THE GEORGE WASHINGTON UNIVERSITY

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Testimony of

JESSICA TILLIPMAN
ASSOCIATE DEAN FOR GOVERNMENT PROCUREMENT LAW STUDIES
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

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Safeguarding the Homeland: Examining Conflicts of Interest in Federal Contracting to Protect America's Future

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Chairman Peters, Ranking Member Paul, and Members of the Committee, thank you for inviting me to testify before the Committee today. I am Jessica Tillipman, the Associate Dean for Government Procurement Law Studies at The George Washington University Law School. In addition to leading the Law School's Government Procurement Law Program, I teach our Anti-Corruption & Compliance course, which focuses on anti-corruption, ethics, and compliance issues in government procurement.

Two years ago, I testified before the House Committee on Oversight and Reform concerning deficiencies in the organizational conflicts of interest (OCIs) regulatory framework and potential legislative solutions.[1] At issue then was McKinsey & Company's alleged conflicts of interest between its work for the Food and Drug Administration (FDA) and its pharmaceutical manufacturer clients.

More recently, I was very pleased to see the enactment of the Preventing Organizational Conflicts of Interest in Federal Acquisition Act.[2] As we await the proposed OCI rule in response to that legislation, this hearing provides an opportunity to

[1] *See McKinsey & Company's Conduct and Conflicts at the Heart of the Opioid Epidemic: Hearing Before the H. Comm. on Oversight & Reform,* 117th Cong. (2022) (statement of Jessica Tillipman, Assistant Dean for Government Procurement Law Studies, The George Washington University Law School). *a*vailable at https://ssrn.com/abstract=4109288.
[2] Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub. L. No. 117-324, 136 Stat. 4439 (2022).

focus on the issues that continue to hinder federal agencies' ability to effectively avoid, neutralize and mitigate OCIs. To fully appreciate why this issue is so important, some context is appropriate.

Maximizing Competition in Government Procurement

Competition remains a primary goal of the U.S. procurement system. "By maximizing the effective use of competition, the government receives its best value in terms of price, quality, and contract terms and conditions. Contractor motivation to excel is greatest when private companies, driven by a profit motive, compete head-to-head in seeking to obtain work."[3] To help ensure competition is not undermined by corruption, misconduct, or unfairness, the United States has enacted numerous laws that address, among other things, the integrity of the competitive marketplace. These laws range from criminal prohibitions (e.g., collusion, procurement integrity, conflicting financial interests) to regulatory restrictions (e.g., impartiality, personal conflicts of interest involving contractors performing acquisition functions, and organizational conflicts of interest).[4]

The Federal Acquisition Regulation (FAR) regulates two types of contractor conflicts of interest: Personal Conflicts of Interest (PCIs)[5] and Organizational Conflicts of Interest (OCIs).[6] Contractor PCIs are present when an *individual* contractor-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."[7] In contrast, OCIs occur when "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage."[8] The term "person" in this definition includes companies and other contracting entities.[9]

Even though both PCIs and OCIs may undermine competition and the integrity of the procurement process, they are treated very differently by the FAR and in practice.

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[3] *See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103 (2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620.
[4] *See generally* Jessica Tillipman, *United States*, *in* Routledge Handbook of Public Procurement Corruption (Williams & Tillipman eds., Routledge, 2024).
[5] *See* FAR 3.11 and FAR 52.203-16.
[6] *See* FAR 9.5.
[7] FAR 3.1101
[8] FAR 2.101
[9] *See generally* Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Con. L.J. 25 (Fall 2005).

Personal Conflicts of Interest (PCIs)

Contractor PCIs are regulated by FAR Part 3 (Improper Business Practices and Personal Conflicts of Interest). This FAR part prohibits different forms of misconduct and is designed to ensure, among other things, that government officials and contractors do not taint procurements with unfair competitive advantages and favoritism towards particular vendors.

In response to growing concerns about the increased outsourcing of acquisition-related work traditionally performed by government officials, in 2011, the Federal Acquisition Regulatory Council (FAR Council) published a final rule: "Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions." The resulting FAR Subpart (3.11) and clause (52.203-16 – Preventing personal Conflicts of Interest) requires contractors to identify and prevent personal conflicts of interest of their employees performing acquisition functions (e.g., planning acquisitions, developing statements of work, evaluating contract proposals, developing evaluation criteria, awarding or administering contracts, etc.) and prohibits the employees from using nonpublic information gained from their performance on a government contract from using such information for personal gain.

This FAR coverage addresses concerns that when the U.S. government retains contractors to perform acquisition functions, there is a greater risk that a conflict between a contractor employee's personal financial interests and the government work it is performing could result in favoritism or bias, ultimately undermining competition.

Organizational Conflicts of Interest (OCIs)

Unlike personal conflicts of interest, organizational conflicts of interest are regulated by FAR Part 9 (Contractor Qualifications). Although OCIs have been regulated since the 1960s, they have become more frequent in recent decades due to consolidation in the information technology and defense industries, and the government's increasing reliance on contractors to provide services traditionally performed by public servants, "especially where the contractor is tasked with providing advice to the Government."[10] Indeed, OCIs are more likely to occur in contracts involving professional services, such as management support, consultant, or advisory services. This is particularly notable

[10] *See* The Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23236 (Apr. 26, 2011).

given the hundreds of billions of dollars the U.S. government spends each year on professional services.[11]

The current framework for analyzing whether an OCI exists derives primarily from FAR subpart 9.5 and decisional precedent from the Government Accountability Office (GAO) and the U.S. Court of Federal Claims (COFC).[12] OCIs are generally separated into three categories:[13]

1. **Impaired objectivity** – may arise where a contractor's outside business relationships create an economic incentive to provide biased advice under a government contract.

2. **Biased ground rules** – may occur when, as part of its work under one procurement, the contractor has helped set the procurement's ground rules, such as writing the statement of work or developing specifications, for another procurement.

3. **Unequal Access to Information** – may occur when a contractor obtains access to nonpublic information as part of its contract performance which gives it an advantage in a later competition for a government contract.

FAR 9.504 (Contracting Officer Responsibilities) requires a Contracting Officer (CO) to "identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and avoid, neutralize, or mitigate significant potential conflicts before contract award." To fulfill this obligation, CO's depend upon contractors to disclose, among other things, "any facts that may cause a reasonably prudent person to question the Contractor's impartiality because of the appearance or existence of bias."[14]

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[11] U.S. Gov't Accountability Off, *A Snapshot of Government-Wide Contracting for FY 2023 (interactive dashboard)* (June 25, 2024), *at* https://files.gao.gov/multimedia/Federal_Government_Contracting/index.html?_gl=1*hfjjfp*_ga*NTk3NTA4ODY5LjE3MjUxMjQ5MTg.*_ga_V393SNS3SR*MTcyNTEyNDkxOC4xLjAuMTcyNTEyNDkxOC4wLjAuMA. See also U.S. Gov't Accountability Off., GAO-24-106932, Federal Contracting: Timely Actions Needed to Address Risks Posed by Consultants Working for China 1 (2024) [hereinafter Consultant Risks], *available at* https://www.gao.gov/products/gao-24-106932 ("From fiscal years 2019 through 2023, federal agencies obligated more than $500 billion on contracts associated with a broad range of consulting services.").

[12] *See generally* Keith Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 Pub. Cont. L. J. 639 (2006) (citing FAR 2.101).

[13] *See* FAR 9.502.

[14] 48 C.F.R. § 1352.209-74 (U.S. Department of Commerce's OCI clause). *See also* 48 C.F.R. § 3452.209-70 (requiring, in Department of Education contracts, disclosure of all such relevant information if such a conflict of interest appears to exist to a reasonable person with knowledge of the relevant facts or if such a person would question the impartiality of the contractor).

Notably, unlike many other FAR requirements, there is no standard OCI solicitation provision or contract clause under FAR Part 52 (Solicitation Provisions and Contract Clauses). Instead, agencies have developed their own solicitation provisions and contract clauses. For example, U.S. Department of Commerce contracts may contain the following language:

> The warrant and disclosure requirements of this paragraph apply with full force to both the contractor and all subcontractors. The contractor warrants that, to the best of the contractor's knowledge and belief, there are no relevant facts or circumstances which would give rise to an organizational conflict of interest, as defined in FAR Subpart 9.5, and that the contractor has disclosed all relevant information regarding any actual or potential conflict. The contractor agrees it shall make an immediate and full disclosure, in writing, to the Contracting Officer of any potential or actual organizational conflict of interest or the existence of any facts that may cause a reasonably prudent person to question the contractor's impartiality because of the appearance or existence of bias or an unfair competitive advantage. Such disclosure shall include a description of the actions the contractor has taken or proposes to take in order to avoid, neutralize, or mitigate any resulting conflict of interest.[15]

Failure to disclose the information required by an applicable OCI clause can lead to a multitude of adverse consequences, including, but not limited to contract termination, prosecution for the making of false statements (including fines and imprisonment), or suspension or debarment. In addition, a false OCI certification could trigger potential civil and criminal liability under the False Claims Act, resulting in treble damages, penalties, imprisonment, and fines.[16]

Reform is Overdue

For the past several decades, there has been widespread acknowledgment that the increased outsourcing of work to government contractors could create fertile ground for conflicts of interest. A 2007 Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress noted:

> . . . the trend toward more reliance on contractors . . . raises the possibility that the government's decision-making processes can be

[15] 48 C.F.R. 1352.209-74.

[16] *See generally* 31 U.S.C. §§ 3729 – 3733. *See also United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Grp., Inc.*, 370 F. Supp. 2d 18, 51-52 (D.D.C. 2005) ("A government contractor's failure to disclose an [OCI] constitutes a false claim under the False Claims Act").

> undermined . . . [u]nless the contractor employees performing these tasks are focused upon the interests of the United States, as opposed to their personal interests or those of the contractor who employs them, there is a risk that inappropriate decisions will be made.[17]

This risk has been exacerbated in contracts for consulting and advisory services.[18] To be clear, this issue is not unique to the United States.[19] A simple internet search provides numerous examples of "consultant conflicts" plaguing public procurement systems around the world. Yet despite decades of red flags relating to these types of contracts, government regulation of these potential hazards has not kept pace.[20]

In 2011, the FAR Council attempted to refine OCI rules to make the regulation more reflective of modern procurement practices.[21] That effort failed and the rule was

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[17] *See generally* Acquisition Advisory Panel, Report of The Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress (Jan. 2007), *available at* https://login.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

[18] *See* The Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23236 (Apr. 26, 2011) (" . . . organizational conflicts of interest are more likely to arise when at least one of the contracts involved is for acquisition support services or advisory and assistance services"). FAR 2.101 (Definitions) does not define "consulting services," but defines "advisory and assistance services" as including "the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures . . . [such as] information, advice, opinions, alternatives, analyses, evaluations, recommendations, training and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations."

[19] For example, while advising the Australian government on anti-tax avoidance laws, a former PWC partner allegedly shared this confidential information "to generate business and sell 'tax avoidance schemes' to some of the biggest companies in the world." *See generally* Eoin Burke-Kennedy, *Consulting Firms Accused of Exploiting Conflicts of Interest Around the World by Australian Senator*, Irish Times (Aug. 24, 2023, 5:05 AM), https://www.irishtimes.com/business/2023/08/24/consulting-firms-accused-of-exploiting-conflicts-of-interest-by-australian-senator/.

[20] *See generally Schooner, Steven L. and Greenspahn, Daniel S., Too Dependent on Contractors? Minimum Standards for Responsible Governance,* 8 J. Cont. Mgmt. 9-25 (Summer 2008), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263358. See also* Tennessee Valley Authority, *Memorandum from the Office of the Inspector General* (Dec. 2, 2022), https://www.oversight.gov/sites/default/files/oig-reports/TVA/2022-17347.pdf (finding that the Tennessee Valley Authority's controls for identifying and mitigating consultant conflicts of interest were not operating effectively); Office of Inspector General, Consumer Financial Protection Bureau, *The CFPB Can Strengthen Its Controls for Identifying and Avoiding Conflicts of Interest Related to Vendor Activities* (March 15, 2017), https://www.oversight.gov/sites/default/files/oig-reports/cfpb-vendor-conflicts-of-interest-mar2017_1.pdf (finding that the CFPB did not actively enforce its conflict of interest disclosure and mitigation requirements in vendor contracts).

[21] *See* The Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23236 (Apr. 26, 2011).

ultimately withdrawn, ten years later, on March 19, 2021.[22] As the FAR Council now attempts to address the issues left unfinished by this abandoned proposed rule, it should strongly consider drawing from some of its findings and recommendations.

In its 2011 proposed rule, the FAR Council noted that OCIs have the ability to undermine the integrity[23] of the competitive acquisition system, which "affects not only the Government, but also other vendors, in addition to damaging the public trust in the acquisition system." For example, as previously noted, in 2022, the House Committee on Oversight and Reform investigated allegations concerning McKinsey & Company's alleged conflicts of interest between its work for the FDA and its opioid manufacturer clients. The investigation and hearing relating to this matter brought widespread attention to deficiencies in the current OCI framework and highlighted the damage to public trust that can be caused by even the appearance of unmitigated OCIs.

More recently, this Committee has focused on potential national security concerns that may stem from conflicts of interest involving consulting and advisory services.[24] As U.S. government contractors continue to expand their work with foreign governments, the growing number of risks that may stem from unmitigated OCIs become clearer. Specifically, companies that maintain intelligence or defense contracts with the United States may jeopardize U.S. national security by simultaneously contracting with foreign adversaries.[25] If these potentially competing interests are neither disclosed nor mitigated, it increases the risk that sensitive information may be exploited or fall into the wrong hands. It also increases the risk that, among other things, contractors may be unable to provide impartial assistance or advice due to their "competing" relationships with certain foreign governments. Additionally, by working with foreign adversaries, these companies may erode the trust of the national security professionals who are the ultimate end users of their services. Outside of the national security realm this lack of confidence is concerning; however, within national security circles, this mistrust can very well have life-and-death consequences.

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[22] *See* The Federal Acquisition Regulation; Organizational Conflicts of Interest, 86 Fed. Reg. 14863 (Mar. 19, 2021).

[23] *See, e.g.*, Press Release, U.S. Department of Justice Office of Public Affairs, *Government Contractor Agrees to Pay $425,000 for Alleged False Claims Related to Conflicts of Interest* (May 20, 2022), https://www.justice.gov/opa/pr/government-contractor-agrees-pay-425000-alleged-false-claims-related-conflicts-interest.

[24] *See generally* U.S. Senate Committee on Homeland Security & Governmental Affairs, *Peters & Hawley Call on GAO to Assess Potential National Security Risks & Conflicts of Interest Posed by Consulting Firms that Contract with US And Chinese Governments*, Majority News (Jan. 24, 2023), https://www.hsgac.senate.gov/media/dems/peters-hawley-call-on-gao-to-assess-potential-national-security-risks-conflicts-of-interest-posed-by-consulting-firms-that-contract-with-us-and-chinese-governments/.

[25] *See* Consultant Risks, *supra* note 11, at 1 (noting that of the $500 billion spent on consulting contracts between 2019-2023, "Departments of Defense (DOD) and Homeland Security (DHS) accounted for over 50 percent of those obligations and have national security focused missions.").

Deficiencies in Law and Practice

The current framework governing OCIs remains (1) outdated, (2) inconsistent with modern procurement practices, and (3) fails to address the growing risks associated with the government's increasing reliance on contractors to provide services which include advice and the exercise of judgment.[26] One need only look to the FAR's approach towards PCIs to understand the glaring absence of guidance and uniformity in the current approach to OCIs.[27]

First, by locating OCIs in FAR Part 9 (Contractor Qualification) instead of FAR Part 3 (Improper Business Practices), it signals that OCIs pose less significant integrity concerns than those embodied by the other business practices addressed in Part 3. As the proposed rule noted in 2011: "While the ability to provide impartial advice and assistance is an important qualification of a Government contractor, the larger issues that underlie efforts to identify and address OCIs are more directly associated with some of the business practices issues discussed in FAR part 3." Experience suggests that its continued placement in FAR Part 9 has led some contracting officials to treat OCI assessments as a rote, check-the-box exercise, rather than a meaningful, thorough, and rigorous analysis. Granted, there are innumerable instances where an OCI may not raise integrity and security concerns, but continuing to treat *all* OCIs as a mere qualification factor minimizes the potential for harm.

Second, as previously noted, unlike PCIs and many other FAR requirements which demand compliance through standard solicitation provisions and contract clauses found in FAR Part 52, no standard FAR OCI solicitation provision or contract clause mandates inclusion in solicitations or contracts. Because agencies have been left to fill this vacuum with their own solicitation provisions and contract clauses, there are now severe inconsistencies and deficiencies in agency approaches to this area of the law.

Third, and most glaringly, FAR Subpart 9.5 (Organizational and Consultant Conflicts of Interest) fails to provide sufficient guidance regarding how to avoid, neutralize, or mitigate OCIs. Unlike FAR Subpart 3.11 (Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions) and 52.203-16 (Preventing Personal Conflicts of Interest), FAR Subpart 9.5 lacks critical definitions, does not

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[26] These issues are exacerbated in the national security context. *See* CONSULTANT RISKS, *supra* note 11, at 1 ("Current acquisition regulations do not specifically direct agencies to consider if contractors consulting for the U.S. government also have consulting contracts with China. Therefore, acquisition personnel do not typically collect information on, assess, or mitigate potential national security risks posed by these consultants when awarding contracts.").

[27] *See* Ethan A. Syster, *Business Risk And Competitive Integrity: A Discretionary Approach To Organizational Conflicts Of Interest In Federal Procurement*, 53 PUB. CON. L.J. 825 (Summer 2024).

thoroughly address compliance, disclosure, and mitigation obligations, and fails to adequately warn contractors of the potential consequences of non-compliance. The absence of guidance and directives has led to a paradoxical issue of both over- and under-compliance. Whereas some contracting officials, lacking guidance, training and awareness, may never even consider OCI risks,[28] others, plagued by an outsized fear of bid protests, may reflexively and unnecessarily exclude a contractor from competition – ultimately undermining procurements and misspending taxpayer dollars. Moreover, with respect to national security risks, the lack of guidance and directives has created hesitancy among acquisition personnel to proactively address the national security risks that may be caused by contractors simultaneously providing consulting services to the United States and foreign adversaries.[29] A new OCI rule should provide clarity, more expansive definitions, greater guidance for contracting officers, updated illustrative examples, and enhanced disclosure and compliance requirements for relevant contractors. This effort should be buttressed by robust training requirements for contracting officials as well.

A Call For Balanced Reform

Although there are important differences between the two types of conflicts of interest, their shared potential to undermine competition, integrity, and national security, demands more equal treatment by the FAR and in practice. The decades-long absence of an update to the federal government's approach to OCIs has weakened the U.S. procurement system and left it vulnerable to abuse, incompetence, and security risks.

Despite a legitimate need to address gaps in the current framework, as this Committee and the FAR Council consider potential legislative and regulatory remedies to these issues, a cautionary approach is necessary. Draconian and heavy-handed approaches to addressing concerns can not only undermine the goals of the legislative and regulatory reform, but create new problems. For example, as the 2011 proposed rule notes, some OCIs are of a lesser concern and Government's business interests may sometimes be assessed as an acceptable performance risk, and therefore empowering contracting officials with (guided) flexibility and discretion to address these issues is critical. Moreover, overly rigid or inflexible frameworks often result in substantial barriers

[28] *See generally* Steel Point Solutions, LLC, B-419709, 2021 WL 3172103 (Comp. Gen. July 7, 2021) (finding that the agency did not perform an OCI review until after the contract was protested).

[29] *See* CONSULTANT RISKS, *supra* note 11, at 2-3 ("DOD and DHS officials noted that current regulations and policies do not specifically direct acquisition personnel to collect information, assess, or mitigate these types of national security risks when awarding most contracts for consulting services." Acquisition professionals also "expressed concerns about attempting to do so without more guidance in acquisition regulations.").

to entry, causing existing contractors to forego opportunities and dissuading new, innovative, and small companies from engaging in the federal marketplace.

Striking a critical balance between necessary and excessive regulation is never easy, but it is critical. It is my hope that a thoughtful and nuanced approach to OCI reform will address integrity and security concerns, bring greater clarity to the existing regulations, and create a more uniform approach across the federal government.

Thank you for the opportunity to share these thoughts with you. I would be pleased to answer any questions you may have for me.