



Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information

Committee on Administration & Management Proposed Recommendation | June 16-17, 2011

1 The Conference believes that it is important to ensure that services provided by
2 government contractors—particularly those services that are similar to those performed by
3 government employees—are performed with integrity and that the public interest is protected.
4 In that light, the Conference recommends that the Federal Acquisition Regulatory Council (“FAR
5 Council”) promulgate model language in the Federal Acquisition Regulation (“FAR”)¹ for agency
6 contracting officers to use when negotiating or administering contracts that pose particular
7 risks of government contractor employee personal conflicts of interest or misuse of non-public
8 information. In order to ensure that, in its effort to protect the public interest, this
9 recommendation does not create excessive compliance burdens for contractors or unnecessary
10 monitoring costs for agencies, the Conference is limiting its recommendation to those areas
11 that it has identified as the top priorities—contractor employees who perform certain activities
12 identified as posing a high risk of personal conflicts of interest or misuse of non-public
13 information.
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¹ The FAR is a set of uniform policies and procedures that all executive agencies must use in procurements from sources outside of the government. 48 C.F.R. § 1.101. All executive agencies must comply with the FAR when purchasing from contractors, though individual agencies can also adopt agency-specific supplements to the FAR by regulation or provide additional requirements in individual contracts. *See, e.g.*, 48 C.F.R. ch. 2 (Defense Federal Acquisition Regulation Supplement for the Department of Defense).



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15 *Background*

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17 In recent years, the federal government has increasingly relied upon private contractors
18 to perform services previously provided in-house by civil servants.² Despite this expansion in
19 the use of government contractors, there continues to be a substantial disparity between the
20 ethics rules regulating government employees and those applicable to government contractor
21 employees. Whereas an array of statutes and regulations creates an extensive ethics regime
22 for government employees, the rules currently applicable to contractor employees vary
23 significantly by agency.

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25 Government employees are subject to various statutes and regulations that create a
26 comprehensive ethics regime governing, among other things, their financial interests, use of
27 government resources, outside activities, and activities in which they may engage after leaving
28 government.³ By contrast, the compliance standards applicable to contractor employees are
29 much less comprehensive and can vary significantly from contract to contract. A handful of
30 statutes apply to contractor employees and prohibit their offering bribes or illegal gratuities,⁴
31 serving as foreign agents,⁵ disclosing procurement information,⁶ or offering or receiving

² Specifically, federal spending on service contracts increased by 85% in inflation adjusted dollars between 1983 and 2007. Kathleen Clark, *Ethics for an Outsourced Government* Table 3 (forthcoming), available at <http://www.acus.gov/research/the-conference-current-projects/government-contractor-ethics>. Over the same period, the number of executive branch employees declined by 18%. *Id.* In this light, the relative significance of the contractor workforce vis-à-vis the federal employee workforce has increased substantially in the last few decades.

³ *Id.* at 7.

⁴ 18 U.S.C. §§ 201(b)–(c).

⁵ *Id.* § 219.

⁶ 41 U.S.C. § 2102.



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32 kickbacks.⁷ The FAR requires contracting officers to identify organizational conflicts of interest
33 (in which the *contractor* has a corporate interest that may bias its judgment or the advice it
34 provides to the government) and either address or waive such conflicts.⁸ The FAR also requires
35 that contracting firms that have entered into one or more government contracts valued in
36 excess of \$5 million and requiring 120 days or more to perform have in place “codes of business
37 ethics and conduct.”⁹ A handful of agencies have adopted ethics regulations supplementing the
38 FAR,¹⁰ and still other agencies impose additional ethics requirements by contract.¹¹

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40 Finally, certain contracting firms, most notably some performing work for the
41 Department of Defense, have voluntarily adopted internal ethics codes, some of which provide
42 fairly detailed rules relating to such important ethical issues as personal conflicts of interest,
43 confidentiality, gifts and gratuities, protection of government property, and other major ethical

⁷ *Id.* §§ 8701–07 (prohibiting kickbacks to contractors, subcontractors, and their employees).

⁸ 48 C.F.R. § 9.500 *et seq.* The FAR provision applies only to organizational conflicts of interest, wherein the *firm itself* possesses such business interests, and not to personal conflicts of interest, wherein one of the *firm’s employees* has a business or financial interest that could influence his or her decisionmaking in performing a contract.

⁹ *Id.* §§ 3.1000–04. These codes must ensure that the firm has adequate systems for detecting, preventing, and reporting illegal conduct and violations of the civil False Claims Act and that it “[o]therwise promote[s] an organizational culture that encourages ethical conduct.” *Id.* § 52.203-13. The FAR does not dictate, however, what types of potential ethical misconduct the internal corporate codes must address.

¹⁰ Agencies that have adopted ethics regimes supplementing those contained in the FAR include the Department of Energy, Department of Health and Human Services, Department of the Treasury, Environmental Protection Agency, Nuclear Regulatory Commission, and United States Agency for International Development. Clark, *supra* note 2, Table VII. These supplemental regimes are not comprehensive, however, and generally apply only to specific types of contracts. By contrast, the Federal Deposit Insurance Corporation, though it is not covered by the FAR, has implemented a comprehensive ethics system that applies to all of its contractor employees. *Id.*; see also 12 C.F.R. § 366.0 *et seq.*

¹¹ See, e.g., USAID Acquisition Regulation 148, available at <http://www.usaid.gov/policy/ads/300/aidar.pdf>.



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44 areas, and that establish internal disciplinary processes for employee violations of such codes.¹²
45 Nevertheless, the corporate codes do not generally require that unethical conduct that is not
46 otherwise illegal or unlawful be reported to the contracting agency.¹³ Furthermore, though the
47 corporate codes provide certain protections for the government,¹⁴ they generally only require
48 contractor employees to protect against personal conflicts with their *employer's* interest rather
49 than the *government's* interest.¹⁵ Finally, many contractors (particularly those outside of the
50 defense setting) do not have internal ethics codes.

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52 *Scope of the Problem*

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54 By dint of their work for and as part of the government, contractors performing certain
55 services, particularly those that can influence government decisions or have access to non-
56 public information, are in a position of public trust and responsibility for the protection of
57 public resources, as is the government itself. It is therefore critical that their employees behave
58 with the same high degree of integrity as government employees and do not exploit positions

¹² See generally DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, PUBLIC ACCOUNTABILITY REPORT (2009), available at <http://www.dii.org/files/annual-report-2008.pdf>. Many of the most extensive internal codes are implemented by companies that are members of the Defense Industry Initiative (“DII”), which includes 95 defense contractors that agree to implement such ethics codes and comply with certain values in maintaining an ethical workplace. Contractor employees can be disciplined internally for violating their company’s ethics code, and companies commit to disclose violations of the law and “instances of significant employee misconduct” to the contracting agency. *Id.* at 49.

¹³ See *id.* at 49–50 (contractors are only *required* to report those violations covered by FAR § 52.203-13).

¹⁴ See *id.* at 33 (noting that DII member company codes require them to protect government property).

¹⁵ See *id.* at 34 (“Employees are prohibited from having personal, business, or financial interests that are incompatible with their responsibility to their employer.”); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-169, ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DOD CONTRACTOR EMPLOYEES 3 (2008) (“Most of the contractor firms have policies requiring their employees to avoid a range of potential interests—such as owning stock in competitors—that conflict with the *firm’s* interest. However, only three of these contractors’ policies directly require their employees to disclose potential personal conflicts of interest with respect to their work at DOD so they can be screened and mitigated by the firms.”).



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59 of public trust for improper personal gain. Whether or not there is any widespread pattern of
60 ethical abuses, the existence of significant ethical *risks* can erode public confidence in the
61 government procurement process and in the government itself. Accordingly, it is entirely
62 appropriate to hold those contractors and their employees to a high ethical standard of
63 conduct.

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65 As noted above, a significant disparity currently exists between the ethical standards
66 applicable to government employees, which are comprehensive and consist predominantly of
67 specific rules, and those applicable to contractor employees, which are largely developed and
68 applied on an ad hoc basis and involve significantly vaguer standards. Many contractors have
69 undertaken laudable efforts to promote a culture of compliance through the implementation of
70 company-specific ethics standards,¹⁶ but not every contractor has such internal standards. The
71 Conference believes that adoption of contractor ethics standards applicable to certain high-risk
72 activities would protect the public interest and promote integrity in government contracting. In
73 addition, the Conference aims to promote public confidence in the system of government
74 contracting and in the integrity of the government.

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76 Of course, the mere existence of a disparity between government employee and
77 contractor ethics standards is not itself conclusive evidence that contractor employee ethics
78 standards should be expanded. Indeed, simply applying the rules governing the ethics of
79 government employees (particularly those dealing with financial disclosures to guard against
80 personal conflicts of interest) directly to contractors could create excessive and unnecessary
81 compliance burdens for contractors and monitoring costs for agencies.¹⁷ To address this

¹⁶ See generally DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, *supra* note 12.

¹⁷ REPORT OF THE ACQUISITION ADVISORY PANEL 418 (Jan. 2007). Various agencies have extended certain aspects of the ethics standards applicable to government employees to contractor employees, see, e.g., 12 C.F.R. § 366.0 *et seq.* (FDIC contractor regulations), and their decision to do so has not necessarily created excessive compliance or monitoring costs. Nevertheless, extending *all* government employee ethics rules to *all* contractor employees



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82 concern, the Conference has focused on the most significant ethical risks that arise in
83 government contracts as well as the activities most likely to implicate those risks. Specifically,
84 the Conference has identified contractor personal conflicts of interest and use of non-public
85 information as two areas calling for greater measures to prevent misconduct. Of course, those
86 are not necessarily the only risks in the current system, and individual agencies have chosen or
87 may hereafter choose to impose ethics requirements in other areas as well. The Conference,
88 however, believes those two identified areas warrant more comprehensive measures to
89 prevent misconduct. The Conference believes those two identified areas call for ethics
90 standards, although agencies should be mindful of risks requiring more particularized treatment
91 that may be present in their specific contexts.

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93 *Personal Conflicts of Interest and Misuse of Certain Non-Public Information*

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95 The most common ethical risks currently addressed in specific agency supplements to
96 the FAR (as well as in contractors' own internal codes of conduct) include personal conflicts of
97 interest, gifts, misuse of government property, and misuse of non-public information.¹⁸ Of
98 these major ethical risks, existing criminal laws regulate contractors' offering or receipt of gifts
99 and misuse of government property. With respect to gifts, criminal bribery laws would prohibit
100 a contractor employee's *offering* anything of value to a federal employee to obtain favorable
101 treatment,¹⁹ and the Anti-Kickback Act would prohibit a contractor employee from *accepting*
102 gifts from a potential sub-contractor or other party that are aimed at improperly obtaining

serving all agencies, without consideration of the specific ethical risks presented, would likely impose costs that are excessive in relation to the benefits received. Accordingly, the Conference believes that the FAR Council and individual agencies should proceed carefully in ensuring that any expansion of the current ethics regime is cost-effective, while at the same time protecting the government's interests.

¹⁸ See *id.*; Kathleen Clark, *supra* note 2, Table VII; Marilyn Glynn, *Public Integrity & the Multi-Sector Workforce*, 52 WAYNE L. REV. 1433, 1436–38 (2006); DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, *supra* note 12, at 29–60.

¹⁹ 18 U.S.C. § 201(c).



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103 favorable treatment under the contract.²⁰ With respect to misuse of property, traditional
104 criminal laws against larceny and embezzlement would prohibit a contractor employee's
105 misappropriating public property, and federal criminal law prohibits a contractor employee's
106 misusing or abusing government property.²¹

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108 On the other hand, a contractor employee is less likely to face sanctions under existing
109 laws if he or she acts despite a personal conflict of interest or exploits non-public information
110 for personal gain. Though the Anti-Kickback Act would prevent a contractor employee's
111 directing business to a third party in exchange for an actual payment,²² nothing under current
112 law would prevent a contractor employee from directing business towards a company in which
113 he or she owns stock (*i.e.*, a personal conflict of interest). Similarly, though insider trading laws
114 would apply if a contractor employee bought securities based upon information learned from
115 government contracts,²³ nothing under current law would prevent a contractor employee from
116 purchasing other items, such as land that will appreciate upon announcement of construction
117 of a military base, on the basis of information learned while performing his or her contractual
118 duties.

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120 In this light, various governmental entities that have studied issues of contractor ethics
121 have singled out preventing personal conflicts of interest and misuse of non-public information

²⁰ 41 U.S.C. § 8702. Of course, in light of the severity of criminal sanctions, many instances of misconduct are likely to go unpunished under the current regime. For instance, resource constraints may make it unlikely that a United States Attorney would prosecute a contractor employee for accepting a lavish meal from a prospective sub-contractor. Nevertheless, the mere threat of criminal prosecution may deter potential misconduct.

²¹ 18 U.S.C. § 641; *Morissette v. United States*, 342 U.S. 246, 272 (1952). In addition, agencies often stipulate by contract that government property may not be used for personal benefit (*e.g.*, a contractor employee's using government computers for personal use). Glynn, *supra* note 18, at 1437.

²² 41 U.S.C. § 8702.

²³ *Dirks v. Sec. Exch. Comm'n*, 463 U.S. 646, 655 n.14 (1983); 17 C.F.R. § 240.10b5-2(b).



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122 as areas that need to be strengthened.²⁴ By focusing on these two areas of risk, the Conference
123 does not intend to discourage agencies from adopting additional ethics requirements regarding
124 procurement activities by regulations or contract. Indeed, some agencies may choose to adopt
125 rules regulating ethical risks such as contractor employee receipt of gifts or misuse of property
126 as an additional prophylactic measure, notwithstanding the existence of criminal penalties
127 covering similar conduct. Rather, the Conference believes that personal conflicts of interest
128 and protection of non-public information are two areas for which greater measures to prevent
129 misconduct are particularly appropriate, and it therefore recommends targeted measures
130 designed to address those risks. The recommendation would serve as a floor upon which
131 agencies could build and would not be intended to deter adoption of a more expansive ethics
132 regime, either individually or through the FAR Council, to the extent the agencies find it
133 appropriate.
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²⁴ See, e.g., Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58,584, 58,588–89 (proposed Nov. 13, 2009) (setting forth rules regulating personal conflicts of interest and use of non-public information for private gain in the case of contractors performing acquisition activities closely related to inherently governmental functions); Glynn, *supra* note 18, at 1436–37 (article by general counsel of the Office of Government Ethics recommending, inter alia, extending ethics rules to include contractor employee conflicts of interest and misuse of non-public information); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 15, at 31 (“We recommend . . . personal conflict of interest contract clause safeguards for defense contractor employees that are similar to those required for DOD’s federal employees.”); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-693, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION 30 (2010) (recommending that the FAR Council provide guidance on the use of non-disclosure agreements as a condition to contractors’ accessing sensitive information and on “establishing a requirement for prompt notification to appropriate agency officials of a contractor’s unauthorized disclosure or misuse of sensitive information”); OFFICE OF GOV'T ETHICS, REPORT TO THE PRESIDENT & TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 38–39 (2006) (noting “expressions of concern” the Office has received regarding personal conflicts of interest and highlighting the possibility of agencies’ including contract clauses to deal with such issues); REPORT OF THE ACQUISITION ADVISORY PANEL, *supra* note 17, at 423–25 (concluding that additional safeguards were necessary in order to protect against contractor employee personal conflicts of interest and misuse of confidential or proprietary information).



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135 *“High Risk” Contracts*

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137 *PCI-Risk Contracts:* The Conference has sought to identify those types of activities most
138 likely to create risks of personal conflicts of interest, situations in which a contractor employee
139 may have some interest that may bias his or her judgment. Several statutes and regulations
140 prohibit contractors from performing “inherently governmental functions,” which are defined
141 as functions “so intimately related to the public interest” as to require performance by
142 government employees.²⁵ The FAR also contains a list of activities that “approach” being
143 classified as “inherently governmental functions.”²⁶ As a recent proposed policy letter from the
144 Office of Federal Procurement Policy recognizes, contractors performing activities that are
145 similar to “inherently governmental functions” should be subject to close scrutiny, given that
146 the work that they perform is near the heart of the traditional role of the federal government.²⁷
147 Several of the functions listed as “approach[ing] . . . inherently governmental functions” involve
148 activities wherein the contractor either advises in agency policymaking or participates in
149 procurement functions, which raise particular risks of employee personal conflicts of interest.
150 Other activities identified as raising particular risks of employee personal conflicts of interest
151 include “advisory and assistance services” and “management and operating” functions.²⁸
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²⁵ Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 5(2)(A), 112 Stat. 2382, 2384; 48 C.F.R. § 2.101; OMB, Circular A-76, Performance of Commercial Activities, Attachment A § B.1.a. Though each of these authorities uses slightly different wording in defining “inherently governmental function,” the differences are apparently of no legal significance. Office of Management & Budget, Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188, 16,190 (proposed Mar. 31, 2010).

²⁶ 48 C.F.R. § 7.503(d).

²⁷ Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. at 16,193–94.

²⁸ REPORT OF THE ACQUISITION ADVISORY PANEL, *supra* note 17, at 411.



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153 The FAR contains provisions identifying activities that “approach” being “inherently
154 governmental functions,”²⁹ feature “advisory and assistance services,”³⁰ or involve
155 “management and operating” functions.³¹ Many of these activities, such as those in which a
156 contractor employee performs tasks that can influence government action, including the
157 expenditure of agency funds, may pose a significant risk of personal conflicts of interest.
158 Several contracting tasks, by their nature, elevate the risk of such conflicts. Those include
159 substantive (as compared to administrative or process-oriented) contract work (hereinafter
160 referred to as “PCI-Risk” contracts³²) such as:

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- 162 • Developing agency policy or regulations
- 163 • Providing alternative dispute resolution services on contractual matters;
164 legal advice involving interpretation of statutes or regulations; significant
165 substantive input relevant to agency decision-making; or professional
166 advice for improving the effectiveness of federal management processes
167 and procedures
- 168 • Serving as the primary authority for managing or administering a project
169 or operating a facility
- 170 • Preparing budgets, and organizing and planning agency activities

²⁹ 48 C.F.R. § 7.503(d).

³⁰ *Id.* § 2.101.

³¹ *Id.* § 17.601.

³² The Conference believes that these activities are particularly likely to pose a risk of personal conflicts of interest. To the extent that the FAR Council or individual agencies believe that other activities pose similar risks, they should remain free to regulate contracts for such activities.



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- 171 • Supporting substantive acquisition planning³³ or research and
172 development activities
- 173 • Evaluating another contractor’s performance or contract proposal
- 174 • Assisting in the development of a statement of work or in contract
175 management
- 176 • Participating as a technical advisor to a source selection board or as a
177 member of a source evaluation board (*i.e.*, boards designed to select or
178 evaluate bids or proposals for procurement contracts)
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180 *Information-Risk Contracts:* Existing regulations also do not comprehensively protect
181 against contractor employees’ disclosure or misuse of non-public governmental, business, or
182 personal information learned while performing government contracts.³⁴ As with personal
183 conflicts of interest, specific activities pose a grave risk of contractor disclosure or misuse of
184 non-public information, which include (hereinafter referred to as “Information-Risk”
185 contracts³⁵):

³³ The FAR Council has issued a proposed rule that would establish personal conflict of interest standards for contractor employees performing acquisition activities closely associated with inherently governmental functions. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. at 58,588. To the extent it is ultimately implemented, this rule would obviate the need for any additional FAR contract clause with respect to these contracts.

³⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 24, at 30 (recommending that the FAR Council provide guidance on the use of non-disclosure agreements as a condition to contractors’ accessing sensitive information and on “establishing a requirement for prompt notification to appropriate agency officials of a contractor’s unauthorized disclosure or misuse of sensitive information”).

³⁵ The Conference believes that these activities are particularly likely to pose a risk of disclosure or misuse of non-public information. This recommendation does not define the term “non-public information”; the FAR Council would be responsible for drafting language more precisely defining the types of information and services covered. In doing so, the FAR Council could choose to draw on existing definitions created for similar purposes. *See, e.g.*, 5 C.F.R. § 2635.703 (defining “nonpublic information” and prohibiting government employees from misusing such information, including information routinely withheld under 5 U.S.C. § 552(b) (FOIA exemptions)); U.S. GOV’T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 24, at



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- Contracts in which certain employees will receive access to information relating to an agency's deliberative processes, management operations, or staff that is not generally released to the public
- Contracts in which certain employees will have access to certain business-related information, including trade secrets, non-public financial information, or other non-public information that could be exploited for financial gain³⁶
- Contracts in which certain employees will have access to personally identifying or other non-public personal information, such as social security numbers, bank account numbers, or medical records³⁷

RECOMMENDATION

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1. **The Federal Acquisition Regulatory Council ("FAR Council") should promulgate model language for use in contracts posing a high risk of either personal conflicts of interest or misuse of certain non-public information.**³⁸ Current law does not adequately regulate

4–5 (defining a category of information that requires safeguards against unauthorized disclosure). To the extent that the FAR Council or individual agencies believe that other activities pose similar risks, they should remain free to regulate such activities through appropriate solicitation provisions or contract clauses.

³⁶ For instance, if an employee of a contractor performing auditing functions for the government were to learn that a large manufacturing firm intends to open a new plant in coming months, the employee could purchase property near the plant and reap a substantial financial windfall. The contemplated regime would require that the contractor train employees privy to such information on their obligations to keep the information confidential and to avoid transacting business on the basis of such information, penalize employees who violate such obligations, and report any employee violations to the contracting agency.

³⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 24, at 6.

³⁸ The Conference takes no position on whether the contractual language adopted in individual contracts should "flow down" to sub-contractors and other persons besides prime contractors performing work on government contracts. That issue is best left to the discretion of the FAR Council.



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200 against the risks of contractor employee personal conflicts of interest and misuse of non-public
201 information. On occasion certain agencies impose additional ethics requirements by
202 supplemental regulation or contract. In addition, certain contractors, especially large
203 companies, have adopted and enforced internal ethics codes. Nevertheless, coverage varies
204 significantly from agency to agency and contract to contract. In order to bring consistency to
205 this process and ensure that the government's interests are adequately protected, the FAR
206 Council should draft model language in the Federal Acquisition Regulation ("FAR") for agency
207 contracting officers to use, with modifications appropriate to the nature of the contractual
208 services and risks presented, when soliciting and negotiating contracts that are particularly
209 likely to raise issues of personal conflicts of interest or misuse of non-public information.

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211 **2. The model FAR provisions or clauses should apply to PCI-Risk and Information-Risk**

212 **Contracts.**³⁹ The proposed FAR provisions or clauses would apply only to PCI-Risk and
213 Information-Risk contracts (or solicitations for such contracts). At the same time, contracting
214 agencies should remain free to incorporate contract language (or to promulgate agency-specific
215 supplemental regulations) dealing with other ethical risks they deem important whether or not
216 the contract at issue qualifies as a PCI-Risk or Information-Risk contract. Thus, the model FAR
217 provisions or clauses adopted in response to this recommendation would serve as a floor upon
218 which agencies could build if they deemed it appropriate, but would not supplant existing
219 programs that now provide or may in the future provide more demanding or expansive ethical
220 protections.

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222 **3. Agencies should have the discretion whether to use or modify the model FAR**

223 **provisions or clauses.** An agency contracting officer would have the option to use the model

³⁹ The draft language would appear in part 52 of the FAR and would consist of draft solicitation provisions (which are used in soliciting contracts) and contract clauses (which are integrated into negotiated contracts). The use of the plural forms "provisions" and "clauses" is not intended to exclude the possibility that the FAR Council could implement the recommendations with a single provision or clause.



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224 FAR provisions or clauses when soliciting and/or contracting for activities falling into the PCI-
225 Risk or Information-Risk categories. Because the provisions or clauses would be optional, the
226 contracting agency would enjoy the discretion to modify the FAR language on a case-by-case
227 basis to fit the circumstances, and to decide to forego including any such language if it deems
228 that the particular contract at issue is unlikely to pose a significant risk of personal conflicts of
229 interest or misuse of non-public information by contractor personnel. Nevertheless, the FAR
230 Council should encourage contracting officers to use the model FAR language when applicable.

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232 4. **The FAR should include model provisions or clauses for use in PCI-Risk**
233 **procurements.** The FAR Council should encourage agencies to consider inclusion of these
234 model provisions or clauses in contracting actions involving PCI-Risk procurements.

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236 The proposed FAR provisions or clauses should require the contractor to certify⁴⁰ that
237 none of its employees who is in a position to influence government actions⁴¹ has a conflict of
238 interest or that conflicted employees will be screened from performing work under any
239 contract. Once a contractor is selected, the contract itself should include a clause requiring the
240 contractor to train employees on recognizing conflicts, to implement a system for employees
241 who can influence government action to report conflicts to the contractor, to screen any
242 conflicted employees from contract performance, to report to the agency periodically on its

⁴⁰ The FAR should include a certification requirement rather than a disclosure process in order to minimize the burden on contractors. In order to fully perform their contractual obligations, contractors should be required to train their key personnel on recognizing and disclosing personal conflicts of interest. In the case of an anticipated conflict, a contractor employee should disclose the issue to the contractor, who must screen the employee from performing under the contract. The contractor should be responsible for disciplining employees who fail to disclose conflicts or honor a screening policy, and for disclosing such violations to the government.

⁴¹ Every employee performing under the contract need not certify that he or she does not possess conflicting financial interests. For instance, in the case of a contractor assisting in the development of agency policy (a function falling within one of the “high risk” categories), employees performing administrative or other non-discretionary (particularly ministerial) tasks, such as those making copies of the report that the contractor will submit, need not perform such a certification.



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243 efforts to protect against employee conflicts, and to disclose to the agency any instances of
244 employee misconduct (as well as disciplinary action taken against any offending employee). A
245 contractor's failure to implement an adequate system for employee conflict certification, to
246 disclose or correct instances of employee misconduct, or to take appropriate disciplinary
247 measures against employees who commit misconduct may be grounds for contract
248 termination. In addition, a contractor that repeatedly proves incapable or unwilling to honor
249 such contractual obligations may be subject to suspension or debarment in appropriate
250 circumstances.

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252 **5. The FAR should include model provisions or clauses for use in Information-Risk**
253 **procurements.** The FAR Council should encourage agencies to include these model provisions
254 or clauses in contracting actions involving Information-Risk procurements.

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256 The FAR language should require the contractor to ensure that its employees who have
257 access to certain non-public information identified as posing an information risk are made
258 aware of their duties to maintain the secrecy of such information and to avoid using it for
259 personal gain. To the extent an employee breaches either of these obligations, the contractor
260 should be responsible for reporting the breach to the government, minimizing the effects of the
261 breach, and, where appropriate, disciplining the offending employee. A contractor's failure to
262 observe these contractual requirements may be grounds for contract termination. In addition,
263 a contractor that proves repeatedly incapable or unwilling to fulfill its duties may be subject to
264 suspension or debarment in appropriate circumstances.

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266 **6. Agencies not covered by the FAR may use the FAR provisions or clauses as a**
267 **resource when negotiating contracts for activities falling in either of the "high risk"**
268 **categories.** Agencies and government instrumentalities not covered by the FAR should
269 nevertheless familiarize themselves with the FAR language promulgated in response to this



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270 recommendation. To the extent that they plan to enter into contracts for activities listed in the
271 PCI-Risk or Information-Risk categories, they should consider employing or, if necessary,
272 customizing these solicitation provisions and/or contract clauses.