October 2015 Update

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TO: COGR Membership

FROM: COGR Staff

SUBJECT: October 2015 Update

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FDP Payroll Certification Pilots: Thursday PM Session at the October COGR Meeting

A Thursday afternoon session at the October 22-23 COGR Meeting is titled: The FDP Payroll Certification Audit Results and their Impact on the Future of Effort Reporting. This session is motivated by the recent release of audit results, by the NSF and HHS OIGs, regarding the FDP Payroll Certification pilots (see "Audit Update" for a summary of the audit reports). Concurrently, section 200.430 of the Uniform Guidance has set the new standards for Compensation & Documentation and the requirements for charging salaries to Federal awards.

And in concert, OMB has signaled that new systems to comply with 200.430 are encouraged and should be explored. These events will impact the future of effort reporting, though without a crystal ball, the exact future of effort reporting is not clear. Federal and University representatives will participate in a panel discussion to address the results of the FDP Payroll Certification audit results and the new requirements under 200.430 to offer varying perspectives on the future of effort reporting.

Costing Policies Committee Update: Thursday AM Session at the October COGR Meeting

COGR recently has welcomed new leaders and members to the Costing Policies Committee. As we remain engaged with many ongoing agenda items, including implementation of the Uniform Guidance, the new and fresh composition of the Committee will allow the Committee to continue its excellent work on behalf of the COGR Membership. This session will include an introduction to the members of the Costing Policies Committee, an issues update, and an open discussion on topics that the Membership may like the Committee to focus on over the next year.

Some of those topics that may be addressed during this session are elaborated upon below in the Costing Policies section of this Update.

Uniform Guidance: Procurement and the Grace Period Extension

In a COGR letter to OMB, dated June 30, 2015, we requested that 2 CFR 200.112 (Conflict of interest) and 2 CFR 200.317-326 (Procurement Standards) be suspended immediately and subject to an extended grace period (see www.cogr.edu homepage, Latest News, for a copy of the letter).

COGR's request specific to 2 CFR 200.317-326 (Procurement Standards) was granted as part of the Technical Corrections released in the Federal Register on September 10, 2015. For most research institutions, this means the effective date will be July 1, 2017 (i.e., FY2018). The extra year will allow the community to engage with OMB to address issues such as the micropurchase threshold and other related issues. COGR has begun strategizing, with other stakeholders, on next steps related to implementation of Procurement Standards; we will share with the Membership possible alternatives in upcoming COGR updates and at the October 22-23 COGR Meeting. Unfortunately, the grace period was not extended to 2 CFR 200.112 (Conflict of interest); however, COGR continues to be engaged in this discussion with OMB and other Federal entities.

Uniform Guidance: September 10, 2015 Technical Corrections and Updated FAQs

In a "Dear Colleagues" letter from the Council on Financial Assistance Reform (COFAR), dated September 11, 2015, the COFAR formally announced the release of technical corrections to the Uniform Guidance (2 CFR Part 200). Per the "Dear Colleagues" letter, corrections were included only where it came to the attention of the COFAR that particular language in the final guidance did not match with the COFAR's intent and would result in an erroneous implementation of the guidance. Technical corrections also were made to 2 CFR Part 25 to remove references to the "System of Award Management" and replace them with the correct term "System for Award Management".

The electronic version of 2 CFR Part 200 (per the eCFR) has since been updated to incorporate the technical corrections. In addition to the extension of the grace period to the Procurement Standards (see previous section), COGR had requested that section 200.431(j) be corrected to clarify the allowability of employee tuition benefits applicable to undergraduate and graduate work completed at other institutions. This technical correction was made.

In addition, FAQs were updated and posted to the COFAR website. The direct link to the updated FAQs is available on the website. We will address significant updates to the FAQs, as applicable, during the October 22-23 COGR Meeting.

Uniform Guidance: F&A and Related Issues

The Costing Policies Committee is spending significant time tracking F&A related issues within the context of the Uniform Guidance implementation. This includes:

- **Employee Tuition Remission (200.431j).** A UG technical correction (see previous section) has resolved this issue.

- **DS-2 Approvals.** COGR will continue engaging with OMB for a technical correction, clarification or FAQ that is crystal clear: "if allowable per the UG, a DS-2 approval is not required." While there are some schools of thought that this already is the OMB expectation, additional confirmation would be helpful.

- **1.3% UCA and 2.0 research weighting factor.** COGR is developing an analysis, in partnership with a consulting firm, to address the flawed 2.0 factor. The goal is to present the analysis to OMB and the Cognizant Agencies later this Fall and to advocate for an adjustment.

- **1.3% UCA application.** A UG FAQ (Appendix III – 2) has clarified application of the UCA: 1) IHEs currently receiving the 1.3% UCA under OMB Circular A-21: for FY2014 and FY2015 F&A rate proposals, they will retain the 1.3% UCA; and for F&A rate proposals for FY2016 and forward, they must propose the UCA using the new methodology, and 2) IHEs not currently receiving the UCA: they may begin proposing the UCA for F&A rate proposals beginning with FY2014, and going forward.

- **NIH Salary over the Cap and F&A Research Base.** A UG FAQ (Appendix III – 3) states that salary costs above the NIH salary limitation must be included in the

appropriate MTDC cost base. COGR's position is that the appropriate MTDC base is Instruction and Departmental Research and believes this treatment would be consistent with Appendix III – A.1.a(3) and would be the most fair and equitable approach to all stakeholders. However, this is a "hot-topic" with the Cognizant Agencies and we recommend IHEs approach this discussion cautiously. COGR has shared its position with OMB and the Cognizant Agencies and hopes to work in partnership with Federal partners to achieve the most reasonable and fair solutions.

- **Negotiation Experiences.** We want to hear about the results of your F&A rate negotiations. In addition to the results of the actual rate negotiation, this includes issues that were raised. If your institution has requested the 4-year rate extension, we also are interested in these results. This will allow COGR and the Membership to track issues and new practices that may be introduced by the Cognizant Agencies. This is of particular interest as we begin to observe the approaches of CAS/HHS and ONR to rate negotiations covered under 2 CFR Part 200.

Contact David Kennedy at dkennedy@cogr.edu on any of the items listed above. In addition, Cathy Snyder from Vanderbilt University and recently selected to the COGR Board also is a point of contact. Cathy can be contacted at cathy.snyder@vanderbilt.edu.

Uniform Guidance: Responding to Agency Deviations and GAO Engagement

Throughout the first year of implementation of the UG, we have encouraged the Membership to help us monitor agency deviations (e.g., restrictions on the F&A rate, vague requests for cost sharing in funding announcements, etc.), and as appropriate, push-back to the agency in question. OMB and the COFAR have signaled their interest by indicating that documenting agency deviations would be one of their metrics to gauge the success of the UG implementation.

UG deviations in the areas of §200.306 Cost sharing or matching and §200. 414 Indirect (F&A) costs have been trending over the past several months. COGR submitted a letter to OMB delineating a number of examples where funding announcements and funding opportunities have deviated from the UG provisions. COGR also commented on the extensive administrative burden created as federal agencies begin to release their policies in accordance with §200.112 Conflict of interest. COGR has urged OMB to consider granting a grace period that coincides with the procurement grace period which would allow for harmonization and a more consistent implementation. To read the full letter, click here.

COGR's approach is to engage agency leaders and OMB on a regular basis to address concerns related to agency deviations. In a recent development, we have been informed that Congress has asked the U.S. Government Accountability Office (GAO) to review the COFAR's progress on advancing merit-based pre-award process for grants and other UG-related topics. COGR is scheduled to meet with GAO representatives prior to the October 22-23 COGR Meeting and will update the Membership.

Financial Closeouts: Next Steps for COGR Engagement

The interrelated topics of the transition to NIH subaccounting (i.e., award-by-award accounting), the new 120-day grant closeout model at NIH (as well as the implementation of 120 days at other agencies), and the functionality of the Payment Management System (PMS) have been

significant COGR agenda items for the past two years. The final transition to NIH subaccounting is underway (see NIH Notice Number: NOT-OD-15-105 (May 28, 2015); *Reminder of Timeline for Administrative Changes to NIH Domestic Awards to Transition to Payment Management System Subaccounts*). COGR leaders, who also are active in the FDP, have been instrumental in tracking issues related to the transition to subaccounting. We encourage COGR members to contact COGR staff if/when concerns and/or operational issues arise.

The two primary focuses for COGR going forward are: 1) 120-day consistency across all agencies (ongoing focus), and 2) 120-day functionality in PMS (immediate focus). First, 120-day consistency across all agencies will require continuing engagement with each Federal agency, as well as OMB and other Federal leaders. While NIH, NSF, and DOD have implemented favorable 120-day policies, standardization across all Federal agencies will require ongoing work and advocacy. While achieving results could be a longer term activity, COGR will continue to raise this issue.

Second, and of more immediate concern, is the challenge to implement the 120-day functionality in PMS so that it is consistent with the new NIH policy described in section 8.6 CLOSEOUT of the 2015 NIH Grants Policy Statement (*Recipients must submit a final FFR, final progress report, and Final Invention Statement and Certification within 120 calendar days of the end of the period of performance (project period). The reports become overdue the day after the 120 calendar day period ends.*) While the 120-day functionality has been implemented in PMS, unease exists.

At issue is the complex reconciliation between the Federal Financial Report (expenditures report) that is submitted to NIH with the Federal Cash Transaction Report (cash report) that is submitted into PMS. The reconciliation is challenging and has compromised a seamless transition to the 120-day closeout model at NIH. However, COGR's understanding is that the Federal Cash Transaction Report (FCTR) becomes obsolete as each NIH award is converted into a subaccount. The function of the FCTR is to verify the cash balance of each NIH award; however, under subaccounting, the cash balance automatically is maintained in PMS, in which case, the FCTR would appear to no longer be necessary. While the easy fix seems to be to eliminate the FCTR (and in turn, eliminate the need to reconcile the Federal Financial Report with the FCTR), PMS leaders are reluctant to eliminate this report.

An important backdrop to this is the ongoing pressure on NIH, and more broadly, on HHS, to address concerns related to unspent balances, timely reporting, and other grants administration and oversight issues. The May 2012 GAO report (GAO-12-360, *Action Needed to Improve the Timeliness of Grant Closeouts by Federal Agencies*) and the recent August 2015 report by the HHS Inspector General (OEI-07-11-00190, *NIH Postaward Grant Administration and Oversight Could be Improved*) put a spotlight on these concerns and, to some extent, distract from more rational and obvious solutions.

COGR will continue its work addressing issues related to Financial Closeouts. Specifically, how best to advance consistency across agencies and develop solutions that will minimize administrative burden, while at the same time, maintaining the highest standards of oversight and stewardship over Federal funds. We will keep the Membership posted on all developments.

Affordable Care Act (ACA) Compliance and Research Assistants

As we reported in the August 2015 COGR Update (published August 17, 2015), COGR has been contacted by the American Council on Education (ACE) and the College and University Professional Association for Human Resources (CUPA-HR) to help them craft policy proposals concerning the management of graduate student employees consistent with the ACA's employer mandate. Specifically, ACE and CUPA-HR have inquired about Research Assistants (RAs) and sought COGR's help formulating a method – or "safe harbor" – that schools could safely use to monitor the effort of RAs without specifically tracking their hours. This would give the IRS and the Department of Treasury assurance that universities are complying with the ACA's employer mandate.

According to Treasury, under the ACA, student employees including RAs working on campus (except under a government work study program) for 30 or more hours per week would be entitled to an offer of a university's employer health insurance coverage. Since the vast majority of RA appointments are less than 30 hours, ACA mandated coverage would not be required. However, at issue is the following: since RA hours are not tracked, how does a university demonstrate that an RA has not worked 30 hours per week?

This brings us to the potential "safe harbor" for RAs, which ACE and CUPA-HR have been discussing with COGR. Specifically, we have suggested that language from 2 CFR 200.430(i)(x) could be helpful in developing the safe harbor: "*It is recognized that teaching, research, service, and administration are often inextricably intermingled in an academic setting.*" This language, which also was part of Circular A-21, is at the heart of the recognition that tracking hours is not feasible in an academic setting.

In effect, using a "confirmation" mechanism to confirm that an RA has completed his/her work, whether the confirmation is made through an effort report, a payroll report, or some other mechanism, the need to document hours is not applicable nor required under the 2 CFR 200.430 (nor Circular A-21). The "*inextricably intermingled*" principle is real and unique to the academic setting and to rely on hours as a tracking mechanism is not practical. Instead, the idea is to propose a "safe harbor" to Treasury/IRS that states universities can rely on the appointment of the RA (e.g., 19 hours) in combination with the effort report, payroll report, or other mechanism to demonstrate that the 30 hour threshold mandating ACA coverage has not been triggered. Hence, there is no need for any type of hours tracking or reporting. Of course, if the RA appointment is 30 hours or more, then ACA mandated coverage is applicable.

Note, Treasury accepted other safe harbors proposed by ACE and CUPA-HR for other groups of employees; including, Adjunct Professors and Work-study Students. We are hopeful that a similar safe harbor would be approved for Research Assistants.

On another note, we have been made aware of a separate ACA issue, also being monitored by ACE, which would detrimentally affect a number of graduate students. For a number of years preceding the ACA, many colleges and universities, particularly Tier 1 research universities, have provided graduate students with student health insurance plan (SHIP) coverage at greatly reduced or no cost as part of their graduate package. Apparently, the IRS recently provided informal guidance that this practice may not be permitted under the ACA's employer mandate and that institutions could face annual fines of $36,500 per impacted individual ($100 per day). Unfortunately, this interpretation is causing great concern and uncertainty at a number of

institutions, causing some schools to consider ending graduate student SHIP subsidies. Apparently, the IRS is basing this opinion on regulatory guidance issued in 2013, which was intended to prevent employers from eluding the employer mandate by providing funds to employees through such tax preferred mechanisms as Health Reimbursement Arrangements to cover the cost of individual health insurance coverage purchased on the individual market. ACE is seeking a clarification from Treasury that would permit schools to continue providing SHIP subsidies to graduate students, or, at a minimum, provide schools with permission to continue this practice during the 2015-16 academic year while Treasury further examines the issue.

There are many moving pieces with January 2016 being the important marker for universities to demonstrate full compliance with the ACA's employer mandate. We expect there to be significant activity around these issues throughout the remainder of the year and we will keep the Membership posted on all developments.

Federal Government Funded through December 11, 2015: Stay-tuned…

The Fiscal Year 2016 Continuing Appropriations Act, 2016 (H.R. 719), signed by President Obama on September 30, 2015, allows government operations to continue under a Continuing Resolution (CR) through December 11, 2015. However, what will transpire as we approach December 11th is uncertain. The "good news" is agency plans that were implemented during the Federal Government shutdown in October 2013 remain fresh, so in the event of a shutdown, agencies are relatively well-prepared to respond. In the event of a worst-case scenario shutdown, COGR will engage with the Membership and the Federal agencies, accordingly.

Under the current CR, agencies are operating under their agency-specific plans. In the case of NIH, Notice Number: NOT-OD-16-002 describes the NIH plan for operating under the CR: *Continuing the procedures identified under NOT-OD-15-050 and consistent with NIH practices during the CRs of FY 2006 - 2015, the NIH will issue non-competing research grant awards at a level below that indicated on the most recent Notice of Award (generally up to 90% of the previously committed level). Upward adjustments to awarded levels will be considered after FY 2016 appropriations are enacted, but NIH expects institutions to monitor their expenditures carefully during this period. All legislative mandates that were in effect in FY 2015 (see NOT-OD-15-054 and NOT-OD-15-048) remain in effect under this CR, including the salary limitation set at Executive Level II of the Federal Pay Scale as described in NOT-OD-15-049.*

…But Just In Case: Government Shut Down Contingency Plans for Grants Administration

NIH releases information on contingency plans for grants administration in the case of a government shutdown.

For Non-Excepted Programs:

HHS' National Institutes of Health (NIH) staff will not be available to provide routine administrative support services. The Payment Management System will be maintained in an operational status for processing grant drawdown requests, including awards received prior to the gap in funding. Notice of Grant Awards with restrictive terms and conditions, or from Payment Management System edit checks and/or drawdown limit controls, will not be processed.

For Excepted Programs:

For appropriations that are not affected by the government shutdown, minimal number of federal staff will be available to provide routine administrative support services. The Payment Management System will be maintained in an operational status to continue processing grant drawdown requests.

Submitting an Application during a Shutdown:

The Grants.gov system will be operational and will be accepting applications from prospective grantees for additional HHS federal assistance funding. HHS will take action on those applications for fully funded and excepted programs. For programs which are non-excepted, the Grants.gov system will accept and store applications until such time as the responsible Department has the authority and funding to return to normal business operations.

In the event of a lapse in appropriations, NIH will issue very specific guidance for NIH applicants and grantees.

Refer to: http://grants.nih.gov/grants/oer.htm and www.hhs.gov for updates.

http://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-164.html

Department of Labor (DOL) Notice of Proposed Rulemaking (NPRM)

COGR submitted comments to the DOL NPRM, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees." DOL proposes to more than double the minimum salary levels for non-exempt and highly compensated employees. COGR stressed that the significant salary increase, if approved, will have a substantial impact on postdocs and other research positions that are currently below the proposed salary threshold, raising important questions about the financial resources required to fund the increase, concerns regarding re-classification of exempt to non-exempt personnel, and increased administrative burden. To read COGR's comment letter to DOL, click here. For more information regarding the NPRM, click here.

Environmental Protection Agency (EPA) releases Final COI Policy

On September 29th, EPA announced steps taken to streamline their final COI policy effective October 1st, in accordance with UG §200.112 Conflict of Interest. Outside of the other changes made to EPA's revised interim policy, EPA policy changes include: 1) elimination of the requirement to COI points of contact make transaction-specific COI inquiries, 2) elimination of pre-award requirements for disclosing COI's relating to contracts and subawards, 3) expansion of the time frames for post-award COI disclosures relating to contracts and subawards to 30 days from the 5/10 day periods specified in EPA's Interim COI Policy, 4) revised COI definition that refers to 2 CFR 200.318(c).

COGR requests that were not granted include: 1) the definition of spouse and dependent children. EPA notes that "immediate family" is the same as that cited in 2 CFR 200.465(c)(4), however considers unfair competitive advantage for procurements to extend beyond the definition of spouse and dependent children, and 2) COGR's request that disclosure requirements for COI be limited to procurement actions that cannot be managed by the institution where the COI exist.

DOD Issues New Cyber Reporting and Safeguarding Requirements

On August 26 DOD issued new requirements for reporting of cyber incidents with adverse effects on contractor information systems or covered defense information residing therein, or on the ability of contractors to provide operationally critical support (165FR51739; https://www.federalregister.gov/articles/2015/08/26/2015-20870/defense-federal-acquisition-regulation-supplement-network-penetration-reporting-and-contracting-for --for a related article see www.nationaldefensemagazine.org/blog/Lists/Posts/Post.aspx?List=7c996cd7-cbb4-4018-baf8-8825eada7aa2&ID=1968&RootFolder=%2Fblog%2FLists%2FPosts). The requirements implement provisions of the FY 2013 and 2015National Defense Authorization Acts.

The new requirements amend the DFARS to provide a revised prescription for safeguarding covered defense information and cyber incident reporting (204.73) and three new or revised DFARS clauses (252.204—7008,7009, and 7012). Of most relevance to COGR members is the revised 7012 Safeguarding clause. It is expanded from addressing controlled technical information (CUI) to encompass a new category of unclassified "covered defense information" (7012(a)). Covered defense information includes CUI, export controlled information, critical Operations Security information, and information marked or identified as requiring safeguarding or dissemination controls. The requirements apply to all such information that is transmitted, used, or stored by or on behalf of the contractor in support of contract performance, or that is provided by DOD. Cyber incidents (defined broadly) affecting this information are subject to detailed review and reporting requirements that apply both to contractors and subcontractors (the DFARS reporting requirements may be superseded by a subsequent DOD rule; see #2 below). The safeguarding requirements also apply to contractor information systems that process, store or transmit covered defense information.

We had worked closely with DOD to develop a process to exempt fundamental research from the disclosure approval requirements of the DFARS 7000 clause (e.g. see COGR February and May 2014 Updates). Without this exemption, fundamental research information becomes controlled technical information subject to the safeguarding requirements of the previous version of the 7012 clause. We also worked with DOD to narrow the scope of the 7012 clause to controlled technical information. When originally proposed it would have applied to all unclassified DOD information on contractor information systems (the December 2013 COGR Update contains a full discussion of this issue). Now however the revised DFARS 7012 clause again expands the scope of information subject to the requirements, and further broadens the requirements to apply to contractor information systems that process such information.

The rule essentially makes the NIST SP 800-171 security requirements compliance standards. This is exactly what we feared and expressed in our comments to NIST on the draft requirements (see COGR May Update). We expressed similar concerns to NARA, which is responsible for the overall government CUI program (comment letter is on the COGR website). While the revised DFARS 7012 clause contains a provision that alternative but equally effective security measures may be used, it requires that the equivalent measures be approved in writing by an authorized representative of the DOD Chief Information Officer (CIO) prior to contract award. We are not sure on what basis the CIO will make this determination or what information may be required from award recipients.

From discussions with a few COGR member institutions it appears the burden estimate in the DFARS rule (4 hours per response) is several orders of magnitude below the actual burden that

will result from these requirements. One institution reports 80 hours for a response to the new 7012 clause; another institution has estimated ongoing costs for three FTE IT personnel as well as one-time equipment costs of $100-150k, renewable every five years.

It is even more critical to assure that our member institutions who solely conduct fundamental research with DOD funding do not become inadvertently subject to the new requirements. While fundamental research information does not fall into any of the categories identified in the revised clause as "controlled defense information," it is not specifically exempted either.
The revised DFARS clauses are already in effect as they were issued as an interim rule. However DOD is accepting comments on the clauses. We already have reached out to both DOD and NARA to urge that fundamental research be specifically exempted from the security requirements. In our comments we expect to suggest that the policy guidance in DFARS 204.7302 include a new provision that projects determined to be fundamental research are not subject to the safeguarding requirements. Comments are due October 26.

A new subpart (239-76) also is included in the rule on acquisition of cloud computing services. This is directed to service providers and appears less relevant to COGR members. The implementing clauses require either a representation that offerors do not anticipate use of cloud computing services in contract performance (252.239—7009) or if so, require contracting officer approval and compliance with the Cloud Computing Security Requirements Guide as well as maintaining government data in the U.S. (7010). While these clauses appear intended for use in acquisition of commercial IT services, we plan to urge DOD to include clarification that contracts for fundamental research or other services where use of cloud computing is incidental to contract performance are not subject to these requirements.

The safeguarding requirements are statutorily mandated. However, they are another example of an unfunded compliance requirement (see below). We will urge DOD to acknowledge and recognize the cost implications in solicitations and contracts that include these requirements.

DOD Issues Mandatory Cyber Incident Reporting Requirements for Contractors

On October 2 DOD issued an interim rule mandating cyber incident reporting requirements for DOD contracts (research contracts are specifically included), cooperative agreements and other transactions (80FR59581; http://www.gpo.gov/fdsys/pkg/FR-2015-10-02/pdf/2015-24296.pdf). It applies to "covered defense information," defined similarly as in the DFARS clause discussed above. It requires reporting of all cyber incidents, defined as actions taken through use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein. "Compromise" is defined as "disclosure of information to unauthorized persons, or a violation of the security policy of a system, in which unauthorized intentional or unintentional disclosure, modification, destruction, or loss of an object, or the copying of information to unauthorized media may have occurred."

The requirements are mandated by Section 941 of the FY 2013 National Defense Authorization Act (NADA; P.L. 112—239). That Act required defense contractors to rapidly report cyber incidents on their unclassified networks or information systems that may affect unclassified defense information or that affect their ability to provide operationally critical support to the DOD. DOD has established a web portal f or this reporting (http://dibnet.dod.mil). In order to report contractors will need to acquire a DOD-approved medium assurance certificate.

Contractors also must conduct reviews for evidence of compromise. The requirements flow down to subcontractors.

The rule recognizes that contractors will incur costs associated with the requirements, including identifying and analyzing cyber incidents and their impacts and obtaining the medium assurance certificates. It does not say DOD will pay these costs. It also indicates that the government will protect attributional/proprietary information reported, and includes restrictions on disclosure. Another part of the rule modifies eligibility criteria to permit greater participation in the voluntary DOD Defense Industrial Base cybersecurity information sharing program.

The rule estimates the impact at 7 hours per response, and does not expect an aggregate impact of $100M or more a year. These estimates may be low, based on the information we have obtained from institutions of the costs of compliance with the DFARS cybersecurity requirements discussed above. We do not fully understand the relationship between this rule and the DFARS rule, which was issued a month or so earlier. The DFARS requirements implement the same section of the NADA and appear redundant. We plan to raise this issue in our comments on the DFARS rule to DOD. Comments on the cyber reporting rule are due Dec. 1.

COGR Expresses Concerns to NASA About Indemnity and Invention Reporting

At its June meeting the COGR Contracts and Intellectual Property Committee (CIP) met with a NASA representative to discuss a number of issues that have arisen with NASA funding awards. In September we followed up with a letter to NASA discussing our concerns with regard to two of those issues: the indemnity language in the NASA terms and conditions implementing the Uniform Guidance, and invention disclosure reporting.

1). Indemnity Language. In the regulations implementing the Uniform Guidance, NASA included a term at section 2 CFR 1800.918 that had previously appeared in 14 CFR 1260.61. That term, Allocation of Risk/Liability, provides that recipients will not make any claim against NASA or the U.S. Government for any injury or death or loss of property or that of their contractors (except for willful misconduct), and will indemnify and hold harmless the Government and its contractors from any third party claim arising from injury or death or property damage arising from use or possession of Government property. Previously this term was restricted to research grants with foreign organizations. In the letter we pointed out that no other federal granting agency has required such indemnity obligations from U.S. domestic grantees. Implementing this term is challenging for two reasons. First, before opening a NASA award containing such terms, universities must review every activity to be performed under the award to determine whether insurance or programs of self insurance are in place to cover the indemnity obligation, which results in delays and higher transaction costs. In addition, where a public institution is prohibited by state law from providing the indemnification, NASA has not included the indemnity language in the award or has waived its application to the institution. However, many NASA grants include subawards. This results in a situation where one institution may be required to indemnify NASA and the other is not, which is an unfair burden.

2) Invention Disclosure Reporting. Several COGR member institutions have received letters from NASA asserting that the institution failed to file an invention disclosure for a particular grant. In these cases, the institutions and Principal Investigators (PIs) involved had not, in fact, disclosed an invention; rather, NASA administrative staff indicated that they had read the final technical report submitted by the PI and had determined that there were inventions that

needed to be reported. NASA has a website (https://invention.nasa.gov/faqs.php) on New Technology Reporting (NTR). However, NASA's definition of reportable new technology is very broad. In the letter we expressed concerns that that this expansive definition may impose a substantial reporting burden on our member institutions. The NASA NTR Form (NF1679) is detailed and burdensome to complete. In the cases we are aware of the institutions and PI's informed NASA that there were no disclosures for a number of reasons including lack of commercial viability and patentability.

Nevertheless, NASA insisted that these technologies be disclosed. This forced the institutions to go through the process of sending invention disclosures and waiving their rights back to the government contemporaneously. This process appears unproductive and wasteful, especially since it is not clear that NASA took any further action with regard to the disclosures. We expressed the view that our member institutions are in a better position to determine what may constitute reportable new technology than NASA administrative staff. Review of final technical reports by NASA staff for such technologies appears redundant and inefficient. We pointed out for patentable inventions the Bayh-Dole Act has a number of requirements for reports to the funding agency, which adds to the redundancy. We indicated we understood NASA's interest in NTR, and offered to assist NASA in making its interests and responsibilities in this area better known to our member institutions while reducing burden.

Clearly neither the new indemnity language nor NTR process is working well. We look forward to further discussions with appropriate NASA officials. In the case of the indemnity language, we may also report this issue to OMB as an example of an agency deviation from the Uniform Guidance.

Lab-to-Market Planning Workshop Held

The October Meeting Report last year discussed NIST's interests and responsibilities for the Lab to Market initiative included in the President's Management Agenda. While much of this initiative is directed at the federal labs, NIST's interest is on how to make transfer of government-funded technologies in general more effective. COGR has held several meetings with NIST over the past year to try to identify a focus for a joint workshop in this area (see December 2014 COGR Update). Other higher ed associations also have been involved in these discussions. On August 31 a workshop was held under APLU auspices led by the Purdue Center for Regional Development Agile Strategy Team. The workshop included 20 participants from NIST, NIH, NSF, DOE, and academic institutions as well as from the associations including COGR.

A "solutions inventory" was developed of possible strategies to accelerate commercialization of federally funded research at universities. The next step is to identify the most promising solutions and to develop strategic action plans.

There have been countless meetings and discussions on this general topic in recent years (e.g. see COGR February 2014 Meeting Report pp. 11-12).. However, the active participation of funding agency representatives and the relationship to the Presidential initiative may lead to more concrete outcomes. An example of one of the more promising ideas identified was establishment of an SBIR "Phase 0" program, aimed at better preparing prospective SBIR Phase I grantees. Another workshop to further develop the strategic actions plans is scheduled for October 30.

DOE Establishes Office of Technology Transitions; RFI Issued

We had not previously reported on the establishment by DOE earlier this year of a new Office of Technology Transitions (OTT). The purpose is to coordinate DOE-wide the commercial development of DOE research. OTT will be responsible for a $20M Energy Technology Commercialization Fund, which will provide matching funds to promote new energy technologies. In May OTT issued an RFI to seek input on how it can most effectively accomplish its mission. It listed several topics on which input was sought, including design and implementation of the new Fund, enhancing linkages among DOE R&D performers, improvements to DOE policies and practices, enhancing technology transfer and commercialization at the national labs, and otherwise enhancing commercialization of DOE technologies. Comments were due in June.

In November of 2008 DOE issued a similar RFI. We responded with fairly detailed comments. We noted that while the ability to partner with DOE laboratories is an important priority for many of our member institutions, challenges in these relationships are of significant concern to the university community. These include the **"**take it or leave it" attitude of some DOE facilities with regard to their willingness to modify the terms of the Standard DOE "Work for Others" Agreement. We also identified a number of problems with the terms of CRADAs and the Standard Agreement used in situations where DOE laboratories are functioning as subcontractors under federally funded research projects (indemnity provisions, patent rights, subaward issues, advance funding requirements and reserved government rights). We made several recommendations and suggestions, including several pertaining to tech transfer best practices (see COGR Winter 2009 Update).

DOE acknowledged our comments but there is little evidence of any progress on these issues. Partly for this reason we chose not to respond to the recent RFI. However, OTT is participating in the lab to market workshop initiative. In addition, the upcoming October UIDP meeting is being hosted by Oak Ridge National Laboratory with extensive national lab participation. In a recent UIDP webinar university participants identified many of the same problems as we identified in the response to the previous RFI. Perhaps some progress finally may begin to be made. We will report on any further developments. (The OTT website including a link to the RFI is at http://energy.gov/technologytransitions/office-technology-transitions).

Update: Patent Troll Legislation Remains Stalled

We have closely followed and reported on this legislation in recent Updates and Meeting Reports. There have been no new developments with regard to either the House (H.R. 9) or Senate (S. 1137) bills. There is some indication that new House leadership may be less friendly to H.R. 9. We will report further when there is any legislative action.

Update: Patent Subject Matter Eligibility Guidance Remains Confused

The August Update summarized updated guidance on subject matter eligibility issued by PTO in July. We noted that while helpful, the new guidance does not solve the basic ambiguity left by the conflicting court decisions in this area. At a BIO IP & Diagnostics Symposium held last

month, the impression was one of total confusion (including on the part of many PTO examiners who attended the symposium).

Common Rule Notice of Proposed Rulemaking (NPRM)

The Department of Health and Human Services released a long-awaited notice of proposed rulemaking to modernize and strengthen the Common Rule on September 8, 2015. The Common Rule was last updated in 1991 and an ANPRM released in July 2011. COGR has formed a working group consisting of COGR Board and at-large members to assist in the development of our response. Following an initial meeting on September 29 and additional subgroup meetings the working group is in the process of developing an initial draft. Working group members will review proposed revisions to the Common Rule and offer insights into COGR's response to the NPRM during a Thursday morning session at the October COGR meeting. We anticipate that this will be one of several opportunities for members to provide their feedback on the NPRM and COGR's planned response.

The current deadline for submitting comments is December 7. COGR and many of its members have submitted requests for an extension ranging from 30-90 days but as of this writing the deadline has not been extended. Members should also be aware that OHRP will host a Town Hall Meeting on Tuesday, October 20. The primary purpose of this day-long meeting will be to respond to questions from the public. The meeting will be webcast. Questions can be submitted in advance of the meeting (deadline October 13) and will be taken during the meeting. Information on submitting questions is included in the meeting notice (see link above). Information on viewing the meeting by webcast will be posted at a later time on the OHRP Web site at *http://www.hhs.gov/ohrp*. An archived version will also be available. This site also includes links to a webinar series on the Common Rule with six topics, including an overview, exclusions and exemptions, informed consent, IRB review and operations, biospecimens, and secondary research use of data.

NIH Names New Deputy Director for Extramural Research

NIH has selected Michael S. Lauer, M.D., as the new Deputy Director for Extramural Research. Dr. Lauer is a board-certified cardiologist and has served as a division director at the National Heart, Lung, and Blood Institute since 2007. He received the Arthur S. Flemming Award for exceptional service in Federal Government; has been an active member of the Patient Centered Outcomes Research Institute; has served as the NIH co-chair for the President's Precision Medicine Initiative; and is described as a strong advocate of human subjects protection.

National Academies Report on Federal Research Regulations and Reporting Requirements

The National Academy of Sciences Committee on Federal Research Regulations and Reporting Requirements released Part 1 of a two-part report, Optimizing The Nation's Investment in Academic Research: A New Regulatory Framework for the 21st Century, on September 22 at the request of Senator Alexander. The report outlines a number of areas where Congress and federal agencies can reduce the administrative workload associated with federal research funding. COGR and its member universities were among the presenters at committee meetings which included federal agency officials, accreditors, and agency inspectors general. COGR appreciates and supports the work and findings of the committee.

The report describes the long-standing and highly productive partnership between the Federal Government and research institutions, but also the growth in federal regulations, policies and guidance that "are at times duplicative, conflicting and ineffective in meeting goals of improved accountability, efficiency" and perhaps even safety. As many reports have noted, when not properly balanced, oversight can diminish the Federal Government's investment in research without enhancing protections.

Among the recommendations related to research proposals, greater use of just-in-time submission; uniform formats; a central repository for assurances; and a central database with investigator information. With regard to subrecipient monitoring, that OMB amend the UG to clarify that IHEs are only responsible for performance monitoring and as an interim measure, permit IHEs to utilize single audit reports and to rely on the Single Audit Act process rather than conducting an independent review of systems and practices. On conflict of interest, the report, citing data from COGR, AAMC and the NSB report, suggests that the 2012 revisions to the PHS COI regulations "led to a substantially bigger haystack without significantly increasing the number of needles found" and suggests that "troublesome provisions and nonspecific language" in the Uniform Guidance "may result in multiple COI policies across the federal government". The report makes the important point that providing expertise to commercial and non-profit organizations is necessary and appropriate and does not represent research misconduct. It recommends that the federal government, in partnership with research institutions, develop a federal-wide COI policy that would return review and management to institutions. Recommendations specific to research institutions include reviewing for excessive or unnecessary institutional policy created in response to federal regulations and fostering a culture of integrity.

The committee will comment on the Common Rule NPRM in part II of the report but supported proposed revisions such as mandating a single IRB for multisite studies. While COGR does not support mandatory use, it supports the committee's recommendation that standard policies and procedures and necessary infrastructure should be developed. Regarding animal research, the report calls for an assessment of the feasibility and utility of a unified federal approach to regulations and policies.

The audit climate and federal audit-related issues are addressed in the report including recommendations that Congress require Inspectors General to resolve issues regarding interpretation of agency policies prior to conducting audits; provide to Congress and the public the total costs of IG audits of research institutions, total initial findings, and total findings following audit resolution; re-examine the methodology for identifying institutions for audit; and that Congress and OMB affirm that research institutions may take advantage of the flexibility in the Uniform Guidance with respect to documentation of personnel expenses. The committee recommends that OMB amend the Uniform Guidance to increase the threshold for procurement by micropurchase to $10,000; establish a 120 day timetable for submission of all federal financial reports; and tie revisions to the DS-2 to the institution's F&A proposal.

The report proposes a new regulatory framework for the nation's investment in academic research that includes a forum, the Research Policy Board (RPB), a responsible federal officer and an underlying set of principles. The RPB would be a government-enabled, government-linked, private-sector entity with staff to support project teams assembled with the goal of providing institutions a formal mechanism for participating in the development, harmonization and review of regulations. A research policy board could be taken up in the higher education act

reauthorization. The report suggests that the RPB should be composed of 9-12 members from academic research institutions and 6-8 liaisons from federal agencies. The report also proposes an OSTP Associate Director, Academic Research Enterprise to coordinate the federal research policy and regulatory process. COGR, AAU and APLU have suggested the need for mechanisms that would allow for the timely engagement of research universities in the development and reform of federal research regulations, policies and guidance and an official or officials within OMB to oversee the process. Alternative models to that proposed in the report might be considered, as more inclusive and subject matter oriented boards or panels that leverage existing structures funded by universities would allow for more inclusive and knowledgeable representation.

National Dialogue

We have noted previously that OMB has initiated an effort to collect feedback from colleges and universities about regulatory burden associated with federal grants and contracts. The initiative is part of the *National Dialogue and Pilot to Reduce Reporting Compliance Costs for Federal Contractors and Grantees*, launched by the Obama Administration in May 2015 to meet objectives outlined in the President's Management agenda as well as requirements in the DATA Act. AAU, COGR and APLU have submitted comments to the National Dialogue website individually under the link for " Grantees." We continue to encourage staff from your institutions to vote for and comment on the ideas submitted by our associations and those of other institutions and to submit new ideas. Although OMB had requested early feedback, the National Dialogue will be open until May 2017. Recent comments from members have included restricting the publication of audit findings prior to final resolution; allowing 120 days for all final reports for all agencies; and that a procurement threshold of $3,000 will result in an increase of approximately 85% in procurement transactions and 20% in procurement dollars related to sponsored research activities alone at one institution. Please vote on these and other comments and add your own.

Audit Update

Payroll Certification

The NSF OIG recently released the report Labor Effort Reporting under the Federal Demonstration Partnership Pilot Payroll Certification at Michigan Technological University. The report notes that the process for initiating salary charges is the same under the pilot system as it was under effort reporting but that charges are viewed on an annual basis at the award (rather than individual) level and suggests that not reporting "effort" on other awards the individual worked on during the reporting period "is a risk". Like George Mason, 73% of salaries were charged to a single (NSF) grant and full allocations remain recorded and available. The report found that "Michigan Tech's system generally provided accountability over federal funds" but "did not always comply with its documentation policies" and demonstrate weaknesses in the controls of its payroll allocation system under both the pilot and effort reporting. The OIG found that 8 of the 180 sample transactions were problematic, 6 of which were late or unsigned reports under the effort reporting system (n=68). There were no late or unsigned reports in the payroll certification sample (n=112). Under payroll certification, two instances were identified where changes to the initial salary and wage distribution were not conducted in accordance with university policy (i.e., the proper forms were not utilized). The report also suggests that Michigan Tech needs to strengthen its internal controls, noting that "a general vulnerability in

Banner was identified that could potentially allow unauthorized access to the entire system" and did not have formalized system auditing to ensure that "unauthorized system changes or system access is identified, and timely remediation action is executed". The IT weaknesses were not specific to the pilot certification system. Michigan Tech largely concurred with the findings. Their response noted that "in several instances they have implemented changes prior to receiving the [NSF OIG] recommendations" and that "the Payroll Certification pilot has strengthened its internal controls over its certification process". This is the second of two payroll certification audits conducted by the NSF OIG and the third of four anticipated reports. A report on the fourth pilot site is expected from the HHS OIG sometime this fall, and a capstone report is expected to follow.

Two-month Salary

The NSF OIG has released three new audit reports with findings related to the NSF two-month salary policy. The first audit of costs totaling $189 million questioned $149,672 of costs claimed on NSF awards including $108,819 in senior personnel salary that exceeded two-months. The second audit of $166 million questioned $568,130 of costs including $444,966 in senior personnel charges that exceeded two-months. The third audit questioned $830,008 of costs including $744,458 in senior personnel salary.

All three universities disagreed with the findings, suggesting that NSF policy that limits salary compensation for senior project personnel is specifically related to proposal preparation and submission and that post-award rebudget authority is permitted including for additional senior personnel salary. On a positive note, NSF has indicated that the basis for the two-month findings misinterprets NSF's faculty salary compensation policy and has allowed salary costs for senior personnel that exceeded two-months, overturning these findings for six universities following audit resolution.

HHS OIG

The HHS OIG released a report entitled NIH Postaward Grant Administration and Oversight Could be Improved. The report suggests weaknesses in NIH's review of progress reports, including approving some awards where required information was not provided and not documenting review where established goals were reported to be unmet and noted that some documentation was late (including FFRs). The OIG recommended that NIH ensure timely submission of reports and revise the NIH Policy Manual and Award Worksheet Report to require a brief narrative documenting awardee progress and whether any change in research goals may influence continued funding. NIH concurred.

Veterans Administration (VA) Public Access Policy

The VA published a draft Policy and Implementation Plan for Public Access to Scientific Publications and Digital Data from Research in the Federal Register on October 7 in response to a 2013 OSTP memorandum directing agencies to develop plans to increase public access to federally funded research. Comments are due by November 6.