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CONFLICTS OF INTEREST:  
*Now It's Getting Personal*

The New FAR Personal Conflicts of Interest Regulations

April 5, 2012



## CONFLICTS OF INTEREST:

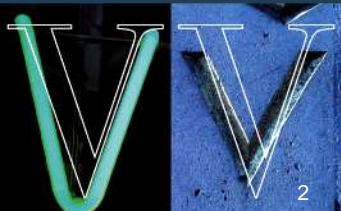
### *Now It's Getting Personal*

## The New FAR Personal Conflicts of Interest Regulations

**Moderator:** Scott Hommer, Partner, Venable LLP

**Panelists:**

- Sherry Rhodes, Vice President, General Counsel & Secretary, Chief Ethics and Compliance Officer, Noblis
- Monique Buckles, Deputy General Counsel & Assistant Secretary, Noblis
- Patrick Gnazzo, Principal, Better Business Practices LLC
- Rob Burton, Partner, Venable, LLP
- Bill Walsh, Partner, Venable, LLP



## Biographies



**Scott Hommer**, Partner at Venable LLP, concentrates his practice in business counseling and litigation with an emphasis on technology companies and government contractors. He represents clients locally, nationally, and internationally on issues including negotiating contracts, acquisitions, protecting intellectual property rights, and successful litigation. Mr. Hommer also has significant experience in counseling clients who do business with the federal, state, and local governments and has represented clients on contract administration matters, contract claims and disputes, bid protests, contract terminations, teaming agreements, conflict of interest issues, intellectual property rights issues, government socio-economic programs, and small business matters.

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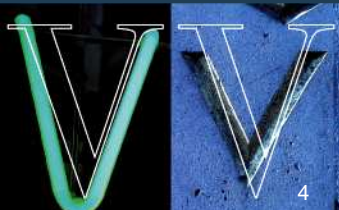
## Biographies



**Sherry Rhodes**, Vice President, General Counsel & Secretary, Chief Ethics and Compliance Officer, is responsible for all legal matters and corporate secretary duties within the Corporation. This includes corporate governance, corporate transactions, tax compliance, intellectual property, litigation management, employment issues and real estate. In her role as Chief Ethics and Compliance Officer, Ms. Rhodes oversees and monitors the implementation of Noblis' Ethics and Compliance Program, which includes among other things: assuring that the Ethics and Compliance Program, including the Code, is periodically revised in light of changes in the laws, regulations and policies that affect all businesses, and the non-profit, public interest industry in particular; training related to the Ethics and Compliance Program; managing Noblis' Compliance Hotline Reporting System and responding to reports; and investigating reports of violations and coordinating any necessary corrective actions.

Prior to working at Noblis, Ms. Rhodes was with several publicly-traded technology companies where, as Vice President, General Counsel and Secretary, she was responsible for all legal and compliance matters, including SEC compliance and mergers and acquisitions. Ms. Rhodes was in the private practice of corporate law for thirteen years prior to going in-house.

Ms. Rhodes graduated Order of the Coif from the University of Maryland School of Law and Magna Cum Laude from the University of Maryland with a Bachelor of Arts. She is a member of the Maryland and District of Columbia Bars and holds a Corporate Counsel Registration from the Virginia Bar. She is also a member of the American Society of Corporate Secretaries and the Association of Corporate Counsel. Ms. Rhodes is on the Board of Washington Metropolitan Chapter of the Association of Corporate Counsel and on the President's Council for Higher Achievement.



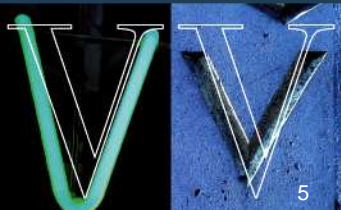
## Biographies



**Monique Buckles**, Deputy General Counsel & Assistant Secretary, provides legal advice and counsel on corporate, legal and regulatory matters involving, but not limited to, government contracts, HIPAA, employment matters, Freedom of Information Act, ethics, compliance, and organizational and personal conflicts of interest. Ms. Buckles' responsibilities also include: providing compliance support to the Chief Ethics and Compliance Officer on matters involving the Federal Acquisition Regulations (FAR) and other Federal department supplemental regulations; serving as a business partner with Finance, Human Resources, Facilities & Security, Procurement and executive management regarding contracts, compliance and general areas of the law; and providing legal advice and guidance on the management and protection of classified information involving U.S. Government programs.

Prior to working at Noblis, Ms. Buckles served as Chief Counsel, Federal (PTS) Services Group with AECOM; Chief of Staff (2006-2009) and Associate General Counsel, Compliance & Ethics (2004-2006) with Fannie Mae; and Senior Counsel, General Law and Ethics with the U.S. Department of Treasury Bureau of Alcohol, Tobacco and Firearms (ATF)/Tax and Trade Bureau (TTB). Ms. Buckles also spent nine years as an attorney with the U.S. Department of Army Corps of Engineers – Headquarters, Pacific Ocean Division Hawaii, and Transatlantic Programs Center, Winchester, VA and with the U.S. Navy – Naval Sea Systems Command, Naval Undersea Warfare Center and Naval Surface Warfare Center.

Ms. Buckles received her B.S. in Real Estate Urban Development/Real Estate Finance from American University, and her J.D. from the Benjamin N. Cardozo School of Law, Yeshiva University. Ms. Buckles is a member of the Maryland and District of Columbia Bars and holds a Corporate Counsel Registration from the Virginia Bar. Ms. Buckles is also a member of the Ethics and Compliance Officers Association and the Association of Corporate Counsel. Ms. Buckles is on the Board of Directors for the Jewish Community Center of Greater Washington.





# Biographies



**Patrick J. Gnazzo** is an expert in the areas of corporate ethics and compliance for domestic and international business.

Mr. Gnazzo is the Principal of Better Business Practices LLC. Better Business Practices specializes in Business Compliance and Ethics Assessments; Compliance and Hotline Reporting; Development and Promulgation of Compliance, Ethics and Employee Open Communication Programs; the Development of Risk Management Processes and Reviews; Employee, Management and Board of Director Ethics and Compliance Training and Management Advice involving Deferred Prosecution and Administrative Agreements.

Mr. Gnazzo was most recently the Senior Vice President and General Manager of CA's Public Sector business. In this position, Mr. Gnazzo headed up all operations for CA's Federal, State and Local government business, including management, administration, and regulatory matters, as well as government relations.

Previously, Mr. Gnazzo was Senior Vice President, Business Practices, and Chief Compliance Officer at CA. In 2007, Mr. Gnazzo was also named CA's Chief Risk Officer. He also oversaw government regulatory compliance. Prior to joining CA in 2005, Mr. Gnazzo served as Chief Compliance Officer at United Technologies Corporation (UTC) for ten years.

Mr. Gnazzo held several other significant positions at UTC, including Vice President for Contracts and Deputy General Counsel at Pratt & Whitney; Vice President and Government Liaison in Washington, D.C.; President of United Technologies International; Vice President and Litigation Counsel; and Vice President for Government Contracts and Compliance.

Mr. Gnazzo joined UTC in 1981, from the U.S. Navy's Office of the General Counsel. Mr. Gnazzo's last position in the Navy was Associate General Counsel, Chief Trial Attorney and Director of the U.S. Department of the Navy's litigation division.

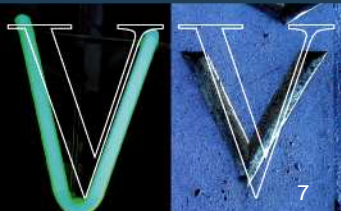


## Biographies



**Robert A. Burton**, Partner at Venable LLP, is a nationally-recognized federal procurement attorney, who focuses his practice on assisting government contractors navigate the complex and rule-driven procurement process. He represents a wide range of companies that conduct business with the federal government, from large defense contractors and systems integrators to small businesses. Mr. Burton assists government contractors with the development and management of their ethics and compliance programs and aids them with their marketing strategies for selling to the government.

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# Biographies

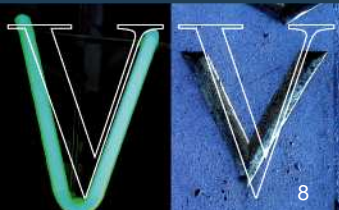


**William L. Walsh**, Partner at Venable LLP, concentrates his practice on representing federal sector companies who contract with DOD and civilian agencies. He represents clients locally, nationally, and internationally in issues including dispute resolution (ADR) and bid protests before the U.S. Government Accountability Office, Federal Boards of Contract Appeals, and executive agencies on contract administration matters, contract claims, contract terminations, teaming agreements, contractor qualification issues, conflict of interest concerns and small business matters.

Mr. Walsh has 30 years of federal and state government contract experience and extensive knowledge and skills in this complex area. Mr. Walsh's legal career began as a lawyer with the DOD on government contract and legislative issues. Mr. Walsh also served as Chief Counsel for NASA's Marshall Space Flight Center.

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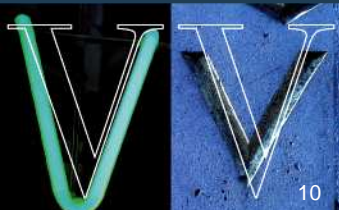
# Agenda

- Background and Legislative History
- Overview of FAR Clause
- Key Definitions
  - Covered Contracts
  - “Acquisition Function Closely Associated with Inherently Governmental Functions”
  - Personal Conflict of Interest
    - Financial Interest
- Ambiguities
- Practical Implications and Expanding Application
- Macro-Level Perspective
  - Dilemmas, Practical Implications and Best Practices
- Mandatory Disclosure of PCI Violations
- Micro-Level Perspective
  - Experiences, Challenges and Implementation Best Practices



## Why is the New FAR Clause Relevant?

- Federal Government spending has increased, while the number of Federal Government employees has decreased.
- Government spending on products has decreased.
- There has been a significant increase in the amount spent on service contracting.



## Background: Report of the Acquisition Advisory Panel

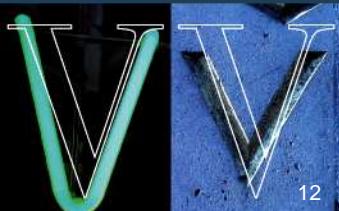
- In January 2007, the Panel first recommended that “the FAR Council, in its unique role as the developer of government-wide acquisition regulations, take the following action: review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with OCIs, personal conflicts of interest (“PCIs”), as well as the protection of contractor confidential and proprietary data.”
- The Panel noted that “there has been no standardization, and there is no central repository or list of best practices available.”



## Background: Legislative History

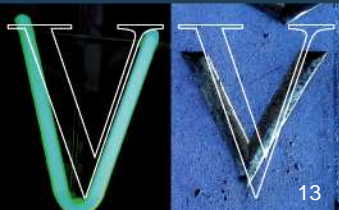
Section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 provided that:

“Not later than 270 days after the date of the enactment of this Act, the Administrator for Federal Procurement Policy shall develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions (including the development, award, and administration of Government contracts) for or on behalf of a Federal agency or department.”



## Background: Rulemaking

- November 13, 2009: The FAR Councils published a proposed rule in the Federal Register.
- November 2, 2011: The FAR Councils published the Final Rule with an effective date of December 2, 2011.



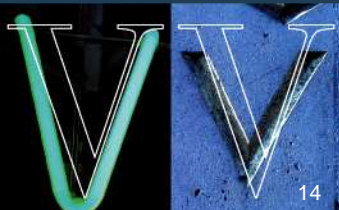


# Overview of New FAR Clause

FAR 52.203-16 requires Contractors to:

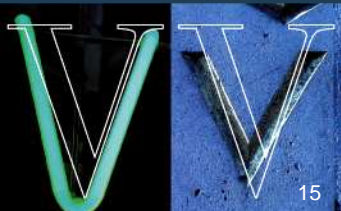
- Screen for and prevent PCIs for covered employees
- Obtain and maintain “a disclosure of interests that might be affected by the task”
- Require each employee to update the disclosure statement with changes
- Prohibit use of “non-public information accessed through performance of a Government contract for personal gain”; Obtain signed NDA
- Report violations to contracting officer
- Train employees to identify and avoid PCIs or the “appearance” of PCIs
- Maintain effective oversight to verify compliance

FAR 52.203-16(d): Subcontract Flowdown



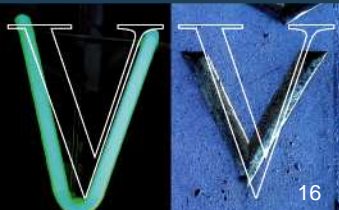
## Covered Contracts

Contracts above the simplified acquisition threshold other than commercial items contracts that are contracts or task orders under which some or all of the work contemplated is for “an acquisition function closely associated with inherently governmental functions.”



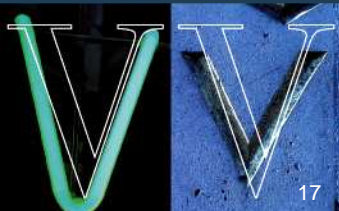
## “Acquisition Function Closely Associated with Inherently Governmental Functions”

- Planning acquisitions
- Determining what supplies or services are to be acquired by the Government, including developing statements of work
- Developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria
- Evaluating contract proposals
- Awarding Government contracts
- Administering contracts
- Terminating contracts
- Determining whether contract costs are reasonable, allocable, and allowable



## What is a Personal Conflict of Interest?

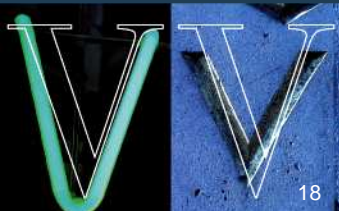
Personal conflict of interest means a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract.



# What is a Financial Interest?

Examples include:

- Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;
- Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);
- Services provided in exchange for honorariums or travel expense reimbursements;
- Research funding or other forms of research support;
- Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);
- Real estate investments;
- Patents, copyrights, and other intellectual property interests; or
- Business ownership and investment interests.





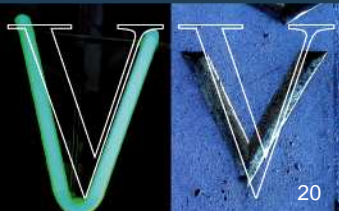
## Ambiguity in Rule

- What constitutes an “acquisition function closely associated with inherently governmental functions” may be overly broad and interpreted differently by different contractors and agencies.
- Example: although many “covered employees” appear to be decision-makers, what constitutes a “contract administrator”?
- The Rule is particularly ambiguous when applied to contracts where only “some” of the contract is subject to the Rule. *See* FAR 3.1106(b).
- What is an “appearance” of a PCI?
- What is a “*de minimis*” interest?



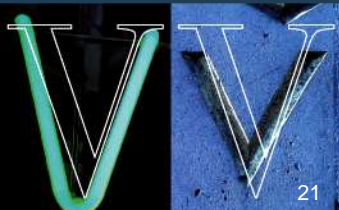
## Practical Implications: How much information to gather and from whom?

- Identification methods will vary depending on company size, industry and procedures already in place.
- Identify the PCIs for your key personnel prior to submitting a proposal; consider maintaining records of significant financial interests for these individuals.
- For other employees, review a list of potential conflicts and either disclose a PCI or confirm none exists.



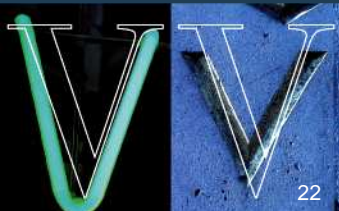
## Practical Implications: Who is in charge?

- Develop a disclosure system in your company and train employees:
  - How and when are PCIs screened?
  - How and when are employees trained?
  - How and to whom does an employee report a financial interest or change?
- Consider making one employee or one committee in charge of screening PCIs. This provides a centralized location to receive confidential employee information.
- Who will be informed of a potential PCI? Who will make the decision to report?
- Have a plan in place and amend company Code of Ethics as appropriate.



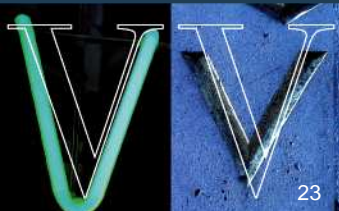
## Expanding Application

- On November 2, 2011, the Department of Defense, General Services Administration, and NASA issued a request for information on whether the rule should be expanded to functions that are not associated with inherently governmental functions.
- The closing date for comments was January 3, 2012.



## Dilemma

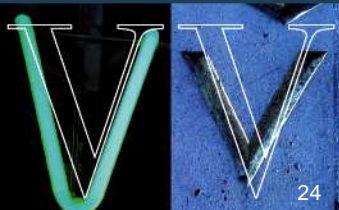
You May Have a Conflicts of Interest Policy, but it May Not Comply with your Contracts and Task Orders Awarded after Dec. 2011.





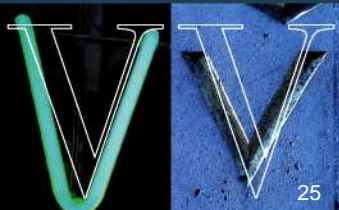
## Current Conflicts of Interest Policies

- Requirements and thresholds for financial reporting vary from company to company
- Most company policies don't set dollar thresholds; they may use a percentage of net wealth
- They don't address non-public information
- They don't address seeking or negotiating employment
- They don't flow down to subcontractors



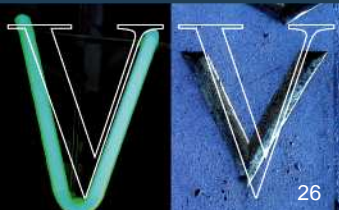
## Personal Relationships and Financial Interests

- Most companies require their procurement personnel and specified management levels to disclose their financial conflicts and those of their immediate family
- The FAR clause covers actual and apparent conflicts– very broad definition of relationships and no specified financial reporting threshold
- Most companies ask about secondary employment but not about potential future employment



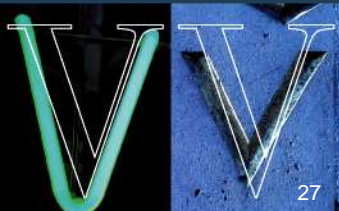
## Non-Public Information

- This is more than proprietary, classified and procurement sensitive information
- Who determines when certain information is non-public?
- Can you just avoid not using the non-public information or do you have to report that it is in your possession?
- The FAR clause refers to a contractor's employees' use of non-public information for personal financial gain
- What if the contractor is unaware of its use in a proposal? Bid Protest or disqualification?



# Disciplinary Actions for Not Reporting

- Discipline must be taken if the employee fails to report an existing conflict
- What if the employee didn't realize that it was a conflict?
- What if it is reported that an employee has the "appearance of a conflict" but the employee disagrees and failed to report?
- What if the Government's Contracting Officer is notified of the failure to report? Is the CO obligated to report that employee to the Suspending and Debarring Official?
- What if the contractor failed to report an apparent conflict because it was not "apparent" to them?



## Best Practices

- Review your internal policies for compliance with the FAR clause
- Set your own reasonable financial reporting threshold
- Be careful of how you satisfy the FAR clause regarding asking your employees if they are negotiating outside employment
- Define carefully and clearly the personal relationships that employees must report
- Work closely with legal and HR on the requirement to discipline and report violations
- Keep very detailed records of all your decisions and actions

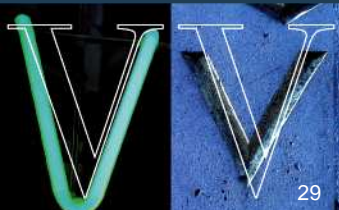




## Be Aware There is a Pothole for the Unwary

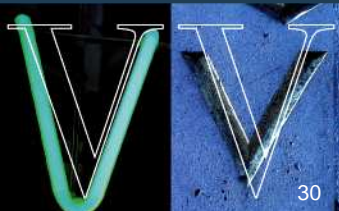
FAR 3.1103(6); 52.203-16

- Report to Contracting Officer any PCI violation (written description of violation).
- Contracting Officer shall:
  - Review actions taken
  - If KO not satisfied, consult with “agency level counsel”
- Then what happens; refer to suspension/debarring officials?



# Best Insurance Policy to Protect the Company

TRAINING AND MORE  
TRAINING!



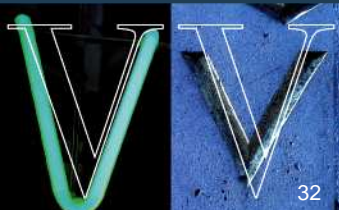
## Noblis: Who We Are

- Noblis is a nonprofit science, technology and strategy organization that helps clients solve complex scientific systems, process, and infrastructure problems in ways that benefit the public.
- Headquartered in Falls Church, Virginia, Noblis has 700 employees, including, accomplished scientists, analysts, engineers, researchers, technology specialists and management experts in offices throughout the country.
- Recognized as one of the World's Most Ethical Companies for 2012 by the Ethisphere Institute for the fourth time.
- Great Places to Work<sup>®</sup> Rankings: 2011 Best Small and Medium Workplaces presented by Entrepreneur<sup>®</sup> for the third consecutive year and the sixth time since 2004.
- Recipient of the National Capital Business Ethics Award.



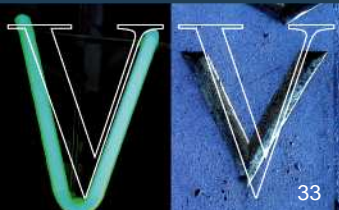
## Noblis' Previous Screening Mechanism: Pre FAR PCI Rule

- Client Acquisition Support Form (PCI Form A)
  - Identified acquisition, task and contract number
  - Listed Noblis employees involved in the acquisition
  - Listed bidders, if available
  - Project Leader confirmation that employees completed required Noblis training and any client requirements
- Statement of Personal or Family Financial Interest (PCI Form B)
  - Immediate Family - employee, spouse, dependent children, any other individual employee has comingled assets (greater than \$5,000)
  - Listing of business relationships
- Certificate for Personnel Participating in Source Selection (PCI Form C)
  - Employee certified that they –
    - Won't accept directly or indirectly employment/business opportunity
    - Won't discuss evaluation criteria with unauthorized individuals
    - Won't accept gratuities
    - Understand obligations were of a continuing nature



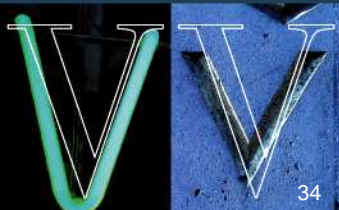
## Noblis' Previous Screening Mechanism: Challenges

- Paper-based process was slow in identifying potential conflicts
  - Difficult to maintain compliance with conflict rules
- Paper-based process was entirely dependent upon Project Leader and employee completion of the various forms
- New task orders issued (one FY to the next) with potential for no updates to paperwork
- Forms often incomplete with a lot of follow-up required
- On-going verification by employees of personal financial information
  - Spouse's employer on bidder's list
  - Financial interest in company on bidder's list



# Paper to Automation

- Reviewed other tools to determine if we can automate the process
- Needed to find solution that would allow for easy submission of information by the Project Leader as well as the employees supporting the acquisition
- Need for compliance in real time
- System had to be user friendly
- Numerous discussions with senior management to commit resources to make the change
- Decided to build solution in-house
- Start to finish 6-8 months (development to rollout)



## Noblis' New Automated Screening Mechanism: Post FAR PCI Rule

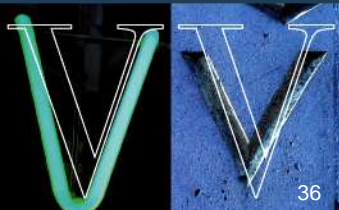
- Applies to all Noblis employees, rather than just “covered employees” as this is a constantly moving target in the acquisition process
- Financial Disclosure Form – Required for all Noblis employees
  - *De minimis* threshold for financial interest: \$5,000
  - Requires update as changes occur and annual certification that information is current
- Project Leader receives an automated email when the acquisition is loaded into Oracle
  - Completes the Project Leader Acquisition Participation Form and Project Leader Acquisition Participation Completion Form which lists employees supporting the acquisition and the bidder's list, if available
  - Automated workflow email is sent to those employees supporting the acquisition advising the employees to complete the required training, validate the FD Form is accurate and complete, and also complete the Employee Participation in Acquisition Form
- Automated System cross-checks the FD Form with bidder's list and highlights any potential flags
- Two levels of review: Project Leader and Compliance Office





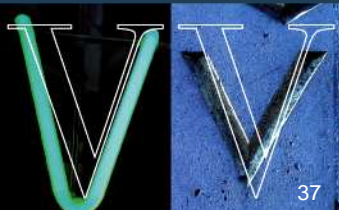
## Noblis' New Automated Screening Mechanism: Benefits

- Compliant with FAR PCI Rule in asking all the right questions
- System flags potential conflicts in real-time
- Name recognition of publicly-held companies in automated database for ease of use
- Managers can perform employee PCI checks before an assignment
  - Applies beyond the acquisition arena
- Project Leaders can perform PCI checks on key personnel prior to submission of proposals
- Enables efficient and consistent review and oversight to ensure compliance
- Cross-checks information uploaded to Oracle's financial database, Noblis' PCI database, and Noblis' time charging system to ensure continued compliance by employees supporting acquisition projects



# Noblis' Best Practices

- Amend Code of Ethics and Conduct and policies/procedures to comply with new FAR PCI Rule
- Seek review and opinion of proposed screening mechanisms from Project Leaders and involve Project Leaders during the review of the tool
- Develop robust internal communications plan
- Stagger employee rollout for completion of FD Form and implementation of the acquisition tool
- Schedule internal audits to identify and address any problems with new screening system
  - Oracle vs. PCI
  - Time Reporting vs. PCI vs. Oracle
- Establish a hard date for transition to new screening system
  - e.g. All new Noblis acquisitions are subject to the new tool as of 1 October 20XX



# There's More to Automation

- Dependent on Project Leader correctly filling out forms (bidder's list, tasks all tied together, listing employees supporting acquisition, etc.)
- Human error still plays a role
  - Financial Interest updates
  - Listing acquisition projects
  - Setting up a new project task number when acquisition work is complete
  - Remembering to do the forms
  - Employees may be supporting an acquisition with no forms on file
- Review of forms is crucial – there is no substitute for judgment



## Questions and Comments

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