

NATIONAL SCIENCE FOUNDATION**45 CFR Part 689**

RIN 3145-AA39

Research Misconduct**AGENCY:** National Science Foundation (NSF).**ACTION:** Proposed rule.

SUMMARY: NSF proposes to revise its existing misconduct in science and engineering regulations at 45 CFR Part 689. These revisions implement the Federal Policy on Research Misconduct issued by the Executive Office of the President's Office of Science and Technology on December 6, 2000.

DATES: Comments must be received by February 25, 2002.

ADDRESSES: Comments should be sent to Anita Eisenstadt, Assistant General Counsel, National Science Foundation, 4201 Wilson Boulevard, Room 1265, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Anita Eisenstadt, Office of the General Counsel, at 703-292-8060.

SUPPLEMENTARY INFORMATION: The Office of Science and Technology Policy issued a final Federal research misconduct policy on December 6, 2000 in 65 FR 76260-76264 ("the Federal policy"). The Federal policy consists of a definition of research misconduct and basic guidelines to help Federal agencies and Federally funded research institutions respond to allegations of research misconduct. The policy directs Federal agencies that support or conduct research to implement it within one year.

The National Science Foundation has had regulations governing research misconduct since 1989. The Foundation is proposing to revise its existing regulations to make them fully consistent with the Federal policy.

The primary change concerns the definition of misconduct. The Federal policy provides a uniform Federal definition of research misconduct. It defines research misconduct as "fabrication, falsification, and plagiarism in proposing, performing, or reviewing research or reporting research results." The Federal policy also defines "fabrication," "falsification," and "plagiarism." This proposed rule adopts the definition of research misconduct set forth in the Federal Policy in place of the definition of misconduct contained in the existing regulation.

A significant portion of the Foundation's budget supports science and engineering education, and NSF has an ongoing interest in the integration of

research and education. In order to ensure the same level of integrity for both education and research activities funded by the Foundation, NSF amended its regulations in 1991 to explicitly include misconduct in NSF-funded science and engineering education within the definition of misconduct. NSF continues to believe that it is important to ensure integrity in proposing, performing, reviewing, or reporting results from education proposals submitted to NSF. For this reason, the revised regulation would continue to define misconduct to include plagiarism, falsification, and fabrication in connection with NSF-funded science and engineering education.

The procedures for responding to allegations of misconduct found in the existing regulations would not materially change because they already conform to the Federal policy. Consistent with the Federal policy, NSF will also continue to protect research misconduct investigative and adjudicative files as exempt from mandatory disclosure under the Freedom of Information Act and the Privacy Act, to the extent permitted by law and regulation. Finally, this rule proposes some minor adjustments to the Foundation's internal timeframes for completing the investigative and adjudicative phases of misconduct proceedings.

Determinations

The Office of Management and Budget has reviewed this proposed rule under Executive Order 12866. The proposed rule is not an economically significant rule or a major rule under the Congressional Review Act. The Unfunded Mandate Reform Act of 1995, in sections 202 and 205, requires that agencies prepare several analytic statements before proposing a rule that may result in annual expenditures of \$100 million by State, local and Indian tribal governments, or by the private sector. As any final rule would not result in expenditures of this magnitude, such statements are not necessary. As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on a substantial number of small businesses.

The provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. 3501 *et seq.*, and its implementing regulations, 5 CFR Part 1320, do not apply to this proposed rule because there are no new or revised recordkeeping or reporting requirements. Finally, NSF has reviewed this rule in light of Section 2

of Executive Order 12778 and certifies that this rule meets the applicable standards provided in sections 2(a) and 2(b) of that order.

List of Subjects in 45 CFR Part 689

Misconduct, Debarment and suspension, Fraud.

Dated: January 18, 2002.

Lawrence Rudolph,

General Counsel, National Science Foundation.

For the reasons set forth in the preamble, the National Science Foundation proposes to revise part 689 of title 45, chapter VI of the Code of Federal Regulations, to read as follows:

PART 689—RESEARCH MISCONDUCT

Sec.

- 689.1 Definitions.
- 689.2 General policies and responsibilities.
- 689.3 Actions.
- 689.4 Role of awardee institutions.
- 689.5 Initial NSF handling of misconduct matters.
- 689.6 Investigations.
- 689.7 Pending proposals and awards.
- 689.8 Interim administrative actions.
- 689.9 Dispositions.
- 689.10 Appeals.

Authority: Section 11(a), National Science Foundation Act of 1950, as amended (42 U.S.C. 1870(a)).

§ 689.1 Definitions.

(a) *Research misconduct* means fabrication, falsification, or plagiarism in proposing or performing research funded by NSF, reviewing research proposals submitted to NSF, or in reporting research results funded by NSF.

(1) *Fabrication* means making up data or results and recording or reporting them.

(2) *Falsification* means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

(3) *Plagiarism* means the appropriation of another person's ideas, processes, results or words without giving appropriate credit.

(4) *Research*, for purposes of § 689.1(a), includes proposals submitted to NSF in all fields of science, engineering, mathematics, and education and results from such proposals.

(b) Research misconduct does not include honest error or differences of opinion.

§ 689.2 General policies and responsibilities.

(a) NSF will take appropriate action against individuals or institutions upon

a finding that research misconduct has occurred. Possible actions are described in § 689.3. NSF may also take interim action during an investigation, as described in § 689.8.

(b) NSF will find research misconduct only after careful inquiry and investigation by an awardee institution, by another Federal agency, or by NSF. An "inquiry" consists of preliminary information-gathering and preliminary fact-finding to determine whether an allegation or apparent instance of research misconduct has substance and if an investigation is warranted. An investigation must be undertaken if the inquiry determines the allegation or apparent instance of research misconduct has substance. An "investigation" is a formal development, examination and evaluation of a factual record to determine whether research misconduct has taken place, to assess its extent and consequences, and to evaluate appropriate action.

(c) A finding of research misconduct requires that—

(1) There be a significant departure from accepted practices of the relevant research community; and

(2) The research misconduct be committed intentionally, or knowingly, or recklessly; and

(3) The allegation be proven by a preponderance of evidence.

(d) Before NSF makes any final finding of research misconduct or takes any final action on such a finding, NSF will normally afford the accused individual or institution notice, a chance to provide comments and rebuttal, and a chance to appeal. In structuring procedures in individual cases, NSF may take into account procedures already followed by other entities investigating or adjudicating the same allegation of research misconduct.

(e) Debarment or suspension for research misconduct will be imposed only after further procedures described in applicable debarment and suspension regulations, as described in §§ 689.8 and 689.9, respectively. Severe research misconduct, as established under these regulations, is an independent cause for debarment or suspension under the procedures established by the debarment and suspension regulations.

(f) The Office of Inspector General (OIG) oversees investigations of research misconduct and conducts any NSF inquiries and investigations into suspected or alleged research misconduct.

(g) The Deputy Director adjudicates research misconduct proceedings and the Director decides appeals.

§ 689.3 Actions.

(a) Possible final actions listed below for guidance range from minimal restrictions (Group I) to the most severe and restrictive (Group III). They are not exhaustive and do not include possible criminal sanctions.

(1) Group I Actions. (i) Send a letter of reprimand to the individual or institution.

(ii) Require as a condition of an award that for a specified period an individual or institution obtain special prior approval of particular activities from NSF.

(iii) Require for a specified period that an institutional official other than those guilty of misconduct certify the accuracy of reports generated under an award or provide assurance of compliance with particular policies, regulations, guidelines, or special terms and conditions.

(2) Group II Actions. (i) Totally or partially suspend an active award, or restrict for a specified period designated activities or expenditures under an active award.

(ii) Require for a specified period special reviews of all requests for funding from an affected individual or institution to ensure that steps have been taken to prevent repetition of the misconduct.

(iii) Require a correction to the research record.

(3) Group III Actions. (i) Terminate an active award.

(ii) Prohibit participation of an individual as an NSF reviewer, advisor, or consultant for a specified period.

(iii) Debar or suspend an individual or institution from participation in Federal programs for a specified period after further proceedings under applicable regulations.

(b) In deciding what final actions are appropriate when misconduct is found, NSF officials should consider:

(1) How serious the misconduct was;

(2) The degree to which the misconduct was knowing, intentional, or reckless;

(3) Whether it was an isolated event or part of a pattern;

(4) Whether it had a significant impact on the research record, research subjects, other researchers, institutions or the public welfare; and

(5) Other relevant circumstances.

(c) Interim actions may include, but are not limited to:

(1) Totally or partially suspending an existing award;

(2) Suspending eligibility for Federal awards in accordance with debarment-and-suspension regulations;

(3) Proscribing or restricting particular research activities, as, for example, to protect human or animal subjects;

(4) Requiring special certifications, assurances, or other, administrative arrangements to ensure compliance with applicable regulations or terms of the award;

(5) Requiring more prior approvals by NSF;

(6) Deferring funding action on continuing grant increments;

(7) Deferring a pending award;

(8) Restricting or suspending participation as an NSF reviewer, advisor, or consultant.

(d) For those cases governed by the debarment and suspension regulations, the standards of proof contained in those regulations shall control. Otherwise, NSF will take no final action under this section without a finding of misconduct supported by a preponderance of the relevant evidence.

§ 689.4 Role of awardee institutions.

(a) Awardee institutions bear primary responsibility for prevention and detection of research misconduct and for the inquiry, investigation, and adjudication of alleged research misconduct. In most instances, NSF will rely on awardee institutions to promptly:

(1) Initiate an inquiry into any suspected or alleged research misconduct;

(2) Conduct a subsequent investigation, if warranted;

(3) Take action necessary to ensure the integrity of research, the rights and interests of research subjects and the public, and the observance of legal requirements or responsibilities; and

(4) Provide appropriate safeguards for subjects of allegations as well as informants.

(b) If an institution wishes NSF to defer independent inquiry or investigation, it should:

(1) Complete any inquiry and decide whether an investigation is warranted within 90 days. If completion of an inquiry is delayed, but the institution wishes NSF deferral to continue, NSF may require submission of periodic status reports.

(2) Inform OIG immediately if an initial inquiry supports a formal investigation.

(3) Keep OIG informed during such an investigation.

(4) Complete any investigation and reach a disposition within 180 days. If completion of an investigation is delayed, but the institution wishes NSF deferral to continue, NSF may require submission of periodic status reports.

(5) Provide OIG with the final report from any investigation.

(c) NSF expects institutions to promptly notify OIG should the

institution become aware during an inquiry or investigation that:

(1) Public health or safety is at risk;
(2) NSF's resources, reputation, or other interests need protecting;

(3) There is reasonable indication of possible violations of civil or criminal law;

(4) Research activities should be suspended;

(5) Federal action may be needed to protect the interests of a subject of the investigation or of others potentially affected; or

(6) The scientific community or the public should be informed.

(d) Awardee institutions should maintain and effectively communicate to their staffs appropriate policies and procedures relating to research misconduct, which should indicate when NSF should be notified.

§ 689.5 Initial NSF handling of misconduct matters.

(a) NSF staff who learn of alleged misconduct will promptly and discreetly inform OIG or refer informants to OIG.

(b) The identity of informants who wish to remain anonymous will be kept confidential to the extent permitted by law or regulation.

(c) If OIG determines that alleged research misconduct involves potential civil or criminal violations, OIG may refer the matter to the Department of Justice.

(d) Otherwise OIG may:

(1) Inform the awardee institution of the alleged research misconduct and encourage it to undertake an inquiry;

(2) Defer to inquiries or investigations of the awardee institution or of another Federal agency; or

(3) At any time proceed with its own inquiry.

(e) If OIG proceeds with its own inquiry it will normally complete the inquiry no more than 90 days after initiating it.

(f) On the basis of what it learns from an inquiry and in consultation as appropriate with other NSF offices, OIG will decide whether a formal NSF investigation is warranted.

§ 689.6 Investigations.

(a) When an awardee institution or another Federal agency has promptly initiated its own investigation, OIG may defer an NSF inquiry or investigation until it receives the results of that external investigation. If it does not receive the results within 180 days, OIG may proceed with its own investigation.

(b) If OIG decides to initiate an NSF investigation, it must give prompt written notice to the individual or

institutions to be investigated, unless notice would prejudice the investigation or unless a criminal investigation is underway or under active consideration. If notice is delayed, it must be given as soon as it will no longer prejudice the investigation or contravene requirements of law or Federal law-enforcement policies.

(c) If a criminal investigation by the Department of Justice, the Federal Bureau of Investigation, or another Federal agency is underway or under active consideration by these agencies or the NSF, OIG will determine what information, if any, may be disclosed to the subject of the investigation or to other NSF employees.

(d) An NSF investigation may include:

(1) Review of award files, reports, and other documents already readily available at NSF or in the public domain;

(2) Review of procedures or methods and inspection of laboratory materials, specimens, and records at awardee institutions;

(3) Interviews with subjects or witnesses;

(4) Review of any documents or other evidence provided by or properly obtainable from parties, witnesses, or other sources;

(5) Cooperation with other Federal agencies; and

(6) Opportunity for the subject of the investigation to be heard.

(e) OIG may invite outside consultants or experts to participate in an NSF investigation. They should be appointed in a manner that ensures the official nature of their involvement and provides them with legal protections available to federal employees.

(f) OIG will make every reasonable effort to complete an NSF investigation and to report its recommendations, if any, to the Deputy Director within 180 days after initiating it.

§ 689.7 Pending proposals and awards.

(a) Upon learning of alleged research misconduct OIG will identify potentially implicated awards or proposals and when appropriate, will ensure that program, grant, and contracting officers handling them are informed (subject to § 689.6(c)).

(b) Neither a suspicion or allegation of research misconduct nor a pending inquiry or investigation will normally delay review of proposals. To avoid influencing reviews, reviewers or panelists will not be informed of allegations or of ongoing inquiries or investigations. However, if allegations, inquiries, or investigations have been rumored or publicized, the responsible

Program Director may consult with OIG and, after further consultation with the Office of General Counsel, either defer review, inform reviewers to disregard the matter, or inform reviewers of the status of the matter.

§ 689.8 Interim administrative actions.

(a) After an inquiry or during an external or NSF investigation the Deputy Director may order that interim actions (as described in § 689.3(c)) be taken to protect Federal resources or to guard against continuation of any suspected or alleged research misconduct. Such an order will normally be issued on recommendation from OIG and in consultation with the Division of Contracts, Policy, and Oversight or Division of Grants and Agreements, the Office of the General Counsel, the responsible Directorate, and other parts of the Foundation as appropriate.

(b) When suspension is determined to be appropriate, the case will be referred to the suspending official pursuant to 45 CFR part 620, and the suspension procedures of 45 CFR part 620 will be followed, but the suspending official will be either the Deputy Director or an official designated by the Deputy Director.

(c) Such interim actions may be taken whenever information developed during an investigation indicates a need to do so. Any interim action will be reviewed periodically during an investigation by NSF and modified as warranted. An interested party may request a review or modification by the Deputy Director of any interim action.

(d) The Deputy Director will make and OIG will retain a record of interim actions taken and the reasons for taking them.

(e) Interim administrative actions are not final agency actions subject to appeal.

§ 689.9 Dispositions.

(a) After receiving a report from an external investigation by an awardee institution or another Federal agency, OIG will assess the accuracy and completeness of the report and whether the investigating entity followed reasonable procedures. It will either recommend adoption of the findings in whole or in part or, normally within 30 days, initiate a new investigation.

(b) When any satisfactory external investigation or an NSF investigation fails to confirm alleged misconduct,

(1) OIG will notify the subject of the investigation and, if appropriate, those who reported the suspected or alleged misconduct. This notification may include the investigation report.

(2) Any interim administrative restrictions that were imposed will be lifted.

(c) When any satisfactory investigation confirms misconduct,

(1) In cases in which debarment is considered by OIG to be an appropriate disposition, the case will be referred to the debarring official pursuant to 45 CFR part 620 and the procedures of 45 CFR part 620 will be followed, but:

(i) The debarring official will be either the Deputy Director, or an official designated by the Deputy Director.

(ii) Except in unusual circumstances, the investigation report and recommended disposition will be included among the materials provided to the subject of the investigation as part of the notice of proposed debarment.

(iii) The notice of the debarring official's decision will include instructions on how to pursue an appeal to the Director.

(2) In all other cases,

(i) Except in unusual circumstances, the investigation report will be provided by OIG to the subject of the investigation, who will be invited to submit comments or rebuttal. Comments or rebuttal submitted within the period allowed, normally thirty days, will receive full consideration and may lead to revision of the report or of a recommended disposition.

(ii) Normally within 45 days after completing an NSF investigation or receiving the report from a satisfactory external investigation, OIG will submit to the Deputy Director the investigation report, any comments or rebuttal from the subject of the investigation, and a recommended disposition. The recommended disposition will propose any final actions to be taken by NSF. Section 689.3 lists possible final actions and considerations to be used in determining them.

(iii) The Deputy Director will review the investigation report and OIG's recommended disposition. Before issuing a disposition the Deputy Director may initiate further hearings or investigation. Normally within 120 days after receiving OIG's recommendations or after completion of any further proceedings, the Deputy Director will send the affected individual or institution a written disposition, specifying actions to be taken. The decision will include instructions on how to pursue an appeal to the Director.

§ 689.10 Appeals.

(a) An affected individual or institution may appeal to the Director in writing within 30 days after receiving the Deputy Director's written decision. The Deputy Director's decision becomes

a final administrative action if it is not appealed within the 30 day period.

(b) The Director may appoint an uninvolved NSF officer or employee to review an appeal and make recommendations.

(c) The Director will normally inform the appellant of a final decision within 60 days after receiving the appeal. That decision will be the final administrative action of the Foundation.

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1813 and 1852

RIN 2700-AC33

Non-Commercial Representations and Certifications and Evaluation Provisions for Use in Simplified Acquisitions

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: This proposed change to the NFS will establish a consolidated set of representations and certifications and an evaluation provision for the acquisition of non-commercial items within the simplified acquisition threshold.

DATES: Comments should be submitted on or before March 26, 2002.

ADDRESSES: Interested parties should submit written comments to Celeste Dalton, NASA Headquarters, Office of Procurement, Contract Management Division (Code HK), Washington, DC 20546. Comments may also be submitted by e-mail to: cdalton@hq.nasa.gov.

FOR FURTHER INFORMATION CONTACT: Celeste Dalton, Code HK, (202) 358-1645, e-mail: cdalton@hq.nasa.gov.

SUPPLEMENTARY INFORMATION:

A. Background

Currently for commercial acquisition, FAR provision 52.212-3, Offeror Representations and Certifications—Commercial Items, provides a consolidated set of representations and certifications. No equivalent provision exists for non commercial items. NASA proposes to establish an equivalent provision for use with NASA's non-commercial acquisitions within the simplified acquisition threshold (SAT). This new consolidated provision will ensure that all appropriate representations and certifications are

consistently used and will simplify the incorporation of representation and certification into solicitations. Additionally, this rule proposes to establish an evaluation provision to be used in non-commercial acquisitions within the SAT when selection is based on other than technically acceptable low offer. This evaluation provision will provide a consistent notice to offerors of how evaluations will be conducted.

B. Regulatory Flexibility Act

NASA certifies that this proposed rule will not have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), because this proposed rule merely consolidates within one provision existing FAR representations and certifications for use in non-commercial simplified acquisitions.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the NFS do not impose any new recordkeeping or information collection requirements, or collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 1813 and 1852

Government Procurement.

Tom Luedtke,

Associate Administrator for Procurement.

Accordingly, 48 CFR Parts 1813 and 1852 are proposed to be amended as follows:

1. The authority citation for 48 CFR Parts 1813 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1813—SIMPLIFIED ACQUISITION PROCEDURES

2. Add section 1813.302-570 to read as follows:

§ 1813.302-570 NASA solicitation provisions.

(a)(1) The contracting officer may use the provision at 1852.213-70, Offeror Representations and Certifications—Other Than Commercial Items, in simplified acquisitions exceeding the micropurchase threshold that are for other than commercial items. This provision must not be used for acquisitions conducted under FAR 13.5.

(2) This provision provides a single, consolidated list of certifications and representations for the acquisition of