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October 2013 COGR Meeting Report

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COUNCIL ON GOVERNMENTAL RELATIONS

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November 7, 2013

October 24 and 25, 2013 Meeting Report

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Committee: James Luther, Chair, Duke University; James Barbret, Wayne State University; Sara Bible, Stanford University; Kelvin Droegemeier, University of Oklahoma; Cynthia Hope, University of Alabama; James R. Maples, University of Tennessee; Kim Moreland, University of Wisconsin – Madison; Mary Lee Brown, University of Pennsylvania, ACUA Liaison; Michael Daniels, Northwestern University; Dan Evon, Michigan State University; Terry Johnson, University of Iowa; Cathy Snyder, Vanderbilt University

Grants Reform Update: OMB Final Guidance Could be Available in December

In the most recent COGR correspondences with staff from the Office of Management and Budget (OMB), we were informed that the Council on Financial Assistance Reform (COFAR) is actively working toward completion of the OMB Final Guidance, which would update the existing administrative, costing, and audit circulars into the single “Omni-Circular”. The Federal Government shutdown affected the COFAR schedule and has affected the likelihood of the intended December 2013 release.

Still, it appears a December release is possible. At the request of the COFAR, COGR and the “Coalition in Support of Innovative Grants Reform” (see next section for more details on the Coalition) tentatively is scheduled to meet with them in late November to discuss roll-out and training strategies for the OMB Final Guidance. This meeting suggests that the final release is imminent. If it does not happen in December, then January 2014 would appear to be likely. With that said, history suggests that additional delays always are a possibility as OMB legal counsel, and/or other federal stakeholders, may require additional time to approve a final release.

COGR expects to play an active leadership role for the COGR membership in providing updates and perspectives on the OMB Final Guidance. We believe a key part of this means corresponding with OMB and the COFAR to clarify sections of the guidance that may be ambiguous, and even more important, to advocate and champion interpretations that are consistent with the primary goal of grants reform – i.e., reduce administrative burden. We will keep the membership posted on all developments.

Thursday Afternoon Session at the October 24th COGR Meeting: Grants Reform and Perspectives from Other Stakeholders

One of the Thursday afternoon sessions at the October 24th COGR Meeting included a panel discussion with other stakeholders from the grants recipient community to provide their perspectives on the OMB grants reform initiative and other issues related to managing federal grants. Key stakeholders representing the States, Nonprofits, Nonprofit Research Organizations and Universities were on the panel. Unfortunately, the invited guest representing a voice of the

Tribal Governments was not able to attend. The five individuals, who were able to participate in this session, were:

- Merril Oliver, Deputy Director
 - State of Maryland Governor’s Grants Office
- Tammie Smith, Public Policy Associate
 - Council on Nonprofits
- Erica Froyd, Lewis-Burke Associates
 - Association of Independent Research Institutes (AIRI)
- Sara Bible, Associate Vice Provost for Research
 - Stanford University
- Jim Luther, AVP and Research Finance Compliance Office
 - Duke University

We provided updates on our recent interaction with other stakeholders in both the August 2013 Update (published on August 29th) and the October 2013 Update (published on October 15th). In those updates we described our outreach efforts and the formation of the “Coalition in Support of Innovative Grants Reform” (i.e., CSI Grants Reform). One of the outcomes of our outreach was a September 11th meeting between the Coalition and representatives from OMB and the COFAR. That meeting was described in the October 2013 Update, and many of the take-aways from that meeting were discussed in the Thursday afternoon session at the COGR Meeting. Some of the highlights of the session are summarized below.

- **The States have Considerable Influence.** We should look to partner with the States whenever feasible. Merrill Oliver is a respected voice in the grants recipient community and the State of Maryland is a key partner with the Federal Government. Of the approximate \$600 billion of annual financial assistance provided to all grant recipients, the States account for approximately 70% of this amount (over \$400 billion) and the State of Maryland accounts for close to \$10 billion of this annual amount. Medicaid accounts for a large portion (approximately 25%) of annual financial assistance to the States and other programs make up the balance. Approximately 75% of these other programs are flowed down to subrecipient organizations that are responsible for implementing the programs. This creates a significant subrecipient monitoring burden for the States, and consequently, we must be attuned to this landscape as we advocate for more rational subrecipient monitoring policies applicable to the research community.
- **The Nonprofits and Nonprofit Research Organizations are Important Voices.** Tammie Smith and Erica Froyd provided their unique perspectives, while also highlighting opportunities for ongoing engagement with COGR. One case of commonality that we share with the Nonprofits (e.g., organizations such as the United Way, local food banks, and nonprofits that are part of broader State associations) is to secure a fair F&A rate when we are subrecipients for a State program. In regard to the Nonprofit Research Organizations, our community has regularly partnered with AIRI, and while there may be slight variation on some of our priorities, we actively collaborate on many issues of common concern.

- **Now is the Time to Think About Training!** The OMB Final Guidance could be available as soon as December (see previous section). Sara Bible and Jim Luther presented their initial thoughts on how they will roll-out the OMB Final Guidance to their faculty, departmental and central administrators (the PPT presentations are available at www.cogr.edu - see Meetings | October 2013 Meeting Presentations tab). Also, the State of Maryland, Governor's Grants Office has developed extensive training tools to support their diverse community of subrecipients. Those materials can be found at: <http://grants.maryland.gov/Pages/grantshome.aspx>
- **Continued OMB and COFAR Engagement is Key.** Upon the release of the OMB Final Guidance, we expect to have active engagement with OMB and the COFAR. While they have indicated they do not want do significant rewrites, if there are egregious oversights or issues that need clarification, COGR will be firm in how we approach any items of concern. Also, FAQs are a "must have" and OMB and the COFAR appear to be interested in developing them. Finally, training and/or webinars provided by OMB and the COFAR will be helpful – however, there still is a need for an "arbiter" in situations of agency/grantee disagreement. We will continue to encourage OMB and the COFAR to have a process to arbitrate disagreements with agency interpretations.

The perspectives from other stakeholders, while also including the University perspective in the panel discussion, ultimately provides COGR with more depth and understanding of the needs and concerns of the broader grants recipient community. This enables us to more effectively advocate and communicate with OMB, the COFAR, and other federal entities. We look forward to working with our partners in the Coalition and will be poised to join forces, as needed, upon OMB's release of the Final Guidance.

NIH Subaccounting and Grants Closeout: COGR and FDP Influence NIH Policy

In the October 2013 Update (published on October 15th), we summarized the evolution of the NIH Subaccounting and Grants Closeout policy change, beginning in the summer and into the fall. As COGR collaborated with the Federal Demonstration Project (FDP) over this period of time, we conveyed a number of concerns to NIH and the Department of Health and Human Services (HHS) Office of Grants and Acquisitions Policy (see COGR letters to NIH and HHS at www.cogr.edu; Latest News, August 7, 2013).

While our primary appeal to NIH and HHS was for a 100% delay in implementation of the transition to "subaccounts" (i.e., award-by-award cash requests), there were political pressures on NIH and HHS to initiate the policy change on October 1, 2013 (see April 2012 GAO report on "Action Needed to Improve the Timeliness of Grant Closeouts by Federal Agencies"; <http://www.gao.gov/products/GAO-12-360>). COGR and the FDP were successful in addressing certain issues of concern, specifically – the October 1, 2013 transition is limited to awards with new document numbers (Types 1, 2, 4, 6, 7, and 9) and continuation awards (Types 5 and 8) will be transitioned beginning on October 1, 2014, rather than October 1, 2013.

The NIH revised policy Notice (and FAQs); “*NIH Domestic Awards to Transition to PMS Subaccounts in FY2014 and FY2015*” can be accessed at the first two links below. In addition, the third link addresses FAQs applicable to Division of Payment Management, HHS, procedures to process expired grants:

<http://grants.nih.gov/grants/guide/notice-files/NOT-OD-13-120.html>

<http://grants.nih.gov/grants/payment/faqs.htm#3781>

http://www.dpm.psc.gov/awarding_agency/pms_grant_expiration_faq/pms_grant_expiration_faq.aspx?explorer.event=true

At a session during the Thursday, October 24th COGR Meeting, we were able to address the topic of NIH Subaccounting and Grants Closeout in more detail. A summary of the session is included below.

NIH Subaccounting and Grants Closeout Discussion Continues at the Thursday Morning Session during the October 24th COGR Meeting

The Thursday morning Costing Policies session at the October 24th COGR Meeting included a timely continuation of the discussion on the NIH Subaccount and Grants Closeout policy change. Three COGR members began the session by presenting case studies specific to their institutions. The three case studies were followed by comments from Michelle Bulls, NIH, and an open forum/Q&A with Ms. Bulls and two of her colleagues from the Division of Payment Management (DPM), HHS. The six individuals, who participated in this session, were:

Dan Evon, Director, Contract & Grant Administration
– Michigan State University

Missy Peloso, Associate Vice Provost for Research Services
– University of Pennsylvania

Joe Gindhart, Assistant VC for Finance and Director of Sponsored Projects Accounting
– Washington University in Saint Louis

Michelle Bulls, Director of the Office of Policy for Extramural Research Administration
– NIH

Michael S. Peckham, Director,
– Division of Payment Management, HHS

Daniel Long, Systems Accountant
– Division of Payment Management, HHS

The case study presentations, the comments from Michelle Bulls, and the Q&A that followed resulted in a lively and productive discussion. Some of the highlights and key points of the session are summarized below.

- **Real Challenges at Universities and Research Institutions.** The NIH policy change will present real challenges. Dan Evon began the case study presentations by summarizing the experience with the National Science Foundation (NSF) transition to a new cash payment system (ACM\$), which took place between September 2012 and April

2013. While the NSF transition presented unique challenges, the expanded timeline and well-planned pilot helped the NSF transition to be manageable and successful. Missy Peloso and Joe Gindhart provided demographics specific to NIH cash requests (e.g., number of NIH awards, dollar volume, and frequency of cash requests) at their respective institutions, while also contrasting the NSF model against an NIH model that could pose risk in terms of new administrative burden, faculty uncertainty and confusion, and other unanticipated problems. The PPT presentations are available at www.cogr.edu (see Meetings | October 2013 Meeting Presentations tab).

- **NIH Approach is to Collaborate with the Universities and Research Institutions.** Michelle Bulls and Michael Peckham reiterated that a collaborative approach will be a NIH and DPM priority. The April 2012 GAO report (see link in previous section) clearly has been a key driver to the policy change. Furthermore, NIH as an operating division under the Department of Health and Human Services, must be responsive to the Department's priorities. Despite these pressure points, NIH already has provided relief by delaying the subaccounting implementation on continuation awards, while also emphasizing that they will work with us over the next year to address other implementation concerns.
- **Grants Closeout Policy, in fact, is the real "Hot Topic".** The transition to subaccounting under the revised version of the NIH policy (NOT-OD-13-120, September 26, 2013) seems to have addressed many of the concerns associated with subaccounting. However, per NOT-OD-13-120, the following may be of greater concern: *In an effort to promote more timely financial closeout of awards, PMS [the Payment Management System] will now hold payment requests for funds in subaccounts for awards that are 90 days or more beyond the project period end date. Funds requests for these awards will not be processed unless, and until, the awarding Agency has approved the payment request.*

Concerns associated with implementing this part of the NIH policy (i.e., strict enforcement of a 90-day rule, as well other associated deadlines such as the Final FFR and FFR revisions) dominated the Q&A portion of the session. Fortunately, the tone of the Q&A focused on solutions. For example, as a solution "patch", NIH could facilitate "financial cost extensions", which would extend the closeout period and allow for "orderly processing" of financial records. And while it was agreed during the Q&A that this would not be the ideal solution, Michelle Bulls expressed interest in implementing a cleaner solution – for example, extending the closeout period to 120 or 150 days. *Finally, and most importantly, NIH implementation of a new closeout policy has not yet been finalized* and it is likely a new closeout policy will not be implemented until October 1, 2014. We will have the opportunity to work with NIH as they develop the final closeout policy.

- **The Quarterly FFR.** The NSF implementation of ACMS\$ included elimination of the quarterly FFR – the basis being that award-by-award "subaccounting" at NSF provided NSF with real-time cash balances and actual expenses to-date for each NSF award. While the pooled method of cash requests necessitated a quarterly report to reconcile the pooled cash request with award-by-award balances, conversion to an award-by-award

“subaccounting” model at NSF eliminated the need for any reconciliation in a quarterly report. NIH (and HHS) have not committed to an elimination of the quarterly report – however, COGR will advocate strongly for elimination of the quarterly report, which we believe would be a superfluous and an unnecessary administrative burden under the new award-by-award subaccounting methodology.

- **Other Issues still to be Addressed.** There are additional issues to be addressed, such as: 1) Implications on our Subrecipient agreements, 2) better guidance on implementation procedures from the other HHS Operating Divisions (e.g., HRSA, SAMHSA, AHRQ, CDC, etc.), and 3) uploading/batch processing capabilities of the Payment Management System (PMS). In the case of uploading/batch processing capabilities, Michael Peckham and Daniel Long from DPM, like Michelle Bulls, will be helpful resources and fully invested in making the NIH policy change a successful transition. The link below includes information on the current PMS upload functionality:
http://www.dpm.psc.gov/grant_recipient/bulkpaymentfile/bulkpaymentfile.aspx

The NIH Subaccount and Grants Closeout policy change has been a hot topic since the summer and will continue to be over the next year. NIH and DPM have made the commitment to work closely with our community over the next year to help ensure a successful policy implementation – we are thankful for their hard work and consideration during the policy transition. COGR, in coordination with the FDP, has established a workgroup to accumulate concerns and to work with NIH to improve and facilitate the NIH policy change. We appreciate all of the feedback you have provided to COGR and the FDP, to date, and we will continue our outreach to the COGR membership and keep you abreast on all developments.

GAO Releases the First of Two Studies on Indirect Costs

The first of two GAO studies that COGR has been following is now available. The report titled: “*NIH Should Assess the Impact of Growth in Indirect Costs on Its Mission*” can be found at:
<http://www.gao.gov/products/GAO-13-760>

The report was completed in response to a request from Senator Jeff Sessions (R-AL) on the Senate Committee on the Budget. In a November 1 note to the COGR ListServe, we provided the following assessment:

- 1) Data from NIH shows that F&A/Indirect has remained a constant percent of total NIH expenditures for at least the past decade,
- 2) In their report, the GAO tries to make the case the F&A/Indirect piece is growing at a more rapid rate than the Direct cost piece,
- 3) However, the data does not seem to support the GAO case – In fact, HHS/NIH disagree with the GAO conclusion,
- 4) HHS/NIH did state they would continue their annual and thorough reviews of changes in F&A versus Direct distributions at NIH,
- 5) COGR, like HHS/NIH, supports ongoing reviews of changes in F&A versus Direct distributions,
- 6) Finally, COGR believes the GAO analysis is weak and inconclusive in a number of areas, and even more important, we strongly affirm that universities employ rigorous financial

stewardship and oversight of federal funds and that our investments in the Research Infrastructure/Compliance/F&A/Indirect activities at our institutions are focused on the most cost efficient practices and compliance with all federal rules and regulations.

Nevertheless, reports such as this can confuse rather than clarify an issue, especially on a subject as nuanced as indirect cost. The Chronicle of Higher Education, on November 4, 2013, published an article (see link below) by Paul Basken titled “*University-Facility Costs Rise Faster Than Grants, NIH Is Warned.*”

<http://chronicle.com/article/University-Facility-Costs-Rise/142813/>

We will monitor developments related to this GAO study. And, as we have reported, a second GAO study was requested by Congress in June. The House Energy and Commerce Committee’s Subcommittee on Oversight and Investigations, chaired by Rep. Tim Murphy (R-PA), sent a letter to the GAO asking the agency to review indirect costs on grants issued by NIH. A copy of the letter is available at:

<http://energycommerce.house.gov/sites/repUBLICANS.energycommerce.house.gov/files/letters/20130624GAO.pdf>

In light of the release of the first study, it is uncertain if this affects whether or not the second study still is necessary – Representative Murphy will need to determine how he wants to proceed. Again, we will pay attention to all developments.

Audit Update

The COGR Costing Committee held a roundtable session at its Wednesday Committee Meeting to address recent audit and investigation activities. We were joined by Jeff Silber, Senior Director of Sponsored Financial Services at Cornell University and Mike Vernick, a Partner at Hogan Lovells. We covered a wide spectrum of topics – below are some observations and anecdotes based on our discussion:

- The NSF Office of Inspector General (OIG) is fully engaged in their Data Analytics audit program. A new report was just released – <http://www.nsf.gov/oig/13-1-004-Cornell.pdf>.
- Data Analytics, effectively, is a methodology that mines the General Ledger and other information systems of the institution, with the goal being to identify those areas of risk that will be the focus of the audit plan.
- Consequently, the audit focus at one institution may be entirely different from another. This moves the NSF OIG away from a model where they concentrate on a single item – e.g., effort reporting only.
- However, the Data Analytics approach raises questions on how extrapolation methods are used to arrive at disallowance amounts. If the highest risk areas are selected as the audit sample, in lieu of a more traditional random sampling technique, this raises the concern of the appropriateness of the extrapolation methodologies.
- The new audit report by the NSF OIG highlights the purchase of computers and office supplies and the applicability of unlike circumstances. Also, travel expenditures, adequacy of documentation on all types of purchases, and availability of original receipts are emphasized.

- The HHS OIG remains active. However, the HHS OIG recently announced a change in their schedule for releasing the *FY2014 HHS OIG Workplan*, from October to January. Consequently, we will learn more about their specific objectives early next year.
- Responsibility for audit resolution at HHS continues to be problematic. In some cases, both the HHS Office of Audit Resolution and the Division of Cost Allocation have disclaimed responsibility, leaving the audit resolution process in limbo.
- Qui tam suits under the False Claims Act remain regular occurrences. COGR reported on two cases in the August 2013 COGR Update (published August 29, 2013). And, an emerging issue is developing in the area of how to calculate damages. At issue is whether damages should be calculated by determining: 1) the difference between what the government actually reimbursed versus what it should have reimbursed, or 2) the full value of the grant(s) at issue.
- Can the federal audit process be improved? Some of our concerns include: 1) general dismissal of the A-133 Single Audit by the OIG community, 2) a “black or white” approach by the OIG community on topics that actually are “gray” and which require more discernment by auditors, 3) to whom is the OIG community accountable when they commit considerable federal and university resources to an audit, and 4) what tools and reports are available to the public that can enhance the transparency on the quality of audits by the OIG community.

This final point is of particular concern as our community struggles to be fully responsive to and cooperative with the OIG community. We encourage you to regularly check the HHS (NIH) and NSF OIG websites (see links below). These sites provide access to published audit reports.

<https://oig.hhs.gov/reports-and-publications/oas/nih.asp>
<http://www.nsf.gov/oig/auditpubs.jsp>

We always are interested in audit experiences at your institution so that we can update the general landscape for the membership – do not hesitate to contact us. We have the most access to HHS and NSF OIG initiatives, but also are interested in activity related to the OIGs at other agencies, as well as other internal and external audit activities.

Fringe Benefit Rate Proposals and Treatment of Carry-Forwards

The COGR Costing Committee is reviewing methodologies applicable to the treatment of carry-forwards (i.e., over- and under-recoveries from prior years) in establishing future year fringe benefit rates. Depending on our findings, we will consider approaching the Division of Cost Allocation (DCA) with our analysis.

NSF Questionnaire and the Improper Payment Elimination and Recovery Act of 2012

Some institutions have received a questionnaire from NSF that addresses a number of financial and internal controls at the institution. The questionnaire stems from agency requirements to comply with the Improper Payment Elimination and Recovery Act of 2012 (IPERA). Effectively, the administrative and cost burden flows down to our institutions and represents another unfunded mandate borne entirely by our institutions.

Other Costing Developments and Discussions

Below are topics that are either new developments or items we have reported on in the past and continue to follow. If there are cost, financial, or audit related topics that you would like to discuss with COGR, please contact David Kennedy at dkennedy@cogr.edu.

F&A Application to Vendor Contracts and Defining MTDC. In the June Meeting Report (published June 21, 2013) we reported on several situations involving the theme where agencies/grants officers/contracting officials have determined that F&A application to large dollar amount vendor contracts is unallowable. This is not a new phenomenon – in fact, it has been a regular occurrence for years as typified in the May 2010 NIH policy on Genomic Arrays (NIH Notice: NOT-OD-10-097). In one of the cases we reported on in the June Meeting Report, the agency in question recently responded to COGR stating: “... *all subcontracts are to be included in the limitation [i.e., F&A can only be applied to the first \$25,000 of the agreement], whether programmatic in nature or a vendor agreement.*” We are continuing to pursue this issue, and as appropriate, will engage OMB and ask that this be reviewed in the context of OMB’s release of the Final Guidance.

NIH Fiscal Policy under the Continuing Resolution (CR). The NIH released Notice Number: NOT-OD-14-012 on October 25, 2013 to address funding levels under the current CR (effective through January 15, 2014). That Notice is available at: <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-14-012.html>

A-133 Compliance Supplement for 2013 – Suspension and Debarment. The A-133 Compliance Supplement was released in July (see link below); much later than in past years. Several COGR members have raised concerns related to the Suspension and Debarment audit requirement – specifically; the suspension and debarment status of the principals (e.g., board members, corporate officers) of a vendor also should be verified. COGR is reviewing this requirement in more detail.

http://www.whitehouse.gov/omb/circulars/a133_compliance_supplement_2013

HHS Memorandum to HHS Grantee Community – Grants Policy Statement. HHS has notified the grantee community that they have completed a revised draft version of the Grant Policy Statement. HHS has indicated that they will keep the grantee community posted and that all appropriate documentation will be posted at: <http://www.hhs.gov/grants/>

Fringe Benefit Rate Proposals and Treatment of Carry-Forwards. The COGR Costing Committee is reviewing methodologies applicable to the treatment of carry-forwards (i.e., over- and under-recoveries from prior years) in establishing future year fringe benefit rates. Depending on our findings, we will consider approaching the Division of Cost Allocation (DCA) with our analysis.

CONTRACTS AND INTELLECTUAL PROPERTY

Committee: David Winwood, Chair, University of Alabama at Birmingham; Mark Crowell, University of Virginia; Alexandra McKeown, The Johns Hopkins University; Cordell Overby, University of Delaware; Patrick Schlesinger, University of California, Berkeley; Kevin Wozniak, Georgia Institute of Technology; Valerie McDevitt, University of South Florida; Fred Reinhart, University of Massachusetts; John Ritter, Princeton University; Wendy Streitz, University of California

CIP Committee Meets with DOD on Revised DFARS 7000 Clause

The October Update noted concerns with the revised (Aug. 8, 2013) version of the DFARS 252.204--7000 clause (78FR48331), which requires DOD contracting officer approval of release of any unclassified information pertaining to the contract. This clause has been of longstanding concern to COGR members, particularly due to its frequent inclusion in university subcontracts from DOD prime contractors.

The revised clause specifically cites the two previous DOD memoranda on contracted fundamental research stating that such research should not be managed in a way that it becomes subject to restrictions on the involvement of foreign researchers or publication restrictions, including subcontracted fundamental research. This is an improvement over previous DOD DFARS policy since DOD contracting officers now must consider the DOD memoranda. However, the exception in the revised clause to contracting officer approval applies only when the project has been scoped and negotiated at the proposal stage by the DOD contracting officer with the contractor and research performer (assuming some portion of the project will be subcontracted) and determined to be fundamental research. In prior discussions with DOD, we noted this appears to require that the determination be made in advance of the overall contract being issued. Often a university subcontractor may not have been identified at that time. Also, in the case where the university contractor has been identified at the proposal stage, it is not clear when and how they will be able to participate to obtain the required determination.

The CIP Committee invited Dr. Robin Staffin, Director for Basic Sciences at DDR&E (and named as DOD contact in the previous DOD memos) to meet and discuss further the revised 7000 clause at the October meeting. At the meeting Dr. Staffin indicated that a problem with the policy on contracted fundamental research stated in the DOD memoranda was that the policy had not been formally incorporated in the DFARS. This led to the incorporation of the memos in the revised 7000 clause. DOD's intent is for the policy to be positively flowed down to subcontractors. However CIP members indicated that ambiguities in the new clause as to how and when fundamental research determinations are made may not lead to positive outcomes.

After further discussion, it was agreed that clarifications in the Procedures, Guidance and Information (PGI) for DOD contracting officers that accompanies the DFARS would be helpful. We requested several clarifications:

- 1) “Project” in (a)(3) of the revised clause refers to the subcontracted activity rather than the overall prime contract;
- 2) The fundamental research determination should be made when the “project” is identified, even if it is identified after the prime contract is issued; and
- 3) The form of the determination should be clarified (including whether acceptance of the Statement of Work in a subcontract proposal that proposes fundamental research is acceptable).

One of the CIP member institutions plans to write to the DOD/Defense Procurement Acquisition Policy (DPAP) representative named in the 7000 clause Federal Register notice to request these PGI clarifications. COGR will follow up with a similar request (possibly jointly with AAU).

NETL Requires Approval of Foreign Nationals

COGR has been informed that a number of universities have received notices from the DOE National Energy Technology Lab (NETL) in Morgantown that all foreign nationals performing research on NETL-funded work must be submitted to DOE for approval. The requirement is applicable even for work performed on campus and regardless of whether the foreign nationals have access to NETL-provided information.

The requirement is based on DOE Order No. 142.3A “Unclassified Foreign Visits and Assignments Program” (<https://www.directives.doe.gov/directives/0142.3a-BOrder/view>). That order applies to unclassified foreign national access to DOE sites, information, technologies, and equipment. It requires approval requests to be submitted via access request Form 142.1-1, and entered into the DOE Foreign Access Central Tracking System (FACTS). The Order includes a Contractor Requirements Document (CRD) as Attachment 1, which extends the requirement to contractors. All the universities that have received the notice have NETL-funded subcontracts via URS. At least one has a term in the subcontract that access approval is required only for NETL sites.

NETL has alleged that the requirement is being implemented DOE-wide. However we have not found any instances of COGR member institutions receiving the requirement other than from NETL. NETL also claims that the requirement does not invalidate the Fundamental Research Exclusion (FRE) from export controls, citing EAR 734.11. That EAR provision permits export of information consistent with national security controls including restrictions on participation of non-U.S. citizens in U.S. government funded research. That provision would allow the submission of the foreign national information to DOE but the effect on the FRE status of the project is unclear. Universities might be forced to implement access controls regardless, particularly in the event certain foreign nationals are disapproved. The requirement also raises questions as to discriminatory treatment of foreign nationals in otherwise open campus research environments.

We understand that the affected universities are continuing to negotiate this requirement with NETL. Depending on the outcome, it may be necessary to raise this issue with senior DOE management. **We would appreciate hearing from COGR members if they receive this requirement, particularly from other parts of DOE.**

More Information Requested on Effects of AIA Grace Period

The October Update included a lengthy discussion of the potential consequences of the dysfunctional grace period for disclosures and publications included in the America Invents Act (AIA). It noted that some institutions may be discouraging their inventive faculty from publishing and that some companies may have expressed unwillingness to engage in collaborations with universities unless the universities agree to file provisional patent applications on all disclosures by participating faculty. The higher ed. associations have prepared a legislative package to amend the AIA to address this situation.

AAU has requested federal relations officers to contact their campus technology transfer officials, patent counsels, and other appropriate campus officials to ask if they have evidence that the lack of an effective grace period in the new patent law is harming the dissemination of research results. The associations would specifically like to know:

- 1) Is your institution encouraging faculty not to disclose?
- 2) Have your faculty disclosures been jeopardized by the disclosure of obvious variants to their inventions?
- 3) In general, how is your institution reacting to this situation?

We included a similar request to COGR members in the October Update. This information will be helpful in further discussions and considerations of the legislative package. COGR members should provide their federal relations officers with the requested information and/or forward the information to Bob Hardy of the COGR staff.

Anti-Patent Troll Legislation Moves Forward

The October Update and other recent COGR materials discussed a number of legislative initiatives to address the patent “troll” problem. These initiatives are of particular concern since universities are “non-practicing entities” (NPEs). “One size fits all” solutions aimed at NPEs that are patent trolls could inadvertently adversely affect universities and non-profit research institutions that do not practice their patents.

- 1) Goodlatte Bill - The October Update focused in particular on a discussion draft circulated by Rep. Goodlatte (R—VA), House Judiciary Committee Chair. Rep. Goodlatte now has formally introduced the legislation (the “Innovation Act;” HR 3309; available at http://judiciary.house.gov/news/2013/10232013_2.html). The bill is very similar to the most recent discussion draft. As discussed in the Update, it would make a number of significant changes in patent law, with regard to pleading requirements, fee shifting, joinder of interested parties, discovery in patent infringement actions, disclosure of financial interests, and the ability of customers or end users to stay infringement actions brought against them. It also would amend the AIA in a number of technical and less

technical ways. It also calls for three studies: of the patent secondary market and U.S. government-owned patents by the Patent and Trademark Office (PTO), and of PTO patent quality by GAO.

There are two or three provisions of primary concern to the university community. One is an amendment to Sec. 285 of the Patent Act, which would direct courts to award to prevailing parties in infringement suits “reasonable fees and other expenses” incurred by that party, unless the court finds the position of the losing party “was substantially justified or that special circumstances make an award unjust.” This is basically a “loser pays” provision, which is not typical in U.S. jurisprudence. (The Act currently allows attorney fees to be awarded in “exceptional cases,” which courts rarely do). The concern is that this provision could adversely affect the ability of universities and their startups to enforce their patents. A second concern is an addition to Sec. 299, which directs courts to join an “interested party” on motion of a defendant in an infringement suit. “Interested party” is defined as including any person who has a direct financial interest in the patent at issue, “including the right to any part of an award of damages or any part of licensing revenue.” The concern is this could not only bring in universities in the case of licensed patents, but also their inventors or any third parties that have been designated to receive a share of licensing revenue. Courts would have very limited discretion to deny joinder motions. A third concern is an amendment to the AIA that would eliminate the Sec. 325(e) “reasonably could have been raised” estopped in post-grant reviews. The higher ed. associations had supported this provision as a way of limiting repeated rounds of challenges to issued patents.

A hearing was held by the House Judiciary Committee on the Goodlatte bill on October 29 (see http://judiciary.house.gov/hearings/113th/hear_10292013.html for the webcast and witness testimony; <http://www.jdsupra.com/legalnews/house-judiciary-committee-holds-hearing-23087/> for a more critical view). The hearing was somewhat partisan. While members and witnesses generally supported many of the concepts in the bill, concerns were expressed about adverse effects on patent holders seeking to enforce legitimate patents. The recent GAO report on patent infringement litigation (GAO-13-465; www.gao.gov/assets/660/657103.pdf) also was mentioned a number of times. That report found that most patent infringement suits are filed by operating companies, and attributed the recent increase in such lawsuits to the prevalence of low-quality software-related patents. Claims in such patents tend to be overly broad or unclear, and not provide clear notice of their scope or boundaries. It concluded “the focus on the identity of the litigant—rather than the type of patent—may be misplaced” (see COGR August 2013 [Update](#) for more discussion of the report).

Despite these concerns, there appeared to be considerable support for some of the basic concepts in the bill, including the fee shifting and joinder provisions. It may be difficult to amend these provisions to carve out universities or address university concerns. The higher ed. associations including COGR that have worked together on patent reform are preparing a letter detailing our concerns. One area in the bill on which the majority of witnesses agreed was that the proposed expansion of the transitional program for post-grant review of business method patents should not be made at this time. As we

previously noted, many criticisms of the previous discussion draft alleged the bill would diminish patent property rights and favor big business at the expense of small inventors.

- 2) Hatch Bill - On October 30 Sen. Hatch introduced a bill (“Patent Litigation Integrity Act”--S. 1612; available at <http://www.hatch.senate.gov/public/index.cfm/releases?ID=6f22f0c5-aa23-47ce-9f30-7d0bfb15491a>) aimed at deterring abusive patent litigation. It has two main features: 1) an amendment to Sec. 285 of the Patent Act to provide for mandatory fee shifting, substantively similar to the Goodlatte bill; and 2) requirements for parties alleging infringement to post bonds to pay accused infringers’ attorney fees and other expenses, at the discretion of the court.

We discussed the bonding provisions in the draft Hatch bill in the October Update. We noted that AAU had been asked to provide comments. The bill as introduced reflects the AAU input. It provides that among the factors for courts to consider in determining bond requirements is whether the party alleging infringement is an institution of higher education or a related non-profit technology transfer organization and in the case of patents licensed by such institutions or organizations, whether an exclusive licensee conducts further research or development of the subject matter to make it more licensable.

These provisions are helpful. However, they are not failsafe in protecting universities against possible bonding requirements. As we noted in the Update, such consequences would constitute a powerful disincentive for universities to defend their patents, creating an anti-competitive environment where universities and their start-ups, with limited financial resources, are unable to pursue legitimate assertion of their patent rights. The same is true of the fee shifting provisions.

NIH Denies March-In Petition on NIH-funded AIDS Drug

Recent COGR Updates and Meeting Reports have discussed a number of Bayh-Dole Act march-in requests submitted to NIH on drug pricing grounds (e.g. see August 2013 Update). The longest pending of these was a petition submitted on October 25, 2012 by several groups, requesting that NIH march in on six NIH-funded patents held by Abbott Laboratories (now AbbVie) used in the manufacture of the HIV/AIDS drug ritonavir, marketed as Norvir (see COGR October 2012 Meeting Report). A similar petition had been filed on Norvir and rejected by NIH in 2004. The petition also requested that NIH adopt two rules that would create standards for future march-in requests. One is to set a ceiling on prices to U.S. residents, based on prices in other high income countries. The second would require NIH to grant licenses to third parties to use federally-funded inventions when used in co-formulated drugs (Norvir is available both as a single drug as well as in co-formulation with other anti-retroviral drugs).

NIH rejected the new petition in a determination published on November 6 (<http://www.ott.nih.gov/sites/default/files/documents/policy/March-In-Norvir2013.pdf>). The NIH determination notes that the same three issues are raised in the latest petition that were considered and decided in 2004. AbbVie’s manufacture of and ritonavir’s availability around the world demonstrate that practical application of the patent has been achieved as required by Bayh-

Dole (failure to achieve practical application of a subject invention is the first ground for march-in under Bayh-Dole). No new information was provided that demonstrates AbbVie has failed to reasonably satisfy health and safety needs, a second ground for Bayh-Dole march-in. (The determination notes that the price of Norvir has not increased since 2003, and that it is provided free or at reduced prices for certain eligible patients). Finally, the determination states that the Bayh-Dole public use requirement “is applicable when a statute or regulation, e.g. a safety or standards regulation, specifically requires the use of a patented technology, and the patent owner is not willing to grant licenses to third parties required to use it in their products.” No such statute or regulation exists here.

The petition alternatively requested NIH to use its Bayh-Dole government use license to practice or have practiced the invention itself. The determination notes that “NIH is a research institution, not a drug manufacturer.” In addition, the majority of patents used in the drug formulations were not federally funded and not subject to the government license. As for the two requested rules, the determination states “It is not appropriate to assess the price of one drug out of the context of a country’s entire health care delivery and drug pricing/reimbursement system.” NIH’s statutory march-in authority under Bayh-Dole is limited to the march-in criteria, and is not appropriately used to address pricing policies and disparities between the U.S. and other countries. While NIH is sensitive to the impact of drug pricing and patient availability, these are broad public policy issues appropriately addressed through legislative and other remedies. NIH’s role is limited to compliance with the Bayh-Dole Act.

The NIH determination appears sensible and appropriate, and consistent with Bayh-Dole Act obligations and requirements as well as past precedents. However, given that two Senators previously have raised issues similar to the march-in petition, and a coalition of consumer groups and student organizations recently asked Congress to examine NIH’s use of march-in authority, this may not be the final word on these issues.

AAUP Report on Ownership of University IP Misstates Situation

Recently the American Association of University Professors (AAUP) issued a draft report: “Defending the Freedom to Innovate: Faculty Intellectual Property (IP) Rights After *Stanford v. Roche*” (<http://www.aaup.org/report/defending-freedom-innovate-faculty-intellectual-property-ip-rights-after-stanford-v-roche>). The report reflects a serious misunderstanding of the Supreme Court’s decision in the *Stanford v. Roche* case as well as the Bayh-Dole Act.

The report asserts that *Stanford v. Roche* affirmed that “universities as hosts of federally supported research have neither an obligation nor a mandate under federal law to take ownership of faculty inventions made in such research.” In fact the decision made no such finding. It was decided on the narrow grounds that the Bayh-Dole Act does not automatically vest title to federally-funded inventions in federal contractors such as universities. The majority opinion did not discuss the compliance obligations of the Bayh-Dole Act. The dissenting opinion in the case by Justice Breyer made clear the nature of the majority’s holding, as follows: “I agree with the majority that the Act does not simply take the individual inventors’ rights and grant them to the government. Rather, it assumes that the federal funds’ recipient, say a university or small business, will possess those rights.” It should be noted that COGR and the other university

associations in their *amicus* brief did not support the vesting theory (see COGR June 2011 [Meeting Report](#) for a fuller discussion).

The AAUP report also asserts that “Nowhere does the (Bayh-Dole) Act mandate university ownership of faculty inventions,” and that “Nor does the act require faculty to assign their inventions to their universities or any other agent for management.” However, the report also cites the Department of Commerce’s standard patent rights clause, pursuant to the authority that Act gives Commerce to develop standard implementing regulations for federal funding agreements. That clause, as the report notes, requires written agreement of contractor employees to disclose inventions and “to execute all papers necessary to file patent applications on subject inventions and to establish the government’s rights in the subject inventions” (37CFR401.14(f)(2)). The regulations also require contractors to convey title to the funding agency in specified circumstances where the contractor fails to disclose inventions or file patent applications as required (401.14(d)). And the Act provides that the government may receive rights to inventions “in which the contractor does not elect to retain rights” (35 USC 202(c)(2)).

Tellingly, since 1995 NIH has required contractors and grantees “to have in place employee agreements requiring an inventor to assign or give ownership of an invention upon acceptance of Federal funds” (A 20/20 View of Invention Reporting to the National Institutes of Health,” cited in the Supreme Court opinion, <http://grants.nih.gov/grants/guide/notice-files/not95-003.html>). That document also provides that “The Bayh-Dole Act requires that there be employee agreements in place at the awardee organizations that obligate inventors to assign title to Federally-supported inventions to the organization.” Assignments of ownership rights to universities thus is a compliance obligation for NIH funding. It also self-evidently is required for universities to comply with the obligations in the Federal regulations cited above. As Justice Breyer’s opinion noted, the Bayh-Dole Act assumes and ordinarily requires assignment of patent rights by the federally funded employee to the federally funded employer.

The AAUP report states that *Stanford v. Roche* “strongly bolsters the AAUP position that faculty should be free to control the disposition of their scholarship without interference by university IP administrators.” This is based on a clearly erroneous interpretation of the decision and the Bayh-Dole requirements. It also states “A compulsory ownership claim changes the relationship between faculty and administration from one of administrative oversight and support to one of an employer with authority over the disposition of work of employees. However routine in companies, it is neither routine nor acceptable, for university faculty.” While this may be the AAUP view, many institutions, particularly public institutions, would argue that their faculty clearly are employees.

We agree with the report on the desirability of shared governance and faculty input in the disposition of IP, as recommended in the NAS report on *Managing University Intellectual Property in the Public Interest* (see COGR Fall 2010 [Update](#)). There also is much discussion in the report of ownership rights in courseware and distance education, which is beyond COGR’s focus on research. However, given that the AAUP appears to be planning an issue campaign with regard to rights in intellectual property (see <http://www.aaup.org/get-involved/issue-campaigns/intellectual-property-risk>), we are concerned about the mischaracterizations in the report with regard to the Bayh-Dole Act and the effects of the *Stanford v. Roche* decision.

Tax Exempt Bond Financing Issue Raised by Draft Legislation

In 2012, The President's Council of Advisors on Science and Technology (PCAST) included in a report on policy options to promote advance manufacturing in the U.S. (www.whitehouse.gov/sites/default/files/microsites/ostp/pcast_amp_steering_committee_report_final_july_27_2012.pdf) a recommendation (#4) that IRS establish a waiver process for the restrictions on industry use of facilities financed with tax exempt bonds established in Revenue Procedure (Rev. Proc.) 2007-47. Subsequently the Treasury's FY2014 Greenbook (<http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2014.pdf>) had a similar recommendation (pg. 120--21), calling for increased flexibility for public/private research arrangements that are covered under the safe harbor from private business use limits in facilities financed by tax-exempt bonds.

This issue has a long history (see COGR Summer 2007 Update). The Treasury document summarizes the current requirements pretty well. For tax exempt status, issuers must limit private business use of the financed facility (direct or indirect use in a trade or business by other than qualified users, which include state and local government units and 501(c)(3) entities, but not the federal government). No more than 10% of the proceeds can be used for private business activities (5% in the case of 501(c)(3)s, such as private universities; 26 USC 141). Industry sponsored research in such facilities raise private business use concerns. The rules provide that industry sponsors must pay a competitive price for use of the technology developed in the research, and that price must be determined at the time the technology is developed for use (not earlier in the process). The rules are based on the Tax Reform Act of 1986.

Treasury has proposed that the law be changed to allow qualified users "to enter into any bona-fide, arms-length contractual arrangement with a private business sponsor of basic research regarding the terms for sharing the economic benefits of any products resulting from the research, including arrangements in which those economic terms (such as exclusive or non-exclusive licenses of intellectual property, and licensing fees or royalty rates) are determined in advance at the time the parties enter into the contractual arrangement." Draft legislation reflecting the proposal has been prepared. It would be effective for research agreements entered into after the date of enactment.

A number of institutions have pushed for more flexibility on private business use, including raising the current percentage limitations. COGR has not taken an "official" position on the issue. However, we believe caution is in order, given that increasing questions are being raised about universities' tax exempt status by policymakers at various levels. The Treasury proposal is more limited, but still could raise concerns about the degree of commercial activity occurring in bond financed facilities. The Rev. Proc. defines "basic research" as "any original investigation for the advancement of scientific knowledge not having a specific commercial objective," as distinguished e.g. from product testing. While helpful, this definition is not necessarily definitive and could raise questions of interpretation. We will report any further developments to the COGR membership.

RESEARCH COMPLIANCE AND ADMINISTRATION

Committee: James Tracy, Chair, University of Kentucky; Lois Brako, University of Michigan; Pamela Caudill, Harvard University; Michael Ludwig, Purdue University; Susan Sedwick, University of Texas, Austin; Pamela Webb, University of Minnesota; Kathleen Delehoy, Colorado State University; Walter Goldschmidts, Cold Spring Harbor Laboratory; Suzanne Rivera, Case Western Reserve University

NSB Report on Investigator Burden

Lisa Nichols, National Science Board (NSB) science policy analyst and liaison to the NSB Taskforce on Administrative Burden joined the Research Compliance and Administration (RCA) committee for a discussion of the Taskforce's preliminary analysis of the responses that it received concerning *Reducing Investigator Administrative Workload*. Nichols and her colleague Jeremy Leffler, Executive Secretary to the Task Force and Outreach Specialist in the NSF Policy Office, participated in a discussion of the Taskforce's then-open-for-comment request for information at the June 2013 COGR meeting.

The Taskforce shared their preliminary analysis and asked follow-up questions specifically addressing areas of burden that may be attributable to institutional policies and practices. What they heard from investigators is not unexpected.

Investigators expressed frustration with financial management tasks; wanting greater control over and fewer approvals for expenditures, real time access to financial reports, simplified or no justification for low threshold expenditures, and templates for developing grant budgets. In the area of integrity compliance, investigators charged that institutions over-regulate human subjects and animal research, and called for quicker turn-around of protocol reviews, better communications with investigators during the review process, enhanced use of electronic systems to streamline protocol reviews and revisions, and streamlined training programs. They urged institutions to exercise any and all flexibilities available under the regulations. As to staffing their research, investigators want to hire staff, including administrative staff, outside the regular human resources processes, and want a portion of the Facilities and Administration (F&A) costs recovered to pay for staff positions. As an alternative, some investigators proposed that the Federal agencies reduce the amount of F&A the institution receives and provide the money saved directly to the investigators in their budgets to hire administrative help.

RCA was joined by representatives of Association of American Universities (AAU) and Association of Public and Land-grant Universities (APLU), co-authors of the joint letter sent to the NSB in June, in a wide ranging discussion with Nichols. The associations are considering a follow-up letter and the construction of an additional comment letter was the focus of the discussion.

Our general response to the NSB would acknowledge that the issues are familiar and we recognize the frustration of investigators. We would concede that institutions often take a conservative approach to compliance in large measure as a reaction to guidance, FAQs and findings by the agencies and various inspectors and auditors' "interpretations" of the regulations that we know often go well beyond the regulations. We believe institutions would be helped in reducing that frustration if we had truly harmonized and streamlined Federal regulations. Finally, we will remind the NSB that institutions have limited resources because of the cap on F&A to implement new systems and hire administrative support to help investigators.

Currently, the joint association recommendation to the NSB will be to advocate for a new Executive Order that requires the agencies to meet in an interagency group – we'll suggest the Research Business Models Subcommittee of Office of Science and Technology Policy (OSTP) – to harmonize and streamline regulations. We will ask that the executive order require the agencies to create a priority list of candidate regulations for elimination or harmonization and report back within six months with the list and timetable for preparing revised regulations. We'll ask for the Executive Order to require representation or the broad participation of the stakeholders in the interagency group. During the discussion with Nichols, we were challenged to provide and advocate for the use of best or effective practices to help reduce the burden. We observed that creating effective practices for bad regulations was a waste of time.

We understand the NSB Taskforce will work through November and December to finalize its recommendations with the goal of presenting them to the NSB when it meets in February. We will get our response to them by November so it can be a part of their consideration.

Effective Management Practices

With a touch of irony given our assertion that effective practices for bad regulations are a waste of time, the Research Compliance and Administration (RCA) committee will begin preparing to revise COGR's *Managing Externally Funded Research Programs: A Guide to Effective Management Practices*. Last revised in 2009, the Guide, first published in 1989, has served as a useful handbook for review grant management systems and various internal control mechanisms to aid in the good stewardship of sponsored activities. The Guide is available on COGR's website under Educational Materials. The work on the new edition will be delayed, however, until the Office of Management and Budget (OMB) issues the final Reform of *Federal Policies Relating to Grants and Cooperative Agreements; Cost Principles and Administrative Requirements (Including Single Audit Act)* With the publication of the new Omni Circular, we will attempt to develop and incorporate effective practices that respond to the new provisions. RCA will design a process and timetable to be announced in February 2014 and will seek volunteers at that time to assist in that process. Stay tuned.

Resumption of Operations After Shutdown

Sally Rockey, Deputy Director of the National Institutes of Health (NIH) addressed COGR on Friday morning, assuring the membership that NIH staff was working to re-establish its operations including the review of proposals and issuing of awards following the resumption of Federal government operations. The same message was delivered by Jeremy Leffler on

Thursday morning concerning operations at the National Science Foundation. Both agencies have established websites to provide up-to-date information concerning application deadlines and any policy modifications, etc. Investigators and institutions should check the websites listed below to ensure that they meet new deadlines.

NSF at <http://www.nsf.gov/bfa/dias/policy/postshutdown.jsp>

NIH at http://grants.nih.gov/grants/2013_shutdown.htm

GRANT Act Developments

On October 23, 2013, Rep. James Lankford (R-OK) reintroduced a slightly modified version of the Grant Reform and New Transparency (GRANT) Act (H.R. 3316) aimed at ensuring accountability in the federal grants process by increasing its transparency to the public. While the new version of the GRANT Act includes some modifications to the version introduced in November, 2011, the bill retained the requirement to post all funded grant applications, grant performance information, and executed grant agreements to a publicly accessible website. The bill includes a provision for each Department to make exceptions to protect intellectual property and sensitive information but the default procedure is that the application, performance information, and executed agreement for all awarded grants must be posted online. In a AAU, APLU and COGR joint letter to Rep. Lankford and other members of the Committee last year, we expressed our concerns that the provisions particularly as related to the application could lead to a number of problems, including release of unprotected intellectual property, the misuse of information related to dual-use research of concern (DURC), and the release of sensitive information about researchers and facilities involving research with animals.

Despite changes aimed at preserving the anonymity of peer reviewers, the revamped bill still requires the institutional affiliation or employer of peer reviewers to be posted which could lead to the identification of reviewers in fields with a small cohort of experts. We argued that real anonymity in the peer review process permits greater candor in the evaluation of grant applications and thereby contributes to a higher quality of review than would otherwise occur and urged the bill's sponsors to consider the assignment of a unique identifier for agency use.

Assigned to the House Committee on Oversight and Government Reform, the committee approved the reintroduced and slightly modified version on October 29, 2013, on a party line vote of 19 Republicans in support and 15 Democrats against, paving the way for a vote by the whole House. Rep. Gerald Connolly (D-VA) offered an amendment during the markup that would have required online posting of only grant abstracts or executive summaries, instead of full grant applications and other grant information. The amendment failed on a party line vote of 15 to 18. Additionally, Rep. Mark Pocan (D-WI) offered and withdrew an amendment that would have modified the bill's requirements on the posting of information about peer reviewers. Subsequent to the committee markup, Rep. Lankford told *Science Insider* that the GRANT Act was not aimed at research agencies, such as the NIH and NSF, but at such agencies as the Departments of Education, Justice and Commerce "that do not have a transparent process in place." He added that the legislation was still a work in progress and that he was working with Democrats on provisions of concern. Rep. Lankford's October 31, 2013 interview can be found at: <http://news.sciencemag.org/funding/2013/10/bill-revising-federal-grants-process-wouldn%E2%80%99t-change-practices-nih-and-nsf-says>.

Given Rep. Lankford's interview, we are hopeful that modifications can be made to the GRANT Act to address many, if not all, of the research community's concerns. If passed in the House as proposed, the research community will be working with members of the Senate to attempt to modify provisions that are viewed as increasing the administrative burden on the investigators and their home institutions.

DATA Act

The Senate Committee on Homeland Security and Government Affairs approved a revised Digital Accountability and Transparency Act of 2013 (DATA Act) (S. 994) on November 6 that is different in a number of ways from the version passed by the House Committee on Oversight and Government Reform in May 2013 as HR 2061. The differences from the perspective of the research community are not substantive and it retains the key features of interest to the research community. It places the burden of implementation on the Federal agencies by avoiding adding or changing, in the short term, the reporting requirements of the recipient communities. It retains consultation with stakeholders, explicitly naming higher education institutions, in the development of new common financial data standards and in the review of reporting requirements with the goals of commonality across agencies and reducing unnecessary duplication and burden. It retains a pilot program to test the common data elements and elimination of duplications and reduction of compliance costs for recipients. We will continue to monitor the progress of the DATA Act and report to the membership.

New GPS and PAPPG

In the midst of the resumption of operations, NIH issued a new *Grants Policy Statement (GPS)* that was effective immediately (October 13, 2013). In a *Summary of Significant Changes*, NIH points to the sections that have been changed in this new version of the GPS. As in the past with annual revisions, NIH has incorporated new and modified requirements implemented since the last update. The requirement for graduate and undergraduate students with a measurable role on a project to have an eRA Commons ID is included in the new GPS. As cautioned in the *NIH Guide Notice (NOT-OD-13-097)*, beginning on October 18, 2013, a warning will be generated when a Research Performance Progress Report (RPPR) is submitted that lists individuals in a graduate or undergraduate student role who have not established an eRA Commons ID. Then, beginning in October 2014, RPPRs lacking the eRA Commons ID for graduate and undergraduate students will receive an error message, and the RPPR will not be accepted by the NIH. There is a new award term for grants funded under the President's Emergency Plan for AIDS Relief (PEPFAR) Program concerning prostitution and sex trafficking which limits the use of funds. This provision is similar to those implemented by USAID and other agencies distributing funds under PEPFAR.

You will recall NIH's notice issued on July 23, 2013, that encouraged institutions to assist graduate students and postdoctoral researchers to achieve their career goals through the use of Individual Development Plans (IDPs) and report on this in all progress reports submitted on/after October 1, 2014, using the Research Performance Progress Report (RPPR). The new GPS imbeds this "expectation" as a reportable element in the RPPR. The transition of this "expectation" to "policy" is worth noting [See GPS Sections 8.4.1.1.2 and 11.3.13.4].

In a similar almost-annual event, the National Science Foundation (NSF) announced in May, 2013, proposed revision to its *Proposal and Award Policies and Procedures Guide (PAPPG)*. NSF usually finalizes proposed revisions in October with an effective date in January of the following year. As NSF labored to catch up, Jeremy Leffler announced at the October COGR meeting that NSF planned to issue the revised PAPPG in November with an effective date in February, 2014. We will notify the membership when the PAPPG is issued.