

ETHICS FOR AN OUTSOURCED GOVERNMENT

Kathleen Clark¹**Abstract**

In recent decades, the federal government has greatly expanded its use of contractors to perform services, and now purchases more than \$260 billion in services every year. The government increasingly turns to contractors to accomplish its programmatic goals, and contractor personnel are now performing tasks that in the past had been performed by government employees.

While an extensive array of ethics statutes and rules regulate government employees to ensure that they make decisions in the interest of the government rather than a private interest, only a few of these restrictions apply to contractor personnel. If a federal employee makes a recommendation on a matter that could affect her financial interest, she could be subject not only to administrative discipline but also to criminal prosecution. In most cases, a contractor employee who has that same financial interest and makes the same recommendation is not subject to any consequences. In fact, the government does not have any systematic way of even finding out when contractor personnel have such conflicts of interest. The personal conflicts of interest of contractor personnel are largely unregulated.

In light of the fact that so much of the government's work is outsourced, the government needs to develop appropriate safeguards to ensure that the public interest is protected when contractors are doing the government's work. This paper describes the complex set of government ethics statutes and regulations, identifies the principles underlying those restrictions, and suggests ways that those principles can be applied to government contractor personnel.

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Introduction

During 2008, insurance giant AIG was under increasing financial pressure. AIG had expanded from selling traditional products, such as life and auto insurance, to more exotic lines, such as credit default swaps (CDSs), which functioned essentially as insurance on a security. Investment banks, such as Goldman Sachs, would purchase a CDS in order to hedge an investment in a particular security. If the security's financial condition weakened (thus increasing the chance that it would default), AIG would have to post cash collateral with the purchaser. If the security defaulted, AIG would have to pay the purchaser the "insured" value of the security.²

By the end of 2007, AIG had sold CDSs on \$500 billion of securities, \$60 billion of which were derived from subprime mortgages.³ Over the course of 2008, as the value of subprime mortgage securities dropped, AIG had to post billions of dollars in cash collateral with the investment banks that had purchased its CDSs. As the bottom fell out of the subprime mortgage market, AIG was unable to make good on its CDS contracts, and was facing possible bankruptcy.⁴

The Treasury Department feared that an AIG bankruptcy could result in even greater financial panic and chaos than the country had already experienced after the Lehman Brothers bankruptcy. To avoid an AIG bankruptcy, Treasury bailed out the company. Treasury had several options available to it in handling the bailout. First, Treasury could have pressured the investment banks to accept a discount (or "haircut") on their CDSs.⁵ (The government used this approach when Chrysler was on the verge of collapse the following year.⁶) Second, Treasury could have negotiated with investment banks and pressured them to return to AIG some of the collateral that AIG had posted earlier as the subprime

² See William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH & LEE L. REV. 943 (2009).

³ BAIRD WEBEL, CONGRESSIONAL RESEARCH SERVICE, ONGOING GOVERNMENT ASSISTANCE FOR AMERICAN INTERNATIONAL GROUP (AIG) 5 (March 18, 2010).

⁴ BAIRD WEBEL, CONGRESSIONAL RESEARCH SERVICE, ONGOING GOVERNMENT ASSISTANCE FOR AMERICAN INTERNATIONAL GROUP (AIG) 1 (March 18, 2010).

⁵ Stephen Gandel, *Could the U.S. Have Saved Billions on AIG Rescue?*, TIME (Jan. 27, 2010) (a November 2008 report by a firm that was advising the federal government indicated that "five of the six biggest creditors of AIG's financial-products division would have been willing to end the contracts for less than face value").

⁶ Louise Story and Gretchen Morgenson, *In U.S. Bailout of A.I.G., Forgiveness for Big Banks*, N.Y. TIMES June 29, 2010.

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mortgage market declined.⁷ Either one of these strategies would have limited taxpayer losses, but the government did not take either approach. Instead, Treasury paid face value to the investment banks,⁸ spending over \$100 billion to bailout AIG, nearly \$13 billion of which went to Goldman Sachs.⁹ The government even insisted that AIG waive its right to sue the investment banks for any misrepresentations the banks had made in connection with the CDS transactions.¹⁰

The government's handling of the AIG bailout was enormously controversial.¹¹ Commentators complained that the government didn't just bail out AIG; it also bailed out the investment banks that had purchased CDSs from AIG.¹² Congressional investigators have asked why the federal government "did not push the banks to make concessions like returning the collateral to AIG or accepting less than full value for their contracts with the insurer."¹³ Why did the government treat investment banks so favorably, paying 100 cents on the dollar for their CDSs and insisting that AIG waive its right to sue the banks for misrepresentation?

As is clear from this narrative, the government's handling of the AIG bailout affected not just AIG itself, but also the investment banks that had purchased CDSs from AIG.¹⁴ As such, government ethics standards would prohibit a government employee who owned stock in AIG or one of those investment banks from participating in the bailout. If a government employee advises the government on how to handle a matter that could affect her own investments, she could end up in prison. A criminal statute prohibits government employees from participating in matters that can have a direct and predictable effect on their own financial interests.¹⁵

The government's point person on the AIG bailout was Dan Jester, who owned a substantial amount of Goldman Sachs stock.¹⁶ Jester advised the government not to pressure Goldman and the other investment banks to accept a discount. Jester is not subject to criminal prosecution for this conflict of interest because the Treasury Department brought him on as a contractor rather than as an employee.¹⁷ This technical maneuver exempted Jester from government ethics restrictions that are intended to protect the public trust.

⁷ Louise Story and Gretchen Morgenson, *In U.S. Bailout of A.I.G., Forgiveness for Big Banks*, N.Y. TIMES June 29, 2010.

⁸ Gretchen Morgenson and Louise Story, *Two at Fed Had Doubts Over Payout by A.I.G.*, N.Y. TIMES, Jan. 27, 2010.

⁹ Gretchen Morgenson and Louise Story, *Two at Fed Had Doubts Over Payout by A.I.G.*, N.Y. TIMES, Jan. 27, 2010 (Goldman Sachs was "A.I.G.'s largest trading partner, [and] received the most money — \$12.9 billion — in the payments to counterparties.")

¹⁰ Louise Story and Gretchen Morgenson, *In U.S. Bailout of A.I.G., Forgiveness for Big Banks*, N.Y. TIMES, June 29, 2010.

¹¹ See Gretchen Morgenson and Louise Story, *Two at Fed Had Doubts Over Payout by A.I.G.*, N.Y. TIMES, Jan. 27, 2010. ("Of all the government rescues undertaken during the credit crisis of 2008, none has stirred more outrage and raised more questions than the bailout of A.I.G. . . ."); Stephen Gandel, *Could the U.S. Have Saved Billions on AIG Rescue?*, TIME (Jan. 27, 2010) ("The AIG bailout has become one of the most enduring controversies from the financial crisis.")

¹² Stephen Gandel, *Could the U.S. Have Saved Billions on AIG Rescue?*, TIME (Jan. 27, 2010) ("Some called the AIG payments, funded by the government, a backdoor bailout of Wall Street, in particular Goldman Sachs."); Gretchen Morgenson and Louise Story, *Two at Fed Had Doubts Over Payout by A.I.G.*, N.Y. TIMES, Jan. 27, 2010 (Two governors of the Federal Reserve Board objected to paying the investment banks face value for the CDSs, "expressed worry that paying the [investment banks] . . . 100 cents on the dollar to unwind their insurance contracts could be a gift to the banks.")

¹³ Gretchen Morgenson and Louise Story, *Two at Fed Had Doubts Over Payout by A.I.G.*, N.Y. TIMES, Jan. 27, 2010.

¹⁴ See OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM [SIGTARP], FACTORS AFFECTING EFFORTS TO LIMIT PAYMENTS TO AIG COUNTERPARTIES 30 (2009):

Questions have been raised as to whether . . . the AIG assistance was in effect a "backdoor bailout" of AIG's counterparties. Then [Federal Reserve Board of New York] President [Timothy] Geithner and . . . general counsel deny that this was a relevant consideration for the AIG transactions. Irrespective of their stated *intent*, however, there is no question that the effect of [the] decisions – indeed, the very *design* of the federal assistance to AIG – was that tens of billions of dollars in Government money was funneled inexorably and directly to AIG's counterparties.

¹⁵ 18 U.S.C. § 208.

¹⁶ Mark Landler and Edmund L. Andrews, *For Treasury Dept., Now Comes Hard Part of Bailout*, N.Y. TIMES, Oct. 4, 2008; Louise Story and Gretchen Morgenson, *In U.S. Bailout of A.I.G., Forgiveness for Big Banks*, N.Y. TIMES June 29, 2010.

¹⁷ See Appendix: Treasury Department contract with Dan Jester (July 31, 2008).

An extensive and complex array of ethics statutes and regulations restrict current and former government employees' activities and financial interests. In general, these restrictions aim to ensure that when government employees make decisions, they do so in the interest of the government rather than for their own (or some other private) interest. The government implements these substantive restrictions by requiring employees to undergo ethics training; requiring certain employees to disclose their financial interests; subjecting those disclosures to review for compliance with ethics standards; and investigating alleged violations.

Most of the ethics statutes and rules that regulate government employees do not apply to contractor personnel.¹⁸ There is no comprehensive regulation of government contractor ethics, even of those individuals who are working in government offices, side-by-side with government employees, providing services and exercising substantial discretion.¹⁹

The government has barely begun to address the ethics of contractor personnel.²⁰ Government contracting regulations instruct procurement officials to identify situations where corporations with government contracts have *organizational* conflicts of interest that could bias their work, but those regulations address only the financial interests of the companies themselves rather than the financial interests of companies' personnel.²¹ Several agencies have regulations addressing the ethics of contractor personnel,²² but enforcement has been ad hoc and episodic, resulting in just one False Claims Act lawsuit.²³ The government has not yet engaged in any systematic effort to address the conflicts of interest of contractor personnel, or to provide training on how to recognize and respond to such conflicts.

In 2007, a federal study found that "the trend toward more reliance on contractors . . . raises the possibility that the government's decision-making processes can be undermined,"²⁴ and recommended that the government determine whether additional measures are needed to address the personal conflicts of interest of those working for contractors.²⁵ The following year, the Government Accountability Office recommended that the Defense Department institute personal conflict of interest standards for contractor personnel.²⁶

Recently, Congress has mandated the development of regulations to address conflicts of interest that arise in one specific area: where contractor personnel are involved in purchasing goods or services,²⁷

¹⁸ There are at least four distinct categories of individuals who perform work for the federal government's executive branch:

1. (regular) government employees, including both civil service employees and high-level appointees;
2. "special government employees" who work on a temporary or intermittent basis;
3. individuals whom the federal government "hires" as independent contractors (e.g., Dan Jester);
4. individuals whom contractors and subcontractors employ or "hire" as independent contractors to perform work for the government.

This paper refers to individuals in the first two categories as "government employees," and refers to individuals in the last two categories as "contractor personnel."

¹⁹ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 3 (2008) ("no [DoD] or FAR [Federal Acquisition Regulation] policy obliges DoD offices using contractor employees to require that they be free from personal conflicts of interest").

²⁰ See Marilyn L. Glynn, Public Integrity and the Multi-Sector Workforce, WAYNE L. REV. 1433 (2006) (noting that "contractor employees are not subject to most federal ethics requirements or direct discipline by the government").

²¹ 48 C.F.R. 2.101.

²² See Table VII.

²³ United States v. Harvard, 323 F.Supp.2d 151 (D. Mass. 2004).

²⁴ REPORT OF THE ACQUISITION ADVISORY PANEL 417 (2007) ("Unless the contractor employees performing these tasks are focused upon the interests of the United States, as opposed to their personal interests or those of the contractor who employs them, there is a risk that inappropriate decisions will be made.")

²⁵ *Id.* at 423.

²⁶ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 31-32 (2008).

²⁷ § 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub.L. 110-417, 122 Stat. 4537 (requiring "the Administrator for Federal Procurement Policy [to] develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions"). In addition, Congress also required the Defense Department "to tighten existing requirements for *organizational* conflicts of interest by contractors in major defense acquisition programs." § 207 of the Weapon Systems Acquisition Reform

and in 2009 the government issued proposed regulations.²⁸ But the proposed regulations are relatively narrow in scope, reaching only those contractor personnel who provide advice or assist the government in dealing with other contractors. The broader issue – how ethics principles should apply to contractor personnel more generally – has not yet been tackled.

Congress has tasked the Office of Federal Procurement Policy to work with the Office of Government Ethics to determine whether the government needs new regulations to address personal conflicts of interest of contractor personnel who perform non-procurement functions.²⁹ This paper does the groundwork on that issue, examining how government ethics principles should be applied to government contractors. Part I gives a brief overview of the extensive ethics restrictions that apply to executive branch employees, discussing the stricter rules that apply to those in more sensitive positions and the looser rules that apply to those who work for the government on a temporary or intermittent basis. Part II discusses the principles that underlie many of these ethics restrictions. Part III documents that the executive branch has outsourced large amounts of work to contractors and that contractor personnel are performing many of the same services as government employees. Part IV describes the few ethics restrictions that do apply to government contractor personnel, discussing both the substantive standards and the mechanisms for implementing them. Part V proposes substantive standards for contractor personnel who are in a position to exercise discretion or have access to government resources, and describes possible mechanisms for implementing those substantive standards. Part VI identifies areas for additional empirical research.

I The Extensive Array of Ethics Restrictions on Government Employees

More than a hundred pages of regulations and over a dozen statutes impose ethics restrictions on executive branch employees.³⁰ This section will describe the restrictions that apply to all executive branch employees, stricter rules that apply only to certain employees (such as high-level officials, treaty negotiators and those involved in procurement), and the looser rules that apply to temporary or intermittent employees (Special Government Employees or SGEs). It will also discuss the primary mechanisms that the government uses to implement these standards, such as requiring many employees to disclose their financial holdings so that ethics officials can review them for compliance with the ethics standards.

A. Ethics Restrictions Applicable to all Executive Branch Employees

Government ethics restrictions can be divided into five substantive categories: financial influences on an employee's government work; the use of government position for non-government purposes; an employee's outside activities; an employee's post-government employment; and restrictions based on an employee's pre-government employment.

Restrictions on financial influences include limits on outside payments to government employees, on their own financial interests, and on their negotiating for future employment. With regard to outside payments, Congress has enacted criminal prohibitions on bribes,³¹ gratuities related to government

Act of 2009, Pub.L. 111-23, 123 Stat. 1704 (emphasis added); Proposed Defense Federal Acquisition Regulation Supplement; Organizational Conflicts of Interest in Major Defense Acquisition Programs (DFARS Case 2009-D015), 75 Fed. Reg. 20954 (April 22, 2010). For a discussion of the difference between personal and organizational conflicts of interests, *see infra* § IV.A.

²⁸ Proposed Rule on Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58584 (Nov. 13, 2009).

²⁹ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub.L. 110-417, 122 Stat. 4539, § 841(b)(3).

³⁰ 5 C.F.R. Parts 2634-37, 2640; 18 U.S.C. §§ 201-219 (criminal conflict of interest statutes); 5 U.S.C. §§ 7351, 7353 (restrictions on gifts); 5 U.S.C. Appx. §§ 501-505 (limits on outside income). Most of these statutes also impose restrictions on legislative branch officials, but this paper focuses on executive branch's employees and contractors.

³¹ 18 U.S.C. § 201(b).

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work,³² and “salary supplementation” (the payment by a non-governmental source for a government employee to do government work).³³ In addition to these criminal prohibitions, there are also non-criminal statutory restrictions on gifts from foreign governments,³⁴ from those who could be affected by the employee’s work or by her agency,³⁵ from subordinates or other government employees of lower salary,³⁶ and regulatory restrictions on gifts³⁷ and compensation from outside employment (including the reimbursement of travel expenses).³⁸ A criminal statute prohibits executive branch officials from making decisions on matters that would affect their own financial interests or the financial interest of a family member, an organization with which they are associated, or a person with whom they are negotiating for future employment.³⁹

The government has also placed limitations on employees’ ability to use their position for private purposes. Examples include the statutory prohibitions on using one’s government position to influence an election⁴⁰ or to hire relatives,⁴¹ and regulatory prohibitions on using public office for private gain;⁴² using non-public government information for personal gain;⁴³ using government time or property for private purposes, such as writing letters of recommendation on government letterhead for recommendations that are unrelated to the subject’s government work;⁴⁴ and the disclosure of sensitive procurement-related information.⁴⁵ Other regulations prevent employees’ from using their government position to further even beneficent outside interests, such as raising money for charitable organizations.⁴⁶

The government also limits its employees’ outside activities. There are criminal prohibitions on employees’ representing parties in disputes against the government⁴⁷ and regulatory restrictions on being awarded a government contract,⁴⁸ serving as an expert witness for an outside party in a case involving the government,⁴⁹ compensated teaching⁵⁰ and partisan political activities.⁵¹

A fourth category of ethics restrictions consists of limits on post-government employment. All executive branch employees are subject to a permanent ban on communicating with current government officials in an attempt to influence them on behalf of someone else with respect to particular matters that the employee participated in personally and substantially while in government, and a 2-year ban on such communications with respect to particular matters that were pending under their responsibility during their last year in government.⁵²

³² 18 U.S.C. § 201(c).

³³ 18 U.S.C. § 209.

³⁴ 5 U.S.C. § 7342.

³⁵ 5 U.S.C. § 7353.

³⁶ 5 U.S.C. § 7351(a) (prohibiting employees from giving gifts to superiors and accepting gifts from employees receiving less pay).

³⁷ 5 C.F.R. 2635 Subparts B and C.

³⁸ 5 C.F.R. 2635 Subpart H.

³⁹ 18 U.S.C. § 208.

⁴⁰ 5 U.S.C. § 7323(a)(1).

⁴¹ 5 U.S.C. § 3110.

⁴² 5 C.F.R. 2635.702.

⁴³ 5 C.F.R. 2635.703.

⁴⁴ 5 C.F.R. 2635.702(b).

⁴⁵ 41 U.S.C. § 423(a). This ban applies not just to government employees but to anyone “who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement.” *Id.* at § 423(a)(2)(A).

⁴⁶ 5 C.F.R. 2635.808.

⁴⁷ 18 U.S.C. § 203 (prohibiting compensation for representational services in matters involving the United States); 18 U.S.C. § 205 (prohibiting representational services in matters involving the United States).

⁴⁸ 48 C.F.R. § 3.601.

⁴⁹ 5 C.F.R. 2635.805.

⁵⁰ 5 C.F.R. 2635.807.

⁵¹ The Hatch Act limits the partisan political activities of most executive branch employees, prohibiting them from running for partisan political office. It also prohibits partisan political activities in the government workplace.

⁵² 18 U.S.C. § 207(a). *See also* 5 C.F.R. 2641.201. In addition, the EPA prohibits the award of non-competitive contracts to former EPA employees in their first year after leaving the agency, or to firms that are controlled by them or that employ them.

A fifth category of ethics restrictions is based on an individual's employment *prior* to joining the government. Two long-standing regulations require a new government employee to recuse herself for one year from participating in any matter involving her former employer if her impartiality could reasonably be questioned,⁵³ and for two years if that employer gave her a payment greater than \$10,000 that may be related to her government position.⁵⁴

B. Stricter Ethics Regulation of Employees in Sensitive Positions

In addition to the statutes and regulations that apply to all executive branch employees, the government has imposed additional ethics restrictions on certain classes of employees who are thought to have particularly sensitive positions, such as high-level officials, political appointees, and those involved in treaty negotiation, bank examinations and procurement.⁵⁵

Presidential appointees may not receive any outside earned income;⁵⁶ may not accept any gifts from lobbyists;⁵⁷ and may not participate in particular matters. Noncareer employees are subject to increased restrictions on their compensation for expressive activities,⁵⁸ and highly paid noncareer employees are limited in the outside earned income they can receive.⁵⁹

The most extensive array of specialized restrictions are post-employment bans, which restrict three types of activities: (1) communicating with current government officials in an attempt to influence them on behalf of others; (2) representing others who seek to influence current government officials; and (3) receiving compensation from particular parties with whom the employee had dealings while in government.⁶⁰ A criminal conflict of interest statute imposes two temporary bans on communications:

- a 1-year ban on former high-level officials contacting officials in the agency where they worked in the year prior to leaving government service;⁶¹ and
- a 2-year ban on former very high-level officials contacting officials in the agency where they worked in the year prior to leaving government service or other high level officials;⁶²

and three bans on representation:

48 C.F.R. 1503.601. The Nuclear Regulatory Commission (NRC) has a similar regulation, but applies for its former employees in the first two years after they leave the commission. 48 C.F.R. 2009.100(a).

⁵³ 5 C.F.R. § 2635.502.

⁵⁴ 5 C.F.R. § 2635.503 (requiring recusal where the payment was "not pursuant to the former employer's established compensation program" and was made "after the former employer knew that the individual was being considered for a Government position").

⁵⁵ In addition to the ethics statutes and regulations that apply across the entire executive branch, many government agencies have additional restrictions that apply only to employees within this agency. See 5 C.F.R. Chapters 21-82. Congress has also enacted some agency-specific restrictions. See, e.g., 47 U.S.C. § 154(b)(2)(A)(ii) (prohibiting all F.C.C. employees from having a financial interest in any company engaged in "the business of communication by wire or radio or in the use of the electromagnetic spectrum").

⁵⁶ 5 C.F.R. 2635.804(a).

⁵⁷ Exec. Ord. No. 13490, 74 Fed. Reg. 4673, (Jan. 21, 2009) (§ 1 of the Ethics Pledge).

⁵⁸ Noncareer employees are subject to a relatively broad prohibition on receiving compensation for expressive activity, such as teaching, speaking or writing. They may not receive compensation if the expression concerns subject matter, industry or economic sector affected by her agency. 5 C.F.R. 2635.807(a)(2)(i)(E)(3). By contrast, regular employees are subject to a narrower prohibition for such compensation: only if it concerns her agency's policies or a matter the employee has worked on during the previous year. C.F.R. 2635.807(a)(2)(i)(E)(1), (2).

⁵⁹ These employees are limited to \$26,955 in outside earned income. See 5 U.S.C. Appx. § 501(a)(1); 5 C.F.R. §§ 2635.804(b), 2636.304 (limiting outside earned income of covered noncareer employees to 15% of the basic rate of pay for level II of the Executive Schedule), 2636.303(a) (defining "covered noncareer employee"); Exec. Ord. No. 13525, 74 Fed. Reg. 69231 (Dec. 23, 2009) setting the pay for Level II at \$179,700.

⁶⁰ See Table II for a list of the post-employment restrictions.

⁶¹ 18 U.S.C. § 207(c). President Obama issued an executive order on his first full day in office requiring Presidential appointees to pledge that they would abide by this ban for two years (rather than the statutorily-required one year). Exec. Ord. No. 13490, (Jan. 21, 2009).

⁶² 18 U.S.C. § 207(d).

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- a 1-year ban on former trade or treaty negotiators representing or giving advice concerning such negotiations that occurred during their last year in government;⁶³
- a 1-year ban on former high-level officials representing foreign governments and political parties;⁶⁴ and
- a permanent ban on the US Trade Representative and Deputy Trade Representative representing foreign governments and political parties.⁶⁵

Two non-criminal statutes restrict certain former employees from accepting compensation from particular parties, including:

- a 1-year ban on former procurement officials' accepting compensation from contractors with whom they did business;⁶⁶ and
- a 1-year ban on former bank examiners' accepting compensation from banks they examined.⁶⁷

President Obama required all of his appointees to pledge that they would not lobby any senior executive branch officials after they leave the government until the end of his administration.⁶⁸

President Obama issued an executive order imposing new restrictions on political appointees based their employment prior to joining the government. The executive order imposes a two-year cooling off period before a registered lobbyist can be appointed to a post in an agency that she lobbied or can participate in any particular matter or on any issue area on which she lobbied.⁶⁹ In addition, it imposes a two-year ban on all appointees (even those who were not lobbyists) participating in a particular matter involving specific parties that is directly and substantially related to the appointee's former employer or client.⁷⁰

C. Looser Ethics Regulation of Temporary Employees

Nearly fifty years ago, when Congress re-wrote the then-existing ethics statutes, it recognized that imposing uniform ethics standards on all government employees could make it difficult for the government to hire experts on a temporary basis.⁷¹ So the omnibus ethics legislation enacted in 1962 created a new category of federal employee -- "Special Government Employee" (SGE) -- for those who would work for the government on a temporary or intermittent basis: 130 or fewer days in a 12-month period.⁷²

As of 2009, the government had 17,600 SGEs.⁷³ While Congress created the SGE category so that the government could access individuals with special expertise, at least one government agency uses

⁶³ 18 U.S.C. § 207(b).

⁶⁴ 18 U.S.C. § 207(f).

⁶⁵ 18 U.S.C. § 207(f)(2).

⁶⁶ 41 U.S.C. § 423(d).

⁶⁷ 12 U.S.C. §§ 1820(k), 1786(w).

⁶⁸ Ex. Ord. No. 13490 (Jan. 21, 2009). President Clinton imposed on his senior political appointees a similar lobbying ban, Ex. Ord. 12834 (Jan. 20, 1993), but rescinded it at the end of his administration. Jason Peckenpaugh, *Clinton Lifts Lobbying Restrictions on Appointees*, GOVT. EXEC. (Jan. 2, 2001).

⁶⁹ Exec. Ord. No. 13490, 74 Fed. Reg. 4673, (Jan. 21, 2009) (§ 3 of the Ethics Pledge).

⁷⁰ Exec. Ord. No. 13490, 74 Fed. Reg. 4673, (Jan. 21, 2009) (§ 2 of the Ethics Pledge). The executive order specifies that a "particular matter" can be a regulation or a contract.

⁷¹ Daniel Guttman, *Organizational Conflict Of Interest and the Growth of Big Government*, 15 HARV. J. LEGIS. 297, 303 (1978) (noting that this legislation "facilitat[ed] the Government's recruitment of persons with specialized knowledge and skills for service on a part-time basis") (quoting S. Rep. No. 2213, 87th Cong., 2nd Sess. 4 (1962)).

⁷² A Special Government Employee is an "employee of the executive or legislative branch . . . who is retained . . . with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days . . ." 18 U.S.C. § 202(a). The government further divides this group into two categories: those who have worked less than 60 days, and those who will work between 60 and 130 days in a year. Some of the ethics statutes apply only to the latter group of SGEs. See, e.g., 18 U.S. § 207(c) (1-year ban on former senior officials contacting employees of the agency where they worked during their last year in government).

⁷³ June 22, 2010 telephone conversation with Dale Christopher, Associate Director, Program Review Division, Office of Government Ethics.

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volunteer SGEs as free labor to leverage its limited resources. The Occupational Safety and Health Administration (OSHA) has recruited over 1100 people to serve as unpaid SGEs to evaluate workplaces.⁷⁴

Many ethics restrictions, including the criminal prohibitions on bribery and illegal gratuities, gift regulations and most of the criminal post-employment restrictions, apply to all SGEs.⁷⁵ Some ethics provisions, such as the ban on compensation for fiduciary services, the limit on outside earned income, the surtax on compensation from private foundations and the option of obtaining of certificate of divestiture to obtain favorable tax treatment for divesting financial holdings, do not apply to SGEs at all. The criminal prohibition on salary supplementation applies only to SGEs who are paid by the government.⁷⁶

Some ethics restrictions, including limits on representational services, award of government contracts, fundraising, service as an expert witness, receiving compensation for expression and certain post-employment activities, apply to SGEs under a narrower range of circumstances than for regular employees. While regular employees may not provide representational services or receive compensation for such services whenever the United States has an interest in the matter, this ban applies to SGEs only if the matter is narrow in scope (i.e., it involves specific parties rather than general policy) and if the SGE actually participated in the matter while in government. If the matter involves not just the government in general but the SGE's agency, then SGEs who are serving more than 60 days are also covered by the representation ban.

While government contracts cannot be awarded to regular government employees, they can be awarded to an SGE unless the contract arose directly out of the SGE's activities, the SGE was in a position to influence the contract award, or some other conflict of interest exists.⁷⁷ While regular executive branch employees are prohibited from serving as an expert witness in any proceeding in which the United States has an interest, that prohibition applies to SGEs only if they have participated in the same matter while in government or, in the case of a proceeding that involves the SGE's agency, to SGEs who are serving more than 60 days, have been appointed by the President, or are serving on a statutorily created commission. While regular employees are prohibited from receiving compensation for expressive activity whenever the subject matter of the expression deals in significant part with her agency's policies or programs,⁷⁸ SGEs are exempted from this restriction.⁷⁹ While regular employees are prohibited from

⁷⁴ This program of using volunteer SGEs has enabled OSHA "to leverage [its] limited resources by utilizing private sector safety and health professionals during VPP onsite evaluations." Policies and Procedures Manual for Special Government Employee (SGE) activity conducted under the auspices of the Occupational Safety and Health Administration's (OSHA) Voluntary Protection Program, Directive No. CSP-03-01-001 (Jan. 4, 2002) (available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2810&p_text_version=FALSE#1-VIII). The leveraging is literally true. SGEs can outnumber government employees on evaluation teams. *Id.* at Ch. 4, § I.B. List of Active SGEs, available at http://www.osha.gov/dcsp/vpp/sge/active_sges.html. OSHA asserts that these SGEs are subject to the same ethical standards as regular government employees. Policies and Procedures Manual for Special Government Employee (SGE) activity conducted under the auspices of the Occupational Safety and Health Administration's (OSHA) Voluntary Protection Program, Directive No. CSP-03-01-001 (Jan. 4, 2002) (available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2810&p_text_version=FALSE#1-VIII) ("While at an onsite evaluation, an SGE is held to the same ethical and legal standards as a . . . government employee.")

⁷⁵ See Table I (Ethics Restrictions on Executive Branch Employees, SGEs and Contractor Personnel) and Table II (Post-Employment Restrictions on Executive Branch Employees, SGEs & Contractor Personnel).

⁷⁶ 18 U.S.C. § 209(c). This limited application of the salary supplementation statute makes sense because if an SGE is not receiving any salary from the government, it would be illogical to prevent that SGE from receiving a salary from a non-government entity.

⁷⁷ 48 C.F.R. § 3.601(b).

⁷⁸ 5 C.F.R. 2635.807(a)(2)(i)(E)(2).

⁷⁹ 5 C.F.R. 2635.807(a)(2)(i)(E)(4). SGEs who are in noncareer positions are also exempted from the broader restriction on receiving compensation for expression related to her agency's general subject matter or industry. *Id.* The prohibition on compensated expression that deals with specific matters also has more limited application to SGEs. *Id.*

soliciting charitable contributions from anyone regulated by their agencies,⁸⁰ SGEs are prohibited from soliciting contributions only from those who could be affected by the SGE's own duties.⁸¹

Two post-employment restrictions apply only to SGEs who have worked more than 60 days within a year: the one-year ban on a former senior official contacting employees of the agency where the employee worked during the previous year, and the one-year ban on a former senior official representing foreign governments and political parties.⁸² Limiting these bans to those who have worked more than 60 days may be justified by a theory that those with less experience in government are less apt to be in a position to inappropriately influence their former government colleagues or less apt to have confidential information that could be passed on to foreign governments.

One of the ways that the federal government obtains advice from experts is by appointing them to serve on advisory committees. Advisory committees consist of individuals from diverse backgrounds who bring their own expertise, experience and perspective to address particular policy problems and provide advice to policy-makers.⁸³ The members' individual perspectives could be conceived of as conflicts of interest, but the government accommodates – rather than eliminates – those conflicts of interest. In the Federal Advisory Committee Act (FACA), Congress mandated that committee membership must “be fairly balanced in terms of the points of views represented,” and that members must disclose conflicts of interest.⁸⁴

The criminal prohibition on financial conflicts of interest does not apply to SGEs who serve on advisory committees if certain criteria are met, such as if they are dealing with matters that are broad in scope (i.e. involving policy rather than particular parties) and if it would affect the SGE or her employer in the same way it would affect other similarly situated individuals or entities.⁸⁵ In addition, an agency official can waive the conflict if she determines that the need for the SGE's services on the advisory committee outweighs the conflict.⁸⁶

The modified ethics restrictions for SGEs demonstrate that government ethics regulation need not involve an all-or-nothing approach. The government can protect its ethical concerns while accommodating its other interests, including its need to obtain expertise on a temporary basis.

D. Implementation of Ethics Standards

The government implements these substantive restrictions by requiring some employees to disclose their financial interests and then reviewing those disclosures for conflicts, by facilitating divestment of assets that would cause conflicts, by giving employees ethics training and advice, by investigating alleged ethics violations, and by disciplining or prosecuting employees who have committed violations.

The government's largest investment in ethics implementation is the financial disclosure process. Every year, approximately 25,000 employees must submit public financial disclosure forms,⁸⁷ and about

⁸⁰ 5 C.F.R. § 2635.808(c)(1)(i).

⁸¹ 5 C.F.R. § 2635.808(c)(1)(ii).

⁸² 18 U.S.C. § 207(c)(2)(B).

⁸³ The Federal Advisory Committee Act also permits the appointment of “representative” members who are supposed to represent particular industries or interest groups. Such “representative” members are not considered government employees at all, and are not subject to the conflict of interest or disclosure requirements. *See* Office of Government Ethics, Op. 82x22 (Memorandum dated July 9, 1982 from J. Jackson Walter, Director of the Office of Government Ethics to Heads of Departments and Agencies of the Executive Branch regarding Members of Federal Advisory Committees and the Conflict-of-Interest Statutes); Office of Government Ethics, Letter to the Chairman of a National Commission dated June 24, 1993, 1993 OGE LEXIS 510.

⁸⁴ 5 U.S.C. Appx. § 5(b)(2).

⁸⁵ 5 C.F.R. 2640.203(g).

⁸⁶ 18 U.S.C. § 208(b)(3).

⁸⁷ August 4, 2010 email to author from Dale Christopher, Associate Director, Program Review Division, Office of Government Ethics.

300,000 additional employees must submit confidential financial disclosure forms,⁸⁸ revealing information about their income, assets, liabilities,⁸⁹ gifts, travel reimbursements, and employment and business affiliations.⁹⁰

All SGEs must file financial disclosure statements, although most of them are subject only to confidential (rather than public) financial disclosures.⁹¹ Some SGEs who would ordinarily be required to file public financial disclosure forms because of the significance of their position can file confidential disclosures instead if they will serve less than 60 days, if the agency head certifies that there is a special need for their services, or if they serve in the White House with a Presidential appointment or commission.

Once the employees submit their disclosure forms, agency officials then review their forms to check for compliance with ethics standards. When these reviews reveal financial conflicts, employees generally have the option of recusing themselves from participating in matters that could affect their finances or divesting themselves of those assets that would otherwise cause the conflict. Since divesting may result in capital gains tax, Congress enacted a special program (a “certificate of divestiture”) to relieve this tax burden.⁹²

The Office of Government Ethics provides formal advice about the application of ethics standards, publishing legal opinions about ethics statutes and regulations on a regular basis.⁹³ In addition, each agency has a Designated Agency Ethics Officer who counsels agency employees on ethics issues.⁹⁴ Government agencies must provide information about ethics standards to all new employees,⁹⁵ and must provide at least one hour of ethics training annually to presidential appointees, White House employees, contracting officers,⁹⁶ and all other employees who are required to file public or confidential financial disclosure reports.⁹⁷ In general, Congress mandates that advice be available to employees and former employees, who may choose whether or not to seek it.⁹⁸ But a 2008 statute *requires* former high-level or procurement officials from the Defense Department (DoD) to seek a written legal opinion from a DoD ethics official before receiving compensation from a DoD contractor within 2 years of leaving the department.⁹⁹

II. Principles Underlying Government Ethics Restrictions

The extensive array of ethics restrictions described above has more in common with the tax code than the Ten Commandments or the Golden Rule. As such, some observers have criticized these restrictions as being so complicated that they lack the moral authority that one would hope for in an *ethics*

⁸⁸ August 4, 2010 email to author from Dale Christopher, Associate Director, Program Review Division, Office of Government Ethics.

⁸⁹ Filers must report loans over \$10,000, except those from financial institutions granted on terms made available to the general public.

⁹⁰ See OGE Form 450, Confidential Financial Disclosure Report, and SF 278, Public Financial Disclosure Report. Public filers must also disclose transactions of real property and securities. *Id.*

⁹¹ 5 C.F.R. § 2634.904(a)(2) (requiring SGEs to file confidential disclosures); *See also* 5 C.F.R. §§ 2634.202(h); 2634.204; 2634.205 (exempting certain SGEs from public disclosure requirements).

⁹² The option of obtaining a certificate of divestiture is not available to Special Government Employees. 26 U.S.C. § 1043(b)(1)(A).

⁹³ 5 U.S.C. App. § 402(b)(8).

⁹⁴ 5 C.F.R. 2638.203(b)(7).

⁹⁵ 5 C.F.R. 2639.703.

⁹⁶ 5 C.F.R. 2639.705(a).

⁹⁷ 5 C.F.R. §§ 2639.704(a), 2639.705(a). For SGEs who are expected to work 60 or fewer days and SGEs who must file public financial disclosures, agencies can provide written training materials instead of one hour of training. 5 C.F.R. §§ 2639.704(e), 2639.705(d).

⁹⁸ By regulation, when a current or former employee seeks advice from an ethics official about whether her acceptance of compensation from a contractor would violate 41 U.S.C. § 423(d), the ethics official must provide a response within 30 days, and the employee and contractor can rely on the ethics official’s advice. FAR 3.104-6(d).

⁹⁹ National Defense Authorization Act of Jan. 28, 2008, P.L. 110-181, Div A, Title VIII, Subtitle D, § 847, 121 Stat. 243.

code. Nonetheless, even within this complexity, one can discern four distinct principles that motivate these many provisions: (1) preventing government employees from abusing the fiduciary nature of public office; (2) the related goal of promoting public confidence in government; (3) maintaining Congressional and executive branch control of federal workers; and (4) ensuring that officials devote adequate attention to their responsibilities. In addition, some ethics restrictions appear to be motivated not by a principle, as such, but simply by a desire to favor or disfavor particular groups or activities.

The principle that underlies most of these restrictions is the fiduciary nature of public office: the idea that public office is a public trust. In a relationship of trust, the trusted party is expected to act for the benefit of the other, and the law imposes a fiduciary obligation on the trusted party to ensure that she acts solely in the interest of the trusting party.¹⁰⁰ These are called fiduciary relationships, and the trusted party is called a fiduciary. These relationships are governed not just by the explicit terms of any agreement between the parties but by additional terms imposed by the common law.¹⁰¹ The law sees these relationships as valuable, and will prevent fiduciaries from abusing their position of trust.¹⁰²

Fiduciary relationships arise in two distinct factual settings.¹⁰³ In the first, an advice-based trust relationship, a person trusts a fiduciary to give her advice about a decision.¹⁰⁴ In the second, an access-based trust relationship, a person entrusts a fiduciary with access to an asset so that the fiduciary can use the asset to benefit the beneficiary.¹⁰⁵ The asset could be tangible property, a financial instrument, or confidential information.

But the mere existence of advice or access is not enough to create a fiduciary relationship. The advice or access must be coupled with an expectation (either subjectively intended or imposed by operation of law) that the party giving the advice or being given access will act in the interest of the trusting party.¹⁰⁶ If one party gives another access to her assets but there is no expectation that the other will use that access for her benefit, then she has merely given the other a gift, and no fiduciary obligation

¹⁰⁰ *Hospital Products Ltd v United States Surgical Corporation*, 156 CLR 41, 96-7 (1984-5) (“The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.”) (quoted in Flannigan at 306). See also *Guerin v The Queen*, 2 SCR 335 [1985] (“where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.”) (quoted in Flannigan at 307).

¹⁰¹ Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887 (“Once a court concludes that a particular relationship has a fiduciary character, the parties’ manifest intention does not control their obligations to each other as dispositively as it does under a contract analysis.”); Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C.L. REV. 595, 598 (1997) (“[T]he content of . . . restrictions [on actions by fiduciaries] and the power to alter [those restrictions] differ from the content and modifiability of the restrictions that ‘mere’ contract law imposes on non-fiduciary . . . contracting parties.”).

¹⁰² P. D. Finn, ‘The Fiduciary Principle’, at 26 T. G. Youdan (ed), *Equity, Fiduciaries and Trusts*, Carswell, Toronto, 1989, cited in Robert Flannigan, *The Fiduciary Obligation*, 9 Oxford J. Legal Stud. 285, 297 (1989).

¹⁰³ Flannigan at 309 (“There are . . . two kinds of trusts that will attract fiduciary status. They are, firstly, the trust which gives the trusted party the ability to exercise ‘influence’ over the trusting party and, secondly, the trust which allows the trusted party to acquire ‘access’ to the employment of assets.”)

¹⁰⁴ Flannigan refers to this type as a “deferential trust.”

¹⁰⁵ Flannigan refers to this as a “vigilant trust.”

The fiduciary obligation deters the fiduciary from acting in a way that “would have the effect of diverting or not maintaining the asset value.” Flannigan at 292. This is commonly referred to as “agency costs,” but Flannigan refers to them “intermediary costs.” Flannigan at 289-290.

Flannigan further explains :

. . . Both types of trust in fact result in the trusted party acquiring ‘access’ to the employment of assets. In the case of deferential trust, however, the access is indirect because it occurs through ‘influence’ exerted by the trusted party. But in either case, and to the same extent, the ‘access’ to assets may be turned to mischievous ends.

Flannigan at 309

¹⁰⁶ Flannigan has identified fact-based and status-based fiduciary relationships. Robert Flannigan, *The Fiduciary Obligation*, 9 Oxford J. Legal Stud. 285, 294, n. 45 (1989). Subjectively intended expectations occur in fact-based fiduciary relationships. Expectations imposed by operation of law occur in status-based fiduciary relationships.

arises.¹⁰⁷ Similarly, if someone gives advice to someone else, but there is no expectation that the adviser is acting on the other's behalf, then no fiduciary duty arises.¹⁰⁸ A fiduciary is someone who is called upon to give advice or has access to resources, but must give that advice or use that access to benefit the other party rather than herself.¹⁰⁹

Government officials are in a position of trust if they can give advice or have access to resources, but must give that advice or use that access on behalf of someone other than themselves. For more than a century, courts have recognized and enforced government officials' fiduciary obligations even in the absence of any specific statutory or regulatory codification of that obligation.¹¹⁰ As the following discussion makes clear, Congress and the executive branch have also recognized the fiduciary nature of governmental power by enacting statutes and regulations that reflect employees' fiduciary duties.¹¹¹

Three aspects of the fiduciary obligation are particularly relevant to government officials. First, the norm against conflicts: a fiduciary must not place herself in a position where her own interest conflicts with her duty toward a beneficiary. Second, the norm against misusing resources: a fiduciary must use the beneficiary's assets to help the beneficiary rather than to help herself or another party. Third, the norm of impartiality: a fiduciary who allocates benefits among beneficiaries must treat beneficiaries of the same class equally and beneficiaries of different classes fairly.¹¹²

The fiduciary norm against conflicts is implicated whenever a fiduciary could personally benefit from a decision she makes or advice that she gives on behalf of a beneficiary. The anti-conflict norm is reflected in many of the restrictions on outside payments to government employees. These fiduciary-based restrictions include limits on gifts and payments from those who could be affected by an employee's duties,¹¹³ criminal prohibitions on bribes and gratuities related to government work,¹¹⁴ and

¹⁰⁷ Flannigan at 308 ("Not every kind of access will be of a fiduciary character. A person may acquire access as a gift.").

¹⁰⁸ See *infra* discussion of "representational members" of FACA committees, who are not even temporary employees of the government and are not subject to the government's fiduciary-based ethics restrictions.

¹⁰⁹ See Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 309 (1989) (discussing advice- and access-based fiduciary relationships). The precise identity of the government official's beneficiary is a matter of some contention, with possibilities including the nation, the government itself, and the public. See parallel discussion of identifying the client of government lawyers. Kathleen Clark, *Government Lawyers and Confidentiality Norms*, WASH. U. L. REV. (2007). What matters here is that a government official must act on behalf of someone other than herself, and thus can be said to owe fiduciary duties.

While government contractors are not supposed to make decisions exercising governmental authority, Office of Management and Budget, Policy Letter 92-1, *Inherently Governmental Functions*, one can find many examples of contractors doing exactly this. Committee on Governmental Affairs, U.S. Senate, *Oversight of the Structure and Management of the Department of Energy*, Staff Report, 96th Cong., 2nd Sess. (Dec. 1980); Subcommittee on Federal Services, Post Office, and Civil Service, Committee on Governmental Affairs, U.S. Senate, *Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy*, S. Hrg. 101-554 (Nov. 6, 1989).

Because of this legal limit (even if it is honored in the breach), in the policy and legal debates over government contracting, much is made of the distinction between making decisions to exercise governmental authority, on the one hand, and giving advice to those who exercise such authority, on the other. But for the purpose of fiduciary analysis, this distinction is unimportant because both those who make decisions about the use of an asset (such as governmental authority) and those who give advice are fiduciaries if they have an obligation to act on behalf of the intended beneficiary rather than herself or another private party. Ethics standards for government employees reflect this fact, requiring not just disinterested decision-making, but also disinterested advice. See, e.g., 18 U.S.C. § 208(a) (prohibiting anyone who "participates personally and substantially as a Government . . . employee, through . . . the rendering of advice . . . in [a] particular matter" from having a financial interest in the matter. Compare Office of Legal Counsel, *Applicability of the Emoluments Clause to Nongovernmental Members of ACUS* (June 3, 2010) (Constitution's Emoluments Clause prohibiting "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State," does not apply to nongovernmental members of the Administrative Conference because although they give advice, they do not exercise governmental authority).

¹¹⁰ Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 74 (1996).

¹¹¹ See, e.g., 5 C.F.R. 2635.101(a) ("Public service is a public trust.").

¹¹² Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 311 (1989) (requirement that fiduciaries not trust property or confidential information included in the conflict component); Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 71 (1996).

¹¹³ 5 U.S.C. § 7353(a)(2).

¹¹⁴ 18 U.S.C. § 201.

restrictions on participation in matters that could affect an employee's own financial interest or that of a party whose interests are imputed to her (such as a family member, an organization with which she is affiliated, or of a party with whom she is negotiating for future employment).¹¹⁵

The fiduciary norm against misuse of resources is explicitly reflected in restrictions on using public office for private gain,¹¹⁶ using government time for private purposes,¹¹⁷ using government position for fundraising or electioneering, and restrictions on partisan political activities in the workplace. It is implicit in the restrictions on accepting gifts from subordinates¹¹⁸ and the anti-nepotism rules.¹¹⁹ The fiduciary norm of impartiality is reflected in regulations that prohibit employees from giving preferential treatment.¹²⁰

Often a fiduciary has access to confidential information in order to conduct her duties for a beneficiary, and the fiduciary duty requires that she use that confidential information only to further the beneficiary's interest rather than those of herself or someone else. This fiduciary duty is reflected in the regulatory restriction on using government information for personal gain.¹²¹ The fiduciary duty not to misuse information continues even after the relationship has ended. The continuing duty to protect information is reflected in an ethics statute that prohibits the disclosure of sensitive procurement information,¹²² and may be reflected in some of the post-employment restrictions.¹²³

The third key aspect of fiduciary duty – treating beneficiaries in the same class equally and beneficiaries in different classes fairly – is also reflected in government ethics regulations. One can find explicit expression of this norm in the regulation setting out the general principles of government service, requiring employees to “act impartially and not give preferential treatment to any private organization or individual.”¹²⁴ This principle may also be implicit in other regulations, such as the prohibition on hiring relatives.¹²⁵

While the restrictions described above directly express fiduciary norms, other restrictions are quasi-fiduciary in nature. They reflect a fiduciary-like concern, but they use a proxy, often broadening the scope of the restriction. For example, the direct fiduciary restriction on gifts prohibits employees from accepting gifts from anyone who could be affected by their duties.¹²⁶ A broader proxy-based restriction prohibits an employee from accepting a gift from anyone who is regulated by her agency.¹²⁷ These broader, proxy-based restrictions prevent the higher-order effects created by an environment in which a regulated company can give gifts to the employees of the agency that regulates it, even if not to the officials directly regulating it.¹²⁸ Another example of a quasi-fiduciary restriction is the government's ban on employees' accepting gifts from any other employee of lower salary.¹²⁹ This regulation uses salary as a proxy for subordinate position. The government also limits the partisan political activities of civil servants not just in the workplace but also outside the workplace. These regulations prohibit employees from soliciting campaign donations for partisan political candidates. While such outside activities would not necessarily cause a civil servant to act in a partisan manner in the workplace, banning

¹¹⁵ 18 U.S.C. § 208.

¹¹⁶ 5 C.F.R. 2635.702.

¹¹⁷ 5 C.F.R. 2635.705.

¹¹⁸ 5 C.F.R. 2635.302(a)(1).

¹¹⁹ 5 U.S.C. § 3110(b).

¹²⁰ *See, e.g.*, 5 C.F.R. 2635.101(a)(8).

¹²¹ 5 C.F.R. 2635.703.

¹²² 41 U.S.C. § 423(a).

¹²³ *See* discussion below.

¹²⁴ 5 C.F.R. 2635.101(b)(8).

¹²⁵ 5 U.S.C. § 3110(b).

¹²⁶ 5 U.S.C. § 7353(b).

¹²⁷ 5 U.S.C. § 7353(a).

¹²⁸ *See* Department of Interior Inspector General, Investigative Report: Island Operating Company *et al.* (2010) (employees of the Mineral Management Service accepted gifts of travel and football tickets from oil and gas company employees).

¹²⁹ The use of such proxies is not without criticism. *See* PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR (1989).

those activities helps to insulate the civil service from partisanship, preventing the creation of a partisan culture that would undermine both the impartiality and the appearance of impartiality in decisions made by such civil servants.

Other quasi-fiduciary restrictions include the bans on representing private parties in disputes with the government (and on accepting compensation for such representation). These bans grew out of experiences during the nineteenth century, when government officials exploited their positions to assist outsiders with claims against the federal government. Rather than fashioning a narrowly tailored ban on employees' inappropriately exploiting their position, Congress enacted a broad ban on any employee representing those with any claims against the federal government. This criminal ban on representation reflects a legitimate fiduciary concern: the misuse of government position. But it is also much broader than what would strictly be necessary to prevent inappropriate exploitation of government position. Thus, the representation ban is but one illustration of the inexact proxies that the government uses in ethics restrictions. Rather than applying to just those employees who could use their government position to aid private parties with claims against the government, the ban applies to all employees, regardless of their position.

Similar concerns motivate the bans on employees' serving as an expert witness for such parties¹³⁰ and on being awarded government contracts. Whether these activities would constitute a violation of a government official's fiduciary obligation would depend on a close examination of the particular facts: was the employee exploiting confidential information or her government position on behalf of a private party or herself? The government has dispensed with this kind of fact-specific inquiry by enacting broader, proxy-based restrictions.¹³¹

The ethics statutes and regulations are not pure or perfect expressions of fiduciary concerns. They often use inexact proxies rather than addressing directly the potential harm. For example, high-level officials and political appointees are subject to stricter regulation of their outside activities, their acceptance of gifts, and their post-government employment. These tighter restrictions may reflect a judgment that such employees may exercise greater discretion and thus could more severely damage the government through the improper exercise of that discretion. Employees who are expected to work less than six months are subject to fewer restrictions, and those expected to work less than three months are subject to even fewer.¹³² This may reflect both the presumption that temporary employees are less likely to exercise broad discretion and the concern that imposing a broad swath of ethics restrictions on them would make them less likely to agree to serve. The ethics rules' imperfect expression of fiduciary duty may reflect the government's need to accommodate other values, such as the need to obtain expertise on a temporary basis or the desire to permit fluidity in the flow of personnel in and out of government.¹³³

The fiduciary norms against conflicts, misuse of resources and partiality can explain most government ethics restrictions, but not all of them. A second principle that can help explain some ethics restrictions is the desire to promote public confidence in government.¹³⁴ This appears to be the primary motivation for the government's varied post-employment restrictions, a seemingly ad hoc collection of temporary and permanent bans former government employees communicating with some or all federal officials on behalf of others;¹³⁵ providing representation or advice on particular topics (e.g., treaty

¹³⁰ 5 C.F.R. 2635.805.

¹³¹ Another example of a proxy is the government's decision to restrict compensation for certain outside activities (such as teaching) rather than restricting the outside activity itself. PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR (1989).

¹³² See Table II.

¹³³ See Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57 (1992).

¹³⁴ This principle – promoting public trust – is not entirely independent of fiduciary theory because fiduciary-based restrictions also generally promote public confidence in government. But some government ethics restrictions (including some post-employment bans) cannot be explained by fiduciary theory, and instead seem to be aimed at promoting confidence. Many post-employment restrictions fall into this category.

¹³⁵ 18 U.S.C. § 207(a).

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negotiations);¹³⁶ assisting certain parties (e.g., foreign governments and political parties);¹³⁷ and receiving compensation from parties that they could have affected while in government.¹³⁸

At first glance, some of these post-employment restrictions (such as the bans applicable to particular matters in which a government employee participated personally and substantially or which was under the employee's responsibility) may appear to be aimed at preventing the misuse of a government resource, confidential information. But these bans on communications with government officials do not prohibit former employees from disclosing or using confidential information, and such employees remain free to give advice behind-the-scenes. While Congress included a ban on such advice in the 1978 Ethics in Government Act, it repealed that provision before it went into effect after many argued that it would prevent appropriate fluidity between the government and the private sectors.¹³⁹

One way that post-employment bans may promote public confidence is by ensuring that former high-level officials cannot misuse the relationships that they have developed while in office. For example, a criminal statute imposes a temporary ban on former high-level employees contacting certain government officials, regardless of whether there is any factual nexus between their former government work and the matter they are now handling.¹⁴⁰ Similarly, President Obama has banned all of his Presidential appointees who leave office from lobbying any high-level officials for the duration of his administration.¹⁴¹

A third principle behind ethics restrictions is the goal of maintaining Congressional and executive branch control of federal workers. For example, restrictions on salary supplementation and on agencies' acceptance of volunteer services reflect Congress's desire to control the conduct of government operations through its appropriations power.¹⁴² A fourth goal is to ensure that workers devote adequate attention to their duties. The limits on outside earned income for certain high-level appointees appear to promote this goal, ensuring that these officials are not distracted by other professional duties.¹⁴³ Here, Congress has used money as a proxy for the time that an employee would devote to that other job.

Some ethics restrictions seem to be motivated not by principle but by a desire to favor or disfavor particular groups or activities. The criminal post-employment statutes favor colleges, universities, nonprofit hospitals and research organizations by exempting them from many of the bans on communication and representation.¹⁴⁴ They disfavor foreign governments and political parties, prohibiting former high-level officials from representing them regardless of whether there is any nexus between that representation and their former government duties.¹⁴⁵ This disfavoring of foreign governments has a long history, from the Constitution's ban on certain government officials accepting

¹³⁶ 18 U.S.C. § 207(b).

¹³⁷ 18 U.S.C. § 207(f). See also discussion *infra*.

¹³⁸ 41 U.S.C. § 423(d) (1-year ban on former procurement officials accepting compensation from contractors with whom they did business); 12 U.S.C. §§ 1820(k), 1786(w) (1-year ban on former bank examiners accepting compensation from banks they examined).

¹³⁹ OFFICE OF GOVERNMENT ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 14 (2006).

The legal ethics rule on former government officials more closely tracks the fiduciary concern with protecting confidential information, prohibiting lawyers who are former government officials from representing someone on a matter they worked on while in government. American Bar Association Model Rule 1.11(a). See also Model Rule 1.11(c) (prohibiting representation where the former government official had access to confidential government information that could be used to the detriment of another party).

¹⁴⁰ 18 U.S.C. § 207(d).

¹⁴¹ Ex. Ord. 13490 (Jan. 21, 2009), 74 Fed. Reg. 4673.

¹⁴² Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57 (1992).

¹⁴³ 5 C.F.R. 2635.804(a); 5 U.S.C. Appx. § 501(a)(1); 5 C.F.R. §§ 2635.804(b).

¹⁴⁴ 18 U.S.C. § 207(j)(2)(B).

¹⁴⁵ 18 U.S.C. § 207(f). Another example of an ethics restriction aimed at disfavoring particular parties is the statutory ban on accepting gifts from foreign governments. 5 U.S.C. § 7342.

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gifts or honorary titles from foreign nations to a 1967 statute prohibiting all government employees from accepting gifts from foreign governments.¹⁴⁶

Another group that has been disfavored by the Obama administration's ethics reforms is lobbyists. On his first full day in office, President Obama issued an executive order severely restricting registered lobbyists' ability to become political appointees.¹⁴⁷ He later issued a memorandum limiting registered lobbyists' ability to communicate with executive branch officials regarding the Recovery Act, requiring any such communications about particular projects to be in writing rather than oral,¹⁴⁸ and instructed agency heads not to appoint registered lobbyists to advisory committees, boards or commissions.¹⁴⁹

In singling out lobbyists for disfavored treatment, President Obama has invoked the populist rhetoric of "reducing the undue influence of special interests."¹⁵⁰ These anti-lobbyist initiatives may be aimed at preventing biases that are based not on an individual's current financial interests but on the individual's past associations. Even so, these measures are both underinclusive and overinclusive. They are underinclusive in that they do not cover someone like former Senator Tom Daschle, who advised special interests on public policy and legislative initiatives, but did not communicate on their behalf, and thus did not have to register as a lobbyist.¹⁵¹ They are overinclusive because they cover not just those lobbyists who have worked for moneyed "special interests," but also those who lobbied for human rights and for children in foster care.¹⁵²

III. Government Service Contracting: A \$268 Billion Sector of Government Spending

In the last two decades, federal government spending has expanded, more than quadrupling from \$800 billion in FY 1983 to \$3.5 trillion in FY 2009.¹⁵³ (See Figure: Federal Spending.) With the additional spending, agencies are required to perform more tasks and are given additional funding to perform those tasks, but they have not hired additional employees to accomplish that work. In fact, Congress has placed limits on the size of the federal employee workforce, and the number of executive branch employees has fallen by one-eighth.¹⁵⁴ (See Figure: Number of Executive Branch Employees.)

¹⁴⁶ U.S. CONST. art. I, § 9, cl. 8 ("No person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept of any present . . . of any kind whatever, from any King, Prince, or foreign State."); 5 U.S.C. § 7342.

¹⁴⁷ Executive Order 13490, 74 Fed.Reg. 4673 (Jan. 21, 2009) (2-year ban on registered lobbyists seeking or accepting a political appointment in an agency they lobbied; participating in the specific issue area they lobbied; and participating in any particular matter on which they lobbied). The Executive Order does not define "specific issue area," so the scope of this prohibition is unclear.

Even as a Presidential candidate, Barack Obama refused to accept political donations from registered lobbyists. *See* Obama Returns Lobbyists' Donations, April 14, 2007 (available at <http://thecaucus.blogs.nytimes.com/2007/04/14/obama-returns-lobbyists-donations/>).

¹⁴⁸ Presidential Memorandum re: Recovery Act Funds (March 20, 2009).

¹⁴⁹ Presidential Memorandum--Lobbyists on Agency Boards and Commissions (June 18, 2010).

¹⁵⁰ Presidential Memorandum--Lobbyists on Agency Boards and Commissions (June 18, 2010).

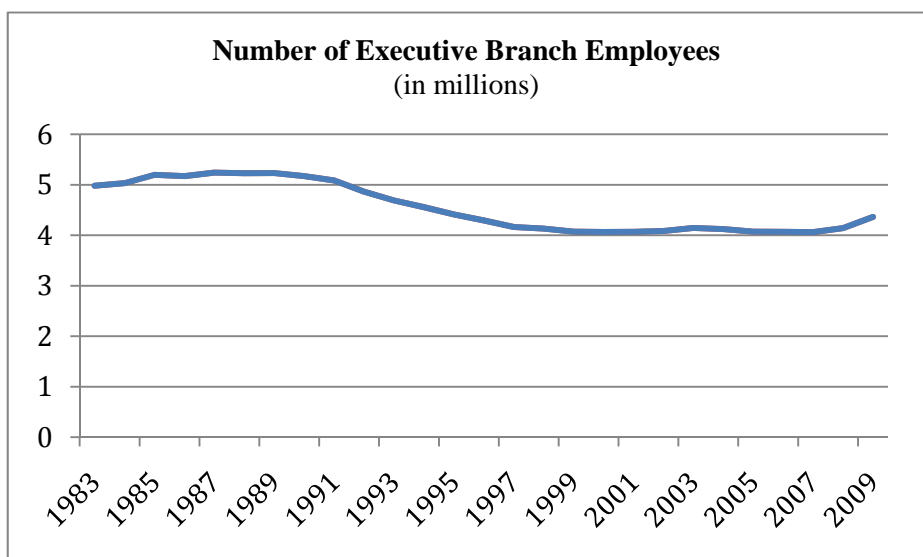
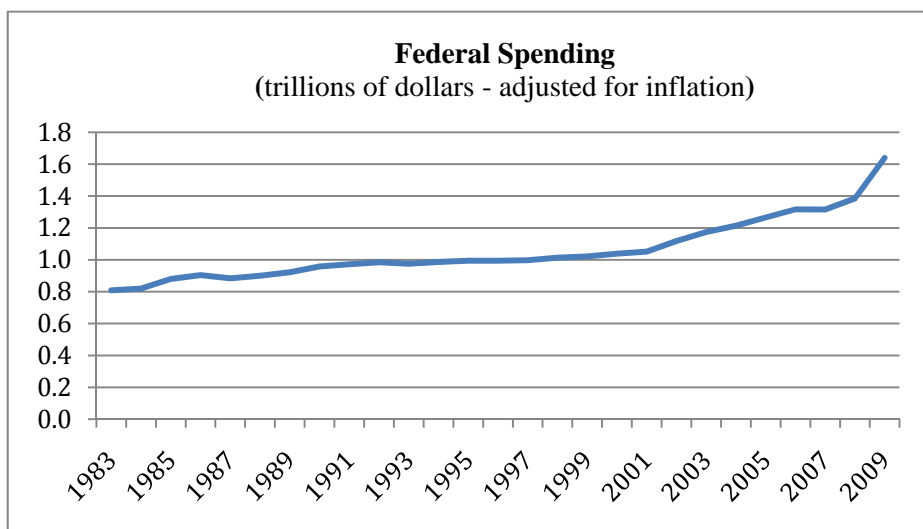
¹⁵¹ Michael Scherer, *Daschle's Problems: When is a Lobbyist Not a Lobbyist?*, TIME, Feb. 3, 2009.

¹⁵² Jonathan Martin, *Lobbyist Ban Limits Obama's Options*, POLITICO, March 13, 2009; Peter Baker, *Nonprofit Groups Seeking Exceptions to Lobby Rule*, N.Y. TIMES, April 21, 2009.

¹⁵³ Table 1.1 — Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2015, Budget of the United States Government: Historical Tables Fiscal Year 2011 (available at <http://www.gpoaccess.gov/usbudget/fy11/hist.html>). Note that these figures are not adjusted for inflation.

¹⁵⁴ GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 5 (2008) (noting the ceilings on the authorized number of government employees have contributed to the government's increased reliance on contractors). The total number of executive branch employees (including members of the military and postal service) fell 12 per cent from 1983 to 2009, from 5.0 to 4.4 million. Office of Personnel Management, Total Government Employment Since 1962 (available at <http://www.opm.gov/feddata/HistoricalTables/TotalGovernmentSince1962.asp>). See Table IV - Number of Executive Branch Employees 1983-2009. The civilian workforce (excluding the postal service) fell from 2.1 to 2.0 million during this same time period. Table 17.1 — Total Executive Branch Civilian Full-Time Equivalent (FTE) Employees, 1981–2011, Budget of the United States Government: Historical Tables Fiscal Year 2011.

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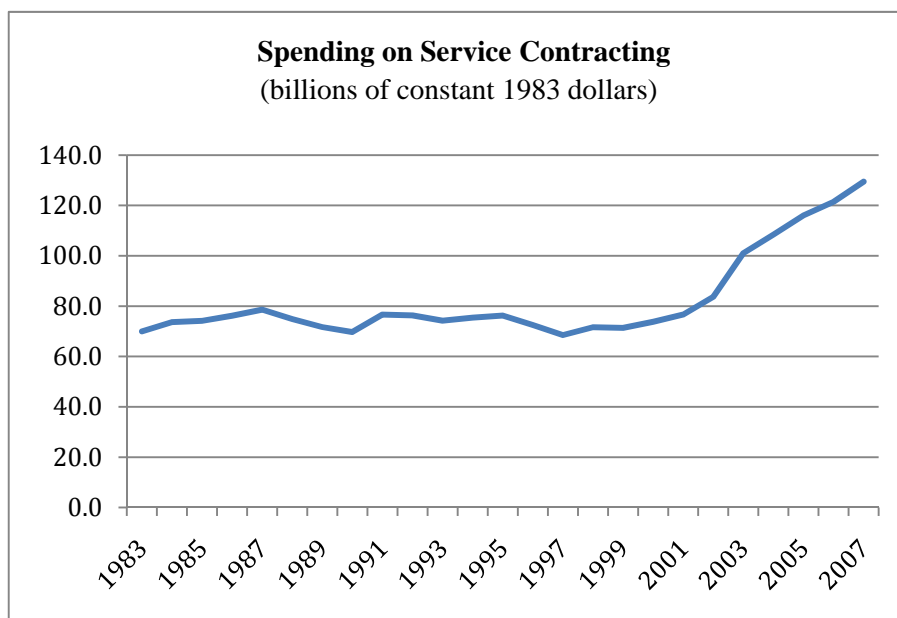
Agencies are meeting these additional performance requirements by expanding their use of contractors to perform services.¹⁵⁵ These services range from the mundane, such as hauling trash or cleaning government offices, to the sophisticated, such as advising the government on how to respond to climate change or the economic crisis. Contractor personnel are now performing many of the tasks that in

¹⁵⁵ In addition to contracts, the government also uses grants and mandates to accomplish its goals while avoiding any increase in the number of government employees. See Donald F. Kettl, *After the Reforms*, GOVT. EXEC. 38 (April 1998):

The federal government . . . does relatively little itself. It . . . does most of its work through contracts with the for-profit and not-for-profit sectors, grants to state and local governments, special provisions in the tax code, and regulations on corporate and individual behavior. . . . The Energy Department is little more than a hollow shell over a vast network of contractors. The actual provision of services in Medicare and Medicaid occurs through private doctors; private contractors (notably regional Blue Cross/Blue Shield operations) process the paperwork and mail the checks.

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the past had been performed by government employees.¹⁵⁶ As the number of government employees has decreased, the amount of government service contracting has increased 85 percent from FY 1983 to FY 2007.¹⁵⁷ (See Figure: Spending on Service Contracting.) In an earlier era, most of the government's



contracts were for products. Now most of the government's contracts are for services. (See Figure: Proportion of Procurement Spending on Services v. Products.)

The government can either contract directly with an individual or with a company that then subcontracts with individuals or hires them as employees. Using service contractor personnel rather than government employees has sometimes resulted in controversy. For example, the Treasury Department used the former technique to obtain the services of Dan Jester, the former Goldman Sachs official described in this paper's introduction who was Treasury's point person on the AIG bailout.¹⁵⁸ The Army, Navy and Air Force have used the latter technique to obtain the services of retired flag officers and civilian officials in "mentoring" and giving advice to current officers.¹⁵⁹ In some cases, these retired

¹⁵⁶ See PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2008); JANINE R. WEDEL, *SHADOW ELITE: HOW THE WORLD'S NEW POWER BROKERS UNDERMINE DEMOCRACY, GOVERNMENT, AND THE FREE MARKET* (2009);); PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* (1999). For a discussion of outsourcing in foreign affairs and defense, see ALLISON STANGER, *ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY* (2009); Laura A. Dickinson, *Public Law Values in a Privatized World*, *YALE J. INTL. L.* 383 (2006).

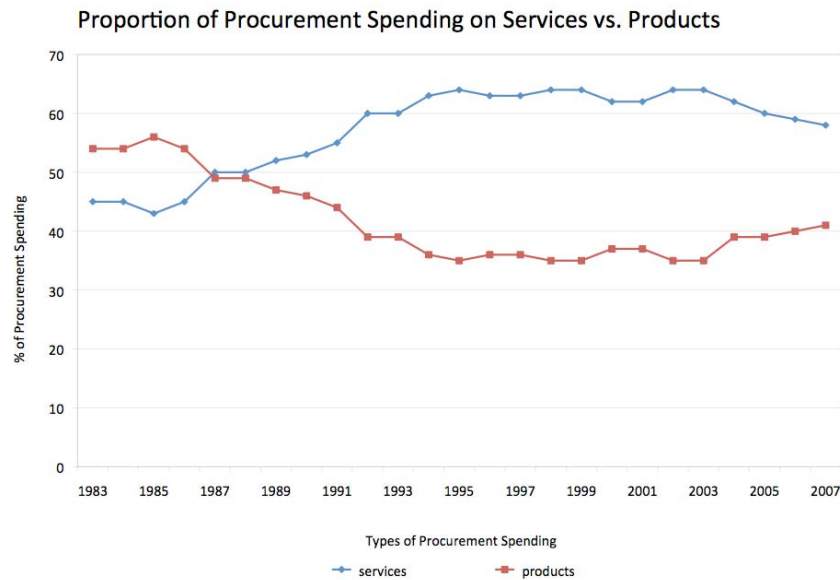
¹⁵⁷ This paper focuses on the government's service contracts, as opposed to its contracts for supplies. Service contracts "directly engage[] the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply." 48 C.F.R. 37.101.

Emblematic of the contracting out of so many government functions, in 2003 the federal government contracted out the creation of its reports on contracting, the Federal Procurement Data System, to a private contractor, Global Computer Enterprises, Inc., a company that has a ".gov" website (www.fpds.gov). See FY 2007 Federal Procurement Report at 3.

¹⁵⁸ Karen Weise, *Treasury's 'Point Man' on AIG Bailout That Benefited Goldman, Owned Goldman Stock*, *Pro Publica*, June 30, 2010 (<http://www.propublica.org/article/treasurys-point-man-on-aig-bailout-that-benefited-goldman-owned-goldman-sto>). Jester received \$30,000 from Treasury for his services. See <http://www.usaspending.gov/search?query=jester&searchtype=JTI1N0VmcSUyNTNEJTI1MjhNYWpvcFnZW5jeSUyNTNBK> iUyNTIxKkRlcGFydG1lbnQIMjUyMG9mJTI1MjB0aGUIMjUyMFRyZWZdXJ5KiUyNTIxKiUyNTI5. For further discussion of Treasury's use of contractors in response to the financial crisis, see Kathleen Clark, *Conflicts of Interest in Bailout Contracting: Unlearned Lessons from the S&L Bailout*, *U. MINN. L. REV.* (forthcoming 2011).

¹⁵⁹ Tom Vanden Brook, Ken Dilanian and Ray Locker, *How Some Retired Military Officers Became Well-Paid Consultants: Retired Military Officers Cash in as Well-Paid Consultants*, *USA TODAY*, Nov. 18, 2009 (Joint Forces Command obtained

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officers who were advising the military on operations had financial ties to companies that sell products designed to aid those same operations.¹⁶⁰ By using these contracts, the government avoids application of almost all the ethics restrictions described above. As a Defense Department official has explained, “one reason that mentors are not hired as employees is so they . . . have freedom from the government ethics bureaucracy. . . . The ethics rules constrain [government employees’] ability to consult for private companies.”¹⁶¹

In some cases, an agency contracts with an entity to perform one discrete task (such as performing a study), and the entity then uses its own personnel to perform that task on its own premises away from a government office.¹⁶² That is the traditional model, but in recent decades, much of service contracting has followed a different model, known as “staff augmentation” or colloquially referred to as “body shops.”¹⁶³ Body shops are companies that supply the government with laborers (“bodies”) to work in government offices, side-by-side with government employees, and often to perform exactly the same tasks as government employees.¹⁶⁴ Agencies contract with body shops to supply the labor that the agency will not or cannot hire directly, and contractor personnel engage in functions that are central to the government’s functioning, such as defining and managing project resources, developing briefings, financial plans and budgets, evaluating and managing programs, advising on the selection of contractors, “making trade-off decisions among costs and capabilities,”¹⁶⁵ and conducting management oversight.¹⁶⁶

mentoring services of retired flag officers by contracting with Northrop Grumman, which then hired mentors as subcontractors). The Marines contracted directly with the retired officers. *Id.*

¹⁶⁰ *Id.* (mentors with financial ties to companies selling products designed to aid particular launch operations from ships gave advice on exercises related to such launch operations). Up until 2010, there were no requirements that the retired flag officers disclose their financial ties to defense contracts and no restriction on their using the information they learn on behalf of those contractors. The Defense Department did not even collect information about these retired officers’ business affiliations. *Id.*

¹⁶¹ *Id.* (quoting Brig. Gen. John R. “Bob” Ranck).

¹⁶² See text accompanying note 135 (discussing Defense Department’s contract with the Institute for Defense Analyses (IDA) to analyze the F-22 jet fighter program).

¹⁶³ Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?* 33 PUB. CONT. L.J. 263, 291 (2004).

¹⁶⁴ The literature on contracting refers to this phenomenon as the multi-sector or blended workforce.

¹⁶⁵ Government Accountability Office, *Defense Acquisitions: DOD’s Increased Reliance on Service Contractors Exacerbates Long-standing Challenges* (Statement of David M. Walker, Comptroller General of the United States), Jan. 23, 2008, at 1, 4.

¹⁶⁶ GOVERNMENT ACCOUNTABILITY OFFICE, *DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS* 45-46 (2008).

Much of the public debate on government contracting has centered on whether the government has contracted out “inherently government functions.” In theory, the government may not contract out such functions. In general, the exercise of

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The shortage of government employees is so severe, in fact, that the government is now contracting out the contracting-out function: advising the government on how to deal with other contractors, including developing requests for proposals, evaluating contractors' proposals, estimating costs, determining the fees that other contractors can earn, developing criteria for evaluating other contractors' work, conducting those evaluations, and identifying the government's and other contractor's liabilities.¹⁶⁷ The government refers to this as contractors involved in the acquisition function.¹⁶⁸ I refer to this as "meta-contracting."¹⁶⁹ Not surprisingly, this meta-contracting area is rife with the potential for conflicts of interest. It is one of the first areas of contracting that has been subjected to personal conflict of interest analysis, as discussed in the next section.

This expansion of outsourcing has occurred despite the fact that Congress has placed two legal constraints on such outsourcing. The first constraint addresses the nature of the relationship between the government and the outsider who is doing the government's work. Congress prohibits agencies from using "personal service contracts" to circumvent the civil service system unless the agency is specifically authorized by statute to do so.¹⁷⁰ "Personal service contracts" are contracts that result in an employer-employee relationship rather than an independent contractor relationship. Determination of whether a particular contract is a "personal services contract" requires analysis of several factors, including whether contractor personnel are directly supervised by a government official. In the private sector, the issue of whether a particular individual is an employee or an independent contractor has important implications taxes, safety standards and potential liability. In the public sector, these same implications may arise, as does the question of whether government ethics standards apply to such individuals.

A second legal constraint on outsourcing addresses not the nature of the *relationship*, but the nature of the *tasks* that the individual is doing for the government. Congress prohibits the contracting out of "inherently governmental functions" (IGFs),¹⁷¹ but it has provided a circular definition of the term, stating that it "means a function that is so intimately related to the public interest as to require performance by Federal Government employees."¹⁷² If a particular task is deemed to be "inherently governmental," then the government must not outsource it. But the statute does not actually define what would constitute an "inherently governmental function."¹⁷³ The statute does explain that the term "includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements."¹⁷⁴ It also provides examples of some functions that

government authority constitutes an "inherently governmental function," but giving advice about how such authority should be exercised and assisting someone who exercises that authority do not. Office of Management and Budget, Policy Letter 92-1, Inherently Governmental Functions, 57 Fed.Reg. 45096 (Sept. 30, 1992); Office of Management and Budget, Work Reserved for Performance by Federal Government Employees, 75 Fed.Reg. 16188 (March 31, 2010). This paper sidesteps the debate over "inherently government functions," because both those who exercise government authority and those who give advice or have fiduciary obligations and should be subject to ethics restrictions.

Another key issue is whether the government has contracted for personal services even where not authorized by statute. See 48 C.F.R. 37.104(b). This is an empirical question that deserves further study. See *infra* Section VI.

¹⁶⁷ *Id.*

¹⁶⁸ This includes evaluating the work of other contractors, helping design requests for proposals, and giving the government advice about how "to acquire desired capabilities." *Id.* at 8 (2008).

¹⁶⁹ It is important to distinguish meta-contracting, where a contractor gives the government advice about how to handle current or future contracts, from subcontracting, where a contractor engages another company to accomplish part of the task that it has agreed to accomplish for the government.

¹⁷⁰ There are at least two legal exceptions to this ban on outsiders' performing inherently government functions. USAID Personal Service Contractors can perform these functions, as can financial agents of the Treasury Department. See Kathleen Clark, *Fiduciary-Based Standards for Bailout Contractors: What Treasury Got Right and Wrong in TARP*, U. MINN. L. REV. (forthcoming 2011).

¹⁷¹ 105 P.L. 270, § 5(2)(A); 112 Stat. 2382 (Federal Activities Inventory Reform Act of 1998).

¹⁷² *Id.* The Federal Acquisition Regulations contain a similar "definition" of IGFs, largely tracking the statute. 48 CFR 2.101

¹⁷³ The regulatory "definition" of inherently governmental functions found in the Federal Acquisition Regulations seems to acknowledge this weakness, stating that "[t]his definition is a policy determination, not a legal determination."

¹⁷⁴ *Id.* at § 5(2)(B) (emphasis added).

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are IGFs, such as “bind[ing] the United States to take or not take some action,”¹⁷⁵ and some that usually are not, such as “providing advice, opinions, recommendations, or ideas to Federal Government officials.”¹⁷⁶

The government has recently moved away from an exclusive focus on whether a particular task is or is not an IGF. Instead, it examines two additional issues. The first issue is whether the government is contracting out tasks that are “closely associated” with inherently governmental functions (i.e., situations in which certain tasks, “if not appropriately managed, may materially limit Federal officials’ performance of inherently governmental functions”).¹⁷⁷ The Obama Administration has proposed a policy to ensure that “when such work is performed by contractors, . . . [the government must] ensure that contractors’ duties do not expand to include performance of inherently governmental functions.”¹⁷⁸ The second issue is the government has sufficient capacity regarding “critical functions,” which is defined as those necessary to ensure that an agency can “effectively perform and maintain control of its mission and operations.” The Obama Administration has directed agencies to ensure that “[f]ederal employees have the technical skills and expertise needed to maintain [this] control.”¹⁷⁹

The government does not know how many contractor (and subcontractor) employees perform services for it. Secretary of Defense Robert Gates recently made the “terrible confession” that he was unable to determine how many contractors were working for him -- not in the Defense Department as a whole, but in the Office of the Secretary of Defense itself.¹⁸⁰

While we have reliable data on the amount of money that the government spends on service contracts, we do not have reliable data on the number of individuals providing those services. Paul Light has

¹⁷⁵ Id. at § 5(2)(B):

An inherently governmental function involves, *among other things*, the interpretation and execution of the laws of the United States so as--

- (i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (iii) to significantly affect the life, liberty, or property of private persons;
- (iv) to commission, appoint, direct, or control officers or employees of the United States; or
- (v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

(emphasis added).

¹⁷⁶ Id. at § 5(2)(C):

The term does not *normally* include--

- (i) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or
- (ii) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

(emphasis added).

¹⁷⁷ Agencies must give special consideration to using federal employees to perform tasks that are closely associated with the performance of an inherently governmental function. 10 U.S.C. § 2463; Pub. L. 111-8, Omnibus Appropriations Act, 2009, Division D, § 736. Office of Management & Budget, Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188, 16,190 (proposed Mar. 31, 2010).

¹⁷⁸ Id.

¹⁷⁹ Office of Management & Budget, Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188, 16,190 (proposed Mar. 31, 2010) (“agencies must . . . take special care to retain sufficient management oversight over how contractors are used to support government operations and ensure that Federal employees have the technical skills and expertise needed to maintain control of the agency mission and operations.”).

¹⁸⁰ Dana Priest and William M. Arkin, *National Security, Inc.*, WASH. POST, July 20, 2010. (“‘This is a terrible confession,’ [Gates] said. ‘I can’t get a number on how many contractors work for the Office of the Secretary of Defense,’ referring to the department’s civilian leadership.”).

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asserted that federal contractor personnel outnumber government employees by a factor of 1.8 to 1,¹⁸¹ but his estimate includes not just jobs at contractors, but also jobs created *indirectly* through contract spending, such as jobs at the grocery stores and dry cleaners that serve contractor personnel.¹⁸² The Defense Department reported that nearly 600,000 contractor personnel provided services in FY 2008, but the GAO determined that the Defense Department's methodology was flawed, underestimating the actual number.¹⁸³ Congress is considering legislation to require each agency in the executive branch to report on the number of contractor personnel providing services.¹⁸⁴ Mandating that service contractors disclose the number of individuals working on their contracts (and in turn requiring agencies to report those numbers) will help the executive branch, Congress and outside observers get a handle on the scope of service contracting.

While the phenomenon of contracting out services is not new,¹⁸⁵ policy makers are only just beginning to grapple with this reality of an outsourced workforce. The Chair and Ranking Member of the Senate Homeland Security and Government Affairs Committee recently "expressed shock" that contractor personnel outnumber government employees in the Department of Homeland Security.¹⁸⁶

IV. The Few Ethics Restrictions on Government Contractor Personnel

Most of the government ethics statutes and regulations described in Section II of this paper do not apply to government contractor personnel, even those employees working side by side with and performing the same functions as government employees. As a result, government contractor personnel may routinely be giving advice that is tainted by conflicts of interest. The government does not collect information on the conflicts of interest of contractor personnel, so it is impossible to know the extent of the problem. But as the following discussion shows, the government has imposed ethics restrictions on only a few narrow slices of the service contractor workforce.

A. Distinguishing Organizational from Personal Conflicts of Interest

In considering government contractor ethics, it is important to distinguish between two different types of restrictions: those that address the conflicts of interest of outside organizations that obtain contracts (known as Organizational Conflicts of Interest or OCIs), and those that address the conflicts of interest of the individuals actually performing the work (known as Personal Conflicts of Interest or PCIs). An OCI arises when contractor personnel have access to government resources or can exercise discretion in a way that could benefit the contractor.¹⁸⁷ For example, an OCI exists if the employee of a contractor evaluates on behalf of the government work performed by her employer.

The issue of OCIs often arises in the context of bid protests: where one company contests the government's decision to award a contract to another company, and argues that the award was improper.

¹⁸¹ In 2005, there were 7.5 million employees of federal contractors. PAUL LIGHT, *THE TRUE SIZE OF GOVERNMENT*. That same year, the Office of Management and Budget reports that there were 4.1 million executive branch employees, including those serving in the military and postal service. Office of Personnel Management, *Total Government Employment Since 1962* (available at <http://www.opm.gov/feddata/HistoricalTables/TotalGovernmentSince1962.asp>).

¹⁸² PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* 22 (1999). Light explains that his methodology begins with the dollar figures reported in the FPDS, considers the Standard Industrial Code (SIC) associated with each contract, and then uses the "job multipliers supplied by the Bureau of Economic Analysis [BEA] input-output model of the economy." *Id.* at 19; August 20, 2010 telephone conversation with Paul Murphy, who conducted the research for Paul Light).

¹⁸³ The National Defense Authorization Act for FY 2008 required DoD to report on the number of contractor personnel providing services. 10 U.S.C. § 2330a(c) GAO, *DEFENSE ACQUISITIONS: OBSERVATIONS ON THE DEPARTMENT OF DEFENSE SERVICE CONTRACT INVENTORIES FOR FISCAL YEAR 2008* (Jan. 29, 2010).

¹⁸⁴ H.R. 5136, National Defense Authorization Act for FY 2011, § 850.

¹⁸⁵ See PAUL LIGHT, *THE TRUE SIZE OF GOVERNMENT* (1999).

¹⁸⁶ Senate Homeland Security and Government Affairs Committee, *Lieberman, Collins Astounded DHS Contract Workers Exceed Number Of Civilian Employees* (Press Release), Feb. 24, 2010.

¹⁸⁷ Matter of: Aetna Government Health Plans, Inc., B-254397.15 (GAO 1995).

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In the seminal GAO bid protest case based on an OCI, a company that had lost its bid for a contract to provide health services argued that the award was tainted by a conflict of interest because the government hired a consultant to write the criteria for the contract award, and that consultant had a contractual relationship with the winning company. The adjudicating agency agreed with this argument and recognized that the government must guard against organizational conflicts of interest in awarding contracts.¹⁸⁸

The government has addressed OCI in its contracting regulations (the Federal Acquisition Regulation or FAR), and defines an OCI as a situation in which a contractor's activities or relationships render it "unable or potentially unable to" provide "impartial assistance or advice," or indicate that its "objectivity in performing the contract work is or might be otherwise impaired."¹⁸⁹ The regulation indicates that contracting officers need to identify such conflicts and avoid or mitigate them,¹⁹⁰ but does not explain how contracting officers should gather the information needed to discern that such conflicts exist.¹⁹¹ These organizational conflict of interest regulations now form the basis for numerous bid protest decisions, and there is a body of law and an infrastructure for implementing these principles through standards and training.¹⁹² But some have criticized these regulations because they place the burden on government officials to identify conflicts without specifying how the official can learn of them.¹⁹³ The onus of identifying OCIs is on the contracting officer prior to an award, and the government is not required to monitor OCIs after the award of a contract.¹⁹⁴

A personal conflict of interest or PCI arises when the employee of a contractor has access to government resources, can exercise discretion in a way that could benefit herself or another person or organization with whom she is associated, or can allocate government benefits among third parties. For the most part, the government does not monitor or regulate contractors' PCIs, as the following story illustrates.

In 2006, the Defense Department needed an independent assessment of whether to extend its controversial contract for the F-22 jet fighter, and commissioned the Institute for Defense Analysis (IDA) to conduct that study. IDA is a federally chartered contractor (known as a Federally Funded Research and Development Center or FFRDC).¹⁹⁵ The then-President of IDA, retired admiral Dennis C. Blair, owned hundreds of thousands of dollars of stock in and served on the board of one of the F-22's subcontractors and would benefit financially if the government extended the contract. Blair participated in the review of the F-22 program, and IDA did not disclose Blair's financial interest in it. IDA recommended that the government extend the F-22 program for a three-year contract, and its recommendation was pivotal in the government's decision to do so. The existence of this financial conflict of interest came to light only after

¹⁸⁸ *Id.*

¹⁸⁹ 48 C.F.R. 2.101. The government adopted these regulations in 1984. See Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25, 30-31 (2005). The regulation also includes a third type of organizational conflict: where the contractor's activities or relationships give it "an unfair competitive advantage." This type of OCI is aimed at ensuring a level playing field among contractors rather than protecting the government's fiduciary interest. See Daniel Guttman, *Organizational Conflict of Interest and the Growth of Big Government*, 15 HARV. J. LEGIS. 297 (1978).

¹⁹⁰ 48 C.F.R. 9.504.

¹⁹¹ REPORT OF THE ACQUISITION ADVISORY PANEL 405 (2007).

¹⁹² Congress recently mandated that the executive branch examine whether these organizational conflict rules are adequate, § 841(b)(1) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, and that the Defense Department tighten organizational conflict rules for contractors that are involved in the contracting function. § 207 of the Weapon Systems Acquisition Reform Act of 2009. The Defense Department issued proposed rule for comment on April 22, 2010. DFARS Case 2009-D015.

¹⁹³ NATIONAL PROCUREMENT FRAUD TASK FORCE LEGISLATION COMMITTEE, *PROCUREMENT FRAUD: LEGISLATIVE AND REGULATORY REFORM PROPOSALS* 17 (2008).

¹⁹⁴ GOVERNMENT ACCOUNTABILITY OFFICE, *CONTINGENCY CONTRACTING IMPROVEMENTS NEEDED IN MANAGEMENT OF CONTRACTORS SUPPORTING CONTRACT AND GRANT ADMINISTRATION IN IRAQ AND AFGHANISTAN* 20 (2010).

¹⁹⁵ The regulations authorizing FFRDCs require that they "be free from organizational conflicts of interest," 48 CFR 35.017(a)(2), but does not require they also be free from personal conflicts of interest.

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a watchdog group found a reference to Blair's holdings in SEC filings, prompting press scrutiny and a Defense Department Inspector General investigation.¹⁹⁶

While a criminal statute prohibits government employees from participating in matters that can have a direct and predictable effect on their own financial interest and a regulation prohibits high-level government employees from receiving compensation for serving on corporate boards of directors,¹⁹⁷ these restrictions do not apply to contractor personnel. Thus, Dennis Blair could legally be involved in evaluating a program that could affect his financial interests.

While the government began addressing OCIs in the 1960s and adopted executive-branch wide regulations to limit them decades ago, only a few agencies have adopted regulations addressing contractors' PCIs. As the following section will make clear, the government has imposed PCI restrictions on only a few slivers of the vast contracting world.

B. Current Ethics Restrictions on Government Contractor Personnel

The government's approach to regulating the ethics of contractors has been largely reactive rather than proactive. After a government official admitted that the agency in charge of bank bailouts had "no way of knowing whether any conflicts of interest exist among the thousands" of contractors it had hired,¹⁹⁸ Congress enacted statutory reforms subjecting any employees of FDIC contractors who are supervised by FDIC managers to government ethics statutes and regulations, and required the FDIC to adopt comprehensive ethics regulations for all other contractor personnel.¹⁹⁹ After Congress investigated the financial conflicts of interest of the president of a Federally Funded Research and Development Center (FFRDC), the Defense Department instituted personal conflict of interest guidelines for FFRDCs.²⁰⁰ After a series of USA TODAY articles about retired flag officers who worked both as consultants for the Pentagon and for defense contractors, Secretary of Defense Robert Gates instituted a new policy requiring that those consultants be hired only as SGEs so that they will be subject to the financial disclosures and other ethics restrictions applicable to part-time government employees. After the GAO issued several reports identifying ethical problems created by meta-contracting, the government issued proposed regulations addressing personal conflicts of interest in that narrow field.²⁰¹ But the potential for conflicts exists on a much broader scale than just meta-contracting. It exists anytime contractor personnel exercise discretion on behalf of the government or have access to government resources.

¹⁹⁶ PROJECT ON GOVERNMENT OVERSIGHT, *PREYING ON THE TAXPAYER: THE F-22A RAPTOR* (2006) (available at <http://www.pogo.org/pogo-files/reports/national-security/f-22a-raptor/ns-f-22a-raptor-2006.html#12>); DEPARTMENT OF DEFENSE OFFICE OF INSPECTOR GENERAL, *REPORT OF INVESTIGATION: ALLEGED CONFLICT OF INTEREST: ADMIRAL DENNIS C. BLAIR, U.S. NAVY (RETIRED) PRESIDENT, INSTITUTE FOR DEFENSE ANALYSES 15* (2006); R. Jeffrey Smith and Renae Merle, *Leader of Panel That Endorsed Jet Program Has Ties to Contractor*, WASH. POST, July 25, 2006, D1.

¹⁹⁷ 18 U.S.C. § 208.

¹⁹⁸ James Risen, *S&L Bailout Agency is Ripe for Fraud, GAO Tells Congress*, L.A. TIMES, Sept. 25, 1990, p.D1 (quoting the director of the Resolution Trust Corporation's asset management division). The Resolution Trust Corporation was a temporary agency whose activities were taken over by the FDIC at the end of 1995.

¹⁹⁹ 12 U.S.C. § 1822(f), 103 Pub. L. 204, § 19(a) (Act of Dec. 17, 1993); 12 C.F.R. Part 366. Congress also subjected all FDIC contractor personnel to the criminal prohibition on bribes and illegal gratuities. 12 U.S.C. § 1822(f)(1)(B).

FDIC's contractor conflict of interest regulations originally applied to all of its service contractors. Contractor Conflicts of Interest, Interim Final Rule, 61 Fed. Reg. 9590 (March 11, 1996). The agency later revised those regulations so that they would not apply to contractors that provide "incidental or housekeeping service[s]," such as food service, janitorial and mail delivery. Minimum Standards of Integrity and Fitness for an FDIC Contractor, Interim Final Rule, 67 Fed. Reg. 34591 (May 15, 2002).

²⁰⁰ Under Secretary of Defense (Acquisition, Technology & Logistics), Memorandum: Federally Funded Research and Development Center (FFRDC) Avoidance of Conflict of Interest (COI) (Jan. 26, 2007). See GOVERNMENT ACCOUNTABILITY OFFICE, *DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DOD CONTRACTOR EMPLOYEES 21-22* (2008); PROJECT ON GOVERNMENT OVERSIGHT, *PREYING ON THE TAXPAYER: THE F-22A RAPTOR* (2006) (available at <http://www.pogo.org/pogo-files/reports/national-security/f-22a-raptor/ns-f-22a-raptor-2006.html#12>).

²⁰¹ 74 Fed. Reg. 58584 (Nov. 13, 2009).

Until 1989, the executive branch's approach to ethics regulation was primarily decentralized and ad hoc.²⁰² Each agency and department had its own set of ethics regulations. As a result, there was wide variation across agencies in the regulation of gifts, financial conflicts, negotiation for future employment, and other ethics concerns. In 1990, President George H.W. Bush issued an executive order requiring the Office of Government Ethics (OGE) to develop regulations that would apply across the entire executive branch.²⁰³ Agencies could then seek OGE's permission to issue supplemental departmental ethics rules if they had concerns not sufficiently protected by the executive branch-wide regulations. This endeavor – centralizing and rationalizing ethics regulation – enabled the government to make strides in simplifying and clarifying its ethics regime.

The regulation of government contractors' ethics is now at a stage similar to where the government ethics regulation was decades ago, before OGE undertook to bring rationality and uniformity to government ethics regulation. Congress and a few agencies have addressed contractor personnel ethics in a few narrowly defined areas, usually in response to specific scandals.

1. Location of Ethics Standards: Statutes, Regulations, Formal Policies and Ad Hoc Contractual Clauses

The government has taken a variety of approaches in imposing ethics restrictions on contractor personnel, from a few statutes that are broad enough to reach not just government employees but also contractors, to regulations specifically aimed at contractor personnel, formal policies imposing such restrictions, and the ad hoc use of contract clauses addressing the ethics of contractor personnel. Several agencies have adopted specific substantive standards that contractor personnel must follow, and then require contractors to implement those standards. Other agencies, such as the Defense Department, have delegated to contractors not just implementation but also the decision of which specific substantive standards to adopt.²⁰⁴

While most of the ethics statutes apply only to government employees, a few of them apply to anyone "acting on behalf of the government," and thus reach contractor personnel performing services for the government. The criminal prohibitions on bribery and illegal gratuities have this broader language,²⁰⁵ and the government has successfully prosecuted contractor personnel for accepting bribes in connection with their work for the government.²⁰⁶ The criminal prohibition on disclosure of sensitive procurement information and the prohibition on serving as a foreign agent also have this broader reach.²⁰⁷ The predecessor to the current criminal financial conflict of interest statute covered anyone who "acts as an . . . agent of the United States,"²⁰⁸ but when Congress overhauled ethics statutes in 1962, it narrowed the scope to just officers and employees.²⁰⁹

While the government has not yet adopted any executive branch-wide ethics restrictions on contractor personnel, in 2009 it issued a proposed regulation for contractor personnel engaged in meta-

²⁰² See PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR 92 (1989).

²⁰³ Ex. Ord. 12731, 55 Fed.Reg. 42547 (Oct. 17, 1990), § 201.

²⁰⁴ Under Secretary of Defense (Acquisition, Technology & Logistics), Memorandum: Federally Funded Research and Development Center (FFRDC) Avoidance of Conflict of Interest (COI) (Jan. 26, 2007) (requiring FFRDCs to have a conflict of interest plan covering gifts, outside activities and financial conflicts).

²⁰⁵ 18 U.S.C. § 201(a). In addition, Congress enacted an anti-kickback statute that reaches contractor and subcontractor personnel. 41 U.S.C. § 51 *et seq.*

²⁰⁶ See GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 11 (2008) (describing 2006 bribery convictions of contractor personnel at the Space and Naval Warfare Systems Center and the Coalition Provisional Authority in Iraq for steering contracts). See also *Dixson v. United States*, 465 U.S. 482 (1984) (bribery statute reaches non-governmental organization employee who administered federal grants).

²⁰⁷ 41 U.S.C. § 423; 18 U.S.C. § 219.

²⁰⁸ 18 U.S.C. § 434. The seminal Supreme Court case interpreting this statute, *United States v. Mississippi Valley Generating Co.* (also known as the *Dixon-Yates case*) involved a conflict of interest not of a regular government employee but of an unpaid part-time consultant.

²⁰⁹ 18 U.S.C. § 208(a).

contracting.²¹⁰ In addition, at least seven executive branch agencies have issued regulations imposing ethics restrictions on the employees of some of their contractors.²¹¹ These regulations are generally narrow in scope, covering only certain types of contractors. For example, personal conflict of interest regulations adopted by the Department of Health and Human Services cover contractors involved with the Medicaid Integrity Audit Program.²¹² Even with respect to covered contractors, the regulations generally restrict only certain types of conflicts of interest rather than imposing more comprehensive restrictions. The U.S. Agency for International Development (USAID), for example, restricts the financial investments and outside employment of its contractors' employees who are stationed abroad, but does not restrict their receipt of gifts.²¹³

Some agencies without contractor ethics regulations have nonetheless adopted formal policies addressing conflicts of interests among their contractor personnel. For example, while the Defense Department has no regulations addressing contractor personnel conflicts, it has issued three distinct policies address these issues in particular contexts. In 2007, after the controversy concerning Dennis Blair's conflict of interest in evaluating the F-22 program, the Department issued a policy requiring its Federally Funded Research and Development Centers (FFRDCs) to screen their employees for conflicts of interest.²¹⁴ In 2009, the Undersecretary of Defense for Acquisition, Technology & Logistics issued a memorandum noting that the risk of personal conflicts of interest increases when contractor personnel are tasked to make subjective judgments on behalf of the government.²¹⁵ While the memorandum indicated that the Defense Department "acquisition community must consider the risks of a contractors' employee having PCIs," and discussed six personal conflict of interest scenarios, it did not explain how to identify such conflicts or what to do about them once they are identified.²¹⁶ In 2010, after a series of USA TODAY articles about retired generals and admirals serving as mentors, Secretary of Defense Gates imposed a new requirement that such retired flag officers be hired as employees (with the concomitant ethics protections) rather than as contractors.²¹⁷

Some agencies have addressed this issue in a more ad hoc fashion rather than in a more systematic way by including personal conflict of interest clauses in their contracts.²¹⁸ For example, before USAID adopted a regulation on personal conflicts of interest, it included such provisions in some of its contracts, and later adopted a regulation prohibiting contractor personnel who are assigned to work in a foreign country from engaging in a business, investing or loaning money to a business in that country.²¹⁹

²¹⁰ Proposed Rule on Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58584 (Nov. 13, 2009).

²¹¹ Agencies that have adopted regulations imposing ethics restrictions on at least some of their contractors include the Agency for International Development (USAID), the Department of Energy, the Environmental Protection Agency, the Federal Deposit Insurance Corporation, Department of Health and Human Services, the Nuclear Regulatory Commission, and the Treasury Department.

²¹² 42 C.F.R. 455.238.

²¹³ 48 C.F.R. 752.7027.

²¹⁴ Under Secretary of Defense (Acquisition, Technology & Logistics), Memorandum: Federally Funded Research and Development Center (FFRDC) Avoidance of Conflict of Interest (COI) (Jan. 26, 2007).

²¹⁵ Ashton B. Carter, Under Secretary of Defense for Acquisition, Technology and Logistics, Memorandum re: Personal Conflicts of Interest (PCIs) of Contractors' Employees (Nov. 24, 2009).

²¹⁶ *Id.* [sic].

²¹⁷ The Department of Health and Human Services has imposed ethics restrictions on Program Integrity contractors by including such provisions in its Program Integrity Manuals.

²¹⁸ See GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 15, 48-52 (2008) (Air Force Electronic Systems Center and the Army Communications Electronics Lifecycle Management Command have used clauses requiring contractors to certify that their employees do not have any personal conflicts, or by requiring individual employees of contractors to sign agreements not to disclose certain sensitive information they learn through their work).

²¹⁹ USAID included a personal conflict of interest provision in a contract with Harvard University to advise the Russian government on developing securities regulations. When Harvard employees disregarded those restrictions and invested in Russia equities, that contractual provision formed the basis for a False Claims Act lawsuit against Harvard and those employees. *United States v. Harvard*, 323 F.Supp.2d 151 (D. Mass. 2004). USAID's regulation provides an exception for contractor personnel who

The General Services Administration includes conflict of interest clauses in contracts for auditing and brokerage services but apparently not in contracts for other services.²²⁰ Some Defense Department components include personal conflict of interest clauses in their contracts for meta-contracting services,²²¹ but few offices use such clauses for other services.²²² Several agencies include confidentiality clauses in their contracts to prevent contractor personnel from misusing confidential information.²²³

2. Substantive Ethics Restrictions on Contractor Personnel

This section provides a brief overview of some of the existing regulations imposing ethics standards on government contractor personnel. Seven agencies have adopted regulations imposing such standards on at least some of their contractor personnel.²²⁴ Many of these regulations are quite narrow, applying only to a limited range of the agency's contractors and imposing only a few restrictions on them. For example, one agency has a regulation imposing ethics standards on contractor personnel who work overseas, but that regulation simply prohibits those individuals from making investments or practicing a profession in the foreign country where they are working.²²⁵

While the federal government's regulation of contractor personnel ethics is generally spotty, two agencies have taken a more comprehensive approach. The FDIC regulates the ethics of all its service contractors' employees, and has adopted regulations addressing their financial conflicts, gifts, outside employment and activities, their use of government resources (including information), and activities after the end of the contract.²²⁶ USAID imposes the full panoply of statutory and regulatory government ethics restrictions on individuals with whom it has personal service contracts.²²⁷

Among these various regulations, one can find restrictions in four of the five substantive categories of ethics regulation: financial influences, misuse of government resources, outside activities and employment after the end of the contract. (See Table VII listing selected agency regulations.) The remainder of this section will discuss how different agencies have regulated financial influences on contractor personnel, their misuse of government resources (including information), outside activities and employment after the end of a contract.

are citizens or legal residents of that foreign country. 48 C.F.R. 752.7027(e). This sort of exception is logical since those individuals would already be expected to have an allegiance to that country through their status as citizen or legal resident.

²²⁰ Letter from GSA Inspector General Brian Miller to Kathleen Clark, July 20, 2010 (on file with author).

²²¹ GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 9 (2008) ("all DoD offices we reviewed that used contractor employees in the source selection process use additional safeguard controls such as contract clauses designed to prevent personal conflicts of interests"). One Air Force office had started using such a clause by the late 1990s. *Id.* at 15.

²²² GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 13 (2008) (only 6 of the 21 program officers had personal conflict of interest safeguards for contractor personnel who provide advice and assistance on governmental decisions).

²²³ GAO, DEFENSE ACQUISITIONS: DOD'S INCREASED RELIANCE ON SERVICE CONTRACTORS EXACERBATES LONG-STANDING CHALLENGES (2010).

²²⁴ The seven agencies with regulations addressing contractor personnel personal conflicts of interest are the Agency for International Development, 48 C.F.R. 752.7027, Department of Energy, 48 C.F.R. 970.0371, Department of Health and Human Services, 42 C.F.R. 455.238, Department of Treasury, 31 C.F.R. 31.214, Environmental Protection Agency, 48 C.F.R. 1552.209-73, Federal Deposit Insurance Corporation, 12 C.F.R. Part 366, and Nuclear Regulatory Commission, 48 C.F.R. 2052.209.

²²⁵ See also 31 C.F.R. 31.200 (Department of Treasury regulations apply only to its TARP contractors); ²²⁵ 48 C.F.R. 970.0371 (Department of Energy regulations apply only to its Management and Operations contractors); 48 C.F.R. 1552, 1503 (EPA regulations apply only to its major Superfund contractors and outside bid evaluators.) See Table VII.

²²⁶ 48 C.F.R. Part 366. See Table VII.

²²⁷ 48 C.F.R. Ch. 7 Appendix D, § 7(m) ("The contractor receives and understands the USAID General Notice entitled "Employee Review of the New Standards of Conduct" . . ."); telephone interview with Amit Khardori, Attorney Advisor, USAID Office of General Counsel (Feb. 25, 2011).

USAID has statutory authority to contract for personal services in its work outside the United States, 22 U.S.C. § 2396(a)(3), and treats these individual contractors as government employees for the purposes of ethics statutes and regulations. USAID imposes a much narrower set of restrictions on the employees of organizations with whom it contracts for other services. See *infra* discussion of 48 C.F.R. 752.7027.

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In discussing restrictions on financial influences, it is important to remember that most contractor personnel are not bound by *any* financial conflict of interest restriction.²²⁸ But a handful of agencies have adopted restrictions to prevent financial conflicts of interest among their contractors' personnel. Agencies have taken a range of approaches. USAID prohibits certain contractor personnel from making one specific class of investments -- investing in businesses in the foreign country where they are performing USAID work.²²⁹ But most agencies take a more general approach, prohibiting:

- financial interests “that could adversely affect . . . [the individual’s] objectivity or judgment,”²³⁰
- “conflict[s] of interest . . . that “may diminish [the individual’s] capacity to perform . . . impartial[ly or] . . . objective[ly],”²³¹
- a “financial interest . . . that relates to the services . . . perform[ed] under the contract,”²³²
- a “personal concern” that “may be incompatible with the government’s interest,”²³³ and
- “a relationship . . . with an entity that may impair the objectivity of the employee . . . in performing the contract work.”²³⁴

These agency regulations do not explain which interest, concerns and relationships they prohibit, and their scope is less clear than the financial conflict standard applicable to government employees, which prohibits them from participated personally and substantially in matters in which they have a financial interest.²³⁵

While the financial conflict of interest standards for government employees reach not just an individual employee’s *own* interests but also those of her family members, organizations with which she is associated, and anyone with whom she is negotiating for future employment,²³⁶ most contractor ethics regulations reach only the contractor employee’s individual interests. One exception is the Treasury Department’s new regulations for TARP contractors, which also addresses the interests of the contractor employee’s “spouse, minor child, or other family member with whom the individual has a close personal relationship.”²³⁷

Financial influences can include not just investments but also the receipt of gifts. Agencies have taken a variety of approaches in restricting the receipt of gifts by contractor personnel. One agency prohibits contractor personnel from soliciting or accepting gifts from any entity “reviewed, audited, investigated, or contacted” under the contract, regardless of the employee’s particular duties.²³⁸ Other agencies take a narrower approach, prohibiting contractor personnel from accepting gifts from anyone who could be affected by the performance of their duties.²³⁹ The Energy Department takes an even narrower approach, prohibiting gifts from individuals or organizations with whom the contractor is doing

²²⁸ Thus, as a contractor employee, Dennis Blair was able to participate in the evaluation of the F-22 fighter jet even though he owned substantial stock in an F-22 subcontractor that would be affected by any decision whether to continue the program.

²²⁹ 48 C.F.R. 752.7027. USAID’s approach is similar to certain financial conflict of interest provisions that restrict all of an agency’s employees from owning certain types of investment, regardless of whether the particular employee has the authority to exercise discretion in a way that could benefit that investment. See *supra* note 37.

²³⁰ 31 C.F.R. 31.201 (Treasury Department regulation addressing TARP contractor personnel personal conflicts of interest).

²³¹ 48 C.F.R. 1503.104-5 (applicable to non-government employees who evaluate bids).

²³² 12 C.F.R. 366.10(a)(1).

²³³ 48 C.F.R. 970.0371-6.

²³⁴ 48 C.F.R. 1552.209-73(b) (EPA Superfund contracts in excess of simplified acquisition threshold).

²³⁵ 18 U.S.C. § 208(a); 5 C.F.R. 2635.401 *et seq.*

²³⁶ 18 U.S.C. § 208.

²³⁷ 31 C.F.R. 31.212 (defining a personal conflict of interest to include “a personal, business, or financial interest of an individual, his or her *spouse, minor child, or other family member with whom the individual has a close personal relationship*, that could adversely affect the individual’s ability to perform under the arrangement, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury” (emphasis added)).

In addition, the Medicaid Integrity regulations indicate that it would be a conflict of interest for a contractor employee to accept a job offer from an entity that is being reviewed. 42 C.F.R. 455.238. That regulation does not directly prohibit contractor personnel from accepting such job offers. Instead, it states that an employee acceptance of a job offer would constitute a post-award conflict of interest, and in response the government can terminate, modify, or choose not to renew the contract.

²³⁸ 42 C.F.R. 455.238(b)(1) (Medicaid Integrity Audit Program).

²³⁹ 31 C.F.R. 31.213(a)(1) (Treasury); 12 C.F.R. 366.12(d)(1) (FDIC).

business only where “circumstances which might reasonably be interpreted as an attempt to influence the recipient[] in the conduct of [his] duties.”²⁴⁰

Of the agencies surveyed, only the FDIC and Treasury have regulations restricting the use of government property,²⁴¹ and only the FDIC explicitly prohibits contractor personnel from providing preferential treatment.²⁴² While five agencies have regulations imposing confidentiality obligations on contractor personnel, these obligations vary in scope. The EPA’s regulation covers “information relating to the proposal” that the contractor employee is evaluating.²⁴³ Other regulations cover any information protected from disclosure under the Privacy Act and FOIA, “nonpublic information,” or “privileged information.” The FDIC’s regulation reaches any information obtained in connection with the contract, but exempts information that is “generally available to the general public.”

Six agencies have regulations restricting the outside employment of contractors’ employees. Some regulations are very general in approach, prohibiting any “business . . . or financial . . . relationship that relates to services . . . perform[ed] under the contract,”²⁴⁴ while others identify specific types of employment that are prohibited because of their nexus to the subject of the contract. For example, Treasury prohibits TARP contractors who are involved with the management or disposition of assets from purchasing those assets,²⁴⁵ and prohibits those involved with the purchase of assets from selling them.²⁴⁶ Two agencies have regulations addressing the outside activities of contractor personnel. The FDIC prohibits its contractor personnel from engaging in any activity that would impair their independence, from having relationships that relate to the services they are performing, and from participating as a party or representing a party in litigation against it.²⁴⁷ Treasury prohibits management officials and “key personnel” of its TARP contractors from engaging in other transactions with Treasury regarding TARP assets.

Finally, two agencies have regulations imposing narrowly tailored restrictions on the employment options available to contractor personnel after they leave the contractor or the contract ends. The FDIC imposes a three-year ban on contractor personnel acquiring assets on which they performed services,²⁴⁸ and the Nuclear Regulatory Commission imposes a one-year ban on contractor personnel working for a licensee.²⁴⁹

3. Implementation Mechanisms and Sanctions

Government agencies have adopted, to a limited degree, some of the same mechanisms to implement ethics restrictions on contractor personnel that exist for government employees: training, advice, mandated disclosure and review of those disclosures, investigation of alleged violations and sanctions for violations. In addition, some agencies have required contractor personnel with access to confidential information to sign nondisclosure agreements.²⁵⁰ But just as in the case with substantive restrictions, their use of these implementation mechanisms for contractor personnel is spotty and inconsistent.

²⁴⁰ 48 C.F.R. 970.0371-4.

²⁴¹ 12 C.F.R. 366.12(d)(2); 31 C.F.R. 31.213(a)(2).

²⁴² 12 C.F.R. 366.12(a). Similarly, employees for Medicaid Integrity Audit Program contractors may not work for “any entity that is reviewed, audited, investigated, or contacted” under the contract, 42 C.F.R. 455.238(b)(1), and employees for certain NRC contractors may not work for a “NRC licensee or applicant undergoing an NRC audit, inspection, or review.” 48 C.F.R. 2052.209-72(c)(2).

²⁴³ 48 C.F.R. 1503.104-5 (EPA).

²⁴⁴ 12 C.F.R. 366.10(a)(1) (FDIC).

²⁴⁵ 31 C.F.R. 31.214(a).

²⁴⁶ 31 C.F.R. 31.214(b).

²⁴⁷ 12 C.F.R. 366.10(a).

²⁴⁸ 12 C.F.R. 366.10.

²⁴⁹ 48 C.F.R. 2052.209-72.

²⁵⁰ GOVERNMENT ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION 30 (Sept. 2010).

The Environmental Protection Agency (EPA) requires individuals who evaluate bids to certify that they do not have any conflicts of interest that could diminish their capacity to act impartially and that they will not disclose or misuse the information they learn.²⁵¹ This approach – requiring certification of no financial conflicts rather than comprehensive disclosure of financial interests – is less intrusive of the privacy of contractor personnel. But its efficacy in preventing conflicts depends on the ability of contractor personnel to understand what would constitute a conflict and to apply that knowledge to their own investment portfolio.

In November 2009, the executive branch proposed new regulations to address personal conflicts of interest of contractor personnel who are involved in meta-contracting.²⁵² These draft regulations would require contractors to screen their employees for conflicts of interest by requiring that employees annually disclose their financial interest to the contractor.²⁵³ Contractors would be required to inform their employees of the personal conflict of interest standards, verify their employees' compliance with those standards, discipline employees who violate them and report any violations to the contracting officer.²⁵⁴ The government would become involved only if the contracting officer suspects a violation, or if the contractor notifies the contracting officer of a violation and requests a waiver from the head of the contracting agency.²⁵⁵

Violation of the contractor ethics standards can result in a range of sanctions. The government can modify the contract, refuse to renew it, or terminate the contract. A conflict of interest may result in a contractor's disqualification. Inaccurate statements on certifications or disclosures may result in debarment, False Claims Act lawsuits,²⁵⁶ and criminal prosecution.

V. Recommendations: Ethics Standards for Contractor Personnel

As Section III described, the government has outsourced huge swaths of its work to the private sector. It has chosen to do so because of certain perceived benefits: the ability to obtain expertise without going through the unwieldy process of hiring government employees;²⁵⁷ the flexibility to obtain services quickly

²⁵¹ 48 C.F.R. 1503.104-5.

²⁵² Proposed Rule on Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58584 (Nov. 13, 2009).

²⁵³ The draft regulation requires contractor personnel to update their financial disclosures at least annually, and whenever a new personal conflict arises. § 3.1101. It defines personal conflict as any “financial interest, personal activity, or relationship that could impair the employee’s ability to act impartially and in the best interest of the Government when performing under the contract,” including compensation, investments, gifts, travel expense reimbursement, intellectual property interest of the “employee, close family members, or other members of the household.” § 3.1101.

²⁵⁴ 74 Fed. Reg. 58584 (Nov. 13, 2009) (proposed regulations).

²⁵⁵ §§ 3.1105, 3.1103, 3.1104.

²⁵⁶ The government has brought False Claims Act cases on the theory that a contractor’s failure to disclose a conflict of interest constitutes an implied false certification. *See e.g.*, *United States v. Harvard*, 323 F.Supp.2d 151 (D. Mass. 2004); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999) (false certification to Department of Energy that contractor had no conflicts of interest); *United States v. Science Applications International Corp.*, 2010 U.S. App. LEXIS 24808 (D.C. Cir. 2010) (recognizing false certification theory, but vacating jury verdict based on collective knowledge standard).

A key issue that arises in these cases is the appropriate measure of damages. Defendants argue that the government incurred no damages because the defendants provided the services requested. The government argues that the entire cost of the contract should be refunded because the government contracted for unbiased services. The D.C. Circuit recently rejected both positions, deciding that the amount of damages is “the amount the government actually paid minus the value of the goods or services the government received or used.” In a case involving an implied false certification that the contractor had no organizational conflicts of interest, the district court accepted the government’s measure of damages. *United States v. Science Applications International Corp.*, 2010 U.S. App. LEXIS 24808 (D.C. Cir. 2010). There may well be substantial uncertainty regarding the value of expert services that are tainted by a conflict of interest.

²⁵⁷ National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* 27, 29 (2003). PARTNERSHIP FOR PUBLIC SERVICE, *CLOSING THE GAP: SEVEN OBSTACLES TO A FIRST-CLASS FEDERAL WORKFORCE* 4 (2010).

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in response to a crisis²⁵⁸ or on a short-term basis;²⁵⁹ the possibility of saving money and gaining efficiency by using the private sector;²⁶⁰ and the political benefit of being able to claim a smaller government without the political cost of actually decreasing government services.²⁶¹

Some critics of contracting have expressed concern that individual members of the public are not adequately protected against abuses by contractor personnel who do not take an oath of office and are not subject to the Constitution, the Freedom of Information Act or other laws that can hold government employees accountable.²⁶² This paper focuses on a different issue: whether the government has adequately protected *itself* from contractor personnel.²⁶³

A. Proposed Substantive Standards for Contractor Personnel Ethics

While we do not know how often contractor personnel have acted in ways that would be prohibited if they had been government employees, the examples of Dan Jester and Dennis Blair suggest that the government is vulnerable to such abuse. As the government delegates more services to contractor personnel, it becomes vulnerable to abuses by those employees.²⁶⁴

Some commentators have suggested that contractor personnel should not be subject to the same ethics restrictions that apply to government employees because many contractors already impose ethics restrictions on their employees.²⁶⁵ The government already requires its largest contractors to have their own internal ethics codes,²⁶⁶ but it does not require that those codes prohibit employees with personal conflicts of interest from working on government contracts.²⁶⁷ Most corporate ethics codes are aimed at preventing their employees from acting in a way that is disloyal to the corporation, not disloyal to the corporation's client, the government.²⁶⁸ A GAO report found only a few examples of contractors with conflict of interest policies that protect the government.²⁶⁹ Some of these codes address the financial

²⁵⁸ See Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, 6 J. CONTRACT MGMT. 9 (Summer 2008) (discussing the government's extensive use of contractors after initiating two wars in a two-year period); MARK K. CASSELL, *HOW GOVERNMENTS PRIVATIZE: THE POLITICS OF DIVESTMENT IN THE UNITED STATES AND GERMANY* (2003) (describing the Resolution Trust Corporation's extensive use of contractors in the early 1990s to respond to the savings and loan crisis).

²⁵⁹ Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 153 (Jody Freeman and Martha Minow, eds. 2009).

²⁶⁰ *But see* Bernard D. Rostker, Robert S. Leonard, Obaid Younossi, Mark V. Arena, and Jessie Riposo, *Cost Controls: How Government Can Get More Bang for Its Buck*, RAND REVIEW (April 2009) (reporting on several studies indicating that contractor personnel cost more than government employees).

²⁶¹ PAUL LIGHT, *THE TRUE SIZE OF GOVERNMENT* (1999).

²⁶² See Gillian E. Metzger, *Privatization As Delegation*, 103 COLUM. L. REV. 1367 (2003); Laura A. Dickinson, *Public Law Values in a Privatized World*, YALE J. INTL. L. 383 (2006); Daniel Guttman, *Public Purpose and Private Service, The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, OECD J. BUDGETING 861 (2003); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003); David H. Rosenbloom* and Mei Jen Hung, *Administrative Law and Culture for the U.S. Collaborative Governance State*, 2009 J. DISP. RES. 327.

²⁶³ While the government has not adequately protected its own interests, it has used its procurement policy to promote the interests of many other constituencies, including laborers 48 C.F.R. 22.403-1 *et seq.*, the blind, 48 C.F.R. 8.700 *et seq.*, small businesses, 48 C.F.R. 19.000 *et seq.*, historically black colleges, 48 C.F.R. 26.300 *et seq.*, and potential victims of human trafficking, 48 C.F.R. 22.1700 *et seq.*

²⁶⁴ The Obama administration may have reversed this trend by encouraging agencies to in-source services.

²⁶⁵ Letter from Alan Chvotkin to Meredith Murphy commenting on FAR Case 2007-017 "Service Contractor Employee Personal Conflicts of Interest" at 2 (July 17, 2008).

²⁶⁶ FAR Subpart 3.10.

²⁶⁷ *Cf.* 42 C.F.R. 414.912 (requiring Medicare Drug Contractors to have a code of conduct addressing "conflicts of interest between the [contractor] and any entity, including the Federal Government, with whom it does business").

²⁶⁸ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 18 (2008).

²⁶⁹ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 9 (2008) ("only three [out of 18 contractors with conflict of interest

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conflicts of individual employees, but unlike the government ethics regulations, they do not attribute to the employee the financial interests of their spouses or other family members.²⁷⁰ At least one contractor has required all professional employees annually to submit a financial disclosure form modeled on a federal form, requiring disclosure of the employee's or a household's financial interest in contractors that are involved in the defense programs on which the employee works.²⁷¹

Are additional ethics standards needed for contractor personnel? GAO asked Defense Department program officers whether the government should impose additional ethics standards for contractor personnel. While all recognized the need for ethics standards in meta-contracting, few had implemented such standards for other services and some opposed imposing new restrictions. They noted that government officials -- rather than contractor personnel -- are ultimately responsible for making decisions; and that additional restrictions will impose additional costs, and could deter some from contracting work.²⁷² Even if a government official is ultimately responsible for a final decision, there can be no doubt that contractor personnel now advise the government about those decisions, and the ethics rules for government employees appropriately reach both those who make decisions and those who give advice. The other concerns, cost and deterring others from bidding on contracts, are legitimate, and in identifying mechanisms to implement ethics standards, the government should consider how to reduce the cost to contractors and the inconvenience to contractor personnel.²⁷³

It is quite a challenge to develop the right approach to applying ethics principles to government contractor personnel. At the extremes, one could either exempt all government contractor personnel from all ethics restrictions or impose the full panoply of ethics restrictions on all government contractor personnel.²⁷⁴ Of course, neither of these approaches is satisfactory. The government has for the most part taken the former approach,²⁷⁵ leaving it vulnerable to abuse by contractor personnel. The other extreme -- reflexively imposing every government ethics restriction on all contractor personnel -- may provide only limited benefit for the government while imposing substantial costs, such as imposing ethics restrictions on contractor personnel (such as those mowing lawns) who are not in a fiduciary position.

This paper recommends an alternative approach. As a preliminary matter, one must first determine which ethical principles are appropriately applied to contractors. Ethics restrictions on government employees reflect four distinct principles: (1) the fiduciary nature of public office; (2) public confidence in government; (3) Congressional and executive branch control of workers; and (4) ensuring that officials devote adequate attention to their responsibilities. Of these four, the first and third principles appear to be the most compelling and should also be applied to the employees of government contractors.

To the degree that contractor personnel influence government decisions or have access to government resources, they -- like their government employee counterparts -- owe fiduciary duties. They are in a position to use that influence or resource for their own or another private purpose. It is

policies] directly require their employees to identify potential personal conflicts of interest with respect to their work for DOD so they can be screened and mitigated by the firms").

²⁷⁰ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 19 (2008).

²⁷¹ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 20 (2008).

²⁷² GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 25 (2008).

²⁷³ Cf. National Commission (2003) (discussing need to simplify financial disclosure requirements for government employees).

²⁷⁴ Cf. Letter from A.R. Hodgkins to Diedra Wingate commenting on FAR Case 2007-017 at 5 (May 27, 2008) ("the full panoply of laws and regulations applicable to Government employees are inappropriate for application to even that subset of [contractor] employees whose roles may raise PCI concerns").

²⁷⁵ There are a few exceptions where the government has imposed ethics restrictions on contractor personnel. See Section IV, *supra*.

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appropriate to put in place restrictions that help ensure that contractor personnel know about and do not violate their fiduciary duties.²⁷⁶

The third principle – Congressional and executive branch control of workers – has particular resonance with regard to contractor personnel. While the federal government has engaged in large-scale outsourcing of services, it has not closely monitored this outsourcing, and does not yet have an accurate, comprehensive inventory of the services contractors provide and the number of contractor personnel providing them. While it is appropriate for the government to delegate to contractors the day-to-day monitoring of particular contractor personnel, the government should be able to exercise control over contractor-provided services on a more global level. To do that, it must first get a handle on the number of contractor personnel who are performing those services. While Congress has passed legislation requiring an inventory of contractor-provided services, the government also needs to develop an accurate census of contractor personnel. Only with this information can the government exercise an appropriate level of control over the contractor personnel who are working indirectly on its behalf.

There is a less compelling case for expressing the remaining two principles in the regulation for contractor personnel. While the second principle -- public confidence in government -- is a legitimate concern, it can largely be addressed by imposing fiduciary-based restrictions that actually protect the public trust rather than simply respond to public perception. The government can address the fourth principle – ensuring that workers devote adequate attention to their work -- in the structure of contracts themselves rather than imposing an extra layer of regulation on contractor personnel. By using fixed-price rather than time-and-materials contracts, the government can effectively delegate to the contractor the responsibility and incentive to ensure that contractor personnel perform diligently.

This paper argues that the government should gather sufficient information about service contractor personnel so that it can exercise control over their work, and that it should impose on those employees ethics restrictions that reflect their fiduciary position. The next step is to determine which types of fiduciary-based restrictions are most appropriate in this context.

A few of the fiduciary-based restrictions already apply to contractor personnel. The criminal prohibitions on bribery, illegal gratuities, revealing sensitive procurement information and acting as an agent for a foreign government apply not just to government employees, but also to any “person acting for or on behalf of the United States.”²⁷⁷ An earlier iteration of the financial conflict of interest statute took a similar approach. It applied not just to employees, but also to agents,²⁷⁸ and the leading Supreme Court decision construing that statute dealt with a government consultant who worked on an unpaid, part-time, temporary basis.²⁷⁹ A contracting fraud task force recently recommended that the criminal financial conflict of interest statute be amended to cover contractor personnel who are involved in meta-

²⁷⁶ The fact that a contractor employee may also owe duties to her direct employer – the contractor – does not diminish the fiduciary duties she owes to her employer’s client, the government. This situation of a contractor employee is analogous to that of a law firm associate. Both owe fiduciary duties to the employer’s client.

²⁷⁷ 18 U.S.C. § 201(a); 18 U.S.C. § 219(c); 41 U.S.C. § 423(a)(2)(A). *See also* 5 U.S.C. § 7342(a)(1)(B) (restriction on gifts from foreign governments and international organizations applies not just to employees, but also to some outside experts and consultants).

²⁷⁸ The predecessor statute, 18 U.S.C. § 434, repealed by Act of Oct. 23, 1962, Pub. L. 87-849 § 2, 76 Stat. 1126:

Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, *is employed or acts as an officer or agent of the United States* for the transaction of business with such business entity, shall be fined not more than \$2,000 or imprisoned not more than two years, or both.

(emphasis added). While the predecessor statute was broader than its replacement in that it reached not just employees but also agents, it was narrower than its replacement in that it applied only to “transaction[s] of business with . . . business entit[ies,], whereas the replacement applied to any “proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter.” 18 U.S.C. § 208(a), Pub. L. 87-840, 76 Stat. 1124.

²⁷⁹ *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) (government contract for purchase of power plant was unenforceable where government consultant that advised the government on contract negotiations was employee of bank that would benefit from construction of plant).

contracting.²⁸⁰ But the problem of contractor conflicts of interest is not limited to the meta-contracting context, and the government should take a more comprehensive approach.

Two components of the FDIC's approach to contractor ethics appear to be particularly attractive and worth emulating. First, contractor personnel who act like government employees (i.e., those who perform functions or activities of the executive branch and are directly supervised by government managers) are deemed to be government employees for the purpose of government ethics restrictions.²⁸¹ Interestingly, while Congress mandated that the FDIC take this approach, in practice the FDIC has not

The executive branch can – and should -- unilaterally impose the full panoply government ethics regulations on such contractor personnel.²⁸² It does not need statutory authority to do so.²⁸³ On the other hand, applying government ethics statutes (including the criminal prohibition on financial conflicts) on such contractor personnel will require legislation.²⁸⁴ Adopting this realistic (rather than formalistic) approach toward individuals who are formally independent contractors (or contractor personnel) but act like government employees can prevent future “Dan Jester” problems: where agencies avoid application of government ethics standards by “hiring” individuals as independent contractors.

Second, the executive branch should adopt comprehensive ethics restrictions for all of its service contractors. The FDIC took this approach more than a decade ago, adopting regulations on the financial influences on contractor personnel, their use of government resources, outside activities, and post-employment activity. The FDIC's experience in administering this ethics regime demonstrates that a comprehensive approach to contractor personnel ethics is possible.

The FDIC's regulations provide a useful starting point, but in some cases, specific regulations adopted by other agencies appear to better address fiduciary concerns. As an initial matter, it is important to recognize that some services, such as lawn mowing, do not place contractor personnel in a fiduciary position, and fiduciary-based restrictions should not be imposed on those contractor personnel. Therefore, agencies should have the ability to exempt from coverage those service contracts that do not place contractor personnel in a fiduciary position. The Treasury Department takes this approach, authorizing the TARP Chief Compliance Officer to exempt contracts for “administrative services” from its conflict of interest regulations.²⁸⁵

Another aspect of the TARP regulations worth emulating is its provision on financial conflicts of interest. It reaches not just the interests of the individual employee of a contractor, but also his “spouse, minor child, or other family member with whom the individual has a close personal relationship.”²⁸⁶ On

²⁸⁰ NATIONAL PROCUREMENT FRAUD TASK FORCE LEGISLATION COMMITTEE, *PROCUREMENT FRAUD: LEGISLATIVE AND REGULATORY REFORM PROPOSALS 16-17* (2008) (recommending an expansion of the statute on financial conflicts, but not the other criminal conflict of interest statutes).

²⁸¹ 12 U.S.C. § 1822(f)(1)(B).

²⁸² The regulatory language could closely follow the model of the FDIC statute. 12 U.S.C. § 1822(f)(1)(B). Here is proposed regulatory language:

“Any individual who, pursuant to a contract or any other arrangement, performs functions or activities of the executive branch, under the direct supervision of an officer or employee of the executive branch, shall be deemed to be an employee of the executive branch for purposes of the ethics and conflict of interest rules and regulations issued by the Office of Government Ethics, including those concerning employee conduct, financial disclosure, and post-employment activities.”

²⁸³ While the FDIC adopted its comprehensive ethics regulations for contractors in response to a statutory mandate, 12 U.S.C. § 1822(f)(3), the executive branch could impose ethics regulations on service contractor personnel without any additional statutory authority. Most of the agency regulations on contractor ethics were not adopted in response to specific statutory mandates.

²⁸⁴ Proposed statutory language would be:

“Any individual who, pursuant to a contract or any other arrangement, performs functions or activities of the executive branch, under the direct supervision of an officer or employee of the executive branch, shall be deemed to be an employee of the executive branch for purposes of title 18, United States Code.”

²⁸⁵ See 31 C.F.R. 31.200(b).

²⁸⁶ 31 C.F.R. 31.212 (defining a personal conflict of interest to include ““a personal, business, or financial interest of an individual, his or her spouse, minor child, or other family member with whom the individual has a close personal relationship, that could adversely affect the individual's ability to perform under the arrangement, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury” (emphasis added)).

the regulation of outside activities, while the FDIC has both specific, narrowly tailored restrictions (such as litigating against the FDIC²⁸⁷) and broader, somewhat vague prohibitions (such as engaging in an activity that would impair independence²⁸⁸). Rather than imposing a broad and vague prohibition on all service contractor personnel, the government should define with greater precision what types of outside activities would impair an individual's independence.

Only two agencies have adopted regulations restricting the activities of contractor personnel after the end of the contract, and both are narrow in scope. The FDIC prohibits contractor personnel who have performed services on specific assets from purchasing assets for three years,²⁸⁹ and the NRC prohibits contractor personnel who have performed work at the site of an NRC licensee or applicant from seeking work from or working for that licensee or applicant for one year.²⁹⁰ The FDIC's regulation appears to be aimed at preventing the abuse of confidential information about FDIC assets. The NRC's regulation appears to be aimed at preventing a contractor employee's current work for the agency from being influenced by the prospect of future employment by an entity regulated by the agency. The narrow reach of these regulations suggests that appropriate reach of post-employment restrictions is quite context-dependent. Rather than adopting a post-employment rule that would apply across the entire executive branch, individual agencies need to identify those types of situations where concerns about the protection of confidential information or potential bias (based on the prospect of future employment) should be addressed through post-employment restrictions.

The following section discusses the government's options for implementing these fiduciary-based standards.

B. Proposed Mechanisms for Implementing Contractor Personnel Ethics

In addition to the challenges of creating the appropriate ethics standards for contractor personnel, it will be necessary to create mechanisms for implementing them. The protection provided by substantive ethics standards will be illusory unless those standards are accompanied by implementation mechanisms.²⁹¹ The substantive ethics standards for government employees are implemented through training, advice, mandated financial disclosures, review of those disclosures, investigation of alleged violations, employment discipline and prosecutions. The government must decide whether to implement its ethics standards for contractor personnel through criminal, regulatory or contractual prohibitions, and whether to provide for enforcement through criminal prosecution, civil fines, False Claims Act litigation, debarment or other contractual remedies.

A key issue in implementing the substantive ethics standards outlined above is whether responsibility for implementation and enforcement will be centralized within a single office in the federal government;²⁹² relegated to individual contracting officers who already have responsibility for identifying and addressing organizational conflicts of interest; distributed among contractor-ethics point persons in the various federal agencies;²⁹³ or delegated to the government's many contractors themselves.

In addition, the Medicaid Integrity regulations indicate that it would be a conflict of interest for a contractor employee to accept a job offer from an entity that is being reviewed. 42 C.F.R. 455.238. That regulation does not directly prohibit contractor personnel from accepting such job offers. Instead, it states that an employee acceptance of a job offer would constitute a post-award conflict of interest, and in response the government can terminate, modify, or choose not to renew the contract.

²⁸⁷ 12 C.F.R. 366.10(a)(2).

²⁸⁸ 12 C.F.R. 366.10.

²⁸⁹ 12 C.F.R. 366.10(a)(3).

²⁹⁰ 48 C.F.R. 2052.209-72.

²⁹¹ See LIBRARY OF CONGRESS, A COUNTRY STUDY: SOVIET UNION (FORMER) (available at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+su0219\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+su0219))) (the Soviet constitution purported to guarantee certain political rights, but did not include mechanisms for the protection of those rights).

²⁹² The government has a central office for developing contracting policies: the Office of Federal Procurement Policy, located within the Office of Management and Budget.

²⁹³ Each federal agency has a Designated Agency Ethics Officer who administers the financial disclosure requirements and provides ethics advice and training. The government may want to consider creating within each agency the position of

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The responsibility to recognize and resolve organizational conflicts of interest has been placed on contracting officers, and some observers have complained that these officials do not have the information, expertise, inclination or resources to detect and respond adequately to these conflicts.²⁹⁴ Contracting officers' primary concern is the efficient administration of the procurement system, not careful adherence to ethical standards. Once again, the FDIC appears to provide the best practice for dealing with personal conflicts of interest. While FDIC contracting officers are charged with reviewing contractors' assertions regarding conflicts,²⁹⁵ they must forward all conflict issues to the contracting unit of the agency's general counsel's office, which then undertakes a review of the conflict.²⁹⁶ This separation of responsibility helps ensure that someone trained in ethics concerns will address conflicts that arise.

The issue of how to implement financial conflict of interest standards on contractor personnel is quite complicated. While the government requires hundreds of thousands of its own employees to file financial disclosure forms that are then reviewed by ethics officials, this may not be the optimal approach.²⁹⁷ The FDIC does not require contractor personnel to fill out annual financial disclosure forms, but does require them to certify to the contractor whether they have any financial or other conflicts that would violate the FDIC's standards,²⁹⁸ and then requires contractors to certify whether their employees have any such conflicts.²⁹⁹

This certification model is similar to the federal government's approach in monitoring the conflicts of interest of employees of recipients of research grants. Institutions receiving those grants have the responsibility – and freedom -- to develop and administer conflict of interest disclosure programs for their own employees.³⁰⁰ The Treasury Department's TARP regulations mandate financial disclosures from contractor personnel, and a proposed regulation currently under consideration would impose such an obligation on contractor personnel involved in meta-contracting.³⁰¹ The government should not expand financial disclosure requirements until it evaluates the relative merits of other approaches that are less burdensome and more narrowly tailored to addressing legitimate ethical concerns.

If a contractor's certification that its employees have no personal conflicts is false, it may form the basis for a civil lawsuit or criminal prosecution under the False Claims Act. The government has used this approach with respect to both personal and organizational conflicts of interest, and has filed False Claims Act suits where contractors made false certifications.³⁰²

One such case stemmed from a USAID contract with Harvard University to assist the Russian government in the development of its capital markets. While there was no statutory or regulatory mandate to do so, USAID incorporated into its contract a provision requiring Harvard to prohibit the employees who worked on this project from investing in equities in Russia. After the government learned that the leaders of the Harvard program had invested in Russian companies, USAID rescinded the

“Designated Agency Contracting Officer,” and placing on that official the responsibility for monitoring contractors' compliance with ethics norms.

²⁹⁴ In 2010, the Defense Department proposed regulations that would require contractors that have identified an organizational conflict of interest after a contract award to disclose the conflict to the Contracting Officer. 75 Fed. Reg. 20954 (April 22, 2010).

²⁹⁵ FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(a) (2008).

²⁹⁶ FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.306(b) (2008).

²⁹⁷ These paper-based forms take extensive amounts of time for individual employees to fill out, and require the disclosure of information that may have no clear relation to application of financial conflicts standards.

²⁹⁸ 12 C.F.R. § 366.14(a).

²⁹⁹ 12 C.F.R. 366.14(c).

³⁰⁰ See 42 C.F.R. 50.601 *et seq.*

³⁰¹ FAR Case 2008-025, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed.Reg. 58584 (November 13, 2009) (proposing 48 C.F.R. 3.1103(a)(1)).

³⁰² See, e.g., cases cited in note 173; *but see* United States ex rel. Siewick v. Jamieson Science and Engineering, 214 F.3d 1372 (D.C. Cir. 2000) (rejecting case premised on false certification of no conflict because law was unsettled).

contract and filed a civil False Claims Act lawsuit against those employees and Harvard. The suit survived a motion to dismiss, and eventually the parties settled the case for \$31 million.³⁰³

The tale of Harvard and USAID might suggest to some that we can rely on False Claims Act lawsuits to ensure the integrity of government contractors. But not all agencies include this kind of conflict of interest provision in their contracts, and even those that do must resort to lengthy and expensive litigation to enforce these norms. The better approach would be to clarify the ethics standards with which contractor personnel must comply, provide them with clear training on those standards, and ensure adequate disclosure so that contractors can be held accountable in an efficient manner when they violate those standards. The FDIC requires contractors to agree to employ only individuals who comply with the ethics standards for contractors,³⁰⁴ and to train their employees about those standards.³⁰⁵ The government should impose these obligations on all service contractors across the entire executive branch.

VI. The Need for Additional Empirical Research

The contracting out of government services is of enormous significance, both in terms of the many important services being outsourced, and in terms of the hundreds of billions of dollars the government spends every year for these services. In the course of performing these services, contractor personnel exercise discretion and have access to government resources. They are in a position to abuse that discretion and those resources. This paper has laid out the case that the government needs to prevent such abuses by imposing ethics standards on the employees of those service contractors.

This paper has also described several significant gaps in the empirical information about individuals performing services on behalf of the government. Addressing these issues will enable the government to make more informed decisions about the relative need for ethics restrictions and the relative costs of different options for imposing them. This section identifies four of the most critical empirical questions.

The number of people who have individual contracts to perform services for the federal government, and whether they are covered by the government ethics rules.

This paper began with a description of Dan Jester, a former Goldman Sachs official whose individual contract with the Treasury Department apparently enabled him to avoid coverage of the financial conflict of interest statute that applies to government employees. More than 130 agencies have authority to enter into service contracts with experts and consultants,³⁰⁶ but it is unclear how many agencies use that authority and how many individuals are hired through this contract mechanism. While Treasury apparently viewed Jester as exempt from government ethics restrictions, it is unclear whether consultants and experts hired in this way are considered “employees,” and thus subject to government ethics standards.³⁰⁷

The number of individuals performing such services under non-contract vehicles, such as grants, and the government’s experience with imposing ethics restrictions on those individuals.

³⁰³ U.S. Attorney’s Office, Harvard Defendants Pay Over \$31 Million to Settle False Claims Act Allegations, Reports U.S. Attorney, Aug. 2, 2005 (press release) (available at <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/08-03-2005/0004081794&EDATE=>).

³⁰⁴ 12 C.F.R. 366.14(d).

³⁰⁵ 12 C.F.R. 366.12(b).

³⁰⁶ GOVERNMENT ACCOUNTABILITY OFFICE, AMERICA COMPETES ACT: NIST APPLIED SOME SAFEGUARDS IN OBTAINING EXPERT SERVICES, BUT ADDITIONAL DIRECTION FROM CONGRESS IS NEEDED 19 (2009) (More than 130 agencies can “obtain temporary or intermittent services of experts and consultants under 5 U.S.C. § 3109.”)

³⁰⁷ *Id.* (it is unclear whether agencies obtaining these services must “appoint[] individuals as federal employees . . . or . . . [can] award[] personal services contracts in accordance with the FAR [Federal Acquisition Regulation]”).

While this paper has focused on contractors, the government actually awards more money in grants than in contracts.³⁰⁸ A significant portion of these grants are for research, and the government has more than a decade of experience in imposing ethics guidelines on the recipients of research grants.

While the government has not directly imposed restrictions on the employees of grant recipients, it has required those recipients to set up systems for monitoring their employees' conflicts of interest, including requirements that individuals working on government grants annually disclose to their employer any conflicting interests or certify that no conflicts exist. Thus, in the research sphere, we have more than a decade of experience with delegated monitoring. The government should evaluate grant recipients' record of monitoring to see whether that method has sufficiently protected the public's interest in unbiased research.

Government contractors' record in monitoring and reporting their own organizational conflicts of interest.

For more than a decade, the government has relied on its contractors to disclose their own organizational conflicts of interest or to certify that they had no such conflicts. In at least one case, the government alleged that a contractor's certification was false, and filed a False Claims Act lawsuit premised on those false certifications.³⁰⁹ In deciding whether to delegate to contractors the task of monitoring their employees' personal conflicts, it would be prudent to assess contractors' track record in monitoring and disclosing their organizational conflicts.

Whether annual financial disclosures have been effective in preventing financial conflicts of interest among government employees.

The government's primary method of preventing financial conflicts of interest among its own employees is by requiring hundreds of thousands of them to file annual financial disclosures. These disclosure requirements impose significant costs on the employees who must file them (both their time and their privacy) and on the government (such as the time that ethics officials spend reviewing these forms). Such costs may be justified if annual disclosures are effective in preventing conflicts.

But an annual disclosure form becomes out-of-date as soon as an employee buys or sells stock, and ethics officials' review of that disclosure is effectively out of date as soon as an employee's job responsibilities change (such as when she moves from one matter to another). The TARP regulations take this same approach,³¹⁰ and proposed personal conflict of interest regulation for meta-contracting would greatly expand this requirement.³¹¹ Before imposing this expensive implementation mechanism on contractor personnel, the government should determine how effective annual disclosures have been and whether another approach (such as requiring employees to certify with respect to particular tasks that they have no conflicts) would be more effective.

Conclusion

Well into the twentieth century, the law allowed product liability suits only where there was privity between the parties. As a result, manufacturers were immune from tort liability as long as they did not enter into contractual relations with the ultimate consumers or those affected by their defective products. Eventually, as the complexity of the modern production and distribution system revealed the

³⁰⁸ From Fiscal Years 2000 to 2010, the federal government spent 16.5% more on grants (\$4.97 trillion) than it spent on contracts (\$4.27 trillion). See Table VIII.

³⁰⁹ *United States v. Science Applications International Corp.*, 2010 U.S. App. LEXIS 24808 (D.C. Cir. 2010).

³¹⁰ 31 C.F.R. 31.217.

³¹¹ 74 Fed. Reg. 58584 (Nov. 13, 2009).

problems with the formalistic approach, the common law adjusted, and recognized the appropriateness of imposing on the manufacturer the responsibility for making safe products, regardless of whether there was privity between the manufacturer and the injured party.³¹² This more realistic approach ushered in an era when consumers were able to recover from manufacturers, and manufacturers had the incentive to protect consumers from defective products.

A similar change is needed with respect to government contractor personnel. We need to recognize employees' ethical obligations to the government regardless of whether those individual employees have a contractual relationship with the government. Ethics needs to follow function, not formalism.

The current black and white distinction between government employees (who are subject to a full panoply of government ethics restrictions) and contractor personnel (most of whom are subject to none) might have made some sense in an earlier era where contractors provided mostly products rather than services. But the last two decades have witnessed a dramatic outsourcing of government functions to contractors. Contractor personnel are giving advice, making recommendations, and providing services that used to be the exclusive province of government employees. Government ethics regulation needs to catch up with the reality of outsourced government and needs to address the ethics issues that arise when contractor personnel are doing the government's work.

As discussed above, for decades, the government's approach to ethics regulation has been primarily reactive rather than proactive. Perhaps it will continue with this approach and wait until an enterprising journalist uncovers a scandal caused by the lack of ethics standards for contractor personnel. The government should not wait for that enterprising journalist to identify the disaster that has been caused by our lax approach to government contractor ethics, but should take action to address contractor personnel ethics before the next ethics disaster occurs.

The government should impose comprehensive ethics standards on the employees of its service contractors. For more than a decade, one agency, the FDIC, has imposed such ethics regulations on its contractors. The government should build on the FDIC's experience and impose such regulations across the entire executive branch.

³¹² *Products Liability*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2005) ("The history of the law of product liability is largely a history of the erosion of the doctrine of privity, which states that an injured person can sue the negligent person only if he or she was a party to the transaction with the injured person.").

**Table I:
Ethics Restrictions on Executive Branch Employees, SGEs & Contractor Personnel**

Citation	Restriction	Applies to: (all employees unless indicated otherwise)	Applies to SGEs?		Application to Contractor Personnel
			SGEs 60+ days	SGE <60 days	
Constitutional provision:					
Art. I, § 9, cl. 8 (Emoluments Clause)	accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State”	“Person[s] holding any Office of Profit or Trust” (i.e., exercising governmental authority) ¹			
Criminal statutes:					
18 U.S.C. § 201	Bribery; illegal gratuity	“officer or employee or person acting for or on behalf of the United States”	Yes		Yes ⁱⁱ
18 U.S.C. § 203	Receive compensation for representing others against US	“officer or employee”	Yes if matter involves specific parties &: • SGE participated in the matter while in government; ⁱⁱⁱ or if matter is pending in SGE’s agency ^{iv}		No
18 U.S.C. § 205	Represent others against US				No
18 U.S.C. § 208	Participating in a matter that has a direct & predictable effect on financial interest of <ul style="list-style-type: none"> • self • family member^v • employer • prospective employer^{vi} • affiliated organization^{vii} 		Yes, except SGEs who serve on FACA committee where <ul style="list-style-type: none"> • the matter is of general applicability & would affect SGE or SGE’s employer in a way similar to other class members;^{viii} or • agency official certifies that need for SGE’s services outweighs the COI;^{ix} • the SGE is a nonvoting representative on a FDA-created FACA committee & the SGE’s financial interest arises from the class she represents;^x or • the FACA committee deals with medical products & the SGE’s financial interest arises from <ul style="list-style-type: none"> ○ her employment at a hospital that could use or sell the product or ○ the use or prescription of 		No

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			the product for patients ^{xi}		
18 U.S.C. § 209	Salary supplementation	“officer or employee of the executive branch ”	Yes if SGE is paid by government ^{xii}		No
18 U.S.C. § 219	Serve as agent for foreign principal	“officer or employee or person acting for or on behalf of the United States”	Yes unless agency head certifies that SGE’s employment is required in the national interest. ^{xiii}		Yes
41 U.S.C. § 423	Disclosure of sensitive procurement information	“present or former official . . . or a person acting . . . on behalf of, or who . . . has advised the United States with respect to, a federal agency procurement”	Yes		Yes
Non-criminal statutes:					
5 U.S.C. § 7321-26	Political activities on- and off-duty (Hatch Act)	Employees	Yes while SGE is conducting government business		No
5 U.S.C. § 7342	Gifts from foreign governments & international organizations	Employees, “expert or consultant who is under contract under section [5 U.S.C. § 3109 . . . including, in the case of an organization performing services under such section, any individual involved in the performance of such services”	Yes		Yes if expert or consultant “hired” under 5 U.S.C. § 3109
5 U.S.C. § 7351	Gifts from subordinates	Employees	Yes		No
5 U.S.C. § 7353	gifts from parties that could be effected by employee’s duties or by her agency	“officer or employee ”	Yes		No
5 U.S.C. Appx. § 101	Public Financial Disclosure	<ul style="list-style-type: none"> employee excepted from competitive service by reason of confidential or policymaking character;^{xiv} or appointed pursuant to 5 U.S.C. § 3105^{xv} 	Yes		No
		<ul style="list-style-type: none"> Employees > GS-15, or receiving at least 120% of minimum GS-15 pay^{xvi} 	Yes ^{xvii} <ul style="list-style-type: none"> But may be allowed confidential disclosure if SGE provides services specially needed & it is 	<60 SGEs must file <i>confidential</i> (rather than <i>public</i>) disclosures ^{xix}	No

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			unlikely that outside employment and financial interests will create a COI ^{xviii}		
		<ul style="list-style-type: none"> White House employees with a commission or appointment from the President^{xx} 	No ^{xxi}		No
5 U.S.C. Appx. § 501(a)(1)	Limiting outside earned income to \$26,955 ^{xxii}	Noncareer employees above GS-15 (i.e., senior-level political appointees)	No ^{xxiii}		No
5 U.S.C. Appx. § 502	Permit employee's name to be used by firm that provides professional services involving a fiduciary relationship Receive compensation for: <ul style="list-style-type: none"> practicing profession that involves a fiduciary relationship; affiliating with firm that provides professional services involving fiduciary relationship; serving as officer or board member of any association, corporation or other entity teaching^{xxiv} 				

18 U.S.C. § 1913	Lobbying with appropriated funds			[31 U.S.C. § 3152]
26 U.S.C. § 1043	Certificate of divestiture		Not available to SGEs ^{xxv}	No
26 U.S.C. § 4941	Imposing a tax on compensation & other transactions between private foundations & high level government officials	President, Vice-President, Presidential & Schedule C appointees, & employees paid at Senior Executive Service level ^{xxvi}	No ^{xxvii}	No
Regulations:				
5 C.F.R. 2534.901 <i>et seq.</i>	Confidential Financial Disclosure	<p>Employees < GS-15 or receiving less than 120% of minimum GS-15 pay if:</p> <ul style="list-style-type: none"> • Duties involve participation in decision or judgment re: <ul style="list-style-type: none"> ○ Procurement, ○ Administering or monitoring of grants, subsidies or other federal financial or operational benefits, ○ Regulating or auditing a non-federal entity, or ○ Other activities that will have a direct substantial economic effect on a non-federal entity, or • Agency concludes that such reports are required, such as investigating or prosecuting violations of criminal or civil law^{xxviii} 	All SGEs (regardless of GS-level) who are not required to file public financial disclosures ^{xxix}	No
		Optional Form 450-A (Confidential Certificate of No New Interests) - Permits incumbent confidential filers to certify no new interests rather than filing entire new form ^{xxx}	Not available to SGEs ^{xxxi}	n/a
5 C.F.R.	Using nonpublic		Yes	No

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2635.703	information for private gain			
5 C.F.R. 2635.101(b)(7) & 2635.703	Misuse of government position for private gain		Yes	No
5 C.F.R. 2635.201 et seq.	solicit or accept gifts from “prohibited sources” (including contractors & contractor employees) ^{xxxii}		Yes	No
5 C.F.R. 2635.502	Participate in matter that could affect financial interest of household member or associate, or where her impartiality could reasonably be questioned		Yes	No
5 C.F.R. 2635.804(a)	Limit on outside earned income	Presidential appointees to full-time noncareer positions	No	No
5 C.F.R. 2635.805	expert witness	Serving as expert witness in a proceeding in which US is a party or has a substantial interest	Yes if SGE who participates in the particular proceeding or matter; ^{xxxiii}	
		Serving as expert witness in a proceeding in which <i>employing agency</i> is a party or has a substantial interest ^{xxxiv}	Yes ^{xxxv}	Yes if <60 SGE who <ul style="list-style-type: none"> was appointed by the President;^{xxxvi} or serves on a commission created by statute.^{xxxvii}
5 C.F.R. 2635.807	compensation for teaching, speaking and writing	<ul style="list-style-type: none"> activity is part of employee’s duties; invitation was extended primarily because of employee’s position; Invitation or compensation is from someone with interests that could be affected by employee’s 	Yes	No

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		duties; or • Information draws substantially on nonpublic information				
		subject matter deals with:	Any matter to which employee is currently or has been assigned in previous year ^{xxxviii}	Yes -- during current appointment	Yes -- but only with respect to particular matters involving specific parties	No
			Ongoing policy, program or operation of employee's agency ^{xxxix}	No		No
		Noncareer employee & subject matter deals with:	Subject matter, industry or economic sector affected by agency ^{xl}	No		No
5 C.F.R. 2635.808	fundraising	may not solicit funds from a subordinate; ^{xli} may not permit use of title or position to further fundraising; ^{xlii}		Yes		No
		may not solicit funds from someone the employee knows is a prohibited source ^{xliii}		Yes -- if the prohibited source's interests may be substantially affected by SGE's performance of duties ^{xliv}		No
48 C.F.R. 3.601	prohibits a contracting officer from awarding a contract to a Government employee			Yes -- if: • contract arose directly out of SGE's activities; • the SGE was in a position to influence the contract award; or • there is another conflict of interest		No
48 C.F.R. 1503.601	prohibits awarding contract to current or former (within 1 year) EPA employee who were involved in the proposal			Yes	No ^{xlv}	No
48 C.F.R. 1903.670	prohibits awarding contract to current or former (within 2 years) Broadcasting Board of Governors					No

	employee who was involved in the proposal				
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**Table II:
Post-Employment Restrictions on Executive Branch Employees, SGEs, ITEP Detailees from Industry & Contractor Personnel**

Provision	Trigger in govt	Scope of ban	Duration	Ban on Communication	Ban on Representation / Advice	Application to Information Technology Exchange Program detailees from industry			Application to SGEs		Application to Contractor Personnel
						identical	modified	None	SGEs 60+ days	SGE <60 days	
18 U.S.C. § 207 – general post-employment statute											
(a)(1)	participated personally and substantially in a matter	Same matter	permanent	x		x			x	X	No
(a)(2)	Matter was pending under employee during last year in govt	Same matter	2 years	x		x			x	x	No
(c)	senior official	Contact officials in agency where worked during last year in govt	1 year	x		X			x		No
(d)	Very senior official	Contact officials in agency where worked during last year in govt or high level officials in any agency	2 years	x		X			X	x	No
(b)	Trade or treaty negotiator	Representation regarding negotiations	1 year		X	X			x	x	No

(f)	senior official	Represent foreign govts & political parties	1 year		X	X			x	Very senior SGEs <60 days	No
(f)(2)	US Trade Representative (USTR) & Deputy USTR	Represent foreign govts & political parties	permanent		x	x			X?	X?	No
41 U.S.C. § 423 – Procurement Integrity statute											
(d)*	Served as contracting officer, program manager, or made a decision re: a contract, subcontract modification, applicable rate, payment or settlement of a claim	Accept compensation from contractor involved	1 year			x			x	x	No
(a)	Advised the US on a procurement or had access to contractor bid, proposal, or source selection info	Disclose contractor bid, proposal, or source selection info	Until award of the contract				More strict ^{xlvi}		x	X	Yes
Bank Examination statutes											
12 U.S.C. §§ 1820(k), 1786(w)*	Was employee of a Federal Reserve bank, Federal banking agency or National Credit Union Administration & served as	Accept compensation as employee, officer, director or consultant from that depository institution	1 year		X				X	X	No

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Table III:
Federal Spending (1983-2009)
 (adjusted for inflation)
 (in trillions of constant 1983 dollars)

Fiscal Year	Federal Spending
1983	0.808
1984	0.820
1985	0.880
1986	0.904
1987	0.884
1988	0.900
1989	0.922
1990	0.959
1991	0.972
1992	0.985
1993	0.975
1994	0.986
1995	0.995
1996	0.995
1997	0.998
1998	1.014
1999	1.022
2000	1.039
2001	1.052
2002	1.118
2003	1.174
2004	1.214
2005	1.266
2006	1.317
2007	1.316
2008	1.385
2009	1.640

source: Table 1.1 — Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2015, Budget of the United States Government: Historical Tables Fiscal Year 2011 (available at <http://www.gpoaccess.gov/usbudget/fy11/hist.html>).

Table IV:
Number of Executive Branch Employees: 1983-2009

Year	Number of employees (in millions)
1983	4.983
1984	5.032

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1985	5.198
1986	5.172
1987	5.243
1988	5.230
1989	5.232
1990	5.173
1991	5.088
1992	4.865
1993	4.691
1994	4.556
1995	4.413
1996	4.293
1997	4.164
1998	4.134
1999	4.073
2000	4.065
2001	4.068
2002	4.086
2003	4.144
2004	4.123
2005	4.072
2006	4.069
2007	4.063
2008	4.142
2009	4.365

source = Historical Federal Workforce Tables - Total Government Employment Since 1962
<http://www.opm.gov/feddata/HistoryTables/TotalGovernmentSince1962.asp>
(includes uniformed servicemembers and postal service employees)

Table V:
Federal Spending on Service Contracts (1983-2007)
(adj. for inflation – constant 1983 dollars)

Year	Spending on Service Contracting (billions of constant 1983 dollars)
1983	70.0
1984	73.6
1985	74.2
1986	76.2
1987	78.6
1988	74.9
1989	71.7
1990	69.7
1991	76.7
1992	76.3

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1993	74.3
1994	75.4
1995	76.2
1996	72.5
1997	68.5
1998	71.6
1999	71.4
2000	73.8
2001	76.6
2002	83.7
2003	101.0
2004	108.4
2005	116.0
2006	121.4
2007	129.4

**Table VI:
Proportion of Procurement Spending on Services vs. Products**

Year	Spending* on Service Contracts	Spending* on Product Contracts	Total Contract Spending*	Services as % of Total Contract Spending	Products as % of Total Contract Spending
1983	70.0	82.3	152.3	46%	54%
1984	76.5	90.4	166.9	46%	54%
1985	79.8	102.7	182.5	44%	56%
1986	83.5	99.0	182.6	46%	54%
1987	89.3	89.2	178.5	50%	50%
1988	88.6	85.5	174.1	51%	49%
1989	88.9	79.9	168.7	53%	47%
1990	91.1	80.2	171.3	53%	47%
1991	104.4	85.3	189.6	55%	45%
1990	107.1	70.7	177.8	60%	40%
1993	107.3	71.0	178.3	60%	40%
1994	111.8	62.9	174.7	64%	36%
1995	116.2	64.6	180.8	64%	36%
1996	113.8	64.8	178.6	64%	36%
1997	110.0	62.8	172.8	64%	36%
1998	116.7	64.1	180.8	65%	35%
1999	118.9	64.2	183.1	65%	35%
2000	127.0	76.5	203.5	62%	38%
2001	135.7	79.9	215.6	63%	37%
2002	150.6	84.3	234.9	64%	36%
2003	185.9	104.4	290.3	64%	36%

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2004	204.8	124.0	328.8	62%	38%
2005	226.6	149.4	376	60%	40%
2006	244.8	169.7	414.5	59%	41%
2007	268.4	191.3	459.7	58%	42%

* in billions of dollars (not adjusted for inflation)

Based on data in Federal Procurement Data System Reports for FY 1983-2007
(available at https://www.fpds.gov/fpdsng_cms/index.php/reports)

**Table VII:
Selected Regulations of Service Contractor Personnel Ethics**

SUBSTANTIVE RESTRICTIONS:

a. Financial Influences

- **Conflicting financial interests:**

Agency	Contracts Affected	Personnel Affected	Prohibition
Energy	Mgmt. & Operations ^{xlvii}	employees assigned to work under the contract ^{xlviii}	make or influence any decisions on behalf of the contractor which directly or indirectly affect the interest of the Government, if the employee's personal concern in the matter may be incompatible with the interest of the Government ^{xlix}
EPA	Superfund contracts > \$150,000	Consultants and employees of contractors & subcontractors	a relationship with an entity that may impair their objectivity in performing the contract work ^l
	Bid evaluation	all	any "conflict of interest . . . that may diminish [his] capacity to perform an impartial, technically sound, objective review of [the] proposal[] or otherwise result in a biased opinion or unfair competitive advantage" ^{li}
FDIC	All	all	"a personal, business, or financial interest or relationship that relates to the services . . . perform[ed] under the contract" ^{lii}
NRC	Research, Evaluation, Technical Consulting, Mgmt. Support Services & Those resulting from	chief executive, directors, key personnel identified in the contract & proposed consultants ^{liv}	"a . . . present or planned interest[] related to . . . [work to be performed under the] contract which: (1) May diminish its capacity to give impartial, technically sound, objective assistance and advice, or may otherwise result in a biased work product; or (2) May result in its being given an unfair competitive advantage" ^{lv}

	unsolicited proposals ^{liii}		
Treasury	TARP contracts and financial agency agreements ^{lvi}	“key individuals” ^{lvii} & “management officials performing work under the” contract ^{lviii}	“a personal, business, or financial interest of an individual, his or her spouse, minor child, or other family member with whom the individual has a close personal relationship, that could adversely affect the individual's ability to perform under the arrangement, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury” ^{lix}
USAID	Contracts performed in a foreign country	all employees & consultants ^{lx}	“make loans or investments to or in any business, profession or occupation” in that country ^{lxi}

- Gifts

Agency	Contracts Affected	Personnel Affected	Prohibition
Energy	Mgmt. & Operations	employees assigned to work under the contract	accept any gratuity or special favor from individuals or organizations with whom the contractor is doing business, or proposing to do business, in accomplishing the work under the contract “under circumstances <i>which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their duties</i> ” ^{lxii}
FDIC	All	All	Accept / solicit for self / others any favor / gift / item of monetary value “from any person who you reasonably believe is seeking an official action from you on our behalf, or has an interest that the performance or nonperformance of your duties to us may substantially affect” ^{lxiii}
HHS	Medicaid Integrity Audit Program	employees, agents & subcontractors	“receive[], solicit[], or arrange[] to receive any . . . gift, . . . payment of expenses, . . . or any other thing of value from any entity that is reviewed, audited, investigated, or contacted during the normal course of performing” the contract ^{lxiv}
Treasury	TARP	Officers, partners & employees	Accept / solicit favors / gifts / items of monetary value from any individual or entity whom the retained entity / officer / partner / employee knows is seeking official action from the Treasury in connection with the arrangement or has interests which may be substantially affected by the performance or nonperformance of duties to the Treasury under the arrangement. ^{lxv}

- **conflicting employment**

Agency	Contracts Affected	Personnel Affected	Prohibition
Energy	Mgmt. & Operations	employees assigned to work under the contract	outside employment that will: <ul style="list-style-type: none"> • “interfere with the proper and effective performance of the[ir] duties” • “[a]pppear to create a conflict-of-interest”, or • “[a]pppear to subject DOE or the contractor to public criticism or embarrassment”^{lxvi}
FDIC	All	all	“Has a personal, business, or financial interest or relationship that relates to the services . . . perform[ed] under the contract” ^{lxvii}
HHS	Medicaid Integrity Audit Program	employees, agents & subcontractors	“receive[], solicit[], or arrange[] to receive any fee, compensation, . . . payment of expenses, offer of employment, or any other thing of value from any entity that is reviewed, audited, investigated, or contacted during the normal course of performing” the contract ^{lxviii}
NRC	Research, Evaluation, Technical Consulting, Mgmt. Support Services & Those resulting from unsolicited proposals	all employees under the contract ^{lxix}	<ul style="list-style-type: none"> • “represent, assist, or otherwise support an NRC licensee or applicant undergoing an NRC audit, inspection, or review where the activities that are the subject of the audit, inspection, or review are the same as or substantially similar to the services within the scope of this contract”^{lxx} • “consulting or other contractual arrangements with any firm or organization the result of which may give rise to a conflict of interest with respect to the work being performed under this contract.”^{lxxi}
		Employees working “at any NRC licensee or applicant site”	<ul style="list-style-type: none"> • “solicit work at that site for that licensee or applicant during the period of performance of the task order or the contract”^{lxxii} • “perform work at that site for that licensee or applicant during . . . [contract] and for one year thereafter”^{lxxiii} • “solicit []or perform work in the same or similar technical area for that licensee or applicant organization . . . [during contract and for] one year after completion of all work under the associated task order, or last time at the site (if not a task order contract).”^{lxxiv}
Treasury	TARP contracts involving acquisition / valuation / management / disposition of	management officials performing work under the arrangement & key individuals	purchase / offer to purchase / assist anyone in purchasing / offering to purchase assets ^{lxxv}

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	specific troubled assets		
	TARP contracts involving giving advice re: purchase of troubled assets		sell / offer to sell / act on behalf of any with respect to sale of asset to Treasury ^{lxxxvi}
USAID	performed in a foreign country	all employees & consultants	“engage, directly or indirectly, either in his/her own name or in the name or through the agency of another person, in any business, profession or occupation in” that country ^{lxxxvii}

b. Misuse of Government Resources

- government information

Agency	Contracts Affected	Personnel Affected	Prohibition
Energy	Mgmt. & Operations	employees assigned to work under the contract	“use privileged information for personal gain, or make other improper use of privileged information which is acquired in connection with their employment on contract work” ^{lxxxviii}
EPA	Bid evaluation	all	<ul style="list-style-type: none"> • disclose information relating to the proposal • use proposal information for any purpose other than evaluating bid^{lxxxix}
FDIC	all	all	use or disclose information obtained from FDIC or a third party in connection with an FDIC contract ^{lxxx}
NRC	Research, Evaluation, Technical Consulting, Mgmt. Support Services & Those resulting from unsolicited proposals	all employees under the contract	<ul style="list-style-type: none"> • use information protected by the Privacy Act or FOIA for a private purpose until the information has been released to public^{lxxxxi} • disclose such information^{lxxxii}
Treasury	TARP	management officials performing work under the arrangement &	<ul style="list-style-type: none"> • “Disclose nonpublic information to anyone” • “Use or allow the use of any nonpublic information to further any private interest”^{lxxxiii}

		key individuals ^{lxxxiii}	
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- **government property**

Agency	Contracts Affected	Personnel Affected	Prohibition
FDIC	All	All	“Use or allow the use of [FDIC] property, except as specified in the contract” ^{lxxxv}
Treasury	TARP	officers, partners & employees	“Improperly use or allow the improper use of Treasury property for the personal benefit of any individual or entity other than the Treasury” ^{lxxxvi}

- **impartiality**

Agency	Contracts Affected	Personnel Affected	Prohibition
FDIC	all	All	<ul style="list-style-type: none"> • provide preferential treatment to anyone in their dealings on behalf of the FDIC^{lxxxvii} • engage “in an activity that would cause [FDIC] to question the integrity of the service you provided, are providing or offer to provide us, or impairs your independence”^{lxxxviii}

c. Outside Activities

Agency	Contracts Affected	Personnel Affected	Prohibition
FDIC	all	all	<ul style="list-style-type: none"> • Engage in activity that would impair independence^{lxxxix} • Have any relationships that relate to the services they are performing^{xc} • Represent a party in litigation against FDIC^{xcii} • Participate as a party in litigation against FDIC^{xcii}

d. Restrictions After the End of a Contract

Agency	Contracts Affected	Personnel Affected	Prohibition
FDIC	all	all	submit “an offer to acquire an asset from [FDIC] for which services were performed during

			the past three years. ^{xxciii}
NRC	Research, Evaluation, Technical Consulting, Mgmt. Support Services & Those resulting from unsolicited proposals	Those performing work for the NRC under this contract at any NRC licensee or applicant site	solicit / perform work in the same or similar technical area or at that site for that licensee or applicant organization for 1 year after work is completed ^{xciv}

IMPLEMENTATION MECHANISMS

- **Contractor Must Obtain Disclosures / Certifications from Its Personnel**

Agency	Contracts Affected	Personnel Affected	Required Disclosure/Certification
Energy	Mgmt. & Operations	employees assigned to work under the contract	<ul style="list-style-type: none"> • “any actual or potential conflicts with DOE's policies regarding conduct of employees of DOE's contractors” • “outside employment services which involve the use of information in the area of the employee's employment with the contractor.”^{xcv}
Treasury	TARP	“key individuals” & “management officials performing work under the” contract	<ul style="list-style-type: none"> • “information . . . in writing about their personal, business, and financial relationships, as well as those of their spouses, minor children, and other family members with whom the individuals have a close personal relationship that would cause a reasonable person with knowledge of the relevant facts to question the individual's ability to perform, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury.”^{xcvi} • certification that they will not <ul style="list-style-type: none"> ○ disclose nonpublic information ○ use or allow the use of nonpublic information to further any private interest^{xcvii}
	TARP contracts involving “acquisition, valuation, management,		the information described above at a level of detail at least as extensive as the public financial disclosures required of high-level officials (Office of Government Ethics Form 278) ^{xcviii}

	or disposition of troubled assets”		
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• **Disclosure of Financial Interests / Certification of No Conflicting Interests to Agency**

Agency	Contracts Affected	Personnel Affected	Required Disclosure/Certification
Energy	Mgmt. & Operations	employees assigned to work under the contract	Employees’ disclosures to contractor described above ^{xcix}
EPA	Bid evaluation	All	Individual certifies that he has “no conflict of interest . . . that may diminish [his] capacity to perform an impartial, technically sound, objective review of this proposal(s) or otherwise result in a biased opinion or unfair competitive advantage” ^{xc}
	Superfund contracts > \$150,000 ^{ci}	Employees, subcontractor employees or consultants working on or having access to information regarding the contract ^{cii}	Contractor must disclose any “relationship of an employee, subcontractor employee, or consultant with an entity that may impair the objectivity of the employee, subcontractor employee, or consultant in performing the contract work.” ^{ciii}
	all	chief executive, directors & any proposed consultant or subcontractor	Prospective contractor must: Either: <ul style="list-style-type: none"> • Certify that it is not aware of “any information bearing on the existence of any organizational conflict of interest” Or: <ul style="list-style-type: none"> • “describe[] concisely all relevant facts concerning any past, present, or planned interests relating to the work to be performed and bearing on whether . . . their chief executive[], directors, or any proposed consultant or subcontractor, may have a potential organizational conflict of interest.”^{civ}
FDIC	All	All	<ul style="list-style-type: none"> • certify “in writing that you . . . have no conflict of interest under” 12 CFR 366.10(a).”^{cv}

			<ul style="list-style-type: none"> notify “within 10 business days after you become aware that you, or any person you employ to perform services for us, are not in compliance with this part”^{cv}
		Those who previously worked at the FDIC	<ul style="list-style-type: none"> sign a certification form that <ul style="list-style-type: none"> he was not a “senior employee” subject to a 1-year cooling off period; and his work for contractor does not involve any matter <ul style="list-style-type: none"> he participated personally & substantially in or under his official authority while at FDIC / RTC^{cvii}
Treasury	TARP contracts and financial agency agreements	“key individuals” & “management officials performing work under the” contract	Certify that these individuals have no personal conflicts of interest, or are subject to a mitigation plan or waiver approved by Treasury ^{cviii}

- Agreement to employ only employees who meet ethics criteria**

Agency	Contracts Affected	Personnel Affected	Provision
FDIC	All	All	Agree in writing to “employ only persons who meet the requirements of this part to perform services on our behalf” ^{cxix}

- Train employees about ethics standards**

Agency	Contracts Affected	Employees Affected	Provision
Energy	Mgmt. & Operations	employees assigned to work under the contract	must “inform[] employees that they are expected to disclose any incompatibilities between duties performed for the contractor and their private interests and to refer undecided questions to the contractor.” ^{cx}
FDIC	All	All	“must ensure that any person you employ to perform services for [FDIC] is informed about their responsibilities under this part” ^{cx}
Treasury	TARP contracts and financial	All “persons receiving nonpublic	Must provide “[p]eriodic training to ensure that [they] know their obligation to maintain its confidentiality and to use it only for purposes contemplated by the arrangement” ^{cxii}

	agency agreements	information”	
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- **Agency Official Charged with Evaluating Conflicts**

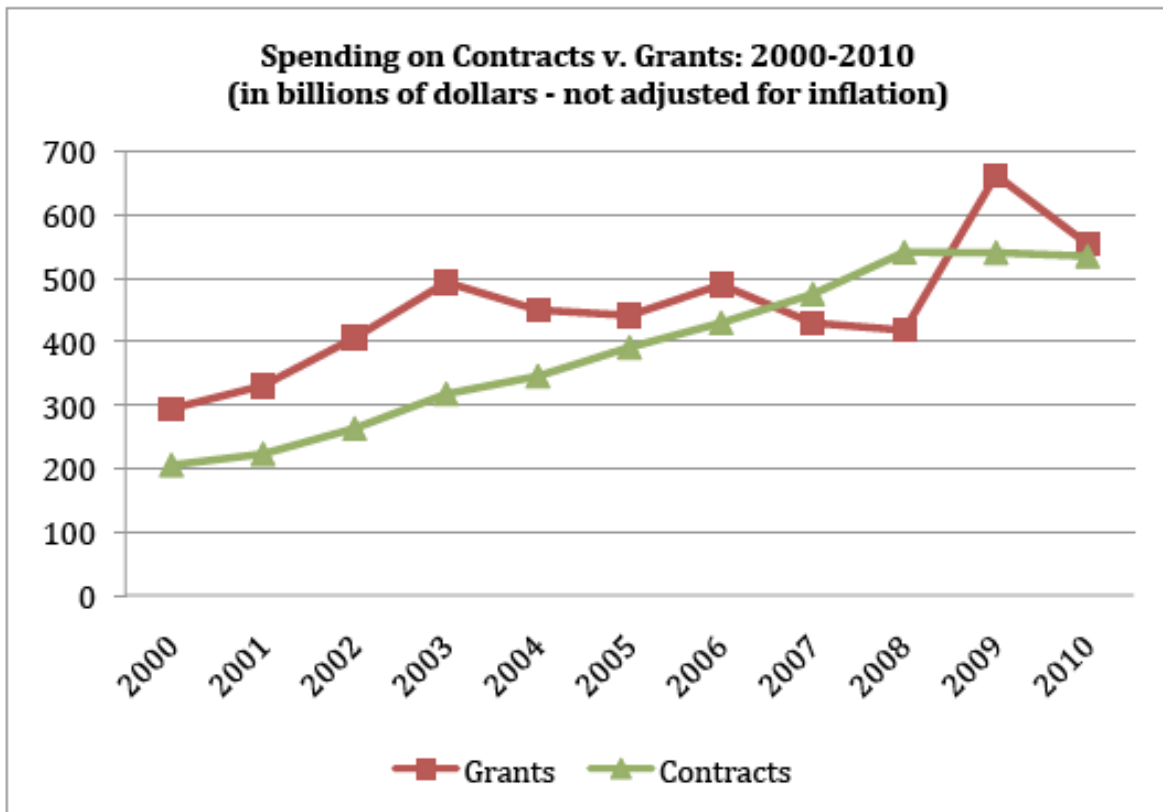
Agency	Contracts Affected	Official	Responsibilities
FDIC	All	Contracting Officer	<ul style="list-style-type: none"> • ensure that the FDIC <i>Integrity and Fitness</i> clause 7.3.2-46 is included in the request for proposal or request for quotation for services estimated to cost greater than \$100,000^{cxiii} • “ensure that a contractor being considered for an award has not been suspended or excluded from performing services” by FDIC or the federal government^{cxiv} • review contractors’ representations & certifications for completeness & identify potential issues that could affect eligibility^{cxv} • consult with Acquisition Services Branch’s Policy and Operations Section and the Legal Division Contracting Law Unit if “there are issues regarding” application of COI regulations^{cxvi} • “forwards all conflicts of interest issues to the CLU for review and determination”^{cxvii} • can seek from Legal Division a waiver of suspension or exclusion when he “determines it is in the corporation’s best interest”^{cxviii}
		Legal Division Contracting Law Unit (CLU)	<ul style="list-style-type: none"> • “reviews conflicts of interests raised by the representations and certifications submitted by a contractor recommended for an award”^{cxix} • “issues a written decision of its determination”^{cxx} • “prepares the cases for eligibility determination, waiver of conflicts of interest, appeal from final decisions, and other documents for the Corporation Ethics Committee (CEC)”^{cxxi} • “may suspend or exclude contractors that violate” ethics regulations^{cxxii} • responsible for administration of Suspension and Exclusion regulations for all contractors except law firms^{cxxiii}
		Legal Division	can waive a suspension or exclusion when requested by Contracting Officer
		Legal Division Ethics Unit	point of contact for matters involving post-government employment restrictions
		Acquisition Services Branch (ASB)	reviews all cases prior to their submission to Corporation Ethics Committee (CEC) ^{cxxiv}
Executive Secretary (“Ethics Counselor”)	decides all cases against contractors for suspension or exclusion ^{cxxv}		

		Assistant General Counsel of the Corporate and Legal Operations (AGC-CLO)	can waive a conflict of interest if the request is “simple and straightforward” (AGC-CLO decisions can be appealed to CEC) ^{cxxvi}
		Corporation Ethics Committee (CEC)	<ul style="list-style-type: none"> • can “reverse, stay, or uphold a final decision of the AGC-CLO” re: waiver^{cxxvii} • can “reverse, stay, or uphold a final decision” of Executive Secretary re: suspension / exclusion^{cxxviii} • can waive a conflict of interest if the request is “more complicated”^{cxxix}
Treasury	TARP	TARP Chief Compliance Officer	<ul style="list-style-type: none"> • Identifies “administrative services” that are exempt from COI regulations^{cxxx} • Receives contractors’ written notification of OCIs^{cxxxi} & disclosure/use of nonpublic information^{cxxxii} • Evaluates whether proposed measures adequately mitigate PCIs^{cxxxiii} • Can waive PCIs^{cxxxiv} • Can waive any regulatory requirement “that is not otherwise imposed by law when it is clear from the totality of the circumstances that a waiver is in the government's interest”^{cxxxv}

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Table VIII:
Spending on Contracts v. Grants: 2000-2010
 in billions of dollars
 (not adjusted for inflation)

Year	Grants	Contracts
2000	295	206
2001	331	223
2002	406	263
2003	494	318
2004	450	346
2005	442	391
2006	490	430
2007	430	475
2008	418	541
2009	663	540
2010	554	535
Total (2000- 2010):	4,971	4,268



Source: USASpending.gov

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http://www.usaspending.gov/trends?trendreport=default&viewreport=yes&&carryfilters=on&tab=List%20View&Go_x=21&&formFields=&&tab=List%20View&fiscal_year=2010&carryfilters=on# (accessed Jan. 5, 2011)

ⁱ The Justice Department's Office of Legal Counsel has opined that the Emoluments Clause does not apply to purely advisory positions. Memorandum Opinion for the Associate Counsel to the President from Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Emoluments Clause to a Member of the President's Council on Bioethics* at 10 (Mar. 9, 2005).

ⁱⁱ See *Dixson v. United States*, 465 U.S. 482 (1984) (bribery statute reaches individuals who administer federal grant even though neither they nor their employer has a contractual relationship with federal government).

ⁱⁱⁱ 18 U.S.C. §§ 203(c)(1), 205(c)(1).

^{iv} 18 U.S.C. §§ 203(c)(2), 205(c)(2).

^v The financial interests of employee's spouse and minor children are imputed to the employee. 18 U.S.C. § 208(a).

^{vi} This applies to "organization[s] with whom [the employee] is negotiating or has any arrangement concerning prospective employment." 18 U.S.C. § 208(a).

^{vii} This applies to "organization[s] in which [the employee] is serving as officer, director, trustee, [or] general partner." 18 U.S.C. § 208(a).

^{viii} 5 C.F.R. 2640.203(g). This exception applies as long as the SGE's financial interest arises as a result of her employment, rather than as a result of any stock she may own in her employer. *Id.*

^{ix} 18 U.S.C. § 208(b)(3).

^x 5 C.F.R. § 2640.203(j)

^{xi} 5 C.F.R. 2640.203(i).

^{xii} 18 U.S.C. § 209(c).

^{xiii} 18 U.S.C. § 219(b).

^{xiv} 5 U.S.C. Appx § 101(f)(5).

^{xv} 5 U.S.C. Appx § 101(f)(4).

^{xvi} 5 U.S.C. Appx § 101(f)(3). As of January, 2010, 120% of the minimum GS-15 rate of pay is \$119,533.60. Office of Government Ethics website (available at http://www.usoge.gov/news/whats_new_2010.aspx#75fr16890)

^{xvii} 5 U.S.C. Appx § 101(d).

^{xviii} 5 C.F.R. 2634.205(a).

^{xix} 5 C.F.R. 2634.201(a); 2634.204(a).

^{xx} 5 U.S.C. Appx § 101(f)(8).

^{xxi} 5 U.S.C. Appx § 101(f)(8).

^{xxii} 5 U.S.C. Appx. § 501(a)(1).

^{xxiii} 5 U.S.C. Appx. § 501(2).

^{xxiv} unless employee obtains prior approval of agency

^{xxv} 26 U.S.C. § 1043(b)(A); 5 C.F.R. § 2634.1003(1).

^{xxvi} 26 U.S.C. § 4946(c).

^{xxvii} 26 U.S.C. § 4946(c).

^{xxviii} 5 C.F.R. 2634.904(a)(1).

^{xxix} 5 C.F.R. 2634.904(a)(2) (all SGEs -- except those required to file public financial disclosures -- are required to file confidential financial disclosures). They must file these reports upon appointment or reappointment, but are not required to file incumbent reports on an annual basis unless they also meet the criteria listed in 5 C.F.R. 2634.904(a)(1). See 5 C.F.R. 2634.903(a).

^{xxx} 5 C.F.R. 2534.905(a).

^{xxxi} 5 C.F.R. 2534.905(b)(1). (This may not be available to SGEs because SGEs are required to file new entrant forms, not incumbent forms.)

^{xxxii} 5 C.F.R. § 2635.102(k) (definition of person includes not only an entity but also any employee of that entity).

^{xxxiii} 5 C.F.R. § 2635.805(a).

^{xxxiv} 5 C.F.R. § 2635.805(b).

^{xxxv} 5 C.F.R. § 2635.805(b)(2)(iii).

^{xxxvi} 5 C.F.R. § 2635.805(b)(2)(i).

^{xxxvii} 5 C.F.R. § 2635.805(b)(2)(ii).

^{xxxviii} 5 C.F.R. 2635.807(a)(2)(i)(E)(1).

^{xxxix} 5 C.F.R. 2635.807(a)(2)(i)(E)(2).

^{xl} 5 C.F.R. 2635.807(a)(2)(i)(E)(3).

^{xli} 5 C.F.R. § 2635.808(c)(1).

^{xlii} 5 C.F.R. § 2635.808(c)(2).

^{xliii} 5 C.F.R. § 2635.808(c)(1)(i).

^{xliv} 5 C.F.R. § 2635.808(c)(1)(ii).

^{xl} 48 C.F.R. 1503.600-71(b).

* These provisions are non-criminal, but provide for civil monetary penalties and administrative penalties, such as contract rescission, suspension or debarment, 41 U.S.C. 423(e), and industry-wide prohibition orders. 12 U.S.C. §§ 1820(k)(6); § 1786(w)(5).

^{xlvi} Information Technology Exchange Program detailees from industry may not disclose this information until 3 years after leaving government, even if the contract has already been awarded. 41 U.S.C. § 423(a)(1), 5 U.S.C. §§ 3701 et seq.

^{xlvi} 48 C.F.R. 970.0371-2.

^{xlvi} 48 C.F.R. 970.0371-3.

^{xlvi} 48 C.F.R. 970.0371-6(a). The regulation gives two examples of such conflicting interests:

- “An employee . . . negotiat[ing], or influence[ing] the award of, a subcontract with a company in which the individual has an employment relationship or significant financial interest;”
- “an employee . . . evaluat[ing] for DOE or for any DOE contractor . . . some technical aspect of the work of another organization with which the individual has an employment relationship, or significant financial interest, or which is a competitor of an organization (other than the contractor who is the individual's regular employer) in which the individual has an employment relationship or significant financial interest.” *Id.*

^l 48 C.F.R. 1552.209-73(b).

^{li} 48 C.F.R. 1503.104-5 (prescribing contract clause).

^{lii} 12 C.F.R. 366.10(a)(1).

^{liii} 48 C.F.R. 2009.570-4(b).

^{liii} 48 C.F.R. 2009.570-2.

^{liii} 48 C.F.R. 2009.570-2.

^{liii} 31 C.F.R. 31.200(b). The regulation permits the TARP Chief Compliance Officer to exempt contracts for administrative services. 31 C.F.R. 31.201.

Financial agency agreements are in some respects distinct from most government contracts in that they are not subject to the Federal Acquisition Regulations and they can involve the delegation of inherently functions, this paper uses the term “contract” to refer to both regular contracts and financial agency agreements under TARP.

^{lvii} A “key individual” is “an individual providing services to a private sector entity who *participates personally and substantially*, through decision, approval, disapproval, recommendation, or the rendering of advice, in the negotiation or performance of, or monitoring for compliance under” the contract. 31 C.F.R. 31.201 (emphasis added).

^{lviii} 31 C.F.R. 31.212(a). A “Management official” is “an individual within a retained entity's organization who has substantial responsibility for the direction and control of the retained entity's policies and operations,” including members of a management committee or executive committee or (in entities without such a committee) general partners. 31 C.F.R. 31.201.

^{lix} 31 C.F.R. 31.201. The TARP regulation does not impose restrictions directly on contractor personnel. Instead, it mandates that contractors “ensure that [their employees “have no personal conflicts of interest.”

^{lx} 48 C.F.R. 752.7027. This restriction does not apply to employees or consultants who are nationals of foreign country where they are performing under the contract.

^{lxi} 48 C.F.R. 752.7027.

^{lxii} 48 C.F.R. 970.0371-4 (emphasis added).

^{lxiii} 12 C.F.R. 366.12(d)(1).

^{lxiv} 42 C.F.R. 455.238(b)(1) The regulation does not directly prohibit these activities. It simply says that if these activities take place, they would constitute a post-award conflict of interest, and that the government can then terminate / modify / not renew the contract.

^{lxv} 31 C.F.R. 31.213(a)(1).

^{lxvi} 48 C.F.R. 970.0371-7 (DOE M&O).

^{lxvii} 12 C.F.R. 366.10(a)(1).

^{lxviii} 42 C.F.R. 455.238(b)(1).

^{lxix} 48 C.F.R. 2052.209-72(c)(1).

^{lxx} 48 C.F.R. 2052.209-72(c)(2).

^{lxxi} 48 C.F.R. 2052.209-72(c)(1).

^{lxxii} 48 C.F.R. 2052.209-72(c)(4)(i).

^{lxxiii} 48 C.F.R. 2052.209-72(c)(4)(ii).

^{lxxiv} 48 C.F.R. 2052.209-72(c)(3).

^{lxxv} 31 C.F.R. 31.214(a).

^{lxxvi} 31 C.F.R. 31.214(b).

^{lxxvii} 48 C.F.R. 752.7027.

^{lxxviii} 48 C.F.R. 970.0371-5. The regulation defines “privileged information” as “include[ing] but . . . not limited to, unpublished information relating to technological and scientific developments; medical, personnel, or security records of individuals; anticipated materials' requirements or pricing action; possible new sites for DOE program operations; internal DOE decisions; policy development; and knowledge of selections of contractors or subcontractors in advance of official announcement.” *Id.*

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- ^{lxxix} 48 C.F.R. 1503.104-5.
- ^{lxxx} 12 C.F.R. 366.13(a). The regulation provides for exceptions where the contract allows or the FDIC authorizes the use or disclosure, the “information is generally available to the general public,” or the FDIC makes the information available to the public. *Id.*
- ^{lxxxi} 48 C.F.R. 2052.209-72(e)(1)(i).
- ^{lxxxii} 48 C.F.R. 2052.209-72 (contractor must not disclose confidential information without prior written approval of contracting officer).
- ^{lxxxiii} 31 C.F.R. 31.217(c)(5). The TARP regulation does not impose confidentiality requirement directly on these contractor personnel. Instead, it imposes these confidentiality restrictions on the contracting entity and requires that the entity to obtain from these individuals nondisclosure agreements.
- ^{lxxxiv} 31 C.F.R. 31.217(b). The TARP regulation defines “nonpublic information” as “Any information that Treasury provides to a [contractor] . . . , or that the [contractor] obtains or develops pursuant to the arrangement . . . until the Treasury determines otherwise in writing, or the information becomes part of the body of public information from a source other than the retained entity.” 31 C.F.R. 31.217(a).
- ^{lxxxv} 12 C.F.R. 366.12(d)(2).
- ^{lxxxvi} 31 C.F.R. 31.213(a)(2).
- ^{lxxxvii} 12 C.F.R. 366.12(a) (FDIC).
- ^{lxxxviii} 12 C.F.R. 366.10(a)(4).
- ^{lxxxix} 12 C.F.R. § 366.10.
- ^{xc} 12 C.F.R. § 366.10.
- ^{xcⁱ} 12 C.F.R. 366.10(a)(2).
- ^{xcⁱⁱ} 12 C.F.R. 366.10(a)(2).
- ^{xcⁱⁱⁱ} 12 C.F.R. 366.10(a)(3). The regulation provides an exception if the contract allows for the acquisition. *Id.*
- ^{xc^{iv}} 48 C.F.R. 2052.209-72.
- ^{xc^v} 48 C.F.R. 970.0371-8(a).
- ^{xc^{vi}} 31 C.F.R. 31.212(b).
- ^{xc^{vii}} 31 C.F.R. 31.217(c)(5).
- ^{xc^{viii}} 31 C.F.R. 31.212(b).
- ^{xc^{ix}} 48 C.F.R. 970.0371-8(b).
- ^c 48 C.F.R. 1503.104-5 (prescribing contract clause).
- ^{ci} 48 C.F.R. 1509.507-2(c) (applicable to Superfund contracts “in excess of the simplified acquisition threshold”).
- ^{cⁱⁱ} 48 C.F.R. 1552.209-73.
- ^{cⁱⁱⁱ} 48 C.F.R. 1552.209-73.
- ^{c^{iv}} 48 C.F.R. 1509.505-70(a).
- ^{c^v} 12 C.F.R. § 366.14(a).
- ^{c^{vi}} 12 C.F.R. 366.14(c).
- ^{c^{vii}} FDIC Post-Government Employment Certification (available at <http://www.fdic.gov/buying/goods/acquisition/PostGovtEmploymentCert.pdf>)
- ^{c^{viii}} 31 C.F.R. 31.212(d).
- ^{c^{ix}} 12 C.F.R. 366.14(d).
- ^{c^x} 48 C.F.R. 970.0371-6(b) (“In making this certification, the [contractor] may rely on the information obtained [from its employees] . . . unless [it] knows or should have known that the information provided is false or inaccurate.”).
- ^{c^{xⁱ}} 12 C.F.R. 366.12(b).
- ^{c^{xⁱⁱ}} 31 C.F.R. 31.217(c)(3).
- ^{c^{xⁱⁱⁱ}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.304 (2008).
- ^{c^{x^{iv}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.307 (2008).
- ^{c^{x^v}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(a) (2008).
- ^{c^{x^{vi}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.304 (2008).
- ^{c^{x^{vii}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.306(b) (2008).
- ^{c^{x^{viii}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.307 (2008).
- ^{c^{x^{ix}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(b) (2008).
- ^{c^{x^x}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(b) (2008).
- ^{c^{x^{xi}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(b) (2008).
- ^{c^{x^{xii}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.307 (2008).
- ^{c^{x^{xiii}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.310(a) (2008).
- ^{c^{x^{xiv}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(b) (2008).
- ^{c^{x^{xv}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.310(b) (2008).
- ^{c^{x^{xvi}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(e) (2008).
- ^{c^{x^{xvii}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(e) (2008).
- ^{c^{x^{xviii}}} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.310(b) (2008).

^{cxxix} FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(e) (2008).

^{cxxx} 31 C.F.R. 31.200(b).

^{cxxxi} 31 C.F.R. 31.211(f).

^{cxxxii} 31 C.F.R. 31.217(c).

^{cxxxiii} 31 C.F.R. 31.212(c).

^{cxxxiv} 31 C.F.R. 31.212(c).

^{cxxxv} 31 C.F.R. 31.215.

Appendix IX
Treasury Department contract with Dan Jester (July 31, 2008)

ORDER FOR SUPPLIES OR SERVICES

PAGE OF PAGES

1 2

IMPORTANT: Mark all packages and papers with contract and/or order numbers.

1. DATE OF ORDER 07/31/2008	2. CONTRACT NO. (If any)	6. SHIP TO:	
3. ORDER NO. TDO08225	4. REQUISITION/REFERENCE NO. 08PR-TDP-238	a. NAME OF CONSIGNEE TDP	

5. ISSUING OFFICE (Address correspondence to) DEPARTMENT OF THE TREASURY PROCUREMENT SERVICES DIVISIONS 1500 PENNSYLVANIA AVENUE, NW MAIL STOP: 1425 NEW YORK AVE, NW SUITE 2100 WASHINGTON DC 20220		b. STREET ADDRESS US DEPARTMENT OF THE TREASURY-DEPAR FINANCIAL MANAGEMENT, ATT: MET SQUA 1500 PENNSYLVANIA AVE., NW	
c. CITY WASHINGTON		d. STATE DC	e. ZIP CODE 20220

7. TO:	f. SHIP VIA
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a. NAME OF CONTRACTOR Dan H. Jester	8. TYPE OF ORDER
---	------------------

b. COMPANY NAME	<input checked="" type="checkbox"/> a. PURCHASE	<input type="checkbox"/> b. DELIVERY
c. STREET ADDRESS	REFERENCE YOUR: RFQ # A08-063 dtd 7/22/08	
d. CITY	Please furnish the following on the terms and conditions specified on both sides of this order and on the attached sheet, if any, including delivery as indicated.	
e. STATE / ZIP CODE	Except for billing instructions on the reverse, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.	

9. ACCOUNTING AND APPROPRIATION DATA See Schedule	10. REQUISITIONING OFFICE DEPARTMENT OF THE TREASURY
--	---

11. BUSINESS CLASSIFICATION (Check appropriate box(es))	12. F.O.B. POINT Destination
<input checked="" type="checkbox"/> a. SMALL <input type="checkbox"/> b. OTHER THAN SMALL <input type="checkbox"/> c. DISADVANTAGED <input type="checkbox"/> g. SERVICE-DISABLED VETERAN-OWNED	
<input type="checkbox"/> d. WOMEN-OWNED <input type="checkbox"/> e. HUBZone <input type="checkbox"/> f. EMERGING SMALL BUSINESS	

13. PLACE OF	14. GOVERNMENT B/L NO.	15. DELIVER TO F.O.B. POINT ON OR BEFORE (Date) 30 Days After Award	16. DISCOUNT TERMS
a. INSPECTION Destination	b. ACCEPTANCE Destination		

17. SCHEDULE (See reverse for Rejections)

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)
	The contractor shall provide Advisory and Assistance Services as described in the attached Statement of Work. 1. The attached Statement of Work and the Contractor's proposal dated July 22, 2008 Continued ...					

18. SHIPPING POINT	19. GROSS SHIPPING WEIGHT	20. INVOICE NO.	17(h) TOTAL (Cont. pages)
21. MAIL INVOICE TO:			
a. NAME TDP PAYMENT			\$25,000.00
b. STREET ADDRESS (or P.O. Box) DEPARTMENT OF THE TREASURY 1500 PENNSYLVANIA AVE, NW ATTN: OFM, 6TH FLOOR MET SQUARE			17(i) GRAND TOTAL
c. CITY WASHINGTON	d. STATE DC	e. ZIP CODE 20220	
			\$25,000.00

22. UNITED STATES OF AMERICA BY (Signature)	23. NAME (Typed) Ernest M. Dilworth TITLE: CONTRACTING/ORDERING OFFICER
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**ORDER FOR SUPPLIES OR SERVICES
SCHEDULE - CONTINUATION**

PAGE OF PAGES

2 2

IMPORTANT: Mark all packages and papers with contract and/or order numbers.

DATE OF ORDER
07/31/2008

CONTRACT NO.

ORDER NO.
TDO08225

ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY ORDERED (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)	QUANTITY ACCEPTED (G)
0001	<p>are hereby incorporated into this purchase order.</p> <p>2. The contractor shall perform the work described in the aforementioned documents at a cost of \$25,000.00.</p> <p>3. Date of Performance is July 23, 2008 through January 17, 2009.</p> <p>Admin Office: DEPARTMENT OF THE TREASURY PROCUREMENT SERVICES DIVISION 1500 PENNSYLVANIA AVE, NW MAIL STOP: 1425 NEW YORK AVE, NW SUITE 2100 WASHINGTON DC 20220</p> <p>Accounting Info: TDP0101SE08XX-2008-610001-TDP1221200-2524-0000000-XXX-XX-XXXXXXXX-XXXXXXXX-XXXXXXXX</p> <p>Financial Advisory Services Dan Jester</p> <p>The total amount of award: \$25,000.00. The obligation for this award is shown in box 17(i).</p>				25,000.00	

TOTAL CARRIED FORWARD TO 1ST PAGE (ITEM 17(H))

1.0 STATEMENT OF WORK

1.1 Scope of Work

The Contractor will perform analyses and make recommendations for Treasury's Office of Domestic Finance on financial markets and on possible structural solutions for distressed institutions and/or sectors. Contractor will submit a report on such issues as directed by the Contracting Officer Technical Representative (defined in Section 4.0, below).

1.2 Deliverables/Period of Performance

The Contractor shall report its findings on an interim basis as determined by the Contracting Officer's Technical Representative and provide a final assessment by January 17, 2009.

2.0 DESIGNATION OF GOVERNMENT CONTRACTING OFFICER

Ernest Dilworth, Contracting Officer, Procurement Services Division, has been assigned to administer the contractual aspects of this contract. Changes in the Scope of Work, contract cost, price, quantity and quality or delivery schedule shall be made only by the Contracting Officer by a properly executed modification. All correspondence that in any way concerns the terms or conditions of this contract shall be submitted directly to the Contracting Officer at the following address:

Department of the Treasury
Procurement Services Division
Attention: Ernest Dilworth
Contracting Officer
1425 New York Avenue, NW
2nd Floor, Suite 2100
Washington, DC 20220
(202) 927-1066

3.0 TECHNICAL DIRECTION

Performance of the work under this contract shall be subject to the technical direction of the Contracting Officer's Technical Representative. The term "technical direction" is defined to include, without limitation, the following:

- a. Directions to the Contractor which redirect the contract effort, shift work emphasis between work areas or tasks, require the pursuit of certain lines of inquiry, fill in details or otherwise serve to accomplish contractual statements of work.
- b. Provision of information to the Contractor which assists in the interpretation of drawings, specifications or technical portions of the work description.

c. Review and, where required by contract, approval of technical reports, drawings, specifications or technical information to be delivered by the Contractor to the Government under the contract.

Technical direction must be within the general scope of work stated in the contract. The COTR does not have the authority to, and may not, issue any technical direction which: (1) constitutes the assignment of any additional work outside the general scope of the contract; (2) in any manner causes an increase or decrease in the total contract cost, or time required for the contract performance or (3) changes any of the expressed terms, conditions or specifications of the contract.

All technical directions shall be issued in writing by the COTR or shall be confirmed by him/her in writing within 5 working days after issuance unless otherwise specified herein.

The Contractor shall proceed promptly with the performance of technical directions duly issued by the COTR in the manner prescribed by this article and within his/her authority under the provisions of this article.

If, in the opinion of the Contractor, any instruction or direction issued by the COTR is within one of the categories as defined in (1) through (3) above, the Contractor shall not proceed, but shall notify the Contracting Officer, in writing, within 5 working days after receipt of any such instruction or direction and shall request the Contracting Officer to modify the contract accordingly. Upon receiving such notification from the Contractor, the Contracting Officer shall issue an appropriate contract modification or advise the Contractor, in writing, that, in his/her opinion, the technical direction is within the scope of this article and does not constitute a change. The Contractor shall thereupon proceed immediately with the direction given. A failure of the parties to agree upon the nature of the instruction or direction, or upon the contract action to be taken with respect thereto, shall be subject to the provisions of the contract clause entitled Disputes 52.233-1 which is incorporated herein.

4.0 1052.201-70 CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE (COTR) DESIGNATION AND AUTHORITY (SEP 1997)

(a) The Contracting Officer's Technical Representative (COTR) is

Mr. Jim Wilkinson
202-622-1906
Department of the Treasury
Washington, DC 20220

(b) Performance of work under this contract shall be subject to the technical direction of the COTR identified above, or a representative designated in writing. The term "technical direction" includes, without limitation, direction to the Contractor that directs or redirects the labor effort, shifts the work between work

areas or locations, fills in details and otherwise serves to ensure that tasks outlined in the work statement are accomplished satisfactorily.

(c) Technical direction must be within the scope of the specification(s)/work statement. The COTR does not have authority to issue technical direction that:

(1) constitutes a change of assignment or additional work outside the specification(s)/work statement;

(2) constitutes a change as defined in the clause entitled "Changes";

(3) in any manner causes an increase or decrease in the contract price, or the time required for contract performance;

(4) changes any of the terms, conditions, or specification(s)/work statement of the contract;

(5) interferes with the Contractor's right to perform under the terms and conditions of the contract; or,

(6) directs, supervises or otherwise controls the actions of the Contractor's employees.

(d) Technical direction may be oral or in writing. The COTR shall confirm oral direction in writing within five work days, with a copy to the contracting officer.

(e) The Contractor shall proceed promptly with performance resulting from the technical direction issued by the COTR. If, in the opinion of the Contractor, any direction of the COTR, or his/her designee, falls within the limitations in (c), above, the Contractor shall immediately notify the contracting officer no later than the beginning of the next Government work day.

(f) Failure of the Contractor and the contracting officer to agree that technical direction is within the scope of the contract shall be subject to the terms of the clause entitled "Disputes."

5.0 (Treasury Dept.) REQUIRED CENTRAL CONTRACT REGISTRATION – EXISTING CONTRACTS (JAN 2002)

The United States Department of the Treasury has adopted the Department of Defense's Central Contractor Registration database as its database for contractor information. (This clause does not apply to the Treasury Bureau known as the Comptroller of the Currency.) Accordingly, the following requirements apply to this contract.

(a) Definitions. As used in this clause -

- (1) "Central Contractor Registration (CCR) database" means the primary Department of Defense (DoD) repository for contractor information required for the conduct of business with DoD.
 - (2) "Data Universal Number System (DUNS) number" means the 9-digit number assigned by Dun and Bradstreet Information Services to identify unique business entities.
 - (3) "Data Universal Numbering System+4 (DUNS+4) number" means the DUNS number assigned by Dun and Bradstreet plus a 4-digit suffix that may be assigned by a parent (controlling) business concern. This 4-digit suffix may be assigned at the discretion of the parent business concern for such purposes as identifying sub-units or affiliates of the parent business concern.
 - (4) "Registered in the CCR database" means that all mandatory information, including DUNS number or the DUNS+4, if applicable, is in the CCR database; the DUNS number has been validated; and all edits have been successfully completed.
- (b) (1) The contractor agrees to register in the CCR database within 15 calendar days of the date of this modification (see Block 16c, Date Signed, on the SF30).
- (2) During performance and through final payment of the contract, the contractor further agrees that (a) it will remain registered in the CCR database and (b) it will maintain its vendor record in the CCR with current, complete and accurate data.
 - (3) The contractor agrees that, after registering in the CCR database, it shall provide notification of its registration to the Contracting Officer along with its DUNS number or, if applicable, its DUNS +4 number. The contractor shall provide this confirmation within the 15 calendar day registration period specified in paragraph (b)(1) above.
 - (4) Lack of registration in the CCR database will make the contractor ineligible to receive payments under the contract and may make the contractor ineligible for contract renewal.
 - (5) DoD established a goal of registering an applicant in the CCR database within 48 hours after receipt of a complete and accurate application via the Internet. However, registration of an applicant submitting an application through a method other than the Internet may take up to 30 days. Therefore, the contractor should consider applying for registration immediately.
- (c) The Contractor is responsible for the accuracy and completeness of the data within CCR, and for any liability resulting from the Government's reliance on inaccurate or incomplete data. To remain registered in the CCR database after the initial registration,

the Contractor is required to confirm on an annual basis that its information in the CCR database is accurate and complete.

(d) Following the Contractor's initial registration in CCR and receipt of any Treasury Department (excluding the Comptroller of the Currency) award of a contract, purchase order, delivery order, task order, basic agreement, basic ordering agreement, or blanket purchase agreement, the Contractor must directly notify the Contracting Officer of any of its changed mandatory business data in CCR within three business days of the change. (See the CCR Handbook at www.ccr.gov for the current mandatory registration data fields, or contact the CCR Assistance Center at 888-227-2423 or 616-961-4725.)

(e) Contractors may obtain information on registration and annual confirmation requirements via the Internet at <http://www.ccr.gov>, from the Defense Electronic Business Program Office (Defense e-Business) at contact.ccr@us.pwcglobal.com, from the CCR Assistance Center at 888-227-2423 or 616-961-4725, from the Defense Logistic Information Service at dlis.support@dliis.dla.mil.

(f) Contractors such as some consultants and sole proprietorships that are small firms that would otherwise have no use for a Dun & Bradstreet (D&B) number, may use an alternative D&B registration method. If needing a D&B number principally for CCR registration, such a Contractor should call D&B toll-free at 800/333-0505, and clearly state that it is a very small business and simply needs a DUNS number for the purpose of CCR registration.

6.0 INVOICING AND PAYMENT INSTRUCTIONS

(a) Invoices shall be submitted in an original and two copies to the following address:

Department of the Treasury
Office of Financial Management
1500 Pennsylvania Avenue, NW
Metropolitan Square Building
6th Floor
Washington, D.C. 20228-0001

(b) A copy of the invoice shall also be submitted to the COTR and CO simultaneously.

(c) Submission of proper invoices shall be rendered on a percentage complete basis in an amount equal to the value of the work performed.

(d) Each invoice submitted shall be supported by appropriate documentation. Documentation necessary to substantiate an invoice shall include, but is not limited to project name and number, invoice number, percent complete, original contract amount, modification amounts, contractor name, and contract number. Such documentation shall meet the approval of the Contracting Officer.

7.0 52.252-2 CLAUSES INCORPORATED BY REFERENCE (FEB 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also the full text of a clause may be accessed electronically at this address: <http://www.arnet.gov/far/> or <http://farsite.hill.af.mil/>

<u>52.222-3</u>	Convict Labor (June 2003)
<u>52.222-21</u>	Prohibition of Segregated Facilities (Feb 1999)
<u>52.222-26</u>	Equal Opportunity (Mar 2007)
<u>52.222-36</u>	Affirmative Action for Workers with Disabilities (June 1998)
<u>52.222-50</u>	Combating Trafficking in Persons (Aug 2007)
<u>52.227-17</u>	Rights in Data – Special Works (DEC 2007)
<u>52.225-13</u>	Restrictions on Certain Foreign Purchases (Feb 2006)
<u>52.232-1</u>	Payments (Apr 1984).
<u>52.232-8</u>	Discounts for Prompt Payment (Feb 2002).
<u>52.232-11</u>	Extras (Apr 1984).
<u>52.232-25</u>	Prompt Payment (Oct 2003).
<u>52.232-33</u>	Payment by Electronic Funds Transfer—Central Contractor Registration (Oct 2003)
<u>52.233-1</u>	Disputes (July 2002).
<u>52.233-3</u>	Protest After Award (Aug 1996)
<u>52.233-4</u>	Applicable Law for Breach of Contract Claim (OCT 2004)
<u>52.244-6</u>	Subcontracts for Commercial Items (Mar 2007).
<u>52.253-1</u>	Computer Generated Forms (Jan 1991).

8.0 ADDITIONAL CONTRACT TERMS AND CONDITIONS

8.1 Inspection/Acceptance

The Contractor shall tender for acceptance only those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its postacceptance rights—

(1) Within a reasonable period of time after the defect was discovered or should have been discovered; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

8.2 Excusable Delays

The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence, such as acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

8.3 Termination for the Government's Convenience.

The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges that the Contractor can demonstrate to the satisfaction of the Government, using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred that reasonably could have been avoided. If the contractor requests in writing that it do so, the Government agrees to issue a no cost termination no later than 30 days after the date of the request.

8.4 Termination for Cause

The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

9.0 CONFIDENTIALITY PROVISION

The Contractor agrees that neither it nor its employees, nor subcontractors, nor subcontract employees will disclose to any third party, or otherwise use, any information it obtains or prepares in the course of performance of this contract without first receiving written permission from the Contracting Officer. The Contractor shall secure information received from or prepared or gathered for Treasury under this contract in a secure

location with access limited to only those Contractor employees with a “need to know”. All information gathered by the Contractor including but not limited to reports, research and electronic files shall become the property of Treasury. Notwithstanding any other provision of this contract, neither the Contractor nor subcontractors shall make any claim of copyright nor any other ownership interest in any of the information gathered under this contract for Treasury. The Contractor shall ensure that all information gathered or prepared by the Contractor including but not limited to reports, research and electronic files are not released to outside parties without written authorization from the Contracting Officer. Upon termination of the contractor's engagement, all documents and records covered by this clause will be disposed of in accordance with the Contracting Officer's instructions. The Contractor's duty with respect to the covered information shall survive the termination of this contract.

10.0 FINANCIAL INTEREST PROVISION

The Federal Acquisition Regulation (FAR) does not require that Contractors be subject to the ethics rules that apply to agency employees. However, given the sensitive nature of the work involved with this contract, Treasury wants to take every step possible – even going beyond the requirements of the FAR – to ensure that the advice provided is as unbiased as possible.

Thus, in addition to the FAR requirements: (1) the Contractor, before proceeding with work under the contract, will disclose to the Department's Designated Agency Ethics Official (DAEO) and to the COTR, in a manner prescribed by the DAEO, a list of his financial interests; (2) the Contractor will consult with the COTR, before beginning any new work assignment, for the specific purpose of determining whether, and the degree to which, the Contractor has a financial conflict of interest in the matter; and (3) the Contractor will not purchase or sell any securities without the prior written approval of the DAEO. This restriction will apply to all securities, including those issued by any financial institution, broker-dealer, or hedge fund. The term “securities” includes all interests in debt or equity instruments, secured and unsecured bonds, debentures, notes, securitized assets and commercial paper, securities or obligations collateralized by mortgages, and all types of preferred and common stock. This does not prohibit the contractor from acquiring or divesting interests in a publicly traded or publicly available mutual fund provided that the fund does not have a policy of concentrating its investments in a particular economic or geographic sector.

REQUEST FOR QUOTATION (THIS IS NOT AN ORDER)		THIS RFO <input type="checkbox"/> IS <input checked="" type="checkbox"/> IS NOT A SMALL BUSINESS SET ASIDE	PAGE 1 OF 9 PAGES
REQUEST NO. 08-063	2. DATE ISSUED 07/22/2008	3. REQUISITION/PURCHASE REQUEST NO.	4. CERT. FOR NAT. DEF. UNDER BDSA REG. 2 AND/OR DMS REG.1
5. ISSUED BY DEPARTMENT OF THE TREASURY PROCUREMENT SERVICES DIVISIONS 1500 PENNSYLVANIA AVENUE, NW MAIL STOP: 1425 NEW YORK AVE, NW SUITE 2100 WASHINGTON DC 20220		6. DELIVERY BY (Date) Multiple	
5b. FOR INFORMATION CALL: (No collect calls)		7. DELIVERY <input checked="" type="checkbox"/> FOB DESTINATION <input type="checkbox"/> OTHER (See Schedule)	
8. NAME OF CONSIGNEE Department of the Treasury, DO		9. DESTINATION	
a. NAME ERNEST DILWORTH		b. STREET ADDRESS ATTN: Ernest Dilworth 1425 New York Ave., NW 2nd Floor, Suite 2100	
b. TO: a. NAME DAN H JESTER		c. CITY Washington	
b. COMPANY		d. STATE DC	
c. STREET ADDRESS		e. ZIP CODE 20220	
f. CITY		g. STATE	
h. ZIP CODE		i. ZIP CODE	
10. PLEASE FURNISH QUOTATIONS TO THE ISSUING OFFICE IN BLOCK 5a ON OR BEFORE CLOSE OF BUSINESS (Date) 07/25/2008 1500 ES		11. SCHEDULE (Include applicable Federal, State and local taxes)	

ITEM NO. (a)	SUPPLIES/SERVICES (b)	QUANTITY (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)
0001	The contractor shall submit a quote for Advisory and Assistance Services as described in the attached Statement of Work. Final Report	1	EA		
Total Price					\$ 25,000.00

2. DISCOUNT FOR PROMPT PAYMENT	a. 10 CALENDAR DAYS (%)	b. 20 CALENDAR DAYS (%)	c. 30 CALENDAR DAYS (%)	d. CALENDAR DAYS	
				NUMBER	PERCENTAGE

NOTE: Additional provisions and representations are are not attached

13. NAME AND ADDRESS OF QUOTER		14. SIGNATURE OF PERSON AUTHORIZED TO SIGN QUOTATION		15. DATE OF QUOTATION	
NAME OF QUOTER DAN H JESTER		SIGNATURE [Redacted]		7-25-08	
STREET ADDRESS [Redacted]		16. SIGNER		b. TELEPHONE	
COUNTY [Redacted]		a. NAME (Type or print) DAN H JESTER		AREA CODE [Redacted]	
CITY [Redacted]		c. TITLE (Type or print)		NUMBER [Redacted]	