THE HEMOPHILIA ALLIANCE

Reform of Federal Policies relating to Grants and Cooperative Agreements;
Cost Principles and Administrative Requirements (including Single Audit Act)
OMB–2013–0001

June 2, 2013

We thank OMB for taking this big step to reform financial assistance requirements to streamline by publishing government-wide requirements in one consolidated regulation, ensure financial integrity and accountability, while assuring the right program outcomes. The Hemophilia Alliance represents 93 Comprehensive Hemophilia Diagnostic and Treatment Centers (HTCs) who receive grant funds from the Maternal Child Health Bureau (MCHB) within the Health Resources and Services Administration (HRSA) within the U.S. Department of Health and Human Services (HHS) (CDFA No. 93.110) and also from the Center for Disease Contro (CFDA 93.184). The primary funding for the MCHB initiated at $7 million dollars almost 20 years ago, and more recently appropriations have only been in the $4.9million dollar range. That results in an average award of approximately $35,000 to each of the recipients and subrecipients under the program. These Federal funds are used generally to financially support one-half time of a nurse or social worker.

This funding level is obviously not sufficient to provide the comprehensive care model that our centers of excellence provide to patients with bleeding and clotting disorders. The source of funding for the Hemophilia Treatment Centers is primarily earned through the provision of clotting factor to their patients which is discounted by pharmaceutical manufacturers that contract with the federal government under another federal program known as the 340B Drug Discount program administered by the Office of Pharmacy Affairs within HRSA. The discounted amount between the commercial price and the 340B price is utilized by the HTCs to fund the comprehensive care services which are not generally reimbursable by insurance. This method of augmenting their resources carries out the Congressional intent expressed in the House Commerce Committee's report on the legislation (H.R. Report 102-384, 102nd Congress, 2nd Session, Part 2, page 12) which states, "In giving these 'covered entities' access to price reductions the Committee intends to enable these [grantees] to stretch scarce Federal resources as far as possible, reaching more eligible patients and providing more comprehensive services."

The above information is provided by way of background to emphasize the significance of our three comments, which go to the heart of any "streamlining" efforts, focus on the reasonableness of requirements imposed upon grantees and subgrantees given the very minor amounts of federal dollars at issue, and how significant and very restrictive and legally unsupportable the government's growing imposition of requirements upon the "program income" earned by recipients which results in disallowance of costs for expenses that are essential to the HTCs in meeting the needs of their doctors, healthcare professionals, and their patients.

1. **OMB Should Establish in this Rule Specific Exemptions from these Requirements for Small Awards ($150,000 or less) and Mandate that all Federal Agencies Adopt "Small Award" Fixed Cost Program Requirements.**

Despite the long term existence of this provision for exceptions in the OMB Circular A-110 Administrative Requirements at 2 CFR §215.4, Federal awarding agencies have not adopted less restrictive provisions for small awards. We believe that OMB should mandate a "fixed cost" small award of $150,000 or less and exempt the awards from all requirements other than the annual submission of the Federal Financial Report SF 425 and a Performance Progress Report (SF-PPR). The proposed rule does not go far enough to implement this flexibility, and if streamlining considerations and risk assessment are the background for such reforms, it seems essential that OMB take this opportunity to mandate a "Small Award" be awarded on a fixed cost basis, with minimal reporting requirements. We agree with OMB regarding the $150,000 or less funding level, where the cost and burden of administering certain requirements outweighs the risk associated with the potential for improper expenditure of federal funds, non-federal matching funds (not applicable to HTC program), and especially the private dollars earned as program income. The burden upon small organizations who receive minimal federal financial support is substantial, and they simply do not have the financial resources to invest in the systems and qualified personnel to understand and carry out the complicated, diverse, and numerous Federal laws, regulations, and policies applicable to Federal grants and subgrants. Furthermore, the Medical Directors and other healthcare professionals at the HTCs would much rather devote their financial resources to the needs of their patients.

We agree with the definition of "Small Award" included below. We, however, suggest the language provided in Subchapter A – General Provisions, __.102 Exceptions, paragraph (c), be deleted and a new paragraph (d) be added to adopt and implement a small award fixed cost program in this regulation as indicated below:

Subchapter A – General Provisions, __.102 Exceptions

(c) Federal awarding agencies may apply more restrictive requirements to a class of recipients when approved by OMB, required by statute, or when those requirements are codified in the Code of Federal Regulations except for the requirements in Subchapter G- Audit Requirements. ~~Federal awarding agencies may apply less restrictive requirements when awarding small Federal awards as defined in Appendix I – Definitions, Small Award, except for those requirements~~

~~imposed by statute or in Subchapter G- Audit Requirements. This option to apply less restrictive requirements includes the option to make small awards for fixed amounts.~~

(d) Federal awarding agencies shall exempt small Federal awards as defined in Appendix I Definitions, *Small Award*, from all requirements of this regulation, except for those requirements imposed by statute, in Subchapter G – Audit Requirements, and in Subchapter E – Post Federal award Requirements, Section ___.505 Performance and Financial Monitoring and Reporting.

Subchapter H APPENDICES, Appendix I – Definitions, p. 177:

Small Award
means a grant or cooperative agreement not exceeding the simplified acquisition threshold set in the Federal Acquisition Regulation at 48 CFR 13 and authorized by 41 U.S.C. § 1908 ($150,000 at the time of publication).

2. <u>OMB Should Revise the Program Income Provisions to Clarify the Definition and to be Establish that Revenue be Spent to Further Eligible Grant Statute Purposes, Eliminating Strict Adherence to the Applicable Cost Principles.</u>

Over the years, Federal awarding agencies have been interpreting program income too broadly, and subjecting its expenditure to all of the award terms and requirements, including the cost principles, that are applicable to Federal appropriations. They fail to recognize the legal analysis regarding the non-federal character of program income (which is private dollars) in past Comptroller General decisions[1], HHS Departmental Appeals Board decisions[2], and references in the *GAO Principles of Appropriations.*[3] When first presented with a grantee earning program income, the Comptroller General, in an early decision, opined that program income <u>does not automatically acquire a federal character</u> and is not required to be deposited in the Treasury as miscellaneous receipts. Instead, it may be retained by the grantee and expended to <u>further eligible grant purposes</u>.[4] It is well established that program income must be expended to further the grant purposes, but Federal awarding agencies over the years have increasingly treated program income as if it has a federal character, and in fact, treated the revenue earned by the recipient identically to the federal appropriation funds.

Federal oversight and restrictions vary greatly depending upon the federal awarding agency interpretations, the particular program, and the terms and conditions of the awards. The primary source of the "grant purpose" is the underlying statutory authorization for the

[1] B-191420 (August 24, 1978), p.4 and 44 Comp. Gen. 87, 88 (1964) (establishing that income generated from federal funds was not subject to section 3617 of the Revised Statutes, 31 U.S.C. § 484 (1970)).
[22]Anchorage Neighborhood Health Center, DAB No. 561 (1984).
[3] GAO Principles of Appropriations Law, 3rd ed., Vol. II, Chapter 10. [also known as the "Red Book"].
[4] GAO Principles of Appropriations Law, 3rd ed, Vol. II at 10-89.

grant program and that statutory purpose should be the sole governing restriction upon expenditures of program income. There is no basis in appropriations law to subject private dollars which are authorized to be added to the grant funds[5] and expended on the same purposes should be subjected to all of the requirements imposed upon federal dollars. Additionally, for non-profit organizations whose primary mission is to be a Federal grantee or subgrantee, it makes it impossible to incur certain unallowable expenses under the cost principles, that all non-profits responsibly and practicably must incur, such as cash reserves, bad debt, interest on debt, etc.

The Federally awarding agencies also too broadly define program income capturing all revenue of the organization without regard to whether the federal dollars or the particular grant supported its generation. "Program income means gross income received by the recipient or subrecipient directly generated by an award supported activity, or earned only as a result of the award during the award period. First, the phrase "directly generated by an award supported activity" should be limited to the activity that is financially supported by Federal appropriations. Agencies have too broadly interpreted "supported activity" to mean any activity carried out by the grantee or subgrantee, whether the Federal program mandates the activity, or financially supports it. For HTCs, there is no Federal requirement that they have a pharmaceutical program for their patients, and there is no federal financial support, whatsoever, provided by HRSA to support the program, either under its MCHB grant, or under the 340B Drug Discount Program. Many HTCs had these programs before the MCHB grant program was established. HTCs are eligible for the 340B Drug Discount Program because they receive a grant or subgrant from MCHB. While the Hemophilia Alliance concedes that the revenue derived from the 340B Drug Discount Program is "earned only as a result of the award," the Federal awarding agency instead insists "all activities" of the HTC, whether federally financially supported or not and whether the activity is included as a requirement in the grant. For this reason, we recommend the following changes to the definition and proposed provisions regarding program income.

First, we note that there is no definition of "program income" in the Appendix I Definitions, and it should be added. The definition is only included in Subchapter E, __.502(g)(2). We propose the following language:

Subchapter E, Post Federal award Requirements, __.502 Standards for Financial and Program Management, paragraphs (g)(2), (7) and (9) Program income.

(2) Definition of program income. Program income means gross income received by the recipient or subrecipient that is directly generated by an award ~~supported~~ activity that is financed in part or in whole with federal award funds, or an activity made possible solely ~~earned only~~ as a result of the award during the award period. "During the award period" is the time between the effective date of the Federal award and the ending date of the Federal award reflected in the notice of award.

[5]We are limiting our comments to "additive" program income.

(7) Use of program income. In the event that the Federal agency does not specify in its regulations or award how program income is to be used, paragraph 8 shall apply automatically to all projects or programs except research. For awards that support research, paragraph (9) shall apply automatically unless the awarding agency specifies an alternative (or a combination of alternatives) in the award notice. In specifying alternatives, the Federal agency may distinguish between income earned by the recipient and income earned by subrecipients and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives~~~~ in paragraphs (9) and (10) of this section, program income earned but not expended during the award period, or in amounts in excess of any required non-federal match percentage ~~limits stipulated shall also~~ may be carried over to the next award period, or be deducted from outlays.

(9) Addition. When authorized, program income may be added to the funds committed to the award by the Federal agency and the recipient. The program income shall be used for the grant purposes as expressed by the statutory authority provided on the Notice of Award~~and under the conditions of the Federal award~~.

We also suggest that the following definition be added:

Subchapter H APPENDICES, Appendix I – Definitions:

Program Income
Program income means gross income received by the recipient or subrecipient that is directly generated by an award activity that is financed in part or in whole with federal award funds, or an activity made possible solely as a result of the award during the award period.

3. OMB Should Establish in this Rule that the Acquisition, Construction, and Renovation of Real Property is an Allowable Cost of Federal Grants.

It has come to our attention that Federal awarding agencies interpret the allowability of real property expenditures significantly different. To our knowledge, HHS may stand alone, but it has allowed no grantee or subgrantee expenditures upon real property costs and also arbitrarily limits renovations costs to a maximum of $150,000 under its HHS Grants Policy Statement. This policy is the only cited basis for this restriction (See HHS GPS p. II-50) and states that there must be explicit legislative language in the grant statute that permits such real property expenditures. This position, however, is not supported in the Government Accountability Office *Principles of Appropriations Law* which clearly sets forth that certain restrictions imposed upon Federal appropriations are inapplicable to grantee expenditures, specifically citing to 41 U.S.C. § 12, the prohibition against entering into contracts for construction or repair of buildings. See Comptroller Decision B-173589 (Sept. 30, 1971) and *Principles of Appropriations Law* at pp. 10-70, 13-153 and 13- 173. Furthermore, the grant administrative regulations (2 CFR 215) and the cost principles (2 CFR 230) permit grantee's acquisition and renovation of real property. HHS currently prohibits not only the expenditure of federal grant funds, but also prohibits the use of program income. Given the

clear legal analysis of appropriations law from GAO, it should be recognized government-wide, the allowability of these costs. New or improved facilities would greatly enhance the HTCs' ability to provide more services to their patients.

To make clear the allowability of real property acquisition, construction, and renovations by recipients and subrecipients, we proposed the following language be amended:

Subchapter E – Post Award Requirements, paragraph __.503:

__.503 Property Standards

This section sets forth uniform standards governing management and disposition of property furnished by the Federal government and property whose cost was charged in whole or in part to a Federal award. Recipients and subrecipients may expend award funds, matching funds, and program income funds on the acquisition, construction, and renovation of real property owned and utilized for the purposes of the award, unless prohibited by statute. Federal awarding agencies shall require recipients to observe these standards under Federal awards and shall not impose additional requirements, unless specifically required by Federal statute or regulation. The recipient may use its own property management standards and procedures provided it observes the provisions of this section.

Thank you for your full consideration of the comments and proposed changes provided above. If you have any questions, or require further clarification, please contact me by email Stacia@HemoAlliance.org, or by phone: (703) 989-3833.

Sincerely,

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