

*Deputy Director* means the Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office, or an individual serving as Acting Deputy Director.

*Commissioner for Patents* and *Commissioner for Trademarks* mean the positions defined in 35 U.S.C. 3(b)(2), or an individual acting in the capacity of one of those positions.

*Issuance* means the entry of a decision into the record of a Board proceeding.

*Management Judge* means the Chief Administrative Patent Judge, the Deputy Chief Administrative Patent Judge, a Vice Chief Administrative Patent Judge, a Senior Lead Administrative Patent Judge, a Lead Administrative Patent Judge, including individuals who serve in these positions in an acting capacity, or any other Administrative Patent Judge who, as part of their duties, supervises the work of other Administrative Patent Judges or is responsible for reviewing the performance of other Administrative Patent Judges.

*Panel* means the members of the Board assigned to a proceeding pursuant to the Board's Standard Operating Procedure 1.

*Proceeding* means an appeal or contested case under Part 41, or trial proceeding under Part 42.

#### **§ 43.3 No Pre-Issuance Director Involvement in Panel Decisions.**

(a) Prior to issuance of a decision by the panel, the Director, Deputy Director, Commissioner for Patents, and Commissioner for Trademarks shall not communicate, directly or through intermediaries, with any member of the panel regarding the decision.

(b) The prohibition of paragraph (a) shall not apply to any proceeding in which the individual is a member of the panel. When sitting as a member of a panel, the Director or other individual listed in paragraph (a) is a coequal member of the panel and exercises no review authority over the proceeding prior to the issuance of the panel's decision on the merits.

(c) Nothing in this section shall prevent the Director or delegate from communicating with a panel as to resource needs or the procedural status of any proceeding pending before the Board.

(d) The Chief Administrative Patent Judge or delegates of the Chief Administrative Patent Judge shall designate panels of the Board on behalf of the Director. The Director may issue generally applicable paneling guidance to be applied to proceedings before the

Board. The Director shall not direct or otherwise influence the paneling or repaneling of any specific proceeding prior to issuance of the panel decision. When reviewing or rehearing an issued panel decision, the Director may direct the repaneling of the proceeding in a manner consistent with PTAB paneling guidance, through an Order entered into the record.

#### **§ 43.4 Limited Pre-Issuance Management Involvement in Decisions.**

(a) Except as requested pursuant to paragraph (b) or permitted under paragraph (d) or (e), prior to issuance of a decision by the panel, no Management Judge or employee of the Office external to the Board shall initiate communication, directly or through intermediaries, with any member of a panel regarding a decision.

(b) Any individual panel member may request that one or more Management Judges provide input on a decision prior to issuance. The choice to request input is optional and solely within the discretion of an individual panel member.

(c) It is within the sole discretion of the panel to adopt any edits, suggestions, or feedback provided to the panel by a Management Judge as part of a review requested under paragraph (b). The panel has final authority and responsibility for the content of a decision and determines whether and how to incorporate any feedback requested under paragraph (b).

(d) The prohibition of paragraph (a) shall not apply to any Management Judge who is a member of the panel. When sitting as a member of a panel, a Management Judge is a coequal member of the panel and exercises no review authority over the proceeding prior to the issuance of the panel's decision on the merits.

(e) Nothing in this section shall prevent a Management Judge from communicating with a panel as to resource needs or the procedural status of any case pending before the Board.

#### **§ 43.5 Review of Decisions by Non-Management Judges.**

If the Office establishes procedures governing the internal circulation and review of decisions prior to issuance to one or more designated members of the Board:

(a) No Management Judge shall participate directly or indirectly in any such review and the reviewing non-Management judges shall not discuss the substance of any circulated decision with a Management Judge prior to issuance of the decision, except with a

Management Judge who is a member of the panel; and

(b) Any edits, suggestions, or feedback provided to the panel pursuant to such circulation and review are optional and in the sole discretion of the panel to accept. The panel has final authority and responsibility for the content of a decision and determines whether and how to incorporate any feedback provided.

#### **§ 43.6 Controlling Legal Authority; No Unwritten or Non-Public Binding Policy or Guidance.**

Notwithstanding any other provision of this Part, all decisions of the Board are expected to comport with all applicable statutes, regulations, binding case law, and written agency policy and guidance applicable to Board proceedings. There shall be no unwritten agency or Board policy or guidance that is binding on any panel of the Board. All written policy and guidance binding on panels of the Board shall be made public.

**Katherine K. Vidal,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

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## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **42 CFR Part 93**

**RIN 0937-AA12**

#### **Public Health Service Policies on Research Misconduct**

**AGENCY:** U.S. Department of Health and Human Services (HHS).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** In this Notice of Proposed Rulemaking (NPRM), the Department of Health and Human Services (HHS), Office of the Secretary, Office of the Assistant Secretary for Health (OASH), Office of Research Integrity (ORI) proposes to revise the Public Health Service (PHS) Policies on Research Misconduct. The proposed revisions are based on the experience ORI and institutions have gained with the regulation since it was released in 2005. This NPRM seeks comment from individuals, institutional officials, organizations, institutions, research funding agencies, and other members of the public on the proposed revisions and how to improve the clarity of substantive and non-substantive.

**DATES:** Submit comments on or before December 5, 2023.

**ADDRESSES:** For efficient management of comments, HHS requests that all comments be submitted electronically to <https://www.regulations.gov> (referred to hereafter as “*regulations.gov*”). In commenting, please refer to the Regulatory Information Number (RIN) [0937-AA12].

*Instructions:* Enter the RIN in the search field at <https://www.regulations.gov> and click on “Search.” To view the proposed rule, click on the title of the rule. To comment, click on “Comment” and follow the instructions. If you are uploading multiple attachments into *regulations.gov*, please number and label all attachments; <https://www.regulations.gov> will not automatically number them. All relevant comments will be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read comments received, please go to <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Sheila Garrity, JD, MPH, MBA, Office of Research Integrity, 1101 Wootton Parkway, Suite 240, Rockville, MD 20852; telephone 240-453-8200.

**SUPPLEMENTARY INFORMATION:** All comments, including any personally identifiable or confidential business information provided, will be placed in the public docket without change and will be publicly available online at <https://www.regulations.gov>. Therefore, HHS cautions commenters about submitting information they do not want to be made available to the public.

When submitting comments on this NPRM, the agency requests that commenters explain their rationale and provide any relevant data and information to support their comments or rationale, as applicable.

This preamble is organized as follows:

- I. Public Participation
- II. Authority for These Regulations
- III. Proposed Updates to Subpart A
- IV. Proposed Updates to Subpart B
- V. Proposed Updates to Subpart C
- VI. Proposed Updates to Subpart D
- VII. Proposed Updates to Subpart E
- VIII. Required Regulatory Analyses

## I. Public Participation

Interested persons are invited to participate in this rulemaking by

submitting written views, opinions, recommendations, and data. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you do not wish to be disclosed publicly. Comments are invited on any topic within the scope of this NPRM.

## II. Authority for These Regulations

The primary authority supporting this rulemaking is 42 U.S.C. 289b (section 493 of the Public Health Service Act, as amended). This authority established ORI as an independent entity within HHS and requires the Secretary to issue regulations to define the term “research misconduct” and implement the research misconduct provisions of the statute. To that end, in 2005 HHS issued Public Health Service (PHS) Policies on Research Misconduct (the “2005 Final Rule”) [42 CFR part 93; 70 FR 28370 (May 17, 2005)]. Since the 2005 Final Rule was issued, ORI has gained extensive experience handling all aspects of the HHS research integrity program under 42 CFR part 93. ORI now seeks to capitalize on that experience through the regulatory revision process.

ORI anticipates release of the final rule in the summer of 2024, with implementation to begin a minimum of 4 months afterward. ORI will aim for an effective date of January 1, 2025, to simplify institutional reporting under proposed § 93.302(b). Once this NPRM is finalized, ORI recognizes that some institutions may wish to implement the revised regulation for research misconduct proceedings already underway. As was done with the 2005 Final Rule, ORI intends that for any allegation of research misconduct received by HHS or an institution before the effective date of the revised regulation, regardless of the stage of the research misconduct proceeding, the proceeding will fall under the 2005 Final Rule. ORI seeks comment on aspects to consider if it were to entertain individual requests to apply the revised regulation to a particular ongoing proceeding.

For additional information and an extensive historical background on the origins of ORI and the development of the PHS policies on research misconduct, we direct the public to 69 FR 20778 (Apr. 16, 2004) and to ORI’s website at <https://ori.hhs.gov/historical-background>. A basic tenet of the scientific process is that research constantly evolves as experimental results and analyses inform new hypotheses. Informed debate and the

discourse of ideas is a natural part of that process. Institutions must foster a research environment that discourages misconduct in all research and that deals forthrightly with possible misconduct associated with PHS supported research. ORI has recognized that the 2005 Final Rule’s complexity and missing definitions may create confusion in some areas. Accordingly, this proposed rule aims to implement revisions that we believe are necessary and appropriate while retaining many of the features of the 2005 Final Rule.

We highlight below the changes in subparts A through E, particularly to draw attention to areas that represent new approaches. Briefly, this NPRM follows the structure of the 2005 Final Rule. Subpart A describes the purpose and fundamental precepts of the regulation. Subpart B provides definitions. Subpart C lists institutional responsibilities, and subpart D describes responsibilities of HHS and ORI. Finally, subpart E covers the process for respondents who wish to contest the ORI findings of research misconduct and HHS administrative actions. We invite public comments on all aspects of this proposed regulation.

## III. Proposed Updates to Subpart A

Subpart A establishes the responsibilities of HHS, PHS, ORI, and institutions in addressing allegations of research misconduct. ORI proposes refining the language in subpart A to clarify the applicability of the regulation to allegations of research misconduct. Subpart A also addresses HHS coordination with other agencies. In addition, ORI proposes removing reference to evidentiary standards and burden of proof formerly found at § 93.106 because proposed revisions throughout part 93, and specifically at § 93.104, address requirements for a finding of research misconduct, including preponderance of evidence to prove an allegation.

A proposed substantive addition to subpart A includes clarifying language about confidentiality, explaining when and how disclosure may be made to “those who need to know.” In the 2005 Final Rule, the phrase “those who need to know” is not defined in § 93.108, causing uncertainty about what information can be disclosed and to whom. To address this concern, we propose to add new paragraphs in § 93.106 to address the situations in which disclosures may need to occur as well as who is considered as having a “need to know” and in what circumstances. We believe these proposed revisions will balance the

rights of all parties while minimizing unnecessary information disclosure.

ORI recognizes that anonymity is a concern for some complainants and witnesses. Institutional, state, or other policies may govern the granting of anonymity to complainants or witnesses in a research misconduct proceeding, so ORI has not proposed language in the NPRM. Instead, ORI proposes to issue guidance on protecting anonymity in transcripts and other materials collected throughout a research misconduct proceeding. ORI is interested in the public's views on maintaining anonymity for complainants or witnesses who request it, including whether to include provisions for such anonymity in the final rule.

The 2005 Final Rule generally applies only to research misconduct occurring within six years of the date HHS or an institution receives an allegation of research misconduct, but it provides a "subsequent use" exception to the six-year limitation in § 93.105(b)(1). From our experience, this "subsequent use" exception has been applied most often to the citation of questioned paper(s) in a researcher's more recent publication or PHS grant application which in turn tolls the six-year time limitation. From our experience the phrase "other use for the potential benefit of the respondent of the research record" also has been viewed as vague and unclear. Therefore, to ensure clarity within the institutional community, we propose that the six-year time limitation be maintained, but we propose revising the "subsequent use" exception at § 93.105(b)(1) to include clarifying information. ORI is interested in public comments on how to further clarify the expectations and/or requirements related to the "subsequent use" exception.

#### IV. Proposed Updates to Subpart B

ORI is proposing revisions to definitions in subpart B and introducing new definitions, some of which align with other changes proposed throughout the regulation. In a few cases, regulatory principles appeared in the body of the 2005 Final Rule without definition; these proposed revisions now appear among the 48 proposed definitions provided in subpart B. We propose moving definitions for "research misconduct", "fabrication", and "falsification" to subpart B without changes. ORI proposes revising the "plagiarism" definition and moving it to subpart B. We believe having all definitions in one place makes it easier for readers, enabling the text in subpart C to focus on institutional responsibilities. We are interested in public comments on all these

definitions, their specific content as well as their inclusion in the listing of definitions in subpart B.

ORI proposes adding some commonly-used terms to the definitions to ensure clarity in usage. These additional terms include "appeal"; "assessment"; "difference of opinion"; "institutional certifying official" and "institutional deciding official"; "research integrity"; "research integrity officer"; and "small institution." Key points of other proposed definitional changes follow, with more expansive definitions in subpart B. This preamble groups the conceptually related terms versus providing them alphabetically as they appear in subpart B.

#### *New Terms and Definitions*

*Institutional Record.* As part of the proposed revisions, we introduce the concept of a robust and required institutional record as part of the research misconduct investigative process. Described in more detail at § 93.223, the proposed institutional record includes the assessment report, inquiry report, investigation report, decision(s) made by the institutional deciding official, and the complete record of any institutional appeal, any other records the institution used for the research misconduct proceeding, documentation related to the determination that records are irrelevant or duplicate and therefore not included, and a single index listing all documents in the institutional record.

*Administrative Record.* The administrative record described at proposed § 93.202 contains information that would be used by ORI in making findings of research misconduct and identifying administrative actions, in addition to serving as the basis for the Departmental Appeals Board (DAB) Administrative Law Judge (ALJ) review and information considered by the HHS Suspension and Debarment Official (SDO). The proposed administrative record comprises: the institutional record; any information provided by the respondent to ORI, including but not limited to the verbatim transcript of any meetings under proposed § 93.403 between the respondent and ORI, whether in person, by phone, or by videoconference; and correspondence between the respondent and ORI; any additional information provided to ORI while the case is pending before ORI; and any analysis or additional information generated or obtained by ORI. Any analysis or additional information generated or obtained by ORI will also be made available to respondent.

*Honest Error.* At times, institutions have raised the issue that "honest error" is not defined in the 2005 Final Rule, and that providing a definition would ensure greater consistency and fairness. We propose to define the term "honest error" in subpart B as a mistake made in good faith.

*Intentionally, Knowingly, and Recklessly.* None of these terms were defined in the 2005 Final Rule. Although "knowingly" and "intentionally" seem to be more commonly understood than "recklessly", we have received requests through the years to provide explicit definitions for clarity and to ensure uniform application in the research community. We propose definitions based on those used in the ALJ's Recommended Decisions in *ORI v. Kreipke*, Decision No. CR5109 (May 18, 2018) at page 14 and *ORI v. Srivastava*, Decision No. 5178 (Sept. 5, 2018) at pages 11–12. We propose that to act "intentionally" means to act with the aim of carrying out the act. To act "knowingly" means to act with awareness of the act. Finally, to act "recklessly" means to act without proper caution despite a known risk for harm. These definitions are found at §§ 93.224, 93.226, and 93.234, respectively.

*Accepted Practices of the Relevant Research Community.* From our experience, many institutions have requested a definition for the phrase "accepted practices of the relevant research community" to ensure clarity and uniformity in application to research misconduct proceedings. Therefore, we propose to adopt at § 93.200 a revised and extended version of the definition provided in the ALJ's Recommended Decision in *ORI v. Kreipke*, Decision No. CR5109 (May 18, 2018) at page 17. Specifically, we propose "accepted practices of the relevant research community" to mean those practices established by 42 CFR part 93 and by PHS funding components, as well as commonly accepted professional codes or norms within the overarching community of researchers and institutions that apply for and receive PHS grants. These practices must be consistent with the definition of research integrity at § 93.236.

*This Part.* Over the years, institutions and government agencies have told us that "this part" is confusing. We propose to define "this part" as meaning 42 CFR part 93 in its entirety, unless otherwise explicitly noted. We further define how to refer to only a portion of the regulation.

### Revised Definition

*Plagiarism.* The 2005 Final Rule states that “Plagiarism is the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit.” In addition to moving the definition of “plagiarism” to § 93.230, we propose to include new § 93.230(a) and (b). Proposed § 93.230(a) differentiates unattributed text copied verbatim or nearly verbatim from the limited use of identical or nearly-identical phrases which describe a commonly-used methodology. Further, proposed § 93.230(b) addresses self-plagiarism and authorship or credit disputes. Self-plagiarism and authorship disputes do not meet the definition of research misconduct and are outside of ORI’s jurisdiction. These issues are better handled at the institutional level.

### V. Proposed Updates to Subpart C

*Compliance and Assurances.* Information and guidance for institutions about compliance and research integrity assurances is provided at §§ 93.300 through 304. We propose clarifying the requirements for establishing and maintaining an active research integrity assurance, in addition to providing specific guidance for small institutions.

*Conflict of interest.* The 2005 Final Rule requires that institutions “ensure that individuals responsible for carrying out any part of the research misconduct proceeding do not have unresolved personal, professional or financial conflicts of interest with the complainant, respondent or witnesses” at § 93.300(b). This requirement has been interpreted by many institutions as a requirement to provide respondents with an opportunity to object to committee members’ participation prior to their appointments to an inquiry committee, if one is used, or an investigation committee. This approach to conflict issues is not required by the 2005 Final Rule although some institutions have apparently made it an unwritten standard. We propose to add clarifying language at § 93.305(h)(5) that addresses how an institution may provide respondents or complainants the opportunity to object to the person or to one or more committee or consortium members, chosen to conduct, support, or participate in the research misconduct proceedings. If an institution chooses to provide one respondent in a proceeding the opportunity to object, it must provide all respondents in that proceeding the opportunity to object. If an institution chooses to provide one complainant the opportunity to object in a proceeding, it

must provide all complainants the opportunity to object in that proceeding. We believe this is fair and will maintain uniformity in the processing of research misconduct allegations.

*Sequestration of research records and other evidence.* ORI is aware of concerns that, in the current research environment and with the use of cloud-based storage, it may not be possible to obtain “custody” of the original research records and other evidence that will be needed to conduct a research misconduct proceeding. We propose to move away from the use of the term “custody” and focus on the institution’s obligation to obtain and sequester all research records and other evidence that will be needed to conduct the research misconduct proceeding (see §§ 93.305(a), 93.306(c)(2)(ii), 93.307(d), and 93.310(d)). We also propose adding new language at § 93.305(a) indicating that when it is not possible to obtain the original research records or other evidence, an institution may obtain copies of the data or other evidence so long as those copies are substantially equivalent in evidentiary value.

*Institutional Assessment.* New language is added at § 93.306 to describe the institutional assessment. We have provided criteria for an assessment to proceed to inquiry at § 93.306(1)(i) through (iii), and we have described reporting requirements as well as a timeline for completion of assessments.

*Institutional Inquiry.* ORI has observed that institutions often convene a committee to conduct a robust, investigation-like process at the inquiry stage. These processes may include interviewing witnesses and reviewing research records, only to repeat them at the investigation stage. ORI plans to issue guidance indicating that an interview conducted at the inquiry phase can be carried forward into investigation and need not be repeated, unless it might reveal further information. We propose a revision at § 93.307(e)(2), to allow institutional discretion in convening committees of experts to conduct reviews at the inquiry stage to determine whether an investigation is warranted. We further provide options for who may do the inquiry review, noting that the institution may use one or more subject matter experts to assist them. For more information on using a committee, consortium, or other person for research misconduct proceedings, see proposed § 93.305(h).

We propose to clarify for institutions in a new section, § 93.307(f)(1)(i), that proceeding to an investigation requires that they have a reasonable basis for concluding that an allegation falls

within the definition of research misconduct under 42 CFR part 93 and involves PHS supported biomedical or behavioral research, research training or activities related to that research or research training, as provided in § 93.102. We also propose including language at § 93.309(c) to clearly indicate that institutions are required to keep sufficiently detailed documentation of each inquiry to permit a later assessment by ORI of the reasons the institution decided not to conduct an investigation.

We propose adding new language to §§ 93.307(f)(2)(ii) and 93.307(g)(2) to describe the inquiry results and inquiry report after an inquiry has been conducted. We have learned over time that the phrase “the allegation may have substance” in current § 93.307(d)(2), may lack the clarity an institution would find helpful to delineate an inquiry from an investigation. By nature, an inquiry is preliminary. An inquiry would not be expected to identify sufficient basis for differentiating honest error or difference of opinion from research misconduct committed intentionally, knowingly, or recklessly, absent an admission of research misconduct. We do not believe such a determination can be made at the inquiry phase to support dismissal of an allegation. However, we propose that the institution should note in the inquiry report any evidence of honest error or a difference of opinion, for full consideration at the investigation stage.

*Institutional Investigation.* From our experience, there has been some confusion about the extent to which institutions must continue to pursue leads at the institutional investigation stage under § 93.310(h). To address this concern, we propose that § 93.310(h) be revised to indicate that, at the investigation stage, the institution may choose to add to or expand the ongoing investigation by including any new allegations pertaining to the same respondent or research records in question (e.g., manuscripts or funding proposals) that come to the institution’s attention during the pendency of the investigation, rather than opening an inquiry to review those new allegations. We believe this will address an institution’s administrative efficiency concern(s) while providing that new allegations are addressed as they are identified.

*Institutional Record.* As defined in proposed § 93.223 and further described at proposed §§ 93.305 through 93.316, ORI proposes that institutions be required to develop, maintain, and provide an institutional record. The institutional record would ultimately be

part of a more expansive administrative record that would form the basis of any ORI decision regarding whether research misconduct has occurred, any decision by the Departmental Appeals Board ALJ, or any decision by the HHS Suspension and Debarment Official (SDO). ORI may provide additional guidance on how to organize and submit the institutional record.

#### VI. Proposed Updates to Subpart D

ORI proposes changes to its processes that align with changes for institutions in subpart C, specifically how ORI assembles the administrative record of a research misconduct proceeding. Further,

1. We propose to add paragraph (b) in § 93.404 that would provide even more clarity by indicating that the lack of an ORI finding of research misconduct does not overturn an institution's determination that the conduct constituted professional or research misconduct warranting remediation under the institution's policy.

2. We clarify actions ORI may take for institutional noncompliance.

3. We indicate when and how ORI may disclose information about a research misconduct proceeding. We propose, at § 93.410(b), a revision that would permit ORI to publish notice of institutional research misconduct findings and implemented institutional actions. This notice would inform the public and research community that allegations of research misconduct have been addressed under the regulation and help to protect the health and safety of the public, promote the integrity of PHS supported research and the research process, or conserve public funds. ORI is interested in public comment on this proposed change, particularly on the opportunity for a respondent to provide comment or information prior to the posting of such a notice.

#### VII. Proposed Updates to Subpart E

From our experience and interactions with institutions and professional organizations, there is a strong desire for a simpler and more expedient appeals process than the approach provided in the 2005 Final Rule. Under the 2005 Final Rule, a Departmental Appeals Board (DAB) ALJ undertakes a *de novo* review of ORI findings of research misconduct and proposed HHS administrative actions, based on evidence (including witness testimony) presented by ORI and the respondent at a hearing. Therefore, we propose a major revision to 42 CFR part 93, subpart E which will provide a streamlined process for contesting ORI

findings of research misconduct and HHS administrative actions. The proposed appeals process would entail ALJ review of the administrative record, which includes all information provided by the respondent to ORI, to determine whether ORI's findings and HHS's proposed administrative actions other than suspension or debarment are reasonable and not based on a material error of law or fact. The proposed appeals process also provides for the possibility of a limited hearing if the ALJ determines that there is a genuine dispute over material fact. There would be no further opportunity to appeal ORI's findings and HHS's proposed administrative actions (other than suspension or debarment) within HHS. This proposal does not change that respondents may request reconsideration of a final debarment decision with the SDO. We believe this approach is advantageous to all parties, providing finality in a more expedient manner. ORI specifically seeks comment on the scope of and need, or lack of need, for the limited hearing in proposed § 93.511, as well as comment on the other proposed revisions to subpart E.

#### VIII. Required Regulatory Analyses

All recipients of PHS biomedical and behavioral research awards must continue to comply with reporting and record keeping requirements in this NPRM. As shown below in the Paperwork Reduction Act analysis, those burdens on institutions encompass essentially all the activities required under the proposed rule.

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, Executive Order 14094, and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866, 13563, and 14094 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We do not believe that this proposed rule, if finalized, would result in significant effects as described below.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing “any rule that includes any Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the

private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold described in Executive Order 14094 is \$200 million. This proposed rule, if finalized, would not result in an expenditure in any year that meets or exceeds this amount.

#### Summary of Impacts and Threshold Analysis

This proposed rule would result in costs associated with covered institutions updating their policies and procedures for responding to allegations of research misconduct; costs associated with covered entities filing an annual statement of assurance (research integrity assurance) and an annual report on allegations received; costs associated with submitting reports and evidence to support their results and conclusions of inquiries or investigations of research misconduct; and costs associated with obtaining all research records and other evidence when there is an allegation of research misconduct and engaging persons to handle the process for addressing the allegations of research misconduct. We anticipate that the proposed rule would likely reduce the burden of compliance by states or other institutions through reduced confusion and uncertainty.

We performed an initial threshold analysis to assess the approximate magnitude of the impacts of the proposed rule to determine whether it would result in significant effects as per section 3(f)(1) of Executive Order 12866. We identified the costs associated with covered institutions updating their policies and procedures for responding to allegations of research misconduct as the largest impact under the proposed rule. For this impact, we anticipate that 5,910 institutions holding research integrity assurances would update their policies and procedures. For the purposes of this threshold analysis, we adopt 16 hours as an estimate for the average time across all covered entities for these tasks. Across all covered entities, this is 94,560 total hours spent updating policies and procedures.

To monetize the change in time use associated with these activities, we adopt an hourly value of time based on the cost of labor, including wages and benefits, and also indirect costs, which “reflect resources necessary for the administrative oversight of employees and generally include time spent on administrative personnel issues (e.g., human resources activities such as hiring, performance reviews, personnel transfers, affirmative action programs), writing administrative guidance documents, office expenses (e.g., space

rental, utilities, equipment costs), and outreach and general training (e.g., employee development).”<sup>1</sup>

For these tasks, we identify a pre-tax hourly wage for Education Administrators, Postsecondary. According to the U.S. Bureau of Labor Statistics, the mean hourly wage for these individuals is \$53.49 per hour.<sup>2</sup> We assume that benefits plus indirect costs equal approximately 100 percent of pre-tax wages, and adjust this hourly rate by multiplying by two, for a fully loaded hourly wage rate of \$106.98. We multiply this fully loaded hourly wage rate by the 94,560 total hours across covered entities spent updating policies and procedures and estimate a total cost in the first year of about \$10.1 million.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires agencies to prepare a regulatory flexibility analysis describing the impact of the proposed rule on small entities (named “institutions” in the proposed rule), permits agency heads to certify that a proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The primary effect of this proposed rule would be to require covered institutions to implement policies and procedures for responding to allegations of research misconduct. The Secretary proposes to certify that this proposed rule would not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act, based on the following facts.

1. As of March 1, 2023, approximately 30 percent (1,785) of 5,910 institutions holding research integrity assurances are small institutions. The primary impact of the NPRM on covered institutions results from the reporting and record keeping provisions which

are analyzed in detail under the heading “The Paperwork Reduction Act.” Significant annual burdens apply only if an institution learns of possible research misconduct and begins an inquiry, investigation, or both.

2. Institutions covered by 42 CFR part 93 reported having conducted a total of 114 inquiries and 101 investigations during the 2021 reporting period. Two inquiries and two investigations were conducted by small institutions. Small institutions may be able to avoid developing and filing the full policies and procedures for addressing allegations of research misconduct required by § 93.304 by filing a Small Institution Statement. Under the 2005 Final Rule, this is called a Small Organization Statement. ORI or another appropriate HHS office will work with small institutions to develop and/or advise on a process for handling allegations of research misconduct consistent with 42 CFR part 93. The burden of filing the Small Institution Statement is .5 hour. Thus, the burden of developing and filing the full policies and procedures for addressing allegations of research misconduct required by § 93.304 will not fall on a substantial number of small entities.

A small entity that files the Small Institution Statement must still report allegations of research misconduct to ORI and comply with all provisions of the proposed rule except as described in § 93.303. The most significant burden that could fall on an entity filing a Small Institution Statement is in addressing allegations of research misconduct which would include obtaining all research records and other evidence when there is an allegation of research misconduct, engaging persons to handle the process for addressing the allegations of research misconduct, and

submitting reports and evidence to support the small institution’s results and conclusions of inquiries or investigations of research misconduct. The average burden per response is estimated at 40 hours. Based on reports of research misconduct over the last 5 years, fewer than 5 small institutions would have to incur that burden in any year. Based on this analysis, HHS concludes that the regulations set forth in the NPRM will not impose a significant burden on a substantial number of small entities. However, HHS will carefully consider comments on the analysis and conclusion.

*Paperwork Reduction Act*

ORI currently holds OMB-Control-Number 0937–0198 for the collection of information from institutions. The information is needed to fulfill section 493 of the Public Health Service Act (42 U.S.C. 289b), which requires assurances from institutions that apply for PHS funding for any project or program that involves the conduct of biomedical or behavioral research. In addition, the information is required to fulfill the assurance and annual reporting requirements of 42 CFR part 93. ORI uses the information to monitor institutional compliance with the regulation. Lastly, the information may be used to respond to congressional requests for information to prevent misuse of Federal funds and to protect the public interest. The Institutional Assurance and Annual Report on Possible Research Misconduct, PHS–6349, and the Assurance of Compliance by Sub-Award Recipients, PHS–6315, are covered by OMB 0937–0198. The OMB approvals expire August 31, 2026, and ORI has applied for renewal with only minor changes to language in the forms.

ESTIMATED ANNUALIZED BURDEN HOUR TABLE  
[3/16/2023]

Forms (if necessary)	Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
PHS–6349 .....	Awardee Institutions .....	5,770	1	10/60	961
PHS–6315 .....	Sub-Awardee Institutions .....	156	1	5/60	13
Total .....	.....	.....	.....	.....	974

<sup>1</sup> U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. 2017. “Valuing Time in U.S. Department of Health and Human Services Regulatory Impact Analyses: Conceptual

Framework and Best Practices.” <https://aspe.hhs.gov/reports/valuing-time-us-department-health-human-services-regulatory-impact-analyses-conceptual-framework>. Page v.

<sup>2</sup> U.S. Bureau of Labor Statistics. Occupational Employment and Wages, May 2021. 11–9033 Education Administrators, Postsecondary. Mean hourly wage. <https://www.bls.gov/oes/current/oes119033.htm>.

ESTIMATED ANNUALIZED COST TO RESPONDENTS  
[3/16/2023]

Forms (if necessary)	Type of respondent	Total burden hours	Hourly wage rate	Total respondent cost
PHS-6349 .....	Awardee Institutions .....	961	\$107.00	\$102,827.00
PHS-6315 .....	Sub-Awardee Institutions .....	13	107.00	1,391.00

For the reasons discussed in the preamble, HHS proposes to revise 42 CFR part 93 to read as follows:

**PART 93—PUBLIC HEALTH SERVICE POLICIES ON RESEARCH MISCONDUCT**

Sec.

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**Authority:** 42 U.S.C. 216, and 289b.

**§ 93.25 Organization of this part.**

This part is subdivided into five subparts. Each subpart contains sections related to a broad topic or specific audience with special responsibilities as shown in the following table.

In subpart . . .	You will find sections related to . . .
A .....	General information about this rule.
B .....	Definitions of terms used in this part.
C .....	Responsibilities of institutions with PHS support.
D .....	Responsibilities of the U.S. Department of Health and Human Services and the Office of Research Integrity.
E .....	Information on how to contest ORI research misconduct findings and HHS administrative actions.

**§ 93.50 Special terms.**

This part uses terms throughout the text that have special meaning. Those terms are defined in subpart B of this part.

**Subpart A—General**

**§ 93.100 General policy.**

(a) Research misconduct involving Public Health Service (PHS) support is contrary to the interests of the PHS and the Federal Government, to the health and safety of the public, to the integrity of research, and to the conservation of public funds.

(b) The U.S. Department of Health and Human Services (HHS) and institutions that apply for or receive PHS support for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or research training share responsibility for the integrity of the research process. HHS has ultimate oversight authority for PHS supported research, and for taking other actions as appropriate or necessary, including the right to assess allegations and perform inquiries or investigations at any time. Institutions and institutional members have an affirmative duty to protect PHS funds from misuse by ensuring the integrity of all PHS supported work, and primary responsibility for responding to and reporting allegations of research misconduct, as provided in this part.

**§ 93.101 Purpose.**

The purpose of this part is to:

- (a) Establish the responsibilities of HHS, the Office of Research Integrity (ORI), and institutions in addressing allegations of research misconduct;
- (b) Define what constitutes research misconduct in PHS supported research;
- (c) Establish the requirements for a finding of research misconduct;
- (d) Define the general types of administrative actions HHS may take in response to research misconduct;
- (e) Require institutions to:
  - (1) Develop and implement policies and procedures for reporting and addressing allegations of research misconduct covered by this part;
  - (2) Provide HHS with the assurances necessary to permit the institutions to participate in PHS supported research.

(f) Protect the health and safety of the public, promote the integrity of PHS supported research and the research process, and conserve public funds.

**§ 93.102 Applicability.**

(a) Every extramural or intramural institution (see § 93.219) that applies for or receives PHS support for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or research training must comply with this part. Further, each recipient of such support is responsible for the compliance of their subrecipients with this part.

(b) This part applies to allegations of research misconduct involving:

- (1) Applications or proposals for PHS support for biomedical or behavioral extramural or intramural research, biomedical or behavioral research training, or activities related to that research or research training;
- (2) PHS supported biomedical or behavioral extramural or intramural research;
- (3) PHS supported biomedical or behavioral extramural or intramural research training programs;
- (4) PHS supported extramural or intramural activities that are related to biomedical or behavioral research or research training, such as, but not limited to, the operation of tissue and data banks or the dissemination of research information;
- (5) Research records produced during PHS supported research, research training, or activities related to that research or research training; and
- (6) Research proposed, performed, reviewed, or reported, as well as any research record generated from that research, regardless of whether an application or proposal for PHS funds resulted in an awarded grant, contract, cooperative agreement, sub-award, or other form of PHS support.

(c) This part does not supersede or establish an alternative to any applicable statutes, regulations, policies, or procedures for handling fiscal improprieties, the ethical treatment of human or animal subjects, criminal matters, personnel actions against Federal employees, or addressing whistleblowers and/or retaliation.

(d) This part does not supersede or establish an alternative to the HHS suspension and debarment regulations as set forth under the Nonprocurement Common Rule (NCR) at 2 CFR part 180 for nonprocurement transactions (as further implemented by HHS at 2 CFR part 376) or the Federal Acquisition Regulation (FAR) at 48 CFR 9.406 and 9.407 for procurement transactions (as further supplemented by HHS at 48 CFR 309.4).

(e) This part does not prohibit or otherwise limit how institutions handle allegations of misconduct that do not fall within this part's definition of research misconduct or that do not involve PHS support.

**§ 93.103 Research misconduct.**

(a) As defined below, research misconduct is fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results (see § 93.238).

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

**§ 93.104 Requirements for findings of research misconduct.**

A finding of research misconduct made under this part requires that:

- (a) There be a significant departure from accepted practices of the relevant research community; and
- (b) The misconduct be committed intentionally, knowingly, or recklessly; and
- (c) The allegation must be proven by a preponderance of the evidence.

**§ 93.105 Time limitations.**

(a) *Six-year limitation.* This part applies only to research misconduct occurring within six years of the date HHS or an institution receives an allegation of research misconduct.

(b) *Exceptions to the six-year limitation.* Paragraph (a) of this section does not apply in the following instances:

- (1) *Subsequent use exception.* The respondent continues or renews any incident of alleged research misconduct that occurred before the six-year limitation through the use of, republication of, or citation to the portion(s) of the research record (e.g., processed data, journal articles, funding

proposals, data repositories) that is alleged to have been fabricated, falsified, or plagiarized, for the potential benefit of the respondent.

(i) When the respondent uses, republishes, or cites to the portion(s) of the research record that is alleged to have been fabricated, falsified, or plagiarized, in submitted or published manuscripts, submitted PHS grant applications, progress reports submitted to PHS funding components, posters, presentations, or other research records within six years of when the allegations were received by HHS or an institution, this exception applies.

(ii) For allegations which may fall under this exception, an institution must inform ORI of the relevant facts before concluding the exception does not apply. ORI will make the final decision about the subsequent use exception for each allegation.

(2) *Exception for the health or safety of the public.* If ORI or the institution, following consultation with ORI, determines that the alleged research misconduct, if it occurred, would possibly have a substantial adverse effect on the health or safety of the public, this exception applies.

#### **§ 93.106 Confidentiality.**

(a) Disclosure of the identity of respondents, complainants, and witnesses in research misconduct proceedings is limited, to the extent possible, to those who need to know, consistent with a thorough, competent, objective, and fair research misconduct proceeding, and as allowed by law. Institutions must inform respondents, complainants, and witnesses, before they are interviewed, if and how their identity may be disclosed. Provided, however, that the institution must disclose the identity of respondents, complainants, or other relevant persons to ORI pursuant to an ORI review of research misconduct proceedings under this part.

(b) Except as may otherwise be prescribed by applicable law, confidentiality must be maintained for any records or evidence from which research subjects might be identified. Disclosure is limited to those who need to know to carry out a research misconduct proceeding.

(c) Disclosure of ongoing research misconduct proceedings under this part is limited, to the extent possible, to those who need to know, consistent with a thorough, competent, objective, and fair research misconduct proceeding, or the purpose of this part as described in § 93.101(f). In this context, “those who need to know” may include public and private entities.

(d) Disclosure of concerns related to the reliability of the research record that is alleged to have been fabricated, falsified, or plagiarized is limited, to the extent possible, to those who need to know, consistent with a thorough, competent, objective, and fair research misconduct proceeding, or the purpose of this part as described in § 93.101(f). In this context, “those who need to know” may include journals, editors, publishers, and public and private entities.

(e) For officials at institutions other than the institution where the research misconduct proceedings are being conducted, their need to know occurs when the institution:

(1) May possess records relevant to allegations under review;

(2) Employs a respondent alleged or found to have committed research misconduct; or

(3) Funds research being conducted by a respondent alleged or found to have committed research misconduct.

#### **§ 93.107 Coordination with other agencies.**

(a) When more than one agency of the Federal Government has jurisdiction over the subject misconduct allegation, HHS will cooperate in designating a lead agency to coordinate the response of the agencies to the allegation. Where HHS is not the lead agency, it may, in consultation with the lead agency, take appropriate action.

(b) In research misconduct proceedings involving more than one agency, HHS may refer to the other agency’s (or agencies’) evidence or reports if HHS determines that the evidence or reports will assist in resolving HHS issues. In appropriate cases, HHS will seek to resolve allegations jointly with the other agency or agencies.

### **Subpart B—Definitions**

#### **§ 93.200 Accepted practices of the relevant research community.**

Accepted practices of the relevant research community means those practices established by 42 CFR part 93 and by PHS funding components, as well as commonly accepted professional codes or norms within the overarching community of researchers and institutions that apply for and receive PHS grants. These practices must be consistent with the definition of research integrity.

#### **§ 93.201 Administrative action.**

Administrative action means an HHS action, consistent with § 93.407, taken in response to a research misconduct proceeding to protect the health and safety of the public, to promote the

integrity of PHS supported biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or research training, or to conserve public funds.

#### **§ 93.202 Administrative record.**

Administrative record comprises: the institutional record; any information provided by the respondent to ORI, including but not limited to the verbatim transcript of any meetings under § 93.403 between the respondent and ORI, whether in person, by phone, or by videoconference, and correspondence between the respondent and ORI; any additional information provided to ORI while the case is pending before ORI; and any analysis or additional information generated or obtained by ORI. Any analysis or additional information generated or obtained by ORI will also be made available to the respondent.

#### **§ 93.203 Allegation.**

Allegation means a disclosure of possible research misconduct through any means of communication and brought directly to the attention of an institutional or HHS official.

#### **§ 93.204 Appeal.**

Appeal means a request that is made by a respondent to the institution or HHS, consistent with § 93.314 and subpart E, to reverse or modify findings, decisions, and/or actions related to allegations of research misconduct, against the respondent.

#### **§ 93.205 Assessment.**

Assessment means a consideration of whether an allegation of research misconduct appears to fall within the definition of research misconduct; appears to involve PHS supported biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or research training, as provided in § 93.102; and is sufficiently credible and specific so that potential evidence of research misconduct may be identified. The assessment only involves the review of readily accessible information relevant to the allegation.

#### **§ 93.206 Charge letter.**

Charge letter means the written notice, as well as any amendments to the notice, that are sent to the respondent stating the findings of research misconduct and any proposed HHS administrative actions. If the charge letter includes a suspension or debarment action, it may be issued jointly by ORI and the Suspension and Debarment Official (SDO).

**§ 93.207 Complainant.**

Complainant means an individual who in good faith makes an allegation of research misconduct.

**§ 93.208 Contract.**

Contract means an acquisition instrument awarded under the Federal Acquisition Regulation (FAR), 48 CFR chapter 1.

**§ 93.209 Day.**

Day means calendar day unless otherwise specified. If a deadline falls on a Saturday, Sunday, or Federal holiday, the deadline will be extended to the next day that is not a Saturday, Sunday, or Federal holiday.

**§ 93.210 Departmental Appeals Board or DAB.**

Departmental Appeals Board or DAB means the organization, within the HHS Office of the Secretary, established to conduct hearings and provide impartial review of disputed decisions made by HHS operating components.

**§ 93.211 Difference of opinion.**

Difference of opinion means an alternative view held by a researcher who is substantively engaged in the scientific subject area. It generally contrasts with a prevailing opinion included in a published research record or generally accepted by the relevant scientific community. The differing opinion must concern scientific data, methodology, analysis, interpretations, or conclusions, not policy opinions or decisions unrelated to data practices.

**§ 93.212 Evidence.**

Evidence means anything offered or obtained during a research misconduct proceeding that tends to prove or disprove the existence of an alleged fact. Evidence includes documents, whether in hard copy or electronic form, information, tangible items, and testimony.

**§ 93.213 Fabrication.**

Fabrication means making up data or results and recording or reporting them.

**§ 93.214 Falsification.**

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.

**§ 93.215 Funding component.**

Funding component means any organizational unit of the PHS authorized to award grants, contracts, or cooperative agreements for any activity covered by this part involving research

or research training; funding components may be agencies, bureaus, centers, institutes, divisions, offices, or other awarding units within the PHS.

**§ 93.216 Good faith.**

(a) Good faith as applied to a complainant or witness means having a reasonable belief in the truth of one's allegation or testimony, based on the information known to the complainant or witness at the time. An allegation or cooperation with a research misconduct proceeding is not in good faith if made with knowing or reckless disregard for information that would negate the allegation or testimony.

(b) Good faith as applied to an institutional or committee member means cooperating with the research misconduct proceeding by impartially carrying out the duties assigned for the purpose of helping an institution meet its responsibilities under this part. An institutional or committee member does not act in good faith if their acts or omissions during the research misconduct proceedings are dishonest or influenced by personal, professional, or financial conflicts of interest with those involved in the research misconduct proceeding.

(c) Good faith as applied to a respondent means acting with reasonable belief that respondent's actions are consistent with accepted practices of the relevant research community.

**§ 93.217 Honest error.**

Honest error means a mistake made in good faith.

**§ 93.218 Inquiry.**

Inquiry means preliminary information-gathering and preliminary fact-finding that meets the criteria and follows the procedures of §§ 93.307 through 93.309.

**§ 93.219 Institution.**

Institution means any person that applies for or receives PHS support for any activity or program that involves the conduct of biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training. This includes, but is not limited to, colleges and universities, PHS intramural biomedical or behavioral research laboratories, research and development centers, national user facilities, industrial laboratories or other research institutes, small research institutions, and independent researchers.

**§ 93.220 Institutional certifying official.**

Institutional certifying official means the institutional official responsible for

assuring on behalf of an institution that the institution has written policies and procedures for addressing allegations of research misconduct, in compliance with this part; and complies with its own policies and procedures and the requirements of this part. The institutional certifying official also is responsible for certifying the content of the institution's annual report, which contains information specified by ORI on the institution's compliance with this part, and ensuring the report is submitted to ORI, as required.

**§ 93.221 Institutional deciding official.**

Institutional deciding official means the institutional official who makes final determinations on allegations of research misconduct and any institutional actions. The same individual cannot serve as the institutional deciding official and the research integrity officer.

**§ 93.222 Institutional member.**

Institutional member or members means an individual (or individuals) who is employed by, is an agent of, or is affiliated by contract or agreement with an institution. Institutional members may include, but are not limited to, officials, tenured and untenured faculty, teaching and support staff, researchers, research coordinators, technicians, postdoctoral and other fellows, students, volunteers, subject matter experts, consultants, or attorneys, or employees or agents of contractors, subcontractors, or sub-awardees.

**§ 93.223 Institutional record.**

The institutional record comprises:

(a) The records that the institution compiled during the research misconduct proceeding pursuant to §§ 93.305 through 93.316, except to the extent the institution subsequently determines and documents that those records are not relevant to the proceeding or that the records duplicate other records that are being retained. These records include, but are not limited to:

(1) The assessment report as required by § 93.306(d);

(2) If an inquiry is conducted, the inquiry report and all records (other than drafts of the report) in support of that report, including, but not limited to, research records and the transcripts of any interviews conducted during the inquiry, information the respondent provided to the institution, and the documentation of any decision not to investigate as required by § 93.309(c);

(3) If an investigation is conducted, the investigation report and all records (other than drafts of the report) in

support of that report, including, but not limited to, research records, the transcripts of each interview conducted pursuant to § 93.310(g), and information the respondent provided to the institution;

(4) Decision(s) by the institutional deciding official, such as the written decision from the institutional deciding official with the final determination of research misconduct findings (whether the institution found research misconduct, and if so, who committed the misconduct) and implemented institutional actions; and

(5) The complete record of any institutional appeal under § 93.314;

(b) The documentation of the determination of irrelevant or duplicate records; and

(c) A single index listing all documents in the institutional record.

#### **§ 93.224 Intentionally.**

To act intentionally means to act with the aim of carrying out the act.

#### **§ 93.225 Investigation.**

Investigation means the formal development of a factual record and the examination of that record that meets the criteria and follows the procedures of §§ 93.310 through 93.316 and leads to a decision not to make a finding of research misconduct or to a recommendation for a finding of research misconduct which may include a recommendation for other appropriate actions, including institutional and administrative actions.

#### **§ 93.226 Knowingly.**

To act knowingly means to act with the awareness of the act.

#### **§ 93.227 Notice.**

Notice means a written or electronic communication served in person or sent by mail or its equivalent to the last known street address, facsimile number, or email address of the addressee.

#### **§ 93.228 Office of Research Integrity or ORI.**

Office of Research Integrity or ORI means the office established by Public Health Service Act section 493 (42 U.S.C. 289b) and to which the HHS Secretary has delegated responsibility for addressing research integrity and misconduct issues related to PHS supported activities.

#### **§ 93.229 Person.**

Person means any individual, corporation, partnership, institution, association, unit of government, or legal entity, however organized.

#### **§ 93.230 Plagiarism.**

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

(a) Plagiarism includes the unattributed verbatim or nearly verbatim copying of sentences and paragraphs from another's work, which materially mislead the reader regarding the contributions of the author. It does not include the limited use of identical or nearly-identical phrases which describe a commonly-used methodology.

(b) Plagiarism does not include self-plagiarism or authorship or credit disputes including disputes among former collaborators who participated jointly in the development or conduct of a research project. Self-plagiarism and authorship disputes do not meet the definition of research misconduct.

#### **§ 93.231 Preponderance of the evidence.**

Preponderance of the evidence means proof by evidence that, compared with evidence opposing it, leads to the conclusion that the fact at issue is more likely true than not.

#### **§ 93.232 Public Health Service or PHS.**

Public Health Service or PHS consists of the following components within the HHS: the Office of the Assistant Secretary for Health, the Office of Global Affairs, the Administration for Strategic Preparedness and Response, the Advanced Research Projects Agency for Health, the Agency for Healthcare Research and Quality, the Agency for Toxic Substances and Disease Registry, the Centers for Disease Control and Prevention, the Food and Drug Administration, the Health Resources and Services Administration, the Indian Health Service, the National Institutes of Health, the Substance Abuse and Mental Health Services Administration, and any other components of HHS designated or established as components of the Public Health Service.

#### **§ 93.233 PHS support.**

PHS support means PHS funding, or applications or proposals therefor, for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training, that may be provided through funding for PHS intramural research; PHS grants, cooperative agreements, contracts; or subawards, contracts, or subcontracts under those PHS funding instruments; or salary or other payments under PHS grants, cooperative agreements, or contracts.

#### **§ 93.234 Recklessly.**

To act recklessly means to act without proper caution despite a known risk for harm.

#### **§ 93.235 Research.**

Research means a systematic experiment, study, evaluation, demonstration, or survey designed to develop or contribute to general knowledge (basic research) or specific knowledge (applied research) by establishing, discovering, developing, elucidating, or confirming information or underlying mechanisms related to biological causes, functions, or effects; diseases; treatments; or related matters to be studied.

#### **§ 93.236 Research integrity.**

Research integrity refers to the use of honest and verifiable methods in proposing, performing, and evaluating research; reporting research results and maintaining the research record with particular attention to adherence to rules, regulations, and guidelines; and following accepted practices of the relevant research community.

#### **§ 93.237 Research Integrity Officer or RIO.**

Research Integrity Officer or RIO refers to the institutional official responsible for administering the institution's written policies and procedures for addressing allegations of research misconduct in compliance with this part.

#### **§ 93.238 Research misconduct.**

Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. Research misconduct does not include honest error or differences of opinion.

#### **§ 93.239 Research misconduct proceeding.**

Research misconduct proceeding means any actions related to alleged research misconduct taken under this part, including but not limited to, allegation assessments, inquiries, investigations, ORI oversight reviews, and appeals.

#### **§ 93.240 Research record.**

Research record means the record of data or results that embody the facts resulting from scientific inquiry. Data or results may be in physical or electronic form. Examples of items, materials, or information that may be considered part of the research record include, but are not limited to, research proposals, raw data, processed data, clinical research records, laboratory records, study records, laboratory notebooks, progress

reports, manuscripts, abstracts, theses, oral presentations, internet and online content, internal reports, and journal articles.

**§ 93.241 Respondent.**

Respondent means the individual against whom an allegation of research misconduct is directed or who is the subject of a research misconduct proceeding.

**§ 93.242 Retaliation.**

Retaliation means an adverse action taken against a complainant, witness, or committee member by an institution or one of its members in response to:

(a) A good faith allegation of research misconduct; or

(b) Good faith cooperation with a research misconduct proceeding.

**§ 93.243 Secretary or HHS.**

Secretary or HHS means the Secretary of HHS or any other official or employee of the HHS to whom the Secretary delegates authority.

**§ 93.244 Small institution.**

Small institution means an institution that receives PHS research funds but may be too small to conduct an inquiry or investigation into an allegation of research misconduct as required by this part without actual or apparent conflicts of interest. A small institution typically has a total of 10 or fewer institutional members.

**§ 93.245 Suspension and debarment.**

Suspension and debarment mean the actions that Federal agencies take to disqualify persons deemed not presently responsible from doing business with the government.

(a) Suspension refers to the temporary disqualification of a person or entity for up to 18 months, typically during the pendency of an investigation and ensuing legal proceedings.

(b) Debarment, meanwhile, refers to a final decision to disqualify a person or entity for a fixed period of time. Both suspension and debarment have government-wide effect: if an entity is suspended or debarred by one agency, it is prohibited from obtaining any Federal contracts or participating in nonprocurement transactions.

(c) Policies and procedures governing suspension and debarment from procurement programs are set forth in the Federal Acquisition Regulation (FAR) at 48 CFR 9.406 and 9.407 (as further supplemented by HHS at 48 CFR 309.4).

(d) Policies and procedures governing suspension and debarment from nonprocurement programs are set forth in the Nonprocurement Common Rule

(NCR) at 2 CFR part 180 (as further implemented by HHS at 2 CFR part 376).

(e) Actions undertaken under the FAR and NCR have reciprocal effect; exclusions issued under one system will result in ineligibility for all government procurement and nonprocurement programs.

**§ 93.246 Suspension and Debarment Official or SDO.**

Suspension and Debarment Official or SDO means the HHS official authorized to impose suspension and debarment.

**§ 93.247 This part.**

This part means 42 CFR part 93 in its entirety, unless otherwise explicitly noted. When referring to only a portion of 42 CFR part 93, that portion may be described as “subpart” (see § 93.25), or as “section” (text within a specific portion of the subpart).

**Subpart C—Responsibilities of Institutions Compliance and Assurances**

**§ 93.300 General responsibilities for compliance.**

Institutions must:

(a) Have written policies and procedures for addressing allegations of research misconduct that meet the requirements of this part;

(b) Respond to each allegation of research misconduct for which the institution is responsible under this part in a thorough, competent, objective, and fair manner, including precautions to ensure that individuals responsible for carrying out any part of the research misconduct proceeding do not have unresolved personal, professional, or financial conflicts of interest with the complainant, respondent, or witnesses;

(c) Foster a research environment that promotes research integrity and the responsible conduct of research, discourages research misconduct, and deals promptly with allegations or evidence of possible research misconduct;

(d) Take all reasonable and practical steps to protect the positions and reputations of good faith complainants, witnesses, and committee members and protect these individuals from retaliation by respondents and/or other institutional members;

(e) Provide confidentiality to the extent required by § 93.106 to all respondents, complainants, and witnesses in a research misconduct proceeding, and to research subjects identifiable from research records or other evidence;

(f) Take all reasonable and practical steps to ensure the cooperation of

respondents and other institutional members with research misconduct proceedings, including, but not limited to, their providing information, research records, and other evidence;

(g) Cooperate with HHS during any research misconduct proceeding or compliance review, including addressing deficiencies or additional allegations in the institutional record if directed by ORI;

(h) Assist in administering and enforcing any HHS administrative actions imposed on its institutional members; and

(i) Have an active research integrity assurance.

**§ 93.301 Research integrity assurances.**

(a) *General policy.* (1) An institution that applies for or receives PHS support for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or research training, must provide HHS with an assurance of compliance with this part by establishing and then maintaining an active research integrity assurance.

(2) PHS funding components may only authorize release of funds for extramural biomedical and behavioral research, biomedical and behavioral research training, or activities related to that research or research training, to institutions that have an active research integrity assurance on file with ORI.

(b) *Research integrity assurance.* The Institutional Certifying Official must assure on behalf of the institution, initially and then annually thereafter, that the institution:

(1) Has written policies and procedures for addressing allegations of research misconduct, in compliance with this part;

(2) Complies with its policies and procedures for addressing allegations of research misconduct; and

(3) Complies with all provisions of this part.

**§ 93.302 Maintaining active research integrity assurances.**

(a) *Compliance with this part.* ORI considers an institution in compliance with this part when it:

(1) Has policies and procedures for addressing allegations of research misconduct according to this part, keeps them in compliance with this part, and upon request, provides them to ORI and other HHS personnel;

(2) Complies with its policies and procedures for addressing allegations of research misconduct;

(3) Complies with all provisions of this part; and

(4) Takes all reasonable and practical specific steps to foster research integrity

consistent with § 93.300, including, but not limited to:

(i) Informing the institution's members about its policies and procedures for addressing allegations of research misconduct, and the institution's commitment to compliance with the policies and procedures; and

(ii) Making its policies and procedures for addressing allegations of research misconduct publicly available.

(b) *Annual report.* An institution must file an annual report with ORI, which contains information specified by ORI, on the institution's compliance with this part. The Institutional Certifying Official is responsible for certifying the content of this report and for ensuring the report is submitted as required.

(c) *Additional information.* Along with its research integrity assurance or annual report, an institution must send ORI such other information as ORI may request on the institution's research misconduct proceedings covered by this part and the institution's compliance with the requirements of this part.

**§ 93.303 Research integrity assurances for small institutions.**

(a) Small institutions may file a "Small Institution Statement" with ORI in place of the institutional policies and procedures required by §§ 93.300(a), 93.301, and 93.304, upon approval by ORI.

(b) The Small Institution Statement does not relieve the institution from complying with any other provision of this part.

(c) By submitting a Small Institution Statement, the institution agrees to report all allegations of research misconduct to ORI. ORI or another appropriate HHS office will work with the institution to develop and/or advise on a process for handling allegations of research misconduct consistent with this part.

(d) If a small institution has or believes it has a conflict of interest during any phase of a research misconduct proceeding, the small institution should contact ORI for guidance.

**§ 93.304 Institutional policies and procedures.**

Institutions seeking an approved research integrity assurance must have written policies and procedures for addressing allegations of research misconduct. Such policies and procedures must:

(a) Address and be consistent with all applicable requirements pertaining to institutional responsibilities included in this part;

(b) Include and be consistent with applicable definitions in this part; and

(c) Be made available to ORI in English.

**§ 93.305 General conduct of research misconduct proceedings.**

(a) *Sequestration of research records and other evidence.* An institution must promptly take all reasonable and practical steps to obtain all research records and other evidence, which may include copies of the data or other evidence so long as those copies are substantially equivalent in evidentiary value, needed to conduct the research misconduct proceeding; inventory the records and other evidence; and sequester them in a secure manner. Where the research records or other evidence are located on or encompass scientific instruments shared by multiple users, institutions may obtain copies of the data or other evidence from such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments. Whenever possible, the institution must obtain the research records or other evidence:

(1) Before or at the time the institution notifies the respondent of the allegation(s); and

(2) Whenever additional items become known or relevant to the inquiry or investigation.

(b) *Access to research records.* Where appropriate, an institution must give the respondent copies of, or reasonable supervised access to, the research records that are sequestered in accordance with § 93.305(a).

(c) *Maintenance of the institutional record.* An institution, as the responsible legal entity for the PHS supported research, has a continuing obligation under this part to ensure that it maintains an adequate institutional record for a research misconduct proceeding. An institution must maintain the institutional record as required by § 93.317.

(d) *Multiple respondents.* Institutions must consider whether any additional researchers are responsible for the alleged research misconduct. Notably, the principal investigator, other coauthors on the publication(s), co-investigators on the funding proposal(s), collaborators, and laboratory members who were involved in conducting the experiments that generated the primary data or in generating the text and figures in the research records (e.g., published papers and funding proposals) must be considered as potential respondents during the assessment, inquiry, and/or subsequent investigation. If any additional respondent(s) are identified throughout the inquiry/investigation, they must be notified of the allegations,

in accordance with §§ 93.307(c), 93.308(a), and 93.310(c).

(e) *Multiple institutions.* When multiple institutions are involved in the allegations, one institution must be designated as the lead institution if a joint research misconduct proceeding (inquiry and/or investigation) is conducted. In a joint research misconduct proceeding, the lead institution should obtain research records pertinent to the inquiry/investigation and witness' testimonies from the other relevant institutions. By mutual agreement, the joint research misconduct proceeding may include committee members from the institutions involved. The determination of whether further inquiry and/or investigation is warranted, whether research misconduct occurred, and which institutional actions are to be taken may be made by the institutions jointly or the responsibilities tasked to the lead institution.

(f) *Pursue leads.* An institution must diligently pursue all significant issues and leads discovered in information obtained from evidence and/or testimony during the inquiry and/or investigation that are determined relevant to the inquiry and/or investigation, including any evidence of additional instances of possible research misconduct. The pursuit of any such issues and/or leads may extend to the examination of additional research records (e.g., published papers, grant applications) of the respondent(s) that contain similar data elements as that of the initial allegation(s). If additional allegations are raised during the inquiry or investigation, the respondent(s) must be notified in writing of the additional allegations raised against them.

(g) *Interviews.* An institution must interview each respondent, complainant, and any other available person who has been reasonably identified as having information regarding any relevant aspects of the investigation, including witnesses identified by the respondent. Institutions may, but are not required to, conduct interviews during the assessment or inquiry. Interviews conducted during an assessment, inquiry, and/or investigation must be consistent with the requirements of this section.

(1) Interviews must be transcribed.

(2) Any exhibits shown to the interviewee during the interview must be numbered and referred to by that number in the interview.

(3) The transcript of the interview must be made available to the relevant interviewee for correction.

(4) The transcript(s) with any corrections and numbered exhibits must be included in the record of the investigation.

(5) The respondent must not be present during the witnesses' interviews but must be provided a transcribed copy of the interview.

*Using a committee, consortium, or other person for research misconduct proceedings.* (1) An institution may use the services of a committee, consortium, or person that the institution reasonably determines to be qualified by practice and/or experience to conduct, support, or participate in the research misconduct proceedings. An institution may choose to use the same committee, consortium, or person for the assessment, inquiry, and/or investigation.

(2) An institution must address any potential, perceived, or actual personal, professional, or financial conflicts of interest between members of the committee or consortium, or the qualified person and the complainant, respondent, or witnesses.

(3) A consortium may be a group of institutions, professional organizations, mixed groups, or individuals that will conduct research misconduct proceedings for other institutions.

(4) An institution must ensure that a committee, consortium, or person acting on its behalf conducts research misconduct proceedings in compliance with the requirements of this part.

(5) An institution is not required to provide respondents or complainants the opportunity to object to the person or to one or more committee or consortium members chosen to conduct, support, or participate in the research misconduct proceedings. If an institution chooses to provide one respondent the opportunity to object in a proceeding, it must provide all respondents the opportunity to object in that proceeding. If an institution chooses to provide one complainant the opportunity to object in a proceeding, it must provide all complainants the opportunity to object in that proceeding.

(i) *Notifying ORI of special circumstances.* At any time during a research misconduct proceeding, as defined in § 93.239, an institution must notify ORI immediately if it has reason to believe that any of the following conditions exist:

(1) Health or safety of the public is at risk, including an immediate need to protect human or animal subjects.

(2) HHS resources or interests are threatened.

(3) Research activities should be suspended.

(4) There is reasonable indication of possible violations of civil or criminal law.

(5) Federal action is required to protect the interests of those involved in the research misconduct proceeding.

(6) HHS may need to take appropriate steps to safeguard evidence and protect the rights of those involved.

### The Institutional Assessment

#### § 93.306 Institutional assessment.

(a) *Purpose.* An assessment's purpose is to decide if an allegation warrants an inquiry.

(b) *Conducting the institutional assessment.* (1) Upon receiving an allegation of research misconduct, the RIO or another designated institutional official must promptly assess the allegation to determine whether the allegation:

(i) Falls within the definition of research misconduct under this part,

(ii) Is within the jurisdictional criteria of 42 CFR 93.102, and

(iii) Is sufficiently credible and specific so that potential evidence of research misconduct may be identified.

(2) In conducting the assessment, the RIO or another designated institutional official must review readily accessible information relevant to the allegation. The RIO or another designated institutional official does not need to interview the complainant, respondent, or other witnesses, or gather information beyond what may have been submitted with the allegation, except as necessary to determine whether the allegation is sufficiently credible and specific so that potential evidence of research misconduct may be identified. Should it be necessary to conduct interviews or gather information, such interviews must be conducted according to the requirements of § 93.305(g).

*Assessment results.* (1) An inquiry must be conducted if the allegation meets the three assessment criteria at § 93.306(b)(1).

(2) If the RIO or another designated institutional official determines that requirements for an inquiry are met, they must:

(i) Document the assessment, in the form of an assessment report (see § 93.306(d)); and

(ii) Promptly take all reasonable and practical steps to obtain all research records and other evidence that are needed, before or at the time the institution notifies the respondent of the allegation(s), consistent with § 93.305, and promptly initiate the inquiry.

(2) If the RIO or another designated institutional official determines that requirements for an inquiry are not met,

they must keep sufficiently detailed documentation of the assessment to permit a later review by ORI of the reasons why the institution decided not to conduct an inquiry.

(d) *Assessment report.* (1) The RIO or another designated institutional official must document the process undertaken and the outcome of the assessment, including:

(i) The allegation(s) assessed;

(ii) The name(s), professional alias(es), and position(s) of the respondent(s);

(iii) Any evidence reviewed;

(iv) Whether the allegation falls within the definition of research misconduct under this part;

(v) Whether the allegation is within the jurisdictional criteria of § 93.102;

(vi) Whether the allegation is sufficiently credible and specific so that potential evidence of research misconduct may be identified; and

(vii) Whether the institution will proceed to inquiry. If the assessment automatically moves to inquiry as required by § 93.306(e)(2), the assessment report must document this action.

(2) The assessment report must be completed within 15 days of when the decision is made to move to inquiry under § 93.306(c) or the institution moves to inquiry under § 93.306(e)(2).

(3) Institutions must keep these records in a secure manner for at least 7 years after the assessment was conducted, and upon request, provide them to ORI.

(e) *Time for completion.* (1) The institution must complete the assessment within 30 days of its initiation.

(2) If the assessment will take longer than 30 days, the institution must initiate an inquiry consistent with § 93.307.

### The Institutional Inquiry

#### § 93.307 Institutional inquiry.

(a) *Criteria warranting an inquiry.* An inquiry is warranted if the allegation:

(1) Was not assessed within the 30-day period for review provided in § 93.306(e); or

(2) Meets the following three criteria:

(i) Falls within the definition of research misconduct under this part;

(ii) Is within the jurisdictional criteria of § 93.102; and

(iii) Is sufficiently credible and specific so that potential evidence of research misconduct may be identified.

(b) *Purpose.* An inquiry's purpose is to conduct an initial review of the evidence to decide if an allegation warrants an investigation.

(c) *Notice to respondent.* At the time of or before beginning an inquiry, an institution must make a good faith effort to notify in writing the presumed respondent, if any. If the inquiry subsequently identifies additional respondents, the institution must notify them. Only allegations specific to a particular respondent are to be included in the notification to that respondent.

(d) *Sequestration of the records.* An institution must obtain all research records and other evidence needed to conduct the research misconduct proceeding, consistent with § 93.305(a).

(e) *Conducting the inquiry*—(1) *Multiple institutions.* A joint research misconduct proceeding must be conducted consistent with § 93.305(e).

(2) *Person conducting the inquiry.* Institutions may, but are not required to, convene committees of experts to conduct reviews at the inquiry stage to determine whether an investigation is warranted. The inquiry review may be done by a RIO or another designated institutional official in lieu of a committee, with the caveat that if needed, these individuals may utilize one or more subject matter experts to assist them in the inquiry review.

(3) *Review of evidence.* The purpose of an inquiry is to conduct an initial review of the evidence to determine whether to conduct an investigation. Therefore, an inquiry does not require a full review of all the evidence related to the allegation.

(4) *Interviews.* Institutions may, but are not required to, call witnesses or respondents for interviews that would provide additional information for the institution's review. Any interviews conducted must follow the requirements of § 93.305(g).

(5) *Pursue leads.* Institutions must diligently pursue all significant issues and leads, consistent with the requirements of § 93.305(f).

(f) *Inquiry results*—(1) *Criteria warranting an investigation.* An investigation is warranted if:

(i) There is a reasonable basis for concluding that the allegation falls within the definition of research misconduct under this part and involves PHS supported biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or research training, as provided in § 93.102; and

(ii) Preliminary information-gathering and fact-finding from the inquiry indicates that the allegation may have substance.

(2) *Honest error and difference of opinion.* (i) A conclusion of honest error or difference of opinion must not be made at the inquiry stage.

(ii) An inquiry cannot determine that an allegation lacks sufficient substance based solely on a respondent's unsubstantiated claim that the alleged research misconduct was a result of honest error or difference of opinion.

(3) *Findings of research misconduct.* Findings of research misconduct, including the determination of whether the alleged misconduct is intentional, knowing, or reckless, cannot be made at the inquiry stage.

(g) *Inquiry report.* (1) The institution must prepare a written report that meets the requirements of this section and § 93.309.

(2) If there is potential evidence of honest error or difference of opinion, the institution must note this in the inquiry report.

(3) The institution must provide the respondent an opportunity to review and comment on the inquiry report and attach any comments received to the report.

(h) *Time for completion.* (1) The institution must complete the inquiry within 60 days of its initiation unless circumstances clearly warrant a longer period.

(2) If the inquiry will take longer than 60 days, the institution must notify ORI and request an extension. As part of the request, the institution must describe the particular circumstances or issues that would warrant additional time to complete the inquiry.

(3) If the inquiry takes longer than 60 days to complete, the inquiry report must document the reasons for exceeding the 60-day period.

#### **§ 93.308 Notice of the results of the inquiry.**

(a) *Notice to respondent.* The institution must notify the respondent whether the inquiry found that an investigation is warranted. The notice must include a copy of the inquiry report and include a copy of or refer to this part and the institution's policies and procedures adopted under its research integrity assurance.

(b) *Notice to complainants.* The institution is not required to notify the complainant(s) whether the inquiry found that an investigation is warranted. The institution may, but is not required to, provide relevant portions of the report to the complainant(s) for comment. If an institution provides notice to one complainant in a case, it must provide notice, to the extent possible, to all complainants in the case.

#### **§ 93.309 Reporting to ORI on the decision to initiate an investigation.**

(a) Within 30 days of deciding that an investigation is warranted, the

institution must provide ORI with the written decision by the institutional deciding official and a copy of the inquiry report which includes the following information:

(1) The names, professional aliases, and positions of the respondent and complainant;

(2) A description of the allegation(s) of research misconduct;

(3) The PHS support, including, for example, grant numbers, grant applications, contracts, and publications listing PHS support;

(4) The composition of the inquiry committee, including name(s), position(s), and subject matter expertise;

(5) Inventory of sequestered research records and other evidence and description of how sequestration was conducted;

(6) Transcripts of interviews, if conducted;

(7) Timeline and procedural history;

(8) Any scientific or forensic analyses conducted;

(9) The basis for recommending that the allegation(s) warrant an investigation;

(10) The basis on which any allegation(s) do not merit further investigation;

(11) Any comments on the inquiry report by the respondent or the complainant;

(12) Any institutional actions implemented, including communications with journals or funding agencies; and

(13) Written decision from the institutional deciding official that an investigation is warranted.

(b) The institution must provide the following information to ORI whenever requested:

(1) The institutional policies and procedures under which the inquiry was conducted;

(2) The research records and other evidence reviewed, transcripts of any interviews, and copies of all relevant documents; and

(3) The charges for the investigation to consider.

(c) Institutions must keep sufficiently detailed documentation of inquiries to permit a later assessment by ORI of the reasons why the institution decided not to conduct an investigation. Consistent with § 93.317, institutions must keep these records in a secure manner for at least 7 years after the termination of the inquiry, and upon request, provide them to ORI.

(d) In accordance with § 93.305(i), institutions must notify ORI and other PHS agencies, as relevant, of any special circumstances that may exist.

## The Institutional Investigation

### § 93.310 Institutional investigation.

Institutions conducting research misconduct investigations must:

(a) *Time.* Begin the investigation within 30 days after deciding that an investigation is warranted.

(b) *Notice to ORI.* Notify ORI of the decision to begin an investigation on or before the date the investigation begins and provide an inquiry report that meets the requirements of §§ 93.307 and 93.309.

(c) *Notice to the respondent.* Notify the respondent in writing of the allegation(s) within a reasonable amount of time after determining that an investigation is warranted, but before the investigation begins.

(1) The institution must give the respondent written notice of any allegation(s) of research misconduct not addressed during the inquiry or in the initial notice of investigation within a reasonable amount of time of deciding to pursue such allegation(s).

(2) If the institution identifies additional respondents during the investigation that were not identified during the inquiry, the institution is not required to conduct a separate inquiry. If any additional respondent(s) are identified during the investigation, the institution must notify them of the allegation(s).

(3) While an investigation into multiple respondents can convene with the same investigation committee members, separate investigation reports and research misconduct determinations are required for each respondent.

(d) *Sequestration of the records.* An institution must obtain all research records and other evidence needed to conduct the research misconduct proceeding, consistent with § 93.305(a).

(e) *Documentation.* Use diligent efforts to ensure that the investigation is thorough and sufficiently documented and includes examination of all research records and other evidence relevant to reaching a decision on the merits of the allegation(s).

(f) *Ensuring a fair investigation.* Take reasonable steps to ensure an impartial and unbiased investigation to the maximum extent practicable, including participation of persons with appropriate scientific expertise who do not have unresolved personal, professional, or financial conflicts of interest relevant to the investigation. An institution may use the same committee members from the inquiry in their subsequent investigation.

(g) *Interviews.* Conduct interviews, consistent with § 93.305(g).

(h) *Pursue leads.* Pursue diligently all significant issues and leads, consistent with the requirements of § 93.305(f), and continue the investigation to completion. Once a proceeding reaches the investigation stage, the institution may choose to add to or expand the ongoing investigation by including any allegation(s) pertaining to the same respondent or research records in question (e.g., manuscripts or funding proposals) that come to the institution's attention during the investigation, rather than opening an inquiry to review those allegation(s).

(i) *Multiple respondents.* Consider, consistent with § 93.305(d), the prospect of additional researchers being responsible for the alleged research misconduct.

(j) *Multiple institutions.* A joint research misconduct proceeding must be conducted consistent with § 93.305(e).

### § 93.311 Investigation time limits.

(a) *Time limit for completing an investigation.* An institution must complete all aspects of an investigation within 180 days of beginning it, including conducting the investigation, preparing the draft investigation report for each respondent, providing the draft report to each respondent for comment in accordance with § 93.312, and sending the final institutional record including the final report to ORI under § 93.315.

(b) *Extension of time limit.* If unable to complete the investigation in 180 days, the institution must ask ORI for an extension in writing that includes the circumstances or issues warranting additional time.

(c) *Progress reports.* If ORI grants an extension, it may direct the institution to file periodic progress reports.

(d) *Investigation report.* If the investigation takes longer than 180 days to complete, the investigation report must include the reasons for exceeding the 180-day period.

### § 93.312 Opportunity to comment on the draft investigation report.

(a) The institution must give the respondent a copy of the draft investigation report and, concurrently, a copy of, or supervised access to, the records on which the report is based. The respondent must submit any comments on the draft report to the institution within 30 days of the date on which the respondent received the draft investigation report.

(b) The institution is not required to provide the complainant(s) a copy of the draft investigation report or relevant portions of that report. Should the

institution choose to do so, all complainants must be treated in the same way—absent extenuating circumstances. The complainant must submit any comments on the draft report to the institution within 30 days of the date on which the complainant received the draft investigation report or relevant portions of it.

### § 93.313 Investigation report.

A final investigation report for each respondent must be in writing and include:

(a) Describe the nature of the allegation(s) of research misconduct, including any additional allegation(s) addressed during the research misconduct proceeding.

(b) Describe and document the PHS support, including, for example, any grant numbers, grant applications, contracts, and publications listing PHS support.

(c) Describe the specific allegation(s) of research misconduct for consideration in the investigation for each respondent.

(d) Composition of investigation committee, including name(s), position(s), and subject matter expertise.

(e) Inventory of sequestered research records/other evidence and how sequestration was conducted during the investigation, if applicable.

(f) Listing of all manuscripts, funding proposals, and research records that were examined during the investigation.

(g) Transcripts of all interviews conducted, as described in § 93.305(g).

(h) Identification of the specific published papers, manuscripts submitted but not accepted for publication (including online publication), PHS grant/contract applications, progress reports, presentations, posters, or other research records that allegedly contained the falsified, fabricated, or plagiarized material.

(i) Any scientific or forensic analyses conducted.

(j) If not already provided to ORI with the inquiry report, include the institutional policies and procedures under which the investigation was conducted.

(k) Identify and summarize the research records and other evidence reviewed and identify any evidence obtained and sequestered but not reviewed.

(l) For each separate allegation of research misconduct identified during the investigation, provide a finding as to whether research misconduct did or did not occur, and if so:

(1) Identify the individual(s) responsible for the misconduct;

(2) Indicate whether the research misconduct was falsification, fabrication, and/or plagiarism; and if the requirements for a finding of research misconduct, as described in § 93.104, have been met. Voting or split decisions by the investigation committee members are not permitted in the final recommendation in the investigation report.

(3) Summarize the facts and the analysis which support the conclusion and consider the merits of any explanation by the respondent;

(4) Identify the specific PHS support;

(5) Identify whether any publications need correction or retraction; and

(6) List any current support or known applications or proposals for support that the respondent has pending with PHS and non-PHS Federal agencies.

Include and consider any comments made by the respondent and complainant on the draft investigation report.

(n) The basis on which allegation(s) did not result in a research misconduct determination.

(o) Any institutional actions recommended or implemented including communications with journals or funding agencies.

#### **§ 93.314 Institutional appeals.**

(a) While not required by this part, if the institution's policies and procedures provide for an appeal by the respondent that could result in a reversal or modification of the findings of research misconduct in the investigation report, the institution must notify ORI of and complete any such appeal within 120 days of its initiation. Appeals of institutional personnel actions or other actions that would not result in a reversal or modification of the findings of research misconduct are excluded from the 120-day limit.

(b) If unable to complete any appeals within 120 days, the institution must ask ORI for an extension in writing that includes the circumstances or issues warranting additional time.

(c) ORI may grant requests for extension for good cause. If ORI grants an extension, it may direct the institution to file periodic progress reports.

#### **§ 93.315 Transmittal of the institutional record to ORI.**

The institution must transmit to ORI the institutional record. The institutional record must be consistent with § 93.223 and logically organized.

#### **§ 93.316 Completing the research misconduct process.**

(a) ORI expects institutions to carry inquiries and investigations through to

completion and to pursue diligently all significant issues and credible allegations of research misconduct. Institutions must notify ORI in advance if the institution plans to close a research misconduct proceeding at the assessment, inquiry, investigation, or appeal stage on the basis that the respondent has admitted to committing research misconduct, a settlement with the respondent has been reached, or for any other reason.

(b) A respondent's admission of research misconduct must be made in writing and signed by the respondent. An admission must specify the falsification, fabrication, and/or plagiarism that occurred and which research records were affected. The admission statement must meet all the elements required for a research misconduct finding under § 93.104 and must be provided to ORI before the institution closes its research misconduct proceeding. The institution must also provide a statement to ORI describing how it determined that the scope of the misconduct was fully addressed by the admission and confirmed the respondent's culpability.

(c) After consulting with the institution on its basis for closing a case under paragraph (a) of this section, ORI may conduct an oversight review of the institution's handling of the case and take appropriate action including:

(1) Approving or conditionally approving closure of the case;

(2) Directing the institution to complete its process;

(3) Directing the institution to address deficiencies in the institutional record;

(4) Referring the matter for further investigation by HHS; or,

(5) Taking a compliance action.

#### **Other Institutional Responsibilities**

##### **§ 93.317 Retention and custody of the institutional record.**

(a) *Maintenance of institutional record.* Unless custody has been transferred to HHS under paragraph (b) of this section, or ORI has advised the institution in writing that it no longer needs to retain the institutional record, an institution must maintain the institutional record in a secure manner for 7 years after completion of the proceeding or the completion of any PHS proceeding involving the research misconduct allegation under subparts D and E of this part, whichever is later.

(b) *Provision for HHS custody.* On request, institutions must transfer custody of or provide copies to HHS of the institutional record or any component of the institutional record and any sequestered physical objects,

such as a computer hard drive, for ORI to conduct its oversight review, to develop the administrative record, or to present the administrative record in any proceeding under subparts D and E of this part.

##### **§ 93.318 Institutional standards of conduct.**

(a) Institutions may have standards of conduct different from the standards for research misconduct under this part. Therefore, an institution may find conduct to be actionable under its standards even if the conduct does not meet this part's definition of research misconduct.

(b) An HHS or ORI finding or settlement on research misconduct findings does not affect institutional findings or actions taken based on an institution's standards of conduct.

#### **Subpart D—Responsibilities of the U.S. Department of Health and Human Services**

##### **General Information**

##### **§ 93.400 General statement of ORI authority.**

(a) *ORI review.* ORI may respond directly to any allegation of research misconduct at any time before, during, or after an institution's response to the matter. The ORI response may include, but is not limited to:

(1) Conducting allegation assessments;

(2) Determining independently if jurisdiction exists under this part;

(3) Forwarding allegations of research misconduct to the appropriate institution or HHS component for inquiry or investigation;

(4) Requesting clarification or additional information, documentation, research records, or other evidence as necessary from an institution or its members or other persons or sources to carry out ORI's review;

(5) Notifying or requesting assistance and information from PHS funding components or other affected Federal and state offices and agencies or institutions;

(6) Reviewing the institutional record and directing the institution to address deficiencies or additional allegations in the institutional record;

(7) Making a finding of research misconduct; and

(8) Proposing or taking administrative actions.

(b) *ORI assistance to institutions.* ORI will:

(1) Provide information, technical assistance, and procedural advice to institutional officials as needed regarding an institution's research

misconduct proceedings and the sufficiency of the institutional record.

(2) Issue guidance and provide information to support institutional implementation of and/or compliance with the requirements of this part.

(c) *Review of institutional research integrity assurances.* ORI will review institutional research integrity assurances and policies and procedures for compliance with this part.

(d) *Institutional compliance.* ORI may make findings and impose HHS compliance actions related to an institution's compliance with this part and with its policies and procedures, including an institution's participation in research misconduct proceedings.

#### **§ 93.401 Interaction with other entities and interim actions.**

(a) ORI may notify and consult with other entities including government funding agencies, institutions, private organizations, journals, publishers, and editors at any time if those entities have a need to know about or have information relevant to a research misconduct proceeding.

(b) If ORI believes that a criminal or civil fraud violation may have occurred, it shall promptly refer the matter to the Department of Justice (DOJ), the HHS Inspector General (OIG), or other appropriate investigative body. ORI may provide expertise and assistance to the DOJ, OIG, PHS offices, other Federal offices, and state or local offices involved in investigating or otherwise pursuing research misconduct allegations or related matters.

(c) ORI may notify affected PHS offices and funding components at any time to enable them to take appropriate interim actions.

(d) The information provided will not be disclosed as part of the peer review and advisory committee review processes but may be used by the Secretary in making decisions about the award or continuation of funding.

#### **Research Misconduct Issues**

##### **§ 93.402 ORI allegation assessments.**

(a) When ORI receives an allegation, it may conduct an assessment or refer the matter to the relevant institution for an assessment, inquiry, or other appropriate actions.

(b) If ORI decides that an inquiry is warranted, it forwards the matter to the appropriate institution or HHS component.

(c) If ORI decides that an inquiry is not warranted it will close the case and forward the allegation in accordance with paragraph (d) of this section.

(d) ORI may forward allegations that do not fall within the jurisdiction of this

part to the appropriate HHS component, Federal or state agency, institution, organization, journal, or other appropriate entity.

##### **§ 93.403 ORI review of research misconduct proceedings.**

(a) In conducting its review of research misconduct proceedings, ORI will:

(1) Determine whether PHS has jurisdiction under this part;

(2) Consider the institutional record and decide whether the institutional record is sufficient, provide instructions to the institution(s) if ORI determines that revisions are needed or additional allegations of research misconduct should be addressed, and require institutions to provide the respondent with an opportunity to respond to information or allegations added to the institutional record;

(3) Determine if the institution conducted the proceedings in a timely and fair manner in accordance with this part with sufficient thoroughness, objectivity, and competence to support the conclusions; and

(4) After reviewing in accordance with paragraphs (a)(1) through (3) of this section, decide whether to close the case without further action or proceed with the case.

(b) If ORI decides to proceed with the case, ORI will:

(1) Obtain additional information or materials from the institution, the respondent, complainants, or other sources, as needed;

(2) Conduct additional analyses, as needed;

(3) Provide the respondent the opportunity to access the institutional record, any additional information provided to ORI while the case is pending before ORI, and any analysis or additional information generated or obtained by ORI;

(4) Provide the respondent the opportunity to submit information to ORI;

(5) Allow the respondent and the respondent's attorney, if represented, to meet virtually or in person with ORI to discuss the information that the respondent has provided to ORI and have ORI's meetings with the respondent transcribed, with a copy of the transcript provided to the respondent for review and suggested correction;

(6) Close the administrative record following paragraphs (b)(3) through (5) of this section;

(7) Provide the respondent the opportunity to access the complete administrative record; and

(8) Take any other actions necessary to complete ORI's review.

##### **§ 93.404 Findings of research misconduct and proposed administrative actions.**

(a) After completing its review of the administrative record, ORI can:

(1) Close the case without a separate ORI finding of research misconduct;

(2) Make findings of research misconduct and propose and take administrative actions based on the administrative record; or

(3) Seek to settle the case.

(b) The lack of an ORI finding of research misconduct does not overturn an institution's determination that the conduct constituted professional or research misconduct warranting remediation under the institution's policy.

##### **§ 93.405 Notifying the respondent of findings of research misconduct and HHS administrative actions.**

(a) When ORI makes a finding of research misconduct or seeks to impose HHS administrative actions, other than suspension or debarment, it notifies the respondent in a charge letter. The charge letter includes the ORI findings of research misconduct, including the basis for such findings in the administrative record, and any proposed administrative actions. The charge letter also advises the respondent how they can access the administrative record and of the opportunity to contest the findings and administrative actions under subpart E of this part. In cases involving a suspension or debarment action, the HHS SDO issues a notice of suspension or proposed debarment to the respondent as part of the charge letter. The notice of suspension or proposed debarment issued by the HHS SDO will include instructions on how the respondent can contest the suspension and/or proposed debarment.

(b) ORI sends the charge letter by certified mail, private delivery service, or electronic mail to the last known address of the respondent or the last known principal place of business of the respondent's attorney, if represented.

##### **§ 93.406 Final HHS actions.**

(a) Unless the respondent contests the findings and/or the administrative actions, other than suspension and/or proposed debarment, contained in the charge letter within the 30-day period prescribed in § 93.501, the ORI finding of and HHS administrative actions, other than suspension and/or proposed debarment, proposed for research misconduct issues are final.

(b) Unless the respondent contests a suspension and/or proposed debarment within the 30-day period prescribed in the NCR or FAR, respectively, the SDO may close the record and issue a final

debarment decision in the matter. Respondents may request reconsideration of a final debarment decision with the SDO.

**§ 93.407 HHS administrative actions.**

(a) Based on the administrative record, HHS may impose administrative actions that include but are not limited to:

- (1) Clarification, correction, or retraction of the research record.
  - (2) Letters of reprimand.
  - (3) Imposition of special certification or research integrity assurance requirements to ensure compliance with applicable regulations or terms of PHS grants, contracts, or cooperative agreements.
  - (4) Suspension or termination of a PHS grant, contract, or cooperative agreement.
  - (5) Restriction on specific activities or expenditures under an active PHS grant, contract, or cooperative agreement.
  - (6) Special review of all requests for PHS funding.
  - (7) Imposition of supervision requirements on a PHS grant, contract, or cooperative agreement.
  - (8) Certification of attribution or authenticity in all requests for support and reports to the PHS.
  - (9) Prohibition on participating in any advisory capacity to the PHS.
  - (10) Adverse personnel action if the respondent is a Federal employee, in compliance with relevant Federal personnel policies and laws.
  - (11) Suspension or debarment administrative actions under the Nonprocurement Common Rule (NCR) at 2 CFR part 180 for nonprocurement transactions (as further implemented by HHS at 2 CFR part 376) or under the Federal Acquisition Regulation (FAR) at 48 CFR 9.406 and 9.407 for procurement transactions (as further supplemented by HHS at 48 CFR 309.4). Such administrative actions have reciprocal effect; exclusions issued under one system will result in ineligibility for all government procurement and nonprocurement programs.
- (b) In connection with findings of research misconduct, HHS also may seek to recover PHS funds spent in support of the activities that involved research misconduct.
- (c) Any authorized HHS component may impose, administer, or enforce administrative actions separately or in coordination with other HHS components, including, but not limited to ORI, OIG, the PHS funding component, and the SDO.

**§ 93.408 Mitigating and aggravating factors in HHS administrative actions.**

The purpose of HHS administrative actions is remedial. The appropriate administrative action is commensurate with the seriousness of the misconduct and the need to protect the health and safety of the public, promote the integrity of the PHS supported research and research process, and conserve public funds. ORI considers the following aggravating and mitigating factors in determining appropriate HHS administrative actions and their terms. Distinct from ORI's process, the SDO considers the aggravating and mitigating factors listed in the NCR or FAR, whichever is appropriate to the funding mechanism, when considering suspension and debarment actions. The existence or nonexistence of any factor is not determinative.

(a) *Knowing, intentional, or reckless.* Were the respondent's actions knowing or intentional or were the actions reckless?

(b) *Pattern.* Was the research misconduct an isolated event or part of a continuing or prior pattern of dishonest conduct?

(c) *Impact.* Did the misconduct have significant impact on the proposed or reported research record, research subjects, other researchers, institutions, or the public health or welfare?

(d) *Acceptance of responsibility.* Has the respondent accepted responsibility for the misconduct by:

- (1) Admitting the conduct;
- (2) Cooperating with the research misconduct proceedings;
- (3) Demonstrating remorse and awareness of the significance and seriousness of the research misconduct; and
- (4) Taking steps to correct or prevent the recurrence of the research misconduct?

(e) *Failure to accept responsibility.* Does the respondent blame others rather than accepting responsibility for the actions?

(f) *Retaliation.* Did the respondent retaliate against complainants, witnesses, committee members, or other individuals?

(g) *Continued risk to PHS funding.* Does the respondent demonstrate responsible stewardship of research resources?

(h) *Other factors.* Are other factors relevant to the circumstances of a particular case?

**§ 93.409 Settlement of research misconduct proceedings.**

(a) HHS may settle a research misconduct proceeding at any time it concludes that settlement is in the best

interests of the Federal Government and the public health or welfare.

(b) A settlement agreement precludes the respondent from contesting any ORI findings of research misconduct, HHS administrative actions (other than a suspension or debarment decision), or ORI's jurisdiction in handling the research misconduct proceeding.

(c) Settlement agreements are publicly available, regardless of whether ORI made a finding of research misconduct.

**§ 93.410 Final HHS action with no settlement or finding of research misconduct.**

When the final HHS action does not result in a settlement or finding of research misconduct, ORI may:

(a) Provide written notice to the respondent, the relevant institution, the complainant, and HHS officials, as it deems necessary.

(b) To the extent permitted by the Privacy Act, 5 U.S.C. 552a, and ORI's system of records notice for research misconduct proceedings, publish notice of institutional research misconduct findings and implemented institutional actions related to the falsified, fabricated, or plagiarized material in the research record, but not the names or other identifying information of the respondent(s), if doing so is within the best interests of HHS to protect the health and safety of the public, to promote the integrity of the PHS supported research and research process, or to conserve public funds.

**§ 93.411 Final HHS action with a settlement or finding of misconduct.**

When a final HHS action results in a settlement or research misconduct finding, ORI:

(a) Shall provide final notification of any research misconduct findings and HHS administrative actions to the respondent, the relevant institution, and HHS officials, including the SDO. The SDO shall provide a separate notice of final HHS action on any suspension or debarment actions.

(b) May provide final notification of any research misconduct findings and HHS administrative actions to the complainant(s).

(c) Shall send a notice to the relevant journal, publisher, data repository, or other similar entity identifying publications or research records which require correction or retraction.

(d) Shall publish notice of the research misconduct findings.

(e) Shall notify the respondent's current employer, if the employer is an institution subject to this part.

## Institutional Compliance Issues

### § 93.412 Making decisions on institutional noncompliance.

ORI may decide that an institution is not compliant with this part if the institution does not implement and follow the requirements of this part and its own research integrity assurance. In making this decision, ORI may consider, but is not limited to the following factors:

(a) Failure to establish and comply with policies and procedures under this part;

(b) Failure to respond appropriately when allegations of research misconduct arise;

(c) Failure to report to ORI all investigations and findings of research misconduct under this part;

(d) Failure to cooperate with ORI's review of research misconduct proceedings; or

(e) Other actions or omissions that have a material, adverse effect on reporting and responding to allegations of research misconduct.

### § 93.413 HHS compliance actions.

(a) An institution's failure to comply with the requirements of this part may result in enforcement action against the institution.

(b) If an institution fails to comply with the requirements of this part, HHS may take some or all of the following compliance actions:

(1) Require the institution to accept and/or implement technical assistance provided by HHS.

(2) Issue a letter of reprimand.

(3) Require the institution to take corrective actions.

(4) Place the institution on special review status. For a designated period, ORI will closely monitor the institution's activities for compliance with this part. Monitoring may consist of, but is not limited to, compliance reviews and/or audits.

(5) Direct that research misconduct proceedings be handled by HHS.

(6) Recommend that HHS debar or suspend the institution.

(7) Any other action appropriate to the circumstances.

(c) If the institution's actions constitute a substantial or recurrent failure to comply with this part, ORI may revoke the institution's research integrity assurance under § 93.301 or § 93.303.

(d) ORI may make public any findings of institutional noncompliance and HHS compliance actions.

## Disclosure of Information

### § 93.414 Notice.

(a) ORI may disclose information to other persons for the purpose of providing or obtaining information about research misconduct as permitted under the Privacy Act, 5 U.S.C. 552a and ORI's system of records notice for research misconduct proceedings.

(b) ORI shall disclose or publish a notice regarding settlements and HHS administrative actions, and release or withhold information as permitted by the Privacy Act and the Freedom of Information Act, 5 U.S.C. 552.

(c) ORI shall disclose or publish final findings of research misconduct when they become final.

(1) HHS may publish the respondent's name, professional alias, respondent's current and/or former position, a detailed summary of the findings, and corrective actions imposed, in any venue it deems appropriate.

(2) Such venues include, but are not limited to, Federal Government exclusionary lists (if relevant), the **Federal Register**, ORI's website, other HHS publications, professional journals and other publications, and media outlets.

(d) To the extent allowed by law, ORI will not release information that would reveal a confidential source.

(e) When ORI closes a case without a settlement or a finding of research misconduct, disclosure may be made to the respondent, relevant institution, and complainant(s). Prior to making any disclosure, ORI will first consider the privacy interests of respondent(s), complainant(s), witnesses, research subjects or others who may be identified in the disclosure and determine whether limited disclosures or confidentiality agreements are needed to protect those interests.

(f) Any publications or disclosures pursuant to this section are not considered appealable "administrative actions" under this part.

### Subpart E—Opportunity To Contest ORI Findings of Research Misconduct and HHS Administrative Actions

#### General Information

##### § 93.500 General policy.

(a) This subpart provides a respondent an opportunity to contest ORI findings of research misconduct and/or HHS administrative actions, other than suspension or proposed debarment, included in a charge letter. To contest a suspension or proposed debarment included in a charge letter, the respondent must provide the SDO directly with information and argument

in opposition to the suspension or proposed debarment in accordance with 2 CFR part 180 (or successor regulation) or with 48 CFR 9.406 and 9.407, as governed by the mechanism of PHS funding involved. A respondent may contest ORI findings and/or HHS administrative actions other than suspension and proposed debarment under this subpart; contest only the suspension or proposed debarment action under 2 CFR part 180 or 48 CFR 9.406 and 9.407; or both.

(b) A respondent may contest ORI research misconduct findings and HHS administrative actions, other than suspension and proposed debarment, by filing a notice of appeal with an Administrative Law Judge (ALJ) at the DAB.

(c) Based on the administrative record, the ALJ shall rule on the reasonableness of the ORI research misconduct findings and the HHS administrative actions other than suspension or debarment.

(d) The ALJ's ruling made under § 93.512 is the final HHS action with respect to the research misconduct findings and administrative actions, other than suspension or proposed debarment. Where a respondent contests a suspension or proposed debarment, the ALJ shall provide a copy of the ruling to the SDO to be included in the official record under 2 CFR part 180 or 48 CFR 9.406 and 9.407; the SDO decides the debarment action under the appropriate regulation.

### Process for Contesting Research Misconduct Findings and/or Administrative Actions

#### § 93.501 Notice of appeal.

(a) *Time to file.* A respondent may contest ORI findings of research misconduct and/or HHS administrative actions other than suspension and proposed debarment by filing a notice of appeal within 30 days of receipt of the charge letter provided under § 93.405.

(b) *Form of a notice of appeal.* The respondent's notice of appeal must be:

(1) In writing;

(2) Signed by the respondent or by the respondent's attorney; and

(3) Submitted to the DAB Chair through the DAB electronic filing system with a copy sent by certified mail, electronic mail, or other equivalent (*i.e.*, with a verified method of delivery), to ORI. If the respondent is also contesting suspension or proposed debarment under 2 CFR part 180, the respondent must send a courtesy copy of the notice of appeal to the SDO.

(c) *Contents of a notice of appeal.* The notice of appeal must:

(1) Admit or deny each finding of research misconduct and each factual assertion made in support of each finding;

(2) Accept or challenge each proposed administrative action;

(3) Provide detailed, substantive reasons for each denial or challenge with references to the administrative record;

(4) Identify any legal issues or defenses that the respondent intends to raise during the proceeding with references to the administrative record;

(5) Identify any mitigating factors in the administrative record; and

(6) State whether a suspension or proposed debarment is also being contested under 2 CFR part 180 or 48 CFR 9.406 and 9.407.

#### **§ 93.502 Appointment of the Administrative Law Judge.**

(a) Within 30 days of receiving a notice of appeal, the DAB Chair, in consultation with the Chief ALJ, must designate an ALJ to determine whether the notice of appeal is timely filed and within the ALJ's jurisdiction under this subpart. If the appeal is determined to be timely and within the ALJ's jurisdiction, the ALJ shall decide the reasonableness of the ORI research misconduct findings and administrative actions in accordance with this subpart. The ALJ shall dismiss an appeal if it is untimely or not within the ALJ's jurisdiction under this subpart.

(b) No ALJ may serve in any proceeding under this subpart if they have any actual or apparent conflict of interest, bias, or prejudice that might reasonably impair their objectivity in the proceeding.

(c) Any party to the proceeding may request the ALJ to withdraw from the proceeding because of an actual or apparent conflict of interest, bias, or prejudice under paragraph (b) of this section. The motion to disqualify must be timely and state with particularity the grounds for disqualification. The ALJ may rule upon the motion or certify it to the Chief ALJ for decision. If the ALJ rules upon the motion, either party may appeal the decision to the Chief ALJ.

(d) An ALJ must withdraw from any proceeding for any reason found by the ALJ or Chief ALJ to be disqualifying.

#### **§ 93.503 Filing of the administrative record.**

(a) For appeals that are not dismissed under § 93.502(a), ORI will file the administrative record for this appeal.

(b) The ALJ's review will be based on the administrative record.

(c) The parties have no right to supplement the administrative record.

#### **§ 93.504 Standard of review.**

(a) The ALJ shall review the administrative record to determine whether ORI's findings and HHS's proposed administrative actions, other than suspension and debarment, reflected in the charge letter are reasonable and not based on a material error of law or fact.

(b) The ALJ may permit the parties to file briefs making legal and factual arguments based on the administrative record.

(c) If the ALJ determines that there is a genuine dispute over facts material to the ORI findings of research misconduct or HHS administrative actions other than suspension and debarment, the ALJ may hold a limited hearing to resolve that genuine factual dispute.

#### **§ 93.505 Rights of the parties.**

(a) The parties to the appeal are the respondent and ORI. The investigating institution is not a party to the case unless it is a respondent.

(b) Except as otherwise limited by this subpart, the parties may:

(1) Be accompanied, represented, and advised by an attorney;

(2) Participate in any case-related conference held by the ALJ;

(3) File motions or briefs in writing before the ALJ;

(4) Present evidence relevant to the factual issues at a hearing, if applicable; and

(5) Present and cross-examine witnesses at a hearing, if applicable.

(c) The parties have no right to discovery before the ALJ.

#### **§ 93.506 Authority of the Administrative Law Judge.**

(a) The ALJ assigned to the case must conduct a fair and impartial proceeding, avoid unnecessary delay, maintain order, and assure that a complete and accurate record of the proceeding is properly made. The ALJ is bound by, and may not refuse to follow or find invalid, all Federal statutes and regulations, Secretarial delegations of authority, and applicable HHS policies, as provided in paragraph (c)(5) of this section.

(b) Subject to review as provided elsewhere in this subpart, the ALJ may:

(1) Review the administrative record and issue a ruling without convening a hearing;

(2) Hold conferences with the parties to identify or simplify the issues, or to consider other matters that may aid in the prompt disposition of the proceeding;

(3) Rule on motions and other procedural matters;

(4) Except for the respondent's notice of appeal, modify the time for the filing

of any document required or authorized under the rules in this subpart.

(5) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(6) Regulate the course of the appeal and the conduct of representatives, parties, and witnesses;

(7) Take action against any party for failing to follow an order or procedure or for disruptive conduct;

(8) Set and change the date, time, schedule, and place of the hearing, if applicable, upon reasonable notice to the parties;

(9) Continue or recess the hearing, if applicable, in whole or in part for a reasonable period of time;

(10) Administer oaths and affirmations at the hearing, if applicable;

(11) Require each party before the hearing, if applicable, to provide the other party and the ALJ with copies of any exhibits that the party intends to introduce into evidence; and

(12) Examine witnesses and receive evidence presented at the hearing, if applicable.

(c) The ALJ does not have the authority to:

(1) Enter an order in the nature of a directed verdict;

(2) Compel settlement negotiations;

(3) Enjoin any act of the Secretary;

(4) Review suspension or proposed debarment;

(5) Find invalid or refuse to follow Federal statutes or regulations, Secretarial delegations of authority, or HHS policies;

(6) Authorize the parties to engage in discovery; and

(7) Modify the time for filing the respondent's notice of appeal.

(d) The Federal Rules of Evidence and the Federal Rules of Civil Procedure do not govern the proceedings under this subpart.

#### **§ 93.507 Ex parte communications.**

(a) No party, attorney, or other party representative may communicate ex parte with the ALJ on any matter at issue in a case, unless both parties have notice and an opportunity to participate in the communication.

(b) If an ex parte communication occurs, the ALJ will disclose it to the other party and offer the other party an opportunity to comment.

(c) The provisions of this section do not apply to communications between an employee or contractor of the DAB and the ALJ.

#### **§ 93.508 Filing, format, and service.**

(a) *Filing.* (1) Unless the ALJ provides otherwise, all submissions required or

authorized to be filed in the proceeding must be filed with the ALJ.

(2) Submissions are considered filed when they are filed with the DAB according to the DAB's filing guidance.

(b) *Format.* (1) The ALJ may designate the format for copies of nondocumentary materials such as videotapes, computer disks, or physical evidence. This provision does not apply to the charge letter or other written notice provided under § 93.405.

(2) Every submission filed in the proceeding must include the title of the case, the docket number, and a designation of the nature of the submission.

(3) Every submission filed in the proceeding must be signed by and contain the address and telephone number of the party on whose behalf the document or paper was filed, or the attorney of record for the party.

(c) *Service.* Service of a submission on other parties is accomplished by filing the submission with the ALJ through the DAB electronic filing system.

#### § 93.509 Filing motions.

(a) Parties must file all motions and requests for an order or ruling with the ALJ, serve them on the other party, state the nature of the relief requested, provide the legal authority relied upon, and state the facts alleged in support of the motion or request.

(b) All motions must be in writing except for those made during a prehearing conference or at a hearing.

(c) Within 10 days after being served with a motion, or other time as set by the ALJ, a party may file a response to the motion. The moving party may not file a reply to the response unless allowed by the ALJ.

(d) The ALJ may not grant a motion before the time for filing a response has expired, except with the parties' consent or after a hearing on the motion. However, the ALJ may overrule or deny any motion without awaiting a response.

(e) The ALJ must make a reasonable effort to dispose of all motions promptly, and, whenever possible, dispose of all outstanding motions before the hearing.

#### § 93.510 Conferences.

(a) The ALJ must schedule an initial conference with the parties within 30 days of the DAB Chair's assignment of the case.

(b) The ALJ may use the initial conference to discuss:

(1) Identification and simplification of the issues, specification of genuine disputes of fact and their materiality to the ORI findings of research misconduct and any administrative actions;

(2) Identification of material legal issues and any need for briefing;

(3) Scheduling dates for the filing of briefs based on the administrative record or the hearing, if applicable; and

(4) Other matters that may encourage the fair, just, and prompt disposition of the proceedings.

(c) The ALJ may schedule additional conferences as appropriate, upon reasonable notice to or request of the parties.

(d) All conferences will be recorded with copies provided to the parties upon request.

(e) The ALJ shall memorialize in writing any oral rulings within 10 days after a conference is held.

(f) By 15 days before the scheduled hearing date, if applicable, the ALJ must hold a prehearing conference to resolve to the maximum extent possible all outstanding issues about evidence, witnesses, motions and all other matters that may encourage the fair, just, and prompt resolution of genuine factual disputes.

#### § 93.511 Hearing to resolve genuine factual dispute.

(a) The ALJ may hold a virtual or in-person hearing that is limited to resolving a genuine factual dispute.

(b) The ALJ shall permit the parties to call witnesses and to question witnesses. The ALJ may also question witnesses.

(c) The parties are not required to submit prehearing briefs.

(d) The parties are not required to give opening or closing statements at the hearing.

(e) The hearing will be transcribed, and the parties will have an opportunity to review the transcript and submit proposed corrections to the ALJ.

(f) Following receipt of the transcript and proposed corrections to the transcript, the ALJ may permit the parties to file briefs with suggested factual findings based on the transcript.

(g) The ALJ will issue findings of fact to the parties that resolves the genuine factual dispute.

#### § 93.512 The Administrative Law Judge's ruling.

(a) Based on the administrative record and any findings of fact as a result of a hearing, if applicable, the ALJ shall issue a ruling in writing setting forth whether ORI's findings and HHS's proposed administrative actions, other than suspension and debarment, reflected in the charge letter are reasonable and not based on a material error of law or fact within 60 days after the last submission by the parties in the case. If unable to meet the 60-day

deadline, the ALJ must set a new deadline and promptly notify the parties and the SDO if a suspension or proposed debarment is contested. The ALJ shall serve a copy of the ruling upon the parties. If a suspension or proposed debarment is contested, the ALJ shall provide a copy of the ruling to the SDO to be included in the official record under 2 CFR part 180.

(b) The ruling of the ALJ constitutes the final HHS action on the findings of research misconduct and administrative actions other than suspension or debarment. The decision of the SDO constitutes the final HHS action regarding suspension or debarment under 2 CFR part 180.

Dated: September 27, 2023.

**Xavier Becerra,**  
*Secretary.*

[FR Doc. 2023-21746 Filed 10-5-23; 8:45 am]

**BILLING CODE 4150-31-P**

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### 45 CFR Parts 2520, 2521 and 2522

RIN 3045-AA84

### AmeriCorps State and National Updates

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Corporation for National and Community Service (operating as AmeriCorps) proposes to revise its regulations governing the AmeriCorps State and National program. This proposed rule would make four substantive changes to the regulations governing the AmeriCorps State and National program to provide programmatic and grantmaking flexibilities. Specifically, this proposed rule would: limit AmeriCorps State and National grantees' required share of program costs (known as "match" or "cost share") to a scale that starts at 24 percent for the first three-year grant cycle and increases more incrementally with each successive three-year grant cycle, until it reaches 50 percent in the sixth three-year grant cycle (that is, the sixteenth year of the grant) and beyond; simplify the criteria that allow AmeriCorps to waive match for AmeriCorps State and National grantees; allow AmeriCorps to grant waivers of education hour limitations under certain circumstances to permit AmeriCorps State and National AmeriCorps members to spend an