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December 2011 Update

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COUNCIL ON GOVERNMENTAL RELATIONS

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TO: COGR Membership
FROM: COGR Staff
SUBJECT: December 2011 Update

TABLE OF CONTENTS

USDA, National Institute of Food and Agriculture F&A Cap Increased
Accelerating Spending on ARRA Programs; Guidance Pending
National Institutes of Health Adopts Animal Care *Guide*
National Science Foundation to Survey Conflicts of Interest
National Institutes of Health Conflicts of Interest
Select Agents and Toxins
The Digital Accountability and Transparency Act (DATA)
The Grant Reform and New Transparency Act (GRANT)
Small Business Subcontracting Reporting
Privacy Act Training

USDA, National Institute of Food and Agriculture (NIFA) F&A Cap Increased

Section 720 of the General Provisions to the Consolidated and Continuing Appropriations Act, 2012 (Pub. L. 112-55), enacted November 18, 2011, states that: “*None of the funds in this Act shall be available to pay indirect costs charged against any agricultural research, education, or extension grant awards issued by the National Institute of Food and Agriculture that exceed 30 percent of total Federal funds provided under each award ...*”

While the 30 percent limitation on total Federal funds (which translates to an effective F&A cap of 42.8% of Modified Total Direct Costs) continues to symbolize an arbitrary cap on F&A reimbursement, it represents an increase from the 22 percent limitation that previously was in effect. In addition, statements from former NIFA Director, Dr. Roger Beachy, suggest that NIFA and the USDA recognize that F&A caps discourage participation in NIFA complete grant programs. Guidance regarding how the new limitation is to be applied will be forthcoming from NIFA.

Accelerating Spending on ARRA Programs: Guidance Pending

COGR provided an update in the October Meeting Report (November 18, 2011) regarding the Office of Management and Budget (OMB) Memorandum M-11-34 (Accelerating Spending of Remaining Funds from the American Recovery and Reinvestment Act for Discretionary Grant Programs). The OMB memo was issued on September 15, 2011, and can be accessed at the following link:

<http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-34.pdf>

OMB M-11-34 is of particular significance to the National Science Foundation (NSF), and consequently, recipients of NSF ARRA funding. Many NSF ARRA awards were established as multi-year awards with the program period extending beyond September 30, 2013. For example the Faculty Early Career Development (CAREER) program comprised over half of the ARRA awards with expiration dates beyond September 30, 2013.

Many of your PIs are receiving correspondences from NSF program staff requesting the PI to accelerate spending on ARRA programs that are scheduled to extend beyond September 30, 2013. While OMB Memorandum M-11-34 does allow agencies to provide waivers for accelerating spending, the OMB guidance states that “[a]gencies should request such waivers sparingly ...” Currently, it is unclear how NSF, or other research funding agencies, will address M-11-34. Policy staff from NSF currently is coordinating with policy staff from NIH on implementation of M-11-34 and hopes to issue guidance to the community during the week of December 12th, or shortly after.

National Institutes of Health Adopts Animal Care Guide

The National Institutes of Health (NIH) has adopted the 8th Edition of the *Guide for the Care and Use of Laboratory Animals* (NAS, 2011) effective January 1, 2012. Institutions receiving Public Health Service (PHS) support for research involving animals must base their program on the 8th Edition of the *Guide* and complete at least one semiannual program review and facilities inspection under the *Guide* by December 31, 2012. NIH has prepared a series of “Position Statements” to clarify the ways in which NIH expects institutions to address implementation and which endorse the performance standards articulated in the *Guide*.

National Science Foundation to Survey Conflicts of Interest

The National Science Foundation has signaled that it will conduct a survey of a sample of its grant recipients to determine how grantees identify, oversee, and manage financial conflicts of interest in research funded by NSF. This survey appears to replicate one conducted by the NSF Inspector General in early 2011. The IG’s *Audit of NSF’s Oversight of Grantee Institutions’ Conflicts of Interest* (OIG 11-2-009) found institutions’ policies generally compliant and recommended NSF develop procedures to ensure conflicts are managed, reduced or eliminated as required by the policy. This survey may be NSF’s first step in response.

National Institutes of Health Conflicts of Interest

We continue to review the option available to object to the recently implemented PHS/NIH financial conflicts of interest (FCOI) regulations. The Board has provided direction to the staff and we will keep the COGR membership informed as we move through this process. As noted in the October meeting report, the outcome of any request for revisions will take time so institutions should proceed to plan their implementation under the new regulations.

Select Agents and Toxins

COGR submitted comments to the Centers for Disease Control and Prevention and USDA Animal and Plant Health Inspection Service (APHIS) concerning the regulations governing the Possession, Use and Transfer of Select Agents and Toxins. A copy of COGR’s comment is available at www.cogr.edu (under Latest News). An additional period for comment may be

provided by CDC and APHIS. Institutions interested in commenting on the list of agents and toxins and the proposed regulatory revisions should monitor the *Federal Register* for notice of an additional comment period.

The Digital Accountability and Transparency Act (DATA), H.R. 2146

The Digital Accountability and Transparency Act (DATA) has been approved by the House Committee on Government Oversight and Reform. This bill would perpetuate the financial reporting requirements established for ARRA, without eliminating the current agency reporting requirements. We wrote to Committee Chairman Issa, to explain the burden this new reporting requirement would create. The September 15, 2011 letter to Chairman Issa is posted to the COGR web site. We have had several discussions with Committee staff on possible revisions to the bill, and those discussions continue. Full House action on the bill is uncertain, and we are advised that no action will occur in the Senate unless it passes the House first.

The Grant Reform and New Transparency (GRANT) Act of 2011, H.R. 3433,

The Grant Reform and New Transparency (GRANT) Act has also been approved by the House Government Oversight and Reform Committee. The legislation, introduced by Oversight Subcommittee on Technology and Information Policy Chairman James Lankford, R-OK, directs agencies to establish uniform standards for how they announce and award grants. We have been speaking to the committee staff and discussed our concerns with certain provisions of the bill and our recommendations to improve it. Specifically, we are concerned about requirements in the bill that would make the names of peer review panel members public as well as those that would require posting grant applications on a public website.

In order to make clear our concerns, COGR joined with AAU and APLU in writing to the House Committee and Subcommittee Chairmen, with copies to the House leadership, and the letter dated November 28, 2011, is posted to the COGR web site. There is no Senate version of the bill, and passage by the full House is uncertain, but we will stay closely engaged and work with our federal relations colleagues to challenge the bill when necessary.

Small Business Subcontracting Reporting

COGR submitted comments on December 5 on proposed new requirements announced on October 5 (*76FedReg*61626) by the Small Business Administration (SBA) for “covered contracts” where small business subcontracting plans are required (contracts above \$650k). The proposed new requirements would require prime contractors to notify the government contracting officer whenever the prime does not use a subcontractor used in preparing the bid or proposal during contract performance or whenever the prime reduces payments to a subcontractor or the payments are 90 days or more past due. These requirements implement provisions of the Small Business Jobs Act of 2010 (H.R. 5297). An additional proposed new requirement would require subcontracting plans and reporting for individual task orders under multi-agency Federal Supply Schedule IDIQ contracts.

In our comments, which can be found at the COGR website, we pointed out that the proposed rule does not indicate the frequency or the point in time during contract performance when the notifications are required. We also pointed out that the notification requirements would be onerous, since small business vendors mentioned in proposals and the planned expenditure levels

often may change during actual performance of the work. With regard to IDIQ contracts, subcontracting achievements currently are reported for the entire contract, and reporting on a task order basis adds burden with little apparent benefit. Given the substantial new burdens, we requested that SBA reconsider whether case-by-case notifications necessarily are required by the Jobs Act, and whether the new IDIQ reporting requirement adds any real value.

Privacy Act Training

On December 8 COGR submitted comments on a proposed rule (*76FedReg63898*) to amend the Federal Acquisition Regulations (FAR) to require contractors to complete training that addresses the protection of privacy in accordance with the Privacy Act of 1974, and the handling and safeguarding of personally identifiable information.

Our comments expressed the view that the proposed rule set forth no compelling reason to requiring expanding privacy training for government contractors and runs counter to the Administration's regulatory streamlining initiatives. While supposedly aimed at ensuring consistency across the Government, it does not supersede other applicable laws or regulations requiring training of contractor personnel on compliance requirement with regard to handling and safeguarding information (e.g. FISMA, OMB Circular A-130). The proposed rule also makes contractors responsible for ensuring compliance with the training requirements, including agency-specific privacy training requirements, which runs counter to the consistency goal and raises compliance and burden issues for contractors. Researchers and staff working on contracts from multiple agencies could be required to complete multiple, and potentially conflicting, training requirements.

Given that the proposed rule adds unnecessary burdens while providing no obvious benefit to either the Government or the contracting community, we requested that the FAR Councils withdraw the rule. A copy of the letter can be found on the COGR website.