

Agenda for November 3, 2010 Meeting of the Committee on Administration

Agenda Item B.1: Should Ethics Requirements Applicable to Employees of Government Contractors Be Expanded? Many commentators have called for greater regulation of employees of government contractors, and the committee should consider both the areas addressed by Professor Clark as calling for more extensive regulation and any other areas identified by committee members. On the other hand, every additional regulation creates extra compliance costs, and excessive regulation may deter companies from entering into contracts with government agencies. Accordingly, agencies have sometimes been reluctant to expand ethical standards applicable to contractor employees beyond their fairly limited scope.¹ Thus, the committee should first decide whether implementing a more comprehensive system of ethical standards for contractor employees is desirable in light of the costs it would create for contractors and agencies.

Agenda Item B.2: What Types of Ethical Rules Should Apply to Contractor Employees? Committee members should draw both upon Professor Clark's report and their past experience in identifying areas wherein greater regulation of contractor employees is necessary. After identifying these areas, the committee should consider what sorts of ethics regulations would eliminate abuses. In doing so, the committee might consider whether the following major rules applicable to government employees should also apply to contractor employees: (1) limitations on receipt of financial benefits from non-government sources²; (2) financial disclosure requirements³; (3) limitations on the use of government position, information, or time for private gain⁴; (4) criminal sanctions on participating in matters in which the employee or a close relative has a financial interest⁵; and (5) criminal sanctions on receiving supplementary income from private sources for work for the government.⁶

¹ *See, e.g.*, OFFICE OF GOVERNMENT ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 38 (2006) (declining to recommend extending criminal conflict of interest statutes to contractor personnel while nevertheless recognizing problems arising from lack of ethical standards governing such personnel) ("OGE Report").

² 5 U.S.C. § 7353; 5 U.S.C. App. §§ 501–05; 31 U.S.C. § 1353.

³ 5 U.S.C. App. §§ 101–111, 402.

⁴ 5 C.F.R. §§ 2635.701–05.

⁵ 18 U.S.C. § 208; 5 C.F.R. § 2635.502.

⁶ 18 U.S.C. § 209.

Agenda Item B.3: Should Contractor Employee Ethics Requirements Apply Uniformly Across the Executive Branch or Be Tailored to Specific Agencies? Though numerous government employee ethics rules apply throughout the executive branch, agencies also frequently possess some discretion in crafting more tailored regimes.⁷ In light of the abuses that have been identified, the committee should determine whether any recommended ethics system should apply uniformly throughout the executive branch or whether individual agencies should be given wide discretion in adopting rules addressing their needs; a third, hybrid option would involve creating an ethics regime applicable to all agencies that individual agencies could supplement as needed.

Agenda Item B.4: Should the Rules Adopted Regulate Contractor Employees Directly or Instead Place the Onus for Policing Ethical Compliance on Contractors? Should Contractor Employee Ethical Standards Be Established in Statutes and Regulations, Imposed via Contract Clauses, or Implemented by Some Other Means? The committee should consider whether agencies should regulate contractor employees directly or whether the onus should be placed on contractors instead, requiring contractors to monitor the ethics conflicts of their employees and holding contractors liable for any lapses through a system of respondeat superior. Additionally, the committee should consider whether standards should be imposed by regulation and/or statute, which would promote consistency and clarity, or integrated into individual contract clauses, which would allow greater flexibility.⁸

Agenda Item B.5: By What Mechanisms Should a Contractor Employee Ethics System Be Implemented? If the committee determines that the primary onus for enforcing ethical obligations should be placed on contractors, it should consider the feasibility of requiring contractors to construct a financial disclosure system for their employees and/or to implement training programs. Alternatively, to the extent the committee decides that the government should regulate contractor employees directly, it should consider whether an agency could efficiently construct a financial disclosure or training system for contractor employees (and whether such systems should be consolidated across agencies in order to avoid duplicative compliance obligations for contractor employees who work with multiple agencies). In either instance, the committee should consider what type of contractual, administrative, or civil remedies agencies might adopt to enforce any ethics regime. The committee also should consider whether it would

⁷ See, e.g., Exec. Order No. 12731 (1990) (setting forth a comprehensive regime of ethical rules applicable to “all executive branch employees” but also encouraging each individual agency to “[s]upplement” this regime “with regulations of special applicability to the particular functions and activities of that agency”).

⁸ See, e.g., OGE Report at 38–39 (suggesting that non-criminal enforcement mechanisms such as contract clauses may be sufficient to regulate contractor employee conflicts of interest); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-169, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DOD CONTRACTOR EMPLOYEES 31–32 (2008) (recommending that the Department of Defense negotiate clauses governing contractor employee conflicts of interest with contractors).

be appropriate to make recommendations to Congress regarding legislation that might address these issues, including potential criminal sanctions on ethical breaches.