UNIVERSITY OF ALASKA
UNIFORM GUIDANCE WORKING GROUP

Section Number & Name: 200.435 Defense and Prosecution of Criminal and Civil Proceedings, Claims, Appeals and Patent Infringements
A21 Reference: J13

BACKGROUND INFORMATION:

A. Does the revised guidance contain new language? ☐ Y ☒ N

Specifically describe the new language and how it differs: See attached.
Mentions Whistleblower Protection Act, deleted a lot of language.

B. Is the new guidance more or less restrictive than university processes? ☐ More ☐ Less

Specifically describe how it is more or less restrictive:

_____

C. Cite any relevant system-wide policies/regulations/procedures:
Accounting and Administrative Manual D-03 Accounting for Unallowable Costs

D. Cite any MAU-level relevant processes or manuals:

_____

E. Is there an impact to electronic systems (Banner HR/Finance, Web Timesheets, Effort Reporting, etc.)? ☐ Y ☒ N

List specific system(s) impacted and method of impact:

_____

ACTION PLAN: Is specific action needed? ☒ Y – see below ☐ N – no action needed

Recommended Action(s):

1. Update Accounting and Administrative Manual for Unallowable Costs D-03 for citations and definition

UA responsible area requiring documentation of compliance: Rosemary Madnick, Heather Paulsen, Barbara Hyde, Tanya Hollis, Christi Eickholt, Andrew Gray, Claire Ligsay, Cindy Eriksen, Tana Myrstol

§200.435 Defense and prosecution of criminal and civil proceedings, claims, appeals and patent infringements.

(a) Definitions for the purposes of this section.

(1) *Conviction* means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon verdict or a plea, including a conviction due to a plea of nolo contendere.

(2) *Costs* include the services of in-house or private counsel, accountants, consultants, or others engaged to assist the non-Federal entity before, during, and after commencement of a judicial or administrative proceeding, that bear a direct relationship to the proceeding.

(3) *Fraud* means:

(i) Acts of fraud or corruption or attempts to defraud the Federal government or to corrupt its agents,

(ii) Acts that constitute a cause for debarment or suspension (as specified in agency regulations), and

(iii) Acts which violate the False Claims Act (31 U.S.C. 3729-3732) or the Anti-kickback Act (41 U.S.C. 1320a-7b(b)).

(4) *Penalty* does not include restitution, reimbursement, or compensatory damages.

(5) *Proceeding* includes an investigation.

(b) *Costs*. (1) Except as otherwise described herein, costs incurred in connection with any criminal, civil or administrative proceeding (including filing of a false certification) commenced by the Federal government, a state, local government, or foreign government, or joined by the Federal government (including a proceeding under the False Claims Act), against the non-Federal entity, (or commenced by third parties or a current or former employee of the non- Federal entity who submits a whistleblower complaint of reprisal in accordance with 10 U.S.C. 2409 or 41 U.S.C. 4712), are not allowable if the proceeding:

(i) Relates to a violation of, or failure to comply with, a Federal, state, local or foreign statute, regulation or the terms and conditions of the Federal award, by the non-Federal entity (including its agents and employees); and

(ii) Results in any of the following dispositions:

(A) In a criminal proceeding, a conviction.

(B) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of non-Federal entity liability.

Deleted: 13.

Deleted: infringement.

Deleted: a. …efinitions. … [1]

Deleted: "…*onviction*," as used herein, … [2]

Deleted: "…*osts*,"…include, but are not limited to, administrative and clerical expenses;…the cost of legal services, whether performed by …of in-house or private counsel; the costs of the services of… accountants, consultants, or others retained by the institution to…ngaged to assist it; costs of employees, officers and trustees, and any similar costs incurred…he non-Federal entity before, during, and after commencement of a judicial or administrative proceeding, that bears…ear a direct relationship to the proceedings. … [3]

Deleted: "…*raud*," as used herein,…means – 53 … [4]

Deleted: (1) …cts of fraud or corruption or attempts to defraud the Federal government or to corrupt its agen … [5]

Deleted: (2)

Deleted: (3) …cts which violate the False Claims Act, …(31 U.S.C., sections… 3729-3731,…732) or the Anti-kickback Act, (41 U.S.C., sections 51 and 54. … [6]

Deleted: "…*enalty*," … [7]

Deleted: "…*roceeding*," … [8]

Deleted: b…*osts.* (1) Except as otherwise described herein, costs incurred in connection with any criminal, civil or administrative proceeding (including filing of a false certification) commenced by the Federal government, … [9]

Deleted: (a) …elates to a violation of, or failure to comply with, a Federal, state, local or foreign statute or… reg … [10]

Deleted: (b)

Deleted: (i)

Deleted: (ii) …n a civil or administrative proceeding involving an allegation of fraud or similar misconduct … [11]

(C) In the case of any civil or administrative proceeding, the disallowance of costs or the imposition of a monetary penalty, or an order issued by the Federal awarding agency head or delegate to the non-Federal entity to take corrective action under 10 U.S.C. 2409 or 41 U.S.C. 4712.

(D) A final decision by an appropriate Federal official to debar or suspend the non-Federal entity, to rescind or void a Federal award, or to terminate a Federal award for default by reason of a violation or failure to comply with a statute, regulation, or the terms and conditions of the Federal award.

(E) A disposition by consent or compromise, if the action could have resulted in any of the dispositions described in paragraphs (b)(1)(ii)(A) through (D) of this section.

(2) If more than one proceeding involves the same alleged misconduct, the costs of all such proceedings are unallowable if any results in one of the dispositions shown in paragraph (b) of this section.

(c) If a proceeding referred to in paragraph (b) of this section is commenced by the Federal government and is resolved by consent or compromise pursuant to an agreement by the non-Federal entity and the Federal government, then the costs incurred may be allowed to the extent specifically provided in such agreement.

(d) If a proceeding referred to in paragraph (b) of this section is commenced by a state, local or foreign government, the authorized Federal official may allow the costs incurred if such authorized official determines that the costs were incurred as a result of:

(1) A specific term or condition of the Federal award, or

(2) Specific written direction of an authorized official of the Federal awarding agency.

(e) Costs incurred in connection with proceedings described in paragraph (b) of this section, which are not made unallowable by that subsection, may be allowed but only to the extent that:

(1) The costs are reasonable and necessary in relation to the administration of the Federal award and activities required to deal with the proceeding and the underlying cause of action;

(f) Payment of the reasonable, necessary, allocable and otherwise allowable costs incurred is not prohibited by any other provision(s) of the Federal award;

(g) The costs are not recovered from the Federal Government or a third party, either directly as a result of the proceeding or otherwise; and,

(h) An authorized Federal official must determine the percentage of costs allowed considering the complexity of litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States, and such other factors as may be appropriate. Such

Deleted: (iii) …n the case of any civil or administrative proceeding, the disallowance of costs or the imposition of a monetary penalty. … [12]

Deleted: (iv) … final decision by an appropriate Federal official to debar or suspend the institution…on-Federal entity, to rescind or void an… Federal award, or to terminate an… Federal award for default by reason of a violation or failure to comply with a law or…tatute, regulation. … [13]

Deleted: (v) … disposition by consent or compromise, if the action could have resulted in any of the dispositions described in subsections (i…aragraphs (b)(1)(ii)(A) through (iv). … [14]

Deleted: shall be…re unallowable if any one of them results in one of the dispositions shown in subsection paragraph (b. … [15]

Deleted: c. …f a proceeding referred to in subsection paragraph (b…. of this section is commenced by the Federal government and is resolved by consent or compromise pursuant to an agreement entered into …y the institution…on-Federal entity and the Federal govern … [16]

Deleted: d. …f a proceeding referred to in subsection paragraph (b…. of this section is commenced by a sta … [17]

Deleted: (1) … specific term or condition of a federally-sponsored agreement; … [18]

Deleted: (2) …pecific written direction of an authorized official of the sponsoring … [19]

Deleted: e. …osts incurred in connection with proceedings described in subsection …aragraph (b, but… of this se … [20]

Deleted: (1)

Deleted: (2) …ayment of the reasonable, necessary, allocable and otherwise allowable costs incurred, as … [21]

Deleted: (3) …he costs are not otherwise … [22]

Deleted: (4)…n authorized Federal official must determine the percentage of costs allowed does not exceed the … [23]

percentage must not exceed 80 percent. However, if an agreement reached under paragraph (c) of this section has explicitly considered this 80 percent limitation and permitted a higher percentage, then the full amount of costs resulting from that agreement are allowable.

(iv) Costs incurred by the non-Federal entity in connection with the defense of suits brought by its employees or ex-employees under section 2 of the Major Fraud Act of 1988 (18 U.S.C. 1031), including the cost of all relief necessary to make such employee whole, where the non- Federal entity was found liable or settled, are unallowable.

(v) Costs of prosecution of claims against the Federal government, including appeals of final Federal agency decisions, are unallowable.

(vi) Costs of legal, accounting, and consultant services, and related costs, incurred in connection with patent infringement litigation, are unallowable unless otherwise provided for in the Federal award.

(vii) Costs which may be unallowable under this section, including directly associated costs, must be segregated and accounted for separately. During the pendency of any proceeding covered by paragraphs (b) and (f) of this section, the Federal government must generally withhold payment of such costs. However, if in its best interests, the Federal government may provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreement to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

Deleted: shall

Deleted: subsection

Deleted: shall be

Deleted: f.

Deleted: institution

Deleted: Pub. L. 100-700

Deleted: institution

Deleted: g.

Deleted: legal, accounting, and consultant services, and related costs, incurred in connection with defense

Deleted: claims or

Deleted: , or the prosecution of claims or appeals against the

Deleted: Government

Deleted: h.

Deleted: 55

Deleted: litigation, are unallowable unless otherwise provided for in the sponsored agreements. ¶
i.

Deleted: ,

Deleted: shall

Deleted: by the institution

Deleted: subsections

Deleted: shall

Deleted: the

Deleted: of the Federal Government

Deleted: by the institution