

COUNCIL ON GOVERNMENTAL RELATIONS

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TO: COGR Membership

FROM: COGR Staff

SUBJECT: May 2013 Update

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NSB Examines PI Administrative Burden

As we reported, the National Science Board (NSB) is examining the source of the administrative burdens on investigators with the goal of making NSF-level changes and recommending to the President and Congress government-wide changes that will help reduce that burden. The NSB issued a request for comments which can be found at: http://www.nsf.gov/nsb/committees/ab/tskforce_ab_rfi.jsp and **extended the deadline for responses to June 7, 2013**. COGR will be submitting comments, and we encourage COGR members to encourage their investigators to respond to the NSB.

DATA Act Remix

Representatives Darrell Issa (R-CA) and Elijah Cummings (D-MD) introduced a revised version of the *Digital Accountability and Transparency Act (DATA)* (HR 2061) on Tuesday, May 21, 2013. Unlike the House-passed version from 2012 (HR 2461), the new measure would not impose significant new reporting requirements on federal grant and contract awardees, but focus on setting government-wide data standards. Similar to the 2012 Senate version (S 3600) proposed by Senators Mark Warner (R-VA) and Rob Portman (R-OH) in most respects, the

revised bill includes a three-year pilot program to evaluate consolidated financial reporting and its ability to increase transparency and reduce the compliance burden on federal award recipients. The pilot would include recipients that collectively receive more than \$10 billion in federal funds and have received funds from multiple agencies in the form of contracts, grants, and sub-awards. Senators Warner and Portman introduced the Senate companion on Tuesday.

COGR has joined with AAU and APLU to offer support for the goals of the DATA Act – transparency and accountability – and acknowledge the value of government-wide financial data standards, the review of current financial reporting requirements with the goal of reducing duplication and costs; and evaluation, through the pilot, consolidated reporting. The letter of support is posted to the COGR web site. We will keep the membership informed as the proposed DATA Act begins its path through Congress.

Grants Reform Summary and June 2nd Comment Deadline

COGR has provided regular updates to the COGR membership since the Proposed Guidance (i.e., Grants Reform) was released on February 1st. The “*Proposed OMB Uniform Guidance: Cost Principles, Audit, and Administrative Requirements for Federal Awards*” was published in the February 1, 2013 – Federal Register Notice (first link below). In support of the Proposed Guidance, OMB provided a number of additional documents (second link below):

<http://www.gpo.gov/fdsys/pkg/FR-2013-02-01/pdf/2013-02113.pdf>

http://www.whitehouse.gov/omb/grants_docs#proposed

The Proposed Guidance is a 241 page document (or a 244 page document if you downloaded the initial posting) that consolidates Administrative Requirements (Circulars A-110, A-102, A-89), Cost Principles (Circular A-21, A-87, A-122), and Audit Requirements (Circulars A-133, A-50) into a single document. Pending a possible future review, the Cost Principles for Hospitals (*Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals*) that are in the regulations of the Department of Health and Human Services (45 CFR Part 75, Appendix E) may be addressed at a later date.

In response to requests by COGR and other stakeholders, OMB extended the deadline for comments from May 2nd to June 2nd. Comments can be submitted at [regulations.gov](http://www.regulations.gov) under docket number OMB-2013-0001. The Federal Register Notice that confirms the deadline extension can be found at: <http://www.gpo.gov/fdsys/pkg/FR-2013-03-21/pdf/2013-06455.pdf>

Institutional Responses to OMB. COGR encourages every COGR institution to respond to OMB. The more comment letters that OMB receives supporting our positions, the better. As you work toward completion of your institutional response, we highly recommend the following approach – this will demonstrate to OMB that we have a cohesive voice.

- Emphasize your institutional priorities. Pages 3 thru 5 of the COGR VERSION 2 – DRAFT (see next section) has been updated to focus on our top priorities.
- Include “thank you” for those items that are most helpful. A “thank you” will confirm to OMB the things we like and it will offset other commenters who may not like the change.
- Include institutional anecdotes and/or data when possible.

- If possible, include Faculty endorsement(s). We believe the COGR final version will not include any divisive responses.
- **DO NOT** copy and paste the entire COGR response into your institutional response. That will not be helpful to OMB.
- If you need to keep it simple, **ENDORSE** the COGR response. If you are in full agreement with the COGR response, a strong one page endorsement can carry a lot of weight.
- Of course, if you disagree with any of the COGR comments, include these comments in your institutional response.

Upon completion and submission of your institutional response, we encourage you to share a copy with COGR. Send the copy to dkennedy@cogr.edu.

COGR Response to OMB: VERSION 2 – DRAFT available on May 22nd. In an email to the COGR ListServe on Friday, April 19th, we provided the membership with the VERSION 1 – DRAFT of the COGR Response to the Proposed OMB Guidance. Seven workgroups including over 25 individuals (see next section) from the COGR Costing and RCA Committees, plus at-large volunteers, developed the VERSION 1 comments.

On May 1st and 2nd, members from the COGR Costing and RCA committees met in Washington D.C. to review and to begin refining the first draft. *The VERSION 2 – DRAFT was sent to the membership on Wednesday, May 22nd.* It is a red-lined / track changes version so that you can see the changes that have been made.

It is unlikely we will be able to share the FINAL VERSION of the COGR Response prior to the June 2nd submission deadline. However, the VERSION 2 – DRAFT is 95% (or more) representative of the Final Version. If there are any major changes between the VERSION 2 – DRAFT and the FINAL VERSION, we will notify the membership by May 30th, at the latest.

OMB Controller Danny Werfel Moves to the IRS

COGR has worked closely and productively with OMB on Grants Reform for over two years. Danny Werfel, as the OMB Controller, has been a leading force behind this initiative and has been a trustworthy and available partner throughout the process. Danny was appointed as the OMB Controller in October 2009, and soon after, COGR worked closely with him during the implementation of ARRA. Danny is a strong supporter of the higher education community and has helped to ensure that the interests of research universities have not been lost amidst the loud voices of the States and other constituencies. Effective May 22nd, at the appointment of President Obama, Danny has moved into the role as Acting Commissioner of the IRS.

COGR and the research community wish Danny the best in his new role and extend out thanks for the sincerity and professionalism Danny brought to his position as the OMB Controller. COGR will continue working closely with OMB over the next year as the new guidance is released and grants reform is implemented.

Important Contributions from the COGR Workgroups and Membership

Seven workgroups including over 25 individuals from the COGR Costing and RCA Committees, plus at-large volunteers, formally have been involved in developing the COGR Response. This is a major effort and those individuals from each of the seven workgroups are recognized below (first name listed represents the workgroup chair).

As we shared in the April 2013 COGR Update, a special recognition to Wally Chan who unexpectedly passed away on March 29th. Wally was a great friend of the higher education and research community, serving as a higher education consultant in private industry and in the San Francisco office of the Division of Cost Allocation (DCA) for over thirty years. After his retirement from the DCA at the end of 2011, he joined the University of California, San Francisco (UCSF) in 2012 and served as a special advisor to the UCSF Vice Chancellor of Finance. He was an important contributor to the Costing Principles workgroup and helped us begin to formulate several key responses to the proposed guidance. Wally will be missed, but his contributions to our community will be remembered. Condolences can be sent to Roz Chan at 10 Hoods Point Way, San Mateo CA 94402.

Administrative Requirements:

Mike Ludwig (Purdue)
Pam Caudill (Harvard Medical)
Michelle Christy (MIT)
Patricia Greer (MIT)

Subrecipient Monitoring:

Pamela Webb (Minnesota)
Jim Barbret (Wayne State)
Rick Inglis (Johns Hopkins)
Maggie Gillean Schamber (Texas, Austin)
Susie Sedwick (Texas, Austin)

Costing Principles:

Dan Evon (Michigan State)
Sue Camber (U of Washington)
Wally Chan (UCSF)
Nilo Mia (UCSF)
Eric Vermillion (UCSF)
Pamela Webb (Minnesota)

Effort Reporting/Payroll:

Jim Luther (Duke)
Dan Evon (Michigan State)
Joe Gindhart (Washington U)
Terry Johnson (Iowa)
Kim Moreland (Wisconsin)

Audit Requirements:

Mary Lee Brown (Penn)
Pam Caudill (Harvard Medical)
Charlene Hart (Nevada, Reno)
Ron Maples (UT, Knoxville)
Michael Miller (NYU)

F&A:

Cindy Hope (Alabama)
Mike Anthony (U of Washington)
Cathy Snyder (Vanderbilt)

Definitions Review:

Susie Sedwick (Texas, Austin)
John Shipley (Miami)

Many of you, in addition to the individuals shown above, have contributed insights either through channeling your comments through the leadership at your institution, or by directly contacting COGR staff. We appreciate all the input that you have provided; thank you! We look forward to working with your institutions as we work toward the final COGR and Institutional

Responses, as well as working with you beyond the June 2nd deadline as OMB develops the Final Guidance.

NIH and Costing of NIH-Funded Core Facilities – Final FAQs Are Available

The FAQs for Costing of NIH-Funded Core Facilities were released on April 8, 2013, per NIH Notice Number: NOT-OD-13-053. The FAQs can be accessed at:

<http://grants.nih.gov/grants/guide/notice-files/NOT-OD-13-053.html>

COGR has provided ongoing and abundant input to NIH staff, beginning in September 2010 when the original NIH Notice was published (NOT-OD-10-138). COGR submitted a formal response to NIH, dated December 8, 2010. At the time, our understanding was that NIH would release a final version of the FAQs in the Spring 2011. However, other priorities, including internal reorganizations at NIH, resulted in the effort being put on hold.

NIH revitalized this initiative last November and COGR actively engaged with NIH between November 2012 and January 2013. COGR comments to NIH over this period were developed by a Workgroup that included individuals from your institutions who volunteered to be on the Workgroup (see COGR Update, December 20, 2012). Now that the FAQs have been released, we can offer our review. COGR's assessment of the final version of the NIH FAQs is mixed. Below is a summary and our observations:

- 1) We urged NIH to narrow the scope of the FAQs to NIH-Funded Core Facilities, and to not broadly address service centers, recharge centers, specialized service facilities, and other similar activities. NIH eliminated many of these broad references, and COGR believes that the final version of the FAQs adequately addresses NIH-Funded Core Facilities only.
- 2) We asked NIH to recognize Working Capital Reserves as necessary in the normal course of business operations. This concept is a long-standing principle in OMB Circular A-87 (State and Local governments). To our disappointment, NIH did not speak to this topic in the final version of the FAQs, though they have indicated that they would be supportive if Working Capital Reserves were cited in the Final Guidance from OMB.
- 3) We also asked NIH to address the concept of an Equipment Replacement Cost Factor in those cases where the core facility equipment was acquired fully or partially with federal funds. Approval of an equipment replacement methodology would help to ensure that institutions and their core facilities maintain access to state-of-the art equipment, while not having to over-rely on future equipment grants from NIH. Again, to our disappointment, NIH did not address this topic in the final version of the FAQs.
- 4) COGR objected to the “one service, one rate” operating principle (FAQ 3). This “principle”, which appears to have no authority in any federal guidance, might be construed as limiting those situations where differential rates are appropriately charged to different sets of users. In fact, differential rates can be appropriate when accounted for correctly and when it can be established that the federal government is not subsidizing other users. FAQ 4a) acknowledges this: *“In general, the fees collected on behalf of each internal user of a specified service should be the same. However, the amount charged to the user may vary according to the type of user, as long as the difference is*

made up from some other source or the institution will be required to absorb the difference.” Consequently, COGR believes that rather than providing helpful guidance, the “one service, one rate” reference fosters confusion.

As your institutions consider the NIH FAQs for Costing NIH-Funded Core Facilities, COGR reminds you that agency FAQs do not represent official federal policy. In fact, NIH acknowledges this in the preamble to the FAQs: *“The purpose of these FAQs is to provide answers to common questions raised regarding NIH-funded core facilities and other applicable research related facilities that support NIH grants. These FAQs are not intended to establish new policies or interpretations of applicable Federal cost principles, nor are they meant to represent broad guidance on the costing treatment of all institutional service and recharge centers.”*

And while there may be examples of auditors using FAQs to inform their audit approach, we need to continue to remind the audit community that FAQs do not represent official federal policy. COGR will continue to advocate to NIH that they address those points of concern that we have identified in the FAQs, and we also will utilize the COGR Response to the Proposed OMB Guidance to speak to the same issues, where appropriate.

Thursday Morning Session at June 6th COGR Meeting: Administration of Service Centers and Federal Guidance

The release of the FAQs for Costing of NIH-Funded Core Facilities (see above) provides an opportunity to assess how our institutions manage core facilities, as well as related issues. However, the discussions with NIH highlighted the fact that there is little federal guidance related to service centers. The current OMB Circular A-21 addresses Specialized Service Facilities, but there is no mention of service centers or recharge centers. And while COGR will propose that selected issues related to service centers be addressed in the Final Guidance, our recommendations will not include any prescriptive suggestions or specific rules on how to manage service centers.

One of the Thursday morning sessions at the June COGR Meeting will address service centers, core facilities, and related issues. Specifically, we will address these topics:

- 1) Recap of the COGR Response to OMB, as applicable to Service Centers;
- 2) Recap of the NIH FAQs and their impact, if any, on how we manage NIH Core Facilities;
- 3) Service Center challenges at our institution; and
- 4) Good Service Center practices at our institutions.

COGR will utilize ideas from this session to help formulate how best to engage federal officials as it relates to federal policies that could be helpful to our community. And if pertinent, we will use input from this session to determine if good practices can be documented in a manner that would be beneficial to research 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.

New GAO Study on Indirect Costs. As we reported in the past two COGR Updates, the U.S. Government Accountability Office (GAO) – an independent, nonpartisan agency that works for Congress to investigate how the federal government spends taxpayer dollars – has begun a study on the indirect costs for National Institutes of Health (NIH) funded extramural research. The study is now fully underway. COGR has met with the GAO team conducting the study, and we know of six COGR schools that have met or are scheduled to meet with the GAO staff.

The study is in response to a request from Senator Jeff Sessions on the Senate Committee on the Budget. The GAO study will examine: a) the protocol for setting policies for covering indirect costs paid to universities, b) the amounts in indirect costs paid out to the largest universities by NIH, and c) how indirect costs vary across NIH grantees. You may recall the GAO study completed a study in 2010 (see <http://www.gao.gov/products/GAO-10-937>), which was conducted in response to the 2007 DOD indirect cost cap on basic research awards. While the new study appears to be unrelated to the 2010 study, some of the same issues are being covered. We will continue to report on this development and will update the membership as we learn more.

NIH Fiscal Policy for the Remainder of FY2013. On May 8th, NIH published their fiscal policy for grant awards for the remainder of FY2013. In addition to a summary of broad NIH fiscal policies, the notice also states that the NIH awarding Institutes/Centers (ICs) will develop and post their fiscal policies consistent with overall NIH goals and available FY 2013 funds. NOT-OD-13-064 is available at:
<http://grants.nih.gov/grants/guide/notice-files/NOT-OD-13-064.html>

NIH Salary Limitation Remains at \$179,700. In January, the President issued Executive Order 13635, which would have allowed for certain rates of pay to be adjusted after March 27, 2013, effectively resulting in an increase in the Executive Level II NIH Salary Limitation from \$179,700 to \$180,600. However, on April 5, 2013, Executive Order 13641 (see link below) was signed and superseded Executive Order 13635. Executive Order 13641 provides for no increase in the Executive Level pay scale and the Executive Level II salary level remains at \$179,700. Also looming are rumblings that the Executive Salary Level III could come into play, possibly with the FY2014 federal budget. We will pay close attention to this issue as negotiations on the FY2014 budget proceed.
<http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/pay-executive-order-13641-adjustments-of-certain-rates-of-pay.pdf>

Department of Justice (DOJ) – Concerns with Policy Clarification; UPDATE. The DOJ, Office of Justice Programs recently released clarifying guidance, subject to the DOJ “Policy and Guidance for Conference Approval, Planning, and Reporting,” on the application of F&A rates to subcontracts/subawards and to participant support costs. The clarifying guidance broadens the definitions of the \$25,000 Subcontract/Subaward Limitation and

Participant Support Costs, and effectively, restricts application of the F&A rate on costs related to conferences, trainings and meetings. COGR staff has conferenced with staff from the DOJ policy office and legal counsel and has raised objections to the DOJ policy clarification. Their position is that the \$25,000 threshold is applicable not only to subrecipient agreements, but to third-party vendor contracts, as well. COGR is pursuing this issue and will raise this topic in our response to the Proposed OMB Guidance.

Accelerating Spending on ARRA Programs: NSF and NIH. In early March, NSF notified all awardees of the status of their ARRA awards and reminded them to responsibly accelerate spending. On March 20th, NSF sent a follow up email to only those awardees with ARRA awards included on NSF's waiver list to notify them that NSF had received verbal approval from OMB to inform awardees that NSF's requested waivers would be granted. Therefore, ARRA awards included in the NSF's waiver request may continue as necessary beyond September 30, 2013, in accordance with the award terms and conditions. In the case of NIH, the ICs have made contact with the impacted grantees, and in the specific case of construction waivers, these waivers were approved by OMB.

Grant Reporting Information Project (GRIP): REPORT UNDER FINAL REVIEW. COGR has provided updates on GRIP since last October. GRIP is an initiative currently being led by the Recovery Accountability and Transparency Board (RATB) to explore implementing an ARRA-type reporting model for all federal grants (note, contracts are not part of GRIP). The initiative is in a proof-of-concept/pre-pilot stage and should be considered preliminary. The results of the pre-pilot will help determine if GRIP should be expanded to a full pilot. The RATB will release a report that provides findings from the pre-pilot; the report currently is under final review. Future development of the GRIP initiative will be subject to critical review by many stakeholders and possible outcomes cannot be predicted at this time. COGR is paying close attention to all developments related to GRIP, including discussions involving a "Universal Award ID" initiative and issues associated with federal payment systems.

Department of Treasury Offset Program (TOP) and Delinquencies with the VA. We have reported on this issue in the past several COGR Updates. In January, we connected with NACUBO to learn more about broad concerns regarding the TOP, and specific concerns with how the VA has processed delinquencies through the TOP. In February, we learned that the Association of Government Accountants (AGA), a membership organization of more than 16,000, comprised of local finance directors, state auditors, federal chief financial officers, academicians and private sector leaders, has engaged with the Department of Treasury and OMB to address concerns related to the TOP. Our understanding is that several States, including Maryland, Arizona, and Nevada have been active in this project. Issues, such as the recent issue with the VA, will be looked at. COGR will continue to follow this issue and keep the membership posted on new developments.

A-133 Compliance Supplement for 2013. We expect that OMB will be releasing the A-133 Compliance Supplement for 2013 soon. We will keep the membership posted on the status of the Compliance Supplement.

Implementation of the NSF Award Cash Management System (ACM\$). Our understanding is that implementation of ACM\$ is underway. COGR has not been informed

of specific experiences to-date; however, we will follow the implementation and any issues that ensue.

NIH Policy on F&A Rate Changes. While this is not the case for A-21 institutions, A-122 organizations are allowed to adjust their F&A rates in the middle of an award cycle, if the F&A rate changes. However, at least one A-122 institution has been told by two different NIH ICs that the ICs in question no longer make a distinction between A-122 and A-21 institutions. Officials from the NIH Office of Policy for Extramural Research Administration (OPERA) are reviewing this situation.

HHS Memorandum to HHS Grantee Community – Grants Policy Statement. HHS has notified the grantee community that HHS has completed a revised draft version of its Grant Policy Statement. They anticipate publication in the summer of 2013 and implementation in the fall of 2103. They have indicated that they will keep the grantee community posted and that all appropriate documentation will be posted at: <http://www.hhs.gov/grants/>

COGR Meets with PCORI to Discuss Contract Issues

We have heard from a number of COGR member institutions about concerns with the terms included in contracts from the Patient-Centered Outcomes Research Institute (PCORI) established by the Affordable Care Act (P.L. 111-48; Subtitle D; Section 6301). On May 22 a group of university representatives and COGR staff met with PCORI leadership and staff to discuss these concerns.

We discussed the challenges of managing research under contracts and suggested a shift to a cost reimbursement approach to alleviate some financial management issues and focused on two principal areas of concern, peer review and disclosure of financial conflicts of interest. We offered modifications that we believe can meet PCORI's statutory requirements for ensuring public access to information and accountability while streamlining the review and compliance issues for institutions. Finally, we briefly discussed the limitation on F&A (40%).

The discussion throughout was cordial and positive. PCORI representatives expressed understanding of many of the concerns, and said they would further consider our suggestions. We will wait and see if this leads to modifications in the contract terms of concern.

Supreme Court Finds for Monsanto in “Roundup Ready” Soybean Case

The COGR December 2012 Update summarized this case which involves Monsanto's “Roundup Ready” patented transgenic soybean seeds. Under the terms of the Technology Agreement under which a farmer uses the seeds, the farmer's use of the seed is limited to one planting season unless further royalties are paid. Bowman, an Indiana farmer, used “commodity seeds” (intended for human or animal consumption) which he purchased from a grain elevator that he suspected contained the Roundup Ready gene to plant a second crop each season (after purchasing the seed for his first crop from a Monsanto affiliate and complying with the agreement). Monsanto sued Bowman for patent infringement.

Bowman argued on the theory of patent exhaustion that the company had exhausted its patent rights after the initial sale of the seeds. That doctrine limits a patent holder's right to control what others can do with a patented item once an authorized sale occurs. The Federal Circuit

rejected that argument and held that Bowman had “created a newly infringing article” by planting the commodity seeds. The Supreme Court unanimously upheld that decision on May 13 (Docket No. 11-796). In the Court’s opinion, the patent exhaustion doctrine would allow a farmer who purchases patented seeds to use or sell those seeds. However, the doctrine does not allow the farmer to intentionally “reproduce” and “make additional” copies of the particular patented seeds for his own use or sale to others, without permission from the patent holder—just as the purchaser of a patented machine does not have the right to make copies and use or sell them. The exhaustion doctrine does not extend to the right to make a new product. Otherwise a patent would protect an invention only for a single sale. The Court recognized the complexity of biological patents, particularly for self-replicating materials, which “are becoming ever more prevalent, complex and diverse.” Self-replication might be necessary to use an item such as a computer program. The opinion made clear its holding applies only to the intentional intervention of the purchaser to make replicas and deprive the patent holder of its royalties.

As noted in the Update, while a number of universities and university associations joined in an *amicus* brief in support of Monsanto, COGR did not participate. Some legal commentators have expressed surprise that the Supreme Court took the case, and the unanimous decision indicates that there was little disagreement among the justices. We noted in the February 2013 Update some criticisms of universities participating on the side of Monsanto.

Federal Circuit Decision Muddies the Patentability of Software and Business Methods

On May 10 a deeply divided Federal Circuit “decided” *en banc* the case of *CLS Bank v. Alice Corp.* (No. 2011-1301). In a short *per curiam* opinion, the court affirmed the district court’s finding that the claims were not patent eligible. However, there were six separate opinions filed in the case with “Additional Reflections” by Chief Judge Rader, totaling 138 pages.

The patent claims involved a computerized trading platform used for conducting financial transactions in which a “trusted” third party settles obligations between a first and second party to eliminate settlement risk. For example, the third party could verify each party’s ability to perform before obligations are actually exchanged. (One example is two banks who agree to exchange currency but postpone the actual exchange until the price is confirmed later). The district court held that the method claims were directed to unpatentable abstract ideas. The Supreme Court 40 years ago held that laws of nature, natural phenomena, and abstract ideas are ineligible for patent protection. In this case “shadow” records were created for each stakeholder and held by the independent third party and then updated, with the actual exchanges occurring at the end of the day when the shadow records indicated sufficient resources were available after the accumulated adjustments to satisfy each party’s obligations. It was a form of escrow done automatically by computer implementation. A majority of the judges held that this was simply an abstract idea facilitated by computer. The fact that the transactions were implemented by computer systems did not add any inventive concept. Using an escrow to avoid the risk of one party’s inability to pay is only an abstract concept. The dissenting judges felt that the system covered by the patent claim was considerably more than an abstract idea, and that the validity of all business method, financial system and software patents now are at risk.

Legal commentary on the decision has been fairly devastating (e.g. “Federal Circuit Nightmare” (www.ipwatchdog.com; www.patents4life.com)). Commentators note that it is unclear how the U.S. Patent and Trademark Office will respond to the decision and that it almost inevitably will need to be reviewed by the Supreme Court. However some also feel that the Supreme Court’s

previous decisions in the patent area have created a legal morass. Their view is that it is understandable that the Federal Circuit would have a very difficult time dealing with these precedents, leading to such results. We will continue to follow developments.

Confusion Continues Over Micro Entity Status Eligibility

We reported in last month's COGR Update about the confusion over the eligibility of institutions of higher education for the new micro entity patent filing status and 75% fee reduction established by the America Invents Act (AIA). We noted that so long as the university inventors themselves are the patent applicants (and meet one of two criteria), they may claim micro entity status even if the university (or its affiliated research foundation) manages the patent process and pays the fees. A number of hypotheticals including responses from the Patent and Trademark Office (PTO) were attached to the report. We also mentioned that PTO has established a form for micro entity applicants from institutions of higher education (available at <http://www.uspto.gov/forms/sb0015b.pdf>).

The form indicates that it may be signed by a party as set forth in 37 CFR 133(b). That regulation provides for signature by an authorized party including registered patent practitioners acting in a representative capacity. However, given the inventor filing requirement, it is not clear whether such practitioners can be the attorney for the assignee institution, or whether powers of attorney will need to be signed by each individual inventor (with new POA's signed by all inventors any time there is a change). University counsels have reached opposite conclusions on this matter. We have requested further clarification from PTO. We hope to have an update for the COGR June meeting.

Senator Schumer Introduces Patent Quality Improvement Act; Other Patent-Related Legislative Developments

On May 6 Sen. Schumer (D—NY) introduced a bill (S. 866) to broaden business method patents beyond financial products or services. Any method used in the administration or management of any enterprise, product or service would be eligible. While this bill as it stands does not appear to have major implications for universities, we understand the Senator is interested in legislation that would address the patent troll issue. We discussed the DeFazio bill (H.R. 845) aimed at patent trolls in last month's Update. In a similar vein, on May 16 Rep. Deutsch (D—FL) introduced a bill (H.R. 2024), the "End Anonymous Patents Act," that would require the disclosure of any sales or transfer of patents, including notice of the real patent-holding party in interest. For current patents the disclosure would be required at the next maintenance fee payment. Lack of such disclosure is a mechanism used by patent trolls to conceal their identity.

American Academy Issues *Arise 2* Report

The American Academy of Arts and Science has issued a report entitled *Arise 2: Unleashing America's Research & Innovation Enterprise*. Many of the findings and recommendations parallel last year's National Academy of Science's report on *Research Universities and the Future of America* (see COGR June 2012 Update), but with a focus on physical sciences and engineering and life sciences and medicine.

Of particular interest is a set of recommendations aimed at achieving the goal of promoting interactions among the academic, government and private sectors throughout the discovery and

development process. These include developing new models for university—industry research, including tax incentives for industry direct support, sponsored investigator-initiated programs with industry partners, and precompetitive collaborations without negotiation of intellectual property (Rec. 2.2); and setting new priorities for the university tech transfer function (Rec. 2.4). This includes recommendations to establish innovation-technology-alliance offices aimed at knowledge export (2.4.1); streamlined IP processes including master template agreements (2.4.2); and to ensure all agreements include a provision that all “unused” knowledge becomes public in a timely fashion (2.4.3). Another set of recommendations (2.5) have to do with developing policies that focus on common interests between academia and industry, with particular attention to managing conflict of interest and publicly disclosing research relationships between academic and industry partners.

As noted these recommendations reinforce those in earlier reports, including the NAS report (Rec. 3) and the December 2012 PCAST report on *The Future of the U.S. Research Enterprise* (Action 5.3—see COGR December 2012 Update). Recommendations such as those for institutional master agreements for industry-sponsored research have been implemented by some institutions, and public—private partnerships continue to grow (the American Academy report contains some examples). This report may add to momentum for further changes in this area.