

Contractor Compliance Programs in an Era of Mandatory Requirements: How to Maximize Effectiveness and Minimize Risks

February 12th, 2009
8:30 – 10:00 a.m.

Venable
575 7th Street, N.W.
Washington, DC, 20004

Moderator:

Doug Brown

Panelists:

Maryanne Lavan
Robert Burton
Tony Fuller
Rebecca Pearson



Discussion Topics:

New law and regulations requiring mandatory reporting of fraud and overpayments: The most recent challenge for contractors

Regulations requiring mandatory codes of conduct, ethics training, and internal controls: The compliance basics

Building federal compliance into a commercial company: Key components and costs of an effective ethics program

Tone at the Top: Building a culture of ethics from the top down

Speaker Biographies

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 PNC



DOUGLAS T. BROWN

SENIOR VICE PRESIDENT AND GROUP MANAGER
GOVERNMENT CONTRACTORS GROUP
PNC BANK, GREATER WASHINGTON

Doug is the Senior Vice President and Group Manager for a specialized group of lenders that focuses on Government Contractors within PNC's Corporate & Institutional Banking Group.

He has over 25 years experience in Corporate lending, the last 15 of which has been specializing in Government Contractors wherever they may be located. This specialized group handles a wide variety of companies that vary in size, geography, technology and agencies of the Federal Government. His banking experience includes middle market, special assets, asset based lending and corporate banking.

Doug earned a B.A. degree from American University and completed graduate studies from The Stonier Graduate School of Banking.

He serves on the Board of Spherix, a local public company in the Biotech business, is the Treasurer of the Montgomery County Chamber of Commerce and has served on the Boards of several Not-For-Profit organizations. Mr. Brown is a local Washingtonian and lives in Kensington, MD.



Maryanne R. Lavan

Maryanne R. Lavan was appointed Vice President of Internal Audit, effective March 5, 2007. Her primary responsibility is to provide independent assessments of governance, internal controls and risk management across Lockheed Martin Corporation.

Prior to her current position, Ms. Lavan was Vice President, Ethics and Business Conduct for Lockheed Martin. Ms. Lavan joined Lockheed Martin in 1990 as an attorney and served in increasingly responsible positions within the Lockheed Martin legal department. Headquartered in Bethesda, Maryland, Lockheed Martin employs about 140,000 people worldwide and is principally engaged in the research, design, development, manufacture and integration of advanced technology systems, products and services. Ms. Lavan graduated magna cum laude from the State University of New York at Albany with a Bachelor of Science degree. She received her juris doctor degree from the Washington College of Law, American University, where she was a member of the Law Review.

Ms. Lavan is an active member of the Public Contract Law Section of the American Bar Association where she co-chairs Ethics Committee. She is also a member of the Board of Directors of Character Education Partnership, a national non-profit, non-partisan coalition of organizations and individuals seeking to foster character education within the nation's schools.



Robert A. Burton

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PRACTICE FOCUS

Robert A. Burton is a nationally-recognized federal procurement expert, who focuses his practice on assisting government contractors navigate the complex and rule-driven procurement process. He represents companies that conduct business across the entire spectrum of the federal government, from the largest defense manufacturers and systems integrators to small businesses that provide products and services to the government.

A thirty-year veteran of procurement law and policy development, Mr. Burton served in the Executive Office of the President as Deputy Administrator of the Office of Federal Procurement Policy (OFPP), the nation's top career federal procurement official. He also served as Acting Administrator for a total of two years during his seven-year tenure at OFPP. Prior to joining OFPP, Mr. Burton served as a senior acquisition attorney in the Department of Defense (DoD), supporting the acquisition and management of large weapon systems contracts. Throughout his career, he has displayed an ability to effectively work with industry, the military services, the civilian agencies, and Congress.

CLIENT BENEFITS

As a result of his extensive background in procurement law and policy, Mr. Burton is uniquely positioned to assist clients in resolving contract problems and policy issues with the federal agencies and Congress. He is also especially well-suited to assist clients with suspension and debarment proceedings, contract cost disputes, internal corporate investigations, and corporate compliance and ethics programs.

As Deputy Administrator of OFPP, Mr. Burton was responsible for the government's acquisition policy and procurement guidance to all Executive Branch agencies. His office was charged with developing policy affecting more than \$400 billion in annual federal spending – a figure that doubled during Mr. Burton's time in office as a result of the Iraq War and other major events.

EDUCATION

- University of Virginia, J.D., 1979
- College of William and Mary, B.A., *magna cum laude*, 1976
- Harvard University, John F. Kennedy School of Government, Senior Executive Fellows Program, 1994
- Office of Personnel Management, Federal Executive Institute, 1989

BAR ADMISSIONS

- District of Columbia
- Virginia

AREAS OF PRACTICE

- Government Contracts

At OFPP, Mr. Burton was instrumental on a number of fronts, including preparing the Administration's policy positions and testimony on proposed acquisition legislation; working with House and Senate committees on the development of acquisition reform proposals; and serving as a principal spokesperson for government-wide acquisition initiatives. He also served as the Executive Director of the Chief Acquisition Officers (CAO) Council. The CAO Council is comprised of the Chief Acquisition Officers from each federal agency. Mr. Burton also managed the activities of the Federal Acquisition Regulatory (FAR) Council, which has statutory authority to promulgate the government's procurement regulations.

Prior to joining OFPP in 2001, he spent over twenty years as a senior acquisition attorney with the Department of Defense. At the Defense Contract Management Agency, he negotiated the resolution of high-profile contract disputes with major defense contractors and provided advice on cost allowability issues. He served as general counsel for DoD's Defense Energy Support Center as well as associate general counsel for the Defense Logistics Agency (DLA), the DoD component responsible for purchasing most of the general supplies and services used by the military services. At DLA, Mr. Burton served as counsel to the agency's suspension and debarment official and managed the agency's fraud remedies program, working with the Department of Justice and the criminal investigative agencies to coordinate appropriate remedies in major procurement fraud cases.

ARTICLES / SPEECHES

Mr. Burton has delivered more than 100 keynote speeches on procurement topics at leading government and industry gatherings.

Mr. Burton was the co-editor of the American Bar Association (ABA) publication, entitled *Best Practices in Dispute Avoidance for Government Contracting* and a contributing author of an international publication, entitled *Integrity in Public Procurement*. He has also published articles in the *ABA Public Contract Law Journal*, *Government Contract Costs, Pricing & Accounting Report*, *ABA Procurement Lawyer*, and the *Service Contractor*.

HONORS

Fellow, National Academy of Public Administration
Secretary of Defense's Exceptional Civilian Service Award, 2008
Lifetime Achievement Award, Coalition for Government Procurement, 2007
Federal Computer Week's Top "Power Player in Procurement," 2007
Fellow, National Contract Management Association (NCMA)
NCMA Contracting Award, 2007
Federal 100 Award, 2006
Council Member, ABA Section of Public Contract Law
Chair, International Working Group on Integrity in Public Procurement
ABA Co-Chair, Accounting, Cost and Pricing Committee
ABA Co-Chair, Contract Dispute Resolution Task Force
Board of Advisors, NCMA

Tony G. Fuller Beers + Cutler

Professional Experience

Mr. Fuller is a Partner at Beers + Cutler and he leads over 40 professionals in the firm's Government Contractor Consulting Practice. He has worked with government contractors for over 15 years on a broad range of accounting, pricing, audit, compliance and litigation related matters.

Mr. Fuller works closely with Beers + Cutler's government contract clients to perform a variety of internal audit related projects. He has produced general and special purpose risk assessments, and successfully executed risk based audit plans in a broad range of compliance areas. He is also called upon to perform special projects, such as complex fraud investigations, forensic accounting and other sensitive internal reviews. During these projects, Mr. Fuller often works with his client's accounting, contracts and compliance functions to assess the efficacy of business processes and identify control gaps. This often leads to the development of corrective action plans that are submitted to the Government. He works with legal counsel to present his findings to government personnel from the Office of Inspector General (OIG) and the Department of Justice (DOJ).

Mr. Fuller's government contract experience also includes large projects in connection with mergers/acquisitions, contract disputes, claims, government audits and other business matters. He has formulated complex quantitative analyses related to manufacturing programs, major system integration projects and other contract issues. In connection with these efforts, Mr. Fuller works with counsel to quantify economic damages, draft and critique expert reports, facilitate settlement negotiations, provide expert testimony and support contractors and their legal counsel during all phases of litigation.

Mr. Fuller has extensive experience in all aspects of GSA Schedule contracting, and he is a sought after expert in this field. His GSA projects have typically involved analyzing complex pricing and compliance issues for major contractors in connection with proposal preparation efforts, contract extensions, internal compliance reviews, OIG audits and DOJ investigations.

Mr. Fuller has authored many articles and speaks frequently on a variety of government contract topics, including contract administration, compliance, audits and investigations.

Education/Professional Associations

Mr. Fuller holds a degree with honors in Economics from the University of California, Los Angeles. Prior to that, he graduated with honors in Arabic Language Studies from The Defense Language Institute, Presidio of Monterey.

Mr. Fuller is an active member of several professional organizations, including the National Contract Management Association and Professional Services Council. He is currently a Co-chair for the Commercial Products and Services Committee of the American Bar Association's Section of Public Contract Law.

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EDUCATION

The George Washington University Law School, LL.M., 1996

Student Editor-in-Chief, American Bar Association *Public Contract Law Journal*

University of North Carolina, J.D., 1989

Articles Editor, *North Carolina Journal of International Law and Commercial Regulation* (ILJ),

Spring 1988-Spring 1989; Staff on ILJ, 1987-1988

Duke University, A.B., 1985

BAR ADMISSIONS

District of Columbia

Florida

U.S. Court of Federal Claims

AREAS OF PRACTICE

Government Contracts

PRACTICE FOCUS

Rebecca Pearson focuses on government contracts law. She assists clients in government contract litigation; contract award protests before the General Accounting Office and federal courts; administrative claims before agency boards of contract appeals; representation before the Department of Justice and federal courts on civil matters involving government contractors; and civil litigation in federal courts involving government prime contractors and subcontractors. Ms. Pearson also counsels clients on matters involving contracts including defective pricing and cost allowance questions, mergers and acquisitions, teaming agreements, legal and regulatory compliance and ethics, and small business issues.

REPRESENTATIVE CLIENTS

As a member of the firm's government contracts group, Ms. Pearson represents a broad range of large and small clients involved in government contracts, including a major defense contractor and a large foodservice distributor.

CLIENT BENEFITS

Ms. Pearson's extensive experience as an Air Force attorney in federal litigation and client counseling, and in interfacing with other federal agencies, provides her with an invaluable "insider's" perspective and proven skills to render timely and effective assistance to clients in a wide variety of government contracts matters.

SIGNIFICANT MATTERS

Ms. Pearson has prosecuted and defended bid protests before government agencies, the Court of Federal Claims, the GAO, and Federal District Court. Ms. Pearson has handled several matters that

required sensitive negotiation or close coordination with counsel from Defense Supply Center Philadelphia.

ACTIVITIES

Ms. Pearson is a member of the editorial board for the American Bar Association's *Public Contract Law Journal* (5-96 to present). She is an active member of the American Bar Association and its Public Contract Law Section.

She is also the current Secretary of the Oakridge Elementary Parent Teacher Association and was past Treasurer of that organization.

PUBLICATIONS

Recent publications, written alone or with others include:

"2007 Year in Review: Analysis of Significant Federal Circuit Government Contracts Decisions," 37 *Pub. Contract L. J.* 625 (Summer 2008)

"Will Allison Reshape the FCA?," 50 *The Government Contractor* ¶ 251, July 16, 2008

"New DOD Guidance on the Berry Amendment: Still Berry After All These Years," *The Procurement Lawyer*, 2007

"Learning From Katrina," *Legal Times*, 2005

SPEAKING ENGAGEMENTS

Panel Member, *Small Business Contracting with the Federal Government: Mentor-Protégé Agreements and Contracting with Special 8(a) Companies*, DC Bar Seminar (Dec. 2007)

Panel Member, *The Impact of Small Business Size Recertification Requirements on Mergers and Acquisitions*, Fairfax County Chamber of Commerce (Mar. 2007)

Panel Member, *Berry Amendment*, Northern Virginia Chapter, National Contract Management Association (Mar. 2006)

Additional Materials

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FAR MANDATORY DISCLOSURE RULE

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Summary of FAR Mandatory Disclosure Rule — Effective 12/12/08

Amends Federal Acquisition Regulation (FAR) to require:

- Ongoing business ethics and compliance program and internal control system within 90 days of contract award (*not required for small business or commercial item contracts*)
- Mandatory disclosure if principal has credible evidence of
 - Criminal law violations involving fraud, conflict of interest, bribery, or gratuity violations
 - Civil False Claims Act violations
 - Significant overpayments
- Provides for suspension or debarment for knowing failure to timely disclose
- Applies to all contracts over \$5M and > 120 days
 - Applies in the U.S. and overseas
- Must be flowed down to subcontracts that meet same size and duration thresholds



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Definition of "Principal"

- Principal is defined as "an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).



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Requirement for Timely Disclosure

- "Credible evidence" standard permits some period of internal investigation before "timely" disclosure is required
- Contract **disclosure** clause requirements apply prospectively from 12/12/08
 - Although disclosure is prospective, past conduct on contracts open to exposure (i.e., pre 12./12/08) is still required
- Period of Exposure – From pre-award conduct to 3 years after final payment on contract
- Timeliness of disclosure
 - Measured from contract award or discovery of credible evidence, whichever is later
 - No set time determines "timely"

Disclose to Agency Office of Inspector General that Issued Contract

- For multiple-agency awards, the OIG of the agency with the largest dollar value award
- For orders from a multi-agency contract or award schedule, the OIG of the ordering agency and the IG of the agency with the basic contract
- If filed with wrong OIG, they can forward it

Business Ethics & Compliance Program

- Communicate periodically and in a practical manner your standards and procedures and other aspects of your business ethics awareness and compliance program and internal control system
- Provide this training to your principals and employees, and as appropriate, your agents and subcontractors



Internal Controls

- Establish procedures to facilitate timely discovery of improper conduct
- Ensure corrective measures are promptly established and implemented
- Assign responsibility at a sufficiently high level and provide adequate resources to ensure effectiveness of the compliance program and internal control system
- Exclude principals "whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct"
- Preamble suggests same due diligence in selecting subcontractors as in hiring principals
- Provide an internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality



Internal Controls (cont.)

- Take disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct
- Train agents and subcontractors on ethics "as appropriate"
- Provide "[f]ull cooperation with any Government agencies responsible for audits, investigations, or corrective action"



"Full Cooperation"

- Waiver of Attorney/Client Privilege and Work Product protections are not required
- 5th Amendment concerns are addressed for individuals and sole proprietors
- Cooperation is limited to the context of the Rule and does not expand Government audit rights or Government access in any other context
- Cooperation must be timely and thorough
 - Measured by the organization's cooperation, not obstructive individuals
 - Begins when contractor knows of investigation
 - Should make employees and documents available

Suspension and Debarment

- New cause of suspension/debarment for *knowing* failure to *timely* disclose a violation
 - Ten mitigating factors at FAR 9.406-1(a) are still valid...but how?
 - Knowledge must be by principals
- Overpayments must be significant
 - In the discretion of the debarring official
 - Obligations are consistent with other FAR clauses requiring report of overpayment



Applies to Wide Range of Contracts and Contractors

- Applies to commercial item contracts*
- Applies to commercial subcontracts*
 - FAR 52.212-5 and 52.244-6 have been modified to reflect this
- Applies to overseas contracts
- Applies to research and educational institutions
- Does NOT apply to grants

*Requirements for business ethics awareness and compliance program and internal control system does not apply to commercial item contracts or small businesses



Actions to Prepare for Mandatory Disclosure

- Understand what contracts are subject to mandatory disclosure, including contracts closed within 3 years
- Identify who is a "principal" on the contract
- Consider having principals identify information regarding potential violations or overpayments under contracts subject to mandatory disclosure
- Ensure that subcontracts appropriately flowdown mandatory reporting requirements



Tips for Effective Ethics Program

- Maintain Ethics Culture/Tone at the Top
- Consistently reinforce commitment to ethical conduct
- Establish and follow program goals
- Track and follow (to extent feasible) standards of Defense Industry Initiative, U.S. Sentencing Guidelines, Sarbanes-Oxley Act, FAR and other defense industry best practices

Tips for Effective Ethics Program (cont.)

- Make sure the program applies to *all* employees
- Construct and implement all of the proper program elements: (Code, policies, *mandatory* training, communications, web site, hotline, posters, business unit compliance infrastructure, investigation procedures, disclosure program, board reporting mechanism)
- Allow program to evolve and change with the changes in the organization



The Brave New World of Government Contractor Compliance Programs: *Maximizing Effectiveness and Minimizing Risk*

By James C. Fontana; J. Scott Hommer, III; and Peter A. Riesen
Venable LLP, Washington, D.C.

“Men must turn square corners when they deal with the government.”

~ Justice Oliver Wendell Holmes

The challenges faced by the government contracting community go far beyond those in the commercial sector. Unlike most industries, federal government contracting is increasingly complicated, highly regulated, and subject to more risks than almost any other business. Non-compliance with the laws and rules governing it can lead to criminal and civil liability for the contractor as an entity, as well as its individual members.

Most if not all of us can name some of the government ethics scandals that have made it to mainstream media: those involving Darlene Druyun, David Safavian, Jack Abramoff, and others affecting not just government employees, but also government contractors. The recent case of The Accela Group, in which a retired rear admiral whose only offense was to sign the cover letter of a proposal during the one-year “cooling-off” period required before communicating with or appearing before his former agency¹, resulted in both the admiral’s and Accela’s suspension from receiving future government contracts.² More recently, a federal D.C. circuit court awarded what could amount to almost a \$7- million verdict against SAIC based on issues related to organizational conflicts of interest (OCIs). The jury found that SAIC made 77 false statements and claims related to SAIC’s failure to disclose OCIs stemming from its subcontract efforts on one program that potentially influenced the company’s work in a separate program. And let’s not forget the several cases of Boeing’s alleged

misappropriation of trade secrets, overbilling, and its complicity in the Druyun scandal that cost it tens of millions of dollars in fines and penalties, loss of senior-level jobs, and prison time for its CFO. These examples, along with the already heightened attention to contractor ethics, both at the agency level and on the political landscape, have raised the stakes and the risks of providing services and goods to the government.

Most of us also know that, while the legal and political fallout from such events has been quite public, and, in the opinion of some in the government contracting community, quite severe, there will likely be more such fallout in the months and years to come. Recent amendments to the *Federal Acquisition Regulation (FAR)*³ evidence some of the repercussions. On December 24, 2007, for example, the *Federal Register*⁴ published final rule changes to the *FAR*, which require certain entities contracting with the federal government to implement ethics compliance programs and to take other steps in an effort to ensure that the employees of those contracting with the federal government are made aware of the means by which they can report alleged ethics violations. Another final rule, issued on November 12, 2008, imposes even more onerous requirements and greater penalties on non-compliant contractors, mandating, among other things, that contractors disclose “credible evidence” of violations of certain federal civil and criminal law.

In light of these realities, the great risk in responding to these new regulations—other than to ignore them altogether—is to create or continue to have an ethics compliance program that may seem compliant with the new regulations, but which is nothing more than a “toothless tiger”—a program that neither effectively identifies nor resolves problems before they turn into much more than a few sleepless nights for senior management. Equally critical is that these issues will impact government contractors both large and small. One of the most common mistakes small companies make is to create a program on paper, but then do little or nothing to implement and manage it. This “set it and forget it” approach—sometimes for the sake of saving costs and because small companies often tend to believe that they are sufficiently under the government’s radar screen as to have little to worry about with regard to

ethics compliance—is both dangerous and counterintuitive. For middle-market and large companies, the false sense of security lies in the notion that their current programs are time-tested, lengthy, and supported by a seemingly endless organization chart. But consider that the new and proposed requirements will require changes to even the most robust programs, and that Boeing, SAIC, and other large firms faced substantial and expensive ethics-related problems despite their model ethics compliance programs.

This potential problem can be solved, however. Before ethics trouble strikes, government contractors, both large and small, can take a variety of simple measures that will turn a paper-thin ethics program into one respected and understood by all levels of an organization—one at the heart of the structure and culture of the company.

The New FAR Ethics Requirements

The new *FAR* ethics requirements have four main components. In summary, they mandate the following:

1. Contractor Code of Ethics

- Required for businesses with contracts or subcontracts over \$5 million and a period of performance of 120 days or more,
- Must be implemented within 30 days of contract award, and
- Must be written and distributed to all employees.⁵

2. Business Conduct Awareness Program

- Required for businesses with contracts or subcontracts over \$5 million, a period of performance of 120 days or more, and that are other than “small,”
- Must be implemented within 90 days of contract award, and
- Requires an internal control system to timely discover improper conduct and ensure corrective measures.⁶

3. Hotline Poster

- Generally, required for businesses with contracts or subcontracts over \$5 million but not for contracts performed entirely outside the U.S. or for commercial items,
- Must be displayed in common work areas and on the company Web site, and
- Must include contracting agency hotlines.⁷

4. Timely Disclosures

- Mandatory reporting of credible evidence of violations of Federal criminal law in connection with the award, performance, or

closeout of a contract or subcontract and involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code,

- Mandatory reporting of credible evidence of violations of the civil False Claims Act in connection with the award, performance, or closeout of a contract or subcontract,
- Mandatory reporting of credible evidence of a significant contract overpayment, other than overpayments resulting from contract financing payments as defined in FAR 32.001.

Interpreting the New FAR Ethics Requirements

The Final Rules Themselves

One reason companies run the risk that their ethics programs are less effective than they should be is that the new final rules do not answer many of the questions that will naturally be raised in attempting to comply with those rules. However, the final rules do provide numerous examples of what should be in such a program. These include the following:

- Assignment of high-level responsibility within the company for the ethics program,
- Adequate ethics resources,
- Periodic reviews of company business practices,
- Ethics reporting hotlines,
- Instructing employees on how to use the hotlines,
- Internal and external ethics audits, and
- Disciplinary action for improper action.⁸

Nonetheless, the rules do not provide many more specifics about what a “code of conduct” should include or how to implement a business conduct awareness system. But guidance is available from a variety of other sources.

U.S. Sentencing Commission Guidelines

The U.S. Sentencing Commission has published guidelines for what constitutes an effective compliance and ethics program. Contractor adherence to these guidelines will be taken into consideration in the Commission’s *culpability score* for purposes of 8C2.5(f) and 8D1.4(c)(1) (the Commission’s “Recommended Conditions of Probation—Organizations”) of the guidelines.⁹ Among other things, the guidelines state that in order for a compliance program to be effective, a contractor should do the following:

(1) Exercise due diligence to prevent and detect criminal conduct, and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. Such compliance and ethics programs should be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is

not generally effective in preventing and detecting criminal conduct.¹⁰

While this provision, standing alone, is also quite general, the guidelines explain that these goals are considered to have been implemented when:

- “The organization’s governing authority [is] knowledgeable about the content and operation of the compliance and ethics program and [exercises] reasonable oversight with respect to the program’s implementation and effectiveness.”¹¹
- “Specific individual[s] within high-level personnel [are] assigned overall responsibility for the compliance and ethics program.”¹²
- Having and publicizing “a system whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.”¹³
- “[A]ppropriate incentives to perform in accordance with the compliance and ethics program.”¹⁴

Further, the commentary to the guidelines provides even more specifics, including the following factors to be considered in determining whether an organization has met the requirements:

- “[A]pplicable industry practice or the standards called for by any applicable governmental regulation”: namely, “[a]n organization’s failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.”¹⁵
- “[T]he size of the organization”: namely, “[t]he formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization’s standards and procedures, depend on the size of the organization.”¹⁶
- “[S]imilar misconduct”: namely, “[r]ecurrence of similar misconduct.”¹⁷

Other Federal Statutes

Other federal statutes, while not focused on the implementation or administration of an ethics compliance program, offer a great deal of direction about what should be covered in employee ethics training and, in day-to-day business, what should and should not be done so as not to run afoul of these myriad laws. Among the more important statutes are the following:

- The False Claims Act (FCA),¹⁸
- The Program Fraud Civil Remedies Act,¹⁹
- The Procurement Integrity Act (PIA),²⁰
- The Anti-Kickback Act,²¹
- The Foreign Corrupt Practices Act,²² and
- The Truth in Negotiations Act.²³

These statutes allow an organization to determine which common business practices need to be strengthened and which need to be altered or eliminated. For example, the FCA makes it a crime to conspire “to defraud the government by getting a false or fraudulent claim allowed or paid.”²⁴ As such, in order to ensure compliance with the FCA, an organization should satisfy itself that company employees given the authority to prepare, review, and submit claims against the government have special instruction so they understand the gravity of materially false representations in the claims context. Additional record-keeping and auditing may also need to be implemented to ensure that no such false representations occur, even unintentionally.

The PIA also provides clear *do’s* and *don’ts*. Among other things, the PIA provides that a person shall not “knowingly disclose contractor bid or proposal information or source selection information before the award of a federal agency procurement contract to which the information relates.”²⁵ This restriction applies to any person who (1) is a present or former U.S. official, or a person who is acting or has acted on behalf of, or who is advising or has advised the United States with respect to the procurement; and (2) has or had access to the information by virtue of that office, employment, or relationship.²⁶

The PIA also provides that a person shall not “knowingly obtain contractor bid or proposal information or source selection information before the award of a federal agency procurement contract to which the information relates.”²⁷ As such, government contractors must first target whether they have employees who fit this description: anyone who has received or may receive access to information that may fall within the PIA’s purview. If so, the contractor should ensure that such employees are given specially targeted training on the handling and destruction of confidential information. Once again, additional record-keeping may be necessary.

The Defense Industry Initiative on Business Ethics and Conduct (DII)

The DII was, according to its Web site,²⁸ “established in June 1986 by 32 major defense contractors who pledged to adopt and implement a set of principles of business ethics and conduct that acknowledge and express their federal-procurement-related corporate responsibilities to the Department of Defense, as well as to the public, the government, and to each other.”²⁹ DII’s mission statement states, in part, that “DII’s essential purpose is to combine the common dedication of its signatories to a culture and practice of ethics and right conduct in all business with the U.S. Defense Department and with others.”³⁰

The DII Web site has a variety of helpful resources available to the general public, including a lengthy list of selected online resources “generally related to

signatories, business ethics, or government ethics and professional ethics associations.”³¹ The DII also has various additional resources available to DII signatory companies.

Other Resources

There are scores of free resources available both in print and online for government contractors regarding ethics compliance. Among some of the more helpful Web sites are the following:

- The U.S. Office of Government Ethics (www.usoge.gov);
- The U.S. Department of Defense Standards of Conduct Office (www.dod.mil/dodgc/defense_ethics/index.html);
- The Legal Information Institute, Government Contracts Resources (http://topics.law.cornell.edu/wex/Government_contracts); and
- Where In Federal Contracting? (www.wifcon.com).

Implementing the New FAR Ethics Requirements

It is one thing to review the voluminous material relevant to government contractor ethics compliance; it is quite another to take what is theory and convert it into practice. In light of this, we offer the following “nuts and bolts” suggestions.

Guiding Principles

In *Anna Karenina*, Leo Tolstoy wisely observed, “Happy families are all alike; every unhappy family is unhappy in its own way.”³² Much the same can be said of ethics compliance programs: all good programs have the same characteristics. They are all driven by a commitment to the basic values underlying, not just an ethics compliance program, but an organization that thinks and acts with ethics in mind. Such a company—both in general and in the person of an ethics compliance officer—constantly asks questions like, “What kinds of people does our company attract?” or “What kinds of attitudes and actions do we encourage?”

More fundamentally, however, there are five main values essential to any organization that wants to implement and maintain a top-notch ethics program. These values are as follows.

- **Tone**—The concept of *tone at the top* means simply that an ethics-based culture is best set—and must be set—at the highest levels of the organization. It involves people, not just at the corporate or business unit level, but at all levels of the organization, starting from the board of directors and flowing down to everyone else in the organization. But this tone at the top cannot be attained simply by a memo from the chairman of the board about the importance of ethics compliance; it is

attained only through a total buy-in throughout the ranks of the organization, where the senior leadership sets the standards by consistently reinforcing their commitment to ethical conduct, knowing what employees are doing in maintaining those standards, and encouraging everyone in the organization to do the same.

- **Inclusiveness**—Ethics programs must set the tone for compliance by involving everyone in the organization. All members of the organization, from the chairman to the receptionist, no matter how busy, should be required to attend training, agree to comply with the code of conduct, and be subject to the same ethics violation reporting procedures. Doing so not only ensures that the message is uniformly distributed, but also strengthens company cohesiveness, which itself fosters an ethics-friendly environment.

- **Thoroughness**—A company’s ethics program must not only fulfill the requirements of the new final FAR provisions, but must do so thoroughly. In other words, to be effective, an ethics program must be both *broad* and *deep*. Written codes of ethics should be brief and reader-friendly, but should adequately summarize the legal requirements, standards of behavior, and more complex policies underlying the program’s requirements. In training, for example, all relevant topics must be covered. With online training, employees should be provided with training modules that are both informative and challenging. The better programs also provide for post-training quizzes that test whether the participant actually participated or, instead, permit employees merely to scroll through the program during a conference call. During live training sessions, there should be a meaningful opportunity for employees to ask questions and provide feedback. Handouts should be supplied, and supplemental resources should be available for further reading. Merely going through the motions without making the motions meaningful is not enough to make and keep a program effective, or if an ethics violation occurs—apart from the fact that rote ethics programs send the highly undesirable signal that the company itself does not take compliance seriously.

- **Transparency**—Any ethics program worth its time and money has established processes in place that avoid even the appearance of favoritism or OCIs. Such a program also provides employees at all levels with the chance to review and ask questions about the training and violation reporting processes in place. Doing so sends a strong signal to those both inside and outside the organization that the ethics compliance program can withstand scrutiny—a message that carries over into all company actions and interactions.

- **Follow-through**—Perhaps the easiest way to distinguish quality ethics compliance programs from those put in place to comply only with the bare minimum requirements is the extent of *follow-through* in investigating, disciplining, and correcting ethics

violations. To be frank, an ethics program must have teeth. If a violation occurs that warrants disciplinary action, that action must be taken without delay. And if, for example, retaliation occurs as a result of an employee's reporting an alleged violation, the company must not only discipline those involved, but also quickly put in place measures to minimize the chances that retaliation will occur again.

In short, while guiding principles can devolve into nothing more than vague platitudes, well-thought-through fundamentals will help shape the specific processes required to ensure that an ethics program is up and running the way it should be.

Gap Analysis

Whether an organization's ethics compliance program already exists and merely needs to be updated, or whether it is time to implement a compliance program from scratch, certain basic questions should be asked and carefully answered before the program is complete. Among these questions are the following:

- Policy Manuals
 - Where can they be found?
 - Are the company's policies easy to find?
 - Are they in one volume or section of one volume?
 - If not, are there ample references in the company handbook to other policies separate from the handbook?
 - Are they clear?
 - Are they as jargon-free as possible?
 - Are they grounded in fundamental values?
 - Do they provide concrete examples?
 - Are they thorough and current?
 - When was the last time they were updated?
 - Who is responsible for maintaining their accuracy?
 - Do all employees have them?
 - Is a system in place to ensure that new hires receive the manuals immediately?
 - Are they available on the Web?
 - Are they available on both the company's intranet and external home page?
- Internal Control System
 - Does the company have a clear, thorough, written procedure for responding to alleged violations?
 - When was it last reviewed and updated?
 - Is the company's ethics compliance officer independent and authorized to make decisions in response to alleged violations without management interference?
 - What is the process for investigating alleged violations of senior management?
 - Do employees understand the process?

- What evidence is there that they understand it?
- Are employees encouraged to use it?
 - Does the tone at the top encourage or discourage its use?
- Is the reporting of alleged violations anonymous?
 - Are employees aware that it is anonymous?
 - Have means been employed to assure employees of its anonymity?
- Is there follow-through in investigating alleged violations and disciplining the relevant employees?
 - Is the follow-through consistent and fair?

- Training

- How often does the company have it?
 - Should it be given more often?
- When was it last offered?
 - Was it last offered before the award of a major contract (and the inclusion of a significant number of new personnel)?
- How is it offered?
 - Is it given live or online?
 - If it is offered online, is there an opportunity to ask questions?
 - If it is offered online, is there a system in place to ensure that all employees have sat through the entire presentation?
- Are handouts available?
 - Are extra copies available?
 - Are copies accessible online?
- Have all employees, including senior management, participated and had a chance to ask questions?
- Have all employees certified in writing that they participated and that they will abide by the policies?
 - Does the company have all certifications on file?

Tips and Tricks for a Solid Ethics Compliance Program

We all learn from those who have gone before us, and this should be no less true in crafting or reviewing an ethics compliance program. The following are just a few additional tips and tricks, culled from companies both large and small, to further promote the success of ethics compliance programs.

- **Provide the option of online training.** Online training is often the most convenient, especially for staff that spend time at a government site more than at corporate headquarters.
- **Set aside a specific time and place for training.** Some companies find the flexibility in allowing employees to take the training whenever and wherever easier than requiring that employees sit down at a particular time. However, setting aside a particular time ensures that all

employees can fit the training in during working hours without delay.

- **Bring in outside counsel to review handbooks and training handouts.** At a minimum, a set of fresh eyes should help ensure that company policy is in line with government expectations and industry practice.

- **Send out periodic ethics e-mail updates or advisories.** Even if most employees delete them, they are reminded of the importance of ethics in the organization.

- **Include real-life examples of ethics violations and how to avoid them.** Case studies taken from the news are effective in reminding employees of the consequences of even unintentional violations.

- **Where appropriate, acknowledge ethics missteps.** Balanced against the need for privacy, maintaining morale, and public relations, being honest about mistakes lends credence to the goal of transparency within the company.

- **Award prizes and otherwise acknowledge ethical behavior.** Acting ethically can and should be rewarded just as employees are awarded for business development, productivity, and other actions that benefit the company.

- **Give employees repeated opportunities to ask questions.** Make sure that employees are regularly able to ask questions and able to do so in a variety of ways (in person, by e-mail, over the phone, by submission to an anonymous drop box).

- **Make sure new employees are promptly given handbooks, training, and other resources.** New employees often fall through the cracks and must wait until the next training cycle, which may occur well after they have worked on procurements in which their knowledge of the rules is essential for full compliance.

Conclusion

Proper ethics compliance, especially for government contractors, cannot be viewed simply as a cost of doing business. New ethics-related requirements

and several recent cases make clear that ethics violations—even those that have been merely alleged—are serious and have the potential to put a company's future at great risk. In our heightened ethics environment, it behooves us all, first, to understand the new rules; second, to carefully review and, if needed, update ethics compliance programs to include manuals, procedures, codes of conduct and training programs; and third, maintain a tone at the top so that the need for compliance is consistently reinforced from senior management on down. In ethics, as with most everything else, it is the preventative measures we take that make the most difference.

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¹ 18 U.S. Code (U.S.C.) 207(c).

² See the U.S. Department of Justice's press release at www.usdoj.gov/usao/cas/press/cas70711-Betancourt.pdf.

³ Title 48 of the Code of Federal Regulations (CFR).

⁴ 72 *Federal Register* 65873.

⁵ As per FAR 52.203-13.

⁶ *Ibid.*

⁷ As per FAR 52.203-14.

⁸ 72 *Fed. Reg.* 65873.

⁹ *U.S. Sentencing Guidelines Manual*, ch. 8, pt. C–D (2006).

¹⁰ *Ibid.*

¹¹ *Ibid.* at 8B2.1(b)(2)(A).

¹² *Ibid.* at 8B2.1(b)(2)(B).

¹³ *Ibid.* at 8B2.1(b)(5)(C).

¹⁴ *Ibid.* at 8B2.1(b)(6)(A).

¹⁵ *Ibid.* at 8B2.1(2)(A)(i), (2)(B).

¹⁶ *Ibid.* at 8B2.1(2)(C)(i).

¹⁷ *Ibid.* at 8B2.1(2)(D).

¹⁸ 31 U.S.C. 3729–3732.

¹⁹ *Ibid.* at 3801–3812.

²⁰ 41 U.S.C. 423.

²¹ *Ibid* at 51–58.

²² 15 U.S.C. 78dd–78ff.

²³ 10 U.S.C. 2306a; 41 U.S.C. 254b.

²⁴ 31 U.S.C. 3729(a)(3).

²⁵ 41 U.S.C. 423(a)(1).

²⁶ *Ibid* at 423(a)(2).

²⁷ *Ibid* at 423(b).

²⁸ www.dii.org.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ *Ibid*.

³² Tolstoy, Leo, *Anna Karenina*, pt. 1, ch. 1 (1873–1877).

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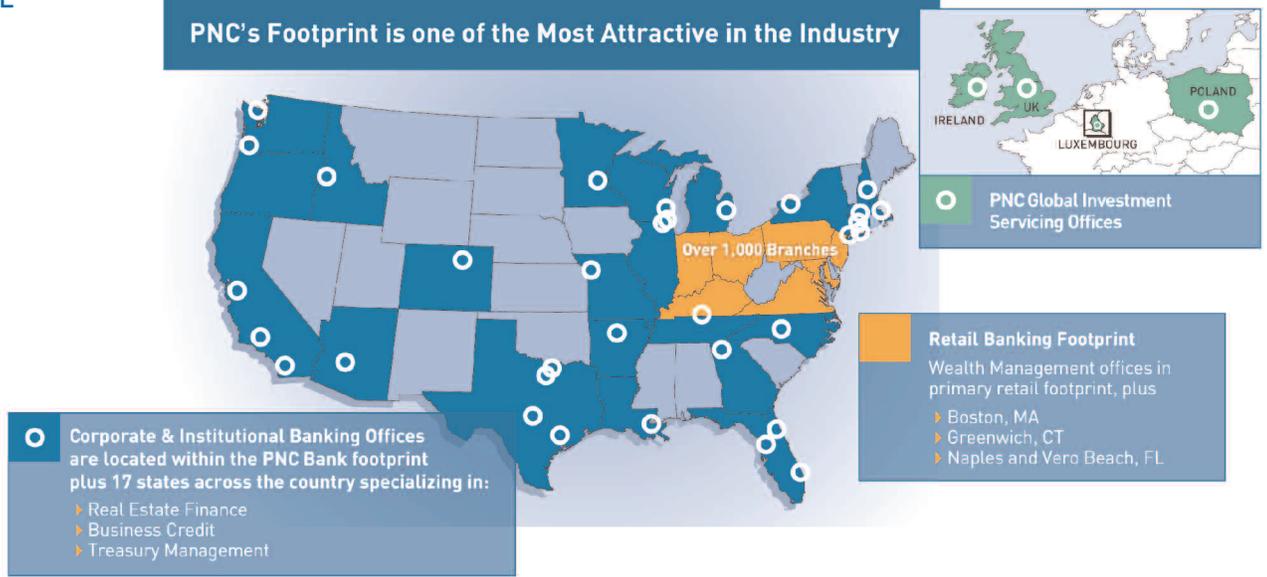
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