FAR Privacy Act Training

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COGR
an organization of research universities

COUNCIL ON GOVERNMENTAL RELATIONS
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General Services Administration
Regulatory Secretariat (MVCB)
1275 First Street, NE, 7th Floor
Washington, D.C. 20417

ATTN: Hada Flowers

Subject: FAR Case 2010-013

Dear Ms. Flowers:

This is in response to the proposed rule (76*FedReg*63898; FR Doc. No: 2011-26546) to amend the Federal Acquisition Regulations (FAR) to require contractors to complete training that addresses the protection of privacy in accordance with the Privacy Act of 1974, and the handling and safeguarding of personally identifiable information.

The Council on Governmental Relations (COGR) is an association of 188 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 conducted at its member institutions. Our member institutions receive a substantial number of federal contracts that would be subject to the proposed rule.

Executive Order 13563, issued by the President earlier this year, has several basic tenets that guide the Administration in crafting regulations. Among these are: to consider costs and how best to reduce burdens for American businesses and consumers; to seek the most flexible, least burdensome approaches; and to ensure that regulations are scientifically-driven (Jack Lew, Director, Office of Management and Budget, *Regulatory Strategy*, posted 1/18/11; available at http://www.whitehouse.gov/blog/2011/01/18/regulatory-strategy . In our view, the proposed rule fails to meet these basic tenets.

The proposed rule fails to set forth a compelling reason for requiring expanded privacy training for government contractors and, in fact, runs counter to the administration's regulatory streamlining initiatives. The Privacy Act has been in existence for over 35 years. The proposed rule provides no explanation as to why the FAR Councils believe that additional protections now are needed which demand the issuance of implementing FAR requirements. While it cites the need to

ensure consistency across the Government, it is unclear how this purpose will be accomplished since the proposed rule does not supersede other applicable laws or regulations requiring instruction of contractor personnel on compliance requirements with regard to handling and safeguarding personally identifiable information. For example, contracts subject to Federal Information Security Management Act (FISMA) and OMB Circular A-130 controls will still require security awareness training as set forth in NIST Special Publication 800-53.

In addition, a large set of other statutes and regulations, which are cited in the proposed rule, exist that already require that government and contractor personnel are trained on compliance with laws and regulations pertaining to handling and safeguarding of personally identifiable information. The value added of the proposed new FAR clause is not demonstrated in the proposed rule. Contractors will continue to be responsible for compliance with these other authorities. The proposed rule adds unnecessary burdens while adding no obvious benefit to either the Government or to the contracting community.

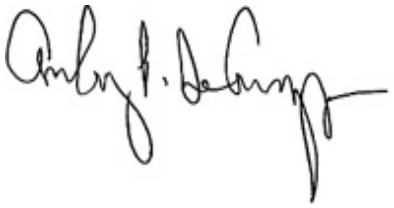
Additional concerns are raised by the proposed FAR prescription and contract clause, which make contractors responsible for ensuring compliance with the training requirements, including agency-specific privacy training requirements ((24.301(c)(7). This requirement runs counter to the consistency goal and raises compliance and burden issues for contractors. Each agency might have different training requirements that could necessitate separate specific employee training tailored to each different federal agency. Particularly in the case where the clause includes Alternate II, contractors will be required to ensure employee training and maintain evidence of such training in cases where they may be unable to confirm adherence of its employees to the training requirement since the agency would have administered the training. Additionally, those researchers and staff working on federally funded contracts from multiple agencies could be required to complete multiple, and potentially conflicting, training requirements.

The scope of contractor employees subject to the requirement is not clear. It appears contractors will be responsible for identifying employees who require access to or handle personally identifiable information or who design, develop or maintain a system of records, and for documenting completion if requested. The proposed language leaves open the question whether the requirement applies to <u>all</u> contractor employees, or only to those who are paid under the particular contract containing the clause. In addition, while the proposed rule states that there is no requirement to collect or provide this information to the Government, this statement appears disingenuous in view of the proposed 24.301(d) and 52.224-xx (b) requirements to provide evidence of completed training upon request. In fact, this will require contractors to collect and maintain this information in all cases.

The request for comments in the Federal Register notice asks whether the burden estimate is accurate and for ways to minimize burden. We believe the annual burden estimate in the proposed rule significantly understates the likely burden, particularly if Alternate I of 52.224-xx is used, requiring contractors themselves to conduct the training and the requirement that training be repeated annually. From this standpoint Alternate II is preferable and is the approach that has been typically followed by agencies in contracts subject to FISMA requirements. However Alternate II raises other compliance issues under the proposed rule, as noted above.

Given the considerable burden implications and the fact that the proposed rule does not provide compelling justification, we respectfully request the FAR Councils to consider withdrawing the rule to avoid causing confusion and redundancy.

Sincerely,



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