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December 23, 2009 - Improving the Implementation of the Paperwork Reduction Act

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Published Date: 12/23/2009

COGR

an organization of research universities

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December 23, 2009

Mabel Echols
Office of Information and Regulatory Affairs
Office of Management and Budget (OMB)
Room 10102, NEOB
725 17th Street, NW
Washington DC, 20503

SUBJECT: Improving the Implementation of the Paperwork Reduction Act

Dear Ms. Echols:

The Council on Governmental Relations (COGR) is an association of 182 research universities and their affiliated academic medical centers and research institutes. COGR concerns itself with the influence of federal regulations, policies, and practices on the performance of research conducted at its member institutions.

We have focused our comment concerning Improving the Implementation of the Paperwork Reduction Act (PRA) to call for the protections afforded small businesses, organizations and entities under the Regulatory Flexibility Act be extended to institutions of higher education, and their affiliated academic medical centers, and research institutes and other non-profit organizations. While it is important to offer specific strategies for strengthening and improving the current steps for estimating burden and reducing unnecessary paperwork, we believe COGR's comments here address the core issues that require immediate attention.

Burden:

One of the fundamental problems with the estimates of burden – time and resources calculated by agencies – prepared by the agencies is the agency's lack of knowledge of the business practices and procedures of all its affected partners. This lack of knowledge is particularly acute when paperwork requests are prepared for contracts and other procurement mechanisms governed by the Federal Acquisition Regulations (FARs) and agency specific FAR-related acquisition regulations.

The presumption in acquisitions is that the principal partners are for-profit businesses and manufacturers. For many FAR provisions, there are alternate sections and related clauses for educational institutions and/or research and development activities. These alternative approaches to some sections of the FAR reflect national policies in some cases, or the nature of the work being performed as in the latter case. These alternatives assist educational institutions in meeting their unique obligations with regard to issues like intellectual property or non-profit-based financial systems. Nonetheless, the more general provisions fall equally on educational institutions as they fall on business and industry.

For example, we have noted and offered comment addressing these operational problems on recent FAR proposed rules. Our experience is that the FAR Councils do not recognize or give relatively short shrift to the special circumstances of institutions of higher education. The recent FAR cases on Contractor Compliance

Programs and Integrity Reporting (FAR Case 2006-007, Contractor Code of Ethics and Business Conduct and the related FAR Case 2007—006 Contractor Compliance Program and Integrity Reporting) and the separate and more recent reporting requirement (FAR Case 2008—027, Federal Awardee Performance and Integrity Information System) are examples where appropriate consideration has not been extended to institutions of higher education and their affiliated entities. FAR requirements tend to be developed in the context of company contractors, and do not sufficiently take into account the nature and needs of other partners. While there have been some clear exceptions, e.g. the implementation of the E-Verify employment verification system, for the most part a “one size fits all” approach has predominated.

In all the cited FAR cases, when asked through the public notice process for comment, we have argued for the creation of an exemption for institutions of higher education, their affiliated academic medical centers and research institutes. In the case of the Code of Conduct (Case 2006-007), we reminded the FAR Councils that we uniformly have business codes of conduct and internal control mechanisms to enable the reporting of improper conduct, as well as disciplinary mechanisms to respond to improper conduct as required by OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. In response to the request for comments on Case 2007-006, we asked for the same exemption afforded small businesses or an alternative clause for contracts that funded, in whole or in part, research and development with an educational or research institution. In this case, we noted that designing and initiating the program required, especially for institutions that will have few covered contracts (and those are most likely to be subcontracts), is not an effective use of scarce institutional resources. An alternative built on performance-based standards and greater flexibility is particularly needed for academic-based organizations.

In the final, cited case, the Federal Awardee Performance and Integrity Information System (FAR Case 2008—027), we were asked to comment on a collection that did not include the actual collection instrument. The notice did include the elements that would be required to complete the reporting. But even armed with this information and when the forms are available, it is difficult within the thirty or sixty day window to determine the time and resources that will be needed until a potential respondent has an opportunity to attempt a response. As we noted in our response:

Given that these requirements will be linked to contract and grant offers and applications, the number of responses required of non-profit research institutions – more than 240 academic institutions expended \$10 million or more in federal research and development funding in 2007 and thus are subject to the requirements – will add significantly to the estimates of the overall burden of entering and maintaining the information in the FASIS for contract and grant activities. The FAR Councils also presume that systems already are in place to track this information. For universities we question this assumption. Contrary to the FAR presumption, while the information for the institution will be available, our understanding is that few systems exist to centrally assemble and track information of this kind or in the requested format at research institutions. Information will need to be extracted from various sources and analyzed to determine the particular data requested before production and submission. The need to establish such systems and enter the data into the FASIS on an ongoing basis will significantly increase the burden estimated in the FAR Case.

Understanding those costs, absent the reporting format, is impossible to predict. Any estimate of burden by the agency or us would be entirely subjective. This is especially true when the proposed website is not yet available and access requirements, data parameters, etc., are not known.

The challenge of estimating burden absent the reporting format was particularly acute in attempting to address the Recovery Transparency and Accountability Board (RTAB) request for comments on the information collection activities associated with Section 1512 of the American Recovery and Reinvestment Act of 2009 (ARRA; OMB Control No.: 0430-0001). The Federal Register notice provided the following information: Total Estimated Number of Respondents: 248,275; Frequency of Responses: Quarterly; Total Estimated Annual Burden Hours: 1,489,650. This calculation equals 6 hours per respondent annually.

COGR prepared an analysis that addressed the burden estimate associated with Section 1512 ARRA reporting based on a general survey of twenty COGR institutions and discussions with additional institutions. We used conservative assumptions in order to provide an estimate that could be supported across the COGR membership and could provide the additional detail for COGR's estimate at your request. COGR estimated that the Section 1512 reporting burden associated with each Recovery Act award is approximately 46 hours annually. It should be noted that some of the major research institutions have received hundreds of individual Recovery Act awards.

This is a burden we cannot sustain.

Limited Assessment:

OMB's PRA review examines and addresses each information collection request – each document - individually as it is presented by an agency/department. This approach fails to consider the cumulative burden of agency collections. OMB acknowledges that the number of hours spent responding to information collections have been increasing, but the current OMB mechanism of review of individual requests cannot address this burden. Nor is it effectively addressed by the efforts of individual agencies to manage their information collection activities.

For recipients of both federal contracts and federal financial assistance agreements a new approach is needed. Research organizations, colleges and universities, their related academic medical centers and research institutes as well as independent research organizations will receive support for research and other sponsored activities as prime and subrecipients through financial assistance (grants and cooperative agreements) and contracts. These organizations, particularly in the case of research universities, can receive awards directly from 26 federal agencies and departments and, as subrecipients on Federal awards, from State and local governments and private industry. As a result, research organizations must address compliance with the full range of provisions of the Federal Acquisition Regulations, and department-specific FAR implementations, e.g., DFARs, and 2 CFR Subtitles A and B Governmentwide Guidance for Grants and Agreements including 2 CFR Part 215, Uniform Administrative Requirements for Grants and Agreements, and the individual agencies implementation in Subtitle B.

This paperwork burden is exacerbated by the issuance of guidance documents that fail to meet OMB's standards for good guidance. Guidance documents that expand reporting or requirements for certification or the maintenance of documentation are generally not a part of OMB's review of information collections nor do they get addressed in a rulemaking process.

The costs in terms of time, effort and financial resources to generate, maintain and/or provide information for Federal agencies is increasing at alarming rates. Research universities are the sole Federal partner whose ability to recover those costs through its Facilities & Administration rate applicable to Federal awards is capped at 26 per cent of the direct and/or modified direct costs of conducting research and other activities for the federal government.

We offer two approaches to a solution: harmonization and the extension of protections under the Regulatory Flexibility Act.

Harmonization:

For recipients of both federal contracts and federal financial assistance agreements, regulations and related information collections must be harmonized government-wide. Research organizations will receive support for research activities as prime and subrecipients through financial assistance (grants and cooperative agreements) and contracts mechanisms. As noted earlier, these organizations, particularly in the case of research universities, can receive awards from 26 agencies and departments and must address compliance with provisions of the FARs and 2 CFR Subtitles A and B.

Federal agencies have attempted to harmonize some regulations and the related information collections and we appreciate those efforts. The establishment of governmentwide guidance/rules addressing debarment and suspension, drug-free workplace and the creation of Title 2 of the CFR itself has helped consolidate and standardize the applicable regulations and reporting requirements. Similarly, the adoption of the Common Rule for the Protection of Human Research Subjects and the creation of a Federal Policy on Research Misconduct have helped to ensure consistent approaches and information collections across agencies. Yet, even these common approaches contain sufficient difference in implementation to require careful review by the recipient community.

We recognize the value of accountability in federal activities. However, the proliferation of regulations and policies and related information collection activities in response to the call for accountability has put a significant burden on those receiving financial assistance and contracts from federal agencies. We recognize that these policies, regulations and requests for information each respond to different statutory requirements applied across the federal government and/or for specific agencies or specific funding mechanisms. Nonetheless, institutions of higher education and their affiliated academic medical centers and research institutes are being overwhelmed by layers of regulations and sometimes competing requirements.

For example, the implementation of the Federal Funding Accountability and Transparency Act of 2006 (FFATA) required federal agencies to post information concerning primary recipients (financial assistance and contracts) and relied on those recipients to submit information on subrecipients. The FFATA requirements were modified for all agencies within the Defense Appropriations Act of 2009 with the expansion of information concerning the compensation of officers of subrecipient organizations. These same requirements have been used, in part, for the reporting under the American Recovery and Reinvestment Act (ARRA). The ARRA reporting has added additional layers of information including the reporting of vendor information, currently not required in FFATA, as well as the number of jobs created and retained. The modifications and additions to the original FFATA requirements have resulted in the need for modifications to systems that recipients designed and implemented to meet the original requirement. Each assessment of the reporting burden dealt with the specific statutory requirements without examining the over-all addition to the burden for recipients.

The implementation of changes has been exacerbated by the creation of new reporting systems to address each regulation. The use of USA Spending.gov for FFATA requirements and the use of Federal Reporting.gov for ARRA have different reporting formats for essentially the same data. The cumulative impact of additions to reporting requirements and the use of different reporting systems for the same or similar data are not examined in OMB's assessment under the PRA review because OMB approaches each request individually without consideration of other agency activities and other related statutory requirements.

Regulatory Flexibility:

We believe that institutions of higher education, hospitals and other non-profit organizations (recipients as defined in A-110) should be afforded the protections of the Regulatory Flexibility Act (RFA) as amended to include information collection requirements. Even these limited protections would ensure that agencies consider the impact of proposed regulations and information collections on these entities.

The RFA, itself, provides for the modification of the applicability of the RFA through an amendment to the definitions of the terms "small organization" and/or "small entity" to include definitions which are more appropriate to the activities of the agency [5 USC 601(4) and (6)]. A "common" redefinition of "small organization" and/or "small entity" would require agencies to include these recipients in their regulatory flexibility agenda, analysis of proposed rules, identification and description of alternatives to the rule and other requirements of the RFA.

The extension of the RFA to this class of recipients could serve as the basis for a broad and careful analysis of the special and unique requirements of institutions of higher education, hospitals and other non-profit organizations in meeting Federal policies, regulations and related information collections. A separate monitor for this class of partners would be needed to comment on the agencies' regulatory flexibility agenda and the initial and final analyses prepared for individual collections.

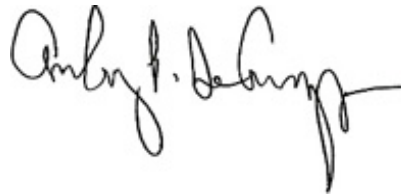
We believe the threshold for significance must be lowered for institutions of higher education, hospitals and other non-profit organizations in the case of the PRA and the related RFA review and, by extension, all federal regulations. Because of the cumulative effect of regulations and related information collections and the cap on the recovery of indirect Facilities and Administrative costs, the threshold for burden and/or significant must be reviewed and assessed.

In summary:

We believe that the current estimates of burden by agencies are flawed because they fail to address the range of potential federal partners and the unique operating and financial systems that are standard across the various segments of the recipient communities. OMB's review of information collection requests are limited to the individual collection and fail to address the cumulative burden of information collections that fall on federal partners that do business across agencies and through the full range of federal mechanisms – grants, contracts, cooperative agreements. Institutions of higher education and their affiliated academic medical centers and research institutes are this unique partner segment. The primary solution is to extend the protections of the Regulatory Flexibility Act to these partners.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Anthony P. DeCrappeo". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Anthony P. DeCrappeo
President