

UIDP Academy Workshop Contemporary Contracting Approaches UIDPVirtual 2020

Moderator: Sandy Mau, UIDP

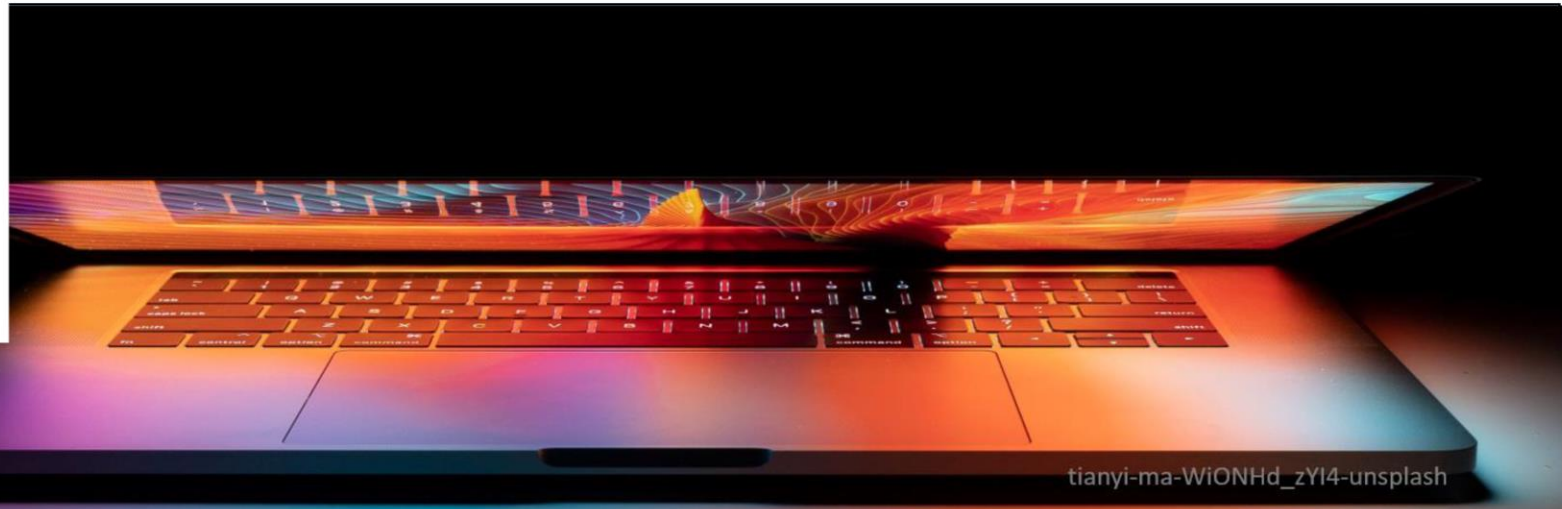
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Jeff Fortin, Penn State

Jarrett Ellis, Georgia Tech Research Corp.

March 23, 2020

UIDP
virtual
2020



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Jarrett Ellis
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UIDP Academy Workshop Contemporary Contracting Approaches

How to Participate

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Georgia Tech Contract Continuum

Jarrett R. Ellis
Associate Director, Industry and International
Contracting
Georgia Tech Research Corporation

Georgia Tech Contract Continuum

The WHAT

The Contract Continuum is a collection of standardized agreements that enables Georgia Tech to engage in industry-sponsored research throughout the entire R&D cycle.

- Basic Research Agreement – Fundamental scientific investigations
- Applied Research Agreement - Proof of concept and early-stage prototyping
- Demonstration Research Agreement - Incremental improvements to existing technology
- Specialized Testing Agreements – Performance testing and evaluation



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Georgia Tech Contract Continuum

The WHAT

The Contract Continuum is published at: <https://industry.gatech.edu>.

Industry Contracting



Contract Continuum for Sponsored Research

Four Types of Agreements for U.S. Industry

Georgia Tech offers contract agreements that enable U.S. industry and our researchers to engage at all stages of R&D. These agreements offer straightforward intellectual property (IP) terms to U.S. companies. [Learn more about international research here.](#)

We will work with you to determine which mechanism is right for you. [View sample agreements here.](#)

Agreement Type	Purpose	IP Terms
Basic Research	To explore fundamental challenges in a technical area	Opportunity to license the resulting IP
Applied Research	To explore a technology's viability and overcome practical challenges To test a product during final stages of development	Fee-based access to the resulting IP Exclusive field-of-use rights for specified time period can be extended or converted to non-exclusive license
Demonstration	To improve existing technology during product development	Exclusive rights to any improvements to company's IP at no additional cost*

-  Sample Agreements
-  F&A Rates
-  International Research

GET STARTED

Contact:
Jarrett R. Ellis, MEd, JD
404.894.6929

Georgia Tech Contract Continuum

The WHAT

We include links to each template in .pdf format.

Industry Contracting

Sample Agreements for Industry Contracting

Georgia Tech researchers submit proposals for industry-sponsored research via the Office of Industry Engagement.

If the sponsoring company accepts the proposal, we negotiate the agreement terms and conditions.

Below are samples of these agreements.

Agreements with U.S. Companies

These samples illustrate the straightforward intellectual property (IP) terms offered under Georgia Tech's "Contract Continuum."

- » **Basic Research:** Explore fundamental challenges in a technical area
- » **Applied Research:** Identify solutions to real-world challenges
- » **Demonstration:** Improve an existing technology
- » **Specialized Testing:** Test new and existing products

Agreements for International Projects

- » **Basic Research Master Agreement**
- » **Basic Research Project Agreement**



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Georgia Tech Contract Continuum

The WHY

- Georgia Tech's contracting methodology is researcher driven. Conversations with research leaders on campus revealed a high interest in working with specific, potentially long-term industry sponsors to enhance educational opportunities for students. The idea of building relationships was key.
- Conversations with potential sponsors revealed a desire to integrate sponsored efforts into the entire R&D spectrum while permitting students to participate at each stage.
- Identifying the right structure required a cooperative effort based on a balance of interests and needs.



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The WHY (continued)

- Example: Company X is a graphene manufacturer interested in developing CO₂ capture technology. A Georgia Tech Materials Science professor has previously published on the unique properties of graphene, including potential use as a CO₂ capture matrix.
- A four-stage research plan is developed as follows:
 - Basic investigation as to whether graphene can be used as a CO₂ capture matrix at scale.
 - Applied investigation for prototype technology based on a particular graphene structure discovered in the basic investigation, if any.
 - Late stage improvements to the graphene structure developed in the applied investigation.
 - Testing and evaluation of the late-stage prototype against specific performance targets



Georgia Tech Contract Continuum

The WHY (continued)

- The sponsor's return-on-expense metrics change at each stage. This is difficult to balance in a one-size-fits-all agreement. A more flexible framework is needed.
- On the other hand, certain features remain immovable for Georgia Tech, such as the right to publish, the right to use foreground IP for future research, assurance that foreground IP will be deployed to the benefit of the public, and maintenance of institutional integrity, including appropriate performance standards and allocations of risk.
- As a result of the foregoing, the Contract Continuum proceeds along an arc of foreground IP rights at key R&D levels. All other terms remain largely the same.



Georgia Tech Contract Continuum

The How – Specific Terms

Basic Research Agreement

Sponsor may be granted a nonexclusive, royalty-free commercial license to project IP. Subject to PI approval.

Sponsor has the option to negotiate an exclusive commercial license at fair market in defined field of use.

Applied Research Agreement

Sponsor receives an exclusive commercial license to all foreground IP for a term of five years in exchange for 5% of contract cost, upfront, per each field of use.

Sponsor may negotiate a extended licenses at fair market value.

Sponsor receives an option to negotiate exclusive licenses to foreground IP in non-declared fields of use.

Demonstration Research Agreement

Sponsor receives exclusive commercial licenses to all improvements to sponsor-owned or sponsor-controlled background IP.

Specialized Testing Agreement

All data and test results on sponsor-owned or sponsor-controlled technology are owned by sponsor.

No further IP development is expected; thus, all rights in foreground IP follow U.S. patent and/or U.S. copyright law.



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Frequently Asked Questions

What has the response been from industry?

- Research revenues from industry sponsors have more than doubled since the Contract Continuum was introduced in 2013.
- Long-term sponsors appreciate having a flexible matrix that enables collaboration with GA Tech throughout the R&D cycle.
- New sponsors appreciate having all terms available for discussion purposes.
- Several sponsors have stated that the Contract Continuum shows that Georgia Tech seeks to be accessible to industry collaboration without compromising its academic mission.

Georgia Tech Contract Continuum

Frequently Asked Questions

- Are any of the forms more popular than the others?
 - Overwhelmingly, our work is done on the Basic Research Agreement. Sponsors are able to explore a variety of subject matters with robust IP access rights and no excess financial commitment.
 - The Applied Research Agreement is the next most popular form; however, most use is with sponsors with whom there is a deeper relationship – a history of basic research. For the most part, it is still modest portion of the overall work that we do for them.



Georgia Tech Contract Continuum

Frequently Asked Questions - continued

- Are any of the forms more popular than the others? - continued
 - Like the Applied Research Agreement, the Demonstration Research Agreement typically arises within a long research relationship around progressive project iterations where Georgia Tech's continued involvement is advantageous. This form is used in the minority of cases.
 - The Specialized Testing Agreement is in regular use by long-term sponsors and newcomers alike. We use this form more often than the Applied and Demonstration forms combined, but still substantially less than the Basic form.



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Frequently Asked Questions - continued

What has the response been from industry?

- Long-term sponsors appreciate having a flexible matrix that enables collaboration with GA Tech throughout the R&D cycle.
- New sponsors appreciate having all terms available for discussion purposes.
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Georgia Tech Contract Continuum

Frequently Asked Questions - continued

Is there a method for navigating difficult requests?

- The Continuum itself demonstrates that GA Tech takes a broad view of university-industry collaboration. We have not met with consistent resistance with any particular model because they were all designed in conversation with sponsors based on mutual goals.
- Our general strategy is to negotiate around the central theme of a balance of interests, one private, in the case of the sponsor, and the other public, in the case of GA Tech.



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Georgia Tech Contract Continuum

Frequently Asked Questions - continued

Is there a method for navigating difficult requests? - continued

- Almost every project falls within the four corners of the Contract Continuum. Rather than a decision tree, we employ a decision scale within relevant framework.
- Example: Publication is an immovable term. Nonetheless, adjustments to the timing of publications may be explored where circumstances provide adequate justification.



**THANK
YOU!**

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IP models with pre-negotiated terms and a menu of options

Jeff Fortin, Ph.D.
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UIDP Virtual 2020



Background Info

*New Approach to IP
Management at Penn
State launched in 2012*

Penn State's 2012 IP Policy Change

Motivation for change

- Long history of expenditures to create/manage IP outpacing revenues
- IP model was not beneficial to the institutes, students, or public
- Lost opportunities (e.g., failed negotiations)

A New Approach to Intellectual Property Management and Industrially Funded Research at Penn State

Henry C. Foley

New Approach

- Benefit students and society – Land Grant Mission
- Catalyze more industry sponsored research, diversify funding streams
- Stronger ties to practitioners

Business funding of research

Higher education R&D expenditures by source of funds
(millions of current dollars)

Source: NSF NCSES HERD Report

Year	All R&D	Federal government	State and local government	Institution funds	Business	Nonprofit organizations	Other
2011	\$ 65,274	\$ 40,769	\$ 3,851	\$ 12,580	\$ 3,183	\$ 3,854	\$ 1,038
2018	\$ 79,436	\$ 42,018	\$ 4,321	\$ 20,438	\$ 4,724	\$ 5,452	\$ 2,483
% Change	22%	3%	12%	62%	48%	41%	139%

- Business R&D funding to universities is growing
- However, just 6% of overall expenditures vs 53% for Fed sources
- Negotiations for industry projects can be resource consuming vs level of funding

Policy Details

*Assignment with
bonanza clause and
no up-front fee*

No other options

The Penn State IP policy

- Penn State will not seek to retain ownership of IP
- Penn State will assign IP to sponsor upon request
- Penn State has right to publish research results
- Penn State has right to practice IP for research and educational purposes
- Bonanza clause: If research results lead to exceptional commercial success, sponsor agrees to 1% royalty annually when annual sales exceed \$20M
- Penn State Researchers must agree and acknowledge IP terms in writing
- Background IP and its availability to license is identified upfront



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Did the new policy meet expectations?

Negotiation time

- No change – average time to negotiate an SRA same today as before
- Other terms require negotiation as well (publication, confidentiality, etc.)

Growth of industry sponsored research

- Good marketing tool
- Steady growth year-over-year but no large uptick
- Certain programs benefited from the policy
- New, larger relationships developed, at least in part, due to the policy

The Issues

IP negotiation is still an issue and slows down progress on programs regularly.

Challenges that we have encountered

- Bonanza clause often a pain point and requires negotiation (40%+ of the time)
- Not all companies want to take ownership, some prefer exclusive license
- IP term customization is now typical ...still negotiating
- Ownership transfer process can be burdensome
- Tracking private usage in bond-finance research facilities is required
- Field of use – our policy is not applicable to life sciences/human health – causing confusion



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What Next

*Offering multiple options
can support a variety of
project types and sponsor
needs*

Options, Options, Options

Universities have implemented successful models that provide choices, or options, that a sponsor can select

- Exclusive license with up-front fee and a bonanza (e.g., Minnesota, Virginia Tech, Iowa State, University of Cincinnati)
- Exclusive license with up-front fee and no bonanza (Georgia Tech for demonstration research)
- Assignment with up-front fee (Ohio State, Iowa State, University of Cincinnati); note, fee can be significant
- NERF for commercial use for an up-front fee, includes option for exclusive (Minnesota, Virginia Tech, Ohio State)
- NERF for research and commercial use w/o up-front fee (Georgia Tech for Basic research)
- Standard terms – agree to negotiate a royalty-bearing license once the IP has been identified



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A great benchmark

Minnesota's model

- Three options with well defined terms
- Clarity on background IP
- Clarity on who manages patenting activity

From: research.umn.edu/mn-ip

OPTION A¹

Pre-pay 10% of sponsored research agreement (or \$15K, whichever is greater)^{2,3,4} for exclusive, worldwide license to all inventions arising from the research project with the following pre-set terms:

- › Sponsor pays 1% royalties on net sales when annual sales using IP exceed \$20M
- › No cap on royalties unless the invention improves on pre-existing product/processes (cap of \$5M)
- › No annual minimums or other technology commercialization fees
- › No time limits or milestones⁵
- › Sponsor is free to sublicense/cross license

OPTION B

Sponsor negotiates a license for resulting technology after the project is complete:

- › No upfront fees
- › No pre-set royalties
- › Sponsor and University negotiate a royalty-bearing license once the IP is developed
- › Option to negotiate a license (6 months)

OPTION C¹

Pre-pay 10% of sponsored research agreement (or \$10K, whichever is greater)^{2,3,4} for fully paid-up, non-exclusive, royalty free, worldwide license to all inventions arising from the research project with the following pre-set terms:

- › No royalties, annual minimums, or other technology commercialization fees
- › May not sublicense or cross license
- › Option to negotiate an exclusive royalty-bearing license (6 months)

THANK YOU!

Jeff Fortin, Ph.D.

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Public Dedication of Intellectual Property

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Public Dedication, Public Domain, Public Access

Public Dedication is the active process an inventor or author or owner must take to place their patentable or copyrightable intellectual property in the **Public Domain** and then make it available for **Public Access** via the internet or other mechanism.



Use of Public Dedication Model - Survey

Has anyone ever agreed to use this model for disposition of IP rights in research results?

Was it in an industry sponsored research agreement?

Public Dedication is an active process.

Inventor waives the right to seek patent protection by publishing or disclosing the inventions thus preventing a patent from issuing.

Author or owner makes an affirmative statement on the work waiving copyrights and placing the work in the public domain.



Public Dedication vs Open Source

After an author or owner makes an affirmative statement on the work waiving copyrights and placing the work in the public domain **there are no longer and copyrights covering the work.**

If an author or owner makes a work publicly accessible via an open source mechanism **the copyrights still exist** and the author/owner licenses those rights to the public under the terms specified in the license or terms of use on the website.



Public Dedication - Companies.

- Advances corporate social responsibility goals, i.e. public access.
- Accelerates negotiations particularly for basic research projects.
- Supports development of technologies that requires more investment from a broad or multiple industry segments by different kinds of entities
- Catalyzes strategic engagement – shows parties can be flexible in working together
- Enables freedom to practice.
- May support multiparty partnerships and consortium development not subject to federal regulations such as Bayh-Dole.



Public Dedication - Universities.

- Accelerates negotiations particularly for basic research projects.
- Supports development of technologies that requires more investment from a broad or multiple industry segments by different kinds of entities
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- Enables freedom to practice.
- May support multiparty partnerships and consortium development not subject to federal regulations such as Bayh-Dole.



Public Dedication – Uses and Limitation

- May work better in software and IT industries where speed is important and unique application and branding are often the key market drivers.
- May be critical where immediate global collaboration is needed – any situations come to mind??
- Does not work if federal funding requires application of Bayh-Dole to potentially patentable results.
- Does not work well if the SOW and definitions of affected research results cannot be clearly stated.
- Does not work well, i.e., defeats the purpose, if the publicly dedicated IP cannot be used without background IP of either party.



Identification of IP is still required.

- Description and disclosure of the IP to be dedicated to the public sets parameters of the obligations.
- Identity of inventors, authors, and owners of the described, disclosed IP is necessary to know who is affected.
- Only the inventors, authors, or owners can take the actions necessary to dedicate IP to the public.



Public Dedication Logistics

- University/Company agree to SOW for project using model
- University/Company define IP to be dedicated
- Get waiver of rights by inventors/authors to implement model:
 - Dept head
 - Managers
 - Dean
 - Tech Transfer officers
 - Project participants (researchers, students)
- Identify results that fit the IP definition
- Decide on timing and method of Public Dedication
- Record agreements, waivers for future reference



**THANK
YOU!**

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University Consulting

Elaine L. Brock, MHSA, JD

Contracts, Compliance and Conflict of Interest Authority, LLC

What is University Consulting?

The University contracts with a company to permit access to University faculty (students, facilities) for purposes recognized by the University as part of the faculty member's permitted consulting days.

So, the faculty are doing what they are permitted to do, e.g., consult 4 days per month, but the University is facilitating that as the contracting party with the company rather than the faculty member being an independent contractor.

Faculty are considered to be performing services in excess of the effort they owe the University (often called “overload”)



Why would a University permit this?

- Build and maintain relationships with companies
- Facilitate targeted solutions and application of theoretical information
- Enable cross-disciplinary team approach to problems
- Maintain control over the scope of consulting activities in key areas
- Enable student interactions with potential employers



Considerations / Policies

Intellectual Property:

- Owned by company (standard consulting terms)

- Owned by University and licensed to Company

 - e.g., NERF

- BIP of either party needed/permitted

Personnel:

How is faculty/participant's time budgeted and paid?

- Overload?

- Intra-university consultant?

- How are rates established?

 - Market based

 - University salary based

Can students participate?

- How paid?

- Course credit, practicum experience

Does this activity count against available allowed consulting days for faculty?



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Considerations / Logistics

Charges:

- Daily/hourly rate

- Budgeted line items

- Fixed price

- F&A

How is faculty/participant's time budgeted and paid

- Overload?

- Intra-university consultant?

- How are rates established?

 - Market based

 - University salary based



Considerations / Regulations

Export Controls

No intent to publish = not fundamental research = not excluded

Human/Animal Subjects

Access to University's assurances system approvals

Related charges for review/oversight

F&A costs and implications

Use of University facilities

Related access using recharge rates

Exclusion from base

Administrative costs

Charge and recovery for contract review and post award costs

Exclusion from base



Considerations / Other

Internal processing responsibility

- Dean, Dept Head
- Office of sponsored activity
- Reporting, e.g., NSF
- HR, Payroll, Effort reporting
- Accounts receivable
- COI
- Tech Transfer
- Export Control

Transparency

- FOIA for public universities
- Disclosure of contract policies

Liability

- University standard insurance and related policies
- Public university's immunities and statutory limitations on liability
- Worker's Comp applicability



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Selling Excess Capacity

Elaine L. Brock, MHSA, JD

Contracts, Compliance, and Conflict of Interest Authority LLC

Excess Capacity – common criteria

- University “service unit” has unique equipment or ability and provides services or goods to University units.
- The costs for providing the services or goods can be easily and accurately identified and can be billed with an approved rate per unit or activity, e.g., per test, per hour
- The University does not use all of the capacity of the service unit so it can provide access to the equipment or services to entities outside the University
- Publication of results by the University is not expected
- Development of IP by University is not expected and rights are not granted to Company
- Company often needs to provide proprietary information or material to the University
- Duration of use may be short and repetitive



Examples of use of excess capacity

- Company provides materials or protocol that the University uses to conduct the testing using its specialized equipment, personnel, or facilities, e.g., wind tunnel, telescope, unique animal model, Six Sigma training, novel or unique process.
- Company provides materials for the University to use with its specialized techniques, methods, or parameters to provide results to the Company, .e. g., unique animal model
- University provides direct access to its specialized facilities or equipment for the Company to conduct their own testing with limited technical assistance from the University.



A University sells excess capacity to:

- Maintain functional operation so that the unit/service is available when needed by the University
- Promote economic development by providing access for external unit who need but cannot afford to duplicate expensive University facilities, i.e., small business development
- Provide hands on experience for students
- Provide a broader spectrum of services to current company sponsors
- Entice new corporate sponsors

Identifying Excess Capacity

- Capacity not currently being used or proposed to be used, or used intermittently
- Market pull, i.e., no practical alternatives
- Costs the University to operate or staff even when not in use
- Dept or Unit Head says use is appropriate to unit's mission

?? Is there any justification for a University establishing or building a unit that will be solely used by external entities??

?? Should the University sell its excess capacity to run a particular test when there is an available company that can do the test but at a higher cost to user??



Federal Guidance*

The costs of services provided by highly complex or specialized facilities operated by the University are allowable as charges to the government if 1, 2 **or** 3:

1. The material costs of such services are charged directly to applicable awards based on actual usage of the services on the basis of a schedule of rates or established methodology that:
 - a. Is no more than the University charges its internal units, **and**
 - b. Recovers only the aggregate costs of the services, i.e., direct costs and its allocable share of all indirect (F&A) costs, **and**
 - c. Rates are adjusted at least biennially, and must take into consideration over/under applied costs of the previous period(s), **and**
 - d. Costs take into account any items of income or Federal financing that qualify as applicable credits (e.g., discounts, rebates)

2. Where the costs are allocated as part of the Universities indirect (F&A) costs.

3. Under some extraordinary circumstances, the Federal Government and the University may establish other costing arrangements.

*2 CFR § 200.468 Specialized service facilities.

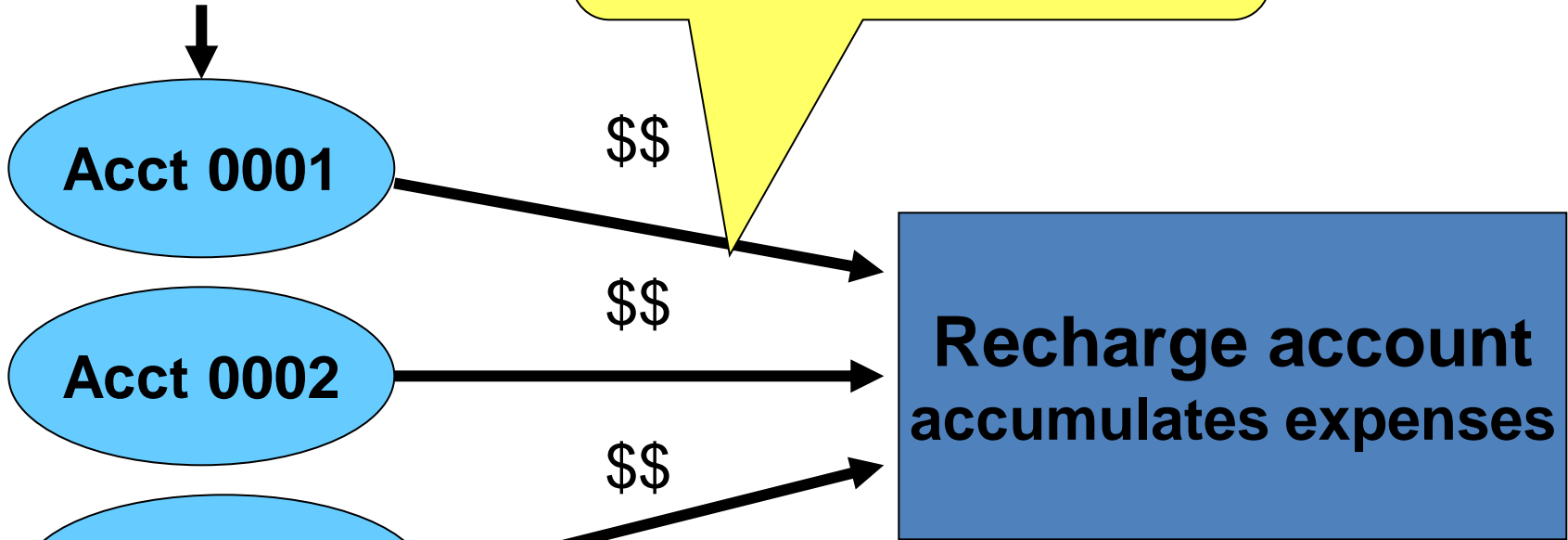
Establishing Fees

- Intent to break even: cost= revenue
- Determine the actual cost and add applicable F&A
- Differentiate fees by type of user:
 - University units and federal govt pay actual cost no built in profit.
 - Companies pay actual cost plus, e.g., adjustment to market rate
- Procedures are established for periodic review of rates, e. g., at least biennially .
- Revenue received in excess of costs is segregated to:
 - Support actual cost audit
 - Show “profit” as base for UBIT, Tax Credit Act
- Rates must be consistently applied once established
- Handy Recharge Rate Request Template <http://finance.umich.edu/analysis/recharge-rates/resources>



\$\$ from Sponsors
Charged at \$x/unit

Acct pays recharge rate
- \$y/unit used



\$x- \$y goes to
discretionary account
when p/g closes



A Few Contract Considerations

- Testing agreements often need to be initiated quickly which requires a contracting vehicle that is easy to use.
 - Template (or master) agreements for these types of projects are useful
 - Consider drop down – single signature agreements with order form, invoicing info
- If Company issues a PO – override inapplicable referenced PO terms
- The probability of IP made by University is low but Companies may require an IP clause “just in case”.
 - University IP related to the unique facility, methodologies, service, etc. should be treated carefully as Background IP
 - The University acquires no rights in the Company's proprietary material or information
 - University grant of a NERF to results may be enough if there is a confidentiality clause
- Address liability, indemnification, insurance
 - If the user will be coming in to use the University's facilities include relevant visitor terms
 - Add disclaimer of warranties by University
 - Indemnification for use of results, facilities by Company



10 Common Audit Comments -

1. Rates billed before approved
2. Rates are not charged consistently to all internal users
3. Wrong recharge rate charged
4. Rates posted to websites are wrong
5. Units “grandfathered” rates to other units rather than using the current approved rate(s)
6. Units book transactions as a rebill to other unit rather than as an approved recharge rate
7. The cost(s) changed, but the recharge rate was not updated e.g., equipment has fully depreciated
8. Unapproved costs are expensed to a recharge chartfield
9. No proper documentation for service costs or revenue billed
10. Costs not timely booked, e.g., staff salaries , depreciation expense

http://finance.umich.edu/sites/default/files/2017-05/Top_10_List.pdf



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Strengthening
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Member
Webinar

WEDNESDAY,

APRIL 8, 2020

12 to 1 p.m. EDT



Jim Bray
Northwestern
University
Moderator

How Companies Approach Academic Research Engagement in these Disruptive Times

[Join us](#) to learn how our industry members, in diverse sectors, are evaluating and reframing their current approaches to academic collaborations.

Panelists



Gaylene Anderson
Boehringer Ingelheim
Pharmaceuticals, Inc



Kent Foster
Microsoft



Austin Kozman
PepsiCo