



# **Pressures on Research Funding under the Trump Administration: Indirect Cost Recovery and Other Restrictions**

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**ROPES & GRAY**

# Agenda

- **Statutory/Regulatory Authority for Indirect Costs**
- **Efforts to Cap Indirect Cost Rates**
- **Renegotiating/Reopening Indirect Cost Rates**
- **How to Prepare; Practical Considerations**
- **Recent Developments and Additional Considerations**

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# Statutory/Regulatory Authority for Indirect Costs

- Under **31 U.S.C. § 6307**, the Director of the Office of Management and Budget (“OMB”) may issue supplementary interpretative guidelines to promote consistent and efficient use of procurement contracts, **grant agreements**, and **cooperative agreements**.
  - *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (2 C.F.R. Part 200) (the “Uniform Guidance”)
- The Uniform Guidance addresses indirect costs (“IDC”), also termed facilities and administration (“F&A”) costs, within its **Cost Principles** at **Subpart E** and within certain of its appendices, including **Appendix III** for institutions of higher education (“IHEs”) and **Appendix IV** for non-profit organizations.

# Statutory/Regulatory Authority for Indirect Costs

- Certain federal agencies have separate codifications of the Uniform Guidance, some with more stringent requirements.
- The U.S. Department of Health and Human Services (“HHS”) currently has its own codification of the Uniform Guidance, set forth at **45 C.F.R. Part 75**, but it will be rescinded later this year (by October 1, 2025), after which the agency has said it will no longer codify its own implementing regulations.
- In October 2024, HHS issued an **Interim Final Rule** that outlines HHS’s implementation of revisions made to the Uniform Guidance in April 2024.



# Statutory/Regulatory Authority for Indirect Costs

- In January 2025, NIH issued a **notice** to update administrative requirements of its grant terms and conditions to reflect updates to the Uniform Guidance and noted that the NIH Grants Policy Statement also will be updated for FY25. See NOT-OD-25-059.
  - Continues to honor **Negotiated Indirect Cost Rate Agreements (“NICRAs”)** negotiated prior to October 1, 2024.
  - “Cognizant agencies for indirect costs **may, but are not required to, renegotiate existing NICRAs**” to reflect changes to the Uniform Guidance.
- The notice expressly adopts certain Uniform Guidance updates
  - *e.g.: de minimis* IDC rate increased from 10% to 15%.



# Determining IDC Rate

- IDCs are allowable under federal awards and are charged as a rate. An IDC rate may be determined in different ways:

1

**Specified Rate:** IDC rates may be specified in statute, regulations, or policy.

- e.g., IDCs for HHS-specific training grants and for those provided to foreign organizations and foreign public entities for work conducted outside the U.S. are limited to 8%.

2

**De Minimis Rate:** If an institution does not have a NICRA, it can use a *de minimis* rate of 15%.

- Can be applied indefinitely.
- Must not be applied to cost reimbursement contracts issued directly by the Federal government in accordance with the Federal Acquisition Regulation.

3

**Negotiated Rate:** Recipient institutions may negotiate a rate with a “cognizant agency for indirect costs”—the Federal agency responsible for reviewing, negotiating, and approving IDC proposals on behalf of all Federal agencies.

# Negotiated IDC Rate – Cognizant Agency

- Assignment of a “cognizant agency for indirect costs” differs by institution type.
- For **institutions of higher education (“IHEs”)**:
  - Cost negotiation cognizance is assigned to HHS or to the Department of Defense Office of Naval Research (“DoD”), depending on which (HHS or DoD) provides more funds directly to the IHE within the past three years.
  - If neither HHS nor DoD provides funding to the IHE, HHS is the default.
  - After cognizance is established, it must continue for a **five-year period**.
  - See Uniform Guidance at Appendix III, paragraph C.11.
- For **nonprofit organizations**:
  - Cost negotiation cognizance is assigned to the Federal agency with the largest dollar value of Federal awards directly funded to the organization.
  - After cognizance is established, the assignment **will not change unless** there is a shift in the dollar volume of Federal awards funded to the organization for three years.
  - See Uniform Guidance at Appendix IV, paragraph C.2.a.





# Negotiated IDC Rate – Agreements, Appeals

- Once an IDC is determined, the cognizant agency must **formalize all determinations or agreements reached** with an institution and provide copies to other agencies that have an interest.

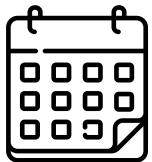
A NICRA is entered into by the IHE and the cognizant agency. HHS IDC rates are negotiated by the Program Support Center Cost Allocation Services or, in the case of for-profit recipients, the Division of Financial Advisory Services at the National Institutes of Health (“NIH”) Office of Acquisition Management and Policy.

- If the cognizant agency for IDCs and the institution are unable to reach agreement on rates, **the appeal system of the cognizant agency for the IDCs** must be followed for resolution of the disagreement.

See Uniform Guidance at Appendix III, paragraphs C.11.g–C.11.h; and Appendix IV, paragraphs C.2.g–C.2.h.

# Certain Limits on Indirect Cost Rates

- The Uniform Guidance provides for limit on the administrative portion of the negotiated IDC rate for IHEs. This limitation does not extend to the facilities portion of the rate.
- The administrative costs charged to Federal awards to IHEs awarded or amended (including continuation and renewal awards) with effect after October 1, 1991, must be limited to 26% of MTDC for the total of general administration and general expenses, departmental administration expenses, sponsored projects administration expenses, and student administration and services expenses.



*This cap was set in 1991 and has not been changed since.*

# Aside: Fringe Benefit Rate

- IDC rate is different than fringe benefit rate.
- Fringe benefits are “allowances and services employers provide to their employees as compensation in addition to regular salaries and wages.” Uniform Guidance § 200.431(a).
  - Fringe benefits may include, *e.g.*, health plan expenses, pension plan expenses, and workman's compensation expenses.
- Federal agencies sponsoring research reimburse institutions for fringe benefit costs, expressed as a percentage of total salaries.
- Fringe benefit rates are renegotiated periodically (*e.g.*, annually).

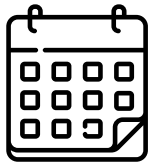
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- Statutory Authority for Indirect Cost Add-Ons
- **Efforts to Cap Indirect Cost Rates**
- Renegotiating/Reopening Indirect Cost Rates
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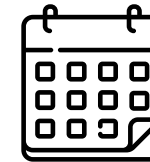
# Efforts to Cap Indirect Cost Rates

**President Clinton** proposed capping indirect cost reimbursements in the FY 1995 budget request, but Congress ultimately did not act. This followed a 33-page report on IDCs from the **Congressional Research Service**.

1994



2017

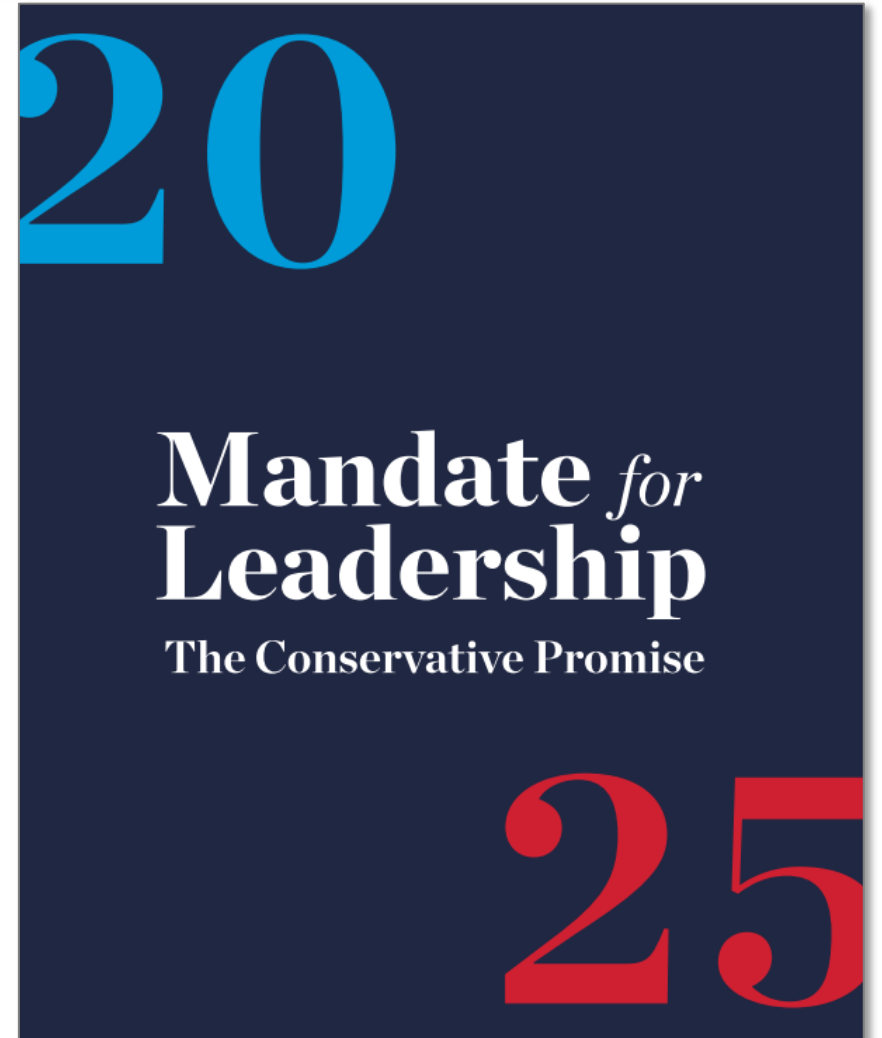


In his first term, **President Trump** proposed cutting IDC rate payments made by NIH to award recipients to 10% of the total grant value/total research costs (the *de minimis* rate at that time), to align more closely with rates accepted from private funders.

The **House Science Committee** held a hearing to examine the role of IDCs in federally funded research but stopped short of supporting the specific cuts proposed by the administration.

# Efforts to Cap Indirect Cost Rates

- **Project 2025** proposes that Congress cap IDC rates paid to IHEs to be comparable to rates offered by private organizations.
- “[T]hese reimbursements cross-subsidize leftist agendas and the research of billion-dollar organizations . . . **Universities also use this influx of cash to pay for [DEI] efforts.**”
- “Congress should cap the indirect cost rate paid to universities so that it **does not exceed the lowest rate a university accepts from a private organization to fund research efforts.** This market-based reform would help reduce federal taxpayer subsidization of leftist agendas.” (p. 355)



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# Renegotiation of IDC Rate

- A recipient or subrecipient with a current federally negotiated IDC rate may apply for a **one-time extension** of that agreement for up to four years.
- Extension subject to review and approval by the cognizant agency for IDCs.
- If extension is granted, the recipient or subrecipient may not request a rate review until the extension period ends.
  - The recipient or subrecipient must re-apply to negotiate a new rate when the extension ends.
  - After a new rate has been negotiated, the recipient or subrecipient may again apply for a one-time extension of the new rate.



# Prospect of Reopening IDC Rates

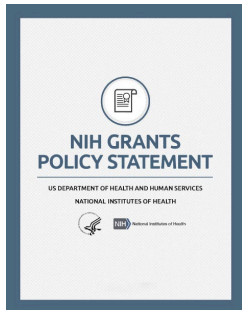


Can an IDC rate, once negotiated, be reopened (legally)?

- Uniform Guidance § 200.411 speaks to adjustments to previously negotiated rates that are found to include **unallowable costs**, including when **unallowable** under Federal statutes, regulations, or the terms and conditions of a Federal award, or when **unallocable** to a Federal award.
- Yet, “**adjustments or refunds** are intended to correct the proposals used to establish the rates and **do not constitute a reopening** of the rate negotiation.” Uniform Guidance § 200.411(a).
- The choice of method to be applied (adjustment or refund) is at the **discretion of the cognizant agency for indirect costs**. See Uniform Guidance § 200.411(d).

# Prospect of Reopening IDC Rates

- According NIH Grants Policy Statement § 7.4:



“F&A costs awarded may be subject to **upward or downward adjustment**, depending on the type of rate negotiated and recipient type.”

“F&A cost reimbursement on grants to IHEs is based on the rates used in the award, which are **not subject to adjustment** in reimbursement **except for the establishment of permanent rates** when a provisional rate was used for funding.”

- F&A costs are subject to **downward adjustment** if the proposal that served as the basis for the negotiation includes **unallowable costs**.

# Prospect of Reopening IDC Rates



## Can IDC rates be lowered unilaterally by an agency?

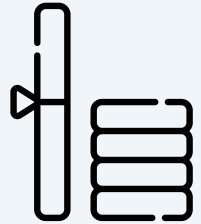
- Negotiated IDC rates must be accepted by all Federal agencies.
- However, a Federal agency may use **a rate different from the negotiated rate** for either a class of Federal awards or a single Federal award only when required by Federal statute or regulation, or when approved by the awarding Federal agency pursuant to **public-facing decision-making criteria**.
- Federal agencies must **notify** OMB of any deviations that are approved by those agencies (no mention of OMB **approval!**).
- Recipients or subrecipients may notify OMB of any disputes regarding an agency's application of a federally negotiated IDC rate.

See Uniform Guidance § 200.414(c).

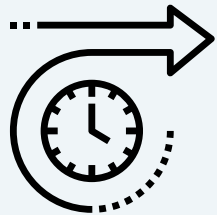
# Prospect of Reopening IDC Rates



There currently is no across-the-board statutory cap on IDC rates, but one could be implemented through Congressional action.



OMB could implement a cap through Uniform Guidance revisions via notice and comment rulemaking.



Revision via Presidential executive order?

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# How to Prepare; Practical Considerations

- Assess which Federal awards received by your institution may be affected by the Trump Administration's executive orders.
- Segregate specific costs that may be subject to government inquiry.
- Prepare for Federal audits and requests for disclosure of funding-related information.
- Determine feasibility and permissibility of reallocating indirect costs as direct costs.

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# Rhode Island TRO

- Temporary Restraining Order, *New York et al. v. Trump*, No. 25-cv-39-JJM-PAS (D.R.I.), ECF No. 50 (Jan. 31, 2025)
  - Plaintiffs are 21 States and the District of Columbia
  - Defendants are President; OMB; Departments of Treasury, HHS, Education, Transportation, Labor, Energy, Homeland Security, Justice; FEMA; EPA; and NSF
- Court ordered:
  - “Defendants shall not pause, freeze, impede, block, cancel, or terminate Defendants’ compliance with awards and obligations to provide federal financial assistance to the States . . . .”
  - “Defendants shall not impede the States’ access to such awards and obligations, except on the basis of the applicable authorizing statutes, regulations, and terms.”
  - “Defendants shall also be restrained and prohibited from reissuing, adopting, implementing or otherwise giving affect to the OMB directive under any other name or title . . . .”



# Notice of Court Order

- Notice of Compliance with Court’s Temporary Restraining Order, *New York et al. v. Trump*, No. 25-cv-39-JJM-PAS (D.R.I.), ECF No. 51 (Jan. 31, 2025).
  - “Federal agencies cannot pause, freeze, impede, block, cancel or terminate any awards or obligations on the basis of the OMB Memo, or on the basis of the President’s recently issued Executive Orders.”
  - “This prohibition applies to all awards or obligations – not just those involving the Plaintiff States in the above-referenced case . . . .”
  - “Agencies may exercise their own authority to pause awards or obligations, provided agencies do so purely based on their own discretion – not as a result of the OMB Memo or the President’s Executive Orders – and provided the pause complies with all notice and procedural requirements in the award, agreement, or other instrument relating to such a pause.”
  - “Out of an abundance of caution, all federal agencies (even those not named as defendants in the case) should comply with the above-referenced terms.”

# District of Columbia TRO

- Memorandum Opinion and Order, *Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget*, No. 25-CV-239 (D.D.C. Feb. 3, 2025).
  - Plaintiffs are four non-profit organizations
  - Defendants are OMB and the OMB Acting Director
- Court ordered:
  - “Defendants are enjoined from implementing, giving effect to, or reinstating under a different name the directives in OMB Memorandum M-25-13 with respect to the disbursement of Federal funds under all open awards . . . .”
  - “Defendants must provide written notice . . . to all agencies to which OMB Memorandum M-25-13 was addressed. The written notice shall instruct those agencies that they may not take any steps to implement, give effect to, or reinstate under a different name the directives in OMB Memorandum M-25-13 with respect to the disbursement of Federal Funds under all open awards.”

# Award Termination



Can Federal agencies terminate existing awards before the end of the project period?

- Pursuant to § 200.340 of the Uniform Guidance, a Federal agency may terminate an award for several reasons, including:
  - “if the recipient or subrecipient **fails to comply** with the terms and conditions of the Federal award.”
  - “pursuant to the terms and conditions of the Federal award, including, to the extent authorized by law, if an award **no longer effectuates the program goals or agency priorities.**”

# Award Termination



Can Federal agencies amend the terms and conditions of an award during the project period?

- Pursuant to 42 CFR § 52.9, the **HHS Secretary** “may with respect to any grant award or class of awards **impose additional conditions** prior to or at the time of any [Public Health Service] award when in the Secretary’s judgment such conditions are necessary to assure or protect advancement of the approved project, the interests of the public health, or the conservation of grant funds.”

# Award Amendment



Can Federal agencies amend the terms and conditions of an award during the project period?

- Pursuant Section 5.5 of the NIH Grants Policy Statement, if the NIH determines “at the time of award or at any time subsequent to award – that the recipient’s management **systems and practices are not adequate to ensure the appropriate stewardship** of NIH funds or to **achieve the objectives** of the award, the [grants management officer] **may impose special, more restrictive terms and conditions on the award** in accordance with applicable regulations including 42 CFR Part 52.9 and 2 CFR Part 200.339 and 45 CFR Part 75.371.”



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