

Negotiating Research Grant Agreements with Universities and Research Institutions

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The information set forth in this outline should not be considered legal advice, because every fact pattern is unique. The information set forth herein is solely for purposes of discussion and to guide practitioners in their thinking regarding the issues addressed herein. Nonlawyers are advised to consult an attorney before undertaking issues addressed herein.

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I. INTRODUCTION

Private foundations frequently provide funds to universities in furtherance of their charitable or otherwise exempt purposes. Funds are provided for various reasons, including supporting academic research projects; funding chairs or professorships or otherwise supporting the quality of academic teaching; obtaining academic expertise in foundation programs, initiatives, or research; supporting capital campaigns or facility development (including athletic support); and providing funding for scholarship or loan programs. This list is certainly not exhaustive, but most foundation grants will fall somewhere within this spectrum. Foundation support for these categories can be documented in a number of different formats. Because the majority of universities supported by foundation grants are nonprofit institutions organized as public charities or are state institutions, no special expenditure responsibility is required. Accordingly, a foundation may simply provide a check to the university in response to a university request to support one of these categories. Likewise, a foundation may provide funding with a letter indicating its intent for the use of the funds. Further down the spectrum, a foundation may provide funding with a gift agreement that restricts funding to be used for specific purposes, provides the foundation with limited rights to reports demonstrating the funds have been used for such purposes, and is countersigned by the university. Finally, funds may come from the foundation requiring specific actions by the university with respect to use of the funds and reporting on the funds. This latter category is particularly important in the funding of academic research. This paper will consider this latter category of grant agreements in the context of academic research, examining where negotiations often take place between the foundation and the university or nonprofit research institution.

II. DISTINGUISHING GRANTS FROM GIFTS

Private non-operating foundations primarily accomplish their charitable purposes by distributing assets to others to be used for purposes that further the foundations' purposes. In fact, Section 4942 of the Internal Revenue Code mandates that private non-operating foundations generally distribute at least five percent of the aggregate fair-market value of their assets on an annual basis in qualifying distributions.¹ Often, these qualifying distributions are in the form of distributions to public charities, including universities. From the foundation perspective, whether a distribution is referred to as a gift or a grant (or a donation) is not an area of focus. Many foundations use these terms interchangeably. The focus of the foundation is making a qualifying distribution under Section 4942. However, in the university and research institution context, gifts are treated differently from grants, and therefore it is worthwhile for a private foundation to understand how the dynamics play out from a university perspective, as this distinction will affect negotiations.

From a pure definitional standpoint, Black's Law Dictionary defines a gift as "[a] voluntary transfer of property to another made gratuitously and without consideration."² A donation is defined as "[a] gift."³ On the other hand, a grant is simply "[a] conveyance; *i.e.*

¹ IRC § 4942; Reg. § 53.4942(a)-3(a)(2).

² See BLACK'S LAW DICTIONARY, 6th ed.

³ See *id.*

transfer of title by deed or other instrument.”⁴ In the foundation context, a grant is a distribution to another organization such that the distribution furthers the exempt purposes of the granting foundation. Where the distribution is made to a public charity (such as a university), the distribution enables the public charity to fulfill its own charitable purposes. These types of distributions by a foundation (whether called a gift, grant, or donation) are all given voluntarily and all satisfy the general definition of a gift. From the foundation standpoint, they are merely to be distinguished from a contract for services. For example, a contract for services is one that would primarily benefit the foundation’s own programs, such as engaging a consultant (which could include an academic at a university or research institution) to perform an evaluation or prepare a report to be used by the foundation itself.⁵

As distinguished from the foundation view, the university (or nonprofit research institution) is focused on the question of whether the distribution constitutes a gift or a grant (or a contract for services), as this determination will guide the internal processes of the university with respect to the persons/departments who must review and approve the transaction, the terms of the transaction, and the type of fee/overhead charge to be related to the transaction. Within the university environment, a gift is a distribution given voluntarily with no (or very few) contractual requirements. It is an irrevocable distribution that requires no deliverables, grants no rights in intellectual property, and has no specific statement of work (though it may be restricted to an area of research or even a project proposed by the researcher). A gift often includes a description or explanation of the intent of the donor; however, the specific method of implementing that intent as well as the specific ways in which the funds are used is left to the discretion of the university. Gifts require a different type of reporting (if they require any reporting at all), with the reporting intended to demonstrate that the gift is being used consistently with the intent of the donor as opposed to a type of reporting that would be more akin to a right to audit with a specific examination of expenditures. Gifts typically do not have a fixed time limit related to the research to be done because the methodology of carrying out the research is left to the discretion of the university and because there is no ability of the donor to recoup the funds that have been given (as they have been irrevocably and gratuitously transferred). A foundation making what a university would consider to be a gift will be most concerned with specifying the purpose of the gift (capital gift, scholarship, endowed chair, etc.), obtaining an acknowledgement of the transfer for its records, having an agreement regarding the use of its name and any public acknowledgement, any right by the university to modify the use of the funds (and under what circumstances), and what, if any, gift fee will be charged by the university against the distribution for “administrative” purposes. These types of gifts are generally coordinated through a university’s development office or affiliated foundation.

On the other hand, what a university considers a grant may start with the development office/affiliated foundation but will typically not remain there. These types of distributions generally follow a specific statement of work and require that work to be done within a specific performance period. The foundation is generally granted rights to inspect the books and records (audit) of the university related to use of the funds and is further provided detailed progress reports. Grant agreements often include obligations on the part of the university to return any balance of the distribution that is not used for the specific purpose for which it is given. A

⁴ *See id.*

⁵ *See, e.g.,* www.mott.org/grantsandguidelines/forgrantees/patriotact/grantsvscontracts (last visited April 6, 2015).

growing area of interest for grant agreements is dealing with intellectual property. Where intellectual property will be shared or granted to the foundation (whether through a license or otherwise), the university will typically consider the distribution to be a grant. Rather than a gift fee, a grant typically involves some payment of overhead expenses of the university/principal investigator, though the overhead may be built into the grant amount.

The determination of whether a distribution constitutes a gift or a grant is not always clear. In such instances, the university will generally look at the agreement as a whole and make a determination of how to process the proposed distribution. Rather than concerning itself with whether a particular distribution is a gift or a grant, the foundation should be concerned with whether documentation of the distribution satisfies the needs of the foundation with respect to the particular distribution. Is the foundation looking only to make a transfer of funds with no further follow-up? Is the foundation interested in funding a research proposal of an academic and receiving reports on that funding but flexible in the time period and methods used by the investigator? Is the foundation desirous of receiving a share of any royalties generated as a result of the study the foundation is funding? Does the foundation want the ability to recoup any funds not used for the project? These questions drive the foundation's view of what ought to be in the agreement; nevertheless, it is useful to understand that the more the foundation seeks an exchange for the distribution, the more likely the university will consider the distribution a grant with the result typically being the university will have specific concerns that it will seek to negotiate around the agreement.

III. PRELIMINARY ISSUES

As a preliminary matter, a foundation should understand that there is no one-size-fits-all approach to grant agreements with universities and research institutions. Each foundation is different, each university/research institution is different, and each project is different. Nevertheless, a foundation is well advised to have its own grant agreement with language that has been approved and considered by the foundation board. It is to be expected that universities and research institutions will have comments, and typically propose revisions, to the foundation's standard agreement. In the same way, universities will often have a standard agreement, and the foundation should consider how the terms of the university's standard agreement vary from the foundation's position.

A good first step in negotiating a research grant agreement with a university or research institution is understanding the values, goals, and cultures of each party. What are the foundation's priorities? What are its values? How will this particular proposed grant further the foundation's priorities and values? The foundation should be able to answer these questions as it moves forward with proposed funding of the grant. For instance, the foundation may be most interested in providing funding toward the development of a new drug to improve the quality of life of individuals suffering with a particular disease. A foundation with this priority will approach its negotiations differently than a foundation that is interested in providing funding for the creation of new educational software for elementary schools. Likewise, a foundation funding translational research will generally approach funding differently than a foundation proposing to fund basic research. The types of research studies to be done will differ, the types of indemnification to be provided will differ, and the intellectual property issues will most often

differ. Likewise, the foundation should understand where the university falls with respect to these issues of its values, goals, and cultures. Universities are first and foremost academic institutions, and furthering education through the ability to publish is critical to university life. The value that a particular university puts on its ability to commercialize intellectual property generated by university staff will color the university's approach to negotiating over intellectual property. These are simply examples of some of the ways in which the uniqueness of the parties will impact the agreement.

In addition to understanding the values, goals, and cultures of the parties and what is to be accomplished by the funding, it is worthwhile to consider the individuals who will be involved in the negotiation process. From the foundation side, this will depend upon the structure of the foundation. The players will certainly include the board of directors, who will have final approval over the grant terms, but may also include staff members (where the foundation has staff) and legal counsel. Those individuals will have varying levels of interest in specific terms of the agreement. Likewise, the university personnel will have varying levels of interest in specific terms of the agreement. The university will involve its academic (researcher, principal investigator, etc.), who will be concerned with the statement of the work, the ability to publish, and the levels of funding, among other things. The university will also include the officer of general counsel and often its technology transfer office, who will be focused on issues concerning indemnification, intellectual property, and dispute resolution issues, among other matters. The office of university president (or its delegee, which may include the dean of the appropriate school) may be most interested in negotiation of the administrative fees. Understanding the individuals who will be involved, their roles, and where they are likely to focus their attention will help in speeding the process of negotiation by allowing the foundation to drill down to the relevant areas with the relevant parties.

Finally, a word should be said regarding the method of negotiation. Most frequently, a representative of the foundation (a board member or a staff member) will initially work with the academic or principal investigator around a potential proposal. That may be written up in a brief statement of work that is a nonbinding summary of the discussions. As the proposal progresses, a grant agreement will be created that is effectively a contract between the foundation and the university or research institution. It is the author's experience that working from the foundation's grant agreement will provide a more favorable outcome than beginning with the university's or research institution's standard agreement. The foundation has taken the time to determine what terms it should offer in its grant agreements. It is the foundation providing the funding. While the foundation should be sensitive to proposed revisions from the university understanding that the university is undertaking obligations (see above discussion of distinguishing gifts from grants), the foundation should keep in mind that it, too, is a charitable organization with an obligation to fulfill its charitable purposes and to seek to maximize its charitable dollars. Beginning with its grant agreement and being willing to negotiate terms while understating that ultimately it has the freedom to choose not to fund a particular grant allows the foundation the greatest flexibility.

IV. PRIMARY ISSUES IN GRANT NEGOTIATIONS

A. INDEMNIFICATION

Indemnification is one of the most frequently negotiated provisions in a foundation research grant agreement. Unlike an agreement between a for-profit sponsor and a university where the university is seeking significant levels of indemnification, in the foundation grant context it is most typically the foundation that is seeking the indemnification. The starting point is understanding the type of research being funded (such as basic research, translational research, etc.), what roles each party is playing in the conduct of the research, and what each party is getting out of the conduct of the research. These answers will in turn provide the framework for who will be indemnifying whom, the parties who will be privy to the indemnity, what types of claims and losses will be covered, and related issues.

A foundation will most often view itself as a passive funder. It typically has not created the project or the protocol to be used in conducting the research and thus it has a very limited role in the conduct of the project and research. Lacking control, the foundation should not be expected to provide indemnification. The foundation may or may not desire to have access to the results of the research or intellectual property resulting from the research (the discussion that will be addressed below); however, where the foundation is granted rights in the results of the research, it is reasonable for the foundation to be asked to provide an indemnity for its use of the research (use of the intellectual property, use of the reports, etc.). A more extensive scope of indemnification is not warranted. On the other hand, the foundation will want to be indemnified by the university against claims arising as a result of the university's conduct. Again, where the foundation has primarily served as a passive funder providing only funding or proprietary materials with little direct benefit to the foundation, it is reasonable for the foundation to seek indemnification from the university.

When negotiating with a state institution for indemnification, the foundation must be aware of the constitutional limitations on the ability to provide indemnification. Many state constitutions view the provision of indemnification as an unfunded liability and prohibit such agreements. Before agreeing to indemnification "as allowed by law," the foundation should understand what that particular state's law says about indemnification and the waiver of sovereign immunity and negotiate around those provisions.⁶

If it is not possible to get full indemnity as a result of state constitutional issues or because the university will not change its position, the foundation may want to consider as an alternative a provision that specifies that each party is responsible for the actions of its own employees, its conduct, and its use of the results. In such instance, the foundation is advised to consider what insurance is available for any potential claims. Ultimately, the foundation should view indemnification for what it is, a business and risk exposure issue. Rather than having a

⁶ An issue that can come up when negotiating with a state university relates to control or full cooperation with defense of a claim. Should the foundation be providing indemnity and request control of the defense or full cooperation with the defense, this will need to be "as allowed by law" as some states (such as Texas) provide that the attorney general has a duty to defend state institutions.

nonnegotiable rule, a foundation should consider its likelihood of exposure and tailor its negotiations accordingly.

Sample Indemnification Clauses

- ◆ Grantee shall defend, indemnify, and hold Foundation, its directors, officers, employees, and agents harmless from and against any and all liability, loss, expense (including reasonable attorneys' fees), or claims for injury or damages arising out of its performance of this Agreement but only in proportion to and to the extent such liability, loss, expenses, attorneys' fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of Grantee, its officers, agents, or employees.
- ◆ Grantee shall indemnify and hold Foundation harmless against any and all claims, demands, damages, liabilities, and costs incurred by Foundation which directly or indirectly result from, or arise in connection with, any negligent act or omission of Grantee, its agents, or employees, pertaining to its activities and obligations under this Agreement. Foundation shall indemnify and hold Grantee, its Trustees, officers, agents, and employees harmless against any and all claims, demands, damages, liabilities, and costs which directly or indirectly result from, or arise in connection with, any negligent act or omission of Foundation, its agents, or employees, pertaining to its activities and obligations under this Agreement or from Foundation's use of the results of the Research Project.
- ◆ Foundation agrees to indemnify and hold Grantee, its Trustees, officers, agents, and employees harmless from any liability, loss, or damage they may suffer as a result of claims, demands, costs, or judgments against them arising out of use by Foundation of the results obtained from the activities performed by Grantee under this Agreement; provided, however, that any such liability, loss, or damage resulting from the following Subsections "a" or "b" is excluded from this Agreement to indemnify and hold harmless:
 - a. the negligent failure of Grantee to substantially comply with any applicable governmental requirements; or
 - b. the negligence or willful malfeasance of any Trustee, officer, agent, or employee of Grantee.
- ◆ The indemnified party shall give notice to the indemnifying party promptly upon receipt of written notice of a claim for which indemnification may be sought under this Agreement, provided, however, that failure to provide such notice shall not relieve indemnifying party of its indemnification

obligations except to the extent that the indemnifying party's ability to defend such claim is materially, adversely affected by such failure. The indemnifying party shall not make any settlement admitting fault or incur any liability on the part of the indemnified party without the indemnified party's prior written consent, such consent not to be unreasonably withheld or delayed. The indemnified party shall cooperate with the indemnifying party in all reasonable respects regarding the defense of any such claim, at the indemnifying party's expense. The indemnified party shall be entitled to retain counsel of its choice at its own expense. In the event a claim falls under this indemnification clause, in no event shall the indemnified party compromise, settle, or otherwise admit any liability with respect to any claim without the prior written consent of the indemnifying party, and such consent not to be unreasonably withheld or delayed.

Alternative to Indemnification

- ◆ It is understood and agreed that neither party to this Agreement shall be liable for any negligent or wrongful acts, either of commission or omission, chargeable to the other unless such liability is imposed by law. This Agreement shall not be construed to seeking to either enlarge or diminish any obligation or duty owed by one party against the other or against a third party.

B. INTELLECTUAL PROPERTY

Depending on the type of grant being awarded, intellectual property negotiations can be the most difficult aspect of the negotiations. This is particularly true when the foundation is making an award to further research in a particular field that may lead to a commercialized product, such as a new drug therapy. As disease funder foundations, such as the Cystic Fibrosis Foundation, have brought increased attention to the field of venture philanthropy, the issue of intellectual property has taken on a heightened role, with many foundations now having an intellectual property policy that may or may not be entirely consistent with the intellectual property policy of the university with whom they are negotiating.⁷ Intellectual property issues worth noting for negotiations include ownership of the intellectual property, licensing rights, march-in rights, royalty sharing, and rights in background intellectual property.

1. *Ownership of Intellectual Property*

With respect to ownership, it is almost always the case that the university will own the intellectual property developed from the funded research. Ownership of the intellectual property

⁷ Issues of intellectual property in venture philanthropy are more central in foundation funding of for-profit labs that are conducting translational research; however, even in the university setting these issues have become an important part of negotiations.

reflects that the transaction is not a fee for service transaction where the work product is to be owned by the customer but rather is funded research with the intellectual property available to the university for future research projects as well as for publication, a key concern of universities.⁸ Universities may be willing to divide ownership of intellectual property, allowing the foundation ownership of intellectual property associated with proprietary materials provided by a foundation or a protocol provided by a foundation that is being tested; however, these are unusual situations in the foundation-sponsored research context as compared to the industry-sponsored research context. More typically, a foundation is less interested in ownership of the intellectual property than in the right to use the intellectual property for internal purposes and the right to see that the intellectual property is disseminated for the public good. These concerns can often be met while allowing the university to maintain ownership of the intellectual property.

Sample Ownership of Intellectual Property Clauses

- ◆ Title to “intellectual property” defined as intellectual property rights, including patents, patent application, trade secrets, trademarks, copyrights, discoveries, inventions, improvements, developments, drawings, and any medium that is made, conceived, developed, or reduced to practice by Grantee which result from or relate to the research or which are funded in whole or in part by Foundation shall reside with Grantee.
- ◆ Title to any invention shall reside in Grantee pursuant to Grantee’s patent policy, unless otherwise indicated or requested by Grantee. If Grantee has no established patent policy or if Grantee does not claim rights under its patent policy, Foundation shall have the right to determine the disposition of Invention rights and, in consultation with Grantee, to take any steps it deems necessary to protect legal rights in the Invention.
- ◆ The data and results derived from the grants shall be the joint property of Grantee and Foundation; however, neither party will be required to report or account to the other for its use of data and results, and each shall be free to use data and results for any lawful purpose.

2. *Licensing of Intellectual Property*

Foundation access to and use of the intellectual property can most easily be accomplished through a licensing arrangement whereby the university (as owner of the intellectual property) grants the foundation a nonexclusive royalty-free license (NERF) for non-commercial use. A non-commercial NERF license allows the foundation access to the intellectual property without paying any further royalty. At the same time, it is non-exclusive, meaning the university, as owner, can license the intellectual property to another. A non-commercial NERF license is

⁸ See Section V.D.

consistent with the funding being that of grant funding as opposed to fee-for-service and allows the university to maintain ownership for purposes of future research and publication while allowing the foundation the right to use the intellectual property internally for research purposes without the fear of violating another party's intellectual property rights.⁹ An issue that can arise when a foundation is granted a non-commercial NERF (whether the foundation is seeking to use the resulting intellectual property or is seeking to sub-license the resulting intellectual property to other researchers) is the issue of background intellectual property rights. Essentially, background intellectual property is intellectual property owned by the university or another third party that exists separate and apart from the foundation-funded research but is necessary to use the intellectual property that is created from the foundation-funded research. Universities are reluctant to grant background intellectual property rights, as it requires careful consideration of obligations the university may have to other parties. However, where background intellectual property will be necessary, the foundation should seek access to background intellectual property for non-commercial research purposes as necessary to utilize the foundation-funded intellectual property.

The foundation may wish to ensure that it has the ability to sub-license the subject intellectual property to other researchers (typically also at no cost or only transfer cost) to allow the foundation the ability to get the intellectual property into the hands of other researchers who may advance the research in other ways. When sub-licensing is involved, the foundation should anticipate that the university will seek to protect its right to be first to publish the intellectual property generated as a result of its research.

Sample Licensing of Intellectual Property Clause

- ◆ With respect to intellectual property, Foundation shall have a non-exclusive, irrevocable, paid-up, royalty-free license for non-commercial, internal, research purposes (with right to sublicense through multiple tiers) only.

Sample Background Intellectual Property Clause

- ◆ In the event that Grantee owns or licenses any intellectual property rights that are necessary to practice or use the invention and are not part of the invention (Related IP Rights), Grantee hereby grants Foundation a non-exclusive, irrevocable, paid up, royalty-free license (with right to sublicense through multiple tiers) to practice and use such Related IP Rights solely to the extent necessary to practice and/or use the invention as permitted in this agreement.

⁹ Note that if a NERF is granted, the foundation should anticipate that the university will request indemnification from the foundation with respect to the foundation's use of the intellectual property.

3. *March-In Rights*

Accepting a license while allowing the university to maintain ownership of the intellectual property results in the patenting, commercialization, and publication of the data being left to the university. The university may not have the same priorities as the foundation, and these issues may not be effectively accomplished. An alternative for the foundation to consider is to seek march-in rights (sometimes referred to as an interruption license). March-in rights are rights to “march in” in the event the grantee or its licensee fails to take effective steps under reasonable circumstances to bring an invention (however that might be defined) to practical application within a specified time period. These rights may go so far as to allow a cancellation of an exclusive license and assignment of the invention back to the foundation.

March-in rights are a part of the Bayh-Dole Act allowing the federal government march-in rights for certain defined reasons.¹⁰ As a result, universities are familiar with the concept. However, universities are extremely reluctant to agree to any significant march-in right, arguing that such rights make it very difficult for the university to license the intellectual property to a third party for commercialization purposes, as the licensee does not want to risk expending significant funds while a third party (here, the foundation) has the right to march in and cancel the exclusive license if commercialization has not occurred on a timeline agreed to between the foundation and the university. Where a foundation is providing a grant to a university that will in turn license any created intellectual property, such march-in rights are difficult to negotiate.

There are steps that are within the umbrella of march-in rights that can be used by a funder to help ensure that the intellectual property is appropriately commercialized for the public benefit. For example, a foundation may negotiate certain diligence provisions toward licensing the intellectual property for commercialization and may have the university keep the foundation informed (through annual reporting or otherwise) on its exercise of diligence and progress in licensing the intellectual property. This does not grant the foundation the right to “march in” with respect to a third party, but allows the foundation remedies to the extent the university fails to exercise diligence in seeking to license the intellectual property. Those remedies may include an assignment of the intellectual property to the foundation so that it can seek to license the intellectual property. The goal is not to take the intellectual property (as the foundation is typically not going to be in the business of seeking licensing partners) but to have the ability to spur on the university towards commercialization, which is in furtherance of the foundation’s mission as well as the university’s. Likewise, while most universities will themselves seek diligence provisions in their licensing agreements with third parties, the foundation may wish to have the ability to review and approve any exclusive licensing agreements of the intellectual property created by the foundation’s funding. Review and approval rights allow the foundation to ensure appropriate diligence provisions are included as well as the ability to consider the appropriateness of the party receiving the exclusive license based on its history, capacity, etc. Alternatively, a foundation may require that diligence provisions be included in license agreements without a right to review and approve the license agreements. This alternative would result in the university having greater flexibility in entering into licensing agreements (because it does not require foundation approval) but allows the foundation to retain a remedy for breach of contract in the event the university fails to include diligence provisions.

¹⁰ See 35 U.S.C § 200 et seq.

Related to the issue of march-in rights is a provision requiring the university to diligently pursue patent protection (where appropriate) and, if the university abandons such pursuits, give notice to the foundation and offer to assign to the foundation the intellectual property for purposes of appropriately protecting the intellectual property. Rather than an issue of commercialization, the issue here is appropriate protection of the intellectual property. As with the interruption license/march-in rights described above, the goal is not to have to use this right but to have the right in the event it must be used.

Sample March-In Rights Clauses

- ◆ Grantee agrees that it, or its designee, or licensee shall take commercially reasonable steps to bring the Invention to practical application or commercial application in a reasonable period of time (based upon the type of Invention) after issuance of a patent or other clear determination of commercial value. Additionally, Grantee agrees that if it, its designee, or its licensee has not taken effective steps within ('x' amount of time), or whatever longer time is reasonable under the circumstances, after a United States Patent issued on an Invention left for administration to Grantee, to bring that Invention to the point of practical application and has not made such Invention available for licensing royalty-free or on terms that are reasonable under the circumstances, and cannot show cause why it should retain all rights, title, and interest for a further period of time, Foundation shall have the right to require: (1) assignment of said patent to Foundation; (2) cancellation of any outstanding exclusive licenses under said patent; and (3) granting of licenses under said patent to an applicant on a non-exclusive, royalty-free basis or on terms that are reasonable under the circumstances.
- ◆ No patent or patent application shall be abandoned without ('x' amount of time) prior notification by Grantee or Inventor(s) to Foundation and offering to assign to Foundation all rights, titles, and interests to the Invention to the extent permitted by law.
- ◆ Grantee agrees that if it licenses an Invention to another party for commercialization, such license agreement shall include an obligation on the part of the licensee to exert its best efforts to commercialize the Invention in a diligent manner and meet appropriate diligence requirements and concrete development milestones to avoid termination of the license. Grantee further agrees it shall monitor performance of the licensee relative to such requirements and milestones.

4. *Royalty Sharing*

Aside from access to the intellectual property through a licensing agreement or the ability to spur the university towards commercialization of the intellectual property is the question of the extent to which the foundation, as funder, should share in any royalties resulting from the intellectual property created by the foundation-funded research. A critical issue in this regard is arriving at an equitable figure, which may be stated as a flat-rate, a multiple of sales, or a percentage of the net proceeds allocable to the invention resulting from the foundation's funding (any of the foregoing of which could be capped). The goal is achieving an equitable solution considering all of the factors leading to the invention. For example, while a foundation may have provided only twenty-five percent of the funding, that twenty-five percent may have been the initial seed capital and receive what is, in effect, a preferred return. On the other hand, the university may already have agreements with other parties that impact on the sharing allocation. Finally, a foundation should recognize what the university has invested (through facilities, resources, etc.), which the overhead charge paid by the foundation will rarely cover. For example, the University of Pennsylvania has guidelines specifying that royalties will only be shared where the foundation has paid for all facility and administrative costs associated with the research project, including the effort of the principal investigator, or has agreed that the royalty sharing will only begin after the facilities and administrative costs have been subtracted from the sponsor's share and provided to the university.¹¹ Alternatives include seeking a royalty that is a multiple of the grant, seeking a royalty as a percentage of net sales, seeking bonus royalties for certain thresholds that are reached, etc. An excellent overview of royalties and monetization (though more focused on grant awards made to for-profit pharmaceutical companies) can be found at *Venture Philanthropy Legal Report Spring 2012 #3: Everything You Ever Wanted to Know About Royalties and Their Monetization but Were Afraid to Ask* (available at schanerlaw.com/wp-content/uploads/2014/07/SLPLLC_Spring_2012.pdf, last accessed April 7, 2015).

Sample Royalty Sharing Clause

- ◆ Grantee agrees to share net royalty income with Foundation based upon the proportionate amount of funding Foundation contributed to the development of the Invention. Net Royalty Income shall mean gross income from the commercialization of the Invention minus patent expenses, inventor distributions, and mandatory distributions under Grantee policy. Such sharing will begin once Net Royalty Income exceeds \$500,000.00.

C. CONFIDENTIALITY

Confidentiality provisions may not be present in every grant agreement. The purpose of a confidentiality provision is to preserve the confidential information of the disclosing party.

¹¹ See Guidelines on Foundation Intellectual Property Issues (upenn.edu/researchservices/pdfs/ngoip-guide.pdf, last accessed April 7, 2015).

Depending upon the nature of the research being conducted, the role of the foundation in working with the university in developing the research structure, and whether some sort of research consortium exists, either side may be providing confidential information. Confidentiality concerns are primarily present for the foundation when the foundation is providing some sort of confidential or proprietary materials to the university to be used as a part of the research. In such instance, the foundation will want to ensure that its confidential information remains confidential.¹² As an example, consider a foundation that is focused on furthering academic research on a particular topic and works with multiple researchers. To the extent the foundation has internally generated its own confidential materials or has received confidential materials from one of the researchers (such as through a NERF license), it is imperative that the foundation maintain confidentiality of such materials. The issue may also be the ongoing or real-time sharing of materials between foundation-funded researchers at the request of the foundation (such as in a funder-created consortium). To ensure that researchers are willing to share information as a part of a more global project, confidentiality concerns must be addressed. The foundation's goal of maintaining confidentiality is to protect its rights and its confidential information and to provide assurance to the university (and any other "sharing" researchers) that shared intellectual property will be kept confidential (though typically not for any type of commercialization purposes). Further, the foundation wants to protect itself against claims that it breached confidentiality agreements that it had with other parties by ensuring shared confidential information remains confidential.

Universities want to ensure their confidential information is protected, enabling them to appropriately pursue patent rights and publication. Universities will also want to have clear mechanisms in place for identifying confidential information to avoid any inadvertent disclosures as researchers use and/or publish information. Most significant to the university will be defining confidential information in such a way so as to allow the university the freedom to publish and/or present its research results in a timely manner. An extremely broad definition of confidential information can easily reach out to the results of the university's research or otherwise impinge on the university's publication rights.

The definition of "confidential information" is one of the most critical aspects of a confidentiality provision. The non-disclosing party will want this definition to be narrow so as to limit its risk in being held liable for inadvertent disclosure. The disclosing party will want a broader definition, as it is that party's confidential information that is at risk. A foundation should weigh its position as it seeks to negotiate this provision. A foundation should likewise consider the likelihood that it will inadvertently disclose a university's confidential information. The less the likelihood of inadvertent disclosure, the more flexible a foundation can be in negotiating the provision. Most confidentiality provisions will exclude information that becomes publically available, other than as a result of acts or omissions of the disclosing party in violation of the confidentiality provision and information that the disclosing party is required to disclose by law. Likewise, some confidentiality provisions will exclude from the definition of "confidential information" information that becomes available to the disclosing party from a source that is not bound by a confidentiality agreement or other obligation of secrecy with respect to such information.

¹² This issue is of much greater concern for commercial sponsors of university research; however, depending upon the specific facts, it can also be a significant issue for foundations.

When confidential information is to be shared amongst researchers participating in foundation-funded research or a foundation-funded consortium, the university may request a provision limiting the use of its confidential information by the foundation or other researchers solely to purposes within the consortium's research. This type of provision allows the research to be shared and used among researchers in the field of interest to the foundation while preserving the research from being used in any other field where the university may wish to exploit it. For example, consider two universities, both funded by the same foundation, that are asked to share information about a common research issue. The universities are assured that the counter-university receiving the research will use the information only for furtherance of its research into the same issue and will not disclose the confidential information to another department at the university or another researcher at the university who may use the confidential information to further research outside the foundation's funding. Finally, because confidential information may still be in the hands of another party at the time the grant agreement terminates, the parties may wish to include a provision regarding return or destruction of the confidential information at the option of the disclosing party. As an alternative to including such details in a confidentiality provision in the grant agreement, the foundation may wish to draft a foundation confidentiality policy as a standard policy that is used as an attachment to the grant agreement and agreed to by the university.

Sample Confidentiality Clauses

- ◆ As a participant in the consortium, Grantee employees or researchers will be provided access to certain confidential and proprietary information involving data and research results from other consortium research projects ("Confidential Information"). For the protection of Grantee and all other consortium participants, Grantee agrees to abide by the Confidential Information Policy attached hereto. Grantee agrees it will use Confidential Information for no other purpose than performing and reporting on research in furtherance of this funded award.
- ◆ To the extent authorized by the law, the parties may wish, from time to time, in connection with work contemplated under this Agreement, to disclose confidential information to each other ("Confidential Information"). Each party will use reasonable efforts to prevent the disclosure of any of the other party's Confidential Information to third parties for a period of ('x' amount of time) after the termination of this Agreement, provided that the recipient party's obligation shall not apply to information that:
 - a. is not disclosed in writing or reduced to writing and so marked with an appropriate confidentiality legend within ('x' amount of time) of disclosure;

- b. is already in the recipient party's possession at the time of disclosure thereof;
- c. is or later becomes part of the public domain through no fault of the recipient party;
- d. is received from a third party having no obligations of confidentiality to the disclosing party;
- e. is independently developed by the recipient party; or
- f. is required by law or regulation to be disclosed.

- ◆ In the event that information is required to be disclosed pursuant to Subsection ___ and to the extent authorized by the law, the party required to make disclosure shall notify the other to allow that party to assert whatever exclusions or exemptions may be available to it under such law or regulation.

D. RIGHTS TO PUBLISH

The right to publish its research results is central to the university. The right to publish in the university context has been described as a combination of four distinct rights: (1) the right to determine the authorship of the manuscript/presentation; (2) the right to choose the publication/forum in which the information will be disseminated; (3) total control over the content of the publication; and (4) freedom from excessive delays.¹³ The ability to publish and/or present research findings in a timely manner is a key component to the role of the university, the nature of its exemption, and its fundamental purposes. Restricting a university's right to publish can result in unrelated business taxable income to the university and call into question the university's continued qualification for the fundamental research exemption under the Export Administration Regulations.¹⁴

While a foundation will typically not seek to restrict a university's right to publish (as both generally desire to see the information disseminated for the benefit of the public),

¹³ See Terence P. McElwee, *Understanding and Negotiating Legal Terms In Sponsored Research Agreements*, at pp.14-15 (available at cdrewu.edu/assets/pdfs/Understanding_Legal_Terms_2006.pdf, last accessed April 7, 2015).

¹⁴ See 15 C.F.R. §§ 730-774, administered by the U.S. Department of Commerce. Under the Export Administration Regulations (and the International Traffic and Arms Regulations, administered by the U.S. Department of State), severe penalties may be imposed for exporting regulated technologies, including disclosing specific information to foreign nationals in an academic setting all without leaving the country. The Export Administration Regulations provide an exemption for information arising out of "fundamental research" provided the research is carried out without any restriction on publication or dissemination of the research results. See Robert E. Bienstock and Theresa J. Colecchia, *The Fundamentals of Sponsored Research in a University Setting*, June 18, 2013 (available at highereducationcompliance.org/resources/publications/NewLawyers_05b_13-06-1.pdf, last accessed April 7, 2015).

publication rights can be inadvertently restricted through an overbroad definition of confidential information. Where “confidential information” is defined so broadly as to include the results of the research, the university’s publication rights are restricted. Likewise, there may be aspects of confidential information that are necessary for the publication. These issues should be considered either by redefining “confidential information” in the confidentiality provision or by providing that confidential information is “subject to the university’s publication rights” in the confidentiality provision. Alternatively, the right to publish provision can specify that the university’s right to publish is not to be limited by any definition of “confidential information” and, to the extent confidential information is needed to support the publication, that the university shall have the right to include such information (the latter being a very pro-university provision). A balance must be struck between the university’s need for academic freedom and publication rights and the foundation’s need to control the confidentiality of the information it provides to the university. At the same time, it can also be the foundation who desires to have the information made public as quickly as possible and the university who desires a delay in order to allow for the filing of patent applications. In either situation, a balance can be struck allowing a limited period of time for the foundation to review the publication and comment upon it (including noting any confidential information that may need to be redacted) while also allowing additional delays as necessary to accommodate patent applications. While this time period will be based on the facts and circumstances present, unlike where a commercial sponsor may want to indefinitely delay publication, foundations and their university grantees are generally both interested in getting the results published as soon as possible.

Sample Rights to Publish Clauses

- ◆ Notwithstanding paragraph ____ (confidentiality), Grantee’s right to publish is unrestricted, except as limited in this paragraph.
- ◆ Grantee shall be free to publish, present, or use any data and results arising out of its performance of the protocol (individually, a “Publication”). At least (‘x’ amount of time) prior to submission for Publication, Grantee shall submit to Foundation for review and comment any proposed oral or written Publication (“Review Period”). Grantee will consider any such comments in good faith but is under no obligation to incorporate Foundation’s suggestions. The Review Period for abstracts or poster presentations shall be (‘x’ amount of time). If during the Review Period, Foundation notifies Grantee in writing that: (i) it desires patent applications to be filed on any inventions disclosed or contained in the disclosures, Grantee will defer Publication for a period not to exceed (‘x’ amount of time), to permit Foundation to file any desired patent applications; and (ii) if the Publication contains Foundation’s Confidential Information as defined in Section ____ and Foundation requests Grantee in writing to delete Foundation’s Confidential Information, Grantee agrees to delete Foundation’s Confidential Information only to the extent such deletion does not preclude the complete and accurate presentation and interpretation of the Study results.

- ◆ Subject to the provisions of Section ____, Grantee shall have the right at its discretion to release information or to publish any material resulting from the Research. Grantee will furnish Foundation with a draft copy of any proposed publication ('x' amount of time) in advance of proposed publication date. Foundation agrees to limit circulation and use of such materials to internal distributions with Foundation and agrees that such distribution will be solely for the purposes of review and comment unless otherwise agreed in writing by Grantee. Grantee shall give Foundation the option of being acknowledged in such publication for its sponsorship of the Research.

E. REPORTING AND RIGHT TO AUDIT

The purpose of the reporting and right to audit provisions in a grant agreement are to provide the foundation assurance the funds are being used in accordance with the grant agreement. This type of reporting is required by private foundations when making grants to other private foundations, non-501(c)(3) organizations, and controlled supporting organizations under the expenditure responsibility rules set out in Section 4945 of the Internal Revenue Code. However, grants to public universities or private universities qualifying as public charities are not subject to the expenditure responsibility rules. Nevertheless, those guidelines are useful in creating the reporting obligations. The foundation should include in its grant agreement a requirement that the university will make regular written status reports regarding its progress in using the grant funds along with a final comprehensive report at the end of the grant term. It is beneficial for the report to include both a narrative portion as well as a financial portion. The narrative portion may cover such things as progress toward achieving the goals of the grant, outcomes since the previous report, a summary of challenges encountered since the last report and how those challenges were handled, and a summary of upcoming work to be accomplished. The financial portion should demonstrate how funding comports to the project budget. While the specific records regarding receipts and expenditures do not necessarily need to be provided with each report, they should be available to the foundation upon written request at any reasonable time. This requirement of detailed progress reports as a contractual obligation is one of the hallmarks separating grants from gifts in the university context, as set forth in Section II above.

Sample Reporting and Right to Audit Clauses

- ◆ Grantee and the principal investigator agree that Foundation shall be entitled, if and when requested by Foundation during business hours, on reasonable notice, and at the expense of Foundation, to audit the books and records of Grantee with respect to the disbursement of the funds represented by this grant.

- ◆ Grantee shall maintain an accurate record of the grant received and all expenses incurred under this grant, and retain such books and records for at least four years after completion of the use of this grant. Furthermore, at the request of Foundation, Grantee shall permit reasonable access to its files, records, and personnel by Foundation (or its designated representatives) for the purpose of making financial audits, evaluations or verifications, program evaluations, or other verifications concerning this grant as Foundation deems necessary. The fees and expenses of such designated representative, solely at the request of Foundation, shall be paid by Foundation.
- ◆ Foundation requires that Grantee furnish a written report with respect to the project financed by the grant, including a summary of funds expended by ('x' date) of the year following the grant and any subsequent year(s) expenditure.
- ◆ Grantee agrees to submit to Foundation periodic project review reports and a final report, including narrative information and full financial accounting of the expenditure of these grant funds, according to the report schedule set forth in Paragraph _____ of this Agreement. All such reports shall become the property of Foundation. Forms and guidelines for the reports will be provided by Foundation. Any payments scheduled for release subsequent to the due date of a project review report shall be held by Foundation until the project review report has been submitted and approved. Foundation, in its discretion, may also require an audit of the agency or project, which may include the review of programmatic as well as financial records. The expense of any audit required by Foundation will be borne by Foundation, with the exception of audits required as part of the grant application process.

V. OTHER AREAS OF NEGOTIATION

A. STATEMENT OF WORK

Statement of work is not necessarily a legal-driven provision. The purpose of the statement of work provision is to establish the goals for the project as well as milestones to be accomplished. While many of the other provisions addressed in this paper are negotiated between counsel for the foundation and the university (as well as intellectual property technology officers, as appropriate), the statement of work is most often negotiated between foundation staff and the principal investigator. The statement of work may result from the principal investigator proposing a project to the foundation and the foundation agreeing to fund the project as proposed. Alternatively, the statement of work may be negotiated between the parties leading to the principal investigator's proposal. In any situation, the statement of work

“should define the who, what, when, where, why, and how of the project effort.”¹⁵ The description provided by the University Industry Demonstration Partnership in their Contract Accords for University Industry Sponsored Agreements, though specific to industry-sponsored research, is helpful to understand what the statement of work should identify:

- The principal investigator(s) (PI(s))
- Project staffing
- Project objectives
- Description of the research to be conducted
- Locations where the research work will be conducted
- Deliverables and milestones, defined in a sufficient level of detail such that one can determine if they are met
- The period of performance
- Any special resources required
- Timing and frequency of meetings and reports

While all of these provisions may not be appropriate in every grant agreement, these are the types of provisions that are useful so that the parties have clearly spelled out their expectations for the funded research.

B. GOVERNING LAW

A well-negotiated grant agreement will address the law that is to govern the agreement. Failure to address the governing law will typically result in the agreement being governed by the law of the state in which the plaintiff files an action. This may or may not be the result the foundation intends. Provided the foundation has an understanding of the law of the state in which the university is located, the foundation may treat this as a bargaining chip in its negotiations. A second alternative is to pick a neutral state. Again, the key is to have an understanding of the law for whatever state is chosen and how that law affects the agreement.

Choice of law should not be confused with choice of venue. While often treated together, they address different issues. Venue, or forum, clauses address the location of an action, while choice of law addresses what law governs. For example, the parties may agree that any action will be brought in California while also agreeing that Texas law will apply (or vice versa). As with the choice of law, choice of venue/forum may be a negotiating chip. However, a foundation should be cautious in agreeing to litigate in another state where it has no real presence, as this will increase the cost to the foundation in the event of a dispute. Alternatives include choosing a neutral state or agreeing that any claim will be brought in the home state of the other party (essentially a dissuading tactic to litigation).

¹⁵ Contract Accords for University Industry Sponsored Agreements, University-Industry Demonstration Partnership (UIDP), October 2012, available at sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga_073004.pdf, last accessed April 7, 2015).

Sample Governing Law Clauses

- ◆ This Agreement shall be governed by the laws of the State of Texas without regard to the conflict of laws provisions thereof, regardless of the place of execution or performance.
- ◆ This Agreement will be governed by and construed in accordance with the laws of the State of Texas without regard to any conflict of laws rule or principle that might refer the governance or construction of this Agreement to the laws of another jurisdiction. Any legal proceeding brought in connection with disputes relating to or arising out of this Agreement will be filed and heard in Tarrant County, Texas, and each party waives any objection that it might raise to such venue as inconvenient.

C. PERFORMANCE CLAUSES

Accountability is important in the world of foundations. Foundations routinely follow up on grants and seek to hold their grantees accountable. As a result, it is not unusual to see performance clauses in grant agreements. For example, an agreement may require that a grantee use its best efforts to accomplish the completion of the project (or interim milestones) within a defined time period. A grant agreement might alternatively have language requiring satisfactory performance of certain tasks within the defined time period. While providing for a level of accountability, foundations should understand these requirements and understand why the university may push back against them. The concept of “best efforts” or “reasonable efforts” or any other variant is vague. While most courts have determined that the term “best efforts” and its variants mean the same thing, what they mean is not easily defined. This vagueness results in a court considering “the factual circumstances surrounding an agreement,” including the particular facts in the case and the field involved.¹⁶ As a result, rather than the parties having common expectations as to the level of effort, the level of effort is ultimately determined by a third party (a court or arbitrator) who is not a part of the original discussions. A better alternative is for the parties to be clear in what they intend, such as identifying the specific milestones to be accomplished and timing related to those goals. “Satisfactory” performance of certain steps is also relatively undefined, as it leaves subjective what constitutes satisfactory performance. The foundation may want this provision, as it gives the foundation the ability to determine (subjectively) whether performance has been achieved. The university may try to remove this language, define the words, or employ an objective third party as the decision maker of whether performance has occurred. The foundation should consider the definition of these provisions in the state in question, the nature of the agreement and project being funded, as well as its grantee, and determine whether to relax these standards.

¹⁶ See, e.g., *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 233 (3rd Cir. 2001); *Triple-A Baseball Club Assocs. V. Northeastern Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir. 1987).

D. USE OF MARKS

Even if no intellectual property is being created or the foundation is not seeking to share in any intellectual property, the foundation should still concern itself with the use of its name, marks, and goodwill. The grant agreement should require written permission by the university to use the foundation's name, marks, or otherwise refer to the foundation so as to allow the foundation the opportunity to control the messaging, ensuring that its name is used in the context in which it approves, that its marks are used consistently, and that it is aware of any such messaging.

Sample Use of Marks Clauses

- ◆ Neither Grantee nor Foundation may use the name, trademark, logo, symbol, or other image or trade name of the other Party or its employees and agents in any advertisement, promotion, or other form of publicity or news release or that in any way implies endorsement without the prior written consent of an authorized representative of the Party whose name is being used. Such approval will not be unreasonably withheld.
- ◆ Grantee will allow Foundation to review and approve the text of any proposed publicity concerning this grant prior to its release. Foundation may include information regarding this grant, including the amount and purpose of the grant, any photographs Grantee may have provided, Grantee's logo or trademark, or other information or materials about Grantee and its activities, in Foundation's periodic public reports, newsletters, and new releases.

E. TERMINATION

The grant agreement should include a provision allowing the foundation to terminate the grant agreement in the event the foundation, in its sole discretion, determines the university has not complied with the terms and conditions of the grant or there is a necessity to terminate the grant to comply with the requirements of a law or regulation applicable to the university, the foundation, or the grant. Other reasons a foundation may wish to include within its right to terminate are significant changes in university leadership or in the principal investigator(s) in the conduct of the research, or in the budget for the project. The termination provision should either include or be based on an obligation of the university to advise the foundation of any such changes in order to allow the foundation to appropriately consider its termination rights.

Either the termination provision or a survival provision should specify which provisions of the grant agreement are to survive termination, such as the confidentiality provisions and, to the extent applicable, intellectual property provisions. Further, the foundation may wish to require that any grant funds not used or committed to the project (committed to the project could mean required salaries or facility expenses incurred to undertake the project) at the time of

termination be returned to the foundation. An alternative to return to the foundation is application of the grant funds to a mutually-agreed upon project.

Sample Termination Clauses

- ◆ Foundation and Grantee acknowledge and agree that either party may, upon ('x' amount of time) prior written notice, terminate the Agreement and the Project. Upon receipt of this notice, Grantee will provide Foundation with a report of work already performed and any completed deliverables. Foundation shall perform payment for the work performed prior to the termination date. Foundation shall allow full credit to, or reimburse, Grantee for any noncancellable obligations incurred by Grantee through termination. Other than as set forth in this paragraph, Foundation will cease to be responsible for any costs or charges of any nature or kind related to the Project after the date of termination.
- ◆ If, upon completion of the project as contemplated by this Agreement or termination, if earlier, the grant funds have not been completely exhausted, Grantee shall provide a written statement of the balance of such funds and a plan for using the remaining funds to Foundation.
- ◆ Foundation reserves the right to discontinue, modify, or withhold any payments to be made under this grant award or to require a total or partial refund of any grant funds if, in Foundation's sole discretion, such action is necessary: (1) because Grantee has not fully complied with the terms and conditions of this grant; (2) to protect the purpose and objectives of the grant or any other charitable activities of Foundation; or (3) to comply with the requirements of any law or regulation applicable to Grantee, Foundation, or this grant.

F. ADMINISTRATION FEES

Large restricted gifts to universities often carry a gift fee intended to cover certain administrative or overhead expenses of the university (primarily its development office). In the context of research grants, foundations can also expect to be faced with payment of administration or overhead fees as indirect costs. From the foundation standpoint, the desire is for funding to go towards the research project rather than indirect expenses. Universities view such indirect costs as costs incurred by the university to support the research and researcher. Universities will often have policies regarding the recoupment of indirect costs from grantors. As a result, it can be beneficial for the foundation to have a considered response and even a policy of its own related to indirect costs. For example, attached to this paper at Attachment A is a copy of the *Indirect Costs Policy for Project Grants and Contracts for Applicant Organizations*

of the Bill and Melinda Gates Foundation. That policy includes the definition of indirect costs (as well as examples), an acknowledgement by the foundation that its policy may result in the grantee needing to look elsewhere to cover indirect costs, and a statement of its policy with respect to indirect costs. While not every foundation will have such a detailed policy, it is useful to have a discussion internally about the willingness of the foundation to pay indirect costs and whether the foundation wishes to set a policy on its indirect cost funding. Whatever the foundation decides to do, this is a topic that should be addressed early so that there are no surprises when the final grant documentation is being drafted. What should be remembered by the foundation is that the issue of indirect costs is (almost always) negotiable. The foundation must consider the circumstances in which it finds the grantee (nature of the grantee, size of the grantee's other funding/endowment, amount of previous indirect funding provided, etc.) and make a determination that the foundation believes to best align with its charitable purposes. That does not always mean that no indirect costs will be paid. It may be that a certain amount of indirect costs are viewed as acceptable to the foundation to support the institutions carrying out the research that is important to the foundation. Rather, it simply means the foundation must weigh these interests.

Sample Administration Fees Clauses

- ◆ Grantee will be permitted to charge annually to the project administration costs not exceeding ____% of the grant amount received in that year.
- ◆ As the funds granted hereunder are intended to be used as specified in the proposal attached as Exhibit "A" which includes overhead expenses, no indirect cost has been otherwise included in this award.

VI. OTHER STANDARD PROVISIONS

In addition to the provisions above which often receive more particular attention, there are a number of standard provisions that should be in grant agreements with universities to the same extent they are in any of the foundation's other grant agreements. The purpose of these standard provisions is to ensure matching expectations between the parties and appropriate documentation for the foundation's grant-making files. Standard provisions that should be in any foundation grant agreement include the following:

1. Amount of the award (and the timing of any phased funding)
2. Acknowledgement of the tax status of the grantee
3. Agreement not to use funds for political activity or advocacy
4. Agreement to use all foundation grant funds in compliance with all applicable anti-terrorist financing and asset control laws, regulations, rules, and executive orders
5. Notice provisions
6. Non-assignment provisions
7. Grant term

8. Dispute resolution

Attachment B to this paper contains examples of these standard provisions.

Sample No Lobbying or Political Intervention Clause

- ◆ Grantee agrees to use the funds only for the designated purpose and not to use the funds for any purpose prohibited by law, including those purposes specified in Section 4945 of the Code. No part of this grant may be used to intervene in any campaign for public office, for a voter registration drive, or for lobbying. For these purposes, “lobbying” is attempting to influence legislation at any level of government through attempts to influence public opinion on a legislative subject or direct communications with those who formulate legislation. Nonpartisan analysis, study, and research are permitted.

Sample Repayment Clause

- ◆ Grantee agrees to repay any portion of the grant which is not used for the designated purpose.

Sample Anti-Terrorism Clause

- ◆ Consistent with Executive Order 13224 and the Patriot Act, no portion of the grant will be used to support terrorism, or will be diverted to other individuals or organizations which have assisted, sponsored, or provided financial, material, or technological support for terrorists or persons associated with terrorists.

VII. CONCLUSION

Grant agreements are useful in clarifying expectations and providing a written record for the parties. This is particularly important in the context of funded research where funds granted are often large, intellectual property rights may be involved, and risks are greater. Although one size will not fit all, and each agreement will need to be carefully considered and negotiated, it is helpful for a foundation to have its own template, an idea of what risks it is willing to take on, and an idea of what rewards it expects (either in the form of potential royalty sharing or in the form of access to information and dissemination of the information for the benefit of the public). Ultimately, the foundation must keep its mission in mind and use its grant agreements, as with all of its property, to further its mission.

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BILL & MELINDA
GATES *foundation*

Indirect Cost Policy for Project Grants and Contracts
for Applicant Organizations

Definition

The Bill & Melinda Gates Foundation defines indirect costs as:

- Overhead expenses or ongoing operational costs incurred by the applicant organization on behalf of the organization's activities and projects, but that are not easily identified with any specific project.
- Administrative or other expenses which are not directly allocable to a particular activity or project.
- Expenses related to general operations of an organization that are shared among projects and/or functions.
- Basic examples include executive oversight, existing facilities costs, accounting, grants management, legal expenses, utilities, and technology support. To further aid the interpretation of this definition, the Foundation has established examples for the use of our applicants and prospective applicants, which are included in Appendix A.

Other Funding

The Foundation is a charitable entity and is not committed to matching the indirect cost rates of the U.S. government or other entities. We recognize that this means that: (a) some grantees may need to engage in cost-sharing between projects, tap into unrestricted funds, or conduct other fundraising to cover operations; or (b) some contractors may choose not to contract with the foundation. However, we believe our policy is consistent with that of many private foundations and certain government entities that have a flat or maximum rate that caps the amount an applicant institution can charge. The Foundation's policy helps ensure furtherance of our charitable purpose.

Maximum Indirect Cost Rates

Indirect cost rates for grants and contracts are subject to the following limitations:

0% rate
Government agencies,
Other private foundations,
For-profit organizations

Up to a 10% rate
U.S. universities,
U.S. community
colleges

Up to a 15% rate
Non-governmental
organizations (NGOs),
International organizations,
Non-U.S. universities

- Indirect Costs Reimbursements = Rate % * Total Project Costs (incl. personnel, sub-contracts, supplies, equipment, etc.)
- Rates and limitations apply to *both* the primary applicant organization and any sub-grantees and sub-contractors. Each respective organization may receive indirect costs up to the rate applicable to their organization type.
 - *Example:* If a U.S. university is the primary grantee and includes an international organization as a sub-grantee, the U.S. university can receive up to a 10% rate, while the international organization can receive up to a 15% rate for indirect costs.
- The rates provided above are the *maximum* rates allowed under the Foundation's policy. A grantee or contractor with an actual indirect cost rate lower than the maximum rate provided above should *not* increase the funding request to the maximum allowed.

- Given the policy provides an 'UP TO' percentage amount, the indirect cost rate approved may be anywhere from 0% to 15% depending on the specific situation. For example:
 - *Example 1:* At the discretion of the foundation, a large grant may be awarded a lower indirect cost rate to reflect reduced overhead required to adequately manage a large grant's direct costs. Actual administrative and maintenance costs do not necessarily increase in direct proportion to grant funds.
 - *Example 2:* If a primary grantee is receiving grant funds which are largely sub-granted to another organization, the foundation may limit the indirect costs the primary grantee receives on the sub-granted funds. Therefore, to reflect this, the rate could be less than the maximum allowed rate for the primary grantee.

Appendix A: Direct and Indirect Cost Examples

DIRECT COSTS

The following may be included as direct costs in both grants and contracts if

DIRECTLY ATTRIBUTABLE TO THE PROJECT:

- Salaries of employees
 - Can include Project Management
 - Can include directly attributable administrative support, legal or accounting functions, with distinct and measured effort on the project.
- Fringe benefits of employees
- Travel for employees
- Consultants
- Supplies
- Sub-grants (defined as work sourced from the primary grantee to another organization, where funding is provided up front)
- Sub-contracts (defined as work sourced from the primary grantee to another organization, where funding is provided in arrears)

The following may be included as direct costs in GRANTS ONLY if DIRECTLY

ATTRIBUTABLE TO THE PROJECT & NEWLY ACQUIRED SPECIFICALLY FOR THE PROJECT:

- Equipment purchases *[Note that all existing equipment would represent indirect costs.]*
- Newly-acquired facilities such as:
 - A new field clinic
 - New testing laboratories
 - New project implementation unit office*[Note that all existing facilities would represent indirect costs.]*
- Utilities for newly acquired facilities
- Newly acquired Information Technology equipment and support for the project

INDIRECT COSTS

- Existing facilities costs (e.g. rent, maintenance, etc.) such as:
 - University headquarters
 - Country/regional offices
- Utilities for existing facilities
- Existing Information technology equipment and support (e.g. centralized IT systems, networks, etc.)
- Existing shared equipment
- Existing equipment maintenance
- Depreciation on equipment
- Insurance
- Communications expenses (e.g. phones, etc.)
- Administrative office supplies
- General administrative support:
 - Executive management (CEO, COO, CFO, etc.)
 - Executive administrators
 - General ledger and grants accounting
 - General financial management staff
 - Internal audit function
 - Institutional legal support
 - Research management personnel
 - Information technology support staff
 - Facilities support personnel
 - Scientific support functions
 - Environmental health/safety personnel
 - Human resources
 - Library & information support
 - Shared procurement resources
 - General logistics support
 - Material management (e.g. tracking procurement, inventory management, shipping)
 - Other shared resources not directly attributable to the project

Note: We make every effort to ensure that cost evaluation under the policy is done consistently and regularly by foundation personnel. For questions or issues with cost line items for your grant or contract proposal, please contact your foundation representative.

Appendix B: Frequently Asked Questions (FAQs)

- **Question: Why doesn't the foundation match my institution's Negotiated Indirect Cost Rate Agreement (NICRA) rate with the U.S. government or other funding organizations?**

Answer: Given the foundation is a charitable entity; we cannot commit to matching indirect costs rates from other entities (e.g., the U.S. federal government, etc.). The foundation's position is that, whenever possible, specifically allocable costs should be identified as direct costs, including those for dedicated ongoing project management and support. Please see Appendix A for examples of direct and indirect costs. Please note that our categorization differs from the U.S. government's instructions to treat project management and support expenses as indirect costs. Therefore, the foundation funds these costs as direct costs onto which is added a 10-15% rate for indirect costs which are not directly attributable to the project.

- **Question: An organization that has a NICRA rate of 40% says its NICRA rate would be reduced or negatively impacted if it accepts a lower rate from the Foundation. Is this true?**

Answer: No. Accepting a grant or contract from a foundation with less than full NICRA rate will not impact the NICRA rate calculation differently than accepting a grant or contract with the full NICRA rate. The calculation of the NICRA rate is a ratio where the numerator is the actual indirect costs and the denominator is all of the project direct costs. If the base or denominator increases faster than the indirect costs then the rate will decrease. Clearly, accepting a grant or contract with less than full NICRA rate may impact actual cash flow since the full overhead cost recovery, is effectively reimbursing the institute for all the applicable indirect costs, while the Foundation may be reimbursing for some (but not all) overhead costs. However, organizations that receive multiple grants or contracts with a full NICRA rate will have a greater capacity to absorb a lower indirect cost rate from the Foundation as more of the organization's indirect costs are being paid by other parties, but a grant or contract with a lower indirect cost rate does not lower the NICRA rate.

- **Question: Why are existing facilities that are used for a foundation project not classified as direct costs?**

Answer: Rent and other facilities costs are part of doing business for an organization and therefore are not specifically attributable to a project or activity. Therefore, facilities expenses of the organization should be categorized as indirect costs. The exception to this in the foundation's policy is when a facility has to be built or acquired specifically for a Gates foundation grant or contract. This situation should occur in limited circumstances. However, when necessary, the costs for acquiring such facilities will be funded or reimbursed as direct costs.

- **Question: How does the calculation of indirect costs work for the primary grantee and the sub-grantee?**

Answer: The primary grantee receives indirect costs on the total budget which includes direct costs and sub-granted or sub-contracted costs. But, the 'sub-granted' or 'sub-contracted' funds would also include direct costs and indirect costs to that respective institution. Therefore, the calculation may look as follows:

Grant to University ABC:

- ABC direct costs (personnel, supplies, travel, etc.) -> \$850k
- Sub-granted costs to non-profit organization XYZ -> \$1.15M
 - Includes direct sub-grantee costs - \$1.0M
 - Includes indirect cost sub-grantee allowance (15%) - \$150k
- Total direct and sub-granted costs to non-profit organization ABC -> \$2.0M
- Indirect cost primary grantee allowance (10%) -> \$200k
- **Total grant award -> \$2.2M**

- **Question: Why are indirect costs not provided to for-profits and government agencies?**

Answer: As a foundation based in the U.S., we generally must ensure that our funds are used for charitable purposes. When the foundation makes a grant or enters into a contract with a U.S. public charity, the organization's status as a charity by the U.S. government is based on an assessment of the organization's mission and activities to confirm the funds will be used for charitable purposes. However, in all other cases of grantee entities, there are no assurances that funds will be used for only charitable purposes. When the foundation makes a grant to a for-profit entity, the burden is shifted to the foundation with Expenditure Responsibility requirements to ensure that 1) the grant funds are used for charitable purposes, and 2) we obtain reporting to ensure how the funds are spent. Since the definition of indirect costs is mainly expenses that are not directly allocable to a particular activity or project, it is not possible for the foundation to confirm that indirect costs paid to a for-profit entity are used only for our project and thus "charitable only."

In regards to government agencies, the foundation's position is that government entities are typically funded by the citizens of the country for various agencies (e.g. Ministry of Health, Finance, Agriculture, etc.). The government entities are benefiting the communities of which the citizens are a part. Therefore, the foundation's policy is to fund the program specific costs related to our project or activity, but the administrative and general operations costs of the government agency should be funded by the respective country's budgetary funds.

- **Question: Why do U.S. universities receive a lower rate than international universities?**

Answer: The foundation has an important relationship with University grantees to perform valuable work projects, including (but not limited to) discovery research, vaccine development, and clinical trials. The foundation's policy considers that U.S. universities should request a limited amount of indirect costs from private funders. In the U.S., indirect costs recoveries are negotiated with federal funding agencies because the majority of U.S. funded research is performed on university campuses. Therefore, the foundation's policy is to provide a rate of 10% to U.S. universities to allow for additional administrative and overhead costs of the institution to be funded by other sources.

- **Question: What are the main differences in this policy versus the previous policy applicable in 2006-2011?**

Answer: The main changes that benefit grantees are:

- All direct costs may now be used to calculate the amount of indirect cost reimbursement. This includes all fees and expenses as well as direct and indirect costs paid to sub-grantees or subcontractors (provided such indirect costs are within the above-stated caps) and approved equipment.
- We have reclassified community colleges to be eligible for 10% indirect costs, which will bring them in-line with U.S. universities.
- This policy now applies to both grants and contracts with the foundation.

Attachment B

SAMPLE GRANT AGREEMENT PROVISIONS

Payment Schedule

1. The grant shall be paid to Grantee in installments according to the Payment Schedule. The payment of each installment shall be conditional upon Foundation's prior receipt, review, and approval of Grantee's written progress report with respect to the use and financial status of the grant and the status of the Project.

Investment of Funds

2. The grant may be comingled with other funds held by Grantee for investment purposes, provided that the grant's principal and any net investment income earned thereon is recorded as a separate restricted fund for the purposes of reporting to Foundation.
3. Grantee shall invest and reinvest any funds disbursed under the grant that are not expended for the purposes of this grant, including all earnings and appreciation thereof, in one or more specially designated accounts in a bank which is a member of the FDIC or investment firm which is a member of the SIPC in accordance with Grantee's governing documents and investment policies which do not conflict with this Agreement, with the laws of the State of Texas, and with federal laws. Each account holding funds provided under the grant, and all realized earnings thereon, shall be fully insured by the FDIC to the extent permitted by law, if the funds are deposited in a bank, or by the SIPC, if the funds are invested with an investment firm. Grantee may not assess an administrative or financial management fee of any kind, or charge expenses of any kind for the costs of administering and using funds disbursed to Grantee under the grant, unless agreed to in writing and in advance by Foundation.

Compliance with Law

4. Grantee will keep its tax-exempt status as a recognized Section 501(c)(3) and Section 509(a) organization current throughout the period of this grant and will comply with all applicable federal and state laws and regulations that govern the use of funds from private Foundations to Grantee organization. This includes but is not limited to the prohibition.

No Lobbying or Political Intervention

5. Grantee agrees to use the funds only for the designated purpose and not to use the funds for any purpose prohibited by law, including those purposes specified in Section 4945 of the Code. No part of this grant may be used to intervene in any campaign for public office, for a voter registration drive, or for lobbying. For these purposes, "lobbying" is attempting to influence legislation at any level of government through attempts to influence public opinion on a legislative subject or direct communications with those who formulate legislation. Nonpartisan analysis, study, and research are permitted.

Anti-Terrorism

6. Consistent with Executive Order 13224 and the Patriot Act, no portion of the grant will be used to support terrorism, or will be diverted to other individuals or organizations which have assisted, sponsored, or provided financial, material, or technological support for terrorists or persons associated with terrorists.

Repayment

7. Grantee agrees to repay any portion of the grant which is not used for the designated purpose.

Confidentiality

8. As a participant in the consortium, Grantee employees or researchers will be provided access to certain confidential and proprietary information involving data and research results from other consortium research projects (“Confidential Information”). For the protection of Grantee and all other consortium participants, Grantee agrees to abide by the Confidential Information Policy attached hereto. Grantee agrees it will use Confidential Information for no other purpose than performing and reporting on research in furtherance of this funded award.
9. To the extent authorized by the law, the parties may wish, from time to time, in connection with work contemplated under this Agreement, to disclose confidential information to each other (“Confidential Information”). Each party will use reasonable efforts to prevent the disclosure of any of the other party’s Confidential Information to third parties for a period of (‘x’ amount of time) after the termination of this Agreement, provided that the recipient party’s obligation shall not apply to information that:
- a. is not disclosed in writing or reduced to writing and so marked with an appropriate confidentiality legend within (‘x’ amount of time) of disclosure;
 - b. is already in the recipient party’s possession at the time of disclosure thereof;
 - c. is or later becomes part of the public domain through no fault of the recipient party;
 - d. is received from a third party having no obligations of confidentiality to the disclosing party;
 - e. is independently developed by the recipient party; or
 - f. is required by law or regulation to be disclosed.
10. In the event that information is required to be disclosed pursuant to Subsection ____ and to the extent authorized by the law, the party required to make disclosure shall notify the other to allow that party to assert whatever exclusions or exemptions may be available to it under such law or regulation.

Rights to Publish

11. Notwithstanding paragraph ____ (confidentiality), Grantee’s right to publish is unrestricted, except as limited in this paragraph.
12. Grantee shall be free to publish, present, or use any data and results arising out of its performance of the protocol (individually, a “Publication”). At least (‘x’ amount of time) prior to submission for Publication, Grantee shall submit to Foundation for review and comment any proposed oral or written Publication (“Review Period”). Grantee will consider any such comments in good faith but is under no obligation to incorporate Foundation’s suggestions. The Review Period for abstracts or poster presentations shall be (‘x’ amount of time). If

during the Review Period, Foundation notifies Grantee in writing that: (i) it desires patent applications to be filed on any inventions disclosed or contained in the disclosures, Grantee will defer Publication for a period not to exceed ('x' amount of time), to permit Foundation to file any desired patent applications; and (ii) if the Publication contains Foundation's Confidential Information as defined in Section ___ and Foundation requests Grantee in writing to delete Foundation's Confidential Information, Grantee agrees to delete Foundation's Confidential Information only to the extent such deletion does not preclude the complete and accurate presentation and interpretation of the Study results.

13. Subject to the provisions of Section ___, Grantee shall have the right at its discretion to release information or to publish any material resulting from the Research. Grantee will furnish Foundation with a draft copy of any proposed publication ('x' amount of time) in advance of proposed publication date. Foundation agrees to limit circulation and use of such materials to internal distributions with Foundation and agrees that such distribution will be solely for the purposes of review and comment unless otherwise agreed in writing by Grantee. Grantee shall give Foundation the option of being acknowledged in such publication for its sponsorship of the Research.

Ownership of IP

14. Title to "intellectual property" defined as intellectual property rights, including patents, patent application, trade secrets, trademarks, copyrights, discoveries, inventions, improvements, developments, drawings, and any medium that is made, conceived, developed, or reduced to practice by Grantee which result from or relate to the research or which are funded in whole or in part by Foundation shall reside with Grantee.
15. Title to any invention shall reside in Grantee pursuant to Grantee's patent policy, unless otherwise indicated or requested by Grantee. If Grantee has no established patent policy or if Grantee does not claim rights under its patent policy, Foundation shall have the right to determine the disposition of Invention rights and, in consultation with Grantee, to take any steps it deems necessary to protect legal rights in the Invention.
16. The data and results derived from the grants shall be the joint property of Grantee and Foundation; however, neither party will be required to report or account to the other for its use of data and results, and each shall be free to use data and results for any lawful purpose.

Licensing of IP

17. With respect to intellectual property, Foundation shall have a non-exclusive, irrevocable, paid-up, royalty-free license for non-commercial, internal, research purposes (with right to sublicense through multiple tiers) only.

Background IP

18. In the event that Grantee owns or licenses any intellectual property rights that are necessary to practice or use the invention and are not part of the invention (Related IP Rights), Grantee hereby grants Foundation a non-exclusive, irrevocable, paid up, royalty-free license (with right to sublicense through multiple tiers) to practice and use such Related IP Rights solely to the extent necessary to practice and/or use the invention as permitted in this agreement.

March-In Rights

19. Grantee agrees that it, or its designee, or licensee shall take commercially reasonable steps to bring the Invention to practical application or commercial application in a reasonable period of time (based upon the type of Invention) after issuance of a patent or other clear determination of commercial value. Additionally, Grantee agrees that if it, its designee, or its licensee has not taken effective steps within ('x' amount of time), or whatever longer time is reasonable under the circumstances, after a United States Patent issued on an Invention left for administration to Grantee, to bring that Invention to the point of practical application and has not made such Invention available for licensing royalty-free or on terms that are reasonable under the circumstances, and cannot show cause why it should retain all rights, title, and interest for a further period of time, Foundation shall have the right to require: (1) assignment of said patent to Foundation; (2) cancellation of any outstanding exclusive licenses under said patent; and (3) granting of licenses under said patent to an applicant on a non-exclusive, royalty-free basis or on terms that are reasonable under the circumstances.
20. No patent or patent application shall be abandoned without ('x' amount of time) prior notification by Grantee or Inventor(s) to Foundation and offering to assign to Foundation all rights, titles, and interests to the Invention to the extent permitted by law.
21. Grantee agrees that if it licenses an Invention to another party for commercialization, such license agreement shall include an obligation on the part of the licensee to exert its best efforts to commercialize the Invention in a diligent manner and meet appropriate diligence requirements and concrete development milestones to avoid termination of the license. Grantee further agrees it shall monitor performance of the licensee relative to such requirements and milestones.

Royalty Sharing

22. Grantee agrees to share net royalty income with Foundation based upon the proportionate amount of funding Foundation contributed to the development of the Invention. Net Royalty Income shall mean gross income from the commercialization of the Invention minus patent expenses, inventor distributions, and mandatory distributions under Grantee policy. Such sharing will begin once Net Royalty Income exceeds \$500,000.00.

Indemnification

23. Grantee shall defend, indemnify, and hold Foundation, its directors, officers, employees, and agents harmless from and against any and all liability, loss, expense (including reasonable attorneys' fees), or claims for injury or damages arising out of its performance of this Agreement but only in proportion to and to the extent such liability, loss, expenses, attorneys' fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of Grantee, its officers, agents, or employees.
24. Grantee shall indemnify and hold Foundation harmless against any and all claims, demands, damages, liabilities, and costs incurred by Foundation which directly or indirectly result from, or arise in connection with, any negligent act or omission of Grantee, its agents, or employees, pertaining to its activities and obligations under this Agreement. Foundation shall indemnify and hold Grantee, its Trustees, officers, agents, and employees harmless against any and all claims, demands, damages, liabilities, and costs which directly or indirectly result from, or

arise in connection with, any negligent act or omission of Foundation, its agents, or employees, pertaining to its activities and obligations under this Agreement or from Foundation's use of the results of the Research Project.

25. Foundation agrees to indemnify and hold Grantee, its Trustees, officers, agents, and employees harmless from any liability, loss, or damage they may suffer as a result of claims, demands, costs, or judgments against them arising out of use by Foundation of the results obtained from the activities performed by Grantee under this Agreement; provided, however, that any such liability, loss, or damage resulting from the following Subsections "a" or "b" is excluded from this Agreement to indemnify and hold harmless:
- a. the negligent failure of Grantee to substantially comply with any applicable governmental requirements; or
 - b. the negligence or willful malfeasance of any Trustee, officer, agent, or employee of Grantee.
26. The indemnified party shall give notice to the indemnifying party promptly upon receipt of written notice of a claim for which indemnification may be sought under this Agreement, provided, however, that failure to provide such notice shall not relieve indemnifying party of its indemnification obligations except to the extent that the indemnifying party's ability to defend such claim is materially, adversely affected by such failure. The indemnifying party shall not make any settlement admitting fault or incur any liability on the part of the indemnified party without the indemnified party's prior written consent, such consent not to be unreasonably withheld or delayed. The indemnified party shall cooperate with the indemnifying party in all reasonable respects regarding the defense of any such claim, at the indemnifying party's expense. The indemnified party shall be entitled to retain counsel of its choice at its own expense. In the event a claim falls under this indemnification clause, in no event shall the indemnified party compromise, settle, or otherwise admit any liability with respect to any claim without the prior written consent of the indemnifying party, and such consent not to be unreasonably withheld or delayed.

Alternative to Indemnification

27. It is understood and agreed that neither party to this Agreement shall be liable for any negligent or wrongful acts, either of commission or omission, chargeable to the other unless such liability is imposed by law. This Agreement shall not be construed to seeking to either enlarge or diminish any obligation or duty owed by one party against the other or against a third party.

No Special Damages

28. Except for the Parties' obligations to indemnify each other pursuant to this Agreement, neither Party shall be liable for special, consequential, or incidental damages arising out of or in connection with this Agreement, even if advised of the possibility of the same.

Reports/Right to Audit

29. Grantee and the principal investigator agree that Foundation shall be entitled, if and when requested by Foundation during business hours, on reasonable notice, and at the expense of

Foundation, to audit the books and records of Grantee with respect to the disbursement of the funds represented by this grant.

30. Grantee shall maintain an accurate record of the grant received and all expenses incurred under this grant, and retain such books and records for at least four years after completion of the use of this grant. Furthermore, at the request of Foundation, Grantee shall permit reasonable access to its files, records, and personnel by Foundation (or its designated representatives) for the purpose of making financial audits, evaluations or verifications, program evaluations, or other verifications concerning this grant as Foundation deems necessary. The fees and expenses of such designated representative, solely at the request of Foundation, shall be paid by Foundation.
31. Foundation requires that Grantee furnish a written report with respect to the project financed by the grant, including a summary of funds expended by ('x' date) of the year following the grant and any subsequent year(s) expenditure.
32. Grantee agrees to submit to Foundation periodic project review reports and a final report, including narrative information and full financial accounting of the expenditure of these grant funds, according to the report schedule set forth in Paragraph _____ of this Agreement. All such reports shall become the property of Foundation. Forms and guidelines for the reports will be provided by Foundation. Any payments scheduled for release subsequent to the due date of a project review report shall be held by Foundation until the project review report has been submitted and approved. Foundation, in its discretion, may also require an audit of the agency or project, which may include the review of programmatic as well as financial records. The expense of any audit required by Foundation will be borne by Foundation, with the exception of audits required as part of the grant application process.

Notice of Changes

33. Grantee shall keep Foundation informed of the status and/or impact of the project from time-to-time. Grantee shall inform Foundation promptly in writing of any significant changes, for example, in leadership, governance, federal income tax status, or financial changes, within Grantee's organization during the grant period or of any significant change that directly impacts the project.
34. Any significant changes in Project and/or organizational leadership should be reported to Foundation within 30 days of the change.
35. Grantee is required to provide Foundation with immediate written notification of: (1) any changes in Grantee's tax-exempt status; (2) Grantee's inability to expend the grant for the purposes described in the grant award letter; or (3) any expenditure from this grant made for any purpose other than those for which the grant was intended.
36. Grantee shall submit in writing to Foundation any proposed modifications of the project budget of more than five percent (5%) for prior approval.

Termination

37. Foundation and Grantee acknowledge and agree that either party may, upon ('x' amount of time) prior written notice, terminate the Agreement and the Project. Upon receipt of this notice, Grantee will provide Foundation with a report of work already performed and any completed deliverables. Foundation shall perform payment for the work performed prior to the termination date. Foundation shall allow full credit to, or reimburse, Grantee for any noncancellable obligations incurred by Grantee through termination. Other than as set forth in this paragraph, Foundation will cease to be responsible for any costs or charges of any nature or kind related to the Project after the date of termination.
38. If, upon completion of the project as contemplated by this Agreement or termination, if earlier, the grant funds have not been completely exhausted, Grantee shall provide a written statement of the balance of such funds and a plan for using the remaining funds to Foundation.
39. Foundation reserves the right to discontinue, modify, or withhold any payments to be made under this grant award or to require a total or partial refund of any grant funds if, in Foundation's sole discretion, such action is necessary: (1) because Grantee has not fully complied with the terms and conditions of this grant; (2) to protect the purpose and objectives of the grant or any other charitable activities of Foundation; or (3) to comply with the requirements of any law or regulation applicable to Grantee, Foundation, or this grant.

Overhead/Indirect Costs

40. Grantee will be permitted to charge annually to the project administration costs not exceeding ____% of the grant amount received in that year.
41. As the funds granted hereunder are intended to be used as specified in the proposal attached as Exhibit "A" which includes overhead expenses, no indirect cost has been otherwise included in this award.

Publicity/Use of Marks

42. Foundation reserves the right to include information relating to the grant and the project on Foundation's website, in periodic reports and newsletters, and in other materials issued by or on behalf of Foundation.
43. Grantee may release information regarding this grant to the media only with written permission of Foundation. All media releases must be approved by Foundation in advance. Foundation shall be provided with copies of news releases or other publicity of Grantee.
44. Grantee will allow Foundation to review and approve the text of any proposed publicity concerning this grant prior to its release. Foundation may include information regarding this grant, including the amount and purpose of the grant, any photographs Grantee may have provided, Grantee's logo or trademark, or other information or materials about Grantee and its activities, in Foundation's periodic public reports, newsletters, and new releases.
45. Neither Grantee nor Foundation may use the name, trademark, logo, symbol, or other image or trade name of the other Party or its employees and agents in any advertisement, promotion, or other form of publicity or news release or that in any way implies endorsement without the

prior written consent of an authorized representative of the Party whose name is being used. Such approval will not be unreasonably withheld.

Dispute Resolution

46. In the event of a dispute between the parties, the aggrieved party shall notify the other party and provide a detailed description of the alleged problem. The parties agree to use reasonable efforts to resolve such dispute by good faith negotiations and mutual agreement. In the event such information resolution is not successful within a reasonable period of time, then either party may institute appropriate court action.
47. In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement or the breach thereof, the parties shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties.
48. If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association (AAA) before resorting to arbitration, litigation, or some other dispute resolution procedure. The AAA shall schedule mediation within ___ days after a written request by either party. The AAA will choose a mediator who shall be an experienced practicing attorney who has no conflicts of interest. All expenses shall be divided equally between the parties. Mediation shall be conducted within ___ days after referral to AAA, and be completed over no more than two business days. All procedures shall be set by the mediator. The results of mediation are non-binding, advisory, and confidential, and the mediator's recommendations, as well as the written or oral evidence produced from mediation, shall not be admissible for any purpose for or against the parties in any later alternative dispute resolution, administrative or legal proceeding.

Governing Law

49. This Agreement shall be governed by the laws of the State of Texas without regard to the conflict of laws provisions thereof, regardless of the place of execution or performance.
50. This Agreement will be governed by and construed in accordance with the laws of the State of Texas without regard to any conflict of laws rule or principle that might refer the governance or construction of this Agreement to the laws of another jurisdiction. Any legal proceeding brought in connection with disputes relating to or arising out of this Agreement will be filed and heard in Tarrant County, Texas, and each party waives any objection that it might raise to such venue as inconvenient.

No Assignment

51. Grantee may not assign or otherwise transfer its rights or delegate any of its obligations under this grant without prior written approval from Foundation.

No Further Commitment for Funding

52. Grantee acknowledges that the receipt of this grant does not imply a commitment on behalf of Foundation to continue funding beyond the terms listed in this grant Agreement.
53. This award is made with the understanding that Foundation has no obligation to provide other or additional support for this project; nor does this award represent any commitment to or expectation of future support from Foundation for this or any other project of Grantee.

Entire Agreement; No Modification

54. This Agreement constitutes a full and complete agreement between the parties and supersedes all previous agreements on this matter. There are no other written or oral agreements, representations, or understandings with respect to the subject matter of this contract. No other verbal or written agreements shall, in any way, vary or alter any provision of this Agreement except in the case of a written amendment to this Agreement signed by the authorized representatives of both parties.
55. This Agreement constitutes the entire agreement of the parties with regard to the matters referred to herein, and supersedes all prior oral and written agreement, if any, of the parties in respect hereto. This Agreement may not be modified or amended except by written agreement executed by both parties hereto. The captions inserted in this Agreement are for convenience only and in no way define, limit, or otherwise describe the scope or intent of this Agreement, or any provision hereof, or in any way affect the interpretation of this Agreement.
56. Section and clause headings are used herein solely for convenience of reference and are not intended as substantive parts of the Parties' agreement. This Agreement incorporates the Exhibits referenced herein. This written Agreement constitutes the entire agreement between the Parties concerning the subject matter, and supersedes all other or prior agreements or understandings, whether written or oral, with respect to that subject matter. Any changes made to the terms, conditions, or amounts cited in this Agreement require the written approval of each Party's authorized representative.