

# COGR

an organization of research universities

## COUNCIL ON GOVERNMENTAL RELATIONS

1200 New York Avenue, N.W., Suite 750, Washington, D.C. 20005  
(202) 289-6655/(202) 289-6698 (FAX)

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Assistant General Counsel for Legislation, Regulation and Energy  
Efficiency  
US Department of Energy  
Office of General Counsel  
1000 Independence Avenue, SW  
Washington DC 20585

SUBJECT: Reducing Regulatory Burden – EO 13563 Retrospective  
Review

Dear Mr. Cohen:

The Council on Governmental Relations (COGR) is an association of over 180 research universities and affiliated academic medical centers and research institutes. COGR concerns itself with the impact of federal regulations, policies, and practices on the performance of research conducted at its member institutions. Our member institutions conduct over \$55 billion in research and development activities each year and we are the predominate performer of basic research in partnership with the Federal government. Research institutions receive support from more than 26 federal agencies through a variety of funding mechanisms, grants, contracts, cooperative agreements, etc. We bring a unique perspective to the question of regulatory burden as we struggle to maintain regulatory compliance with each agency's rules, regulations and guidance.

We are encouraged that President Obama has asked the federal agencies to conduct this retrospective review of existing rules to assess which should be maintained, modified, strengthened or repealed to increase efficiencies and decrease burden. Research institutions seek to find a balance between achieving regulatory compliance and conducting research. We have advocated for a fundamental examination and evaluation of the current relationship between research institutions and the Federal government to strengthen and, in some cases, repair the relationship to ensure productivity. One of the key aspects of this assessment is regulatory reform.

### Recommendations to the National Research Council

As a part of this call for change, COGR joined with the Association of American Universities (AAU) and Association of Public and Land-grant Universities (APLU) to prepare recommendations to the National Research

Council's (NRC) on-going Committee on Research Universities' examination of actions that can be taken by all stakeholders to assure the ability of the American research university to maintain excellence in research and doctoral education. Sponsored in part by the Department of Energy, this Committee requested recommendations for regulatory reforms that could improve research universities' ability to carry out their research and educational missions. A copy of the joint Association response is attached here for your information.

The recommendations address some of the principles that are articulated in Executive Order (EO) 13563 notably the need for coordination and harmonization, as appropriate; the burden of cumulative, prescriptive regulations; and the need for a balance between regulation and flexibility in the performance of work under a Federal grant or contract. Specifically, the recommendations call for harmonization of regulations and information systems across agencies to eliminate duplication and redundancy; elimination of regulations that do not add value or enhance accountability; and designing regulations that set performance goals rather than simply procedural compliance.

The recommendations address financial reforms as well because of the unique challenges faced by research universities under the severe limitations imposed by a cap on the recovery of our facilities and administrative (F&A) costs when conducting research for Federal agencies. This cap results in a situation where every new regulation is an unfunded mandate placed on the university.

### **Principles for Improving Regulations**

The principles that informed our recommendations to the NRC echo the principles for improving regulations outlined in EO 13563 and more fully described in the guidance provided by the Office of Management and Budget to the Federal agencies.

We need consistent, harmonized performance-based standards in regulatory programs across the agencies and for all funding mechanisms. The principles of coordination and harmonization across agencies and establishing performance objectives rather than prescriptive compliance requirements were first articulated in EO 12866 and are reiterated in EO 13563. Agencies frequently pledge to harmonize but do not implement common forms, rules, etc. that will achieve that goal.

EO 13563 calls for an assessment of the burden and related costs of cumulative regulations on the affected communities. As OMB notes in its guidance, simplification and harmonization are critical components of a regulatory program because "regulated entities might be subject to requirements that, even if individually justified, may have a cumulative effect imposing undue, unduly complex or inconsistent burdens." This is a particular concern for research institutions who engage in research with multiple federal agencies. The stacking of regulations within and across agencies increases the burden without any apparent benefit to achieving the mission of research. Specifically, agencies are asked to promote coordination and integration among agencies to reduce redundancy, inconsistency or overlapping requirements and begin to address the significant number of regulatory requirements. No single regulation may meet the threshold of significance required to trigger increased scrutiny under the Paperwork Reduction Act, Regulatory Flexibility Act and/or Administrative Procedures Act, but the cumulative impact of each unique agency regulation simply increases the overall costs of doing business.

We believe before any regulation is implemented agencies should do a risk assessment to determine whether requirements can be tiered by risk to prevent over-regulation across activities. Whether to prevent fraud, control toxic agents, or ensure the protection of human subjects, agencies

should determine what situations or organizations pose the highest risk of non-compliance and design requirements that apply the appropriate level of control to the affected communities.

These principles inform any comment that COGR offers on new regulations, policies or guidance.

## **Recommendations for the Department of Energy**

### **Federal Research Terms and Conditions**

We recommend that the Department of Energy (DOE) review the terms and conditions used in its research agreements across the Department's programs and laboratories. We urge the Department to implement the Federal Research Terms and Conditions established in January 2008 to provide a uniform standard core set of administrative terms and conditions on research and research-related awards that are subject to OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations" (2 CFR part 215). Built on the work of the Federal Demonstration Partnership, these standard award terms and conditions provide consistency and efficiencies for the administration of Federal awards.

### **Reporting Requirements**

The Department of Energy should consider eliminating excessive reporting requirements that fail to provide greater accountability.

### **American Recovery and Reinvestment Act: (ARRA)**

As COGR members dealt with America Recovery and reinvestment Act (ARRA) reporting, we found the Department of Energy the most difficult agency to work with in meeting our reporting obligations. Additional reporting requests, monthly reporting, specialized reporting formats for principal investigators, and other ongoing demands from Energy program areas have been the norm under ARRA.

### **ARPA –E:**

Unfortunately, we see similar reporting requirements continuing under the ARPA-E program. Reporting requirements designed for more high risk awardees do not reflect the nature of the relationship of research organizations with the Federal agencies governed by various OMB administrative circulars. Research institutions are required to submit monthly detailed reports as a supplement to the Standard Form (SF) 270 documenting costs by cost category and transaction by transaction. Contractors working for DOE follow up with repeated requests to link detailed expenditures with proposal budgets. Additional documentation describing in detail how salary calculations are made, the cost basis for salaries, tuition, etc., are unlike requirements for any other agency. We fail to understand how this level of detail provides needed information.

## **Cost Sharing**

The Department of Energy has a long history of requiring mandatory cost share commitments from its industry partners. While this may be an appropriate expectation of for-profit industry enterprises, to require the same commitment from research institution partners ignores both the public policy role and the non-profit status of research universities. We believe that the Department should conduct an evaluation of the goal of cost sharing in/across its programs. In 2009, the National Science Board (NSB) conducted such a review of the National Science Foundation (NSF) programs and determined that mandatory cost sharing requirements were appropriate for only a small subset of NSF programs – specifically, programs where it was determined that an institutional commitment is critical to long-term program success. NSF, acting on recommendations from the NSB, has eliminated mandatory and voluntary committed costs sharing for all but five programs. We believe that programs sponsored by the Department of Energy should be subject to similar scrutiny before cost sharing requirements can be imposed.

## **Restrictions on Conduct of Research**

Restrictions on access to facilities and limitations on rights to information and data place unnecessary hurdles in partnering with the Department of Energy in the conduct of research.

### **Access to National Laboratories:**

Broad prohibitions or limitations on the access to national laboratories to conduct research activities require award-by-award negotiations of separate terms to allow foreign nationals – students and scholars – access to national laboratories. The Department should consider easing those restrictions in line with National Security Decision Directive 189 (NSDD 189) which states that “no restriction may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. Statutes.”

The repeated negotiation and failure to reach timely resolution of these clauses creates hardships, sometimes quite severe. Delays may cause students not to be hired to work on projects and may delay significantly completion of theses and dissertations. We believe it would be in the best interest of the Department and its research partners for the Department consider new ways to structure agreements to allow easier access to the laboratories and facilities.

In January, 2009, we responded to the Department’s Notice of Inquiry Questions Concerning Technology Practices at DOE Laboratories (73FR72036) concerning technology partnerships. At that time, we outlined some challenges with completing agreements with the Department and noted that Department components vary widely in their willingness to modify terms of agreements. A copy of that letter is available on request. We have seen a greater willingness to make needed modifications but inconsistencies persist particularly with regard to non-US citizens.

### **Ownership of Data:**

The Department of Energy asserts greater “contract” rights to data developed in the course of a research program than normally asserted by other federal agencies. This may include asserting additional rights to such data for years after performance of the contract or to ownership of software, even though the Federal Acquisition Regulations provide for

universities normally to claim copyright in such data and software. The Department has the unique concept of “contract rights” in data, which includes use of the FAR 52.227-16 Additional Data Requirement clause and rights to license limited rights data or restricted computer software that the government normally doesn’t get. The definitions used by the department are inconsistent with other agencies as well. These restrictions raise policy issues for universities especially as they restrict the ability of universities to disseminate research data. The Department’s use of such terms leads to prolonged negotiations and delays in the conduct of research.

We appreciate the Department of Energy providing this opportunity for public participation and hope to have additional opportunities for participation as the Department drafts its plan and constructs the initial list of regulations to be reviewed under EO 13563.

Sincerely,

Anthony P. DeCrappeo  
President

Enclosure: *Regulatory and Financial Reform of Federal Research Policy Recommendations to the NRC Committee on Research Universities* (COGR, AAU, APLU, January 21, 2011)

Cc: Cass Sunstein, Office of Management and Budget