

ETHICS, EMPLOYEES AND CONTRACTORS: FINANCIAL CONFLICTS OF INTEREST IN AND OUT OF GOVERNMENT

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ABSTRACT

In recent decades, the federal government has greatly expanded its use of contractors to perform services and now purchases more than \$260 billion in services every year. The government has increasingly turned to contractors to accomplish its programmatic goals, and contractor personnel are now performing tasks that in the past had been performed by government employees.

While government employees are subject to strict ethical standards, most of these standards do not apply to contractor personnel. If a federal employee makes a recommendation on a matter that could affect her financial interest, she could be subject not only to administrative discipline, but also to criminal prosecution. In most cases, a contractor employee who has that same financial interest and makes the same recommendation is not subject to any consequences. In fact, the government does not have any systematic way of even finding out when contractor personnel have such conflicts of interest. The personal conflicts of interest of contractor personnel are largely unregulated.

This Article discusses the disparity between the strict regulation of employees and the lax regulation of contractor personnel, explores possible explanations for the wide disparity in standards for these two groups, and suggests several research questions that should be answered prior to deciding whether to impose strict financial conflict standards on contractor personnel.

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INTRODUCTION

During 2008, insurance giant American International Group (AIG) was under increasing financial pressure. AIG had expanded from selling traditional products, such as life and auto insurance, to more exotic lines, such as credit default swaps (CDSs), which functioned essentially as insurance on securities.¹ Investment banks, such as Goldman Sachs, would

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purchase a CDS in order to hedge an investment in a particular security. If the security's financial condition weakened—thus increasing the chance that it would default—AIG would have to post cash collateral with the purchaser.² If the security defaulted, AIG would have to pay the purchaser the “insured” value of the security.³

By the end of 2007, AIG had sold CDSs on \$500 billion of securities, \$60 billion of which were derived from subprime mortgages.⁴ Over the course of 2008, as the value of subprime mortgage securities dropped, AIG had to post billions of dollars in cash collateral with the investment banks that had purchased its CDSs. As the bottom fell out of the subprime mortgage market, AIG was unable to make good on its CDS contracts and was facing possible bankruptcy.⁵

The Treasury Department feared that an AIG bankruptcy could result in even greater financial panic and chaos than the country had already experienced after the Lehman Brothers bankruptcy. To avoid an AIG bankruptcy, Treasury bailed out the company.⁶ Treasury had several options available to it in handling the bailout. First, Treasury could have pressured the investment banks to accept a discount, or “haircut,” on their CDSs.⁷ (The government used this approach when Chrysler was on the verge of

of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees. Based on this research, the Administrative Conference adopted a recommendation that the FAR Council adopt contract clauses for imposing financial conflict and confidentiality standards on certain contracts. *See* Appendix IV.

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1. *See* William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 943, 944 (2009).

2. *Id.* at 951–52.

3. *Id.* at 948–49.

4. BAIRD WEBEL, CONG. RESEARCH SERV., R40438, ONGOING GOVERNMENT ASSISTANCE FOR AMERICAN INTERNATIONAL GROUP (AIG) 5 (2009).

5. *Id.* at 1.

6. Stephen Gandel, *Could the U.S. Have Saved Billions on AIG Rescue?*, TIME (Jan. 27, 2010), <http://www.time.com/time/business/article/0,8599,1957115,00.html>.

7. *Id.* A November 2008 report by a firm that was advising the federal government indicated that “five of the six biggest creditors of AIG's financial-products division would have been willing to end the contracts for less than face value.” *Id.*

collapse the following year.⁸) Second, Treasury could have negotiated with investment banks and pressured them to return to AIG some of the collateral that AIG had posted earlier as the subprime mortgage market declined.⁹ Either one of these strategies would have limited taxpayer losses, but the government did not take either approach. Instead, Treasury paid face value to the investment banks,¹⁰ spending over \$100 billion to bail out AIG, nearly \$13 billion of which went to Goldman Sachs.¹¹ The government even insisted that AIG waive its right to sue the investment banks for any misrepresentations the banks had made in connection with the CDS transactions.¹²

The government's handling of the AIG bailout was enormously controversial.¹³ Commentators complained that the government not only bailed out AIG, but also the investment banks that had purchased CDSs from AIG.¹⁴ Congressional investigators asked why the federal government "did not push the banks to make concessions like returning the collateral to AIG or accepting less than full value for their contracts with the insurer."¹⁵ Why did the government treat investment banks so favorably, paying 100 cents on the dollar for their CDSs and insisting that AIG waive its right to sue the banks for misrepresentation?

As is clear from this narrative, the government's handling of the AIG bailout affected not just AIG itself but also the investment banks that had purchased CDSs from AIG.¹⁶ As such, government ethics standards would

8. Louise Story & Gretchen Morgenson, *In U.S. Bailout of A.I.G., Forgiveness for Big Banks*, N.Y. TIMES (June 29, 2010), <http://www.nytimes.com/2010/06/30/business/30aig.html>.

9. *Id.*

10. Gretchen Morgenson & Louise Story, *Two at Fed Had Doubts Over Payout by A.I.G.*, N.Y. TIMES, Jan. 27, 2010, at B7, available at <http://dealbook.nytimes.com/2010/01/27/two-at-fed-had-doubts-over-payout-by-aig/>.

11. *Id.* (Goldman Sachs was "A.I.G.'s largest trading partner, [and] received the most money—\$12.9 billion—in the payments to counterparties.").

12. Story & Morgenson, *supra* note 8.

13. See Morgenson & Story, *supra* note 10 ("Of all the government rescues undertaken during the credit crisis of 2008, none has stirred more outrage and raised more questions than the bailout of A.I.G. . . ."); Gandel, *supra* note 6 ("The AIG bailout has become one of the most enduring controversies from the financial crisis.").

14. See, e.g., Gandel, *supra* note 6 ("Some called the AIG payments, funded by the government, a backdoor bailout of Wall Street, in particular Goldman Sachs."); Morgenson & Story, *supra* note 10 (two governors of Federal Reserve Board objected to paying investment banks face value for CDSs and "expressed worry that paying the [investment banks] . . . 100 cents on the dollar to unwind their insurance contracts could be a gift to the banks").

15. Morgenson & Story, *supra* note 10.

16. See OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP-10-003, FACTORS AFFECTING EFFORTS TO LIMIT PAYMENTS TO AIG COUNTERPARTIES 30 (2009) ("Questions have been raised as to whether . . . the AIG assistance was in effect a 'backdoor bailout' of AIG's counterparties. Then [Federal Reserve Board of New York] President [Timothy] Geithner and . . . general counsel deny that this was a relevant consideration for the AIG transactions. Irrespective of their stated intent, however, there is no question that the *effect* of [the] decisions—indeed, the very *design* of the federal assistance to AIG—was that tens of billions of dollars of Government money was funneled inexorably and directly to AIG's counterparties.").

prohibit a government employee who owned stock in either AIG or one of those investment banks from participating in the bailout. If a government employee advises the government on how to handle a matter that could affect her own investments, she could end up in prison. A criminal statute prohibits government employees from participating in matters that can have a direct and predictable effect on their own financial interests.¹⁷

The government's point person on the AIG bailout was Dan Jester, who owned a substantial amount of Goldman Sachs stock.¹⁸ Jester advised the government not to pressure Goldman and the other investment banks to accept a discount.¹⁹ Jester is not subject to criminal prosecution for this conflict of interest because the Treasury Department brought him on as a contractor rather than as an employee. This technical maneuver exempted Jester from the financial conflict-of-interest restrictions that are intended to protect the public trust.

This Article identifies the financial conflict-of-interest standards for insiders and outsiders doing the government's work: government employees and government contractor personnel. It examines whether the same standards that apply to government employees would be appropriate for contractor personnel and what types of mechanisms are available for implementing such standards. Part I describes the phenomenon of government outsourcing. Part II describes the strict financial conflict-of-interest restrictions that apply to Executive Branch employees, and Part III describes the few conflict-of-interest restrictions that apply to government contractor personnel. Part IV explores possible principled, policy-based and historical explanations for this disparate treatment. Part V argues that prior to adopting wide-ranging law reform, there is a need for additional empirical research to clarify what kinds of contractor personnel are performing which services for the government. Rather than prescribing specific legal reforms, this Article sketches out the principles and policy considerations that should guide the development of financial conflict standards for outsiders who do the government's work.

I. GOVERNMENT SERVICE CONTRACTING: A \$268 BILLION SECTOR OF GOVERNMENT SPENDING

In recent decades, the government has greatly expanded its use of service contractors. From 1983 to 2007, its spending on service contracting increased 85% in constant dollars.²⁰ The government can either contract

17. 18 U.S.C. § 208 (2006).

18. Mark Landler & Edmund L. Andrews, *For Treasury Dept., Now Comes Hard Part of Bailout*, N.Y. TIMES, Oct. 3, 2008, at A1; Story & Morgenson, *supra* note 8.

19. Landler & Andrews, *supra* note 18.

20. This article focuses on the government's contracts for *services*, as opposed to its contracts for *products*. Service contracts "directly engage[] the time and effort of a contractor whose primary pur-

directly with individuals or with a company that then either subcontracts with individuals or hires them as employees. The government's use of service contracts has, on occasion, proven to be controversial. For example, the Treasury Department used the former technique to obtain the services of Dan Jester, the former Goldman Sachs official described in this Article's introduction who was Treasury's point person on the AIG bailout.²¹ The Army, Navy and Air Force have used the latter technique to obtain the services of retired flag officers and civilian officials to serve as "mentors" and give advice to current officers.²² In some cases, these retired officers who were advising the military on operations had financial ties to companies that sell products designed to aid those same operations.²³ By using these contracts, the government avoids application of almost all government ethics restrictions, including financial conflict standards. As a Department of Defense official has explained, "one reason that mentors are not hired as employees is so they . . . have freedom from the government ethics bureaucracy [T]he ethics rules constrain [government employees'] abilit[ies] to consult for private companies."²⁴

In some cases, an agency contracts with an entity to perform one discrete task (such as performing a study), and the entity then uses its own personnel to perform that task on its own premises away from government

pose is to perform an identifiable task rather than to furnish an end item of supply." 48 C.F.R. § 37.101 (2010). Emblematic of the contracting out of so many government functions, in 2003 the federal government contracted out the creation of its reports on contracting, the Federal Procurement Data System, to a private contractor, Global Computer Enterprises, Inc., a company that has a ".gov" website (www.fpbs.gov). See FED. PROCUREMENT DATA SYS., U.S. GEN. SERVICES ADMIN., FEDERAL PROCUREMENT REPORT FY 2007, Foreword to Section I (2008), available at https://www.fpbs.gov/downloads/FPR_Reports/Fiscal%20Year%202007/Total%20Federal%20View.pdf.

21. Karen Weise, *Treasury's 'Point Man' on AIG Bailout That Benefited Goldman, Owned Goldman Stock*, PRO PUBLICA (June 30, 2010), <http://www.propublica.org/article/treasurys-point-man-on-aig-bailout-that-benefited-goldman-owned-goldman-sto>. Jester received \$30,000 from Treasury for his services. See *Prime Award Spending Data*, USA SPENDING.GOV, <http://www.usaspending.gov/search?query=jester&searchtype=JT11N0VmcSUyNTNEJTI1Mj hNY Wpvc kFn ZW5 jeSU yNT NBKi UyN Tlx Kk Rlc GFyd G1 lbn Ql MjUy MG9 mJT IIM jB0 aGU IMj UyM Fry Z WF zdX J5 KiU yN Tlx KiU yNTI5> (last visited Aug. 29, 2011). For further discussion of Treasury's use of contractors in response to the financial crisis, see Kathleen Clark, *Fiduciary Standards for Bailout Contractors: What Treasury Got Right and Wrong in TARP*, 95 MINN. L. REV. 1614 (2011).

22. Tom Vanden Brook, Ken Dilanian & Ray Locker, *Retired Military Officers Cash in as Well-Paid Consultants*, USA TODAY (Nov. 18, 2009), http://www.usatoday.com/news/military/2009-11-17-military-mentors_N.htm (detailing how Joint Forces Command obtained mentoring services of retired flag officers by contracting with Northrop Grumman, which then hired mentors as subcontractors). The Marines contracted directly with the retired officers. *Id.*

23. *Id.* (discussing how mentors with financial ties to companies selling products designed to aid particular launch operations from ships gave advice on exercises related to such launch operations). Until 2010, there were no requirements that the retired flag officers disclose their financial ties to defense contracts and no restriction on their using the information they learn on behalf of those contractors. The Defense Department did not even collect information about these retired officers' business affiliations. *Id.*

24. *Id.* (quoting Brig. Gen. John R. "Bob" Ranck).

offices.²⁵ That is the traditional model, and it describes how many government service contractors operated until the mid-1990s.

But in the last two decades, much of service contracting has followed a different model, known as “staff augmentation,” or colloquially referred to as “body shops.”²⁶ Body shops are companies that supply the government with laborers (“bodies”) to work in government offices, side-by-side with government employees, and often to perform exactly the same tasks as government employees.²⁷ Agencies contract with body shops to supply the labor that the agency will not or cannot hire directly, and contractor personnel engage in functions that are central to the government’s functioning, such as defining and managing project resources, developing financial plans and budgets, evaluating and managing programs, advising on the selection of contractors, “making trade-off decisions among costs, schedules, and capabilities,”²⁸ and conducting management oversight.²⁹

The government contracts out so much of its work, that it even contracts out the contracting-out function: advising the government on how to deal with other contractors, including developing requests for proposals, evaluating contractors’ proposals, estimating costs, determining the fees that other contractors can earn, developing criteria for evaluating other contractors’ work, conducting those evaluations, and identifying the government’s and other contractors’ liabilities.³⁰ The government refers to this as contractors being involved in the acquisition function.³¹ I refer to this as “meta-

25. See text accompanying note 132 (discussing Defense Department’s contract with the Institute for Defense Analyses (IDA) to analyze the F-22 jet fighter program).

26. Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263, 291 (2004).

27. The literature on contracting refers to this phenomenon as the multi-sector or blended workforce.

28. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-621T, DEFENSE ACQUISITIONS: DOD’S INCREASED RELIANCE ON SERVICE CONTRACTORS EXACERBATES LONG-STANDING CHALLENGES 4 (2008) (Statement of David M. Walker, Comptroller General of the United States).

29. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-360, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 25–26 (2008). Much of the public debate on government contracting has centered on whether the government has contracted out “inherently governmental functions.” *Id.* at 1. In theory, the government may not contract out such functions. In general, the exercise of government authority constitutes an inherently governmental function, but giving advice about how such authority should be exercised and assisting someone who exercises that authority does not. Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. 45,096 (Sept. 30, 1992); Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188 (March 31, 2010). This Article sidesteps the debate over “inherently governmental functions,” because both those who exercise government authority and those who give advice or have fiduciary obligations and should be subject to ethics restrictions. Another key issue is whether the government has contracted for personal services even where not authorized by statute. See 48 C.F.R. § 37.104(b) (2009). This is an empirical question that deserves further study. See *infra* Part V.

30. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 29, at 6.

31. This includes evaluating the work of other contractors, helping design requests for proposals, and giving the government advice about how to acquire desired capabilities. *Id.* at 8.

contracting.”³² Not surprisingly, meta-contracting is rife with the potential for conflicts of interest, and the government is considering imposing financial conflict standards on contractor personnel who do this work.³³

While the phenomenon of contracting out services is not new,³⁴ policy-makers are only just beginning to grapple with this reality of an outsourced workforce. Both the Chair and the Ranking Member of the Senate Homeland Security and Government Affairs Committee recently “expressed shock” that contractor personnel outnumber government employees in the Department of Homeland Security.³⁵ The following Part discusses the disparity between the strict financial conflict standards that apply to government employees and the lack of such standards for most contractor personnel. While government employees and service contractor personnel are sometimes performing the same tasks, they are subject to quite different standards regarding financial conflicts of interest.

II. FINANCIAL CONFLICT STANDARDS FOR GOVERNMENT EMPLOYEES

Federal government employees are subject to a wide range of ethics restrictions. More than a hundred pages of regulations and over a dozen statutes impose ethics restrictions on Executive Branch employees.³⁶ These rules cover a wide range of subjects: restrictions based on an individual’s employment before entering the government, restrictions on their outside activities while working for the government, and restrictions on the kind of employment available to them after they leave government. This Part focuses on one aspect of these rules: restrictions on the financial influences on government employees. It first describes the substantive standards and then discusses how the government implements them.

A. Substantive Financial Conflict Standards

A criminal statute prohibits Executive Branch officials from participating in matters that would affect their own financial interests or the finan-

32. It is important to distinguish meta-contracting, where a contractor gives the government advice about how to handle current or future contracts, from subcontracting, where a contractor engages another company to accomplish part of the task that it has agreed to accomplish for the government.

33. Minutes of Committee on Administration, Admin. Conference of the U.S., Nov. 3, 2010, available at <http://www.acus.gov/wp-content/uploads/downloads/2011/04/COA-1st-Mtg-Minutes.pdf>.

34. See PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* (1999).

35. Press Release, Senate Homeland Sec. & Gov’t Affairs Comm., Lieberman, Collins Astounded DHS Contract Workers Exceed Number of Civilian Employees (Feb. 24, 2010), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.Minority.News&ContentRecord_id=2A540130-5056-8059-7630-CDF042F47AE0.

36. 5 C.F.R. §§ 2634–2637, 2640 (2011); 18 U.S.C. §§ 201–219 (2006) (criminal statutes); 5 U.S.C. §§ 7351, 7353 (2006) (restrictions on gifts); 5 U.S.C. app. §§ 501–505 (2006) (limits on outside income). Most of these statutes also impose restrictions on legislative branch officials, but this Article focuses on Executive Branch’s employees and contractors.

cial interests of family members, organizations with which they are associated, or people with whom they are negotiating for future employment.³⁷ Employees must recuse themselves from participating even when they have only small financial interests at stake.³⁸ Most of the restrictions on financial interests apply not just to regular government employees, but also to those who are hired to work on a temporary or intermittent basis (“Special Government Employees” or SGEs).³⁹

One of the ways that the federal government obtains advice from experts is by appointing them to serve on advisory committees. Advisory committees consist of individuals from diverse backgrounds who bring their own expertise, experiences, and perspectives to address particular policy problems and provide advice to policy-makers.⁴⁰ The members’ individual perspectives could be conceived of as conflicts of interest, but the government accommodates—rather than eliminates—those conflicts of interest. In the Federal Advisory Committee Act (FACA), Congress mandated that committee membership must “be fairly balanced in terms of the points of view represented” and that members must disclose conflicts of interest.⁴¹

The criminal prohibition on financial conflicts of interest does not apply to an SGE who serves on an advisory committee if certain criteria are met, such as if she is dealing with matters that are broad in scope (i.e.

37. 18 U.S.C. § 208 (2006). *See infra* Appendix I for a list of the statutory and regulatory financial conflict standards for government employees.

38. *See* *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 558–59 (1961).

39. Nearly fifty years ago when Congress re-wrote the then-existing ethics statutes, it recognized that having a one-size-fits-all approach to ethics could make it difficult for the government to hire experts on a temporary basis. Daniel Guttman, *Organizational Conflict Of Interest and the Growth of Big Government*, 15 HARV. J. ON LEGIS. 297, 303 (1978) (quoting S. REP. No. 87-2213, at 4 (1962)) (noting that this legislation “facilitat[ed] the Government’s recruitment of persons with specialized knowledge and skills for service on a part-time basis”). So Congress created a new category of federal employee—“Special Government Employee” (SGE)—for those who would work for the government on a temporary or intermittent basis: 130 or fewer days in a 12-month period. A Special Government Employee is an “employee of the executive or legislative branch . . . who is retained . . . with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days . . .” 18 U.S.C. § 202(a) (2006). The government further divides this group into two categories: those who have worked less than 60 days, and those who will work between 60 and 130 days in a year. Some of the ethics statutes apply only to the latter group of SGEs. *See, e.g.*, 18 U.S.C. § 207(c) (2006) (1-year ban on former senior officials contacting employees of the agency where they worked during their last year in government). As of 2009, the government had 17,600 SGEs. Telephone Interview with Dale Christopher, Assoc. Dir., Program Review Division, Office of Gov’t Ethics (June 22, 2010).

40. The Federal Advisory Committee Act also permits the appointment of “representative” members who are supposed to represent particular industries or interest groups. Such “representative” members are not considered government employees at all, and are not subject to the conflict of interest or disclosure requirements. *See* Memorandum from J. Jackson Walter, Dir. of the Office of Gov’t Ethics on Conflicts-of-Interest Statutes, to Heads of Dep’ts and Agencies of the Exec. Branch (July 9, 1982); Letter from Stephen D. Potts, Dir. of the Office of Gov’t Ethics, to the Chairman of a National Commission (June 24, 1993), available at http://www.usoge.gov/ethics_guidance/opinions/advop_files/1993/93x14.pdf.

41. 5 U.S.C. app. § 5(b)(2) (2006).

involving policy rather than particular parties) and if it would affect the SGE or her employer in the same way it would affect other similarly situated individuals or entities.⁴² In addition, an agency official can waive the conflict if she determines that the need for the SGE's services on the advisory committee outweighs the conflict.⁴³

The modified ethics restrictions for SGEs demonstrate that government ethics regulation need not involve an all-or-nothing approach. The government can protect its ethical concerns while accommodating its other interests, including its need to obtain expertise on a temporary basis.

B. Implementation of Financial Conflict Standards

The government implements these financial conflict-of-interest restrictions by requiring some employees to disclose their financial interests and then reviewing those disclosures for conflicts, by facilitating divestment of assets that would cause conflicts, by giving employees ethics training and advice, by investigating alleged ethics violations, and by disciplining or prosecuting employees who have committed violations.

The government's largest investment in ethics implementation is the financial disclosure process. Every year, approximately 25,000 employees must submit public financial disclosure forms,⁴⁴ and about 300,000 additional employees must submit confidential financial disclosure forms,⁴⁵ revealing information about their income, assets, liabilities,⁴⁶ gifts, travel reimbursements, and employment and business affiliations.⁴⁷

All SGEs must file financial disclosure statements, although most of them are subject only to confidential (rather than public) financial disclosures.⁴⁸ Some SGEs who would ordinarily be required to file public financial disclosure forms because of the significance of their positions can instead file confidential disclosures if they will serve less than 60 days, if an agency head certifies that there are special needs for their services, or if they serve in the White House under presidential appointments or commissions.⁴⁹

42. 5 C.F.R. § 2640.203(g) (2011).

43. 18 U.S.C. § 208(b)(3) (2006).

44. Email from Dale Christopher, Assoc. Dir., Program Review Div., Office of Gov't Ethics, to Kathleen Clark (Aug. 4, 2010) (on file with author).

45. *Id.*

46. Filers must report loans over \$10,000, except those from financial institutions granted on terms made available to the general public.

47. See OFFICE OF GOV'T ETHICS, OGE FORM 450, CONFIDENTIAL FINANCIAL DISCLOSURE REPORT; OFFICE OF GOV'T ETHICS, SF-278 FORM, PUBLIC FINANCIAL DISCLOSURE REPORT. Public filers must also disclose transactions of real property and securities. *Id.*

48. 5 C.F.R. § 2634.904(a)(2) (2010) (requiring SGEs to file confidential disclosures); see also 5 C.F.R. §§ 2634.202(h) (2010), 2634.204 (2010), 2634.205 (2010) (exempting certain SGEs from public disclosure requirements).

49. See 5 C.F.R. §§ 2634.204 (2010), 2634.205 (2010), 2634.202(h) (2010).

Once the employees submit their disclosure forms, agency officials then review those forms to check for compliance with ethics standards.⁵⁰ When these reviews reveal financial conflicts, employees generally have the option to recuse themselves from participating in matters that could affect their finances or to divest themselves of those assets that would otherwise cause conflicts. Since divesting may result in capital gains tax, Congress enacted a special program, a certificate of divestiture, to relieve this tax burden.⁵¹

The Office of Government Ethics provides formal advice about the application of ethics standards, publishing legal opinions about ethics statutes and regulations on a regular basis.⁵² In addition, each agency has a Designated Agency Ethics Officer who counsels agency employees on ethics issues.⁵³ Government agencies must provide information about ethics standards to all new employees⁵⁴ and must provide at least one hour of ethics training annually to presidential appointees, White House employees, contracting officers,⁵⁵ and all other employees who are required to file public or confidential financial disclosure reports.⁵⁶ In general, Congress mandates that advice be available to employees and former employees, who may choose whether or not to seek it.⁵⁷ But a 2008 statute *requires* every former high-level or procurement official from the Department of Defense (DoD) to seek a written legal opinion from a DoD ethics official before receiving compensation from a DoD contractor within two years of leaving the department.⁵⁸

III. THE FEW FINANCIAL CONFLICT STANDARDS FOR GOVERNMENT CONTRACTOR PERSONNEL

The government has taken a variety of approaches to imposing financial conflict restrictions on contractor personnel. A few agencies have adopted regulations imposing financial conflict standards for some of their

50. *Id.* § 2634.605 (2010).

51. The option of obtaining a certificate of divestiture is not available to Special Government Employees. 26 U.S.C. § 1043(b)(1)(A) (2006).

52. 5 U.S.C. app. § 402(b)(8) (2006).

53. 5 C.F.R. § 2638.203(b)(7).

54. *Id.* § 2638.703.

55. *Id.* § 2638.705(a).

56. *Id.* §§ 2638.704(a) (2010), 2638.705(a) (2010). For SGEs who are expected to work 60 or fewer days and SGEs who must file public financial disclosures, agencies can provide written training materials instead of one hour of training. *Id.* §§ 2638.704(e) (2010), 2638.705(d) (2010).

57. By regulation, when a current or former employee seeks advice from an ethics official about whether her acceptance of compensation from a contractor would violate 41 U.S.C. § 423(d) (2006), the ethics official must provide a response within 30 days, and the employee and contractor can rely on the ethics official's advice. FAR 3.104-6(d) (2006).

58. National Defense Authorization Act of Jan. 28, 2008, Pub. L. No. 110-181, div. A, tit. VIII, subtitle D, § 847, 122 Stat. 3, 243-44.

contractors' personnel. Other agencies have adopted policy guidance imposing financial conflict standards on narrowly identified groups of contractor personnel.⁵⁹ And some agencies have imposed financial conflict standards on contractor personnel on an ad hoc basis by including clauses with such provisions in contracts.

While most of the ethics statutes apply only to government employees, a few of them reach outsiders doing the government's work. The criminal prohibitions on bribery and illegal gratuities apply to anyone "acting for or on behalf of the [government]," and thus reach contractor personnel performing services for the government.⁶⁰ The government has successfully prosecuted contractor personnel for accepting bribes in connection with their work for the government.⁶¹ An earlier version of the current criminal financial conflict-of-interest statute covered anyone who "acts as an . . . agent of the United States,"⁶² and the leading Supreme Court decision construing that statute dealt with a government consultant who worked on an unpaid, part-time, temporary basis.⁶³ But when Congress overhauled ethics statutes in 1962, it narrowed the scope to just officers and employees.⁶⁴

While the government has not yet adopted any Executive Branch-wide ethics restrictions on contractor personnel, in 2009 it issued a proposed regulation for contractor personnel engaged in meta-contracting.⁶⁵ In addi-

59. CENTERS FOR MEDICARE & MEDICAID SERVICES, PRESCRIPTION DRUG BENEFIT MANUAL (2006), available at https://www.cms.gov/PrescriptionDrugCovContra/Downloads/PDBManual_Chapter9_FWA.pdf.

60. 18 U.S.C. § 201(a) (2006). In addition, Congress enacted an anti-kickback statute that reaches contractor and subcontractor personnel. Anti-Kickback Act of 1986, 41 U.S.C. §§ 51-58 (2006).

61. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-169, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DOD CONTRACTOR EMPLOYEES 11 (2008) (describing 2006 bribery convictions of contractor personnel at the Space and Naval Warfare Systems Center and the Coalition Provisional Authority in Iraq for steering contracts); see also *Dixson v. United States*, 465 U.S. 482 (1984) (bribery statute reaches non-governmental organization employee who administered federal grants).

62. The predecessor statute, 18 U.S.C. § 434 (1958), *repealed by* Act of Oct. 23, 1962, Pub. L. No. 87-849, § 208, 76 Stat. 1119, 1126:

Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, *is employed or acts as an officer or agent of the United States* for the transaction of business with such business entity, shall be fined not more than \$2,000 or imprisoned not more than two years, or both.

(emphasis added). While the predecessor statute was broader than its replacement in that it reached not just employees but also agents, it was narrower than its replacement in that it applied only to "transaction[s] of business with . . . business entit[ies]," whereas the replacement applied to any "proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter . . ." 18 U.S.C. § 208(a) (2006).

63. *United States v. Miss. Valley Generating Co. (The Dixon-Yates Case)*, 364 U.S. 520 (1961) (government contract for purchase of power plant was unenforceable where government consultant who advised the government on contract negotiations was employee of bank that would benefit from construction of plant).

64. 18 U.S.C. § 208(a) (2006).

65. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58,584 (proposed Nov. 13, 2009) (to be codified at 48 C.F.R. pt. 3, 52).

tion, seven Executive Branch agencies have issued regulations imposing ethics restrictions on the employees of some of their contractors.⁶⁶ These regulations are generally narrow in scope, covering only certain types of contractors. For example, personal conflict-of-interest regulations adopted by the Department of Health and Human Services cover contractors involved with the Medicaid Integrity Audit Program.⁶⁷ Even with respect to covered contractors, the regulations generally restrict only certain types of conflicts of interest rather than imposing more comprehensive restrictions. The regulation for the U.S. Agency for International Development (USAID) contractors, for example, restricts financial investments and outside employment but not the receipt of gifts.⁶⁸

Some agencies without contractor ethics regulations have nonetheless adopted formal policies addressing conflicts of interests among their contractor personnel. For example, while the Department of Defense has no regulations addressing contractor personnel conflicts, it has issued three distinct policies addressing these issues in particular contexts. In 2007, after a controversy concerning whether a federally chartered contractor (known as a Federally Funded Research and Development Center or FFRDC) had given the government advice tainted by the personal financial interests of the President of the FFRDC, the Department issued a policy requiring its FFRDCs to screen their employees for conflicts of interest.⁶⁹ In 2009, the Undersecretary of Defense for Acquisition, Technology, and Logistics issued a memorandum noting that the risk of personal conflicts of interest (PCIs) increases when contractor personnel are tasked to make subjective judgments on behalf of the government.⁷⁰ The memorandum indicated that the Department of Defense “acquisition community must consider the risks of a contractor’s employee having PCIs” and discussed six personal conflict-of-interest scenarios, but it did not explain how to identify such conflicts or what to do about them once they are identified.⁷¹ In 2010, after a series of *USA Today* articles about retired generals and admirals serving as mentors, Secretary of Defense Gates imposed a new

66. Agencies that have adopted regulations imposing ethics restrictions on at least some of their contractors include the Agency for International Development (USAID), the Department of Energy, the Environmental Protection Agency, the Federal Deposit Insurance Corporation, the Department of Health and Human Services, the Nuclear Regulatory Commission, and the Treasury Department.

67. 42 C.F.R. § 455.238 (2010).

68. 48 C.F.R. § 752.7027 (2010).

69. Memorandum from Under Sec’y of Def. for Acquisition, Tech. and Logistics, on the Federally Funded Research and Development Center (FFRDC) and Avoidance of Conflict of Interest (COI) (Jan. 26, 2007) (on file with author).

70. Memorandum from Ashton B. Carter, Under Sec’y of Def. for Acquisition, Tech., and Logistics on Personal Conflicts of Interest (PCIs) of Contractors’ Employees (Nov. 24, 2009) (on file with author).

71. *Id.*

requirement that such retired flag officers be hired as employees (with the concomitant ethics protections) rather than as contractors.⁷²

Some agencies have addressed this issue in an ad hoc fashion, rather than in a more systematic way, by including personal conflict-of-interest clauses in their contracts.⁷³ For example, before USAID adopted a regulation on personal conflicts of interest, it included such provisions in some of its contracts.⁷⁴ The General Services Administration includes conflict-of-interest clauses in contracts for auditing and brokerage services but apparently not in contracts for other services.⁷⁵ Some Department of Defense components include personal conflict-of-interest clauses in their contracts for meta-contracting services,⁷⁶ but few offices use such clauses for other services.⁷⁷

A. Substantive Financial Conflict Standards

This Subpart provides a brief overview of some of the existing regulations imposing financial conflict-of-interest standards on government contractor personnel. Most contractor personnel are not bound by *any* financial conflict-of-interest restriction.⁷⁸ But seven agencies have adopted restrictions to prevent financial conflicts among some of their contractors' personnel.⁷⁹ Most of these regulations are quite narrow, applying only to a

72. The Department of Health and Human Services has imposed ethics restrictions on Program Integrity Contractors by including such provisions in its Program Integrity Manuals.

73. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 61, at 15, 48–52 (Air Force Electronic Systems Center and the Army Communications Electronics Lifecycle Management Command have used clauses requiring contractors to certify that their employees do not have any personal conflicts, or by requiring individual employees of contractors to sign agreements not to disclose certain sensitive information they learn through their work.).

74. USAID included a personal conflict-of-interest provision in a contract with Harvard College to advise the Russian government on developing securities regulations. When Harvard employees disregarded those restrictions and invested in Russia equities, that contractual provision formed the basis for a False Claims Act lawsuit against Harvard and those employees. *United States v. Harvard Coll.*, 323 F. Supp. 2d 151 (D. Mass. 2004). USAID's regulation provides an exception for contractor personnel who are citizens or legal residents of that foreign country. 48 C.F.R. § 752.7027(e) (2010). This sort of exception is logical since those individuals would already be expected to have an allegiance to that country through their status as citizen or legal resident.

75. Letter from Brian Miller, GSA Inspector Gen., to Kathleen Clark (July 20, 2010) (on file with author).

76. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 62, at 9 (“[A]ll DOD offices we reviewed that used contractor employees in the source selection process use additional safeguard controls such as contract clauses designed to prevent personal conflicts of interests.”). One Air Force office had started using such a clause by the late 1990s. *Id.* at 15.

77. *Id.* at 13 (“Only 6 of the 21 offices had personal conflict of interest safeguards . . . that involve advice and assistance on governmental decisions . . .”).

78. Thus, as a contractor employee, Dennis Blair was able to participate in the evaluation of the F-22 fighter jet even though he owned substantial stock in an F-22 subcontractor that would be affected by any decision whether to continue the program.

79. The seven agencies with regulations addressing contractor personnel personal conflicts of interest are the Agency for International Development, 48 C.F.R. § 752.7027 (2010); Department of Energy, 48 C.F.R. § 970.0371 (2010); Department of Health and Human Services, 42 C.F.R.

limited range of the agency's contractors and imposing only a few restrictions on them. For example, USAID has a regulation imposing ethics standards on contractor personnel who work overseas.⁸⁰

Agencies have taken a range of approaches in addressing financial conflicts. One agency prohibits certain contractor personnel from making one specific class of investments—investing in businesses in the foreign country where they are working.⁸¹ But most agencies take a more general approach, prohibiting:

- financial interests “that could adversely affect the individual’s . . . objectivity or judgment,”⁸²
- “conflict[s] of interest . . . that may diminish [the individual’s] capacity to perform . . . impartial[ly or] . . . objective[ly],”⁸³
- a “financial interest . . . that relates to the services . . . perform[ed] under the contract,”⁸⁴
- a “personal concern” that “may be incompatible with the [government’s] interest,”⁸⁵ and
- “a relationship . . . with an entity that may impair the objectivity of the employee . . . in performing the contract work.”⁸⁶

These agency regulations do not explain which interests, concerns, and relationships they prohibit, and the scope of these regulations is less clear than the financial conflict standard applicable to government employees, which prohibits them from participating personally and substantially in matters in which they have financial interests.⁸⁷

Of the agencies that regulate contractor personnel ethics, most have applied such restrictions to some but not all of their contractors. But one

§ 455.238 (2010); Department of Treasury, 31 C.F.R. § 31.214 (2010); Environmental Protection Agency, 48 C.F.R. § 1552.209-73 (2010); Federal Deposit Insurance Corporation, 12 C.F.R. § 366 (2010), and Nuclear Regulatory Commission, 48 C.F.R. § 2052.209 (2010). *See infra* Appendix II: Financial Conflict Regulation of Service Contractor Personnel.

80. *See also* 31 C.F.R. § 31.200 (2010) (Department of Treasury regulations apply only to its TARP contractors); 48 C.F.R. § 970.0371 (2010) (Department of Energy regulations apply only to its Management and Operations contractors); 48 C.F.R. §§ 1503, 1552 (2010) (EPA regulations apply only to its major Superfund contractors and outside bid evaluators).

81. 48 C.F.R. § 752.7027 (2010). USAID’s approach is similar to certain financial conflict-of-interest provisions that restrict all of an agency’s employees from owning certain types of investments, regardless of whether the particular employee has the authority to exercise discretion in a way that could benefit an investment. *See* 5 U.S.C. app. § 5(b)(2) (2006).

82. 31 C.F.R. § 31.201 (2010) (Treasury Department regulation addressing TARP contractor personnel personal conflicts of interest).

83. 48 C.F.R. § 1503.104-5 (2010) (applicable to non-government employees who evaluate bids).

84. 12 C.F.R. § 366.10(a)(1) (2010).

85. 48 C.F.R. § 970.0371-6 (2010).

86. 48 C.F.R. § 1552.209-73(b) (2010) (EPA Superfund contracts in excess of simplified acquisition threshold).

87. 18 U.S.C. § 208(a) (2006); 5 C.F.R. § 2635.401 (2010).

agency, The Federal Deposit Insurance Corporation (FDIC), has taken a different approach, imposing ethics restrictions—including financial conflict standards—on all of its service contractor personnel.⁸⁸

While the financial conflict standards for government employees reaches not just an individual employee's *own* interests but also those of her family members, organizations with which she is associated, and anyone with whom she is negotiating for future employment,⁸⁹ most contractor ethics regulations reach only the contractor employee's individual interests. One exception is the Treasury Department's regulations for TARP contractors, which also addresses the interests of contractor employees' "spouses, minor children, and other family members with whom the individuals have a close personal relationship."⁹⁰

B. Implementation of Financial Conflict Standards

Government agencies have adopted, to a limited degree, some of the same mechanisms to implement ethics restrictions on contractor personnel that exist for government employees: training, advice, mandated disclosure and review of those disclosures, investigation of alleged violations, and sanctions for violations. But just as in the case of substantive restrictions, their use of implementation mechanisms for contractor personnel is spotty and inconsistent.

The Environmental Protection Agency (EPA) requires individuals who evaluate bids to certify that they do not have any conflicts of interest that could diminish their capacity to act impartially and that they will not disclose or misuse the information they learn.⁹¹ This approach—requiring certification of the absence of financial conflicts rather than comprehensive disclosure of financial interests—is less intrusive on the privacy of contractor personnel. But its efficacy in preventing conflicts depends on the abili-

88. 12 C.F.R. § 366 (2010). *See infra* Appendix II: Financial Conflict Regulation of Service Contractor Personnel.

89. 18 U.S.C. § 208 (2006).

90. 31 C.F.R. § 31.212 (2010) (defining a personal conflict of interest to include "personal, business, and financial relationships, as well as those of their spouses, minor children, and other family members with whom the individuals have a close personal relationship that would cause a reasonable person with knowledge of the relevant facts to question the individual's ability to perform, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury."). For further analysis of the conflict-of-interest standards for TARP contractors, see Kathleen Clark, *Fiduciary Standards for Bailout Contractors: What Treasury Got Right and Wrong in TARP*, 95 MINN. L. REV. 1614 (2011).

In addition, the Medicaid Integrity regulations indicate that it would be a conflict of interest for a contractor employee to accept a job offer from an entity that is being reviewed. 42 C.F.R. § 455.238 (2010). That regulation does not directly prohibit contractor personnel from accepting such job offers. Instead, it states that an employee acceptance of a job offer would constitute a post-award conflict of interest, and in response, the government can terminate, modify, or choose not to renew the contract.

91. 48 C.F.R. § 1503.104-5 (2010).

ties of contractor personnel to understand what would constitute a conflict and to apply that knowledge to their own investment portfolios.

In November 2009, the Executive Branch proposed new regulations to address personal conflicts of interest of contractor personnel who are involved in meta-contracting.⁹² These draft regulations would require contractors to screen their employees for conflicts of interest by requiring that employees annually disclose their financial interest to the contractors.⁹³ Contractors would be required to inform their employees of the personal conflict-of-interest standards, verify their employees' compliance with those standards, discipline employees who violate them, and report any violations to the contracting officer.⁹⁴ The government would become involved only if the contracting officer suspects a violation, or if the contractor notifies the contracting officer of a violation and requests a waiver from the head of the contracting agency.⁹⁵

Violation of the contractor ethics standards can result in a range of sanctions. The government can modify the contract, refuse to renew it, or terminate the contract.⁹⁶ A conflict of interest may result in a contractor's disqualification. Inaccurate statements on certifications or disclosures may result in debarments, criminal prosecutions, or False Claims Act lawsuits. The government has brought False Claims Act cases on the theory that a contractor's failure to disclose a conflict of interest constitutes an implied false certification.⁹⁷ One such case stemmed from a USAID contract with Harvard University to assist the Russian government in the development of its capital markets.⁹⁸ While there was no statutory or regulatory mandate to do so, USAID incorporated into its contract a provision requiring Harvard to prohibit the employees who worked on this project from investing in equities in Russia.⁹⁹ After the government learned that the leaders of the Harvard program had invested in Russian companies, USAID rescinded the contract and filed a civil False Claims Act lawsuit against those em-

92. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58,584 (proposed Nov. 13, 2009) (to be codified at 48 C.F.R. pts. 3, 52).

93. The draft regulation requires contractor personnel to update their financial disclosures at least annually and whenever a new personal conflict arises. *Id.* at 58,587. It defines personal conflict as any "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," including compensation, investments, gifts, travel expense reimbursement, intellectual property interest of the "employee, . . . close family members, or . . . other members of the household." *Id.*

94. *Id.*

95. *Id.* at 58,588.

96. *Id.*

97. *See, e.g.,* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257 (D.C. Cir. 2010) (recognizing false certification theory, but vacating jury verdict based on collective knowledge standard); United States v. President & Fellows of Harvard Coll., 323 F. Supp. 2d 151 (D. Mass. 2004); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776 (4th Cir. 1999) (false certification to Department of Energy that contractor had no conflicts of interest).

98. *Harvard*, 323 F. Supp. 2d at 159-60.

99. *Id.* at 160-61.

ployees and Harvard.¹⁰⁰ The suit survived a motion to dismiss, and eventually the parties settled the case for \$31 million.¹⁰¹

A key issue that arises in these cases is the appropriate measure of damages. Defendants argue that the government incurred no damages because the defendants provided the services requested. The government argues that the entire cost of the contract should be refunded because the government contracted for unbiased services. In a case stemming from a contractor's inaccurate certification that it had no organizational conflicts of interest, the D.C. Circuit recently rejected both positions, deciding that the amount of damages is "the amount the government actually paid minus the value of the goods or services the government received or used."¹⁰² There may well be substantial uncertainty regarding the value of expert services that are tainted by a conflict of interest.

IV. POSSIBLE EXPLANATIONS FOR DISPARATE TREATMENT OF CONTRACTORS AND EMPLOYEES

As the previous Part discussed, the government has adopted a strict financial conflict standard for its employees, requiring that they not participate in matters that could have direct and predictable effects on their financial interests. The government also invests significant resources in implementing this financial conflict restriction, requiring hundreds of thousands of employees to disclose their investments and having ethics officials review those disclosures for compliance with those standards. By contrast, most contractor personnel are not subject to any financial conflict standards.¹⁰³ In light of the fact that some contractor personnel are performing the same tasks that government employees perform, why are contractor personnel not subjected to the same financial conflict standards? This Part explores whether a principle or policy can explain and justify this different treatment.

The financial conflict standard for government employees reflects an underlying principle: public office is a public trust, and therefore government employees owe fiduciary duties.¹⁰⁴ In a relationship of trust, the

100. *Id.* at 162.

101. Press Release, U.S. Attorney's Office, Harvard Defendants Pay Over \$31 Million to Settle False Claims Act Allegations, Reports U.S. Attorney (Aug. 3, 2005), available at <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/08-03-2005/0004081794&EDAT E=>.

102. *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1279 (D.C. Cir. 2010).

103. Contractor personnel are subject to the criminal statute prohibiting bribes and gratuities related to their government work.

104. Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 87-91 (1996) ("To a large degree, the existing federal ethics rules dealing with employees' financial interests reflect the conflict component of the fiduciary obligation.").

trusted party is expected to act for the benefit of the other, and the law imposes a fiduciary obligation on the *trusted* party to ensure that she acts solely in the interest of the *trusting* party.¹⁰⁵ These are called fiduciary relationships, and the trusted party is called a fiduciary. These relationships are governed not just by the explicit terms of any agreement between the parties, but also by additional terms imposed by the common law.¹⁰⁶ The law sees these relationships as valuable and will prevent fiduciaries from abusing their positions of trust.¹⁰⁷

Fiduciary relationships arise in two distinct factual settings.¹⁰⁸ In the first, an influence-based trust relationship, a fiduciary can influence another person's decision.¹⁰⁹ In the second, an access-based trust relationship, a person *entrusts* a fiduciary with access to an asset so that the fiduciary can use the asset to benefit the beneficiary.¹¹⁰ The asset could be tangible property, a financial instrument, or confidential information.

105. *Hospital Products Ltd. v United States Surgical Corporation* (1984) 156 CLR 41, 96–97 (Austl.) (“The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.”); *see also* *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (Can.) (“Where by statute, by agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.”).

106. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887 (“[O]nce a court concludes that a particular relationship has a fiduciary character, the parties' manifest intention does not control their obligations to each other as dispositively as it does under a contract analysis.”); Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 598 (1997) (“[T]he content of . . . restrictions [on actions by fiduciaries] and the power to alter [those restrictions] differ from the content and modifiability of the restrictions that ‘mere’ contract law imposes on non-fiduciary . . . contracting parties.”).

107. P. D. Finn, *The Fiduciary Principle*, in EQUITY, FIDUCIARIES AND TRUSTS 1, 26 (T.G. Youdan ed. 1989), *cited in* Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 297 (1989).

108. Flannigan, *supra* note 107, at 309 (“There are . . . two kinds of trusts that will attract fiduciary status. They are, firstly, the trust which gives the trusted party the ability to exercise ‘influence’ over the trusting party and, secondly, the trust which allows the trusted party to acquire ‘access’ to the employment of assets.”). The influence category is seen as just a subset of access, where the ability to influence is seen as just one way of having access to a beneficiary's assets. Robert Flannigan, *Access Or Expectation: The Test For Fiduciary Accountability*, 89 CANADIAN B. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?a_bstract_id=1698794 (“Presumed undue influence is a fiduciary matter because the access acquired through influence exposes the individual to opportunism.”); *see also* Rick Bigwood, *From Morgan to Etridge: Tracing the (Dis)Integration of Undue Influence in the United Kingdom*, in EXPLORING CONTRACT LAW 379 (Neyers, Bronaugh & Pitel eds., 2009).

109. Flannigan refers to this type as a “deferential trust.” *See* Flannigan, *supra* 107, at 287.

110. Flannigan refers to this as a “vigilant trust.” The fiduciary obligation deters the fiduciary from acting in a way that would “have the effect of diverting or not maintaining the asset value.” *Id.* at 292. This is commonly referred to as “agency costs,” but Flannigan refers to them “intermediary costs.” *Id.* at 289–90. Flannigan further explains:

Both types of trust in fact result in the trusted party acquiring “access” to the employment of assets. In the case of deferential trust, however, the access is indirect because it occurs through “influence” exerted by the trusted party. But in either case, and to the same extent, the “access” to assets may be turned to mischievous ends.

Id. at 309.

But the mere existence of influence or access is not enough to create a fiduciary relationship. The influence or access must be coupled with an expectation (either subjectively intended or imposed by operation of law) that the party influencing a decision or being given access will act in the interest of the trusting party.¹¹¹ If one party gives another access to her assets but there is no expectation that the other will use that access for her benefit, then she has merely given the other a gift, and no fiduciary obligation arises.¹¹² Similarly, if someone influences another's decision but there is no expectation that she is acting on the other's behalf, then no fiduciary duty arises.¹¹³ A fiduciary is someone who is called upon to influence another's decision or has access to another's resources but must act to benefit the other party rather than herself.¹¹⁴

Government officials are in a position of trust if they can influence government decisions or have access to resources and must use that influence or access on behalf of someone other than themselves. For more than a century, courts have recognized and enforced government officials' fidu-

111. Flannigan has identified fact-based and status-based fiduciary relationships. *Id.* at 294 n.45. Subjectively intended expectations occur in fact-based fiduciary relationships. Expectations imposed by operation of law occur in status-based fiduciary relationships.

112. *Id.* at 308 (“Not every kind of access will be of a fiduciary character. A person may acquire access as a gift.”).

113. See *supra* notes 42–43 and accompanying text.

114. See Flannigan, *supra* note 107, at 309 (discussing advice- and access-based fiduciary relationships). The precise identity of the government official's beneficiary is a matter of some contention, with possibilities including the nation, the government itself, and the public. For parallel discussion of identifying the client of government lawyers, see Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033 (2007). What matters here is that a government official must act on behalf of someone other than herself, and thus, can be said to owe fiduciary duties.

While government contractors are not supposed to make decisions exercising governmental authority, Memorandum from John F. Owens, Office of Mgmt. & Budget, Exec. Office of the President on OMB Policy Letter 92-1, *Inherently Governmental Functions* (Nov. 12, 1992), one can find many examples of contractors doing exactly this. See *Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy: Hearing Before the Subcomm. on Federal Services, Post Office, and Civil Service, of the S. Comm. on Governmental Affairs, 101st Cong.* (1989); STAFF OF S. COMM. ON GOVERNMENTAL AFFAIRS, 96TH CONG., REPORT ON OVERSIGHT OF THE STRUCTURE AND MANAGEMENT OF THE DEPARTMENT OF ENERGY (1980).

Because of this legal limit (even if it is honored in the breach), in the policy and legal debates over government contracting, much is made of the distinction between making decisions to exercise governmental authority, on the one hand, and giving advice to those who exercise such authority, on the other. But for the purpose of fiduciary analysis, this distinction is unimportant because both those who make decisions about the use of an asset (such as governmental authority) and those who give advice are fiduciaries if they have an obligation to act on behalf of the intended beneficiary rather than herself or another private party. Ethics standards for government employees reflect this fact, requiring not just disinterested decision-making but also disinterested advice. See, e.g., 18 U.S.C. § 208(a) (2006) (prohibiting anyone who “participates personally and substantially as a Government . . . employee, through . . . the rendering of advice . . . [in a] particular matter” from having a financial interest in the matter). Cf. Memorandum from the Op. Office of Legal Counsel on the Applicability of the Emoluments Clause to Nongovernmental Members of ACUS to the Chairman of the Admin. Conf. of the U.S. (June 3, 2010) (quoting U.S. CONST. art. I, § 9, cl. 8) (explaining that the Constitution's Emoluments Clause prohibiting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State,” does not apply to nongovernmental members of the Administrative Conference because, although they give advice, they do not exercise governmental authority).

ciary obligations even in the absence of any specific statutory or regulatory codifications of those obligations.¹¹⁵ Congress and the Executive Branch have also recognized the fiduciary nature of governmental power by enacting statutes and regulations that reflect employees' fiduciary duties.¹¹⁶

A fiduciary must not place herself in a position where her own interest conflicts with her duty toward a beneficiary.¹¹⁷ This fiduciary norm against conflicts is implicated whenever a fiduciary could personally benefit from her influence on a beneficiary's decision, and it is reflected in the ban on an employee's participating in matters that could affect her own financial interest or that of a party whose interests are imputed to her (such as a family member, an organization with which she is affiliated, or a party with whom she is negotiating for future employment).¹¹⁸

The federal government has recognized its employees' fiduciary status by imposing conflict-of-interest standards on them. Are contractor personnel who perform services for the government also fiduciaries? The government seems to have recognized that at least some of them are and has imposed conflict standards on narrow ranges of them.¹¹⁹ Outside of those already covered by these agency regulations and contract clauses, are other government contractor personnel in fiduciary positions?

The common law recognizes that fiduciary status depends not on one's status as an employee or independent contractor but instead on the tasks assigned.¹²⁰ In the words of a leading scholar of fiduciary obligation, "It does not matter whether an actor pursues a particular undertaking as an employee or as an independent contractor."¹²¹

Some contractor personnel influence government decisions or have access to government resources and thus are in fiduciary positions. The government has begun to recognize that some contractor personnel—those involved in meta-contracting—are in positions to influence government decisions and thus should be subject to fiduciary-based conflict-of-interest standards.¹²² But many other contractor personnel also have the ability to influence government decisions or have access to government resources. Fiduciary theory can help explain the financial conflict standard imposed

115. Clark, *supra* note 104, at 74.

116. See, e.g., 5 C.F.R. § 2635.101(a) (2010) ("*Public service is a public trust.*").

117. Flannigan, *supra* note 107, at 311 (requirement that fiduciaries not trust property or confidential information included in the conflict component); Clark, *supra* note 104, at 71.

118. 18 U.S.C. § 208 (2006).

119. See *infra* Appendix II: Financial Conflict Regulation of Service Contractor Personnel.

120. Garrett v. BankWest, 459 N.W.2d 833, 838 (S.D. 1990) (citing Yuster v. Keefe, 90 N.E. 920, 922 (Ind. App. 1910)).

121. Robert Flannigan, *Fiduciary Mechanics*, 14 CANADIAN LAB. & EMP. L.J. 25, 44 (2008) ("There is only one factor or criterion. It is whether access is qualified by limited purpose.").

122. Federal Acquisition Regulations for Preventing Personal Conflicts of Interest for Contractor Employees, 74 Fed. Reg. 58,584 (Nov. 13, 2009) (to be codified at 48 C.F.R. pt. 3, 52).

on government employees. But it does not provide a principled basis for explaining the lack of conflict regulation for most contractor personnel.

On the other hand, even if in theory the principle of fiduciary relationships should apply to contractor personnel, there could be legitimate policy reasons not to apply this principle broadly to contractor personnel. Perhaps the imposition of fiduciary standards on contractor personnel would interfere with some other policy goal.

The government has chosen to outsource huge swaths of its work to the private sector because of certain perceived benefits, such as the ability to obtain expertise without going through the unwieldy process of hiring government employees,¹²³ the flexibility to obtain services quickly in response to a crisis¹²⁴ and on a short-term basis,¹²⁵ the possibility of saving money and gaining efficiency by using the private sector,¹²⁶ and the political benefit of being able to claim a smaller government without the political cost of actually decreasing government services.¹²⁷

Imposing financial conflict standards on contractors could make it more difficult for the government to obtain the expertise it needs. Some observers claim that individuals with expertise are likely to have financial interests related to that expertise.¹²⁸ Requiring that contractor personnel be conflict-free or requiring that they undergo the same kind of financial disclosure and conflict-screening as government employees will make contracting less desirable and thus reduce the pool of possible contractors available to the government. Imposing such a regime would be costly to contractor personnel who would have to make detailed disclosures, to contracting organizations that would have to review those disclosures and implement the standards, and to the government itself, which would bear much of the added financial cost.

123. See NAT'L COMM'N ON THE PUB. SERV., THE BROOKINGS INST., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 27-29 (2003); see also P'SHIP FOR PUB. SERV., CLOSING THE GAP: SEVEN OBSTACLES TO A FIRST-CLASS FEDERAL WORKFORCE 4 (2010).

124. See Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, 6 J. CONT. MGMT. 9, 13 (2008) (discussing the government's extensive use of contractors after initiating two wars in a two-year period); MARK CASSELL, HOW GOVERNMENTS PRIVATIZE: THE POLITICS OF DIVESTMENT IN THE UNITED STATES AND GERMANY 1-5 (2002) (describing the Resolution Trust Corporation's extensive use of contractors in the early 1990s to respond to the savings and loan crisis).

125. Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 153 (Jody Freeman & Martha Minow eds., 2009).

126. But see Bernard D. Rostker, Robert S. Leonard, Obaid Younossi, Mark V. Arena & Jessie Riposo, *Cost Controls: How Government Can Get More Bang for Its Buck*, RAND REV., Spring 2009, at 18 (reporting on several studies indicating that contractor personnel cost more than government employees), available at http://www.rand.org/content/dam/rand/pubs/corporate_pubs/2009/RAND_CP22-2009-04.pdf.

127. See generally LIGHT, *supra* note 34.

128. But see Guttman, *supra* note 39.

These are legitimate concerns, and they suggest that the government should not simply apply the financial conflict standards for government employees to government contractor personnel. But neither are these policy concerns sufficient to justify the lack of any financial conflict standards for most contractor personnel. The fact that the government has been able to impose such standards on narrow bands of contractor personnel proves that imposing fiduciary-based standards can be practical. Neither principle nor policy can explain the current pattern of regulating only a few narrow bands of contractor personnel. Instead, this pattern of regulation appears, at least in part, to stem from specific contractor ethics scandals.

The government's approach to regulating the ethics of contractors has been largely reactive rather than proactive. After a government official admitted that the agency in charge of bank bailouts had "no way of knowing whether any conflicts of interest exist among the thousands" of contractors it had hired,¹²⁹ Congress enacted statutory reforms subjecting any employees of FDIC contractors who are supervised by FDIC managers to government ethics statutes and regulations and required the FDIC to adopt comprehensive ethics regulations for all other contractor personnel.¹³⁰ After Congress investigated the financial conflicts of interest of the president of a Federally Funded Research and Development Center (FFRDC), the Defense Department instituted personal conflict-of-interest guidelines for FFRDCs.¹³¹ After a series of *USA Today* articles about retired flag officers who worked both as consultants for the Pentagon and for defense contractors, Secretary of Defense Robert Gates instituted a new policy requiring that those consultants be hired only as SGEs, so that they would be subject to the financial disclosures and other ethics restrictions applicable to part-time government employees.¹³² After the GAO issued reports identifying

129. James Risen, *S&L Bailout Agency is Ripe for Fraud, GAO Tells Congress*, L.A. TIMES, Sept. 25, 1990, at D1 (quoting the director of the Resolution Trust Corporation's asset management division). The Resolution Trust Corporation was a temporary agency whose activities were taken over by the FDIC at the end of 1995.

130. See 12 U.S.C. § 1822(f) (2006); 12 C.F.R. § 366 (2010). Congress also subjected all FDIC contractor personnel to the criminal prohibition on bribes and illegal gratuities. 12 U.S.C. § 1822(f)(1)(B) (2006). FDIC's contractor conflict-of-interest regulations originally applied to all of its service contractors. Contractor Conflicts of Interest, 61 Fed. Reg. 9,590 (Mar. 11, 1996) (to be codified at 12 C.F.R. pt. 366). The agency later revised those regulations so that they would not apply to contractors that provide "incidental or housekeeping services," such as food service, janitorial and mail delivery. Minimum Standards of Integrity and Fitness for an FDIC Contractor, 67 Fed. Reg. 34,591, 34,593 (May 15, 2002) (to be codified at 12 C.F.R. pt. 366).

131. Memorandum from the Under Sec'y of Def. for Acquisition, Tech. and Logistics, DOCID 3614747, on the Federally Funded Research and Development Center (FFRDC) and Avoidance of Conflict of Interest (COI) (Jan. 26, 2007); see U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 61, at 21-22; PROJECT ON GOV'T OVERSIGHT, PREYING ON THE TAXPAYER: THE F-22A RAPTOR (2006), available at <http://www.pogo.org/pogo-files/reports/national-security/f-22a-raptor/ns-f-22a-raptor-2006.html#12>.

132. Memorandum from the Sec'y of Def., OSD 03721-10, on the Policy on Senior Mentors (Apr. 1 2010), available at http://www.cpms.osd.mil/sespm/docs/Senior_Mentor_Policy.pdf; Tom Vanden Brook, Ken Dilanian & Ray Locker, *Military's 'Senior Mentors' Cashing In: Retired Officers*

ethical problems created by meta-contracting, the government issued proposed regulations addressing personal conflicts of interest in that narrow field.¹³³ But the potential for conflicts exists on a much broader scale than just meta-contracting. It exists anytime contractor personnel can influence government decisions or have access to government resources and should be using that influence or access to benefit the government.

While the different treatment of contractor personnel and government employees can be explained by historical developments, explanation is not the same as justification. The historical happenstance that resulted in this disparate treatment presents a challenge: How should the government regulate the financial interest of its contractor personnel? There is a principle-based reason to impose fiduciary-based standards on those contractor personnel who are in fiduciary positions because of their access to government resources or their ability to influence government decisions. And there are legitimate policy-based reasons not to impose fiduciary-based standards on some of these contractor personnel if doing so would deter personnel with the needed expertise from lending their services to the government or if doing so would be too costly.

The regulation of contractor personnel conflicts is at an early stage. A few agencies have adopted standards for some of their contractors, and the government is considering regulation of all contractor personnel involved in meta-contracting. But there has not been an overarching vision of which contractor personnel should be subject to such standards, what exactly those standards should be, and how to implement them.¹³⁴

This article has identified the issue of contractor personnel financial conflicts as a problem to be addressed, argues that the principle that should guide regulation in this area is the fiduciary obligation, and acknowledges that a fiduciary-based standard will need to address and accommodate legitimate concerns about the cost and practicality of imple-

on Payroll of Pentagon and Defense Firms, USA TODAY, Nov. 18, 2009, at A1.

133. Federal Acquisition Regulations for Preventing Personal Conflicts of Interest for Contractor Employees, 74 Fed. Reg. 58,584 (Nov. 13, 2009) (to be codified at 48 C.F.R. pt. 3, 52).

134. Until 1989, the Executive Branch's approach to ethics regulation was primarily decentralized and ad hoc. See U.S. DEP'T OF JUSTICE, PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM 92 (1989). Each agency and department had its own set of ethics regulations. As a result, there was wide variation across agencies in the regulation of gifts, financial conflicts, negotiation for future employment, and other ethics concerns. In 1990, President George H.W. Bush issued an executive order requiring the Office of Government Ethics (OGE) to develop regulations that would apply across the entire Executive Branch. Exec. Order No. 12,731, § 201, 55 Fed. Reg. 42,547 (Oct. 19, 1990). Agencies could then seek the OGE's permission to issue supplemental departmental ethics rules if they had concerns not sufficiently protected by the Executive Branch-wide regulations. This endeavor—centralizing and rationalizing ethics regulation—enabled the government to make strides in simplifying and clarifying its ethics regime.

The regulation of government contractors' ethics is now at a stage similar to where the government ethics regulation was decades ago, before OGE undertook to bring rationality and uniformity to government ethics regulation. Congress and a few agencies have addressed contractor personnel ethics in a few narrowly defined areas, usually in response to specific scandals.

menting these standards. The following Part identifies some of the empirical questions that the government should answer before imposing such restrictions on broad swaths of contractor personnel.

V. WHAT IS TO BE DONE? EMPIRICAL QUESTIONS THAT NEED TO BE ANSWERED

The contracting out of government services is of enormous significance, both in terms of the many important services being outsourced, and in terms of the hundreds of billions of dollars the government spends every year for these services. In the course of performing these services, contractor personnel influence government decisions and have access to government resources. They are in a position to abuse that discretion and those resources. While we do not know how often contractor personnel have acted in ways that would be prohibited if they had been government employees, the examples of Dan Jester and Dennis Blair suggest that the government is vulnerable to such abuse. When the government delegates services to contractor personnel, it becomes vulnerable to abuses by those personnel.

The previous Part showed that while the disparity between financial conflict standards for government employees and those for contractor personnel can be explained as a matter of historical happenstance, it cannot be justified on principle or policy grounds. What the reader might expect (at this point in the Article) is a recommendation for imposing additional conflict standards to be placed on contractor personnel.

But it is not yet clear what policy reforms the government should adopt. Should it impose the same financial conflict standards—civil and criminal—on contractor personnel that it imposes on government employees? Should some but not all contractor personnel be covered by such standards? Who should administer financial conflict standards for contractor personnel: Government ethics officials who have experience in administering the standards for government employees? Contracting officers who currently have responsibility for identifying organizational conflicts of interests? Other government officials who would be tasked with contractor ethics compliance? Or should the government delegate to contracting companies the administration of these financial conflict standards?

Some commentators have suggested that contractor personnel should not be subject to the same ethics restrictions that apply to government employees because many contractors already impose ethics restrictions on their employees.¹³⁵ The government already requires its largest contractors

135. Letter from Alan Chvotkin, Exec. Vice President and Counsel, Prof'l Services Council, to Meredith Murphy, Gen. Services Admin. Regulatory Secretariat (July 17, 2008), *available at* <http://www.pscouncil.org/AM/Template.cfm?Section=Register&TEMPLATE=/C/M/ContentDis->

to have their own internal ethics codes,¹³⁶ but it does not require that those codes prohibit employees with personal conflicts of interest from working on government contracts.¹³⁷ Most corporate ethics codes are aimed at preventing their employees from acting in a way that is disloyal to the corporation, not disloyal to the corporation's client, the government.¹³⁸ A GAO report found only a few examples of contractors with conflict-of-interest policies that protect the government.¹³⁹ Some of these codes address the financial conflicts of individual employees, but unlike the government ethics regulations, they do not attribute to the employee the financial interests of their spouses or other family members.¹⁴⁰ At least one contractor has required all professional employees annually to submit a financial disclosure form modeled on a federal form, requiring disclosure of the employee's or a household's financial interest in other contractors that are involved in the defense programs on which the employee works.¹⁴¹

Are additional financial conflict standards needed for contractor personnel? A contracting fraud task force recently recommended that the criminal financial conflict-of-interest statute be amended to cover contractor personnel who are involved in meta-contracting.¹⁴² But the problem of contractor conflicts of interest is not limited to the meta-contracting context, and the government should take a more comprehensive approach.

The GAO asked Department of Defense program officers whether the government should impose additional ethics standards for contractor personnel.¹⁴³ While all recognized the need for ethics standards in meta-contracting, few had implemented such standards for other services, and some opposed imposing new restrictions.¹⁴⁴ They noted that government officials—rather than contractor personnel—are ultimately responsible for making decisions and that additional restrictions will impose additional

play. cfm& CONTENT ID= 2295 (commenting on FAR Case 2007-017: "Service Contractor Employee Personal Conflicts of Interest").

136. 48 C.F.R. § 3.1002 (2010).

137. Cf. 42 C.F.R. § 414.912 (2010) (requiring Medicare Drug Contractors to have a code of conduct addressing "conflicts of interest between [the contractor] and any entity, including the Federal Government, with whom it does business").

138. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 61, at 18.

139. *Id.* at 9 ("[O]nly three [out of 18 contractors with conflict of interest policies] directly require their employees to identify potential personal conflicts of interest with respect to their work at DOD so they can be screened and mitigated by the firms.").

140. *Id.* at 19.

141. *Id.* at 20.

142. NAT'L PROCUREMENT FRAUD TASK FORCE LEGISLATION COMM., *PROCUREMENT FRAUD: LEGISLATIVE AND REGULATORY REFORM PROPOSALS 16-17* (2008) (recommending an expansion of the statute on financial conflicts, but not the other criminal conflict-of-interest statutes), *available at* [http://www.gsaig.gov/?Link Serv ID=A 8DD55 A6-A6 BB-D9 F8-0788C 31C3 9FC 3C D0&showMeta=0](http://www.gsaig.gov/?Link%20Serv%20ID=A%208DD55%20A6-A6%20BB-D9%20F8-0788C%2031C3%209FC%203C%20D0&showMeta=0).

143. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 61, at 24–25.

144. *Id.* at 25.

costs and could deter some from contracting work.¹⁴⁵ Even if a government official is ultimately responsible for a final decision, there can be no doubt that contractor personnel influence the government's decisions, and the conflict-of-interest standards for government employees reach not just employees who make decisions but also those who influence such decisions. The other concerns—cost and deterring others from bidding on contracts—are legitimate. In identifying mechanisms to implement ethics standards, the government should consider how to reduce the cost to contractors and the inconvenience to contractor personnel.¹⁴⁶

It is quite a challenge to develop the right approach to applying ethics principles to government contractor personnel. At the extremes, one could either exempt all government contractor personnel from all ethics restrictions or impose the full panoply of ethics restrictions on all government contractor personnel.¹⁴⁷ Of course, neither of these approaches is satisfactory. The government has for the most part taken the former approach,¹⁴⁸ leaving it vulnerable to abuse by contractor personnel. The other extreme—reflexively imposing every government ethics restriction on all contractor personnel—may provide only limited benefit for the government while imposing substantial costs, and imposing ethics restrictions on contractor personnel (such as those mowing lawns) who are not in a fiduciary position.

These are complicated issues, and the government should not rush to impose these standards on a \$268 billion sector of the economy without more thorough analysis of the policy implications. The Administrative Conference of the United States recently took a modest step in the direction of increased regulation, recommending that the Federal Acquisition Regulatory Council Adopt optional contract clauses that could be inserted in contracts for services where there is a high risk of personal conflicts of interest or misuse of nonpublic information.¹⁴⁹

Prior to imposing conflict of interest standards on broad swaths of contractor personnel, there are significant empirical questions that should be answered. Obtaining answers to these questions will enable the gov-

145. *Id.* at 25.

146. NAT'L COMM'N ON THE PUB. SERV., *supra* note 123 (discussing the need to simplify financial disclosure requirements for government employees).

147. *Cf.* Letter from A.R. Hodgkins, Vice President of Fed. Gov't Programs, to Diedra Wingate, Gen. Services Admin. Regulatory Secretariat (May 27, 2008) ("[T]he full panoply of laws and regulations applicable to Government employees are inappropriate for application to even that subset of [contractor] employees whose roles may raise PCI concerns."), available at <http://www.regulations.gov/search/Regs/contentStreamer?objectId=0900006480602aab&disposition=attachment&contentType=pdf>.

148. There are a few exceptions where the government has imposed ethics restrictions on contractor personnel. See *supra* Part III.

149. Administrative Conference Recommendation 2011-3, 76 Fed. Reg. 48,792 (Aug. 9, 2011). Appendix IV reproduces the text of the recommendations.

ernment to make more informed decisions about the relative need for ethics restrictions and the relative costs of different options for imposing them. This Part identifies five of the most critical empirical questions.

*A. What Types of Services Do Contractors Perform for the Government?
How Many Individuals Perform Those Services?*

The federal government has engaged in large-scale outsourcing of services, but it has not closely monitored this outsourcing and does not have an accurate, comprehensive inventory of the services contractors provide and the number of contractor personnel providing them. Secretary of Defense Robert Gates recently made the “terrible confession” that he was unable to determine how many contractors were working for him—not in the Defense Department as a whole, but in the Office of the Secretary of Defense itself.¹⁵⁰ Congress has passed legislation requiring an inventory of contractor-provided services,¹⁵¹ but the government also needs to develop an accurate census of contractor personnel.

While we have reliable data on the amount of money that the government spends on service contracts,¹⁵² we do not have reliable data on the number of individuals providing those services. Paul Light has asserted that federal contractor personnel outnumber government employees by a factor of 1.8 to 1,¹⁵³ but this estimate includes not just jobs at contractors but also jobs created *indirectly* through contract spending, such as jobs at the grocery stores and dry cleaners that serve contractor personnel.¹⁵⁴ The Departments of Defense and State and USAID reported that nearly 230,000 contractor personnel were providing services in Iraq and Afghanistan as of the second quarter of FY 2009, but the GAO determined that the agencies’ methodology was flawed, underestimating the actual number.¹⁵⁵

150. Dana Priest & William M. Arkin, *National Security, Inc.*, WASH. POST, July 20, 2010, at A1 (“‘This is a terrible confession,’ [Gates] said. ‘I can’t get a number on how many contractors work for the Office of the Secretary of Defense,’ referring to the department’s civilian leadership.”).

151. See, e.g., 10 U.S.C. § 2330 (2006).

152. See FEDERAL PROCUREMENT DATA SYSTEM – NEXT GENERATION, https://www.fpds.gov/fpdsng_cms/index.php/reports (last visited Sept. 27, 2011).

153. See Paul C. Light, *The Real Crisis in Government*, WASH. POST, Jan. 12, 2010, at A17 (noting that in 2005, there were 7.5 million employees of federal contractors); *Total Government Employment Since 1962*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/feddata/HistoricalTables/TotalGovernmentSince1962.asp> (last visited Sept. 27, 2011) (showing that there were 4.1 million Executive Branch employees, including those serving in the military and postal service, in 2005).

154. LIGHT, *supra* note 34, at 21, 24. Light explains that his methodology begins with the dollar figures reported in the FPDS, considers the Standard Industrial Code (SIC) associated with each contract, and then uses the “job multipliers supplied by the Bureau of Economic Analysis [BEA] input-output model of the economy.” *Id.* at 19.

155. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-1, CONTINGENCY CONTRACTING: DOD, STATE, AND USAID CONTINUE TO FACE CHALLENGES IN TRACKING CONTRACTOR PERSONNEL AND CONTRACTS IN IRAQ AND AFGHANISTAN (2009), available at <http://www.gao.gov/new.items/d101.pdf>.

Congress is considering legislation to require each agency in the Executive Branch to report on the number of contractor personnel providing services.¹⁵⁶ Mandating that service contractors disclose the number of individuals working on their contracts (and in turn requiring agencies to report those numbers) will help the Executive Branch, Congress, and outside observers get a handle on the scope of service contracting.

B. How Many People Have Individual Contracts To Perform Services for the Federal Government? Do the Ethics Standards That Apply to Government Employees Apply to These Individuals As Well?

This Article began with a description of Dan Jester, a former Goldman Sachs official, whose individual contract with the Treasury Department apparently enabled him to avoid coverage of the financial conflict-of-interest statute that applies to government employees. More than 130 agencies have authority to enter into service contracts with experts and consultants,¹⁵⁷ but it is unclear how many agencies use that authority and how many individuals are hired through this contract mechanism. While Treasury apparently viewed Jester as exempt from government ethics restrictions, it is unclear whether consultants and experts hired in this way are considered “employees” and thus subject to government ethics standards.¹⁵⁸

C. How Many Individuals Perform Such Services for the Government Under Non-Contract Vehicles Such As Grants? What Has Been the Government’s Experience in Imposing Ethics Restrictions on Those Individuals?

While this Article has focused on contractors, the government actually awards more money in grants than contracts.¹⁵⁹ A significant portion of these grants is for research, and the government has more than a decade of experience in imposing ethics guidelines on the recipients of research grants.¹⁶⁰

156. National Defense Authorization Act for Fiscal Year 2011, H.R. 5136, 111th Cong. § 850 (2010).

157. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-789, AMERICA COMPETES ACT: NIST APPLIED SOME SAFEGUARDS IN OBTAINING EXPERT SERVICES, BUT ADDITIONAL DIRECTION FROM CONGRESS IS NEEDED 19 n.8 (2009) (More than 130 agencies can “obtain temporary or intermittent services of experts and consultants under 5 U.S.C. § 3109.”).

158. *Id.* (explaining that it is unclear whether agencies obtaining these services must “appoint[] individuals as federal employees . . . or . . . [can] award[] personal services contracts in accordance with the FAR [Federal Acquisition Regulation]”).

159. From Fiscal Years 2000 to 2010, the federal government spent 16.5% more on grants (\$4.97 trillion) than it spent on contracts (\$4.27 trillion). *See infra* Appendix III: Spending on Contracts v. Grants: 2000–2010.

160. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-110 (1993), available at http://www.WhiteHouse.gov/omb/circulars_a110.

While the government has not directly imposed restrictions on the employees of grant recipients, it has required those recipients to set up their own systems for monitoring their employees' conflicts of interest, including requirements that individuals working on government grants annually disclose to their employers any conflicting interests or certify that no conflicts exist. Thus, in the research sphere, we have more than a decade of experience with delegated monitoring. The government should evaluate grant recipients' record of monitoring to see whether that method has sufficiently protected the public's interest in unbiased research.

D. Do Government Contractors Have a Good Record in Monitoring and Reporting Their Own Organizational Conflicts of Interest?

For more than a decade, the government has relied on its contractors to disclose their own organizational conflicts of interest or to certify that they had no such conflicts. In at least one case, the government alleged that a contractor's certification was false and filed a False Claims Act lawsuit premised on those false certifications.¹⁶¹ In deciding whether to delegate to contractors the task of monitoring their employees' personal conflicts, it would be prudent to assess contractors' track records in monitoring and disclosing their organizational conflicts.

E. Have the Annual Financial Disclosures Required of Government Employees Been Effective in Preventing Financial Conflicts of Interest?

The government's primary method of preventing financial conflicts of interest among its own employees is by requiring hundreds of thousands of them to file annual financial disclosures. These disclosure requirements impose significant costs on the employees who must file them (both their time and their privacy) and on the government (such as the time that ethics officials spend reviewing these forms). Such costs may be justified if annual disclosures are effective in preventing conflicts.

But an annual disclosure form becomes out-of-date as soon as an employee buys or sells stock, and ethics officials' review of that disclosure is effectively out-of-date as soon as an employee's job responsibilities change (such as when she moves from one matter to another). The government imposed this financial disclosure and review requirement on TARP contractors,¹⁶² and has proposed it for the meta-contracting context as well, which would be a substantial expansion of its use.¹⁶³ Before imposing this

161. United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1263 (D.C. Cir. 2010).

162. See 31 C.F.R. § 31.217 (2010).

163. See Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58,584 (proposed Nov. 13, 2009) (to be codified at 48 C.F.R. pt. 3, 52).

expensive implementation mechanism on contractor personnel, the government should determine how effective annual disclosures have been and whether another approach (such as requiring employees to certify with respect to particular tasks that they have no conflicts) would be more effective.

CONCLUSION

Well into the twentieth century, the law allowed product liability suits only where there was privity between the parties.¹⁶⁴ As a result, manufacturers were immune from tort liability as long as they did not enter into contractual relations with the ultimate consumers or those affected by their defective products. Eventually, as the complexity of the modern production and distribution system revealed the problems with the formalistic approach, the common law adjusted and recognized the appropriateness of imposing on the manufacturer the responsibility for making safe products, regardless of whether there was privity between the manufacturer and the injured party.¹⁶⁵ This more realistic approach ushered in an era when consumers were able to recover from manufacturers, and manufacturers had the incentive to protect consumers from defective products.

A similar change is needed with respect to government contractor personnel. We need to recognize employees' ethical obligations to the government regardless of whether those individual employees have a contractual relationship with the government. Ethics needs to follow function, not formalism.

The current black and white distinction between government employees (who are subject to strict financial conflict standards) and contractor personnel (most of whom are subject to none) might have made some sense in an earlier era where contractors provided mostly products rather than services. But the last three decades have witnessed a dramatic outsourcing of government functions to contractors. Contractor personnel are giving advice, making recommendations, influencing government decisions, and providing services that used to be the exclusive province of government employees. Government ethics regulation needs to catch up with the reality of outsourced government and needs to address the ethics issues that arise when contractor personnel are doing the government's work.

164. 8 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 184 (1998).

165. *Id.* ("The history of the law of product liability is largely a history of the erosion of the doctrine of PRIVACY, which states that an injured person can sue the negligent person only if she was a party to the transaction with the injured person.").

Appendices
I. Financial Conflict of Interest Restrictions on Executive Branch Employees, SGEs & Contractor Personnel

Restriction	Position	Applies to:		
		Regular Employees	Special government employees (SGEs)	Contractor personnel
Ban on financial conflicts of interest	Criminal ¹	All	Some ²	None
	Regulatory ³	All	All ⁴	None
Ban on salary supplementation ⁵		All	All SGEs paid by government ⁶	None
Public Financial Disclosure Required ⁷	President ⁸		--	--
	Vice President ⁹		--	--
	Those in positions where basic rate of pay is more than \$119,533.60 ¹⁰	All	All	None
	Those in positions classified above GS-15 ¹¹	All	All	--
	Flag officers ¹²	All	All	--
	Administrative law judges ¹³	All	All	--
	Political appointees ¹⁴	All ¹⁵	All	None
	Civilian White House employees with Presidential appointment or commission ¹⁶	All	All	None
	Postmaster General and certain Postal employees ¹⁷	All	All	None
	Director, OGE ¹⁸		--	--
Designated agency ethics officials ¹⁹	All	All	None	
Confidential Financial Disclosure Required ²⁰	Employees who are not required to file public financial disclosures ²¹	All who participate personally and substantially through decision or judgment without supervision or review in: <ul style="list-style-type: none"> • Contracting or procurement • Grants, subsidies, licenses or federal benefits • Regulating a non-federal entity or • Activities that have a direct & substantial economic effect on a non-federal entity 	All ²²	None

APPENDIX I ENDNOTES

1. 18 U.S.C. § 208(a) prohibits employees from participating in a matter that has a direct & predictable effect on financial interest of
 - employee
 - spouse
 - minor children
 - prospective employer (“organization[s] with whom [the employee] is negotiating or has any arrangement concerning prospective employment.”)
 - “organization in which the employee is serving as officer, director, trustee, [or] general partner.
2. Applies to all SGEs except those who serve on FACA committee where
 - the matter is of general applicability & would affect SGE or SGE’s employer in a way similar to other class members;² or
 - agency official certifies that need for SGE’s services outweighs the COI;²
 - the SGE is a nonvoting representative on a FDA-created FACA committee & the SGE’s financial interest arises from the class she represents;² or
 - the FACA committee deals with medical products & the SGE’s financial interest arises from
 - her employment at a hospital that could use or sell the product or
 - the use or prescription of the product for patients.`
- 5 C.F.R. 2640.203(i).
3. 5 C.F.R. 2635.502 (prohibiting employee from participate in “a particular matter involving specific parties that is likely to have a direct and predictable effect on the financial interest of a member of his household” if a reasonable person would question his impartiality).
4. 5 C.F.R. 2635.102(h) (defining “employee” to include special government employees).
5. 18 U.S.C. § 209.
6. 18 U.S.C. § 209(c).
7. 5 U.S.C. Appx § 101(f)(3) (those occupying positions classified above GS-15, or for which the rate of basic pay is at least \$119,533.60 (receiving at least 120% of the minimum GS-15 pay. As of January, 2010, 120% of the minimum GS-15 rate of pay is \$119,533.60. Office of Government Ethics website (available at http://www.usoge.gov/news/whats_2010.aspx#75fr16890).
8. 5 U.S.C. Appx § 101(f)(1).
9. 5 U.S.C. Appx § 101(f)(2).
10. 5 U.S.C. Appx § 101(f)(3) (those occupying positions classified above GS-15, or for which the rate of basic pay is at least \$119,533.60 (receiving at least 120% of the minimum GS-15 pay. As of January, 2010, 120% of the minimum GS-15 rate of pay is \$119,533.60. Office of Government Ethics website (available at http://www.usoge.gov/news/whats_new_2010.aspx#75fr16890).
11. 5 U.S.C. Appx § 101(f)(3).
12. 5 U.S.C. Appx § 101(f)(3) (members of the uniformed service whose pay grade is at least that for O-7s under 37 USC § 201).
13. 5 U.S.C. Appx § 101(f)(4) (employees appointed pursuant to 5 U.S.C. § 3105).
14. 5 U.S.C. Appx § 101(f)(5) (those in positions “excepted from the competitive service by reason of being of a confidential or policymaking character”).
15. 5 U.S.C. Appx § 101(f)(5) (the Director of the Office of Government Ethics may issue regulations exempting individuals where such exclusion would not affect adversely the integrity of the Government or the public’s confidence in the integrity of the Government).
16. 5 U.S.C. Appx § 101(f)(8).
17. 5 U.S.C. Appx § 101(f)(6).
18. 5 U.S.C. Appx § 101(f)(7).
19. 5 U.S.C. Appx § 101(f)(7).
20. 5 C.F.R. 2534.904.
21. 5 C.F.R. 2634.904(a)(1).
22. *Id.* § 2634.904(a)(2) (requiring all SGEs, except those required to file public financial disclosures, to file confidential financial disclosures). They must file these reports upon appointment or reappointment but are not required to file incumbent reports on an annual basis unless they also meet the criteria listed in 5 C.F.R. § 2634.904(a)(1) (2010). *Id.* § 2634.903(a).

II. Financial Conflict Regulation of Service Contractor Personnel

SUBSTANTIVE RESTRICTIONS:

Agency	Contracts Affected	Personnel Affected	Prohibition
Energy	Mgmt. and Operations ²³	Employees assigned to work under the contract ²⁴	"make or influence any decisions on behalf of the contractor which directly or indirectly affect the interest of the Government, if the employee's personal concern in the matter may be incompatible with the interest of the Government." ²⁵
EPA	Superfund contracts > \$150,000	Consultants and employees of contractors and subcontractors	a relationship with an entity that may impair their objectivity in performing the contract work ²⁶
	Bid evaluation	All	any "conflict of interest . . . that may diminish [his] capacity to perform an impartial, technically sound, objective review of [the] proposal(s) or otherwise result in a biased opinion or unfair competitive advantage" ²⁷
FDIC	All	All	"a personal, business, or financial interest or relationship that relates to the services . . . perform[ed] under the contract." ²⁸
NRC	Research, Eval., Tech. Consulting, Mgmt. Supp. Serv. & those resulting from unsolicited proposals ²⁹	All ³⁰	"a . . . present or planned interest[] related to the work to be performed under [the contract] which: (1) May diminish its capacity to give impartial, technically sound, objective assistance and advice, or may otherwise result in a biased work product; or (2) May result in its being given an unfair competitive advantage." ³¹
	TARP contracts and financial agency agreements ³²	"Key individuals" ³³ and "management officials performing work under the [contract]" ³⁴	"a personal, business, or financial interest of an individual, his or her spouse, minor child, or other family member with whom the individual has a close personal relationship, that could adversely affect the individual's ability to perform under the arrangement, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury." ³⁵
USAID	Contracts performed in a foreign country	All employees and consultants ³⁶	"make loans or investments to or in any business, profession or occupation" in that country. ³⁷

IMPLEMENTATION MECHANISMS:

Financial Disclosures/Certifications to Contractor:

Agency	Contracts Affected	Personnel Affected	Required Disclosure/Certification
Energy	Mgmt. and Operations	Employees assigned to work under the contract	<ul style="list-style-type: none"> • “[A]ny actual or potential conflicts with DOE’s policies regarding conduct of employees of DOE’s contractors”³⁷ • “[O]utside employment services which involve the use of information in the area of the employee’s employment with the contractor”³⁸ • “[I]nformation . . . in writing about their personal, business, and financial relationships, as well as those of their spouses, minor children, and other family members with whom the individuals have a close personal relationship that would cause a reasonable person with knowledge of the relevant facts to question the individual’s ability to perform, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury.”³⁹ • Certification that they will not: <ul style="list-style-type: none"> ○ Disclose nonpublic information; or ○ Use or allow the use of nonpublic information to further any private interest⁴⁰
Treasury	TARP	Key individuals and management officials performing work under the contract	

Financial Disclosures/Certifications to Agency:

Agency	Contracts Affected	Personnel Affected	Required Disclosure/Certification
Energy	Mgmt. and Operations	Employees assigned to work under the contract	Employees’ disclosures to contractor described above ⁴¹
	Bid evaluation	All	Individual must certify that he has “no conflict of interest . . . that may diminish [his] capacity to perform an impartial, technically sound, objective review of this proposal(s) or otherwise result in a biased opinion or unfair competitive advantage.” ⁴²
EPA	Superfund contracts > \$150,000 ⁴³	Employees, subcontractor employees or consultants working on or having access to information regarding the contract ⁴⁴	Contractor must disclose any “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.” ⁴⁵

Agency	Contracts Affected	Personnel Affected	Required Disclosure/Certification
EPA	All	Chief executive, directors and any proposed consultant or subcontractor	<p>Prospective contractor must either:</p> <ul style="list-style-type: none"> • Certify that it is not aware of “any information bearing on the existence of any organizational conflict of interest;”⁴⁷ <p>or:</p> <ul style="list-style-type: none"> • “[D]escribe[] concisely all relevant facts concerning any past, present, or planned interests relating to the work to be performed and bearing on whether . . . their chief executive[], directors, or any proposed consultant or subcontractor, may have a potential organizational conflict of interest.”⁴⁶ • Must certify “in writing that you . . . have no conflict of interest under [12 CFR] 366.10(a).”⁴⁷ • Must notify the FDIC “within 10 business days after you become aware that you, or any person you employ to perform services for us, are not in compliance with this part”⁴⁸ • Must sign a certification form that: <ul style="list-style-type: none"> ○ He was not a “senior employee” subject to a 1-year cooling off period; and ○ His work for contractor does not involve any matter: <ul style="list-style-type: none"> ▪ He participated personally and substantially in; or ▪ Under his official authority while at FDIC / RTC.⁴⁹
FDIC	All	All Those who previously worked at the FDIC	<p>Must certify that these individuals have no personal conflicts of interest or that they are subject to a mitigation plan or waiver approved by the Treasury.⁵⁰</p>
Treasury	TARP	Key individuals and management officials performing work under the contract	<p>Must certify that these individuals have no personal conflicts of interest or that they are subject to a mitigation plan or waiver approved by the Treasury.⁵⁰</p>

Contractor agrees to employ only employees who meet ethics criteria:

Agency	Contracts Affected	Personnel Affected	Provision
FDIC	All	All	Must agree in writing to “employ only persons who meet the requirements of this part to perform services on our behalf.” ⁵¹

Contractor trains personnel on ethics standards:

Agency	Contracts Affected	Employees Affected	Provision
Energy	Mgmt. and Operations	Employees assigned to work under the contract	Must "inform[] employees that they are expected to disclose any incompatibilities between duties performed for the contractor and their private interests and to refer undecided questions to the contractor" ⁵²
FDIC	All	All	"[M]ust ensure that any person you employ to perform services for [FDIC] is informed about their responsibilities under this part" ⁵³
Treasury	TARP contracts and financial agency agreements	All those in receipt of "nonpublic information"	Must provide "[p]eriodic training to ensure that [they] know their obligation to maintain its confidentiality and to use it only for purposes contemplated by the arrangement" ⁵⁴

Agency Official Charged with Evaluating Conflicts:

Agency	Contracts Affected	Official / Office	Responsibilities
FDIC	All	Contracting Officer	<ul style="list-style-type: none"> "[E]nsure that the FDIC <i>Integrity and Fitness</i> clause 7.3.2-46 is included in the request for proposal or request for quotation for services estimated to cost greater than \$100,000"⁵⁵ "[E]nsure that a contractor being considered for an award has not been suspended or excluded from performing services" by FDIC or the federal government⁵⁶ "[R]eview[] the contractor's representations and certifications for completeness and to identify potential issues that could affect eligibility"⁵⁷ Consult with Acquisition Services Branch's Policy and Operations Section and the Legal Division Contracting Law Unit "[i]f there are any questions regarding" application of COI regulations⁵⁸ "[F]orwards all conflicts of interest issues to the CLU for review and determination"⁵⁹ Can seek from Legal Division a waiver of suspension or exclusion when he "determines it is in the corporation's best interest"⁶⁰ "[R]eviews conflicts of interests raised by the representations and certifications submitted by a contractor recommended for an award"⁶¹ "[I]ssues a written decision of its determination"⁶² "[P]repares the cases for eligibility determination, waiver of conflicts of interest, appeal from final decisions, and other documents for the Corporation Ethics Committee (CEC)"⁶³ "[M]ay suspend or exclude contractors that violate" ethics regulations⁶⁴ Responsible for administration of Suspension and Exclusion regulations for all contractors except law firms⁶⁵

Agency	Contracts Affected	Official / Office	Responsibilities
FDIC (Cont'd)		Legal Division Legal Division Ethics Unit Acquisition Services Branch (ASB) Executive Secretary ("Ethics Counselor")	Can waive a suspension or exclusion when requested by Contracting Officer Serves as a point of contact for matters involving post-government employment restrictions Reviews all cases prior to their submission to Corporation Ethics Committee (CEC) ⁶⁶
	All	Executive Secretary ("Ethics Counselor") Assistant General Counsel of the Corporate and Legal Operations (AGC-CLO) Corporation Ethics Committee (CEC)	Decides all cases against contractors for suspension or exclusion ⁶⁷ Can waive a conflict of interest if the request is "simple and straightforward" (AGC-CLO decisions can be appealed to CEC) ⁶⁸ • Can "reverse, stay, or uphold a final decision of the AGC-CLO" re: waiver ⁶⁹ • Can "reverse, stay, or uphold a final decision" of Executive Secretary re: suspension / exclusion ⁷⁰ • Can waive a conflict of interest if the request is "more complicated" ⁷¹ • Identifies "administrative services" that are exempt from COI regulations ⁷² • Receives contractors' written notification of OCIs ⁷³ and disclosure/use of nonpublic information ⁷⁴ • Evaluates whether proposed measures adequately mitigate PCIs ⁷⁵ • Can waive PCIs ⁷⁶ • Can waive any regulatory requirement "that is not otherwise imposed by law when it is clear from the totality of the circumstances that a waiver is in the government's interest" ⁷⁷
Treasury	TARP	TARP Chief Compliance Officer	

APPENDIX II ENDNOTES

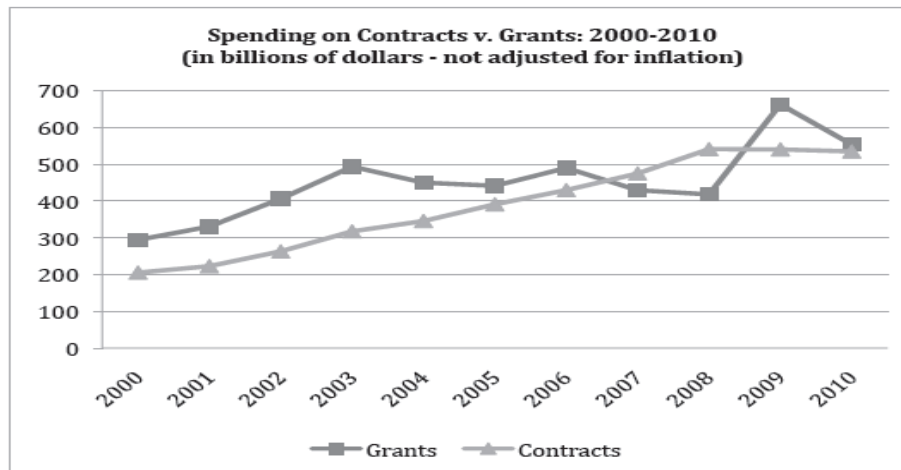
23. 48 C.F.R. § 970.0371-2 (2009).
24. 5 C.F.R. § 970.0371-3.
25. *Id.* § 970.0371-6(a). The regulation gives two examples of such conflicting interests:
 - “An employee . . . negotiat[ing], or influence[ing] the award of, a subcontract with a company in which the individual has an employment relationship or significant financial interest;”
 - “An employee . . . evaluati[ng] for DOE or for any DOE contractor . . . some technical aspect of the work of another organization with which the individual has an employment relationship, or significant financial interest, or which is a competitor of an organization (other than the contractor who is the individual's regular employer) in which the individual has an employment relationship or significant financial interest.” *Id.*
26. *Id.* § 1552.209-73(b).
27. *Id.* § 1503.104-5 (prescribing contract clause).
28. 12 C.F.R. § 366.10(a)(1) (2010).
29. 48 C.F.R. § 2009.570-4(b) (2009).
30. *Id.* § 2009.570-2.
31. *Id.*
32. 31 C.F.R. § 31.200(b) (2010). The regulation permits the TARP Chief Compliance Officer to exempt contracts for administrative services. *Id.* § 31.201. Financial agency agreements are in some respects distinct from most government contracts in that they are not subject to the Federal Acquisition Regulations and they can involve the delegation of inherent functions. This article uses the term “contract” to refer to both regular contracts and financial agency agreements under TARP.
33. A “key individual” is “an individual providing services to a private sector entity who *participates personally and substantially*, through decision, approval, disapproval, recommendation, or the rendering of advice, in the negotiation or performance of, or monitoring for compliance under” the contract. *Id.* § 31.201 (2010) (emphasis added).
34. *Id.* § 31.212(a). A “Management official” is “an individual within a retained entity's organization who has substantial responsibility for the direction and control of the retained entity's policies and operations,” including members of a management committee or executive committee or (in entities without such a committee) general partners. *Id.* § 31.201.
35. *Id.* The TARP regulation does not impose restrictions directly on contractor personnel; instead, it mandates that contractors ensure that their employees “have no personal conflicts of interest.” *Id.* § 31.212(a).
36. 48 C.F.R. § 752.7027(e) (2009). This restriction does not apply to employees or consultants who are “citizens or legal residents” of the foreign country where they are performing under the contract. *Id.*
37. *Id.*
38. *Id.* § 970.0371-8(a).
39. 31 C.F.R. § 31.212(b) (2010).
40. *Id.* § 31.217(c)(5). If the contract involves the “acquisition, valuation, management, or disposition of troubled assets,” then the level of detail must be at least as extensive as that required for public financial disclosure by high-level officials (Office of Government Ethics Form 278). *Id.*
41. 48 C.F.R. § 970.0371-8(b) (2010).
42. *Id.* § 1503.104-5 (prescribing contract clause).
43. *Id.* § 1509.507-2(c) (applying to Superfund contracts “in excess of the simplified acquisition threshold”).
44. *Id.* § 1552.209-73.
45. *Id.*
46. *Id.* § 1509.505-70(a).
47. 12 C.F.R. § 366.14(a) (2010).
48. *Id.* § 366.14(c).
49. FDIC, ACQUISITION POLICY AND FORMS, FDIC POST-GOVERNMENT EMPLOYMENT CERTIFICATION (2009), available at <http://www.fdic.gov/buying/goods/acquisition/PostGovtEmploymentCert.pdf>.
50. 31 C.F.R. § 31.212(d) (2010).
51. 12 C.F.R. § 366.14(d) (2010).
52. 48 C.F.R. § 970.0371-6(b) (2009).
53. 12 C.F.R. § 366.12(b) (2010).
54. 31 C.F.R. § 31.217(c)(3) (2010).

54. FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.304 (2011), *available at* <http://www.fdic.gov/buying/goods/acquisition/apm/PGL.html>.
55. *Id.* § 1.307.
56. *Id.* § 1.309(a).
57. *Id.* § 1.304.
58. *Id.* § 1.306(b).
59. *Id.* § 1.307.
60. *Id.* § 1.309(b).
61. *Id.*
62. *Id.*
63. *Id.* § 1.307.
64. *Id.* § 1.310(a).
65. *Id.* § 1.309(b).
66. *Id.* § 1.310(b).
67. *Id.* § 1.309(e).
68. *Id.*
69. *Id.* § 1.310(b).
70. *Id.* § 1.309(e).
71. 31 C.F.R. § 31.200(b) (2010).
72. *Id.* § 31.211(f).
73. *Id.* § 31.217(c).
74. *Id.* § 31.212(c).
75. *Id.*
76. *Id.* § 31.215.

III: Spending on Contracts v. Grants: 2000–2010

Billions of Dollars (Not Adjusted for Inflation)

Year	Grants	Contracts
2000	295	206
2001	331	223
2002	406	263
2003	494	318
2004	450	346
2005	442	391
2006	490	430
2007	430	475
2008	418	541
2009	663	540
2010	554	535
Total	4,971	4,268 ⁷⁷



77. See generally USA SPENDING.GOV, www.usaspending.gov (last visited Aug. 30, 2011).

IV: Administrative Conference of the United States Recommendations

On June 17, 2011, the Administrative Conference of the United States adopted the following six recommendations:⁷⁸

1. The Federal Acquisition Regulatory Council (“FAR Council”) should promulgate model language for use in contracts posing a high risk of either personal conflicts of interest or misuse of certain non-public information.⁷⁹ Current law does not adequately regulate against the risks of contractor employee personal conflicts of interest and misuse of non-public information. On occasion certain agencies impose additional ethics requirements by supplemental regulation or contract. In addition, certain contractors, especially large companies, have adopted and enforced internal ethics codes. Nevertheless, coverage varies significantly from agency to agency and contract to contract. In order to bring consistency to this process and ensure that the government’s interests are adequately protected, the FAR Council should draft model language in the Federal Acquisition Regulation (“FAR”) for agency contracting officers to use, with modifications appropriate to the nature of the contractual services and risks presented, when soliciting and negotiating contracts that are particularly likely to raise issues of personal conflicts of interest or misuse of non-public information.

2. The model FAR provisions or clauses should apply to PCI-Risk and Information-Risk Contracts.⁸⁰ The proposed FAR provisions or clauses would apply only to PCI-Risk and Information-Risk contracts (or solicitations for such contracts). At the same time, contracting agencies should remain free to incorporate contract language (or to promulgate agency-specific supplemental regulations) dealing with other ethical risks they deem important whether or not the contract at issue qualifies as a PCI-Risk or Information-Risk contract. Thus, the model FAR provisions or clauses adopted in response to this recommendation would serve as a floor upon which agencies could build if they deemed it appropriate, but would not supplant existing programs that now provide or may in the future provide more demanding or expansive ethical protections.

78. Administrative Conference Recommendation 2011-3, 76 Fed. Reg. 48,792 (Aug. 9, 2011).

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

80. The draft language would appear in part 52 of the FAR and would consist of draft solicitation provisions (which are used in soliciting contracts) and contract clauses (which are integrated into negotiated contracts). The use of the plural forms “provisions” and “clauses” is not intended to exclude the possibility that the FAR Council could implement the recommendations with a single provision or clause. See the Preamble for the definition of “PCI-Risk” and “Information-Risk” contracts.

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

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

The proposed FAR provisions or clauses should require the contractor to certify⁸¹ that none of its employees who is in a position to influence government actions⁸² has a conflict of interest or that conflicted employees will be screened from performing work under any contract. Once a contractor is selected, the contract itself should include a clause requiring the contractor to train employees on recognizing conflicts, to implement a system for employees who can influence government action to report conflicts to the contractor, to screen any conflicted employees from contract performance, to report to the agency periodically on its efforts to protect against employee conflicts, and to disclose to the agency any instances of employee misconduct (as well as disciplinary action taken against any offending employee). A contractor's failure to implement an adequate system for employee conflict certification, to disclose or correct instances of employee misconduct, or to take appropriate disciplinary measures against employees who commit misconduct may be grounds for contract termination. In addition, a contractor that repeatedly proves incapable or unwilling to

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

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

honor such contractual obligations may be subject to suspension or debarment in appropriate circumstances.

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

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

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