February 7, 2017

Secretariat on Responsible Conduct of Research
16th Floor Mailroom
350 Albert Street
Ottawa, ON K1A 1H5
Email: secretariat@rcr.ethics.gc.ca

Dear Secretariat,

We write to provide our comments on the proposed revisions to the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (2014) (hereinafter "TCPS2"). Owing to time constraints, we have elected to focus our comments on the proposed revisions to Chapters 6 and 11 of TCPS2, which pertain to the Governance of Research Ethics Review and Clinical Research, respectively. We write in our capacity as independent academic researchers, each with substantial expertise in the areas of research governance and clinical research ethics. Our formal training lies in Law (MH, TL) and Philosophy (FB).

In very general terms, we support a number of the proposed revisions, but nonetheless have serious reservations about some of the proposed changes. Our concerns are outlined in the attached Table where we have taken the time to explain the limitation with some of the text, or point out where we believe text is missing, and provide alternative wording for the Secretariat's consideration.

Our comments do not represent an exhaustive review of the proposed changes. However, we would be interested in performing an exhaustive review under contract, should that be of interest to the Secretariat. We have, for example, noted in the attached Table one change to Chapter 6 (marked with an '*') where we are of the view that further research is required in order to formulate the best changes possible to the TCPS2.

We would be pleased to further discuss our concerns and suggestions with members of the Secretariat.

Sincerely,

Françoise Baylis, CN, ONS, PhD, FRSC, FCAHS
Professor and Canada Research Chair in Bioethics and Philosophy

Faculty of Medicine, Novel Tech Ethics, Dalhousie University
PO Box 15000
1379 Seymour St
Halifax, Nova Scotia
B3H 4R2

Trudo Lemmens, LicJur, LLM, DCL
Professor and Scholl Chair in Health Law and Policy
Faculty of Law, University of Toronto
Jackman Building
78 Queen's Park, room J448
Toronto, Ontario
M5S 2C3

Matthew Herder, LLM, JSM
Associate Professor, Health Law Institute
Faculties of Medicine and Law, Dalhousie University
PO Box 15000
6061 University Ave
Halifax, Nova Scotia
B3H 4R2

Table. Changes to Proposed Revisions to TCPS2.

	Original text	Justification for change	Suggested text
Chapter 6 Lines 665-669	The rights of sponsors with respect to the analysis of data, interpretation of results and publication of findings, and ownership thereof, are typically described in sponsor-researcher contracts. In the context of clinical trials they are often referred to as clinical trial agreements. These contracts may seek to place restrictions on access to data, the publication of findings, either directly or through provisions that seek to protect their intellectual property rights to research procedures, data, or other information.	The text adds legitimacy to sponsors' assertions that any and potentially all data generated in the course of research is the property of sponsors. Such assertions are indeed routinely made in sponsored-research agreements. However, these assertions are not grounded in Canadian law. This is especially the case for data generated through clinical research. There is no Canadian statute (federal or provincial) or Court decision stating that clinical data falls within the scope of any intellectual property rights. Internationally, important bodies such as the European Medicines Agency (EMA) have explicitly removed clinical data from the sphere of proprietary information. It is our understanding that Canada's national pharmaceutical regulator, Health Canada, is also in the process of following the EMA's lead in this regard. In short, allowing data that is generated in the course of clinical research to be appropriated is antithetical to the overarching commitment to respect for persons in the TCPS.	The rights of sponsors with respect to the analysis of data, interpretation of results and publication of findings, and ownership thereof, are typically described in sponsor-researcher contracts. In the context of clinical trials they are often referred to as clinical trial agreements. These contracts may seek to place restrictions on access to data, the publication of findings, either directly or through provisions that seek to protect alleged intellectual property rights to research procedures, data, or other information. Institutions and REBs should ensure that nothing in a clinical trials agreement suggests that clinical trials data are to be considered intellectual property and/or subject to any obligation of confidentiality. They should further ensure that these agreements respect the principle that all clinical trials data are to be shared publicly, and that the onus is on the sponsor to provide compelling evidence of why specific data (other than clinical trials data) has to be kept confidential.

	Original text	Justification for change	Suggested text
Chapter 6 Lines 670-672	Institutions and REBs should ensure that sponsors' legitimate interests are reasonably balanced against researchers' ethical and legal obligations to participants and their duty to disseminate data and research findings.	This text further legitimizes sponsors' assertions that research data is their property. In our view sponsors do not have "legitimate interests" in owning clinical data given that the data is derived from clinical research participants who consent to participate in research for the purpose of generating new and useful knowledge about an intervention under study. If sponsors are allowed to own such data, by extension, they may choose not to publicly disclose it. There is a mountain of evidence that demonstrates this frequently occurs in the pharmaceutical research setting. In that scenario, the entire basis for participants' consent—the promise of new knowledge creation—disappears. There is thus no way to 'reasonably balance' the possibility of non-disclosure by research sponsors with researchers' obligations to research participants which requires the dissemination of clinical data. The proposed wording mirrors the text of Lines 594-595 of revised Chapter 11. The use of the term 'reasonably balanced' opens the door to a host of justifications for keeping data confidential.	It is the responsibility of Institutions and REBs to ensure that sponsor-researcher contracts are in compliance with the guidance of this Policy. The contribution of participants to the research enterprise and the public interest associated with transparency of data are respected through timely and accessible dissemination of research data and findings.

	Original text	Justification for change	Suggested text
Chapter 6 Lines 684-687	(c) provide that all confidentiality and publication clauses: • are consistent with the researchers' duties to share new information from research with REBs and study participants and to report study findings in a timely manner without undue restriction;	The statement "…in a *timely manner without undue restriction*" is unacceptably vague. The Application section for Article 6.24 notes that some institutions "deem unacceptable any publication restrictions that exceed a time limit of three to six months after the close of the study." We are of the view that this specific time limitation should be adopted as a best practice and merits codification within Article 6.24.	(c) provide that all confidentiality and publication clauses: • are consistent with the researchers' duties to share new information from research with REBs and study participants and to report study findings as early as 6 months after the close of a study and without undue restriction.
Chapter 6	Missing text for Chapter 6	The wording of Article 6.24 would be stronger if at least one example of undue restrictions was explicitly identified. Under no circumstances should a sponsor be able to withhold permission to publish or otherwise disseminate research data and findings.	For example, it would be inappropriate to leave a clause in the clinical trials agreement that gives the research sponsor discretion with respect to the timing of the release of results and clinical trials data.
Chapter 6 Line 688	Missing text for Chapters 6 and 11	Under no circumstances should a sponsor be able to withhold permission to publish or otherwise disseminate research data and findings. Under the current TCPS2, Article 11.12(b), a clear statement to this effect exists for clinical trials (it reads: "Any prohibition or undue limitation on the publication or dissemination of scientific findings from clinical trials is ethically unacceptable." We were not able to find any similar statement in the proposed changes to either Chapter 6 or, as we note below, Chapter 11.	Add, immediately following the first bullet point under Article 6.24(c), a new bullet point that states: "stipulate that under no circumstances shall a confidentiality or publication clause require the consent of the sponsor for publication or data dissemination." Also add equivalent text to Chapter 11.

	Original text	Justification for change	Suggested text
Chapter 6 Line 695	permit researchers to access all study data collected at their respective sites; and	This wording implies that the sponsor may own the data. On the contrary, in our view, researchers should retain custody over study data generated at their research site in keeping with their duties to research participants.	allow researchers to retain custody over all study data collected at their respective sites; and
Chapter 6 Lines 719-721	The onus to justify restrictions on dissemination or access to data should lie with the one seeking any such restriction, usually the researcher or sponsor. The reasonableness of restrictions on either the content or timing of dissemination should be measured against institutional policies.	It seems inappropriate to rely on institutional policies to determine the reasonableness of restrictions on the content or dissemination of data and research findings. The TCPS should itself provide clear guidance as to what specific circumstances might allow for some restrictions on certain kinds of research data.	Institutional policies should emphasize the fundamental importance of timely dissemination of results and underlying data.* *Note: We believe additional research is required in order to identify specific circumstances in which some restrictions on dissemination of certain data may be justified.
Chapter 11 Lines 594-595	contribution of participants to the research enterprise is respected through timely and accessible dissemination of all findings.	As worded there is no explicit reference to clinical data.	contribution of participants to the research enterprise is respected through timely and accessible dissemination of clinical data and research findings.
Chapter 11 Lines 613-614	All clinical trials shall be registered before recruitment of the first trial participant in a publicly accessible registry that is acceptable to the World Health Organization (WHO) or the International Committee of Medical Journal Editors (ICMJE).	The wording here is potentially subject to misinterpretation. While clinical trials are defined broadly on lines 61-62 to encompass any “interventional study in which both the intervention(s) and the outcome(s) are health related, use of the term clinical trial in Article 11.9 risks being read narrowly in keeping with the traditional meaning of a clinical trial.	All clinical trials and other interventional studies in which both the intervention(s) and the outcome(s) are health related shall be registered before recruitment of the first trial participant in a publicly accessible registry that is acceptable to the World Health Organization (WHO) or International Committee of Medical Journal Editors.

	Original text	Justification for change	Suggested text
Chapter 11 Lines 633-638	Missing text for Chapter 11	In the proposed new Article 11.10, researchers are assigned with the responsibility to update the registry with the "location of findings." The corresponding Application section notes that "researchers are required to update the registry with reports of findings or information about where to access findings…as they become available." Given that compliance with clinical trial registration and results reporting remains modest, we believe it is essential to have a much stronger statement included in TCPS2, Chapter 11, about researchers' absolute duty to publicly report findings from clinical trials and other interventional studies involving humans. Other parts of the TCPS2 describe researchers' obligations to disseminate their research. However, given that clinical trials and interventional studies are predicated on the generation of new knowledge, an additional stand-alone obligation to publicly report research findings from such studies should be set out in a new Article to Chapter 11, Section E, "Transparency and Accountability". This new stand-alone obligation should make public reporting of clinical trials and other interventional studies that are subject to registration pursuant to Article 11.9 mandatory.	Research findings from all clinical trials and other interventional studies that are subject to registration pursuant to Article 11.9 must be publicly reported.

	Original text	Justification for change	Suggested text
	Missing text for Chapter 11	In light of the observed challenges in ensuring timely registration and results reporting for clinical trials and other interventional studies we wish to highlight a useful suggestion to improve compliance. The principal value of registration is to scrutinize evidence by comparing that evidence at two or more points, namely, upon registration and when results are reported. That is, registration serves as a mechanism for auditing clinical trials and interventional studies as a way to assessing the quality of the clinical evidence that is generated during research. Was the trial design changed during the research process? Why? Did it impact the research results? REBs can play a much stronger role in encouraging compliance with registration and results reporting requirements, in turn, enhancing the potential auditing value of registries. REBs simply need to ask, as a part of their review processes for all clinical trials and other interventional studies, the following question: “Have you been involved in any clinical trial or other interventional study, which was completed more than 12 months ago, for which the results remain inaccessible?” In our view, REBs should not approve any research proposal for which the answer to this	As a part of the review process for clinical trials and other interventional studies, REBs shall ask researchers and/or sponsors who submit a new clinical trial or interventional study whether they have been involved in any other clinical trial or interventional study which was completed more than 12 months ago and for which the results are not yet available.

		question is ‘yes’. We recommend adding a new Article to Chapter 11, Section E stipulating that REBs must ask researchers seeking approval to carry out a clinical trial or other interventional study to demonstrate public reporting of results for any trials or studies previously conducted.	
	Original text	**Justification for change**	**Suggested text**
Chapter 11 Lines 919-920	Council for International Organizations of Medical Sciences (CIOMS). International Ethical Guidelines for Biomedical Research Involving Human Subjects. Geneva: 2002.	New CIOMS guidelines were published in December 2016. http://cioms.ch/ethical-guidelines-2016/WEB-CIOMS-EthicalGuidelines.pdf These should be referenced and content should be reviewed to ensure that revisions to TCPS2 are not out of step with international standards.	Council for International Organizations of Medical Sciences (CIOMS). International Ethical Guidelines for Health-related Research Involving Humans. Geneva: 2016.