

MEMO

To: Clients
From: Leslee Gilbert, VSA
Date: 2/8/25
RE: NIH Indirect Cost Rate Announcement

This memo covers the recent HHS announcement regarding Facilities and Administration (F&A) rate change as well as relevant Congressional legislation related to the topic. It also analyzes possible next steps, including likely legal and Congressional challenges to this executive action. We expect this issue to continue to develop over the next several weeks and months, and we will update you on developments and work with you to discover the best way forward that protects your research enterprise.

NIH Action on Indirect Cost Rates (i.e. “F&A”)

On Friday, Feb. 7, 2025, the National Institutes of Health (NIH) released Notice Number NOT-OD-25-068, “Supplemental Guidance to the 2024 NIH Grants Policy Statement: Indirect Cost Rates,” announcing a deviation from the negotiated indirect cost rate. The Supplemental Guidance stipulated that there will be a standard indirect rate of 15% across all NIH grants for indirect costs in lieu of a separately negotiated rate for indirect costs in every grant. This rate would apply for “any new grant issued, and for all existing grants to institutions of higher education retroactive to the date of issuance of this Supplemental Guidance.... This policy shall be applied to all current grants for go forward expenses from Feb. 10, 2025 forward as well as for all new grants issued.” NIH will not be “applying this cap retroactively back to the initial date of issuance of current grants to institutions of higher education.”

In explaining the rationale for the decision, NIH outlined that, in Fiscal Year 2023, the agency awarded approximately \$26 billion to direct costs for research and \$9 billion for indirect costs. The indirect costs were “not readily assignable to the cost objectives of the grants” and therefore opaque for the agency to assess. They also contrasted the university indirect costs (which average 28% and in some cases 50-60%) with that of private foundations (which range between 10% to 15%). Finally, NIH argued that they would prefer more of the dollars go to direct scientific research costs.

Congressional Legislation on the Topic of NIH Indirect Cost Rates

Current law is ensconced in Public Law (P.L. 118-47, the Consolidated Appropriations Act, 2024. In Division D, Title II, covering the Department of Health and Human Services, Congress included section 224 (page 677) related to “indirect cost negotiated rates”:

SEC. 224. In making Federal financial assistance, the provisions relating to indirect costs in part 75 of title 45, Code of Federal Regulations, including with respect to the approval of deviations from negotiated rates, shall continue to apply to the National Institutes of Health to the same extent and in the same

manner as such provisions were applied in the third quarter of fiscal year 2017. None of the funds appropriated in this or prior Acts or otherwise made available to the Department of Health and Human Services or to any department or agency may be used to develop or implement a modified approach to such provisions, or to intentionally or substantially expand the fiscal effect of the approval of such deviations from negotiated rates beyond the proportional effect of such approvals in such quarter.

This bill language has two main parts. The first part freezes NIH indirect costs at the rate of the third quarter of fiscal year 2017. The second part essentially stipulates that no appropriated funds “in this or prior acts” or made available to HHS or any other department or agency, can be used to modify indirect costs from negotiated rates.

The provisions for PL 118-47 were extended by the current Continuing Resolution, P.L. 118-158, and are therefore current law.

Community and Congressional Response and Potential Next Steps

Given Congressional direction and law on the topic of NIH indirect costs, it is highly likely that one or more affected parties will sue for an injunction of the Supplemental Guidance. Key higher education associations have also put out statements related to the HHS action urging the administration to rescind the decision:

AAMC: <https://www.aamc.org/news/press-releases/aamc-statement-drastic-cuts-nih-funded-research>

AAU: <https://www.aau.edu/newsroom/press-releases/statement-aau-president-barbara-r-snyder-cuts-nih-facilities-administrative-costs>

APLU: <https://www.aplu.org/news-and-media/news/aplu-statement-on-cuts-to-reimbursement-of-nih-facilities-administrative-costs/>

ACE: <https://www.acenet.edu/News-Room/Pages/Statement-Trump-to-Slash-Research-Reimbursement.aspx>

Senator Patty Murray (D-WA), Vice Chair of the Senate Appropriations Committee, also put out a statement condemning the announcement and pointing out the illegality of the action based on P.L. 118-47: <https://www.murray.senate.gov/senator-murray-slams-indirect-cost-rate-for-nih-as-massive-indiscriminate-cut-setting-back-progress-on-lifesaving-research/>

Several Members of Congress have called for oversight hearings on the action, although most of the calls are from Democratic Members who are not in charge of the oversight schedule. Several Member offices have already asked institutions of higher education in their states and districts to provide input on the affect the decision will have on their research enterprises.

Suggested Actions Related to Congressional Outreach

1. Gather information on the annual impact of the decision and wider impacts on students and medical research for the region to present to Members.
2. Communicate with your delegation. For Fiscal Year 2025 appropriations, it will be important for Congress to continue including provisions related to freezing indirect cost rates.
 - a. If there is another Continuing Resolution (CR), the goal is to continue section 224 of P.L. 118-47. Therefore, we would want to avoid an anomaly in a CR undercutting the FY24 section.
 - b. If there is an FY25 Labor/HHS/Education appropriations' package, then it will be useful to have the continuation of section 224 of P.L. 118-47 in the bill.

Given that this decision affects many institutions of higher education, it will be useful to coordinate strategy where it makes sense with key associations. As this is such a consequential administrative action, we look forward to discussing potential actions relevant to your institution and working with you on implementation.