

New OMB Uniform Guidance:

Implications for International Projects

By William Ferreira and Marta Thompson

** This article went to press prior to each agency's issuance of Uniform Guidance implementing regulations. The authors encourage review of sponsor-specific regulations and policies expected to be released in December 2014.*

Institutions engaged in federally sponsored projects abroad will find new and revised obligations in the new Office of Management and Budget ("OMB") Uniform Guidance. The new regulations are a significant development for research and compliance professionals involved in the day-to-day administration of foreign projects, such as federally funded research collaborations, public health services, technical assistance, capacity building, and teaching initiatives.

More than OMB Circulars A-110, A-21, and A-122, the consolidated Uniform Guidance attempts to address some of the unique foreign-activity issues faced by recipients of federal grants and cooperative agreements. There are many positive changes, such as improved guidance on the allowability of foreign

taxes and currency exchange losses. But there is some uncertainty in how federal sponsors will apply the new rules to special scenarios and unique costs that awardees deem necessary to operation at foreign outposts.

Highlighted below are some of the more significant Uniform Guidance developments that affect federally-sponsored transnational projects.

Foreign Value Added Taxes

The allowability of foreign VAT historically has been the subject of inconsistent and ambiguous interpretation by regulators. VAT is a form of consumption tax that a buyer remits on the purchase of an item or service in the host country. VAT can be substantial – e.g., 25% or more added to the purchase price – and sometimes unbudgeted at the proposal stage.

Circular A-21 did not address VAT but stated in Section J.49 (Taxes) that "taxes which the institution is required to pay and which are paid or accrued in accordance with generally accepted accounting principles are allowable." Conversely, HHS and NIH (and at times, USAID) have suggested in formal and informal

guidance that VAT is an unallowable charge to foreign grants and domestic grants with foreign components. Whether this means that foreign VAT on supplies and services procured abroad are unreimbursable under federal awards has been a question. Several institutions have pursued time-consuming and uncertain VAT exemptions from foreign revenue authorities.

The Uniform Guidance offers some clarity. It provides that foreign VAT "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" (Section 200.470). This appears to be a welcome development, although it may depend on how sponsors interpret the "legal" obligation to pay VAT. Query whether an institution is "legally required to pay" VAT if a VAT exemption is available in the host country. Often an exemption is technically available to NGOs and nonprofits under local law or through a bilateral or diplomatic agreement, but procedurally the exemption is very difficult to obtain. Foreign authorities are not eager to afford local tax exemptions to U.S.

organizations, and where an exemption is granted, often it's burdensome to operationalize. Where a VAT exemption is available in the host country, many institutions will continue to seek the exemption in order to relieve pressure on sponsored project budgets; these institutions also may require their foreign subrecipients to obtain such exemptions.

Note that with respect to awards funded by U.S. foreign assistance funds – e.g., many USAID and State Department awards – the Uniform Guidance does not appear to alleviate the statutorily-required interim and final foreign VAT reporting requirements.

Exchange Rates

The currency exchange rate used in a proposal is not the same exchange rate in effect on the day the award is funded, when funds are transferred to local bank accounts, when funds are obligated and disbursed for local goods and services, when funds are drawn down, or when financial reports are prepared and submitted. As a result of exchange rate fluctuations, the awardee or subawardee may wind up with less (or more) foreign currency than it originally anticipated. Without prior approval from the sponsor, federal awards typically do not allow for currency exchange cost reserves, currency hedging cost items, or direct charging of currency losses to federal awards.

Section 200.440 of the Uniform Guidance allows for “cost increases for fluctuations in exchange rates” subject to the availability of funding and prior approval from the sponsor. The Council on Financial Assistance Reform (COFAR) clarified that prior approval is not required every time the exchange rate changes and an award is charged; approval of exchange rate fluctuations is required only when the change results in the need for additional funding, or the increased cost results in the need to significantly reduce the scope of the project. Notwithstanding this new language, it seems unlikely that sponsors routinely will augment awards to neutralize currency losses. But the new language would seem to support reasonable rebudgeting to manage the effect of such losses.

Awardees also are advised to account for local currency gains prior to the expiration of the award, and to maintain “adequate source documentation from a commonly used source in effect at the time the expense was made.”

Missing from the Uniform Guidance is instruction on how to financially track currency exchange. Without concrete guidance, federal awardees will continue to implement a spectrum of accounting methods to manage and track foreign exchange gains and losses, including, for example:

- The “first in, first out method”: This method uses the oldest exchange rate realized to account for expenses until the funds exchanged at that rate have been fully expensed. Subsequent expenses are charged to the funds received at the next oldest exchange rate and so on.
- The “weighted average method”: This method uses an exchange rate that represents the weighted average of all the realized exchange rates in a given period.

Neither of these accounting methods eliminate the risk of a budget shortfall due to currency losses, and neither intend to suggest that exchanges of federal funds may occur well in advance of the incurrence of foreign costs (notwithstanding the currency insulation that such a practice could offer). Under the Uniform Guidance, awardees still must minimize the time that elapses between drawdown of federal funds and actual disbursement for project costs (Section 200.305). Accordingly, large advances of grant funds to foreign offices and bank accounts could be difficult to align with the applicable guidance.

Costs Related to Individuals Working Abroad

To recruit and maintain talent in foreign countries is a challenge. U.S. expatriates and foreign workers often expect a competitive package of benefits and allowances on par with multinational corporations. Institutions that post U.S. citizens to long-term foreign assignments often struggle to maintain clear and consistent guidelines on the availability and accounting treatment of “additional” benefits that expats customarily anticipate. Similarly, foreign nationals hired abroad often demand compensation packages that align not only with local law, but also host country norms and custom. As discussed below, costs associated with housing allowances, personal living expenses, severance payments, and relocation abroad present knotty allowability issues, even under the new Uniform Guidance.

Housing allowances and personal living expenses

In addition to basic salary, expats and foreign nationals working abroad may receive additional benefits, such as housing, transportation, meal, and education allowances, cost of living adjustments, utility supplements, and even international tax advice. Circular A-21 deemed unallowable “goods or services for personal use of the institution's employees” and further prohibited “housing allowances and personal living expenses for/of the institution's officers”. (Section J.22, J.23). The Uniform Guidance maintains the general prohibition on goods or services for personal use of the institution's employees, but it appears to liberalize the rules on housing and personal living expenses: “Costs of housing (e.g., depreciation, maintenance, utilities, furnishings, rent), housing allowances and personal living expenses are only allowable as direct costs regardless of whether reported as taxable income to the employees. In addition, to be allowable direct costs must be approved in advance by a Federal awarding agency.” (Section 200.445.)

Where the awardee can justify a direct allocation of these costs to federal projects (which is no easy analysis in some situations), the new guidance suggests that express prior written approval is necessary to charge these expenses. Query whether approval of a budget that identifies these among many other costs constitutes the sponsor's prior approval, or whether separate and more specific approval is needed. Query further whether an institutional policy – such as an expat benefits policy or a foreign employee handbook – should specify these benefits to support allowability. As always, sponsors are not bound by administrative budget approvals where later audits find costs to be unsupported as direct costs or inconsistent with cost accounting principles or institutional policy.

Note also that the Uniform Guidance provision on compensation for personal services makes clear that “Costs which are unallowable under





other sections of these principles must not be allowable under this section solely on the basis that they constitute personnel compensation.” (Section 200.430). Accordingly, awardees may need to decouple housing and similar expenses from an employee’s total compensation package, at least for prior approval purposes.

Severance payments to foreign nationals

Foreign employment regimes may provide for mandatory or customary severance payments to local workers who disengage from the awardee’s employment. The Uniform Guidance repeats Circular A-21’s admonition that severance is allowable only to the extent that in each case, it is required by (a) law, (b) employer-employee agreement, (c) established policy that constitutes, in effect, an implied agreement, or (d) circumstances of the particular employment. But Section 200.431(i) of the Uniform Guidance includes new guidance on severance payments to foreign nationals employed outside of the United States:

- (4) 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.
- (5) 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.

Whether and how awardees will demonstrate that severance payments abroad do not exceed “customary or prevailing practices” of the institution in the U.S. remains to be seen. Institu-

tions may need to review their domestic severance policies or be prepared to show necessity to the federal project and take prior approval from the sponsor. Query whether conformance with local law or custom will satisfy the necessity requirement. The new guidance also appears to establish a presumption against severance payments where positions are lost on account of project wind down or change in scope; this could be unwelcome news to many foreign nationals employed abroad who have come to expect some form of disengagement compensation upon federal project closeout.

Relocation costs

Whereas Circular A-21 made passing reference to relocation costs in the context of new employee recruitment, the Uniform Guidance offers “relocation” as a standalone cost principle, and as part of the recruitment cost principle. (Sections 200.463, 200.464.)

Relocation costs incident to recruitment of new employees continue to be allowable to the extent that such costs are incurred pursuant to the awardee’s standard recruitment program; if the employee resigns for reasons within the employee’s control within 12 months after hire, the awardee must credit the award. (Section 200.463.)

The Uniform Guidance provides for relocation 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”, 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, and (3) reimbursement does not exceed the employee’s actual (or reasonably estimated) expenses. The obligation to follow an “established written policy” may put pressure on institutions to develop expatriate benefits policies and international employment guidelines, or at least to gauge whether and how domestic benefit policies accommodate international postings. (Section 200.464.)

The Uniform Guidance includes a generous list of relocation costs, such as the costs of transportation of the employee, his or her immediate family, and personal effects to the new location; the costs of finding a new home, such as advance trips; closing costs, such as brokerage, legal, and appraisal fees incident to the

disposition of the employee’s former home (subject to limitations); the continuing costs of ownership (for up to six months) of the vacant former home; and other necessary and reasonable expenses normally incident to relocation, such as the costs of canceling an unexpired lease (limited to three times the monthly rental), and purchasing insurance against loss of or damages to personal property. (Section 200.464.)

As part of recruitment costs, the Uniform Guidance also makes clear that short-term travel visas (as opposed to longer-term, immigration visas) are generally allowable expenses that may be proposed as a direct cost. (Section 200.463.)

Security costs

Many institutions contract for security services under federal projects that entail travel to such places as Iraq and Afghanistan. Like Circular A-21, the Uniform Guidance allows for necessary and reasonable expenses incurred for security to protect facilities, personnel, and work products. (Section 200.457.) Justifying the need for security services in high-risk locations usually is straight-forward; however, allocating those costs across multiple projects abroad presents a classic challenge.

Administrative obligations

Conflict of interest

The Uniform Guidance requires sponsors to establish procurement-related conflict of interest policies for Federal awards, and awardees to disclose in writing any potential conflict of interest to the sponsor in accordance with those policies. (Section 200.112.) In the context of procurements under Federal awards, if the awardee has a “parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest.” (Section 200.318.) The reason for this rule is readily apparent: procurement transactions between related entities appear to be less than arm’s length and therefore are possibly a bad deal for the government.

Many awardees operate federal projects abroad through sophisticated legal structures—often motivated by legal or practical necessity—such as wholly controlled subsidiary entities formed

NCURA PATHWAYS

Volunteer Pathways

NCURA has identified three distinct volunteer pathways for its members to get involved - Presenter, Leadership, and Volunteer at the regional and/or national level. "Pathways" is intended to inspire and inform NCURA members on how to engage NCURA as a volunteer in any or all of these opportunities. To get involved visit <http://collaborate.ncura.edu/VolunteerOpportunities>

Hollie Schreiber's Journey

Looking back at my participation in NCURA, I realize that I didn't choose my own pathway; it



was kind of forced upon me. I don't say that with negativity; I say that with appreciation.

My first involvement was as a presenter - before I was even a member. A colleague knew I had an "expertise" and recruited me to

present at a regional meeting in 2008. Before I knew it, she had also given my name to the program chair for the next regional meeting. I ended up on that program committee and presenting two sessions. I was caught in a whirlwind of volunteerism that hasn't stopped since. Since that first meeting in 2008, I have presented during at least five regional meetings, and several annual meetings.

I owe a big thanks to Kay Ellis. I wouldn't have thrust myself onto that stage, but I'm very glad she pushed me out there.

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in the U.S. or in a host country. These related entities may "borrow" personnel and services from the other in advancement of the federal project. In many cases, corporate formalities and boundaries are blurred for federally sponsored project programmatic purposes, and project costs incurred by a wholly controlled foreign entity may be considered the parent awardee's own costs. Whether the conflict of interest policies contemplated in the Uniform Guidance apply to such scenarios remains to be seen.

Subawards to foreign entities

A perennial challenge in cross-border projects is the obligation to monitor foreign subrecipients. Where foreign organizations lack cost accounting infrastructure or are otherwise "high risk", some institutions have issued "fixed price" subawards, even in situations where the foreign organization is a substantive project collaborator (e.g., not a mere "vendor" of goods and services to the prime awardee).

The Uniform Guidance introduces the concept of a "fixed amount subaward" and eliminates the awardee's discretion to award them. "With prior written approval from the Federal awarding agency, a pass-through entity may provide subawards based on fixed amounts up to the Simplified Acquisition Threshold", currently \$150,000. (Section 200.332) Such fixed amount awards are appropriate only where certain conditions listed in Section 200.201 are satisfied, such as where there is a specific project scope and adequate cost, historical, or unit pricing data available to establish a fixed amount award with assurance that no increment above actual cost is realized. These items may be tricky to establish relative to foreign organizations.

As to foreign subrecipient indirect costs, Section 200.414 provides a "de minimis" indirect cost rate of 10% of modified total direct costs (MTDC) to those entities that have never had a negotiated indirect cost rate, thereby eliminating a potential administrative barrier to new foreign subrecipients participating in federal projects. Yet to be determined is whether this new language will influence or affect sponsor policies that currently appear to deny indirect costs to non-U.S. organizations (HHS) or limit such indirect cost recovery to 8% of modified total direct costs (NIH).

Also, Section 200.331 of the Uniform Guidance is newly prescriptive in terms of data and other elements that must be included in subawards, including foreign subawards. This may merit modifications to foreign subaward templates. Awardees must provide in the subaward: (1) more than ten basic award identification data points as listed in Section 200.331; (2) "all requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award"; (3) additional terms to ensure that the prime awardee can fulfill its own responsibility to the Federal sponsor (e.g., record retention, technical reporting); (4) indirect cost rates that apply to subrecipient (either federally approved, negotiated with the subawardee in accordance with applicable cost principles, or de minimis as defined in Section 200.414); (5) a requirement that the subrecipient make its records and financial statements available to the awardee and auditors; and (6) terms and conditions on closeout of the subaward. Collectively, these elements suggest that it would be insufficient to simply attach the prime award document to the subaward document to satisfy all these requirements.

With respect to federal audit requirements applicable to foreign subrecipients, the Uniform Guidance appears to make a change. Circular A-133 stated specifically that it did not apply to "non-U.S. based entities expending

Federal awards received either directly as a recipient or indirectly as a subrecipient”, although many sponsors still applied A-133 or comparable audit standards to foreign recipients and subrecipients. The Uniform Guidance exempts for-profit subrecipients from the audit requirements of Subpart F, but there is no express exemption afforded to foreign subrecipients.

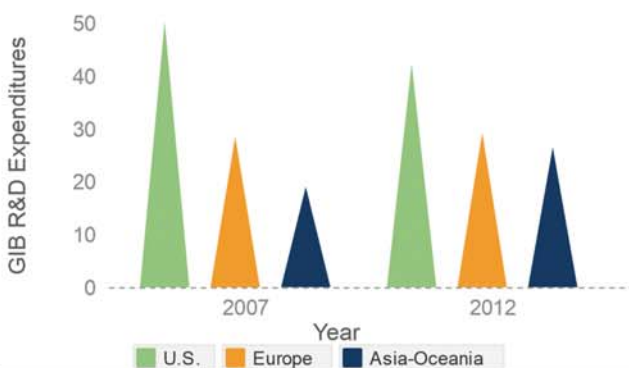
Conclusion

Many more aspects of the Uniform Guidance merit review by international project administrators, including, for example, the revised travel cost principle in Section 200.474; closeout requirements in Sections 200.331(a)(6) and 200.343; and documentation of salary costs in Section 200.430. Already some foreign collaborators have indicated to U.S. prime awardees that they intend to benefit from the Uniform Guidance changes that appear to liberalize rules governing, for example, allowability of VAT and documentation of compensation costs. As medical and scientific research becomes increasingly international, these and related issues will continue to challenge awardees and attract attention from sponsors. More clarity may come from sponsor-specific implementations of the Uniform Guidance, and also perhaps from audit and enforcement activity over the next several years.

The Uniform Guidance’s effective date was December 26, 2013, and awardees become subject to the new rules on December 26, 2014. ■

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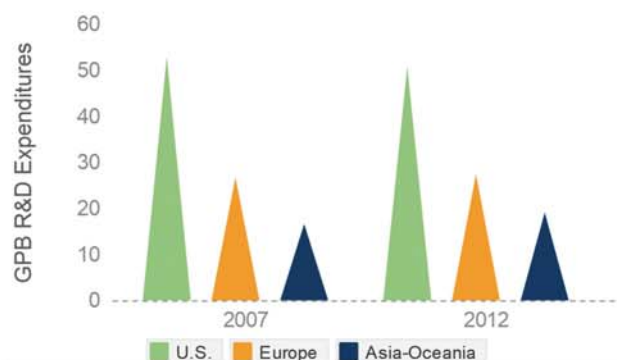


Share of Global Industry Biomedical R&D Expenditures

42.3% - U.S. share of global industry biomedical (GIB) R&D expenditures in 2012, a nearly 8% decrease from 2007.

29.2% - Europe’s share of GIB R&D expenditures in 2012, a .7% increase from 2007.

26.5% - Asia-Oceania’s share of GIB R&D expenditures in 2012, a 7.5% increase from 2007.



Share of Global Public-Sector Biomedical R&D Expenditures

50.8% - U.S. share of global public-sector biomedical (GPB) R&D expenditures in 2012, a 2.1% decrease from 2007.

27.4% - Europe’s share of GPB R&D expenditures in 2012, a .7% increase from 2007.

19.1% - Asia-Oceania’s share of GPB R&D expenditures in 2012, a 2.5% increase from 2007

*note: Figures are inflation-adjusted.

REFERENCES

http://www.nejm.org/doi/full/10.1056/NEJMp1311068?query=featured_home&
<http://www.usnews.com/news/articles/2014/01/02/us-medical-research-spending-drops-while-asia-makes-gains>

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