Alice and the Terms & Conditions Rabbit Hole

A Terms & Conditions Adventure Story

David Schultz, University of Houston
Carrie Chesbro, Stanford University
Agenda

The White Rabbit
• Our Goals in the Terms & Conditions Story

Who Are You?
• Sources of Terms & Conditions

Painting the Roses Red
• Planning, Monitoring, and Prior Approvals

Taller or Shorter?
• Conflicting Terms & Conditions

Tweedle Dee & Tweedle Dum
• Cautionary Tales

Mad Hatter
• Curious Words of Wisdom
The White Rabbit

GOALS
## The White Rabbit; Types of Federal Awards

<table>
<thead>
<tr>
<th>Grant</th>
<th>Cooperative Agreement</th>
<th>Contract</th>
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</thead>
<tbody>
<tr>
<td>• Assistance Funding</td>
<td>• Assistance Funding</td>
<td>• Procurement Action</td>
</tr>
<tr>
<td>• 2 CFR 200</td>
<td>• 2 CFR 200</td>
<td>• FAR, Other</td>
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<tr>
<td>• Limited Sponsor</td>
<td>• Substantial Sponsor</td>
<td>• Sponsor Involvement</td>
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<tr>
<td>Involvement</td>
<td>Involvement</td>
<td>Varies</td>
</tr>
</tbody>
</table>


Cheshire Cat Moment

- Other Transaction Authority
- Special or Emergency Funding
- Non-Federal Sponsors
- ??????
Who Are You?

SOURCE DOCUMENTATION
<table>
<thead>
<tr>
<th>Topic</th>
</tr>
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<tbody>
<tr>
<td>Who Are You?</td>
</tr>
<tr>
<td>Agreement Review</td>
</tr>
<tr>
<td>WHAT WAS FUNDED?</td>
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<tr>
<td>DATES OF PERFORMANCE</td>
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<tr>
<td>AMOUNT FUNDED</td>
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<td>CARRYFORWARD</td>
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<td>PRE-AWARD SPENDING</td>
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<td>REPORTING</td>
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<td>BILLING</td>
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<td>METHOD FOR REQUESTING CHANGES</td>
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<td>ALLOWABLE COSTS</td>
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<td>CLOSEOUT REQUIREMENTS</td>
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</table>
| Who Are You?  
Extended Review |
<table>
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<th></th>
</tr>
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<tbody>
<tr>
<td><strong>Funding Opportunity</strong></td>
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<tr>
<td><strong>Legislative Rules</strong></td>
</tr>
<tr>
<td><strong>Proposal Documents</strong></td>
</tr>
<tr>
<td><strong>Award Document</strong></td>
</tr>
<tr>
<td><strong>Agency Guidelines</strong></td>
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<tr>
<td><strong>Uniform Guidance</strong></td>
</tr>
</tbody>
</table>
Who Are You?
Complete Review

Incorporated T&Cs
Historic Documentation
Correspondence
Required Reports
System of Record
Cheshire Cat Moment

- Agency updates or FAQs
- Requests after-the-fact
- Archived agency links
- Defining “source”
Painting the Roses Red

PLANNING, MONITORING, & PRIOR APPROVALS
Painting the Roses Red
Planning & Monitoring

- Know the Award
- Routine Financial Reviews
- Budget Projections
- Technical Check-Ins
- Strong Central/Dept Communication
- Apprise PI of Prior Approval Requirements
Painting the Roses Red
Prior Approvals

- Scope of Work
- Budget Changes
- Personnel Changes
- Effort Changes
- Performance Period
- Participant Support
- Equipment Purchases
- Foreign Travel
- Subawards
This award is based on the application submitted to, and as approved by, NIH on the above-titled project and is subject to the terms and conditions incorporated either directly or by reference in the following:

a. The grant program legislation and program regulation cited in this Notice of Award.

b. Conditions on activities and expenditure of funds in other statutory requirements, such as those included in appropriations acts.

c. 45 CFR Part 75.

d. National Policy Requirements and all other requirements described in the NIH Grants Policy Statement, including addenda in effect as of the beginning date of the budget period.

e. Federal Award Performance Goals: As required by the periodic report in the RPPR or in the final progress report when applicable.

f. This award notice, INCLUDING THE TERMS AND CONDITIONS CITED BELOW.

(See NIH Home Page at http://grants.nih.gov/grants/policy/awardconditions.htm for certain references cited above.)
8.1.2 Prior Approval Requirements

This section describes the activities and/or expenditures that require NIH prior approval. NIH prior approval requirements are summarized in Exhibit 7, which is provided for guidance only. For the prior approval requirements specified in the exhibit, approval is required whether or not the change has a budgetary impact. The circumstances under which prior approval is required also are summarized in the exhibit.

Recipients also should consult Subpart IIB for prior approval requirements that apply to specific mechanisms, types of grants, and types of recipients.

Any question about the need for prior approval for an activity or cost under a specific NIH award should be directed to the GMO.

### Exhibit 7. Summary of Actions Requiring NIH Prior Approval

<table>
<thead>
<tr>
<th>NIH prior approval is required for</th>
<th>Under the following circumstances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Additional no-cost extension, extension greater than 12 months, or late notification of initial no-cost extension (8.1.2.1)</td>
<td>All instances.</td>
</tr>
</tbody>
</table>
### Painting the Roses Red

**Research Terms & Conditions Tool**

Research Terms and Conditions Appendix A
Prior Approval Matrix
November 12, 2020

<table>
<thead>
<tr>
<th>Prior Written Approval (prior approval)*</th>
<th>Reference</th>
<th>RTC Overlay</th>
<th>NSF</th>
<th>DOE</th>
<th>NIH</th>
<th>USDA</th>
<th>NIFA</th>
<th>DOC</th>
<th>NASA</th>
<th>DHS-GFAD</th>
<th>DHS-FEMA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts</td>
<td>200.407</td>
<td>Required</td>
<td>Required</td>
<td>Required</td>
<td>Required</td>
<td>Required</td>
<td>Required</td>
<td>Required</td>
<td>Required</td>
<td>Required</td>
<td></td>
</tr>
<tr>
<td>Changes in principal investigator (PI), project leader, project partner, or scope of effort.</td>
<td>200.407(a)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
</tr>
<tr>
<td>Cost sharing or matching</td>
<td>200.407(b)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
</tr>
<tr>
<td>Use of uncovered indirect costs, including indirect costs on cost sharing or matching.</td>
<td>200.407(c)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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</tr>
<tr>
<td>Use of current fair market value to determine the value of non-Federal entity contributions of services and donations of property for the purposes of cost sharing or matching.</td>
<td>200.306(d)(2)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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</tr>
<tr>
<td>Costs of the fair market value of equipment or other capital assets and fair rental charges for land when the Federal award supports activities that require use of equipment, buildings or land.</td>
<td>200.306(h)(2)</td>
<td>Waived</td>
<td>Waived</td>
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<tr>
<td>Program Income</td>
<td>200.407(c)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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<tr>
<td>Use of program income during the period of performance (additive method).</td>
<td>200.307(e)(2)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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<tr>
<td>Revision of budget or program plans</td>
<td>200.407(d)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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</tr>
<tr>
<td>Change in the scope or the objective of the project or program.</td>
<td>200.306(c)(1)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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<tr>
<td>Change in a key person specified in the application or Federal award.</td>
<td>200.306(c)(2)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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<td>Waived</td>
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</tr>
<tr>
<td>Unenrollment from the project for more than three months, or a 25 percent reduction in time devoted to the project by the approved Project Director (PD) or PI.</td>
<td>200.306(c)(3)</td>
<td>Waived</td>
<td>Waived</td>
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<td>Waived</td>
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<tr>
<td>Inclusion, unless waived, of costs that require prior approval in accordance with Subpart E – Cost Principles.</td>
<td>200.306(c)(4)</td>
<td>Waived</td>
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<td>Waived</td>
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<td>Waived</td>
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<tr>
<td>Transfer of funds budgeted for participant support costs to other categories of expense.</td>
<td>200.306(c)(5)</td>
<td>Waived</td>
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<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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</tr>
<tr>
<td>Subawarding, transferring or contracting out of any work under a Federal award, including fixed amount subawards as deemed in 200.333. This provision does not apply to the acquisition of supplies, materials, equipment or general support services.</td>
<td>200.306(c)(6)</td>
<td>Waived</td>
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<td>Waived</td>
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<tr>
<td>Changes in the approved cost sharing or matching provided by the non-Federal entity.</td>
<td>200.306(d)(7)</td>
<td>Waived</td>
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<tr>
<td>Need for additional federal funds to complete the project.</td>
<td>200.306(e)(8)</td>
<td>Waived</td>
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<tr>
<td>Incurred project costs 60 calendar days before the Federal awarding agency makes the Federal award.</td>
<td>200.306(e)(1)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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<td>Waived</td>
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<td>Waived</td>
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<tr>
<td>Incurred project costs more than 90 calendar days pre-award.</td>
<td>200.306(e)(2)</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
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Cheshire Cat Moment

- Award-Specific Budget Limitations
- Special Funding Programs
- Pass-Thru Entity Terms
- ??????
Taller or Shorter?

CONFLICTING TERMS
Taller or Shorter?

- Award
- Funding Program
- Agency Terms
- Federal Terms
- Public Laws
- Entity Policies
Taller or Shorter?
Conflicting Terms Considerations

- Is the most restrictive term within the award-specific terms?
- If the most restrictive term is at a higher level, is there specific authority within the notice of award?
- Is the conflicting term at the institutional level? Is there a process to receive an exception from the institution if the cost meets all sponsor costing requirements?
- Does your institution have a method to request approval from leadership? And a way to document the process and decision?
- Is it appropriate to contact the sponsor for guidance or approval? Is there a preferred contact method required by the sponsor or by your institutional procedures?
- If unable to proceed, is the scope of work impacted? How? Next Steps?
Taller or Shorter?
Conflicting Terms Considerations

- Do we have the systems and/or processes to meet the non-standard requirements?
- How have we approached similar circumstances or awards in the past?
- Do we have audit history to pull from?
- Who is the ultimate authority at the institution on how to interpret conflicting terms and at what point would an award no longer be considered?
- Is a decision based on other factors that may or may not change the institutions position or risk tolerance?
- Who is financially responsible for taking our chances and how is that documented?
Cheshire Cat Moment

- Change in leadership
- Updated desk procedures
- Policy changes
- State law?
Tweedle Dee & Tweedle Dum

CAUTIONARY TALES & RESOURCES
Tweedle Dee & Tweedle Dum

Industry Standards
- Web Resources
- Policy & Regulation Updates
- Consultant Review

Audit Reports
- Current Trends
- Compliance Planning

Experts & Colleagues
- NCURA
- FDP
- Network

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Consider flow-downs to subrecipients, and impact of negotiated terms on subs

Are standard requirements covered in standard procedures? Will special handling be required?

Follow the rabbit down the rabbit hole when reviewing award notices, plan for success.

Roses should be red from the start, not after-the-fact. Be aware of prior approvals and monitor for them.

Utilize available tools and resources; reach out to others for support and guidance as needed.
Mad Hatter’s Tea - The Recipe Will Change

- Nothing is absolute, so anticipate changes
- Institutional risk is a reflection of prior audit history
- Policy positions evolve over time and may not be fully mature
- The federal government will always find creative ways to shift responsibilities to institutions of higher education (IHEs)
- Review your internal tools and documentation often
- Ensure that your policies are not conflicting or absolute
- Interpretation is learned over time and requires good mentoring
Cheshire Cat Moment

- Appreciate the “gray”
- Make informed decisions
- Anticipate push back
- ??????
Questions?
STAY WITH US!

AFTER THE SHOW

Will begin 5 minutes after the conclusion of the webinar