

COGR

Council On Governmental Relations

An Association of Research Institutions

Principles for Evaluating Conflict of Commitment Concerns in Academic Research

This Framework is provided as a tool to the COGR Membership with the understanding that COGR is not providing legal, regulatory, or policy advice.

Acknowledgements

Many thanks to the team of COGR members and COGR staff who contributed to the completion of this paper.

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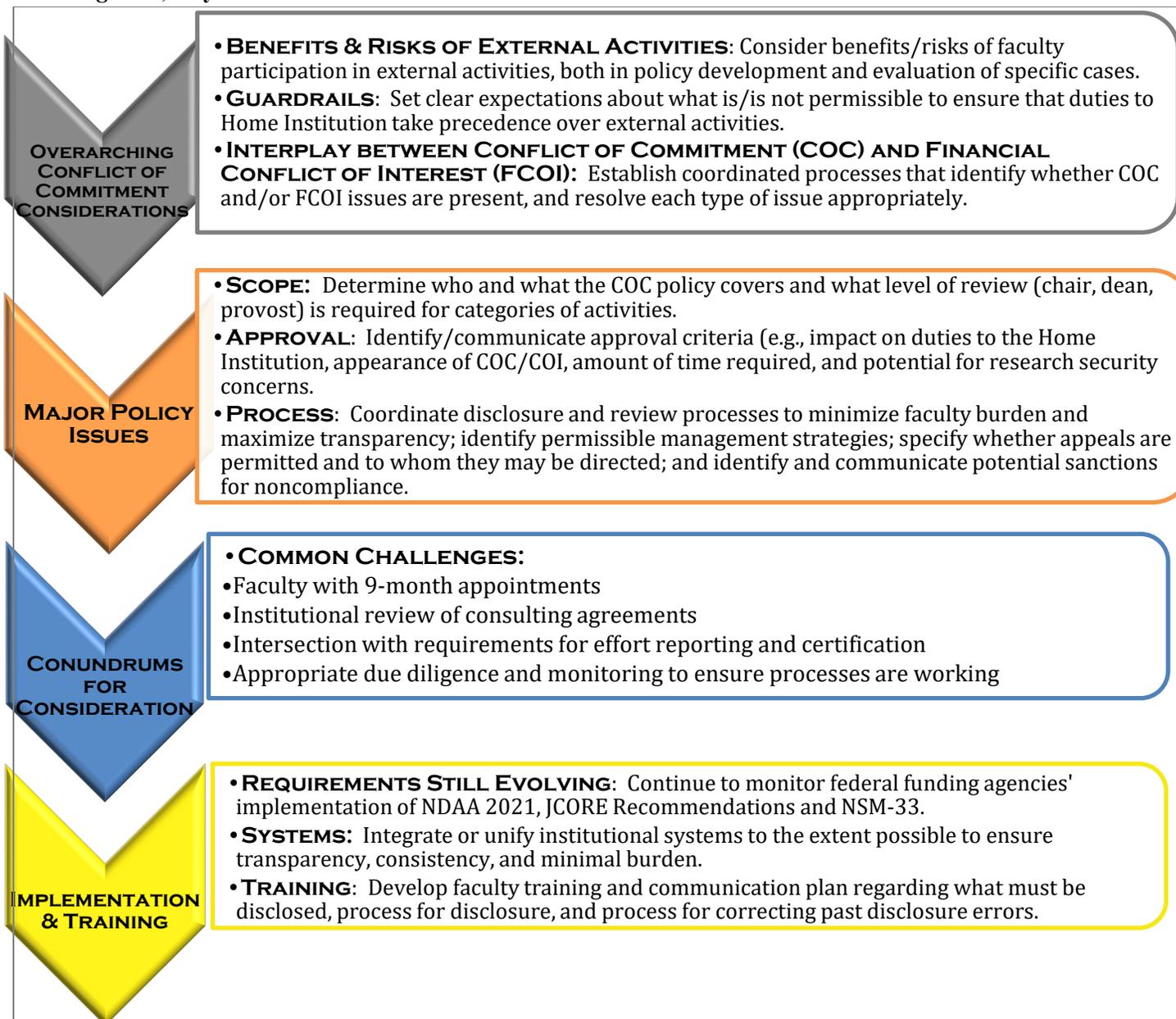
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Overview

Recently, many research institutions have begun evaluating their policies and processes concerning conflict of commitment. This evaluation was initiated, in part, as a response to federal research funding agencies' focus on disclosure of international research activities and support. This document discusses major principles that institutions might consider in conducting such policy/process evaluations, followed by illustrative case studies. Below is a summary of the document's key points:

Figure 1, Key Points: Evaluation of Conflicts of Commitment



Introduction

Research institutions have long maintained policies that address the concept of “conflict of commitment.” These policies may date back many years and focus on engagements that a faculty member enters as a private individual and that may interfere, or appear to interfere, with the faculty member’s primary obligations to their institution. These competing engagements may be compensated, such as consulting, or uncompensated, such as serving as a volunteer member of an editorial board. Typically, concerns have focused on whether faculty members are fulfilling their obligations of teaching, research, service, and, for academic medical centers, clinical care, or whether time, attention, and potentially institutional resources, are being diverted inappropriately to the outside activity.

Over the past few years, many institutions have started to review and evaluate their conflict of commitment (COC) policies in response to questions about the possibility of inappropriate foreign influence on federally funded research (“Inappropriate Foreign Influence”). Key points in this area include faculty member involvement in research and activities at institutions other than the researcher’s home institution (“External Entities”), especially when these activities are undertaken pursuant to a formal employment agreement and involve non-U.S. entities. As such activities have come to light, they have presented COC questions, among other issues.

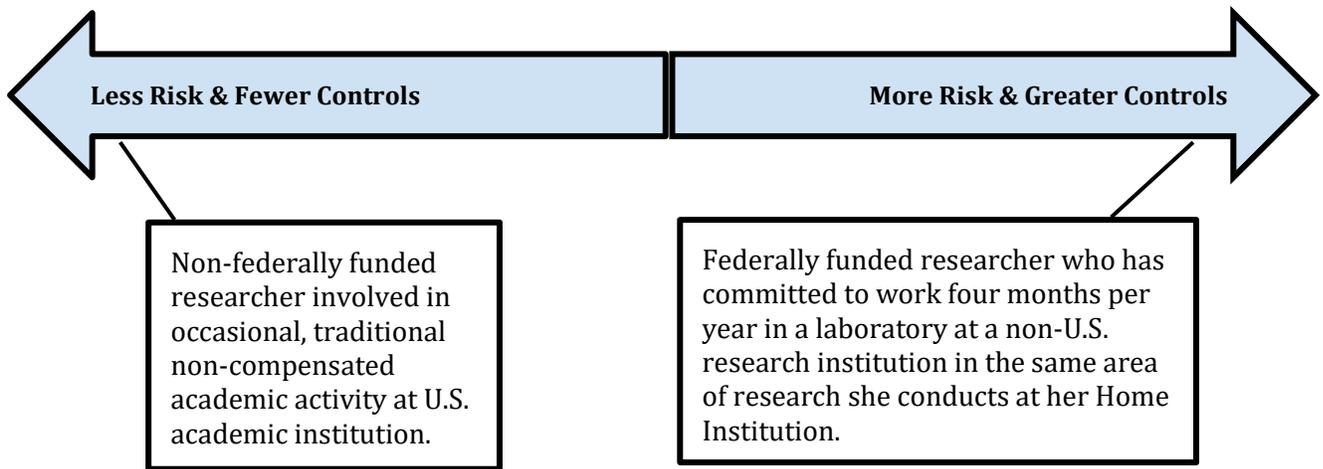
In mid-January 2021, institutional concerns regarding COC policies and processes took on new urgency with the release of the recommendations from the National Science and Technology Council (NSTC) Joint Committee on the Research Environment’s (JCORE) Subcommittee on Research Security: “Recommendations for Strengthening the Security and Integrity of America’s Science and Technology Research Enterprise” (“2021 JCORE Recommendations”).¹ At the same time, the White House released its “Presidential Memorandum on United States Government-Supported Research and Development National Security Policy” (“NSM-33”),² which contains directives to federal research funding agencies to strengthen conflict of commitment disclosure requirements for funding recipients.

There is no “one size fits all” policy or process for addressing COC because institutions vary tremendously in terms of research portfolio, size, culture, and employment models. In addition, institutional risk assessment also influences policy and process development.

¹ Available at <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/NSTC-Research-Security-Best-Practices-Jan2021.pdf>.

² Available at <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-united-states-government-supported-research-development-national-security-policy/>

The 2021 JCORE Recommendations recognize the role of risk assessment and advocate the use of a “balanced, risk-based approach” that recognizes the benefits and risks of international collaboration.³



In light of this renewed focus on COC, COGR developed this document to provide a reference framework for institutions as they evaluate their COC policies and processes.⁴ This document (“Framework”) recognizes that Inappropriate Foreign Influence is just one of many issues that institutions must consider in evaluating COC policies and processes, and thus it begins by discussing the broader principles that underlie COC policies and practices and the distinction between financial conflict of interest (FCOI) and COC. The Framework next examines points to consider when drafting or evaluating COC policies, taking account of the 2021 JCORE Recommendations, NSM-33, and Section 223 of the National Defense Authorization Act for Fiscal Year 2021 (NDAA 2021)⁵, which includes some similar requirements albeit using slightly different language. Finally, the Framework explores common conundrums that institutions encounter with COC oversight and concludes with several illustrative case studies, set forth in **Appendix A**, that may serve as a basis for institutional discussion and training.

The language in the 2021 JCORE Recommendations, NSM-33 and NDAA 2021 has not yet been implemented through the issuance of agency regulations, guidance, or frequently asked questions.

³ *Supra* n. 1 at p. 4 (“This approach must seek to apply protective measures commensurate with identified risks, accounting for both likelihood of occurrence and impact, weighed against tangible benefits and any accompanying cost or administrative burden resulting from mitigation measures.”)

⁴ Such policies and processes may take many forms including external/outside activity policies, conflict of commitment policies, combined conflict of interest and conflict of commitment policies, and faculty handbook provisions. *See, e.g.*, University of North Carolina Charlotte, [University Policy 102.1](#), “External Professional Activities of Faculty and Other Professional Staff,” (rev. Aug. 28, 2019); Vanderbilt University, [Faculty Manual, Chapt. 3](#), “Conflict of Interest and Commitment,” (accessed Feb. 12, 2021).

⁵ [Pub. L. 116-283](#) (Jan. 1, 2021). *See, also*, [Conference Report 116-617](#) (Dec. 3, 2020).

Given this evolving situation, this Framework responds to the current conditions and will be updated as needed.

Scope & Relevant Definitions

Scope:

This discussion focuses on the activities of tenured or tenure-track faculty members at academic research institutions. The Framework takes this approach because many academic research institutions permit only these faculty members to spend some portion of their institutional time engaged in outside activities. Nonetheless, the principles that are discussed also may be applied to other research personnel.

Definitions:

As used in this Framework, the terms below have the following definitions:

Conflict of Commitment (COC): A situation in which an individual accepts or incurs conflicting obligations between or among multiple employers or other entities.⁶

(Many institutional policies reference “COC” but only cover a faculty member’s distribution of time and responsibilities between their Home Institution and their outside activities.⁷ Until the publication of the 2021 JCORE Recommendations and NSM-33, there was no official definition of COC at the federal level that applied to research funding recipients; both documents include the foregoing definition.)

Financial COI (FCOI): A situation in which an individual, or the individual’s spouse or dependent child, has a financial interest or financial relationship that could directly and significantly affect the design, conduct, reporting or funding of research.⁸

Foreign Government Sponsored Talent Program (FGTP) or Recruitment: An effort, directly or indirectly organized, managed, or funded by a foreign government or institution to recruit

⁶ *Supra* n. 1 at p. 2, n. 2; *supra* n. 2 at Section 2(d).

⁷ See, e.g., University of Arizona, “[Conflict of Commitment Policy](#),” (rev. June 2017); Oregon State University, “[Conflict of Commitment Policy](#),” (eff. Feb. 1, 2012).

⁸ *Supra* n. 1 at p. 2, note 1; *supra* note 2 at Section 2(c). This definition is similar to that used for “financial conflict of interest” in the Public Health Service regulations for “Promoting Objectivity in Research” at 42 CFR Section 50.603 (“PHS Regulations”). The PHS Regulations, however, do not address FCOI in the context of the funding of research, only in “design, conduct or reporting,” and they also focus on “Significant Financial Interests” as defined therein.

science and technology professionals or students (regardless of citizenship or national origin, and whether having a full-time or part-time position).⁹

External Entity: An institution, company, government entity, foundation, professional organization, or other type of entity that is not the faculty member’s Home Institution.

Home Institution: The academic research institution or other entity that is the primary employer of the faculty member.

Institutional Responsibilities: A faculty member’s Home Institution responsibilities including, e.g., research; teaching; administration; clinical care; conference attendance, research presentations or lectures at other universities or uncompensated publication review; and service on institutional committees.

Outside Activity: An activity that a faculty member performs, or commits to perform, at or for an External Entity.

Major Principles and Objectives to Consider when Formulating/Evaluating COC Policies

Benefits of Faculty Participation in External Activities

Academic research institutions (“institutions”) are unique because they often have policies that explicitly permit faculty to spend a specific portion of their time (e.g., one day per week) engaged in Outside Activities, and may even encourage them to do so.¹⁰ This approach differs from that of commercial research enterprises, which typically disallow employee participation in any compensated external activity and may require employees to enter into non-compete and non-disclosure agreements as a pre-requisite for employment.

⁹ *Supra* n. 2 at Section 2(e). As drafted, the definition is unclear as to whether a private institution’s private recruitment efforts could be considered a FGTP but encompassing solely private action seems inconsistent with the notion of a “government-sponsored... program.” Note that there are other definitions that preceded the definition for FGTP found in the 2021 JCORE Recommendations and NSM-33. *See, e.g.*, NSF, “[Personnel Policy on Foreign Government Talent Recruitment Programs](#),” n. 1, (Jul. 11, 2019)

¹⁰ *See, e.g.*, Rice University, “[Conflicts of Commitment and Outside Activities for Faculty](#),” (rev. Jun. 2020), (“As a general rule, it is a COC if Faculty Members spend more than 20% of their total professional effort, on non-Rice professional Outside Activities, the equivalent of one day a week on average, cumulative for all Outside Activities.); Georgetown University, Office of Research Oversight/Regulatory Affairs, “[Approval of Extramural Activity](#),” (accessed Dec. 31, 2020) (outside activity “does not exceed an average of eight hours a week”).

Institutions take a more flexible approach to Outside Activities because participation in Outside Activities enables faculty to:

- Disseminate knowledge and education to the broader public;
- Gain real-world experience to help ensure that teaching and research are applicable to the “real world” and that resulting findings can be broadly applied;
- Identify research questions that are relevant to communities outside of academia;
- Collaborate and share expertise with industry to answer broad questions;
- Promote community engagement with research institutions;
- Enhance funding opportunities and enable access to unique resources;
- Strengthen technology transfer;
- Develop professional growth opportunities for faculty and trainees; and
- Engage globally in research, education, and service.

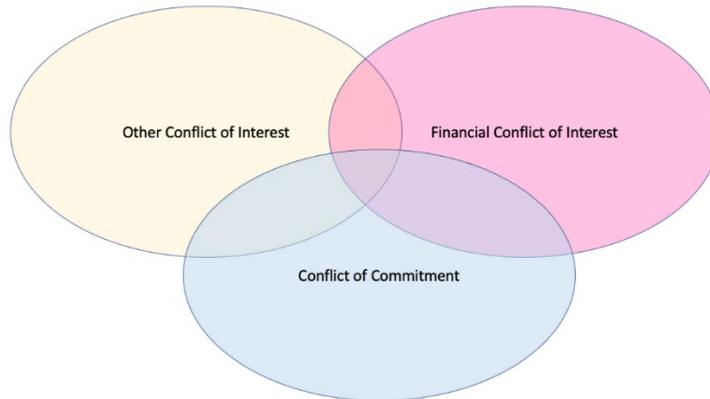
The Need for Guardrails

Although institutions permit faculty to engage in Outside Activities, such participation may not take precedence over the duties owed to the Home Institution. This is particularly true in the case of tenured faculty who are provided with a lifetime academic appointment and tremendous freedom in their research and teaching activities, in part as exchange for making their primary commitment of time and intellectual abilities to the Home Institution and its students, fellow faculty, and programs. To ensure that faculty may participate in Outside Activities without jeopardizing their ability to perform their Institutional Responsibilities, COC policies (and other documents that may define the faculty member’s responsibilities, such as employment contracts and faculty handbooks) should focus on addressing the following objectives:

- Clearly establish that the faculty member’s primary obligation is to the Home Institution and ensure faculty commitment to their Institutional Responsibilities.
- Protect university resources and intellectual property from being diverted to External Entities via Outside Activities or being used inappropriately for the personal gain of the faculty member.
- Safeguard the reputation of the Home Institution and its faculty from the appearance of dual loyalties or undue influence by an External Entity.
- Provide faculty members with the flexibility to conduct Outside Activities but set boundaries and establish expectations for those activities.
- Ensure transparency and accountability about the type, nature, and extent of faculty member’s Outside Activities, including identification, management, and/or elimination of any COIs and/or COCs.
- Protect against Inappropriate Foreign Influence and promote objectivity in research.

- Ensure that responsibilities to research sponsors are met.
- Ensure students, trainees, and staff are not adversely affected by faculty participation in Outside Activities.

Delineating the Boundaries between COC and COI



The boundaries between COC and the various types of COIs, financial and otherwise, are not always clear and may overlap. For example, a faculty member who owns a start-up company related to her research and spends three days a week focusing on company business may have both a FCOI and a COC. If the faculty member is a “silent partner” who does not spend any time on the start-up, she would not have a COC, but may still have a FCOI. Moreover, if she “volunteers” (without receipt of any compensation or ownership interest) to work three days a week at the company to gain access to company data for her overall research, she may have a COC, and her receipt of company data may create a non-financial, “other” COI concern. Institutions, therefore, need to review each fact pattern carefully to discern what types of COCs and COIs are involved and to ensure that relevant policies and procedures are applied appropriately.¹¹

¹¹ Recently, some federal agencies have used the term “non-financial conflict of interest” (NFCOI) to describe conflicts of commitment and possibly other types of conflicts as well. *See*, General Accounting Office’s (GAO), “[Federal Research - Agencies Need to Enhance Policies to Address Foreign Influence](#),” (Dec. 2020). It is difficult to define the activities encompassed by the term NFCOI; to determine whether, or how, such activities affect research pursuits; and whether regulation of such pursuits may, in some cases, be perceived to impermissibly chill freedoms of association and speech. *See, also*, Editorial, “[Nature journals tighten rules on non-financial conflicts](#),” *Nature* 554, p. 6 (Jan. 31, 2018) (Requiring disclosure of “...non-financial competing interests” including “membership of governmental, non-governmental, advocacy or lobbying organizations, or serving as an expert witness.”).

Special Concerns Raised by Foreign Government-Sponsored Talent Recruitment Programs

Faculty participation in Foreign Government-Sponsored Talent Recruitment Programs (FGTP) may raise special COC concerns. Such programs may require participants to sign contracts that bind faculty to obligations that could interfere with or appear to divert faculty time and attention away from obligations to the Home Institution. The chart below sets forth actual examples of common provisions found in FGTP contracts¹² along with the potential COC issue they present.

FGTP Provision Category	FGTP Contract Specific Provisions	Concern
Teaching and Recruitment Provisions	“On average, teach one graduate course per year.”	Obligations such as teaching, advising, and recruiting students could interfere or compete with obligations to carry out these activities for students at the Home Institution.
	“On average, advise two undergraduate students and recruit three graduate students.”	
	“Provide letters of recommendation for students.”	
Copyright and Intellectual Property Provisions	“Any copyrightable or patentable materials, and other related or similar intellectual properties ... which are created or developed by [U.S. faculty member] ... at [non-U.S. institution] ... shall be applied and publicized in the names of both [non-U.S. institution] and [U.S. faculty member]. ([Non-U.S. institution] shall be the first author affiliation).”	Unless there is a clear boundary between the Outside Activity and the U.S. Home Institution activity, intellectual property that would otherwise be the sole property of the U.S. Home Institution now becomes jointly owned with the External Entity. This shared ownership may run afoul of multiple Home Institution policies and federal funding agency requirements.
Team-Building Provisions	“Assist in introducing the research institution to core domestic and international talent, helping build a high-level research team.”	Helping to build a team at an External Entity could divert energy away from similar activity at the Home Institution and could compete against the Home Institution’s recruitment efforts for the same talent.
Publication Provisions	“[W]e expect that you will author publications based on your work in our country. You will have the right to publish the results of your research in our country without restriction. In any publication describing research that was conducted in our country, you will list our institution as your primary affiliation and your other place of employment as your secondary site of appointment.”	Publications that list another institution as the primary affiliation may dilute the Home Institution’s academic reputation and leadership in the field and do not appropriately acknowledge the Home Institution’s investment in the faculty member’s research. In the case of Inappropriate Foreign Influence, such provisions also may raise concerns if the affiliations were not appropriately disclosed.

¹² U.S. Senate, Permanent Subcommittee on Investigations, “[Threats to the U.S. Research Enterprise: China’s Talent Recruitment Plans](#),” [Appendix A](#) (Nov. 18, 2019).

FGTP Provision Category	FGTP Contract Specific Provisions	Concern
Extensive Time Commitments & Work Obligations	The job objectives and tasks that [U.S. faculty member] should complete include... leading the development of the school's translational medicine discipline, advancing the building of the discipline and the talent team, undertaking tasks of teaching undergraduate and postgraduate courses and talents training work, and vigorously introducing outstanding talents, improving teaching and research skills, expanding international exchanges and cooperation, enhancing the international influence of the discipline, achieving innovative research results, and promoting the pace of building our university into a first-class university."	Carrying out such an extensive portfolio, which appears to include leadership activities, teaching, recruiting, and talent development, could interfere with obligations to the Home Institution and could compete against, and divert energy from, the Home Institution.
	"Each year the work time shall be not less than 2 months."	Contracts that contain specific periods of work commitment must be evaluated against time commitments to the Home Institution, including time committed on sponsored projects.

Points to Consider for COC Policies and Processes

As noted, no universal COC policy exists that could address the unique circumstances of each research institution. Despite the variety in institutional requirements, however, each COC policy should address the following core questions:

- **Whom does the policy cover?**

Although discussion in this document is focused on tenured faculty members, institutions must consider whether COC policies also should apply to non-tenured faculty and staff. This decision may be impacted by factors such as:

- The Home Institution's status as public or private
- Applicable provisions of collective bargaining agreements (if any)
- Level of risk that dual employment may pose to the Home Institution
- Sponsor/funding agency requirements

- **How will the Home Institution address concerns about Inappropriate Foreign Influence?**

Although federal funding agencies have not yet specifically responded to NSM-33's mandate to issue policies requiring disclosure of information related to COC, NIH and NSF already had been moving in the direction of mandating greater disclosure.¹³ The passage of the NDAA 2021 continued this trend, and the publication of the 2021 JCORE Requirements did so as well. At a

¹³ See, [NIH, NOT-OD-19-114](#), "Reminders of NIH Policies on Other Support and on Policies related to Financial Conflicts of Interest and Foreign Components," (July 10, 2019); [NIH 2020 Virtual Seminar Presentation Materials](#), "Commitment Transparency" presentation, (last updated Jan. 13, 2021); [NSF FAQ on Current and Pending Support PAPPG](#) (NSF 20-1) (updated Dec. 9, 2020).

minimum, institutional policies regarding COC will need to meet regulatory and agency requirements. **Appendix B** sets forth a chart comparing COC-related requirements of the 2021 JCORE Recommendations, NSM-33, NDAA 2021 and current NIH and NSF requirements, to facilitate institutional implementation.

- **What activities must be disclosed for review/approval? Will some types of activities be considered pre-approved or exempt?**

The types of activities that are required to be disclosed for institutional review/approval will be influenced by funding agency requirements, applicable laws, existing institutional policies, and risk tolerance. Institutions should consider how to address a variety of scenarios, including faculty who have numerous Outside Activities; a single Outside Activity that requires a significant time commitment; or an Outside Activity with a minimal time commitment, but which competes with Institutional Responsibilities. Additionally, institutions should be prepared to address *quid pro quo* appointments, where the faculty member is offered an affiliation or other benefit by an External Entity with an expectation that the faculty member will, in return, host visiting students or scientists from the External Entity. These arrangements could undermine the institution's authority to determine to whom this privilege should be granted.

Institutions may require different levels of review depending on the type of activity, and its perceived risk level. Some activities may require prior approval; others, just disclosure. For example, serving as an editor for a scholarly journal, as a peer reviewer for a funding agency, or as an officer for a professional society are traditional academic activities with a much lower risk of conflict, and thus may require limited, or no, disclosure and/or review, unless the time commitment is such that it interferes with academic activities on which the Home Institution places higher priority (e.g., teaching assigned classes).¹⁴

- **What are the criteria for approval?**

For activities that require prior approval, institutions should consider addressing the following questions in their COC policies:

- What standards will be used to evaluate the commitment? For example, the University of Minnesota's *Policy on Outside Consulting and Other Commitments* calls for the institution to evaluate Outside Activities to determine if they interfere with the performance of regular

¹⁴ See, e.g., University of California Office of the President (UCOP), APM-025, "[Conflict of Commitment and Outside Activities of Faculty Members](#)," (Jan. 15, 2020); University of Texas Rio Grande, "[Decision Matrix for Approval of Outside Activities and Conflict of Interest Disclosures](#),"(accessed Jan. 17, 2021).

employment duties, compete with coursework offered by the university, and/or compete with services offered by the employee's unit.¹⁵

- How reviewers should consider activities that give rise to the appearance of COC, as well as actual COC?
- Does the activity being reviewed pose a potential research security risk considering federal standards and regulations?
- Is the scope of the Outside Activity sufficiently distinguished from the scope of research commitments at the Home Institution?
- What is the duration of approval? When should the activity be for re-reviewed?
- **How will the amount of time spent on Outside Activities be measured?**

Institutions must determine: (a) whether and how to establish a maximal time allowance for institutional time that faculty can spend on Outside Activities; and (b) how faculty should quantify the time spent on Outside Activities to ensure that they do not exceed any such limits. In terms of an upper limit, many institutions allow faculty to devote an average of one day per week to Outside Activities.¹⁶ Quantifying time spent is much more difficult, however, and raises the issue of how the denominator should be defined (e.g., Five or seven-day week? Eight-hour day or longer? Average over 52 weeks, or only weeks actually worked, excluding vacation days?).¹⁷ Institutions also need to consider whether documentation or tracking mechanisms are appropriate or necessary.

- **Who will perform the review, and will there be an appeals process?**

Processes should include an opportunity for review at the supervisory, departmental and/or dean's office level to ensure that institutional leaders who are most knowledgeable about the faculty member's Institutional Responsibilities have an opportunity to evaluate the Outside Activity's impact on those responsibilities. Some institutions may choose to have COCs evaluated by a faculty review committee. Certain types of Outside Activities may require review by central administrative units, such as export control, conflict of interest, or technology transfer offices. Review and approval by the provost's office also may be warranted for some situations. Further, assessing senior leaders' Outside Activities may require particular care to ensure transparency and a fully independent review.

¹⁵ (Dec. 7, 2020), available at <https://policy.umn.edu/operations/outsideconsulting>

¹⁶ *Supra* n. 10.

¹⁷ *See, e.g.*, Princeton University, Dean of the Faculty, "[Outside Professional Activities](#)," (accessed Jan. 27, 2021) ("The University interprets the one-day-a-week rule as permitting one working day per calendar week (*i.e.*, one eight- to twelve-hour day out of seven) to be devoted to outside professional activities.").

Outside Activities that go to the heart of the academic mission, such as teaching or performing research for an External Entity, may require special permissions.¹⁸ Finally, institutions also must consider whether their processes will incorporate an appeals process, and if so, who will be responsible for reviewing appeals.

- **How will the review process for COC interface with other disclosure, review, and approval processes?**

There are distinct criteria for the review of COC and COI concerns, and review processes typically encompass distinct reviewing/approving units as well. Thus, many institutions have separate COC and COI disclosure/review/approval processes. For example, the University of California system has one system for the disclosure/review/approval of Outside Activities for COC and another for COI.¹⁹ Other institutions may have a combined system for collection of information pertaining to Outside Activities, and this system then disseminates the information that is collected to the various units that are responsible for COC and COI review/approval.²⁰

In any event, as discussed above, it is possible for a single Outside Activity to present both COC and COI concerns, forcing institutions to consider how to coordinate review to ensure the activity is thoroughly vetted for both types of concerns. The timing and frequency of reporting (COC vs. COI) also should be considered (e.g., annually vs. rolling). Disclosure mechanisms such as forms, routing, software systems, and review processes should be tailored to promote:

- Appropriate involvement by departmental and central administrative units (e.g., conflict of interest office, office of sponsored programs, export controls office, provost's office);
- Receipt of complete and consistent information by those offices;
- Ease of use and ability to update the collected information;
- Reduction of duplicative data entry by faculty members through well-constructed entry forms, the ability to carry-over information from one reporting period to the next, and the use of a single disclosure system accessed by multiple offices where possible; and

¹⁸ See, Virginia Commonwealth University, "[Outside Professional Activity & Employment Policy, Research and Continuing Education](#)," (Jan. 1, 1983). See, also, Harvard University, Office of the Provost, "[Statement on Outside Activities of Holders of Academic Appointments](#)," (accessed Jan. 1, 2021), ("Persons holding full-time academic appointments at Harvard should devote their teaching efforts primarily to the education of Harvard students. Faculty members may not hold a regular faculty appointment at another institution, except in connection with a Harvard-sponsored joint program with that institution, or similar arrangement as approved by their Dean.").

¹⁹ University of California San Francisco, "[FY20 Outside Activity Tracking System \(OATS\) Annual Certification Notification](#)," (July 9, 2020).

²⁰ University of Chicago, "[COI-COC Processing](#)," (accessed Jan. 17, 2021).

- Consistency between information reported to federal sponsors and what is reported to the Home Institution.

As federal funding agencies look to roll out new policies for COC disclosure, institutions may want to consider combining COC and COI disclosure and review processes for efficiency and thoroughness. In this regard, the 2021 JCORE Recommendations suggest that institutions maintain a repository of disclosure filings from all employees involved in the research enterprise, whether they receive federal research funding or not.²¹ Additionally, high-level “cross-training” of personnel involved in COC and COI review processes may be helpful.

- **What are potential management strategies for conflicts of commitment?**

Institutions should consider including potential COC management strategies in COC policies, as well as the development of COC management plans for individual cases. Possible strategies could include the following items:

- Transparency and disclosure
- Enhanced, mandatory COC training
- Full or partial leave of absence or use of sabbatical leave for the Outside Activity
- Restructuring research responsibilities to manage the conflict, such as adding an additional principal investigator or mentor
- Oversight by senior faculty or administrators, such as regular check-ins to ensure appropriate mentoring and lab supervision
- Elimination, reduction, or suspension of the Outside Activity
- Reduction in the Home Institution appointment to accommodate the Outside Activity

- **What are the Sanctions for Failure to Disclose?**

In the context of FCOI, institutions are required to include in their FCOI policies the sanctions for failure to disclose and other policy violations. In the context of COC, institutions should assess whether the same sanctions should apply, or whether there should be a different approach.

JCORE suggests that institutions prescribe “appropriate and effective consequences for violation of disclosure requirements and other activities that threaten research security and integrity.”²² The

²¹ *Supra* n. 1 at p. 8.

²² *Id.* at p. 13.

recommendations go on to suggest a range of possible consequences from removing an individual from performing activities on a research contract or grant to termination of tenure and expulsion.²³

Institutions should consider that some FGTPs and other programs require participants to withhold and not disclose such participation to their Home Institutions and should make clear that any such requirement violates the Home Institution's disclosure policies. This type of withholding of information could, in and of itself, indicate that a COC is present. In many cases, however, non-disclosure may result from an innocent omission or confusion regarding requirements. Sanctions should take into account a range of scenarios and mitigating factors.

Addressing Common COC Conundrums

Most institutional policies regarding faculty External Activities have three similar elements, which are listed here.

- An assertion that the faculty member's primary allegiance should be to the Home Institution.²⁴
- The specification of a certain number of days, or a percentage of time (generally equivalent to one day per week), of institutional time during which faculty members can engage in External Activities.²⁵
- A description of the process for Outside Activity disclosure, review, and approval to ensure that the activities do not interfere with faculty member obligations at the Home Institution.²⁶

²³ *Id.*

²⁴ See, e.g., Emory University, *Faculty Handbook*, Chapt. 13, Section 13.3, "[Conflict of Commitment](#)," (accessed Jan. 1, 2021)("Emory faculty owe their primary professional allegiance to the university; their primary commitment of time and intellectual energies is to the education, research, and other programs supporting the university's mission."); New York University, "[Academic Conflict of Interest and Conflict of Commitment Policy](#)," Section III.A, (Sept. 1, 2013)("Full-time NYU faculty members owe their primary professional allegiance to NYU, and their primary commitment of time and intellectual energies should be to NYU's teaching, research, and clinical programs.").

²⁵ See, e.g., University of Pittsburgh, "[Faculty Use of University Time for Outside Professional Activities](#)," (accessed Jan. 1, 2021)("University time spent on outside professional activity must not exceed an average of one (1) day per week, up to 35 days (for 8-month appointees) or 48 days (for 11-month appointees) each academic year."); University of Washington, "[Outside Professional Work Policy](#)," Section 2.B., (May 20, 2015)("Subject to approval in advance, full-time members of the faculty, librarians, and academic personnel may engage in outside consulting work for remuneration to the maximum extent of 13 calendar days each academic quarter in which the individual is employed (averaging no more than one day per seven-day week.")).

²⁶ See, e.g., University of Alabama at Birmingham, *Faculty Handbook*, "[External and Internal Activities](#)," Section 3.11.1, (accessed Jan. 1, 2021)(requiring advance written approval to participate in external activities from dean through department chair).

To address the issues that arise in the Inappropriate Foreign Influence area, however, Outside Activity policies also must consider certain conundrums that frequently arise in this space. These conundrums are discussed in the following subsections.

Nine-month Faculty Appointments

Faculty in some disciplines traditionally have nine-month appointments, and frequently pursue employment or other activities with External Entities during the prescribed summer break. Although this situation may not create a COC based on the time involved, it may still involve activities that compete with Institutional Responsibilities. Faculty, however, may assert that the institution does not have authority over Outside Activities during a period in which the faculty are not compensated.²⁷ On the other hand, the PHS Regulations on FCOI require disclosure of any Significant Financial Interests, regardless of when these interests are acquired.²⁸ Further, funding agencies have recently made clear that they require disclosure of payments from non-U.S. institutions of higher education as well as disclosure of unpaid or honorary appointments.²⁹ Finally, some summer activities (or, in some cases activities undertaken during a sabbatical period) - especially those involving research - may “bleed over” into the academic year. In light of these factors, institutions may have a reasonable basis to seek disclosures of activities outside the academic year, but they may want to consult with legal counsel when establishing the basis and parameters of disclosure and review.

Review of Agreements for Outside Activities - Consulting

As discussed above, agreements between faculty and External Entities may contain numerous provisions that are problematic for the Home Institution such as employment conditions, authorship requirements, and provisions affecting intellectual property. In light of these provisions, Home Institutions must weigh the pros and cons of reviewing such agreements. These include the following items:

- **Potential Advantages**
 - Helps ensure that Outside Activities are permissible and in accordance with all relevant institutional policies
 - Protects Home Institution interests such as intellectual property (IP)
 - Allows for Home Institutions to understand breadth and scope of Outside Activities

²⁷ Note that institutions may take different approaches regarding faculty with 9-month appointments. Generally, such faculty members remain employees of the institution throughout the year and continue to receive benefits. Some institutions may pay the faculty member’s 9-month salary over a 12-month period, and faculty may continue to access and use the Home Institution’s resources during this time.

²⁸ 42 CFR Section 50.604(e)

²⁹ See, e.g., NIH NOT-OD-19-114, *supra* n. 13.

- Promotes compliance with funding agency requirements, including any requirements to provide agreements³⁰
- Provides an opportunity to discuss with faculty the pros and cons of entering into particular agreements

- Potential Disadvantages
 - Demands additional resources and processes dedicated to agreement review
 - May give rise to inconsistent review outcomes, based on different reviewer perspectives
 - May delay Outside Activity approval and/or COI/COC determinations
 - Increases the risk that review will be construed as providing legal advice to faculty members and thus increase institutional legal exposure
 - Increases potential reputational and regulatory risk from implied endorsement of the Outside Activity by the Home Institution

When an institution decides to incorporate consulting agreement review as part of its Outside Activity review and approval process, additional conundrums are raised:

- How will the institution review and approve Outside Activities for which the faculty member states that no agreement exists?
- What does “review” of the agreement imply? A clear differentiation between a review for permissibility versus individual legal representation must be established in policy and practice.
- Will institutional resources be allocated for direct negotiations with External Entities or will the affected faculty members act as a go-between?

Some institutions have addressed these issues by providing faculty with template consulting agreements or boilerplate provisions that address Home Institution concerns for incorporation into consulting agreements.³¹

³⁰ [NIH 2020 Virtual Seminar Presentation Materials, Commitment Transparency](#), (Jan. 13, 2021) (advising that NIH will impose a requirement that grant recipients provide copies of investigator’s grant and contract agreements with external foreign entities).

³¹ See, e.g., Penn State University Altoona, [“Guidelines for Faculty Consulting Agreements,”](#) (accessed Feb. 12, 2021) (sets forth terms recommend for inclusion in faculty consulting agreements and terms that should be avoided); University of Rochester, [“Faculty Consulting Agreement Template,”](#) (accessed Feb. 12, 2021).

Effort Reporting and Certification

Federal agencies are rightly concerned that Outside Activities may interfere with effort commitments on sponsored projects. Grants management approaches to effort reporting, however, exclude, by definition, effort outside the institution. As set forth in the Uniform Guidance, “effort” is based on Institutional Base Salary (IBS), which does not include external activities by definition and is not based on a particular number of hours per week or other metric. Thus, in accordance with longstanding grants management regulations, “100% effort” is the total time spent on activities for which the individual receives IBS.³² This metric is only partly useful in assessing an individual faculty member’s “capacity” to take on Outside Activities because, as stated, it cannot, by definition, encompass Outside Activities. Despite this definition, at some point, a faculty member’s commitment to perform an Outside Activity may require a “real-world” evaluation. This analysis requires some type of quantification of the amount of time that the faculty member has committed to Institutional Responsibilities and comparing that commitment to the time that the faculty member will commit to the Outside Activity. Of course, this quantification can never be precise, given that faculty do not punch time clocks or work a 40-hour week, rather they have schedules that constantly shift among their Institutional Responsibilities.

Detecting Undisclosed Outside Activities & Due Diligence

The 2021 JCORE Recommendations state that institutions “need to develop the means to identify instances where disclosures are incomplete or inaccurate, or when disclosure policies are otherwise violated.”³³ A recent survey conducted by the Department of Health and Human Services Office of the Inspector General regarding academic institutions’ responses to Inappropriate Foreign Influence may supply some clues in this regard. This survey asked institutions whether they employed certain monitoring or due diligence efforts, including collecting copies of agreements with External Entities, contacting External Entities to confirm disclosure details reported by researchers, and comparing information disclosed by researchers with information found in external sources such as web searches and journal articles. Yet, given most institutions’ limited resources for monitoring activities, such efforts may not be feasible, or at best, applied to a sample of cases through a risk-based approach. This use of sampling, coupled with training regarding disclosure requirements, may provide an alternate method for quality assurance in this area.

³² 2 CFR Section 200.430.

³³ *Supra* n. 1 at p. 12.

Conclusion

Ensuring the right balance between Outside Activities and institutional obligations remains a central issue for institutions, particularly now with the additional overlay of concern regarding Inappropriate Foreign Influence. It seems likely that federal agencies will continue their focus on COC issues, given the bipartisan nature of such concerns, the passage of the NDAA 2021 with its disclosure requirements, and the fact that numerous federal agencies were involved in developing the 2021 JCORE Recommendations.

Though the specific details of federal funding agency requirements for COC policies are not yet known, it is clear that agencies will be issuing additional requirements. Accordingly, institutions may want to consider this Framework when reviewing current COC policies and processes and determining whether changes may be warranted. Any such changes must not only address Inappropriate Foreign Influence, but also ensure that COC policies continue to enable faculty members to engage in Outside Activities that benefit faculty, their Home Institutions, and the U.S. research enterprise as a whole.

Appendix A: Case Studies and Possible Review Considerations

Case Study No. 1: Leadership of a Not-for-Profit Association

 **Key Words:** Travel, not-for-profit, officer

Prof. Washington is elected as president of a prestigious national not-for-profit association. This position aligns with the Home Institution's mission, although there is no relationship, including no research funding, between the association and Home Institution. As president, Prof. Washington receives no compensation, only reimbursement of travel expenses. However, the position requires multiple trips a year to various engagements and involves much more of a time commitment than the one day/week the Home Institution permits for faculty Outside Activities.

- Could there be a risk that the association would compete against the Home Institution for donations, sponsored funding, talent, or other resources? What facts would be needed to assess this potential risk?
- Is there a possibility, in some cases, that Prof. Washington might be required to prioritize responsibilities to the not-for-profit over those to the Home Institution?
- Whose input would be needed to assess this potential COC? The department chair could provide input regarding departmental obligations such as teaching and service, but is dean or provosital input needed as well? Why or why not?
- Should a partial leave of absence be considered for this Outside Activity? Could the president's term be limited? Are there other management strategies?

Case Study No. 2: Expert Witness for Software Company

 **Key Words:** IP, software, consulting, non-disclosure or confidentiality agreement, agreement review

Prof. Adams created software-related intellectual property (IP) several years ago. The Alpha Company has a non-exclusive license for the IP through Prof. Adams' Home Institution, and Prof. Adams receives a portion of the licensing revenue, per Home Institution policy. Alpha Company asks Prof. Adams to consult regarding its legal actions against Bravo University, which licensed related technology to the Alpha. The consulting agreement has a non-disclosure agreement covering all information Prof. Adams receives about or related to the Alpha Company. Prof. Adams fears the consulting agreement could interfere with her responsibility to support her Home Institution if problems arise concerning the licensing agreement between Bravo University and Alpha Co.

- Who, if anyone, should review the agreement to advise Prof. Adams as to whether this proposed consulting activity could result in a COC?

- Should Prof. Adams confer with others at her Home Institution to gain advice?
- Who should decide whether the proposed consulting arrangement is a COC
- If it is, could it be managed? How?
- Can Prof. Adams' Home Institution prohibit Prof. Adams from participating in the consulting activity if it finds a COC?

Case Study 3: Deanship at a Non-U.S. University

 **Key Words:** Dean, honorary appointment, sabbatical, summer/winter break

Prof. Jefferson took sabbatical to serve as a visiting professor at Charles University in China. During his sabbatical, he accepted an appointment as the dean of academic affairs at Charles University. After his sabbatical, he returned to his U.S. Home Institution, but he maintained his role as a dean at Charles U. Prof. Jefferson did not disclose his appointment as a dean to his Home Institution, and he continues to spend several weeks in the summer and during winter break travelling back to Charles University.

- Under what circumstances, if any, would this scenario not create a COC?
- What additional information is needed to evaluate the risk here? Questions could include:
 - Is Charles University a restricted entity? Is it known to have ties to the Chinese military?
 - What is the nature of Prof. Jefferson's research, if any? Does his work involve any export controlled or proprietary information?
 - Has Prof. Jefferson signed a contract with Charles University? What is the term of his commitment? What does the contract require?
 - What are Prof. Jefferson's responsibilities as a dean? Are they similar to the expectations of such a position in the U.S.?
 - How much time does Prof. Jefferson spend on Charles University activities?
 - How is Prof. Jefferson described on the Charles University website?
- Prof. Jefferson states that his role at Charles University is purely honorary and that he is just a "figurehead." How might his statement be validated? Even if his role is truly non-substantive, does it nonetheless create an appearance of a COC? How harmful is such an appearance?

Case Study 4: Consultant to Perform Company Research

 **Key Words:** Consulting, part-time job

Prof. Madison is a professor of ceramic engineering at Home Institution. Home Institution allows faculty to spend one day per week on Outside Activities that are related to their field of

expertise. Faculty members who want to exceed the time limit must request approval from their dean and justify it with an explanation of how the activity will benefit the Home Institution.

Prof. Madison also is a consultant for Delta Company, a cutting-edge ceramics manufacturer. Prof. Madison works for Delta one day a week, on average, providing scientific advice. Delta asks Prof. Madison to begin performing research work for the company, and this new activity would increase the time she works for Delta to 20 hours per week.

The Dean denies Prof. Madison's request to engage in 20-hours per week of Outside Activities. Prof. Madison argues the work will help her keep her students current with industry trends. The Dean states the commitment will reduce the time Prof. Madison spends with her students and views the 20-hour per week consulting commitment as a part-time job. Prof. Madison insists that she works 80 hours or more per week for Home Institution.

- Rather than conducting the research consulting as an Outside Activity, could Prof. Madison carry out this work as sponsored research at Home Institution? Under what circumstances would that be appropriate, or inappropriate?
- Is there an opportunity to involve graduate students in the work to gain real world experience? Would this be allowed under institutional policies (e.g., involving students in Outside Activities)?
- Is Prof. Madison's institutional intellectual property (IP) licensed to Delta Company?
- Is the work Prof. Madison will perform for Delta Company sufficiently separate and distinct from her ongoing institutional research (i.e., no scientific overlap which could lead to IP ownership concerns between Home Institution and Delta)?
- Can the Dean offer Prof. Madison a reduced institutional appointment to allow for the additional consulting time per week?
- Should the Dean be required to explain his reasoning in support of his decision? Does the Dean have facts to support his decision (e.g., complaints about Prof. Madison's lack of availability)?
- Does the policy allow for an "appeal" - if so, to whom? What should the criteria be for review?

Case Study 5: Co-direct a Laboratory at another Institution

 **Key Words:** Grant proposal, thesis committee, lab co-director, collaboration

Prof. Monroe is a professor of pharmacology at Home Institution. Prof. Monroe travels frequently to conferences and to collaborate with other scientists. Echo University recently invited Prof. Monroe to be co-director of a lab at Echo. This position will require Prof. Monroe to spend, on average, one day per week working on projects at Echo. Prof. Monroe will submit

grant proposals through Echo in which Monroe will be listed as Key Personnel. Prof. Monroe also will chair a doctoral student's thesis committee at Echo.

Prof. Monroe's dean states that Prof. Monroe is not permitted to be a lab co-director or a thesis committee chair at another institution. Prof. Monroe argues that scholarly collaboration with peers at other institutions is expected of faculty. The dean cites the significant time commitment and states that the nature of the activities impermissibly diverts Prof. Monroe's intellectual energy and creativity, and potential grant funding, away from Home Institution.

- Does Home Institution's policy explicitly state activities such as this are prohibited or is it "assumed"? Is an explicit statement necessary?
- What if Echo University was an international institution? Would this make a difference?
- What if Prof. Monroe accepted the position at Echo University without disclosing it to Home Institution?
- Is there a way for Prof. Monroe to collaborate with Echo University that would take into account the dean's concerns? What might that relationship look like (e.g., institutional collaboration agreement with a defined statement of work and research objectives)?
- Would the dean or someone in leadership need to be involved in negotiating the relationship with Echo University?
- Are there other possible management strategies? For example, could Prof. Monroe take a sabbatical for a year to work on this collaboration? Instead of chairing the doctoral committee, could Prof. Monroe be a member?

Case Study 6: Highly Compensated Consultant with Access to Company's Proprietary Data Set

 **Key Words:** Data set, proprietary, leave, employment offer

Prof. Jackson is a computer science professor who is being recruited by Foxtrot Company. Prof. Jackson wants to remain in academia, but Foxtrot is offering a very significant salary increase and will provide Prof. Jackson access to a unique data set collected from users of Foxtrot's technology. Prof. Jackson negotiates an alternative offer. She will take one semester of leave from Home Institution to work full-time at Foxtrot Co. Thereafter, she will spend one day a week at Foxtrot, for which Foxtrot will pay her an amount equivalent to one-third of her annual Home Institution salary. Foxtrot also will provide Prof. Jackson, and two of her six graduate students, with access to the proprietary data set.

Prof. Jackson will be allowed to publish research on the data set but the data themselves cannot be made publicly available, per a data use agreement between Prof. Jackson and Foxtrot Co. Prof. Jackson explains to her dean that the subject matter of her engagement with Foxtrot Co.

will be similar to the subject of her NSF grant, and she will be able to validate her research results using Foxtrot's unique data set. When Prof. Jackson's dean expresses some concerns about the arrangement, Prof. Jackson says maybe she was wrong to reject Foxtrot Co.'s offer of full employment, and she threatens to leave Home Institution.

- Does the fact that Prof. Jackson's time commitment is one day per week alleviate any COC concern? Does the analysis change when the significant compensation from Foxtrot is considered? Is there a COC, or the appearance of a COC, although there is not compensation?
- Does the Foxtrot payment create a FCOI with respect to the NSF grant? What factors should be considered in this regard? How might such a conflict be managed?
- What are the ramifications of the data use agreement? If the data set cannot be made public, is there a risk that Prof. Jackson may not be able to comply with funding agency or journal data sharing requirements?
- What about the fact that only two of Prof. Jackson's graduate students will have access to the Foxtrot Co. data? Will such limited access create an appearance of preferential treatment for those students or other issues in the lab?
- What are the benefits of access to the Foxtrot data? Will it enable a more robust application of Prof. Jackson's research to real-world requirements?
- What impact does Prof. Jackson's engagement with Foxtrot have on her ongoing research activities and resulting institutional IP? Is there a possibility that Foxtrot will push for joint ownership of institutional IP because the research scope and company business are so closely related?
- Will access to the data by the graduate students require a separate agreement? If so, is it an employment agreement requiring assignment of IP to Foxtrot?

Case Study 7: Adjunct Faculty Position at Non-U.S. University

 **Key Words:** 9-month appointee, adjunct faculty, access to laboratory and office space

Prof. Van Buren is the world's expert in a rare disease that is prevalent in southern India, but not in the United States. Golf University in southern India wants to develop expertise in this field to help patients there. Golf University invites Prof. Van Buren to become an adjunct faculty member so that Prof. Van Buren will help the university build capacity in this area.

Prof. Van Buren is a 9-month appointee at Home Institution. Golf University asks Prof. Van Buren to commit to spending 2 months a year on site and offers him access to laboratory and office space during those months, as well as a 2-month salary. Golf University expects Prof.

Van Buren to help set up the laboratory with appropriate equipment, to develop research ideas and projects, and to mentor junior faculty and trainees.

Ultimately, if any new treatments emerge from these collaborations, Golf University plans to work quickly to bring them to market. Prof. Van Buren recently lost all U.S. federal funding for this line of research because the disease in question is so rare in the U.S.

- Does Prof. Van Buren’s arrangement with Golf University constitute a COC? As Prof. Van Buren is on a 9-month appointment at Home Institution, isn’t he allowed to spend his summer months on activities outside Home Institution?
- Is it realistic to assume that Prof. Van Buren’s activities at Golf University (i.e., lab activity, mentoring junior faculty and trainees) will be confined to two summer months? Could the activities at Golf University interfere with Prof. Van Buren’s commitment to Home Institution?
- Isn’t part of the academic mission to disseminate expertise so that others around the world can learn and build upon the progress made, to benefit their own communities? How is this mission reconciled with concerns about “diversion of intellectual capital”?
- Does the fact that Prof. Van Buren lost U.S. funding for his research on the rare disease establish a boundary between the work he would do in India and the work he does at Home Institution?
- Prof. Van Buren argues there is a moral obligation to assist a developing country to develop new treatments for diseases common in that region. How should the institution respond?

Case Study 8: Founding a Non-profit Spin-out

 **Key Words:** Non-profit, co-founder, spin-out, failed to report

Prof. Harrison is a department head who endorsed an institutional ‘affiliation’ with a non-profit entity – the Juliette Company – spun out of a departmental program he created without Home Institution’s review and approval. Prof. Harrison is listed as a co-founder and advisor at the Juliette Company. Juliette Company’s mission is to help underprivileged youth and students gain access to training opportunities in the biotech sector, an area unrelated to Prof. Harrison’s research at Home Institution or to the research interests of his department.

At the very public announcement by the Juliette Company of this “collaboration,” the mayor of the city where Juliette Company is headquartered expressed his excitement at collaborating with Prof. Harrison and Home Institution. Prof. Harrison was present at the event with his Home Institution credentials on full display. Also present at the ‘launch’ with her Home Institution credentials on display, was Prof. Tyler, a senior researcher who reports to Prof. Harrison at Home Institution. Prof. Tyler also serves as the vice-president and co-founder of

the Juliett Company. Prof. Harrison failed to report his engagement with the Juliett Company in his annual Outside Activities report, but Prof. Tyler did.

- Were Home Institution policies for reporting outside professional activities followed? Would other policies be applicable (e.g., interactions with the media, use of Home Institution name and logo)?
- Is Prof. Harrison required to review and get approval from his Dean prior to entering into an affiliation agreement with External Entities?
- Are Prof. Harrison and Prof. Tyler required to disclose Outside Activities annually even if the activity is uncompensated?
- Is it appropriate for a faculty member to involve a subordinate in the faculty member's Outside Activities?
- Is there possible misuse of Home Institution's name when a collaboration is not approved by an appropriate institutional official?
- Were the titles assumed by Prof. Harrison and Prof. Tyler in line with what is permitted for full-time researchers and faculty at Home Institute engaging in Outside Activities?
- Were Home Institution resources being used to support Outside Activities?
- What risks may have been assumed by the Home Institution and/or Prof. Harrison and Prof. Tyler? Reputational? Legal? Financial?
- Can this case be effectively managed?

Case Study 9: Academic Medical Center Case Study

 **Key Words:** Hospital, clinical trials, recruit, consultant, mentorship

Dr. Wilson is a leading orthopedic surgeon with an extensive practice at Home Institution academic medical center. Dr. Wilson also leads several clinical trials on hip and knee replacements. He has been invited by a rural hospital – Oscar Hospital – in Peru to help establish a best-practice joint replacement program. Most of the work will be conducted via Zoom, but Dr. Wilson will need to spend at least two weeks a year at Oscar Hospital.

Oscar Hospital also hopes that Dr. Wilson will encourage medical students from Home Institution to participate in internships at the hospital and help recruit newly qualified surgeons to join the hospital's practice. Dr. Wilson will act as a consultant physician for specific patients at Oscar Hospital, but he will never be the physician of record. He will be paid an hourly consulting fee for his activity at Oscar Hospital, and the hospital plans to publicize his "mentorship" to patients and the public.

- Does this engagement constitute a COC for Dr. Wilson? What information would be needed to assess the potential conflict?

- If this engagement constitutes a COC, could it be managed? What changes might be required to manage the conflict?
- How could the arrangement be monitored to ensure that Dr. Wilson continues to meet his commitments at Home Institution?
- Does this engagement involve the practice of medicine in Peru? If so, does that present additional risks? Will Dr. Wilson be covered by malpractice insurance? If so, whose insurance will cover these activities?
- Are there any patient privacy concerns regarding Dr. Wilson's consulting physician activities? If so, are they only issues under Peruvian law, or could U.S. law be implicated?

Case Study 10: International Health Initiative Case Study

 **Key Words:** Fundraiser, satellite clinical care, federal grants

Dr. Polk is the chief of Sierra Academic Medical Center's (AMC) Global Health Initiative. Dr. Polk spends 100% of his time working in Kenya at Tango Hospital, which is owned by Sierra and supported by federal agencies, private foundations, and individuals. Dr. Polk is a successful fundraiser, and he has generated significant donor revenue that he has used to develop satellite clinical care offerings for Tango.

Sierra AMC allows clinical faculty to spend one day per week on outside professional activities related to their field of expertise. These activities must be approved by the faculty member's chief of service or Sierra's president if the faculty member is a chief of service.

Dr. Polk approached Sierra's president seeking approval to consult for Victor International Hospital (Victor) for 40 hours/month. Dr. Polk's consulting would focus on assisting Victor in fundraising within Kenya and obtaining U.S. federal grants, as well as establishing a satellite clinical care program for Victor. Dr. Polk maintains that his work for Victor will not impinge on his responsibilities to Sierra and will only increase medical and humanitarian services within Africa.

Questions

- Does the arrangement proposed by Dr. Polk constitute a COC? A COI? If so, how?
- Could Dr. Polk's proposed consulting activity be modified in a way to make it acceptable to Sierra? If so, how?

COGR Council On Governmental Relations							
Institutional-Related Requirements Under Key Documents Pertaining to Federal Research Funding and Inappropriate Foreign Influence							
Definitions of Key Terms							
Key Questions/Issues	NSM-33	JCORE Recommendations	NDA 2021 Section 223	NSF Documents Re. COI & COC (2020 PAPPG, FAQs, etc.)	NIH GPS & Associated Documents (Notices, FAQs, PHS Regulations on Objectivity in Research)	Key Differences	Comments
Conflict of Interest (COI)	"Situation in which an individual, or the individual's spouse or dependent children, has a financial interest or financial relationship that could directly and significantly affect the design, conduct, reporting, or funding of research."	Same definition used in NSM-33.	No definition.	COI = "When reviewer(s) reasonably determine that a significant financial interest could directly and significantly affect the design, conduct, or reporting of NSF-funded research or educational activities."	Financial COI = "A significant financial interest that could directly and significantly affect the design, conduct or reporting of PHS-funded research."	•Unlike NIH & NSR the JCORE Recommendations and NSM-33: (a) do not have financial threshold requirements; (b) include affect on "funding of research."	
Conflict of Commitment (COC)	"Situation in which an individual accepts or incurs conflicting obligations between or among multiple employers or other entities. Many institutional policies define conflicts of commitment as conflicting commitments of time and effort, including obligations to dedicate time in excess of institutional or funding agency policies or commitments. Other types of conflicting obligations, including obligations to share improperly information with, or to withhold information from, an employer or funding agency, can also threaten research security and integrity, and are an element of a broader concept of conflicts of commitment."	Same definition used in NSM-33.	No definition.	No definition.	No definition		NSM-33 & JCORE Recommendations definition includes contractual non-disclosure provisions that are common in many consulting contracts as an example of a COC.
Current & Pending [Research] Support	See definition of "Other Support."	See definition of "Other Support."	"All resources made available or expected to be made available to an individual in support of the individual's research and development efforts." Includes foreign and domestic sources, sources made available to applicant institution or directly to individual, with or without monetary value, and in-kind contributions requiring a commitment of time and directly supporting individual's R&D efforts (e.g., office/lab space, equipment, supplies, employees, students).	"All resources made available to an individual in support of and/or related to all of his/her research efforts, regardless of whether or not they have monetary value." Includes in-kind contributions with an associated time commitment. Does not include support provided directly to postdocs from an other organization. Does not include consulting activities unless the individual is conducting research as part of the consulting.	See definition of Other Support.	•NDA 2021 and NSF define "current and pending support" v. JCORE, NSM and NIH which define "other support." •NDA 2021 definition is narrower than NSF definition because it is limited to resources "in support of the individual's research and development efforts." For this reason, it also is narrower than JCORE and NSM-33 definitions of "Other Support." •NSF definition has exclusions that are not found in the other definitions such as support provided to postdocs from another organization and consulting that does not involve research. •NSF definition also introduces the concept of time commitment with respect to reporting in-kind contributions. In-kind contribution not intended for use on the NSF project/proposal and with no associated time commitment do not need to be reported.	
Other Support	"Other support, contractual or otherwise, direct and indirect, including current and pending private and public sources of funding or income, both foreign and domestic. For researchers this includes "all resources made available to a researcher in support of and/or related to all of their professional R&D efforts, including resources provided directly to the individual rather than through the research institution, and regardless of whether or not they have monetary value." Includes: foreign and domestic sources, in-kind (lab/office space, equipment, supplies, equipment); gifts with terms/conditions; financial support for lab personnel; students/visiting researchers supported by outside sources.	Same definition used in NSM-33.	See definition of Current & Pending Support.	See definition of Current & Pending Support.	All financial resources, whether federal, non-federal, commercial or institutional, available in direct support of an individual's research endeavors, including but not limited to research grants, cooperative agreements, contracts and/or institutional awards. Includes support provided to applicant entity or to individual investigator from foreign and domestic sources. Includes in-kind support (e.g., lab/office space, supplies, equipment, employees").	•NDA 2021 definition of Current & Pending Research Support is narrower than JCORE and NSM-33 definitions of Other Support. •NDA 2021 definition is limited to resources "in support of the individual's research and development efforts." •JCORE and NSM-33 definition extends to "all resources made available to a researcher in support of and/or related to all of their professional R&D efforts." [Emphasis added]. This may encompass consulting that does involve research.	JCORE and NSM-33 definitions may encompass consulting that does not involve research.
Foreign Government Sponsored Talent Recruitment Program (FGSTP)	"An effort directly or indirectly organized, managed, or funded by a foreign government or institution to recruit S&T professionals or students (regardless of citizenship or national origin, and whether having a full-time or part time position.)"	"An effort directly or indirectly organized, managed, or funded by a foreign government, including state-owned enterprises, or a foreign institution to recruit science & technology professionals or students (regardless of citizenship or national origin, and whether having a full-time or part-time position.)"	No definition.	No definition.	No definition.	•NSM-33 definition is subtly, but importantly different from JCORE definition. NSM includes a program organized/managed/funded "by a foreign government or institution." •JCORE definition makes clear that the "foreign institution" is "organized, managed or funded by a foreign government."	Given that the term includes "government-sponsored," the JCORE definition makes more sense.

Scope/Applicability

<u>Key Questions/Issues</u>	<u>NSM-33</u>	<u>JCORE Recommendations</u>	<u>NDAA 2021 Section 223</u>	<u>NSF Documents Re. COI & COC (2020 PAPPG, FAQs, etc.)</u>	<u>NIH GPS & Associated Documents (Notices, FAQs, PHS Regulations on Objectivity in Research)</u>	<u>Key Differences</u>
Is federal funding required to trigger applicability to an institution or individual?	Not, necessarily. Disclosure requirements broadly apply to the "U.S. R&D enterprise," which potentially encompasses those who are not federally funded." Agencies are directed to require disclosures from participants in the U.S. R&D enterprise who "significantly influence the design, conduct, reporting, reviewing or funding of federally-funded research" in accordance with the specifications in NSM-33. Although disclosure requirements currently specified in NSM-33, apply to "participants in the Federally funded R&D enterprise, " agencies may require disclosure of additional information and/or disclosure from a broader range of R&D enterprise participants as a matter or course or on request.	Recommendation dependent. The recommendations are directed to "research organizations" without specific reference to funding. Some recommendations reference NSM-33 with regard to standards that apply to recipients of federal F&D funding, but most are written in a way that they could apply to organizations, whether or not they received federal funding. Further, some specifically state that they apply regardless of funding source (e.g., Recommendations 6 & 10).	Yes. Applies to entities that apply for/receive research and development award from a federal agency and to individuals who meet the definition of "covered individual."	Yes. Applies to those applying for/receiving/working on NSF funded projects.	Yes. Applies to those applying for/receiving/working on NIH funded projects.	<ul style="list-style-type: none"> JCORE Recommendations have the largest scope with potential applicability of at least some of the recommendations to non-federally funded research organizations and individuals. NSM-33 has the next largest potential scope, at least with respect to disclosure requirements. At present, these are confined to participants in federally-funded R&D, with potential for agencies to expand to participants in the "U.S. R&D enterprise," which encompasses non-federally funded entities/individuals. The statutory authority for such an expansion, however, is unclear. NDAA 2021 has a much narrower scope, as compared to the JCORE Recommendations and NSM-33. It applies to individuals who apply for/receive federal R&D funding and who "contribute in a substantive, meaningful way" to scientific development/execution of federally-funded R&D project AND are designated as a "covered individual" by the federal funding agency.
Is there a funding threshold to trigger applicability to individual or institution?	<ul style="list-style-type: none"> No, for individual disclosure obligations. Yes, for requirement of establishing research security program. Threshold = \$50 million per year in federal science and engineering funding. 	No.	No. [Note: There is a financial threshold of \$100,000,000 in extramural research expenditures for applicability to federal funding agencies.]	No.	No.	<ul style="list-style-type: none"> A major distinction between NSM-33 & JCORE Recommendations concerns threshold at which an organization should establish a security program: <ul style="list-style-type: none"> NSM- requires this for research institutions receiving >\$50 million/year in federal science/engineering support. JCORE has no financial threshold for estb. of research security program, although recommendations are supposed to be "risk-based."

 Institutional-Related Requirements Under Key Documents Pertaining to Federal Research Funding and Inappropriate Foreign Influence						
Requirements (or Recommendations in the Case of JCORE Recommendations) & Timelines, if any						
Key Questions/Issues	NSM-33	JCORE Recommendations	NDA 2021 Section 223	NSF Documents Re. COI & COC (2020 PAPP, FAQs, etc.)	NIH GPS & Associated Documents (Notices, FAQs, PHS Regulations on Objectivity in Research)	Key Differences
Disclosures	<ul style="list-style-type: none"> Require disclosure of information related to potential COI and COC from "participants in the federally funded R&D enterprise" based on role. [NOTE: There is an internal inconsistency in terms of applicability. The "Roles and Responsibilities" section references disclosures from "participants in U.S. R&D enterprise who significantly influence the design, conduct, reporting, reviewing or funding of federally-funded research" while the section on specific disclosure requirements requires disclosures from "participants in federally funded R&D enterprise."] <ul style="list-style-type: none"> Must ensure federally-funded research organizations have policies/processes re. COI and COC. Due Date: Research funding agency heads must have disclosure policies by 1/14/22 Timing: Initial (part of proposal/award process, assigned relevant duties as contractor) and updates (annually or more often per change in circumstances) Categories of information to be disclosed: <ul style="list-style-type: none"> Other Support Organizational Affiliations & Employment FGSTP or Other Programs - Current or pending participation in/applications to FGSTP or programs sponsored by foreign governments, instrumentalities, or entities. Institution or funding agency may require copy of contract. Positions, Appointments & Affiliations -- foreign and domestic -- with foreign entities, including titled, un-titled, academic, professional, institutional, with or without remuneration, FT, PT, voluntary, adjunct, visiting or honorary. <ul style="list-style-type: none"> Persons within "Federally Funded R&D Enterprise" Covered by Disclosures: PIs/Sr. & Key Personnel, Program Officers, Researchers at Federal Labs and Facilities (whether or not federally employed) -- Must disclose all of the above categories of information. <ul style="list-style-type: none"> Peer reviewers, Advisory Committee or Panel Members -- Must disclose all of the above except "Other Support." Other Requirements: Agencies must standardize disclosure processes, definitions and forms to extent practicable -- coordinated by OMB, OSTP and Office of Government Ethics. <ul style="list-style-type: none"> Agencies may require broader disclosures or disclosures from a broader range of R&D enterprise participants. 	<ul style="list-style-type: none"> Recommends disclosures that will enable "reliable determinations" of whether/where COI and COC exist (i.e., "all information necessary to identify and assess potential" COC/COI). and development of appropriate risk mgmt. plans. <ul style="list-style-type: none"> Timing: Initial disclosures on hiring/assignment of relevant duties and annual updates (with consideration of more frequent updates to reflect changes.) Categories of Information to be Disclosed: Categories largely mirror NSM-33 categories, and include Other Support, organizational affiliations and employment, current/pending participation in FGSTP programs, and positions/appointments/affiliations that are "relevant to the individual's relationship to the research organization." Persons Required to Disclose: Recommends requiring disclosures from researchers (including postdocs and other staff), grad students, visiting scholars performing research over extended period, contractors. Other Requirements: <ul style="list-style-type: none"> Research organizations should assist employees, affiliates and students with disclosures that are required to comply with federal funding agency requirements. Institutions should require that copies of associated contracts be disclosed on request. 	<ul style="list-style-type: none"> Requires federal research agencies to require as part of application for an R&D award that each "covered individual" disclose information about resources made available, or expected to be made available to the individual "in support of the individual's research and development efforts." Timing: At time of application for award and update at request of agency prior to award and at any time subsequent, as determined by agency. Categories of Information to be Disclosed: Amt., type and source of all Current and Pending Support (see definition above) received by or expected to be received by the Covered Individual. Persons Required to Disclose: Individual who contributes in a "substantive, meaningful way to the scientific development or execution" of a R&D project proposed to be carried out with federal R&D funding AND is designated as a "covered individual" by the federal funding agency. <ul style="list-style-type: none"> Other Requirements: <ul style="list-style-type: none"> Individual must certify that disclosure is current, accurate and complete. Individual must agree to update disclosure on request and as determined by agency. Research institution applying for the federal funding must certify that each "covered individual" employee who is listed on funding application has been made aware of the requirements. Recommends that research organizations maintain repository of disclosure filings whether individuals are supported by federal funding. Research organizations should report COC and COI to funding agencies when appropriate, particularly when they can't be managed. Law enforcement should be notified if nondisclosure suggests illegal activity. 	<ul style="list-style-type: none"> Requires disclosure of Current & Pending Support as defined above and as detailed in NSF FAQ on Current and Pending Support at https://www.nsf.gov/bfa/dias/policy/papp/pappg20_1/faqs_cps20_1.pdf NSF terms and conditions provide process for post-award disclosure of undisclosed current support and in-kind contribution information. (Article 38) 	<ul style="list-style-type: none"> Requires disclosure of Other Support as defined above and as elaborated on in NOT-OD-19-114 and NIH webpage on Protecting U.S. Biomedical Intellectual Innovation. 	<ul style="list-style-type: none"> NDA 2021 has narrowest scope because it applies to fewest people and institutions; JCORE Recommendations have the largest scope because they are potentially applicable to research institutions and their employees regardless of funding, as well as to post-docs and graduate students and visiting scholars. See comparison of differences between definitions of Other Support and Current and Pending Support above. NDA 2021 has additional certifications from institution and individual making disclosure that are not present in the other documents.
Investigation of Violations of Disclosure Requirements, Including Consequences for Violations & Information Sharing	<ul style="list-style-type: none"> Investigation: Federal funding agencies and their Inspector Generals, General Counsel, and law enforcement are to work with university program offices and security officers and private sector to improve mechanisms/capabilities to identify and investigate violations of agency disclosure requirements. Due Date: None. Consequences: Agencies shall ensure appropriate and effective consequences for violation of disclosure requirements and other activities that threaten research security, including termination of contract/grant; removal of individual from contract/grant; suspension/debarment/declaration of ineligibility to participate in certain activities; suspension/debarment from receipt of federal funding; suspension/denial of Title IV funds; civil/criminal penalties. Due Date: None Information Sharing: <ul style="list-style-type: none"> Consistent with privacy laws/legal restrictions: funding agencies will share information from researcher disclosures. funding agencies will share information about individuals who violate disclosure and other policies or "whose activities clearly demonstrate an intent to threaten research security and integrity" with federal law enforcement, DHS, & Dept. of State. agency heads may provide notice to other federal funding institutions in cases "where significant concerns have arisen, but a final determination has not yet been made." funding agencies will include grant terms/conditions that allow for information sharing. 	<ul style="list-style-type: none"> Investigation: Research organizations should develop mechanisms to identify incomplete/inaccurate disclosures or policy violations, including documenting and reporting violations to authorities, including law enforcement where appropriate. Employment Agreements: Research organizations should include provisions in employment agreements that promote research security/integrity, including: <ul style="list-style-type: none"> Expectations regarding conducting/reporting activities outside of the employment period (e.g., summers for faculty with 9-month appointments) Expectations re. security training/policy adherence; Permit organizations to take effective action against violators. Consequences: Ensure appropriate penalties for violations of laws, agency standards, ethical standards and organizational policies, including the replacement on grant/contract, termination of grant funding, probation, revocation of tenure, termination, expulsion, civil & criminal penalties. Information Sharing: To extent consistent with law, research organizations should share information about violators with funding agencies and otherwise as required by law. 	<ul style="list-style-type: none"> Consequences for Violations: Federal funding agency may reject applications for R&D awards for violation of law or agency terms/conditions including disclosure requirements. <ul style="list-style-type: none"> If covered individual "knowingly fails" to disclose required information federal agency may: <ul style="list-style-type: none"> Reject application Suspend/terminate R&D award to individual or entity Temporarily or permanently discontinue any or all funding from agency for individual/entity Temporarily or permanently suspend/debar individual/entity; refer matter to appropriate IG for investigation; Temporarily or permanently suspend/debar individual/entity; refer matter to appropriate IG for investigation; Take other action as authorized by law. Place individual/entity in federal awardee performance and integrity information system for noncompliance to alter other agencies; <ul style="list-style-type: none"> Take other action as authorized by law. Restrictions on Actions Against Entities: Action may only be taken against entities if: <ul style="list-style-type: none"> entity did not make employed covered individual aware of disclosure and certification requirements; and entity knew covered individual failed to disclose required information and did not take steps to remedy nondisclosure before application was submitted; or head of research agency determines entity is owner/controlled/substantially influenced by covered individual and individual knowingly failed to disclose required information. <p>Process: Federal funding agency must provide notice to individual/entity prior to enforcement action and provide opportunity and process to contest proposed action.</p>	Policy violations handled per agency processes.	Policies violations handled per agency processes.	The potential consequences set forth in NSM-33 and the JCORE Recommendations for non-disclosure are much broader than those contained in NDA 2021. Further, NDA 2021 contains very specific parameters for holding an entity responsible non-disclosures by a covered individual.
Participation in FGSTP	<ul style="list-style-type: none"> Federal funding agencies shall establish (or clarify existing) policies that prohibit federal personnel who are also participants in U.S. R&D enterprise from participating in FGSTP. Agency heads may implement policies to extend this prohibition to some/all agency contractor personnel. Due Date: 1/14/22 	Research institutions should assist researchers who are considering participation in FGSTP by helping them with review of contracts and understanding their commitments and implications of those commitments.	No specific requirements.	See definition of Current and Pending Support	See definition of Other Support	Appears that there will be an federal-agency wide ban on participation in FGSTP. May potentially apply to researchers who have part-time appointments with federal agencies.
Training	<ul style="list-style-type: none"> Director of National Intelligence with agencies heads will develop information and intelligence products related to research security that can be provided to research institutions and others. Materials will include counterintelligence awareness training. Due Date: None Federal agencies will develop initial and annual refresher training for federal agency personnel conducting R&D activities or participating in process of allocating federal R&D funding re. research security. Due Date: None Research institutions research security programs should include export control training as an element. Due Date: 1/14/22 	<ul style="list-style-type: none"> Research organizations should offer Research Ethics & Compliance (RECR) training to all researchers, including new students, visiting scholars, employees and affiliates regardless of funding. Research organizations should ensure that all organization members are aware of circumstances and behaviors that pose research security risks, including: <ul style="list-style-type: none"> specific common provisions of FGSTP contracts obligations to conduct R&D activities for other entities without knowledge/permission of home institution foreign travel related to R&D activities, particularly when paid for by foreign entities, without justification regarding benefits extended travel that is inconsistent with organizational obligations collaborations with researcher on consolidated screening list gifts with terms/conditions. 	<ul style="list-style-type: none"> NDA 2021 requires entities to make covered individuals aware of their disclosure and certification requirements. 	N/A	N/A	<ul style="list-style-type: none"> NDA 2021 has very defined training requirements for entities. NSM-33 training requirements focus on federal agencies. JCORE Recommendations have very broad training requirements for research organizations.
Evaluation of Research Partnerships	N/A	<ul style="list-style-type: none"> Research organizations should establish a centralized review and approval process for evaluating formal research partnerships/contracts with outside entities for research security/integrity risks. Consider affiliations/ownership; value of IP; planned research activities; information sharing and publication rights; personnel exchanges; export control considerations; funding; contract terms. 	N/A	N/A	N/A	N/A