COUNCIL ON GOVERNMENTAL RELATIONS
1200 New York Avenue, N.W., Suite 750, Washington, D.C. 20005
(202) 289-6655/(202) 289-6698 (FAX)

June 26, 2007

MEETING REPORT

THE COUNCIL ON GOVERNMENTAL RELATIONS
WASHINGTON MARRIOTT HOTEL
June 7 and 8, 2007

Note: All slide presentations from the June 2007 COGR meeting are available on the COGR website at www.cogr.edu/meetings.)

GENERAL DEVELOPMENTS

1. Thursday Morning Special Topics

Institutional Financial Conflicts of Interest - The Thursday morning discussion of institutional financial conflicts of interest (COI) practiced a discussion of definitions of and review process for institutional conflict on a series of case studies. Some participants with institutional COI policies admitted that the actual practices used to review financial relationships did not necessarily match the procedures outlined in the policy; asking whether it was wiser to change the policy or the practices. Not everyone uses a committee to conduct an initial review or, in some cases, a "full" review. How institutional relationships and interests are communicated across campus – through formal and informal networks and relationships – clearly affects who makes the "disclosure." The presenters – Gunta Liders, Susan Sedwick and Mary Ellen Sheridan – will work with Research Compliance and Administration Committee to develop commentary and/or management strategies for the cases presented and we will post them to the web site. The development of the commentary will benefit from a more interactive approach and we will solicit your contributions later in the year.

Discussion of *20 Questions* Document – Please see 3. under Contracts and Intellectual Property Committee

Effort Reporting - Please see 6. under Costing Policies Committee.

2. Thursday Afternoon Forums

a) Animals in Research

This session of the Open Forum examined the rising threat to the use of animals in teaching and research and how one university, the University of California, Los Angeles responded to that threat. Frankie Trull, President of the National Association for Biomedical Research (NABR) described the organizations and their strategies to protest and prevent the use of animals. She offered compelling examples of how the nature of the protests have changed in recent years putting the physical safety and security of individual investigators and their families at risk. The new tactics include: targeting of third parties, e.g., suppliers or insurers; personal harassment and intimidation including home visits; the use of the Internet to expose personal information and make threats; and a well-funded increase in political activities. It is the increased use of violence and intimidation against an investigator that focused the activities on UCLA's campus. As on any campus, UCLA was challenged to balance the rights of some to criticize while

ensuring the ability of others to continue to pursue their research. Roberto Peccei, Vice Chancellor for Research at the University of California, Los Angeles, described how his campus responded to heightened incidents of threats and intimidation against individuals engaged in animal research. A Task Force made recommendations in four key areas: reinforcing the commitment of the University to the principles of academic freedom; addressing how best to protect the safety of faculty members; better coordinating administrative responses to events; and addressing possible legal remedies to take against activists' threats. The slides from both presentations are available on the COGR web site. A copy of the UCLA Task Force analysis and recommendations is available as well.

b) COGR Panel Discusses IT Security Requirements

A panel session discussed the increasing challenges posed by inconsistent agency implementation of the requirements of Homeland Security Presidential Directive 12 (HSPD-12). The Directive requires common standards of identification for federal employees and contractors for physical access to federal facilities and logical access to federal information systems. However, agency interpretation of the scope of this requirement varies. NIH has been applying the requirement to contractor employees with access to databases developed under contract, even if the database is not a required deliverable. The Department of Education (ED) has been applying the requirement essentially to all contract employees, including subcontractors. In contrast, NSF applies the requirement only to contractors who require access to NSF facilities or systems.

Where deemed applicable, an assessment must be made of the relative level of risk (low, moderate, high), with security screening of employees based on the assessed level of risk. Contract employees are required to complete detailed questionnaires (i.e., OPM SF 85 for Non-Sensitive [low risk] Positions; SF 85P for Public Trust [moderate risk] Positions; SF 86 for National Security [high risk] Positions). At all levels the screening requires submission of detailed personal and medical information, with the scope and detail of the required information increasing with the assigned level of risk. ED has applied the moderate level screening requirement, for example, to researchers undertaking a school impact study of interventions, despite the fact that the study involves no access to federal facilities or information systems and that the local IRB requires submission of data protection plans and assurances of confidentiality for personally identifiable information. Issues have arisen with regard to the refusal of researchers to submit the screening information and the related costs and burdens. Government scientists also have objected to the requirements (see Washington Post, Tuesday, June 12, 2007; Page D04).

The COGR panel included Felice Levine, Executive Director of the American Educational Research Association (AERA); David Lambert, CIO at Georgetown University; Carol Bales, Senior Policy Analyst in OMB's Office of E-Government and Information Technology; and Mark Pekrul, Senior Program Analyst in OPM's Federal Investigative Services Division. Dr. Levine reviewed some of the issues that have arisen particularly with ED's implementation of HSPD-12; Dr Lambert discussed the activities of EDUCAUSE and Internet 2 with regard to developing a future vision of authentication requirements; Ms. Bales discussed HSPD-12 requirements (a copy of her presentation is

included with the Meeting Presentations); and Mr. Pekrul discussed the investigative process.

It was clear from the panel discussion that OMB has given agencies wide discretion in determining the appropriate implementation of HSPD-12. However, ED and other agencies also have cited OMB as the source of agency requirements that appear to go beyond the intent of the directive. While Ms. Bales offered to provide a point of contact for such concerns, broader clarification from OMB is necessary as to the scope of the requirements. Subsequently COGR in association with AERA and AAAS has written to the OMB Administrator for E-Government and Information Technology requesting a meeting to discuss our concerns and to seek solutions that will protect federal resources while not impeding government-funded research and that avoid the screening of research personnel where there is no clear and compelling rationale for doing so. Separately AERA also has written to ED to request a similar meeting

c) Using Tax Exempt Bonds to Finance Facilities for Federally-Funded Research

Our panelists for this session were: Terry Johnson, Controller, University of Iowa; Charles Cardall, Bond Counsel with Orrick, Herrington & Sutcliffe LLP; and was moderated by Wendy Streitz, Director for Policy Analysis and Campus Services for the University of California System. The intent was to explain the issue in more detail, describe the real adverse impact on one university due to the uncertainty in the bond community, and provide an update on attempts to clarify the rules.

As was stated in the Meeting Agenda, it is widely known in the research community that when a federal agency funds research at universities, the agency retains a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States any subject invention throughout the world. What is not as well known is that Section 150 of the Internal Revenue Code provides that the federal government is not a "governmental unit" for purposes of the provisions of the Internal Revenue Code addressing municipal bonds. As a result, for purposes of evaluating private business use, the federal government is considered a private person and use by the federal government of bond-financed facilities is considered private business use. Mr. Cardall gave an overview of why this might have occurred, and then gave an excellent description of the IRS guidance on this issue, the lack of clarity in the IRS guidance materials, and why some in the bond community have become increasingly reluctant to issue an unqualified opinion on the tax exempt status of university bonds issued to construct research facilities.

Terry Johnson then walked the attendees through the planning and financing process the University of Iowa engaged in for a research building, that in the end required the University to use taxable debt financing, due to their bond counsel's uncertainty on the question of federally funded research as private use.

COGR continues to work with Department of Treasury and IRS officials, along with representatives from the National Association of Bond Lawyers, on an amendment to IRS

rules to expressly provide that the rights required to be granted to the federal government in awards for sponsored research under the Bayh-Dole Act will not cause the institution to be disqualified from use of tax exempt bonds. We expect a positive outcome on this amendment some time this summer.

2. NSF Deputy Director Gives Keynote Address

Dr. Kathie L. Olsen, Deputy Director of the National Science Foundation, was our Guest Speaker. Dr. Olsen joined NSF from the Office of Science and Technology Policy (OSTP) in the Executive Office of the President, where she was the Associate Director and Deputy Director for Science and responsible for overseeing science and education policy including physical sciences, life sciences, environmental science, and behavioral and social sciences. Prior to the OSTP post, she served as the Chief Scientist at the National Aeronautics and Space Administration (May 1999- April 2002). Dr Olsen's remarks will be posted to the COGR web site.

3. New Board Members Selected

The COGR Board of Directors unanimously approved the recommendations of the Nominating Committee and appointed the following individuals to the COGR Board, effective August 1, 2007: Michelle Christy, Director of Research and Project Administration, Princeton University, and soon to be Director, Office of Grants and Contracts, Massachusetts Institute Technology; Christina Hansen, Assistant Vice Chancellor for Research, University of California-Irvine; John Shipley, Comptroller, Purdue University; Marianne Woods, Associate Vice President for Research, University of Alabama; and Leonard Zwelling, Vice President for Research Administration, University of Texas M.D. Anderson Cancer Center.

In addition the Board voted unanimously to renew the following current Board members for their second three-year term: Jamie Lewis Keith, Vice President and General Counsel, University of Florida; Ara Tahmassian, Associate Vice President for Research Compliance, Boston University; and Nikki Krawitz, Vice President for Finance and Administration, University of Missouri System.

As stated by Marvin Parnes, Chair of the Nominating Committee, the Committee had an excellent slate of candidates to consider, any of whom would have made very good Board members**.**

4. New COGR Member Institutions

Since our last meeting in February, we received new member applications and the Board unanimously approved for COGR membership the University of Texas-San Antonio, The Colorado School of Mines, and the Michigan Technological University. We welcome these institutions to COGR.

RESEARCH COMPLIANCE AND ADMINISTRATION

Committee: Gunta Liders, University of Rochester, Chair; Mark Brenner, University of Nevada, Reno; Todd Guttman, Ohio State University; Jamie Lewis Keith, University of Florida; Ara Tahmassian, Boston University; David Wynes, Emory University; Michelle Christy, Princeton University; Susan Sedwick, University of Texas, Austin

1. Follow-Up on Research Misconduct

Members of the Research Compliance and Administration Committee (RCA) met with representatives of Department of Health and Human Services (HHS) Office for Research Integrity (ORI) on Tuesday, June 5, 2007 to follow-up on the February discussions concerning the detailed and prescriptive nature of the "Model Research Policy for Responding to Allegations of Research Misconduct" previously posted on ORI's web site. As we reported in February, during the RCA meeting with ORI Director Chris Pascal and other ORI staff members, we reiterated the concerns expressed in a joint-association comment that the detailed policy proposed by ORI is problematic because research institutions misconduct policies must be broadly stated to allow institutions to satisfy the requirements of all Federal funding agencies. Since that time, ORI finalized a "***Sample*** *Policy and Procedures for Responding to Allegations of Research Misconduct*." The June 5 meeting included Chris Pascal, ORI Director, Larry Rhodes, Director of the ORI Division of Education and Integrity, John Dahlberg, ORI Director of Investigative Oversight and Jo An Rochez, Research Oversight Senior Attorney from the HHS Office of General Counsel. The discussions focused on: the (now) *Sample Policy and Procedures*; issues identified by ORI's in its oversight role; and how research institutions can work with ORI to ensure effective inquiries and investigations of allegations of misconduct.

On June 5, Chris Pascal and his colleagues affirmed that there is no expectation on the part of ORI that institutional policies would contain the level of detail offered in the recently posted *Sample Policy and Procedures*. ORI posted a "Preamble" to the *Sample Policy* that includes a similar affirmation:

> "The research misconduct regulation requires institutions to have written policies and procedures … that meet the requirements of the regulation (42 CFR §§ 93.300, 93.302, 92.304).…This [Sample] combining of the policy and procedures, however, is not intended to indicate that institutions should change their typical practice of having general misconduct policies and more detailed procedures….This Sample Policy and Procedures is intended to meet the regulatory requirements, but … it is not intended to represent the best or only way of meeting those requirements."

This distinction between meeting the requirements of the regulations and using the *Sample Policy and Procedures* is important because the *Sample Policy* includes additional "guidance"

that is prescriptive, exceeds the regulatory requirements and, in some cases, is contradictory to the regulations.

In February, Committee members and ORI staff explored ways in which institutions could develop guidance drawn from university practices that would describe effective strategies for addressing troublesome aspects of handling misconduct allegations. ORI provided the Committee a list of its "top" thirteen areas of concern with universities' management of research misconduct cases. In the June meeting, we attempted to prioritize these areas with ORI. For example, the sequestration of data/evidence remains high on ORI's list and represents an area where effective practices could help institutions in meeting their obligations. However, there are areas in which ORI and the institutions have difference of opinion and interpretation that would benefit from further discussion with ORI. For example, ORI believes that an investigation of an allegation should be widened beyond the original allegation based on new assertions or on the general "behavior' of an individual. In such an area, COGR will develop a summary of institutional practices and continue the discussions with ORI.

RCA will begin reviewing the entire ORI "problems" list and seek the memberships' assistance in drafting effective practices in the identified areas. We did learn that ORI is working independently on a "manual" that will gather best practices from research institutions from attendees of the ORI-sponsored Research Integrity Officers (RIO) Boot Camps. Nonetheless, the COGR review and development will be useful as the ORI "manual" will not be available for 2-3 years. The list of thirteen problem areas will be posted to the Members Only section of the COGR web site and we welcome your comments, observations, strategies for addressing the areas of concern.

ORI's compliance review of institutional research misconduct policies was the final discussion topic. ORI recently requested copies of scientific misconduct policies from the top 100 Public Health Service (PHS) funded institutions to assess compliance with PHS research misconduct regulations. This email requesting the policies was dated May 3rd and sent to the individual who submits the annual report to ORI. As the memorandum stated, "to ensure that (you) remain eligible for PHS funding," institutions had 30 days to respond to this inquiry.

When asked what criteria would be used to review institutional policies, we got differing opinions from the individuals participating in the June meeting. The most conservative view expects all the provisions of the PHS regulations to be incorporated into institutional policies. The most prevalent opinion among the ORI staff including Pascal reinforced the Preamble to the *Sample Policy* and the February discussions – policies could be broadly stated as long as they were consistent with the PHS regulations and could reference meeting the PHS regulations (and other appropriate federal agency regulations) as appropriate. The important thing from ORI's perspective is that institutions exhibited a good faith effort to execute effective internal policies.

Institutions should be thoughtful in responding to ORI's review and, if offered, any recommendations for changes to institutional policies. Institutions should question requests for modifications from ORI that make the institutional policies too specific or narrow and limit your ability to implement other federal agency requirements. The ORI review may be delayed with staffing changes occurring at ORI.

2. Update – Homeland Security's Chemical Facility Standards

As described in the Spring Update, COGR submitted a comment on the Department of Homeland Security's (DHS) interim final rule on Chemical Facility Anti-Terrorism Standards (72FR 17688). When the rule was proposed in December 2006, the research community naively believed that the proposed regulations focused on larger production and industrial use facilities. The potential negative impact of the interim final rule on universities did not become clear until the publication of Appendix A, as a part of the interim final rule on April 9, 2007. Appendix A lists DHS' Chemicals of Interest and sets the screening threshold amounts for a variety of chemicals that will trigger university compliance with the regulations.

COGR endorsed the detailed analysis provided by the Campus Safety Health and Environmental Management Association (CSHEMA), a division of the National Safety Council, and urged the exemption of all non-production, non-diagnostic laboratories. Comments were also submitted by our colleagues at the American Council on Education (ACE), the National Association of College and University Business Officers (NACUBO), AAU, and NASULGC as well as individual colleges and universities. We understand that DHS received over 5000 comments from a very broad range of potential "chemical facilities" – large and small businesses, manufacturing firms, farmers, etc.

Since submitting comments and calling for a delay in implementation, representatives from COGR and other higher education associations including individual university Federal relations officers have continued to consider ways to engage DHS in a discussion of our concerns. Among other things, we have called on other Federal department and agency representatives to intervene on our behalf.

On June 20, association and university representatives met with the Acting Director of the DHS Chemical Security Compliance Division, Lawrence Stanton. Mr. Stanton emphasized that he appreciated the university community's comments on the rule, and that those comments are being taken very seriously. As has been reported, Mr. Stanton confirmed that Appendix A is being revised – some chemicals will be removed from the list; all will have a specific threshold amount. With the revisions in Appendix A, he suggested that the number of "facility" top screens that would need to be completed will be reduced. The Top Screen is the tool DHS will use to determine a facility's risk level and if, as a consequence, a vulnerability assessment and security pal are needed. The rule allows organizations to designate a "facility" at a level that it determines to be appropriate – at a laboratory, building or campus level – for determining the chemical screening thresholds. Clearly there are consequences if an institution defines facilities either too broadly, e.g., the whole campus, or too narrowly, e.g. individual labs. Estimates of the time required to complete a Top Screen on a research university campus have ranged from 2000 to 8000 hours. While Stanton recognizes that campuses without a current chemical inventory face a significant task in determining whether they met or exceed the screening thresholds, DHS is adamant that not having information about certain chemicals held on campuses places the security of the nation at risk and is not acceptable.

Mr. Stanton appears willing to consider modifications to the implementation schedule and to continue to discuss how institutions that have facilities that meet the screening thresholds address the vulnerability assessment and, if required, the creation of a site security plan. He clearly

recognizes that universities and colleges have distinctive challenges in addressing security questions and seems willing to work with the university community to explore effective practices for campus-based research facilities. The association and university attendees found the meeting positive and the tone and approach as one seeking cooperation and collaboration. Based on the meeting, it is our belief that there will be time for institutions to respond to the requirements in a measured and more thoughtful manner.

As these discussions proceed, we will keep the membership informed. Currently, the final publication of Appendix A listing the chemicals of interest and screening threshold quantities is not expected to occur until mid-July. In the short term, before the final publication of Appendix A, campuses may want to begin to consider how they will approach conducting or updating a chemical inventory – what information is available (e.g., through procurement data or shared chemical stores inventories); what facilities (e.g., laboratories or buildings) may be affected (e.g., through updated space inventories, etc.) The Chemical Security Assessment Tool (CSAT) that includes the Consequence Screening Questionnaire or Top Screen and Users Manual is on the DHS web site at: http://www.dhs.gov/xprevprot/programs/gc_1169501486197.shtm. Institutions may want to review the questionnaire that appears at the URL to consider how to approach defining facilities, etc. Without Appendix A, it is not required and, in fact, impossible to complete the Top Screen. However, if institutions could review and identify questions they have about the Top Screen that are not resolved in the Users Manual now, we can bring those questions to the attention of DHS representatives as we work further with them to find a reasonable and effective implementation strategy for these regulations as applied to research universities.

3. Federal Funding Accountability and Transparency Act of 2006

The Spring Update described the Federal Funding Accountability and Transparency Act of 2006 (FFAT Act) sub**contract**s database pilot. The pilot is being conducted by the Federal Acquisition Regulations (FAR) Civil and Defense Councils for contracts only. As required by the statute, the pilot is designed to determine the most efficient and least burdensome means of collecting subcontract data into a searchable public database. When fully implemented subaward reporting would be a requirement of all award mechanism, regardless of whether the award is a grant, contract or cooperative agreement.

On June 19, the Grants Policy Committee (GPC) of the US Chief Financial Officers Council held a Stakeholder's Webcast & Meeting where Thomas Cooley, chair of the GPC and CFO of the National Science Foundation described the implementation of the FFAT Act provisions including subaward reporting for grants, cooperative agreements and other Federal financial assistance agreements. Slides of Mr. Cooley's presentation are available at: http://www.grants.gov/aboutgrants/grants_news.jsp

The GPC intends to conduct a separate pilot this summer of subawardee reporting on financial assistance mechanisms. The GPC is taking a very different approach to that proposed by the FAR Councils for contract-based reporting. The GPC hopes to capture subawardee data – name, address, performance location, DUNS number, etc. – in applications and, thus, placing the requirement or burden on the Federal agency to report subawardee information as it posts prime awardee information to the Federal database. Under this approach, the GPC would recommend,

after the pilot, any needed changes to application information to enable the agency to collect subawardee data. Changes in subwardees during the performance period would require a modification of the database. How that would be accomplished has not yet been determined.

The GPC is looking for grantees to volunteer to participate in the subawardee pilot this summer. Those interested can send an expression of interest to GPCWebcast@nsf.gov . Participating in the pilot is an opportunity to help define the process and frame the reporting procedures for the research community.

4. Dual-Use: NSABB Strategies for Minimizing Potential Misuse

As noted in the Spring Update, the National Science Advisory Board for Biosecurity has issued a draft *Proposed Strategies for Minimizing the Potential Misuse of Life Science Research* as a discussion document. The *Proposed Strategies* offers a framework for the oversight of dual-use life sciences research - legitimate research that has the potential to yield information that could be misused to threaten public health and safety. COGR has formed a working group on Biosecurity to review the draft *Proposed Strategies*. The Working Group includes RCA members and additional colleagues from RCA member institutions, and At-Large members, some of whom served on the working group that reviewed and comments on the on select agent regulations.

The COGR Working Group on Biosecurity is charged with the task of constructing a formal comment on the specific questions posed by NSABB in Appendix 5 of the *Proposed Strategies*, and any other aspects of the report that are of concern to our membership. There will be a formal call for comments from the NSABB posted to the Federal Register in the near future. However, given the importance of the *Proposed Strategies* and the impact that these will have on the dissemination of research results, the Working Group urges the COGR membership to begin a dialogue on campus with researchers and staff framed around the *Proposed Strategies*, generally, and Appendix 5, specifically. The document can be found archived with the materials from the NSABB's April 19, 2007 meeting or using this link: DRAFT Report of the NSABB Working Group on Oversight Framework Development The Working Group encourages and welcomes your comments and concerns on the document. Please forward comments to cblum@cogr.edu.

5. DOD Military Recruiting and ROTC Access

On May 7, 2007, the Department of Defense (DOD) issued a proposed rule in the Federal Register to provide for Military Recruiting and Reserve Officer Training Corps (ROTC) Program Access to Institutions of Higher Education (72FR25713). The proposed rule modifies the regulations known as the Solomon Amendment to reflect legislative changes passed in 2004 to ensure access to campuses that is "at least equal in quality and scope" provided other recruiters. This rule proposes defining equal in quality and scope to mean access to the campus and students that is equal to that provided to "the nonmilitary recruiter receiving the most favorable access."

You will recall that a coalition of universities, law schools, and/or law school faculty – Forum for Academic and Institutional Rights (FAIR) – challenged the provisions of the Solomon Amendment because of DOD's position on the participation of gays in military service. DOD delayed implementing these 2004 statutory changes until the legal challenges were resolved with

the Supreme Court's decision upholding the constitutionality of the Solomon Amendment in Rumsfeld v. FAIR [537 US 47 (2006)].

In addition to defining the meaning of access equal in quality and scope, the proposed rule describes policies or practices that would violate the requirement such as refusing to notify students, schedule appointments, or provide interview rooms for recruiting on a par with other nonmilitary recruiters. The proposed extends the Federal agencies whose funding would be denied or withdrawn from a campus that violates the rule. Non-complying institutions would be prohibited from receiving funds from DOD, Labor, Health and Human Services, some Education funds, and, with this new rule, Homeland Security, Transportation, the CIA, and Nuclear Security Administration. Non-compliance by one unit of an institution affects funding for the entire institution.

Comments on the proposed rule are due by July 6, 2007. COGR is reviewing whether to submit comment on this proposed rule and welcomes you thoughts and comments to cblum@cogr.edu no later than June 29, 2007.

6. Update on the Federal Research Progress Report and Financial Report

The February 2007 Meeting report detailed the proposed federal financial report (FFR) and research performance progress report (RPPR). At the May Federal Demonstration Partnership (FDP) meeting, agency officials provided an update to these report formats. The RPPR Working Group has reviewed and considered all comments received with respect to the RPPR draft format. The RPPR has been modified to clarify terminology and avoid redundancy. The proposed Changes/Problems/Special Reporting **requirement** will likely be an **optiona**l category in the final format. The Office of Science and Technology Policy and Office of Management and Budget are currently reviewing the RPPR format; when the review is complete, the RPPR will be posted to the Federal Register for formal community vetting. Questions and comments arising from initial preview of the FFR were generally ones of clarification, and therefore, no modifications to the format were made. Similarly, this form is also at OMB for preparation for Federal Register notification.

CONTRACTS AND INTELLECTUAL PROPERTY

Committee: James A. Severson, University of Washington, Chairman; Kathleen Irwin, University of Wisconsin-Madison; Marvin Parnes, University of Michigan; Wendy Streitz, University of California; Ann Hammersla, Massachusetts Institute of Technology; Catherine Innes, University of North Carolina, Chapel Hill; Fred Reinhart, Wayne State University; John Ritter, Princeton University; Jill Sorenson, The Johns Hopkins University; Patricia Weeks, Fox Chase Cancer Center

1. Patent Reform Legislation Moves Toward Resolution

As reported in recent COGR Updates and Meeting Reports, the two-year effort in the Congress to significantly reform U.S. patent law appears to be moving toward closure. As of this writing hearings have been held in both the House and Senate, and the bills are expected to be reported out of the responsible committees before the 4th of July recess.

As background, identical patent reform legislation has been introduced in both the House and Senate (H.R. 1908 and S. 1145). It is bipartisan, bicameral legislation, which is unusual in the current Congress. COGR is participating in a joint higher education association working group led by the Association of American Universities (AAU), which has developed a position statement on the legislation (available at http://www.aau.edu/intellect/ipissues.cfm).

The biggest change would be to move the U.S. from a "first to invent" standard for patenting to a "first inventor to file" system. This change is controversial both in the academic community and in the larger patent community. However, the joint association statement indicates that we do not oppose the change so long as 1) an appropriate grace period is included for scientific publications; 2) a requirement for a strong inventor's oath is included; and 3) the existing provisional patent application process is preserved. #s 2 and 3 are not problematic. On #1, while the legislation contains a one-year grace period, the language is not as clear as we would like. We believe it needs to clearly protect an inventor's ability to file for a patent both within one year after his/her own publication(s) disclosing the invention and also that of other parties who subsequently disclose the discovery or invention in a publication within the one year period. Otherwise such disclosures either by the inventor or others may be viewed as "prior art" defeating the ability to obtain a patent, and thus discouraging publication. Congressional staff appears to be understanding and sympathetic to this concern. We are hopeful that the final version of the legislation will contain the appropriate language.

Certain other provisions in the legislation are very contentious among various industry sectors, and of varying concern to the university community.

1) New post-patent grant opposition procedure. There is general support for a new streamlined administrative procedure at the Patent and Trademark Office (PTO) that would permit anyone to challenge a patent within a limited time period after its issuance. However, the legislation also includes a "second window" for a challenge for the life of

the patent, under some specified conditions. This provision is strongly opposed by a number of industry groups because it would reduce patent certainty. We believe it could adversely affect universities' ability to license their inventions, for the same reason.

2) Apportionment of damages for patent infringement. The current legislation would greatly reduce judicial and jury discretion in determining damages for infringement. It would provide for damages to be based solely on the economic value attributable to the patent's specific contribution over the prior art, rather than the entire market value of the infringing product or process. While of lesser concern to universities, many in the patent community oppose this change because it could have the effect of reducing infringement damages to a "cost of doing business" rather than providing a serious deterrent to infringement.

3) Expansion of prior user rights. The legislation would expand "prior user rights" beyond the current limitation to business method patents to all patents. It also would allow an infringer to claim as a defense that it had "made substantial preparations for commercial use of the subject matter" before the filing date of the patent, rather than the current requirement of actually practicing the subject matter commercially for more than one year prior to the patent application. We strongly oppose this provision. It would elevate trade secret protection to a status equivalent to patent protection, and defeat the purpose of the patent system to encourage innovation through disclosure. It might also encourage patent piracy since it could enable someone to scour the literature, find an article pointing to a probable invention, and develop a protocol that would give them the necessary record of "substantial preparation."

4) Expanded PTO rulemaking authority. The legislation would give rulemaking authority to PTO to make substantive changes in patent requirements. Currently PTO is limited to regulating the patent application process. This change is widely opposed on the grounds that substantive changes should be made only by the Congress. Given that PTO seems to be largely driven by its resource constraints, we share the concern.

The various stakeholders have been strongly encouraged by the Congressional sponsors of the legislation to seek to find common ground on these various provisions. The stakeholders all appear to have legitimate concerns. For example, the IT industry sector strongly backs the limitation on infringement damages due to some huge recent jury verdicts against IT companies. The BIO community, on the other hand, is concerned that an unlimited "second window" will seriously affect their ability to commercialize inventions (including those licensed from universities). AAU currently is participating in discussions about possible compromise language on behalf of the associations working group. However, cracks in support among the Congressional sponsors have begun to appear. Many of the Republican members in particular have cited concerns that the above provisions will adversely affect their constituencies including universities.

At this point prospects for the patent reform legislation are uncertain. However, there is general agreement that if it does not pass Congress this year, the process will need to start over again in the next Congress. Given the time and energy invested in the current legislation, and that some features have wide support (e.g. publication of all patent applications after 18 mos.; third party

submissions of information to PTO to improve patent quality), this would be an unfortunate outcome. We will keep the COGR membership informed of the status.

2. Coalition Challenges Proposed PTO Rules on Continuations

A coalition of companies has written to OMB regarding two draft final rules initially proposed by PTO last year ((71 *Fed. Reg*. 48; P-066; 71 *Fed. Reg*. 61; P-067) and currently under OMB review. The rules would make substantial changes in patent practice for continuing applications, requests for continued examination, applications containing patentably indistinct claims, and the examination of claims. COGR commented on the proposed changes in a letter to PTO dated May 2, 2006 (see June 2006 COGR Meeting Agenda). We expressed serious concerns about the potential negative effects on universities (a copy of the comment letter is on the COGR website at http://www.cogr.edu/files/CurrentComments.cfm).

The coalition letter challenges PTO's authority to issue the rules, and cites a number of procedural and substantive concerns. It urges OMB to return the draft rules to PTO and designate them as economically significant, thus requiring preparation of a Regulatory Impact Analysis for public comment in accordance with OMB Circular A-4. It also cites the need to conform to the principles of OMB's Information Quality Guidelines.

PTO received hundreds of public comments, the overwhelming majority of which were critical of the proposed rules. While we have not seen the final versions currently under review by OMB, available information indicates that they are very similar to the proposed rules. No university or higher education association is included in the coalition. However, in informal conversations with coalition members we expressed sympathy with their goals. We understand that coalition representatives recently met with OMB to reiterate the concerns expressed in the letter. It is unclear what action OMB will take.

3. Updated *20 Questions* and *University-Industry Research Relationships*

We have completed updates to the *20 Questions about University Technology Transfer* and *University—Industry Research Relationships* COGR documents. These update the current versions of these documents on the COGR website, which now are 8 and 12-years-old respectively.

The *20 (now 21) Questions* document discusses issues such as the relationship of technology transfer to universities' primary missions, the role of universities in economic development, why universities sue companies to enforce patent rights, the distinction between universities and patent "trolls," whether patent "thickets" are hindering research and innovation, challenges in university—industry research collaborations, and university use of licensing revenues and whether they have any connection to the high cost of drugs. These issues formed the basis for discussion at a Thursday morning session with the CIP Committee. In general the participants at the session felt that these were appropriate questions for consideration in the COGR document.

The document also describes the nature and accomplishments of university technology transfer, the Bayh-Dole Act, and discusses the relationship between patents and publishing. It seeks to

reflect the increased visibility of technology transfer issues and to respond to concerns that have arisen since the last version of this document.

The *University—Industry* document seeks to place university—industry relationships in historical and national contexts; describes models for relationships; benefits of collaboration, and discusses challenges in the relationships in greater detail than the *Questions*. It also contains links to various source materials and to other viewpoints.

We will notify the membership when the new versions of these documents are available.

4. NASA Issues Final Rule on IT Security Requirements for Contractors

Previously COGR had commented on the proposed NASA/NFS rule on security requirements for IT resources (see COGR Fall 2006 Update). NASA issued its final rule on May 10, 2007 (72 *Fed. Reg*. 90, pp. 26560-26563). The final rule contained no significant changes. In response to COGR's comment that the clearance requirements should not apply to university contractors that develop data to which NASA has access and the right to use but is owned by the university, NASA stated this is a data protection, not ownership, issue. The NASA notice cites the Federal Information System Management Act (FISMA) and HSPD-12 among other authorities. The requirements apply to all contracts whose performance requires contractors to "use information systems to generate, store, process, or exchange data with NASA or on behalf of NASA, regardless of whether the data resides on a NASA or a contractor's information system."

COGR also has heard from a number of universities that personal identity verification (PIV) now is required for investigators who perform research at NASA facilities, based on HSPD-12. These requirements are set forth in NASA GIC 06-02,"Personal Identity Verification of Grantees and Recipients" attached as modifications to FDP grants and cooperative agreements from NASA Ames. GIC 06-02 requires the grantee to provide the social security number or visitor number for foreigners and date and place of birth for each person (the person needing the badge cannot provide this personal data directly). While there was some initial confusion about the responsibility for funding PIV, our understanding is that the NASA facility will be responsible for the verification.

The clearance requirements for access to federal facilities appear to fall clearly within the intent of HSPD-12. However, the broad application of the security requirements to NASA contractors raises similar issues to those discussed in the COGR panel session. Absent clarification from OMB, we may expect to see further proliferation of such requirements. We will continue to seek clarification.

5. Bureau of Labor Statistics Requires Approval of Contractor Publications

The Bureau of Labor Statistics recently amended its agreement terms and conditions to add a clause (VII-L) that gives BLS the right to require submission of any research output from the project intended for publication for review and approval to assure adherence to the agreement. Where submission is required, the clause states "the output shall not be released or published without the advance written approval of the BLS Project Coordinator. The recipient and designated agents will be bound by the determinations of the BLS Project Coordinator."

Previously agreements for use of BLS data included a clause (VII-K) that provided for review and approval of any research output intended for publication that "could raise reasonable questions regarding any compromise or breach of confidentiality or any disclosure of individually identifiable information. Where such reasonable questions exist, such outputs may not be released or published without the advance written approval of the BLS Project Coordinator." Given the focus on confidentiality and individually identifiable information, most universities had found the "K" clause acceptable. However, the new "L" clause gives BLS an unlimited approval right over all publications, which is not acceptable to many universities.

At the request of several universities who had tried unsuccessfully to negotiate the new clause with BLS, COGR contacted BLS. We were informed that the clause had been added by BLS counsel, based upon the provisions of the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) of 2002. While CIPSEA requires agency review of protected information to assure that confidentiality is preserved, it does not mandate the broad publication approval right claimed by BLS. We suggested that VII-L be modified to give BLS a 45-day right to object to disclosures because of compromise or breach of confidentiality, with the provision that in the event BLS made such objection, the research output could not be released or published without either the advance written approval of the BLS Project Coordinator or removal of the confidential material. The COGR language was not acceptable to BLS, who insisted that VII-L was necessary based on advice of counsel. They also asserted that as an independent objective statistical agency they never had or would delay or prevent a publication from going forward in any BLS data sharing program for reasons other than non-compliance with the terms of agreements designed to protect confidentiality.

We provided BLS with sample sponsor publication approval policies from a number of institutions, and indicated that this problem was likely to grow. In return BLS provided us with a list of 15 mostly COGR universities that allegedly had accepted the language. Checks with about half of these institutions indicate that the institutions either had accepted only the previous "K" clause or were unaware that the BLS terms and conditions had changed. We urge institutions with BLS agreements to review the terms.

As of this writing, negotiations remain unsuccessful. In a number of cases ongoing research projects are at risk. Several institutions have contacted or are considering contacting their Congressional representatives about this matter. In addition to our usual concerns about sponsor restrictions, requirements for review and approval of reports arising from the use of BLS data prior to publication appear to run counter to the BLS mission to disseminate essential statistical data to the public and to other federal agencies in a timely and impartial manner.

6. Army Responds to COGR Letter on Contractor Manpower Reporting

On July 31, 2006 COGR wrote to the Army, raising concerns about the Contractor Manpower Reporting (CMR) clause recently added to Army solicitations and contracts. The clause includes a requirement to report the estimated direct labor hours, defined as total number of hours of labor performed on a task during the reporting period as well as direct labor dollars. It extends to all contracting tiers. We pointed out that the requirement raised issues of consistency with OMB Circular A-21 (incorporated into the Federal Acquisition Regulations (FAR) at FAR 31.3).

There is no requirement in Circular A-21 (see Section J.10) for the payroll systems of educational institutions to capture salary or wage data based on hours worked, or to report labor hours. We expressed concerns that the Army requirement might require creation of new payroll cost allocation systems by universities beyond A-21 requirements, inconsistent both with the FAR and OMB guidance, and could raise audit issues (a copy of the comment letter is on the COGR website at http://www.cogr.edu/files/CurrentComments.cfm).

By letter dated June 12, 2007 the Army responded to the COGR concerns. The Army letter stated that CMR requires only estimates of direct labor hours and direct labor dollars, and that exact data based on payroll systems is not required. Estimates can be based on a determination of the number of full and part time staff working on a particular contract assuming a 40-hour work week for full-time staff (with fractional efforts for part time), multiplied by the number of weeks of the contract term. According to the letter, CMR information will not be used for audit purposes and there is no intent to reconcile the estimates with costs billed on particular contracts. As a contract deliverable, costs of preparing the CMR data are allowable pursuant to Circular A-21.

While the letter does not fully address our concerns, it may be helpful in clarifying the Army's intent, particularly with regard to potential audit issues. We plan to post the letter on the COGR website.

7. Deemed Export Advisory Committee Holds Two Campus Regional Meetings

The COGR Spring Update noted that we would report on the Department of Commerce's Deemed Export Advisory Committee's (DEAC) second regional meeting on May 2 at Georgia Tech (for background on the Committee see COGR Fall 2006 Update). University speakers at the meeting made a number of recommendations, including continued use of classification as the primary mechanism to control information at universities; reliance on visa screening to screen undesirable foreign nationals at the border rather than on campus; and clarification of what constitutes "proprietary information" for control purposes (the meeting presentations are available at http://www.export.gatech.edu/?section=GT_DEAC).

A second campus regional meeting was held at MIT on June 19. Informal feedback on the Georgia Tech meeting both from DEAC members and from Commerce representatives indicated that for the MIT meeting, recommendations that focused on concrete steps that the DEAC could recommend for Commerce to undertake to address university concerns would be helpful, particularly if they did not require Congressional action. We conveyed these concerns to the organizers and a number of the potential participants in the MIT meeting. Preliminary feedback indicates that the DEAC found most of the presentations at the MIT meeting to be responsive and very helpful. A copy of the meeting presentations will be posted on the MIT website.

At these meetings, a consensus has been expressed that the existing Commerce Control List (CCL) is overly complex, too long and overbroad. It needs to be shorter, tighter and more dynamic with regard to technologies of real concern, at least for deemed exports ("higher fences around narrower areas," as expressed by the DEAC Chair at the Georgia Tech meeting). Given that the deemed export rule is basically a U.S. construct, it might be feasible for Commerce to develop a shorter list for deemed exports than for actual physical exports. A related possibility

could be a greater role for universities in the CCL determination process for deemed exports, perhaps through expanded participation in the existing Commerce Technical Advisory Committees or other mechanisms.

Another area for consideration is the existing "one size fits all" approach to proprietary information in the EAR. Information may be proprietary for reasons of private economic competitive interests having little if anything to do with national security. More clearly distinguishing the nature of proprietary information controlled for deemed export purposes would better serve national security goals and reduce the scope of university concerns. Also, the licensing paradigm for deemed exports currently follows the transaction-based model used for actual exports. A more streamlined approach should be considered. Finally, there are differences between the EAR and the International Traffic in Arms Regulations (ITAR) that are not statutorily-based and do not appear to serve a clear purpose. While not solely within Commerce's purview, a recommendation from the DEAC to harmonize the regulations to the extent possible might be helpful.

COGR in collaboration with AAU is considering developing a set of recommendations to the DEAC along these lines, particularly with regard to the process for determining technologies that should be controlled for deemed export purposes. We will continue to report on developments.

COSTING POLICIES

Committee: Al Horvath, Columbia University, Chairman; Michael Amey, The Johns Hopkins University; Joanne DeStefano, Cornell University; Jerry Fife, Vanderbilt University; Natalie Krawitz, University of Missouri; Yoke San Reynolds, University of Virginia; Susan Camber, University of Washington; Michelle Fortnam, ACUA Liaison, Stanford University; Ron Maples, University of Tennessee; John Shipley, Purdue University

1. Costing Committee Meeting with Gil Tran (OMB) and Debbie Rafi (ONR)

Gil Tran, Technical Manager, Office of Federal Financial Management, OMB, and Debbie Rafi, Director, Indirect Cost Branch, ONR met with the Costing Committee on Wednesday, June 6th. Gil and Debbie were open and forthright in discussing the following topics:

- **SAS 112**. OMB announced implementation of SAS 112 (Communicating Internal Control Related Matters Identified in an Audit in the Federal Register as an Interim Final Rule on Tuesday, June 26. Implementation was initially to be communicated as a memo from the OMB Controller, Linda Combs. After further consideration, OMB determined implementation of SAS 112 was a significant event and required a formal Federal Register notice. Though there will be a 60-day public comment period, the affect of the Interim Final Rule will be that SAS 112 is effective immediately and applicable to A-133 audits for all audit periods ending on or after December 15, 2006.

  The practical impact of SAS 112 is that there will still be a much "lower bar" as to what constitutes reporting of an internal control matter. This could result in more findings reported in your A-133 audit. The negative outcome of more findings could be a reclassification from a "low risk" grantee to a "high risk" grantee. The Federal Register notice will include specific definitions and clarifications.

  (Note, a Federal Register notice on June 11 announced that the 2007 Circular A-133 Compliance Supplement is now available for comment. This announcement should be viewed independently from the discussion above related to SAS 112. The June 11 notice simply indicates that the 2007 Compliance Supplement is available for comment. The 2007 Compliance Supplement, which will be applicable to your FY07 A-133 audit, does not include any significant changes to the Research & Development Cluster, nor does it address SAS 112. All comments related to the 2007 Compliance Supplement must be sent in writing to Hai_M._Tran@omb.eop.gov by October 31, 2007.)

- **A-133 Quality Report, Department of Education**. Sometime in the next month, the Department of Education (ED) is scheduled to release a report on the Quality of the A-133 Audit. From a COGR standpoint, the primary concern relates to the A-133 Research and Development (R&D) Cluster. Our understanding is that the ED report, while having

a number of recommendations, will not address the R&D cluster in as much depth as other areas. Nevertheless, it will be important to pay attention to the recommendations as they could affect future conduct of A-133 audits, regulations defined in OMB Circular A-133, and the future of the Single Audit Act.

- **Effort Reporting Audits**. We talked briefly on this topic. One theme continues to be reiterated: some in the Inspectors General (IG) community do not feel OMB Circular A-21 adequately defines payroll distribution and effort reporting standards. Hence, it is fair to conclude that effort reporting scrutiny and audits will continue.

- **The Sunset of Public Law 106-107**. The Federal Financial Assistance Management Improvement Act of 1999 (Public Law 106-107) was enacted in November 1999 with the purpose of improving the effectiveness of federal financial assistance programs. The Grants Policy Committee (GPC), along with the Grants Executive Board (GEB), has played important roles for formulating and executing policy. However, the Act will sunset ("cease to be effective") in November 2007. And while many of the initiatives should continue at the direction of each granting agency, they may have to continue without the same formal structures (e.g., GPC, GEB) in place.

- **FDP Faculty Burden Survey and the Treatment of Administrative Specialists**. In the October 2006 meeting (also see the October Meeting Report on www.cogr.edu), we raised the question if federal agencies might allow award recipients to set aside some funds for an "administrative specialist" position? This question was raised as a response to the FDP Faculty Burden Survey (see www.thefdp.org), which suggested that this type of support could create significant gains in research productivity. The Faculty Burden Survey does a nice job of initiating the discussion, and upon further refinement of the core issues, this could be a topic in which we engage the appropriate federal officials.

- **2008 Initiatives**. Past experience indicates that as the Bush Administration winds down, key personnel and decision-makers will leave the administration. Subsequently, as COGR looks closer at issues such as the Treatment of Administrative Specialists, it may become more difficult to engage the appropriate federal officials. The research community should be aware of this dynamic as we approach 2008.

2. Survey of 2005-2006 F&A Rates Results Posted on COGR Web Site

The Survey of 2005-2006 F&A Rates (and related F&A topics) was conducted in the Fall-Winter of 2006-2007. In total, 139 surveys were completed. This includes surveys completed by each of the top 20 research institutions, 41 out of the top 50, and 81 out of the top 100 institutions as listed in the 2005 NSF Survey results (R&D Expenditures, ranked by all R&D expenditures for the first 200 institutions).

Three types of reports are available: F&A Rate, Effective F&A Recovery, and Internal Distribution of F&A Recovery reports. The reports can be viewed and/or downloaded either in a PDF format, or as "Flashpaper" (an Adobe application that allows for web-ready viewing). Reports in XLS format can be made available upon request. Data related to the Cost of

Compliance also was collected in the 2005-2006 survey. Results applicable to this data will be available under a separate cover.

A Report Summary is also available and includes analysis, footnotes, qualifiers, and other descriptive material. The Report Summary shows a trend analysis capturing results from the 2000-2001, 2002-2003, and 2005-2006 surveys. ***The trend data indicates F&A rates have remained relatively constant over the past five years.***

The reports and summary are available at www.cogr.edu, and can be found under the Resources tab. Initially, access will be restricted to COGR members, and you will need your user name (normally, this is your email address) and password (you will need to remember what you previously defined). If you cannot gain access or do not remember your password, you will need to go to the "Members Only" section and click on the "Request Access" option.

3. COGR's Response to the DCA "Best Practices Manual"

In the past several reports, we have discussed COGR's strategy for responding to the Division of Cost Allocation (DCA) "Best Practices Manual". The manual is an internal DCA guide, and is not meant to override the policy guidance in Circular A-21. However, it is still important for the research community to be engaged and knowledgeable in the DCA's review and rate negotiation positions. The extent to which the DCA implements their interpretations from the manual can have a significant impact on F&A rates.

A COGR working group, in collaboration with the COGR Costing Committee, expects to finalize a "draft" version of "COGR's Response to the Manual" over the next couple of months, and share our draft with the DCA. Our approach to the DCA will be that the DCA manual overall is a fair and reasonable document, and we appreciate the DCA's openness to including the research community during the process of developing the manual. While we are not in a position to ask the DCA to revise the manual, we would like the DCA to consider COGR's interpretations on those topics where we disagree with the DCA's position.

Though the result of this approach may be that we continue to "agree to disagree", we hope that our comments assist the DCA in understanding the research community's position on those areas that are most sensitive. Based on DCA's response to our draft, we expect to finalize the draft version and make it available to the membership. We will keep you updated as this process unfolds.

4. HHS Office of Inspector General (HHS OIG) Recent Developments

The HHS OIG recently released its Semiannual Report to Congress (see www.oig.hhs.gov), covering the period October 1, 2006 through March 31, 2007. The report is notable from the higher education standpoint for its lack of activity and findings related to NIH and research institutions. However, there are other items to pay attention to, including:

- At least one of the four HHS OIG scheduled audits related to Clerical and Administrative Salaries should be released in the near future. We will let the membership know when we learn more.

- The audit work related to Graduate Student Compensation is completed. This initiative, from last summer, was based on a request from Representative Barton (R-TX) when he was Chair of the House Energy and Commerce Committee. 97 institutions were asked to provide data related to the level of graduate student compensation charged to NIH awards (with a specific focus on compliance with the zero postdoctoral salary level). While the audit report is not currently available on the HHS OIG web site, we have been told that there were no findings from the audit.

- While things are relatively quiet, the HHS OIG communicates with the NSF OIG and is aware of the ongoing NSF OIG labor and effort reporting audits. We do not expect the HHS OIG to follow the NSF OIG's lead, unless there are indications of serious problems. Nevertheless, the HHS OIG will remain attuned to risk areas through its internal HHS OIG committee meetings, and we will stay tuned to any new developments.

5. NSF Office of Inspector General (NSF OIG) Recent Developments

The NSF OIG continues to be active. This includes ongoing work associated with labor and effort reporting audits, as well completion of several audit reports now available on their web site. The following points are worth noting:

- An "Audit of Payroll Distribution System" at the California Institute of Technology (dated March 30, 2007) was recently posted (see http://www.nsf.gov/oig/07-1-013_California_Institute_of_Technology.pdf). The audit report stated that Caltech "generally has a well established and sound Federal grants management enterprise program". The most significant discussions in the report were related to accounting for voluntary committed cost sharing (i.e., definitively committed) and cost sharing inferred in a proposal narrative. Dick Seligman, the Senior Director of the Office of Sponsored Research at Caltech, shared insights to the audit, as well as Caltech's response during our June 6 Costing Committee Meeting. While there was no significant questioning of costs, Caltech took the audit report seriously. According to Dick, internal policy and practice changes at Caltech will span the proposal, post award, and financial reporting stages of the grant process, and will also result in systems/technology updates.

- Two other recently posted audit reports can be found on the NSF OIG's web site: "Audit of Temple University's Incurred Cost under NSF Contract REC-9912177" (see http://www.nsf.gov/oig/07-1-005_Temple_University.pdf) and "University of Puerto Rico, National Science Foundation Award Numbers DUE-9753543, EPS-0223152" (see http://www.nsf.gov/oig/07-1-012_University_of_Puerto_Rico.pdf). The Temple University audit report focused on the treatment of a contract funding modification. The University of Puerto Rico audit report emphasized the familiar topic of subawardee monitoring, as well as policies associated with claiming of indirect costs.

- Though separate from the NSF OIG activities, the NSF's Division of Institution and Award Support (DIAS) continues its desk reviews of specific awards (at times, coupled with short on-site visits). Between 30 and 40 institutions per year are selected and "high risk" awards (e.g. large dollar amount awards, awards made to new grantees, etc.) are

used to target the institutions. The DIAS presents this activity as reviews only, and that the reviews should not be construed as audits.

6. Effort Reporting

We mailed hard copies of the COGR effort reporting paper ("Compensation, Commitments, and Certification") to all of our member institutions, and also made available extra copies at the meeting. For those interested in obtaining extra copies in bulk, they can be purchased for $5.00 each plus shipping/handling. Contact Anne Taylor at ataylor@cogr.edu.

While completion of the paper was a milestone, the discussion of effort reporting carries forward. As mentioned in the previous section, the NSF OIG continues to be active in its labor and effort reporting audits. Indications are that issues related to effort commitments, cost sharing, and the treatment of key personnel that contribute effort (but are not charged) to an award will be an audit focus. This is in addition to ongoing auditor concerns on "independent internal evaluations", "suitable means of verification by responsible officials", and timeliness (i.e., what constitutes a late effort report, 30 days?, 90 days?, etc.).

In addition to ongoing effort reporting audits, two other effort-related topics have elevated as high priority COGR initiatives:

- **NSF Summer Salary**. The NSF policy, as stated in the NSF Grant Proposal Guide (Chapter II., Proposal Preparation Instructions, section C.2.g(i)(a)), articulates the unique-to-NSF summer salary model. There are exceptions that permit academic year salary, however, summer salary is the norm. COGR has engaged NSF in a discussion to allow institutions to propose, budget, and charge academic year salary as a standard option (institutions choosing to utilize the summer salary model could continue to do so). While the typical 2/9ths salary limitation might still be applicable, a policy revision that would allow for proposing/budgeting/charging flexibility would be desirable. Institutions that can provide faculty release time in the academic year to conduct NSF sponsored activity, and use those salary savings during the summer, will be in position to better address situations where faculty engage in multiple activities (e.g., research, proposal writing, student mentoring, etc.) during the summer.

- **Veterans Affairs / University Joint Appointments**. A number of institutions that have VA affiliations have struggled with issues related to effort reporting and compensation. Inconsistency on how "total professional effort" is interpreted, absence of guidance on "commitment" metrics, and effort expectations related to K awards have all been communicated to COGR as problematic areas. At the meeting, we asked for volunteers to be part of a working group to address these and similar issues, and we are pleased to announce we have had four individuals that have volunteered to help. Over the next month, we will formulate the next steps as to how best to proceed.

Our approach on all issues will be to continue to seek constructive dialogue with other professional associations, federal representatives, and research community leaders. We will keep the membership posted on all developments.

7. Other Costing Issues; Communications with Federal Officials

Below are issues that COGR has engaged with federal officials over the past several months. Some of these issues were discussed in the Friday morning Q&A session, and the first three presented below have all been resolved and/or clarified. The final issue, Rebudgeting of F&A; Department of Commerce and NOAA, is still under discussion.

- **Unobligated Balances for NIH Awards.** The unobligated balance (including a prior year carryover) on NIH awards should not exceed 25% of the current year's total approved budget. However, NIH directions are not clear as to what the denominator (total approved budget) should be for computing the 25%. By example, if the year 2 award amount is $250k, and there is $30k remaining at the end of the year 1, what is the denominator in year 2? The year 2 award amount of $250k, or the year 2 amount of $250k, plus the $30k carryover amount (i.e., $280k)? According to Joe Ellis from OPERA, NIH, there is inconsistency in NIH directions. Joe confirmed that $280k is the correct denominator. He also indicated NIH will update inconsistencies in their directions.

- **Army Medical Command and NIH Salary Limitations**. Last month, the Army Medical Command proposed use of the congressionally mandated salary limitation for NIH grants, on grants made under the Department of Defense congressionally mandated research programs. Upon follow-up by COGR, the Army Secretariat agreed that it is not within the Medical Command's authority to establish a salary limitation, and this practice will be discontinued.

- **F&A Waiving; USDA/U.S. Canola Association.** Email correspondences between a member institution and the U.S. Canola Association (USCA) suggested that the USCA had the ability to influence the USDA-CSREES evaluation of proposals under the Alternative Crops Competitive Grants Program. Specifically, the RFA for this program allows F&A Recovery, but the USCA stated it does not consider proposals that include F&A costs. Upon contact with an official from the USDA, COGR was told that the USCA does not have influence over the program, and that F&A is not used as an eligibility requirement. While F&A is capped at 20% for this program, institutions should not be waiving the 20% F&A.

- **Rebudgeting of F&A; Department of Commerce and NOAA**. We reported in the Spring Update on a situation related to the Department of Commerce's requirement for prior approval when rebudgeting indirect costs (F&A). Those agencies that are part of the FDP (Commerce is not part of the FDP) have waived the Circular A-110 requirement (section .25(c)(5)) for prior approval when rebudgeting indirect cost. NOAA, as an agency under Commerce, has allowed some flexibility by permitting rebudgeting not to exceed 10 percent of the total budget (see Circular A-110, section .25(f)). We are in contact with representatives from NOAA and Commerce to address both the lack of consistency between NOAA and Commerce, as well as to inquire if there is any willingness by Commerce to adopt the FDP approach.