



Capital VIEW

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incorporated the interim final rule into its grant award conditions (NOT-OD-08-055). This NIH implementation references the section in the Code of Federal Regulations (2 CFR Part 175) that contains the interim final guidance and, as a consequence, should carry forward any changes that are incorporated into the final rule. This prohibition against engaging in severe forms of trafficking in persons, procuring a commercial sex act, or using forced labor in the performance of the agreement is similar, but not the same, as the Federal Acquisition Regulation (FAR) of the same name.

The FAR interim rule on Combating Trafficking in Persons was substantially revised and presented as an interim rule with a request for comments in August 2007. Unlike the OMB guidance for grants, the contract provisions require the institution to notify all employees working on a project of the US Government's zero tolerance policy regarding trafficking in persons and the actions the institution will take if an employee violates the government's policy. As an interim rule, it is in effect as of April 2008.

The FAR Councils (the Civil and the Defense Acquisition Regulations Councils that discuss and propose revisions to the FAR) issued a final rule requiring a Contractor Code of Business Ethics and Conduct on November 23, 2007. The current rule requires a written contractor code of business ethics and conduct for contracts and subcontracts exceeding \$5 million and a performance period of more than 120 days.

Most institutions will have policies and procedures that address issues of business ethics and conduct and can link those policies and procedures together and present them as a code for the institution. Creating a web site that provides links to the related policies and describes, in general, disciplinary actions that may be pursued for improper conduct (another requirement of the FAR) is an efficient way to meet the requirement for a written code. To meet the FAR requirement, an institution should develop a process for notification of the employees engaged in affected contracts that could direct them to the web site for additional information. In addition to the required business ethics and conduct awareness program, the contracting institution is required to have an internal control system that facilitates discovery of improper conduct and ensures corrective measures are instituted and carried out. If your institution is in compliance with OMB Circular A-110 and A-21 you are likely to

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have those systems already in place. Finally, the rule requires posting of the sponsoring Federal agencies fraud hotline poster in the common work areas and work sites for the specific contract. This requirement can be waived if the institution has implemented a business ethics and conduct awareness program that includes a reporting mechanism, "such as a hotline poster."

In an unusual development, the FAR Councils actually proposed amendments to the November 23 final rule before it was published in its final version! The amendments were proposed in the Federal Register on November 14, 2007 and add significantly greater detail to the description of the nature of the code of business ethics and conduct training, the assignment of responsibility for compliance with the code and the elements of the internal control systems. This proposed amendment is not in effect, and it is difficult to know when or if further modifications will be made to the final rule.

In yet another action, on March 26, 2008, the FAR Councils issued an advance notice of proposed rulemaking in the area of organizational and individual financial conflicts of interest. In this notice, the FAR Councils indicated their interest in determining if, when and how contractor employees' personal financial interests need to be addressed or whether greater disclosure of contractors' policies and practices would be an effective and efficient way to promote ethical behavior. In a related announcement, the FAR Councils ask if there is a need to revise the current guidance on organizational financial conflicts of interest including the development of standard provisions and clauses. The notice reviews current agency-specific regulations and asks the public to comment by May 27, 2008. These advance notices indicate that the Councils and their participating agency representatives have interest in an area. A proposed rule may or may not be drafted for comment. It does suggest, however, that institutions will want to review the current agency-specific rule and policies to determine whether they meet the current requirements.

And as if the new rules (interim or final) aren't confusing enough, the time-worn troublesome contract clauses continue and have expanded throughout the agencies. In response to the continuing problems with some agency acquisition (and grant) terms and conditions, the Council on Governmental Relations (COGR), the Association of American Universities (AAU) and the Federal Demonstration Partnership (FDP) are updating the Troublesome Clauses Report first issued in 2004. To date, institutions report receiving a similar number of troublesome clauses in federal contracts as reported 4 years ago. Once again restrictions on publications appear to be the most significant problem arising, mostly with DOD agencies. Help in the form of the final report should be available in late April.

As spring finally begins to arrive along with "the boys of spring," and in light of the confusion with the development of recent Federal regulations, it seems fair to ask "Who's on first?"

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RESEARCH COMPLIANCE

News and Analysis for Colleges, Universities and Teaching Hospitals

Human Trafficking: Internal Control Requirements For Recipients of Federal Research Funding

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This article provides (1) background on the federal government's anti-trafficking grant and contract provisions and (2) key internal control elements of each provision, to assist with compliance.

In recent years, the federal government has strengthened its policies against "human trafficking." Broadly defined, human trafficking consists of procuring a "commercial sex act" or inducing a person through force, fraud, or coercion to perform work. Today, recipients of federal research funds routinely encounter grant and contract provisions that implement the government's anti-trafficking policies.

Few grantees think of themselves as being at serious risk of violating these provisions, because the prohibited activities — for example, forced labor, forced transportation, and prostitution — are so clearly illegal, immoral, or illicit and do not occur in a research environment.

Yet, grantees may wind up not complying with their anti-trafficking obligations. Noncompliance is rarely the result of engaging in trafficking activ-

ity; instead, institutions can be tripped up by grant and contract provisions that are neither uniform nor straightforward on the subject of internal control obligations.

Provisions in Federal Grants and Contracts

The Trafficking Victims Protection Act, which became law in 2000, requires that federal contracts, grants, and cooperative agreements include a clause allowing the government to terminate the funding agreement if the recipient or a subrecipient, including its employees, procures a "commercial sex act" or engages in "severe forms of trafficking" during the period of time that the agreement is in effect.¹ (It's worth noting that the institution and the employee could be ultimately accountable for engaging in prohibited activity — e.g., the institution risks losing the funding instrument and both the institution and employee risk prosecution.)

Pursuant to this statute, the government issued in August 2007 a new contract clause for all federal procurement contracts (i.e., agreements that are not grants and cooperative agreements). The provision is located in the Federal Acquisition Regulation (FAR) clause 52.222-50.

For federal grants and cooperative agreements, the Office of Management and Budget (OMB) issued in November 2007 a separate provision, located in section 175 of Title 2 ("OMB Award Term").

The FAR clause and the OMB award term are not the same, but each provision expresses the government's policy against

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¹ The term "severe forms of trafficking in persons" means "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjecting to involuntary servitude, peonage, debt bondage, or slavery." (See 22 USC § 7102(8).)

"Commercial sex act" is defined as "any sex act on account of which anything of value is given to or received by any person." (See 22 USC § 7102(3).)

- engaging in trafficking in persons during the period of the agreement;
- procuring a commercial sex act during the period of the agreement; and
- using forced labor in connection with performance of the agreement.

In addition to the FAR clause and the OMB award term, certain federal agencies have developed special terms and conditions designed to prohibit an awardee's promotion or advocacy of human trafficking (e.g., prostitution). Such agency terms are often based on requirements codified in funding program legislation. For example, the statute authorizing the President's Emergency Program For AIDS Relief (PEPFAR) imposes as a precondition to an institution's receipt of these funds certain anti-trafficking internal control requirements.

The FAR clause, OMB award term, and agency special terms and conditions are the three primary sources of anti-trafficking internal control obligations for recipients of federal research funding.

Substantive Violations Possible?

While this article and the accompanying tables (pages 7–8) focus on a recipient's internal control obligations associated with the FAR clause, OMB award term, and agency terms, this is not to say that there is zero risk of violating the substantive prohibitions contained in these terms — i.e., forced labor, forced transportation, or prostitution.

For example, an employee's use of a prostitute during a grant-related business trip (even in jurisdictions where prostitution is legal) indeed may violate the anti-trafficking provisions and allow the government to terminate the agreement.

Substantive violations may be a particular compliance concern for grantees employing foreign nationals on overseas projects in countries that do not prohibit prostitution and related activities.

(For further information, consult Hogan & Hartson's 2007 and 2008 client updates on human trafficking provisions, at www.hhlaw.com/wfferreira.)

Internal Control Obligations

Unfortunately, the internal control obligations created by the FAR clause, the OMB award term, and agency terms are neither clear nor consistent. For ex-

ample, the FAR clause requires institutions to notify its employees of the government's "zero tolerance policy" for trafficking.

Agency terms may require the same notification to employees, but more often they mandate the creation of an institutional policy explicitly opposing prostitution and sex trafficking.

The OMB award term requires neither, yet imposes other informational reporting to the awarding agency. Keeping track of an institution's obligations under multiple terms can be confusing.

The tables on pages 7-8 address common areas of internal control confusion between the FAR clause, the OMB award term, and the agency terms. Each table focuses on the following key internal control questions:

◆ **Institutional human trafficking policy:** Does the provision require the institution to issue a policy explicitly opposing prostitution and sex trafficking?

◆ **Employee notification:** Does the provision require the institution to notify employees of the government's "zero tolerance policy" for human trafficking?

◆ **Other compliance obligations:** Does the provision impose any other internal control obligations on the institution?

As illustrated by the tables, a "one size fits all" approach may not satisfy an institution's anti-trafficking obligations across various agreements.

To date, there do not appear to be any enforcement actions or government audit findings implicating an institution's compliance with anti-trafficking provisions. Noteworthy, however, is a June 2009 *Washington Post* editorial by Secretary of State Hillary Clinton in which she deems trafficking a "particularly urgent" problem and "an important priority of our foreign policy agenda" (<http://tinyurl.com/kwy8zr>).

Also noteworthy is the nomination and confirmation of Luis de Baca to the State Department post of "Ambassador-at-Large to Monitor and Combat Trafficking in Persons." The installation of de Baca, a former Department of Justice official and aggressive prosecutor within the human trafficking prosecution unit, may be an early sign of the new administration's commitment to enforcing public policy in this area. ✧

Internal Control Obligations: Grant and Contract Provisions Addressing Human Trafficking

**FAR Clause (Federal Procurement Contracts)
FAR Clause 52.222-50**

Applicability: This provision appears in federal contracts.

Institutional Human Trafficking Policy: None required.

Employee Notification: Required.

- Contractors and subcontractors must notify employees¹ of the government's "zero tolerance policy" concerning trafficking in persons. The government's "zero tolerance policy" states the following:

Contractors and contractor employees shall not—

1. Engage in severe forms of trafficking in persons during the period of performance of the contract;
2. Procure commercial sex acts during the period of performance of the contract; or
3. Use forced labor in the performance of the contract.

- Contractors and subcontractors must notify employees of the actions that will be taken against employees for violations of the zero tolerance policy. FAR Clause 52.222-50(c)(1)(ii) states that such actions "may include, but are not limited to, removal from the contract, reduction in benefits, or termination of employment."

Other Compliance Requirements:

- Contractors must take appropriate action "up to and including termination" against employees and subcontractors that violate the government's zero tolerance policy.
- Contractors must inform the contracting officer of
 1. Any information the contractor receives from any source alleging that conduct of an employee, subcontractor, or subcontractor employee, violates the government's zero tolerance policy.
 2. Any actions taken against contractor employees, subcontractors, or subcontractor employees pursuant to the FAR clause.
- Contractors must flow down FAR Clause 52.222-50 to subcontracts.

**OMB Award Term (Grants & Cooperative Agreements):
2 CFR § 175**

Applicability: This provision appears in federal grants and cooperative agreements.

Institutional Human Trafficking Policy: None required.

Employee Notification: None required.

Other Compliance Requirements:

- Grantees must inform the awarding agency of any information received from any source alleging a violation of paragraph a.1 of the OMB award term. Paragraph a.1 states:

You as the recipient, your employees², subrecipients under this award, and subrecipients' employees may not—

- i. engage in severe forms of trafficking in persons during the period of time that the award is in effect;
- ii. procure a commercial sex act during the period of time that the award is in effect; or
- iii. use forced labor in the performance of the award or subawards under the award.

- Grantees must flow down the requirements of paragraph a.1 to subawards.

continued

¹ For purposes of the FAR Clause, an "employee" is defined as "an employee of the Contractor directly engaged in the performance of work under the contract who has other than a minimal impact or involvement in contract performance." FAR 52.222-50(a).

² For purposes of the OMB Award Term, an "employee" is defined as follows (2 CFR § 175.15(b)):

- i. An individual employed by you or a subrecipient who is engaged in the performance of the project or program under this award; or
- ii. Another person engaged in the performance of the project or program under this award and not compensated by you including, but not limited to, a volunteer or individual whose services are contributed by a third party as an in-kind contribution toward cost sharing or matching requirements.

Internal Control Obligations: Grant and Contract Provisions Addressing Human Trafficking, continued

Agency Terms (Pursuant to Funding Program Legislation)

Applicability: These provisions are agency-specific terms often based on statutory requirements of various funding programs. Such agency terms frequently appear in grants and contracts that have a significant international or overseas component.

Institutional Human Trafficking Policy: Often required.

- Agency terms may require awardees to have “a policy explicitly opposing prostitution and sex trafficking.” No further guidance regarding the form or content of such a policy is provided in the agency term. Institutions have taken a variety of approaches to issuing a policy opposing prostitution and sex trafficking. For example, some awardees have implemented one or more of the following approaches: (1) taking the position that human trafficking prohibitions are already covered under their general institutional code of conduct; (2) proactively including in award proposals a statement that evidences opposition to human trafficking; and (3) developing and issuing an institutional “human trafficking policy.”

- o Note that there is no general requirement in the Trafficking Victims Protections Act for awardees to have a policy concerning human trafficking. However, the PEPFAR legislation includes a statutory provision stating that “No funds made available to carry out [PEPFAR] may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.”³ Agency terms that implement this statutory requirement have been the subject of recent lawsuits that claim infringement on free speech rights (i.e., claims that the federal government is engaging

in unconstitutional viewpoint discrimination by compelling an awardee to have a specific policy). In *DKT International v. USAID* (2007)⁴, the U.S. Court of Appeals for the District of Columbia held that requiring grantees to have a policy against prostitution and sex trafficking does not violate a grantee’s First Amendment rights. In contrast, the Southern District of New York in *Alliance for Open Society International v. USAID* (2008)⁵ held the opposite and granted a preliminary injunction in favor of the plaintiff awardees. The ultimate resolution of these lawsuits is unclear.

Employee Notification: Potentially required.

- Some agency terms require awardees to notify their employees of the government’s opposition to human trafficking.
- Some agency terms require awardees to notify their employees of the awardee’s opposition to human trafficking.

Other Compliance Requirements:

- Agency terms may require awardees to specially certify to the awarding agency compliance with the agency terms.
- Agency terms often require the substance of the terms to be flowed down to subrecipients and subcontractors.
- Some agency terms require none of the above; for example, the term could simply inform the awardee that the award may be terminated if the awardee engages in conduct that violates the government’s policy against human trafficking.

³ 22 USC § 7631(f).

⁴ 477 F.3d 758 (D.C. Cir. 2007).

⁵ 570 F. Supp.2d 533 (S.D.N.Y. 2008).

Note: The tables summarize key internal compliance obligations but are not meant to substitute for a careful review of the terms of a particular provision in a recipient’s funding instrument.