(3) Nonconfidential data or other information submitted by interested persons pertaining to the health assessment or health effects study;

(4) The protocol for the health effects study;

(5) A list of the individuals responsible for external peer review of the report of a health effects study, their comments, and ATSDR's response to the comments; and

(6) For health effects study, the notice announcing the availability of a draft final report for public review and comment, all comments received in response to the notice, and any responses to the comments by ATSDR.

(b) The record may contain a confidential portion which shall include all information determined to be confidential by the Administrator under this part.

(c) The Administrator may determine other documents are appropriate for inclusion in the record for health assessments or health effects studies.

(d) Predecisional documents, including draft documents, are not documents upon which ATSDR bases its conclusions in health assessments or health effects studies, and are not usually included in the record for health assessments or health effects studies.

(e) The record for ATSDR health assessments and health effects studies will be available for review, upon prior request, at ATSDR headquarters in Atlanta, Georgia.

(f) Nothing in this section is intended to imply that ATSDR's decisions to conduct health assessments or health effects studies, or the reports of health assessments or health effects studies, are subject to judicial review.

§ 90.14 Documentation and cost recovery.

(a) During all phases of ATSDR health assessments and health effects studies, documentation shall be completed and maintained to form the basis for cost recovery, as specified in section 107 of CERCLA.

(b) Where appropriate, the information and reports compiled by ATSDR pertaining to costs shall be forwarded to the appropriate EPA regional office for cost recovery purposes.

PART 93—PUBLIC HEALTH SERVICE POLICIES ON RESEARCH MISCONDUCT

Sec.

Subpart A—General

Subpart B—Definitions

Subpart C—Responsibilities of Institutions

COMPLIANCE AND ASSURANCES

AUTHORITY: 42 U.S.C. 216, 241, and 289b.

SOURCE: 70 FR 28384, May 17, 2005, unless otherwise noted.

§ 93.25 Organization of this part.

This part is subdivided into five subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities as shown in the following table.

In subpart . . .	You will find provisions related to . . .
A	General information about this rule.
B	Definitions of terms used in this part.
C	Responsibilities of institutions with PHS support.
D	Responsibilities of the U.S. Department of Health and Human Services and the Office of Research Integrity.

In subpart . . .	You will find provisions related to . . .
E	Information on how to contest ORI research misconduct findings and HHS administrative actions.

§ 93.50 Special terms.

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart B of this part.

Subpart A—General

§ 93.100 General policy.

(a) Research misconduct involving PHS support is contrary to the interests of the PHS and the Federal government and to the health and safety of the public, to the integrity of research, and to the conservation of public funds.

(b) The U.S. Department of Health and Human Services (HHS) and institutions that apply for or receive Public Health Service (PHS) support for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or research training share responsibility for the integrity of the research process. HHS has ultimate oversight authority for PHS supported research, and for taking other actions as appropriate or necessary, including the right to assess allegations and perform inquiries or investigations at any time. Institutions and institutional members have an affirmative duty to protect PHS funds from misuse by ensuring the integrity of all PHS supported work, and primary responsibility for responding to and reporting allegations of research misconduct, as provided in this part.

§ 93.101 Purpose.

The purpose of this part is to—

(a) Establish the responsibilities of HHS, PHS, the Office of Research Integrity (ORI), and institutions in responding to research misconduct issues;

(b) Define what constitutes misconduct in PHS supported research;

(c) Define the general types of administrative actions HHS and the PHS may take in response to research misconduct; and

(d) Require institutions to develop and implement policies and procedures for—

(1) Reporting and responding to allegations of research misconduct covered by this part;

(2) Providing HHS with the assurances necessary to permit the institutions to participate in PHS supported research.

(e) Protect the health and safety of the public, promote the integrity of PHS supported research and the research process, and conserve public funds.

§ 93.102 Applicability.

(a) Each institution that applies for or receives PHS support for biomedical or behavioral research, research training or activities related to that research or research training must comply with this part.

(b)(1) This part applies to allegations of research misconduct and research misconduct involving:

(i) Applications or proposals for PHS support for biomedical or behavioral extramural or intramural research, research training or activities related to that research or research training, such as the operation of tissue and data banks and the dissemination of research information;

(ii) PHS supported biomedical or behavioral extramural or intramural research;

(iii) PHS supported biomedical or behavioral extramural or intramural research training programs;

(iv) PHS supported extramural or intramural activities that are related to biomedical or behavioral research or research training, such as the operation of tissue and data banks or the dissemination of research information; and

(v) Plagiarism of research records produced in the course of PHS supported research, research training or activities related to that research or research training.

(2) This includes any research proposed, performed, reviewed, or reported, or any research record generated from that research, regardless of whether an application or proposal for

PHS funds resulted in a grant, contract, cooperative agreement, or other form of PHS support.

(c) This part does not supersede or establish an alternative to any existing regulations or procedures for handling fiscal improprieties, the ethical treatment of human or animal subjects, criminal matters, personnel actions against Federal employees, or actions taken under the HHS debarment and suspension regulations at 45 CFR part 76 and 48 CFR subparts 9.4 and 309.4.

(d) This part does not prohibit or otherwise limit how institutions handle allegations of misconduct that do not fall within this part's definition of research misconduct or that do not involve PHS support.

§ 93.103 Research misconduct.

Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.

(a) Fabrication is making up data or results and recording or reporting them.

(b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

(c) Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

(d) Research misconduct does not include honest error or differences of opinion.

§ 93.104 Requirements for findings of research misconduct.

A finding of research misconduct made under this part requires that—

(a) There be a significant departure from accepted practices of the relevant research community; and

(b) The misconduct be committed intentionally, knowingly, or recklessly; and

(c) The allegation be proven by a preponderance of the evidence.

§ 93.105 Time limitations.

(a) *Six-year limitation.* This part applies only to research misconduct occurring within six years of the date HHS or an institution receives an allegation of research misconduct.

(b) *Exceptions to the six-year limitation.* Paragraph (a) of this section does not apply in the following instances:

(1) *Subsequent use exception.* The respondent continues or renews any incident of alleged research misconduct that occurred before the six-year limitation through the citation, republication or other use for the potential benefit of the respondent of the research record that is alleged to have been fabricated, falsified, or plagiarized.

(2) *Health or safety of the public exception.* If ORI or the institution, following consultation with ORI, determines that the alleged misconduct, if it occurred, would possibly have a substantial adverse effect on the health or safety of the public.

(3) *''Grandfather'' exception.* If HHS or an institution received the allegation of research misconduct before the effective date of this part.

§ 93.106 Evidentiary standards.

The following evidentiary standards apply to findings made under this part.

(a) *Standard of proof.* An institutional or HHS finding of research misconduct must be proved by a preponderance of the evidence.

(b) *Burden of proof.* (1) The institution or HHS has the burden of proof for making a finding of research misconduct. The destruction, absence of, or respondent's failure to provide research records adequately documenting the questioned research is evidence of research misconduct where the institution or HHS establishes by a preponderance of the evidence that the respondent intentionally, knowingly, or recklessly had research records and destroyed them, had the opportunity to maintain the records but did not do so, or maintained the records and failed to produce them in a timely manner and that the respondent's conduct constitutes a significant departure from accepted practices of the relevant research community.

(2) The respondent has the burden of going forward with and the burden of proving, by a preponderance of the evidence, any and all affirmative defenses raised. In determining whether HHS or the institution has carried the burden

of proof imposed by this part, the finder of fact shall give due consideration to admissible, credible evidence of honest error or difference of opinion presented by the respondent.

(3) The respondent has the burden of going forward with and proving by a preponderance of the evidence any mitigating factors that are relevant to a decision to impose administrative actions following a research misconduct proceeding.

§ 93.107 Rule of interpretation.

Any interpretation of this part must further the policy and purpose of the HHS and the Federal government to protect the health and safety of the public, to promote the integrity of research, and to conserve public funds.

§ 93.108 Confidentiality.

(a) Disclosure of the identity of respondents and complainants in research misconduct proceedings is limited, to the extent possible, to those who need to know, consistent with a thorough, competent, objective and fair research misconduct proceeding, and as allowed by law. Provided, however, that:

(1) The institution must disclose the identity of respondents and complainants to ORI pursuant to an ORI review of research misconduct proceedings under § 93.403.

(2) Under § 93.517(g), HHS administrative hearings must be open to the public.

(b) Except as may otherwise be prescribed by applicable law, confidentiality must be maintained for any records or evidence from which research subjects might be identified. Disclosure is limited to those who have a need to know to carry out a research misconduct proceeding.

§ 93.109 Coordination with other agencies.

(a) When more than one agency of the Federal government has jurisdiction of the subject misconduct allegation, HHS will cooperate in designating a lead agency to coordinate the response of the agencies to the allegation. Where HHS is not the lead agency, it may, in consultation with the lead agency, take appropriate action to protect the health and safety of the public, promote the integrity of the PHS supported research and research process and conserve public funds.

(b) In cases involving more than one agency, HHS may refer to evidence or reports developed by that agency if HHS determines that the evidence or reports will assist in resolving HHS issues. In appropriate cases, HHS will seek to resolve allegations jointly with the other agency or agencies.

Subpart B—Definitions

§ 93.200 Administrative action.

Administrative action means—

(a) An HHS action in response to a research misconduct proceeding taken to protect the health and safety of the public, to promote the integrity of PHS supported biomedical or behavioral research, research training, or activities related to that research or research training and to conserve public funds; or

(b) An HHS action in response either to a breach of a material provision of a settlement agreement in a research misconduct proceeding or to a breach of any HHS debarment or suspension.

§ 93.201 Allegation.

Allegation means a disclosure of possible research misconduct through any means of communication. The disclosure may be by written or oral statement or other communication to an institutional or HHS official.

§ 93.202 Charge letter.

Charge letter means the written notice, as well as any amendments to the notice, that are sent to the respondent stating the findings of research misconduct and any HHS administrative actions. If the charge letter includes a debarment or suspension action, it may be issued jointly by the ORI and the debarring official.

§ 93.203 Complainant.

Complainant means a person who in good faith makes an allegation of research misconduct.

§ 93.204 Contract.

Contract means an acquisition instrument awarded under the HHS Federal Acquisition Regulation (FAR), 48 CFR Chapter 1, excluding any small purchases awarded pursuant to FAR Part 13.

§ 93.205 Debarment or suspension.

Debarment or *suspension* means the Government wide exclusion, whether temporary or for a set term, of a person from eligibility for Federal grants, contracts, and cooperative agreements under the HHS regulations at 45 CFR part 76 (nonprocurement) and 48 CFR subparts 9.4 and 309.4 (procurement).

§ 93.206 Debarring official.

Debarring official means an official authorized to impose debarment or suspension. The HHS debarring official is either—

(a) The Secretary; or

(b) An official designated by the Secretary.

§ 93.207 Departmental Appeals Board or DAB.

Departmental Appeals Board or *DAB* means, depending on the context—

(a) The organization, within the Office of the Secretary, established to conduct hearings and provide impartial review of disputed decisions made by HHS operating components; or

(b) An Administrative Law Judge (ALJ) at the DAB.

§ 93.208 Evidence.

Evidence means any document, tangible item, or testimony offered or obtained during a research misconduct proceeding that tends to prove or disprove the existence of an alleged fact.

§ 93.209 Funding component.

Funding component means any organizational unit of the PHS authorized to award grants, contracts, or cooperative agreements for any activity that involves the conduct of biomedical or behavioral research, research training or activities related to that research or research training, e.g., agencies, bureaus, centers, institutes, divisions, or offices and other awarding units within the PHS.

§ 93.210 Good faith.

Good faith as applied to a complainant or witness, means having a belief in the truth of one's allegation or testimony that a reasonable person in the complainant's or witness's position could have based on the information known to the complainant or witness at the time. An allegation or cooperation with a research misconduct proceeding is not in good faith if made with knowing or reckless disregard for information that would negate the allegation or testimony. Good faith as applied to a committee member means cooperating with the research misconduct proceeding by carrying out the duties assigned impartially for the purpose of helping an institution meet its responsibilities under this part. A committee member does not act in good faith if his/her acts or omissions on the committee are dishonest or influenced by personal, professional, or financial conflicts of interest with those involved in the research misconduct proceeding.

§ 93.211 Hearing.

Hearing means that part of the research misconduct proceeding from the time a respondent files a request for an administrative hearing to contest ORI findings of research misconduct and HHS administrative actions until the time the ALJ issues a recommended decision.

§ 93.212 Inquiry.

Inquiry means preliminary information-gathering and preliminary fact-finding that meets the criteria and follows the procedures of §§ 93.307–93.309.

§ 93.213 Institution.

Institution means any individual or person that applies for or receives PHS support for any activity or program that involves the conduct of biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training. This includes, but is not limited to colleges and universities, PHS intramural biomedical or

behavioral research laboratories, research and development centers, national user facilities, industrial laboratories or other research institutes, small research institutions, and independent researchers.

§ 93.214 Institutional member.

Institutional member or *members* means a person who is employed by, is an agent of, or is affiliated by contract or agreement with an institution. Institutional members may include, but are not limited to, officials, tenured and untenured faculty, teaching and support staff, researchers, research coordinators, clinical technicians, postdoctoral and other fellows, students, volunteers, agents, and contractors, subcontractors, and subawardees, and their employees.

§ 93.215 Investigation.

Investigation means the formal development of a factual record and the examination of that record leading to a decision not to make a finding of research misconduct or to a recommendation for a finding of research misconduct which may include a recommendation for other appropriate actions, including administrative actions.

§ 93.216 Notice.

Notice means a written communication served in person, sent by mail or its equivalent to the last known street address, facsimile number or e-mail address of the addressee. Several sections of Subpart E of this part have special notice requirements.

§ 93.217 Office of Research Integrity or ORI.

Office of Research Integrity or *ORI* means the office to which the HHS Secretary has delegated responsibility for addressing research integrity and misconduct issues related to PHS supported activities.

§ 93.218 Person.

Person means any individual, corporation, partnership, institution, association, unit of government, or legal entity, however organized.

§ 93.219 Preponderance of the evidence.

Preponderance of the evidence means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

§ 93.220 Public Health Service or PHS.

Public Health Service or *PHS* means the unit within the Department of Health and Human Services that includes the Office of Public Health and Science and the following Operating Divisions: Agency for Healthcare Research and Quality, Agency for Toxic Substances and Disease Registry, Centers for Disease Control and Prevention, Food and Drug Administration, Health Resources and Services Administration, Indian Health Service, National Institutes of Health, and the Substance Abuse and Mental Health Services Administration, and the offices of the Regional Health Administrators.

§ 93.221 PHS support.

PHS support means PHS funding, or applications or proposals therefor, for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training, that may be provided through: Funding for PHS intramural research; PHS grants, cooperative agreements, or contracts or subgrants or subcontracts under those PHS funding instruments; or salary or other payments under PHS grants, cooperative agreements or contracts.

§ 93.222 Research.

Research means a systematic experiment, study, evaluation, demonstration or survey designed to develop or contribute to general knowledge (basic research) or specific knowledge (applied research) relating broadly to public health by establishing, discovering, developing, elucidating or confirming information about, or the underlying mechanism relating to, biological causes, functions or effects, diseases, treatments, or related matters to be studied.

§ 93.223 Research misconduct proceeding.

Research misconduct proceeding means any actions related to alleged research misconduct taken under this part, including but not limited to, allegation assessments, inquiries, investigations, ORI oversight reviews, hearings, and administrative appeals.

§ 93.224 Research record.

Research record means the record of data or results that embody the facts resulting from scientific inquiry, including but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, journal articles, and any documents and materials provided to HHS or an institutional official by a respondent in the course of the research misconduct proceeding.

§ 93.225 Respondent.

Respondent means the person against whom an allegation of research misconduct is directed or who is the subject of a research misconduct proceeding.

§ 93.226 Retaliation.

Retaliation for the purpose of this part means an adverse action taken against a complainant, witness, or committee member by an institution or one of its members in response to—

(a) A good faith allegation of research misconduct; or

(b) Good faith cooperation with a research misconduct proceeding.

§ 93.227 Secretary or HHS.

Secretary or *HHS* means the Secretary of HHS or any other officer or employee of the HHS to whom the Secretary delegates authority.

Subpart C—Responsibilities of Institutions

COMPLIANCE AND ASSURANCES

§ 93.300 General responsibilities for compliance.

Institutions under this part must—

(a) Have written policies and procedures for addressing allegations of research misconduct that meet the requirements of this part;

(b) Respond to each allegation of research misconduct for which the institution is responsible under this part in a thorough, competent, objective and fair manner, including precautions to ensure that individuals responsible for carrying out any part of the research misconduct proceeding do not have unresolved personal, professional or financial conflicts of interest with the complainant, respondent or witnesses;

(c) Foster a research environment that promotes the responsible conduct of research, research training, and activities related to that research or research training, discourages research misconduct, and deals promptly with allegations or evidence of possible research misconduct;

(d) Take all reasonable and practical steps to protect the positions and reputations of good faith complainants, witnesses and committee members and protect them from retaliation by respondents and other institutional members;

(e) Provide confidentiality to the extent required by §93.108 to all respondents, complainants, and research subjects identifiable from research records or evidence;

(f) Take all reasonable and practical steps to ensure the cooperation of respondents and other institutional members with research misconduct proceedings, including, but not limited to, their providing information, research records, and evidence;

(g) Cooperate with HHS during any research misconduct proceeding or compliance review;

(h) Assist in administering and enforcing any HHS administrative actions imposed on its institutional members; and

(i) Have an active assurance of compliance.

§ 93.301 Institutional assurances.

(a) *General policy.* An institution with PHS supported biomedical or behavioral research, research training or activities related to that research or research training must provide PHS with an assurance of compliance with this part, satisfactory to the Secretary.

PHS funding components may authorize funds for biomedical and behavioral research, research training, or activities related to that research or research training only to institutions that have approved assurances and required renewals on file with ORI.

(b) *Institutional Assurance.* The responsible institutional official must assure on behalf of the institution that the institution—

(1) Has written policies and procedures in compliance with this part for inquiring into and investigating allegations of research misconduct; and

(2) Complies with its own policies and procedures and the requirements of this part.

§ 93.302 Institutional compliance with assurances.

(a) *Compliance with assurance.* ORI considers an institution in compliance with its assurance if the institution—

(1) Establishes policies and procedures according to this part, keeps them in compliance with this part, and upon request, provides them to ORI, other HHS personnel, and members of the public;

(2) Takes all reasonable and practical specific steps to foster research integrity consistent with § 93.300, including—

(i) Informs the institution's research members participating in or otherwise involved with PHS supported biomedical or behavioral research, research training or activities related to that research or research training, including those applying for support from any PHS funding component, about its policies and procedures for responding to allegations of research misconduct, and the institution's commitment to compliance with the policies and procedures; and

(ii) Complies with its policies and procedures and each specific provision of this part.

(b) *Annual report.* An institution must file an annual report with ORI which contains information specified by ORI on the institution's compliance with this part.

(c) *Additional information.* Along with its assurance or annual report, an institution must send ORI such other aggregated information as ORI may request on the institution's research misconduct proceedings covered by this part and the institution's compliance with the requirements of this part.

§ 93.303 Assurances for small institutions.

(a) If an institution is too small to handle research misconduct proceedings, it may file a ''Small Organization Statement'' with ORI in place of the formal institutional policies and procedures required by §§ 93.301 and 93.304.

(b) By submitting a Small Organization Statement, the institution agrees to report all allegations of research misconduct to ORI. ORI or another appropriate HHS office will work with the institution to develop and implement a process for handling allegations of research misconduct consistent with this part.

(c) The Small Organization Statement does not relieve the institution from complying with any other provision of this part.

§ 93.304 Institutional policies and procedures.

Institutions seeking an approved assurance must have written policies and procedures for addressing research misconduct that include the following—

(a) Consistent with § 93.108, protection of the confidentiality of respondents, complainants, and research subjects identifiable from research records or evidence;

(b) A thorough, competent, objective, and fair response to allegations of research misconduct consistent with and within the time limits of this part, including precautions to ensure that individuals responsible for carrying out any part of the research misconduct proceeding do not have unresolved personal, professional, or financial conflicts of interest with the complainant, respondent, or witnesses;

(c) Notice to the respondent, consistent with and within the time limits of this part;

(d) Written notice to ORI of any decision to open an investigation on or before the date on which the investigation begins;

(e) Opportunity for the respondent to provide written comments on the institution's inquiry report;

(f) Opportunity for the respondent to provide written comments on the draft report of the investigation, and provisions for the institutional investigation committee to consider and address the comments before issuing the final report;

(g) Protocols for handling the research record and evidence, including the requirements of § 93.305;

(h) Appropriate interim institutional actions to protect public health, Federal funds and equipment, and the integrity of the PHS supported research process;

(i) Notice to ORI under § 93.318 and notice of any facts that may be relevant to protect public health, Federal funds and equipment, and the integrity of the PHS supported research process;

(j) Institutional actions in response to final findings of research misconduct;

(k) All reasonable and practical efforts, if requested and as appropriate, to protect or restore the reputation of persons alleged to have engaged in research misconduct but against whom no finding of research misconduct is made;

(l) All reasonable and practical efforts to protect or restore the position and reputation of any complainant, witness, or committee member and to counter potential or actual retaliation against these complainants, witnesses, and committee members; and

(m) Full and continuing cooperation with ORI during its oversight review under Subpart D of this part or any subsequent administrative hearings or appeals under Subpart E of this part. This includes providing all research records and evidence under the institution's control, custody, or possession and access to all persons within its authority necessary to develop a complete record of relevant evidence.

§ 93.305 Responsibility for maintenance and custody of research records and evidence.

An institution, as the responsible legal entity for the PHS supported research, has a continuing obligation under this part to ensure that it maintains adequate records for a research misconduct proceeding. The institution must—

(a) Either before or when the institution notifies the respondent of the allegation, inquiry or investigation, promptly take all reasonable and practical steps to obtain custody of all the research records and evidence needed to conduct the research misconduct proceeding, inventory the records and evidence, and sequester them in a secure manner, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments;

(b) Where appropriate, give the respondent copies of, or reasonable, supervised access to the research records;

(c) Undertake all reasonable and practical efforts to take custody of additional research records or evidence that is discovered during the course of a research misconduct proceeding, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments; and

(d) Maintain the research records and evidence as required by § 93.317.

§ 93.306 Using a consortium or other person for research misconduct proceedings.

(a) An institution may use the services of a consortium or person that the institution reasonably determines to be qualified by practice and experience to conduct research misconduct proceedings.

(b) A consortium may be a group of institutions, professional organizations, or mixed groups which will conduct research misconduct proceedings for other institutions.

(c) A consortium or person acting on behalf of an institution must follow the requirements of this part in conducting research misconduct proceedings.

THE INSTITUTIONAL INQUIRY

§ 93.307 Institutional inquiry.

(a) *Criteria warranting an inquiry.* An inquiry is warranted if the allegation—

(1) Falls within the definition of research misconduct under this part;

(2) Is within § 93.102; and

(3) Is sufficiently credible and specific so that potential evidence of research misconduct may be identified.

(b) *Notice to respondent and custody of research records.* At the time of or before beginning an inquiry, an institution must make a good faith effort to notify in writing the presumed respondent, if any. If the inquiry subsequently identifies additional respondents, the institution must notify them. To the extent it has not already done so at the allegation stage, the institution must, on or before the date on which the respondent is notified or the inquiry begins, whichever is earlier, promptly take all reasonable and practical steps to obtain custody of all the research records and evidence needed to conduct the research misconduct proceeding, inventory the records and evidence, and sequester them in a secure manner, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments.

(c) *Review of evidence.* The purpose of an inquiry is to conduct an initial review of the evidence to determine whether to conduct an investigation. Therefore, an inquiry does not require a full review of all the evidence related to the allegation.

(d) *Criteria warranting an investigation.* An inquiry's purpose is to decide if an allegation warrants an investigation. An investigation is warranted if there is—

(1) A reasonable basis for concluding that the allegation falls within the definition of research misconduct under this part and involves PHS supported biomedical or behavioral research, research training or activities related to that research or research training, as provided in § 93.102; and

(2) Preliminary information-gathering and preliminary fact-finding from the inquiry indicates that the allegation may have substance.

(e) *Inquiry report.* The institution must prepare a written report that meets the requirements of this section and § 93.309.

(f) *Opportunity to comment.* The institution must provide the respondent an opportunity to review and comment on the inquiry report and attach any comments received to the report.

(g) *Time for completion.* The institution must complete the inquiry within 60 calendar days of its initiation unless circumstances clearly warrant a longer period. If the inquiry takes longer than 60 days to complete, the inquiry record must include documentation of the reasons for exceeding the 60-day period.

§ 93.308 Notice of the results of the inquiry.

(a) *Notice to respondent.* The institution must notify the respondent whether the inquiry found that an investigation is warranted. The notice must include a copy of the inquiry report and include a copy of or refer to this part and the institution's policies and procedures adopted under its assurance.

(b) *Notice to complainants.* The institution may notify the complainant who made the allegation whether the inquiry found that an investigation is warranted. The institution may provide relevant portions of the report to the complainant for comment.

§ 93.309 Reporting to ORI on the decision to initiate an investigation.

(a) Within 30 days of finding that an investigation is warranted, the institution must provide ORI with the written finding by the responsible institutional official and a copy of the inquiry report which includes the following information—

(1) The name and position of the respondent;

(2) A description of the allegations of research misconduct;

(3) The PHS support, including, for example, grant numbers, grant applications, contracts, and publications listing PHS support;

(4) The basis for recommending that the alleged actions warrant an investigation; and

(5) Any comments on the report by the respondent or the complainant.

(b) The institution must provide the following information to ORI on request—

(1) The institutional policies and procedures under which the inquiry was conducted;

(2) The research records and evidence reviewed, transcripts or recordings of any interviews, and copies of all relevant documents; and

(3) The charges for the investigation to consider.

(c) *Documentation of decision not to investigate.* Institutions must keep sufficiently detailed documentation of inquiries to permit a later assessment by ORI of the reasons why the institution decided not to conduct an investigation. Consistent with § 93.317, institutions must keep these records in a secure manner for at least 7 years after the termination of the inquiry, and upon request, provide them to ORI or other authorized HHS personnel.

(d) *Notification of special circumstances.* In accordance with § 93.318, institutions must notify ORI and other PHS agencies, as relevant, of any special circumstances that may exist.

THE INSTITUTIONAL INVESTIGATION

§ 93.310 Institutional investigation.

Institutions conducting research misconduct investigations must:

(a) *Time.* Begin the investigation within 30 days after determining that an investigation is warranted.

(b) *Notice to ORI.* Notify the ORI Director of the decision to begin an investigation on or before the date the investigation begins and provide an inquiry report that meets the requirements of § 93.307 and § 93.309.

(c) *Notice to the respondent.* Notify the respondent in writing of the allegations within a reasonable amount of time after determining that an investigation is warranted, but before the investigation begins. The institution must give the respondent written notice of any new allegations of research misconduct within a reasonable amount of time of deciding to pursue allegations not addressed during the inquiry or in the initial notice of investigation.

(d) *Custody of the records.* To the extent they have not already done so at the allegation or inquiry stages, take all reasonable and practical steps to obtain custody of all the research records and evidence needed to conduct the research misconduct proceeding, inventory the records and evidence, and sequester them in a secure manner, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments. Whenever possible, the institution must take custody of the records—

(1) Before or at the time the institution notifies the respondent; and

(2) Whenever additional items become known or relevant to the investigation.

(e) *Documentation.* Use diligent efforts to ensure that the investigation is thorough and sufficiently documented and includes examination of all research records and evidence relevant to reaching a decision on the merits of the allegations.

(f) *Ensuring a fair investigation.* Take reasonable steps to ensure an impartial and unbiased investigation to the maximum extent practicable, including participation of persons with appropriate scientific expertise who do not have unresolved personal, professional, or financial conflicts of interest with those involved with the inquiry or investigation.

(g) *Interviews.* Interview each respondent, complainant, and any other available person who has been reasonably identified as having information regarding any relevant aspects of the investigation, including witnesses identified by the respondent, and record or transcribe each interview, provide the recording or transcript to the interviewee for correction, and include the recording or transcript in the record of the investigation.

(h) *Pursue leads.* Pursue diligently all significant issues and leads discovered

that are determined relevant to the investigation, including any evidence of additional instances of possible research misconduct, and continue the investigation to completion.

§ 93.311 Investigation time limits.

(a) *Time limit for completing an investigation.* An institution must complete all aspects of an investigation within 120 days of beginning it, including conducting the investigation, preparing the report of findings, providing the draft report for comment in accordance with § 93.312, and sending the final report to ORI under § 93.315.

(b) *Extension of time limit.* If unable to complete the investigation in 120 days, the institution must ask ORI for an extension in writing.

(c) *Progress reports.* If ORI grants an extension, it may direct the institution to file periodic progress reports.

§ 93.312 Opportunity to comment on the investigation report.

(a) The institution must give the respondent a copy of the draft investigation report and, concurrently, a copy of, or supervised access to, the evidence on which the report is based. The comments of the respondent on the draft report, if any, must be submitted within 30 days of the date on which the respondent received the draft investigation report.

(b) The institution may provide the complainant a copy of the draft investigation report or relevant portions of that report. The comments of the complainant, if any, must be submitted within 30 days of the date on which the complainant received the draft investigation report or relevant portions of it.

§ 93.313 Institutional investigation report.

The final institutional investigation report must be in writing and include:

(a) *Allegations.* Describe the nature of the allegations of research misconduct.

(b) *PHS support.* Describe and document the PHS support, including, for example, any grant numbers, grant applications, contracts, and publications listing PHS support.

(c) *Institutional charge.* Describe the specific allegations of research misconduct for consideration in the investigation.

(d) *Policies and procedures.* If not already provided to ORI with the inquiry report, include the institutional policies and procedures under which the investigation was conducted.

(e) *Research records and evidence.* Identify and summarize the research records and evidence reviewed, and identify any evidence taken into custody but not reviewed.

(f) *Statement of findings.* For each separate allegation of research misconduct identified during the investigation, provide a finding as to whether research misconduct did or did not occur, and if so—

(1) Identify whether the research misconduct was falsification, fabrication, or plagiarism, and if it was intentional, knowing, or in reckless disregard;

(2) Summarize the facts and the analysis which support the conclusion and consider the merits of any reasonable explanation by the respondent;

(3) Identify the specific PHS support;

(4) Identify whether any publications need correction or retraction;

(5) Identify the person(s) responsible for the misconduct; and

(6) List any current support or known applications or proposals for support that the respondent has pending with non-PHS Federal agencies.

(g) *Comments.* Include and consider any comments made by the respondent and complainant on the draft investigation report.

(h) *Maintain and provide records.* Maintain and provide to ORI upon request all relevant research records and records of the institution's research misconduct proceeding, including results of all interviews and the transcripts or recordings of such interviews.

§ 93.314 Institutional appeals.

(a) While not required by this part, if the institution's procedures provide for an appeal by the respondent that could result in a reversal or modification of the findings of research misconduct in the investigation report, the institution must complete any such appeal within 120 days of its filing. Appeals from personnel or similar actions that

would not result in a reversal or modification of the findings of research misconduct are excluded from the 120-day limit.

(b) If unable to complete any appeals within 120 days, the institution must ask ORI for an extension in writing and provide an explanation for the request.

(c) ORI may grant requests for extension for good cause. If ORI grants an extension, it may direct the institution to file periodic progress reports.

§ 93.315 Notice to ORI of institutional findings and actions.

The institution must give ORI the following:

(a) *Investigation Report.* Include a copy of the report, all attachments, and any appeals.

(b) *Final institutional action.* State whether the institution found research misconduct, and if so, who committed the misconduct.

(c) *Findings.* State whether the institution accepts the investigation's findings.

(d) *Institutional administrative actions.* Describe any pending or completed administrative actions against the respondent.

§ 93.316 Completing the research misconduct process.

(a) ORI expects institutions to carry inquiries and investigations through to completion and to pursue diligently all significant issues. An institution must notify ORI in advance if the institution plans to close a case at the inquiry, investigation, or appeal stage on the basis that the respondent has admitted guilt, a settlement with the respondent has been reached, or for any other reason, except the closing of a case at the inquiry stage on the basis that an investigation is not warranted or a finding of no misconduct at the investigation stage, which must be reported to ORI under § 93.315.

(b) After consulting with the institution on its basis for closing a case under paragraph (a) of this section, ORI may conduct an oversight review of the institution's handling of the case and take appropriate action including:

(1) Approving or conditionally approving closure of the case;

(2) Directing the institution to complete its process;

(3) Referring the matter for further investigation by HHS; or,

(4) Taking a compliance action.

Other Institutional Responsibilities

§ 93.317 Retention and custody of the research misconduct proceeding record.

(a) *Definition of records of research misconduct proceedings.* As used in this section, the term ''records of research misconduct proceedings'' includes:

(1) The records that the institution secures for the proceeding pursuant to §§ 93.305, 93.307(b) and 93.310(d), except to the extent the institution subsequently determines and documents that those records are not relevant to the proceeding or that the records duplicate other records that are being retained;

(2) The documentation of the determination of irrelevant or duplicate records;

(3) The inquiry report and final documents (not drafts) produced in the course of preparing that report, including the documentation of any decision not to investigate as required by § 93.309(d);

(4) The investigation report and all records (other than drafts of the report) in support of that report, including the recordings or transcriptions of each interview conducted pursuant to § 93.310(g); and

(5) The complete record of any institutional appeal covered by § 93.314.

(b) *Maintenance of record.* Unless custody has been transferred to HHS under paragraph (c) of this section, or ORI has advised the institution in writing that it no longer needs to retain the records, an institution must maintain records of research misconduct proceedings in a secure manner for 7 years after completion of the proceeding or the completion of any PHS proceeding involving the research misconduct allegation under subparts D and E of this part, whichever is later.

(c) *Provision for HHS custody.* On request, institutions must transfer custody of or provide copies to HHS, of any institutional record relevant to a research misconduct allegation covered by this part, including the research

records and evidence, to perform forensic or other analyses or as otherwise needed to conduct an HHS inquiry or investigation or for ORI to conduct its review or to present evidence in any proceeding under subparts D and E of this part.

§ 93.318 Notifying ORI of special circumstances.

At any time during a research misconduct proceeding, as defined in § 93.223, an institution must notify ORI immediately if it has reason to believe that any of the following conditions exist:

(a) Health or safety of the public is at risk, including an immediate need to protect human or animal subjects.

(b) HHS resources or interests are threatened.

(c) Research activities should be suspended.

(d) There is reasonable indication of possible violations of civil or criminal law.

(e) Federal action is required to protect the interests of those involved in the research misconduct proceeding.

(f) The research institution believes the research misconduct proceeding may be made public prematurely so that HHS may take appropriate steps to safeguard evidence and protect the rights of those involved.

(g) The research community or public should be informed.

§ 93.319 Institutional standards.

(a) Institutions may have internal standards of conduct different from the HHS standards for research misconduct under this part. Therefore, an institution may find conduct to be actionable under its standards even if the action does not meet this part's definition of research misconduct.

(b) An HHS finding or settlement does not affect institutional findings or administrative actions based on an institution's internal standards of conduct.

Subpart D—Responsibilities of the U.S. Department of Health and Human Services

GENERAL INFORMATION

§ 93.400 General statement of ORI authority.

(a) *ORI review.* ORI may respond directly to any allegation of research misconduct at any time before, during, or after an institution's response to the matter. The ORI response may include, but is not limited to—

(1) Conducting allegation assessments;

(2) Determining independently if jurisdiction exists under this part in any matter;

(3) Forwarding allegations of research misconduct to the appropriate institution or HHS component for inquiry or investigation;

(4) Recommending that HHS should perform an inquiry or investigation or issue findings and taking all appropriate actions in response to the inquiry, investigation, or findings;

(5) Notifying or requesting assistance and information from PHS funding components or other affected Federal and state offices and agencies or institutions;

(6) Reviewing an institution's findings and process;

(7) Making a finding of research misconduct; and

(8) Proposing administrative actions to HHS.

(b) *Requests for information.* ORI may request clarification or additional information, documentation, research records, or evidence from an institution or its members or other persons or sources to carry out ORI's review.

(c) *HHS administrative actions.* (1) In response to a research misconduct proceeding, ORI may propose administrative actions against any person to the HHS and, upon HHS approval and final action in accordance with this part, implement the actions.

(2) ORI may propose to the HHS debarring official that a person be suspended or debarred from receiving Federal funds and may propose to other appropriate PHS components the implementation of HHS administrative

actions within the components' authorities.

(d) *ORI assistance to institutions.* At any time, ORI may provide information, technical assistance, and procedural advice to institutional officials as needed regarding an institution's participation in research misconduct proceedings.

(e) *Review of institutional assurances.* ORI may review institutional assurances and policies and procedures for compliance with this part.

(f) *Institutional compliance.* ORI may make findings and impose HHS administrative actions related to an institution's compliance with this part and with its policies and procedures, including an institution's participation in research misconduct proceedings.

§ 93.401 Interaction with other offices and interim actions.

(a) ORI may notify and consult with other offices at any time if it has reason to believe that a research misconduct proceeding may involve that office. If ORI believes that a criminal or civil fraud violation may have occurred, it shall promptly refer the matter to the Department of Justice (DOJ), the HHS Inspector General (OIG), or other appropriate investigative body. ORI may provide expertise and assistance to the DOJ, OIG, PHS offices, other Federal offices, and state or local offices involved in investigating or otherwise pursuing research misconduct allegations or related matters.

(b) ORI may notify affected PHS offices and funding components at any time to permit them to make appropriate interim responses to protect the health and safety of the public, to promote the integrity of the PHS supported research and research process, and to conserve public funds.

(c) The information provided will not be disclosed as part of the peer review and advisory committee review processes, but may be used by the Secretary in making decisions about the award or continuation of funding.

RESEARCH MISCONDUCT ISSUES

§ 93.402 ORI allegation assessments.

(a) When ORI receives an allegation of research misconduct directly or becomes aware of an allegation or apparent instance of research misconduct, it may conduct an initial assessment or refer the matter to the relevant institution for an assessment, inquiry, or other appropriate actions.

(b) If ORI conducts an assessment, it considers whether the allegation of research misconduct appears to fall within the definition of research misconduct, appears to involve PHS supported biomedical or behavior research, research training or activities related to that research or research training, as provided in § 93.102, and whether it is sufficiently specific so that potential evidence may be identified and sufficiently substantive to warrant an inquiry. ORI may review all readily accessible, relevant information related to the allegation.

(c) If ORI decides that an inquiry is warranted, it forwards the matter to the appropriate institution or HHS component.

(d) If ORI decides that an inquiry is not warranted it will close the case and forward the allegation in accordance with paragraph (e) of this section.

(e) ORI may forward allegations that do not fall within the jurisdiction of this part to the appropriate HHS component, Federal or State agency, institution, or other appropriate entity.

§ 93.403 ORI review of research misconduct proceedings.

ORI may conduct reviews of research misconduct proceedings. In conducting its review, ORI may—

(a) Determine whether there is HHS jurisdiction under this part;

(b) Consider any reports, institutional findings, research records, and evidence;

(c) Determine if the institution conducted the proceedings in a timely and fair manner in accordance with this part with sufficient thoroughness, objectivity, and competence to support the conclusions;

(d) Obtain additional information or materials from the institution, the respondent, complainants, or other persons or sources;

(e) Conduct additional analyses and develop evidence;

(f) Decide whether research misconduct occurred, and if so who committed it;

(g) Make appropriate research misconduct findings and propose HHS administrative actions; and

(h) Take any other actions necessary to complete HHS' review.

§ 93.404 Findings of research misconduct and proposed administrative actions.

After completing its review, ORI either closes the case without a finding of research misconduct or—

(a) Makes findings of research misconduct and proposes and obtains HHS approval of administrative actions based on the record of the research misconduct proceedings and any other information obtained by ORI during its review; or

(b) Recommends that HHS seek to settle the case.

§ 93.405 Notifying the respondent of findings of research misconduct and HHS administrative actions.

(a) When the ORI makes a finding of research misconduct or seeks to impose or enforce HHS administrative actions, other than debarment or suspension, it notifies the respondent in a charge letter. In cases involving a debarment or suspension action, the HHS debarring official issues a notice of proposed debarment or suspension to the respondent as part of the charge letter. The charge letter includes the ORI findings of research misconduct and the basis for them and any HHS administrative actions. The letter also advises the respondent of the opportunity to contest the findings and administrative actions under Subpart E of this part.

(b) The ORI sends the charge letter by certified mail or a private delivery service to the last known address of the respondent or the last known principal place of business of the respondent's attorney.

§ 93.406 Final HHS actions.

Unless the respondent contests the charge letter within the 30-day period prescribed in § 93.501, the ORI finding of research misconduct is the final HHS action on the research misconduct issues and the HHS administrative actions become final and will be implemented, except that the debarring official's decision is the final HHS action on any debarment or suspension actions.

§ 93.407 HHS administrative actions.

(a) In response to a research misconduct proceeding, HHS may impose HHS administrative actions that include but are not limited to:

(1) Clarification, correction, or retraction of the research record.

(2) Letters of reprimand.

(3) Imposition of special certification or assurance requirements to ensure compliance with applicable regulations or terms of PHS grants, contracts, or cooperative agreements.

(4) Suspension or termination of a PHS grant, contract, or cooperative agreement.

(5) Restriction on specific activities or expenditures under an active PHS grant, contract, or cooperative agreement.

(6) Special review of all requests for PHS funding.

(7) Imposition of supervision requirements on a PHS grant, contract, or cooperative agreement.

(8) Certification of attribution or authenticity in all requests for support and reports to the PHS.

(9) No participation in any advisory capacity to the PHS.

(10) Adverse personnel action if the respondent is a Federal employee, in compliance with relevant Federal personnel policies and laws.

(11) Suspension or debarment under 45 CFR Part 76, 48 CFR Subparts 9.4 and 309.4, or both.

(b) In connection with findings of research misconduct, HHS also may seek to recover PHS funds spent in support of the activities that involved research misconduct.

(c) Any authorized HHS component may impose, administer, or enforce HHS administrative actions separately or in coordination with other HHS

components, including, but not limited to ORI, the Office of Inspector General, the PHS funding component, and the debarring official.

§ 93.408 Mitigating and aggravating factors in HHS administrative actions.

The purpose of HHS administrative actions is remedial. The appropriate administrative action is commensurate with the seriousness of the misconduct, and the need to protect the health and safety of the public, promote the integrity of the PHS supported research and research process, and conserve public funds. HHS considers aggravating and mitigating factors in determining appropriate HHS administrative actions and their terms. HHS may consider other factors as appropriate in each case. The existence or nonexistence of any factor is not determinative:

(a) *Knowing, intentional, or reckless.* Were the respondent's actions knowing or intentional or was the conduct reckless?

(b) *Pattern.* Was the research misconduct an isolated event or part of a continuing or prior pattern of dishonest conduct?

(c) *Impact.* Did the misconduct have significant impact on the proposed or reported research record, research subjects, other researchers, institutions, or the public health or welfare?

(d) *Acceptance of responsibility.* Has the respondent accepted responsibility for the misconduct by—

(1) Admitting the conduct;

(2) Cooperating with the research misconduct proceedings;

(3) Demonstrating remorse and awareness of the significance and seriousness of the research misconduct; and

(4) Taking steps to correct or prevent the recurrence of the research misconduct.

(e) *Failure to accept responsibility.* Does the respondent blame others rather than accepting responsibility for the actions?

(f) *Retaliation.* Did the respondent retaliate against complainants, witnesses, committee members, or other persons?

(g) *Present responsibility.* Is the respondent presently responsible to conduct PHS supported research?

(h) *Other factors.* Other factors appropriate to the circumstances of a particular case.

§ 93.409 Settlement of research misconduct proceedings.

(a) HHS may settle a research misconduct proceeding at any time it concludes that settlement is in the best interests of the Federal government and the public health or welfare.

(b) Settlement agreements are publicly available, regardless of whether the ORI made a finding of research misconduct.

§ 93.410 Final HHS action with no settlement or finding of research misconduct.

When the final HHS action does not result in a settlement or finding of research misconduct, ORI may:

(a) Provide written notice to the respondent, the relevant institution, the complainant, and HHS officials.

(b) Take any other actions authorized by law.

§ 93.411 Final HHS action with settlement or finding of research misconduct.

When a final HHS action results in a settlement or research misconduct finding, ORI may:

(a) Provide final notification of any research misconduct findings and HHS administrative actions to the respondent, the relevant institution, the complainant, and HHS officials. The debarring official may provide a separate notice of final HHS action on any debarment or suspension actions.

(b) Identify publications which require correction or retraction and prepare and send a notice to the relevant journal.

(c) Publish notice of the research misconduct findings.

(d) Notify the respondent's current employer.

(e) Take any other actions authorized by law.

INSTITUTIONAL COMPLIANCE ISSUES

§ 93.412 Making decisions on institutional noncompliance.

(a) Institutions must foster a research environment that discourages misconduct in all research and that deals forthrightly with possible misconduct associated with PHS supported research.

(b) ORI may decide that an institution is not compliant with this part if the institution shows a disregard for, or inability or unwillingness to implement and follow the requirements of this part and its assurance. In making this decision, ORI may consider, but is not limited to the following factors—

(1) Failure to establish and comply with policies and procedures under this part;

(2) Failure to respond appropriately when allegations of research misconduct arise;

(3) Failure to report to ORI all investigations and findings of research misconduct under this part;

(4) Failure to cooperate with ORI's review of research misconduct proceedings; or

(5) Other actions or omissions that have a material, adverse effect on reporting and responding to allegations of research misconduct.

§ 93.413 HHS compliance actions.

(a) An institution's failure to comply with its assurance and the requirements of this part may result in enforcement action against the institution.

(b) ORI may address institutional deficiencies through technical assistance if the deficiencies do not substantially affect compliance with this part.

(c) If an institution fails to comply with its assurance and the requirements of this part, HHS may take some or all of the following compliance actions:

(1) Issue a letter of reprimand.

(2) Direct that research misconduct proceedings be handled by HHS.

(3) Place the institution on special review status.

(4) Place information on the institutional noncompliance on the ORI Web site.

(5) Require the institution to take corrective actions.

(6) Require the institution to adopt and implement an institutional integrity agreement.

(7) Recommend that HHS debar or suspend the entity.

(8) Any other action appropriate to the circumstances.

(d) If the institution's actions constitute a substantial or recurrent failure to comply with this part, ORI may also revoke the institution's assurance under §§ 93.301 or 93.303.

(e) ORI may make public any findings of institutional noncompliance and HHS compliance actions.

DISCLOSURE OF INFORMATION

§ 93.414 Notice.

(a) ORI may disclose information to other persons for the purpose of providing or obtaining information about research misconduct as permitted under the Privacy Act, 5 U.S.C. 552a.

(b) ORI may publish a notice of final agency findings of research misconduct, settlements, and HHS administrative actions and release and withhold information as permitted by the Privacy Act and the Freedom of Information Act, 5 U.S.C. 552.

Subpart E—Opportunity To Contest ORI Findings of Research Misconduct and HHS Administrative Actions

GENERAL INFORMATION

§ 93.500 General policy.

(a) This subpart provides a respondent an opportunity to contest ORI findings of research misconduct and HHS administrative actions, including debarment or suspension, arising under 42 U.S.C. 289b in connection with PHS supported biomedical and behavioral research, research training, or activities related to that research or research training.

(b) A respondent has an opportunity to contest ORI research misconduct findings and HHS administrative actions under this part, including debarment or suspension, by requesting an

administrative hearing before an Administrative Law Judge (ALJ) affiliated with the HHS DAB, when—

(1) ORI has made a finding of research misconduct against a respondent; and

(2) The respondent has been notified of those findings and any proposed HHS administrative actions, including debarment or suspension, in accordance with this part.

(c) The ALJ's ruling on the merits of the ORI research misconduct findings and the HHS administrative actions is subject to review by the Assistant Secretary for Health in accordance with § 93.523. The decision made under that section is the final HHS action, unless that decision results in a recommendation for debarment or suspension. In that case, the decision under § 93.523 shall constitute findings of fact to the debarring official in accordance with 45 CFR 76.845(c).

(d) Where a proposed debarment or suspension action is based upon an ORI finding of research misconduct, the procedures in this part provide the notification, opportunity to contest, and fact-finding required under the HHS debarment and suspension regulations at 45 CFR part 76, subparts H and G, respectively, and 48 CFR Subparts 9.4 and 309.4.

§ 93.501 Opportunity to contest findings of research misconduct and administrative actions.

(a) *Opportunity to contest.* A respondent may contest ORI findings of research misconduct and HHS administrative actions, including any debarment or suspension action, by requesting a hearing within 30 days of receipt of the charge letter or other written notice provided under § 93.405.

(b) *Form of a request for hearing.* The respondent's request for a hearing must be—

(1) In writing;

(2) Signed by the respondent or by the respondent's attorney; and

(3) Sent by certified mail, or other equivalent (*i.e.*, with a verified method of delivery), to the DAB Chair and ORI.

(c) *Contents of a request for hearing.* The request for a hearing must—

(1) Admit or deny each finding of research misconduct and each factual assertion made in support of the finding;

(2) Accept or challenge each proposed HHS administrative action;

(3) Provide detailed, substantive reasons for each denial or challenge;

(4) Identify any legal issues or defenses that the respondent intends to raise during the proceeding; and

(5) Identify any mitigating factors that the respondent intends to prove.

(d) *Extension for good cause to supplement the hearing request.* (1) After receiving notification of the appointment of the ALJ, the respondent has 10 days to submit a written request to the ALJ for supplementation of the hearing request to comply fully with the requirements of paragraph (c) of this section. The written request must show good cause in accordance with paragraph (d)(2) of this section and set forth the proposed supplementation of the hearing request. The ALJ may permit the proposed supplementation of the hearing request in whole or in part upon a finding of good cause.

(2) Good cause means circumstances beyond the control of the respondent or respondent's representative and not attributable to neglect or administrative inadequacy.

Hearing Process

§ 93.502 Appointment of the Administrative Law Judge and scientific expert.

(a) Within 30 days of receiving a request for a hearing, the DAB Chair, in consultation with the Chief Administrative Law Judge, must designate an Administrative Law Judge (ALJ) to determine whether the hearing request should be granted and, if the hearing request is granted, to make recommended findings in the case after a hearing or review of the administrative record in accordance with this part.

(b) The ALJ may retain one or more persons with appropriate scientific or technical expertise to assist the ALJ in evaluating scientific or technical issues related to the findings of research misconduct.

(1) On the ALJ's or a party's motion to appoint an expert, the ALJ must give the parties an opportunity to submit nominations. If such a motion is

made by a party, the ALJ must appoint an expert, either:

(i) The expert, if any, who is agreed upon by both parties and found to be qualified by the ALJ; or,

(ii) If the parties cannot agree upon an expert, the expert chosen by the ALJ.

(2) The ALJ may seek advice from the expert(s) at any time during the discovery and hearing phases of the proceeding. The expert(s) shall provide advice to the ALJ in the form of a written report or reports that will be served upon the parties within 10 days of submission to the ALJ. That report must contain a statement of the expert's background and qualifications. Any comment on or response to a report by a party, which may include comments on the expert's qualifications, must be submitted to the ALJ in accordance with § 93.510(c). The written reports and any comment on, or response to them are part of the record. Expert witnesses of the parties may testify on the reports and any comments or responses at the hearing, unless the ALJ determines such testimony to be inadmissible in accordance with § 93.519, or that such testimony would unduly delay the proceeding.

(c) No ALJ, or person hired or appointed to assist the ALJ, may serve in any proceeding under this subpart if he or she has any real or apparent conflict of interest, bias, or prejudice that might reasonably impair his or her objectivity in the proceeding.

(d) Any party to the proceeding may request the ALJ or scientific expert to withdraw from the proceeding because of a real or apparent conflict of interest, bias, or prejudice under paragraph (c) of this section. The motion to disqualify must be timely and state with particularity the grounds for disqualification. The ALJ may rule upon the motion or certify it to the Chief ALJ for decision. If the ALJ rules upon the motion, either party may appeal the decision to the Chief ALJ.

(e) An ALJ must withdraw from any proceeding for any reason found by the ALJ or Chief ALJ to be disqualifying.

§ 93.503 Grounds for granting a hearing request.

(a) The ALJ must grant a respondent's hearing request if the ALJ determines there is a genuine dispute over facts material to the findings of research misconduct or proposed administrative actions, including any debarment or suspension action. The respondent's general denial or assertion of error for each finding of research misconduct, and any basis for the finding, or for the proposed HHS administrative actions in the charge letter, is not sufficient to establish a genuine dispute.

(b) The hearing request must specifically deny each finding of research misconduct in the charge letter, each basis for the finding and each HHS administrative action in the charge letter, or it is considered an admission by the respondent. If the hearing request does not specifically dispute the HHS administrative actions, including any debarment or suspension actions, they are considered accepted by the respondent.

(c) If the respondent does not request a hearing within the 30-day time period prescribed in § 93.501(a), the finding(s) and any administrative action(s), other than debarment or suspension actions, become final agency actions at the expiration of the 30-day period. Where there is a proposal for debarment or suspension, after the expiration of the 30-day time period the official record is closed and forwarded to the debarring official for a final decision.

(d) If the ALJ grants the hearing request, the respondent may waive the opportunity for any in-person proceeding, and the ALJ may review and decide the case on the basis of the administrative record. The ALJ may grant a respondent's request that waiver of the in-person proceeding be conditioned upon the opportunity for respondent to file additional pleadings and documentation. ORI may also supplement the administrative record through pleadings, documents, in-person or telephonic testimony, and oral presentations.

§ 93.504 Grounds for dismissal of a hearing request.

(a) The ALJ must dismiss a hearing request if the respondent—

(1) Does not file the request within 30 days after receiving the charge letter;

(2) Does not raise a genuine dispute over facts or law material to the findings of research misconduct and any administrative actions, including debarment and suspension actions, in the hearing request or in any extension to supplement granted by the ALJ under § 93.501(d);

(3) Does not raise any issue which may properly be addressed in a hearing;

(4) Withdraws or abandons the hearing request; or

(b) The ALJ may dismiss a hearing request if the respondent fails to provide ORI with notice in the form and manner required by § 93.501.

§ 93.505 Rights of the parties.

(a) The parties to the hearing are the respondent and ORI. The investigating institution is not a party to the case, unless it is a respondent.

(b) Except as otherwise limited by this subpart, the parties may—

(1) Be accompanied, represented, and advised by an attorney;

(2) Participate in any case-related conference held by the ALJ;

(3) Conduct discovery of documents and other tangible items;

(4) Agree to stipulations of fact or law that must be made part of the record;

(5) File motions in writing before the ALJ;

(6) Present evidence relevant to the issues at the hearing;

(7) Present and cross-examine witnesses;

(8) Present oral arguments;

(9) Submit written post-hearing briefs, proposed findings of fact and conclusions of law, and reply briefs within reasonable time frames agreed upon by the parties or established by the ALJ as provided in § 93.522; and

(10) Submit materials to the ALJ and other parties under seal, or in redacted form, when necessary, to protect the confidentiality of any information contained in them consistent with this part, the Privacy Act, the Freedom of Information Act, or other Federal law or regulation.

§ 93.506 Authority of the Administrative Law Judge.

(a) The ALJ assigned to the case must conduct a fair and impartial hearing, avoid unnecessary delay, maintain order, and assure that a complete and accurate record of the proceeding is properly made. The ALJ is bound by all Federal statutes and regulations, Secretarial delegations of authority, and applicable HHS policies and may not refuse to follow them or find them invalid, as provided in paragraph (c)(4) of this section. The ALJ has the authorities set forth in this part.

(b) Subject to review as provided elsewhere in this subpart, the ALJ may—

(1) Set and change the date, time, schedule, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences with the parties to identify or simplify the issues, or to consider other matters that may aid in the prompt disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Require the attendance of witnesses at a hearing;

(6) Rule on motions and other procedural matters;

(7) Require the production of documents and regulate the scope and timing of documentary discovery as permitted by this part;

(8) Require each party before the hearing to provide the other party and the ALJ with copies of any exhibits that the party intends to introduce into evidence;

(9) Issue a ruling, after an *in camera* inspection if necessary, to address the disclosure of any evidence or portion of evidence for which confidentiality is requested under this part or other Federal law or regulation, or which a party submitted under seal;

(10) Regulate the course of the hearing and the conduct of representatives, parties, and witnesses;

(11) Examine witnesses and receive evidence presented at the hearing;
(12) Admit, exclude, or limit evidence offered by a party;
(13) Hear oral arguments on facts or law during or after the hearing;
(14) Upon motion of a party, take judicial notice of facts;
(15) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;
(16) Conduct any conference or oral argument in person, by telephone, or by audio-visual communication;
(17) Take action against any party for failing to follow an order or procedure or for disruptive conduct.
(c) The ALJ does not have the authority to—
(1) Enter an order in the nature of a directed verdict;
(2) Compel settlement negotiations;
(3) Enjoin any act of the Secretary; or
(4) Find invalid or refuse to follow Federal statutes or regulations, Secretarial delegations of authority, or HHS policies.

§ 93.507 Ex parte communications.

(a) No party, attorney, or other party representative may communicate *ex parte* with the ALJ on any matter at issue in a case, unless both parties have notice and an opportunity to participate in the communication. However, a party, attorney, or other party representative may communicate with DAB staff about administrative or procedural matters.
(b) If an *ex parte* communication occurs, the ALJ will disclose it to the other party and make it part of the record after the other party has an opportunity to comment.
(c) The provisions of this section do not apply to communications between an employee or contractor of the DAB and the ALJ.

§ 93.508 Filing, forms, and service.

(a) *Filing.* (1) Unless the ALJ provides otherwise, all submissions required or authorized to be filed in the proceeding must be filed with the ALJ.
(2) Submissions are considered filed when they are placed in the mail, transmitted to a private delivery service for the purpose of delivering the item to the ALJ, or submitted in another manner authorized by the ALJ.
(b) *Forms.* (1) Unless the ALJ provides otherwise, all submissions filed in the proceeding must include an original and two copies. The ALJ may designate the format for copies of nondocumentary materials such as videotapes, computer disks, or physical evidence. This provision does not apply to the charge letter or other written notice provided under § 93.405.
(2) Every submission filed in the proceeding must include the title of the case, the docket number, and a designation of the nature of the submission, such as a ''Motion to Compel the Production of Documents'' or ''Respondent's Proposed Exhibits.''
(3) Every submission filed in the proceeding must be signed by and contain the address and telephone number of the party on whose behalf the document or paper was filed, or the attorney of record for the party.
(c) *Service.* A party filing a submission with the ALJ must, at the time of filing, serve a copy on the other party. Service may be made either to the last known principal place of business of the party's attorney if the party is represented by an attorney, or, if not, to the party's last known address. Service may be made by—
(1) Certified mail;
(2) First-class postage prepaid U.S. Mail;
(3) A private delivery service;
(4) Hand-delivery; or
(5) Facsimile or other electronic means if permitted by the ALJ.
(d) *Proof of service.* Each party filing a document or paper with the ALJ must also provide proof of service at the time of the filing. Any of the following items may constitute proof of service:
(1) A certified mail receipt returned by the postal service with a signature;
(2) An official record of the postal service or private delivery service;
(3) A certificate of service stating the method, place, date of service, and person served that is signed by an individual with personal knowledge of these facts; or
(4) Other proof authorized by the ALJ.

§ 93.509 Computation of time.

(a) In computing any period of time under this part for filing and service or for responding to an order issued by the ALJ, the computation begins with the day following the act or event, and includes the last day of the period unless that day is a Saturday, Sunday, or legal holiday observed by the Federal government, in which case it includes the next business day.

(b) When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government must be excluded from the computation.

(c) Where a document has been filed by placing it in the mail, an additional 5 days must be added to the time permitted for any response. This paragraph does not apply to a respondent's request for hearing under § 93.501.

(d) Except for the respondent's request for a hearing, the ALJ may modify the time for the filing of any document or paper required or authorized under the rules in this part to be filed for good cause shown. When time permits, notice of a party's request for extension of the time and an opportunity to respond must be provided to the other party.

§ 93.510 Filing motions.

(a) Parties must file all motions and requests for an order or ruling with the ALJ, serve them on the other party, state the nature of the relief requested, provide the legal authority relied upon, and state the facts alleged.

(b) All motions must be in writing except for those made during a prehearing conference or at the hearing.

(c) Within 10 days after being served with a motion, or other time as set by the ALJ, a party may file a response to the motion. The moving party may not file a reply to the responsive pleading unless allowed by the ALJ.

(d) The ALJ may not grant a motion before the time for filing a response has expired, except with the parties' consent or after a hearing on the motion. However, the ALJ may overrule or deny any motion without awaiting a response.

(e) The ALJ must make a reasonable effort to dispose of all motions promptly, and, whenever possible, dispose of all outstanding motions before the hearing.

§ 93.511 Prehearing conferences.

(a) The ALJ must schedule an initial prehearing conference with the parties within 30 days of the DAB Chair's assignment of the case.

(b) The ALJ may use the initial prehearing conference to discuss—

(1) Identification and simplification of the issues, specification of disputes of fact and their materiality to the ORI findings of research misconduct and any HHS administrative actions, and amendments to the pleadings, including any need for a more definite statement;

(2) Stipulations and admissions of fact including the contents, relevancy, and authenticity of documents;

(3) Respondent's waiver of an administrative hearing, if any, and submission of the case on the basis of the administrative record as provided in § 93.503(d);

(4) Identification of legal issues and any need for briefing before the hearing;

(5) Identification of evidence, pleadings, and other materials, if any, that the parties should exchange before the hearing;

(6) Identification of the parties' witnesses, the general nature of their testimony, and the limitation on the number of witnesses and the scope of their testimony;

(7) Scheduling dates such as the filing of briefs on legal issues identified in the charge letter or the respondent's request for hearing, the exchange of witness lists, witness statements, proposed exhibits, requests for the production of documents, and objections to proposed witnesses and documents;

(8) Scheduling the time, place, and anticipated length of the hearing; and

(9) Other matters that may encourage the fair, just, and prompt disposition of the proceedings.

(c) The ALJ may schedule additional prehearing conferences as appropriate, upon reasonable notice to or request of the parties.

(d) All prehearing conferences will be audio-taped with copies provided to the parties upon request.

(e) Whenever possible, the ALJ must memorialize in writing any oral rulings within 10 days after the prehearing conference.

(f) By 15 days before the scheduled hearing date, the ALJ must hold a final prehearing conference to resolve to the maximum extent possible all outstanding issues about evidence, witnesses, stipulations, motions and all other matters that may encourage the fair, just, and prompt disposition of the proceedings.

§ 93.512 Discovery.

(a) *Request to provide documents.* A party may only request another party to produce documents or other tangible items for inspection and copying that are relevant and material to the issues identified in the charge letter and in the respondent's request for hearing.

(b) *Meaning of documents.* For purposes of this subpart, the term documents includes information, reports, answers, records, accounts, papers, tangible items, and other data and documentary evidence. This subpart does not require the creation of any document. However, requested data stored in an electronic data storage system must be produced in a form reasonably accessible to the requesting party.

(c) *Nondisclosable items.* This section does not authorize the disclosure of—

(1) Interview reports or statements obtained by any party, or on behalf of any party, of persons whom the party will not call as witness in its case-in-chief;

(2) Analyses and summaries prepared in conjunction with the inquiry, investigation, ORI oversight review, or litigation of the case; or

(3) Any privileged documents, including but not limited to those protected by the attorney-client privilege, attorney-work product doctrine, or Federal law or regulation.

(d) *Responses to a discovery request.* Within 30 days of receiving a request for the production of documents, a party must either fully respond to the request, submit a written objection to the discovery request, or seek a protective order from the ALJ. If a party objects to a request for the production of documents, the party must identify each document or item subject to the scope of the request and state the basis of the objection for each document, or any part that the party does not produce.

(1) Within 30 days of receiving any objections, the party seeking production may file a motion to compel the production of the requested documents.

(2) The ALJ may order a party to produce the requested documents for *in camera* inspection to evaluate the merits of a motion to compel or for a protective order.

(3) The ALJ must compel the production of a requested document and deny a motion for a protective order, unless the requested document is—

(i) Not relevant or material to the issues identified in the charge letter or the respondent's request for hearing;

(ii) Unduly costly or burdensome to produce;

(iii) Likely to unduly delay the proceeding or substantially prejudice a party;

(iv) Privileged, including but not limited to documents protected by the attorney-client privilege, attorney-work product doctrine, or Federal law or regulation; or

(v) Collateral to issues to be decided at the hearing.

(4) If any part of a document is protected from disclosure under paragraph (d)(3) of this section, the ALJ must redact the protected portion of a document before giving it to the requesting party.

(5) The party seeking discovery has the burden of showing that the ALJ should allow it.

(e) *Refusal to produce items.* If a party refuses to provide requested documents when ordered by the ALJ, the ALJ may take corrective action, including but not limited to, ordering the noncompliant party to submit written answers under oath to written interrogatories posed by the other party or taking any of the actions at § 93.515.

§ 93.513 Submission of witness lists, witness statements, and exhibits.

(a) By 60 days before the scheduled hearing date, each party must give the ALJ a list of witnesses to be offered during the hearing and a statement describing the substance of their proposed testimony, copies of any prior

written statements or transcribed testimony of proposed witnesses, a written report of each expert witness to be called to testify that meets the requirements of Federal Rule of Civil Procedure 26(a)(2)(B), and copies of proposed hearing exhibits, including copies of any written statements that a party intends to offer instead of live direct testimony. If there are no prior written statements or transcribed testimony of a proffered witness, the party must submit a detailed factual affidavit of the proposed testimony.

(b) A party may supplement its submission under paragraph (a) of this section until 30 days before the scheduled hearing date if the ALJ determines:

(1) There are extraordinary circumstances; and

(2) There is no substantial prejudice to the objecting party.

(c) The parties must have an opportunity to object to the admission of evidence submitted under paragraph (a) of this section under a schedule set by the ALJ. However, the parties must file all objections before the final prehearing conference.

(d) If a party tries to introduce evidence after the deadlines in paragraph (a) of this section, the ALJ must exclude the offered evidence from the party's case-in-chief unless the conditions of paragraph (b) of this section are met. If the ALJ admits evidence under paragraph (b) of this section, the objecting party may file a motion to postpone all or part of the hearing to allow sufficient time to prepare and respond to the evidence. The ALJ may not unreasonably deny that motion.

(e) If a party fails to object within the time set by the ALJ and before the final prehearing conference, evidence exchanged under paragraph (a) of this section is considered authentic, relevant and material for the purpose of admissibility at the hearing.

§ 93.514 Amendment to the charge letter.

(a) The ORI may amend the findings of research misconduct up to 30 days before the scheduled hearing.

(b) The ALJ may not unreasonably deny a respondent's motion to postpone all or part of the hearing to allow sufficient time to prepare and respond to the amended findings.

§ 93.515 Actions for violating an order or for disruptive conduct.

(a) The ALJ may take action against any party in the proceeding for violating an order or procedure or for other conduct that interferes with the prompt, orderly, or fair conduct of the hearing. Any action imposed upon a party must reasonably relate to the severity and nature of the violation or disruptive conduct.

(b) The actions may include—

(1) Prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;

(2) Striking pleadings, in whole or in part;

(3) Staying the proceedings;

(4) Entering a decision by default;

(5) Refusing to consider any motion or other action not timely filed; or

(6) Drawing the inference that spoliated evidence was unfavorable to the party responsible for its spoliation.

§ 93.516 Standard and burden of proof.

(a) *Standard of proof.* The standard of proof is the preponderance of the evidence.

(b) *Burden of proof.* (1) ORI bears the burden of proving the findings of research misconduct. The destruction, absence of, or respondent's failure to provide research records adequately documenting the questioned research is evidence of research misconduct where ORI establishes by a preponderance of the evidence that the respondent intentionally, knowingly, or recklessly had research records and destroyed them, had the opportunity to maintain the records but did not do so, or maintained the records and failed to produce them in a timely manner and the respondent's conduct constitutes a significant departure from accepted practices of the relevant research community.

(2) The respondent has the burden of going forward with and the burden of proving, by a preponderance of the evidence, any and all affirmative defenses raised. In determining whether ORI has carried the burden of proof imposed by

this part, the ALJ shall give due consideration to admissible, credible evidence of honest error or difference of opinion presented by the respondent.

(3) ORI bears the burden of proving that the proposed HHS administrative actions are reasonable under the circumstances of the case. The respondent has the burden of going forward with and proving by a preponderance of the evidence any mitigating factors that are relevant to a decision to impose HHS administrative actions following a research misconduct proceeding.

§ 93.517 The hearing.

(a) The ALJ will conduct an in-person hearing to decide if the respondent committed research misconduct and if the HHS administrative actions, including any debarment or suspension actions, are appropriate.

(b) The ALJ provides an independent *de novo* review of the ORI findings of research misconduct and the proposed HHS administrative actions. The ALJ does not review the institution's procedures or misconduct findings or ORI's research misconduct proceedings.

(c) A hearing under this subpart is not limited to specific findings and evidence set forth in the charge letter or the respondent's request for hearing. Additional evidence and information may be offered by either party during its case-in-chief unless the offered evidence is—

(1) Privileged, including but not limited to those protected by the attorney-client privilege, attorney-work product doctrine, or Federal law or regulation.

(2) Otherwise inadmissible under §§ 93.515 or 93.519.

(3) Not offered within the times or terms of §§ 93.512 and 93.513.

(d) ORI proceeds first in its presentation of evidence at the hearing.

(e) After both parties have presented their cases-in-chief, the parties may offer rebuttal evidence even if not exchanged earlier under §§ 93.512 and 93.513.

(f) Except as provided in § 93.518(c), the parties may appear at the hearing in person or by an attorney of record in the proceeding.

(g) The hearing must be open to the public, unless the ALJ orders otherwise for good cause shown. However, even if the hearing is closed to the public, the ALJ may not exclude a party or party representative, persons whose presence a party shows to be essential to the presentation of its case, or expert witnesses.

§ 93.518 Witnesses.

(a) Except as provided in paragraph (b) of this section, witnesses must give testimony at the hearing under oath or affirmation.

(b) The ALJ may admit written testimony if the witness is available for cross-examination, including prior sworn testimony of witnesses that has been subject to cross-examination. These written statements must be provided to all other parties under § 93.513.

(c) The parties may conduct direct witness examination and cross-examination in person, by telephone, or by audio-visual communication as permitted by the ALJ. However, a respondent must always appear in-person to present testimony and for cross-examination.

(d) The ALJ may exercise reasonable control over the mode and order of questioning witnesses and presenting evidence to—

(1) Make the witness questioning and presentation relevant to deciding the truth of the matter; and

(2) Avoid undue repetition or needless consumption of time.

(e) The ALJ must permit the parties to conduct cross-examination of witnesses.

(f) Upon request of a party, the ALJ may exclude a witness from the hearing before the witness' own testimony. However, the ALJ may not exclude—

(1) A party or party representative;

(2) Persons whose presence is shown by a party to be essential to the presentation of its case; or

(3) Expert witnesses.

§ 93.519 Admissibility of evidence.

(a) The ALJ decides the admissibility of evidence offered at the hearing.

(b) Except as provided in this part, the ALJ is not bound by the Federal Rules of Evidence (FRE). However, the ALJ may apply the FRE where appropriate (e.g., to exclude unreliable evidence).

(c) The ALJ must admit evidence unless it is clearly irrelevant, immaterial, or unduly repetitious. However, the ALJ may exclude relevant and material evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence under FRE 401–403.

(d) The ALJ must exclude relevant and material evidence if it is privileged, including but not limited to evidence protected by the attorney-client privilege, the attorney-work product doctrine, or Federal law or regulation.

(e) The ALJ may take judicial notice of matters upon the ALJ's own initiative or upon motion by a party as permitted under FRE 201 (Judicial Notice of Adjudicative Facts).

(1) The ALJ may take judicial notice of any other matter of technical, scientific, or commercial fact of established character.

(2) The ALJ must give the parties adequate notice of matters subject to judicial notice and adequate opportunity to show that the ALJ erroneously noticed the matters.

(f) Evidence of crimes, wrongs, or acts other than those at issue in the hearing is admissible only as permitted under FRE 404(b) (Character Evidence not Admissible to Prove Conduct; Exceptions, Other Crimes).

(g) Methods of proving character are admissible only as permitted under FRE 405 (Methods of Proving Character).

(h) Evidence related to the character and conduct of witnesses is admissible only as permitted under FRE Rule 608 (Evidence of Character and Conduct of Witness).

(i) Evidence about offers of compromise or settlement made in this action is inadmissible as provided in FRE 408 (Compromise and Offers to Compromise).

(j) The ALJ must admit relevant and material hearsay evidence, unless an objecting party shows that the offered hearsay evidence is not reliable.

(k) The parties may introduce witnesses and evidence on rebuttal.

(l) All documents and other evidence offered or admitted into the record must be open to examination by both parties, unless otherwise ordered by the ALJ for good cause shown.

(m) Whenever the ALJ excludes evidence, the party offering the evidence may make an offer of proof, and the ALJ must include the offer in the transcript or recording of the hearing in full. The offer of proof should consist of a brief oral statement describing the evidence excluded. If the offered evidence consists of an exhibit, the ALJ must mark it for identification and place it in the hearing record. However, the ALJ may rely upon the offered evidence in reaching the decision on the case only if the ALJ admits it.

§ 93.520 The record.

(a) HHS will record and transcribe the hearing, and if requested, provide a transcript to the parties at HHS' expense.

(b) The exhibits, transcripts of testimony, any other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ.

(c) For good cause shown, the ALJ may order appropriate redactions made to the record at any time.

(d) The DAB may return original research records and other similar items to the parties or awardee institution upon request after final HHS action, unless under judicial review.

§ 93.521 Correction of the transcript.

(a) At any time, but not later than the time set for the parties to file their post-hearing briefs, any party may file a motion proposing material corrections to the transcript or recording.

(b) At any time before the filing of the ALJ's decision and after consideration of any corrections proposed by the parties, the ALJ may issue an order making any requested corrections in the transcript or recording.

§ 93.522 Filing post-hearing briefs.

(a) After the hearing and under a schedule set by the ALJ , the parties may file post-hearing briefs, and the ALJ may allow the parties to file reply briefs.

(b) The parties may include proposed findings of fact and conclusions of law in their post-hearing briefs.

§ 93.523 The Administrative Law Judge's ruling.

(a) The ALJ shall issue a ruling in writing setting forth proposed findings of fact and any conclusions of law within 60 days after the last submission by the parties in the case. If unable to meet the 60-day deadline, the ALJ must set a new deadline and promptly notify the parties, the Assistant Secretary for Health and the debarring official, if debarment or suspension is under review. The ALJ shall serve a copy of the ruling upon the parties and the Assistant Secretary for Health.

(b) The ruling of the ALJ constitutes a recommended decision to the Assistant Secretary for Health. The Assistant Secretary for Health may review the ALJ's recommended decision and modify or reject it in whole or in part after determining it, or the part modified or rejected, to be arbitrary and capricious or clearly erroneous. The Assistant Secretary for Health shall notify the parties of an intention to review the ALJ's recommended decision within 30 days after service of the recommended decision. If that notification is not provided within the 30-day period, the ALJ's recommended decision shall become final. An ALJ decision that becomes final in that manner or a decision by the Assistant Secretary for Health modifying or rejecting the ALJ's recommended decision in whole or in part is the final HHS action, unless debarment or suspension is an administrative action recommended in the decision.

(c) If a decision under § 93.523(b) results in a recommendation for debarment or suspension, the Assistant Secretary for Health shall serve a copy of the decision upon the debarring official and the decision shall constitute findings of fact to the debarring official in accordance with 45 CFR 76.845(c). The decision of the debarring official on debarment or suspension is the final HHS decision on those administrative actions.

SUBCHAPTER I [RESERVED]