

Update #5

Status of Indirect Rate Caps in Courts and Congress

December 11, 2025 @2pm eastern

maximus

**Research administration
consulting services
and solutions**

- Indirect Cost Rate proposals
- Space surveys
- Grants management
- Asset management

CRIS **WebSPACE** **ERS**



Agenda

- **Attorney Scott Sheffler, Partner, Venable, LLP, Federal Contracts and Grants Practice. Teaches Federal Grant Law as an adjunct professor at the George Washington University Law School**
- **Q&A**
- **Mak Karim, Maximus Senior Consultant (Former National Director of HHS-CAS)**



Housekeeping Items

- Questions
 - Please use Q&A function
 - Not chat
- Session will be recorded

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**Research administration
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Maximus Higher Education Practice

Consulting services

- F&A proposal assistance, Space Survey, Negotiations
- Reviews of service/recharge centers
- Sponsored Programs
 - Pre- and Post-Award Staffing Support
 - Organizational Reviews
 - Policy/Procedure Compliance
- Asset Management Services

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- WebSpace® — Space Inventory and Survey System
- Effort Reporting System®

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Years of Experience

500+

Colleges and universities served

Disclaimer

The views expressed in this presentation are exclusively those of the author, Scott S. Sheffler. They should not be attributed more broadly to Venable LLP or anyone other than Mr. Sheffler.

Agenda

- Litigation as of December 9, 2025
- Potential Uniform Guidance Updates: Executive Order 14332
- Legislative Initiatives
- Questions/Discussion

LITIGATION AS OF DECEMBER 9, 2025

Recall the Rate Caps at Issue

Agency (Issuance Date)	Targeted Grantees (Asserted applicability date)	Nature of Cap	Link to Rate Cap Policy
National Institutes of Health (NIH) (Feb 7, 2025)	All grantees (Immediate effect on all awards for Institutions of Higher Education; Applied only to new awards for all others)	“[S]tandard indirect rate of 15% across all NIH grants for indirect costs in lieu of a separately negotiated rate for indirect costs in every grant”	https://grants.nih.gov/grants/guide/notice-files/NOT-OD-25-068.html
National Science Foundation (NSF) (May 5, 2025)	Institutions of Higher Education (Applied only to new awards made to Institutions of Higher Education)	Rate capped at 15% over MTDC Note: Pending outcome of litigation, new awards contain a term stating that, if NSF prevails in the litigation, NSF will impose the cap. As noted below, however, NSF has lost and withdrawn appeal.	https://www.nsf.gov/policies/document/indirect-cost-rate?_ga=2.120720577.896795908.1757032900-1270759832.1757032900
Department of Defense (DoD) (Jun 12, 2025)	Institutions of Higher Education (Applied to new awards; For existing awards, DoD to renegotiate to rate cap by Nov 10, 2025, or terminate award)	Rate capped at 15%. No base specified, but negotiation procedures of 2 C.F.R. Part 200, Appendix III referenced, implying MTDC.	https://www.cogr.edu/sites/default/files/DoD%20Implementation%20of%20SECDEF%20Indirect%20Cost%20Cap%20Memo%20-%202025-06-12.pdf?_ga=2.247253837.896795908.1757032900-1270759832.1757032900

Recall the Rate Caps at Issue

Agency (Issuance Date)	Targeted Grantees (Asserted applicability date)	Nature of Cap	Link to Rate Cap Policy
Department of Energy (DOE 1) (Apr 11, 2025)	Institutions of Higher Education (Applied only to new awards executed on or after May 8, 2025) (PF 2025-22)	“[S]tandardized 15 percent indirect cost rate for all grant awards to IHEs” Immediately effective in that PF asserts DOE will terminate all inconsistent awards	https://www.energy.gov/management/pf-2025-22-adjusting-department-energy-grant-policy-institutions-higher-education-ihe
Department of Energy (DOE 2) (May 8, 2025)	State/Local, Nonprofit, For-Profit grantees (different rates) (Applied only to new awards executed on or after May 8, 2025) (PF 2025-25 for State/Local; PF 2025-26 for Nonprofits; PF 2025-27 for For-Profits)	Indirect costs + fringe benefit costs capped as percentage of total award amount, including federal and mandatory cost share amounts), as follows: <ul style="list-style-type: none"> • 15% of total award for Nonprofit and For-Profit recipients • 10% of total award for State and Local Government recipients 	https://www.energy.gov/sites/default/files/2025-11/FAL25-05%20%20Indirect%20Cost%20and%20Fringe%20Benefit%20Reimbursement%20Limitations%206-30%20%28revised%29.pdf (Also see Policy Flashes referenced in FAL)

Status of IHE Indirect Rate Cap Litigation

Cap	Case	Status
NIH	Commonwealth of Massachusetts, et al v. National Institutes of Health, et al, Docket No. 25-1343 (1st Cir., filed Apr 09, 2025)	D. Mass. permanently enjoined implementation nationwide. Appeal to the First Circuit underway. Fully briefed before First Circuit. Oral argument took place on November 5. District Court’s permanent injunction currently remains in effect.
NSF	Association of American Universities, et al v. National Science Foundation, et al, Docket No. 25-1794 (1st Cir., filed Aug 15, 2025)	D. Mass. vacated policy. Government appealed to First Circuit. Appellant (government) moved to dismiss appeal on September 26, granted by First Circuit on September 30.
DOD	Association of American Universities, et al v. Department of Defense, et al, Docket No. 25-cv-11740 (D. Mass., filed Jun 16, 2025)	D. Mass. vacated policy through final judgement on October 10. Thus far, no appeal by DoD. Given dismissal in NSF case, perhaps no appeal with be forthcoming.

Status of IHE Indirect Rate Cap Litigation

Cap	Case	Status
DOE 1 (IHE)	Association of American Universities, et al v. Department of Energy, et al, Docket No. 25-1727 (1st Cir., filed Jul 31, 2025)	D. Mass. vacated policy flash and enjoined application. Appeal to First Circuit underway. Appellant’s (government) brief filed September 24. Proceedings suspended during government shutdown. With recommencement of government operations, Appellee’s response brief is due by Dec. 22, with a reply within 21 days thereafter.
DOE 2 (State/ Local)	State of New York, et al v. Department of Energy, et al, Docket No. 25-cv-1458 (D. Or., filed Aug. 15, 2025)	D. Or. Vacated Policy Flash 2025-25 (State/Local Government Cap). Thus far, no appeal by the government. Given dismissal in NSF case, perhaps no appeal with be forthcoming.

Summaries to Convey Key Issues

- DOE State and Local Cap in D. Oregon:

- Plaintiffs successfully challenged Policy Flash 2025-25 (Cap of 10 percent for State and Local Governments) and the relevant portion of Financial Assistance Letter 2025-05
- Summary Judgement
- Challenge under APA, arguing it is contrary to law because inconsistent with 2 C.F.R. § 200.414(c), which provides:

(c) *Federal Agency Acceptance of Negotiated Indirect Cost Rates.* (See § 200.306.)

- (1) Negotiated indirect cost rates must be accepted by all Federal agencies. A Federal agency may 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 the awarding Federal agency in accordance with paragraph (c)(3) of this section.
- (2) The Federal agency must notify OMB of any approved deviations. The recipient or subrecipient may notify OMB of any disputes with Federal agencies regarding the application of a federally negotiated indirect cost rate.
- (3) The Federal agency must implement, and make publicly available, the policies, procedures and general decision-making criteria that their programs will follow to seek and justify deviations from negotiated rates.
- (4) The Federal agency must include, in the notice of funding opportunity, the policies relating to indirect cost rate reimbursement or cost share as approved under paragraph (e). As appropriate, the Federal agency should incorporate discussion of these policies into its outreach activities with applicants before posting a notice of funding opportunity. See § 200.204

Summaries to Convey Key Issues

- DOE State and Local Cap in D. Oregon:
 - Government argues that a cap on a line item is not alteration of indirect cost mechanisms governed by the Uniform Guidance, and further argues that such caps to budget line items are committed entirely to agency discretion
 - Court disagrees, holding that “the regulations [UG] define what costs are allowable and allocable and establish a procedure for determining what costs are reimbursable in what proportions” which provides the Court a meaningful standard to apply in review under the APA
 - Court vacates the PF, holding with respect to plaintiff’s contrary to law argument:
 - The effect of the PF is to override effectiveness of NICRAs. As such, a “deviation” for a “class” of awards must comply with the procedures of 2 C.F.R. § 200.414(c). The Court holds that a “class” cannot be *all awards*.
 - The PF does not provide, as required by § 200.414(c)(3), criteria DOE will use to seek and justify deviations.
 - The PF was not incorporated into FOAs as required by § 200.414(c)(4).
 - The PF would, in some instances, result in forcing a grantee to accept less than the *de minimis* rate in violation of § 200.414(f).
 - To the extent the PF caps fringe costs, it is inconsistent with the Uniform Guidance, which permits recovery of otherwise allowable and allocable fringe costs.
 - By grouping fringe costs with indirect costs for purposes of the cap, the PF essentially forces recipients to treat fringe costs as indirect costs when they can be treated as direct costs.
 - The effective result of the PF is to create a mandatory cost share obligation, which is an item requiring notice in the FOA.

Summaries to Convey Key Issues

- NIH IHE on Appeal in the First Circuit:
 - Government argues that the District Court lacks jurisdiction because the case is fundamentally a contract payment case for which the Tucker Act provides the pertinent jurisdiction at the Court of Federal Claims.
 - Government argues that the NIH guidance is consistent with the requirements of 45 C.F.R. § 75.414(c).
 - Government argues that the NIH guidance is not barred by the NIH appropriation rider that seems generally to prevent changes to NIH indirect rate determination processes. At bottom, the government argues it has followed the existing procedures of § 75.414(c), so it has not violated the appropriation rider.

POTENTIAL UNIFORM GUIDANCE UPDATES:

**EXECUTIVE ORDER 14332 – IMPROVING OVERSIGHT OF
FEDERAL GRANTMAKING**

EO 14332 (Aug. 7, 2025)

Improving Oversight of Federal Grantmaking

High-level Policy Provisions:

- Directs agency heads to designate a senior official to be directly involved in review of Funding Opportunity Announcements (FOAs) and discretionary awards “for consistency with agency priorities and the national interest.”
- Asserts that “[d]iscretionary awards must, where applicable, demonstrably advance the President’s policy priorities.”
- Asserts a long-term coordinating role in individual agency grant-making processes.
- Instructs that research awards should focus on demonstrated commitment to “rigorous, reproducible scholarship” and not focus on institutional historical reputation.

EO 14332 (Aug. 7, 2025)

Improving Oversight of Federal Grantmaking

Uniform Guidance Updates Forthcoming:

- OMB to revise the Uniform Guidance, 2 C.F.R. Part 200, to add an express regulatory basis for terminating awards for convenience, including when awards no longer effectuate agency priorities.
- ***OMB to revise the UG to “appropriately limit the use of discretionary grant funds for costs related to facilities and administration.”***
- Agency heads to review existing grants to assess extent to which contain termination for convenience provisions, and ensure new awards include such terms.
- Agency heads to ensure “affirmative authorization” by agencies incorporated into drawdown process and “require grantees to provide written explanations or support, with specificity, for each drawdown.”

Venable LLP Client Alert: <https://www.venable.com/insights/publications/2025/08/how-the-latest-executive-order-reshapes-federal>

LEGISLATIVE INITIATIVES (As of December 9, 2025)

National Defense Authorization Act 2026

Conferenced Bill Text, Dec. 7, 2025 (Per House Armed Services Committee):

1 **SEC. 230. PROHIBITION ON MODIFICATION OF INDIRECT**
2 **COST RATES FOR INSTITUTIONS OF HIGHER**
3 **EDUCATION AND NONPROFIT ORGANIZA-**
4 **TIONS.**

5 (a) PROHIBITION.—The Secretary of Defense may
6 not change or modify indirect cost rates (otherwise known
7 as facilities and administration cost rates) for Department
8 of Defense grants and contracts awarded to institutions
9 of higher education and nonprofit organizations (as those
10 terms are defined in part 200 of title 2, Code of Federal
11 Regulations) until the Secretary makes the certification
12 described under subsection (b).

National Defense Authorization Act 2026

13 (b) CERTIFICATION.—A certification under this sub-
14 section is a certification to the congressional defense com-
15 mittees that the Department of Defense—

16 (1) working with the extramural research com-
17 munity, including representatives from universities,
18 university associations, independent research insti-
19 tutes, and private foundations, has developed an al-
20 ternative indirect cost model that has—

21 (A) reduced the indirect cost rate for all
22 applicable institutions of higher education and
23 nonprofit organizations (compared to indirect
24 rates for fiscal year 2025); and

25 (B) optimized payment of legitimate and
26 essential indirect costs involved in conducting
1 Department of Defense research to ensure
2 transparency and efficiency for Department of
3 Defense-funded grants and contracts; and

4 (2) established an implementation plan with
5 adequate transition time to change budgeting and
6 accounting processes for affected institutions of
7 higher education and nonprofit organizations.

Department of Commerce, NASA and National Science Foundation Appropriation Bill (Senate Version, S. 2354)

10 SEC. 542. In making Federal financial assistance, the
11 Department of Commerce, the National Aeronautics and
12 Space Administration, and the National Science Founda-
13 tion shall continue to apply the negotiated indirect cost
14 rates for Institutions of Higher Education in section
15 200.414 of title 2, Code of Federal Regulations, including
16 with respect to the approval of deviations from negotiated
17 indirect cost rates, to the same extent and in the same
18 manner as such negotiated indirect cost rates were applied
19 in fiscal year 2024: *Provided*, That none of the funds ap-

20 propriated in this or prior Commerce, Justice, Science,
21 and Related Agencies Appropriations Acts, or otherwise
22 made available to the Department of Commerce, the Na-
23 tional Aeronautics and Space Administration, and the Na-
24 tional Science Foundation may be used to develop, modify,
1 or implement changes to such fiscal year 2024 negotiated
2 indirect cost rates.

Notes:

- Not passed Senate, no action since July ([link](#))
- House version (H.R. 5342) does not appear to contain same language; Not yet passed House and no action since September

Department of Defense Appropriation Bill (Senate Version, S. 2572)

19 SEC. 8123. In making Federal financial assistance,
20 the Department of Defense shall continue to apply the ne-
21 gotiated indirect cost rates for Institutions of Higher Edu-
22 cation in section 200.414 of title 2, Code of Federal Regu-
23 lations, including with respect to the approval of devi-
24 ations from negotiated indirect cost rates, to the same ex-
25 tent and in the same manner as such negotiated indirect
1 cost rates were applied in fiscal year 2024: *Provided*, That
2 none of the funds appropriated in this or prior Depart-
3 ment of Defense Appropriations Acts, or otherwise made
4 available to the Department of Defense may be used to
5 develop, modify, or implement changes to such fiscal year
6 2024 negotiated indirect cost rates.

Notes:

- Not passed Senate, no action since July ([link](#))
- House version (H.R. 4016):
 - Does not appear to contain same language
 - Passed House on July 18
 - Possible progress toward consideration of House version in the Senate as of early December ([link](#))

Labor, HHS, Education, and Related Agencies Appropriation Bill (Senate Version, S. 2587)

13 SEC. 224. In making Federal financial assistance, the
14 provisions relating to indirect costs in part 75 of title 45,
15 Code of Federal Regulations, including with respect to the
16 approval of deviations from negotiated rates, shall con-
17 tinue to apply to the National Institutes of Health to the
18 same extent and in the same manner as such provisions
19 were applied in the third quarter of fiscal year 2017. None
20 of the funds appropriated in this or prior Acts or otherwise
21 made available to the Department of Health and Human
22 Services or to any department or agency may be used to
23 develop or implement a modified approach to such provi-
24 sions, or to intentionally or substantially expand the fiscal
25 effect of the approval of such deviations from negotiated

1 rates beyond the proportional effect of such approvals in
2 such quarter.

Notes:

- Not passed Senate, no action since July ([link](#))
- House version (H.R. 5304): *See next slide.*

Labor, HHS, Education, and Related Agencies Appropriation Bill (House Version, H.R. 5304)

Notes:

- Not passed House, no action since September (link)
- Does not contain language from above slide (S. 2587) re indirect rate caps.
- However, does contain the language to the right.
- The language to the right also appeared in the House version of the Labor, HHS, Education, and Related Agencies Appropriations Bill for FY25 (H.R. 9029, Sec. 237), but the bill was never enacted, with a Continuing Resolution funding these agencies in FY25 instead.

16 SEC. 235. None of the funds made available by this
17 Act to the National Institutes of Health may be used for
18 facilities and administration costs (as defined in section
19 200.414 of title 2, Code of Federal Regulations) that ex-
20 ceed 30 percent of an award to an applicable educational
21 institution that is an organization subject to taxation
22 under section 4968 of the Internal Revenue Code of 1986.

Scope:

- IRC (26 U.S.C.) § 4968 generally applies to IHEs with at least 3,000 tuition-paying students located in the U.S. and endowments of \$500,000 or more per student.

Tool to Stay Apprised of Appropriations Status

Appropriations
 Status Table
 maintained at
 Congress.gov:
<https://www.congress.gov/crs-appropriations-status-table>

Appropriations Status Table

Regular Appropriations Continuing Resolutions											
Appropriation Bills	Subcommittee Approval		Committee Approval		Initial Passage		Resolution of House-Senate Differences			Presidential Approval	
	House	Senate	House	Senate	House	Senate	Conference Report	House	Senate		
FY2026 Continuing Appropriations, Agriculture, Leg. Branch, MCVA and Extensions Act H.R. 5371 See [+] Notes								See (+) note	222-209 11/12/2025 See (+) note	60-40 11/10/2025 See (+) note	P.L. 119-37 11/12/2025
Notes +											
Agriculture H.R. 4121 S. 2256 CRS 48564 See [+] Notes	9-7 06/05/2025		35-27 06/23/2025 H.Rept. 119-172	27-0 07/10/2025 S.Rept. 119-37 See (+) note		See (+) note [See also entry for H.R. 3944 below]		See (+) note See entry for H.R. 5371 See (+) note		P.L. 119-37 11/12/2025	
Notes +											
Commerce-Justice-Science H.R. 5342 S. 2354 CRS R48643 See [+] Notes	9-6 07/15/2025	(voice vote) 07/09/2025	34-28 09/10/2025 H.Rept. 119-272	19-10 07/17/2025 S.Rept. 119-44 See (+) note							
Notes +											
Defense H.R. 4016 S. 2572 See [+] Notes	(voice vote) 06/10/2025		36-27 06/12/2025 H.Rept. 119-162	26-3 07/31/2025 S.Rept. 119-52	221-209 07/18/2025 Special Rule H. Res. 580						



QUESTIONS / DISCUSSION

Committed to Your Success

As a law firm of more than 900 professionals, Venable delivers legal services globally in every area of regulatory compliance, government affairs, corporate and business transactions, intellectual property, and complex litigation. But no matter the practice, we are united by our passion for the work, all meant to empower you, our client, to be the best version of yourself in any circumstance. Because it's not about us; it's about you – your priorities, your goals, your long list of *what-ifs* that keep you up at night. That's just our to-do list. That's what keeps us focused – your success.

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Attorneys and advisors

125

Years
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15

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