



## **Administrative Conference Recommendation 2011-3**

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

**Adopted June 17, 2011**

The Conference believes that it is important to ensure that services provided by government contractors—particularly those services that are similar to those performed by government employees—are performed with integrity and that the public interest is protected. In that light, the Conference recommends that the Federal Acquisition Regulatory Council (“FAR Council”) promulgate model language in the Federal Acquisition Regulation (“FAR”)<sup>1</sup> for agency contracting officers to use when negotiating or administering contracts that pose particular risks of government contractor employee personal conflicts of interest or misuse of non-public information. In order to ensure that, in its effort to protect the public interest, this recommendation does not create excessive compliance burdens for contractors or unnecessary monitoring costs for agencies, the Conference is limiting its recommendation to those areas that it has identified as the top priorities—contractor employees who perform certain activities identified as posing a high risk of personal conflicts of interest or misuse of non-public information.

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<sup>1</sup> 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) The FAR Council consists of the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of General Services. *See* 41 U.S.C. §§ 1102, 1302.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### *Background*

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

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

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<sup>2</sup> 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.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> 18 U.S.C. §§ 201(b)–(c).

<sup>5</sup> *Id.* § 219.

<sup>6</sup> 41 U.S.C. § 2102.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

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

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

<sup>8</sup> 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.

<sup>9</sup> *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.

<sup>10</sup> 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.*

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

### *Scope of the Problem*

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

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<sup>12</sup> 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.

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

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

<sup>15</sup> 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.”).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

As noted above, a significant disparity currently exists between the ethical standards applicable to government employees, which are comprehensive and consist predominantly of specific rules, and those applicable to contractor employees, which are largely developed and applied on an ad hoc basis and involve significantly vaguer standards.<sup>16</sup> Many contractors have undertaken laudable efforts to promote a culture of compliance through the implementation of company-specific ethics standards,<sup>17</sup> but not every contractor has such internal standards. The Conference believes that adoption of contractor ethics standards applicable to certain high-risk activities would protect the public interest and promote integrity in government contracting. In addition, the Conference aims to promote public confidence in the system of government contracting and in the integrity of the government.

Of course, the mere existence of a disparity between government employee and contractor ethics standards is not itself conclusive evidence that contractor employee ethics standards should be expanded. Indeed, simply applying the rules governing the ethics of government employees (particularly those dealing with financial disclosures to guard against personal conflicts of interest) directly to contractors could create excessive and unnecessary

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<sup>16</sup> There are pending FAR rules relating to protection of non-public information, 76 Fed. Reg. 23,236 (Apr. 26, 2011), and preventing personal conflicts of interest for contractor employees performing acquisition activities closely related to inherently governmental functions, 74 Fed. Reg. 58,584 (Nov. 13, 2009), but these proposed rules are not yet adopted and also cover only some of the topics addressed in this recommendation.

<sup>17</sup> See generally DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, *supra* note 12.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

compliance burdens for contractors and monitoring costs for agencies.<sup>18</sup> To address this concern, the Conference has focused on the most significant ethical risks that arise in government contracts as well as the activities most likely to implicate those risks. Specifically, the Conference has identified contractor employees' personal conflicts of interest and use of non-public information as two areas calling for greater measures to prevent misconduct. Of course, those are not necessarily the only risks in the current system, and individual agencies have chosen or may hereafter choose to impose ethics requirements in other areas as well. The Conference, however, believes those two identified areas warrant more comprehensive measures to prevent misconduct. The Conference believes those two identified areas call for ethics standards, although agencies should be mindful of risks requiring more particularized treatment that may be present in their specific contexts.

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

The most common ethical risks currently addressed in specific agency supplements to the FAR (as well as in contractors' own internal codes of conduct) include personal conflicts of interest, gifts, misuse of government property, and misuse of non-public information.<sup>19</sup> Of these major ethical risks, existing criminal laws regulate contractors' offering or receipt of gifts and misuse of government property. With respect to gifts, criminal bribery laws would prohibit

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<sup>18</sup> 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 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.

<sup>19</sup> *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.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

a contractor employee's *offering* anything of value to a federal employee to obtain favorable treatment,<sup>20</sup> and the Anti-Kickback Act would prohibit a contractor employee from *accepting* gifts from a potential sub-contractor or other party that are aimed at improperly obtaining favorable treatment under the contract.<sup>21</sup> With respect to misuse of property, traditional criminal laws against larceny and embezzlement would prohibit a contractor employee's misappropriating public property, and federal criminal law prohibits a contractor employee's misusing or abusing government property.<sup>22</sup>

On the other hand, a contractor employee is less likely to face sanctions under existing laws if he or she acts despite a personal conflict of interest or exploits non-public information for personal gain. Though the Anti-Kickback Act would prevent a contractor employee's directing business to a third party in exchange for an actual payment,<sup>23</sup> nothing under current law would prevent a contractor employee from directing business towards a company in which he or she owns stock (*i.e.*, a personal conflict of interest). Similarly, though insider trading laws would apply if a contractor employee bought securities based upon information learned from government contracts,<sup>24</sup> nothing under current law would prevent a contractor employee from purchasing other items, such as land that will appreciate upon announcement of construction

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<sup>20</sup> 18 U.S.C. § 201(c).

<sup>21</sup> 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.

<sup>22</sup> 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 19, at 1437.

<sup>23</sup> 41 U.S.C. § 8702.

<sup>24</sup> *Dirks v. Sec. Exch. Comm'n*, 463 U.S. 646, 655 n.14 (1983); 17 C.F.R. § 240.10b5-2(b).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

of a military base, on the basis of information learned while performing his or her contractual duties.

In this light, various governmental entities that have studied issues of contractor ethics have singled out preventing personal conflicts of interest and misuse of non-public information as areas that need to be strengthened.<sup>25</sup> By focusing on these two areas of risk, the Conference does not intend to discourage agencies from adopting additional ethics requirements regarding procurement activities by regulations or contract. Indeed, some agencies may choose to adopt rules regulating ethical risks such as contractor employee receipt of gifts or misuse of property as an additional prophylactic measure, notwithstanding the existence of criminal penalties covering similar conduct. Rather, the Conference believes that personal conflicts of interest and protection of non-public information are two areas for which greater measures to prevent misconduct are particularly appropriate, and it therefore recommends targeted measures designed to address those risks. The recommendation would serve as a floor upon which agencies could build and would not be intended to deter adoption of a more expansive ethics

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<sup>25</sup> 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 proposed FAR 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 19, 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 18, 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).





## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

regime, either individually or through the FAR Council, to the extent the agencies find it appropriate.

### *“High Risk” Contracts*

*PCI-Risk Contracts:* The Conference has sought to identify those types of activities most likely to create risks of personal conflicts of interest, situations in which a contractor employee may have some interest that may bias his or her judgment. Several statutes and regulations prohibit contractors from performing “inherently governmental functions,” which are defined as functions “so intimately related to the public interest” as to require performance by government employees.<sup>26</sup> The FAR also contains a list of activities that “approach” being classified as “inherently governmental functions.”<sup>27</sup> As a recent proposed policy letter from the Office of Federal Procurement Policy recognizes, contractors performing activities that are similar to “inherently governmental functions” should be subject to close scrutiny, given that the work that they perform is near the heart of the traditional role of the federal government.<sup>28</sup> Several of the functions listed as “approach[ing] . . . inherently governmental functions” involve activities wherein the contractor either advises in agency policymaking or participates in procurement functions, which raise particular risks of employee personal conflicts of interest. Other activities identified as raising particular risks of employee personal conflicts of interest include “advisory and assistance services” and “management and operating” functions.<sup>29</sup>

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<sup>26</sup> 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).

<sup>27</sup> 48 C.F.R. § 7.503(d).

<sup>28</sup> Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. at 16,193–94.

<sup>29</sup> REPORT OF THE ACQUISITION ADVISORY PANEL, *supra* note 18, at 411.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

The FAR contains provisions identifying activities that “approach” being “inherently governmental functions,”<sup>30</sup> feature “advisory and assistance services,”<sup>31</sup> or involve “management and operating” functions.<sup>32</sup> Many of these activities, such as those in which a contractor employee performs tasks that can influence government action, including the expenditure of agency funds, may pose a significant risk of personal conflicts of interest. Several contracting tasks, by their nature, elevate the risk of such conflicts. Those include substantive (as compared to administrative or process-oriented) contract work (hereinafter referred to as “PCI-Risk” contracts<sup>33</sup>) such as:

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

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<sup>30</sup> 48 C.F.R. § 7.503(d).

<sup>31</sup> *Id.* § 2.101.

<sup>32</sup> *Id.* § 17.601.

<sup>33</sup> 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.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- Supporting substantive acquisition planning<sup>34</sup> or research and development activities
- Evaluating another contractor's performance or contract proposal
- Assisting in the development of a statement of work or in contract management
- Participating as a technical advisor to a source selection board or as a member of a source evaluation board (*i.e.*, boards designed to select or evaluate bids or proposals for procurement contracts)

*Information-Risk Contracts:* Existing regulations also do not comprehensively protect against contractor employees' disclosure or misuse of non-public governmental, business, or personal information learned while performing government contracts.<sup>35</sup> As with personal conflicts of interest, specific activities pose a grave risk of contractor disclosure or misuse of non-public information, which include (hereinafter referred to as "Information-Risk" contracts<sup>36</sup>):

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<sup>34</sup> 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.

<sup>35</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 25, 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").

<sup>36</sup> 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 25, at



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 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 gain<sup>37</sup>
- 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 records<sup>38</sup>

### RECOMMENDATION

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.**<sup>39</sup> Current law does not adequately regulate

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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.

<sup>37</sup> 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.

<sup>38</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 24, at 6.

<sup>39</sup> 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.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

2. **The model FAR provisions or clauses should apply to PCI-Risk and Information-Risk Contracts.**<sup>40</sup> The proposed FAR provisions or clauses would apply only to PCI-Risk and Information-Risk contracts (or solicitations for such contracts). At the same time, contracting agencies should remain free to incorporate contract language (or to promulgate agency-specific supplemental regulations) dealing with other ethical risks they deem important whether or not the contract at issue qualifies as a PCI-Risk or Information-Risk contract. Thus, the model FAR provisions or clauses adopted in response to this recommendation would serve as a floor upon which agencies could build if they deemed it appropriate, but would not supplant existing programs that now provide or may in the future provide more demanding or expansive ethical protections.

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<sup>40</sup> 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. See the Preamble for the definition of "PCI-Risk" and "Information-Risk" contracts.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

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

The proposed FAR provisions or clauses should require the contractor to certify<sup>41</sup> that none of its employees who is in a position to influence government actions<sup>42</sup> has a conflict of interest or that conflicted employees will be screened from performing work under any contract. Once a contractor is selected, the contract itself should include a clause requiring the contractor to train employees on recognizing conflicts, to implement a system for employees

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<sup>41</sup> 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.

<sup>42</sup> 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.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

who can influence government action to report conflicts to the contractor, to screen any conflicted employees from contract performance, to report to the agency periodically on its efforts to protect against employee conflicts, and to disclose to the agency any instances of employee misconduct (as well as disciplinary action taken against any offending employee). A contractor's failure to implement an adequate system for employee conflict certification, to disclose or correct instances of employee misconduct, or to take appropriate disciplinary measures against employees who commit misconduct may be grounds for contract termination. In addition, a contractor that repeatedly proves incapable or unwilling to honor such contractual obligations may be subject to suspension or debarment in appropriate circumstances.

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

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

6. **Agencies not covered by the FAR also should consider using or modifying the model FAR provisions or clauses when negotiating contracts for activities falling in either of the “high risk” categories.** Agencies and government instrumentalities not covered by the FAR should nevertheless familiarize themselves with the FAR language promulgated in response to this recommendation. To the extent that they plan to enter into contracts for activities listed in the PCI-Risk or Information-Risk categories, they should consider employing or, if necessary, modifying these solicitation provisions and/or contract clauses.