



## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (20-029)]

### **Reporting Requirements Regarding Findings of Harassment, Sexual Harassment, Other Forms of Harassment, or Sexual Assault**

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Final Notice of a new NASA term and condition regarding sexual harassment, other forms of harassment, and sexual assault.

**SUMMARY:** NASA is publishing, in final form, a new term and condition regarding sexual harassment, other forms of harassment, and sexual assault. NASA's intention to develop and implement this new term and condition was specified in the **Federal Register** of July 17, 2019, FR Doc. 2019-15088, on page 34206.

The many hundreds of U.S. institutions of higher education and other organizations that receive NASA funds are responsible for fully investigating complaints under and for compliance with federal non-discrimination laws, regulations, and executive orders. The implementation of new reporting requirements is necessary to help ensure research environments to which NASA provides funding are free from sexual harassment, other forms of harassment, and sexual assault. Additionally, NASA is bolstering our policies, guidelines, and communications. These requirements are intended, first, to better ensure that organizations funded by NASA clearly understand expectations and requirements. In addition, NASA seeks to ensure that recipients of

grants and cooperative agreements respond promptly and appropriately to instances of sexual harassment, other forms of harassment, and sexual assault.

**FOR FURTHER INFORMATION CONTACT:**

For any questions, comments, or concerns regarding sexual or other forms of harassment, please contact the Office of Diversity and Equal Opportunity (ODEO), 300 E Street, SW, Washington, DC 20546, email: *civilrightsinfo@nasa.gov*; telephone (202) 358–2180; FAX: (202) 358-3336.

**SUPPLEMENTARY INFORMATION:** As a U.S. funding Agency of scientific research and development, and the primary funding Agency for aeronautics and space research and technology, NASA is committed to promoting safe, productive research and education environments for current and future scientists and engineers. We consider the Principal Investigator (PI) and any Co-Investigator(s) (Co-I) identified on a NASA award and all personnel supported by a NASA award to be in a position of trust and must not engage in harassing behavior during the award period of performance whether at the recipient’s institution, on-line, or outside the organization, such as at field sites or facilities, or during conferences and workshops.

On July 17, 2019, NASA published a request for public comment regarding the Agency’s proposed implementation of new notification requirements [84 FR 34206, pages 34206-24208, July 17, 2019]. All comments were carefully considered in developing the final version of the term and condition. A document listing the comments and NASA responses is posted on the NASA ODEO website at: <https://www.nasa.gov/offices/odeo/policy-and-publications>.

Upon implementation, the new term and condition will require recipient organizations to report to NASA any findings/determinations of sexual harassment, other forms of harassment, or sexual assault regarding a NASA funded PI or Co-I. The new term and condition will also require the

recipient to report to NASA if the PI or Co-I is placed on administrative leave or if the recipient has imposed any administrative action on the PI or Co-I, or any determination or an investigation of an alleged violation of the recipient's policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, other forms of harassment, or sexual assault. Finally, the new term and condition specifies the procedures that will be followed by NASA upon receipt of a report.

The full text of the new term and condition is provided below:

**Reporting Requirements Regarding Sexual Harassment, Other Forms of Harassment, or Sexual Assault**

(a) The Principal Investigator (PI) and any Co-Investigator(s) (Co-I) identified on a NASA award are in a position of trust. These individuals must comport themselves in a responsible and accountable manner during the award period of performance, whether at the recipient's institution, on-line, or at locales such as field sites, facilities, or conferences/workshops. Above all, NASA wishes to assure the safety, integrity, and excellence of the programs and activities it funds.

(b) For purposes of this term and condition, the following definitions apply:

1. *Administrative Leave/ Administrative Action:* Any temporary/ interim suspension or permanent removal of the PI or Co-I, or any administrative action imposed on the PI or Co-I by the recipient under organizational policies or codes of conduct, statutes, regulations, or executive orders, relating to activities, including but not limited to the following: teaching, advising, mentoring, research, management/ administrative duties, or presence on campus.
2. *Finding/Determination:* The final disposition of a matter involving sexual harassment or other form of harassment under organizational policies and processes, to include the exhaustion of

permissible appeals exercised by the PI or Co-I, or a conviction of a sexual offense in a criminal court of law.

3. *Other Forms of Harassment:* Non-gender or non-sex-based harassment of individuals protected under federal civil rights laws, as set forth in organizational policies or codes of conduct, statutes, regulations, or executive orders.

4. *Sexual harassment:* May include but is not limited to gender or sex-based harassment, unwelcome sexual attention, sexual coercion, or creating a hostile environment, as set forth in organizational policies or codes of conduct, statutes, regulations, or executive orders.

(c) *The recipient is required to report to NASA:* (1) Any finding/determination regarding the PI or any Co-I<sup>1</sup> that demonstrates a violation of the recipient's policies or codes of conduct, relating to sexual harassment, other forms of harassment, or sexual assault; and/or (2) if the PI or any Co-I is placed on administrative leave or if any administrative action has been imposed on the PI or any Co-I by the recipient relating to any finding/determination or an investigation of an alleged violation of the recipient's policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, other forms of harassment, or sexual assault.<sup>2</sup> Such reporting must be submitted by the Authorized Organizational Representative (AOR) to NASA's Office of Diversity and Equal Opportunity at <https://missionstem.nasa.gov/term-condition-institutional-harassment-discr.html> within 10 business days from the date of the finding/determination, or the

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<sup>1</sup> If a co-I is affiliated with a subrecipient organization, the AOR of the subrecipient must provide the requisite information directly to NASA and to the recipient. The subrecipient must act in accordance with Title 2 of the Code of Federal Regulations, Section 200.331, Requirements for Pass-Through Entities.

<sup>2</sup> Recipient findings/determinations and placement of a PI or Co-I on administrative leave or the imposition of an administrative action must be conducted in accordance with organizational policies and processes. They also must be conducted in accordance with federal laws, regulations, and executive orders.

date of the placement of a PI or Co-I by the recipient on administrative leave or the imposition of an administrative action.<sup>3</sup>

(d) Recipient agrees to insert the substance of this term and condition in any subaward/subcontract involving a co-investigator. Recipient will be responsible for ensuring that all reports, including those related to co-investigators, comply with this term and condition.

(e) Each report must include the following information:

- NASA Award Number;
- Name of PI or Co-I being reported;<sup>4</sup>

*Type of Report:* Select one of the following:

- Finding/Determination that the reported individual has been found to have violated the recipient's policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, other forms of harassment, or sexual assault; *or*
- Placement by the recipient of the reported individual on administrative leave or the imposition of any administrative action on the PI or any Co-I by the recipient relating to any finding/determination, or an investigation of an alleged violation of the recipient's policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, other forms of harassment, or sexual assault.

The recipient must also provide:

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<sup>3</sup> Such report must be provided regardless of whether the behavior leading to the finding/determination, or placement on administrative leave, or the imposition of an administrative action occurred while the PI or Co-I was carrying out award activities.

<sup>4</sup> Only the identification of the PI or Co-I is required. Personally identifiable information regarding any complainants or other individuals involved in the matter must not be included in the report. In the rare circumstance that information regarding a PI or Co-I is subject to the Family Educational and Privacy Act, 20 U.S.C. § 1232g and its implementing regulations, 35 C.F.R. Part 99, the recipient shall comply with those requirements.

- A description of the finding/ determination and action(s) taken, if any; *and/or*
- The reason(s) for, and conditions of placement of the PI or any Co-I on administrative action or administrative leave.

The recipient, at any time, may propose a substitute investigator if it determines the PI or any Co-I may not be able to carry out the funded project or activity and/or abide by the award terms and conditions.

In reviewing the report, NASA will consider, at a minimum, the following factors:

- a. The safety and security of personnel supported by the NASA award;
  - b. The overall impact to the NASA-funded activity;
  - c. The continued advancement of taxpayer-funded investments in science and scientists; and
  - d. Whether the recipient has taken appropriate action(s) to ensure the continuity of science and that continued progress under the funded project can be made.
- (f) Upon receipt and review of the information provided in the report, NASA will consult with the AOR, or designee. Based on the results of this review and consultation, the Agency may, if necessary and in accordance with 2 CFR 200.338, assert its programmatic stewardship responsibilities and oversight authority to initiate the substitution or removal of the PI or any Co-I, reduce the award funding amount, or where neither of those previous options is available or adequate, to suspend or terminate the award. Other personnel supported by a NASA award must likewise remain in full compliance with the recipient's policies or codes of conduct, statutes, regulations or executive orders relating to sexual harassment, other forms of harassment, or sexual assault. With regard to any personnel not in compliance, the recipient must make appropriate arrangements to ensure the safety and security of other award personnel and the

continued progress of the funded project. Notification of these actions is not required under this term and condition.

Other personnel supported by a NASA award must likewise remain in full compliance with awardee policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, other forms of harassment, or sexual assault. With regard to any personnel not in compliance, the awardee must make appropriate arrangements to ensure the safety and security of other award personnel and the continued progress of the funded project. Notification of these actions is not required under this term and condition.

*End of Term and Condition*

*Implementation:* NASA will implement the new term through revision of the NASA Agency Specific Requirements to the Research Terms and Conditions, the Grant General Conditions, and the Cooperative Agreement—Financial and Administrative Terms and Conditions. These revised terms and conditions will become effective thirty days from the date of publication in the **Federal Register** and will be available in the NASA Grants and Cooperative Agreement Manual (GCAM).

The new term and condition will be applied to all new NASA awards and funding amendments to existing awards made on or after the effective date. This new reporting requirement will apply to all findings/determinations that occur on or after the effective date of the terms and conditions. With regard to notification of placement on administrative leave, the recipient must notify NASA within 10 business days from the date the recipient determines that placement on administrative leave is necessary.

Recipients are strongly encouraged to conduct a thorough review of the term and condition to determine whether the new reporting requirements necessitate any changes to the institution's policies and procedures. The new term and condition will be effective for any new award, or funding amendment to an existing award, made on or after the effective date. For these purposes, this means that any finding/determination, placement on administrative leave or the imposition of any administrative action by the institution made on or after the start date of an award or funding amendment subject to the new term will invoke the new reporting requirements.

### **Public Comments Received in Response to NASA Federal Register Notice of July 17, 2019 (84 Fed. Reg. 34206) and NASA Responses**

#### **Brigham Young University**

Comment: Notwithstanding [our] support, we strongly encourage NASA to align its reporting requirements with the National Science Foundation (NSF) reporting requirements that have already been put in place. Standardizing reporting requirements across federal funding agencies is the best way to effect compliance from recipients of federal financial assistance that have grants from or contracts with multiple agencies. . . Although the NSF reporting requirements are similar to the reporting requirements described in NASA's notice, several important differences exist, including the reporting period, the point at which administrative actions must be reported, and the requirements for reporting convictions of sexual offenses. These inconsistencies should be addressed in an effort to reduce the administrative burden of compliance. The adoption of differing reporting requirements across federal agencies places an unnecessary administrative burden on recipients of federal financial assistance and creates the potential for confusion. In contrast, having uniform reporting requirements would promote efficiency and institutional compliance. Accordingly, we request that NASA work with other federal agencies, including NSF, to align its reporting requirements with similar existing requirements and to establish a consistent standard prior to moving forward with the proposed term and condition.

NASA Response: NASA has fully aligned its reporting requirements with the National Science Foundation's (NSF's). The single difference between NASA's proposed term and condition and the term and condition issued by NSF in 2018, is the length of time to report findings of sexual harassment. NSF's term and condition provides for 10 business days to report; NASA's proposed term and condition provided for seven business days. NASA has revised its timeframe from seven to 10 business days to bring the two timeframes into conformity.

#### **Council on Governmental Relations (COGR), Et al.**

Comment 1: Reporting administrative action taken regarding a PI or Co-I to NASA during an investigatory process. NASA's proposal would require institutions to report if "the PI or the Co-I

is placed on administrative leave or if the recipient has imposed any administrative action on the PI or the Co-I.” As defined in the new reporting requirement, “administrative action” captures a vast array of temporary actions, which could be and frequently are preliminary to any findings or conclusions. Such actions can relate to activities including “but not limited to the following: teaching, advising, mentoring, research, management/ administrative duties, or presence on campus.” These preliminary or interim measures are non-punitive and designed to protect all parties involved pending an outcome of an investigation. In addition, we believe a reporting requirement based on administrative actions could chill the use of these important interim measures out of concern that NASA may create a record or take action against a PI or Co-I prematurely. As an alternative to the current recommendation, we recommend that NASA narrow this proposed reporting requirement. One option would be to require reporting only in situations where administrative leave has been imposed and the PI or Co-I has been found responsible but is appealing the adjudication, or when the terms of a pre-adjudication leave would affect performance under the award.

We also urge NASA to rely on existing approval processes in lieu of awardee institutions’ reporting of administrative actions taken regarding the PI or Co-I. NASA already has approval procedures for substituting a PI or Co-I when a leave could impact performance. The NASA approval procedures for substituting a PI or Co-I when performance is impacted provides the agency with appropriate notice of this change. Adding an additional notification requirement pertaining to that same PI or Co-I whose performance is impacted by administrative leave during an investigation of reported harassment risks incurring greater costs than the benefits achieved. For these reasons, we recommend that NASA strike the requirement that notification be given to NASA for any administrative action and focus on those that impact performance of the NASA-funded project.

NASA Response: NASA seeks to ensure consistency with NSF’s grant term and condition on harassment reporting to ease the administrative burden on recipients that can be caused by differing external requirements. As our definition of administrative leave is consistent with NSF’s, NASA declines to limit to final disposition. In addition, NASA views one of the primary purposes of a recipient institution in taking an action such as placing an individual on administrative leave is to better ensure the safety, including psychological and physical safety, of the research environment and the academic community. In the interest of ensuring safe and inclusive research environments, NASA is confident that recipient institutions, including universities and other entities, which are committed to safety and inclusion, will continue to utilize these kinds of actions, when it is appropriate to do so.

Comment 2: Clarification is needed on reportable action. The proposed reporting requirement describes “Administration Leave/ Administrative Action” as “Any temporary/ interim suspension or permanent removal of the PI or Co-I, or any administrative action imposed on the PI or the Co-I by the recipient under organizational policies or codes of conduct, statutes, regulations, or executive orders, relating to activities, including but not limited to the following: teaching, advising, mentoring, research, management/ administrative duties, or presence on campus.” But there is no real definition of what constitutes an administrative action. The 116th Congress is currently considering H.R. 36 “Combatting Sexual Harassment in Science Act of 2019.” The legislation, as passed by the House of Representatives, includes language

calling on the Director of the Office of Science and Technology Policy to develop policy guidelines that define administration action as “*administrative action, related to an allegation against grant personnel of any sexual harassment or gender harassment, as set forth in organizational policies or codes of conduct, statutes, regulations, or executive orders, that affects the ability of grant personnel or their trainees to carry out the activities of the grant.*” We ask that NASA consider including this language in the final NASA reporting requirements.

NASA Response: NASA defines “Administrative Action/Administrative Leave” as “Any temporary/interim suspension or permanent removal of the PI or Co-I, or any administrative action imposed on the PI or Co-I by the recipient under organizational policies or codes of conduct, statutes, regulations, or executive orders, relating to activities, including, but not limited to, the following: teaching, advising, mentoring, research, management/ administrative duties, or presence on campus.” While we appreciate the suggested language, we view it as placing unnecessary limitations on the requirement. In addition, the current language is consistent with NSF’s definition. Finally, as Congress has not enacted the proposed legislation into law, NASA declines to accept this comment and will retain the current definition.

Comment 3: The reporting requirement may have unintended consequences. If the report to NASA forms the basis for a NASA decision, and is subject to the Freedom of Information Act (FOIA), a graduate student, research trainee, postdoctoral researcher, or other grant personnel may be legitimately concerned that the release of such a report could impact their future employment opportunities. This would be especially troubling in a situation that results in no findings. A graduate student, research trainee, postdoctoral researcher, or other grant personnel would also need to weigh their decision to bring forth an allegation with the understanding that such a report may lead to the removal of funding that is being used to support the research grant, which may be detrimental to their career progress. To mitigate these unintended consequences, we recommend revising the language of the new reporting requirement to emphasize the NASA process to substitute a PI or Co-I, rather than suspension or termination of the award. We appreciate the process proposed by NASA that will allow “the recipient, at any time, to propose a substitute investigator if it determines the PI or any Co-I may not be able to carry out the funded project or activity and/or abide by the award terms and conditions.”

NASA Response: The proposed NASA term and condition aligns with the National Science Foundation term and condition. Both agencies reference the possibility of substitution or removal of a PI or Co-I, as well as the possibility of suspension or termination. They do so in the context of an agency review of the report and a consultation between the agency and the recipient institution. This consultation seeks in part to ensure that “the recipient has taken appropriate action(s) to ensure the continuity of science and that continued progress under the funded project can be made.” In addition, NASA recognizes the sensitivity of the information that may be contained in the notifications and will take appropriate steps to manage such information consistent with the Privacy Act, the Freedom of Information Act and other applicable federal laws.

Comment 4: Initiation of the Substitution or Removal of the PI or any Co-I. We also understand that upon receipt of and review of the information, NASA “may, if necessary and in accordance

with 2 CFR 200.338, assert its programmatic stewardship responsibilities to initiate the substitution or removal of the PI or any Co-I, reduce the award funding amount, or where neither of those previous options is available or adequate, to suspend or terminate the award.” Before taking such a drastic course of action as terminating the award, we request that NASA work with the Authorized Organizational Representative (AOR) to discuss and exhaustively explore all other options.

NASA Response: NASA will first engage the recipient institution to discuss options including, but not limited to, use of a substitute PI or Co-I. NASA anticipates that action to suspend/terminate the award will be necessary only if the recipient does not identify a reasonable alternative. If, based on the factors identified above, the recipient institution determines that it is appropriate to initiate use of a substitute PI on the award, and then at some future point, the administrative leave or administrative action is lifted, or if the PI or Co-I is found not to have violated the recipient’s policies, codes of conduct, statutes or regulations or executive orders relating to sexual harassment, the recipient should work with NASA regarding reinstatement of the PI to the award.

Comment 5: Clarity is needed on confidentiality and use of reported information. We are very concerned about the prospect that sensitive personnel information, not otherwise public, could become public under FOIA. We ask that NASA carefully examine this issue and modify the proposed reporting requirements with clarifying language which sufficiently addresses these concerns. This will be particularly important if NASA chooses to maintain the reporting obligations in the new term and condition, which will result in the information arising from matters under an investigation that may not even lead to a finding of a violation. NASA should make clear in the new reporting requirements how it will handle reported information. Will it be shared with other agencies? Although we strongly recommend that NASA not mandate the reporting of all kinds of administrative actions, should the agency maintain that proposed requirement, it will be important for NASA to have a way to update its records following an institutional finding of no responsibility. Prior to implementation, NASA should be confident that its internal processes and protocols will fully address reasonable concerns. At the minimum, if a report is triggered before an investigation concludes and the investigation yields no “finding/determination,” which would require the awardee to provide further information to NASA, the agency should clearly note that in any archived material pertaining to that report.

NASA Response: NASA recognizes the sensitivity of the information that may be contained in the notifications and will take appropriate steps to manage such information consistent with the Privacy Act, the Freedom of Information Act and other applicable federal laws. Importantly, NASA makes it clear in its proposed term and condition that it does not require names other than those of the relevant PI or Co-I and that other names must not be included.

NASA also recognizes that, because of the sensitivity of the information contained in the notifications, there is a need to limit exposure of this information on grant management systems and will protect the information consistent with federal law referenced above. NASA intends to follow the methodology of NSF in this regard, developing a secure mechanism by which the notifications will be routed directly to the NASA Office of Diversity and Equal Opportunity and limiting access to only those NASA personnel with an express need to know. NASA also has

revised the term and condition to make clear to those submitting notifications not to include names other than the PI or Co-I. NASA has an obligation to keep complete and accurate records. Therefore, as part of the internal process to implement the term and condition, NASA will clearly note in its records when a recipient institution finds that an alleged harasser did not engage in harassment.

Comment 6: The intersection with privacy regulations and state laws could pose conflicts. We have concerns about how the new reporting requirements will coincide with the Family Educational Rights and Privacy Act (FERPA) and other federal privacy regulations or state laws, which may prohibit sharing information on student and personnel matters outside of the higher education institution. We have concerns that there may be overlap or redundancy that could create conflicting legal obligations for higher education institutions. It is possible that conflicts between the NASA reporting requirement and other privacy regulations and laws may cause confusion for recipients and create questions about which legal obligation takes precedent.

NASA Response: NASA agrees that in a rare circumstance that a PI or co-I is a student subject to FERPA, this reporting requirement could conflict with FERPA's statutory prohibitions. Accordingly, footnote four was adjusted to note that institutions should comply with FERPA in these circumstances. With regard to state laws and regulations, many state privacy laws contain language allowing for information disclosure to federal agencies, and if there were to be a conflict, traditional preemption doctrines would apply.

Comment 7: Subrecipient reporting should be the subrecipient's responsibility. The proposed reporting requirement includes the requirement that "Recipient agrees to insert the substance of this term and condition in any subaward/ subcontract involving a co-investigator. *Recipient will be responsible for ensuring that all reports, including those related to co-investigators, comply with this term and condition.*" We recommend that if a subrecipient has a reportable finding/determination, compliance with this rule shall be the direct responsibility of the subrecipient. Due to privacy concerns, it is not appropriate for the primary award recipient to have direct knowledge of the investigation being conducted by a subrecipient. The primary award recipient's responsibility should be limited to passing through the appropriate terms and conditions from the prime award for inclusion in the subaward. We suggest that the subrecipient provide the subrecipient's report directly to NASA. Any changes that directly impact the performance of the subaward or the prime recipient's obligation to NASA should be communicated via the prior approval requirements of the subrecipient's subaward. Any temporary/interim suspension or permanent removal of the PI or Co-I should be in accordance with the subrecipient's policies or codes of conduct, as well as any relevant statutes, regulations, or executive orders.

NASA Response: NASA agrees that the primary award recipient's responsibility should be limited to passing through the appropriate terms and conditions from the prime award for inclusion in the subaward. NASA has revised the term and condition to require the subrecipient's Authorized Organizational Representative to report notifications directly to NASA. The subrecipient must act in accordance with Title 2 Code of Federal Regulations, Section 200.331, Requirements for Pass-Through Entities.

Comment 8: Interaction with pending Title IX rules and other existing federal and state rules. Colleges and universities have a clear and unambiguous responsibility under Title IX of the Education Amendments of 1972 to respond to allegations of sexual harassment, including sexual assault. . . There are laws in addition to Title IX that address sexual harassment involving employees –most notably Title VII of the Civil Rights Act of 1964, but also numerous state and local laws. The overlapping but different requirements imposed by the new term and condition, Title VII, and state and local antidiscrimination laws could cause confusion and create conflicting obligations for institutions that are committed to complying with all applicable laws. Federal policy needs to give institutions enough flexibility to ensure that all legal and other obligations—no matter their source—are properly addressed when resolving sexual harassment allegations. The U.S. Department of Education published a proposed Title IX rule in late 2018 and the higher education community submitted comments in January 2019.<sup>5</sup> When the rule is finalized later this year, colleges and universities will likely undertake changes in campus structures in regards to the implementation of the final rule. This, as well as the new terms and condition from NSF, NASA, and other federal agencies, without coordination or shared definitions, can make the process confusing and more complicated for the person reporting the harassment and the institution implementing the various rules. This is especially true as the Title IX offices are often the offices tasked with carrying out the new rules, while the AOR has the ultimate reporting duty to NASA. We ask wherever possible, NASA utilize existing definitions and harmonize with other federal agencies regarding existing rules and reporting requirements.

NASA Response: NASA is coordinating its efforts with the White House National Science and Technology Joint Committee on Science and Technology Subcommittee on Coordinating Administrative Requirements for Research and the Subcommittee on Safe and Inclusive Research Environments to ensure NASA is proceeding in a coordinated manner with other agencies, including the National Science Foundation. This coordination includes utilizing existing definitions and harmonizing with other federal agencies regarding existing rules and reporting requirements, wherever possible.

Comment 9: An appeals process is needed. NASA should provide for an appeals process for any determinations made with the new term and condition. This should also be coordinated with any institutional appeals process and is especially important as institutions often have complex multi-layered appeals procedures. A NASA appeals procedure is particularly necessary in cases in which an interim measure (e.g. administrative action) is imposed and reported to NASA but where the PI or Co-I is ultimately found not responsible. The outcome of an appeals process, whether at NASA or the institution, should be promptly shared between NASA and the institution. Also, please know that institutions welcome the opportunity to work with NASA in the development of an appeals process.

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<sup>5</sup> <https://www.acenet.edu/news-room/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf> and <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf> and <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf>

NASA Response: NASA declines to establish an appeals process related to this term and condition. Federal civil rights laws and regulations prohibiting discrimination and harassment by recipients of federal financial assistance, including NASA regulations, provide recipients with due process rights for action taken by the Agency address a finding of non-compliance with these laws and regulations. The Agency will not take such action until it determines that 1) the recipient's compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure to comply with a requirement and (3) the action has been approved by the NASA Administrator.

Comment 10: Submission of notification to NASA should be secure. The *Federal Register* notice indicates that notifications must be submitted by the AOR via email to NASA's Office of Diversity and Equal Opportunity via email at: [civilrightsinfo@nasa.gov](mailto:civilrightsinfo@nasa.gov). We recommend that NASA consider submission of notifications via a secure web portal rather than through e-mail.

NASA Response: NASA will develop a secure mechanism by which the notifications will be routed directly to the Office of Diversity and Equal Opportunity, which will limit access to only those NASA personnel with an express need to know. NASA also has revised the term and condition to make clear to those submitting notifications not to include names other than the PI or Co-I.

Comment 11: Sufficient time is needed for the recipient to report notification of placement on administrative leave to NASA. The proposed reporting timeframe of seven (7) business days, however, may not allow institutions adequate time, particularly in the case of an administrative action. In the National Science Foundation (NSF) "Notification Requirements Regarding Findings of Sexual Harassment, Other Forms of Harassment, or Sexual Assault" published on September 21, 2018, the final term and condition allows for ten (10) business days for notification to NSF from the date of the finding/ determination, or the date of the placement of a PI or a Co-I by the awardee on administration leave." While the difference is slight, it is helpful, and we believe there should be harmonization among the federal science agencies on these new terms and conditions wherever possible.

NASA Response: NASA has revised the reporting requirement to allow recipients 10 business days to report from the date of a finding/determination, the date of the placement of a Co-I on leave or the imposition of another administrative action.

Comment 12: Implementation. According to the *Federal Register* notice, "upon receipt and resolution of all comments, it is NASA's intention to implement the new term through revision of NASA's "Agency Specific Requirements to the Research Terms and Conditions, the Grant General Conditions, and the Cooperative Agreement-Financial and Administrative Terms and Conditions." We strongly encourage NASA's Office of Civil Rights to thoroughly review and consider the comments received from the higher education and scientific communities before taking any action to implement these new reporting requirements. We also encourage NASA to consider convening a small roundtable discussion with key stakeholders from universities to discuss the new reporting requirements before implementing them. An open and comprehensive

dialogue between NASA and the community is essential if we are to combat and end sexual harassment in the scientific workplace.

NASA Response: NASA is thoroughly reviewing and considering all comments received. The Agency is aware that NSF held a roundtable discussion with key stakeholders before implementing its harassment reporting requirements. NASA intends to hold a diversity, equity and inclusion summit that will include discussion of its new requirements.

### **University of California System**

Comment 1: Consistency. UC is primarily concerned with inconsistencies that exist between NASA's proposal and NSF's term and condition. Should other federal grant-making agencies propose similar terms to require reporting of Sexual Violence and Sexual Harassment (SVSH policy) or other forms of harassment, UC is concerned that there would be a patchwork of possibly conflicting and burdensome requirements from agencies seeking to follow NSF's and NASA's example. UC first and foremost recommends consistency across federal grant-making agencies to avoid confusion about different reporting requirements.

NASA Response: NASA is carefully reviewing all comments it has received requesting conformity between its reporting requirements and those of NSF. In addition, we are coordinating our efforts through the White House National Science and Technology Joint Committee on Science and Technology Subcommittee on Coordinating Administrative Requirements for Research and the Subcommittee on Safe and Inclusive Research Environments to ensure NASA is proceeding in a coordinated manner with other agencies.

Comment 2: Timing of Notification. NASA's proposal requires the recipient's Authorized Organizational Representative (AOR) to submit a report within seven business days from the date of a finding/determination, the date of the placement of a (co-)PI on leave or the imposition of another administrative action. This timeline is both insufficient and inconsistent with NSF's term and condition, which provides ten days to submit the necessary report. A discrepancy between NASA's and NSF's reporting deadlines, as currently proposed, would be burdensome on IHEs that are already tasked with maintaining compliance with multiple and often conflicting agency requirements, and would increase the risk of errors and missed reporting deadlines by grantees. To promote compliance by all institutions that would be subject to the term and condition, UC recommends that NASA modify its reporting deadline to ten business days, consistent with NSF's current requirements.

NASA Response: NASA has revised the reporting requirement to allow recipients 10 business days to report from the date of a finding/determination, the date of the placement of a Co-I on leave or the imposition of another administrative action.

Comment 3: Role of Subrecipients. UC has concerns regarding the role of subrecipients in the proposed NASA reporting process. The proposed term states that the recipient agrees to insert the term in any subcontract involving a co-investigator, and the recipient will be responsible for ensuring that all reports, including those relating to co-investigators, comply with the term. This appears to imply that reports for co-investigators at subrecipient institutions must be reviewed and/or submitted by the recipient's AOR. Such a requirement would put the recipient institution

in the position of not only having potentially inappropriate access to sensitive information, but also having to determine whether the subrecipient institution has an event triggering NASA notification, and whether it has properly complied with the subrecipient's own policies and procedures, with which the recipient would be unfamiliar. We are likewise concerned that the subrecipient would be required to submit such sensitive and premature information to primary awardees. We strongly urge NASA to revise this requirement to be consistent with the NSF process so that subrecipient institutions submit their own reports directly to NASA.

NASA Response: NASA agrees that the primary award recipient's responsibility should be limited to passing through the appropriate terms and conditions from the prime award for inclusion in the subaward. NASA has revised the term and condition to require the subrecipient's Authorized Organizational Representative to report notifications directly to NASA. The subrecipient must act in accordance with Title 2 Code of Federal Regulations, Section 200.331, Requirements for Pass-Through Entities.

Comment 4: Privacy. Reports of SVSH and assault potentially contain highly sensitive information not only about the respondent, but about the reporting parties and witnesses, who may be concerned about retaliation and other adverse effects on their careers. An effective SVSH investigation therefore requires impartiality, discretion and professionalism. These factors not only ensure a fair and thorough factual inquiry, but also protect the privacy, safety and reputations of all involved parties. The imperative of protecting privacy and respecting due process during an investigation is why UC is particularly concerned with the proposed requirement that universities report to NASA certain open investigations, i.e., those where a (co-)PI has been put on leave during the course of the investigation. Such a requirement can compromise investigations, interfere with the rights of both the reporting party and the party under investigation, undermine due process, lead to misunderstandings of NASA's role in investigations and damage careers, including those of the (co-)PIs, co-workers and students.

NASA Response: NASA views one of the primary purposes of a recipient institution in taking an action such as placing an individual on administrative leave is to better ensure the safety, including psychological and physical safety, of the research environment and the academic community. In the interest of ensuring safe and inclusive research environments, NASA is confident that recipient institutions, including universities and other entities, which are committed to safety and inclusion, will continue to utilize these kinds of actions, when it is appropriate to do so.

NASA recognizes the sensitivity of the information that may be contained in the notifications and will take appropriate steps to manage such information consistent with the Privacy Act, the Freedom of Information Act and other applicable federal laws. Importantly, NASA makes it clear in its proposed term and condition that it does not require names other than those of the relevant PI or Co-I and that other names must not be included.

NASA also recognizes that, because of the sensitivity of the information contained in the notifications, there is a need to limit exposure of this information on grant management systems. NASA intends to follow the methodology of NSF in this regard, developing a secure mechanism by which the notifications will be routed directly to the NASA Office of Diversity and Equal

Opportunity and limiting access to only those NASA personnel with an express need to know. NASA also has revised the term and condition to make clear to those submitting notifications not to include names other than the PI or Co-I. As part of the internal process to implement the term and condition, NASA will clearly note in its records when a recipient institution finds that an alleged harasser did not engage in harassment.

Comment 5: Family Educational Rights and Privacy Act of 1974 (FERPA). In addition, the university must comply with FERPA, a federal law that protects the privacy of student education records. In the *Reporting Requirements Regarding Findings of Harassment, Sexual Harassment, Other Forms of Harassment, or Sexual Assault* we noted that footnote 1 of subsection (e) expressly states that the identification of the complainant or other individuals involved in the matter must not be included in the report, which protects the privacy of the complaining party, including students. However, the proposed NASA reporting obligations could conflict with FERPA in the uncommon instance when the co-(PI) alleged to have engaged in harassment is a graduate student.

NASA Response: NASA agrees that in a rare circumstance that a PI or co-I is a student subject to FERPA, this reporting requirement could conflict with FERPA's statutory prohibitions. Accordingly, footnote four was adjusted to note that institutions should comply with FERPA in these circumstances. NASA recognizes the sensitivity of the information that may be contained in the notifications and will take appropriate steps to manage such information consistent with the Privacy Act of 1974, the Freedom of Information Act and other applicable federal laws. Importantly, NASA makes it clear in its proposed term and condition that it does not require names other than those of the relevant PI or Co-I and that other names must not be included. With regard to state laws and regulations, many state privacy laws contain language allowing for information disclosure to federal agencies, and if there were to be a conflict, traditional preemption doctrines would apply

Comment 6: Reports via Email. NASA's proposed term would also require the recipient's AOR to submit the necessary reports to NASA via email. Given the sensitive nature of the information contained in these reports, UC is concerned that this method of transmittal is not secure and may increase the risk of submission of spurious, malicious or unauthorized reports (i.e., not by the recipient's recognized AOR). UC recommends that reports be transmitted through a more secure portal, consistent with the NSF procedures UC also encourages NASA to ensure that there is a mechanism to verify that reports are submitted by a valid AOR from the recipient institution.

NASA Response: NASA will develop a secure mechanism consistent with federal privacy law by which the notifications will be routed directly to the Office of Diversity and Equal Opportunity, which will limit access to only those NASA personnel with an express need to know. NASA also has revised the term and condition to make clear to those submitting notifications not to include names other than the PI or Co-I.

Comment 7: Appropriate Handling, Storage and Maintenance of Confidentiality. Grantee organizations need assurance that NASA will appropriately handle, store and maintain the confidentiality of such sensitive information, and NASA should clarify whether the information

would be protected from potential subpoenas, Freedom of Information Act requests or any other legal action.

NASA Response: NASA will develop a secure mechanism consistent with federal privacy law by which the notifications will be routed directly to the Office of Diversity and Equal Opportunity, which will limit access to only those NASA personnel with an express need to know. NASA also has revised the term and condition to make clear to those submitting notifications not to include names other than the PI or Co-I. As to potential subpoenas, Freedom of Information Act requests or any other legal action, again, NASA will act in accord with all applicable law.

Comment 8: Clarity/Definitions. NASA's proposed term makes general references to "statutes" and "regulations." UC requests clarification as to whether the reportable findings are limited to categories protected under federal civil rights law or whether findings of discrimination and harassment expressly protected by state laws and regulations should also be reported.

NASA Response: NASA has revised the term and condition to add a definitions section. NASA defines finding/determination as "The final disposition of a matter involving sexual harassment or other form of harassment under organizational policies and processes, to include the exhaustion of permissible appeals exercised by the PI or Co-I, or a conviction of a sexual offense in a criminal court of law." The reporting requirement is limited to only federal laws over which NASA has jurisdiction.

Comment 9: Impact on Project Members/Reporting. Consequences for violations of SVSH policy or other harassment policies are determined at the end of the investigation when the preponderance of the evidence shows the employee violated policy. UC is concerned that NASA's reporting requirement, as proposed, could irreparably damage NASA-funded projects as well as the reputations of individuals involved—particularly if an allegation of harassment or assault is not substantiated. Participants on a NASA project, including postdoctoral researchers, staff and students, may experience adverse impacts on their current and future professional endeavors and livelihoods. As a result, NASA project members may be reluctant to report harassment if they believe a report could disrupt or terminate their project. Further, UC is concerned that the term does not address NASA's process in those situations in which a report is made concerning allegations that are later found to be unsubstantiated. In such a circumstance, UC would expect that names of exonerated PIs or Co-Is would be removed from any allegation-related internal NASA lists or databases on which they had appeared.

NASA Response: Civil rights laws and their implementing regulations protect NASA project members who report harassment from retaliation. NASA's Office of Diversity and Equal Opportunity investigates complaints of retaliation. As to removing names of PIs or Co-Is ultimately found not to have engaged in harassment in violation of a recipient's policy, NASA will clearly note in its records when an alleged harasser is found not to have harassed, as it has an obligation to ensure the accuracy of our records.

**University of Wisconsin-Madison**

Comment 1: NASA is proposing that reports be submitted “within seven business days from the date of the finding/determination, or the date of the placement of a PI or Co- I by the recipient on administrative leave or the imposition of an administrative action.” Originally, NSF proposed that reports be submitted within seven business days. Ultimately, based on public comments, NSF decided to allow ten business days to report, which is a more reasonable period of time for institutions to convey information. Submission necessitates coordination between multiple offices, which takes time.

NASA Response: NASA has revised the reporting requirement to allow recipients 10 business days to report from the date of a finding/determination, the date of the placement of a Co-I on leave or the imposition of another administrative action.

Comment 2: NASA is requesting that reports be sent to an email address. However, email may not be a secure form of communication. Given the sensitive nature of the reports, we recommend that NASA consider creating a secure website to receive these reports. Again, in response to public comments, NSF created a secure website for reporting, and we ask NASA to do the same. NASA’s expectations about what should occur if a reportable instance happens at a subrecipient institution is not clear. The Notice reads: “(d) Recipient agrees to insert the substance of this term and condition in any subaward/subcontract involving a co- investigator.

Recipient will be responsible for ensuring that all reports, including those related to co-investigators, comply with this term and condition.” This could mean a number of different things, including:

- a. The subrecipient institution is responsible for submitting reports to NASA, or
- b. The subrecipient institution must provide information to the recipient, who ensures that all required data elements are included prior to the recipient submitting the report, or
- c. The subrecipient institution must provide information to the recipient, who ensures that all required data elements are included prior to the subrecipient submitting the report, or
- d. The subrecipient institution must provide a certification to the recipient institution that, should the subrecipient make a report to NASA, it will do so in compliance with the reporting requirements.

As written, the language does not provide clear direction to the recipient and subrecipient. An area of concern is privacy. Should an administrative action be taken or administrative leave imposed in anticipation of investigating an allegation, the investigation may result in a conclusion that a violation did not occur. In this case, an individual’s reputation may be harmed if entities other than those with a need to know are privy to the information. NASA should clarify expectations and responsibilities for both the recipient and subrecipient and do so in a manner that protects privacy. To align with NSF, we recommend that NASA consider requiring that reports be submitted directly from the subrecipient to NASA.

NASA Response: In response to the recommendation that NASA create a secure website to receive these reports, NASA has developed a secure mechanism by which the notifications will be routed directly to the Office of Diversity and Equal Opportunity, which will limit access to only those NASA personnel with an express need to know. NASA also has revised the term and

condition to make clear to those submitting notifications not to include names other than the PI or Co-I. In response to the recommendation that NASA should clarify expectations and responsibilities for both the recipient and subrecipient, NASA has revised the term and condition to require the Authorized Organizational Representative of the subrecipient institution to notify NASA directly.

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Federal Register Liaison Officer.

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