

ALERT

Update: Federal Judge Blocks NIH Cap on Indirect Rates for Grants

March 6, 2025

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UPDATE:

On March 5, 2025, Judge Angel Kelley, a federal district court judge sitting in Massachusetts, granted a nationwide preliminary injunction which serves to temporarily block the Trump Administration's attempt to cap the indirect cost rates of National Institutes of Health (NIH) grants at 15%. Judge Kelley granted the preliminary injunction in response to three different actions challenging the February 7 Notice issued by NIH. One of the actions was filed by states, another was filed by medical associations, and another was filed by higher-education associations and universities. The order granting the preliminary injunction highlights the impact the Notice would have on quality of research, public health, and human life.

In granting Plaintiffs' motion, Judge Kelley determined that the Plaintiffs have a substantial likelihood of success on the merits. Judge Kelley found that the Notice likely conflicts with existing regulation, which prescribes a process for deviation from Negotiated Indirect Cost Rate Agreements (NICRAs) and requires "documented justification," among other things. Judge Kelley also determined that the Notice is likely contrary to appropriations rider § 224, which contains multiple provisions meant to restrict NIH's ability to enact an across-the-board rate reduction. Judge Kelley also reasoned that the Notice likely failed to follow the Administrative Procedure Act because it failed to abide by notice and comment requirements, is impermissibly retroactive, and more.

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SUMMARY: On February 7, 2025, the Office of the Director for the National Institutes of Health (NIH) issued a Notice (Notice No. NOT-OD-25-068) imposing a cap of 15% on the indirect cost rates that can be charged to the Government on both new and certain existing grant awards. The Notice became effective upon its issuance. Twenty-two state Attorneys General challenged the Notice in a February 10 lawsuit that seeks to prevent NIH from implementing the cap within their states, and a temporary restraining order was granted for those plaintiff states pending a February 21 hearing. This change aligns with the Trump administration's broader efforts to reduce federal spending and increase efficiency in government-funded programs.

PURPOSE: The Notice states that “[t]he United States should have the best medical research in the world” and reasons that, as such, funding should go toward direct scientific research as opposed to overhead. According to the Notice, “[t]his [15%] rate will allow grant recipients a reasonable and realistic recovery of indirect costs while helping NIH ensure that grant funds are, to the maximum extent possible, spent on furthering its mission.” The Notice cites private-sector indirect cost rates and notes that the 15% cap exceeds the regulatory minimum of 10%.

CHANGE: For any new grants issued by NIH, recipients will be subject to a standardized 15% indirect cost rate regardless of any existing negotiated indirect cost rate agreement (NICRA). For existing grants held by Institutes of Higher Education (IHE), any requests for reimbursement for costs incurred after the date of the Notice will also be subject to the 15% standardized rate. The Notice clarifies that NIH is not applying the cap retroactively to the initial date of issuance of IHE grants – i.e., NIH is not intending to claw back funds already disbursed or applying the cap to invoices for costs that were incurred prior to the Notice. But NIH claims it would have the authority to do so under the applicable cost principles for NIH grants, which are found in 45 C.F.R. § 75.414(c).

BACKGROUND: NIH grants, like most federal grants, allow for reimbursement of a grantee’s “indirect costs,” including:

- Facilities: depreciation on buildings, equipment and capital improvements, interest on debt associated with certain buildings, equipment and capital improvements, and operations and maintenance expenses; and
- Administration: general administration and general expenses such as the director’s office, accounting, personnel and all other types of expenditures not listed specifically under one of the subcategories of “Facilities” (including cross allocations from other pools, where applicable).

45 C.F.R. § 75.414(a); *see also* 2 C.F.R. § 200.414. Grantees typically seek reimbursement for indirect costs through a single indirect cost rate that is applied to the recipient’s modified total direct costs in each reimbursement request. Established grantees typically have established NICRAs with either NIH or another federal agency. Absent a NICRA, NIH’s regulations permit grantees to use a de minimis indirect cost rate of 10%. *Id.* (In its most recent update to the Uniform Grant Guidance, which we covered here, OMB increased the de minimis indirect cost rate to 15%, but NIH has not issued a corresponding update to its grant regulations.)

Citing to a Fiscal Year 2021 budget document, the Notice states that the average indirect cost rate has been 27% to 28%, with some organizations charging rates over 60%.

Once accepted by an agency, NICRAs should be accepted across the Government and apply for the life of an award. NIH's cost principles for grants at 45 C.F.R. § 75.414(c), which largely mirror the Uniform Guidance, permit NIH to 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 a Federal awarding agency head or delegate based on documented justification" under a published policy and procedure for such justifications. NIH's regulations require that any deviation be included in the Notice of Funding Opportunities (NOFOs) for an award. 45 C.F.R. § 75.414(c)(4).

IMPACT: As of February 10, 2025, 22 states have already challenged the Notice, filing suit to block NIH action on this policy. The suit argues, among other things, that the Notice violates the Administrative Procedure Act (APA) and that "HHS cannot retroactively alter existing grant agreements." According to the complaint, the Notice will result in "layoffs, suspensions of clinical trials, disruption of ongoing research programs, and laboratory closures." Those in the academic community have also made their opposition to the Notice known.

If the courts allow NIH to proceed with implementation of the Notice, contractors and subgrantees that support IHEs in the performance of grants – from providing equipment and suppliers to facility services – could see dramatic effects under their subawards and anticipated follow-on awards if grantees no longer have the budget to pay agreed-upon rates and exercise change or termination rights. A federal district court in Massachusetts issued a TRO on February 10, preventing NIH from implementing the cap in the 22 states represented in the lawsuit pending a hearing on February 21. *Following the initial TRO, the judge extended the temporary pause nationwide.*

According to a study from Education Reform Now, conducted since the Notice was issued on February 7, states with significant research institutions stand to lose substantial funding because of the cap. Some states are facing reductions of hundreds of millions of dollars because of the cap, such as Texas, which faces a reduction of over \$310 million.

IHEs large and small could see dramatic impacts to their budgets if the cap is implemented per the Notice. It may disproportionately impact larger institutions, like IHEs, that can demonstrate higher overhead rates. But smaller institutions often lack the same level of robust private support or endowments to fall back on, and they are likely to be more heavily reliant on federal funds for their basic research infrastructure needs.

Any new NIH NOFOs will likely include the cap, and recipients that apply for and receive awards will be accepting the cap in the terms of their grants. Until the court rules on the states' request for an injunction against the Notice, awardees should be mindful of the cap and consider it effective. Wiley is continuing to monitor this unfolding issue and is available to help grantees, subgrantees, and subcontractors to navigate this complex landscape.