Budget (OMB).

Note: Includes global health funding through three appropriations vehicles: State-Foreign Operations; Labor, HHS, and Education (Labor-HHS); and Defense. HIV/AIDS amounts include U.S. contributions to the Global Fund to Fight AIDS, Tuberculosis and Malaria.
Background & Context

Countries benefiting from U.S. domestic awards with foreign components:

- Nigeria
- Tanzania
- Ethiopia
- Kenya
- Uganda
- Ghana
- Malawi
- South Africa
- Mozambique
- Zambia
- China
- India
- Vietnam

“I spot a trend...”
Background & Context

- **Regulatory / audit spotlight on “foreign components” of sponsored projects:**
  - “The Agency audited just the foreign component of the project.”
  - “Contract templates were not suited for use overseas.”
  - “Records did not substantiate salary costs at the foreign location.”
  - “The foreign subrecipient did not understand its obligations.”
  - “No review of the foreign subrecipient’s cost accounting infrastructure.”
  - “Currency exchange gains/losses went unrecorded.”
  - “Foreign taxes were deemed ineligible costs.”
  - “Questionable benefits and allowances were paid to foreign staff.”
  - “The foreign location did not comply with foreign law.”
Overview of New OMB Uniform Guidance
Overview of New OMB Uniform Guidance

• Issued December 26, 2013.
• “Super-circular” or “Omni-circular”.
• Applies to institutions of higher education (“IHEs”), non-profits, and state/local governments.
• Streamlines and consolidates administrative rules, cost principles, and audit requirements for federal awards (grants and cooperative agreements).
• Effective on December 26, 2014.
• Each agency must promulgate implementing regulations.
• Organization: Published at 2 CFR Part 200:
  – Subpart A — Acronyms and Definitions
  – Subpart B — General Provisions
  – Subpart C — Pre-Federal Award Requirements and Contents of Federal Awards
  – Subpart D — Post Federal Award Requirements
  – Subpart E — Cost Principles
  – Subpart F — Audit Requirements
Overview of New OMB Uniform Guidance

Applicability to foreign recipients

- Federal agencies may apply subparts A through E of the Uniform Guidance to foreign public entities, or foreign organizations, except where inconsistent with the international obligations of the United States or the statute or regulations of a foreign government.
- “Foreign organization” and “Foreign Public Entity” are defined terms.

Key take away…

- As a practical matter, U.S. awardees will flow down to foreign subrecipients applicable parts of the Uniform Guidance, and monitor foreign entity compliance.
- Federal agencies are not likely to exempt foreign entities.
- Sponsors increasingly audit the “foreign component” of domestic awards.
- Subpart F (Audit Requirements) also may extend to foreign entities.
Cost Allowability
Value Added Taxes (VAT)

• VAT is a consumption tax levied on products, materials, and services purchased in many foreign countries.
• Levied in lieu of sales tax.
• But it’s like a sales tax, in that the consumer pays.
• Can be a very high tax rate -- e.g., 25 percent or more of the value of goods and services purchased.
• Often unbudgeted at the proposal stage.

• Current NIH Grants Policy Statement (Section 16.6):
  – “Customs and Import Duties. Unallowable under foreign grants and domestic grants with foreign components. This includes consular and visa fees, customs surtax, value-added taxes, and other related charges.”

• Several federal sponsors discourage VAT charges.
Value Added Taxes (VAT)

Uniform Guidance

• “Value Added Tax (VAT) -- Foreign taxes charged for the purchase of goods or services that a non-Federal entity is legally required to pay in country is an allowable expense under Federal awards.” (UG § 200.470(c)).

• Compare to Circular A-21 rule: “taxes which the institution is required to pay and which are paid or accrued in accordance with generally accepted accounting principles are allowable.” (J.49)

Key take away…

• Key question: when is an institution “legally required to pay”?  
• Often an exemption is available to nonprofits but difficult to apply for and burdensome to operationalize.  
• Unallowable VAT has become a very common audit finding.  
• Many awardees will continue to seek foreign VAT exemptions.
Exchange rates

Context

• Rate at which one currency is exchanged for another.
• Complications arise because exchange rates fluctuate.
• Grantees may wind up with more or less foreign currency than expected.
• Foreign expenses may be higher than expected.
• Potentially relevant exchange rate dates include:
  - Budget preparation date
  - Budget submission date
  - Award date
  - Drawdown date
  - Wire transfer date
  - Currency exchange date
  - Obligation date
  - Expenditure date
  - Invoice date
  - FSR date

• Without prior sponsor approval, federal awards typically do not allow for currency exchange cost reserves, currency hedging cost items, or charging of currency losses to federal awards.
Exchange rates

Uniform Guidance

• “Cost increases for fluctuations in exchange rates are allowable costs subject to the availability of funding, and prior approval by the Federal awarding agency.” (UG § 200.440).

Key take away…

• Question: is sponsor approval required for every cost increase, even when there is no change in total project cost? Probably not. See Aug. 29, 2014 OMB FAQs.
• Unlikely that sponsors will augment awards to neutralize currency losses.
• New guidance would seem to support reasonable re-budgeting and similar steps to manage the effect of currency losses.
• There remains a spectrum of accounting methods to manage foreign exchange; UG does not offer guidance.
• Caution against large advance conversion of federal funds to foreign currency.
Housing and personal living allowances

**Context**

- U.S. expatriates and foreign employees based abroad often expect a competitive package of benefits and personal allowances.
- Expats and foreign nationals working abroad may receive:
  - Housing allowance
  - Airfare and automobile allowance
  - Cost-of-living adjustments
  - Travel and relocation benefits
  - Education allowance
  - Mobile phone and communications allowance
  - Utility supplements
  - International tax advice and tax equalization
- Local law, norms, and customs figure.
- Challenging to establish and consistently apply an expatriate benefits policy, or a foreign employee policy.
Housing and personal living allowances

Uniform Guidance

- Cost of goods or services for personal use of employees are unallowable.
- Cost of housing (depreciation, maintenance, utilities, furnishings, rent, etc.), housing allowances, and personal living expenses are only allowable as direct costs regardless of whether reported as taxable income, and must be approved in advance by the sponsor. (UG § 200.445).

Key take away…

- Implication is that housing and personal living expenses are unallowable unless there is prior written approval (UG § 200.407).
- Is prior approval more than approval of a budget that includes these costs?
- Sponsor may request the university’s policy on the cost.
- Goods, services, and housing provided as part of a compensation package will not make an otherwise unallowable cost allowable (UG § 200.430(d)(1)).
  - Foreign nationals employed abroad often get housing and other allowances as part of a comp package
Severance payments to foreign nationals

Context

- Foreign law and custom may provide for severance payments to foreign nationals employed abroad on the university’s sponsored projects.
- Often paid when employees leave service or when a project ends.
- Foreign workers often expect some form of disengagement compensation upon closing or wind down of a project, when services are no longer be needed.
- Universities may have severance policies that apply to personnel employed in the United States.
- Some universities have foreign HR policies (including severance policies) that apply only to personnel employed abroad in the host country.
- Distinctions between the domestic and foreign policies may be an issue under the Uniform Guidance.
- Severance payments to foreign nationals that conform to host country law may not always be allowable costs under the Uniform Guidance.
Severance payments to foreign nationals

Uniform Guidance

• “Severance payments to foreign nationals employed by the non-Federal entity outside the United States, to the extent that the amount exceeds the customary or prevailing practices for the non-Federal entity in the United States, are unallowable unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency.” (UG § 200.431(i)).

• “Severance payments to foreign nationals employed by the non-Federal entity outside the United States due to the termination of the foreign national as a result of the closing of, or curtailment of activities by, the non-Federal entity in that country, are unallowable, unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency.” Id.
Severance payments to foreign nationals

Key take away…

• Foreign severance payments that are more generous than U.S. domestic staff severance payments would seem to be unallowable.
  – What if there is no policy for U.S. domestic staff?

• Foreign severance payments upon project closeout also would seem to be unallowable.

• Exception: the costs are “necessary” to performance of the project and approved by the sponsor.
  – How do you demonstrate “necessity”?

• Review domestic policies and consider how it may affect allowability of foreign severance.
Relocation costs

Context

• Relocation costs are often included as part of an employee’s recruitment package, and may be a considerable expense for employees relocating abroad.

• Under A-21, relocation costs generally were allowable under the recruitment cost category (new employee recruitment).

• Uniform Guidance includes a standalone section specifically on relocation costs.

• “Relocation costs are costs incident to the permanent change of duty assignment (for an indefinite period or for a stated period of not less than 12 months) of an existing employee or upon recruitment of a new employee.” (UG § 200.464).
Relocation costs

Uniform Guidance

• Relocation is allowable, provided that:

1. The move is for the benefit of the employer.
2. Reimbursement to the employee is in accordance with an established written policy consistently followed by the employer.
3. The reimbursement does not exceed the employee’s actual (or reasonably estimated) expenses.

Key take away…

• Only allowable for indefinite or 12+ month relocations; if a new employee resigns within that period, must credit the award.

• The established written policy must be consistently applied (sponsored and nonsponsored projects).

• Are consultant relocation costs subject to this cost principle?
Security costs

Context

• Projects in developing countries or conflict zones often require additional security precautions such as armed guards, protective gear, cameras, barriers, etc..

• Generally allowable under A-21 and Uniform Guidance.

• Institutions must justify the need to the awarding agency.

• Cost allocation across several projects can be challenging.
Security costs

Uniform Guidance

• Necessary and reasonable expenses incurred for routine security to protect facilities, personnel, and work products are allowable.

• Includes wages and uniforms for personnel, equipment, barriers, protective gear, contractual security services, and consultants. (UG § 200.457).

Key take away…

• Review country condition information for justification of security costs.

• If security is used to protect a facility housing multiple projects, consider carefully the cost allocation methodology.
Administrative & Clerical Salaries

Uniform Guidance

• Eliminates the “major project” concept.
• Direct charging is appropriate only if:
  1. Administrative and clerical services are integral to the project;
  2. Individuals involved can be specifically identified to the project;
  3. The costs are explicitly budgeted and have prior written approval from sponsor; and
  4. The costs are not also recovered as indirect costs.

Key take away…

• Has anything really changed?
• Just because a foreign project requires administrative assistance does not mean that such activity can be directly charged.
• Prepare budgets carefully.
• Document allocability of administrative and clerical effort (e.g., time sheets / effort reports that identify the project).
Administrative Compliance
Procurement

Context

- Uniform Guidance changes significantly the procurement standards set forth in Circular A-110.
- Rigid new documentation and competition requirements.
- Query whether foreign subrecipients can implement the new requirements.
- Topics of regulation:
  - Organizational conflict of interest
  - Competition
  - Methods of procurement
Procurement – Organizational Conflict of Interest

**Uniform Guidance**

- Non-Federal entities with a parent, affiliate, or subsidiary must maintain written conflict of interest policies to prevent impartiality in procurements involving related organizations.
- Organizational conflict of interest may occur where the awardee is “unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.” (UG § 200.318(c)).

**Key take away…**

- Many universities operate their foreign projects through a separate legal entity for legal and practical purposes (registration requirements, tax implications, etc.).
  - Remains to be seen how these conflict of interest rules will be applied to wholly controlled foreign entities of U.S. domestic awardees that borrow personnel and services from the domestic awardee.
- Organizational COI may be a particular concern under a foreign subawardee’s procurement activity.
Procurement – Competition

Uniform Guidance

• “All procurement transactions must be conducted in a manner providing full and open competition.” (UG § 200.319).
• Awardees must “conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.” Id.
• Awardee must ensure that all prequalified lists of persons, firms or products are current and include enough qualified sources to ensure maximum open and free competition.
Procurement – Methods of procurement

Uniform Guidance

- Non-Federal entities must use one of five procurement methods (UG § 200.320):
  - **Micro-purchases** – Acquisitions not exceeding $3,000 may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable. To the extent practicable, micro-purchases should be distributed evenly among suppliers.
  - **Small purchases** – Acquisitions not exceeding the Simplified Acquisition Threshold ($150,000) must obtain price or rate quotations from “an adequate number” of qualified sources.
  - **Sealed bids** – Bids are publicly solicited and a firm fixed price contract is awarded to a reasonable bidder with the lowest price.
  - **Competitive proposals** – Requires publicized solicitations from multiple sources, and evaluation according to written criteria.
  - **Noncompetitive proposals** – Sole source awards are allowable when item is only available from a single source, exigent circumstances require immediate acquisition, sponsor expressly authorizes sole source pursuant to a written request, or competition is determined to be inadequate after solicitation of a number of sources.

Key take away…

- Above procurement methods are more restrictive and detailed than A-110.
Subrecipient v. Contractor

**Uniform Guidance**

- **Subrecipient**: “Non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program...may also be a recipient of other Federal awards directly from a Federal awarding agency.” (UG § 200.93).

- **Contractor (or vendor)**: An entity that receives a contract for goods or services needed to carry out a project or program under a Federal award. (UG § 200.22-23).

- The substance of the relationship is more important than the form, and agreements should be characterized according to judgment on case by case basis. (UG § 200.330).

**Key take away...**

- Subrecipients are held to the administrative, scientific, and financial terms of the prime award; whereas contractors and vendors are subject to limited flowdown terms.
Subrecipient v. Contractor

Key take away…

• Regulators perceive an incentive for prime awardees to *mischaracterize* a sub-entity as a contractor instead of a subrecipient:
  – Would allow prime to avoid subrecipient monitoring.
  – Would allow prime to issue short purchase-order-type contracts.
  – Would streamline pre-award process (less diligence needed on contractors).
  – Would allow prime to recover additional F&A (e.g., F&A applied to entire value of vendor agreement instead of first $25K of subaward).
  – Would free sub-entity from cost accounting.
  – Would allow prime to award “fee or profit” to sub-entity.
  – May free sub-entity from FCOI and other public policies.
  – May be especially attractive for foreign sub-entities.

• But foreign entities value the “investigator” designation.

• Beware the concept of “fixed price subawards” to foreign entities.
Subawards to foreign entities

Context

• Foreign subrecipient monitoring is among the most challenging of all prime awardee obligations.

• Foreign subrecipients often do not initially understand the extensive compliance obligations that flow through a federal subaward.

• Sponsors rigidly hold the U.S. prime awardee accountable for the foreign subrecipient’s costs and compliance.

• Uniform Guidance requires prime awardees to evaluate subrecipient’s risk of noncompliance to determine level of monitoring.

• For high risk foreign subrecipients, some prime awardees have used “fixed price subawards”.
  – Uniform Guidance precludes fixed price subawards without prior written approval; the amount must be below the Simplified Acquisition Threshold ($150,000), and the subaward must meet requirements in UG § 200.201. (UG § 200.332).
Subawards to foreign entities

Uniform Guidance

• Prime awardee must:
  – Include specified technical information about the prime and subaward, all flowdown terms, indirect cost rate, access to records, and close out terms.
  – Evaluate subrecipient’s risk of noncompliance, based on subrecipient's prior experience; previous audits; new personnel or systems; etc.
  – Impose special award conditions if appropriate.
  – Implement monitoring procedures, such as site visits and financial reports.
  – Consider enforcement actions against noncompliant subrecipients. (UG § 200.330-331)

Key take away…

• Audit issues have been tied to (1) incomplete diligence on foreign subrecipients; (2) poorly drafted foreign subawards; and (3) lack of monitoring.
• Thoroughly vet foreign subrecipients prior to subaward.
  – Intensive inquiry into subrecipient’s financial management system, effort reporting policies, prior audits, key personnel, training policies, personnel policies, registration status, etc.
• Counsel should be involved in foreign subaward drafting.
  – Old subaward templates must be updated to reflect Uniform Guidance prescriptions.
Audit requirements

Uniform Guidance

• Audit requirements (Subpart F) do not explicitly exclude foreign subrecipients, unlike A-133 which stated specifically that it did not apply to “non-U.S. based entities”.
• Subrecipient monitoring requirements suggest that prime recipients verify that every subrecipient is audited as required by Subpart F when the subrecipient reaches the audit threshold in UG § 200.501.

Key take away…

• Sponsors may extend Subpart F or comparable audit requirements to foreign recipients.
• If applicable, prime awardee must resolve foreign subrecipient audit findings and issue a management decision.
• Common audit issues:
  – Effort reporting, VAT, indirect costs (under UG, foreign subrecipients without an IDC rate may be eligible to charge the de minimus 10% of MTDC, if not prohibited by sponsor policy. UG § 414(f)).
Where do we go from here?

• “Frequently Asked Questions” -- issued Aug. 29, 2014 (www.cfo.gov/cofar)
• Additional clarity may come via sponsor-specific implementations of the Uniform Guidance (to be issued by December 2014).
• There may be inconsistencies among and within sponsors.
• Uniform Guidance may prompt revisions to university policies, systems, and contract templates.
• Counsel should participate alongside sponsored projects administrators to digest, interpret, and implement the Uniform Guidance.