Supplemental Compensation: $1M DOJ Settlement

A $1 million settlement between a university and the Department of Justice (DOJ) was made public in July ("University Agrees to Pay $1 Million to Settle Federal False Claims Act Allegation" – DOJ press release, July 7, 2008). The "whistle-blower" lawsuit and settlement was announced by the United States Attorney, Northern District of Georgia, and was related to mischarging "supplemental" pay to federal grants, contracts and cooperative agreements.

Unfortunately, as is sometimes the case with DOJ settlements, there were no public records and details of the case were not available. One newspaper in the Midwest reported on the story, but details again were limited. However, in that article it did state that the University was settling in order to avoid legal costs, and further described the institution's position that the issue was a "good-faith dispute" over "how to apply highly complicated, cost-accounting principles governed by regulations that are hundreds of pages long."

In the March 2007 COGR “Effort Reporting” paper (Compensation, Commitments, and Certification), Chapter Ic. addressed “Special Care for Supplemental Compensation”. In light of the recent $1 million settlement, it is a good opportunity to revisit some of the important issues raised in the paper (page numbers from the glossy-version of the COGR paper are indicated in parentheses).

♦ (Page 16) “When a faculty member is at 100% full-time workload during a continuous period of employment, additional assignments normally cannot result in an increase in compensation.” This is a paraphrase of language from J10d, Circular A-21, and effectively makes it difficult for an institution to support supplemental compensation when an individual is already at a 100% full-time workload.

♦ (Page 16) “Intra-university consulting generally occurs without additional compensation, and should not result in an increase of the rate of pay.” This also is a paraphrase of language from J10d, Circular A-21. The important message is that supporting supplemental compensation via intra-university consulting is a difficult test to meet, and except for several exceptions defined in J10d (e.g., consulting across department lines, or consulting involving a separate or remote location), supplemental compensation generally is not allowed.

♦ (Page 16) “Examples of incidental work are not provided in A-21, though one criterion might include the ‘regularity’ of the assignment. In general, these assignments are not related to sponsored programs and are not included as part of IBS.” Incidental work is addressed in J10a, Circular A-21, and states that for work in excess of one’s normal workload, supplemental compensation is allowable. However, compensation associated with incidental work normally would be excluded from an individual’s base salary. Furthermore, performing incidental work on federal grants, contracts, or cooperative agreements normally would be not applicable, and therefore, a discussion that relates incidental work with work performed on federal projects normally is not necessary.

From a federal compliance perspective, when a faculty member (with a full-time appointment over a continuous period of time) receives research funding, the definition of full-time workload and institutional base salary (IBS) is unaffected. The expectation is
that the faculty member will be able to contribute time to the research by receiving release time from his/her other duties.

However, a 2004 audit, conducted by the National Science Foundation, Office of Inspector General, provided interesting insights to this discussion (see http://www.nsf.gov/oig/sdsuf.pdf). The institution in question had a long-standing agreement with their cognizant agency (the Division of Cost Allocation, DCA) that “overload salary” (in this context, the same as supplemental compensation) paid for during the academic year could be added to the prior-established IBS to create a revised IBS. While this was contrary to most federal standards, the institution was governed by state law such that release time from teaching duties was not permitted. In effect, a faculty member who received a research grant would not be released from his/her current duties, and work on the grant would constitute a redefinition (i.e., an increase) in his/her responsibilities (and supplemental compensation would be justified).

In the audit resolution, the institution’s position was reaffirmed. The terms of the audit resolution agreement specified that supplemental salary compensation for faculty members during the academic year a) had to be clearly identified, b) had to be requested in the grant proposal, and c) approved by NSF in writing through issuance of a notice of grant award accepting the proposal (or otherwise).

Finally, in the COGR effort paper, we concluded Chapter 1c. by describing “Supplemental Compensation, conditions for Allowability”.

♦ (Pages 17-18) The following conditions should be met to determine situations where full workload may be redefined, where base salary may be adjusted, and where supplemental compensation may be allowable. These steps have been reviewed, and accepted, by federal officials in a number of situations. However, due to the sensitivity of this topic, the institution should be clear when proposing supplemental compensation in a grant application, and consult the appropriate federal agencies and officials.

a. In accordance with A-21, J10, salary policies must be uniform and consistently applied.

b. A definition of full workload must be established that sufficiently enumerates full workload requirements, such that it is obvious when full workload is exceeded.

c. The amount paid as the revised base salary must be calculated and paid in accordance with salary policies of the institution, as stated in point a) above, and be commensurate with the devoted effort.

d. The total salary and full workload must be considered the full activities of the individual, accounted for within his or her 100% effort, and be accounted for in the effort reporting system of the institution.

As the title of Chapter 1c. suggests, “special care” is the operative approach when considering supplemental compensation policies. Supplemental compensation is allowable and can be proposed when the conditions listed above are met. However, institutions should be diligent in establishing and monitoring their policies and practices, as this can be an area of potential audit risk.