



Committee on Administration

Minutes

November 3, 2010

Members Attending

John Cooney (Chair)

Willard K. Tom

Arlene Klepper

Michael Ravnitzky

David C. Frederick

John Kamensky

James Tozzi

Helgi Walker

Stephen G. Burns

Paul Bardos

Robert I. Cusick

ACUS Staff Attending

Paul R. Verkuil

(Chairman)

Shawne McGibbon

(General Counsel)

Jonathan Siegel

(Director of Research & Policy)

Reeve T. Bull

(Attorney Advisor, DFO)

Invited Guests Attending

Kathleen Clark (Consultant)

Steven L. Schooner

Daniel Gordon

Leigh Bradley

Notes:

The meeting commenced at 1:00 pm in the conference room of the Administrative Conference of the United States (“ACUS”). Mr. Cooney called the meeting to order and welcomed the attendees. He asked that all attendees identify themselves by name. He then turned the floor over to Chairman Verkuil for some brief introductory remarks.

Chairman Verkuil noted that this is the second committee of the reconstituted ACUS to meet and indicated that this project is one of the most important ones the Conference will address. He noted that government contractors are becoming a very significant part of what government does, increasingly performing functions once done only by government employees. He indicated that the issue of what ethics rules shall apply to such contractors is therefore of great importance.

Mr. Siegel then offered a few remarks on the administrative aspects of the committee’s meeting. First, he described the structure of the Conference and how a committee goes about preparing a recommendation and ultimately submitting it to the full Conference for a vote. Second, he noted that public members of the committee will be treated as special government employees for purposes of financial disclosure. Third, he explained how committee members



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should conduct their communications in order to comply fully with the Federal Advisory Committee Act. Finally, he described the procedures for members and special guests to speak during the meeting.

Mr. Cooney entertained a motion to permit any alternate attendees and specially invited guests to speak during the meeting, to which all committee members consented. He then turned the discussion over to Professor Clark to provide an overview of her report.

Ms. Clark gave a brief presentation summarizing the major aspects of her report. First, she explained the significant increase in the use of government contractors in the last few years. Second, she noted that extensive ethics rules apply to government employees but that very limited provisions apply to contractor employees (with the Federal Deposit Insurance Corporation (“FDIC”) having adopted perhaps the most extensive set of regulations for such persons). Third, she identified the principles underlying regulation of government employees and suggested that two of those principles, fiduciary duty and the need to control the federal workforce, also should apply to contractor employees. Finally, she recommended that all contractor employees supervised by government employees be subject to all ethical rules applicable to government employees; that the executive branch adopt ethical rules for contractor employees covering financial influences, misuse of resources, and improper outside activities; that individual agencies decide whether to impose narrowly tailored post-employment restrictions; and that Congress consider applying ethics statutes to contractor employees.

Mr. Cooney then invited committee members to ask questions regarding Ms. Clark’s report. Mr. Tozzi suggested that the proposed personal conflict of interest rule applying to contractors who assist the government in hiring other contractors (“meta-contracting”) is more detailed than the FDIC’s rule governing such conflicts for contractor employees and that perhaps the former should be adopted. Ms. Clark responded that the costs in adopting that rule might be excessive. Mr. Frederick noted that financial disclosure requirements might be insufficient to police against conflicts since the disclosures are quickly out of date. Ms. Clark agreed, stating that a better approach might be requiring contractor employees to certify a lack of conflicts prior to beginning any task. Mr. Tozzi suggested that the conflicts standards in the proposed meta-contracting rules might be applied in such a certification process. Ms. Clark stated that more empirical work would need to be done before deciding if such a standard was appropriate. Ms. Walker agreed that a task-based disclosure is superior to regularly filling out a disclosure form. She also stated that agencies will need to retain flexibility to bring in contractor employees in emergency situations without extensive financial disclosure requirements. Ms. Clark generally agreed with the idea of an emergency exception but noted that more extensive regulations than what currently exist should apply in non-emergency situations. Mr. Frederick stated that he felt that promoting public confidence in government is a key aspect of any ethics system. Ms. Clark agreed but noted that imposing fiduciary requirements on contractor employees, as she proposes, would itself increase public confidence.



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Mr. Cooney then turned the discussion to the question of whether the ethics standards applicable to contractor employees should be expanded beyond their currently limited scope. He suggested that the type of work contractors do and the size of the contractor should factor into any standards applied to them. Mr. Cusick stated that the Office of Government Ethics (“OGE”) believes that such ethics standards should be expanded, at least where contractor employees perform tasks requiring ethical decision-making (and particularly where they work side-by-side with government employees). He noted, however, that the standards should not be expanded so extensively that excessive costs are imposed on contractors and that the types of standards should depend on the types of functions performed. He further explained that OGE has attempted to achieve some of these goals by promoting the use of contract clauses related to ethics and training. He suggested that OGE would not itself have the resources to police any ethics abuses were standards greatly expanded.

Mr. Cooney then invited Mr. Gordon to offer his perspective. Mr. Gordon noted that there is very little distinction between tasks performed by contractor employees and those performed by government employees; indeed, such government and contractor employees often work side-by-side. He stated that a ban on personal services contracting technically exists but that it is essentially a dead letter. Also, he noted that some functions are almost completely outsourced to contractors (e.g. information technology) and that contractor employees often far outnumber government employees in certain departments. Accordingly, Mr. Gordon noted that the ethics regime that should apply to contractor employees is a major issue and that an ACUS project in this area would be quite helpful. Mr. Cooney further noted that the problem of extensive use of contractors is longstanding, dating back at least to the mid-1980s.

Professor Schooner emphasized the significance of government contracting, stating that such contracts are worth approximately \$500 billion per year. He also noted a number of distinctions any proposal will need to consider. First, supply, service, and construction contracts each raise a distinct set of issues. Second, it may be impractical for rules to cover every sub-contractor or employee of each contractor. Third, an ethics system might impose major costs for small businesses. Fourth, it may be particularly difficult to obtain financial disclosures from foreign companies performing government contracts. Finally, he noted that any attempt to address the problem of contractor ethics must take into account two macro issues: (a) the government has under-invested in the acquisition process over the past two decades and (b) agencies are under tremendous pressure to buy more effectively and spend less money, yet any system of ethics will undoubtedly create increased compliance costs.

Mr. Tozzi noted that the rules for organizational conflicts of interest (“OCI”) might bear upon the project as well, noting that personal conflicts of interest (“PCI”) and OCIs often accompany each other. Mr. Gordon suggested that OCIs are a major issue but are largely already covered by existing law; a major gap still exists in regulating PCIs, by contrast. Ms. Clark further noted that OCIs do not always accompany PCIs.



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Mr. Siegel then asked whether the committee members felt that a problem existed such that a recommendation on ethics rules should be proposed. Mr. Cusick stated that such an ethics system should be adopted to increase transparency. Ms. Klepper asserted that a problem exists but suggested that the cost of resolving it may outweigh the benefits of doing so. She further suggested that, to the extent a system is adopted, it should focus on discretionary actors and use task-based disclosure. Mr. Schooner suggested that implementing a system to resolve ethics issues could take generations. Ms. Walker stated that the broader problem may be the political branches' attempting to obscure the size of the federal government by increased outsourcing to contractors and that ethics regulations are insufficient to solve this issue. Mr. Gordon agreed with Ms. Walker's assertion that a broader problem exists but suggested that adopting ethics rules for PCIs would still improve upon the current system. Mr. Kamensky noted that a contractor workforce is more flexible than a government employee workforce (e.g. easier to hire/fire persons), which likely motivates the expansion of the contractor corps. Mr. Tozzi suggested that another problem is allowing contractors to write rules during rulemaking proceedings, which process should be regulated by any standards adopted. Mr. Frederick noted that government has always hired contractors (e.g. outside lawyers), that the government will continue to do so, and that a project on the ethical implications this raises would definitely be valuable.

Mr. Cooney then moved the discussion to the types of ethics rules that should apply to government contractors. Mr. Ravnitzky stated that five factors affect the analysis: employee self-awareness, organization's awareness, perception of conflict, actual conflict, and intentional malfeasance. He asserted that most ethical issues arise with failings of the first two factors. Mr. Tom noted that any system will need to account for the varying needs of agencies and the cost of regulation. Mr. Cooney inquired as to how the proposed financial disclosure rules in the meta-contracting context had been received. Mr. Gordon stated that he did not recall any specific reactions to those rules but that the need for regulation in the meta-contracting area was widely recognized. Mr. Tom suggested that agencies might adopt opt-in provisions for ethical regulations. Mr. Schooner noted that any system of ethics should focus on collecting only meaningful information, not just information generally. Ms. Bradley suggested that a risk-management perspective may offer the best approach to the problem. Each agency should identify major risks and then adopt a mitigation strategy to address those risks, taking into account the expenses thereof and choosing the most cost-effective strategies (with non-disclosure clauses, targeted training, and task-based certification of no conflicts being good examples).

Mr. Ravnitzky suggested that allowing each agency to design its own ethics regime could minimize costs. Mr. Bardos noted, however, that many small agencies may not have the resources to design such systems, so there should also perhaps be a common scheme upon which individual agencies could elaborate. Mr. Siegel stated that the ultimate recommendation will be



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approximately 3-12 pages, and so a feasible approach would be suggesting some general principles agencies could adopt rather than attempting to design a detailed, statute-like plan.

Mr. Cusick noted that training is generally a cost-effective means of promoting ethical compliance, and it is becoming even cheaper as it is computerized. Mr. Cooney inquired as to how the Department of Defense (“DOD”) would implement a contractor employee training requirement. Ms. Bradley, who works at DOD, stated that contractor employees could easily be added to trainings conducted for government employees. Mr. Schooner noted that 60-65% of procurement dollars are spent by DOD, so their perspective is very important.

Walter Shaub, a public attendee who is Deputy General Counsel at OGE, stated that extending criminal sanctions to contractor employees would be problematic, since those penalties are quite complex and often cast too wide a net. A better approach would perhaps be holding contractors, who are more sophisticated, liable for violations. Mr. Schooner stated that, as a general matter, government tends to overregulate initially, but the regime then loosens. He further noted that many large contractors already have ethics programs for their employees, so the goal is reaching smaller contractors without creating excessive compliance costs.

Ms. Clark stated that Table 5 of her report shows that the FDIC, Department of Treasury, and Department of Energy already impose training requirements on contractor employees. Mr. Siegel asked whether those agencies train contractor employees only in the rules that apply to them, and Ms. Clark indicated that they did. Ms. Klepper asked whether Treasury’s contractor employee requirements would have applied to Dan Jester, a former Goldman Sachs employee who assisted in the AIG bailout. Ms. Clark stated that Treasury’s current regime did not apply when Dan Jester was hired. Mr. Cooney asked whether any of these agencies who have acted have special provisions for small contractors. Ms. Clark noted that the agencies generally had not differentiated between contractors based on their size.

Mr. Schooner noted that part of the problem may be that the prohibition on personal service contracting obscures the issue. Congress simply assumes that the prohibition has addressed these problems, but the prohibition is a dead letter. An ACUS study squarely acknowledging the problem and proposing solutions would therefore be valuable. Mr. Bardos noted that, to the extent the full panoply of ethics rules applies to contractor employees supervised by government employees as Ms. Clark suggests, the term “supervise” must be carefully defined.

Mr. Siegel stated that it seemed there was consensus on the existence of a problem and the importance of considering the needs of different agencies and not imposing excessive costs. He noted that the committee should perhaps appoint a drafting sub-committee to prepare a draft recommendation to consider at the next meeting. He inquired as to the top priorities to address in that draft recommendation. Ms. Clark stated that the recommendation should propose a



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comprehensive ethics system for service contractor employees regulating acts implicating ethical concerns, should impose all existing ethics rules on contractor employees immediately supervised by government employees, and should consider the creation of compliance officers. Mr. Schooner suggested that the system adopted should set concrete rules rather than relying on vague principles. Mr. Cusick agreed with this point, noting that a values based system is too vague in light of the millions of persons covered.

Mr. Kamensky inquired whether experience could be drawn from other nations. Mr. Schooner stated that the American approach is well ahead of that of almost all other nations. Mr. Cusick agreed. He further noted that New Zealand fairly successfully uses a values based system, but noted that larger nations such as the United States likely could not successfully do so. Ms. Clark suggested that, in addition to considering the experience of other countries, considering the experience of the private sector is also useful. Mr. Tozzi disagreed, stating that at least Wall Street has done a poor job of policing ethical compliance. Mr. Cooney asked whether anyone had ever been suspended for violating FDIC or Troubled Asset Relief Program rules. Ms. Clark stated that she was not aware of any instances of that. Mr. Kamensky noted that he was troubled by a system based on “standards,” fearing it would devolve into a checklist.

Ms. Clark stated that any recommendation should adopt substantive standards for dealing with financial conflicts, outside activities, and post employment activities. In deciding the content of these standards, the experience of other agencies may be informative. Ms. Klepper asked whether any agencies had adopted financial conflict of interest rules for contractor employees similar to those in form SF278. Ms. Clark stated that some agencies had imposed something similar in the meta-contracting area through contract clauses. Ms. Klepper asked how far down in the agency such reporting requirements go. Ms. Clark responded that the Department of Treasury imposed them on leaders and people doing significant work under the contract. Mr. Frederick suggested that a risk-based/task-based system might be optimal. Mr. Kamensky stated that such a system differs from one based on government-wide standards, which is what Ms. Clark proposes. Ms. Clark agreed, noting that at least certain standards should apply across agencies in order to account for the fact that some contractors work with multiple agencies, though individual agencies can perhaps deviate from or supplement these standards as needed. Mr. Cooney asked if defense contractors might themselves have programs worth considering. Mr. Schooner responded that larger firms often have aspirational programs, but the focus is on complying with actual regulations. He further noted that he thought a task-based system might be optimal. Mr. Burns noted that an important question involved in creating a cross-agency standard is who will enforce it. Mr. Ravnitzky noted that the postal service should be included in any ethics system, notwithstanding its exemption from other regulations.

Mr. Cooney asked for any questions from members of the public. Anu Koodathil, a law student from Villanova University, thanked the Committee for the opportunity to attend. No other public participant posed a question or comment. Mr. Siegel noted that a draft



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recommendation should be prepared prior to the next meeting. Mr. Cooney stated that such a document could be used as a strawman for discussion. He then thanked everyone for attending and adjourned the meeting.