Speaking of Diversity – Agency Implementations of 2 CFR 200

By Jackie Bendall

Diversity in research administration is a GREAT thing! Except when it comes to diverse interpretations of what was supposed to be "Uniform Guidance."

Many of you may find yourselves spending more time than you ever anticipated reading (and re-reading!) the provisions of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, (hereinafter referred to as 2 CFR 200) and can likely recite certain provisions verbatim. While §2 CFR 200.107 provides that any exceptions to the requirements of 2 CFR 200 must be approved by OMB, agencies apparently can argue that they are in fact not making an exception, but an interpretation. The growing trend of deviations against the provisions in 2 CFR 200 absent OMB approval appear to be significant, forcing this continuous exercise. Funding Opportunities, Broad Agency Announcements (BAAs), agency policies, agency email correspondence and, in areas of Facilities and Administrative Cost caps, Cost Sharing/Leveraging, and Conflicts of Interest (to name a few) suggests what those of us fought hard to change, remains much the same ole, same ole, little changes due to workarounds created by varied interpretations. To complicate matters a bit further, as of the writing of this article, the Research Terms and Conditions (RT&C's) of most agencies have not been made public, adding to concerns that the process may be no different than what we're experiencing with 2 CFR 200. In a September 2015 letter to OMB, COGR detailed the most significant agency deviations, and we're hopeful we'll be heard and gain some traction. So stay tuned!

To be fair, combining eight federal circulars into one Code of Federal Regulations (CFR) was no cakewalk for OMB/COFAR. However, somewhere the term "Uniform" has taken on a different meaning in terms of following the Administration's Executive Order 13563, Improving Regulation and Regulatory Review. Proof of this has been demonstrated by the various examples collected over the past several months, in part by a convergence of FAR like content in 2 CFR 200 in areas of Procurement (2 CFR 200.318), Conflict of Interest (2 CFR 200.112), and Subrecipient Monitoring (2 CFR 200.330). With the new guidance focus on performance (performance of reasonable efforts for research that can't be priced like widgets) along with a prime recipient's responsibility to determine subrecipient vs. contractor relationships, it can leave me at least wondering if I'm really missing something, or if this whole move is worse now than it was pre 2 CFR 200.

For example, over the course of many months, questions have risen related to for-profit entities. If a for-profit entity can't collect profit under financial assistance awards, would there ever be any reason to issue a subgrant or sub-cooperative agreement? How is reasonable, allocable, and allowable determined when for-profit rate information is generally considered proprietary? Do federal agencies expect universities to employ the same methodologies and tools they do when contracting under the FAR to determine "reasonable" (e.g. weighted guidelines) profit/fee? Is it expected that universities have a trained specialist to determine what types of contracts to utilize (e.g., Time and Materials, Cost plus Fixed Fee) as do the federal agencies who send their employees to extensive week long classes for this? What type of agreement is used when for-profit

entity is conducting research and development under prime recipient's cooperative agreement? Does FAR only apply, or are we looking at a 2 CFR 200/FAR combo? 2 CFR 200 only? In the course of my regular discussions with various agency representatives, I've been told to "use 'university policies' for determining reasonableness…" but against what standards and whose? Will this satisfy internal and external auditors or the Office of Inspector Generals? Or will more findings be made, spending thousands of dollars and effort, not to mention reputational risks to reach the same conclusion as we've seen before. The regulations aren't clear, and more often than not, it's the universities who are footing the bills.

In closing, there have been signs of progress in the Federal Government's understanding that more work is needed in the areas of streamlining and reducing costs and burden. OMB's decision to extend procurement implementation for an additional year will allow agencies and institutions to develop suitable practices and processes to meet the regulatory standards. The new National Dialogue: Improving Federal Procurement and Grant Processes, an initiative of the Chief Acquisition Officers Council, the Department of Health and Human Services, and the General Services Administration affords the general public the ability to participate in ideas to modernize a 21st century government. The initiative focuses on reducing burden in the area of compliance requirements reporting, and solicits feedback on procurement processes, practices and reports for contracts as well as grants practices and processes. The National Academy of Sciences Committee on Federal Research Regulations and Reporting Requirements released Part 1 of a two-part report, Optimizing The Nation's Investment in Academic Research: A New Regulatory Framework for the 21st Century. The report outlines a number of areas where Congress and federal agencies can reduce the administrative workload associated with federal research funding.

While these are three important steps in the right direction, it will take infrastructure, resources, agreement, and a whole lot of time before these ideas turns to reality. In other words, institutions and federal agencies must all own this problem together, while being mindful of set-backs and unexpected road-closures. If this were such an easy problem to solve, it would most certainly be solved by now.

One thing is for certain: continuing to work with our federal partners towards a little less 'diversity' and a little more 'uniformity' among the agencies for regulation interpretation will take time. In the meantime, recent evidence seems to suggest that devising plans and templates promoting a tactical and consistent approach may land you a quicker response. The response may not always be what you want to hear but it documents a problem worthy of attention, and as with anything, change happens in numbers.

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