

WORKING WITH UNCLE SAM

Managing Compliance Risk When Providing Services to the U.S. Government

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Goals for Today

- Identify compliance and ethics issues that arise when Federal employees are working side-by-side with contractor employees.
- Identify situations that lend themselves to non-compliance.
- Identify best practices to mitigate such risks.
- Share the experiences and knowledge of the audience.
- Retain slides for future reference.

Unique Situation/Challenge

- Strict limitations on relationships and interactions
 - Federal laws and regulations
 - Corporate ethics policies

But...

- Expect high performing teams with "Esprit de Corps"
 - "One-team" concept with shared common goals
 - Recognize each other as friends and colleagues
 - Blur "arms-length" legal relationship between Federal employees and contractors (prohibited sources)
- Business need to encourage and facilitate open communications

Issues

- Gifts & Business Courtesies
- Social Interaction
- Protecting Proprietary and Non-public Data
- Transportation and Travel
- Solicitation
- Personal Activities
- Off-Duty Activities
- Revolving (Employment) Door

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Gifts & Business Courtesies

- Gifts
 - Governance
 - 18 USC § 201 (Bribery)
 - 5 CFR § 2635 subpart B - Gifts from Outside Sources
 - 202(a)(1) - General Rule: No gifts from a "prohibited source" or based on official position
 - 203(b) Exclusions from the definition of "Gift"
 - 204(a)-(m) - Exceptions that allow acceptance of otherwise prohibited gifts
 - E.O. 13770 (1/28/17) - Limits gifts to "political appointees" from lobbyists and lobbyist employers
 - Government agency gift acceptance statutes and regulations
 - Company policies

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Ethical Guidance for Acceptance of Gifts

5 C.F.R. 2635.201(b) Considerations for declining otherwise permissible gifts.

Every employee has a fundamental responsibility to the United States and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. An employee's actions should promote the public's trust that this responsibility is being met. For this reason, employees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality as a result of accepting the gift.

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Gifts

- Common Scenarios:
 - “Special Occasions” – Individual or group gifts for retirements, deaths, marriages
 - “Traditional Gift Giving” – holidays, birthdays, etc.
 - Office Social Events and Treats for the Office
 - Event Attendance
 - Gifts to Agencies (not individuals)
 - Recognition / Awards

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Common Gift Scenarios

- “Special Infrequent Occasions” & “Traditional Gift Giving Occasions”
 - Government personnel may accept gifts valued at \$20 or less from contractor.
 - \$20 max from contractor company, not individual contractor employees / \$50 max per year
 - If contractor contributes, group gift limited to \$20 value.
 - *Personal relationship* exception for family or long-term close personal friends.
 - Donation to charity designated by Federal employee IS a gift to the employee
 - Contractor rules may limit accepting or offering gifts.
 - Traditional Gift Giving - Feds limited to \$10 and no group gifts

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Common Gift Scenarios

- Office Social Events and Treats for the Office
 - Contractor and government employees may share food and refreshments paid for personally (potluck)
 - Time charging diligence – may never charge to Government for social events (e.g., holiday parties, etc.)
 - If gift exchange: \$20 max. (note Feds limited to \$10)

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Common Gift Scenarios

- Event Attendance:
 - On any day Fed employee is speaking – Free attendance is not a gift
 - Widely Attended Gathering exception (204(g))
 - Include required information on invitation but let agency make WAG determination
 - Written approval required in advance
- Gifts to Agency
 - Most agencies have authority to accept gifts such as models or photos for display
 - 31 U.S.C. § 1353 – Agencies may accept unsolicited gifts of travel and related expenses

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Common Gift Scenarios

- Recognition and Awards
 - To Feds:
 - (Note: many contractors limit recognition for non-employees)
 - Certificates and items of little intrinsic value intended for presentation
 - Items of \$20 or less in value / no more than \$50 per year
 - To Contractors: Prohibited
 - Exception: For contributions unrelated/outside any contract if in the public interest.

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Social Interaction

- Governance:
 - Gift laws/rules/policies (See slide 5)
 - 5 CFR § 2635.101(b)(8)&(14) – Impartiality & appearance of impropriety
- Common Scenarios:
 - Participation in office social/morale-building events (holiday parties, team-building events)
 - Participation in contractor-sponsored conferences/events/training
- Issues:
 - Charging time
 - Expenses (Who pays?)
 - Gift exchanges and “swag”
 - Appearance of favoritism/loss of impartiality

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Protecting Proprietary and Non-Public Data

- Governance:
 - Contract terms
 - Non-disclosure agreements
 - 5 CFR § 2635.703 – Use of Non-public Information
 - Trade Secrets Act, 18 USC 1905
 - Procurement Integrity Act, 41 USC 423, 48 CFR 3.104-4
 - Economic Espionage Act, 18 USC 1831 -1839
 - Privacy Act, 5 USC 552a
 - Freedom of Information Act, 5 USC 552
 - Company policies

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Protecting Proprietary & Non-Public Data

- **What is non-public information?**
 - Procurement sensitive information
 - Contractor proprietary information and contractor bid or proposal information
 - Government source selection information (48 CFR 2.101)
 - Privacy Act information
 - Classified information
 - Any other information not available to the public and not clearly releasable under FOIA

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Protecting Proprietary & Non-Public Data

- Common risks
 - Email:
 - Responding "Reply to all"
 - Including non-public information in attachments
 - Not checking all of the email recipients.
 - Shared printers
 - Cubicles
 - Speaker phones
 - Presenting non-public information to a group
 - Conference calls
 - Leaving non-public information on a desk

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Transportation and Travel

- Governance:
 - Gift laws/rules/policies (see slide 5)
 - 5 CFR § 2635.101(b)(8)&(14) – Impartiality and appearance of impropriety
 - 31 USC 1353, 41 CFR 304 et seq. (Payment of Travel Expenses)
 - Contract terms
- When is it appropriate for contractor to provide transportation?
 - Government would pay either way: cost reimbursable, included in scope of work
 - Only permissible means (e.g. –outside vehicles prohibited on a facility or beyond a certain point).

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Solicitation

- Governance:
 - 5 CFR 2635.202(c) & 808(c)(1) Government personnel may not solicit gifts from prohibited sources.
 - 5 CFR § 2635.101(b)(8)&(14) – Impartiality and appearance of impropriety
 - 48 CFR 3.101-2 May not solicit from government contractor
 - 5 CFR 2635.502 (Personal and Business Relationships)
 - Company policies
- Common solicitations:
 - To provide services beyond scope of contract (e.g.: IT help)
 - To contribute to fundraisers (CFC, Girl Scouts, school benefits)
 - To provide personal assistance (fix my personal laptop?)
 - To help draft a statement of work
 - To provide a job for spouse, relative or friend

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Personal Activities

- Governance:
 - 5 CFR Part 773, 774 (Political Activities of Federal Employees)
 - 5 CFR 735.201 (No gambling by Federal employees)
 - 5 CFR 2635.502 (Personal and Business Relationships)
 - Company policies
- Common Scenarios:
 - Political speech (e.g., photos, campaign materials, e-mails)
 - Gambling (e.g., March Madness, fantasy football)
 - Conducting personal business (Real estate, jewelry sales, insurance sales, financial advice, tax preparation)

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Outside Activities

- Governance:
 - 18 USC §§ 201, 203, 205, 208 (Bribery, gifts, conflicts of interest)
 - 5 CFR § 2635 Subpart H (Outside Activities)
 - 5 CFR § 2635.101(b)(8)&(14) - Impartiality and appearance of impropriety
 - 5 CFR 2635.502 (Personal and Business Relationships)
 - Company policies
- Common Scenarios:
 - Government employee has part-time work with contractor
 - Off-duty business partnerships (Government and contractor)
 - Government employee contracting with the Government (48 CFR 3.6)
- Considerations:
 - Use of Government or contractor resources
 - Required reviews and approvals
 - Conflicts of interest
 - Use of office and position for personal gain

Revolving (Employment) Door

- Governance:
 - 18 USC § 208 (Conflicts of Interest)
 - 5 CFR § 2635 Subpart F (Seeking Employment) (Updated July 26, 2016, Federal Register)
 - National Defense Authorization Act for FY 2008 (Section 847)
 - 41 USC 423 (Procurement Integrity Act)
 - E.O. 13490 and 13770 (Ethics Pledges)
 - 126 Stat. 291 (STOCK Act)
 - Anti-Lobbying restrictions: P.L. 115-91, FY-18 NDAA section 1045
 - Company policies
- Common Restrictions/Requirements:
 - Recusal necessary prior to seeking or discussing employment
 - STOCK Act Notice of negotiations
 - Agency ethics opinion on post-employment restrictions
 - Section 847 letter required for senior procurement officials

Revolving (Employment) Door

- Risky Situations
 - Government employee, during the daily meeting with the contractor, mentions she plans to retire soon and asks if contractor has any openings.
 - Seeking employment: recusal necessary (But, can employee still do her job???)
 - If hired by contractor in same workgroup: substantial representational restrictions
- Contract is set to expire, so contractor employee applies for position in the Government.
 - Check company conflict of interest policy
 - Non-compete clause?

Remedies & Tools

- Provide training tailored to address blended workforce issues.
- Invite everyone in the workplace, contractors and government, personnel (even those not required to attend annual ethics training)
- Review contract requirements
- Address risky situations before they occur
- Review Government and contractor rules
- Recognize that contractors/contractor employees are prohibited sources
 - "Alliance" not "partnership"
 - Contractor under great pressure to say "yes"
- Set expectations and boundaries
- Provide readily available sources of advice (ethics advisor or general counsel)

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Remedies & Tools

- Build relationship with your ethics or legal counterpart
 - Establish agreed-upon procedures for handling and reporting improper disclosures of non-public data
- Involve ethics officials in planning of events
- OGE: "Working with Government Contractors" Booklet (www.oge.gov)

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Feedback

- What do you know now that you didn't know an hour ago?
- How will this presentation help you do your job?

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Questions?

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