GLOBAL PARTNERSHIP for EDUCATION

BOD/2013/02 DOC 02
Meeting of the Board of Directors

7 February 2013

REQUEST FOR APPROVAL OF ALTERNATIVE PROVISIONS IN THE FINANCIAL PROCEDURES AGREEMENT WITH UNICEF

For Decision

1. PURPOSE

This paper relates to the proposed Financial Procedures Agreement between the World Bank as Trustee for the Global Partnership for Education Fund (GPEF) and the United Nations Children's Fund (UNICEF), which is now in near-final form. The purpose of this paper is to seek a decision from the Board of Directors to exercise permitted flexibilities to include alternative provisions proposed by UNICEF that deviate from two of the requirements of the Contribution Agreements between the Trustee and Contributors to the GPEF.

2. RECOMMENDED DECISION

The Secretariat requests that the Board of Directors approves the following decision:

BOD/2013/02-XX—Financial Procedures Agreements with UNICEF: Based on the explanation provided by UNICEF (attached as an Annex to this paper), the Board of Directors, in agreement with the World Bank as Trustee for the GPEF, decides that Sections 8.2(c) and 8.4 of the Standard Provisions of Contribution Agreements signed between the Trustee and Contributors to the GPE Trust Fund shall not apply to Financial Procedures Agreements between the Trustee and UNICEF, and that the following alternative text proposed by UNICEF is acceptable.

> "In accordance with the GPE's Misuse of Funds Policy, the GPE Board's designation of UNICEF as Managing Entities reflects the GPE Boards' assessment that UNICEF has policies and procedures to mitigate risk of misuse of funds and to address misuse should it occur. UNICEF confirms that these policies and procedures will be fully applied with regard to each Allocation.

Without limiting the generality of Section N.N *[Section number to be provided upon finalization of the Agreement]* above UNICEF further confirms that UNICEF will, through the GPE Secretariat, advise the GPE Board and the Trustee if, in the application of its accountability and oversight framework it initiates an investigation into allegations that some part of a Cash Transfer has been used in a manner inconsistent with the purposes for which it was provided by the GPE, and will continue to provide information about such investigation and any follow-up action in accordance with UNICEF's Information Disclosure Policy and other relevant policies and procedures and decisions of its Executive Board. In the event that UNICEF determines that such misuse has occurred it will notify the Board of Directors, through the Secretariat, and the Board of Directors may instruct the Trustee to withhold further Cash Transfers under the relevant Allocation. In addition, if UNICEF has determined that such misuse occurred while the funds were under UNICEF's direct control, UNICEF will promptly return an amount equal to the misused funds to the Trustee. If the misuse of funds was due to the action of a third party, and UNICEF successfully initiates recovery action, UNICEF will transfer all such recovered funds to the Trustee."

3. BACKGROUND

3.1 The terms under which the Trustee administers GPEF Contributions on behalf of all Contributors are defined in, among other things, the Standard Provisions of the Contribution Agreements between the Trustee of the GPEF and Contributors to the GPEF.

3.2 The Standard Provisions of the Contribution Agreement set out a list of fourteen provisions that should be included in all Financial Procedures Agreements, but allows the Trustee and Board of Directors the flexibility to agree otherwise.

3.3 UNICEF and the Trustee, with support from the Secretariat, have agreed upon most of the final text of the Financial Procedures Agreement applicable where UNICEF acts as a Managing Entity. However, there are two areas where UNICEF has proposed alternative text that would require the Trustee and the Board to exercise the flexibilities permitted under the Standard Provisions of the Contribution Agreements.

3.4 The request to the Board set out in this paper therefore is a request to exercise those flexibilities with respect to the following two provisions:

> *"8.2 Except as the Trustee and Board may otherwise agree, each Transfer Agreement or Transfer Memorandum shall provide that: [...] (c) If the Board notifies the Trustee through the Secretariat that the Board has determined, following consultation with the Supervising Entity or Implementer, that Transferred Funds have been used in a manner inconsistent with the terms of the corresponding Transfer Agreement or Transfer Memorandum or the applicable decisions of the Board, the Trustee shall withhold transfers to such Supervising Entity or Implementer and/or require the Supervising Entity or Implementer to promptly return such funds to the Trustee or as otherwise instructed by the Board.*
>
> *8.4. Except as the Trustee and the Board may otherwise agree, each Transfer Agreement and Transfer Memorandum shall name the Contributors as third party beneficiaries with direct rights on the part of the Contributors to seek recourse under the Transfer Agreement or Transfer Memorandum and will provide the Trustee with the rights of novation and assignment to enable the Contributors to seek direct recourse against a Supervising Entity or Implementer."*

3.5 UNICEF's proposed alternative text, together with UNICEF's explanation for the proposed alternative text, is included as an Annex to this paper.

3.6 The Trustee recognizes that UNICEF's proposed alternative text seeks to: (a) increase reliance on UNICEF's accountability and oversight framework which is expected to achieve the Contributors' underlying interest that the funds be used for the purposes intended and that recovery efforts be made if funds are misused, as an alternative to Contributors' third party beneficiary rights; and (b) ground the exercise of the remedies of withholding Cash Transfers and of requiring the return of misused funds on a determination by UNICEF that misuse has occurred.

3.7 The Trustee is willing to accept UNICEF's proposed text, if the Board of Directors also accepts the text. UNICEF's proposal does not change the Trustee's obligations and responsibilities under the Contribution Agreements and/or the Financial Procedures Agreement.

4. NEXT STEPS

4.1 Assuming the Board approves the proposed alternate language, as specified in recommended decision above, the Trustee and UNICEF will proceed to finalize and execute the Financial Procedures Agreement.

ANNEX

NOTE
RE: PROPOSED TERMS REGARDING THIRD PARTY BENEFICIARY RIGHT TO SEEK RECOURSE
FOR CONTRIBUTORS TO GPE POOL FUNDING MECHANISM

Introduction

- UNICEF and the World Bank as Trustee for the Global Partnership for Education Trust Fund are finalizing the text of an agreement (referred to as the "Financial Procedures Agreement") whereby UNICEF will be able, from time to time, to receive money from the GPE pooled fund administered by the World Bank, to support UNICEF's implementation (as "Managing Entity") of GPE-supported education programs.

- As reflected in the GPE's governance documents [and the GPE Board's Misuse of Funds document], the GPE, being a global partnership of multiple stakeholders, is premised on the principle that funds are administered, and programs implemented, by members of the partnership within their own accountability and oversight frameworks. The GPE Board only approves a partner to act as Managing Entity if such partner maintains and applies an appropriate accountability and oversight framework.

- Consistent with standard arrangements for pooled funds – for example, the United Nations Development Group's multi-donor trust fund ("MDTF") modality – and the GPE partnership principle described above that all partners operate within their own accountability and oversight frameworks, the administrator of the pooled fund has no oversight or responsibility for funds once disbursed from the pool.

- UNICEF is being asked to agree, in its capacity as a Managing Entity, that the contributors to the pool will have "third party beneficiary rights" under the Financial Procedures Agreement to seek direct recourse against UNICEF for the enforcement of that agreement, including if the funds received by UNICEF from the pool are misused by UNICEF or by entities to which UNICEF subsequently transfers such funds.

- This Note explains UNICEF's position on these "third party beneficiary rights". Section 2 of BOD/2013/02 DOC 02 sets out UNICEF's proposed alternative text.

1. There is no "accountability gap". UNICEF's accountability and oversight framework allows the underlying interest of contributors to the GPE pool – that the funds be used for the purposes intended and that recovery efforts be made if funds are misused – to be achieved.

- UNICEF exercises the same degree of care and diligence in the discharge of its functions for transfers from the GPE pool as it exercises with respect to the administration and management of all the other elements of its program of cooperation with the relevant national government and of all its other resources. It is accountable for implementation of the activities in the same

way it is accountable for implementation of all its programs of cooperation.

- UNICEF has a sound accountability and oversight framework, covering financial management (including audit and control frameworks), procurement, program or project design, implementation, and monitoring and prevention of fraud and corruption. UNICEF will be applying its accountability and oversight framework fully to GPE funds received and the implementation of GPE-financed Activities. This will have been accepted by the GPE Board in designating UNICEF as a Managing Entity.

- In that regard, as a matter of policy, UNICEF investigates all non-frivolous allegations of fraud and if it determines that UNICEF funds have been misused it takes action as it determines is appropriate (including possible recovery efforts and/or criminal referrals); and where the UNICEF funds are a restricted contribution (as they would be in this case) any recovered funds are returned to the funder (in this case, the GPE Fund). In addition, if UNICEF determines that GPE funds were misused while such funds were under its direct control, UNICEF will return such funds to the GPE Fund. UNICEF would of course keep the GPE Secretariat fully informed of developments to the extent consistent with its regulations, rules and policies (as already agreed with the GPE).

- The application of UNICEF's accountability and oversight framework is supervised and overseen by the UNICEF Executive Board (which shares some of the same members as the GPE Board) and independent internal and external auditors.

2. The concept of "direct claims" is not consistent with the principles of pooled funds. The pooled funding mechanism is adopted to increase efficiency in the transfer of financial resources to support international development and to reduce transaction time and costs for both contributors and recipients by establishing a single line between the pool and the recipients. The "direct claim" arrangements undermine those goals by creating unnecessary complications and discarding the principle of a single mechanism by granting contributors direct rights against recipients.

Reflecting the strength and oversight of the UNICEF accountability framework, this has been UNICEF's consistent position with regard to pooled funding mechanisms, reflected, for example, in the structure of United Nations Development Group standard multi-donor trust funds, where such rights are not available to contributors. It would be inappropriate for UNICEF to construct a unique arrangement with regard to the GPE.

3. The concept of "direct claims" is a commercial concept that is not consistent with partnership principles. The concept of "third party beneficiary" rights is a commercial concept where the parties to a contract agree that the contract is actually being entered into for the benefit of another party (often to discharge an obligation that one of the contracting parties owes to the third party). It is inappropriate in an arrangement between partners, as in the GPE partnership. As outlined above, UNICEF's accountability and oversight framework, the operation of which is supervised by the UNICEF Executive Board and the independent external auditors, provides the proper accountability arrangements. In accordance with the principles of partnership, should the GPE Board, representing the contributors, have

concerns regarding UNICEF's determinations regarding the use of GPE funds, these would be addressed and resolved through good faith discussions between the chief executives of the two organizations and not through enforcement action.

United Nations Children's Fund
New York Headquarters
January 17th, 2013