

# Compliance & Ethics Professional

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at National Grid in Syracuse, New York

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by Monique D. Buckles, Esq.

# Personal conflicts of interest: Is a program really that hard to implement?

- » Employees may have personal conflicts of interest (PCI) that affect their ability to work on specific government contracts.
- » Government contractors who provide acquisition support must have rules in place to identify and address potential PCI issues.
- » Implementing the government PCI rules is not difficult.
- » The PCI rules do not require employees to initially disclose the amounts of their financial investments.
- » An organized approach to managing PCI protects companies and government contractors, as well as the government.

**I**n 2011, the government issued a final rule amending the Federal Acquisition Regulation (FAR) to include new provisions for government contractors and subcontractors. The new provisions impose compliance requirements around personal conflicts of interest (PCI) that arise during their employees' involvement in the performance of certain acquisition functions on behalf of federal agencies and departments. A personal conflict of interest arises when a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the government when performing under the contract. Sources of conflicts of interest also arise from financial interests of close family members and household members, which may be imputed to the covered employee.



Buckles

Examples of these PCI include:

- ▶ compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;

- ▶ consulting relationships, including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation;
- ▶ services provided in exchange for honorariums or travel expense reimbursement;
- ▶ research funding or other forms of research support;
- ▶ investments in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);
- ▶ real estate investments;
- ▶ patents, copyrights, and other intellectual property interests; or
- ▶ business ownership and investment interests.

The rule also added requirements that the contractor shall:

- ▶ have procedures in place to screen covered employees for potential personal conflicts of interests;
- ▶ prevent personal conflicts of interests including not assigning or allowing a covered employee to perform any task under

the contract for which the contractor has identified a personal conflict of interest for the employee that the contract cannot satisfactorily prevent or mitigate in consulting with the contracting agency;

- ▶ prohibit use of non-public information accessed through performance of a government contract for personal gain;
- ▶ obtain a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a government contract;
- ▶ inform covered employees of their obligations to disclose and prevent personal conflicts of interest; not to use non-public information for personal gain; and avoid even the appearance of a personal conflict of interest;
- ▶ maintain effective oversight to verify compliance with personal conflict of interest safeguards;
- ▶ take appropriate disciplinary action in cases of covered employees' failure to comply with the policies established pursuant to the FAR clause; and
- ▶ report to the contracting officer any violation by a covered employee as soon as it is identified.

The government defined a covered employee as contractor or subcontractor employees performing acquisition functions closely associated with inherently governmental functions such as:

- ▶ supporting or providing advice or recommendations to the government for planning acquisitions;
- ▶ determining what supplies or services are to be acquired by the government, including developing statements of work;
- ▶ developing or approving any contractual documents, to include documents defining requirement, incentive plans, and evaluation criteria;

- ▶ evaluating contract proposals;
- ▶ awarding government contracts;
- ▶ administering contracts (including ordering changes or giving technical direction in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor products or services);
- ▶ terminating contracts; and
- ▶ determining whether contract costs are reasonable, allocable, and allowable.

### **Apprehension about imposing the requirements**

Government contractors seem to be struggling with implementing programs to comply with the PCI rules. Some government contractors argue that the PCI rule is overly intrusive, while others shrug their shoulders and wonder what to do next. Government contractors also seem to be afraid of their employees' reactions when asked for the information necessary to comply with the PCI rule.

However, implementing the PCI rule is not hard. The US government has required its "covered" employees and political appointees to fill out financial disclosure forms for years. The covered employees must complete these forms, reporting on their financial interests as well as other interests outside the government. The form is available in a fillable format using an automated tool. The completed forms are reviewed manually or electronically by their designated agency ethics official or their designee. Depending on the form, covered employees have to report assets with a value greater than \$1,000 at the end of the reporting period or assets held for investment that produced more than \$200 in income during the reporting period. The assets that must be reported include, but are not limited to, stocks, bonds, annuities, trust holdings, investment real estate, investment life insurance, holdings of variable annuities, defined benefit pension plans provided

by a former employer (including the name of the employer) and sector mutual funds. The covered employee must also include this information for spouses and dependent children and they must also disclose information regarding honoraria, salary, fees, commissions and other income earned greater than \$200 during the reporting period. The list goes on. It gets worse. In some cases, the form is available to the public.

For the contractors, the government makes it just as easy as they tell contractors what they need in order to comply with the PCI rule. And the good news for the contractors is that their collection of the PCI information is not released to the public. Frankly, the information that the contractors collect only needs to be accessible by a limited number of individuals within their company, preferably, (1) a project leader who has actual information regarding the government contract the covered employee is supporting, and (2) a chief ethics and compliance officer (CECO) or the general counsel who performs a second-level consistency review.

So, if the government is requiring this of its covered employees and the government is telling contractors what they need in order to comply with the PCI requirements, why are so many contractors having trouble complying with the PCI rule?

### **Sensitive issues**

Although the implementation process is not difficult, what seems to be the biggest challenge is how to tell your employees that they need to disclose information that in the past they have not had to share with their employer. Figuring out which employees are considered covered is also a concern. Companies seem to think that employees will have a visceral reaction to disclosing this information to their employer and, in some cases, they are correct. What companies don't understand is that it really is about

*how* you handle the process. Employees aren't sharing their balance in their bank accounts, how much they own in a particular stock, or giving any amounts of their holdings. They are just sharing a list of the required financial interests that must be disclosed under the PCI rule. For example, employees initially only need to share the name of the specific stock, bond, or the type/location of their real estate investments. It's only if there is a conflict or the appearance of a conflict that the contractor may need to know the specific amounts of these holdings. As for determining who is a covered employee, companies should be overly inclusive rather than exclusive. It never hurts a company to be overly protective.

What should companies do if they want to voluntarily roll out a PCI reporting program or are required to have one under the FAR? As a former government ethics official and in-house ethics and compliance officer, I can tell you that dealing with issues of personal financial interests and disclosing them to someone other than your immediate family members is one of the most sensitive topics and programs to roll out. It is easy to do, once you make the decision to implement.

### **Implementing a PCI program**

Provided below are ten ways to implement a PCI program.

#### **1. Risk assessment**

Do a risk assessment of the work that you do, and whether there is a need for a PCI program and the scope of the program. At the same time, identify your employees who are considered covered. These should be employees who are part of your senior management and who interact with industry, government, vendors, and other external companies. For government contractors, these should be, at a minimum, those involved in acquisition functions, as previously explained.

## 2. Scope

Define the personal interests that you as a company need to be concerned about if a conflict arose. If you are a government contractor, you need to focus on the definition of PCI in the FAR.

## 3. *De minimus* determination

Establish a threshold amount that works for you. The government threshold for reporting is assets held for investment with a value greater than \$1,000 at the end of the reporting period, or assets held for investment that produced more than \$200 in income during the reporting period. The PCI rule has a *de minimus* exception amount, but does not provide what the amount should be. This should be a reasonable amount. Some companies use the government *de minimus* amount, but others have set the amount in the range of \$2,500–\$5,000.

## 4. Innovation

Create and then implement a financial disclosure report that contains the personal financial interest information that you need or decide to collect from your employees. If you want, you can create a report the old fashion way—on paper; you can develop a process through an automated solution using tools such as a database application; or you can develop an automated solution that is more comprehensive, allowing for automated reports that automatically identify actual or potential conflicts. In the case of the non-disclosure requirement (if you are a government contractor), have your employees—when they start working for you—sign non-disclosure agreements that prohibit disclosure of information derived from government contract performance.

## 5. Ambassadors of compliance

Create a focus group within your company of key employees that have very strong opinions on company issues. Discuss with them the importance of being conflict-free and solicit

their feedback on the financial disclosure report requirements. Use this focus group as your “ambassadors of compliance” when you roll out the PCI program. Have them explain to their colleagues the importance of the program and what needs to be disclosed. Use the “train the trainer” approach with your ambassadors.

## 6. Communication program

Stage your program roll out, working from the top of your company down. This will allow the management team to be able to talk about the process and the requirements of the financial disclosure report first hand.

## 7. Policies and procedures

Develop policies and procedures around your PCI program. Make sure that you require your employees to keep their information current. In other words, when they sell a stock, they need to remove it from the financial disclosure report, and conversely, when they buy a stock, they need to add it to the report. They don't need to fill out the financial disclosure report annually, but rather keep it current and updated “as needed.” If you follow the government approach for its employees, then the form is updated just once a year. That may work great for companies that do not provide services to the government, but for those that need to comply with the PCI rule, the information has to be current. Develop an annual certification program that requires employees to acknowledge that their information is current. This can be done through email or an automated solution.

## 8. Mitigation plan

If an employee has a potential or actual conflict of interest, realign assignments with other employees, or see if there is some way to mitigate the conflict through a blind trust, selling of the stock, or some other mitigation approach. If you are a government contractor and you

cannot satisfactorily prevent a personal conflict of interest, reach out to the contracting officer to determine a best approach to mitigating the risk that works for you and the government. The contractor shall comply, and require compliance by its employee, with any conditions imposed by the government agency (only the head of the relevant contracting activity may agree to a mitigation plan or waiver), as necessary to mitigate the conflict of interest. Or, you may have to remove the employee or subcontractor employee from performance of the contract or terminate the applicable subcontract. Note: For government contractors that employ subcontractors, the PCI clause in the contract needs to flow down to subcontractors for all subcontracts that exceed \$150,000 and in which the subcontractor employee will perform acquisition functions closely associated with inherently governmental functions.

## 9. Training

Train your employees regarding the importance of conflict-free transactions.

## 10. Reward

Determine an approach to reward your employees for compliance and, at the same time, take disciplinary action against those employees who violate the reporting requirement.

### Summary

Remember that although the PCI rule seems to be overly burdensome, it is not from an implementation perspective. It can easily be done, once you get over the hurdle of what your employees will think and which employees are absolutely required to file a financial disclosure report. Companies that avoid PCI, whether they are government contractors or commercial contractors, will avoid serious problems down the road, and then they can easily be branded as a conflict-free company in their respective industry. \*

*The views above are solely the views of the author.*

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