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**REPORT TO**

**SUNY Chancellor Nancy Zimpher  
SUNY Senior Vice-Chancellor Monica Rimai**

**REVIEW OF**

**THE RESEARCH FOUNDATION – SUNY RELATIONSHIP**

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The logo for Hogan Lovells, featuring the firm's name in a serif font. The text is white and set against a solid blue square background.

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**Clifford Stromberg  
The Law Firm of Hogan Lovells US LLP  
Washington, DC  
May 2011**

## C O N T E N T S

	<u>Page</u>
<b>SCOPE OF THIS REPORT .....</b>	<b>2</b>
<b>EXECUTIVE SUMMARY .....</b>	<b>5</b>
<b>REPORT ON SUNY RESEARCH FOUNDATION RELATIONSHIP .....</b>	<b>13</b>
1. Pre-Award Functions and Stimulating the Growth of Research.....	13
2. Grant Administration. ....	19
3. Disputes and Litigation.....	24
4. Compliance Functions. ....	25
5. Technology Transfer and Commercialization. ....	29
6. Legal Support.....	43
7. Affiliated Entities and Ventures. ....	45
8. Costs and Charges. ....	51
9. Communication, Collaboration and Transparency.....	57
10. Legal Separation Between the RF and SUNY .....	62
11. Mission and Governance. ....	68
<b>RECOMMENDATIONS.....</b>	<b>76</b>
<b>LIST OF CHARTS</b>	
#1 Growth in SUNY Sponsored Research .....	14
#2 SUNY versus Comparable Institutions: Growth in Total Federal Research .....	15
#3 Sources of SUNY Research Funding.....	17
#4 SUNY Research Compared to Endowment Assets .....	18
#5 Categories and Locations of RF Employees .....	20
#6 Top Universities (plus SUNY): Research Expenditures, License Income and Return on Research Expenditures .....	32
#7 SUNY-RF Technology Transfer Performance Over Time .....	34
#8 Rate of SUNY Indirect Cost Recovery by Sponsor .....	54
#9 Trends in Indirect Cost Recovery .....	55
#10 Sponsored Program Revenue Projections.....	83
#11 Sponsored Program Revenue and F&A Recovery Analysis .....	84
<b>LIST OF INTERVIEWEES .....</b>	<b>85</b>

## **REPORT**

**To: SUNY Chancellor Nancy Zimpher  
SUNY Senior Vice President and Chief Operating Officer Monica Rimai**

**From: Clifford Stromberg, Hogan Lovells US LLP**

**Date: March 2011**

**Re: Review of The Research Foundation – SUNY Relationship**

### **SCOPE OF THIS REPORT**

The Chancellor asked Hogan Lovells to review the legal status of the Research Foundation of SUNY (the “RF”), and its operational relationships with SUNY and the SUNY campuses, including importantly SUNY’s four health science centers (“HSCs”), which perform a large part of the research administered by the RF. We performed this review during the period October 2010 - February 2011.

A. **Interviews**. We interviewed more than 50 people, including:

1. Most of the RF’s management.
2. A significant number of RF Board Members.
3. Most of the leadership team at SUNY Stony Brook’s HSC.
4. Most of the leadership team at SUNY Upstate’s HSC.
5. Most of the leadership team at SUNY Downstate’s HSC.
6. Most of the leadership team at SUNY Buffalo’s HSC.
7. A few leaders suggested to us at some other major SUNY campuses (Albany, Binghamton, CNSE).
8. Officials at SUNY Central Administration.

After preparing a draft of this Report, we interviewed several top RF managers a second time, in order to check certain facts and obtain responses on issues.

## B. Document Review.

In addition, we reviewed a large number of documents, including such items as:

- RF policies and procedures
- RF strategic plans
- RF financial statements
- RF summary reports on research activity and many other subjects
- SUNY Central Administration policies and procedures relevant to RF functions
- A modest number of additional campus-specific policies and procedures related to research.

We relied on documents provided by the RF and SUNY, and our review was for overall analysis only. We did not conduct “due diligence,” “discovery” or comprehensive document review by any means. There may well be relevant documents and items of information that were not brought to our attention and of which we are unaware.

## C. “Benchmarking” Comparisons.

In order to place the RF-SUNY performance in better perspective, we also reviewed comparable performance of other public and private Universities on various parameters (e.g., technology transfer (or “tech transfer”) success). We summarize those comparisons at several places in the Report.

Consistent with the Chancellor’s instructions, the purpose of this Report is to summarize our findings concerning two principal issues: (a) how well the SUNY-RF relationship is functioning, as perceived by the providers, and as perceived by the recipients of the RF services, and (b) areas where changes might improve the relationship. This Report was not intended to function for other purposes, such as assessing the performance of any individuals, auditing finances, or resolving interorganizational disputes. Naturally, in describing particular transactions or interactions, the participants’ descriptions of facts varied. It was not uncommon for one executive to complain “We were not consulted,” while their opposite number said, “Oh yes, we consulted them extensively.” It was not feasible as part of this Report for us to try to adjudicate such differences. Instead, we focused on reporting patterns in which effective consultation was or was not perceived as having occurred. This is just one example of the kinds of differences we encountered.

We benefited enormously from the intelligence, generosity of time and candor of those we interviewed. It is obvious that the RF, the SUNY campuses and SUNY Central Administration have able and dedicated people who are striving mightily, in a stressful, complex, and resource-challenged environment, to do the very best job possible, and to foster greatness in the SUNY research enterprise. Consistent with the policy-level focus of this Report, we have not quoted any individuals. The RF and SUNY have a very

important relationship and the vitality of each is essential to the other. We hope that this Report will assist them to strengthen their relationship.

## EXECUTIVE SUMMARY

By most measures, in working together, SUNY and the RF have achieved impressive results. For example:

- The RF administers almost \$900 million of research annually, which is about the fourth largest portfolio of sponsored research of any University in the nation. It places SUNY behind only the University of California, University of Texas and Johns Hopkins, and ahead of such well-respected University systems as Illinois, Michigan, Washington and Wisconsin.
- This achievement is even more impressive when one considers that some of the leading competing research institutions have a much more focused research portfolio than does SUNY. For example, Johns Hopkins is preeminent in biomedical research in part because the University is fundamentally focused on that arena, and recruits and devotes most of its resources to that goal. Likewise, MIT is overwhelmingly invested in physical sciences, computing and engineering. Iowa is deeply invested in agricultural and plant genomics research. But SUNY's research -- administered by the RF -- includes major components in areas as diverse as medical research, biofuels, nanoscience, chemical engineering, professional training, and physics.
- The RF's task is even more challenging because, unlike many major research University systems that are centralized on one or two campuses, SUNY requires the RF to support research and technology transfer enterprises across 64 campuses, including health science centers, several other University centers and doctrinal research institutions, as well as a large number of University colleges, and technology college campuses.
- Moreover, New York State is somewhat unique in the amount of research funding support the Legislature provides to private institutions (such as Cornell) that in effect compete with the State (SUNY) system.
- Because of the unusually complex New York State contracting and procurement process, SUNY has in a sense foisted upon the RF a heterogeneous array of special tasks, such as hiring employees for special projects that really are not part of the core research administration function; entering into joint ventures and collaborations that would be administratively difficult for SUNY to engage in directly; and owning and managing real property and facilities for a variety of SUNY-affiliated ventures. None of these functions is within the RF's core mission or competencies, but the RF has undertaken them because SUNY believed that it could not achieve its

educational objectives by any other means. However, this naturally diffuses the RF's focus.

- In light of these and other challenges, the overall achievements of the SUNY-RF relationship are impressive. Indeed, virtually every leader we interviewed stated that given the complexity and delay attendant to the New York State contracting process, the RF is indispensable, and without its competent discharge of critical functions, SUNY's research enterprise virtually could not operate and SUNY would fall increasingly behind other great Universities.

Despite these achievements, it is also obvious that there are strains and areas of dysfunctionality in the SUNY-RF relationship that impede SUNY's success and its ability to maximize its efficient use of resources. The RF, by its charter, has only one set of customers--the members of the SUNY system. Under the RF's charter, its sole mission is advancing the research goals of SUNY, i.e. to perform functions "of benefit to and in keeping with the educational purposes and objects of [SUNY]." <sup>1/</sup> Since SUNY alone can define its goals, the RF should be highly attentive to what SUNY desires. Indeed, the 1977 SUNY-RF Agreement states at the outset that "the Foundation's sole purpose is to serve the University." Yet the leaders of SUNY campuses, as well as leaders of SUNY Central Administration, frequently voice the belief that the RF does not act like a service organization devoted to the priorities of SUNY. Rather, it aspires to and increasingly does chart its own independent course, regardless of SUNY's views. And among the campus "customers" we interviewed, almost all said they rated the RF's performance overall as only "pretty good," but not "very good." On a scale of 1 to 10, they generally rated its overall performance in the range of "5 or 6." It should be possible to do better.

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<sup>1/</sup> The RF Charter makes clear that its only purposes are to advance the missions of SUNY. Its purposes are:

(a) To assist in developing and increasing the facilities of State University of New York to provide more extensive educational opportunities for and service to its students, faculty, staff and alumni, and to the people of the State of New York, by making and encouraging gifts, contributions and donations of real and personal property to or for the benefit of State University of New York;

(b) To receive, hold and administer gifts or grants, and to act without profit as trustee of educational and charitable trusts, of benefit to and in keeping with the educational purposes and objects of State University of New York; and

(c) To finance the conduct of studies and research in any and all fields of the arts and sciences, of benefit to and in keeping with the educational purposes and objects of State University of New York..." (RF Charter (1951, as amended 2009), p. 1 (emphasis added)).

We probed extensively. Naturally, there were differences of viewpoint within and across the campuses. But overall, based on our review, the RF's functioning in various areas of activity can be assessed as follows:

**1. Pre-Award Functions.** In recent years, overall SUNY sponsored research has grown only by about 2%/year, even taking into account the significant (\$100 million) special influx of American Recovery and Reimbursement Act ("ARRA") dollars. During this same period, the top 20 institutional recipients of sponsored research funds in the nation increased their share of total NIH funding from 30% to 35%. But meanwhile, a number of SUNY campuses have actually declined in relative research ranking compared to peer institutions.

Overall, New York State's portion of national sponsored research declined from 10% in 1980 to about 8% today. Part of the reason for the decline is the relative paucity of New York State resources made available for faculty recruitment and program support, but there are organizational deficits as well. Contrary to what the RF at times says and some believe, the RF really performs no significant role--nor is there any campus desire that it do so--in crafting research priorities, or identifying sources of funding, or developing new sponsor relationships. In reality, the RF's role begins when there is a grant award. Another important point is that the campuses historically have been dissociated from one another, with few research interactions with one another. This impedes SUNY since research teams on one campus who need a special capacity that is lacking, but perhaps exists at another SUNY campus, may not know it, and therefore their proposed team may not be as strong as it could be. Recent initiatives like the "Find a Scholar" on-line instrument hold promise that they will enable SUNY researchers to work together more effectively and the RF is supporting this effort. But it is still a major SUNY deficiency that strong faculty who reside in different campuses are not "virtually" united in ways that would increase success in obtaining grants.

**2. Grant Administration.** SUNY leaders generally believe that the RF does a good job on the "nuts and bolts," "back office" functions of post-grant awards, such as equipment/materials purchasing, staff hiring, salary and benefits administration, fund accounting and financial administration. Indeed, the RF agrees that those are its core functions. But the RF is said to be less responsive to policy level input (such as on the selection of software systems or the feasibility of administrative requirements).

The campuses also say the RF is needlessly difficult and challenging in "second guessing" them about employee pay levels and HR issues. The RF says that as a single, unified employer, it must achieve pay "comparability" and cannot make unwarranted exceptions. The RF also says it is responsive to campus concerns. It notes that it has invested heavily in improving IT systems and believes it is becoming more effective.

The campuses also believe the RF's 39% fringe benefit rate is too high and may cause them to be non-competitive on some grants. The RF disagrees, given SUNY's own 44% fringe rate. There is no readily apparent solution.

In contrast, there seems to be widespread agreement that the RF performs well the core functions of grant administration and fund accounting.

Certain potential concerns about the robustness of compliance processes were noted, however (see #4 below).

**3. Disputes and Litigation.** Campus leaders believe that the RF is frequently and puzzlingly uncommunicative about HR disputes, grievances, claims and litigation that affect the campus workforce and lead to costs SUNY must then bear. The RF says these disputes are rare, but clearly enough have been cited to demonstrate this is an area for improvement. Litigation is not an everyday matter: it should be possible to coordinate better.

**4. Compliance.** In general, the campuses are responsible (as the grantee) for scientific oversight and accountability, while the RF is responsible for financial management and accountability. Unfortunately, a variety of functions and scenarios fall between these functions, or traverse them. Hence, it is disturbingly unclear who bears responsibility for various elements necessary for accurate effort reporting, or what happens if purchasing decisions alter materials or equipment and adherence to the research protocol, or how the campuses and RF dovetail on data security. This lack of clarity poses potential risks for SUNY. It is not evident to stakeholders that the RF has a strong compliance function. RF disputes this, but concedes that it has begun new initiatives to strengthen compliance, including a new on-line certification application. Compliance issues merit greater attention.

**5. Technology Transfer and Commercialization.** This is supposed to be a major strength of the RF; it is not. It is conceded by both SUNY and the RF that in light of the overall size of SUNY's sponsored research portfolio, the "output" in terms of invention disclosures, patents, licenses and especially royalty income, have all been extremely weak as compared to benchmark institutions. Stakeholders ascribe this failure to different causes. Some are exogenous to the RF (e.g., the dispersion of SUNY research across many campuses, the lack of SUNY funding for faculty hiring and new lab space at some campuses).

But many of the reasons for poor performance do relate to the RF. Many campuses cite: (a) the RF's lack of strategic tech transfer vision or strategy; (b) the RF's failure to consult campuses and instances of "selling cheap" very promising SUNY inventions; (3) the RF's lack of high-level tech transfer expertise from industry; and (d) the RF's lack of entrepreneurial "culture". There is probably more than enough criticism to go around, but this clearly is an area that requires more attention. Other institutions have effectively used "gap" funding vehicles, technology incubators and an investment fund. SUNY and the RF traditionally have lacked any substantial "gap" funding vehicle. The SUNY-RF incubators are viewed as having had only modest success. The RF indicates that it is now starting a technology incubator for this purpose with \$1 million. An investment fund is just now being developed. It appears that SUNY does pay a

competitive share of IP revenues to faculty investors. The main problem is that the licensing revenue pipeline as a whole is far too thin.

**6. Legal Support.** SUNY Central Administration and the campuses have varying perceptions of the adequacy of RF legal support. Many campus counsel and executives say that some of the rank and file RF lawyers are skilled and helpful. But there seems to be almost universal belief that the legal leadership level has been problematic (not knowledgeable about higher education, difficult, and even combative with the campuses). I interviewed the entire RF legal staff. They had some good answers to specific problems, and there is probably some “right” on both sides of the SUNY-RF disputes. For example, the RF responds that sometimes they tell the campuses that steps are legally required or prohibited and they are criticized simply because the campus doesn’t like the legal reality. More problematic is the fact that the RF legal leadership has been remarkably disparaging toward SUNY -- their only client. Clearly there are recurrent frictions over lack of coordination in litigation, employee disputes, etc. There has been a recent personnel change. But more disturbingly, the RF appears to have tolerated for some time a culture in which the lead counsel has been openly hostile and provocative to its customers. This was not working well.

**7. Affiliate Entities and Ventures.** This is another area of problems and lost opportunities. It is unfair that frequently, when a SUNY component cannot do directly something it wants, it simply says, “Let the RF do it.” Hence, the RF feels itself involuntarily drawn into many ventures (Fuller Road, Buffalo 20/20, BioBAT) that may not be part of its “core” scientific grant administration functions. The RF says it is just trying to help when SUNY asks. But the main problem is not whether the RF participates but how. It is shocking how many senior campus leaders say that in negotiating these ventures, the RF and its outside counsel “ignore SUNY’s goals,” “strong arm” or “intimidate” SUNY--which is supposed to be the sole entity that the RF serves. It is widely perceived that the RF has “its own agenda,” tries to “reinforce its power at the expense of SUNY” and so on. The RF says these are misconceptions – yet they recur across many deals and campuses. This is an area where changes in process are called for.

**8. Costs/Charges.** The RF charges the “centralized” campuses 3.7% on their sponsored research revenue, and the decentralized campuses 2.7%. (Actually, the rates are 4% and 3%, but .3% is deducted from each for the Chancellor’s fund.) As one would expect, campuses grouse about the charges. It is hard to determine if charges should be “tweaked” a bit up or down. The RF does not seem to have added to its reserves in recent years, so that might indicate it is operating at a real cost level. But on the other hand, it keeps adding functions and some campuses don’t think they are required. But the RF says IT systems constitute the main cost and as research compliance becomes more complex and demanding, system upgrades are needed. The campuses do have a point that there are some internal inequities in the charges (such as where they are levied on large equipment purchases--when the campuses have no cash revenue from such purchase, and it is just a wash--but I am told that has been fixed.) Some attention also might be given to inter-campus equity issues.

My sense is that RF charges are not widely inappropriate. Moreover, the RF's recent financial plan shows that it faces significant financial challenges, and that it must accelerate funding of an accrued \$250 million pension underfunding liability. So it may in fact need increased revenues--if SUNY wants the RF to perform all its current functions. If you wanted a more careful financial analysis, an appropriate firm could do it, but my guess is that given the total RF central administration budget (of just \$29 million out of a total RF 2010 budget of \$930 million), any changes would not dramatically affect campuses anyway.

**9. Communication, Collaboration and Transparency; the Legal Separation Between the RF and SUNY.** This is another major, problematic area. In simple terms, it seems that the RF feels "besieged" by outside publicity, inquiries, and investigations; that it is committed to "hunkering down"; that it believes it can better resist such intrusions by stressing its private character and legal separation from SUNY; and therefore it tries to erect a bulwark of separation across a wide array of functions. The effect on SUNY is widespread frustration that the RF is "secretive," "uncommunicative," a "black-hole" and "resistant even when it doesn't need to be."

There are certainly situations in which this legal separation must be maintained. But my overall impression is that the RF exaggerates them--they use it as an excuse. Many kinds of information sought by SUNY -- and denied by the RF -- would not create the problem that the RF cites. The RF cites legal criteria that are not usually the determinative ones. So they have created a remedy -- secretiveness -- that is far too broad for the supposed disease. The result is corrosive distrust. While there certainly are productive peer relationships at an operational level, too often the RF essentially "blows off" even legitimate inquiries from senior management of SUNY Central Administration and campuses. It treats them sort of the way the U.S. State Department treats local "native" personnel at embassies: to be given information only to the minimum extent needed. The overall attitudinal relationship of SUNY and the RF is poor, and needs to be improved by a cultural change at minimum.

**10. The Legal Separation Between the RF and SUNY.**

As noted, the RF believes it must guard its legal separation from SUNY in order to avoid public (FOIL) status of its documents, and further governmental intrusion into its decision making. However, the rationale seems to have taken on a life of its own, and has been applied more promiscuously to a variety of circumstances than probably is necessary. As noted above, the RF cites legal factors which are not in fact the key ones the courts consider. Therefore, the RF has at times just said "No" to information requests when it could have used recognized legal techniques (e.g., Joint Defense Agreement, Common Interest Agreement, or using a third-party consultant) in order to share information. Indeed, in some cases, it has even refused to share information where a Joint Defense Agreement was in place. The result is that SUNY and its legal counsel lack routine information needed about the RF.

**11. Governance.** There are at least two important dimensions to RF governance: (a) internal, and (b) in relation to SUNY.

It is shocking that the governance of the RF has been widely perceived to have become so personalized. When people talk of the RF's mission or goals, they never ask or say what the Board believes--it is all "John wants x", or "John believes y." It is as if the Board of a \$1 billion nonprofit corporation does not even exist. In 30 years of advising dozens and dozens of large nonprofit organization boards, I have never seen such a phenomenon.

Whatever the causes, as a legal and policy matter, this is unwise. Interestingly, the campuses perceive the leadership functions at the RF to be handled at very different levels of effectiveness. There is widespread acknowledgement that the CEO is able, but also concern over his having "his own agenda," "being dedicated primarily to survival," and being "the guy who taught Machiavelli."

In contrast, some top operations executives are viewed as very collegial, competent and helpful. The finance functions/planning are viewed as needing improvement. The tech transfer functions are viewed as weak. And the legal functions are viewed as hostile and difficult. The RF responds with variations of "we are misunderstood." Probably the response for which they are most justified is that the research personnel often blame RF personnel for what is actually a legal obligation, or SUNY policy, or campus procedure, without knowing the distinction. In effect, the RF feels it gets blamed for "everything wrong with the world."

The RF Charter is perfectly clear in saying that the RF's sole mission is to support SUNY and its goals. But a surprise to me was that, with a few notable exceptions, the RF leadership does not even pay lip service to that concept. They seem to view themselves as a private organization that needs to become more private. They are at times dismissive of the management talent on the campuses.

Even more problematic is the fact that several of the RF's own board members said flatly that the Board process is "a joke," that they receive little information, are not asked for views, and that RF management likes "keeping us in the dark." They said, "We don't function as a real Board." This obviously must be addressed.

Several Board members and others questioned whether it was rationally defensible that the RF CEO also serves as Secretary to the SUNY Board. Putting aside the talents of individuals, this is a very questionable arrangement from the viewpoint of "best practices" in governance. It risks stifling candid governance input because the CEO of an outside organization is nevertheless seen as the "interpreter" of the SUNY Board's intentions.

Several RF Board members raised the question of whether the Chancellor really should want to Chair the Board, as opposed to just being a member. Some modification of the Chancellor's role in the RF might be considered, for reasons outlined in the Report.

It is a challenge to develop governance changes that simultaneously (a) insulate SUNY and the RF from one another appropriately and (b) more effectively support RF compliance with SUNY's goals. It seems clear that some believe SUNY should "grab hold" of the RF more in terms of setting policy directions and demanding reports on responsiveness. Others believe SUNY should "take a half step back" and increase its separateness from the RF. To an extent, I think you can take each approach, in different areas, and that would probably be the wisest course.

My detailed recommendations are presented beginning on page 76.

## REPORT ON THE RESEARCH FOUNDATION – SUNY RELATIONSHIP

### 1. Pre-Award Functions and Stimulating the Growth of Research.

Fundamentally, the RF does not have a major role in pre-award research activities. In its 2009 Strategic Plan, the RF states that among the functions it performs is “helping faculty, staff and students find funding for their projects,” (RF, “Growth Through Innovation and Collaboration: A Strategic Plan for the Research Foundations of SUNY,” at 3 (2009)), but no one we spoke to at SUNY said this actually occurred. Occasionally at planning meetings, RF management has offered views about what directions might increase the scope of funded SUNY research. But as they know, the way Universities generally work is that research ideas “bubble up” from principal investigators (“PIs”) pursuing their interests, rather than emanating from top-down mandates. The campuses take the lead in charting research priorities except when, as in the case of the College of Nanoscale Science and Engineering (“CNSE”), there is a specific legislative or organizational funding mandate. So the RF does not -- and is not now expected to -- play any significant role in defining research priorities.

There seems to be a divergence of views as to how active the RF is in the next phase of the research “life cycle”: shaping research proposals generated by PIs. The RF personnel say that they do perform a helpful role in assisting PIs (upon request) to shape their proposals, prepare budgets, ensure compliance with sponsor submission formats and meet sponsor requirements. In this way, they believe their help increases the success rate of SUNY researchers competing for grants. However, most of the campus research leaders downplay this RF central office contribution and say that such grant preparation is performed overwhelmingly on the campuses themselves, and that the RF brings little added expertise in this arena.

It would be a sterile exercise to try to discern just how much RF input is helpful versus redundant; people may naturally emphasize their own efforts. A more significant issue is whether the RF, by virtue of its dealings with sponsors, could perform some useful role in alerting PIs to changing sponsor priorities, methods of ranking grant applications or process issues that could increase the chances that grant applications will be successful. The campuses largely say that their scientists already pay close attention to NIH, NSF, DOD, DOE and Foundation funding priorities and changes in process, and they really do not need to look to the RF for help in this area.

A different question is whether SUNY and the RF are doing the best job possible to link up researchers in various fields who may need special competencies on their grants that don't exist on their particular campus. Obviously, it is enormously helpful to SUNY competitively if, despite the geographic separation of SUNY campuses, they can act like a single “virtual” University. If a brilliant genomics researcher at Buffalo, Upstate or Downstate needs a biostatistics expert, or an orthopedic researcher needs a biomedical engineering expert, and such experts exist at Stony Brook, SUNY needs to find a way to link them. Currently, this rarely happens, according to campus leaders. At

the behest of Stony Brook’s leadership, a new on-line tool was being made available to help faculty locate such expertise. The RF says that in implementing its Strategic Plan, it is now trying hard to coordinate researchers to work together in pursuit of larger grants. The RF is preparing an “asset inventory” via its “Find a Scholar” database (using the “Community of Science” software). They and SUNY hope this will better link research colleagues at disparate campuses. It will be important to ensure that this initiative succeeds.

The fact remains that comparing the last few years’ volume of sponsored research at SUNY campuses shows only a modest rate of growth for most (but not all) campuses:

**Chart #1: Growth in SUNY Sponsored Research**

<u>Institution</u>	<u>FY2006</u> <u>(\$Millions)</u>	<u>FY2010</u> <u>(\$Millions)</u>	<u>4-Year Increase</u>
University at Buffalo	129	149	15%
Stony Brook University	159	200	25%
Upstate Medical University	38	38	0%
Downstate Medical Center	51	54	6%
Buffalo State	39	48	23%
Binghamton University	27	40	48%
University at Albany (net of CNSE)	151	102	-33%
CNSE	0	168	N/A
Total (including many other campuses not separately listed)	725	891	23%
Total without U Albany and CNSE	573	620	8%

Source: Compiled from RF data in the “Sponsored Program Expenditure Profile Summary” (Year Ended June 30, 2010).

RF’s sponsored research revenue grew from \$709 million in 2006 to \$892 million in 2010 (and total revenue grew from \$742 million in 2006 to \$936 million in 2010), though the 2010 totals are significantly inflated due to one-time ARRA awards.

Perhaps the major conclusion that leaps out from this data is that--putting aside the remarkable achievement of Albany and CNSE--the overall SUNY sponsored research enterprise has grown only about 8% in four years, or 2% per year. Moreover,

much of the SUNY increase, as the RF acknowledges, was due to an influx of ARRA dollars, about \$100 million. Otherwise there has been very little growth. In 2009-2010, without the new legislation, the increase would have been 1.4%.

During this period, the NIH budget (including supplemental ARRA funds) grew from \$32.4 billion to \$36.2 billion, an increase of 12%. During this same period, the top 20 institutions increased their share of total NIH funding from 30% to 35%. (NIH Blue Ridge Institute).

A longer-term view of SUNY research growth is provided by the following chart. (We prepared the chart from SUNY data and added some comparison institutions, which have comparable levels of sponsored research):

**Chart #2: SUNY Versus Comparable Institutions: Growth in Total Federal Research (Constant 1983 Dollars)**

<u>Institution</u>	<u>2007 Total Research (\$Millions)</u>	<u>% Change 1998-2007</u>	<u>Net Change in National Ranking (1998-2007)</u>
Stony Brook	103	34%	-4
University at Buffalo	121	47%	0
University at Albany	119	333%	+78
Baylor	169	46%	+2
Case Western	143	49%	+3
Colorado State	110	46%	+4
Emory	153	63%	+9
Michigan State	138	32%	-3
NYU	114	35%	-6
Oregon HSU	110	86%	+21
UC Irvine	119	68%	+15
U Cincinnati	145	67%	+11
U Colorado	100	53%	+7
U Georgia	127	8%	-15
Iowa	140	30%	-3
Kentucky	127	46%	-4
U Md-Baltimore	138	78%	12
Rochester	143	52%	6

Source: Center for Measuring University Performance at Arizona State University, "The Top American Research Universities," p. 110-116 (2009).

As the 2008 “Final Report of Findings and Recommendations” of the New York State Commission on Higher Education, chaired by former Cornell President Hunter Rawlings, noted:

“[W]e should also be worried. There is troubling evidence that the State has slipped in [research] stature over the last twenty years. For example, as this report documents, the powerful position that New York State once enjoyed in national research standings has faded. Whereas the State captured 10% of the nation’s academic research and development spending in 1980, today that number stands at 7.9%, as other states have received a greater proportion of these funds. Using just this one measure, the Commission calculates that more than \$2.2 billion dollars and over 27,000 jobs have been lost in the State.” (New York State Commission on Higher Education, “Final Report of Findings and Recommendations,” p. 6 (June 2008)).

Indeed, the RF projects basically a flat trend in overall SUNY sponsored research between 2010 (\$891 million) and 2015 (\$884 million), with some major campuses declining (e.g., CNSE declining from \$168 million to \$155 million and Stony Brook declining from \$200 million to \$169 million). (RF, “Final Financial Plan: Fiscal Year 2010-11,” Exhibit E).

Thus, despite their impressive achievements, there is clearly a need for SUNY and the RF to step back and look at the “big picture” of how research can more effectively be stimulated and coordinated across campuses.

In re-considering the SUNY-RF research strategy, it is important to focus on the distribution of funding sources overall (bearing in mind that their relative importance to research at different campuses varies significantly). For FY 2009-10, the numbers were:

<b>Chart #3: <u>Sources of SUNY Research Funding</u></b>	
<b><u>Federal</u></b>	<b><u>\$Millions</u></b>
Department of Health and Human Services	217
National Science Foundation	60
Department of Education	22
Department of Defense	22
Agency for International Development	20
Other Federal	49
Total Direct Federal	390
Federal through other institutions (other Universities, States, etc.)	62
Federal through New York State	106
New York State Direct	53
Business, industry and other	183
<b>GRAND TOTAL</b>	<b>891</b>

Source: RF data.

For a more complete description of the distribution of sponsored funding of each of the major SUNY campuses, and the trends, see Chart #10 attached at page 83.

In assessing the “output” of SUNY’s sponsored research program, it is also important to note that not all of the \$891 million of sponsored research is really “research” of the kind that is likely to give rise to scientific breakthroughs and inventions. Of the total, only \$567 million (though this is still a huge total) is “organized research,” i.e. what most Universities regard as “scientific” research. The remainder is “public services” (\$204 million), “training” (\$48 million), and other services. As is readily apparent, federal research is preponderant, with life sciences the largest component. But business-sponsored research is still significant, and likely to become even more so.

In considering what it would take for SUNY research to grow more robustly, another dimension is to assess SUNY's current success in sponsored research in comparison to the endowment assets available to support University staffing and infrastructure. On this gradient, SUNY has leveraged its resources very well:

**Chart #4: SUNY Research Compared to Endowment Assets**

<u>Institution</u>	<u>Rank for Federal Research Grants</u>	<u>Rank for Endowment Assets</u>
University at Albany	90	700
University at Buffalo	64	123
Stony Brook University	84	389

Source: Center for Measuring University Performance at Arizona State University, "The Top American Research Universities," p. 32, 48 (2009) (based on 2007 data).

These data suggest that SUNY has done quite well given the relative paucity of unrestricted (quasi-endowment) resources that it has available. But this does not tell the whole story, since "endowment" measures only reserve assets. In fact, many SUNY people commented that New York State has been fairly generous in funding new SUNY facilities, but not so as to faculty lines and program support. If SUNY is to rise in eminence in research, the State will need to provide enhanced funding to recruit faculty and jump-start programs, functions that often are supported by University endowment earnings. The RF itself has observed that SUNY suffers from the "absence of a well-defined and executed SUNY faculty recruitment and retention program that ensures the efficient and effective support of faculty." (Strategic Plan, at 50 (2009)). Some research foundations, such as Georgia Tech Research Corporation and the University of Kansas Center for Technology Commercialization, explicitly include as one of their functions assisting the University with recruiting research faculty.

SUNY also needs a coherent, overall research enhancement strategy. This is not to suggest that it must be based on SUNY Central Administration "adjudicating" competing campus research interests or priorities. As is usually acknowledged, the best research ideas arise directly from teams of researchers. However, especially in times of constrained resources, what SUNY could do more effectively is to look coldly and objectively at its strengths, weaknesses, etc. and identify research areas where enhanced effort is likely to yield more effective grant applications. Initiatives, such as the "Find a Scholar" program (using the "Community of Science" software), that more effectively links researchers at different campuses should help.

## **2. Grant Administration.**

### **2.A. HR and Related Functions.**

Perhaps the most important functions that the RF performs are the nuts and bolts of hiring, procurement, contracting, and payroll administration. The RF defines some of the value it brings to SUNY as follows:

As a private, nonprofit educational corporation, the RF has the independence and authority to enter into business arrangements that support research [by performing functions for SUNY such as]:

- compliance with federal and state regulations and sponsor terms and conditions
- prefunding of expenditures prior to sponsor reimbursement
- flexibility to employ people within the project start and end dates
- ability to enter into contracts with sponsors, subcontractors and other partners. (Strategic Plan, at 2 (2009)).

Overall, the RF employs some 17,000 people in the course of a year, including some 5,000 students. The headcount varies considerably at any given time as people rotate in and out of employment on grants. For example, the headcount was 11,736 on July 3, 2009, but just 9,575 on November 20, 2009 and then 10,185 on November 19, 2010. These individuals are categorized by the RF in three ways:

- “Sponsored”: those who are employed for and under the budgets supported by specific sponsored research grants (i.e. the bulk of research assistive personnel);
- “RF Funded”: those who for various reasons are paid through indirect cost recoveries; and
- “Agency”: those persons the RF employs on behalf of entities that are not SUNY, but are affiliated with SUNY, such as faculty practice plans or research accelerator joint ventures.

The distribution among these categories varies dramatically by campus, as Chart #5 below comparing the largest campuses shows:

**Chart #5: Categories and Locations of RF Employees (November 2010)**

	<u>Albany</u>	<u>Buffalo</u>	<u>Stony Brook</u>	<u>Downstate</u>	<u>Upstate</u>
<b>Agency</b>	2	170	1,165	25	682
<b>RF Funded</b>	88	248	279	30	82
<b>Sponsored</b>	744	1,327	1,554	344	298
<b>Total</b>	834	1,745	2,998	399	1,062

Source: RF, "Employee Headcount by Funding Source" (March 24, 2011).

There are some structural reasons for these differences, but there are also political or operational ones. For example, the large "Agency" number of employees at Stony Brook is comprised primarily of support employees for CPMP (the medical faculty's "Clinical Practice Management Plan") which is a non-State entity, although subject to the Article 16 Regents' rules. At Stony Brook, the RF employs more than 1,500 people (largely billing clerks, nurses and secretaries) who support clinical practice and have only a tangential connection to research functions. In contrast, we were told that Downstate became so "frustrated" with the difficulty of dealing with the RF, that the corresponding faculty clinical practice created a separate corporation and transferred support employees into it. As the Stony Brook and Downstate examples illustrate, there is not necessarily a consistent rationale for RF employment across campuses.

The campuses complain about various aspects of the RF's performance of basic HR functions. As is widely acknowledged, one of the main problems of New York State contracting that the RF was created to address is that the time frame needed to bring people onto the State payroll, and determine "class and comp," or to have separate research supply contracts or sponsor agreements approved by OSC and OAG, is so long that it would effectively kill research programs. The RF is supposed to avoid these obstacles, and by all accounts it does so very effectively. This is its indispensable function, without which virtually everyone believes the SUNY research enterprise would atrophy.

But problems persist in how the RF performs these functions. For example, in the view of many campus researchers, they themselves have the expertise to decide whether a nurse practitioner (who will work with cancer patients enrolled in a clinical trial and also assist in data recordation for the research) needs to be at x or y level of experience and compensation. They resent it when the RF "second guesses" them and, in their minds, impedes the research project. But, in response, the RF says in effect, "Look, we are a unified employer. Consistent with law and best practices in HR, we

need to achieve some consistency in job classifications and pay grades. We can't just let each PI and campus make its own inconsistent decisions."

From a legal point of view, there is a lot of justification to the RF rejoinder. They have been legally mandated to perform an HR function, and they should be allowed to do it lawfully and professionally. What is harder to assess is why there is a perception across a number of campuses that the RF meddles not just in specific compensation decisions, but, one might say, in "policy level" issues affecting the workforce, such as the overall mix of nurses, nurse practitioners, and LPNs. One campus executive said that 70% or 80% of the faculty are happy with the RF's performance in this regard, but others said problems were too common. Also, several of the campus HR people said they were simply not consulted and were treated high-handedly when the RF overruled their decisions.

Most campus people said the RF does a good job of getting employees on the payroll quickly, though naturally there was grouching about occasional problems. In some cases, they said they expected an employee to arrive, only to find that the RF had found a hiring glitch and the employment would not occur. The RF head of HR seemed genuinely committed to managing things well with the campuses, but the campus HR directors in some cases still said the routine process too often is mishandled. At a minimum, implementing a better mechanism for communication about hiring time frames and compensation adjustments seems prudent.

There also has been friction over the RF's calculation of fringe benefits, its configuration of benefits, and the costs passed on to the campuses. In light of the turnover of personnel involved in the revolving portfolio of research grants, many campuses say that there is no need for the high levels of fringe benefits provided by the RF. The RF fringe benefit cost is currently 39%, which is passed on to the grant. The largest components are retirement (13.4%), group health (15.5%), and FICA (7.3%). Some researchers feel this makes them noncompetitive with other leading Universities when they apply for grants and propose budgets. The RF counters that it needs to compete with other New York State employers, and that if it did not provide these benefits, it could not recruit high-quality personnel, which would impede research.

The RF notes that SUNY's own fringe benefit level is even higher, 44.09%. <sup>2/</sup> The RF states that "the RF regularly compares RF premium contributions and fringe benefit rates to University benchmarks to assure that the costs in the fringe benefit pool are reasonable, so as to compete with other Universities for sponsored research program funding and continue to attract and retain prominent research faculty." (RF, "A Background Document Supporting the Strategic Plan 2009-14: Environmental Scan and

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<sup>2/</sup> The RF points out that "The RF recovers the funds needed to cover the cost of employee fringe benefits programs by applying fringe benefit rates to accounts that fund employee salary and wages," based on rates negotiated with the Department of Health and Human Services ("HHS"). The current rate is 44.09%, resulting in annual credits or deficiencies, which are then resolved in next year's rate. (RF, "Final Financial Plan Fiscal Year 2010-11," p. 49).

Assessment of Internal Strength and Weakness” (April 2009)). However, many campuses question whether this has been accomplished. The 2009 RF Strategic Plan also notes that in 2007 the RF performed a study of “fringe rate components, institutional peer system data, and actions taken to control RF fringe rates,” and that a remaining task was to prepare options and responses. (Strategic Plan, at 13 (2009)). The request has been embodied in the RF’s 2011 Final Financial Plan.

The campus personnel’s rejoinder is in part that you don’t need faculty-level benefits for a workforce of lab technicians who come and go based on grants and that certain University benefits are designed more for long-term faculty and similar employees. <sup>3/</sup> The campuses object to the total cost being passed on to them.

Obviously, any change in fringe benefits rates would implicate HR policies, collective bargaining agreements, and legal issues. If the RF rate were lower (and therefore the “delta” between the SUNY and RF rates were greater), it might simultaneously (a) helpfully lower research budgets, but (b) create a problem by exacerbating the differences between benefits to RF workers (such as those in the faculty practice plans) and the SUNY employees who work alongside them performing similar functions. These are complex benefits and HR management issues. We flag them and note that addressing them might reduce one irritant in the SUNY-RF relationship.

## **2.B. Financial Management and Fund Accounting.**

Along with HR administration, financial management and fund accounting are the principal functions that the RF performs. Accordingly, they are the ones to which the RF has devoted most of its resources in recent years. The RF says it has invested heavily in IT systems, etc. to better track and report on grant finances and expenditures. This is not an area that we undertook to audit or that we are professionally equipped to assess. What we can report is that there seemed to be a reasonably high level of satisfaction among the campuses with the way the RF performs this function. We were not told of major problems or of any material failure of the RF to be able to report effectively on the remaining unencumbered amounts under grants, or other information the campuses might need. The RF believes it has continually strengthened its capacities in these areas.

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<sup>3/</sup> Some other research Universities have found a way to balance the need to recruit and retain high quality personnel with the concept that fringe benefits should be commensurate with each type of employment. They identify several categories of personnel and vary fringe benefits accordingly. Many Universities, such as Georgia Tech and the University of Central Florida, have separate fringe benefit rates for temporary personnel. Other institutions, such as the University of Kansas, determine the fringe benefit rate based on the activity level of the faculty or staff member (e.g., if an individual works .90 to 1.0 FTE, then he or she receives a 34% rate; if he or she works .5 to .89 FTE, a 39% rate; and if he or she works .01 to .49, a 9% rate). (University of Kansas, Research and Graduate Studies, “Fringe Benefit Calculation” (effective July 2010, and effective for FY 2011)).

But one major concern, addressed in Section 4 below on Compliance, is that neither the RF nor the campuses seemed clear on who was responsible for tracking effort reporting, which of course affects how grant budgets and expenditures are computed, and which carries substantial legal compliance risks. We did not learn of any major problems that had yet occurred, but this is not a sufficient cause for confidence. SUNY and the RF need to put in place a secure effort reporting mechanism that in fact ties the total “institutional base salary” from all sources and the RF grant accounting.

There was some lack of clarity about who actually possessed support data and was able to verify the consistency and reality of faculty time and effort across research (RF), teaching (SUNY), administration (SUNY or Hospital), faculty clinical practice (non-State faculty practice plan), etc. Several campus executives complained that the RF was usually very slow in responding to information requests. The RF believes its recent system upgrades provide a solid basis for effective reporting, and that, attendant to that, there is greater clarity of roles between the RF and SUNY. Also, the RF has convened a new Compliance Committee to work on this across campuses. (See Section 4 of this Report addressing Compliance.)

### **3. Disputes and Litigation.**

It was surprising to us that there were such frequently recurring frictions between the campuses and the RF over employee actions, grievances, disputes, and litigation. As with some other issues, the reports were quite asymmetrical: the RF said that it coordinated very well with the campuses and consulted them routinely on disputes, threatened claims, and litigation, while the campus personnel complained that they often were “blindsided” by RF decisions. This may be a “filtering” effect, i.e. that if nine things go right, people nevertheless remember the one that went wrong. Or it may be that glitches should be rarer than they are and there is simply poor communication. Campus personnel reported recurring problems of the following kinds:

- The RF will discharge someone without adequate prior consultation with the affected campus office, and this may create a problem for other employees or a program.
- The RF will discharge someone based on incomplete information, such as one case in which a “beloved” employee who was popular with both co-workers and supervisors was discharged for remediable reasons, in the view of the local campus.
- The RF will decide to litigate cases that the campus thinks are not the strongest, or will settle cases that the campus thinks could effectively be litigated. In effect, the RF makes its own decisions instead of deferring to, or consulting, the campus (which must work with the person).
- The RF may settle cases on which campus counsel have previously worked--without consulting them, thereby surprising them and creating difficulties.
- The RF will engage private counsel and expect the campus to pay for them, but without consulting campus counsel on selection of the outside counsel.

We would not attach as much significance to these reports if they emanated from just one campus, but they were reported by all four health science centers, for example.

In effect, the RF legal staff said: “Look, we try hard. How much consultation is enough is in the eye of the beholder. We face a large number of issues, and some need to be decided quickly.” Also, the RF legal staff made a point which to an extent rings true: “Sometimes people say they were not consulted simply because they disagree with the final result.”

We do not think it would be fruitful to try to make definitive “findings” on this universe of events. The fact remains that collegial communication among the campuses and HR personnel handling employee issues is desirable, and both groups should support an effort to improve that communication. Disputes and litigation are recurring, but by their nature are less common than many other day-to-day grant administration functions. Coordinating on these cases should be possible.

#### **4. Compliance Functions.**

Obviously, in today's legal and regulatory environment, enormous attention must be devoted to achieving legal and ethical compliance in the conduct of sponsored research. The RF states that one of the core functions it performs is to ensure "compliance with federal and state regulations and approve terms and conditions." (Strategic Plan, at 2 (2009)). SUNY, like other leading institutions, seeks to maintain a robust and state-of-the-art compliance program, which includes many elements: campus-based policies; training; consultation with legal counsel; fund accounting and internal controls; clinical review by internal review boards ("IRB"); review by various faculty committees; management oversight; and other mechanisms. One campus executive cited as a positive example a case of a PI misappropriating funds. The campus discovered the problem; the campus and the RF each had audits; and they cooperated well in resolving it.

Nevertheless, SUNY faces particular challenges in achieving compliance, among them the fact that SUNY is distributed across 64 campuses; SUNY includes some campuses that have a large research portfolio and endogenous research management capacity, as well as many campuses that have relatively little sponsored research or ability to manage the occasional compliance issues on their own; and compliance functions are seen as divided between SUNY campuses and the RF. The latter point highlights the need for clarity.

The SUNY-RF arrangement; under which RF is the recipient of the sponsored research grant, but the awards are performed at various SUNY campuses, is not unique, but it does represent some compliance challenges. The basic division of functions seems to be that (a) the RF performs the financial and administrative accountability functions, and (b) the campuses directly perform the scientific compliance functions (such as compliance with human subjects rules, U.S. Food and Drug Administration regulations, animal care and use, conflicts of interest, research misconduct, and similar issues. However, in this bifurcated arrangement, it is a challenge to ascertain how exactly the RF is able, as grantee, to comply with the Federalwide Assurance, since some of the assurances it addresses, such as human subjects standards, are implemented in fact by the campuses. Likewise, as to IRB functions, it must be clear how the RF verifies conflict of interest issues as well. RF personnel commented that "not a lot of attention has been given to what compliance is done by RF versus the campus." The question is why this confusion has been allowed to continue for so long.

Neither the RF nor the campuses seemed clear on who was responsible for managing institutional effort reporting obligations. Effort reports are used to document and support compensation costs charged to federal awards. Because compensation costs generally comprise the single largest element of direct charges to federal awards, weaknesses in an institution's effort reporting policies, procedures, or practices can generate substantial legal compliance risk. For example, over the past five years, effort reporting has been involved -- in some form or fashion -- in almost every sponsored research-related False Claims Act settlement involving Universities. We did not learn of

any major problems that had yet occurred, but this is not a sufficient cause for confidence. SUNY and the RF need to ensure that there is a secure effort reporting mechanism that is based on the appropriate “institutional base salary,” and that is able to reasonably allocate that salary across the total professional effort of faculty members and others working on sponsored projects. Further, if it does not already do so, this system should link directly to the RF grant accounting system. SUNY and the RF should also consider reviewing their effort reporting policies and procedures and assessing the need for training initiatives to ensure that both faculty and administrators understand and can comply with their effort reporting obligations.

There was some lack of clarity about who actually possessed support data and was able to verify the consistency and accuracy of faculty time and effort reporting across functions and payment sources, including research (RF), teaching (SUNY), administration (SUNY or Hospital), faculty clinical practice (non-state faculty practice plan), etc. RF officers conceded that this was a weakness, but said they had recently convened a group to address those issues. They also are seeking a vendor for software to better manage on-line all faculty research compliance issues. This should be in place by June 2012.

The materials from a July 2010 SUNY-RF Vice Presidents for Research meeting clearly flagged areas in which greater effort was to be devoted, such as:

- “Develop a research compliance analysis,”
- “Consider the national compliance environment,”
- “Identif[y] applicability of the regulations to RF-grantee institution” and “provid[e] the inventory to SUNY Interim University Counsel.” (RF and SUNY, “Research Compliance: Vice Presidents for Research Meeting” (July 28, 2010)).

The Vice Presidents identified as “Strengths” their knowledge of rules such as OMB Circulars and Federal Acquisition Regulations. More importantly, the group identified research compliance gaps, such as:

- Institutional Conflicts of Interest
- Misconduct in Science
- Human Subjects Protection
- Use of Animals in Research
- Recombinant DNA research. (RF and SUNY, “Research Compliance: Vice Presidents for Research Meeting” (July 28, 2010)).

A long list of remedial actions was identified, but they were described in such vague terms (e.g., “connect campuses to RF and SUNY levels,” “facilitate research compliance communities and culture” and “leverage expertise”) that it is impossible to discern what actually was to be undertaken. (RF and SUNY, “Research Compliance: Vice Presidents for Research Meeting” (July 28, 2010)).

Overall, the SUNY-RF reporting process should be assessed to consider, for example: (1) is the actual effort reporting system robust enough to ensure compliance in today's environment (after all, great policies/procedures only do so much if the system itself is dysfunctional); (2) is there a sound suite of policy/procedure documents; (3) are roles and responsibilities carefully thought out, assigned, and explained; (4) has there been enough training and education such that both faculty and departmental administrators understand the rules and can follow them; (5) how does the institution monitor compliance. None of these are easy questions and they are particularly difficult for SUNY because it covers so many different institutions.

For example, the responsibility for financial grant administration, fund accountability, etc. resides with the RF. The responsibility for scientific oversight, IRB review, protocol review, integrity of scholarship, and publication of data resides at the campus level. But a number of important compliance questions are hybrid and traverse this neat, theoretical division of functions. The important issue of effort reporting, [4/](#) for example, requires that the faculty performing the work (who must complete effort reports) and the campus HR people who track salary and effort, as well as the RF people who report grant expenditures, all must be working from the same data, and be "on the same page."

As you know, many other institutions have encountered problems with insufficiently integrated effort reporting or compliance processes. A recent article in the journal of the National Council of University Research Administrators (the "Research Management Review"), co-authored by Stony Brook University's President, Samuel L. Stanley, Jr., noted that some institutions are developing a web-based faculty portal so that faculty members can log into a central system to review and complete multiple compliance requirements. Such a system can serve dual roles by eliminating redundant tasks for faculty and ensuring that all of the necessary players have the information that they need (i.e. that the information is consistent). Such an instrument would be particularly helpful within SUNY.

Another compliance issue we became aware of involved specialized service/recharge centers for SUNY. Such a center is an accounting mechanism to achieve fair imputation of ancillary costs to grants (e.g., using specialized equipment). A problem arose at University of Buffalo, in which certain operations probably should have been established as a recharge center, and another issue arose at Stony Brook, concerning rates charged by such a center. This is a subject of increasing interest to the HHS Inspector General, which has begun a pilot audit of a University in another region on this set of issues. So this is another example of an area in which SUNY and the RF

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[4/](#) The RF's most recent Strategic Plan Progress Report stated that the RF is collaborating with the campuses on a "streamlined, electronic effort reporting process." (RF, "Strategic Plan Progress Report: The Year in Review," p. 3 (2010)). In summer 2010, the RF-SUNY Research Vice Presidents wrote an outline of an initiative, "Operational Excellence: Effort Reporting," with many elements. But no one I interviewed was clear on where this was going.

share an interest in ensuring that each understand exactly what the other is doing and charging for.

My sense is that the RF recognizes the importance of reviewing in a holistic sense the compliance functions -- from policies and procedures, through IT systems, legal standards, personnel training etc. -- but that they feel they currently lack the resources to undertake this. Hence, it would be wise for SUNY and the RF to confer, and to triage the analytic tasks in the coming years so that the more important ones are funded and conducted first. Among the issues that we see major research Universities focusing major attention upon, are the following:

- Effort reporting.
- Cost transfers (a high incidence of cost transfers can be a “red flag” for auditors).
- Direct charging practices (what is charged to a grant).
- Direct charging of administrative and clerical costs (the government believes that these generally should be covered by the University’s Facilities and Administrative (“F&A”) rate, though at times direct charging can be justified). Buffalo is currently undergoing an audit on this issue.
- Cost sharing (if the University promises to match some portion of federal funds, it must do so).
- Sub-recipient monitoring (if the RF or SUNY passes federal dollars to a sub-recipient, they still may have an obligation to ensure proper use of such funds).

## **5. Technology Transfer and Commercialization.**

### **5.A. Overall Performance.**

Tech transfer/commercialization is an increasingly important function for research Universities for many reasons. For example:

- The University's mission is to diffuse knowledge and improve society--and the effective translation of knowledge into inventions advances that goal.
- The Bayh-Dole Act requires recipients of federal research support to, among other things, share a portion of the revenue with the inventor and use the remainder to support the translation of scientific research or education into publicly available inventions.
- In fields such as life sciences and electrical engineering/computer sciences, the private sector offers enormous financial opportunities to investors. For a University to remain competitive in recruiting star researchers, it needs to offer them mechanisms to ensure that their inventions can be commercialized and that they can share in revenues.
- University budgets are under multiple pressures; free cash flow is in short supply. Technology licensing revenue can be an important source of unrestricted "marginal" dollars, even if it is small in "total" dollars.
- Increasingly, State legislators view issues in terms of "jobs created." Universities will be supported more if they are viewed not simply as generators of knowledge, but rather as engines of regional job creation.

For these and other reasons, SUNY needs to be in the forefront of tech transfer. SUNY also ought to be a leader in tech transfers for many reasons. For example:

- Overall, SUNY has a total sponsored research portfolio of about \$900 million, ranking No. 4 among all Universities in the nation. (Strategic Report, p. 15 (2009) (citing data from the National Science Board, Science and Engineering Institutes (2008)).
- SUNY's research is concentrated in life sciences, engineering, computing, nanosciences, and other areas which command great interest from the investor community.
- SUNY is located in New York State, the financial/investment leader in the U.S., and a state that is home to many large industrial and technology corporations.
- New York State's population of 19 million offers intellectual capital that many states lack.

However, SUNY also has some disadvantages, such as:

- SUNY's research is dispersed across many campuses.
- Some major SUNY research campuses (Buffalo, Albany, Syracuse) are located in secondary cities that find it difficult to compete with the Bay Area, Boston or Research Triangle in attracting mobile researchers.
- SUNY lacks the capital investment pool to jump-start programs and hire faculty in critical areas. (The Legislature has been more generous in supporting buildings and infrastructure.)

Given these competing positive and negative factors affecting tech transfer, how does one evaluate the level of success that SUNY and the RF have had, or that they should be expected to have? First, there is the question of what the goal should be, and then the question of what metrics best measure achievement of that goal. Clearly, the RF should be evaluated in part on how well it achieves the goals it sets for itself. Among its strategic goals is to “create a technology transfer licensing toolbox that will be accessible to campus Technology Transfer Offices (TTOs).” (Strategic Plan, p. 7 (2009)). Yet, the campuses say it has not effectively done so to date. Another RF goal is to “develop and implement a gap fund for developing early-stage technology/IP in order to take timely advantage of market opportunities.” (Strategic Plan, p. 7 (2009)). The RF has just recently started such a fund with a \$500K investment, matched by \$500K from two campuses.

Overall, most participants agree that the SUNY-RF efforts in technology transfer have been only modestly successful, and disappointing overall.

There are a number of gradients on which Universities customarily rate their success in technology transfer – and SUNY/RF rank poorly on most of them:

1. Tech Transfer Revenues. In FY 2009, the RF's technology transfer licensing revenues were \$13.8 million, a total of 2.7% of its federally sponsored research funding. Compare this to the performance in FY 2009, for example, of the Wisconsin Alumni Research Foundation (\$56.5 million in licensing revenue, or 9.67% of the University of Wisconsin-Madison's federally sponsored research funding), the University of Florida Research Foundation (\$50.4 million in licensing revenue, or 15% of the University's federally sponsored research funding), or the University of Georgia Research Foundation (\$30.5 million, or 24.6% of the University's federally sponsored research funding). Moreover, in its 2010-2011 “Final Financial Plan,” the RF projects royalty revenue to remain essentially flat for the next five years (\$8.5 million to \$9.2 million). (RF, “Final Financial Plan: Fiscal Year 2010-11,” p. 19). This is a remarkably unambitious goal, given all that the RF says about stimulating tech transfer.

The median return (IP revenue divided by research expenditures) for the top 20 institutions was about 9%. SUNY's realization was 1.3%! SUNY is by far the lowest of any of the top 20 institutions on this gradient.

For a broader comparison, see Chart #6 on the next page. It shows vividly that SUNY has a relatively poor record of earning licensing revenue, given the huge base of research it performs.

**CHART #6: Top Universities (plus SUNY): Research Expenditures, License Income, and Return on Research Expenditures for FY 2007**

<u>Rank</u>	<u>Name of Institution</u>	<u>2007 Research Expenditures</u>	<u>2007 License Income</u>	<u>License Income as % of Research Expenditures</u>
1	New York University	\$297,867,000	\$791,210,587	265.6%
2	Columbia University	\$620,344,000	\$135,632,417	21.9%
3	University of California System	\$4,012,743,039	\$97,593,575	2.4%
4	Northwestern University	\$361,529,245	\$85,298,599	23.6%
5	Wake Forest University	\$185,609,000	\$71,226,905	38.4%
6	University of Minnesota	\$547,966,000	\$63,315,910	11.6%
7	University of Washington/Washington Research Foundation	\$961,483,207	\$63,283,697	6.6%
8	Massachusetts Institute of Technology (MIT)	\$1,216,800,000	\$61,600,000	5.1%
9	University of Rochester	\$357,473,948	\$53,336,965	14.9%
10	Stanford University	\$699,922,095	\$50,370,600	7.2%
11	University of Florida	\$473,800,000	\$48,035,273	10.1%
12	W.A.R.F./ University of Wisconsin Madison	\$1,028,000,000	\$46,700,000	4.5%
13	University of Massachusetts	\$397,470,000	\$40,738,116	10.2%
14	Mount Sinai School of Medicine of NYU	\$269,451,000	\$23,590,318	8.8%
15	University of Colorado	\$637,400,000	\$22,698,000	3.6%
16	Emory University	\$365,017,326	\$17,681,766	4.8%
17	Iowa State University	\$242,412,000	\$17,659,203	7.3%
18	University of Utah	\$274,556,126	\$17,493,415	6.4%
19	University of Iowa Research Foundation	\$363,243,000	\$17,392,522	4.8%
20	University of Georgia	\$332,612,000	\$16,156,819	4.9%
<b>28</b>	<b>Research Foundation of SUNY</b>	<b>\$781,857,438</b>	<b>\$10,189,593</b>	<b>1.3%</b>

Source: RTI International, "Technology Transfer and Economic Development: A Strategic Analysis for State University of New York Research Foundation," p. 6 (March 4, 2009) (compiled from Association of University Technology Managers Annual Survey, FY 2007).

2. Invention Disclosures. In FY 2009, SUNY invention disclosures numbered 320. Compare this to the performance of the Wisconsin Alumni Research Foundation (“WARF”), which reported 345 disclosures despite receiving fewer federally sponsored research dollars than the RF. However, SUNY’s invention disclosure rate exceeds that of most top Universities that report such data. All things being equal in terms of quality (unknown), this suggests that SUNY does have a promising tech transfer pipeline.

3. Patent Applications. The RF submitted 205 patent applications in FY 2009, and 55 patents were granted. Compare this to the performance of WARF, which submitted 265 patent applications (not including foreign applications) and was granted 111 patents), or the Georgia Institute of Technology, which was granted 60 patents, despite having almost \$300 million fewer in federally sponsored research dollars than SUNY.

4. Licenses. The RF executed 49 licenses and option agreements in 2009. Compare this to the performance of WARF (56), the Iowa State University Research Foundation (84), and UGARF (112), each of which received substantially less in federally sponsored research dollars than the RF. Several campus personnel we interviewed complained of situations in which the inventors and the campus IP programs felt like the RF licensed the faculty’s technologies too cheaply.

Significantly, it is not just that the SUNY-RF technology performance is not currently robust. This relative deficiency has existed for more than a decade, and there is not yet evidence of strong improvement.

The basic numbers on important gradients of tech transfer activity are presented in Chart #7:

**CHART #7: SUNY – RF Technology Transfer Performance Over Time**

	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>
Invention Disclosures	253	245	284	268	290	320	260
Patent Applications	169	193	195	208	209	205	182
Patents Granted	44	34	33	41	46	55	61
Licenses/Options Executed	48	78	45	54	55	49	48
Royalties (\$Millions)	14.5	12.9	10.1	11.1	18.0	13.8	12.3

Sources: RF Data Dashboard; Quarterly Strategic Plan Progress Reports. However, the RF has reported some uptick in both licenses and revenues in 2011. See Second Quarter Strategic Plan Progress Report.

There has been some increase in invention disclosures and patent applications. But as to revenue, except for Stony Brook’s Reo Pro (\$8.2 million of the total \$10.0 million), a stable and large source of royalty revenue, the performance would be far worse. Overall, year after year, Stony Brook generates 90% or more of total SUNY royalty income. In effect, aside from one invention at one campus, the entire SUNY system and its \$1 billion/year research enterprise produce no material licensing revenue.

This chart has shocking implications for SUNY: usually one would expect economies of scale--the greater and more diverse the research portfolio the greater the visibility and the greater the yield in tech transfer. Being located in New York State, one of the world’s financial capitals, also should help. Yet, SUNY is 4<sup>th</sup> nationally in total research but just 28<sup>th</sup> in IP revenue. 5/

So on many of these parameters, SUNY is regarded as deficient. The stakeholders cite varying reasons for this. The RF, for example, refers to one major challenge being “[The] absence of a well defined and executed SUNY faculty recruitment and retention program that ensures the expertise and efficient support of faculty and new graduate students,” (Strategic Plan, at 5 (2009)). Without constant recruitment of key faculty, it has been hard to stay competitive.

5/ The RF cites a Milken Institute study that ranked SUNY #21 internationally among Universities in commercialization, based on a variety of factors. (See Pappas Report, Exhibit E.) Some individual campuses have significantly increased their royalties--such as Binghamton, which has multiplied several-fold in a few years, currently to about \$600,000.

Many at the RF also note that the yield on technology transfer is almost wholly dependent on the kinds of faculty that the SUNY campuses recruit, their research interests, their focus on translational work, etc.--over which the RF has no control. Some stakeholders also note that technology transfer revenue is not a meaningful measure of research administration functions because most revenues derive not from an accumulation of many research successes but from the rare “blockbuster” drug, device, or invention, and these cannot be predicted or “managed to.” Others counter that even if one looks at earlier stage pipeline measures, such as invention disclosures or licenses granted, SUNY does poorly, and these metrics are more closely reflective of overall effort. One could go on looking for answers, but the unavoidable starting point is that, for whatever constellation of reasons, SUNY has not performed as well in tech transfer as the size of its research portfolio would suggest that it should.

In developing a plan to improve performance, it might be helpful to look at especially successful research foundations--such as WARF. WARF has done a number of things to raise its profile and impact. First, WARF invested in its technology transfer leadership team by hiring Craig Heim in a newly created position of licensing manager for start-up companies. Before that, professors who wanted to launch companies needed to approach one of seven different licensing managers, and those from outside the University had to try to figure out which manager would communicate with different companies. Heim’s prior investment banking background well-positioned him to assist faculty interested in pursuing a start-up. In addition, WARF hired Hewlett-Packard’s former director of intellectual property licensing as its chief technology commercialization officer.

Second, WARF cultivated relationships with key alumni (such as John Morgridge, former Chairman of CISCO Systems) allowing it to capitalize not only on their expertise but also to raise funds for innovative programs. Morgridge participated in an innovative “boot camp” for scientists sponsored by the University of Wisconsin-Madison Business School, [6/](#) and has also contributed to a research institute, the Morgridge Institute for Research. Alumni who feel invested in an institution are more likely to freely give their time, expertise, and financial resources.

Third, WARF has worked to create a culture that encourages faculty to think hard about technology transfer. The head of the University’s Research Park, Mark Bugher, stresses that as faculty members become comfortable with the commercialization process, more come forward with disclosures and start-up ideas.

Fourth, WARF has not isolated itself – it seeks opportunities to emulate good ideas from other Universities and research foundations across the country. In 2010,

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[6/](#) Note that CNSE held an “entrepreneurial boot camp” in February 2011; the press release covering the event does not describe whether the RF participated in the development of this program. (CNSE Press Release, “UAlbany NanoCollege hosts 150 leaders and executives in clean energy for launch of ‘Entrepreneurial Boot Camp’ series” (February 3, 2011)).

WARF's senior managers visited the University of Utah to learn more about the successful technology transfer programs it recently implemented. WARF launched a program in 2008 called "MERLIN," modeled on an MIT program; MERLIN relies on volunteers who have launched, grown and successfully managed businesses to advise entrepreneurs who are building start-up companies. In these and other ways, WARF has strived to become even more successful.

Another dimension on which a University's technology transfer function is increasingly being evaluated is whether it generates interest sufficient to develop (a) a high tech "accelerator" or "incubator," and (b) an affiliated venture fund. Many Universities have developed one or both. This has been spurred by a 2006 IRS ruling affirming the nonprofit status of a community college foundation that planned to unveil a new high-technology incubator and pre-seed capital fund). (I.R.S. Written Determination 200614030 (April 7, 2006)).

For example, the University of Utah has:

- established a seed fund, KickStart;
- established specialized investment funds focusing on key, high-value research areas at the University (such as software and energy);
- actively recruited entrepreneurs to start companies;
- formed a University-based accelerator, Venture Bench, providing a suite of services for pre-revenue University start-ups (such as business plan development and accounting assistance);
- created a "virtual incubator" program for qualified small University start-ups, which receive a \$50,000 credit for sponsored research conducted at the University to further product and market development of a technology;
- created a variety of programs through the Technology Commercialization Office, such as business plan competitions (with seed funding prizes for the winners), law clinics and entrepreneur-in-residence programs; and
- encouraged faculty to view commercialization as a "priority." (See Matt Storms, "How to create more Midwest university start-ups: looking to Utah for an example," ENTREPRENEURS' COUNSEL, August 24, 2009).

After an overhaul of its technology transfer efforts in 2005, the University of Utah challenged MIT for its rank as the top American University generator of start-up companies in the Association of University Technology Managers annual survey. In 2009, the University of Utah outperformed MIT by launching 19 companies based on University research, while MIT launched 18. UT's success stems from robust efforts not only to develop new programs, but also to change the mindset about the importance of technology transfer at the University. As a result of UT's new programs, between 15 and 24 start-ups have been launched at the University each year since 2006; these results are dramatic given that between 1970 and 2005, it had launched fewer than seven start-ups each year. In addition, the University built its program while receiving only a fraction of the research expenditures of comparably successful Universities (\$355 million in sponsored research in 2009).

Given the RF's central role in tech transfer, it is important that there be a sense among the campus investigators and technology transfer personnel who work with the RF that the RF is skilled and knowledgeable and that, whatever the result, they can obtain useful technical assistance from the RF. Such a widespread perception does not now exist. Technology transfer personnel at several campuses said that on concrete, technical issues, the RF legal people were usually skilled and helpful. But in terms of larger strategy, or on more strategic issues like bundling of technologies, selling vs. licensing, or deferring commercialization during scale-up, they were "out of their depth." Now this may be unfair: there may be a bit of SUNY pridefulness. The RF staff said they routinely meet the need, and respect their technology transfer colleagues on the campus who are "closer to the action" and know the PIs. But the RF people did not feel inferior in expertise, and they may be correct; we are not in a position to judge that.

Other Universities, including Case Western, Georgia Tech, North Carolina State University, Ohio State, University of California at San Diego, University of Michigan, University of Texas at Austin and Wake Forest have directly established or are considering establishing accelerators and venture funds. Universities are choosing to become affiliates of a special fund devoted solely to financing start-up companies formed to commercialize technologies licensed from research at the participating Universities; Osage University Partners, founded in 2009 by venture professionals and a former president of the Association of University Technology Managers, shares the profits generated by the fund's investments with the participating Universities which include the University of California-Berkeley, University of Florida and the University of Michigan. In addition, some state legislatures have created state-subsidized venture funds, such as Georgia's GRA Venture Fund LLC.

Likewise, a "gap funding" vehicle, such as exists at the University of California, University of Texas, University of Washington and the University of Wisconsin-Madison, can be potent. These smaller grants help researchers "bridge" from sponsored basic research and invention disclosure to proof of concept and commercialization opportunities.

SUNY has itself spawned several accelerator/incubators, including the Advanced Biotechnology Incubator at SUNY Downstate Medical Center and the Long Island High Technology Incubator located on the Stony Brook campus. The general impression seems to be that there has been moderate but not overwhelming success. Of course the CNSE has been spectacularly successful in attracting companies to locate in New York.

Based on interviews in late 2008 and early 2009, RTI International identified SUNY campus concerns about “areas in which SUNY/RF has fallen short in providing centralized [technology transfer] services,” which indicated the following:

- “Campuses report not being engaged in decision-making, with the result that [tech transfer] decisions are not always seen as being in their best interests”
- “Efforts to educate and expand awareness of [tech transfer] topics are limited”
- “Relationship building with faculty is insufficient”
- “Disclosures seem to go into a ‘black hole’”
- “Generally, subjects reported a lower than desired level of support.” (RTI International, “Technology Transfer and Economic Development: A Strategic Analysis for State University of New York Research Foundation,” p. 4 (Jan. 20, 2009)).

Concerns about the services to decentralized campuses were:

- “Key players are disconnected and uncoordinated: SUNY is not working as a system. The size and breadth of the system are not being leveraged.”
- “Basic data management/sharing infrastructure is lacking.”
- “A disproportionate amount of resources is allocated to disclosure and patent management, taking away from activities that build relationships and revenue.” (RTI International, “Technology Transfer and Economic Development: A Strategic Analysis for State University of New York Research Foundation,” at 4 (Jan. 20, 2009)).

With a few exceptions (e.g., the “Find a Scholar” initiative), essentially, two years later, we heard these same complaints.

The RF’s “Proposed Strategic Framework for SUNY” includes a number of these ideas, including (1) “select and implement common IT tools for communicating and sharing key data related to research activity,” (2) “[p]ool/showcase SUNY technology to industry and investors,” and (3) “create virtual teams of networking and licensing experts,”--but it may be too early to tell if these really are occurring.

Very recently, SUNY and the RF issued a summary of “SUNY and the Entrepreneurial Century -- Implementation Initiatives” (dated April 2011) noting steps such as:

- “Development of a state-wide entrepreneurship competition that inspires participating faculty to prepare for the creation of an actual business.”
- “The Technology Accelerator Fund (TAF) will bridge the gap between R&D funding and private investment by providing grants . . .”
- “[A] system-wide suite of courses, grants, and mentorship programs that will foster more entrepreneurial campus cultures . . .”
- February 2011 launch of the “Find a Scholar” program and database. (RF, “SUNY and the Entrepreneurial Century -- Implementation Initiatives” (April 8, 2011)).

## 5.B Regionalization.

Another pending issue is the move to “regionalize” the tech transfer process at SUNY campuses by creating five “Regional Hubs.” The “Regional Hubs” for tech transfer will be Binghamton (servicing, for example, Alfred, Cortland, Delhi, ESF, Morrisville, Oneonta and Oswego), as well as Albany, Buffalo, CNSE, and Stony Brook.

Under the new RF plan for “Regionalization of Tech Transfer,” the RF will retain only a few key functions for all campuses, such as “pool/showcase SUNY technologies,” “industry outreach,” “educate faculty through IT staff,” “provide access and expert user for tools,” and “manage patent billing, contract with attorneys.”

On the other hand, the regional campuses will perform many tech transfer functions for themselves, and under contract/voucher for the smaller campuses assigned to them as well. These functions will include “mak[ing] patent recommendations,” “plan[ing] commercialization,” “licensing negotiation,” “incubation,” and “business advisory services,” as well as (seemingly redundantly of RF) “systematic outreach to regional industry.”

This initiative has proponents and opponents. The basic premise seems unarguable: that it makes no sense for a campus with a very small portfolio of sponsored research, and a small or nonexistent pipeline of inventions, to try to maintain expertise and devote personnel and resources to complex issues of research administration, compliance and tech transfer. Indeed, the functions could more efficiently be “rented” from a sister SUNY campus that had deep, internal expertise in that area. However, the larger campuses that would be the “regional” providers are concerned that their resources will be spread too thin; that the tech transfer interests of the smaller campuses have little to do with the “regional” campuses sophisticated life sciences missions; and that they will not be reimbursed effectively for such personnel and efforts. The RF, however, feels that the regionalization initiative is responsive to its mandate to serve the entire SUNY research enterprise while efficiently managing costs.

Regionalization seems like a reasonable effort. Naturally, it would help avoid frictions if the charging/reimbursement system between Hubs and served campuses is fair. The RF has developed such a charge schedule providing, for example the fixed dollar fees for specific services like invention disclosure evaluation (\$1,500), and the Hub campus recovery of gross royalties after expenses on completed licenses.

### 5.C. Faculty Participation in IP Revenue.

Many participants in the tech transfer market say that a University's success depends in part on assuring that it provides a competitive level of financial incentives to faculty, so they do not defect to other institutions or to industry. Universities use a variety of formulae in allocating IP revenue among inventors, others on the research team, the academic department, and the administrative unit (school, campus, and overall University).

SUNY's policy is to provide the inventor and the inventor's heirs or legatees a nonassignable share in any proceeds from the management and licensing of an invention equal to 40% of the gross royalty paid. Each SUNY campus establishes its own guidelines for the distribution of the remaining 60% of the royalties within the institution. Typically, the campus will support research in the department of the inventor and the rest of the institution. For example, Stony Brook divides the funds among the VP for Research, the inventor's laboratory, the President and the "supporting entity," varying the percentage received with the amount of royalties generated.

In accordance with the 1977 SUNY-RF Agreement, the RF adopted as its own the "Patents and Inventions Policy of State University of New York," as approved by the SUNY Board of Trustees on September 19, 1979 and amended November 16, 1988. Presumably, therefore, when the RF allocates IP revenue, it abides by the SUNY policy.

Here are a few comparisons to other public institutions' policies on allocation of IP revenues:

- Georgia Tech Research Corporation ("GTRC") pays the inventor the first \$2,500 of gross licensing revenue. The inventor then earns 33% of any further revenue. For revenues up to \$500,000, the inventor's academic department or unit will receive 17% and GTRC will receive 50%. For revenues between \$501,000 and \$1 million, the academic department will receive 27% and GTRC will receive 40%. For revenues above \$1 million, the academic department will receive 33% and GTRC will receive 34%.
- Penn State Research Foundation ("PSRF") pays the inventor 40% of the royalty income after deducting patent expenses. PSRF receives 40%, and the relevant administrative unit of the college receives 20%.
- The University of Iowa Research Foundation ("UIRF") pays the inventor the first \$100,000 of net income; thereafter, it pays 25% to the inventor, 15% to the inventor's department, 15% to the inventor's college and 20% to a research enrichment fund managed by the University of Iowa Vice President for Research. The UIRF retains 25% for operating expenses. If a single license generates more than \$10 million in annual income, the University will receive at least 15% of the income.

- The Wisconsin Alumni Research Foundation (WARF) pays inventors 20% of the gross royalty revenue generated by a licensed invention; after paying the inventor's share, WARF deducts its operating expenses from its two sources of revenue (royalties on licensed inventions and WARF's endowment). The net income is used to fund WARF's annual grant, or gift, to UW-Madison, which the University can spend as it sees fit (sometimes with a grant to the inventor's department).

Based on this limited comparison of public Universities, it appears that SUNY's payments to inventors are within the normal range.

Unfortunately, despite the fact that SUNY pays inventors twice as much as UW-Madison, received more federal sponsored research dollars in 2009, and has more than nine times the number of faculty members (18,663, not including community college faculty), WARF was granted almost triple the number of U.S. patents (111) granted to SUNY (44) in a typical year. So the "rate-limiting step" in remaining competitive for faculty in terms of their IP commercialization opportunities may not be the rate of payment, but the relative success of technology transfer transactions--upon which any revenue depends.

## 6. Legal Support.

The RF has allocated about 10 FTE, or 7% of its staff, to legal functions. The RF also spends significant sums annually on outside counsel, both for litigation matters and for transactions, particularly involving the creation of affiliates. Some of this legal effort is devoted to advising the RF itself on internal functions, managing litigation, and so forth. But significant effort is also devoted to legal support for the research and technology transfer functions at the campuses.

There is no way to avoid reporting that among all RF functions, the legal function overall has been viewed especially negatively by the consumers of the RF's services at the campuses and SUNY Central Administration. This is not uniform across the board. For example, several campuses commented favorably on the collegiality and skill of RF counsel principally devoted to intellectual property issues. Those working on HR and staffing services were viewed as helpful and skilled at times. But overall, the comments were that the RF counsel office is "secretive," "difficult" "not collegial," "not knowledgeable," and "not as good as they think."

The SUNY personnel complained that:

- The RF legal leadership treats the campuses in a high-handed, condescending manner, as if campus-based counsel do not know their business.
- The RF legal staff believes they have more expertise than they do on some issues, and does not appreciate that the campus personnel may deal with an issue far more frequently than they, and may have added expertise.
- The RF legal staff seem more interested in protecting the RF or enhancing its authority than in solving problems for SUNY.
- The RF counsel are "political" and approach many issues from the perspective of what top RF management wants rather than what is the best result for SUNY.

When I interviewed virtually all the RF legal staff, the "rank and file" seemed earnest, intelligent, conscientious, and eager to perform well. They said with conviction that "it takes two to tango," and that often the campuses complain of lack of collegiality simply because the RF has a legal obligation to be the "cop on the beat," to insist on regulatory compliance or proper HR processes, and that campus personnel just want the convenient outcome regardless of process. This Report is not the place to try to assign relative "right," but it is important to stress that while a large number of campus personnel think the RF counsel are not responsive, the RF counsel feel just as strongly to the contrary.

We have tried hard to stay away from individual or personality-related issues in this Report. However, it is impossible to report accurately on this issue without noting certain points. The campuses uniformly expressed a different level of confidence in and appreciation of the assistance received from the RF on some issues more than others. But the RF's then-General Counsel was uniformly viewed as very difficult, abrasive and at times hostile. That hostility came through loud and clear in our interviews. The RF General Counsel repeatedly described SUNY personnel--her client's sole customer--as "stupid," "out of it," "don't know what they're talking about," "academics with no idea about tech transfer," needing to "get with the program," "we need to whip them into shape," etc. We have rarely heard such intemperate remarks from a lawyer for a service organization. Even more surprisingly, these views were expressed to me not only in private, but also in a large meeting with all RF legal staff present. This attitude clearly was part of the RF "culture." As one senior RF manager conceded, "[The General Counsel] just exploited an underlying cultural issue between RF and SUNY." "The RF General Counsel recently departed. But a change in personnel without a change in culture will not suffice.

The RF General Counsel had been combatively rigid about a number of legal issues that are somewhat nuanced and that have caused recurring problems between SUNY and the RF. (See Section 10, addressing the "Legal Separation of the RF and SUNY"). Generally, in affiliated organizations, like SUNY and the RF, counsel recognize that issues often are close calls, and that there are several ways to approach the issue, or adjust functions in order to reach a mutually acceptable result. But repeatedly on significant issues, such as access to records, sharing information about strategy, terminations, etc. The RF General Counsel conveyed to both SUNY campus counsel and SUNY outside counsel that there was only one way -- "my way." This is unusual among related nonprofit organizations. Some SUNY personnel expressed the view that the RF's CEO encouraged and utilized the combative stance of RF counsel for tactical advantage in fending off SUNY and enhancing the RF's authority and role. The recent change in personnel provides the opportunity to confirm or dispel this view.

Without doubt, there is a need for better and more systematic collegial communication among the RF and campus lawyers. In the recommendation section, we make some suggestions to this end.

Note: Also see the discussion of the RF's use of outside counsel in Section 7 on Affiliated Entities and Ventures.

## **7. Affiliated Entities and Ventures.**

The RF is somewhat unusual among other University research foundations, in the number of affiliated entities and ventures it has spawned. CUBRC, Inc., formed in 1983, was the earliest affiliate and continues to be active. Currently, the RF has 17 affiliates. Affiliate creation has increased within the past few years. The majority of the affiliates were formed after 2000; of those 12, four were formed between 2008 and 2010 and one will be formed in 2011.

The affiliates are as follows:

1. Binghamton Center for Emerging Technologies (“BCET”) – Formed in October 2010, this nonprofit corporation will work in partnership with Endicott Interconnect Technologies and the RF, with support from Binghamton University’s Small Scale Systems Integration and Packaging Center, to fulfill technical needs of the Department of Defense and other federal agencies.

Note: Binghamton Technologies Corporation – This is a private non-profit entity created by the RF to construct a high-tech facility to spur job development. But it has not really gotten started and is being dissolved.

2. BioBAT, Inc. – Formed in 2006 by the New York City Economic Development Corporation and the RF (acting on behalf of SUNY Downstate Medical Center), BioBAT will develop the Brooklyn Army Terminal into a site for biotechnology expansion, manufacturing and research. The Mayor of New York City and others expressed the hope that BioBAT will help create an additional 500,000 square feet of commercial lab space in Brooklyn and generate economic development. The first 56,000 square feet are scheduled to be completed in 2011.

3. Broad Hollow Bioscience Park, Inc. (“Broad Hollow”) – Formed in 1998 by Cold Spring Harbor Laboratory, this nonprofit incubator facility on the Farmingdale State College of New York campus has a mission to facilitate an environment in which technologically innovative businesses can develop and commercialization of new technologies can be encouraged. The RF became a member of Broad Hollow in 2000.

4. Brookhaven Science Associates, LLC (“BSA”) – Formed in 1998 as a 50-50 partnership (a non-profit LLC) between a charitable trust, the Battelle Memorial Institute (Battelle), and the RF (on behalf of Stony Brook University), under contract from the U.S. Department of Energy, BSA’s sole purpose is to manage and operate Brookhaven National Laboratory. BSA is governed by a board of directors chosen by Battelle and the RF, but including individuals from six research institutions (Columbia, Cornell, Harvard, MIT, Princeton and Yale). BSA has net assets of about \$7 million. In recent years, revenues have run about \$7 million and expenses about \$4 million.

5. Buffalo 2020 Development Corporation (“Buffalo 2020”) – Formed in 2004 by the RF and University of Buffalo Foundation, the Buffalo 2020 Development Corporation was charged with developing research facilities on UB property in Buffalo. Buffalo 2020 partnered with Kaleida Health to construct a facility (scheduled to be completed in late 2011) in downtown Buffalo with clinical facilities, research and development facilities, and a biosciences incubator.

6. CBN Connect, Inc. (“CBN”) – Formed in 2008 by the Technical Assistance Center at SUNY Plattsburgh, working through and on behalf of the RF in partnership with the St. Regis Mohawk Tribe and the Adirondack North Country Association, CBN plans to develop affordable broadband access and encourage the provision of communications services to businesses and residents in Clinton, Essex and Franklin counties.

7. CUBRC, Inc. (“CUBRC”) – Formed in 1983 by the RF (acting on behalf of SUNY Buffalo) and the University at Buffalo Foundation Incubator, Inc., CUBRC conducts research, development, testing and systems integration in a variety of areas including Medical Biotechnology, Chemical and Biological Defense and Public Health and Safety. CUBRC conducts roughly \$40 million in research each year, 30% of which is classified work for the Department of Defense.

8. Central New York Biotechnology Research Center (“CNY-BRC”) – Through the RF, SUNY Upstate Medical University and SUNY College of Environmental Science and Forestry (“ESF”) partnered in 2005 with the Metropolitan Development Association of Syracuse and Central New York, LeMoyne College, and the Syracuse VA Medical Center to create the CNY Biotechnology Research Center (“CNY-BRC”). The facility provides the high-caliber technology necessary to commercialize biotechnical products and services (including DNA, proteomic, bioinformatic, and tissue-engineering technologies).

9. Downstate Technology Center, Inc. – Formed in 2000 by the RF (on behalf of SUNY Downstate Medical Center) and the Health Science Center at Brooklyn Foundation, Inc. as a private nonprofit corporation, the Downstate Technology Center includes a biotech incubator and other facilities designed to foster the growth of the bioscience/biotechnology workforce.

10. Entrepreneurial Innovation, Inc. (“EII”) – The RF plans to incorporate EII in 2011 “to accelerate the commercialization of promising and innovative SUNY technologies across the New York State.” (RF, “Goals and Strategies: News and Items of Interest” (2010)). EII will facilitate the RF’s Gap Fund program, which will raise funds to provide targeted competitive investments of capital for promising technologies developed within the SUNY system. The RF says it will be “seeking partnerships through a philanthropic raise,” but what this means is unclear. (RF, “Strategic Plan Progress Report: The Year in Review (2009-2010),” p. 7 (2010)).

11. Fort Schuyler Management Corporation (“FSMC”) – Formed in 2009 as a private nonprofit corporation, it is a partnership between the RF and the SUNY Institute of Technology (“SUNYIT”), FSMC will facilitate the construction of a nanotechnology and semiconductor development and manufacturing facility and manage the construction of a Center for Advanced Technology (“CAT”) and a Computer Chip Commercialization Center adjacent to the SUNYIT campus. It will also help advance the mission of CNSE at University of Albany.

12. Fuller Road Management Corporation (“FRMC”) – Formed in 1993 by the RF and the University of Albany Foundation, FRMC serves as landlord and supports the brick and mortar and infrastructure needs of SUNY’s College of Nanoscale Science and Engineering and leases clean room facilities for nanotechnology related research and development at the University of Albany. The New York Office of the State Comptroller audited the RF and FRMC and concluded that they had complied with applicable terms and conditions related to state funding for nanotechnology research between 2000 and 2009.

13. Long Island High Technology Incubator, Inc. (“LIHTI”) – Formed in 1989 by the RF (on behalf of Stony Brook University) and the Stony Brook Foundation, Inc., LIHTI’s mission is to develop new high technology companies in specified technology areas, including biotechnology, environmental science, electronics, information technologies and new materials. Forty-four companies have successfully graduated from the LIHTI program.

14. Purchase College Advancement Corporation (“PCAC”) – Formed in 2004 by the RF on behalf of the State University College at Purchase and the Purchase College Foundation, this private nonprofit corporation’s mission is to operate facilities that will support Purchase College’s academic mission and stimulate economic development in the mid-Hudson region.

15. Source Sentinel, LLC – Formed in 2002 by the RF (on behalf of the SUNY College of Environmental Science and Forestry) in partnership with O’Brien & Gere Limited and Sensis Corporation, this limited liability company develops proprietary, early warning water/wastewater/storm water sensing and alert technology.

16. SUNY China International Corporation – Formed in 2006 by the RF to develop new academic and research collaborations with Chinese Universities, this nonprofit organization gained a second member--the Neil D. Levin Graduate Institute of International Relations and Commerce Foundation, Inc.--in 2009.

17. SUNY Fredonia Technology Incubator, Inc. – Formed in 2010 by the RF and the Fredonia College Foundation, the nonprofit’s mission is to develop and manage a technology incubator. The 21,000 square foot “green” incubator facility, located in Dunkirk, New York, opened in late 2009.

Note: University at Albany Bioscience Development Operation was a nonprofit corporation formed by the RF (on behalf of University of Albany Foundation) to promote research facilities, but the RF withdrew in 2010.

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It is no secret that affiliates have generally been formed to fulfill indirectly a business purpose that SUNY could not perform directly due to a myriad of restrictions in the various statutes and regulations governing State entities. Often, when there is a legal or funding or staffing or other organizational impediment, SUNY says, "Okay, lets 'run it' through the RF"--as if that were a simple solution. Hence, SUNY has often requested that the RF create a special purpose entity to perform such functions. This approach has had both favorable and unfavorable consequences:

#### Favorable Consequences of SUNY-RF Affiliates

1. Some of the affiliates demonstrably achieve purposes that help advance SUNY's mission, and that SUNY would not be able to achieve directly or rapidly.
2. Given New York State's legal rules (limits on State assumption of debt, on joint ventures with industry, on Office of State Comptroller ("OSC") and Office of Attorney General ("OAG") State appropriations, on indemnification, and especially the time and complexity involved in review processes), it is very difficult for SUNY to contract with private parties for joint ventures without (a) massive delay, (b) onerous required State contract terms that most private parties find unacceptable, and (c) atypical provisions related to costs or liabilities (i.e. shifting all risk to the other party). The RF is able to handle those matters in a more timely, business-like way that private sector parties can accept.
3. Some affiliates help expand SUNY's "footprint" in the private sector in a manner that may help stimulate second-order opportunities for SUNY later.

#### Unfavorable Consequences of SUNY-RF Affiliates

1. The RF acknowledges that SUNY's insistence that the RF create various affiliates tends to divert the RF from its core research administration mission, and tends to embroil it in disputes.
2. Conversely, some affiliates are seen by SUNY as having turned out to be rather tangential to its mission, and having served primarily to enhance the RF's authority and control over some SUNY activities.
3. The proliferation of affiliates has been criticized by the OAG and OSC as "end-runs" around State counsel that have created some skepticism or even hostility toward SUNY. Those offices dislike what they perceive as SUNY using the RF to achieve an "evasion" of their authority to monitor and approve SUNY activities.

4. Because most entrepreneurial activities reside in RF-created affiliates, SUNY has not developed internal skills in some of those areas.

5. Governance of affiliates creates recurring tensions between the RF and SUNY since, having created an affiliate, the RF naturally asserts its right to control it.

It is impossible not to mention another problem relating to affiliates that was cited by many executives at a number of campuses: the conduct of the RF's retained outside counsel on most of these affiliate ventures. SUNY executives complained that:

- The RF outside counsel purports to be representing both SUNY's interests and the RF's, but then often ignores SUNY's instructions and interests, or subordinates them to the RF's preferences in structuring deals.
- The RF outside counsel is interested more in "enhancing RF's authority" or "creating more work for himself" than in advancing SUNY's mission. Counsel was described as "arrogant" and "unresponsive."

One campus executive said: "I can't believe it. I was browbeaten and intimidated by a guy who says he's functioning as my lawyer!" Another executive said, "[the RF counsel] stabbed us in the back." Another said, "I was told he was representing us--but now, actually, I don't know who he represents." Another said, "he twists my arm even though he is supposed to be advising SUNY--and one time he threatened that if I didn't cave in, he would [harm] us and make sure we never got another dollar of support from the RF." I will assume that counsel or other participants in these conversations might say they were misunderstood and this does not fairly reflect their approach.

In these affiliate transactions, the RF and SUNY have disagreed substantially over issues such as the best way real property transfers should be handled, or the best way tax credits might be sought, or the legal authority to structure deals a certain way. Perhaps some of the SUNY-RF frictions over affiliate relationships derive from these legitimate differences in viewpoint. But an added problem is that a number of SUNY leaders feel that the RF and its counsel try to manipulate them for the RF's own power goals, and wind up dominant financially or in terms of governance of the affiliates. Hence, the SUNY executives have little confidence that they have been told the truth as to legal issues. SUNY campus and SUNY Central Administration said that RF counsel and RF outside counsel were generally confrontational, condescending and not very collegial when working on these affiliate documents and transactions. The RF in turn, says that those complaints just arise from substantive legal disagreements, and that RF-retained counsel is able and experienced.

We make no conclusion on the merits of this disagreement. But clearly it is a toxic, corrosive element which prevents SUNY and the RF from working together as successfully as they might on affiliate projects. It should be rectified in some fashion.

Several SUNY leaders also commented that they feel the RF and especially its outside counsel have a self-interested “promotional” interest in proliferating affiliates, since that creates more work and more need for the RF. Their comments can be summarized as follows: “We have too many affiliates. Nobody knows why we need them all. The RF likes to create and dominate them. We need to be more selective.” The RF acknowledges that, in retrospect, not all of the affiliates have turned out to perform major, necessary functions. But they counter that all were created at the request of SUNY-- they were not original ideas of the RF, and that, when created, the RF was told SUNY could not perform the needed functions directly. And SUNY executives did not express a desire to fold down the affiliates most relevant to their respective campuses. Usually they questioned “the other guy’s” affiliate.

All in all, this area of affiliate activity is one that merits attention. It should be possible to clarify roles and reform this process so that the RF and SUNY can work better together.

## **8. Costs and Charges.**

The RF supports its costs primarily by levying a service charge (assessment) on the campuses for their research administered through the RF. The current assessment is 4% of gross research revenue for the “centralized” campuses (i.e., for which the RF performs its full menu of services) and 3% for the campuses (such as Stony Brook and Albany), which have assumed responsibility for themselves by performing some functions. (Note that Upstate and Downstate are seeking to move to decentralized status). Of these amounts, .25% goes directly to the Chancellor’s fund, so, in effect, the RF lives off of service fees of 3.75%/2.75%.

There is a widespread sense on the larger campuses that the assessment is too high. While understandable, in that virtually everyone in academic medical centers complain about all costs that burden their missions (faculty also vociferously complain about their own campus rent levels, overhead allocations, etc.), this complaint may be unfair. First, even if the RF assessment rate were reduced, in the case say of Upstate, from 4% to 3%, given Upstate’s research portfolio of \$38 million, that would “save” Upstate only \$380,000--some of which might be eaten up by the functions Upstate would then need to perform, due to reduced RF services. This amount would not alter Upstate’s overall finances. RF assessments were \$27.3 million in 2006 and are planned to be \$29.8 million in 2011. (RF, “Final Financial Plan: Fiscal Year 2010-11,” Exhibit D). During this same period, campus F&A recoveries grew from \$114 million to \$137 million.

Another way to look at this is to consider how the RF’s own finances have changed. Over the past few years, it has maintained a relative balance of revenues and expenses on current operations. But it has experienced volatile accrued charges due to required asset revaluations and charges for accrued pension and post-retirement health benefits for employees required by changes in the accounting rules--resulting in substantial net deficits. The liability was \$184 million in 2010 (though this was elsewhere said to be \$252 million as of June 30, 2010). The RF then began to set aside funds to satisfy these liabilities. The RF now has a plan to fund the accrued liability over 10 years, but that requires positive operating margins. Moreover, the plan only increases the funding percentage of the total liability from 44% to 64% over five years--while the total liability grows from \$184 million to \$268 million and the unfunded part drops only from \$104 million to \$98 million.

There are many complexities to the analysis of RF finances that are beyond my expertise and the scope of this Report. But I think it is obvious that while the RF’s assessment might be “tweaked” and its application to various specific circumstances might be adjusted, the assessment itself is not the heart of the issue. The RF should be adequately funded for the tasks it is asked to perform--and then it should be expected to perform those tasks well.

Note: The Pappas Consulting Group's report recommended consideration of several new assessment models, but they have not been adopted. An RF white paper concluded that the current "flat" assessment model based on gross research revenue (rather than actual indirect cost recovery) had resulted in the fact that "large research institutions subsidize those campuses that conduct a greater percentage of [poorly reimbursed] NYS programs in comparison to research grants that provide better F&A recovery." (RF, "Direct Cost of Campus Subsidies" (2005)). Also, issues of inter-campus equity could be addressed.

In answer to a question from me, the RF responded:

"We continue to look at different options for alternative methodologies for funding the corporate office and we are considering the following methodologies:

- Activity based costing whereby costs are allocated to campuses based on a logically related statistic (e.g. human resources costs allocated based on the number of campus FTEs).
- Other assessment methodologies that assess different revenue streams at different rates. For example:
  - Research vs. training or public service programs;
  - Federal vs. private vs. New York state funded programs.
- Allocating the central office budget "off the top" and allocate the balance of the unrestricted revenue back to the campuses based on the percentage for which it was earned.
- A hybrid combination of any or all of the above.
  - We are also considering a regional view to all of the methodologies above.

At the present time we have not determined a new assessment methodology and we continue to operate using the one described below."

Recently the RF changed the contribution requirements for retiree health plans. In its March 2011 Benefits Bulletin, the RF stated bluntly:

"Over the years, the RF has tried to maintain a benefits program comparable to that of SUNY—in both what we offer and in premium rates. The RF does not receive state taxpayer funding for employee benefits. Our source of funding for benefits comes from our sponsored program and staffing services budgets. These budgets are not able to keep up with the growing costs of providing retiree health care.

The primary reasons for the increase are medical cost inflation, decreasing returns on investment, and the growing number of those eligible for the benefit . . .

The gap between liability and assets is growing alarmingly. The change in retiree contribution rates will help us to close the gap and maintain our benefits program for the long term.” (RF, “Benefits Bulletin” (March 2011)).

The RF’s “Final Financial Plan” for 2010-11 shows that it faces a number of serious financial challenges. For example:

- It projects a 3.4% revenue increase (due largely to ARRA funds) to \$992 million, comprised of \$778 million in direct costs and \$144 million in indirect cost recovery. This 18.6% recovery rate is projected to be flat for five years.
- Other components of revenue (investment income of about \$10 million, IP revenue of about \$9.5 million, moving to \$11.5 million, and gifts of \$9 million) are flat overall, and overall are not major variables at present.
- The RF notes that “the result of this projected slow growth relative to expected increases in operating costs could affect the sustainability of the SUNY research enterprise.”
- The RF’s F&A recovery rate was 17.4% in 2009, 19.3% in 2010 and is projected to be 17.8% in 2011. (RF, Data Dashboard).
- Campus expenditures are projected to increase from about \$100 million to \$110 million.
- Central RF office expenditures are projected to be flat, about \$28 million.
- The RF says it plans to try to replenish reserves, which it needs for financial stability, while seeking “efficiencies” to improve services.

Most importantly, the RF itself projects flat revenues for the next five years. If that is so, then the expectations of SUNY for RF services and initiatives must be appropriately tempered.

Chart #11 on page 84 displays the current direct and indirect costs, negotiated F&A rate, and recovery for each campus.

The SUNY campuses' ability to pay the RF assessment depends on their indirect cost recoveries. Those in turn depend on rates negotiated with each payer. Thus, it is relevant to bear in mind that the level of indirect cost recovery varies significantly by sponsor source. See Chart #8 below:

**Chart #8: Rate of SUNY Indirect Cost Recovery By Sponsor**

<u>Sponsor</u>	<u>Direct Expenditures</u>	<u>Indirect Recoveries</u>	<u>% Indirect Recovery</u>
U.S. Department of Health & Human Services	159	58	36%
National Science Foundation	47	13	28%
U.S. Department of Education	20	2	10%
U.S. Department of Defense	15	6	40%
Federal-Through Other Entities	48	15	31%
Federal Through NYS	91	15	16%
NYS Direct	149	5	3%
Business/Industry	159	19	12%

Source: Compiled from RF data in "Sponsored Program Expenditures By Funding Source" (Year Ended June 30, 2010).

This is important since it demonstrates the dependence of SUNY (like many Universities) on the indirect cost recoveries from a few sources--such as HHS and NSF. Moreover, as the RF itself noted elsewhere, "Some programs do not provide full [F&A] recovery and this lack of funding causes internal subsidies. As the cost of research increases, the subsidies need to be evaluated to determine if this model can sustain the enterprise." (Strategic Plan, p. 9 (2009)). As noted, these subsidies are inherently asymmetric (since the mix of sponsors varies dramatically across the SUNY campuses). Hence, an analysis of inter-campus equity may be warranted. Overall, in FY 2010, the RF reported recovery by SUNY of \$144 million of indirect costs on direct grant expenditures of \$747 million--a 19.3% recovery rate.

In its Second Quarter 2010-2011 Strategic Plan Progress Report, the RF reported somewhat different numbers for 2011, the F&A rate of recovery projected by RF was 27.9% on federal grants, 2.7% in New York State funding, and 8.8% on private sponsor funding.

Overall the RF computes that its recovery rate is as follows, currently and as projected in five years:

**Chart #9: Trends in Indirect Cost Recovery**

<u>Source</u>	<u>% 2010</u>	<u>% Projected 2015</u>
Federal	27.4%	27.4%
State/Local	3.7%	4.5%
Private	12.3%	7.6%
Total	19.3%	18.7%

Source: RF, “Final Financial Plan: Fiscal Year 2010-11,” p. 17.

The F&A overall recovery rate was 19.3% overall in FY 2010--a composite of 27.4% for federal research, 3.7% for New York State and 12.3% for privately sponsored research. (RF, Data Dashboard; RF, “Final Financial Plan: Fiscal Year 2010-11,” Exhibit G).

Overall, the RF had net assets as of June 30, 2010 of negative \$104 million, a \$38 million drop from the prior year. The 1977 Agreement states that “since the Foundation’s sole purpose is to serve the University, any income of the Foundation in excess of the amount necessary to meet its own operating expenses” and “prudent reserve funds should be expended for the benefit of the University and in furtherance of its purposes, in such manner as the Foundation shall determine, with the approval of the University [and the Director of the Division of Budget].” This suggests that the RF should at least be consulting with SUNY at a high level, concerning its plans for revenues, charges, and expenditures.

As the Pappas Report noted, “current charges to several centralized campuses [i.e. those with smaller research portfolios, for which the RF therefore performs tech transfer functions] exceed their ability to recover indirect cost, thus causing their sponsored program activity to operate at a deficit. This phenomenon occurs in instances where a high percentage of grant awards are secured from sponsors with low indirect cost allowances [e.g., U.S. Department of Education, U.S. Department of Agriculture, NYS Education Department].” (Pappas Consulting Group, “The Research Foundation of SUNY, Operational Review,” p. 14 (revised draft November 2007)).

Obviously, it would be possible to devise a more complex, nuanced charging system, based on actual cost recoveries or ability to pay, or other factors. But the RF should be given an opportunity to consider what they think would be a viable, fair model.

Another way to look at RF expenses is the headcount they support. The RF headcount has grown from 152 in 2001 to 164 in 2007 to 157 in November 2010. Given the growth in SUNY sponsored research, and the growing complexity of IT systems and compliance, and the proliferation of affiliates, this is not really a great increase at all.

Indeed, the headcount is down from as high as 184 in 2006, so this suggests the RF personnel are working very hard and the administrative staffing is pretty lean.

The RF has maintained only modest reserves, growing from \$1.7 million in 2006 to \$4.9 million in 2010. It seeks to increase that to \$9 million in 2015. It also has an investment reserve, which the RF states is “to help ensure campuses receive the distribution of projected investment income in a particular year.” The RF says that the reserve account now has a \$34 million negative balance since “[t]he losses that resulted from market conditions were not allocated to campuses.” (RF, “Final Financial Plan: Fiscal Year 2010-11,” p. 42). The RF projects an elimination of this negative balance by 2016. (RF, “Final Financial Plan: Fiscal Year 2010-11,” Exhibit B).

Net available working capital was \$42 million in 2010, and the RF expects to build it to \$87 million in 2014-15. This represents a significant change in an otherwise largely static projection. However, as noted, it believes such reserves will be fully required to satisfy accrued pension and related liabilities. Moreover, the RF is concerned -- with some justification -- about its ability to continue taking on more and more functions on behalf of SUNY, and its capacity to continue upgrading systems to meet compliance needs, while living off of a constrained budget.

The RF has rightly pointed out that it faces significant potential financial bumps on the road. As its 2009 Strategic Plan noted: “Currently the major source of RF revenue is the recovery of F&A on sponsored projects. As the NYS budget continues to decline, the demands on the F&A recovery increase. The RF financial plan needs to address this pressure and develop models to enhance the entire enterprise... the intent is not to increase the assessment to campuses to support major initiatives, but to explore...various sources of funding.” (Strategic Plan, at 9 (2009)). No details were given.

## **9. Communication, Collaboration and Transparency.**

As is evident, a recurring theme in this Report is that, as perceived by both the RF and SUNY, the communication process between them does not function very well. This Report identifies many of the areas of poor communication. There are some areas in which communication has not been noted as problematic, such as routine grant administration, funding issues, and sponsor requirements. But what is disturbing is the broad range of areas in which endemic, serious communication problems have been cited, including with respect to:

- Employee disputes and terminations
- Resolution of lawsuits
- Technology licensing
- Access to records
- Affiliate entities
- Reporting to the Board

Naturally, one must ask whether these communication problems are simply routine “glitches” in a complex system, or they represent something more. I think it is clear that they represent something more, and that something is a substantial cultural disconnection between the organizations. They fail to communicate well because they have different conceptions of how they ought to communicate.

SUNY believes that the RF is a service and supporting organization; that the RF ought to consult SUNY in advance on important actions; that the RF should take its views into account; and that the RF should keep SUNY apprised of all major developments. The RF, in contrast, jealously guards its identity as a “private, non-profit corporation” which is independently governed and is not part of or managed by SUNY. The RF sincerely believes this. But in our view, they also take this posture as a tactic to avoid having SUNY second-guess their judgments or meddle in their decision-making.

It is understandable that the RF is at pains to underscore its legal separateness from SUNY (see Section 10 below) because of recurring, strenuous efforts of the press and the Legislature to obtain RF information and affect its decision-making. However, in my view, the RF tends to “throw the baby out with the bathwater.” Based on the desire to keep itself “private,” it tends to deny SUNY even information that would not cause the RF suddenly to become a public entity subject to public laws. And there are ways for the RF to share information with SUNY that SUNY needs to administer programs and monitor the relationship that would not convert such information into public records. But the RF has been very uncreative even in exploring such methods as are consistent with the law (such as Joint Defense or Common Interest Agreements).

It frankly is unreasonable for the RF to resist inquiries from the Chair of its own Board, who has fiduciary duties to superintend its operations, on the ground that she also holds the position of SUNY Chancellor. Absent a specific conflict of interest, this wall of silence seems unwarranted. Similarly, several campus Presidents who sat on the

RF Board also say it provides them with little information and then at times only grudgingly. (See Section 10 below).

Also, many SUNY executives say that the RF culture is a culture of secrecy, multiple bureaucratic games and non-transparency. The RF executives believe this is unfair and that they have withheld information only for legitimate legal reasons.

This array of communication problems has persisted for a long time. In 2007, the Pappas Consulting Group concluded an extensive review of the RF. Many of the findings pointed to the need for RF to be more service-oriented and less secretive and distant in its relationship with SUNY. For example, Pappas Consulting Group said:

- “RF needs to view its relationship with campuses as that of a partner rather than a regulatory/compliance authority; too intrusive at times.”
- “RF does not fully understand that its role is to work for and on behalf of the SUNY campuses.”
- “RF has a limited understanding of the research mission, function and purpose of each [campus], especially...the doctoral granting Universities.” (Pappas Consulting Group, “Operational Review,” p. 5 (revised draft November 2007)).

In fairness, Pappas Consulting Group also noted that “the perceptions articulated by SUNY campus customers of the Foundation stand in stark contrast with those held by central staff members” and the RF. (Pappas Consulting Group, “Operational Review,” p. 7 (revised draft November 2007)).

Yet the fundamental fact is that four years later, the frictions remain. As one campus executive said,

“When the President has been unhappy with certain licensing agreements, I have called the RF and told them we were unhappy with the services they were providing under the 1977 agreement. They do not respond as an entity providing services for our benefit, but have acted as if they are independent of us. Our relationship with them should not give them the ability to act against SUNY’s interests or those of faculty members whose intellectual product they are negotiating away without consultation.”

It is disconcerting to many at SUNY that the RF seems resolutely refractory to improving its responsiveness to SUNY. In August 2009, the RF wrote in its Strategic Plan that among its goals was to “establish a methodology to continuously assess and improve satisfaction of the SUNY community.” (Strategic Plan, p. 7 (2009)). It added that:

“We have spent the last two years asking and evaluating fundamental questions about the way in which the RF could emerge as a more strategic and effective partner with SUNY, its sponsors, and the RF’s affiliated corporations in order to benefit New York State. To that end, considerable self-assessment has taken place at the RF. RF Staff have reached out to the SUNY campuses and other entities to ascertain their perceptions of the strengths, weaknesses, opportunities and threats that will face the RF [and]...these efforts influenced the shape of the [strategic plan]...that was presented to the Board.” (Strategic Plan, p. i (2009)).

Yet, 18 months later, the SUNY campuses generally do not report seeing any higher level of responsiveness from the RF.

The RF Charter makes clear that its only purposes are to advance the missions of SUNY. Its purposes are:

“(a) To assist in developing and increasing the facilities of State University of New York to provide more extensive educational opportunities for and service to its students, faculty, staff and alumni, and to the people of the State of New York, by making and encouraging gifts, contributions and donations of real and personal property to or for the benefit of State University of New York;

(b) To receive, hold and administer gifts or grants, and to act without profit as trustee of educational and charitable trusts, of benefit to and in keeping with the educational purposes and objects of State University of New York; and

(c) To finance the conduct of studies and research in any and all fields of the arts and sciences, of benefit to and in keeping with the educational purposes and objects of State University of New York ...” (RF Charter (1951, as amended 2009), p. 1 (emphasis added)).

It is also important to bear in mind that while the RF is recognized as a 501(c)(3) tax-exempt organization, its favored public charity status (as compared to that of a 501(c)(3) private foundation) is premised entirely on its being a “functionally integrated” Type III supporting organization to SUNY. Thus, the RF’s operations do not independently warrant its preferred public charity status; instead, such status is recognized by the IRS as being derivative of, and dependent upon, its relationship to SUNY, and its consequent support of the advancement of SUNY’s mission as its publicly supported organization. Per IRS requirements, that status depends upon the “responsiveness” of the RF to the mission and goals of its supported organization

(SUNY), and the RF's significant involvement or "integration into" (i.e. as an "integral part of") the operations of SUNY, as the RF's publicly supported organization. Historically, such involvement has been demonstrated by showing that the supported organization would engage in the activities directly--were it not for the involvement of the supporting organization--and/or that the supporting organization makes payments of substantially all of its net income (e.g., 85% or more) to or for the use of its supported organization. These criteria are deemed indicative of a sufficient level of attentiveness by the supporting organization to the publicly supported one. (See generally Treasury Regulation Section 1.509(a)-4(i)). Here, the latter criterion (net income) is not met, so the former (alignment of mission) must be.

While the foregoing was the state of play for some time, in the Pension Protection Act of 2006 ("PPA"), Congress further tightened the requirements for such Type III supporting organizations by establishing within the Type III category, both "functionally integrated" and "non-functionally integrated" versions, with the non-functionally integrated version having less favorable characteristics (additional requirements similar to those long-applied to private foundations, e.g., excess business holdings limitations and mandatory payout rules). (See generally Internal Revenue Code ("IRC") Section 4943(f)(5)). Among other things, a functionally-integrated supporting organization is expected to engage in activities substantially all of which directly further and facilitate the operations of the supported organization; the post-PPA rules now require that a Type III supporting organization (a) have a "close and continuous" working relationship with its supported organization, and (b) provide sufficient information to the supported organization to ensure that the supported organization is able to monitor the services that help support its achievement of its goals. (Internal Revenue Code ("IRC") Section 509(f)(1)(A)).

In tightening the rules pursuant to the PPA, it is evident that the Congress and the IRS were concerned about the true "integration" of a Type III supporting organization with its publicly supported organization. In that regard, the Joint Committee on Taxation ("JCT") report prepared in connection with the PPA noted that "the current [i.e. pre-PPA] regulatory standards [for being considered functionally integrated] are not sufficiently stringent to ensure that there is a sufficient nexus between the supporting and supported organizations." (See Technical Explanation of H.R.4, the "[PPA]" JXX-38-06, p.360, note 571 (Aug. 3. 2006) (the "JCT Report")).

In plain English, therefore, in order to maintain its favored status as a 501(c)(3) public charity on a going forward basis, at a minimum, the RF should be (a) providing SUNY with all information about its activities and operations that SUNY reasonably needs to sufficiently confirm that the RF is functioning in a manner that is actually consistent with and that advances SUNY's actual goals and priorities, and (b) accepting reasonable guidance from SUNY so as to ensure that the RF's activities are in fact sufficiently integrated with, and responsive to, the advancement of SUNY's goals and not impeding them. (See generally IRC Sections 509(f)(1)(A) and 4943(f)(5); see also JCT Report p. 362 (noting that the failure to provide sufficient information is a factor in determining whether the current law responsiveness test is met)).

Thus, the RF's tax status, in effect, requires that it share with SUNY information that SUNY needs--unless there is specific legal justification for not doing so.

## 10. Legal Separation Between the RF and SUNY.

Obviously, the RF has a hybrid character – it is a “private, nonprofit” entity (RF, 2010 Annual Report, p. 13), whose sole purpose is to supply SUNY’s public mission. (See 1977 Agreement, p. 6). Thus, the RF says it is a “private, not for profit educational corporation incorporated in 1951 by private citizens... [The RF] is governed by an independent board of directors.” (RF, 2010 Annual Report, p. 1 (emphasis added)). It goes on to say that it is “able to form partnerships that enhance the education, research and public service mission of SUNY,” but that while “the RF has the flexibility to help SUNY campuses attract business through affiliated corporations,” the RF is just one of “SUNY’s largest service providers” and while it “shares some unique arrangements with SUNY,” “SUNY does not govern the RF’s mission nor its board of directors.” (RF, 2010 Annual Report, p. 1 (emphasis added)).

There are dangers in too much divergence of perceived mission. There have been a surprising number of legal disputes between foundations and the entities that they were supposed to be servicing. This suggests, at a minimum, that it would be wise to clarify legal standards and relationships. As one scholar summarized, “Ambiguity in the authority and obligations between a University and a foundation can lead to internal legal disputes that are damaging to both.” (Cady, “Public University and Affiliated Foundation Relationships – Balancing Control and Autonomy” (unpublished paper, 2005)). The scholar observed that usually, “Public University foundations are private entities with public responsibilities.” (Cady, “Balancing Autonomy and Control,” (2005)).

But the RF Charter makes clear that its only purposes are to advance the missions of SUNY. Its purposes are:

“(a) To assist in developing and increasing the facilities of State University of New York to provide more extensive educational opportunities for and service to its students, faculty, staff and alumni, and to the people of the State of New York, by making and encouraging gifts, contributions and donations of real and personal property to or for the benefit of State University of New York.

(b) To receive, hold and administer gifts or grants, and to act without profit as trustee of educational and charitable trusts, of benefit to and in keeping with the educational purposes and objects of State University of New York; and

(c) To finance the conduct of studies and research in any and all fields of the arts and sciences, of benefit to and in keeping with the educational purposes and objects of State University of New York ...” (RF Charter (1951, as amended 2009), p. 1 (emphasis added)).

So, there is no question that the RF should be aligned with and subservient to SUNY's mission. Some toleration of divergence has occurred, but SUNY should be aware of the risks.

There has been recurrent litigation with the RF about whether its relationship with SUNY makes it a state agency or instrumentality. In Zhao v. State University of New York, 472 F. Supp. 2d 289 (E.D.N.Y. 2007), the court accepted as established that "The [RF] is a private, non-profit corporation established by the New York State Board of Regents pursuant to Section 216 of the Education Law of the State of New York and is a corporate entity separate from SUNY." Nevertheless, in this employment discrimination case, the court noted that "the roles of the Research Foundation and SUNY, as it related to employees, are substantially intertwined. In particular, the [RF]...acts as the employer, but delegates the hiring and other employment decisions to the SUNY representative." Hence, "although the [RF]... is a separate entity from SUNY, the purpose for its existence is to administer grants awarded to SUNY and to provide other services in support of SUNY's mission. Thus, SUNY's grant money flows through the [RF] and the [RF] employees operate under the direction of SUNY employees." Accordingly, the court refused to dismiss a claim against the RF, since it was deemed for those purposes to have an "identity of interest" with SUNY.

In a similar case, Towers v. State University of New York at Stony Brook, 2007 WL 1470152 (E.D.N.Y. May 21, 2007) the court relied on Zhao in ruling that the plaintiff had alleged facts indicating that SUNY Stony Brook and the RF might possess an identity of interest. For an analogous finding as to the City University of New York and its research foundation, see Fox v. City University of New York, 1996 WL 384915 (S.D.N.Y. July 10, 1996).

Another New York court concluded that the SUNY-RF relationship is so close and intertwined that the two should be deemed "joint employers" under the antidiscrimination provisions of Title VII. Pemrick v. Stracher, 67 F. Supp. 2d 149 (E.D.N.Y. 1999). In summing up its conclusion that the RF and SUNY are "joint, integrated employers," the court said "The ...State University of New York and the Research Foundation of SUNY are inseparable in terms of their mission and their money." This would not seem to leave much ambiguity, but of course the facts in each case may affect future rulings.

There is also the issue of what suits against a state agency are permissible. As the court in Zhou stated, "there is no question that SUNY is a State agency entitled to Eleventh Amendment immunity." (See also Dube v. State University of New York, 900 F.2d 587, 594 (2d Cir. 1990) ("For Eleventh Amendment purposes, SUNY is an integral part of the Government of the State [of New York] and when it is sued, the State is the real party.")). The same would presumably not be true of the RF, however. The Zhou court indirectly acknowledged this, although it found that it did not matter because "any actions the administrator [took] as agent of the Research Foundation also were performed as part of her official capacity as a SUNY employee" and also would be protected by immunity.

These rulings suggest that it would be important to future liability actions to clearly differentiate: (a) actions taken by people in their capacity as SUNY employees, (b) actions taken by people in their capacity as RF employees, and (c) actions taken by people in both capacities simultaneously. This often is necessary in the dual-role context, and many Universities face this. The best practices in the HR field certainly are to clearly differentiate roles (and to take care to do so in correspondence, emails, stationery, meetings, etc.). It is not clear that SUNY and the RF effectively put this into practice across the board.

Such challenges are cited by the RF as a key reason for not sharing information with SUNY on various matters. But as noted above, the reasons cited as decisive by the courts are not ones that are likely to be changed by subtleties of whether the RF answered a SUNY inquiry or copied SUNY campus personnel on an email. The basic structural relationship is what causes the courts to conclude that the RF and SUNY are “inseparable in terms of their mission and their money,” and that “the purpose for [the RF’s] existence is to administer grants awarded to SUNY.” SUNY and the RF can litigate particular factual matters in cases, but they must live with the reality of these basic features of the relationship. It is fanciful to believe that these big factors can be made to evaporate by denying an occasional request for one piece of problematic information. So I would suggest that SUNY and the RF take appropriate measures to clarify their respective roles on the “big” operational issues, but that they recognize that even separate entities are permitted to communicate when they have a shared need in their respective operations.

One conclusion that can be drawn from these legal rulings is that while it may be desirable to avoid public disclosure obligations with regard to RF documents and functions, a legal disclosure obligation is likely to depend in the long run on the basic mission, relationship, and funding of the RF--which cannot readily be changed. It is not likely to be significantly affected by minor “tweaking” of such matters as the manner in which documents are produced, or whether SUNY is consulted on certain issues.

At times the RF seems to have acted as if such measures would be decisive. Indeed, the campuses and campus counsel frequently voice the suspicion that the RF invokes “separation” and “legal privilege” as a mere pretext for not sharing information with SUNY--even when there is no material legal risk in doing so. Although every case is naturally determined on its own merits, and one can provide no assurances about future cases, the decisive factors, as viewed by the New York courts thus far, are factors that SUNY and the RF are not likely to be willing or able to change: whether the purpose of the RF is to advance SUNY’s mission; whether the RF receives public funds; and whether the RF performs functions that would otherwise need to be public functions performed directly by SUNY. The sharing of information alone is not likely to change this; yet, the RF reflexively invokes this non-sharing of information position as if it would somehow be a critical factor in rendering the RF a public body. It seems that the RF has taken a super-conservative tactical position on this, perhaps for other reasons.

RF counsel cite as another concern that sharing information with SUNY may waive the attorney-client privilege. However, many of the disputes and litigation situations in which this issue arises are ones in which an employee might assert a claim against both the RF and SUNY, or a third party is considering or asserting a claim and in discovery might add one or the other entity as another defendant. In situations such as these, it is common for parties who are entirely separate but might both need to defend claims, to share information under a “Joint Defense” or “Common Interest” agreement. The very purpose of such a legal mechanism is to enable parties to share information useful to defending potential claims without compromising their separate attorney-client privilege or relinquishing separate rights or defenses each may have. The RF seems reluctant to use such a mechanism with SUNY. Indeed, it has refused to share data with SUNY and its outside counsel in some instances even when a Joint Defense Agreement was in place for this very purpose.

In some circumstances, for the RF to disclose reports to SUNY would make such documents obtainable under New York State’s Freedom of Information Law (“FOIL”). (See NY Public Officers Law § 84 et seq.). In some contests such an objection to disclosure is entirely defensible. However, under the FOIL, state agencies may deny access to records that, among other things, (i) if disclosed, would impair present or imminent contract awards or collective bargaining negotiations; (ii) “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise”; (iii) are intra-agency materials which are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations, external audits; (iv) “if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures.” (NY Public Officers Law § 87(2)).

### Comparisons to University-Foundation Disputes in Other States

One thing that is critical, however, is ensuring that the mission and goals of the research foundation and the University remain strongly aligned. There are some painful examples of Universities and supporting foundations that have had debilitating public disputes. The director of Foundation Programs and Research for the Association of Governing Boards of Universities and Colleges has noted that it is “extremely rare” for an educational institution to dissolve a relationship with a related foundation. (Tom Corwin, “School may cut all ties to board,” THE AUGUSTA CHRONICLE, June 24, 2008). Disputes usually result from the failure of the University and the foundation to communicate about expectations.

Note: We outline below some disputes in other states just to underscore the range of issues and the risks of unanticipated fights. Some of these foundations were established for other purposes (such as fundraising) and all are under different state statutes.

There has been recurring litigation in other states over the public status of research foundations affiliated with public Universities. Each is usually resolved by reference to the unique wording of state law, but the trend has been toward deeming the foundations to be public for purposes of discovery of information, at least. <sup>7/</sup> At least one federal court, however, has concluded that even a research foundation operated “at all times, ‘solely in connection with’” a University is not necessarily a state instrumentality. Theron v. Sollinger and Wisconsin Alumni Foundation, 2000 WL 34235997 (W.D. Wis. July 20, 2000). In Theron, the court dismissed a due process claim against the Wisconsin Alumni Foundation because “[m]erely listing the areas in which defendant foundation takes actions on behalf of the University is not enough to show that it is acting as a state instrumentality when it undertakes patent application prosecution, or that it is performing traditionally exclusive sovereign functions or has been compelled by the University to make the decisions it does on patent application prosecution.”

University of South Alabama: The University of South Alabama spent more than a decade resolving disputes with its supporting foundation, the University of South Alabama Foundation; the disputes often played out in both the courtroom and the local Alabama media. Two of the disputes spawned litigation. At the heart of the conflict was a lack of communication between the University and the Foundation, and a deep tension resulting from University fears that the former President and founder of the University (who had been forced to step down) was attempting to control the University through his leadership of the Foundation. The litigation became so rancorous that the judge reprimanded the University trustees for referring to the Foundation as the “Axis” powers in a court filing. (William Rabb, “Foundation wins a round in USA fight,” MOBILE REGISTER, June 20, 2001). Only after a joint meeting with the Governor of Alabama, court-ordered mediation and \$1.9 million in legal fees did the two sides finally reach a settlement in one of the cases. (“Governor meets with feuding USA, foundation officials,” MOBILE REGISTER, July 12, 2001; “USA pays legal bill, concludes settlement,” MOBILE REGISTER, August 28, 2001).

Clark College: Clark College challenged the Clark College Foundation’s refusal to let it review and copy records, which the Foundation said would subject it to State audit. The case was ultimately settled on a basis allowing access to records sufficient at

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<sup>7/</sup> See e.g., Jackson v. Eastern Michigan University Foundation, 544 N.W.2d 737 (Mich. Ct. App. 1996) (finding the foundation to be a “public body” for purposes of the state’s freedom of information act (“FOIA”) “because it is primarily funded by Eastern Michigan University,” despite language in organizational documents disavowing that either was the agent for the other) and The State ex rel. Toledo Blade Company v. University of Toledo Foundation, 602 N.E.2d 1159 (Ohio 1992) (holding that a legally “private” foundation is nevertheless a “public office” (i.e., state agency or instrumentality) for purposes of Ohio’s FOIA law (despite steps taken to ensure separation between the two organizations, such as arms-length reimbursement of expenses) because the Foundation’s sole purpose is to “receive, hold, invest and administer funds for the benefit of the University” and there is a “public interest” in knowing the functions that such an important entity engages in).

least to verify that the Foundation was serving Clark County's mission. (See Cady, "Balancing Autonomy and Control," (2005)).

Medical College of Georgia: In June 2008, the Augusta Chronicle reported that the Medical College of Georgia ("MCG"), after years of conflict with the Medical College of Georgia Foundation, issued an ultimatum: the Foundation's board should resign or a new foundation would be created. (Andrea Jones, "Medical college warns board," ATLANTA JOURNAL AND CONSTITUTION, June 14, 2008). MCG leadership determined that the Foundation's priorities were not always aligned with MCG's priorities. ("Medical College of Georgia to ax Medical College of Georgia Foundation," ATLANTA BUSINESS CHRONICLE, June 13, 2008; Tom Corwin, "Split with foundation in works," THE AUGUSTA CHRONICLE, June 13, 2008). When the Foundation's board did not resign, MCG not only organized a new entity to replace the Foundation, it also initiated a lawsuit alleging, among other things, that the Foundation had violated its fiduciary duties to MCG, refused to align its fundraising priorities with MCG and refused to timely provide financial information necessary for MCG's budgeting and planning purposes. ("Medical College of Georgia looks inward for new foundation," SAVANNAH MORNING NEWS, 2008 WLNR 13476539, July 18, 2008; "Board of Regents sues Medical College of Georgia Foundation," ATLANTA BUSINESS CHRONICLE, October 20, 2009). Eventually, MCG dismissed the lawsuit (though local press coverage is unclear about what sparked the reconciliation). (Dave Williams, "Medical College, foundation bury the hatchet," ATLANTA BUSINESS CHRONICLE, November 1, 2010).

Princeton University: In 1961, the Robertson family made a \$35 million gift (which grew considerably in value over time) for the benefit of Princeton. The gift was administered by the Robertson Foundation, whose Board of seven was appointed four by Princeton and three by the Robertson family. After some disputes over use of funds, the family sued, arguing that the Princeton members had a conflict of interest. The Foundation alleged that \$100 million of the Foundation's funds had been misappropriated to Princeton's missions rather than the Foundation's. The court rejected this view on the grounds that the purpose of such "supporting organizations" is "to be responsible to the public charities they support." Robertson v. Princeton University, No. C-99-02 (N.J. Super. Ct. Ch. Div., Oct. 25, 2007).

Cases such as these always involve unique facts. But they underscore that friction between Universities and foundations can cause both institutions to spiral downward, and that resolving differences of mission at the front end is essential.

## 11. Mission and Governance.

### 11.A. Scope of RF Mission.

There is no “right” or “wrong” way for a public University to manage its research. Some of the most successful, such as University of California and University of Texas (#1 and #2, respectively, among public Universities in total sponsored research awards in FY 2007) (Strategic Report, at 15 (2009)), manage both their portfolios of sponsored research and their technology transfer functions internally without a separate research foundation. Apparently, under their state’s legal/regulatory regime, this is feasible.

Other public Universities internally retain only the management of the research grants, but externalize to a separate research foundation the tech transfer/commercialization activities. A typical example is the Iowa State University Research Foundation, whose mandate is to (1) “own, manage, and protect intellectual properties including patents, copyrights and materials on behalf of the University”; (2) “procure legal counsel to protect, manage, and develop those properties,” in cooperation with the University; (3) “manage the proceeds from licensing for the benefit of the University and the State of Iowa while remaining financially independent and self-sustaining”; and (4) provide seed funds to develop disclosed technologies and financial support to University start-ups (including rent and fees for professional consulting). (Iowa State University Research Foundation, Inc., “About Us”).

Research foundations with a similar scope of functions include:

- Florida Atlantic Research Foundation
- Penn State Research Foundation
- University of Iowa Research Foundation
- Wisconsin Alumni Research Foundation

Still other public Universities have created research foundations that -- like the SUNY RF -- perform for the University not only tech transfer functions, but also the broader research grant administration process itself. Examples include:

- Florida State University Research Foundation
- Georgia Tech Research Corporation
- University of Florida Research Foundation
- University of Kansas Medical Center Research Institute

There is no readily apparent correlation between choice of structure and the University’s sponsored research portfolio or tech transfer success. That appears to be determined by many other factors, such as endowment, academic tradition, location, business community support, etc. For example, the University of California system, which manages both grant administration and commercialization of technology within the system, routinely appears as the first or second University on The Patent Board’s annual

“Universities Patent Scorecard” (based on the strength of their technologies, impact and the number of patents granted). Indeed, the University of Texas and the University of Wisconsin remain neck-and-neck on the 2009 Patent Scorecard, despite the fact that one relies upon a research foundation (Wisconsin) and one does not (Texas). So the RF structure is certainly a well-recognized, functional one.

11.B. **Alignment of Mission and Performance.**

In its 2009 “Environmental Scan,” the RF said that it had reflected on various independent consultant reports, a satisfaction survey of SUNY “customers,” and internal RF data, and summarized its strengths and weaknesses as follows:

Strengths

- “The wide-ranging breadth and depth of the talents and experience of SUNY faculty are the core strength of the RF.” (Of course, this is an achievement of SUNY, not the RF.)
- “The long-term tenure of staff within the RF in its Central office and on the campuses.” (This is important.)
- “Ability to pre-fund sponsored awards.” (This is a fact, not an achievement.)
- “Autonomous private sector nature of the RF.” (Again, a fact, not a performance achievement.)
- “Unified policies, systems and controls, i.e., the RF coordinates all affiliated corporation agency fund and sponsored program administration.” (A fact, not an achievement.)
- “Mature and stable governance structure...The Board of Directors...provides governance and oversight with a breadth of skills...” (In fact, the Board largely says it has been marginalized.) (Environmental Scan, p. 5-7).

Hence, it is hard to see these strengths--as declared by RF--as major achievements.

The RF listed its “limitations” as follows:

- “The lack of clearly articulated roles and responsibilities between the RF Central Office and the campuses sometimes inhibits the ability of SUNY to be as responsive as necessary to sponsor demands.” (What does the RF suggest as a remedy?)

- “Minimal inter-campus research collaboration. While occasional inter-campus collaborations have occurred, the RF has not focused its efforts on encouraging synergies across the SUNY system.” (Why not? This problem has subsisted for decades. Note, however, the RF’s new “Find a Scholar” initiative.)
- “Overwhelming nature of compliance requirements. Increased regulatory requirements and the potential lack of consistency in administering appropriate measures have heightened the RF’s and SUNY’s compliance risks.” (This is a challenge for all institutions and the RF is right to flag it. But, having made this observation, what has the RF done to address it?)
- “RF’s current roles are unclear in both tech transfer and economic development,” and there is “lack of engagement with campuses...as well as between campuses.” Also, a “[d]isproportionate amount of resources are allocated to disclosure and patent management taking away from activities that build relationships and potential revenue.” (What has the RF done to address this?)
- “Greater emphasis needs to be placed on the provision of pre-award support areas such as multi-campus proposal opportunities and participation in COEUS-RF-SUNY consortium.” (Has the RF demonstrably changed resource allocation to accomplish this?)
- “The current funding model for the RF Central office creates disincentives to SUNY campuses with low sponsored-program activity [whose RF costs]...often exceed their indirect cost recoveries...The funding model also has limited revenue sources – reimbursed indirect cost, investment income, and royalty income. The RF does not have access to capital to make long-term investments, provide gap funding for commercialization of intellectual property, or stimulate economic development programs.” (What initiatives does the RF propose? Note the recent gap funding plan.)

In sum, the RF should be asked to outline a specific agenda of measures it proposes to address what it has itself identified as weaknesses.

There are many 501(c)(3) charitable organizations that are “supporting organizations” that have their own Boards and independent governance processes. Nevertheless, by law and practice, the supporting organization is supposed to have only one goal in mind: to be attentive to the mission of the “supported organization” as the supported organization defines it, and to support it. The supported organization cannot order the supporting organization to disburse money to it because funds are under the control of the Board of the supporting organization. But the latter is not supposed to run off and define goals in contradiction to the supported organization either. Here, by Charter, the RF’s sole purpose is to help SUNY advise its mission--as defined by SUNY, not by the RF. Given that, the RF should be more attentive to its performance problems, as identified year after year by SUNY.

### 11.C. **Governing Body.**

The governing bodies of University-affiliated research foundations are configured in varying ways. They are usually designed to insure sufficient University control while in some, but not all, cases also importing outside expertise. Here is a profile of the governing bodies of some research foundations.

- University of Florida Research Foundation – 11 members (or 12 if the Chairman of the Board of Governors of the State of Florida chooses to appoint a member): 8 members of the University administration (or their respective designees) (the President of the University of Florida, Provost/Vice President for Academic Affairs, Vice President for Research, Vice President for Finance and Administration, Senior Vice President for Agricultural and Natural Resources, Senior Vice President for Health Affairs, Dean of the College of Engineering and Dean of the College of Liberal Arts and Sciences (or their respective designees) and 3 persons nominated by the President of the University of Florida.
- Georgia State University Research Foundation – 10 members: 6 members of the University community (including the President of Georgia State University); 1 dean, elected annually by the Dean's Group of Georgia State University; 2 members of the Georgia State University Senate Research Committee, elected annually by that committee; and 1 member of the University's faculty, elected annually by the Georgia State University Senate Research Committee.
- Georgia Tech Research Corporation – 12 members: the President of the Georgia Institute of Technology and 3 faculty members appointed by the President; 2 members selected by the governing body of the Georgia Tech National Alumni Association; 2 members selected by the governing body of the Georgia Tech Foundation; and 4 members chosen from industry by the previously-chosen board members.
- Iowa State University Research Foundation – 19 members: 12 members of the University community (including the President of Iowa State University and one member of the Iowa State Board of Regents) and 7 alumni.
- University of Iowa Research Foundation – 18 members: all members are elected by the Board of Directors of the University of Iowa Foundation from nominees chosen by the President of the University of Iowa, and must include a member of the State Board of Regents of the State of Iowa (or a designee) and the President, Senior Vice President and Treasurer, Vice President for Research, and Associate Vice President for Economic Development of the University of Iowa (or their designees).

- University of Kansas Medical Center Research Institute – 23 members: 6 members of the University administration (the Chancellor of the University of Kansas, the Executive Vice Chancellor and Vice Chancellor for Administration of the University of Kansas Medical Center, the Senior Vice Chancellor & Dean of the University of Kansas School of Nursing & Allied Health, the Associate Vice Chancellor of Finance of the University of Kansas Medical Center, the Vice Chancellor for Research of the University of Kansas Medical Center); 6 faculty members and 11 outside persons.
- Wisconsin Alumni Research Foundation – 18 members: all members (including the Chancellor of the University of Wisconsin-Madison) are appointed by the members then on the board. All members, unless a part of the University community, must have attended the University of Wisconsin-Madison for a period of not less than two years or have been graduated from the University of Wisconsin.

When compared to this peer group, the composition of the SUNY RF Board appears fairly typical.

#### 11.D. Role and Involvement of the RF Board.

In recent decades, many legal and organizational dynamics have combined to establish a new standard for “best practices” in non-profit organizations. Whereas in prior eras, “charitable” Boards frequently confined themselves to a gentle level of oversight, and delegation of virtually all authority to management, this is no longer permissible or accepted. To a great extent, law, public policy, and economics have required charitable organization Boards to fulfill essentially the same level of fiduciary duties as Boards of for-profit corporations. Various scandals over conflict of interest, breach of fiduciary duty, carelessness, etc. (involving Allegheny Health, the Bishop trust, Allina Healthcare, the United Way, etc.) have brought new scrutiny to Boards of non-profit organizations. This has been especially true in the University, hospital, and biomedical research fields because of the perceived social sensitivity and significance of their missions.

The Boards of such organizations have been held to ever-higher standards for the duties of care, loyalty, and confidentiality. Nonprofit Boards are legally required not simply to defer to management, to await information, and to pursue management’s recommendations. But, on the contrary, to be active inquisitors, to require information they feel they need to govern, and to exercise independent business judgment. This is now recognized as not just “best practice,” but as “standard practice” among nonprofit Boards. Indeed, some courts have set the bar of expectations very high, and have faulted Boards, even when they weighed various strategic alternatives, for not being assertive enough in really vetting strategic alternatives. (See e.g., Manhattan Eye, Ear & Throat Hospital v. Spitzer, 715 N.Y.S.2d 715 (Sup. Ct. N.Y. 1999)). (See generally, American Bar Association, “Guidebook for Non-Profit Directors” (2002); “Ten Best

Practices for Measuring the Effectiveness of Non-Profit Healthcare Boards,” MODERN HEALTHCARE (December 2006)).

Unfortunately, that is not at all the way the key participants describe the functioning of the RF. I interviewed a significant subset of the total Board; every one of them said they thought the Board’s role and functions were not being properly managed. Among the chief complaints:

- They said that RF executives “manage” (i.e. “manipulate”) the Board rather than informing and serving it. Management is said to “dole out information as if it were gold,” and that at times it seems to Board members that management “wants us to be in the dark.” “The whole place is a mushroom farm.”
- They complained that the Board does not meet together in person, so there develops little sense of shared “ownership” of the enterprise and of problem-solving.
- The tone of Board meetings is that instead of being accountable to the Board, and mildly concerned that it should be answering its questions, the RF management is always “minimizing the discussion” and “just going through the motions.”
- Virtually no decisions or initiatives emanate from the Board. It is all management-driven.
- Several Board members said they were offended that when they did ask tough questions; they were treated as if that was inappropriate. One experienced Board member, who has served on other Boards, said he had never seen anything like the RF dynamic.

Board members also expressed concern that, as a result, the entire perception of the RF among outside constituencies, and even within SUNY, was that it was a “one-man fiefdom” dominated by the CEO. They are concerned that everyone talks about “John wants x” or “John will not support y,” as though the Board almost does not exist.

Also, many commented that the CEO, despite hard work and significant abilities, leaves the impression in many that he “has his own agenda,” and is “dedicated primarily to his own survival and building up his own power.” Board members complained that he does not display the attitude of actually working for and reporting to the Board at all. Instead, rather than being the servant or emissary of the RF Board, he cultivates “games within games” with various political constituencies, that he is not seen as a “straight-shooter,” and, on the contrary, is “the guy who taught Machiavelli.” This is not a good image for an organization of the public stature and role of the SUNY RF.

I asked the RF CEO about these perceptions. He said they were unfair, and that he and other executives do try to keep the Board informed. He ascribed these

perceptions to the multiple roles that the RF performs, and to the fact that he is often asked to liase with, or build bridges to, other constituencies, and so naturally he has conversations that may then be distorted as they are re-told.

Nevertheless, two Board members went so far as to say that they were worried about their own legal liability, since they simply did not know enough as Board members to be sure that if a problem arose, they could really address why the decision had been made and what facts it was based upon.

In 30 years of work advising dozens and dozens of large nonprofit organization Boards, I have never seen such a dynamic, as described by the Board members themselves.

#### 11. E. **Role of the Chancellor.**

The role of the University system Chancellor or President varies among the major public University-affiliated research foundations. In some (such as the KU Center for Research, University of Florida Research Foundation, and University of Georgia Research Foundation), the Chancellor (or President) is Chair of the Board--but this seems to be a distinctly minority circumstance. In many more foundations (e.g., the Florida Atlantic University Research Corporation, Georgia State University Research Foundation, Georgia Tech Research Corporation, Iowa State University Research Foundation, Kansas University Medical Center Research Institute, and Wisconsin Alumni Research Foundation), the Chancellor (or President) is a member of the Board, but is not the Chair.

It seems clear that the RF is such a financially and programmatically important entity for SUNY that the Chancellor ought to serve on the Board and be privy to all its functions. But, there are several reasons why SUNY might wish to consider having the Chancellor be a Board member, but not Board Chair, of the RF:

- The RF is a billion-dollar corporation. The Board Chair should be able to devote a great deal of time to its oversight. The SUNY Chancellors' myriad other obligations make this infeasible.
- Having the SUNY Chancellor chair the RF Board may blur the distinction or separation between the two organizations in the minds of the legislature, sponsors, and public.
- Having the Chancellor serve in this role may be a "lighting rod" for criticism of SUNY, which is not helpful.
- The Chancellor's role may be another factor cited in lawsuits by claimants against the RF who would also like SUNY to be responsible.

- Also, because the Chancellor is Chair of the Board, any issue that becomes severe involving the RF “splashes” back to her. Indeed, this may occur even before she is aware of the issue as it is passed up the chain of command.

On the other hand, having an entirely independent RF Board Chair carries risks. The person might be a visionary, interested in and entirely devoted to SUNY, consistent with the 1977 Agreement and the RF’s corporate mission. But prospectively there can be no assurance that every future outside RF Chair would possess such qualities. Thus, whether to retain or relinquish the RF Chair role is a tough choice that the Chancellor should carefully consider.

#### 11.F **Role of the RF CEO on SUNY Board.**

There is the additional issue of whether it is appropriate, given the overall SUNY-RF relationship, for the RF CEO to serve as Secretary to the SUNY Board, and thereby, as the recorder of its deliberations, the person who briefs the Chair on many issues and informally interprets the Boards’ wishes to individuals and constituencies. The RF has its own priorities, and as this Report amply demonstrates, its own strains with SUNY. Thus, it seems more than a bit questionable whether the Secretary of the SUNY Board can be perceived as fair and unbiased in all his dealings, while he wears the other important hat as CEO of the RF. For purposes of these observations, the talent and integrity of the individual are irrelevant; I assume he would not be performing these dual functions unless those appointing him felt he was exceptionally able to discharge them, but that is not the point. Many people involved with SUNY and the RF expressed concern and consternation about this arrangement, and in effect said they felt “intimidated” in dealing with the RF because of this dual and potent role with SUNY. I suggest that this appointment be reconsidered.

## RECOMMENDATIONS

Here are about 50 specific recommendations to improve the SUNY-RF relationship and the success of SUNY research:

### 1. Pre-Award Activity.

1.1. The growth in SUNY-RF research has not kept pace with leading institutions. SUNY should determine whether it wants the RF to play any new or different role regarding pre-award development of research resources. If there is no natural role for the RF, then SUNY should energetically explore other methods to increase cooperation among campuses in identifying and exploiting sponsor opportunities.

1.2. The RF's new "Find a Scholar" initiative, using the "Community of Science Software," and similar initiatives to link SUNY researchers on different campuses, should be energetically supported. But in addition, SUNY should financially incentivize research administrators and researchers across campuses to work together, given that such expertise at SUNY is distributed widely across disparate campuses, and that it takes effort to identify collaborators.

1.3. SUNY properly does not want to try to pick research areas that will be "winners" versus "losers" and force faculty into these areas. But any University with limited resources needs to target prospects for growth. SUNY could benefit from a more explicit, targeted "center of strength" or "critical research nucleus" approach. It should seek to allocate "state line" support specifically targeted at high-yield research areas.

### 2. Grant Administration.

2.1. SUNY and the RF should convene a meeting of RF campus Operations Managers, and campus HR Directors and Counsel, for each of the major campuses, for the purpose of adopting a coordination protocol on HR issues, which would require appropriate collaboration and avoid recurring disputes. Substantive judgments may still differ at times, but everyone should have the same understanding as to the "rules of the road."

2.2. SUNY and the RF should convene a small HR group to consider whether more flexible categories of employment and varying fringe benefit rates could save money without hurting recruitment to any meaningful extent.

2.3. The RF should re-examine the process by which it advises campuses of hiring time frames and compensation decisions. Frictions can be reduced.

### 3. **Disputes and Litigation.**

3.1. Likewise, RF Counsel and the major campus counsel should execute a simple two-page “Operational Policy” or “MOU” about how they will routinely collaborate in decisions on the avoidance, assertion, compromise, settlement or litigation of claims. Currently, there is a sense of disorder (or at least a lack of coordination) on some sensitive matters.

3.2. The RF should consult more closely with SUNY when engaging private counsel and instructing them on strategy, so they respond to SUNY as well.

### 4. **Compliance Functions.**

4.1. The Research VP’s compliance initiative, begun in the summer of 2010, should be rigorously pursued and assessed. A report on specific steps should be requested.

4.2. Given the high current sensitivity and enforcement activity in the area of effort reporting, and the complexity of achieving compliance within the dissociated SUNY-RF structure, the RF and SUNY’s four health science centers should jointly develop a protocol clarifying their respective responsibility for elements of effort reporting.

4.3. Likewise, the RF and SUNY should develop a joint policy defining responsibilities to address non-compliance events, changes in budgets or protocols, etc.

4.4 More broadly, on effort reporting, the RF should:

(a) assess whether there are improvements that could be made to its effort reporting system, including increased automation, better integration with financial systems, or other “hardware/software” changes that would enhance compliance capabilities (RF says it has just begun such an initiative);

(b) review its existing suite of policy/procedure documents and update them to the extent necessary;

(c) determine whether roles and responsibilities are adequately assigned and explained;

(d) review existing training materials and whether they adequately provide faculty and departmental administrators with a basis to understand and follow applicable rules; and

(e) assess existing monitoring capabilities and whether they should be enhanced.

4.5. Likewise, the RF has important areas of potential compliance weakness, such as conflicts of interest, human subjects, and scientific misconduct. The RF and SUNY must collaborate to develop more robust compliance processes in these areas.

4.6. Key SUNY personnel could benefit from added compliance training.

4.7. The new RF cross-campus compliance committee should disseminate “best practices” as they are ascertained.

4.8. RF management should instruct RF counsel to cooperate collegially with SUNY counsel on sensitive matters of common concern, such as investigations.

## **5. Technology Transfer and Commercialization.**

5.1. SUNY should devise a more ambitious development plan, including recruitment of designated faculty who either “fill holes” in research areas that could catalyze growth, or who are themselves PIs likely to give rise to valuable inventions.

5.2. SUNY needs a plan specifically to recruit faculty who work in fields where commercializable inventions are more likely than not.

5.3. SUNY and the RF should jointly develop a protocol clarifying their respective roles in determining tech transfer decisions (e.g., sell, license, package, or hold).

5.4. SUNY should task the VP for Research of each major campus with reporting now on the obstacles of tech transfer, the current invention pipeline, and targets for tangible results.

5.5. The RF should be encouraged to fund a senior position with an executive possessing significant private sector commercialization/investment experience to link SUNY with industry, venture capital, and financial entities.

5.6. SUNY and the RF should pose concrete, aggressive, but achievable, goals for increasing the long-standing low level of royalty revenues.

5.7. SUNY should consider establishing a “single portal” that the industry can use to access SUNY tools for finding faculty researchers and potential collaborators (similar to the University of California’s “UC Discovery Grant” website). In addition, the RF could develop a service, similar to the one created by the Iowa State University Research Foundation, that allows companies to register to receive SUNY emails about new technologies related to their areas of interest.

5.8. SUNY should work to ensure that the “regionalization” effort succeeds by working with the RF on its proposal for a fair reimbursement formula for the major campuses that provide the tech transfer services (otherwise, this initiative will fail).

5.9. Each SUNY campus that is associated with an incubator/accelerator (Downstate, Upstate, Stony Brook) should be asked to propose a plan to increase their current modest level of success.

5.10. The new \$1 million RF/SUNY “gap” fund should be expanded. It is a critical process with relatively low cost, but \$1 million will not be sufficient to have a major impact. \$5-10 million would be a reasonable target.

5.11. RF should work with SUNY to develop a start-up investment fund for SUNY inventors.

5.12. SUNY should mine its alumni network to try to establish linkages with technology executives who have business interests related to SUNY researchers’ work.

5.13. SUNY should seek ways to celebrate and publicize faculty tech transfer successes. Faculty are competitive. This helps create a tech transfer culture.

## 6. **Legal Support.**

6.1. The hostile manner of prior RF General Counsel relations to SUNY must not be allowed to recur. This is a broader cultural issue than an individual one and RF’s top management should be held accountable for correcting it.

6.2. It might help achieve a better “cultural” concordance between the RF and the campuses’ counsel if they met together periodically to address recurring issues.

6.3. More broadly, top RF leadership needs to change the legal department’s attitude toward SUNY and reinforce to legal staff that the RF is a service organization to SUNY. That mission does not mean that professional standards are abandoned, but it does frame the approach that lawyers take to serving the client.

6.4. Some RF legal staff are especially knowledgeable and helpful to SUNY and should be rewarded for that level of performance.

6.5. There is significant risk to the RF and SUNY if they do not require their respective counsel to cooperate fully on sensitive matters and investigations. They should be required to do so absent demonstrable, unique reasons for not doing so.

## **7. Affiliated Entities and Ventures.**

7.1. SUNY should be judicious in asking the RF to establish affiliated organizations--they should be created only to fulfill functions that genuinely cannot effectively be fulfilled within SUNY. They should have realistic business plans. In establishing such an organization via the RF, both SUNY and the RF should confirm that SUNY is the principal and the RF is the agent. The RF should not view such organizations as serving any separate "mission."

7.2. The RF and SUNY should jointly review the affiliates and consider which might be significantly improved or made more effective, and by what means. Some seem to be "just coasting."

7.3. When the RF retains outside counsel to create or advise an affiliated organization, it should ensure that they are appropriately attentive to the overall RF and SUNY missions, and do not pressure SUNY to relinquish its interests in favor of other interests.

## **8. Costs and Charges.**

8.1. The RF should continue its existing efforts to operate efficiently, to develop additional lines of revenue, and to report transparently to SUNY on its finances. The RF and SUNY should explore whether the future scope of operations that SUNY expects the RF to undertake can be supported purely on the basis of the current charge (of 2.7% for "centralized" campuses and 3.7% for "decentralized" campuses). In fairness, the service expectations for the RF need to be realistically calibrated in light of the revenue provided to the RF.

8.2. The RF should explore whether there are fair methods of abating the current overhead charge for grant funds that create no revenue margin.

8.3. The RF should complete its exploration of potential alternative charging mechanisms, and make recommendations to a joint SUNY-RF group. The decisions should be jointly arrived at.

8.4. The RF should share with SUNY a realistic, long-range financial plan for how the RF will fund its accrued pension benefits, maintain and upgrade IT systems, etc. and what implications this has for its necessary charges. It has called the trend "alarming." What does it recommend?

8.5. The RF should present an overall projection of each affiliate's financial performance (i.e. where is it going?) and the overall impact of affiliates.

8.6. The RF reports that indirect cost recovery on New York State/local sponsored research is very small--3 to 4%. In some instances, such research nevertheless serves SUNY's purposes (supporting some overhead, supporting faculty,

enhancing rankings). In other cases, grants may lead to hidden costs (unsupported faculty or facilities in future years). The RF and SUNY might wish to assess more specifically the desirability of various State-supported grants.

8.7. SUNY should recognize that RF central office staff are performing a dizzying array of functions, which constantly grow, with a relatively low and stable number of employees. Priorities must realistically be set in seeking new RF functions.

## 9. **Communication, Collaboration and Transparency.**

9.1. As a combined legal/policy matter, the RF and SUNY should develop a general protocol (subject to variation for good cause in particular legal situations), on (a) routine collaboration, (b) sharing of information, and (c) legal limitations on sharing of non-public record information that would be subject to public records laws in SUNY's hands. This is not working well currently, and current bars to cooperation do not appear required by law.

9.2. When a Joint Defense Agreement or similar agreement is in place, the RF should comply with it.

9.3. The Board should hold the RF CEO accountable for improving/changing what is widely seen as a "culture of secrecy," and the overall quality and tenor of SUNY-RF interaction and communication within a defined time period. That should be one significant factor in retention and compensation.

## 10. **Legal Separation Between the RF and SUNY.**

See Recommendations 9.1, 9.2, and 11.2.

## 11. **Mission and Governance.**

11.1. The RF should significantly increase the direct involvement of its Board in oversight of its activities. For example:

11.1.a. Consistent with the sentiments of many RF Board members, the RF Board should meet in person at least a few times per year.

11.1.b. RF staff should give the Board far more information in advance of Board meetings.

11.1.c. The RF Board should energetically query management.

11.1.d. Management's approach should be to invite Board judgment, not to minimize it and "manage" the Board away from involvement.

11.2. The RF should comply with IRS requirements concerning its communications with SUNY to assure compliance with SUNY goals.

11.3. The Chancellor should consider whether it is realistically feasible for her, given her myriad other obligations, effectively to Chair a Board of a large business enterprise, such as the RF, or whether it is preferable that she serve on, but not Chair, the Board.

11.4. The SUNY Board should reconsider whether it is appropriate to ask the CEO of an outside organization (RF) that has substantial business dealings with SUNY to serve as Secretary to the SUNY Board and as interpreter of its intentions to SUNY management.

## 12. **Other Recommendations.**

12.1. SUNY currently is precluded from engaging in public-private partnerships since it legally cannot lease or transfer or make available its property directly to any private entity (other than DASNY or the SUNY Construction Fund)--even if doing so would demonstrably advance its mission. Hence, SUNY must seek RF assistance to accomplish indirectly the goals SUNY cannot achieve directly. To cure this, SUNY could seek a legislative amendment to Education Law § 355(2)(s) to pursue such ventures. The New York State Commission on Education supports this goal. (NYS Commission on Higher Education, "Final Report," p. 47 (2008)).

12.2. Other legislative amendments could also be pursued (e.g., to State Finance Law Section 112(2) and (3) to utilize a post-contract audit process in lieu of the burdensome and slow pre-approval OSC process for contracts, leases, etc.) or to Education Law Sections 373 and 376 to permit SUNY far more flexibility in contracting and staffing. (NYS Commission on Higher Education, "Final Report," at 48 (2008)).

12.3. If desired, other helpful legislative "relief" measures could be proposed. Some analysis of this has already been performed.

**Chart #10: Sponsored Program Revenue Projections**

	FY 2010 Actual	FY 2011 Projected	FY 2012 Projected	FY 2013 Projected	FY 2014 Projected	FY 2015 Projected
<b>University at Albany</b>						
Federal	\$ 47,401,035	\$ 48,273,066	\$ 49,238,527	\$ 49,238,527	\$ 50,223,297	\$ 50,223,297
Federal ARRA	1,889,022	1,276,577	255,316	-	-	-
Federal Flow Through	37,561,816	37,236,063	37,980,784	37,980,784	38,740,400	38,740,400
State and Local	11,007,791	12,062,520	12,303,770	12,303,770	12,549,845	12,549,845
Private/Other	5,392,146	5,298,129	5,404,091	5,404,091	5,512,173	5,512,173
Total	103,251,810	104,146,355	105,182,488	104,927,172	107,025,715	107,025,715
<b>College of Nanoscale Science &amp; Engineering</b>						
Federal	5,355,900	6,408,150	7,053,558	7,406,235	7,776,547	8,165,374
Federal ARRA	608,077	500,000	-	-	-	-
Federal Flow Through	2,768,408	4,417,350	4,638,218	4,870,128	5,113,635	5,369,317
State and Local	80,445,435	82,135,851	80,360,500	60,122,176	60,105,126	60,360,382
Private/Other	78,763,034	83,834,882	84,095,425	84,888,787	82,032,190	80,767,349
Total	167,940,853	177,296,233	176,147,701	157,287,326	155,027,498	154,662,422
<b>University at Buffalo</b>						
Federal	88,914,366	96,100,000	98,015,000	99,975,000	101,980,000	104,020,000
Federal ARRA	9,617,273	12,350,000	-	-	-	-
Federal Flow Through	16,041,009	14,770,000	15,078,000	15,378,600	15,687,000	16,000,000
State and Local	10,304,331	10,945,000	11,164,120	11,388,000	11,615,000	11,850,000
Private/Other	24,053,936	29,800,000	30,443,000	30,596,000	31,214,000	31,376,000
Total	148,930,916	163,965,000	154,700,120	157,337,600	160,496,000	163,246,000
<b>Stony Brook University</b>						
Federal	117,229,170	121,176,000	120,000,000	120,000,000	120,000,000	120,000,000
Federal ARRA	10,195,810	10,500,000	8,400,000	2,800,000	-	-
Federal Flow Through	21,361,888	21,450,000	21,000,000	21,000,000	21,000,000	21,000,000
State and Local	34,691,756	20,500,000	10,500,000	10,500,000	10,500,000	10,500,000
Private/Other	16,596,235	16,400,000	17,100,000	17,100,000	17,170,000	17,670,000
Total	200,074,859	190,026,000	177,000,000	171,400,000	169,170,000	169,170,000
<b>SUNY Downstate Medical Center</b>						
Federal	28,209,119	25,832,885	26,352,125	26,881,803	27,422,127	27,973,312
Federal ARRA	1,888,290	5,915,860	-	-	-	-
Federal Flow Through	4,349,909	4,876,130	5,090,207	5,317,437	5,558,908	5,815,806
State and Local	10,785,884	10,532,182	10,234,781	9,945,862	9,665,180	9,392,500
Private/Other	8,412,118	9,966,058	12,978,346	16,907,290	22,033,244	28,722,621
Total	53,645,320	57,123,115	54,655,459	59,052,392	64,679,459	71,904,239
<b>All Others</b>						
Federal	74,955,373	80,501,458	83,664,498	83,235,800	84,802,996	86,823,135
Federal ARRA	4,132,007	16,209,245	11,548,780	1,818,605	628,037	147,272
Federal Flow Through	86,477,701	76,972,195	68,299,313	69,148,069	69,962,527	70,974,243
State and Local	18,452,380	21,512,277	20,320,453	20,254,521	20,452,510	20,074,264
Private/Other	33,338,335	34,963,039	36,252,105	37,390,666	38,699,520	40,046,084
Total	217,355,797	230,158,214	220,085,149	211,847,661	214,545,590	218,064,998
<b>Total</b>						
Federal	362,064,964	378,291,559	384,323,708	386,737,365	392,204,967	397,205,118
Federal ARRA	28,330,479	46,751,682	20,204,096	4,618,605	628,037	147,272
Federal Flow Through	168,560,732	159,721,738	152,086,522	153,695,018	156,062,470	157,899,766
State and Local	165,687,577	157,687,830	144,883,624	124,514,329	124,887,661	124,726,991
Private/Other	166,555,804	180,262,108	186,272,967	192,286,834	197,161,127	204,094,227
Total	\$ 891,199,555	\$ 922,714,917	\$ 887,770,917	\$ 861,852,151	\$ 870,944,262	\$ 884,073,374

Source: RF, "Final Financial Plan: Fiscal Year 2010-11," Exhibit F.

**Chart #11: Sponsored Program Revenue and F&A Recovery Analysis**

	Fiscal 2010 Actual			Fiscal 2011 Projected			Negotiated Federal F&A Recovery rate	Projected FY 2011 F&A Recovery rate
	DIRECT	INDIRECT	TOTAL	DIRECT	INDIRECT	TOTAL		
<b>University Centers and Doctoral Degree Granting Institutions:</b>								
* University at Albany	637,973,157	129,030,253	767,003,410	660,495,839	130,248,809	790,744,648	51.5%	17.3%
* College of Nanoscale Science & Engineering	86,937,279	16,315,196	103,252,474	88,758,232	15,388,123	104,146,355	51.5%	3.8%
* Binghamton University	157,476,328	10,464,525	167,940,853	170,818,572	6,477,661	177,296,233	53.0%	22.9%
* University at Buffalo	29,513,619	7,403,650	36,917,269	30,948,000	7,075,000	38,023,000	30.0%	30.0%
* Stony Brook University	113,443,776	35,487,140	148,930,916	125,510,000	38,455,000	163,965,000	58.5%	26.5%
* SUNY Downstate Medical Center	161,820,498	38,254,361	200,074,859	150,200,000	39,826,000	190,026,000	57.0%	21.0%
* Upstate Medical University	44,931,437	8,713,883	53,645,320	47,214,455	9,908,660	57,123,115	59.0%	32.3%
* SUNY ESF	29,059,275	9,290,484	38,349,758	30,380,000	9,814,000	40,194,000	58.0%	16.5%
* College of Optometry	12,399,271	2,203,461	14,602,732	14,246,000	2,352,000	16,598,000	56.0%	39.3%
	2,391,674	897,554	3,289,228	2,420,580	952,365	3,372,945	79.5%	
<b>University Colleges:</b>	77,068,099	12,297,104	89,365,203	71,279,034	10,506,383	81,785,417		
* SUNY Brockport	4,569,540	385,835	4,955,376	5,453,000	508,000	5,961,000	75.0%	9.3%
* Buffalo State College	39,930,792	8,312,284	48,243,076	31,363,191	6,382,812	37,746,003	47.0%	20.4%
* SUNY Cortland	2,563,469	242,056	2,805,525	2,671,000	238,831	2,909,831	56.5%	8.9%
* SUNY Fredonia	3,017,573	197,033	3,214,605	3,025,000	235,000	3,260,000	70.0%	7.8%
* SUNY Geneseo	686,665	205,360	892,024	1,667,385	194,115	1,861,500	75.0%	11.6%
* SUNY New Paltz	4,291,125	378,872	4,669,998	4,601,820	368,146	4,969,966	78.0%	8.0%
* Old Westbury	1,243,430	101,147	1,344,576	1,430,550	124,848	1,555,398	73.0%	8.7%
* College at Oneonta	5,931,811	657,497	6,589,308	6,165,022	594,000	6,759,022	72.0%	9.6%
* SUNY Oswego	3,342,808	572,378	3,915,187	3,474,649	665,385	4,140,034	76.0%	19.1%
* SUNY Plattsburgh	5,208,268	553,507	5,761,775	5,300,000	537,000	5,837,000	70.0%	10.1%
* SUNY Potsdam	3,180,666	278,881	3,459,547	3,607,782	294,142	3,901,924	73.5%	8.2%
* Purchase College	2,233,338	278,640	2,511,978	1,547,635	195,104	1,742,739	75.0%	12.6%
* Empire State College	868,614	133,614	1,002,228	972,000	169,000	1,141,000	27.2%	17.4%
<b>Technology Colleges:</b>	11,302,677	1,000,270	12,302,946	24,028,198	1,753,154	25,781,352		
* Alfred State College	662,860	38,561	701,421	1,190,000	128,894	1,318,894	70.0%	10.8%
* SUNY Canton	1,649,777	111,078	1,760,855	1,750,000	131,000	1,881,000	72.0%	7.5%
* SUNY Cobleskill	3,238,581	233,724	3,472,305	5,631,743	576,530	6,208,273	70.0%	10.2%
* SUNY Delhi	319,393	21,701	341,093	511,810	13,315	525,125	56.5%	2.6%
* Farmingdale State College	1,701,355	198,451	1,899,806	4,314,817	378,861	4,693,678	75.0%	8.8%
* Morrisville State College	2,110,155	208,398	2,318,553	1,475,928	154,600	1,630,528	70.0%	10.5%
* SUNYIT	1,614,452	188,184	1,802,636	9,153,900	369,954	9,523,854	70.0%	4.0%
* Maritime College	6,103	174	6,277	-	-	-	70.0%	0.0%
<b>SUNY System Administration:</b>	20,677,436	1,850,560	22,527,996	22,440,000	1,963,500	24,403,500		
* Sys. Admin - Provost	20,677,436	1,850,560	22,527,996	22,440,000	1,963,500	24,403,500	19.0%	8.8%
* Sys. Admin - Chancellor	-	-	-	-	-	-	0.0%	0.0%
<b>GRAND TOTAL</b>	<b>747,021,368</b>	<b>144,178,187</b>	<b>891,199,555</b>	<b>778,243,071</b>	<b>144,471,846</b>	<b>922,714,917</b>		<b>18.6%</b>

\* Note: Campuses F&A rates are based on an MTDC base while all other schools are on a Salary and Wage base.  
 Also, University Centers, Upstate Medical University, SUNY Downstate Medical Center, SUNY ESF and Buffalo State College are using the negotiated Research rate.

**SUNY – RF REVIEW: PERSONS INTERVIEWED**

<u>Persons</u>	<u>Title</u>	<u>E-mail</u>	<u>Phone</u>
<b>Research Foundation</b>			
John O'Connor	President	john.o'connor@suny.edu	(518) 320-1362
Bonny Boice	Executive VP	bonny.boice@rfsuny.org	(518) 434-7061
Adam Gibbs	Interim CFO	adam.gibbs@rfsuny.org	(518) 434-7037
Sherry Holland	General Counsel & Secretary	sherry.holland@rfsuny.org	(518) 434-7045
Heather Hage	Intellectual Property Counsel	heather.hage@rfsuny.org	(518) 434-7045
Steven Fischer	Board Member and Chair of Audit Committee	steve@fischerpoint.net	(518) 469-2083
John Simpson	Board Member	simpson@buffalo.edu	(716) 645-2901
Samuel Stanley, MD	Board Member	samuel.stanley@stonybrook.edu carol.londoiro@stonybrook.edu (assistant)	(631) 632-6265
George Philip	Board Member	presmail@uamail.albany.edu	(518) 956-8013
John LaRosa	Board Member	john.larosa@downstate.edu	(718) 270-2611
Lynn Manning	VP for Admin. & HR	lynn.manning@rfsuny.org	(518) 434-7107
Gregory O'Connor	Director of Corporate Strategic	gregory.o'connor@rfsuny.org	(518) 434-7153

<u>Persons</u>	<u>Title</u>	<u>E-mail</u>	<u>Phone</u>
	Initiatives		
Joshua Toas	Deputy General Counsel	joshua.toas@rfsuny.org	(518) 434-7045
Rich Agnello			
Timothy Jennings	Asst. VP Ofc. of General Counsel	tim.jennings@rfsuny.org	(518) 434-7045
Garrett Sanders	VP Sponsored Programs Admin.	garrett.sanders@rfsuny.org	(518) 434-7130
Monique Westbay	Legal Services Manager & Sr. Paralegal	monique.westbay@rfsuny.org	(518) 434-7051
Joanmarie Dowling	Labor & Employment Counsel	joanmarie.dowling@rfsuny.org	(518) 434-7046
Gerard Drahos	VP for Info. Services Chief Info. Officer	gerard.drahos@rfsuny.org	(518) 434-7205
<b>SUNY – Central</b>			
Monica Rimai	Sr. VP & Chief Operating Officer	monica.rimai@suny.edu	(518) 320-1281
Marti Ellermann	Attorney	marti.ellerman@suny.edu	(518) 443-5141
Kathy Preston	System Administration	kathy.preston@suny.edu	(518) 320-1193
James Ketterer	Deputy Provost and Vice Chancellor for Policy and Planning	james.ketter@suny.edu	(518) 320-1313

<u>Persons</u>	<u>Title</u>	<u>E-mail</u>	<u>Phone</u>
<b>SUNY – Downstate</b>			
John LaRosa, MD	President	john.larosa@downstate.edu	(718) 270-2611
Ivan Lisnitzer	Executive Vice President & COO	ivan.lisnitzer@downstate.edu	(718) 270-1234
John Allen	VP Research	john.allen@downstate.edu	(718) 270-2680
Paul Davis	Interim CFO	paul.davis@downstate.edu	(718) 270-3176
Kevin O'Mara	Counsel	kevin.o'mara@downstate.edu	(718) 270-4628
<b>SUNY – Stony Brook</b>			
Samuel Stanley, MD	President	samuel.stanley@stonybrook.edu carol.londoiro@stonybrook.edu (assistant)	(631) 632-6265
John Marburger, MD	VP Research & Professor of Physics	john.marburger@stonybrook.edu	(631) 632-7932
Ellen Cohen	Chief Executive Officer of The Clinical Practice Management Plan	ellen.cohen@stonybrook.edu	(631) 444-2055
Chester Bisbee, Ph.D.	Director, Technology Licensing and Industry Relations	chester.bisbee@stonybrook.edu	(631) 632-9009
Lynn Johnson	Director, Human Resource Services	lynn.johnson@stonybrook.edu	(631) 632-6151

<u>Persons</u>	<u>Title</u>	<u>E-mail</u>	<u>Phone</u>
John Weyhenmeyer, Ph.D.	VP, Managing Director, Technology Accelerator Fund	james.weyhenmeyer@rfsuny.org	(518) 434-7121
Susan Blum	Counsel	susan.blum@stonybrook.com	(631) 444-8250
<b>SUNY – Upstate</b>			
David Smith, MD	President	smith@upstate.edu	(315) 464-4513
John McCabe, MD	CEO	mccabej@upstate.edu	(315) 464-4223
Stewart Wright	CFO	frances@upstate.edu (e-mails to be sent to his assistant)	(315) 464-6530
Steven Goodman, Ph.D.	VP – Research	goodmans@upstate.edu	(315) 464-4515
Steve Brady	Sr. VP, Administration and Finance	bradys@upstate.edu	(315) 464-4510
Steven Taffet, Ph.D	Professor, Microbiology and Immunology	taffets@upstate.edu	(315) 464-5419
Christopher E. Turner, Ph.D.	Professor, Cell and Developmental Biology	turnerce@upstate.edu	(315) 464-8598
Mark Schmitt, Ph.D.	Professor, Biochemistry and Molecular Biology	schmittm@upstate.edu	(315) 464-8713
Regina McGraw	Counsel	mcgrawr@upstate.edu	(315) 464-4700

<u>Persons</u>	<u>Title</u>	<u>E-mail</u>	<u>Phone</u>
<b>SUNY – Buffalo</b>			
John Simpson	President (to retire 1/15/11)	simpson@buffalo.edu	(716) 645-2901
Scott Nostaja	Sr. VP & Chief Operations Officer	snostaja@buffalo.edu	(716) 645-5463
David Dunn, MD	VP – Health Sciences Dept.	vphs@buffalo.edu	(716) 829-2100
Jeffrey Dunbar	Director, STOR	dunbarj@buffalo.edu	(716) 645-8134
Robert J. Genco D.D.S., Ph.D.	Vice Provost, STOR	rigenco@buffalo.edu	(716) 645-8131
Satish Tripathi, Ph.D.	Provost, Exec. VP of Academic Affairs	tripathi@buffalo.edu	(716) 645-2992
Alexander Cartwright, Ph.D.	Interim VP for Research	anc@buffalo.edu	(716) 645-1053
Ann Williams	Counsel	acw8@buffalo.edu	(716) 829-6076
<b>SUNY – Binghamton</b>			
Bahgat Sammakia	Interim VP for Research	bahgat@binghamton.edu	607-777-6880
<b>SUNY – Albany</b>			
George Philip	President	presmail@uamail.albany.edu	(518) 956-8013
J. Eric Smith	Director of Auxiliary Services	jsmith3@uamail.albany.edu	(518) 442-5950