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**Contractor Compliance Program and Integrity Reporting**

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COGR comments on FAR Case 2007 - 006, Contractor Compliance Program and Integrity Reporting.

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# COGR

an organization of research universities

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Subject: FAR Case 2007—006  
Contractor Compliance Program and Integrity Reporting

Dear Mr. Woodson:

The Council on Governmental Relations (COGR) is an association of more than 175 research universities and their affiliated academic medical centers and research institutes. COGR concerns itself with the influence of federal regulations, policies and practices on the performance of research and other sponsored activities conducted at its member institutions. As stewards of federal funds, the research community is committed to maintaining the highest standards of integrity. COGR works with the research community to identify effective management practices that help meet those standards of integrity and honesty in the conduct of all government awards, contracts, grants and other financial assistance agreements. To achieve the goal of compliance across the organizations, we seek a clear and consistent policy across the government. Thus, we remain concerned that the FAR Councils have moved forward with the new Subpart 3.10 and these proposed amendments to the recently finalized rule as a requirement for federal contractors.

#### **Withdraw Rule or Exempt Educational Institutions**

When we commented on the Contractor Code of Business Ethics and Conduct, now 48 CFR Part 3, Subpart 3.10 and its associated clauses at 52.203-13 and 14, our primary concern was that this requirement undermines the goal for a single federal government-wide set of standards to foster integrity and honesty that applies both to government contracting and other funding mechanisms. A uniform approach across the government supports efforts toward achieving compliance in an effective and efficient manner. We prefer a performance-based standard that allows a variety of tailored approaches to meeting the standard across funding mechanisms and agencies.

We believe the final rule at 48 CFR Part 3, Subpart 3.10 should be withdrawn until the completion of the current inter-agency initiative under

government. As an alternative, educational and research institutions should be granted the same exemption afforded small businesses by making the clause requirements for a formal training and/or awareness program and internal control systems inapplicable to educational and research institutions [52.203-13(c)].

One federal government-wide, performance-based standard that allows flexible implementation approaches is critical for several reasons. Each educational and research institution, unlike most corporations, typically receive funding through the full range of award mechanisms (grants, contracts, other agreements) from many different agencies. These organizations need flexibility in their approach to fostering integrity and honesty in activities conducted with government funding to enable them to implement the most effective approach for each setting within their highly decentralized and varied research environments. Some use a single code of business conduct but many have several policies, each addressing different aspects of conduct that together cover all elements of the conduct that the FAR rules require. The approach that is most effective depends on the institution. We continue to urge that implementation of both the final and proposed FAR rules be deferred or withdrawn for educational and research funding recipients pending completion of the NSTC initiative which is considering the special circumstances of educational and research institutions.

### **An Alternative Contract Clause for Research and Development with an Educational Institution**

With the announcement of the final rule addressing requirements for a contractor code of business ethics and conduct, research institutions are confronted with a daunting challenge. Designing and initiating the program required, especially for institutions that will have few covered contracts (and those are most likely to be subcontracts), is not an effective good use of scarce institutional resources.

If the FAR Councils elect not to withdraw or exempt educational and research institutions from the final rule, we propose the creation of an alternate clause for contracts that fund, in whole or in part, research and development with an educational or research institution. We believe that with minor modifications the current clause at 52.203-13 and 52.203-14 can address our concerns with the prescriptive nature of the Rule. A proposed Alternative Clause is appended here.

The need for a performance-based standard and flexibility in approach are particularly acute for academic research institutions. The missions of academic institutions are different from corporations and require governance structures unique to meeting their instructional, research and service goals. Academic institutions are highly decentralized, with many distinct cultures operating within a single organization. Governance is shared with the faculty who carry the principal responsibilities for achieving the institution's missions. As a consequence, a single, centralized "top-down," approach to any compliance obligation is rarely the most effective approach. Compliance is often most effective when the leadership of the institution establishes and commits the institution to an important standard or principle for conduct and then enables and supports each group, whether faculty or administrators, to determine the most effective optimal approach to achieving the required standard of conduct in their particular setting.

The “one size fits all” approach reflected in the final rule and in the proposed rule fails to recognize such distinctions. Most importantly, a single code of conduct is likely to be less effective in most areas in which universities and nonprofit research institutions already have separate, performance based codes of conduct. For instance, universities typically have different policies for financial conflicts

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of interest relating to purchasing decisions, clinical prescribing standards or research reflecting the institution’s multiple missions. All address this issue of conflicting financial interests and relationships in a manner tailored for the specific activity. While some policies are more amenable to the type of compliance program envisioned in the Rule, others are specific to research or instruction. Regardless, they are substantive policies that are taken very seriously and enforced by the institution.

The need for flexibility is heightened for state academic institutions that are subject to state statutes on public records and on ethical standards. State institutions may be subject to detailed state statutory requirements for ethical conduct and need to be able to comply with those requirements while, at the same time, satisfying the federal requirement. Having the flexibility of a federal performance-based standard, rather than one setting forth particular methods to achieve ethical practices, would allow state institutions to coordinate compliance with their federal and state law requirements within the same policies.

The Alternative Clause we propose addresses these general concerns with the minor modification throughout that recognizes that there may be a program or a group of programs, a policy or set of policies that address business ethics and conduct.

### **Hotline Posters**

The proposed Alternative Clause addresses our concern that, within the final rule (3.1003(a) and (b) and 52.203-14(b)), different agencies can impose different requirements regarding the form of a hotline poster. This approach could result in a single university or research institute having to post multiple posters on the same requirement – an impractical and administratively wasteful outcome. The potential profusion of posters will undermine the effectiveness of any one poster. As an alternative, we suggest guidance from the General Services Administration and the development, in consultation with the agencies, of a single hotline poster that can include a single point of contact for federal contracts.

### **Periodic Reviews**

Annual audits of research processes may already review compliance with policies for ethical conduct of research funded under federal contracts [52.203-13(c)(2)(ii)(A)]. The Councils can acknowledge through the use of an Alternative Clause that duplication of review is not required where reviews under other rules, regulations, laws, circulars or the like already cover the necessary subjects.

### **Communicating the Code**

In addition, FAR rules and clauses (52.203-13(b)(ii); 52.203-14) impose an outdated and prescriptive method of communicating requirements for ethics in government contracting to employees—providing a copy of the code of conduct to each employee engaged in the contract. The requirement should be to inform each employee engaged in the performance of the contract about applicable conduct policies. While this could be done by providing copies, it may be more effectively done by referring employees to web sites or providing tutorials in person, on-line or through other means, consistent with the request in FAR Case 20007-006 for suggestions for

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minimizing burdens through the use of information technology. As noted above, the physical display of multiple hotline posters in common work areas is impractical and wasteful. Serious consideration should be given to including electronic posters as an alternative to paper posters rather than a supplement.

We have attached an alternate version of the FAR Subpart 3.10 that addresses some of these concerns. However, it does not fully address the more fundamental issue of the need in the case of educational and research organizations to recognize the validity of separate policies for different types of conduct that allow the policies to target the type of audience and its culture and practices.

### **Proposed Amendments to Subpart 3.10 – FAR Case 2007-006**

Our concerns with the final FAR Rule apply to the current FAR Case 2007—006 as well. As the current Case amends Subpart 3.10, it is difficult to address the current case without returning to our comment on the now final rule as well. We believe the Councils need to engage with the NSTC Committee before finalizing the application of the proposed rule to educational and research institutions and organizations. We again urge that implementation of the proposed FAR for research contracts awarded to universities and nonprofit organizations be deferred pending completion of the NSTC initiative and a consistency review.

We appreciate the importance of reflecting the U.S. Sentencing Commission Guidelines in institutional compliance programs and contractors may want to consider them in designing compliance programs. However, the proposed requirements in FAR 52.203—XX are very prescriptive. We currently do not know if the NSTC initiative will reflect similar requirements, or a different approach. Nonetheless, OMB requirements with regard to grants and agreements state that “no additional procurement standards or requirements shall be imposed by the federal awarding agencies upon recipients, unless specifically required by federal statute or executive order or approved by OMB” (2CFR215.40).

There is no legal requirement that the Sentencing Guidelines be incorporated into regulation. Absent a statutory or Executive Order requirement, the cost and burden of implementing the proposed rule as described far exceed the described benefit. We recommend that the FAR be revised to suggest that the U.S. Sentencing Guidelines may be taken into consideration but are not a required component of the compliance program. We believe the detailed elements for the design, implementation, and

monitoring of an internal control system incorporated at 52.203-13 (c)(2)(ii) be eliminated in the final rule.

These detailed elements undermine the need of educational and research organizations for flexibility. As we have noted above, the assignment of responsibility for the various aspects of a policy or policies that address issues of integrity may be decentralized reflecting the operation of the organization. In a similar manner, it is infeasible to expect background checks of all employees working on contracts as the due diligence provisions would imply. State institutions face the additional challenge of exposing themselves to legal claims in ways that private institutions and companies do not if they conduct comprehensive programs and risk assessments to detect and stop conduct that may lead to unethical business practices. Public institutions' documents and materials created in such assessments may be considered public documents as defined under various state public records laws and, thus, readily available. These institutions should have programs to prevent and detect unethical and illegal conduct

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but require flexibility on how best to do so and when to document those efforts. For all of these reasons, we believe the proposed additions incorporated throughout Subpart 3.10 and related and associated parts and clauses should be eliminated.

We hope that our comments on the proposed FAR case regarding the need for government-wide consistency, performance-based standards, and openness to various methods of communicating standards permitting more flexibility in approach are key elements for educational and research organizations.

We appreciate the opportunity to comment on the proposed rule outlined in FAR Case 2007-006. We are willing to participate in further discussions or consideration of an exemption for educational institutions and/or an Alternate Clause.

Sincerely,

Anthony P. DeCrappeo  
President