New Business Models for Research - Appendix

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APPENDIX

A: *Accountability*

Universities fully subscribe to the single audit concept embodied in the Single Audit Act and OMB Circular A-133. Under these provisions, the current system clearly provides adequate accountability and permits demonstration of responsible use of public funds. However, a number of federal agencies increasingly are insisting on performing their own audits. As a result, the government may spend more on audits than it is likely to recover from findings of deviations from requirements. Government data indicate that the findings in university audits have not skyrocketed, but in fact have declined. For example, audits by the NSF Inspector General have identified questioned costs of $8.7 million in FY 2000, $7.0 million on 2001, and $5.7 million in 2002, with corresponding sustained findings through the audit resolution process of $2.4 million, $1.9 million and $1.4 million. 1

guidance on Circular A-133 in the March 2003 Compliance Supplement, Part 6, Section M, Subrecipient Monitoring. Currently, prime recipients meet their financial monitoring responsibility by reviewing the latest Circular A-133 audit of the subrecipient, which has been accepted by the subrecipient's audit agency. The revised Circular A-133 guidance moves the oversight of subrecipients in a direction diametrically opposed to the goals of the Single Audit Act by requiring prime recipients to join the government and audit firms as an additional auditor of their sister institutions. They are now either required or strongly encouraged to conduct transaction testing to recalculate invoices, and arrange site visits to examine procedures and inspect records. Subjecting subrecipients to additional audit in this manner is an unnecessary waste of resources in the case of all those subrecipients that have already demonstrated the adequacy of their systems through their Circular A-133 audits. Such additional reviews are duplicative, costly, and disruptive, particularly since the vast majority of subawards issued by universities are made to other universities for collaborative research projects where the funding agency has already approved the participation of the collaborating university. The potential for incurring unnecessary costs through such activities will grow commensurate with the increase in collaborative research. As reported by NSF in InfoBrief 03-327, 7.2% of federally-funded university research is passed through to subrecipients, an increase from the 5.2% passed through in 1998.2

Another example of redundant and costly government rules with respect to financial accountability is the imposition of Cost Accounting Standards on universities, finalized in 1996. A COGR paper, "Cost Accounting Standards Rules for Universities: A Case of Overzealous Bureaucracy" - explains the background and chronology of events that led to these unnecessary rules.3 Imposition of CAS and the Disclosure Statement (DS-2) resulted in an estimated $20 million in start-up costs for the top 100 universities, and in the seven years since that time, only 25 universities have received audited and approved DS-2s from their cognizant federal agency.4 The other 125 remain in limbo, unsure of how to proceed when changes in accounting practices are needed. This uncertainty is particularly unnerving because under CAS rules, changes should not be made until the DS-2 is approved so that the proposed changes can be analyzed for cost

impact. Even the few universities with an approved DS-2, as predicted in the referenced paper, received inconsistent interpretations by federal auditors and rate negotiators with respect to cost items such as clerical and administrative salaries, employee benefits, and administrative computing. It is noteworthy that application of CAS to educational institutions was included in the Office of Information and Regulatory Affairs' 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates, as an unnecessary and duplicative regulation to be referred to OMB for evaluation. However, OMB rejected the review without further explanation.

B. *Inconsistency of policies and practices among federal agencies, and*
E. *Regulatory requirements*

OMB Circular A-110 is based on principles that provide a reasonable approach to the management of research supported by federal grants and agreements at universities, but the OMB guidance has not been implemented uniformly by the agencies. Over the past 20 years, the regulations have become quite inconsistent, providing several layers of administrative rules that obscure the core principles. Users now require three sources of information: the OMB basic A-110 guidance on the core principles; a diverse array of inconsistent agency implementing regulations, and a further layer of expanded authorities granted by the ten FDP member agencies to only a select group of university participants, engaged in federally approved demonstrations under the auspices of the Federal Demonstration Partnership (FDP). It is time that these "demonstrations" (begun under the Florida Demonstration Project in the early 1980's) be brought to a close and that Circular A-110 be implemented uniformly and on a government-wide basis for all research. 4

COGR has compiled a matrix of federal agency implementation of OMB Circular A-110.5 It demonstrates the wide diversity in agency implementation. It also is worth noting that "verbatim" implementation by a number of agencies, as indicated in the matrix, in fact leads to more inconsistencies, as Circular A-110 grants agencies the option to make choices in the implementation of various provisions (e.g. prior approvals). Verbatim implementation does not reveal which choices will be made by individual agencies.

At present, inconsistencies exist not only between FDP member and non-member research funding agencies, but variances exist even among the FDP agencies. The FDP General Terms and Conditions implement the "expanded authorities" contained in OMB Circular A-110 (.25(e)). However, the agency-specific requirements vary in their implementation of these prior approvals (e.g. EPA, ONR). Review of the individual agency terms and conditions indicates a wide variety of other agency-specific requirements.6 The situation is similar with regard to the Federal Acquisition Regulations (FAR) used by government agencies in research contracts with universities. While there are standardized FAR clauses, a great number of individual agency supplements exist. An example is the area of rights in data, where there are considerable individual agency variations from the basic FAR clause (FAR52.227; see for example DFARS 252.227; DEAR 927.402).7 Proliferation of these agency variances undermines the concept of a uniform government procurement system.

There are many other examples of inconsistencies in policies and practices among federal research funding agencies in the implementation of regulatory requirements. For example, only two agencies (NIH and NSF) have implemented financial disclosure requirements with regard to investigator conflicts of interest. While COGR generally supports the NSF/NIH regulations, they are not fully consistent with each other. We have consistently expressed a strong preference for a government-wide policy.8 A similar example is research misconduct. We support both OSTP's approach as set forth in the December, 2000 Federal Policy on Research Misconduct and NSF's implementation (45 CFR Part 689) . However, NSF is the only major research funding agency to date that has issued final regulations, and we are concerned about the potential inability to achieve uniform government-wide implementation.9 The streamlining and simplification process initiated by the Federal Financial Assistance Management Improvement Act of 1999 (P.L. 106-107) also seems to be moving slowly. While the initiatives undertaken by the interagency groups established under the Act have laudable goals, we are concerned that some of the proposed new approaches may increase, rather than decrease, administrative burdens on universities.10

While we are not aware of efforts to quantify the impact of these inconsistencies on recipients, it seems self evident that greater consistency among federal funding agencies would improve efficiency, reduce administrative burdens, and increase the cost effectiveness of federal research funding. It also would facilitate compliance.

H: Research Infrastructure

In this context, the term research infrastructure means research buildings, space and equipment, as well as administrative needs. The mechanism for defining and allocating the costs related to these research needs is provided in OMB Circular A-21, which defines allowable direct costs and the procedure for establishing facilities and administrative rates (F&A).

We believe that over the past 10-15 years, short term political and budget considerations have resulted in changes to Circular A-21 that have trumped the government's stated goals of providing the best science the country can afford. A pressing issue is the cap on the administrative portion of the F&A cost rate. The government has not imposed such a restriction on any other class of research providers and has not reviewed the cap in over a decade. As regulatory requirements have dramatically increased during this time, most universities now have administrative costs that exceed the cap. Currently we estimate that underrecovery by universities of legitimate administrative costs amounts to $200 million annually. More importantly, the government has not restrained the agencies from refusing to fully fund the government negotiated rate. As a result, the underrecovery of F&A costs by universities due to arbitrary agency limitations far exceeds their loss of funds due to the cap, and is estimated to be $1 billion. These data were gathered in a 2003 COGR study on the Cost of Doing Business.11 Its findings are consistent with a 2000 RAND report done for OSTP, which estimated that universities are forced to fund between $700 million and $1.5 billion of research infrastructure costs due to federally imposed limits on F&A payments.12

Universities cannot and should not bear the burden of unfair cost shifting. The 2002 NSF report on Science and Engineering Indicators states that during the past three decades, university

support for academic R&D grew faster than funds from any other source except industry and faster than any other source during the past five years. It is estimated that in 2001, academic institutions have provided about $6 billion or 20% of total academic R&D expenditures. (This compares with 11% in 1973.) According to NSF, throughout the 1980s and 1990s, university R&D funds were divided roughly equally between two components: separately budgeted institutional R&D funds and mandatory & voluntary cost sharing, which includes unreimbursed facilities and administrative costs.

With respect to facilities, a report to the NIH Director, issued in 2001, provides an analysis of the current insufficiency of biomedical research facilities, estimates of needed expansion of facilities, and the financial roadblocks to facilities renewal.13 Several of the recommendations in this report parallel the findings described by COGR. The report is entitled, "NIH Working Group on Construction of Research Facilities: A Report to the Advisory Committee of the Director, NIH".

In a further blow to the research infrastructure, the government has prohibited special cost studies, which are intended to illustrate special needs, such as for the use of energy required in high tech laboratories. COGR has repeatedly reminded OMB of its promise to issue a fair and equitable policy for utility cost recovery.14 Finally, we have pointed out on several occasions requirements in Circular A-21 that add no value and should be eliminated. A letter recommending elimination of such provisions was sent to OMB on July 3, 2002.15

I. *Information Technology*

We fully support government-wide initiatives to improve business relationships through use of electronic systems. However, after having raised the issue with federal agencies individually, COGR expressed concerns to OMB several months ago about the proliferation of federal electronic grant application programs. We noted, "…it is with dismay that we confront an increasing array of unique electronic application systems created by federal agencies some of which, in their design, fail to provide the university with the opportunity to meet its federally mandated regulatory obligations….The development of separate systems that hinder effective management will waste resources."16

This is an area of great concern to COGR and its member universities. As stated by COGR Board member Marvin Parnes of the University of Michigan in recent testimony before the House Energy and Commerce Subcommittee on Technology, Information Policy, Intergovernmental Relations and the Census, "…It is our opinion that much harm has been, and is being done, in the current research environment. Many agencies have jumped on the proverbial bandwagon of electronic grants systems. Each agency touts its system as the easiest to use, the most comprehensive, the best and foremost, and the most in tune with the users' needs. Indeed, taken alone, each might be. Taken *en masse*, they become a cacophony. University grants offices, and often individual faculty and laboratory staff, must learn all of the new systems introduced, often with less than ideal instruction or documentation available, resulting in much wasted effort. Without efficient and effective communication between the granting agency, the researcher, and the university administrators charged with fiduciary and administrative oversight, the introduction of new systems might do more harm than good".

This testimony summarizes not only the concerns of universities in this area, but also our recommendations. 17

J. Technology Transfer Optimization

COGR has worked closely with federal agencies and other higher education associations to prepare reports that provide data and information on intellectual property management. One example is the July 2001 NIH Report to the U.S. Congress, entitled "A Plan to Ensure Taxpayers' Interests Are Protected", that discussed the returns on public investment in biomedical research.18 Another example is the April, 2003 report of the President's Council of Advisors on S&T (PCAST) on Technology Transfer of Federally Funded R&D.19 These reports provide a wealth of data and information on federal technology transfer and the university technology transfer activities resulting from the Bayh-Dole Act of 1980 (P.L. 96-517) and related legislation. Both of these reports concluded that the existing technology transfer framework under Bayh-Dole works well and should not be changed. Statistical data on university technology transfer activities can be found in the annual licensing surveys of the Association of University Technology Transfer Managers (AUTM).20

COGR historically has strongly supported the goals and policy objectives of the Bayh-Dole Act. Therefore, we are concerned that recent initiatives on the part of a number of government agencies have departed from the uniform federal framework provided by the Act and its implementing regulations (37 CFR Part 401). 21 We also are concerned about the expansion of the previously unique DOD authority to fund "transactions other than contracts, grants and cooperative agreements" for basic, applied and advanced R&D projects and prototypes. The authority has been expanded to the new Department of Homeland Security (DHS), and further expansion to other agencies has been discussed. "Other transactions (OTs)" are not subject to the normal federal contract (i.e. FAR) or grant (i.e. OMB/agency grant regulations) requirements. Of particular significance, OTs do not require Bayh-Dole Act patent rights or obligations to be applied to either prime or sub awardees. They also are not subject to standard government administrative and financial compliance requirements. While some aspects of the flexibility provided by OTs might be beneficial both for the government and research performers, we believe a further trend away from Bayh-Dole patent rights is neither in the national interest nor in the interests of universities. 22

With respect to the impact of technology transfer on social relationships, we point to testimony presented by COGR Board member Andrew Neighbour of the University of California at Los Angeles before the House Energy and Commerce Subcommittee on Health at its July 10, 2003 hearings on NIH: Moving Research from the Bench to the Bedside.23 Dr. Neighbour noted in his testimony that "The passage of the Bayh-Dole Act in 1980 was a bold and inspired move that shifted from the government to universities the responsibility for protecting and commercializing inventions made with federal funds. The Act applies to research funded by any federal agency. However, because most life sciences and biomedical research is supported through the NIH, and this segment tends to generate the most intellectual property, it is the NIH that plays perhaps the most visible role in Bayh-Dole implementation. Over the past twenty years or so, the guidance, oversight and coordination provided by NIH has served to build a collaborative alliance between academe and the government leading to more and more effective technology transfer."

Dr. Neighbour went on to note that unfortunately, however, these successes have turned a spotlight onto the process which, in turn, has caused some to ask whether universities are getting too rich from taxpayer supported research or whether they are perhaps wasting this resource and not realizing adequate return on investment. He indicated that while oversight and monitoring of federally supported programs is clearly appropriate and desirable, some of the criticisms appear to be founded on misunderstandings of the process and the drivers that motivate its participants.

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1 NSF audit resolution – staff presentation at February 2003 COGR Meeting Click here to view.

2 NSF INFOBRIEF 03-327, August 2003 Click here to view.

3 "Cost Accounting Standards Rules for Universities: A Case of Overzealous Bureaucracy", Milton Goldberg and Kate Phillips Click here to view

4 DHHS IG Staff Presentation at February 2003 COGR Meeting Click here to view.

5 Matrix of OMB Circular A-110 implementation by agency Click here to view

6 FDP Terms and Conditions Click here to view.

7 Presentation by Robert Hardy, COGR Associate Director, at AUTM Meeting Click here to view.

8 COGR letters to NSF and NIH on conflicts of interest Click here to view NSF letter and Click here to view NIH letter

9 COGR letter to OSTP on misconduct in science Click here to view

10 COGR letter to DHHS on P.L. 106-107 Click here to view

11 COGR Cost of Doing Business Click here to view

12 "Paying for University Research Facilities and Administration", Charles A. Goldman and T. Williams, 2000, RAND (301-451-7002)

13 NIH Working Group on Construction of Research Facilities: A Report to the Advisory Committee of the Director, NIH, June 2001 Click here to view.

14 COGR letter to OMB on Utility Cost Adjustment Click here to view. and supplemental information Click here to view

15 COGR letter to OMB on streamlining OMB Circular A-21 Click here to view.

16 COGR letter to OIRA on proliferation of electronic research administration systems Click here to view

17 Testimony of Dr. Marvin Parnes before the House Committee on Energy and Commerce, Subcommittee on Technology, April 2003 Click here to view.

18 NIH Report to Senator Ron Wyden Click here to view.

19 PCAST Report on Technology Transfer (Not published yet)

20AUTM Licensing Survey Click here to view.

21 Foreign Entity Invention Rights Click here to view.
COGR Letter to National Institutes of Mental Health on FAR Deviation in patent rights Click here to view.
COGR Letter to Department of Commerce on Veterans' Administration and Bayh-Dole Act Click here to view.

22 Other Transactions Concerns Click here to view.

23 Testimony of Dr. Andrew Neighbour before the House Committee on Energy and Commerce, Subcommittee on Health, July 2003 Click here to view.