



Council On Governmental Relations

*An Association of Research Institutions*

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## Announcements

### **COGR's March 1-4, 2022, Virtual Meeting: Registration Open**

Registration is [now open](#) for our upcoming virtual COGR Meeting. COGR members can register and pay [online](#) or through [paper registration](#) and pay via check. If using the latter to register, please be sure to notify [memberservices@co-gr.edu](mailto:memberservices@co-gr.edu) and include a copy of the check and registration form. If your institution will be registering five or more individuals, there is a special pricing code available. The meeting agenda is posted online [here](#), and as sessions and speakers continue to be confirmed, we will update the agenda online accordingly. Attendees will have the opportunity to ask questions during most of the sessions but are also encouraged to submit their questions or topics of interest in advance [here](#).

Back by popular demand, COGR will again be adding discussion hours to the agenda, in which attendees can engage directly with COGR staff, Committee members, and each other on a variety of meeting-related topics. Attendees must register separately for these sessions and registration links will be sent to registered attendees the week before the meeting.

## Research Security & Intellectual Property Management (RSIP)

### **Concerns Mount Over Possible Expansion of DOE DEC Beyond DOE (UPDATE)**

Previous COGR Updates have discussed the Determination of Exceptional Circumstances (DEC) recently issued by the Department of Energy (DOE) to strengthen the Bayh-Dole Act domestic manufacturing requirement for DOE-funded inventions. We had expressed concerns for the potential of these requirements to spread beyond DOE.

COGR has participated in a number of recent calls with senior Administration officials about a potential Executive Order on strengthening domestic manufacturing that could include a similar requirement. In these calls we expressed serious concerns about the potential adverse effects on university technology transfer of a requirement for government review and approval of any ownership changes involving inventions that receive government funding. An informal [AUTM survey](#) of tech transfer directors indicated that the vast majority believed that the DOE requirement would definitely or likely inhibit their ability to find licensees for DOE-funded technologies. One office stated that it had completely halted efforts to protect or license IP affected by the DOE DEC.

We expressed support in our calls for the need to strengthen domestic manufacturing. However, enhancing the Bayh-Dole Act domestic manufacturing requirement will not result in establishment of additional sources that currently do not exist. There appear to be some fundamental misunderstandings of the waiver process for the current requirement by policymakers, as well as misconceptions about the licensing process. We attempted to clarify these misunderstandings in our discussions.

A more constructive approach would be to develop incentives to encourage more domestic manufacturing. Hopefully our discussions now are moving in that direction. We remain concerned that a version of the DOE requirement might appear in the pending Executive Order. The result could be a serious challenge to the ability of institutions to commercialize government-funded inventions, with adverse effects on innovation and job creation.

## **Export Controls**

### **BIS Expands Entity List (NEW)**

On November 26, BIS [added twenty-seven](#) foreign entities and individuals to the Entity List (86 FR 67317), mostly involving Chinese entities. Eight technology entities based in the PRC were added to the list as part of Commerce's efforts to prevent U.S. emerging technologies from being used for the PRC's quantum computing efforts that support military applications, such as counter-stealth and counter-submarine applications, and the ability to break encryption or develop unbreakable encryption.

### **AUECO Meeting (NEW)**

The University of Pennsylvania is [hosting a conference](#) on Export Controls and Research Security at Higher Education and Scientific Institutions May 3-4, 2022. The conference will be preceded by a day of workshops on May 2 and followed by the Association of University Export Control Officers (AUECO) Membership Meeting on May 5, 2022. This annual conference is a unique opportunity to bring universities, research centers, and multiple U.S. Government Agencies together to discuss the current and future regulatory landscape and how it specifically affects them.

This year's conference includes a focus on Research Security in higher education. Confirmed Government speakers include Assistant Secretary of Commerce for Export Administration, BIS, Thea Kendler, Jeanette McMillian (ODNI), Rebecca Keiser (NSF), Mike Lauer (NIH, tentative), and representatives from OSTP, BIS, DDTC, DoD (invited), and OFAC (invited). Other confirmed speakers include Michael Vernick (Akin Gump) and Kevin Wolf, former Assistant Secretary of Commerce for Export Administration, BIS, and currently with Akin Gump<sup>1</sup>.

### **DHS Reestablishes Academic Advisory Council (NEW)**

On January 12, the Department of Homeland Security [announced](#) it was reestablishing its Academic Advisory Council (HSAAC). The purpose is to provide advice and recommendations to the Secretary and DHS senior leadership on matters related to homeland security and the academic community. The Council will have up to 30 members, including four from higher education associations. Council members will serve a three-year term.

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<sup>1</sup> For more details, including the current agenda and speakers, see: <https://researchservices.upenn.edu/2022-conference-on-export-controls-and-research-security-at-higher-education-and-scientific-institutions/>

The Advisory Council was established in 2012 but had not met since July of 2017 and subsequently was disbanded in October of 2019. Its reestablishment was applauded by a number of higher education leaders<sup>2</sup>. Those interested in serving on HSAAC must send a current résumé and category of interest to [DHSAcademic@hq.dhs.gov](mailto:DHSAcademic@hq.dhs.gov). The deadline to submit a request is **11:59 p.m. ET on February 15, 2022**.

### **Hoover Institution Reports on Ethical Risks in Research Collaborations with China (NEW)**

In mid-December the Hoover Institution, as part of its [Project on China's Global Sharp Power \(CGSP\)](#), released a new report, [Eyes Wide Open: Ethical Risks in Research Collaboration with China](#). The report discusses a case study on the ethical risks in research collaboration with China. Among the report's recommendations are that universities should revise existing concepts of research integrity to ensure consistency with democratic values and define a common standard or set of conditions for ethical reviews of research. This report builds upon previous reports from the Hoover Institution including [Global Engagement: Rethinking Risk in the Research Enterprise](#), released in 2020, which contained recommendations concerning how sensitive data from American universities can be protected from exploitation by adversaries.

[A webinar](#) on the report's release was widely attended by COGR member representatives. Some of the discussion was potentially disturbing, such as doubts expressed about the continued viability of NSDD-189 and the fundamental research exemption (FRE). However, in our view the discussion was fairly nuanced and balanced.

### **DOJ Shifts "China Initiative" Strategy (UPDATE)**

On January 27, at the American Physical Society's annual leadership meeting, FBI Deputy Senior National Intelligence Officer [Patrick Shiflett](#) said that the Bureau is shifting its strategy in the "China Initiative" cases. Shiflett [said](#) "there is going to be less emphasis at the FBI on taking these cases to prosecution. And there's going to be more use of regulatory solutions...FBI and DOJ realized that our strategy needed to readjust and that your voices were heard."

The strategy shift followed upon a number of well-publicized losses by DOJ in prosecutions brought under the China Initiative. Most prominent was the dropping of charges against MIT nanoengineering professor Gang Chen for alleged nondisclosure of ties with Chinese entities. The case was dropped after DOJ learned from the Department of Energy that Chen had not been required to disclose activities that prosecutors accused him of omitting on a 2017 grant application, and that those activities would not have affected DOE's funding decision<sup>3</sup>.

One exception was the conviction of Harvard chemistry professor Charles Lieber in late December. He was found guilty on all six felony charges, including two counts of making false statements to government officials and four related tax offenses. He is the first academic scientist related to the China Initiative to be found guilty. His case did not involve misappropriation of research results or economic espionage, but false statements and tax fraud

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<sup>2</sup> See <https://www.aau.edu/key-issues/aau-sends-letter-thanking-secretary-mayorkas-reestablishing-homeland-security-academic>

<sup>3</sup> For more discussion see <https://www.aip.org/fyi/2022/us-research-security-campaign-under-strain-cases-falter>.

stemming from his failure to disclose affiliations and funding from a Chinese university and talent recruitment program. The case has been extremely controversial and led to a great deal of commentary.<sup>4</sup>

FBI Director Christopher Wray [gave a speech](#) on January 31 at the Reagan Presidential Library in which he stated “there's just no country that presents a broader threat to our ideas, innovation, and economic security than China” while describing the increasing pace of Chinese government espionage efforts. Importantly, Director Wray did not discuss or mention the Justice Department’s China Initiative, nor did his speech include any mention of universities as a particular concern.

The China Initiative has led to serious concerns in the research community about ethnic profiling and the potential for abuses. The shift in strategy by DOJ is likely to be welcomed by most. COGR believes concerns about non-disclosures are more appropriately dealt with by the research funding agencies such as through the NSPM-33 Guidance discussed [elsewhere](#) in this Update.

### **NASEM (UPDATE)**

**Roundtable.** We’ve discussed the National Academies of Science, Engineering, and Medicine (NASEM) National Science, Technology, and Security Roundtable in previous COGR Updates and Reports (e.g., [August 2021 Update](#)). The fifth meeting was held Jan. 26—27. The meeting included an update and discussion on NSPM-33 implementation with OSTP, NSF, and NIH as well as a discussion with the State Department, NSF, and NIH on international efforts on research security. Our understanding is that the Roundtable serves only as a forum and will not issue any recommendations.

**Critical Technologies.** Another NASEM Committee that will be issuing a report and recommendations is the ad hoc *Committee on Protecting Critical Technologies for National Security in an Era of Openness and Competition*. The Committee, which is sponsored by DARPA and NSF, will address several questions in the context of specific science and technology domains. To date it has held nine meetings. Some of these have featured both public and closed sessions; others have been entirely closed<sup>5</sup>.

Although not directly related, on February 7, OSTP released an [updated list](#) of critical and emerging technologies important to national security. In an accompanying press release, OSTP indicated that this list will be a useful resource that guides new and existing efforts to promote U.S. technological leadership, cooperate with allies and partners, advance democratic values, attract, and retain diverse science and technology talent from around the world, and protect against threats to U.S. security.

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<sup>4</sup> See <https://www.science.org/content/article/what-charles-lieber-verdict-says-about-u-s-china-initiative>; <https://www.technologyreview.com/2021/12/23/1043106/china-initiative-charles-lieber-trial-2/>

<sup>5</sup> For more information see <https://www.nationalacademies.org/our-work/protecting-critical-technologies-for-national-security-in-an-era-of-openness-and-competition#sectionWebFriendly>

## **House Passes Competitiveness Legislation (UPDATE)**

On February 4, the House passed the America COMPETES Act of 2022 (H.R. 4521) in a 222-210 vote. The process will now move to conference negotiations with the Senate to reconcile the bill with the U.S. Innovation and Competitiveness Act (USICA, possibly now retitled “Made in America”) approved by the Senate in June (see COGR [May](#) and [June 2021](#) Updates).

As discussed in previous COGR Updates, we have concerns about several USICA research security provisions, including **Section 3138** on CFIUS, **Section 6124** requiring faculty reporting of foreign gifts and contracts, **Section 2308** requiring NSF to develop a plan to identify sensitive or controlled research areas and provide background screening, and **Section 2526** mandating NSF to collect copies of any contracts, agreements, or documentation. The House COMPETES bill does not contain a CFIUS provision and has other less onerous research provisions pertaining to NSF. It also contains higher reporting thresholds for both institutional and faculty gifts and contracts from foreign sources. It incorporates the NSF for the Future Act previously discussed.

The House bill includes a number of research security provisions that were in the previous bill. Section 10306(d) directs the Foundation to take steps to address security risks to Foundation-supported research, including the appointment of a Chief of Research Security, the development of an online resources to inform institutions and researchers of security risks, support for the establishment of a risk assessment center, and support for research on misconduct in the research environment. It authorizes NSF to request proposal supporting documentation, including copies of contracts, grants, or any other agreement specific to foreign appointments, employment with a foreign institution, participation in a foreign talent program and other information and various mechanisms for enforcement of related NSF policies. It also directs NSF to require and support the development of research security training.

Section 90304 lowers the Section 117 foreign gifts and contracts annual disclosure requirement to \$100,000 (\$250,000 for gifts or contracts with a particular foreign source over three years). It adds requirements for institutions to maintain a policy requiring faculty, professional staff, and other staff engaged in research and development to disclose any gifts received from, or contracts entered into with, a foreign source the value of which is \$50,000 or more. It also requires institutions to maintain a searchable database of such disclosures for the previous five years. Additionally, it requires institutions to maintain a plan to effectively identify and manage potential information gathering by foreign sources through espionage targeting faculty, professional staff, and other staff engaged in research and development that may arise from gifts received from, or contracts entered into with, a foreign source.

Like the Senate bill, the House bill contains a prohibition on participation in foreign talent recruitment programs (Section 10651) applicable to all federal agencies. The House bill has overlapping prohibitions. It requires applicants to federal research agencies with an annual extramural research expenditure over \$100M to certify they are not an active participant of a malign foreign talent recruitment program from a foreign country of concern and will not be a participant for the duration of the NSF award. It also requires institutions applying for an award to certify that each covered individual who is employed by the institution has been made aware of the requirement.

NSF applicants specifically are required (Section 10306(d)(8)) to certify they are not an active participant of a malign foreign talent recruitment program from a foreign country of concern and will not be a participant for the duration of the NSF award. Institutions applying for an NSF award must certify that each covered individual who is employed by the institution has been made aware of the requirement. No dollar threshold is specified.

The House provisions are narrower in their definition of these prohibited programs. They focus specifically on prohibiting participation in ‘malign’ foreign talent recruitment programs. Hopefully during the conference negotiations this provision will be narrowly crafted to ensure that legitimate and important international scientific collaborations and activities are not adversely impacted.

The COMPETES bill contains many other non-security related provisions, including those dealing with STEM education, diversity, immigration, and sexual harassment as well as authorizing major funding increases for NSF and other agencies. It is expected that the House and Senate will informally negotiate over the next several weeks. The eventual prospects for the legislation are uncertain. It should be noted that the bill is only an authorization; actual funding is dependent on the appropriations process. Currently the government is funded by a continuing resolution, most recently extended to March 11<sup>6</sup>.

### **FY’22 NDAA Passed Without Research Security Provisions of Concern (UPDATE)**

On December 15, the Senate passed the final FY22 NDAA bill in a bipartisan 89-10 vote. The House passed the compromise measure the previous week 363-70. The compromise bill does not include any of the research security measures discussed in the [November Update](#). These related to increased cyber incident reporting requirements; prohibitions on the participation of federally funded researchers in malign foreign talent recruitment programs; and the creation of a new pilot program to vet researchers working on non-classified research. These provisions may, however, still be considered during conference negotiations on the legislation discussed above.

COGR members are reminded that the FY ’21 NDAA requirement for disclosures of current and pending research support now is being implemented by the NSPM-33 Guidance discussed elsewhere in this Update.

### **DARPA Revises Foreign Influence Risk Rubric (UPDATE)**

The COGR [November Update](#) discussed DARPA’s new Countering Foreign Influence Program (CFIP) which required risk assessments of all proposed Senior/Key Personnel selected for negotiation of a fundamental research grant or cooperative agreement award. It included a risk rubric that assigned risk ratings. Included in the rubric was a broad qualitative rubric related to foreign ties or associations. DARPA received significant pushback on

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<sup>6</sup> For more discussion see <https://www.science.org/content/article/house-passes-sweeping-u-s-innovation-bill-teeing-talks-senate>; <https://www.nature.com/articles/d41586-022-00349-3>; and <https://www.washingtonpost.com/politics/2022/02/04/china-competes-act-house/>.



use of this rubric from COGR and other higher education associations as well as OSTP and other government sources.

On December 1, DARPA announced modifications to its risk assessment rubric to remove this rubric. It also issued accompanying FAQs to help clarify the CFIP and use of the revised rubric. The revised DARPA rubric is much improved from the earlier version. On January 19, COGR hosted a DARPA webinar on the CFIP and revised rubric. The webinar was well-received by COGR members. The slides are available at the [COGR website](#).

## Research Ethics & Compliance (REC)

### **Implementation of the Presidential Memorandum on United States Government-Supported Research and Development National Security Policy (“NSPM-33”)**

On January 4, 2022, the Office of Science and Technology Policy (OSTP) published long-awaited National Security and Technology Council (NSTC) Joint Committee on the Research Environment Subcommittee on Research Security’s [“Guidance for Implementation National Security Presidential Memorandum 33 \(NSPM-33\) on National Security Strategy for United States Government-Supported Research and Development”](#) (“Implementation Guidance”). The Guidance provides direction to federal agencies in their implementation of the major categories of requirements under [NSPM-33](#): (a) researcher disclosure requirements (b) digital persistent identifiers (DPIs); (c) consequences for violation of disclosure requirements; (d) information sharing among federal agencies and with law enforcement entities; and (e) research security programs.

COGR has summarized the major points of the Implementation Guidance in the following two documents:

- [Summary of NSTC Guidance for Implementing National Security Presidential Memorandum 33 Disclosure Requirements](#)
- [Summary of NSTC Guidance for Implementing National Security Presidential Memorandum 33: Provisions Regarding DPIs, Consequences, Information Sharing and Research Security Programs](#)

COGR presented a webinar regarding the Implementation Guidance on January 11, 2022, at which Michael Vernick, Partner at the law firm of Akin Gump and Theresa Colecchia, Senior Associate General Counsel for Johns Hopkins University, presented on items within the Guidance to which institutions should give particular consideration, including the requirements for research security programs. COGR staff also participated in a NACUA briefing on the Implementation Guidance on January 13.

On January 21, 2022, OSTP hosted a webinar regarding the Implementation Guidance for associations working in the area of academic research. OSTP’s Dr. Christina Eller led the seminar, which included representatives from OSTP and the following federal research funding agencies: NSF, NIH, Department of Energy, and Department of Defense. Webinar presenters provided a general overview of the Implementation

Guidance and advised that model disclosure forms will be developed over the next 120 days. OSTP also stated that it had initiated a 90-day engagement period with stakeholders regarding research security program requirements. OSTP provided an email address ([ResearchSecurity@ostp.eop.gov](mailto:ResearchSecurity@ostp.eop.gov)) to which stakeholders may submit questions and comments regarding the Guidance. COGR subsequently hosted a Zoom meeting for Dr. Eller to meet COGR staff and discuss the Implementation Guidance, and Dr. Eller once again welcomed stakeholders to provide comments regarding the Guidance.

### **COGR Response Letter to NSPM-33 Implementation Plan**

In response to OSTP's request for comments regarding the Implementation Guidance, COGR has assembled a cross-committee working group to prepare a written response outlining concerns regarding the Implementation Guidance and suggestions for clarification and improvement. The working group is finalizing the response letter and will send it to OSTP shortly.

### **Session Regarding NSPM-33 Security Program Requirements at March COGR Membership Meeting**

One of the most important topics in the Implementation Guidance was its description of the basic requirements for institutional research security programs. These requirements cover the following components: cybersecurity, foreign travel security, research security training, and export control training. During the upcoming March membership meeting, institutional representatives will discuss how their institutions are addressing the Guidance requirements including development of new processes, administrative and governance models, and training for stakeholders.

### **Common Electronic CV Project Update**

COGR continues to work with representatives from the Association of America Universities (AAU) and the Federal Demonstration Project (FDP) regarding the development of standardized electronic CV to report their affiliations and research support. The NSPM-33 Implementation Guidance contains very useful guidance regarding the potential use of digital persistent identifiers (DPIs) as a mechanism to reduce administrative burden on researchers, and the working group hopes that it can capitalize on OSTP's support for this concept.

### **NSF SORN Response Update**

In December 2021, COGR [provided comments](#) in response to a System of Records Notice (SORN) published in the Federal Register by NSF regarding the use of its new data analytics tool NSF-77. This tool will be used to compare data from researcher disclosures to NSF against publicly available information on patents and publications in an effort to identify any inconsistencies. COGR met separately with Rebecca Keiser from NSF and staff for the House Science, Space and Technology Committee's Research and Technology

Subcommittee at their request to further discuss concerns regarding the SORN’s compliance with the federal Privacy Act. During these meetings, COGR emphasized its support for NSF-77’s use to develop metrics regarding the extent of research disclosure issues, while highlighting areas in which the SORN should better address Privacy Act requirements. These areas include obtaining information directly from researchers, as well as seeking stakeholder input on NSF’s “rules of the road” for the use of the system prior to their implementation.

### **Department of Energy Interim COI Policy (NEW)**

The Department of Energy (DOE) issued [Financial Assistance Letter 2022-02](#), an interim financial conflict of interest (FCOI) policy for grant awardees. This policy closely follows the Public Health Service (PHS) financial conflict of interest regulations “Promoting Objectivity in Research” ([42 CFR Part 50, Subpart F](#)), however, there are some important differences, including the following points:

- **Differences in Definitions:** There are some notable differences between the PHS Policy and the interim DOE policy. For example, at different points within the DOE Policy, it defines a financial conflict of interest as a significant financial interest that affects the “funding” and/or “purpose” of the project, in addition to the “design, conduct, and reporting” of the project, which is the language used in the PHS Policy.
- **Options for Additional Reporting:** The DOE interim policy advises that DOE, on an award-by-award basis, may require reporting from not just an “investigator,” but from anyone participating in the research. Similarly, DOE may opt to have an institution report both unmanaged/unmanageable and managed FCOIs, as well as requiring the provision of investigator disclosure of significant financial interests. This potential for requirements that differ from award-by-award requirements may place significant burden on institutional conflict of interest (COI) programs.
- **Organizational Conflicts of Interest (COI):** Unlike the PHS Policy, the interim DOE policy has a section requiring a “non-Federal entity” with a “parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe” to maintain “written standards of conduct covering organizational conflicts of interest and “disclose in writing any potential or actual organizational conflict of interest to the DOE program office.” This section of the DOE interim policy seems to be aimed at COIs arising out of the parent/affiliate/subsidiary relationship, but some of the section’s specifications in this regard require clarification.

COGR has provided a list of questions regarding the interim policy to DOE and is scheduled to meet with DOE on February 18<sup>th</sup> to discuss these questions. Additionally, COGR has invited DOE representatives to attend the March membership meeting to present on this new policy.

## **Veterans Administration (NEW)**

On January 31<sup>st</sup>, the Veterans Administration Office of the General Counsel [issued instructions](#) regarding recent guidance from the Department of Justice (DOJ) on the application of the criminal conflict of interest statute (18 U.S.C. Section 209) to researchers who have a compensated appointment at the Veterans Administration (VA). This memorandum advises that a VA compensated investigator may not receive compensation for working on “VA research” *directly* from a non-federal entity, unless one of two exceptions discussed below are met. “VA research” is defined as “research that is conducted by VA investigators (serving on VA compensated, WOC, or IPA appointments) while on VA time (acting in their VA capacity) or on VA property.”

The VA guidance provided an example of a situation in which such direct compensation may occur, and this example describes a very common situation for private university research faculty who also have an appointment at a VA:

A VA research investigator with a VA-funded merit award who also holds a grant from the National Institutes of Health (“NIH”) that is performed in a WOC status at VA cannot receive salary support from the NPC [VA-affiliated Nonprofit Education and Research Corporation] or university affiliate for the NIH work performed at VA [unless an exception applies].”

The two exceptions that may allow for direct payment to the VA investigator are: (a) the State Treasury exception; or (b) the without compensation (WOC) exception. The State Treasury Exception permits payment to the researcher in the foregoing scenario when the compensation for the NIH work at the VA (i.e., the VA research) comes from a state university or other state entity. For this exception to apply, the VA’s Ethics Specialty Team must determine that the state entity that wants to make payment is authorized to so, whereupon the entity will be placed on an approved list. Once on the approved list, the VA researcher may accept payment directly from the state entity for time spent working on the VA research.

The WOC exception permits a VA employee to be paid for federal research work directly by a non-federal source if the employee’s *only* VA appointment is a WOC appointment. For example:

[A] university or NPC employee who does NOT have a VA paid appointment can hold a VA WOC appointment and may be paid for that work directly by the NPC or university affiliate.

On February 9, 2022, the VA presented a [recorded webinar](#) on this directive with case examples. Slides shown during the webinar can be found at [this link](#). The webinar discussed a potential solution for a case in which neither the WOC nor State Treasury exemption apply:

**Case Example:**

*VA compensated investigator has a 5/8 appointment at the VA and an appointment at a private university. The private university receives a federal grant that it will administer. The grant will pay the VA compensated investigator 2/8 salary support, and the grant proposes that research work will be done in VA labs.*

**Possible Solutions:**

- Solution 1: Increase the VA compensated investigator’s appointment to 7/8 with private university reimbursing the VA for the 2/8 appointment time. This solution requires approval of the granting agency/sponsor and the negotiation of a memorandum of understanding between the private university and the VA for the reimbursement. Under this solution, the compensation to the VA compensated investigator for time spent working on VA research does not come directly from a non-federal source.
- Solution 2: The investigator cost shares effort on the award/grant and receives no compensation from the private university for work on the grant. Under this solution, the investigator does not receive compensation for VA research directly from a non-federal entity.
- Solution 3: The site of the research is moved from the VA lab to private university’s lab. Under this solution, the research would no longer be considered to be “VA research.”

During this webinar, the VA representatives advised that institutions with investigators who perform research at the VA immediately begin the process of evaluating the circumstances of each individual investigator who performs VA research. Representatives emphasized that institutions should contact local VA research offices to develop appropriate solutions for particular situations and that institutions need not give up grants.

**Scientific Integrity Task Force Report (NEW)**

The National Science and Technology Council’s (NSTC) scientific integrity task force issued its report “[Protecting the Integrity of Government Science](#).” The report presents the results of the task force’s assessment of “scientific integrity policy and practices” within the U.S. government. Although the report is directed to science conducted by units of the federal government, it advocates agency action on policies and practices that may ultimately impact research award recipients. The major themes of this report include:

- Strengthening scientific integrity policies, including those to deter “undue influence” on the conduct of science;
- Creating and improving the culture of scientific integrity by developing/reviewing/updating

scientific integrity policies.

- Adoption of sound practices that carry out scientific integrity policies, including procedures to report concerns without fear of retaliation.
- Addressing emerging issues such as diversity, equity, and inclusion, as well as emerging technology (e.g., artificial intelligence, machine learning) and new “modes of science” (e.g., citizen science).

OSTP’s next step is to develop a framework that agencies can use to assess their scientific integrity policies.

### **Upcoming REC Meetings with Federal Agency Officials (NEW)**

In February, REC will be hosting attorney John Claud, Assist. Director of the U.S. Department of Justice (DOJ) Consumer Protections Branch, at its monthly meeting to discuss DOJ’s recent clinical trials fraud initiative. This initiative is aimed at criminally prosecuting certain research misconduct in clinical trials, including data falsification in federally funded clinical trials and clinical trials supporting FDA new drug or device applications.

In March, REC and CGA will meet with Dr. Liza Bundesen, the recently appointed Deputy Director of Extramural Research at the National Institutes of Health. Dr. Bundesen will discuss the initiatives and priority programs on which she is currently working.

### **Costing & Financial Compliance (CFC)**

#### **Measuring Cost of Compliance on Targeted Federal Regulations: NSPM-33 (NEW)**

The Costing Committee is engaged with a new COGR initiative to look at cost of compliance on targeted federal regulations. This initial foray is focused on NSPM-33, and at the upcoming March COGR Meeting we will present a session titled, *Cost of Compliance: NSPM-33, New Disclosure Requirements, and Research Security Plans*. We will look at the new NSPM-33 disclosure and research security requirements using a cost of compliance lens. We will share a survey methodology COGR has used with ten member institutions, and several of these institutions will present case studies. The data COGR has collected will be shared with federal agency leaders to support further discussions on administrative burden, harmonization opportunities, and how to pay for this new unfunded compliance mandate.

We expect to make a call to COGR institutions interested in completing a survey both for this initiative and upcoming initiatives, including the NIH policy on data sharing and management. If you are interested in participating, contact Kris West at [kwest@cogr.edu](mailto:kwest@cogr.edu) or David Kennedy at [dkennedy@cogr.edu](mailto:dkennedy@cogr.edu).

## **Challenges with the Payment Management System (PMS) & the FCTR (ONGOING)**

This topic is a COGR topic of concern, which refuses to go away. First, we direct you [COGR's 2021 August Update](#) for a detailed description of PMS-related issues we have followed over the past several years, including: 1) new NIH approval process if greater than 120 days are requested for closeout, 2) ongoing “leniency” on the submission of Final Federal Financial Reports (FFRs) due to the problem created by new PMS edit checks, 3) and the longstanding G-account closeout issue.

Second, COGR is paying close attention to the promised elimination of the Federal Cash Transactions Report (FCTR), [OMB Standard Form 272](#). This action will solve the reconciliation issue between the FCTR and the Final FFR by eliminating the edit check barrier for submitting a Final FFR. It also will reduce administrative burden by cancelling the FCTR, which has been redundant and unnecessary ever since HHS/NIH introduced “subaccounts” more than five years ago. Our new understanding is institutions should begin to receive guidance notices from HHS/NIH in the spring and that final action should be implemented for the quarter ending June 30, 2022.

## **Treatment of Procurement and Related Rebates (ADDENDUM)**

This topic was addressed during the Wednesday, October 29 NIH/NSF panel session at the October COGR meeting by Michelle Bulls from NIH, in response to comments made by representatives from [Cost Allocation Services](#), U.S. Department of Health and Human Services (CAS/HHS) at several conferences in the Fall 2021. At issue was (and continues to be) the treatment of rebates associated with institutional p-cards and similar lump-sum procurements—i.e., situations where rebates that cannot be identified to individual federal awards. These rebates often are associated with strategic sourcing agreements, established by an institution's Office of Procurement, which ultimately result in cost savings on all procurements and federal awards.

First, below is a revised reprint from the [November 2021](#) COGR Update, based on Michelle Bulls' comments at the October COGR meeting and longstanding policy requirements defined in [2 CFR Part 200.406 – Applicable Credits](#). *After this section is an Addendum providing additional comments.*

- Institutions should have policies—which in some cases may be disclosed in the institution's DS-2—for identifying and crediting rebates to federal awards. As specified in the Uniform Guidance, a credit rebate “*can be identified specifically with a particular final cost objective, such as a Federal award, or other internally or externally funded activity, or that can be directly assigned to such activities relatively easily with a high degree of accuracy*” (see [2 CFR Part 200.413\(a\) – Direct Costs](#)).
- When rebates cannot be readily identified with a *high degree of accuracy* to a specific federal award, institutions should have policies to ensure, when appropriate, a portion of the lump-sum rebates are identified to federal awards. There is no requirement for an institution to develop a complex allocation and crediting methodology to identify immaterial amounts, sometimes less than \$1, to specific federal awards.

- In the past, CAS allowed these lump sum portions to be applied as an offset to F&A cost pools in the institution's F&A cost rate proposal. Our understanding is CAS will no longer allow this methodology.
- Upon identifying the lump sum portion, institutions can issue a check payable to U.S. Treasury (or another appropriate federal agency as determined by past experience and/or prior agreements with federal officials).
- Note, when a federal award has been closed and a credit rebate can be readily identified to that award, it is an open question on how that rebate should be treated—e.g., should that award be reopened in order to issue the credit rebate? In these situations, the institution should contact the program officer to determine the appropriate treatment, including a determination if materiality should be a consideration.

Since COGR published the November Update, we have continued to follow developments associated with this issue. ***Based on conversations with COGR members and their recent experience with managing this issue, we add the following:***

- ***First, to reiterate, when a credit easily can be directly associated with a federal award, that credit should be applied to the award. The awarding agency should be contacted for disposition instructions if such a credit directly relates to a closed federal award.*** This is a longstanding practice of COGR institutions, and policies and internal controls around this practice should be documented and readily available to federal officials.
- However, certain lump sum credits and rebates cannot be directly associated with a *high degree of accuracy* to federal awards. In these situations, the institution should have policies and internal controls around how these credits and rebates are treated.
- ***There likely is not a single way to treat these lump sum credits and rebates.*** As said above, when a credit can be directly associated with a federal award, that amount should be credited to the award. In other situations when a credit can be directly identified with a non-research function of the institution, the credit should be applied to the non-research function. And again, for lump sum credits and rebates that cannot be directly identified to either the federal award or a non-research function, the institution should have policies and internal controls around how these credits and rebates are treated.
- ***Methodologies to address the lump sum credits and rebates that cannot be directly identified to either the federal award or the non-research function will vary from institution to institution.*** COGR does not suggest a uniform approach—rather, we suggest a methodology that is premised on the principles of audit transparency and equity to the federal government to be the starting point. Additionally, institutions receive varying levels of vendor detail relating to rebates, thereby making assignment of the amounts to specific cost categories or individual accounts challenging. Experience shared by COGR institutions suggests that the amounts ultimately prorated to federal awards often are immaterial.



- ***From the standpoint of specific funding agencies (e.g., NIH), COGR is not aware of any concerns that these credits should be associated with a particular funding agency.*** Instead, if the institution determines that a portion of the lump sum credit benefits the federal government, the preferred recommendation seems to be to issue a check payable to U.S. Treasury (or another appropriate federal agency as determined by past experience and/or prior agreements with federal officials).
- Finally, it is possible that institutions will be asked to share their policies and practices with their cognizant agency for indirect costs. This is a reasonable request. ***However, because federal regulations (e.g., 2 CFR Part 200 – Uniform Guidance) do not prescribe a single methodology, institutions will be best served if they can demonstrate an institutional policy that is premised on the principles of audit transparency and equity to the federal government.***

If institutions have additional concerns, you can consider contacting the cognizant agency for indirect costs. Or contact David Kennedy at [dkennedy@cogr.edu](mailto:dkennedy@cogr.edu) if you want to discuss this issue in more detail.

### **Treatment of Cost Sharing in the F&A Cost Rate Proposal (REMINDER)**

While not addressed at the October COGR meeting, another issue recently raised by [Cost Allocation Services \(CAS\)](#), U.S. Department of Health and Human Services (CAS/HHS), concerns the treatment of cost sharing in the F&A cost rate proposal. Below is a revised reprint from the November 2021 COGR Update.

- First, Voluntary Uncommitted Cost Sharing (VUCS) is never to be included in the organized research base. This was clarified two decades ago in [OMB Memorandum 01-06](#) (January 5, 2001)—*Voluntary uncommitted cost sharing should be treated differently from committed effort and should not be included in the organized research base for computing the F&A rate or reflected in any allocation of F&A costs.*
- However, M-01-06 also recognizes that most federal research awards *should have some level of committed faculty (or senior researchers) effort, paid or unpaid by the Federal Government ... [and] if a research program sponsored agreement shows no faculty (or senior researchers) effort, paid or unpaid by the Federal Government, an estimated amount must be computed by the university and included in the organized research base.* Consequently, institutions should identify these situations.
- Finally, it should be noted the National Science Foundation (NSF) no longer permits voluntary committed cost sharing to be proposed on awards, which has had the impact over the past decade of reducing the total amount of cost sharing applicable to NSF awards. Cost sharing policies by other agencies also will impact the total amount of cost sharing in an institution's organized research base.

The total amount (as a percentage) of cost sharing included in the organized research base will vary from institution to institution, and consequently, a single metric to quantify cost sharing should not be applicable. We encourage institutions to be diligent in capturing mandatory and committed cost sharing in their organized research base, and to have the corresponding documentation that supports the amount included.

## **Audit Update: Single Audit and Federal Developments**

COGR continues to follow audit developments both on the single audit and the federal Office of Inspector General (OIG) fronts. Below is a summary of developments:

- *The 2021 Compliance Supplement (CS)* was released in three separate postings and is now completed for the current single audit cycle. These documents are available per the links below and also are available on the [OMB–Office of Federal Financial Management \(OFFM\) website](#). The [2021 Compliance Supplement](#) was released on August 25, 2021, and on August 30, COGR submitted a [comment letter](#) to address several topics (i.e., HEERF reporting, cash management, and audit reasonableness) of potential concern. [Addendums 1 and 2](#) were released in December and January (respectively) and provide additional guidance on programs associated with the American Rescue Plan.
- *The Department of Health and Human Services, Office of Inspector General (HHS-OIG) Workplan* can be followed at the [HHS-OIG website](#). Of potential interest to some COGR members is a new initiative to look at compliance associated with the [Provider Relief Funds and billing requirements for out-of-network patients](#).
- *The National Science Foundation, Office of Inspector General (NSF-OIG)* released a report on January 21<sup>st</sup> titled [Promising Practices for NSF Award Management](#). The report was prepared by NSF OIG contractor Cotton & Company LLP as an NSF OIG resource for the research community to identify “promising practices” gleaned from eighteen separate NSF OIG audits. COGR has raised two concerns: 1) the report does not include management responses, audit resolution, or any other counter to the auditor perspective, and 2) “promising practices” could (un)intentionally transform into new audit standards. COGR expects to meet with NSF OIG staff to share its concerns.

Also note the next section below, *Resolution to NSF OIG Audit Finding*. Included is an update on how this item was reported in the November 2021 COGR Update.

### **Resolution to NSF OIG Audit Finding: Application of the F&A Cost Rate (UPDATE)**

This topic was addressed during the NIH/NSF panel session at the October COGR Meeting. Jean Feldman from NSF provided an update on an issue COGR raised earlier in the year. On May 14, 2021, COGR wrote a [letter](#) to the National Science Foundation (NSF) to address recent NSF Office of Inspector General (OIG) audit findings concerning the application of the F&A cost rate to a new award (and in some cases, with a PI transfer). Specifically, the NSF OIG cited the following example as an audit finding: 1) an F&A cost rate was proposed at 52 percent, 2) at the time of award a new F&A cost rate of 54 percent had been negotiated, and 3) institutional policy allowed the proposed 52 percent F&A cost rate to be used on the award. *A common institutional policy is to permit the lower 52 percent F&A cost rate to be used, which allows proposed direct costs for the PI to be maintained—and there is no harm to NSF.*

*This issue has now been addressed in an audit resolution.* In a recent [NSF Management Response to an External Audit](#) (dated December 2, 2021), NSF supported the common institutional policy. In that response, NSF wrote:

**Finding 7: Incorrect Application of Proposed Indirect Cost Rates NSF does not sustain the finding.**

*NSF's policy requires grantees to budget indirect costs using current indirect cost rates in accordance with PAPPG Chapter II, Section C.2.g(viii), Indirect Costs. However, during the award performance period, Grantees may provide voluntary uncommitted cost sharing at any time consistent with OMB's clarification Q-132, 2 CFR Frequently Asked Questions dated 5/3/2021 and PAPPG Chapter II, Section C.2.g(xii), Cost Sharing. Also see NSF's Cost Sharing Policy at <https://www.nsf.gov/bfa/dias/policy/>. Accordingly, NSF does not agree with the recommendation to direct [the institution] to strengthen the administrative and management controls and processes over establishing indirect cost rates for NSF awards to ensure that it applies costs at the rates in effect at the time of the initial award.*

*However, NSF does agree that grantees must have internal controls in place to ensure that the rates applied do not exceed the rates in effect at the time of the award, thereby avoiding overcharges of indirect costs to NSF awards. Final action will be complete 2 upon a determination by [the institution] Audit No. 19-1-013 Page 3 NSF that [the institution] has implemented adequate internal controls to ensure that awards are not charged indirect costs in excess of the rate(s) in effect at the time of the award.*

**Costing & Financial Compliance (CFC): Other Issues (NEW & UPDATES)**

The items below are issues that the CFC Committee has either recently reported and/or is continuing to follow:

**2020 NSF Higher Education Research & Development (HERD) Survey.** The 2020 HERD was released on December 27<sup>th</sup> and includes the [InfoBrief](#) summary and the complete suite of [2020 data tables](#) (which includes the popular *Table 21 – Higher education R&D expenditures, ranked by all R&D expenditures, by source of funds: FY 2020*). Also of interest is *Table 16 – Higher education R&D expenditures, by highest degree granted, institutional control, and type of cost: FYs 2010-20*. Table 16 includes data on recovered and unrecovered indirect costs, in aggregate, for all institutions—for FY2020, the total recovered indirect costs were almost \$14 billion and the total unrecovered indirect costs were \$5.7 billion.

**Heritage Foundation: Report on F&A.** In January, the Heritage Foundation released a [report](#) titled *Indirect Costs: How Taxpayers Subsidize University Nonsense*. Rather than attempt a serious analysis on the role of F&A costs at colleges and universities, the report instead takes a political jab at institutions of higher education. In 2019, COGR published a paper titled [Why the System Works](#), which provides an alternative and balanced analysis of the history, role, and importance of a reliable mechanism for recovering F&A costs.

**Facilities and Administrative (F&A) Cost Rates Under COVID-19.** COGR also released the paper, [F&A Cost Rates and Reimbursement Pressures Under COVID-19](#) in April 2021. This paper builds on the

2019 paper, with a focus on how the pressures of the COVID-19 pandemic impacted issues around F&A cost rates and reimbursement.

**NSF OIG: NSF Award Recipient COVID-19 Audits and Capstone Report.** As we have reported in prior updates, the NSF OIG released a [Capstone Report \(OIG-21-6-003\): Observations on the OMB COVID-19 Flexibilities \(prepared by Cotton & Company LLP, August 3, 2021\)](#). On Page 1 of the report (page 6 per the PDF), the NSF OIG summarized “*WHAT WE LEARNED*”: *NSF award recipients used the COVID-19 flexibilities to continue performing essential research and services during the COVID-19 pandemic, as summarized in Appendix II, and were generally prudent in their stewardship of federal resources [COGR emphasis added]*.

**Uniform Guidance (UG) and FAQ Reminder.** Electronic versions of [2 CFR Part 200 \(Uniform Guidance\)](#) and the corresponding [UG FAQs \(May 3, 2021\)](#) are available and easily accessed at the links above.

Please contact David Kennedy at [dkennedy@cogr.edu](mailto:dkennedy@cogr.edu) to further discuss any of these issues above, or other items that have not been covered.

## Contracts & Grants Administration (CGA)

### **NIH Releases Salary Cap Notice (NEW)**

On February 10, 2022, NIH released its [annual guide notice](#) increasing the salary cap for Executive Level II salary from \$199,300 to \$203,700 effective January 2, 2022. At the time of this writing, NIH remains under a Continuing Resolution, the "Continuing Appropriations Act, 2022" ([Public Law 117-70](#)), that applies the terms and conditions of the Consolidated Appropriations Act, 2021. NIH has said that for active awards, including new and continuing awards issued in FY 2022 restricted by the previous Executive Level II, recipients may rebudget if funds are available and if the salary cap increase is consistent with the institutional base salary to accommodate the current Executive Level II salary level. To read more about the salary limitation click [here](#). Please contact Jackie Bendall for additional information at [jbendall@cogr.edu](mailto:jbendall@cogr.edu).

### **NIH Seeks Comments on Potential Updates to the Genomic Data Sharing Policy (NEW)**

On November 30, 2021, NIH released an RFI (NIH guide Notice [NOT-OD-22-029](#)), “Proposed Updates and Long-Term Considerations for the NIH Genomic Data Sharing Policy.” NIH seeks comments on potential updates to the NIH Genomic Data Sharing Policy in order to keep pace with evolving scientific opportunities and stakeholder expectations. COGR sees this as a great opportunity to provide input that NIH may consider prior to the January 25, 2023, effective date of NIH’s Final Policy on Data Management and Sharing. COGR will address some of the nine questions in the Notice, including questions regarding harmonization, data linkage, and genomic

and data management sharing timelines. For more information about the Guide Notice click [here](#). Comments are due February 28, 2022. Please contact Jackie Bendall at [jbendall@cogr.edu](mailto:jbendall@cogr.edu) with questions.

### **NIH Issues Guide Notice for Inclusion of Safety Plans (NEW)**

NIH recently issued Notice [NOT-OD-22-074](#), “Plans to Promote Safe Environments at Conferences Supported by NIH Grants and Cooperative Agreements”, requiring applicants to develop and address at the just-in-time stage key elements in a safety plan for R13 and U13 conference participants. NIH also requires applicants to address information regarding how the plan will be communicated to participants, how applicants intend to document allegations and resulting actions, and what steps organizers will take to ensure a safe and respectful environment for all attendees, free from discrimination and harassment. This requirement follows a similar requirement implemented by the National Science Foundation for conference awards. Safety plans will be reviewed prior to any award being made. Safety plans are required for applications due April 12, 2022, or after. For more information about the notice click [here](#). Please contact Jackie Bendall at [jbendall@cogr.edu](mailto:jbendall@cogr.edu) for additional information.

### **NIH Draft Strategic Plan (NEW)**

NIH’s Chief Officer for Scientific Workforce Diversity (COWSD), Dr. Marie Bernard will be joining COGR during its March 2022 membership meeting to discuss the COWSD [Draft Strategic Plan](#) and to discuss common themes received in response to NIH’s Request for Information (RFI) on suggestions to advance and strengthen racial equity, diversity, and inclusion in biomedical research and advance health disparities and health equity research ([NOT-OD-21-066](#)) (see COGR [comment letter](#)). Included on the White House list of immediate priorities, government agencies will be expected to develop initiatives and take action on systemic racism and barriers to opportunities. We look forward to Dr. Bernard’s presentation. A post-meeting report will capture key points from the discussion. Please contact Jackie Bendall at [jbendall@cogr.edu](mailto:jbendall@cogr.edu) for additional information.

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**COGR would like to thank COGR Board Chair David Norton (University of Florida) and the COGR Committee members for their time, dedication, and expertise, without which the efforts and activities conveyed in these updates would not be possible.**

**Contracts & Grants Administration (CGA)**

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