Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions: What Lessons Can Be Learned From This First Effort to Address Government Contractors Employees’ Personal Conflicts of Interest

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Abstract

Personal conflicts of interest among contractor employees are an increasingly visible and controversial area of U.S. Government contracting, given the U.S. Government’s expanded reliance on contractor personnel. On November 2, 2011, the FAR Council issued a final rule on preventing personal conflicts of interest for contractor employees performing acquisition functions and issued a request for information regarding whether other privately contracted services in addition to acquisition support present sufficient risk to the integrity of the U.S. Government procurement process to warrant additional regulation.

This paper will review the defects in the new rule; will evaluate what lessons can be learned from the new rule to enhance future rules governing the personal conflicts of interest of U.S. Government contractors’ employees; and recommend better integration of U.S. Government compliance regulations to include conflicts of interest rules, protection of proprietary information, and the mandatory disclosure rule to reduce contractor compliance cost and promote implementation efficiencies through integration.
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Introduction

Early in the morning of September 15, 2011, a dozen federal and local law enforcement vehicles descended upon 20 Sanford Ferry Court, in the quiet Celebrate Virginia neighborhood in Stafford County, Virginia.¹ According to real estate records, the home was purchased by Kathleen Doris McGrade in December of 2009 for $676,165.² Coincidently or not, her purchase came just months after Sterling Royale Group, LLC (“Sterling Royale Group”) began receiving contracts from the U.S. Department of State.³

In May 2009, Sterling Royale Group, a woman-owned HUBzone business, reportedly began receiving what eventually totaled forty-three contracts worth $52,095,333 from the Department of State’s Overseas Building Operations, for embassy construction work abroad.⁴ To date there is no public record that Sterling Royale Group failed to perform on these contracts; however, a journalist, Matthew Boyle, discovered a notable family connection.⁵ The Chief Executive Officer of Sterling Royale Group,

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⁴ Id; See USAspending.gov, http://USAspending.gov (last visited Oct. 6, 2012) (the Department of State terminated and de-obligated funds on contracts awarded to Sterling Royale Group; the result, total value of funding on contracts awarded to Sterling Royale Group was $42,293,101).
⁵ Matthew Boyle, State Department Contract Officer Steers $52 Million to Secret Husband, Daughter, supra note 3.
Jennifer Herring, is the daughter of Kathleen D. McGrade, the owner of the raided home. The company’s Vice President, Brian Collinsworth is her husband.

Kathleen D. McGrade was a management analyst for ATSG, LLC (“ATSG”) working on-site at the Department of State. ATSG is a service disabled veteran-owned contractor headquartered in Arlington, VA that provides, among other services, acquisition support to the U.S. Department of State. McGrade allegedly steered State Department contracts to Sterling Royale Group. When questioned by the journalist Matthew Boyle, Collinsworth denied any relationship with McGrade other than to state that she was the contracting officer on Sterling Royale’s contracts.

Once the family connection was uncovered, McGrade was terminated by the Department of State and the matter was referred to the Department of State’s Office of Inspector General. On August 19, 2011, the Sterling Royale Group, McGrade, Collinsworth, and Herring were all placed on the United States Government’s Excluded

6 Id.
7 Id.
8 Id.
11 Matthew Boyle, State Department Contract Officer Steers $52 Million to Secret Husband, Daughter, supra note 3 (The Daily Caller claims to have uncovered the marriage through wedding photographs on Collinsworth’s MySpace profile which suggested the two were married in 2007, although McGrade does not appear to have taken Collinsworth’s surname).
Parties List System. Given Ms. McGrade’s employment by a contractor, she was exempt from financial and family disclosures that an individual employed by the U.S. Government would normally be subject to in a similar situation; that is, until the new rule.14

On December 2, 2011 a new rule, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, became effective.15 The question is, if this new rule had been in effect earlier, would a contractor employee providing acquisition support have been able to funnel $53 million to family member’s firm as has been alleged of Ms. McGrade and the Sterling Royale Group?

Background

On November 2, 2011, the Federal Acquisition Regulation Council (the “FAR Council”) issued a final rule, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions (the “PCI Rule”).16 The PCI Rule was

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14 5 C.F.R. § 2638.102(4); See U.S. Office of Government Ethics Form 450, Confidential Financial Disclosure Report, and SF 278, Public Financial Disclosure Report; See generally 18 U.S.C. § 208 (a criminal conflict of interest statute that prohibits a U.S. Government employee from participating personally and substantially in a matter that would affect the employee’s own, employee’s spouse or minor child’s financial interests).
issued in response to Section 841 of the Duncan Hunter National Defense Authorization Act ("NDAA") for fiscal year 2009, which called for “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.”17

The congressional directive set out in the NDAA stemmed from the January 2007 report of the Acquisition Advisory Panel ("AAP"), a blue ribbon panel, to the Office of Federal Procurement Policy and the United States Congress.18 The AAP recommended that the FAR Council review existing regulations regarding organizational conflicts of interest, personal conflicts of interest and protection of nonpublic information.19 AAP noted the lack of standardization among agencies regarding conflicts of interest rules and guidance, and concluded that the FAR Council was best positioned to establish uniform government-wide conflicts of interest policies and clauses.20

Re-enforcing the AAP’s position, in 2008, the U.S. Government Accountability Office ("GAO") published its report on conflicts of interest laws and policies, Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees.21 After GAO’s review of the U.S. Department of Defense ("DOD") conflicts of interest laws and policies, including interviews of U.S. Government ethics officials and senior leadership,

18 REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS (Jan. 2007).
19 Id. at 422.
20 Id.
GAO advised the DOD to employ safeguards to prevent personal conflicts of interest for contractor employees who are providing services affecting government decisions, similar to those safeguards required for DOD federal employees.\textsuperscript{22}

Confirming AAP and GAO’s recommendations for additional conflicts of interest rules, the FAR Council issued the PCI Rule under review here, effective December 2, 2011.\textsuperscript{23} The PCI Rule applies only to service contracts providing “acquisition functions closely associated with inherently governmental functions.”\textsuperscript{24}

The applicable acquisition functions closely associated with inherently governmental functions defined in the PCI Rule are: planning acquisitions; determining what supplies and/or services are required; developing contractual documents which may include requirements, incentive plans, and/or evaluation criteria; evaluating responses; awarding contracts; administering contracts, terminating contracts; and cost allowability analyses.\textsuperscript{25}

The PCI Rule amends the FAR Subpart 3.11 and adds a new clause at FAR 52.203-16.\textsuperscript{26} Contracts, as well as task and delivery orders issued on or after December 2, 2011 exceeding the simplified acquisition threshold are subject to the PCI Rule.\textsuperscript{27} Further, the clause at FAR 52.203-16 must be included by prime contractors in subcontracts exceeding $150,000 where subcontractor employees are performing covered functions.

\begin{footnotesize}
\begin{enumerate}
\item\textit{Id.} \textsuperscript{22}
\item Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68,017. \textsuperscript{23}
\item\textit{Id.} \textsuperscript{24}
\item FAR 3.1101(1)-(8) (2011). \textsuperscript{25}
\item Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. at 68025. \textsuperscript{26}
\item FAR 3.1106(a)(1). \textsuperscript{27}
\end{enumerate}
\end{footnotesize}
services.\textsuperscript{28} However, contracts for the acquisition of commercial items are exempt from the PCI Rule.\textsuperscript{29}

Under the PCI Rule personal conflicts of interest are defined to include “financial interest, personal activity, or a relationship that could impair the contractor employee’s ability to act impartially and in the best interest of the Government.”\textsuperscript{30} The PCI Rule targets a contractor’s employee who performs an acquisition function closely associated with an inherently governmental function (the “covered employee”), and also reaches that employee’s close family members and other members of the covered employee’s household.\textsuperscript{31} Examples of financial interests that may trigger the PCI Rule include: other employment (including seeking employment); gifts, including travel; compensation including referral fees; research funding; investments in stocks, bonds, real estate and partnerships; intellectual property interests and business interests.\textsuperscript{32}

Federal contractors with service contracts for acquisition functions subject to the PCI Rule must supplement their current compliance programs by implementing procedures to screen their employees for potential personal conflicts of interest.\textsuperscript{33} Screening procedures include mandating that covered employees submit disclosure statements that reveal any personal interests that may be affected by their assigned task.\textsuperscript{34} Disclosure statements must be updated when the contractor “employee’s personal or

\textsuperscript{28} FAR 52.203-16(d) (2011).
\textsuperscript{29} FAR 12.503(a)(9) (2011).
\textsuperscript{30} FAR 52.203-16(a).
\textsuperscript{31} FAR 52.203-16(a).
\textsuperscript{32} Id.
\textsuperscript{33} FAR 52.203-16(b)(1).
\textsuperscript{34} FAR 52.203-16(b)(1)(ii).
financial circumstances change in such a way that a new personal conflict of interest might occur because of the task the covered employee is performing.\textsuperscript{35}

In addition, covered employees must execute non-disclosure agreements prohibiting disclosure of non-public information accessed through their assigned task.\textsuperscript{36} Contractors must prevent personal conflicts of interest in acquisition services contracts by prohibiting employees who have an identified personal conflict of interest from working on contracts where an identified conflict exists.\textsuperscript{37} Contractors must prohibit employees from using, for personal gain, non-public information accessed through performance on an acquisition services contract.\textsuperscript{38} To achieve compliance, contractors must have covered employees execute non-disclosure agreements to protect non-public information.\textsuperscript{39}

Federal contractors have a duty to inform covered employees of their obligations under the PCI Rule.\textsuperscript{40} Each contractor must maintain effective oversight to ensure its personal conflicts of interest safeguards are effective.\textsuperscript{41} Contractors must discipline any employee who is found to be in violation of the PCI Rule and must report any such identified violation to the cognizant contracting officer.\textsuperscript{42}

\textsuperscript{35} Id.
\textsuperscript{36} FAR 52.203-16(b)(2).
\textsuperscript{37} FAR 52.203-16(b)(2)(i).
\textsuperscript{38} FAR 52.203-16(b)(2)(ii).
\textsuperscript{39} FAR 52.203-16(b)(2)(iii).
\textsuperscript{40} FAR 52.203-16(b)(3).
\textsuperscript{41} FAR 52.203-16(b)(4).
\textsuperscript{42} FAR 52.203-16(b)(5) – (b)(6).
I. **Defects in the PCI Rule**

As the AAP and GAO advised, the U.S. Government’s increased reliance on contractors warrants personal conflicts of interest regulations for contractor employees; however, the new PCI Rule in its current form is defective, limited in scope and riddled with ambiguities. The shortcomings of the new PCI Rule as addressed herein, should be considered in any future contractor employees’ personal conflicts of interest rules.

The PCI Rule falls short in integrating seamlessly with current federal compliance rules. Although it is necessary to protect the U.S. Government from contractor employees’ personal conflicts of interest, the addition of the PCI Rule simply adds to the plethora of federal compliance rules and so further compounds each contractor’s cost of doing business with the U. S. Government.

To that end, the U.S. Government could minimize the PCI Rule’s impact on its contractors without defeating the objective of a sound procurement system, by drafting personal conflict of interest rules congruent with current compliance rules. The PCI Rule should better integrate into current federal compliance rules including: i) existing U.S. Government agencies’ personal conflict of interest rules and guidance; ii) current and prospective organizational conflicts of interest rules; and, iii) the FAR mandatory disclosure rule.
A. Necessitates Follow-On Rule(s)

1. Request for Information

Given the issuance of the final PCI Rule, the question remains whether additional rules are needed, to regulate employees beyond those performing acquisition functions closely associated with inherently governmental functions.43 Simultaneous to the publication of the PCI Rule on November 2, 2011, the FAR Council and the Office of Government Ethics issued a Request For Information (“RFI”) for Review of Regulatory Coverage Regarding Prevention of Personal Conflicts of Interest for Contractor Employees.44 The RFI asked whether other types of contracting in addition to acquisition functions addressed in the PCI Rule, raise increased risk of personal conflicts of interest, and if so whether the PCI Rule should be expanded beyond acquisition functions closely associated with inherently governmental functions.45

The Professional Services Council (the “PSC”), the leading advocate for U.S. Government service contractors, was the only respondent to this RFI; however, the

43 S.3254, 112th Cong. § 845 (2011-2012) (on 6/4/2012 The National Defense Authorization Act for Fiscal Year 2013 was placed on the Senate Legislative Calendar under General Orders Calendar No. 419) (in § 845 Assessment of Extension of Limitations to Certain Additional Functions and Contracts- the Secretary of Defense shall review the current guidance on personal conflicts of interest for contractor employees to determine whether it would be in the best interest of the DoD to extend the PCI Rule to: (1) Functions other than acquisition functions that are closely associated with inherently governmental functions; (2) Personal services contracts; and (3) Contracts for staff augmentation services).


45 Id.
absence of responses is not indicative of an apathetic industry.\textsuperscript{46} Rather in 2008, eighteen responses were received in two comment periods in response to FAR Case 2007-017, \textit{Service Contractor Employee Personal Conflicts of Interest Advance Notice of Proposed Rulemaking}.\textsuperscript{47} In 2009 and 2010, an additional nineteen responses were received in response to FAR Case 2008-025, \textit{Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions}.\textsuperscript{48} These cumulative responses present a comprehensive picture of associated industry perspective on U.S. Government contractor employees’ personal conflicts of interest rules.

2. The Administrative Conference of the United States

The Administrative Conference of the United States (the “ACUS”) is an independent federal agency chartered to improve the administrative procedures of federal agencies.\textsuperscript{49} Due to the U.S. Government’s increased reliance on contractors to perform functions previously provided by federal employees, the ACUS is a leading proponent for regulating U.S. Government contractor employees’ personal conflicts of interest.\textsuperscript{50}

At its Plenary Session on June 16 – 17, 2011, the ACUS formally adopted Recommendation 2011-3, \textit{Compliance Standards for Government Contractor Employees}

\textsuperscript{49} THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, http://www.acus.gov/about/ (select “About”).
Specifically, ACUS recommended that:

1) The FAR Council should promulgate model language for use in contracts posing a high risk of either personal conflicts of interest or misuses of certain non-public information;

2) The FAR Council should model FAR provisions or clauses should apply to PCI-risk and Information Risk Contracts.

3) Agencies should have the discretion whether to use or modify the model FAR provisions or clauses.

4) The FAR Council should include in the FAR model provisions or clauses for use in PCI-Risk procurements.

5) The FAR should include in the FAR a model provision or clauses for use in Information-Risk procurements.

6) Agencies not covered by the FAR also should consider using or modifying the model FAR provision or clauses when negotiating contracts for activities falling in either of the ‘high risk” categories.52

In the second recommendation, the ACUS advocated for regulating all activities where a contractor’s employee is performing a task that can influence a government action, “PCI-Risk” contracts.53 The ACUS characterized PCI-Risk contracts as contracts where contractors provide acquisition functions closely associated with inherently

52 THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, supra note 49, at 12-16.
53 Id. at 9.
governmental functions and adds other areas vulnerable to increased risk for personal conflicts of interest such as: developing agency policies and rules, advising on improving the effectiveness of federal management processes and procedures, providing dispute resolution services on contractual matters, and other legal advice involving interpretation of statutes or rules.  

These tasks, which the ACUS deems high risk, are also identified in FAR Subpart 7.5 Inherently Governmental Functions as functions “approaching” inherently governmental functions. Thus, an obvious expansion of the PCI Rule would be to broaden the scope of the rule to include functions that approach inherently governmental functions as set out in FAR 7.503 Policy.  

In fact, Robert A. Burton, a former Deputy Administrator of the Office of Federal Procurement Policy, believes that expansion is inevitable; claiming that the PCI Rule governing acquisition functions is a pilot. He believes additional contractor employees’ personal conflicts of interest rules will be forthcoming.  

54 Id. at 10-11.
55 FAR § 7.503(d).
57 Id.
3. Industry Perspective

a. The Project on Government Oversight

The Project on Government Oversight (“POGO”) is a nonpartisan independent watchdog that advocates for U.S. Government reforms by investigating corruption, misconduct, and conflicts of interest in the federal government.\(^{58}\)

POGO believed that the original intent of Congress, as set out in the NDAA, was to prevent U.S. Government contractor employees from working on DOD matters where a contractor’s employee has a financial interest.\(^{59}\) POGO stated that in publication of the final PCI Rule, the original intent had “effectively been watered down.”\(^{60}\) In response to the NDAA directive to prevent contractor employees’ personal conflicts of interest, POGO looked beyond regulating contractor employees’ personal conflicts of interest and considered the root issue, the contractor employees’ performance of inherently governmental functions.\(^{61}\) POGO’s solution was to audit federal agencies to confirm that contractor employees are not performing inherently governmental functions.\(^{62}\) POGO recommended that acquisition functions simply not be performed by contractor personnel.\(^{63}\)

\(^{58}\) PROJECT ON GOVERNMENT OVERSIGHT, http://www.pogo.org/about/ (select “About”).


\(^{60}\) Id. at 2.

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Id.
b. **The Coalition for Government Procurement**

At the other end of the spectrum, against any additional rules for monitoring contractor employees’ personal conflicts of interest, is The Coalition for Government Procurement (the “Coalition”), a national trade association which represents commercial contractors in the federal market by advocating for improved government acquisition policies.\(^64\) The Coalition took the position that imposing “prevention, oversight and reporting requirements at the employee level causes a duplication of contractor efforts.” \(^65\) The Coalition asserted that contractors could more efficiently and at less cost embed employees’ personal conflicts of interest screenings into existing compliance programs.\(^66\)

The ABA Public Contract Law Section, in reference to the PCI Rule and potential new organizational conflicts of interest rules, supported the Coalition’s argument when it stated that pending FAR and DOD rules already encompass the scope of the six ACUS recommendations adopted in Recommendation 2011-3.\(^67\)


\(^{66}\) Id.

\(^{67}\) Letter from Donald G. Featherstun, Chair, Section of Public Contract Law to Reeve Bull, Administrative Conference of the United States Attorney Advisor (Jun 10, 2011) (on file with the author).
c. **The Professional Services Council**

The Professional Services Council (“PSC”) also took aim at the six ACUS recommendations. PSC labeled the ACUS recommendations flawed and argued against their use as a roadmap for future personal conflicts of interest rules.68

PSC asserted that the PCI Rule is untested, ambiguous and premature for expansion.69 PSC commented that the ambiguities in the PCI Rule, including the lack of definition of key terms, warranted delaying the rule’s expansion.70 PSC noted that over time the common practices developed by contractors and agencies in implementation and execution of the PCI Rule can be embedded in its expansion.71

4. **Recommendation for Follow-On Rule(s)**

Follow-on rules for U.S. Government contractor employees’ personal conflicts of interest will be essential to clarify the current ambiguities in the PCI Rule. It is hoped that the FAR Council will, as PSC has suggested, codify in any follow-on rule common practices established by industry’s implementation of the PCI Rule to facilitate uniformity in the rule’s application.

The success of the PCI Rule will impact whether personal conflicts of interest rules for contractor employees are expanded beyond acquisition functions. Certainly PCI-Risk contracts, as identified by the ACUS, such as developing agency policies and rules

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69 Id. at 6.
70 Id. at 2.
71 Id.
or providing dispute resolution services on contractual matters, are additional tasks where the contractor’s employee can influence a government action warranting monitoring the respective contractor employee’s personal conflicts of interests.\textsuperscript{72}

B. Commercial Item Exemption

Procuring an acquisition function closely associated with an inherently governmental function as a commercial item does not erase the risk that a personal conflict of interest will arise; yet, the PCI Rule exempts services for acquisition functions awarded on a commercial item basis.\textsuperscript{73}

A prominent example of acquisition functions purchased on a commercial basis is the General Services Administration’s (GSA) Mission Oriented Business Integrated Services (MOBIS) Schedule 874, which offers acquisition management support services.\textsuperscript{74} Services for acquisition functions purchased under the GSA MOBIS schedule such as market research, recommending procurement strategies, developing statements of work and supporting proposal evaluations are exempt from the PCI Rule.\textsuperscript{75}

In cases where the contractor’s acquisition services were purchased on a commercial basis and a personal conflict of interest arises, the service provider could be lulled into a false sense of security given this commercial item exemption. Although the purchase would be exempt under the PCI Rule, the contractor would remain subject to

\textsuperscript{72}THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, \textit{supra} note 49 at 10-11.
\textsuperscript{73}FAR 12.503 (a)(9).
\textsuperscript{74}The General Services Administration, http://www.gsa.gov/portal/content/104551.
\textsuperscript{75}Keith R. Szeliga and Franklin C. Turner, \textit{Preventing Personal Conflicts of Interest Among Contractor Employees Performing Acquisition Support Services}, Briefing Papers No. 12-4 at 4 (March 2012).
FAR Part 9.406 – Causes for Debarment.\textsuperscript{76} Under Causes for Debarment, the debarring official may debar a contractor based on any cause so serious or compelling in nature that it affects the present responsibility of the contractor.\textsuperscript{77}

1. **Recommendation on the Commercial Item Exemption**

   In 2011, the FAR Council issued a proposed rule for organizational conflicts of interest.\textsuperscript{78} No commercial item exemption like the exemption under the PCI Rule exists in current or proposed FAR organizational conflicts of interest rules.

   Acquisition functions are vulnerable to unmitigated organizational and personal conflicts of interest. Given such a high risk area, it remains unclear why the FAR Council chose to monitor organizational conflicts of interest in commercial acquisitions and exempt commercial acquisition support contracts from the scope of the PCI Rule. For the U.S. Government’s procurement system to reap the benefit of regulating contractor employees’ personal conflicts of interest, the PCI Rule should be revised to include acquisition functions closely associated with inherently governmental functions purchased on a commercial basis.

C. **Integrating the PCI Rule with Existing Personal Conflicts of Interest Rules**

   Civilian and defense agencies have long recognized the problem of contractor employees’ personal conflicts of interest.\textsuperscript{79} As a result, pre-existing personal conflicts of

\textsuperscript{76} FAR 9.406-2(b)(1)(vi).
\textsuperscript{77} FAR 9.406-2 (c).
interest policies and procedures utilized in some federal agencies and the armed services vary significantly.\textsuperscript{80} Agencies’ practices to prevent contractor employees’ personal conflicts of interest generally include some combination of contract clauses, non-disclosure agreements, self-certification, and contractor liability.\textsuperscript{81}

1. The Department of Defense

Armed services commands with personal conflicts of interest guidance for their contractors’ employees include the Air Force Electronic Systems Center and the Army Communications Electronics Lifecycle Management Command.\textsuperscript{82} Cited in the March 2008 Government Accountability Office (GAO) report, \textit{Defense Contracting Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees}, the Air Force Electronic Systems Center has included a financial conflicts of interest clause for contractors’ employees in their advisory and assistance contracts since the late 1990s.\textsuperscript{83}

a. Air Force Electronic Systems Center

The Air Force Electronic Systems Center’s contract clause looks solely to the contractor employee’s financial interests.\textsuperscript{84} The clause prohibits assigning the contractor’s employee to an Air Force advisory or assistance contract where the

\textsuperscript{79} GAO-08-169, \textit{supra} note 21, at 13 (nineteen DoD offices were reviewed by GAO and found to have established procedures to prevent personal conflicts of interest by contractors’ employees involved in the source selection process).
\textsuperscript{81} GAO-08-169, \textit{supra} note 21, at 13-18, 45-50.
\textsuperscript{82} \textit{Id.} at 15,16.
\textsuperscript{83} \textit{Id.} at 17.
\textsuperscript{84} \textit{Id.}
employee, his spouse, a minor child, or a household member has a conflicting financial interest. \footnote{Id.} (See Figure 1: Air Force Electronic Systems Center’s Financial Conflict of Interest Clause).
Except as provided for under subparagraph (d) hereof, the prime contractor shall not assign, nor allow any employee for whom it receives payment under this contract to perform any task under this contract concerning any program, prime contractor, contract, or other matter in which that employee, or that employee's spouse, minor child or household member has a financial interest. For each employee who performs a task in violation of this prohibition, the price of the contract line item number (CLIN) under which the prime contractor receives payment for that performance shall be reduced by the product of the hourly rate prescribed for that employee in the schedule (including wages, indirect costs, general and administrative expenses and profit), multiplied by the number of hours in which that employee was performing the task in violation of this prohibition, and the prime contractor shall forfeit any right to receive said payment. Direct and indirect costs allocable to the expended hours for which payment has been forfeited shall be accounted for as unallowable costs and shall not be charged to this or any other Government contract.

A financial interest consists of any interest in, or affiliation with, a prime contractor, a subcontractor to a prime contractor, any offerors, or any prospective subcontractor to any offeror for the program, contract, or other matter for which the employee is performing the support task under this contract. A financial interest does not consist of an interest in or affiliation with, the prime contractor that is the party to this contract. The financial interest can take the form of any ownership interest (e.g. stock; ownership of bonds; a loan or other financial arrangement that is other than an arm's length transaction; employment, or an arrangement concerning prospective employment, including negotiations therefore, or, any non-arm's length loan, any gift from, or any other non-arm's length financial arrangement or interest with, any person who is directly communicating with the Government on behalf of any prime contractor, subcontractor holder thereto, or any prospective subcontractor or offeror as described above).

The prime contractor shall obtain and maintain, as part of its personnel records, a financial disclosure statement from each employee assigned to perform support tasks for the Government under any order resulting from this program. The financial disclosure statement shall: (1) list any financial interests described in subparagraph (b) hereof, (2) be obtained not later than each employee's initial assignment to a support task under this program, (3) be updated at least annually, and (4) be reviewed by the prime contractor with each employee on an annual basis during the term of the orders under this program.

Whenever the prime contractor wishes to assign an employee to perform a task on an order under this program concerning any program, contract, prime contractor, or other matter in which the employee has a financial interest as defined under subparagraph (b) hereof, the prime contractor shall, before making the assignment, obtain a written waiver from the primary contracting officer (PCO), by submitting to the PCO a written request for waiver including all relevant supporting information. The PCO shall have the sole discretion to grant or deny the waiver in whole or in part. The PCO's determination shall be discretionary, final and conclusive and not subject to appeal under the Disputes clause or the Contract Disputes Act of 1978.

The prime contractor shall, upon written request by the PCO, and at no increase in contract price, make such financial disclosure statement available to the Government for inspection and review.
Similar to the PCI Rule, this Air Force contract clause requires a financial disclosure be submitted to the contractor when the contractor employee is assigned to a task on an Air Force advisory or assistance contract. Distinct from the PCI Rule, this contract clause requires an annual update to the employee’s financial disclosure and permits the U.S. Government access to the contractor employee’s financial disclosure submission. Here, the responsibility lies with the contractor to review its employees’ financial disclosures and prohibit an employee with an identified personal conflict of interest from performing on an Air Force Electronic Systems Center’s contract.

b. Army Communications Electronics Lifecycle Management Command

The Army Communications Electronics Lifecycle Management Command’s management of contractor employee’s personal conflicts of interests also focuses on the contractor employee’s financial interest. The Command’s contract clause is incorporated in contracts for support services such as budgeting, and for advisory and assistance support. Here, the organizational conflicts of interest contract clause addresses contractor employees’ personal financial conflicts of interest and provides that the contracting officer has the discretion to require that the contractor’s employee execute a financial interest agreement, “Contractor-Employee Personal Financial Interest/Protection of Sensitive Information Agreement.”

86 Id. at 48.
87 Id. at 49.
88 Id. at 17.
89 Id. at 51.
90 See Appendix 1: U.S. Army Contractor Employee Personal Financial Interest/Protection of Sensitive Information Agreement
Unlike the Air Force Electronic System Center’s contractor employee’s financial disclosure, here the contractor employee has the burden to analyze his own financial interests to include those of his spouse and any minor children.\textsuperscript{91} This contractor employee must be trained in order to be able to self-assess any financial conflict of interest.\textsuperscript{92} The Army requires the contractor employee to certify by execution of this Contractor-Employee Personal Financial Interest/Protection of Sensitive Information Agreement, that no known conflicts of interest exist and he must agree to a continuing obligation to notify the contractor in the event of a conflicting financial interest.\textsuperscript{93}

2. U.S. Civilian Agencies

U.S civilian agencies with relevant personal conflicts of interest policies and practices for their contractor employees include the Department of Energy, the Environmental Protection Agency, the Federal Deposit Insurance Corporation, the Department of the Treasury, the Department of Health and Human Services Centers for Medicare and Medicaid Services and the National Institute of Health.\textsuperscript{94}

a. The Department of Energy

The Department of Energy ("DOE") updated its acquisition rules in December 2000 to include monitoring its contractor employees’ financial interests on management

\textsuperscript{91} \textit{Id.} at 17.
\textsuperscript{92} \textit{Id.} at 52.
\textsuperscript{93} \textit{Id.} at 17.
and operating contracts.\textsuperscript{95} Contractor employees on DOE management and operating contracts are not permitted to make or influence decisions which directly or indirectly affect the interest of the U.S. Government, when the employee has an employment relationship or a financial interest which is incompatible with the interest of the Government.\textsuperscript{96} The responsibility lies with the contractor employee to disclose to his employer any incompatibilities between his private interest and the Government’s interest.\textsuperscript{97}

\textbf{b. The Environmental Protection Agency}

Contractors serving the Environmental Protection Agency (EPA) have had an obligation to disclose personal conflicts of interest of their employees since 1994.\textsuperscript{98} Under EPA’s contract clause, Notification of Conflicts of Interest Regarding Personnel, the contractor agrees to notify the EPA’s project officer and contracting officer of actual and potential personal conflicts of interest.\textsuperscript{99} Here “a personal conflict of interest is defined as a 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.”\textsuperscript{100} The broad scope of this clause which includes monitoring subcontractors and consultants shifts the risk to the contractor for the personal conflicts of not only its employees but its consultants and subcontractors as well.

\textsuperscript{95} 48 C.F.R. § 970.0371.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} 48 C.F.R. § 1552.209-73 (May 1994).
\textsuperscript{99} 48 C.F.R. § 1552.209-73(b).
\textsuperscript{100} Id.
c. Department of Health and Human Services

The Centers for Medicare and Medicaid Services (CMS), an agency within the Department of Health and Human Services, provides health coverage for one hundred million people.\(^{101}\) In 2006, CMS began its Medicaid integrity audit program to combat Medicaid provider fraud, waste, and abuse.\(^{102}\) Under this program, CMS retains contractors to review Medicare provider activities, audit claims, identify overpayments and educate providers on integrity issues.\(^{103}\)

In addition to following FAR guidance on organizational conflicts of interest, post contract award CMS regulates Medicaid integrity audit program contractors and their employees’ personal conflicts of interest.\(^{104}\) Effective since October 2008, the CMS rule considers a post-award conflict of interest when the contractor employee receives, solicits, or arranges to receive any “fee, compensation, gift, payment of expenses, offer of employment, or any other thing of value” from an entity with a tie to the Medicaid integrity audit program contractor either through an audit or simply through contact with the contractor under a Medicaid integrity audit program contract.\(^{105}\)

Under CMS’ Conflicts of Interest clause, a contract may not be renewed, may be modified or may even be terminated in the event of a contractor and, or its employee’s

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\(^{102}\) CMS.gov Centers for Medicare and Medicaid Services, http://www.cms.gov/ (select “Medicare-Medicaid Coordination;” then select “Fraud Prevention;” then select “Medicaid Integrity Program – General Information”).

\(^{103}\) Id.

\(^{104}\) 42 C.F.R. § 455.238.

\(^{105}\) 42 C.F.R. § 455.238(b)(1).
conflict of interest. The CMS clause goes beyond monetary bribes, kickbacks and gratuities by including offers of employment and any other thing of value. Including the phrase “any other thing of value” in the clause acts as catch-all for unforeseeable contractor employees’ personal conflicts. Remedies including potential contract termination hold the contractor responsible for the actions of its employees.

d. Department of Treasury

Effective November 2, 2011, the Department of Treasury’s Troubled Asset Relief Program (“TARP”) implemented contractor employees’ personal conflicts of interest rules to cover contracts with the Department of Treasury for services provided under TARP. The contractor performing services under TARP must monitor its individual employees for personal conflicts of interest. Employees subject to this review are limited to management and key individuals; however, their spouses, minor children, and other close family members’ personal interests are subject to scrutiny, as well. Employees with identified personal conflicts are disqualified from performing work under a TARP contract unless waived by the TARP Chief Compliance Officer.

Under TARP, the contractor employees provide written disclosures to the contractor regarding personal, business and financial relationships that could adversely

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106 42 C.F.R. § 455.238 (c).
107 42 C.F.R. § 455.238(b).
108 See generally, Kathleen Clark, Fiduciary-Based Standards for Bailout Contractors: What the Treasury Got Right and Wrong in Tarp, 95 MINNESOTA L. REV. 1614 (2011) (the Department of Treasury’s implementation of fiduciary-based ethics rules on contractors who influence government decisions was unusual).
109 31 C.F.R. § 31.212.
110 31 C.F.R. § 31.212(b).
111 31 C.F.R. § 31.212(c).
affect their objectivity in contract performance for the Department of Treasury. The TARP contractor must certify, initially and annually, that its employees are free from personal conflicts of interest. The Department of Treasury provides enforcement measures of default termination, debarments, and referrals for criminal prosecution for non-compliance.

Unique to the Department of Treasury is their approach of executing on-site compliance reviews to evaluate the effectiveness of contractors’ internal controls and procedures for monitoring organizational and personal conflicts of interest. These on-site compliance reviews were implemented because of the fact that the contractors self-report on the monitoring of their organizational and personal conflicts of interest.

3. Decentralized Rules Across Agencies

The current ad hoc decentralized approach to regulating contractor employees’ personal conflicts of interest resembles the approach taken by the U.S. Government for federal employees’ personal conflicts of interest prior to 1989 when individual agencies had their own respective ethics rules. In Executive Order No. 12731, President George H.W. Bush required the Office of Government Ethics simplify ethics rules across all agencies by creating uniform “rules that establish a single, comprehensive, and clear set

\[\text{112 31 C.F.R. § 31.212 (b).} \]
\[\text{113 31 C.F.R. § 31.212 (d) and (e).} \]
\[\text{115 Id. at 2.} \]
\[\text{116 Id. at 7.} \]
\[\text{117 CLARK, supra note 93, at 26.} \]
of executive-branch standards of conduct,” then permitting agencies to supplement these rules with additional requirements.  

Unlike the homogeneous result from Executive Order 12731, under which a baseline set of rules were applied uniformly across federal agencies for monitoring federal employees’ financial interests, in implementing the PCI Rule, key components for monitoring contractor employees’ personal conflicts of interest are left to the discretion of individual contractors. This lack of uniformity in the implementation of the PCI Rule fails to promote simplicity and uniformity in ethics rules among federal agencies.

As described above, current agency-specific contractor employees’ personal conflicts of interest rules vary in the types of contracts subject to agency-specific rules and the contractor employees targeted for monitoring by the respective agency. The PCI Rule targets contractor employees performing acquisition functions closely associated with inherently governmental functions. The PCI Rule does not consider these employees’ supervisors. A covered employee’s supervisor, who is not directly providing an acquisition function under a contract, may still act on behalf of his own personal interests by influencing the covered employee and, or gaining non-public information from the covered employee.

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119 CLARK, supra note 93, at 54.
121 Id.
Certain existing agency-specific personal conflicts of interest guidance expands the scope of contractor employees subject to scrutiny.122 For example, the Nuclear Regulatory Commission cast its net broader, to monitor the chief executive, directors and key personnel identified in the subject contract.123 The Federal Deposit Insurance Corporation monitors personal conflicts of interest of “all” subject contract personnel.124

4. **Recommendation on Integrating with Existing PCI Rules**

The PCI Rule, limited in its application to covered employees performing acquisition functions, leaves open the question of whether additional rules for contractor employees’ personal conflicts of interest will be promulgated. For now, federal agencies regulating contractor employees’ personal conflicts of interest beyond acquisition functions will continue to maintain their respective agency-specific policies and procedures.

As a result, contractor employees’ personal conflicts of interest rules remain decentralized and incongruent across federal agencies. Contractors’ compliance programs must remain flexible to accommodate the PCI Rule to include contract-specific financial disclosures, potential additional federal personal conflicts of interest rules, and adherence to agency-specific rules.

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122 CLARK, supra note 93, at 54.
123 Id.
124 Id.
D. Integrating with OCI Rules

1. Organizational Conflicts of Interest (“OCI”)

A recurring complaint regarding the FAR Council’s promulgation of rules is their inability to successfully integrate new rules with existing rules. This issue presents itself in the integration of the PCI Rule with federal organizational conflicts of interest (“OCI”) rules. Federal OCI rules are currently in a state of flux. Proposed FAR OCI rules, published on April 26, 2011, will, if issued as is, change the direction of current OCI policy.

The Department of Defense (DOD) was directed by the U.S. Congress to address organizational conflicts of interest issues in the Weapon Systems Acquisition Reform Act of 2009. The subsequent Defense Federal Acquisition Regulations Supplement (DFARS) OCI rule, established on GAO case precedents, initially proposed organizational conflicts of interest rules for all types of contracts; however, the final rule was limited to major defense acquisition programs (“MDAP”) in anticipation of the new FAR rule. The preamble to the DFARS OCI rule explained that further coordination

125 Telephone Meeting with Professional Services Council, chaired by Alan Chvotkin, Executive Vice President and Counsel (Dec. 13, 2011).
of parallel FAR and DFARS OCI efforts would have delayed the DFARS OCI rule and created confusion.\textsuperscript{129}

\textbf{2. The Proposed FAR OCI Rule}

The proposed FAR OCI rule moves away from GAO case precedent which established unequal access to information, biased ground rules and impaired objectivity as the three bases of OCI.\textsuperscript{130} The proposed FAR OCI rule divides OCI issues into those that risk harm to the integrity of the competitive acquisition process, adversely affecting the U.S. Government, other vendors, and the taxpayer, and those that could present harm to the U.S. Government's business interests, but would not impact the integrity of the competitive acquisition system.\textsuperscript{131}

The FAR Council recognized that there is a disconnect between reviewing organizational conflicts in terms of unequal access to information, biased ground rules and impaired objectivity versus reviewing whether or not the organizational conflict of interest impacts the integrity of the acquisition process.\textsuperscript{132} The FAR Council is specifically looking to public comment on the proposed FAR OCI rule prior to establishing its final approach.\textsuperscript{133}

\begin{footnotesize}
\begin{enumerate}
\item Yukins, supra note 123, at 1.
\item Organizational Conflicts of Interest, 76 Fed. Reg. 23236.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
Team is currently reviewing public comments to the proposed FAR OCI rule for a planned July 18, 2012 report prior to issuance of the final rule.\textsuperscript{134}

Since OCI rules remain incongruent between the FAR and DFARS, it comes as no surprise that a plan for a harmonious integration of the PCI Rule with current and proposed FAR OCI rules has not been established.

\textbf{a. Non-Disclosure Agreements}

An example of the FAR Council’s inability to successfully integrate compliance rules can be seen in the implementation and use of non-disclosure agreements. The PCI Rule utilizes non-disclosure agreements as a tool to govern the contractor personnel’s use of non-public information.\textsuperscript{135} The proposed FAR OCI rule also uses non-disclosure agreements as a means to mitigate unequal access to non-public information.\textsuperscript{136} In each, the objective, to prevent an unintended use of non-public information obtained in the performance of a U.S. Government contract, is the same; yet, the implementation of the overlapping rules is sufficiently distinct as to require separate corporate compliance processes, increasing the burden upon contractors.

The PCI Rule requires that contractors that are awarded service contracts for acquisition functions closely associated with inherently governmental functions have each covered employee execute a non-disclosure agreement to prohibit an employee’s release of non-public information accessed through the employee’s performance on the


\textsuperscript{135} Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68017.

\textsuperscript{136} Organizational Conflicts of Interest, 76 Fed. Reg. 23236.
service contract. No template for the required non-disclosure agreement is provided in the PCI Rule; therefore, each contractor is responsible for drafting its own non-disclosure agreement. These non-disclosure agreements are executed between the contractor and its employee. Contractors are not required to provide the U.S. Government or third-parties, whose information may be the subject of such non-disclosure agreements, notice regarding executed non-disclosure agreements.

The proposed FAR OCI rule requires contractors to protect non-public information obtained during the performance of a contract. One method of protecting non-public information the proposed rule requires is that contractor employees with access to such non-public information sign a non-disclosure agreement. Unlike the PCI Rule, the non-disclosure agreements under the proposed FAR OCI rule give the U.S. Government and third-parties the right to enforce the contractors’ obligations to protect their respective non-public information.

Should the proposed FAR OCI rule become final as is, the non-disclosure agreement under the PCI Rule would not be displaced by the FAR OCI rule and would remain a legal obligation of contractor employees performing acquisition functions closely associated with inherently governmental functions. As stated, the non-disclosure agreements under the PCI Rule do not provide the U.S. Government or third-party non-public information owners any notice with respect to the execution of non-disclosure agreements.

137 FAR 52.203-16(b)(2)(ii).
138 Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. at 68020.
139 Id.
140 Organizational Conflicts of Interest, 76 Fed. Reg. 23236.
141 Organizational Conflicts of Interest, 76 Fed. Reg. at 23254.
142 Id.
agreements intended to protect their respective non-public information. Further the U.S. Government and third-parties have no rights to enforce the terms of these agreements against the contractor or the contractor employees.

Acquisitions functions closely associated with inherently governmental functions have been identified as a high risk area warranting contractor employees’ personal conflicts of interest rules; yet, the non-disclosure agreements used to monitor these contracts have less authority, enforceable only by the contractor against the employee, than non-disclosure agreements which will stem from the proposed FAR OCI rule where the U.S. Government and third-party beneficiaries have rights of enforcement.

3. The Current FAR OCI Rule - Waiver

The current FAR OCI rule permits the agency head or designee to waive the organizational conflict if he determines that the waiver is in the best interest of the Government. The proposed FAR OCI rule, although more restrictive than the current rule, would permit waivers of organizational conflicts to accomplish the agency’s mission in exceptional circumstances. The PCI Rule also provides for waivers in exceptional circumstances.

When an organizational conflict of interest is waived, can the same set of facts give rise to a personal conflict of interest on the part of the contractor employee and vice versa? In the recent False Claim Act case against Science Applications International

143 FAR 9.503.
144 Organizational Conflicts of Interest, 76 Fed. Reg. at 23246.
145 FAR 3.1104.
146 Crowell & Moring LLP (Producer) (Nov. 16, 2011), Understanding and Implementing the New FAR Contractor Personal Conflicts of Interest Provisions [Webinar] available
Corporation ("SAIC"), the Government presented evidence that the company’s vice president simultaneous to his performance on a government contract played an active role in the Association of Radioactive Metal Recyclers ("ARMR") advocating for standards governing release of radioactive material. The result, the vice president’s acts supported an organizational conflict of interest allegation of bias against SAIC. The same facts, the vice president’s dual engagements in advocating for ARMR standards while performing on the government contract, would substantiate a personal conflict of interest, as well.

Responding to FAR Case 2007-17, Alan Chovtkin on behalf of the PSC noted that the two waivers are distinct. Should the contractor procure an organizational conflict of interest waiver, PCI Rule compliance procedures must be maintained to rule out any contractor employees’ personal conflicts of interests. If a personal conflict of interest is identified, an additional waiver request regarding the personal conflict of interest would be required.

While the discretion of the contracting officer, in his authority to waive organizational and personal conflicts of interest, is advantageous, the two rules do not necessarily coordinate and will likely remain legally distinct concepts requiring separate contractor compliance procedures.

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148 Id.

149 Letter from Alan Chvotkin, Professional Services Counsel Executive Vice President and Counsel to Ms. Meredith Murphy, General Services Administration Regulatory Secretariat (July 17, 2008) available at http://www.rules.gov/#!home.
4. Recommendation on Integrating with OCI Rules

The proposed FAR OCI rule, if issued as is, includes a new FAR clause, Access to Nonpublic Information.\textsuperscript{150} The proposed FAR OCI clause is subordinate to other contract clauses regarding protection of nonpublic information.\textsuperscript{151} As a result, in a contract that includes the PCI Rule and the proposed OCI rule, the PCI Rule trumps the proposed OCI rule in regards to protection of nonpublic information.

Although both clauses require the contractor employee to execute a non-disclosure agreement, the proposed OCI rule is substantially more stringent than the PCI Rule. The proposed OCI rule requires that the contractor indemnify and hold harmless the Government for misuse or release of non-public information and provide a copy of executed non-disclosure agreements to the contracting officer.\textsuperscript{152} In addition, the proposed OCI rule provides third-party beneficiaries legal remedies for contractors’ failure to comply with the clause.\textsuperscript{153}

In the event that the proposed FAR OCI rule is finalized as is, the FAR Council should consider its integration with the PCI Rule regarding access to non-public information. At a minimum, given the remedies available in the proposed OCI rule, the FAR Council should consider reversing the contractual restrictions to have the PCI Rule subordinate to the proposed OCI clause. The enforcement provisions in the proposed OCI rule produce a more effective rule for protecting non-public information.

\textsuperscript{150} Organizational Conflicts of Interest, 76 Fed. Reg. 23236.
\textsuperscript{151} Organizational Conflicts of Interest, 76 Fed. Reg. at 23253.
\textsuperscript{152} Organizational Conflicts of Interest, 76 Fed. Reg. at 23252.
\textsuperscript{153} Organizational Conflicts of Interest, 76 Fed. Reg. at 23253.
E. Integrating with Contractor Code of Business Ethics and Conduct

In the PCI Rule, the contractor must report to the contracting officer any employee’s personal conflict of interest violation as soon as it is identified.\textsuperscript{154} This is, in essence, a mandatory disclosure obligation both like and unlike the mandatory disclosure obligation first imposed upon contractors in 2008.

In 2008, in reaction to limited responses in contractors’ voluntary disclosure obligations, the FAR Council issued a rule on Contractor Code of Business Ethics and Conduct, often referred to as the Mandatory Disclosure rule.\textsuperscript{155} Under the FAR clause 52.203-13, Contractor Code of Business Ethics and Conduct, the contractor has a mandatory obligation to report certain criminal violations and civil False Claims Act violations.\textsuperscript{156} As an example, an ethics violation of bribery under FAR 52.203.3 Gratuities would require a mandatory disclosure to the Inspector General and the contracting officer.\textsuperscript{157} Under the PCI Rule, a personal conflict of interest such as a contractor’s employee performing a proposal evaluation function which encompasses assessment of a company in which the employee has a significant financial investment would require mandatory disclosure to the cognizant contracting officer, but not to the Inspector General.\textsuperscript{158}

Comments on the PCI Rule in its interim stage included the suggestion that contractor employees’ personal conflicts of interest violations be reported to the Inspector

\textsuperscript{154} FAR 3.1103.
\textsuperscript{155} FAR 52.203-13.
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} FAR 52.203-3.
\textsuperscript{158} FAR 3.1103.
The FAR Council’s argument against reporting PCI violations to the Inspector General was that personal conflicts of interest violations are a contractual issue for the contracting officer and unless the violation is criminal do not warrant reporting to the Inspector General.\textsuperscript{160} Further, if the violation rises to the level of criminal, reporting to the Inspector General would still be required under the Mandatory Disclosure rule.\textsuperscript{161}

1. **Training**

However, the distinct reporting structures are not the only issue in integrating the PCI Rule with the Contractor Code of Business Ethics. The PCI Rule further requires that contractors support programs in business ethics awareness, compliance and internal controls.\textsuperscript{162} Specifically, a contractor’s business ethics awareness and compliance program must include “effective training programs” and the dissemination of information “appropriate to an individual’s respective roles and responsibilities.”\textsuperscript{163} The training provided must be given to the “contractor’s principals and employees, and as appropriate, the Contractor’s agents and subcontractors.”\textsuperscript{164}

The PCI Rule simply requires contractors to inform covered employees of their obligations and specifically asserts no formal training is required.\textsuperscript{165} Yet, given the contractors’ dependence upon their employees understanding of their obligations,

\textsuperscript{159} Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. at 68021.

\textsuperscript{160} Id.

\textsuperscript{161} Id.

\textsuperscript{162} FAR 52.203-13.

\textsuperscript{163} FAR 52.203-13(c)(1)(i).

\textsuperscript{164} FAR 52.203-13(c)(1)(ii).

\textsuperscript{165} FAR 3.1103.
realistically contractors will need to train in order to obtain accurate results in their employees’ disclosures.

2. Credible Evidence Standard

In the case of the Contractor Code of Business Ethics and Conduct a standard is established by which to assess a violation. The standard is that there must be “credible evidence” of a violation.\textsuperscript{166} In the PCI Rule no such standard is established.

3. Recommendation on Integrating with Code of Business Ethics and Conduct

Because the FAR Council has imposed a more stringent layer of compliance for the contractor to include a written code of business ethics and an internal control system of processes, it would be more efficient in contractors’ implementation of their compliance programs and the U.S. Government’s ability to monitor and enforce all ethics rules, to integrate the requirements of the PCI Rule into the contractor’s Code of Business Ethics and Conduct. At present, the Code of Business Ethics and Conduct and the PCI Rule require two distinct sets of policies and procedures within the contractor’s compliance program in order for the contractor to maintain full compliance with both rules.

F. Defining Terms in the PCI Rule

In the final PCI Rule, the FAR Council’s legislation lacks clarity in defining key terms required to implement the rule.\textsuperscript{167}

\textsuperscript{166} FAR 52.203-13(c)(2)(ii)(F).

\textsuperscript{167}
1. A “De Minimis” Interest

As set out in the PCI Rule a personal conflict of interest is “a 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.” The PCI Rule specifies that a de minimis interest does not result in a violation. A de minimis interest is simply defined as one that would not “impair the employee’s ability to act impartially and in the best interest of the Government.”

This definition of de minimis in the PCI Rule is too subjective to provide tangible guidance to contractors as to what constitutes a de minimis interest. Individual contractors will be left to their own respective interpretations of the phrase. The result will be a non-uniform implementation of the PCI Rule. The lack of a clear definition of de minimis creates an ambiguity subject to future debate, litigation and potential protests.

In addition, the problem with leaving the term de minimis undefined is that the lack of a clear definition establishes an automatic defense for a contractor interpreting and implementing the rule. Should the U.S. Government determine a violation has occurred warranting a contractor’s mandatory disclosure to its respective contracting officer, the contractor can immediately assert that the violation was de minimis. The result, the issue of the covered employee’s personal conflict of interest is deflected to the question of defining a de minimis interest.

168 FAR 3.1101.
169 Id.
170 Id.
a. Recommendation for Defining a “De Minimis” Interest

In Preventing Personal Conflicts of Interest Among Contractor Employees Performing Acquisition Support Services, Keith R. Szeliga and Franklin C. Turner suggested that a definition of de minimis should take into consideration the dollar value of the financial interest and its relative value in comparison to the employee’s total assets, and the value of the subject contract.\textsuperscript{171}

Notably, the term de minimis has been more explicitly defined as it relates to personal conflicts of interest in the rules monitoring federal executive branch employees.\textsuperscript{172} While there is no per se de minimis standard applied to executive branch employees’ financial interests, the Office of Government Ethics (“OGE”) does consider that certain financial interests will be “too remote or too inconsequential to affect the integrity of the employee’s service.”\textsuperscript{173} For example, in assessing executive branch employees’ potentially conflicting financial interests, the OGE has exempted relatively small elements of publicly traded stock. For employees holding publicly traded stock in a party related to a matter the exemption applies up to $15,000.\textsuperscript{174} The threshold is up to $25,000, if the security interest held by the employee is merely affected by and not directly related to the matter.\textsuperscript{175}

The FAR Council should amend the PCI Rule to provide a definition for “de minimis.” In 2011, the U.S. Department of Health and Human Services (“DHHS”)…

\textsuperscript{171} Szeliga & Turner, \textit{supra} note 74, at 5.
\textsuperscript{172} 5 C.F.R. § 2635, 2640.
\textsuperscript{173} 18 U.S.C § 208(b)(2).
\textsuperscript{174} 5 C.F.R. § 2640.202.
\textsuperscript{175} Id.
revised rules for disclosures of their investigators’ significant financial interests. The threshold for de minimis interest for the purpose of the investigators’ financial disclosures is $5,000. The FAR Council should follow the lead of DHHS and define any de minimis interest under the PCI Rule at $5,000. Providing a definitive value for de minimis eliminates subjective interpretations by contractors and ensures uniform implementation of this key component of the PCI Rule.

2. A “Covered Employee”

Under the PCI Rule, a covered employee is defined as an individual who performs an acquisition function closely associated with inherently governmental functions. A covered individual is an employee of a contractor, or may be a subcontractor who is a self-employed individual treated as a covered employee of the contractor because there is no employer to whom such an individual could submit the required disclosure.

A contractor awarded an acquisition services contract must identify employees tasked with acquisition functions closely identified with inherently governmental functions under the contract. One technique to identify these covered employees would be to screen by the direct charge code tied to the acquisition function.

The unanswered question is whether personal conflicts of interest monitoring should extend beyond these “covered employees.” For example, a covered employee’s

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177 Id.
178 FAR 3.1101.
179 Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. at 68018.
supervisor will in his duties of managing the covered employee gain contract knowledge which could potentially include non-public information.\textsuperscript{180} The possibility exists that the supervisor, technically not a covered employee and with no duty to execute a non-disclosure agreement, could act on behalf of his own personal interest on knowledge gained in his supervisory duties. In this case, the supervisor’s personal conflict of interest would fall outside of the PCI Rule.

Consider the contractors’ team of lawyers, compliance personnel and internal auditors who review the disclosures of covered employees. These contractors’ employees, now privy to non-public information, are not subject to the PCI Rule and have no legal obligation thereunder.

\textbf{a. Recommendation for Defining a “Covered Employee”}

The definition of the covered employee should be expanded to include the supervisors of the employees performing acquisition functions. Further, contractors should require any compliance personnel with internal audit responsibilities for contracts with acquisition services execute non-disclosure agreements.

3. A “Close Family Member”

The PCI Rule scrutinizes the financial interest of the covered employee, his close family members and other members of the covered employee’s household.\textsuperscript{181} The FAR Council has failed to define the “close family member.”

The current spouse of a covered employee is indisputably considered a close family member; however, even a covered employee’s child raises ambiguities. Questions arise as to whether the child is subject to the rule only if he is a minor and, or if he still resides in the same household as the covered family member. Further it is unclear whether a step child not living in the same household as the covered employee or part time in the household would be considered subject to the PCI Rule. Additionally, whether a covered employee’s parent and, or grandparent would be considered a close family member is unresolved.

The FAR Council has broadened the reach of the PCI Rule to include members of the covered employee’s household, expanding the rule beyond the scope encompassed in similar federal employees’ governing rules.\textsuperscript{182} In addition to close family members, household members may include roommates, roommates’ partners, and potentially domestic servants. The scope of household members is far-reaching and potentially excessive.\textsuperscript{183}

A legal opinion offered by Kevin C. Dwyer commenting in 2010 prior to issuance of the final rule, suggested that any family member who is legally or physically related to

\begin{footnotesize}
\textsuperscript{181} FAR 3.1103.
\textsuperscript{182} Szeliga & Turner, \textit{supra} note 74, at 6.
\end{footnotesize}
a covered employee could be” subject to the rule. 184 He suggested that narrowing the PCI Rule to apply the parameters utilized to monitor federal employees, which include only the financial interests of the employee’s spouse and those of any minor child. 185

In another approach, the general counsel of Afognak Native Corporation & Alutiiq, LLC, Jessica C. Graham, offered her company’s definition of family member as it relates to employees’ personal conflicts of interest, as follows:

Family means your immediate family (by blood or marriage), including any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, brother-in-law, sister-in-law or someone living in your household. 186

The Department of Treasury’s Troubled Asset Relief Program (“TARP”) personal conflicts of interest rules provide a clear definition of a close family member. 187 In TARP, the personal interest of the contractor employee’s spouse and dependent children are monitored. 188 Dependent children are defined to include a daughter, stepdaughter, son and, or stepdaughter, provided the child is unmarried, under twenty-one and living in the employee’s home or characterized as a dependent by the Internal Revenue Service. 189

184 Id.
185 Id; See 5 C.F.R. § 2635.402(b)(2)(i)-(ii).
187 31 C.F.R. § 31.201.
188 Id.
189 Id.
a. **Recommendation for Defining a Close Family Member**

The FAR Council should refine the definition of the “close family member” to provide contractors more specificity in implementing the PCI Rule. Jessica C. Graham’s definition appears closest to the intent of the FAR Council at defining a “close family member” to cover a child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, brother-in-law, sister-in-law or other individual living in the home.\(^1\)

4. **“Non-Public Information”**

In his piece, *Addressing Government Contracting-Related Conflicts of Interest on Both Personal and Organizational Fronts*, Michael Farr raised the discrepancy in the definition of nonpublic information that the FAR Council proposed in interim versions of the personal conflicts of interest rule and the proposed FAR OCI rule.\(^2\) Farr argued for a single definition of non-public information.\(^3\)

The FAR Council did reconcile the definition of non-public information in the final version of the PCI Rule to the definition in the proposed FAR OCI rule. The second prong of the definition of non-public information in the interim personal conflicts of

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\(^3\) *Id.*
interest rule was “not authorized by the agency to be made available to the public.”193 The PCI Rule second prong now reads “has not been disseminated to the general public and the Government has not yet determined whether the information can or will be made available to the public.”194 In comparison the second prong of the proposed FAR OCI definition for non-public information reads “has not been disseminated to the general public, and the Government has not yet determined whether the information can or will be made available to the public.”195

a. Recommendation for Defining Non-Public Information

In the final PCI Rule, the definition for non-public information remains broad and in effect relies on the contractor’s interpretation as to what information is non-public.196 As contractors continue to implement their own interpretations of the PCI Rule, the U.S. Government’s ability to enforce the PCI Rule weakens concomitantly. The PCI Rule could be revised to require marking non-public information with a legend, so that information will be protected prior to its dissemination to contractor employees.197 Marking the non-public information removes any subjectivity in the contractor’s analysis of what information requires protection and is subject to the PCI Rule.

193 Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. at 58587.
194 FAR 3.1101.
195 Organizational Conflicts of Interest, 76 Fed. Reg. at 23243.
197 FARR supra note 185, at 44.
G. Acquisition Functions Closely Associated with Inherently Governmental Functions

The PCI Rule does define an acquisition function closely associated with inherently governmental functions. The issue is the lack of uniformity between the definition of an acquisition function closely associated with an inherently governmental function as set out in FAR Subpart 3.11 – Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions and the FAR Subpart 7.5 Inherently Governmental Functions § 7.503 Policy. (See Figure 2: Inherently Governmental Procurement Functions.)

Figure 2 Inherently Governmental Procurement Functions

<table>
<thead>
<tr>
<th>FAR Subpart 3.11</th>
<th>FAR Subpart 7.5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planning acquisitions</td>
<td></td>
</tr>
<tr>
<td>Determining what supplies or service are to be acquired by the Government, including developing statement of work</td>
<td>Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency)</td>
</tr>
<tr>
<td>Developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria</td>
<td>Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation</td>
</tr>
<tr>
<td>Evaluating contract proposals</td>
<td>Participating as a voting member on performance evaluation boards</td>
</tr>
<tr>
<td>Awarding Government contracts</td>
<td>Awarding contracts</td>
</tr>
<tr>
<td>Administering contracts</td>
<td>Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services)</td>
</tr>
<tr>
<td>Terminating contracts</td>
<td>Terminating contracts</td>
</tr>
<tr>
<td></td>
<td>Participating as a voting member on any source selection boards</td>
</tr>
</tbody>
</table>

198 FAR 52.203-16(a).
199 FAR 3.1101.
200 FAR 7.503.
In September 2011, the Office of Management and Budget’s Office of Federal Procurement Policy (“OFPP”) published final guidance on inherently governmental functions. OFPP followed existing law established by the 1998 Federal Activities Inventory Reform Act listing inherently governmental procurement functions, as currently set out in FAR Subpart 7.503(c) (12).

Section 321 of the NDAA for fiscal year 2009 required the Office of Management and Budget create a single consistent definition for inherently governmental functions. Further, OFPP’s September 2011 guidance restated NDAA’s intent to limit the definition of inherently governmental functions to “a” single authorized definition is unambiguously stated.

The lack of a single definition creates ambiguity in implementation. As an example, the PCI Rule identifies “planning acquisitions” as the first acquisition function closely associated with inherently governmental functions subject to the PCI Rule. The FAR, in Subpart 7.5 Inherently Governmental Functions Section 7.503 Policy, which

\[\text{\textsuperscript{201}}\text{ OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF FEDERAL PROCUREMENT POLICY POLICY LETTER 11-01, PERFORMANCE OF INHERENTLY GOVERNMENTAL AND CRITICAL (2011).}\]

\[\text{\textsuperscript{202}}\text{ Id. at 65. See also FAR 7.503(c)(12).}\]


\[\text{\textsuperscript{204}}\text{ OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF FEDERAL PROCUREMENT POLICY POLICY LETTER 11-01, PERFORMANCE OF INHERENTLY GOVERNMENTAL AND CRITICAL at 1 (2011).}\]

\[\text{\textsuperscript{205}}\text{ FAR 3.1101.}\]
the PCI Rule closely models, does not identify “planning acquisitions” as an inherently
governmental function. 206

Adding confusion, FAR Subpart 7.5 Inherently Governmental Functions, Section
7.503 Policy lists examples of functions that are not generally deemed to be an inherently
governmental function, yet these functions “approach” this classification due to the
nature of the function. 207 Nineteen examples of functions approaching inherently
governmental functions are given, including: services in support of acquisition planning;
technical evaluation of contract proposals, and participating as voting or nonvoting
members of a source evaluation board. Per FAR 3.1101, these examples arguably are
subject to the PCI Rule. Alternatively, among the nineteen examples are services that
involve feasibility studies and strategy options for developing agency policy, providing
arbitration or other dispute resolution methods, and providing legal advice; these
functions are not subject to the PCI Rule.

The FAR Council acknowledged these differences between FAR Subpart 3.1101
and FAR Subpart 7.503 (c) (12) and concluded that the two definitions are not
inconsistent. 208 While the definitions may not be inconsistent, the definitions of
inherently governmental procurement activities in the two parts are sufficiently different
that a contractor could rely on the definitions in FAR Subpart 7.503 to resist screening
employees that provide support services cited in FAR Subpart 7.503(d) such as

icipation planning, on the grounds that these services are defined as approaching

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206 FAR 7.503(c)(12).
207 FAR 7.503 (d).
208 Preventing Personal Conflicts of Interest for Contractor Employees Performing
Acquisition Functions, 76 Fed. Reg. at 68018.
inherently governmental functions as opposed to inherently governmental functions; therefore, not subject to the PCI Rule.\textsuperscript{209}

Further, the language in FAR Subpart 7.5, Inherently Governmental Functions, clearly states that the cited inherently governmental procurement activities of FAR 7.503(c)(12) are examples and the list is not all-inclusive.\textsuperscript{210} FAR 3.1101 contains no similar language, neither identifying the FAR 7.503(c)(12) cited activities as examples, or leaving open any opportunity for other activities to be categorized as acquisition functions closely associated with inherently governmental. \textsuperscript{211} The language in FAR 3.1101 does not include “catch-all” language for acquisition functions closely associated with inherently governmental functions not identified at time of publication.\textsuperscript{212}

The PCI Rule is triggered when the contracted service supports an acquisition function closely associated with inherently governmental functions.\textsuperscript{213} Additional potential for contention exists regarding the definition of “supports.”\textsuperscript{214} While the

\textsuperscript{210} FAR 7.503.
\textsuperscript{211} FAR 3.1101.
\textsuperscript{213} FAR 3.1103.
\textsuperscript{214} Attachment to Letter #2008-025-10 from Council of Defense and Space Industry Associations to Ms. Hada Flowers General Services Administration Regulatory Secretariat (Jan. 12, 2010) available at http://www.rules.gov/#/home (technical knowledge not often available to Contracting Officers is required to determine what activities conclusively constitute “supporting” a work function or service).
dictionary defines support to mean to assist in performance, no guidance is given as to the
types of activities that would be considered to support an acquisition function.215

1. **Recommendation Regarding Inherently Governmental Functions**

    Recommending utilizing one consistent definition of inherently governmental
procurement activities throughout all sections of the FAR seems obvious. Government
employees and contractors alike would benefit from consistency within the FAR
regarding defining what procurement activities constitute inherently governmental
functions. Again, the subjectivity of the contractor’s implementation of the PCI Rule
would be best served from a single definition of inherently governmental procurement
activities throughout the FAR.

H. **Contractor Employees’ Disclosures**

    Although under the PCI Rule the contractor has discretion regarding
implementation of its compliance program for screening its employees for personal
conflicts of interest, one mandatory component of this screening process is “disclosure of
interests” of the covered employees.216

    As noted, the contractor is required to procure from the covered employee a
disclosure including: financial interests of the covered employee, of close family
members, and, or other members of the covered employees’ household; and other
employment or financial relationships of the covered employee; and gifts, including

216 FAR 3.1103 (a)(i).
The employee is required to update his disclosure when his circumstances change in relation to his assigned task to the extent that a personal conflict becomes possible.218

1. Contractors Monitoring Their Own?

An unresolved concern, raised by ACUS researcher Kathleen Clark, is whether sufficient research has been done to support the premise that the contractor is the optimum choice for monitoring its employees’ personal conflicts of interest.219 The concern is evidenced by the case against Science Applications International Corporation (SAIC) where the U.S. Court of Appeals upheld the lower court’s holding that the contractor knowingly made false statements of compliance with organizational conflicts of interest requirements.220 Clark suggested that contractors’ histories in regards to self-policing for organizational conflicts of interest would be worthy of study prior to a determination that contractors should continue to monitor their own employees’ personal conflicts of interest.221 Countering, the FAR Council pointed out that its objective is to permit the contractor flexibility in the screenings of its covered employees and stated unequivocally that it is the contractor’s responsibility to review employees’ disclosures.222

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217 Id.
218 FAR 3.1103(a)(ii).
219 CLARK, supra note 93, at 39.
221 Id.
222 Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. at 68020.
2. Creating Loopholes from the Onset

Given this flexibility afforded the contractors to devise subjective compliance programs to monitor employees, interpretations of the PCI Rule and implementations will vary. Suggestions for standardized non-disclosure agreements and financial disclosure forms were rejected in favor of this “flexibility” for the contractors by the FAR Council. This contractor flexibility borders on creating a loophole from which the PCI Rule’s objectives can be circumvented.

3. Covered Employees’ Scope of Disclosure

The PCI Rule dictates that contractors have covered employees submit a personal interest disclosure which must include the employee’s financial interests. No further guidance is given on the specificity of the employee’s disclosure of his personal interests. For example, the instructions for the Executive Branch Personnel Public Financial Disclosure Report are specific regarding a federal employee’s disclosure of both the source and the amount of a financial interest, including threshold amounts for reporting purposes. Under the PCI Rule, however, an employee’s personal disclosure report could simply state the source of the financial interest and remain silent as to the

223 Id. at 68023.
224 FAR 3.1103.
225 See generally David J. Ginsberg & Robert R. Bohn, Let’s Get Personal: A Guide to the Interpretation and Implementation of the FAR Personal Conflicts of Interest, 47 The Procurement Lawyer 4, 11 (Summer 2012) (the contractor with one covered contract for one employee could use one customized disclosure form, while the contractor with multiple covered contracts and multiple covered employees may be able to develop a standard comprehensive disclosure form periodically updated by their covered employees).
226 OFFICE OF GOVERNMENT ETHICS, STANDARDFORM 278 EXECUTIVE BRANCH PERSONNEL PUBLIC FINANCIAL DISCLOSURE REPORT (Mar 29, 2001).
One solution is to set a minimum value threshold, for example $5,000, above which the contractor employee must disclose the financial interest. Absent a mandatory obligation to disclose the value or amount of the financial interest any discussion on the definition of de minimis is irrelevant.

Regarding federal employees’ disclosures, the Executive Branch Personnel Public Financial Disclosure Report notes that auditors of these reports must be given sufficient information to make an informed judgment. In the PCI Rule contractors have no obligation to require information sufficient to sustain an informed judgment. Due to the fact that a contractor has no liability for its employee’s violation provided that the contractor follows the appropriate steps to uncover and report violations, the question is whether contractors will prepare boilerplate disclosure forms that lack the substance of their federal colleagues’ forms. Arguably, a safer solution for the contractor is minimum compliance, thereby satisfying compliance obligations while limiting risks and costs that would otherwise come with substantive in-depth personal conflicts analyses.

Further, the PCI Rule gives no guidance on the remaining components, employment or financial relationships and gifts, of the required contractor employee disclosure. For example, what is the reach back time period the contractor employee must address when disclosing prior employment and financial relationships.

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227 Interview with Monique D. Butler, Deputy, Noblis, Inc. (Feb. 13, 2012) (Noblis’ initial covered employee screening checks financial institutions and other business entities for conflicts without requesting the dollar value associated with the entity; in the event a nexus is determined during the initial screening between the entity and the subject contract, the dollar value of the covered employee’s personal interest is then requested).

228 OFFICE OF GOVERNMENT ETHICS, STANDARDFORM 278 EXECUTIVE BRANCH PERSONNEL PUBLIC FINANCIAL DISCLOSURE REPORT (MAR 29, 2001).

229 FAR 3.1103(a)(1)(i)(B)-(C).
4. Household Members

The PCI Rule considers the financial interests of the covered employee, close family members and other members of the household.\textsuperscript{230} To require covered employees to disclose the financial interests of non-familial household members is unrealistic. Roommate scenarios where two non-familial individuals share a home are not rare. Under the PCI Rule, roommates would be required to share sufficient personal data such that a covered employee could determine any possibility of conflict. In the event of a conflict, the covered employee would be required to disclose the roommate’s personal data to the covered employee’s company. In this case of non-familial housemates, the covered employee’s ability to respond to this inquest is dependent upon the cooperation of the roommate.

5. Covered Employees’ Work Experience

Government contractors often hire their predecessor's employees on follow-on service contracts. As a result, an individual contractor employee’s work experience may include several U.S. Government contractors.

A covered employee may frequently rotate companies without moving his retirement account.\textsuperscript{231} What is the outcome for a personal conflict of interest violation if a covered employee’s retirement account remains managed by a predecessor contractor?

\textsuperscript{230} Id.

\textsuperscript{231} See Letter no. 2008-025-08 from Karen L. Manos, Chair, Section Public Contract Law American Bar Association to Ms. Hada Flowers General Services Administration Regulatory Secretariat (Jan. 12, 2010) \textit{available at} http://www.rules.gov/#!home (search “FAR Case 2008-08”) (mandating that updating disclosures when investment portfolios of employee and spouses may include potential contractors is “onerous and unproductive”).
Further, such a retirement account may include the predecessor company’s stock, as well. Personal conflicts of interest resulting from a covered employee’s prior employment are foreseeable. Yet, the PCI Rule does not address whether these covered employees will be forced to move their retirement accounts and, or sell stock in order to mitigate a personal conflict of interest.

A mutual fund investment instrument may also create a personal conflict of interest that is challenging to monitor. When a mutual fund is managed by a third-party, the holder is not always knowledgeable instantaneously of changes in the fund which could unbeknownst to a covered employee create a financial investment in a company with an interest in the covered employee’s current contract.

I. Costs

1. Compliance Costs

The PCI Rule is one component in an extensive set of compliance rules governing U.S. Government contractors. Another component, the Contractor Business Ethics Compliance Program and Disclosure Requirements of 2008, amplified compliance requirements for a contractor code of business ethics and conduct, required an internal control system, and, as noted, called for mandatory disclosures of specific violations including false claims and overpayments.

Additional research would be required to quantify or even estimate contractors’ financial costs to conform to all applicable compliance rules. After drafting of new

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232 Telephone Meeting with Professional Services Council, chaired by Alan Chvotkin, Executive Vice President and Counsel (Dec. 13, 2011).
policies and procedures for implementing the PCI Rule, contractors will also need trained compliance personnel with the ability to determine personal conflicts of interest to review employees’ disclosures. Contractors will incur indirect costs for compliance as well, given that the PCI Rule is likely to increase contractors’ risks for bid protest litigation, for third-parties non-disclosure violations and for False Claims Act violations.$^{234}$

As demonstrated in comparing the PCI Rule’s non-disclosure agreements with the proposed FAR OCI rule’s non-disclosure agreement, compliance rules imposed upon contractors are promulgated with little consideration for harmonious integration into existing and proposed compliance rules.$^{235}$ This results in increased costs to the contractor for compliance. Increased compliance budgets operate as a barrier to entry for small to mid-size businesses in the U.S. Government contract market. The compliance cost becomes an opportunity cost, as the U.S. Government loses vendors due to high costs of compliance.

2. **Opportunity Costs**

   A potential opportunity cost resulting from the PCI Rule is a reduction in the work force available to contractors for acquisition functions. Contractor employees are required to share personal data with their employers that could affect an employee’s

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$^{235}$ See Christopher R. Yukins, *The Draft OCI Rule – New Directions And The History Of Fear*, 53 The Government Contractor ¶ 148, 5 (May 4, 2011) (regarding the proposed OCI rule, “the proposed rule makes no effort to integrate OCIs with ... the new compliance systems that contractors are rapidly developing under the requirements of FAR 52.203-13”).
negotiated compensation package. Opponents to the PCI Rule suggest that employers could unfairly leverage covered employee’s personal data in salary negotiations. Potential employees may be deterred from accepting acquisition function positions requiring disclosure of financial and other personal data including the employee’s family’s personal data.

In implementing the PCI Rule, one prominent contractor, Noblis, Inc. (“Noblis”) has not found this theory to be true. Noblis, a contractor specializing in providing acquisition services to the U.S. Government, screens its employees’ financial interests by financial institution and other business entities without requesting that employees disclose the associated dollar values of these financial interests. Noblis determined that a holistic approach requesting personal interest disclosures from all of its employees, as opposed to singling out the covered employee, was a more efficient implementation of the PCI Rule. Noblis will request further information from the covered employee only if a nexus is flagged between the employee’s financial interest and the associated acquisition services contract. Noblis has not experienced employee resistance regarding this disclosure requirement.

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237 *Id.*
238 Interview with Monique D. Butler, Deputy, Noblis, Inc. (Feb. 13, 2012).
239 *Id.*
240 *Id.*
241 *Id.*
242 *Id.* E.g. Interview with Terry Myers, Sr. Vice President Compliance, ManTech International Corporation (Feb. 13, 2012) (ManTech had not experienced employee push back on the personal interest disclosure requirement).
Other possible explanations for contractor employees’ acquiescence to personal interests’ disclosures include the current depressed state of the economy, which decreases an employee’s willingness to resist disclosures of personal interest; or, employees may simply lack the sophistication to understand their own clout to challenge the requirement.

3. **Weighing Costs against Results**

Compliance costs include drafting policies and procedures, training, engaging compliance personnel, internal audits, and more. Opportunity costs could include loss of vendors willing to do business with the U.S. Government and potential loss of specialized talent as a result of personal disclosure requirements. To justify all costs combined the PCI Rule should diminish contractor employees’ fraud against the U.S. Government. As often is the case, one cannot quantify the number of violations that will be prevented due to the PCI Rule. Certainly, applying the contractor employees’ disclosure requirements to a wider scope of contractor services theoretically would increase the violations prevented.

J. **Effectiveness of the PCI Rule**

Will the PCI Rule be effective in preventing and identifying contractor employee abuse? Consider the facts of the U.S. Government’s bailout of AIG. The “point person on the AIG bailout was Dan Jester.”243 Jester was engaged by the U.S. Department of Treasury as a contractor.244 In this role, he advised the U.S. Government not to push

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243 Id. at 3.
244 Id.
investment banks, including Goldman Sachs, to take concessions on their contracts.\textsuperscript{245} In the case of Dan Jester, a financial disclosure would have highlighted his Goldman Sachs holdings, which eventually did come to light and resulted in his departure from the project.\textsuperscript{246} However, the existence of the PCI Rule would not have accelerated this outcome as the services contracted for here were not for an acquisition function and therefore would not be subject to the PCI Rule.

The case of Kathleen McGrade is a relevant example in that ATSG, her previous employer, provided acquisition services to the Department of State. The contractor employee personal disclosures directed by the PCI Rule are aimed to highlight the type of personal conflict of interest alleged here. Kathleen McGrade is alleged to have influenced the issuance of contract awards to Sterling Royale, a company owned and operated by her husband and daughter. Given the reported facts and the issuance of the PCI Rule, one could project that the PCI Rule would have been an effective means to uncover the nexus between Ms. McGrade and the Sterling Royale Group.

However, the reported facts in this case allege that all parties lied, at least to the reporter, about their familial relationships.\textsuperscript{247} Mr. Smithey, the fiancé of Ms. McGrade’s daughter at the time of McGrade’s wedding, was reported to have stated that McGrade and Collinsworth intentionally hid their marriage.\textsuperscript{248} The journalist, Matthew Boyle,  

\textsuperscript{245} Id.  
\textsuperscript{248} Id.
quoted Mr. Smithey as follows: “It was a big secret, in fact, they even told me it was a secret and not to tell anyone that they know that they are married, because of the whole conflict of interest and all that.”249 The reported facts infer that the parties knew of the illicit nature of their actions but still chose to proceed. One could speculate that had the PCI Rule been in place during the time of these allegations, the parties likely could have simply omitted their familial information on any required financial interests disclosures.

In implementing the PCI Rule, the U.S. Government is attempting to legislate the morality of its contractors’ employees. Given no system of checks and balances is required to verify the contractor employees’ disclosure statements, individuals who are inclined to falsify disclosures will likely continue to do so. Such employees seeking to misappropriate their positions for personal gain are unlikely to be deterred by a potential job loss.

1. Effectiveness of Financial Disclosures in Deterring Personal Conflicts of Interest

In Ethics for an Outsourced Government, Kathleen Clark asks a critical question that remains unanswered: “Whether annual financial disclosures have been effective in preventing financial conflicts of interest among government employees.”250

Certain federal employees are required to file financial disclosures annually.251 Ms. Clark indicated that this is an expensive process, citing costs to the federal

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249 Id.
employees in time and privacy and cost to the government for review. Regarding these annual disclosure obligations, she suggested that the disclosures may become out-of-date immediately after they are filed due to changes in portfolios and assignments, thereby further reducing the effectiveness of the disclosures. With the uncertainty in the effectiveness of financial disclosures for federal employees, Ms. Clark questioned the implementation of such a procedure for contractors absent further research.

If the effectiveness of the federal employees’ financial disclosures in preventing and identifying employee abuse could be quantified, it follows that such an analysis would be beneficial in drafting the PCI Rule. However, the final PCI Rule is now in effect and includes contractor employees’ personal interest disclosures. The question of the effectiveness of the federal employee financial disclosures as it relates to molding a successful PCI Rule is now moot.

2. Don’t Ask Don’t Tell

Key to the effectiveness of the PCI Rule is the contractors’ role in its implementation. As the response to the comments on the PCI Rule indicates, contractors are only liable for a failure to comply with compliance procedures set out in the rule.

252 CLARK, supra note 93, at 39.
253 Id.
254 Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. at 68022.
A contractor is not held liable for an employee’s violation provided the contractor followed the procedures for identifying and reporting conflicts pursuant to the rule.\textsuperscript{255}

The contractor is tasked to screen employees for personal conflicts of interest to include a disclosure of interest.\textsuperscript{256} As discussed, the disclosure is to include the financial interest of the covered employee, his close family members, and other members of his household.\textsuperscript{257} The PCI Rule considers financial interests, employment and financial relationships and gifts relevant for the covered employee’s disclosure; however, the rule fails to provide any specifics on details required.\textsuperscript{258} The PCI Rule contains no guidance as to whether or not a nominal investment of $1,000 can be considered de minimis. The PCI Rule assigns no time frame for a look back as to finances, employment and/or gifts of the contractor’s employee. The contractor has the flexibility to design the disclosure report and is responsible for its review.\textsuperscript{259} The PCI Rule does not require the contractor submit the covered employee’s disclosure statement to the U.S. Government.

Provided that the contractor complies with compliance procedures designated in PCI Rule, the contractor incurs no penalty for its covered employee’s violation. The end result is not the same when the contractor’s motivation is to implement procedures capable of defending an allocation of inadequate compliance procedures pursuant to the PCI Rule as opposed to a contractor who designs its compliance program to filter out any employees’ personal conflicts of interest. These distinct motivations will produce distinct results.

\begin{flushright}
\footnotesize
\textsuperscript{255} \emph{Id.}
\textsuperscript{256} FAR 3.1103.
\textsuperscript{257} \emph{Id.}
\textsuperscript{258} \emph{Id.}
\textsuperscript{259} \emph{Id.}
\end{flushright}
A telling indicator may be the personnel assigned by the contractor to review the disclosures. For instance, the contractor may choose to have the Human Resources Department issue a boilerplate disclosure form for the employee’s personnel file, a check the box process. In the alternative, the covered employee’s supervisor, with a working knowledge of the assigned task and relevant players involved, may review the disclosure for any nexus between the covered employee’s interest and the contract. The latter, the covered employee’s supervisor, will likely produce a thorough result as far as the PCI Rule; however, the former, a process administered by Human Resources which addresses financial interests, employment and financial relationships and gifts is sufficient to meet the guidelines of the PCI Rule.

The issue is the contractor is dis-incentivized to design a thorough personal conflicts of interest screening process, creating a “don’t ask don’t tell” scenario where less is better. The path of least resistance for the contractor is to meet the minimum standards of the rule in order to comply with the rule. As the alternative, a thorough investigation by the contractor into an employee’s personal financial interests increases the risk of identifying a violation resulting in a mandatory disclosure to the contracting officer and forced displacement of the employee.

3. **Recommendation for Effectiveness of PCI Rule**

To ensure that the PCI Rule and future iterations of contractor employees’ personal conflicts of interest rules are effective, stronger penalties are needed for contractors and contractor employees for contractor employees’ personal conflicts of interest violations. Risk of contractor employee abuse will continue if the potential for substantive personal gains remains larger than any subsequent punishment for violations.
Further, contractors with no risk in the event of an employee’s violation will lack incentives to comply to the level necessary for the PCI Rule to be effective. A penalty system where the contractor risks contract termination, suspension or debarment for its employees’ violations would incentivize the contractor to diligently comply with the PCI Rule.260

II. Conclusion
The impetus for issuing the PCI Rule can be traced to the 1990s when federal agencies began inserting conflict of interest clauses in prime contracts.261 Momentum for the PCI Rule continues from the AAP, GAO and ACUS. The consensus is that regulating contractor employees’ personal conflicts of interest is warranted. Given the overwhelming support for the PCI Rule, its current scope – the PCI Rule applies only to acquisition functions closely associated to inherently governmental functions except when these services are acquired on a commercial basis - is too limited.

In 2009, the proposed PCI Rule contained remedies including termination for default and suspension and debarment for contractors that failed to comply with the rule.262 In the final PCI Rule, these remedies were omitted excepting when a contractor discloses an identified personal conflict and the contracting officer deems the contractor’s

260 See GAO-12-984R, supra note 113, at 6 (enforcement for TARP conflicts violations by the Dept. of Treasury include default terminations, debarments, and referrals for criminal prosecution).
resolution inadequate.\textsuperscript{263} Under this limited set of circumstances the contracting officer may take “appropriate” action.\textsuperscript{264}

Noting that not all violations of the PCI Rule will rise to the criminal level thus requiring disclosure to the Inspector General under FAR 52. 203-13(b)(3), the FAR Council fails to clearly identify ramifications for contractors violating the PCI Rule.\textsuperscript{265} The PCI Rule does state that contractor employees found in violation should incur “appropriate disciplinary action” from the contractor.\textsuperscript{266} Again, no guidance is given defining “appropriate disciplinary action.”

Neither the contractor or the contractor’s employee bears substantial risk for failure to comply with the PCI Rule. If the contractor incurs no penalties for its employees’ violations, the PCI Rule will have little impact. Under the PCI Rule, contractors can implement a skeletal procedure demonstrating compliance and as a result, mitigate contractor liability in the event of a violation.

1. **Recommendations for PCI Rule**

   The PCI Rule should be revised to include contractor employees’ certification attesting to the accuracy of each personal disclosure. An employees’ false statement in a disclosure and, or the certification should be subject to criminal penalties. Contractors should risk penalties up to suspension and debarment for contractor employee violations.

\textsuperscript{263} FAR 3.1103(b)(3).
\textsuperscript{264} Id.
\textsuperscript{265} Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. at 68021.
\textsuperscript{266} FAR 3.1103(a)(5).
Agencies should monitor the compliance of their contractors with on-site compliance reviews. The commercial exemption should be eliminated. Further, acquisition functions regulated by the PCI Rule should include functions that “approach” inherently governmental functions as set out in FAR § 7.503 Policy in addition to functions closely associated with inherently governmental functions.

2. Summary

Consider the ATSG employee, Kathleen McGrade. McGrade lost her work assignment at the Department of State, her job at ATSG, and she is now listed on the U.S. Government’s Excluded Parties List System; however, public records indicate that to date no charges have been brought against her. Although there is little analysis or consensus on the legitimacy of risks that contractor employees’ abuse impacts the integrity of the procurement system, the McGrade circumstance, as reported, substantiates that the risk is real.

Analysis of the cost of compliance is equally challenging. Contractors obliged to comply with a plethora of procurement rules continue to task internal overhead personnel such as auditors and attorneys to implement processes for compliance where it is difficult to quantify the cost, direct and indirect, of compliance with each rule. Any mechanism available to reduce the cost of compliance would be advantageous to contractors and the Government, alike.

At a minimum, a holistic approach integrating U.S. Government compliance rules to include organizational conflicts of interest, personal conflicts of interest and protection
of proprietary information would reduce the cost to the contractor and close unnecessary loopholes thereby increasing the effectiveness of compliance rules for the Government.
III. Appendix 1:

CONTRACTOR EMPLOYEE PERSONAL FINANCIAL INTEREST/PROTECTION
OF SENSITIVE INFORMATION AGREEMENT

This Agreement refers to Contract/Order _____________________ entered into between
the US Army CECOM Contracting Center and ____________________(Contractor).

As an employee of the aforementioned Contractor, I understand that in connection with
my involvement in the support of the above-referenced Contract/Order, I may receive or
have access to certain “sensitive information” relating to said Contract/Order, and/or may
be called upon to perform services which could have a potential impact on the financial
interests of other companies, businesses or corporate entities. I hereby agree that I will
not discuss or otherwise disclose (except as may be legally or contractually required) any
such “sensitive information” maintained by US Army CECOM Contracting Center or by
others on behalf of US Army CECOM Contracting Center, to any person, including
personnel in my own organization, not authorized to receive such information.

“Sensitive information” includes:

(a) Information provided to the contractor or the Government that would be competitively
useful on current or future related procurements; or

(b) Is considered source selection information or bid and proposal information as defined
in FAR 2.101, and FAR 3.104-4; or

(c) Contains (1) information about a contractor’s pricing, rates, costs, schedule, or
contract performance; or (2) the Government’s analysis of that information; or

(d) Program information relating to current or estimated budgets, schedules or other
financial information relating to the program office; or

(e) Is properly marked as source selection information or any similar markings.

Should “sensitive information” be provided to me under this Contract/Order, I agree
not to discuss or disclose such information with/to any individual not authorized to
receive such information. If there is any uncertainty as to whether the disclosed
information comprises “sensitive information”, I will request my employer to request a
determination in writing from the US Army CECOM Contracting Center Contracting
Officer as to the need to protect this information from disclosure.

I will promptly notify my employer if, during my participation in the subject
Contract/Order, I am assigned any duties that could affect the interests of a company,
business or corporate entity in which either I, my spouse or minor children, or any
member of my immediate family/household has a personal financial interest. “Financial
interest” is defined as compensation for employment in the form of wages, salaries,
commissions, professional fees, or fees for business referrals, or any financial
investments in the business in the form of direct stocks or bond ownership, or partnership interest (excluding non-directed retirement or other mutual fund investments). In the event that, at a later date, I acquire actual knowledge of such an interest or my employer becomes involved in proposing for a solicitation resulting from the work under this Contract/Order, as either an offeror, an advisor to an offeror, or as a subcontractor to an offeror, I will promptly notify my employer. I understand this may disqualify me from any further involvement with this Contract/Order, as agreed upon between US Army CECOM Contracting Center and my company. Among the possible consequences, I understand that violation of any of the above conditions/requirements may result in my immediate disqualification or termination from working on this Contract/Order pending legal and contractual review.

I further understand and agree that all Confidential, Proprietary and/or Sensitive Information shall be retained, disseminated, released, and destroyed in accordance with the requirements of law and applicable Department of Defense or US Army CECOM Contracting Center directives, regulations, instructions, policies and guidance.

This Agreement shall be interpreted under and in conformance with the laws of the United States.

I agree to the Terms of this Agreement and certify that I have read and understand the above Agreement. I further certify that the statements made herein are true and correct.

Signature and Date
Company Name and Phone Number