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December 4, 2023

Office of Federal Financial Management
Office of Management and Budget
725 17th Street, NW
Washington, DC 20006

RE: Docket OMB-2023-0017, Proposed Rule – Guidance for Grants and Agreements

Comments submitted electronically via Regulations.gov

To the Office of Federal Financial Management:

STM appreciates the opportunity to provide comments on the Office of Management and Budget (OMB) proposed revisions to 2 CFR Part 200, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (“the Guidance”). STM and its members work with federal agencies and their grantees to support the communication and increase the impact of activities funded by the government in research, scientific and medical practice, and scholarship. We therefore support the efforts of OMB to update and clarify the Guidance to best support these activities. We also welcome and encourage OMB to further engage with the scholarly publishing community to ensure that guidance is aligned with evolving practices and needs in scholarly and scientific communication.

STM’s members include scholarly societies, commercial publishers, and university presses, united by a devotion to advancing trusted research worldwide. We are committed to building a future where researchers, practitioners, and the public have access to information that is open, trusted, and trustworthy. Innovation and the practical use of the latest discoveries, depends upon information that is credible, accessible, discoverable, meta-tagged, and preserved with integrity, and our members actively engage to support US leadership in discovery and development for the public good.

These efforts are backed by significant investments in the creation and maintenance of products and services necessary for the communication of the results of federally funded research, including online infrastructure, pre-printing, archiving, metadata tagging, linking, and data management. Our members have also invested in developing and experimenting with new approaches to providing access, including gold open access and other sustainable business models that will enable access and equity at scale without compromising on quality and integrity. Sustainable models, together with support for copyright, enable publishers to maintain trustworthiness, equity, and accuracy in the scholarly record and ensure it can reliably be used by researchers, practitioners, and the public, as well as, increasingly, artificial intelligence tools.

To achieve our shared goal, STM offers these comments on areas where the proposed revisions could be further clarified or improved. In this submission, we first provide some context for our recommendations with respect to the government’s public access policy and the role of licensing in advancing access to high-quality information. We then offer specific recommendations for clarifications and edits to the proposed revisions.

The Nelson memo and its impact on grants and the Guidance

STM’s comments below are offered in the context of ongoing efforts by federal agencies to implement the August 2022 White House Office of Science and Technology Policy memo on “Ensuring Free, Immediate, and

Equitable Access to Federally Funded Research” (“the Nelson memo”), and the robust support for open science and open access publishing within our membership.¹ These efforts are tailored to provide the broadest and most equitable access to and participation in outputs related to research around the world, and our below recommendations are offered in the spirit of ensuring OMB’s guidance aligns with and supports these efforts.

Current global efforts to expand open access indicate that direct support for publishing (which includes Article Publishing Charge (APC)-supported open access, Read and Publish Agreements, and other evolving models) provides the most sustainable path to open access.² Publishers are actively working to develop and promote a variety of models, which can reduce inequity for researchers at participating institutions and can help increase compliance with policy and reduce administrative burdens. While no single model will work across the system, STM believes that knowledge-creation, discovery, and sharing is best enabled when the final articles resulting from all stages of the peer-review and publication process are immediately openly available to all. The Version of Record (VoR) is the authoritative version for researchers and the public. It is more cited, more used, and garners more attention than other versions of an article, and is the version preferred by researchers.³ As OSTP has been explicit that the government will be “business-model agnostic” with respect to approaches to open access, it is critical that OMB guidance supports this by being clear that all approaches to funding open access publishing costs will be allowable in grants.

Immediate access to a version of the article funded under subscription models has not proven to work at scale, even if it may temporarily work for some publishers or disciplines, or as a transitional model.⁴ While the approach appears cost free to the researcher and funder, it is reliant on subscriptions to support the significant investments publishers make that ensure the quality, integrity, discoverability, and accessibility of research in perpetuity, and it also introduces duplicative costs and administrative burdens in the creation, preservation, and curation of repositories. Subscriptions are put at risk by the immediate availability of a large body of cost-free accepted manuscripts, as demonstrated by widely used resources, such as Unsub.org, that encourage institutions to cancel subscriptions for materials that can be freely accessed. Without sustainable funding – for a diversity of models for access -- fewer resources are available to ensure the quality and integrity of the scientific record, undermining the ability of scholarly communication to support public trust in science and resulting in a dampening effect on innovation, job growth, and scientific progress. New barriers to access could also be created if important journals that serve critical research communities cease publication. The Guidance therefore needs to provide flexibility that allows a variety of licensing approaches and conditions to be put on access to articles, even those written by recipients and subrecipients of Federal awards, to maintain the ability of the scholarly communications ecosystem to provide access with quality and equity.

¹ STM issued a detailed statement in support for open access in 2023 (<https://www.stm-assoc.org/stm-oa-position/>), has joined the government’s 2023 Year of Open Science (<https://nasa.github.io/Transform-to-Open-Science/year-of-open-science/>), and has a long-running research data program (<https://www.stm-assoc.org/research-data-program/>).

² STM’s Open Access Dashboard provides information on the growth of open access and various types and funding models, including Read and Publish and other pooled funding arrangements <https://www.stm-assoc.org/oa-dashboard/>.

³ See, for example, a 2020 survey by Springer Nature, “Exploring researcher preference for the version of record” (<https://www.springernature.com/gp/open-research/version-of-record>).

⁴ See, for example the case of *the Journal of Clinical Investigations*, discussed in <https://scholarlykitchen.sspnet.org/2009/02/26/end-of-free-access/>, or the case of *the Annals of Mathematics*, discussed in <http://www.msri.org/attachments/workshops/587/MSRIfinalreport.pdf>. When the Green OA model is used with reduced or without any embargo, it undermines the subscription model on which it relies.

In sum, STM believes that the federal government and its grantees will best be able to advance the impact of the grants by providing all grantees with full support for open access publishing, along with full flexibility on choice of publication outlet and licensing terms, to ensure researchers have the same opportunity to publish in their journal of choice, which will enable them to reach the optimal audience for their work. Grantees should also be provided with the full opportunity to budget for other open science activities, including data management and sharing, software and code development and sharing, and other activities including metadata tagging, curation, and preservation.

The importance of licensing

Any revisions to the Guidance with respect to licensing and rights in intangible property need to be consistent with the rights of recipients and subrecipients to a Federal award as patent and copyright holders, as well as the Bayh-Dole Act and its implementing regulations. STM notes the following important principles for OMB's consideration which inform our recommendations with respect to section 200.315.

Licensing is an important tool to make intangible property available, including articles, databases, software, and the like. Intellectual property protection, and the use of licensing, incentivizes the creation and improvement of such works. The wide array of licenses used and offered by publishers supports investments in the quality and integrity of these materials. Flexibility in licensing options is key to ensuring equity and academic freedom, allowing researchers to publish their articles under licenses and through agreements that meet their individual needs and preferences, as well as the needs for sustainability in publishing.

With respect to the articles published by STM members that report on the results of a Federal award, a key purpose of publication is to ensure that the ideas in an article can be used and reused to develop new discoveries and innovations. No specific license is required to ensure use and reuse of the ideas and results of a Federal award. However, copyright holders should be allowed, if they choose, to retain their exclusive rights to approve future uses (e.g., reproduction, adaptation (modification), or communication to the public (redistribution)) of the unique expression of those ideas as presented in the article.

Researchers should be free to choose their preferred license for their works: while some prefer to apply a Creative Commons Attribution (CC BY) license to their publication, others prefer to apply licenses that enable copyright holders to approve (or disapprove) further uses such as commercial reuse or the creation of derivative works (e.g., a Creative Commons Non-Commercial Non-Derivative (CC BY-NC-ND) license). The latter license provides rightsholders with an opportunity to safeguard against potential misuse of the work or the creation or spread of misinformation in relation to the work. Researchers should be aware that some so-called "rights retention strategies," rather than protecting author rights, require researchers to apply licenses that result in relinquishing those rights.

Publishers develop policies regarding copyright, licensing, and copyright transfer to best support their communities, and flexibility in funder policies is required to enable publishers to address researcher needs and preferences. Regardless of the author's choice of license arrangements, authors generally have many rights related to sharing articles with the public, many enshrined in copyright law.⁵ Neither these rights, nor agreements made between an author and a publisher, should be superseded by a Federal license.

Finally, it is important to note that when intangible property is acquired by a recipient or subrecipient of a Federal reward, that property may be subject to terms and conditions of use or made available under license.

⁵ Publishers support authors in knowing their rights for sharing articles through an initiative called How Can I Share It (www.howcanishareit.com).

This may be due to preferences of the rightsholder for license types or restrictions, or it may reduce the cost for the acquisition of the intangible property to only require the use needed for the purpose of the Federal award. Therefore, the Guidance should provide maximal flexibility for recipients and subrecipients of Federal grants to use and apply appropriate licenses to their needs, unrestricted by additional requirements from Federal agencies. Where the government might override this flexibility by exercising a license as envisioned in the Guidance, the government should be required to articulate a clear Federal purpose for such requirements that is grounded in statutory authority.

STM recommendations

With the above context and comments in mind, we make the following recommendations for revisions to the proposed revisions to sections of OMB Guidance for Grants and Agreements.

[200.1] As noted in the RFI explanation, a definition of encumbrance has been added to sections 200.311, 200.313, and 200.315. To avoid any confusion or potential misalignment in future revisions to the Guidance, we recommend that instead a definition of encumbrance be added to 200.1. STM also recommends that the definition of encumbrance with respect to intangible property not include the broad and unclear language, “restrict its free use,” as this could prevent the use of licensing arrangements that protect academic freedom and provide flexibility for grantees. STM therefore recommends the following definition be used here:

An encumbrance means a claim or liability that is attached to the property or some other right held by a party that is not the owner. An encumbrance may lessen the value of the property and restrict its free use until the encumbrance is lifted.

[200.311] STM recommends that the two sentences defining encumbrance be removed or revised as noted in the recommendation for 200.1.

[200.313] STM recommends that the two sentences defining encumbrance be removed or revised as noted in the recommendation for 200.1.

[200.315(a)] STM recommends that the two sentences defining encumbrance be removed or revised as noted in the recommendation for 200.1.

[200.315(a)] STM understands clause (a) to refer only to intangible property “acquired under a Federal award,” which is to say, intangible property purchased or licensed with funding provided by a grant. For such works, the above recommended modification to the encumbrance definition in 200.1 should provide flexibility for acquisition mechanisms that provide specific rights to the user. To avoid potential misunderstanding that clause (a) also refers to works created by the recipient or subrecipient (which are separately covered in (b)), STM recommends that additional clarifying language be added that exempts such works from this clause. Specific language could be as follows (addition in red):

Title to intangible property acquired under a Federal award vest upon acquisition in the recipient or subrecipient. The recipient or subrecipient must use that intangible property for the originally-authorized purpose and must not encumber the property without the approval of the Federal agency or pass-through entity. **Copyright in works voluntarily created by a recipient or subrecipient is not considered acquired under a federal award.** ~~An encumbrance is a claim or liability that is attached to the property or some other right held by a party that is not the owner. An encumbrance may lessen the value of the property and restrict its free use until the encumbrance is lifted.~~ When no longer needed

for the originally-authorized purpose, disposition of the intangible property must occur in accordance with the provisions in § 200.313(e).

[200.315(b)] The existing Guidance, as well as the proposed Guidance, refer in a number of ways to works created by a recipient or subrecipient that report on the work performed by the recipient or subrecipient. These provisions could potentially conflict with the rights of copyright owners and other intellectual property holders, as well as the operation of the Bayh-Dole Act. While grant reports delivered to the agency are required under Federal Acquisition Regulations and appropriately used by the government for Federal purposes, articles reporting on federally funded research are different. As products of a partnership between researchers and publishers, they are subject to licensing agreements and should be treated separately. Where funding is provided for such articles, it may be appropriate for additional demands to be made by agencies. That said, the operation of copyright with respect to author preferences and contracts with publishers should always be respected. For works “acquired by” a recipient or subrecipient for use in the performance of the Federal award, these may have restrictions that further restrict their dissemination. STM is also concerned that the meaning of Federal purposes is not clarified by this Guidance and could be interpreted quite broadly. By indicating one specific potential federal purpose (i.e., making available through a repository), OMB is potentially creating less clarity, rather than more. STM therefore recommends the following clarifications to the language in section 315(b) to ensure equity, academic freedom, and respect for copyright:

To the extent permitted by law, the recipient or subrecipient is not prohibited from asserting any copyright it may own in any work **required by, funded by, or acquired under the Federal award, and may assert and exercise all applicable rights under the U.S. Copyright Act, 17 U.S.C. §§ 101 et seq.** To the extent permitted by law, the Federal agency reserves a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes and to authorize others to do so **for Federal purposes.** This includes the right to require recipients and subrecipients to make ~~such~~ **works required or funded by a federal award** available through agency-designated public access repositories **under a license of the copyright holder’s choice.**

[200.336] Revisions to previous language related to “open and machine-readable formats” in the first sentence of section 200.336 introduce undefined terms “open file” and “non-licensed” which are unclear as to their meaning and application in this context. STM recommends that the Guidance retain the previous phrasing.

[200.461] In modernizing the language in this section related to the dissemination of the outputs of a Federal award, STM recommends that OMB be as expansive as needed to address evolving business models for open access, evolving open science practices, and other potential needs. STM recommends this section be entitled:

Publication and printing costs, **and other open science costs**

[200.461(b)] As above, STM recommends that the specified allowable costs include all funding mechanisms for open access publishing, not only APCs (which should be referred to as “article publishing charges”) or “similar,” but allow for other models as well. In addition, to avoid potentially reducing clarity with a new category of “developed under,” this language could be stricken as (b)(1) specifies that the articles must report on the Federal award. STM therefore recommends the following additions and clarifications:

(b) Page charges, article ~~processing~~ **publishing** charges, or ~~similar~~ open access fees for professional journal publications and other peer-reviewed publications ~~developed under a Federal award~~ are allowable where:

[200.461(b)(2)] The language in this section, while unchanged from the previous version, is unclear as to the “impartiality” requirement. This requirement should be consistent with the principle of consistent charging to ensure the costs for recipients and subrecipients are not assessed differently by virtue of the Federal award. In addition, a journal may publish original research, editorials, notes, and letters, each of which may be treated differently and have different charges (or no charges at all). Consistent with OMB’s goal to promote clarity, STM recommends the following language (which is also parallel to the wording in (1)):

(2) The charges are levied impartially ~~on all items published by the journal~~, with respect to whether or not ~~the work was supported by the Federal government under a Federal award~~.

[200.461(c)] Consistent with the recommendation above for the 200.461, STM recommends the addition of a section as follows. Alternately, this could be added as a new, appropriately numbered, section under “General Provisions for Selected Items of Cost.”

(c) Costs related to the making available of software or data and the curation, metadata tagging, hosting, preservation, and other charges related to open science are allowable where:

(1) They relate to research data, publications, or other outputs resulting from a Federal award.

(2) The recipient or subrecipient may charge the Federal award during closeout for the costs of open science activities related to public access requirements or data management and sharing plans if the costs were not incurred during the period of performance of the Federal award. If incurred, these costs must be charged to the final budget period of the award unless otherwise specified by the Federal agency.

Thank you in advance for your consideration of these suggestions. Please feel free to reach out to me (caroline@stm-assoc.org) or David Weinreich, Director of Policy and Government Relations (weinreich@stm-assoc.org, 202-599-0639), if we can clarify any of them further. As we hope is made clear by these comments, scholarly publishers are a key stakeholder in ensuring the maximum impact of Federal awards and therefore a partner with the government in advancing US leadership in science and discovery. STM and its members welcome further opportunities to engage in the development of grant policies related to the dissemination of research reports, data, and other outputs. It is our hope that these recommended clarifications to the guidance will support the appropriate use of Federal awards and advance their impact. Working together, we can ensure access, equity, and integrity in the scholarly communications ecosystem.

Sincerely,



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CEO
STM

About STM

At STM we support our members in their mission to advance trusted research worldwide. Our more than 140 members collectively publish 66% of all journal articles and tens of thousands of monographs and reference works. As academic and professional publishers, learned societies, university presses, start-ups and established players, we work together to serve society by developing standards and technology to ensure research is of high quality, trustworthy and easy to access. We promote the contribution that publishers make to innovation, openness and the sharing of knowledge and embrace change to support the growth and sustainability of the research ecosystem. As a common good, we provide data and analysis for all involved in the global activity of research.

The majority of our members are small businesses and not-for-profit organizations, who represent tens of thousands of publishing employees, editors, reviewers, researchers, authors, readers, and other professionals across the United States and world who regularly contribute to the advancement of science, learning, culture and innovation throughout the nation. They comprise the bulk of a \$25 billion publishing industry that contributes significantly to the U.S. economy and enhances the U.S. balance of trade.