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Federal Contractor Business Ethics and Compliance Policies

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5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

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Federal Contractor Business Ethics and Compliance Policies



November 18, 2026

By Wojciech Z. Kornacki, Esq.

Lecturer

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Agenda

What are key Federal Compliance Contractor Requirements?

What are key Compliance Policies?

How to limit risks and mitigate Enforcement Actions?



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Sources

Federal Acquisition Regulation ('FAR') Subpart 3.10 – *Contractor Code of Business Ethics and Conduct*

FAR Part 9 – *Contractor Qualifications*

FAR Part 52.203-13 – *Contractor Code of Business Ethics and Conduct*

Federal Government Enforcement Actions

U.S. Department of Justice – Evaluation of Corporate Compliance Programs

https://www.justice.gov/ (public release/archive)
https://deccs.pmddtc.state.gov/ (enforcement & agreements)

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What are key Federal Compliance Contractor Requirements?

Subpart 3.10 – *Contractor Code of Business Ethics and Conduct*

3.1002 Policy.

(a) Government contractors must conduct themselves with the highest degree of integrity and honesty.

(b) Contractors should have a written code of business ethics and conduct. To promote compliance with such code of business ethics and conduct, contractors should have an employee business ethics and compliance training program and an internal control system that-

(1) Are suitable to the size of the company and extent of its involvement in Government contracting;

(2) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; and

(3) Ensure corrective measures are promptly instituted and carried out.

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Subpart 3.10 – *Contractor Code of Business Ethics and Conduct*

3.1004 Contract clauses.

(a) Insert the clause at FAR 52.203-13, Contractor Code of Business Ethics and Conduct, in solicitations and contracts if the value of the contract is expected to exceed $7.5 million and the performance period is 120 days or more.

(b) (1) Unless the contract is for the acquisition of a commercial product or commercial service or will be performed entirely outside the United States, insert the clause at 52.203-14, Display of Hotline Poster(s), if–

(i) The contract exceeds $7.5 million or a lesser amount established by the agency; and

(ii) (A) The agency has a fraud hotline poster; or

(B) The contract is funded with disaster assistance funds.

(2) In paragraph (b)(3) of the clause, the contracting officer shall–

(i) Identify the applicable posters; and

(ii) Insert the website link(s) or other contact information for obtaining the agency and/or Department of Homeland Security poster.

(3) In paragraph (d) of the clause, if the agency has established policies and procedures for display of the OIG fraud hotline poster at a lesser amount, the contracting officer shall replace "$7.5 million" with the lesser amount that the agency has established.

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Subpart 3.10 – *Contractor Code of Business Ethics and Conduct*

3.1000 Scope of subpart.

This subpart-

(a) Implements 41 U.S.C. 3509, Notification of Violations of Federal Criminal Law or Overpayments; and

(b) Prescribes policies and procedures for the establishment of contractor codes of business ethics and conduct, and display of agency Office of Inspector General (OIG) fraud hotline posters.

3.1001 Definitions.

As used in this subpart-

Subcontract means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

Subcontractor means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

United States means the 50 States, the District of Columbia, and outlying areas.

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FAR Part 9 – *Contractor Qualifications*

9.103 Policy.

(a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.

(b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. If the prospective contractor is a small business concern, the contracting officer shall comply with subpart 19.6, Certificates of Competency and Determinations of Responsibility. (If Section 8(a) of the Small Business Act (15 U.S.C. 637) applies, see subpart 19.8.)

(c) The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

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To be determined responsible, a prospective contractor must-

(a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(c) Have a satisfactory performance record (see 9.104-3 (b) and subpart 42.15). A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;

(d) Have a satisfactory record of integrity and business ethics (for example, see subpart 42.15);

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(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a).)

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations (see also inverted domestic corporation prohibition at 9.108).

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9.104-3 Application of standards.

(a) *Ability to obtain resources.* Except to the extent that a prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, the contracting officer shall require acceptable evidence of the prospective contractor's ability to obtain required resources (see 9.104-1(a), (e), and (f)). Acceptable evidence normally consists of a commitment or explicit arrangement, that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel. Consideration of a prime contractor's compliance with limitations on subcontracting shall take into account the time period covered by the contract base period or quantities plus option periods or quantities, if such options are considered when evaluating offers for award.

(b) *Satisfactory performance record.* A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of the contract is a significant factor to consider in determining satisfactory performance. The contracting officer shall consider the number of contracts involved and the extent of deficient performance in each contract when making this determination. If the pending contract requires a subcontracting plan pursuant to subpart 19.7, The Small Business Subcontracting Program, the contracting officer shall also consider the prospective contractor's compliance with subcontracting plans under recent contracts.

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(c) (1) *Affiliated concerns.* Affiliated concerns (see "Concern" in 19.001 and "Small business concern" in 2.101) are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the contracting officer shall consider the affiliate's past performance and integrity when they may adversely affect the prospective contractor's responsibility.

(2) *Joint ventures.* For a prospective contractor that is a joint venture, the contracting officer shall consider the past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture.

(d) (1) *Small business concerns.* Upon making a determination of nonresponsibility with regard to a small business concern, the contracting officer shall refer the matter to the Small Business Administration, which will decide whether to issue a Certificate of Competency (see subpart 19.6).

(2) *Limitations on subcontracting.* A small business that is unable to comply with the limitations on subcontracting may be considered nonresponsible (see 52.219-3, Notice of HUBZone Set-Aside or Sole Source Award; 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns; 52.219-14, Limitations on Subcontracting; 52.219-27,Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program; 52.219-29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns; and 52.219-30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program). A small business that has not agreed to comply with the limitations on subcontracting may be considered nonresponsive.

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9.104-4 Subcontractor responsibility.

(a) Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors (but see 9.405 and 9.405-2 regarding debarred, ineligible, or suspended firms). Determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility.

(b) When it is in the Government's interest to do so, the contracting officer may directly determine a prospective subcontractor's responsibility (*e.g.*, when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). In this case, the same standards used to determine a prime contractor's responsibility shall be used by the Government to determine subcontractor responsibility.

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9.104-5 Representation and certifications regarding responsibility matters.

(a) When an offeror provides an affirmative response in paragraph (a)(1) of the provision at 52.209-5, Certification Regarding Responsibility Matters, or paragraph (h) of provision 52.212-3, the contracting officer shall-

(1) Promptly, upon receipt of offers, request such additional information from the offeror as the offeror deems necessary in order to demonstrate the offeror's responsibility to the contracting officer (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment, or Federal tax delinquency in an amount that exceeds $15,000.

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52.209-5 Certification Regarding Responsibility Matters.

As prescribed in 9.104-7(a), insert the following provision:

CERTIFICATION REGARDING RESPONSIBILITY MATTERS (AUG 2020)

(a) (1) The Offeror certifies, to the best of its knowledge and belief, that—

(i) The Offeror and/or any of its Principals–

(A) Are □ are not □ presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;

(B) Have □ have not □, within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property (if offeror checks "have", the offeror shall also see 52.209-7, if included in this solicitation);

(C) Are □ are not □ presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in paragraph (a)(1)(i)(B) of this provision;

(D) Have □, have not □, within a three-year period preceding this offer, been notified of any delinquent Federal taxes in an amount that exceeds the threshold at 9.104-5(a)(2) for which the liability remains unsatisfied.

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9.104-6 Federal Awardee Performance and Integrity Information System.

(a) (1) Before awarding a contract in excess of the simplified acquisition threshold, the contracting officer shall review the performance and integrity information available in the Federal Awardee Performance and Integrity Information System (FAPIIS), (available at https://www.cpars.gov), including FAPIIS information from the System for Award Management (SAM) Exclusions and the Contractor Performance Assessment Reporting System (CPARS).

(2) In accordance with 41 U.S.C. 2313(d)(3) , FAPIIS also identifies–

(i) An affiliate that is an immediate owner or subsidiary of the offeror, if any (see 52.204-17, Ownership or Control of Offeror); and

(ii) All predecessors of the offeror that held a Federal contract or grant within the last three years (see 52.204-20, Predecessor of Offeror).

(b) (1) When making a responsibility determination, the contracting officer shall consider all the information available through FAPIIS with regard to the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror in FAPIIS, as well as other past performance information on the offeror (see subpart 42.15).

(2) For evaluation of information available through FAPIIS relating to an affiliate of the offeror, see 9.104-3(c).

(3) For source selection evaluations of past performance, see 15.305(a)(2). Contracting officers shall use sound judgment in determining the weight and relevance of the information contained in FAPIIS and how it relates to the present acquisition.

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(4) Since FAPIIS may contain information on any of the offeror's previous contracts and information covering a 5-year period, some of that information may not be relevant to a determination of present responsibility, *e.g.*, a prior administrative action such as debarment, suspension, voluntary exclusion, or administrative agreement, that has expired or otherwise been resolved, or information relating to contracts for completely different products or services.

(5) Because FAPIIS is a database that provides information about prime contractors, the contracting officer posts information required to be posted about a subcontractor, such as trafficking in persons violations, to the record of the prime contractor (see 42.1503(h)(1)(v)). The prime contractor has the opportunity to post in FAPIIS any mitigating factors. The contracting officer shall consider any mitigating factors posted in FAPIIS by the prime contractor, such as degree of compliance by the prime contractor with the terms of FAR clause 52.222-50.

(c) If the contracting officer obtains relevant information from FAPIIS regarding criminal, civil, or administrative proceedings in connection with the award or performance of a Government contract; terminations for default or cause; determinations of nonresponsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics; or comparable information relating to a grant, the contracting officer shall, unless the contractor has already been debarred, suspended, or has agreed to a voluntary exclusion-

(1) Promptly request such additional information from the offeror as the offeror deems necessary in order to demonstrate the offeror's responsibility to the contracting officer (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, if the information appears appropriate for the official's consideration.

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9.105-3 Disclosure of preaward information.

(a) Except as provided in subpart 24.2, Freedom of Information Act, information (including the preaward survey report) accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government.

(b) The contracting officer may discuss preaward survey information with the prospective contractor before determining responsibility. After award, the contracting officer or, if it is appropriate, the head of the surveying activity or a designee may discuss the findings of the preaward survey with the company surveyed.

(c) Preaward survey information may contain proprietary or source selection information and should be marked with the appropriate legend and protected accordingly (see 3.104-4).

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FAR Part 9 – *Contractor Qualifications*

Subpart 9.4 - Debarment, Suspension, and Ineligibility

9.400 Scope of subpart.

(a) This subpart-

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of "ineligible" in 2.101); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405), it does not prescribe policies and procedures governing declarations of ineligibility except for contractors that have been declared ineligible pursuant to 10 U.S.C. 983 (see 9.110, and 9.405-1(b)).

(c) For Federal Acquisition Supply Chain Security Act (FASCSA) orders, see subpart 4.23.

9.401 Applicability.

In accordance with Public Law 103-355, Section 2455 (31 U.S.C.6101 , note), and Executive Order 12689, any debarment, suspension or other Governmentwide exclusion initiated under the Nonprocurement Common Rule implementing Executive Order 12549 on or after August 25, 1995, shall be recognized by and effective for Executive Branch agencies as a debarment or suspension under this subpart. Similarly, any debarment, suspension, proposed debarment or other Governmentwide exclusion initiated on or after August 25, 1995, under this subpart shall also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.

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FAR Part 9 – *Contractor Qualifications*

9.402 Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these remedies be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures in this subpart.

(c) Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) When more than one agency has an interest in the debarment or suspension of a contractor, the Interagency Suspension and Debarment Committee, established under Executive Order 12549, and authorized by section 873 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) (31 U.S.C.6101 , note), shall resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension, debarment, or related administrative action by any agency.

(e) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.

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(e) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.

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FAR Part 9 – *Contractor Qualifications*

9.403 Definitions.

As used in this subpart—

Administrative agreement means an agreement between an agency suspending and debarring official and the contractor used to resolve a suspension or debarment proceeding, or a potential suspension or debarment proceeding.

Affiliates.–

(1) Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly–

(i) Either one controls or has the power to control the other; or

(ii) A third party controls or has the power to control both.

(2) Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

Agency means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition that creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812).

Conviction means—

(1) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(2) Any other resolution that is the functional equivalent of a judgment establishing a criminal offense by a court of competent jurisdiction, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

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Contractor means any individual or other legal entity that–

(1) Directly or indirectly (*e.g.*, through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or

(2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.

Indictment means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense is given the same effect as an indictment.

Legal proceedings means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

Nonprocurement Common Rule means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. See 2 CFR part 180 and agency enacting regulations in 2 CFR subtitle B.

Pre-notice letter means a written correspondence issued to a contractor in a suspension or debarment matter, which does not immediately result in an exclusion or ineligibility. The letter is issued at the discretion of the suspending and debarring official. The letter is not a mandatory step in the suspension or debarment process.

Unfair trade practices means the commission of any or the following acts by a contractor–

(1) A violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determined by the International Trade Commission.

(2) A violation, as determined by the Secretary of Commerce, of any agreement of the group known as the "Coordination Committee" for purposes of the Export Administration Act of 1979 (50 U.S.C. App. 2401, et seq.) or any similar bilateral or multilateral export control agreement.

(3) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the Department or the head of the agency to which such certificate was furnished.

Voluntary exclusion means a contractor's written agreement to be excluded for a period under the terms of a settlement between the contractor and the suspending and debarring official of one or more agencies. A voluntary exclusion must have Governmentwide effect.

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FAR Part 9 – *Contractor Qualifications – www.sam.gov*

9.404 Exclusions in the System for Award Management.

(a) The General Services Administration (GSA)—

(1) Operates the web-based System for Award Management (SAM), which contains exclusion records; and

(2) Provides technical assistance to Federal agencies in the use of SAM.

(b) An exclusion record in SAM contains the—

(1) Names and addresses of the entities debarred, suspended, proposed for debarment, voluntarily excluded, declared ineligible, or excluded or disqualified under the nonprocurement common rule, with cross-references when more than one name is involved in a single action;

(2) Name of the agency or other authority taking the action;

(3) Cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) Effect of the action;

(5) Termination date for each listing;

(6) Unique Entity Identifier;

(7) Social Security Number (SSN), Employer Identification Number (EIN), or other Taxpayer Identification Number (TIN), if available; and

(8) Name and telephone number of the agency point of contact for the action.

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9.405 Effect of listing.

(a) Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action (see 9.405-1(a)(2), 9.405-2, 9.406-1(d), 9.407-1(d), and 26.505(e)). Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors and other entities that have an active exclusion record in SAM because they have been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.

(c) Agencies shall not enter into, renew, or extend contracts with contractors that have been declared ineligible pursuant to 22 U.S.C. 2593e .

(d) Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are excluded from acting as individual sureties (see part 28).

(e) (1) After the opening of bids or receipt of proposals or quotes, the contracting officer shall review the exclusion records in SAM.

(2) Bids received from any listed contractor in response to an invitation for bids shall be entered on the abstract of bids, and rejected unless the agency head determines in writing that there is a compelling reason to consider the bid.

(3) Proposals, quotations, or offers received from any listed contractor shall not be evaluated for award or included in the competitive range, nor shall discussions be conducted with a listed offeror during a period of ineligibility, unless the agency head determines, in writing, that there is a compelling reason to do so. If the period of ineligibility expires or is terminated prior to award, the contracting officer may, but is not required to, consider such proposals, quotations, or offers.

(4) Immediately prior to award, the contracting officer shall again review the exclusion records in SAM to ensure that no award is made to a listed contractor.

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FAR Part 9 – *Contractor Qualifications – www.sam.gov*

9.405-1 Continuation of current contracts.

(a) *Contractors debarred, suspended, proposed for debarment, or voluntarily excluded*. (1) Notwithstanding the debarment, suspension, proposed debarment, or voluntary exclusion, of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, proposed for debarment, or voluntarily excluded, unless the agency head directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(2) For contractors debarred, suspended, proposed for debarment, or voluntarily excluded, unless the agency head makes a written determination of the compelling reasons for doing so, ordering activities shall not—

(i) Place orders exceeding the guaranteed minimum under indefinite quantity contracts;

(ii) Place orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or

(iii) Add new work, exercise options, or otherwise extend the duration of current contracts or orders.

(b) Ineligible contractors. A covered agency, as defined in 9.110-1, shall terminate existing contracts and shall not place new orders or award new contracts with contractors that have been declared ineligible pursuant to 10 U.S.C. 983 (see 9.110), except for contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial products and commercial services.

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FAR Part 9 – *Contractor Qualifications – www.sam.gov*

9.405-2 Restrictions on subcontracting.

(a) When a contractor debarred, suspended, proposed for debarment, or voluntarily excluded, is proposed as a subcontractor for any subcontract subject to Government consent (see subpart 44.2), contracting officers shall not consent to subcontracts with such contractors unless the agency head states in writing the compelling reasons for this approval action. (See 9.405 concerning declarations of ineligibility affecting sub-contracting.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors are prohibited from entering into any subcontract in excess of $45,000, other than a subcontract for a commercially available off-the-shelf item, with a contractor that has been debarred, suspended, proposed for debarment, or voluntarily excluded, unless there is a compelling reason to do so. If a contractor intends to enter into a subcontract in excess of $45,000, other than a subcontract for a commercially available off-the-shelf item, with a party that is debarred, suspended, proposed for debarment, or voluntarily excluded, as evidenced by the party's having an active exclusion record in SAM (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded, to notify the contracting officer, in writing, before entering into such subcontract. For contracts for the acquisition of commercial products, the notification requirement applies only for first-tier subcontracts. For all other contracts, the notification requirement applies to subcontracts at any tier. The notice must provide the following:

(1) The name of the subcontractor;

(2) The contractor's knowledge of the reasons for the subcontractor having an active exclusion record in SAM;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its having an active exclusion record in SAM; and

(4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, proposed debarment, or voluntary exclusion.

(c) The contractor's compliance with the requirements of 52.209-6 will be reviewed during Contractor Purchasing System Reviews (see subpart 44.3).

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FAR Part 9 – *Contractor Qualifications*

9.406 Debarment.

9.406-1 General.

(a) It is the suspending and debarring official's responsibility to determine whether debarment is in the Government's interest. The suspending and debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures, mitigating factors, or aggravating factors should be considered in making any debarment decision. Before arriving at any debarment decision, the suspending and debarring official should consider factors such as the following (some of the factors below could apply to individuals such as contractors that are individuals, and are so marked):

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor (including an individual) brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment (or the individual cooperated with the investigation) and, if so, made the result of the investigation available to the suspending and debarring official.

(4) Whether the contractor (including an individual) cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor (including an individual) has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor (including an individual) has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) (i) Whether the contractor has instituted or agreed to institute new or revised review and control procedures, ethics training, or other relevant training programs.

(ii) For an individual, whether the individual has attended relevant remediation training.

(9) Whether the contractor (including an individual) has had adequate time to eliminate the circumstances that led to the cause for debarment.

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(10) (i) Whether the contractor's management recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

(ii) For an individual, whether the individual recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for debarment and has adopted practices to prevent recurrence.

(11) Whether the contractor (including an individual) has a pattern or prior history of wrongdoing, the frequency of incidents and/or duration of the wrongdoing, and the actual or potential harm or impact that results, or may result, from the wrongdoing.

(12) Whether and to what extent the contractor (including an individual) planned, initiated, or carried out the wrongdoing, and the kind of positions within the contractor's organization held by the individual involved in the wrongdoing.

(13) Whether the wrongdoing was pervasive within the contractor's organization.

(14) Whether the individual or the contractor's principals tolerated the offense.

(15) Whether the contractor (including an individual) is or has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this subpart.

(16) Whether the contractor (including an individual) has entered into an administrative agreement with a Federal agency or a similar agreement with a State or local government that is not Governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this subpart.

(17) Whether there are any other factors to consider for the contractor (including an individual) appropriate to the circumstances of a particular case.

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(b) The existence or nonexistence of any aggravating or mitigating factors or remedial measures such as set forth in paragraph (a) of this section is not necessarily determinative of a contractor's present responsibility. Accordingly, if a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the suspending and debarring official, its present responsibility and that debarment is not necessary.

(c) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending and debarring official may extend the debarment decision to include any affiliates of the contractor if they are—

(1) Specifically named; and

(2) Given written notice of the proposed debarment and an opportunity to respond (see 9.406-3(c)).

(d) A contractor's debarment, or proposed debarment, shall be effective throughout the executive branch of the Government, unless the agency head or a designee (except see 26.505(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e) (1) When the suspending and debarring official has authority to debar contractors from both contracts pursuant to the Federal Acquisition Regulation in this chapter and contracts for the purchase of Federal personal property pursuant to the Federal Management Regulation (FMR) in 41 CFR part 102-38, that official shall consider simultaneously debarring the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When debarring a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the debarment notice shall so indicate and the appropriate FAR and FMR citations shall be included.

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9.406-2 Causes for debarment.

The suspending and debarring official may debar-

(a) A contractor for a conviction of or civil judgment for-

(1) Commission of fraud or a criminal offense in connection with-

(i) Obtaining;

(ii) Attempting to obtain; or

(iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law102-558)); or

(5) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

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(b) (1) A contractor, based upon a preponderance of the evidence, for any of the following-

(i) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as-

(A) Willful failure to perform in accordance with the terms of one or more contracts; or

(B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(ii) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace, as indicated by-

(A) Failure to comply with the requirements of the clause at 52.226-7, Drug-Free Workplace; or

(B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 26.504).

(iii) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law102-558)).

(iv) Commission of an unfair trade practice as defined in 9.403 (see Section 201 of the Defense Production Act (Pub.L.102-558)).

(v) Delinquent Federal taxes in an amount that exceeds $10;000.

(A) Federal taxes are considered delinquent for purposes of this provision if both of the following criteria apply:

(1) The tax liability is finally determined. The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(2) The taxpayer is delinquent in making payment. A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

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FAR Part 9 – *Contractor Qualifications*

Subpart 9.5 - Organizational and Consultant Conflicts of Interest

9.500 Scope of subpart.

This subpart-

(a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;

(b) Provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations; and

(c) Implements section 8141 of the 1989 Department of Defense Appropriation Act, Pub.L.100-463, 102 Stat.2270-47 (1988).

9.501 Definition.

Marketing consultant, as used in this subpart, means any independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation or submission of an offer for a Government contract by that offeror. An independent contractor is not a marketing consultant when rendering-

(1) Services excluded in subpart 37.2;

(2) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);

(3) Routine legal, actuarial, auditing, and accounting services; and

(4) Training services.

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What are key Compliance Policies?

Accurate Invoicing Policy

Anti-Bribe/Kickback Policy

Anti-Drug Use Policy

Artificial Intelligence Use Policy

Code of Ethics

Conflicts of Interests

Contract Legal Review

Cybersecurity Policy

Export Controls Policy

Gifts and Donations Policy

Mandatory Disclosure Policy

Mischarging/Overbilling Policy

Original Parts Policy

Trade Agreements Act Policy

Training Policy

Whistleblower Policy

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What are key Compliance Policies?

Evaluating Corporate Compliance Policies

Accessibility

Responsibility

Gatekeepers

Risk-Based Training

Availability of Guidance

Communication about misconduct

Internal/External Effectiveness Review

Effectiveness of the Reporting Mechanism

Commitment to Whistleblower Protections

Investigations Conducted by Qualified Personnel

This party review

Corporate Culture & Oversight

Compliance Officer Autonomy

Outsourcing Compliance?

Yates Memorandum

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How to limit risks and mitigate Enforcement Actions?

U.S. Department of State Concludes $36 Million Settlement Resolving Export Violations by BAE Systems, Inc. (BAE) - United States Department of State

VIOLATIONS

The ITAR violations in this proposed charging letter are derived from 12 voluntary disclosures Respondent submitted to DDTC in accordance with 22 C.F.R. 127.12 between August 2019 and December 2024. Due in part to the large number of violations over an extended period of time, the Department provides a summary of the violations, which fall into four broad categories: 1) unauthorized exports of technical data to the People's Republic of China (PRC); 2) failure to manage DDTC authorizations properly; 3) unauthorized exports of defense articles; and 4) failure to report material changes to Respondent's DDTC registration. The violations demonstrate a failure to maintain effective ITAR compliance practices and require further remedial action across Respondent's operating units and subsidiaries.

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U.S. Department of State Concludes $36 Million Settlement Resolving Export Violations by General Electric Company

VIOLATIONS

The ITAR violations in this proposed charging letter are derived from 12 voluntary disclosures Respondent submitted to DDTC in accordance with 22 C.F.R. 127.12 between August 2019 and December 2024. Due in part to the large number of violations over an extended period of time, the Department provides a summary of the violations, which fall into four broad categories: 1) unauthorized exports of technical data to the People's Republic of China (PRC); 2) failure to manage DDTC authorizations properly; 3) unauthorized exports of defense articles; and 4) failure to report material changes to Respondent's DDTC registration. The violations demonstrate a failure to maintain effective ITAR compliance practices and require further remedial action across Respondent's operating units and subsidiaries.

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Government Contractor Settles False Claims Act Allegations Based on Violations of the Trade Agreements Act

ALEXANDRIA, Va. – OMNI Business Systems, Inc., located in Alexandria, has agreed to pay $80,944.00 to settle a civil fraud case alleging that OMNI violated the Trade Agreements Act and the False Claims Act by fraudulently misrepresenting the country of origin for certain products on federal supply schedules.

The settlement arises in connection with a lawsuit filed by an OMNI competitor under the whistleblower provision of the False Claims Act: *United States ex rel. Vogel v. OMNI Business Systems, Inc., et al.* The settlement resolves allegations that OMNI violated the False Claims Act by fraudulently misrepresenting the country of origin for over a dozen toner products manufactured by HP, Inc., and offering them for sale, as Trade Agreements Act (TAA) compliant, through a General Services Administration (GSA) Multiple Award Schedule (MAS) contract and an Air Force Blanket Purchase Agreement. Despite Omni being told to remove the non-TAA compliant items, the settlement resolves allegations that the products remained available for purchase — and sales were made of the items — through GSA and the Air Force.

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CEO and VA Employee Sentenced for Paying and Receiving Illegal Health Care Kickbacks and Bribes

Two Florida men were sentenced today for their roles in a conspiracy to pay and receive illegal health care kickbacks. Laurent Cassagnol was sentenced to 6 months in prison, and Heriberto Rivera was sentenced to 13 months in prison. In addition to the prison terms, Cassagnol was ordered to forfeit $175,172, and Rivera was ordered to forfeit $515,542, which represented the proceeds that the defendants obtained from the offense.

According to court documents, Cassagnol, 43, and Rivera, 43, both of Orlando, Florida, conspired to pay and receive illegal kickbacks and bribes to direct veterans and their families, who were patients of the VA Community Care Program (VACCP), to Rivera's clinic, Family Integrative Medicine of Orlando, LLC (FIMO), for acupuncture, chiropractic adjustments, and other holistic medical services. Rivera, the CEO of FIMO, paid illegal kickbacks and bribes to Cassagnol, an Advanced Medical Support Assistant for VACCP, in exchange for Cassagnol using his position with the VA to steer VA patients to FIMO for medical services. Cassagnol was a vital point of contact between veterans and the VA health care system; his abuse of that role took advantage of veterans and their families who rely on the VA to obtain medical care. The actions of both defendants put profit before the needs of VA patients.

As a result of the illegal kickbacks, over $14 million in fraudulent claims were submitted to the VA and VACCP, of which over $11 million was paid. The investigation was the result of a complaint made to the VA Office of the Inspector General (VA-OIG) fraud hotline.

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Defense Contractor Agrees to Pay $13.7 Million to Settle Allegations of Overbilling

DRS Technical Services Inc. (DRS) has agreed to pay $13.7 million to settle allegations that it violated the False Claims Act by knowingly overbilling the government for work performed by DRS personnel who lacked the job qualifications required by the contract, the Justice Department announced today. DRS is located in Herndon, Virginia, and is a subsidiary of DRS Defense Solutions LLC.

The government contends that from Jan. 1, 2003, to Dec. 31, 2012, DRS billed CECOM for work performed by individuals whose job qualifications did not meet all the qualifications prescribed by the contracts for the labor categories under which their efforts were billed, thereby falsely increasing the amount of money DRS claimed and CECOM paid. Similarly, from Dec. 19, 2009, to Dec. 18, 2011, the government contends that DRS charged the Coast Guard's Aviation Logistics Center for work performed by individuals whose job qualifications did not meet the qualifications prescribed by the contract, again, thereby inflating the cost of the services provided.

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Defense Contractor Agrees to Pay $27.5 Million to Settle Overbilling Allegations

LMIS is a subsidiary of Lockheed Martin Inc., which is headquartered in Bethesda, Maryland. The alleged labor mischarging occurred on the Rapid Response (CR2) contract and the Strategic Services Sourcing (S3) contract, both issued by the U.S. Army Communication and Electronics Command (CECOM). CECOM is located at Fort Monmouth, New Jersey, and at the Aberdeen Proving Group in Maryland. The purpose of the CR2 and S3 contracts is to provide rapid access to products and services to be provided to the Army in Iraq and Afghanistan. Individual task orders then are separately negotiated, based on these contracts, to quickly meet the needs of CECOM. LMIS allegedly violated the terms of the contracts by using under-qualified employees who were billed to the United States at the rates of more qualified employees. The overbilling allegedly resulted in greater profit for LMIS.

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California Laboratory and Its Owner Pay $1.25M to Settle Allegations of Kickbacks to Marketers

Clinical laboratory Lab Genomics LLC based in Fountain Valley, California, and its owner, Leena Dalal, have agreed to pay $1.25 million to the United States to resolve allegations that they violated the False Claims Act by paying illegal kickbacks to marketers.

"The payment of kickbacks compromises the integrity of our healthcare programs," said Assistant Attorney General Brett A. Shumate of the Justice Department's Civil Division. "The Department will continue to pursue enforcement against those who profit from such unlawful kickback arrangements."

The settlement resolves certain allegations in a lawsuit originally filed by Sunil Wadhwa and Ken Newton under the whistleblower provisions of the False Claims Act, which permit private parties to sue on behalf of the United States for false claims and share in a portion of the Government's recovery. Relators will receive $225,000 of the proceeds from the settlement. The *qui tam* case is captioned *United States ex rel. Wadhwa and Newton v. Admera Health, LLC, et al.* (E.D. Cal.). The United States previously resolved similar allegations against Admera Health LLC and NEXT Bio-Research Services LLC d/b/a Next Molecular Analytics.

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How to limit the risks of Enforcement Actions?

GlaxoSmithKline to Plead Guilty & Pay $750 Million to Resolve Criminal and Civil Liability Regarding Manufacturing Deficiencies at Puerto Rico Plant

BOSTON – SB Pharmco Puerto Rico Inc., a subsidiary of GlaxoSmithKline, PLC (GSK), has agreed to plead guilty to charges relating to the manufacture and distribution of certain adulterated drugs made at GSK's now-closed Cidra, Puerto Rico, manufacturing facility, the Justice Department announced today. The resolution includes a criminal fine and forfeiture totaling $150 million and a civil settlement under the False Claims Act and related state claims for $600 million.

The drugs, manufactured at the plant between 2001and 2005, are Kytril, Bactroban, Paxil CR and Avandamet. Kytril is a sterile anti-nausea medication. Bactroban is a topical anti-infection ointment commonly used to treat skin infections. Paxil CR is the controlled release formulation of the popular anti-depressant drug, Paxil, and Avandamet is a combination Type II diabetes drug.

October 26, 2010

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GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data

Largest Health Care Fraud Settlement in U.S. History

Global health care giant GlaxoSmithKline LLC (GSK) agreed to plead guilty and to pay $3 billion to resolve its criminal and civil liability arising from the company's unlawful promotion of certain prescription drugs, its failure to report certain safety data, and its civil liability for alleged false price reporting practices, the Justice Department announced today. The resolution is the largest health care fraud settlement in U.S. history and the largest payment ever by a drug company.

July 2, 2012

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Conclusion

Assess and Analyze Risks – ongoing monitoring

Develop Compliance Policies – review effectiveness

Make Mandatory Reporting – timely reporting with credible information

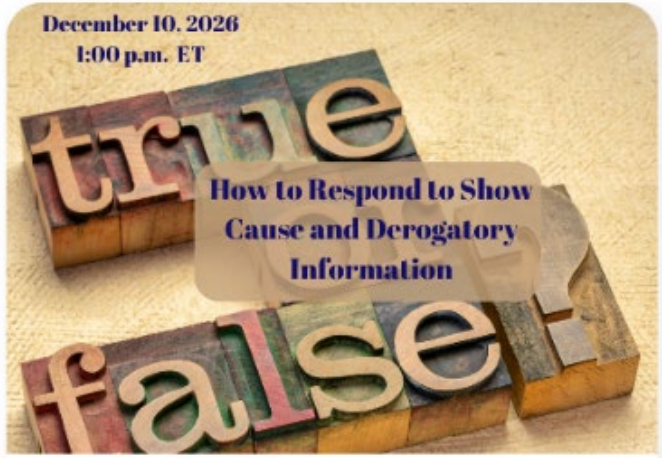
Train and Stay Current With New Developments – revise policies as necessary

Re-assess and Re-analyze Risks – ongoing monitoring

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Additional Courses:



2026-12-10

How To Respond To Show Cause And Derogatory Inform...



2026-12-22

Year In Review – Key Legal Developments In Feder...



2027-02-22

How To Win Bid Protests At The Court Of Federal Cl...

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Thank you!



Wojciech Kornacki
Government Contract and Compliance Counsel,
Of Counsel
kornackiw@theodorewatson.com I 202.640-3023

CRITICAL THINKING, CLEAR DIRECTION, DECISIVE RESULTS

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Subpart 3.10 - Contractor Code of Business Ethics and Conduct

Parent topic: Part 3 - Improper Business Practices and Personal Conflicts of Interest

3.1000 Scope of subpart.

This subpart-

(a) Implements 41 U.S.C. 3509, Notification of Violations of Federal Criminal Law or Overpayments; and

(b) Prescribes policies and procedures for the establishment of contractor codes of business ethics and conduct, and display of agency Office of Inspector General (OIG) fraud hotline posters.

3.1001 Definitions.

As used in this subpart-

Subcontract means any contract entered into by a *subcontractor* to furnish *supplies* or services for performance of a prime contract or a *subcontract*.

Subcontractor means any supplier, distributor, vendor, or firm that furnished *supplies* or services to or for a prime contractor or another *subcontractor*.

United States means the 50 States, the District of Columbia, and *outlying areas*.

3.1002 Policy.

(a) Government contractors *must* conduct themselves with the highest degree of integrity and honesty.

(b) Contractors *should* have a written code of business ethics and conduct. To promote compliance with such code of business ethics and conduct, contractors *should* have an employee business ethics and compliance training program and an internal control system that-

(1) Are suitable to the size of the company and extent of its involvement in Government *contracting*;

(2) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; and

(3) Ensure corrective measures are promptly instituted and carried out.

3.1003 Requirements.

(a) *Contractor requirements.*

(1) Although the policy at 3.1002 applies as guidance to all Government contractors, the contractual requirements set forth in the clauses at 52.203-13, Contractor Code of Business Ethics and Conduct, and 52.203-14, Display of Hotline Poster(s), are mandatory if the contracts meet the conditions specified in the clause prescriptions at 3.1004.

(2) Whether or not the clause at 52.203-13 is applicable, a contractor *may* be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a *subcontract* awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the *United States* Code or a violation of the civil False *Claims* Act. Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for *suspension* and/or *debarment* until 3 years after final payment on a contract (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8)).

(3) The Payment clauses at FAR 52.212-4(i)(5), 52.232-25(d), 52.232-26(c), and 52.232-27(l) require that, if the contractor becomes aware that the Government has overpaid on a contract financing or *invoice* payment, the contractor *shall* remit the overpayment amount to the Government. A contractor *may* be suspended and/or debarred for knowing failure by a principal to timely disclose credible evidence of a significant overpayment, other than overpayments resulting from contract financing payments as defined in 32.001 (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8)).

(b) *Notification of possible contractor violation*. If the *contracting officer* is notified of possible contractor violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C.; or a violation of the civil False *Claims* Act, the *contracting officer shall*-

(1) Coordinate the matter with the agency Office of the Inspector General; or

(2) Take action in accordance with agency procedures.

(c) *Fraud Hotline Poster.*

(1) Agency OIGs are responsible for determining the need for, and content of, their respective agency OIG fraud hotline poster(s).

(2) When requested by the Department of Homeland Security, agencies *shall* ensure that contracts funded with disaster assistance funds require display of any fraud hotline poster applicable to the specific contract. As established by the agency OIG, such posters *may* be displayed in lieu of, or in addition to, the agency's standard poster.

3.1004 Contract clauses.

(a) Insert the clause at FAR 52.203-13, Contractor Code of Business Ethics and Conduct, in *solicitations* and contracts if the value of the contract is expected to exceed $7.5 million and the performance period is 120 days or more.

(b)

(1) Unless the contract is for the *acquisition* of a *commercial product* or *commercial service* or will be performed entirely outside the *United States*, insert the clause at 52.203-14, Display of Hotline Poster(s), if–

(i) The contract exceeds $7.5 million or a lesser amount established by the agency; and

(ii)

(A) The agency has a fraud hotline poster; or

(B) The contract is funded with disaster assistance funds.

(2) In paragraph (b)(3) of the clause, the *contracting officer shall*–

(i) Identify the applicable posters; and

(ii) Insert the website link(s) or other contact information for obtaining the agency and/or Department of Homeland Security poster.

(3) In paragraph (d) of the clause, if the agency has established policies and procedures for display of the OIG fraud hotline poster at a lesser amount, the *contracting officer shall* replace "$7.5 million" with the lesser amount that the agency has established.

Part 9 - Contractor Qualifications

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Parent topic: Federal Acquisition Regulation

9.000 Scope of part.

This part prescribes policies, standards, and procedures pertaining to prospective contractors' responsibility; *debarment*, *suspension*, and ineligibility; qualified *products*; *first article testing* and approval; contractor team arrangements; defense production pools and research and development pools; and organizational conflicts of interest.

Subpart 9.1 - Responsible Prospective Contractors

9.100 Scope of subpart.

This subpart prescribes policies, standards, and procedures for determining whether prospective contractors and subcontractors are responsible.

9.101 Definitions.

Administrative proceeding means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (*e.g.*, Securities and Exchange Commission Administrative Proceedings, Civilian Board of Contract Appeals Proceedings, and Armed Services Board of Contract Appeals Proceedings). This includes administrative proceedings at the Federal and state level but only in connections with performance of a Federal contract or grant. It does not include agency actions such as contract audits, site visits, corrective plans, or *inspection* of deliverables.

Surveying activity, as used in this subpart, means the cognizant *contract administration office* or, if there is no such office, another organization designated by the agency to conduct preaward surveys.

9.102 Applicability.

(a) This subpart applies to all proposed contracts with any prospective contractor that is located-

(1) In the *United States* or its *outlying areas*; or

(2) Elsewhere, unless application of the subpart would be inconsistent with the laws or customs where the contractor is located.

(b) This subpart does not apply to proposed contracts with-

(1) Foreign, State, or local governments;

(2) Other U.S. Government agencies or their instrumentalities; or

(3) Agencies for people who are blind or severely disabled (see subpart 8.7).

9.103 Policy.

(a) Purchases *shall* be made from, and contracts *shall* be awarded to, *responsible prospective contractors* only.

(b) No purchase or award *shall* be made unless the *contracting officer* makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the *contracting officer shall* make a determination of nonresponsibility. If the prospective contractor is a small business concern, the *contracting officer shall* comply with subpart 19.6, Certificates of Competency and Determinations of Responsibility. (If Section 8(a) of the Small Business Act (15 U.S.C. 637) applies, see subpart 19.8.)

(c) The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest *offer*. A prospective contractor *must* affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

9.104 Standards.

9.104-1 General standards.

To be determined responsible, a prospective contractor *must*-

(a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(c) Have a satisfactory performance record (see 9.104-3 (b) and subpart 42.15). A prospective contractor *shall* not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;

(d) Have a satisfactory record of integrity and business ethics (for example, see subpart 42.15);

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a).)

(f) Have the necessary production, *construction*, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations (see also inverted domestic corporation prohibition at 9.108).

9.104-2 Special standards.

(a) When it is necessary for a particular *acquisition* or class of *acquisitions*, the *contracting officer shall* develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards *may* be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards *shall* be set forth in the *solicitation* (and so identified) and *shall* apply to all *offerors*.

(b) *Contracting officers shall* award contracts for subsistence only to those prospective contractors that meet the general standards in 9.104-1 and are approved in accordance with agency sanitation standards and procedures.

9.104-3 Application of standards.

(a) *Ability to obtain resources*. Except to the extent that a prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, the *contracting officer shall* require acceptable evidence of the prospective contractor's ability to obtain required resources (see 9.104-1(a), (e), and (f)). Acceptable evidence normally consists of a commitment or explicit arrangement, that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel. Consideration of a prime contractor's compliance with limitations on subcontracting *shall* take into account the time period covered by the contract base period or quantities plus *option* periods or quantities, if such *options* are considered when evaluating *offers* for award.

(b) *Satisfactory performance record*. A prospective contractor that is or recently has been seriously deficient in contract performance *shall* be presumed to be nonresponsible, unless the *contracting officer* determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of the contract is a significant factor to consider in determining satisfactory performance. The *contracting officer shall* consider the number of contracts involved and the extent of deficient performance in each contract when making this determination. If the pending contract requires a subcontracting plan pursuant to subpart 19.7, The Small Business Subcontracting Program, the *contracting officer shall* also consider the prospective contractor's compliance with subcontracting plans under recent contracts.

(c)

(1) *Affiliated concerns*. Affiliated concerns (see "Concern" in 19.001 and "Small business concern" in 2.101) are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the *contracting officer shall* consider the affiliate's *past performance* and integrity when they *may* adversely affect the prospective contractor's responsibility.

(2) *Joint ventures.* For a prospective contractor that is a joint venture, the *contracting officer shall* consider the *past performance* of the joint venture. If the joint venture does not demonstrate past performance for award, the *contracting officer shall* consider the *past performance* of each party to the joint venture.

(d)

(1) *Small business concerns*. Upon making a determination of nonresponsibility with regard to a small business concern, the *contracting officer shall* refer the matter to the Small Business Administration, which will decide whether to issue a Certificate of Competency (see subpart 19.6).

(2) *Limitations on subcontracting*. A small business that is unable to comply with the limitations on subcontracting *may* be considered nonresponsible (see 52.219-3, Notice of *HUBZone* Set-Aside or Sole Source Award; 52.219-4, Notice of Price Evaluation Preference for *HUBZone* Small Business Concerns; 52.219-14, Limitations on Subcontracting; 52.219-27,Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program; 52.219-29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged *Women-Owned Small Business Concerns*; and 52.219-30, Notice of Set-Aside for, or Sole Source Award to, *Women-Owned Small Business Concerns* Eligible Under the Women-Owned Small Business Program). A small business that has not agreed to comply with the limitations on subcontracting *may* be considered nonresponsive.

9.104-4 Subcontractor responsibility.

(a) Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors (but see 9.405 and 9.405-2 regarding debarred, *ineligible*, or suspended firms). Determinations of prospective subcontractor responsibility *may* affect the Government's determination of the prospective prime contractor's responsibility. A prospective contractor *may* be required to provide written evidence of a proposed subcontractor's responsibility.

(b) When it is in the Government's interest to do so, the *contracting officer may* directly determine a prospective subcontractor's responsibility (*e.g.,* when the prospective contract involves medical *supplies*, urgent requirements, or substantial subcontracting). In this case, the same standards used to determine a prime contractor's responsibility *shall* be used by the Government to determine subcontractor responsibility.

9.104-5 Representation and certifications regarding responsibility matters.

(a) When an *offeror* provides an affirmative response in paragraph (a)(1) of the provision at 52.209-5, Certification Regarding Responsibility Matters, or paragraph (h) of provision 52.212-3, the *contracting officer shall*-

(1) Promptly, upon receipt of *offers*, request such additional information from the *offeror* as the *offeror* deems necessary in order to demonstrate the *offeror*'s responsibility to the *contracting officer* (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating *debarment* or *suspension* action, where an *offeror* indicates the existence of an indictment, charge, *conviction*, or civil judgment, or Federal tax delinquency in an amount that exceeds $15,000.

(b) The provision at 52.209-11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony *Conviction* under any Federal Law, implements sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) (and similar provisions in subsequent appropriations acts). When an *offeror* provides an affirmative response in paragraph (b)(1) or (2) of the provision at 52.209-11 or paragraph (q)(2)(i) or (ii) of provision 52.212-3, the *contracting officer shall–*

(1) Promptly, upon receipt of *offers*, request such additional information from the *offeror* as the *offeror* deems necessary in order to demonstrate the *offeror*'s responsibility to the *contracting officer* (but see 9.405);

(2) Notify, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating *debarment* or *suspension* action; and

(3) Not award to the corporation unless an agency *suspending and debarring official* has considered *suspension* or *debarment* of the corporation and made a determination that *suspension* or *debarment* is not necessary to protect the interests of the Government.

(c) If the provision at 52.209-12, Certification Regarding Tax Matters, is applicable (see 9.104-7(e)), then the *contracting officer shall* not award any contract in an amount greater than $7 million, unless the *offeror* affirmatively certified in its *offer*, as required by paragraph (b)(1), (2), and (3) of the provision.

(d) *Offerors* who do not furnish the representation or certifications or such information as *may* be requested by the *contracting officer shall* be given an opportunity to remedy the deficiency. Failure to furnish the representation or certifications or such information *may* render the *offeror* nonresponsible.

9.104-6 Federal Awardee Performance and Integrity Information System.

(a)

(1) Before awarding a contract in excess of the *simplified acquisition threshold*, the *contracting officer shall* review the performance and integrity information available in the Federal Awardee Performance and Integrity Information System (FAPIIS), (available at https://www.cpars.gov), including FAPIIS information from the *System for Award Management (SAM*) Exclusions and the Contractor Performance Assessment Reporting System (CPARS).

(2) In accordance with 41 U.S.C. 2313(d)(3), FAPIIS also identifies–

(i) An affiliate that is an immediate owner or subsidiary of the *offeror*, if any (see 52.204-17, Ownership or Control of *Offeror*); and

(ii) All predecessors of the *offeror* that held a Federal contract or grant within the last three years (see 52.204-20, Predecessor of *Offeror*).

(b)

(1) When making a responsibility determination, the *contracting officer shall* consider all the information available through FAPIIS with regard to the *offeror* and any immediate owner, predecessor, or subsidiary identified for that *offeror* in FAPIIS, as well as other *past performance* information on the *offeror* (see subpart 42.15).

(2) For evaluation of information available through FAPIIS relating to an affiliate of the *offeror*, see 9.104-3(c).

(3) For source selection evaluations of *past performance*, see 15.305(a)(2). *Contracting officers shall* use sound judgment in determining the weight and relevance of the information contained in FAPIIS and how it relates to the present *acquisition*.

(4) Since FAPIIS *may* contain information on any of the *offeror*'s previous contracts and information covering a 5-year period, some of that information *may* not be relevant to a determination of present responsibility, *e.g.*, a prior administrative action such as *debarment*, *suspension*, voluntary exclusion, or administrative agreement, that has expired or otherwise been resolved, or information relating to contracts for completely different *products* or services.

(5) Because FAPIIS is a database that provides information about prime contractors, the *contracting officer* posts information required to be posted about a subcontractor, such as trafficking in persons violations, to the record of the prime contractor (see 42.1503(h)(1)(v)). The prime contractor has the opportunity to post in FAPIIS any mitigating factors. The *contracting officer shall* consider any mitigating factors posted in FAPIIS by the prime contractor, such as degree of compliance by the prime contractor with the terms of FAR clause 52.222-50.

(c) If the *contracting officer* obtains relevant information from FAPIIS regarding criminal, civil, or administrative proceedings in connection with the award or performance of a Government contract; terminations for default or cause; determinations of nonresponsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics; or comparable information relating to a grant, the *contracting officer shall*, unless the contractor has already been debarred, suspended, or has agreed to a voluntary exclusion-

(1) Promptly request such additional information from the *offeror* as the *offeror* deems necessary in order to demonstrate the *offeror*'s responsibility to the *contracting officer* (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating *debarment* or *suspension* action, if the information appears appropriate for the official's consideration.

(d) The *contracting officer shall* document the contract file for each contract in excess of the *simplified acquisition threshold* to indicate how the information in FAPIIS was considered in any responsibility determination, as well as the action that was taken as a result of the information. A *contracting officer* who makes a nonresponsibility determination is required to document that information in FAPIIS in accordance with 9.105-2(b)(2).

9.104-7 Solicitation provisions and contract clauses.

(a) The *contracting officer shall* insert the provision at 52.209-5, Certification Regarding Responsibility Matters, in *solicitations* where the contract value is expected to exceed the *simplified acquisition threshold*.

(b) The *contracting officer shall* insert the provision at 52.209-7, Information Regarding Responsibility Matters, in *solicitations* where the resultant contract value is expected to exceed $750,000.

(c) The *contracting officer shall* insert the clause at 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters-

(1) In *solicitations* where the resultant contract value is expected to exceed $750,000; and

(2) In contracts in which the *offeror* checked "has" in paragraph (b) of the provision at 52.209-7.

(d) The *contracting officer shall* insert the provision 52.209-11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony *Conviction* under any Federal Law, in all *solicitations*.

(e) For agencies receiving funds subject to section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and similar provisions in subsequent appropriations acts, the *contracting officer shall* insert the provision 52.209-12, Certification Regarding Tax Matters, in *solicitations* for which the resultant contract (including *options*) *may* have a value greater than $7 million. Division B of the Consolidated and Continuing Further Appropriations Act, 2015 appropriates funds for the following agencies: the Department of Commerce, the Department of Justice, the National Aeronautics and Space Administration, the Office of Science and Technology Policy, the National Science Foundation, the Commission on Civil Rights, the Equal Employment Opportunity Commission, the U.S. International Trade Commission, the Legal Services Corporation, the Marine Mammal Commission, the Office of the *United States* Trade Representative, and the State Justice Institute.

9.105 Procedures.

9.105-1 Obtaining information.

(a) Before making a determination of responsibility, the *contracting officer shall* possess or obtain information sufficient to be satisfied that a prospective contractor currently meets the applicable standards in 9.104.

(b)

(1) Generally, the *contracting officer shall* obtain information regarding the responsibility of prospective contractors, including requesting preaward surveys when necessary (see 9.106), promptly after a bid opening or receipt of *offers*. However, in negotiated *contracting*, especially when research and development is involved, the *contracting officer may* obtain this information before issuing the request for proposals. Requests for information *shall* ordinarily be limited to information concerning-

(i) The low bidder; or

(ii) Those *offerors* in range for award.

(2) Preaward surveys *shall* be managed and conducted by the *surveying activity*.

(i) If the *surveying activity* is a *contract administration office*-

(A) That office *shall* advise the *contracting officer* on prospective contractors' financial competence and credit needs; and

(B) The administrative *contracting officer shall* obtain from the auditor any information required concerning the adequacy of prospective contractors' accounting systems and these systems' suitability for use in administering the proposed type of contract.

(ii) If the *surveying activity* is not a *contract administration office*, the *contracting officer shall* obtain from the auditor any information required concerning prospective contractors' financial competence and credit needs, the adequacy of their accounting systems, and these systems' suitability for use in administering the proposed type of contract.

(3) Information on financial resources and performance capability *shall* be obtained or updated on as current a basis as is feasible up to the date of award.

(c) In making the determination of responsibility, the *contracting officer shall* consider information available through FAPIIS (see 9.104-6) with regard to the *offeror* and any immediate owner, predecessor, or subsidiary identified for that *offeror* in FAPIIS, including information that is linked to FAPIIS such as from SAM, and CPARS, as well as any other relevant *past performance* information on the *offeror* (see 9.104-1(c) and subpart 42.15). In addition, the *contracting officer should* use the following sources of information to support such determinations:

(1) Records and experience data, including verifiable knowledge of personnel within the *contracting office*, audit offices, *contract administration offices*, and other *contracting offices*.

(2) The prospective contractor-including bid or proposal information (including the certification at 52.209-5 or 52.212-3(h) (see 9.104-5)), questionnaire replies, financial data, information on production equipment, and personnel information.

(3) Commercial sources of supplier information of a type offered to buyers in the private sector.

(4) *Preaward survey* reports (see 9.106).

(5) Other sources such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations.

(d) *Contracting offices* and cognizant *contract administration offices* that become aware of circumstances casting doubt on a contractor's ability to perform contracts successfully *shall* promptly exchange relevant information.

9.105-2 Determinations and documentation.

(a) Determinations.

(1) The *contracting officer*'s signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. When an *offer* on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, the *contracting officer shall* make, sign, and place in the contract file a determination of nonresponsibility, which *shall* state the basis for the determination.

(2) If the *contracting officer* determines that a responsive small business lacks certain elements of responsibility, the *contracting officer shall* comply with the procedures in subpart 19.6. When a Certificate of Competency is issued for a small business concern (see subpart 19.6), the *contracting officer shall* accept the Small Business Administration's decision to issue a Certificate of Competency and award the contract to the concern.

(b) *Support documentation*.

(1) Documents and reports supporting a determination of responsibility or nonresponsibility, including any *preaward survey* reports, the use of FAPIIS information (see 9.104-6), and any applicable Certificate of Competency, *must* be included in the contract file.

(2)

(i) The *contracting officer shall* document the determination of nonresponsibility in FAPIIS (available at https://www.cpars.gov) if-

(A) The contract is valued at more than the *simplified acquisition threshold*;

(B) The determination of nonresponsibility is based on lack of satisfactory performance record or satisfactory record of integrity and business ethics; and

(C) The Small Business Administration does not issue a Certificate of Competency.

(ii) The *contracting officer* is responsible for the timely submission, within 3 working days, and sufficiency, and accuracy of the documentation regarding the nonresponsibility determination.

(iii) As required by section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111-212), all information posted in FAPIIS on or after April 15, 2011, except *past performance* reviews, will be publicly available. FAPIIS consists of two *segments*-

(A) The non-public *segment*, into which Government officials and contractors post information, which can only be viewed by-

(1) Government personnel and authorized users performing business on behalf of the Government; or

(2) An *offeror* or contractor, when viewing data on itself; and

(B) The publicly-available *segment*, to which all data in the non-public *segment* of FAPIIS is automatically transferred after a waiting period of 14 calendar days, except for-

(1) *Past performance* reviews required by subpart 42.15;

(2) Information that was entered prior to April 15,2011; or

(3) Information that is withdrawn during the 14-calendar-*day* waiting period by the Government official who posted it in accordance with paragraph (b)(2)(iv) of this section.

(iv) The *contracting officer*, or any other Government official, *shall* not post any information in the non-public *segment* of FAPIIS that is covered by a disclosure exemption under the Freedom of Information Act. If the contractor asserts within 7 calendar days, to the Government official who posted the information, that some of the information posted to the non-public *segment* of FAPIIS is covered by a disclosure exemption under the Freedom of Information Act, the Government official who posted the information *must* within 7 calendar days remove the posting from FAPIIS and resolve the issue in accordance with agency Freedom of Information Act procedures, prior to reposting the releasable information.

9.105-3 Disclosure of preaward information.

(a) Except as provided in subpart 24.2, Freedom of Information Act, information (including the *preaward survey* report) accumulated for purposes of determining the responsibility of a prospective contractor *shall* not be released or disclosed outside the Government.

(b) The *contracting officer may* discuss *preaward survey* information with the prospective contractor before determining responsibility. After award, the *contracting officer* or, if it is appropriate, the head of the *surveying activity* or a designee *may* discuss the findings of the *preaward survey* with the company surveyed.

(c) *Preaward survey* information *may* contain proprietary or *source selection information* and *should* be marked with the appropriate legend and protected accordingly (see 3.104-4).

9.106 Preaward surveys.

9.106-1 Conditions for preaward surveys.

(a) A *preaward survey* is normally required only when the information on hand or readily available to the *contracting officer*, including information from commercial sources, is not sufficient to make a determination regarding responsibility. In addition, if the contemplated contract will have a fixed price at or below the *simplified acquisition threshold* or will involve the *acquisition* of *commercial products* or *commercial services* (see part 12), the *contracting officer should* not request a *preaward survey* unless circumstances justify its cost.

(b) When a cognizant *contract administration office* becomes aware of a prospective award to a contractor about which unfavorable information exists and no *preaward survey* has been requested, it *shall* promptly obtain and transmit details to the *contracting officer*.

(c) Before beginning a *preaward survey*, the *surveying activity shall* ascertain whether the prospective contractor is debarred, suspended, or *ineligible* (see subpart 9.4). If the prospective contractor is debarred, suspended, or *ineligible*, the *surveying activity shall* advise the *contracting officer* promptly and not proceed with the *preaward survey* unless specifically requested to do so by the *contracting officer*.

9.106-2 Requests for preaward surveys.

The *contracting officer*'s request to the *surveying activity* (*Preaward Survey* of Prospective Contractor (General),SF 1403) *shall*-

(a) Identify additional factors about which information is needed;

(b) Include the complete *solicitation* package (unless it has previously been furnished), and any information indicating prior unsatisfactory performance by the prospective contractor;

(c) State whether the *contracting office* will participate in the survey;

(d) Specify the date by which the report is required. This date *should* be consistent with the scope of the survey requested and normally *shall* allow at least 7 working days to conduct the survey; and

(e) When appropriate, limit the scope of the survey.

9.106-3 Interagency preaward surveys.

When the *contracting office* and the *surveying activity* are in different agencies, the procedures of this section 9.106 and subpart 42.1 *shall* be followed along with the regulations of the agency in which the *surveying activity* is located, except that reasonable special requests by the *contracting office shall* be accommodated (also see subpart 17.5).

9.106-4 Reports.

(a) The *surveying activity shall* complete the applicable parts of SF 1403, *Preaward Survey* of Prospective Contractor (General); SF 1404, *Preaward Survey* of Prospective Contractor-Technical; SF 1405, *Preaward Survey* of Prospective Contractor-Production; SF 1406, *Preaward Survey* of Prospective Contractor-Quality Assurance; SF 1407, *Preaward Survey* of Prospective Contractor-Financial Capability; and SF 1408, *Preaward Survey* of Prospective Contractor-Accounting System; and provide a narrative discussion sufficient to support both the evaluation ratings and the recommendations.

(b) When the contractor surveyed is a small business that has received preferential treatment on an ongoing contract under Section 8(a) of the Small Business Act (15 U.S.C. 637) or has received a Certificate of Competency during the last 12 months, the *surveying activity shall* consult the appropriate Small Business Administration field office before making an affirmative recommendation regarding the contractor's responsibility or nonresponsibility.

(c) When a *preaward survey* discloses previous unsatisfactory performance, the *surveying activity shall* specify the extent to which the prospective contractor plans, or has taken, corrective action. Lack of evidence that past failure to meet contractual requirements was the prospective contractor's fault does not necessarily indicate satisfactory performance. The narrative *shall* report any persistent pattern of need for costly and burdensome Government assistance (*e.g.,* engineering, *inspection*, or testing) provided in the Government's interest but not contractually required.

(d) When the *surveying activity* possesses information that supports a recommendation of complete award without an on-site survey and no special areas for investigation have been requested, the *surveying activity may* provide a short-form *preaward survey* report. The short-form report *shall* consist solely of the *Preaward Survey* of Prospective Contractor (General), SF 1403. Sections III and IV of this form *shall* be completed and block21 *shall* be checked to show that the report is a short-form preaward report.

9.107 Surveys of nonprofit agencies participating in the AbilityOne Program.

(a) The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee), as authorized by 41 U.S.C. chapter 85, determines what *supplies* and services *Federal agencies* are required to purchase from AbilityOne participating nonprofit agencies serving people who are blind or have other severe disabilities (see subpart 8.7). The Committee is required to find an AbilityOne participating nonprofit agency capable of furnishing the *supplies* or services before the nonprofit agency can be designated as a mandatory source under the AbilityOne Program. The Committee *may* request a *contracting office* to assist in assessing the capabilities of a nonprofit agency.

(b) The *contracting office*, upon request from the Committee, *shall* request a capability survey from the activity responsible for performing preaward surveys, or notify the Committee that the AbilityOne participating nonprofit agency is capable, with supporting rationale, and that the survey is waived. The capability survey will focus on the technical and production capabilities and applicable *preaward survey* elements to furnish specific *supplies* or services being considered for addition to the *Procurement* List.

(c) The *contracting office shall* use the Standard Form 1403 to request a capability survey of organizations employing people who are blind or have other severe disabilities.

(d) The *contracting office shall* furnish a copy of the completed survey, or notice that the AbilityOne participating nonprofit agency is capable and the survey is waived, to the Executive Director, Committee for Purchase From People Who Are Blind or Severely Disabled.

9.108 Prohibition on contracting with inverted domestic corporations.

9.108-1 Definitions.

As used in this section-

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an *inverted domestic corporation* under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

Subsidiary means an entity in which more than 50 percent of the entity is owned-

(1) Directly by a parent corporation; or

(2) Through another *subsidiary* of a parent corporation.

9.108-2 Prohibition.

(a) Section 745 of Division D of the Consolidated Appropriations Act, 2008 (Pub. L. 110-161) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions) prohibit, on a Governmentwide basis, the use of appropriated (or otherwise made available) funds for contracts with either an *inverted domestic corporation*, or a *subsidiary* of such a corporation, except as provided in paragraph (b) of this section and in 9.108-4 Waiver.

(b)

(1) Section 745 and its successor provisions include the following exception: This section *shall* not apply to any Federal Government contract entered into before the date of the enactment of this Act, or to any *task order* issued pursuant to such contract.

(2) To ensure appropriate application of the prohibition and this exception, *contracting officers should* consult with legal counsel if, during the performance of a contract, a contractor becomes an *inverted domestic corporation* or a *subsidiary* of one.

9.108-3 Representation by the offeror.

(a) In order to be eligible for contract award, an *offeror must* represent that it is neither an *inverted domestic corporation*, nor a *subsidiary* of an *inverted domestic corporation*. Any *offeror* that cannot so represent is *ineligible* for award of a contract, unless waived in accordance with the procedures at 9.108-4.

(b) The *contracting officer may* rely on an *offeror*'s representation that it is not an *inverted domestic corporation* unless the *contracting officer* has reason to question the representation.

9.108-4 Waiver.

Any *agency head may* waive the prohibition in subsection 9.108-2 and the requirement of subsection 9.108-3 for a specific contract if the *agency head* determines *in writing* that the waiver is required in the interest of national security, documents the determination, and reports it to the Congress.

9.108-5 Solicitation provision and contract clause.

The *contracting officer shall*-

(a) Include the provision at 52.209-2, Prohibition on *Contracting* with *Inverted Domestic Corporations*-Representation, in each *solicitation* for the *acquisition* of *products* or services (including *construction*); and

(b) Include the clause at 52.209-10, Prohibition on *Contracting* with *Inverted Domestic Corporations*, in each *solicitation* and contract for the *acquisition* of *products* or services (including *construction*).

9.109 Prohibition on contracting with an entity involved in activities that violate arms control treaties or agreements with the United States.

9.109-1 Authority.

This section implements 22 U.S.C. 2593e.

9.109-2 Prohibition.

Contracting officers shall not award, renew, or extend a contract for the *procurement* of *products* or services with an entity identified as excluded in the *System for Award Management*, specifically for this subpart, on the basis of involvement in activities that violate arms control treaties or agreements with the *United States*.

9.109-3 Exception.

The prohibition in 9.109-2 does not apply to contracts for the *procurement* of *products* or services along a major route of supply to a zone of active combat or major *contingency operation*, as specified in statute or by the cognizant *Combatant Commander*, in consultation with the *Chief of Mission*. As of *May* 10, 2018, countries along the major route of supply to support operations in Afghanistan are Afghanistan, Georgia, the Kyrgyz Republic, Pakistan, the Republic of Armenia, the Republic of Azerbaijan, the Republic of Kazakhstan, the Republic of Tajikistan, the Republic of Uzbekistan, and Turkmenistan.

9.109-4 Certification by the offeror.

(a) In order to be eligible for contract award, an *offeror* is required to—

(1)

(i) Certify that it does not engage and has not engaged in any activity that contributed to or was a significant factor in the President's or Secretary of State's determination that a foreign country is in violation of its obligations undertaken in any arms control, nonproliferation, or disarmament agreement to which the *United States* is a party, or is not adhering to its arms control, nonproliferation, or disarmament commitments in which the *United States* is a participating state. The determinations are described in the most recent unclassified annual report provided to Congress pursuant to section 403 of the Arms Control and Disarmament Act (22 U.S.C. 2593a). The report is available at https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-arms-control-verification-and-compliance/; and

(ii) Similarly certify with regard to any entity owned or controlled by the *offeror*; or

(2) Provide with its *offer* information that the President of the *United States* has–

(i) Waived application under 22 U.S.C. 2593e(d) or (e); or

(ii) Determined under 22 U.S.C. 2593e(g)(2) that the entity has ceased all activities for which measures were imposed under 22 U.S.C. 2593e(b).

(b) If certifying in accordance with 52.209-13(b)(1), the *Offeror* is required to submit the certification with the *offer*. It is not included in the annual representations and certifications in the *System for Award Management*.

(c) The *contracting officer may* rely on an *offeror*'s certification unless the *contracting officer* has reason to question the certification.

(d) Upon the determination of a false certification under 52.209-13, an *offeror* will be subject to such remedies as *suspension* or *debarment* under subpart 9.4 *shall* be for a period of not less than 2 years, inclusive of any *suspension* period, if *suspension* precedes a *debarment* (see 9.406-4(a)(1)(iii) and (a)(2)).

9.109-5 Solicitation provision.

Unless the exception at 9.109-3 applies, the *contracting officer shall* include the provision at 52.209-13, Violation of Arms Control Treaties or Agreements-Certification, in each *solicitation* for the *acquisition* of *products* or services (including *construction*) that exceeds the *simplified acquisition threshold*, other than *solicitations* for the *acquisition* of *commercial products* or *commercial services*.

9.110 Reserve Officer Training Corps and military recruiting on campus.

9.110-1 Definitions.

As used in this section—

Covered agency means–

(1)The Department of Defense;

(2)Any department or agency for which regular appropriations are made in a Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act;

(3)The Department of Homeland Security;

(4)The National Nuclear Security Administration of the Department of Energy;

(5)The Department of Transportation; or

(6)The Central Intelligence Agency.

Institution of higher education means an institution that meets the requirements of 20 U.S.C. 1001 and includes all sub-elements of such an institution.

9.110-2 Authority

This section implements 10 U.S.C. 983.

9.110-3 Policy.

(a) Except as provided in paragraph (b) of this section, 10 U.S.C. 983 prohibits the *covered agency* from providing funds by contract to an *institution of higher* education if the Secretary of Defense determines that the institution has a policy or practice that prohibits or in effect prevents—

(1) The Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (ROTC) at that institution;

(2) A student at that institution from enrolling in a unit of the Senior ROTC at another *institution of higher* education;

(3) The Secretary of a military department or the Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(4) Military recruiters from accessing certain information pertaining to students (who are 17 years of age or older) enrolled at that institution:

(i) Name, address, and telephone listings.

(ii) Date and place of birth, educational level, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(b) The prohibition in paragraph (a) of this section does not apply to an *institution of higher* education if the Secretary of Defense determines that—

(1) The institution has ceased the policy or practice described in paragraph (a) of this section; or

(2) The institution has a long-standing policy of pacifism based on historical religious affiliation.

9.110-4 Procedures.

If the Secretary of Defense determines, pursuant to the procedures at 32 CFR part 216, that an *institution of higher* education is *ineligible* to receive funds from a *covered agency* because of a policy or practice described in 9.110-3—

(a)The Secretary of Defense will create an active exclusion record for the institution in the *System for Award Management*; and

(b)A *covered agency shall* not solicit *offers* from, award contracts to, or *consent to subcontracts* with the institution. The prohibition in this paragraph (b) does not apply to *acquisitions* at or below the *simplified acquisition threshold* or to *acquisitions* of *commercial products* and *commercial services*, including commercially available off-the-shelf items.

9.110-5 Contract clause.

The *contracting officer shall* insert the clause at 52.209-14, Reserve Officer Training Corps and Military Recruiting on Campus, in *solicitations* and contracts that are expected to exceed the *simplified acquisition threshold*, with institutions of higher education, when using funds from a *covered agency*. The clause is not prescribed for *solicitations* and contracts using part 12 for the *acquisition* of *commercial products* and *commercial services*.

Subpart 9.2 - Qualifications Requirements

9.200 Scope of subpart.

This subpart implements 10 U.S.C. 3243 and 41 U.S.C.3311 and prescribes policies and procedures regarding *qualification requirements* and the *acquisitions* that are subject to such requirements.

9.201 Definitions.

As used in this subpart-

Qualified bidders list (QBL) means a list of bidders who have had their *products* examined and tested and who have satisfied all applicable *qualification requirements* for that product or have otherwise satisfied all applicable *qualification requirements*.

Qualified manufacturers list (QML) means a list of manufacturers who have had their *products* examined and tested and who have satisfied all applicable *qualification requirements* for that product.

9.202 Policy.

(a)

(1) The *head of the agency* or designee *shall*, before establishing a *qualification requirement*, prepare a written justification-

(i) Stating the necessity for establishing the *qualification requirement* and specifying why the *qualification requirement must* be demonstrated before contract award;

(ii) Estimating the likely costs for testing and evaluation which will be incurred by the potential *offeror* to become qualified; and

(iii) Specifying all requirements that a potential *offeror* (or its product) *must* satisfy in order to become qualified. Only those requirements which are the least restrictive to meet the purposes necessitating the establishment of the *qualification requirements shall* be specified.

(2) Upon request to the *contracting activity*, potential *offerors shall* be provided-

(i) All requirements that they or their *products must* satisfy to become qualified; and

(ii) At their expense (but see 9.204(a)(2) with regard to small businesses), a prompt opportunity to demonstrate their abilities to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned, or of another agency obtained through interagency agreements or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency).

(3) If the services in paragraph (a)(2)(ii) of this section are provided by contract, the contractors selected to provide testing and evaluation services *shall* be-

(i) Those that are not expected to benefit from an absence of additional qualified sources; and

(ii) Required by their contracts to adhere to any restriction on *technical data* asserted by the potential *offeror* seeking qualification.

(4) A potential *offeror* seeking qualification *shall* be promptly informed as to whether qualification is attained and, in the event it is not, promptly furnished specific reasons why qualification was not attained.

(b) When justified under the circumstances, the agency activity responsible for establishing a *qualification requirement shall* submit to the advocate for competition for the *procuring activity* responsible for purchasing the item subject to the *qualification requirement*, a determination that it is unreasonable to specify the standards for qualification which a prospective *offeror* (or its product) *must* satisfy. After considering any comments of the advocate for competition reviewing the determination, the head of the *procuring activity may* waive the requirements of paragraph (a)(1)(ii) through (a)(4) of this section for up to 2 years with respect to the item subject to the *qualification requirement*. A copy of the waiver *shall* be furnished to the *head of the agency* or other official responsible for actions under paragraph (a)(1) of this section. The waiver authority provided in this paragraph does not apply with respect to *qualification requirements* contained in a QPL, QML, or QBL.

(c) If a potential *offeror* can demonstrate to the satisfaction of the *contracting officer* that the potential *offeror* (or its product) meets the standards established for qualification or can meet them before the date specified for award of the contract, a potential *offeror may* not be denied the opportunity to submit and have considered an *offer* for a contract solely because the potential *offeror*-

(1) Is not on a QPL, QML, or QBL maintained by the Department of Defense (DoD) or the National Aeronautics and Space Administration (NASA); or

(2) Has not been identified as meeting a *qualification requirement* established after October 19,1984, by DoD or NASA; or

(3) Has not been identified as meeting a *qualification requirement* established by a civilian agency (not including NASA).

(d) The procedures in subpart 19.6 for referring matters to the Small Business Administration are not mandatory on the *contracting officer* when the basis for a referral would involve a challenge by the *offeror* to either the validity of the *qualification requirement* or the *offeror*'s compliance with such requirement.

(e) The *contracting officer* need not delay a proposed award in order to provide a potential *offeror* with an opportunity to demonstrate its ability to meet the standards specified for qualification. In addition, when approved by the head of an agency or designee, a *procurement* need not be delayed in order to comply with paragraph (a) of this section.

(f) Within 7 years following enforcement of a QPL, QML, or QBL by DoD or NASA, or within 7 years after any *qualification requirement* was originally established by a civilian agency other than NASA, the *qualification requirement shall* be examined and revalidated in accordance with the requirements of paragraph (a) of this section. For DoD and NASA, *qualification requirements* other than QPL's, QML's and QBL's *shall* be examined and revalidated within 7 years after establishment of the requirement under paragraph (a) of this section. Any periods for which a waiver under paragraph (b) of this section is in effect *shall* be excluded in computing the 7 years within which review and revalidation *must* occur.

9.203 QPL's, QML's, and QBL's.

(a) Qualification and listing in a QPL, QML, or QBL is the process by which *products* are obtained from manufacturers or distributors, examined and tested for compliance with specification requirements, or manufacturers or potential *offerors*, are provided an opportunity to demonstrate their abilities to meet the standards specified for qualification. The names of successful *products*, manufacturers, or potential *offerors* are included on lists evidencing their status. Generally, qualification is performed in advance and independently of any specific *acquisition* action. After qualification, the *products*, manufacturers, or potential *offerors* are included in a Federal or Military QPL, QML, or QBL. (See 9.202(a)(2) with regard to any product, manufacturer, or potential *offeror* not yet included on an applicable list.)

(b) Specifications requiring a qualified product are included-

(1) In the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions; and

(2) On the Department of Defense *Acquisition* Streamlining and Standardization Information System (ASSIST) website at *https://assist.dla.mil*.

(c) Instructions concerning qualification procedures are included in the following publications:

(1) Federal Standardization Manual, FSPM-0001.

(2) Department of Defense Manual 4120.24, Defense Standardization Program (DSP) Procedures, (*www.esd.whs.mil/Directives/Issuances/dodm*) as amended by Military Standards 961 and 962 (*https://assist.dla.mil*).

(d) The publications in paragraphs (b)(1) and (c)(1) of this section *may* be obtained from the address in 11.201(d)(1).

9.204 Responsibilities for establishment of a qualification requirement.

The responsibilities of agency activities that establish *qualification requirements* include the following:

(a) Arranging publicity for the *qualification requirements*. If active competition on anticipated future *qualification requirements* is likely to be fewer than two manufacturers or the *products* of two manufacturers, the

activity responsible for establishment of the *qualification requirements must*-

(1) Periodically furnish through the *Governmentwide point of entry (GPE*) a notice seeking additional sources or *products* for qualification unless the *contracting officer* determines that such publication would compromise the national security.

(2) Bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement. However, such costs *may* be borne only if it is determined in accordance with agency procedures that such additional qualified sources or *products* are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period of time, considering the duration and dollar value of anticipated future requirements. A prospective contractor requesting the *United States* to bear testing and evaluation costs *must* certify as to its status as a small business concern under Section 3 of the Small Business Act in order to receive further consideration.

(b) Qualifying *products* that meet specification requirements.

(c) Listing manufacturers and suppliers whose *products* are qualified in accordance with agency procedures.

(d) Furnishing QPL's, QML's, or QBL's or the *qualification requirements* themselves to prospective *offerors* and the public upon request (see 9.202(a)(2)(i)).

(e) Clarifying, as necessary, *qualification requirements*.

(f) In appropriate cases, when requested by the *contracting officer*, providing concurrence in a decision not to enforce a *qualification requirement* for a *solicitation*.

(g) Withdrawing or omitting qualification of a listed product, manufacturer or *offeror*, as necessary.

(h) Advising persons furnished any list of *products*, manufacturers or *offerors* meeting a *qualification requirement* and suppliers whose *products* are on any such list that-

(1) The list does not constitute endorsement of the product, manufacturer, or other source by the Government;

(2) The *products* or sources listed have been qualified under the latest applicable specification;

(3) The list *may* be amended without notice;

(4) The listing of a product or source does not release the supplier from compliance with the specification; and

(5) Use of the list for advertising or publicity is permitted. However, it *must* not be stated or implied that a particular product or source is the only product or source of that type qualified, or that the Government in any way recommends or endorses the *products* or the sources listed.

(i) Reexamining a qualified product or manufacturer when-

(1) The manufacturer has modified its product, or changed the material or the processing sufficiently so that the validity of previous qualification is questionable;

(2) The requirements in the specification have been amended or revised sufficiently to affect the character of the product; or

(3) It is otherwise necessary to determine that the quality of the product is maintained in conformance with the specification.

9.205 Opportunity for qualification before award.

(a) If an agency determines that a *qualification requirement* is necessary, the agency activity responsible for establishing the requirement *must* urge manufacturers and other potential sources to demonstrate their ability to meet the standards specified for qualification and, when possible, give sufficient time to arrange for qualification before award. The responsible agency activity *must*, before establishing any *qualification requirement*, furnish notice through the GPE. The notice *must* include-

(1) Intent to establish a *qualification requirement*;

(2) The specification number and name of the product;

(3) The name and address of the activity to which a request for the information and opportunity described in 9.202(a)(2) *should* be submitted;

(4) The anticipated date that the agency will begin awarding contracts subject to the *qualification requirement*;

(5) A precautionary notice that when a product is submitted for qualification testing, the applicant *must* furnish any specific information that *may* be requested of the manufacturer before testing will begin; and

(6) The approximate time period following submission of a product for qualification testing within which the applicant will be notified whether the product passed or failed the qualification testing (see 9.202(a)(4)).

(b) The activity responsible for establishing a *qualification requirement must* keep any list maintained of those already qualified open for inclusion of additional *products*, manufacturers, or other potential sources.

9.206 Acquisitions subject to qualification requirements.

9.206-1 General.

(a) Agencies *may* not enforce any QPL, QML, or QBL without first complying with the requirements of 9.202(a). However, *qualification requirements* themselves, whether or not previously embodied in a in a QPL, QML, or QBL, *may* be enforced without regard to 9.202(a) if they are in either of the following categories:

(1) Any *qualification requirement* established by statute prior to October 30,1984, for civilian agencies (not including NASA); or

(2) Any *qualification requirement* established by statute or administrative action prior to October 19,1984, for DoD or NASA. *Qualification requirements* established after the above dates *must* comply with 9.202(a) to be enforceable.

(b) Except when the *agency head* or designee determines that an *emergency* exists, whenever an agency elects, whether before or after award, not to enforce a *qualification requirement* which it established, the requirement *may* not thereafter be enforced unless the agency complies with 9.202(a).

(c) If a *qualification requirement* applies, the *contracting officer* need consider only those *offers* identified as meeting the requirement or included on the applicable QPL, QML, or QBL, unless an *offeror* can satisfactorily demonstrate to the *contracting officer* that it or its product or its subcontractor or its product can meet the standards established for qualification before the date specified for award.

(d) If a product subject to a *qualification requirement* is to be acquired as a *component* of an end item, the *contracting officer must* ensure that all such *components* and their *qualification requirements* are properly identified in the *solicitation* since the product or source *must* meet the standards specified for qualification before award.

(e) In *acquisitions* subject to *qualification requirements*, the *contracting officer shall* take the following steps:

(1) Use presolicitation notices in appropriate cases to advise potential suppliers before issuing *solicitations* involving *qualification requirements*. The notices *shall* identify the specification containing the *qualification requirement* and establish an allowable time period, consistent with delivery requirements, for prospective *offerors* to demonstrate their abilities to meet the standards specified for qualification. The notice *shall* be publicized in accordance with 5.204. Whether or not a presolicitation notice is used, the general synopsizing requirements of subpart 5.2 apply.

(2) Distribute *solicitations* to prospective contractors whether or not they have been identified as meeting applicable *qualification requirements*.

(3) When appropriate, request in accordance with agency procedures that a *qualification requirement* not be enforced in a particular *acquisition* and, if granted, so specify in the *solicitation* (see 9.206-1(b)).

(4) Forward requests from potential suppliers for information on a *qualification requirement* to the agency activity responsible for establishing the requirement.

(5) Allow the maximum time, consistent with delivery requirements, between issuing the *solicitation* and the contract award. As a minimum, *contracting officers shall* comply with the time frames specified in 5.203 when applicable.

9.206-2 Contract clause.

The *contracting officer shall* insert the clause at 52.209-1, Qualification Requirements, in *solicitations* and contracts when the *acquisition* is subject to a *qualification requirement*.

9.206-3 Competition.

(a) *Presolicitation*. If a *qualification requirement* applies to an *acquisition*, the *contracting officer shall* review the applicable QPL, QML, or QBL or other identification of those sources which have met the requirement before issuing a *solicitation* to ascertain whether the number of sources is adequate for competition. (See 9.204(a) for duties of the agency activity responsible for establishment of the *qualification requirement*.) If the number of sources is inadequate, the *contracting officer shall* request the agency activity which established the requirement to-

(1) Indicate the anticipated date on which any sources presently undergoing evaluation will have demonstrated their abilities to meet the *qualification requirement* so that the *solicitation* could be rescheduled to allow as many additional sources as possible to qualify; or

(2) Indicate whether a means other than the *qualification requirement* is feasible for testing or demonstrating quality assurance.

(b) *Post solicitation*. The *contracting officer shall* submit to the agency activity which established the *qualification requirement* the names and addresses of concerns which expressed interest in the *acquisition* but are not included on the applicable QPL, QML, or QBL or identified as meeting the *qualification requirement*. The activity will then assist interested concerns in meeting the standards specified for qualification (see 9.202(a)(2) and (4)).

9.207 Changes in status regarding qualification requirements.

(a) The *contracting officer shall* promptly report to the agency activity which established the *qualification requirement* any conditions which *may* merit removal or omission from a QPL, QML, or QBL or affect whether a source *should* continue to be otherwise identified as meeting the requirement. These conditions exist when-

(1) *Products* or services are submitted for *inspection* or acceptance that do not meet the *qualification requirement*;

(2) *Products* or services were previously rejected and the defects were not corrected when submitted for *inspection* or acceptance;

(3) A supplier fails to request reevaluation following change of location or ownership of the plant where the product which met the *qualification requirement* was manufactured (see the clause at 52.209-1, *Qualification Requirements*);

(4) A manufacturer of a product which met the *qualification requirement* has discontinued manufacture of the product;

(5) A source requests removal from a QPL, QML, or QBL;

(6) A condition of meeting the *qualification requirement* was violated; *e.g.,* advertising or publicity contrary to 9.204(h)(5);

(7) A revised specification imposes a new *qualification requirement*;

(8) Manufacturing or design changes have been incorporated in the *qualification requirement*;

(9) The source is listed in the *System for Award Management* Exclusions (see subpart 9.4); or

(10) Performance of a contract subject to a *qualification requirement* is otherwise unsatisfactory.

(b) After considering any of the above or other conditions reasonably related to whether a product or source continues to meet the standards specified for qualification, an agency *may* take appropriate action without advance notification. The agency *shall*, however, promptly notify the affected parties if a product or source is removed from a QPL, QML, or QBL, or will no longer be identified as meeting the standards specified for qualification. This notice *shall* contain specific information why the product or source no longer meets the *qualification requirement*.

Subpart 9.3 - First Article Testing and Approval

9.301 Definition.

Approval, as used in this subpart, means the *contracting officer*'s written notification to the contractor accepting the test results of the *first article*.

9.302 General.

First article testing and *approval* (hereafter referred to as testing and *approval*) ensures that the contractor can furnish a product that conforms to all contract requirements for acceptance. Before requiring testing and *approval*, the *contracting officer shall* consider the-

(a) Impact on cost or time of delivery;

(b) Risk to the Government of foregoing such test; and

(c) Availability of other, less costly, methods of ensuring the desired quality.

9.303 Use.

Testing and *approval may* be appropriate when-

(a) The contractor has not previously furnished the product to the Government;

(b) The contractor previously furnished the product to the Government, but-

(1) There have been subsequent changes in processes or specifications;

(2) Production has been discontinued for an extended period of time; or

(3) The product acquired under a previous contract developed a problem during its life;

(c) The product is described by a performance specification; or

(d) It is essential to have an approved *first article* to serve as a manufacturing standard.

9.304 Exceptions.

Normally, testing and *approval* is not required in contracts for-

(a) Research or development;

(b) *Products* requiring qualification before award (*e.g.,* when an applicable *qualified products list* exists (see subpart 9.2));

(c) *Products* normally sold in the commercial market; or

(d) *Products* covered by complete and detailed technical specifications, unless the requirements are so novel or exacting that it is questionable whether the *products* would meet the requirements without testing and *approval*.

9.305 Risk.

Before *first article approval*, the *acquisition* of materials or *components*, or commencement of production, is normally at the sole risk of the contractor. To minimize this risk, the *contracting officer shall* provide sufficient time in the delivery schedule for *acquisition* of materials and *components*, and for production after receipt of *first article approval*. When Government requirements preclude this action, the *contracting officer may*, before *approval* of the *first article*, authorize the contractor to acquire specific materials or *components* or commence production to the extent essential to meet the delivery schedule (see *Alternate* II of the clause at 52.209-3, *First Article Approval*-Contractor Testing, and *Alternate* II of the clause at 52.209-4, *First Article Approval*-Government Testing). Costs incurred based on this authorization are allocable to the contract for—

(a) Progress payments; and

(b) Termination settlements if the contract is terminated for the convenience of the Government.

9.306 Solicitation requirements.

Solicitations containing a testing and *approval* requirement *shall*-

(a) Provide, in the circumstance where the contractor is to be responsible for the *first article approval* testing-

(1) The performance or other characteristics that the *first article must* meet for *approval*;

(2) The detailed technical requirements for the tests that *must* be performed for *approval*; and

(3) The necessary data that *must* be submitted to the Government in the *first article approval* test report;

(b) Provide, in the circumstance where the Government is to be responsible for the *first article approval* testing-

(1) The performance or other characteristics that the *first article must* meet for *approval*; and

(2) The tests to which the *first article* will be subjected for *approval*;

(c) Inform *offerors* that the requirement *may* be waived when *supplies* identical or similar to those called for have previously been delivered by the *offeror* and accepted by the Government (see 52.209-3(h) and 52.209-4(i));

(d) Permit the submission of alternative *offers*, one including testing and *approval* and the other excluding testing and *approval* (if eligible under paragraph (c) of this section);

(e) State clearly the *first article*'s relationship to the contract quantity (see paragraph (e) of the clause at 52.209-3, *First Article Approval*-Contractor Testing, or 52.209-4, *First Article Approval*-Government Testing);

(f) Contain a delivery schedule for the production quantity (see 11.403). The delivery schedule *may*-

(1) Be the same whether or not testing and *approval* is waived; or

(2) Provide for earlier delivery when testing and *approval* is waived and the Government desires earlier delivery. In the latter case, any resulting difference in delivery schedules *shall* not be a factor in evaluation for award. The clause at 52.209-4, *First Article Approval*-Government Testing, *shall* contain the delivery schedule for the *first article*;

(g) Provide for the submission of contract numbers, if any, to document the *offeror*'s eligibility under paragraph (c) of this section;

(h) State whether the approved *first article* will serve as a manufacturing standard;

(i) Include, when the Government is responsible for *first article testing*, the Government's estimated testing costs as a factor for use in evaluating *offers* (when appropriate); and

(j) Inform *offerors* that the prices for *first articles* and *first article* tests in relation to production quantities *shall* not be materially unbalanced (see 15.404-1(g)) if *first article* test items or tests are to be separately priced.

9.307 Government administration procedures.

(a) Before the contractor ships the *first article*, or the *first article* test report, to the Government laboratory or other activity responsible for *approval* at the address specified in the contract, the *contract administration office shall* provide that activity with as much advance notification as is feasible of the forthcoming *shipment*, and-

(1) Advise that activity of the contractual requirements for testing and *approval*, or evaluation, as appropriate;

(2) Call attention to the notice requirement in paragraph (b) of the clause at 52.209-3, *First Article Approval*-Contractor Testing, or 52.209-4, *First Article Approval*-Government Testing; and

(3) Request that the activity inform the *contract administration office* of the date when testing or evaluation will be completed.

(b) The Government laboratory or other activity responsible for *first article testing* or evaluation *shall* inform the *contracting office* whether to approve, conditionally approve, or disapprove the *first article*. The *contracting officer shall* then notify the contractor of the action taken and furnish a copy of the notice to the *contract administration office*. The notice *shall* include the *first article shipment* number, when available, and the

applicable *line item number*. Any changes in the drawings, designs, or specifications determined by the *contracting officer* to be necessary *shall* be made under the Changes clause, and not by the notice of *approval*, conditional *approval*, or disapproval furnished the contractor.

9.308 Contract clauses.

9.308-1 Testing performed by the contractor.

(a)

(1) The *contracting officer shall* insert the clause at 52.209-3, *First Article Approval*-Contractor Testing, in *solicitations* and contracts when a fixed-price contract is contemplated and it is intended that the contract require-

(i) *First article approval*; and

(ii) That the contractor be required to conduct the *first article testing*.

(2) If it is intended that the contractor be required to produce the *first article* and the production quantity at the same facility, the *contracting officer shall* use the clause with its *Alternate* I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before *first article approval*, the *contracting officer shall* use the clause with its *Alternate* II.

(b)

(1) The *contracting officer shall* insert a clause substantially the same as the clause at 52.209-3, *First Article Approval*—Contractor Testing, in *solicitations* and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require

(i) *First article approval* and

(ii) That the contractor be required to conduct the *first article* test.

(2) If it is intended that the contractor be required to produce the *first article* and the production quantity at the same facility, the *contracting officer shall* use a clause substantially the same as the clause at 52.209-3, *First Article Approval*—Contractor Testing, with its *Alternate* I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before *first article approval*, the *contracting officer shall* use a clause substantially the same as the clause at 52.209-3, *First Article Approval*—Contractor Testing, with its *Alternate* II.

9.308-2 Testing performed by the Government.

(a)

(1) The *contracting officer shall* insert the clause at 52.209-4, *First Article Approval*-Government Testing, in *solicitations* and contracts when a fixed-price contract is contemplated and it is intended that the contract require *first article approval* and that the Government will be responsible for conducting the *first article* test.

(2) If it is intended that the contractor be required to produce the *first article* and the production quantity at the same facility, the *contracting officer shall* use the basic clause with its *Alternate* I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before *first article approval*, the *contracting officer shall* use the basic clause with its *Alternate* II.

(b)

(1) The *contracting officer shall* insert a clause substantially the same as the clause at 52.209-4, *First Article Approval*-Government Testing, in *solicitations* and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require *first article approval* and that the Government be responsible for conducting the *first article* test.

(2) If it is intended that the contractor be required to produce the *first article* and the production quantity at the same facility, the *contracting officer shall* use a clause substantially the same as the clause at 52.209-4, *First Article Approval*-Government Testing, with its *Alternate* I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before *first article approval*, the *contracting officer shall* use a clause substantially the same as the clause at 52.209-4, *First Article Approval*-Government Testing, with its *Alternate* II.

Subpart 9.4 - Debarment, Suspension, and Ineligibility

9.400 Scope of subpart.

(a) This subpart-

(1) Prescribes policies and procedures governing the *debarment* and *suspension* of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of contractors debarred, suspended, proposed for *debarment*, and declared *ineligible* (see the definition of "*ineligible*" in 2.101); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of *ineligible* contractors (9.404) and the effect of this listing (9.405), it does not prescribe policies and procedures governing declarations of ineligibility except for contractors that have been declared *ineligible* pursuant to 10 U.S.C. 983 (see 9.110, and 9.405-1(b)).

(c) For Federal *Acquisition* Supply Chain Security Act (FASCSA) orders, see subpart 4.23.

9.401 Applicability.

In accordance with Public Law 103-355, Section 2455 (31 U.S.C.6101, note), and Executive Order 12689, any *debarment*, *suspension* or other Governmentwide exclusion initiated under the Nonprocurement Common Rule implementing Executive Order 12549 on or after August 25, 1995, *shall* be recognized by and effective for Executive Branch agencies as a *debarment* or *suspension* under this subpart. Similarly, any *debarment*, *suspension*, proposed *debarment* or other Governmentwide exclusion initiated on or after August 25, 1995, under this subpart *shall* also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.

9.402 Policy.

(a) Agencies *shall* solicit *offers* from, award contracts to, and *consent to subcontracts* with responsible contractors only. *Debarment* and *suspension* are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of *debarment* and *suspension* requires that these remedies be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies *shall* impose *debarment*

or *suspension* to protect the Government's interest and only for the causes and in accordance with the procedures in this subpart.

(c) Agencies are encouraged to establish methods and procedures for coordinating their *debarment* or *suspension* actions.

(d) When more than one agency has an interest in the *debarment* or *suspension* of a contractor, the Interagency *Suspension* and *Debarment* Committee, established under Executive Order 12549, and authorized by section 873 of the *National Defense* Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) (31 U.S.C.6101, note), *shall* resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any *suspension*, *debarment*, or related administrative action by any agency.

(e) Agencies *shall* establish appropriate procedures to implement the policies and procedures of this subpart.

9.403 Definitions.

As used in this subpart—

Administrative agreement means an agreement between an *agency suspending and debarring official* and the *contractor* used to resolve a *suspension* or *debarment* proceeding, or a potential *suspension* or *debarment* proceeding.

Affiliates.–

(1) Business concerns, organizations, or individuals are *affiliates* of each other if, directly or indirectly–

(i) Either one controls or has the power to control the other; or

(ii) A third party controls or has the power to control both.

(2) Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the *debarment*, *suspension*, or proposed *debarment* of a *contractor* which has the same or similar management, ownership, or principal employees as the *contractor* that was debarred, suspended, or proposed for *debarment*.

Agency means any executive department, military department or defense *agency*, or other *agency* or independent establishment of the executive branch.

Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition that creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812).

Conviction means—

(1) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(2) Any other resolution that is the functional equivalent of a judgment establishing a criminal offense by a court of competent jurisdiction, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

Contractor means any individual or other legal entity that–

(1) Directly or indirectly (*e.g.,* through an affiliate), submits *offers* for or is awarded, or reasonably *may* be expected to submit *offers* for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or

(2) Conducts business, or reasonably *may* be expected to conduct business, with the Government as an agent or representative of another *contractor*.

Indictment means *indictment* for a criminal offense. An information or other filing by competent authority charging a criminal offense is given the same effect as an *indictment*.

Legal proceedings means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

Nonprocurement Common Rule means the procedures used by Federal *Executive Agencies* to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, *insurance*, payments for specified use, and donation agreements. See 2 CFR part 180 and *agency* enacting regulations in 2 CFR subtitle B.

Pre-notice letter means a written correspondence issued to a *contractor* in a *suspension* or *debarment* matter, which does not immediately result in an exclusion or ineligibility. The letter is issued at the discretion of the *suspending and debarring official*. The letter is not a mandatory step in the *suspension* or *debarment* process.

Unfair trade practices means the commission of any or the following acts by a *contractor*–

(1) A violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determined by the International Trade Commission.

(2) A violation, as determined by the Secretary of Commerce, of any agreement of the group known as the "Coordination Committee" for purposes of the Export Administration Act of 1979 (50 U.S.C. App. 2401, et seq.) or any similar bilateral or multilateral export control agreement.

(3) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the Department or the *head of the agency* to which such certificate was furnished.

Voluntary exclusion means a *contractor*'s written agreement to be excluded for a period under the terms of a settlement between the *contractor* and the *suspending and debarring official* of one or more *agencies*. A *voluntary exclusion must* have Governmentwide effect.

9.404 Exclusions in the System for Award Management.

(a) The General Services Administration (GSA)—

(1) Operates the web-based *System for Award Management (SAM*), which contains exclusion records; and

(2) Provides technical assistance to *Federal agencies* in the use of SAM.

(b) An exclusion record in SAM contains the—

(1) Names and addresses of the entities debarred, suspended, proposed for *debarment*, voluntarily excluded, declared *ineligible*, or excluded or disqualified under the nonprocurement common rule, with cross-references when more than one name is involved in a single action;

(2) Name of the agency or other authority taking the action;

(3) Cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) Effect of the action;

(5) Termination date for each listing;

(6) *Unique Entity Identifier*;

(7) Social Security Number (SSN), Employer Identification Number (EIN), or other *Taxpayer Identification Number (TIN)*, if available; and

(8) Name and telephone number of the agency point of contact for the action.

(c) Each agency *must*—

(1) Identify the individual(s) responsible for entering and updating exclusions data in SAM and assign the appropriate roles;

(2) Remove the exclusion roles in SAM when the individual leaves the organization or changes functions;

(3) For each exclusion, including each voluntary exclusion, accomplished by the agency–

(i) Enter the information required by paragraph (b) of this section within 3 working days after the action becomes effective;

(ii) Determine whether it is legally permitted to enter the SSN, EIN, or other TIN, under agency authority to suspend or debar; and

(iii) Update the exclusion record in SAM, generally within 5 working days after modifying or rescinding an action;

(4) In accordance with internal retention procedures, maintain records relating to each *debarment*, *suspension*, proposed *debarment*, or voluntary exclusion taken or entered into by the agency;

(5) Establish procedures to ensure that the agency does not solicit *offers* from, award contracts to, or *consent to subcontracts* with contractors who have an active exclusion record in SAM, except as otherwise provided in this subpart;

(6) Direct inquiries concerning listed contractors and other entities to the agency or other authority that took the action; and

(7) Contact GSA for technical assistance with SAM, via the support e-mail address or on the technical support phone line.

(d) SAM is available via https://www.sam.gov.

9.405 Effect of listing.

(a) Contractors debarred, suspended, proposed for *debarment*, or voluntarily excluded, are excluded from receiving contracts, and agencies *shall* not solicit *offers* from, award contracts to, or *consent to subcontracts* with these contractors, unless the *agency head* determines that there is a compelling reason for such action (see 9.405-1(a)(2), 9.405-2, 9.406-1(d), 9.407-1(d), and 26.505(e)). Contractors debarred, suspended, proposed for *debarment*, or voluntarily excluded, are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors and other entities that have an active exclusion record in SAM because they have been declared *ineligible* on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Agencies *shall* not solicit *offers* from, award contracts to, or *consent to subcontracts* with these contractors under those conditions and for that period.

(c) Agencies *shall* not enter into, renew, or extend contracts with contractors that have been declared *ineligible* pursuant to 22 U.S.C. 2593e.

(d) Contractors debarred, suspended, proposed for *debarment*, or voluntarily excluded, are excluded from acting as individual *sureties* (see part 28).

(e)

(1) After the opening of bids or receipt of proposals or quotes, the *contracting officer shall* review the exclusion records in SAM.

(2) Bids received from any listed contractor in response to an invitation for bids *shall* be entered on the abstract of bids, and rejected unless the *agency head* determines *in writing* that there is a compelling reason to consider the bid.

(3) Proposals, quotations, or *offers* received from any listed contractor *shall* not be evaluated for award or included in the competitive range, nor *shall* discussions be conducted with a listed *offeror* during a period of ineligibility, unless the *agency head* determines, *in writing*, that there is a compelling reason to do so. If the period of ineligibility expires or is terminated prior to award, the *contracting officer may*, but is not required to, consider such proposals, quotations, or *offers*.

(4) Immediately prior to award, the *contracting officer shall* again review the exclusion records in SAM to ensure that no award is made to a listed contractor.

9.405-1 Continuation of current contracts.

(a) *Contractors debarred, suspended, proposed for debarment, or voluntarily excluded* .

(1) Notwithstanding the *debarment*, *suspension*, proposed *debarment*, or voluntary exclusion, of a contractor, agencies *may* continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, proposed for *debarment*, or voluntarily excluded, unless the *agency head* directs otherwise. A decision as to the type of termination action, if any, to be taken *should* be made only after review by agency *contracting* and technical personnel and by counsel to ensure the propriety of the proposed action.

(2) For contractors debarred, suspended, proposed for *debarment*, or voluntarily excluded, unless the *agency head* makes a written determination of the compelling reasons for doing so, ordering activities *shall* not—

(i) Place orders exceeding the guaranteed minimum under indefinite quantity contracts;

(ii) Place orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or

(iii) Add new work, exercise *options*, or otherwise extend the duration of current contracts or orders.

(b) *Ineligible* contractors. A covered agency, as defined in 9.110-1, *shall* terminate existing contracts and *shall* not place new orders or award new contracts with contractors that have been declared *ineligible* pursuant to 10 U.S.C. 983 (see 9.110), except for contracts at or below the *simplified acquisition threshold* or contracts for the *acquisition* of *commercial products* and *commercial services*.

9.405-2 Restrictions on subcontracting.

(a) When a contractor debarred, suspended, proposed for *debarment*, or voluntarily excluded, is proposed as a subcontractor for any subcontract subject to Government consent (see subpart 44.2), *contracting officers shall* not *consent to subcontracts* with such contractors unless the *agency head* states *in writing* the compelling reasons for this approval action. (See 9.405 concerning declarations of ineligibility affecting sub-*contracting*.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors are prohibited from entering into any subcontract in excess of $45,000, other than a subcontract for a commercially available off-the-shelf item, with a contractor that has been debarred, suspended, proposed for *debarment*, or voluntarily excluded, unless there is a compelling reason to do so. If a contractor intends to enter into a subcontract in excess of $45,000, other than a subcontract for a commercially available off-the-shelf item, with a party that is debarred, suspended, proposed for *debarment*, or voluntarily excluded, as evidenced by the party's having an active exclusion record in SAM (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for *Debarment*, or Voluntarily Excluded, to notify the *contracting officer*, *in writing*, before entering into such subcontract. For contracts for the *acquisition* of *commercial products*, the notification requirement applies only for first-tier subcontracts. For all other contracts, the notification requirement applies to subcontracts at any tier. The notice *must* provide the following:

(1) The name of the subcontractor;

(2) The contractor's knowledge of the reasons for the subcontractor having an active exclusion record in SAM;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its having an active exclusion record in SAM; and

(4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's *debarment*, *suspension*, proposed *debarment*, or voluntary exclusion.

(c) The contractor's compliance with the requirements of 52.209-6 will be reviewed during Contractor Purchasing System Reviews (see subpart 44.3).

9.406 Debarment.

9.406-1 General.

(a) It is the *suspending and debarring official*'s responsibility to determine whether *debarment* is in the Government's interest. The *suspending and debarring official may*, in the public interest, debar a contractor for any of the causes in 9.406-3. The existence of a cause for *debarment*, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures, mitigating factors, or aggravating factors *should* be considered in making any *debarment* decision. Before arriving at any *debarment* decision, the *suspending and debarring official should* consider factors such as the following (some of the factors below could apply to individuals such as contractors that are individuals, and are so marked):

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for *debarment* or had adopted such procedures prior to any Government investigation of the activity cited as a cause for *debarment*.

(2) Whether the contractor (including an individual) brought the activity cited as a cause for *debarment* to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for *debarment* (or the individual cooperated with the investigation) and, if so, made the result of the investigation available to the *suspending and debarring official*.

(4) Whether the contractor (including an individual) cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor (including an individual) has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for *debarment*.

(7) Whether the contractor (including an individual) has implemented or agreed to implement remedial measures, including any identified by the Government.

(8)

(i) Whether the contractor has instituted or agreed to institute new or revised review and control procedures, ethics training, or other relevant training programs.

(ii) For an individual, whether the individual has attended relevant remediation training.

(9) Whether the contractor (including an individual) has had adequate time to eliminate the circumstances that led to the cause for *debarment*.

(10)

(i) Whether the contractor's management recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for *debarment* and has implemented programs to prevent recurrence.

(ii) For an individual, whether the individual recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for *debarment* and has adopted practices to prevent recurrence.

(11) Whether the contractor (including an individual) has a pattern or prior history of wrongdoing, the frequency of incidents and/or duration of the wrongdoing, and the actual or potential harm or impact that results, or *may* result, from the wrongdoing.

(12) Whether and to what extent the contractor (including an individual) planned, initiated, or carried out the wrongdoing, and the kind of positions within the contractor's organization held by the individual involved in the wrongdoing.

(13) Whether the wrongdoing was pervasive within the contractor's organization.

(14) Whether the individual or the contractor's principals tolerated the offense.

(15) Whether the contractor (including an individual) is or has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for *debarment* specified in this subpart.

(16) Whether the contractor (including an individual) has entered into an administrative agreement with a *Federal agency* or a similar agreement with a State or local government that is not Governmentwide but is based on conduct similar to one or more of the causes for *debarment* specified in this subpart.

(17) Whether there are any other factors to consider for the contractor (including an individual) appropriate to the circumstances of a particular case.

(b) The existence or nonexistence of any aggravating or mitigating factors or remedial measures such as set forth in paragraph (a) of this section is not necessarily determinative of a contractor's present responsibility. Accordingly, if a cause for *debarment* exists, the contractor has the burden of demonstrating, to the satisfaction of the *suspending and debarring official*, its present responsibility and that *debarment* is not necessary.

(c) *Debarment* constitutes *debarment* of all divisions or other organizational elements of the contractor, unless the *debarment* decision is limited by its terms to specific divisions, organizational elements, or commodities. The *suspending and debarring official may* extend the *debarment* decision to include any *affiliates* of the contractor if they are—

(1) Specifically named; and

(2) Given written notice of the proposed *debarment* and an opportunity to respond (see 9.406-3(c)).

(d) A contractor's *debarment*, or proposed *debarment*, *shall* be effective throughout the executive branch of the Government, unless the *agency head* or a designee (except see 26.505(e)) states *in writing* the compelling reasons justifying continued business dealings between that agency and the contractor.

(e)

(1) When the *suspending and debarring official* has authority to debar contractors from both contracts pursuant to the Federal *Acquisition* Regulation in this chapter and contracts for the purchase of Federal *personal property* pursuant to the Federal Management Regulation (FMR) in 41 CFR part 102-38, that official *shall* consider simultaneously debarring the contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*.

(2) When debarring a contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*, the *debarment* notice *shall* so indicate and the appropriate FAR and FMR citations *shall* be included.

9.406-2 Causes for debarment.

The *suspending and debarring official may* debar-

(a) A contractor for a *conviction* of or civil judgment for-

(1) Commission of fraud or a criminal offense in connection with-

(i) Obtaining;

(ii) Attempting to obtain; or

(iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of *offers*;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the *United States* or its *outlying areas*, when the product was not

made in the *United States* or its *outlying areas* (see Section 202 of the Defense Production Act (Public Law102-558)); or

(5) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b)

(1) A contractor, based upon a *preponderance of the evidence*, for any of the following-

(i) Violation of the terms of a Government contract or subcontract so serious as to justify *debarment*, such as-

(A) Willful failure to perform in accordance with the terms of one or more contracts; or

(B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(ii) Violations of 41 U.S.C. chapter 81, *Drug-Free Workplace*, as indicated by-

(A) Failure to comply with the requirements of the clause at 52.226-7, *Drug-Free Workplace*; or

(B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a *drug-free workplace* (see 26.504).

(iii) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the *United States* or its *outlying areas*, when the product was not made in the *United States* or its *outlying areas* (see Section 202 of the Defense Production Act (Public Law102-558)).

(iv) Commission of an unfair trade practice as defined in 9.403 (see Section 201 of the Defense Production Act (Pub.L.102-558)).

(v) Delinquent Federal taxes in an amount that exceeds $10;000.

(A) Federal taxes are considered delinquent for purposes of this provision if both of the following criteria apply:

(1) *The tax liability is finally determined.* The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(2) *The taxpayer is delinquent in making payment.* A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(B) Examples.

(1) The taxpayer has received a statutory notice of deficiency, under I.R.C. §6212, which entitles the taxpayer to seek Tax Court review of a proposed tax deficiency. This is not a delinquent tax because it is not a final tax liability. *Should* the taxpayer seek Tax Court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(2) The IRS has filed a notice of Federal tax lien with respect to an assessed tax liability, and the taxpayer has been issued a notice under I.R.C. §6320 entitling the taxpayer to request a hearing with the IRS Office of Appeals contesting the lien filing, and to further appeal to the Tax Court if the IRS determines to sustain the lien filing. In the course of the hearing, the taxpayer is entitled to contest the underlying tax liability because the

taxpayer has had no prior opportunity to contest the liability. This is not a delinquent tax because it is not a final tax liability. *Should* the taxpayer seek tax court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(3) *The taxpayer has entered into an installment agreement pursuant to I.R.C. §6159.* The taxpayer is making timely payments and is in full compliance with the agreement terms. The taxpayer is not delinquent because the taxpayer is not currently required to make full payment.

(4) *The taxpayer has filed for bankruptcy protection.* The taxpayer is not delinquent because enforced collection action is stayed under 11 U.S.C. 362 (the Bankruptcy Code).

(vi) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of-

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the *United States* Code;

(B) Violation of the civil False *Claims* Act (31 U.S.C. 3729-3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

(vii) Determination of a false certification under 52.209-13, Violation of Arms Control Treaties or Agreements-Certification.

(2) A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the *United States*, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989, as amended by Executive Order 13286). Such determination is not reviewable in the *debarment* proceedings.

(c) A contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.

9.406-3 Procedures.

(a) *Investigation and referral*. Agencies *shall* establish procedures for the prompt reporting, investigation, and referral to the *suspending and debarring official* of matters appropriate for that official's consideration.

(b) *Decision-making process.*

(1) Agencies *shall* establish procedures governing the *debarment* decision-making process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures *shall* afford the contractor (and any specifically named *affiliates*) an opportunity to submit, in person, *in writing*, or through a representative, information and argument in opposition to the proposed *debarment*. If the *suspending and debarring official* extends the opportunity for the contractor to submit material in opposition, then the official *should* also give a deadline for submission of materials. The *suspending and debarring official may* use flexible procedures to allow a contractor to present matters in opposition in person or remotely through appropriate technology; if so, the *suspending and debarring official should* change the notice in paragraph (c)(3)(iv) of this section to include those flexible procedures.

(2) In actions not based upon a *conviction* or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed *debarment*, agencies *shall* also-

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of proposal to debar*. A notice of proposed *debarment shall* be issued by the *suspending and debarring official* to the contractor and any specifically named *affiliates*.

(1) The written notice *shall* be sent—

(i) By U.S. mail or private delivery service to the last known street address, with delivery notification service;

(ii) By email to the point of contact email address in the contractor's SAM registration, if any, or to the last known email address as confirmed by the agency; or

(iii) By certified mail to the last known street address with return receipt requested.

(2) The notice *shall* be sent—

(i) To the contractor, the contractor's identified counsel for purposes of the administrative proceedings, or the contractor's agent for service of process; and

(ii) For each specifically named affiliate, to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agent for service of process.

(3) The notice *shall* state—

(i) That *debarment* is being considered;

(ii) The reasons for the proposed *debarment* in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(iii) The cause(s) relied upon under 9.406-2 for proposing *debarment*;

(iv) That, within 30 days after receipt of the notice, the contractor *may* submit, in person, *in writing*, or through a representative, information and argument in opposition to the proposed *debarment*, including any additional specific information that raises a genuine dispute over the material facts;

(v) The agency's procedures governing *debarment* decision making;

(vi) The effect of the issuance of the notice of proposed *debarment*;

(vii) The potential effect of an actual *debarment*;

(viii) That in addition to any information and argument in opposition to a proposed *debarment*, the contractor *must* identify—

(A) Specific facts that contradict the statements contained in the notice of proposed *debarment*. Include any information about any of the factors listed in 9.406-1(a). A general denial is insufficient to raise a genuine dispute over facts material to the proposed *debarment*;

(B) All existing, proposed, or prior exclusions and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(C) All criminal and civil proceedings not included in the notice of proposed *debarment* that grew out of facts relevant to the cause(s) stated in the notice; and

(D) All of the contractor's *affiliates*; and

(ix) That if the contractor fails to disclose the information in paragraph (c)(3)(viii) of this section, or provides false information, the agency taking the action *may* seek further criminal, civil, or administrative action against the contractor, as appropriate.

(d) *Suspending and debarring official's decision*.

(1) In actions based upon a *conviction* or civil judgment, or in which there is no genuine dispute over material facts, the *suspending and debarring official shall* make a decision on the basis of all the information in the administrative record, including any submission made by the contractor. If no *suspension* is in effect, the decision *shall* be made within 45 days from the date that the official administrative record is closed, unless the *suspending and debarring official* extends this period for good cause. The official record closes upon the expiration of the contractor's time to submit information and argument in opposition, including any extensions (see paragraph (b)(1) of this section).

(2)

(i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact *shall* be prepared. The *suspending and debarring official shall* base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The *suspending and debarring official may* refer matters involving disputed material facts to another official for findings of fact. The *suspending and debarring official may* reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The *suspending and debarring official*'s decision *shall* be made after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed *debarment* is not based upon a *conviction* or civil judgment, the cause for *debarment must* be established by a *preponderance of the evidence*.

(e) *Notice of suspending and debarring official's decision*.

(1) If the *suspending and debarring official* decides to impose *debarment*, the contractor and any *affiliates* involved *shall* be given prompt notice using the procedures in paragraphs (c)(1) and (2) of this section—

(i) Referring to the notice of proposed *debarment*;

(ii) Specifying the reasons for *debarment*;

(iii) Stating the period of *debarment*, including effective dates; and

(iv) Advising that the *debarment* is effective throughout the executive branch of the Government unless the head of an agency or a designee makes the statement called for by 9.406-1(d).

(2) If *debarment* is not imposed, the *suspending and debarring official shall* promptly notify the contractor and any *affiliates* involved, using the procedures in paragraphs (c)(1) and (2) of this section.

(f) *Administrative agreements*.

(1) If the contractor enters into an administrative agreement with the Government in order to resolve a *debarment* or potential *debarment* proceeding, the *suspending and debarring official shall* access the website (available at https://www.cpars.gov, then select FAPIIS), enter the requested information, and upload documentation reflecting the administrative agreement.

(2) The *suspending and debarring official* is responsible for the timely and accurate submission of documentation reflecting the administrative agreement. The submission *should* be made within 3 working days.

(3) With regard to information that *may* be covered by a disclosure exemption under the Freedom of Information Act, the *suspending and debarring official shall* follow the procedures at 9.105-2(b)(2)(iv).

(g) *Voluntary exclusions*.

(1) If the contractor enters into a voluntary exclusion with the Government in order to resolve a *debarment* or potential *debarment* matter, the *suspending and debarring official shall* access the website (available at https://www.sam.gov) and enter the requested information into the exclusions section of SAM (see 9.404(c)(3)).

(2) The *suspending and debarring official* is responsible for the timely and accurate submission of documentation reflecting the voluntary exclusion. The submission *should* be made within 3 working days.

(3) Regarding information that *may* be covered by a disclosure exemption under the Freedom of Information Act, the *suspending and debarring official shall* follow the procedures at 9.105-2(b)(2)(iv).

(h) *Pre-notice letters*. Prior to initiating a proposed *debarment*, a pre-notice letter *may* be issued at the discretion of the agency *suspending and debarring official*. A pre-notice letter is not required to initiate *debarment* under this subpart. (See 9.403.)

9.406-4 Period of debarment.

(a)

(1) *Debarment shall* be for a period commensurate with the seriousness of the cause(s). Generally, *debarment should* not exceed 3 years, except that-

(i) *Debarment* for violation of the provisions of 41 U.S.C. chapter 81, *Drug-Free Workplace* (see 26.505) *may* be for a period not to exceed 5 years;

(ii) *Debarments* under 9.406-2(b)(2) *shall* be for 1 year unless extended pursuant to paragraph (b) of this section; and

(iii) *Debarments* under 9.406-2(b)(1)(vii) *shall* be for a period of not less than 2 years, inclusive of any *suspension* period, if *suspension* precedes a *debarment* (see paragraph (a)(2) of this section).

(2) If *suspension* precedes a *debarment*, the *suspension* period *shall* be considered in determining the *debarment* period.

(b) The *suspending and debarring official may* extend the *debarment* for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a *debarment may* not be extended solely on the basis of the facts and circumstances upon which the initial *debarment* action was based. *Debarments* under 9.406-2(b)(2) *may* be extended for additional periods of one year if the Secretary of Homeland Security or the Attorney General determines that the contractor continues to be in violation of the employment provisions of the Immigration and Nationality Act. If *debarment* for an additional period is determined to be necessary, the procedures of 9.406-3 *shall* be followed to extend the *debarment*.

(c) The *suspending and debarring official may* reduce the period or extent of *debarment*, upon the contractor's request, supported by documentation, for reasons such as-

(1) Newly discovered material evidence;

(2) Reversal of the *conviction* or civil judgment upon which the *debarment* was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the *debarment* was imposed; or

(5) Other reasons the the *suspending and debarring official* deems appropriate.

9.406-5 Scope of debarment.

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor *may* be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct *shall* be evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor *may* be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement *may* be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct *shall* be evidence of such knowledge, approval, or acquiescence.

9.407 Suspension.

9.407-1 General.

(a) The *suspending and debarring official may*, in the public interest, suspend a contractor for any of the causes in 9.407-2, using the procedures in 9.407-3.

(b)

(1) *Suspension* is a serious action to be imposed on the basis of *adequate evidence*, pending the completion of an investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government's interest. In deciding whether immediate action is necessary to protect the Government's interest, the *suspending and debarring official* has wide discretion. The *suspending and debarring official may* infer the necessity for immediate action to protect the Government's interest either from the nature of the circumstances giving rise to a cause for *suspension* or from potential business relationships or involvement with a program of the Federal Government. In assessing the adequacy of the evidence, agencies *should* consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment *should* include an examination of basic documents such as contracts, *inspection* reports, and correspondence. An indictment or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes *adequate evidence* for purposes of *suspension* actions.

(2) The existence of a cause for *suspension* does not necessarily require that the contractor be suspended. The *suspending and debarring official should* consider the seriousness of the contractor's acts or omissions and *may*, but is not required to, consider remedial measures, mitigating factors, or aggravating factors, such as those in 9.406-1(a). A contractor has the burden of promptly presenting to the *suspending and debarring official* evidence of remedial measures or mitigating factors when it has reason to know that a cause for *suspension* exists. The existence or nonexistence of any remedial measures or aggravating or mitigating factors is not necessarily determinative of a contractor's present responsibility.

(c) *Suspension* constitutes *suspension* of all divisions or other organizational elements of the contractor, unless the *suspension* decision is limited by its terms to specific divisions, organizational elements, or commodities. The *suspending and debarring official may* extend the *suspension* decision to include any *affiliates* of the contractor if they are-

(1) Specifically named; and

(2) Given written notice of the *suspension* and an opportunity to respond (see 9.407-3(c)).

(d) A contractor's *suspension shall* be effective throughout the executive branch of the Government, unless the *agency head* or a designee (except see 26.505(e)) states *in writing* the compelling reasons justifying continued business dealings between that agency and the contractor.

(e)

(1) When the *suspending and debarring official* has authority to suspend contractors from both contracts pursuant to the Federal *Acquisition* Regulation in this chapter and contracts for the purchase of Federal *personal property* pursuant to Federal Management Regulation (FMR) in 41 CFR part 102-38, that official *shall* consider simultaneously suspending the contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*.

(2) When suspending a contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*, the *suspension* notice *shall* so indicate and the appropriate FAR and FMR citations *shall* be included.

9.407-2 Causes for suspension.

(a) The *suspending and debarring official may* suspend a contractor suspected, upon *adequate evidence*, of-

(1) Commission of fraud or a criminal offense in connection with-

(i) Obtaining;

(ii) Attempting to obtain; or

(iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of *offers*;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Violations of 41 U.S.C. chapter 81, *Drug-Free Workplace*, as indicated by-

(i) Failure to comply with the requirements of the clause at 52.226-7, *Drug-Free Workplace*; or

(ii) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a *drug-free workplace* (see 26.504);

(5) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the *United States* or its *outlying areas*, when the product was not made in the *United States* or its *outlying areas* (see Section 202 of the Defense Production Act (Public Law102-558));

(6) Commission of an unfair trade practice as defined in 9.403 (see section 201 of the Defense Production Act (Pub.L.102-558));

(7) Delinquent Federal taxes in an amount that exceeds $10;000. See the criteria at 9.406-2(b)(1)(v) for determination of when taxes are delinquent;

(8) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of-

(i) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the *United States* Code;

(ii) Violation of the civil False *Claims* Act (31 U.S.C. 3729-3733); or

(iii) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001; or

(9) Determination of a false certification under 52.209-13, Violation of Arms Control Treaties or Agreements-Certification.

(10) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Indictment for any of the causes in paragraph (a) of this section constitutes *adequate evidence* for *suspension*.

(c) The *suspending and debarring official may* upon *adequate evidence* also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

9.407-3 Procedures.

(a) *Investigation and referral*. Agencies *shall* establish procedures for the prompt reporting, investigation, and referral to the *suspending and debarring official* of matters appropriate for that official's consideration.

(b) *Decision-making process*.

(1) Agencies *shall* establish procedures governing the *suspension* decision-making process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures *shall* afford the contractor (and any specifically named *affiliates*) an opportunity, following the imposition of *suspension*, to submit, in person, *in writing*, or through a representative, information and argument in opposition to the *suspension*. If the *suspending and debarring official* extends the opportunity for the contractor to submit material in opposition, then the official *should* also give a deadline for submission of materials. The *suspending and debarring official may* use the flexible procedures in 9.406-3(b)(1); if so, the *suspending and debarring official should* change the notice in paragraph (c)(5) of this section to include those flexible procedures.

(2) In actions not based on an indictment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the *suspension* and if no determination has been made, on the basis of advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the *suspension* would be prejudiced, agencies *shall* also-

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of suspension*. When a contractor and any specifically named *affiliates* are suspended, they *shall* be immediately advised using the procedures in 9.406-3(c)(1) and (2)—

(1) That they have been suspended and that the *suspension* is based on an indictment or other *adequate evidence* that the contractor has committed irregularities–

(i) Of a serious nature in business dealings with the Government; or

(ii) Seriously reflecting on the propriety of further Government dealings with the contractor—any such irregularities *shall* be described in terms sufficient to place the contractor on notice without disclosing the Government's evidence;

(2) That the *suspension* is for a temporary period pending the completion of an investigation and such legal proceedings as *may* ensue;

(3) Of the cause(s) relied upon under 9.407-2 for imposing *suspension*;

(4) Of the effect of the *suspension*;

(5) That, within 30 days after receipt of the notice, the contractor *may* submit, in person, *in writing*, or through a representative, information and argument in opposition to the *suspension*, including any additional specific information that raises a genuine dispute over the material facts;

(6) That additional proceedings to determine disputed material facts will be conducted unless–

(i) The action is based on an indictment; or

(ii) A determination is made, on the basis of advice by the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the *suspension* would be prejudiced;

(7) That, in addition to any information and argument in opposition to a *suspension*, the contractor *must* identify–

(i) Specific facts that contradict the statements contained in the notice of *suspension*. Include any information about any of the factors listed in 9.406-1(a). A general denial is insufficient to raise a genuine dispute over facts material to the *suspension*;

(ii) All existing, proposed, or prior exclusions and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(iii) All criminal and civil proceedings not included in the notice of *suspension* that grew out of facts relevant to the cause(s) stated in the notice; and

(iv) All of the contractor's *affiliates*; and

(8) That if the contractor fails to disclose the information in paragraph (c)(7) of this section or provides false information, the agency taking the action *may* seek further criminal, civil, or administrative action against the contractor, as appropriate.

(d) *Suspending and debarring official's decision*.

(1) The *suspending and debarring official*'s decision *shall* be based on all the information in the administrative record, including any submission made by the contractor, for actions—

(i) Based on an indictment;

(ii) In which the contractor's submission does not raise a genuine dispute over material facts; or

(iii) In which additional proceedings to determine disputed material facts have been denied on the basis of advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office.

(2)

(i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact *shall* be prepared. The *suspending and debarring official shall* base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) Thesuspending and debarring official *may* refer matters involving disputed material facts to another official for findings of fact. The *suspending and debarring official may* reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The *suspending and debarring official*'s decision *shall* be made after the conclusion of the proceedings with respect to disputed facts.

(3) The *suspending and debarring official may* modify or terminate the *suspension* or leave it in force (for example, see 9.406-4(c) for the reasons for reducing the period or extent of *debarment*). However, a decision to modify or terminate the *suspension shall* be without prejudice to the subsequent imposition of—

(i) *Suspension* by any other agency; or

(ii) *Debarment* by any agency.

(4) Prompt written notice of the *suspending and debarring official*'s decision *shall* be sent to the contractor and any *affiliates* involved, using the procedures in 9.406-3(c)(1) and (2).

(e) *Administrative agreement*.

(1) If the contractor enters into an administrative agreement with the Government in order to resolve a *suspension* or potential *suspension* proceeding, the *suspending and debarring official shall* access the website (available at *https://www.cpars.gov*, then select FAPIIS), enter the requested information, and upload documentation reflecting the administrative agreement.

(2) The *suspending and debarring official* is responsible for the timely and accurate submission of documentation reflecting the administrative agreement. The submission *should* be made within 3 working days.

(3) With regard to information that *may* be covered by a disclosure exemption under the Freedom of Information Act, the *suspending and debarring official shall* follow the procedures at 9.105-2(b)(2)(iv).

(f) *Voluntary exclusion*.

(1) If the contractor enters into a voluntary exclusion with the Government in order to resolve a *suspension* or potential *suspension* proceeding, the *suspending and debarring official shall* access the website (available at https://www.sam.gov) and enter the requested information into the exclusions section of SAM (see 9.404(c)(3)).

(2) The *suspending and debarring official* is responsible for the timely and accurate submission of documentation reflecting the voluntary exclusion. The submission *should* be made within 3 working days.

(3) Regarding information that *may* be covered by a disclosure exemption under the Freedom of Information Act, the *suspending and debarring official shall* follow the procedures at 9.105-2(b)(2)(iv).

(g) *Pre-notice letter*. Prior to initiating a *suspension*, a pre-notice letter *may* be issued at the discretion of the agency *suspending and debarring official*. A pre-notice letter is not required to initiate *suspension* under this subpart. (See 9.403.)

9.407-4 Period of suspension.

(a) *Suspension shall* be for a temporary period pending the completion of an investigation and any ensuing legal proceedings, unless sooner terminated by the *suspending and debarring official* or as provided in this section.

(b) If legal proceedings are not initiated within 12 months after the date of the *suspension* notice, the *suspension shall* be terminated unless an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests its extension, in which case it *may* be extended for an additional 6 months. In no event *may* a *suspension* extend beyond 18 months, unless legal proceedings have been initiated within that period.

(c) The *suspending and debarring official shall* notify the Department of Justice or other responsible prosecuting official of the proposed termination of the *suspension*, at least 30 days before the 12-month period expires, to give that official an opportunity to request an extension on the Government's behalf.

9.407-5 Scope of suspension.

The scope of *suspension shall* be the same as that for *debarment* (see 9.406-5), except that the procedures of 9.407-3 *shall* be used in imposing *suspension*.

9.408 [Reserved]

9.409 Contract clause.

The *contracting officer shall* insert the clause at 52.209-6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for *Debarment*, or Voluntarily Excluded, in *solicitations* and contracts where the contract value exceeds $45,000.

Subpart 9.5 - Organizational and Consultant Conflicts of Interest

9.500 Scope of subpart.

This subpart-

(a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;

(b) Provides examples to assist *contracting officers* in applying these rules and procedures to individual *contracting* situations; and

(c) Implements section 8141 of the 1989 Department of Defense Appropriation Act, Pub.L.100-463, 102 Stat.2270-47 (1988).

9.501 Definition.

Marketing consultant, as used in this subpart, means any independent contractor who furnishes advice, information, direction, or assistance to an *offeror* or any other contractor in support of the preparation or submission of an *offer* for a Government contract by that *offeror*. An independent contractor is not a *marketing consultant* when rendering-

(1) Services excluded in subpart 37.2;

(2) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, *components*, or facilities);

(3) Routine legal, actuarial, auditing, and accounting services; and

(4) Training services.

9.502 Applicability.

(a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.

(b) The applicability of this subpart is not limited to any particular kind of *acquisition*. However, organizational conflicts of interest are more likely to occur in contracts involving-

(1) Management support services;

(2) Consultant or other professional services;

(3) Contractor performance of or assistance in technical evaluations; or

(4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

(c) An *organizational conflict of interest may* result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future *acquisition*. In the latter case, some restrictions on future activities of the contractor *may* be required.

(d) *Acquisitions* subject to unique agency *organizational conflict of interest* statutes are excluded from the requirements of this subpart.

9.503 Waiver.

The *agency head* or a designee *may* waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver *must* be *in writing*, *shall* set forth the extent of the conflict, and requires approval by the *agency head* or a designee. *Agency heads shall* not delegate waiver authority below the level of head of a *contracting activity*.

9.504 Contracting officer responsibilities.

(a) Using the general rules, procedures, and examples in this subpart, *contracting officers shall* analyze planned *acquisitions* in order to-

(1) Identify and evaluate potential organizational conflicts of interest as early in the *acquisition* process as possible; and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) *Contracting officers should* obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary *solicitation* provisions and *contract clauses* (see 9.506).

(c) Before issuing a *solicitation* for a contract that *may* involve a significant potential conflict, the *contracting officer shall* recommend to the *head of the contracting activity* a course of action for resolving the conflict (see 9.506).

(d) In fulfilling their responsibilities for identifying and resolving potential conflicts, *contracting officers should* avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The *contracting officer*'s judgment need be formally documented only when a substantive issue concerning potential *organizational conflict of interest* exists.

(e) The *contracting officer shall* award the contract to the apparent successful *offeror* unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the *contracting officer shall* notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the *contracting officer* finds that it is in the best interest of the *United States* to award the contract notwithstanding a conflict of interest, a request for waiver *shall* be submitted in accordance with 9.503. The waiver request and decision *shall* be included in the contract file.

9.505 General rules.

The general rules in 9.505-1 through 9.505-4 prescribe limitations on *contracting* as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts *may* arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. Each individual *contracting* situation *should* be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are-

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses-

(1) Proprietary information that was obtained from a Government official without proper authorization; or

(2) *Source selection information* (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

9.505-1 Providing systems engineering and technical direction.

(a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production *shall* not-

(1) Be awarded a contract to supply the system or any of its major *components*; or

(2) Be a subcontractor or consultant to a supplier of the system or any of its major *components*.

(b) Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore this contractor *should* not be in a position to make decisions favoring its own *products* or capabilities.

9.505-2 Preparing specifications or work statements.

(a)

(1) If a contractor prepares and furnishes complete specifications covering *nondevelopmental items*, to be used in a competitive *acquisition*, that contractor *shall* not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. The restriction in this paragraph (a)(1) *shall* not apply to-

(i) Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data *may* have been paid for separately or in the price of the product; or

(ii) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.

(2) If a single contractor drafts complete specifications for nondevelopmental equipment, it *should* be eliminated for a reasonable time from competition for production based on the specifications. This *should* be done in order to avoid a situation in which the contractor could draft specifications favoring its own *products* or capabilities. In this way the Government can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

(3) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government *may* have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition *should* be imposed.

(b)

(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services-or provides material leading directly, predictably, and without delay to such a work statement-that contractor *may* not supply the system, major *components* of the system, or the services unless-

(i) It is the sole source;

(ii) It has participated in the development and design work; or

(iii) More than one contractor has been involved in preparing the work statement.

(2) Agencies *should* normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own *products* or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in paragraph (b)(1) of this section.

(3) For the reasons given in paragraph (a)(3) of this section, no prohibitions are imposed on development and design contractors.

9.505-3 Providing evaluation services.

Contracts for the evaluation of *offers* for *products* or services *shall* not be awarded to a contractor that will evaluate its own *offers* for *products* or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests.

9.505-4 Obtaining access to proprietary information.

(a) When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor *may* gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information-

(1) Furnished voluntarily without limitations on its use; or

(2) Available to the Government or contractor from other sources without restriction.

(b) A contractor that gains access to proprietary information of other companies in performing *advisory and assistance services* for the Government *must* agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The *contracting officer shall* obtain copies of these agreements and ensure that they are properly executed.

(c) Contractors also obtain proprietary and *source selection information* by acquiring the services of *marketing consultants* which, if used in connection with an *acquisition*, *may* give the contractor an unfair competitive advantage. Contractors *should* make inquiries of *marketing consultants* to ensure that the *marketing consultant* has provided no unfair competitive advantage.

9.506 Procedures.

(a) If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, *contracting officers* first *should* seek the information from within the Government or from other readily available sources. Government sources include the files and the knowledge of personnel within the *contracting office*, other *contracting offices*, the cognizant contract administration and audit activities and offices concerned with contract financing. Non-Government sources include publications and *commercial services*, such as credit rating services, trade and financial journals, and business directories and registers.

(b) If the *contracting officer* decides that a particular *acquisition* involves a significant potential *organizational conflict of interest*, the *contracting officer shall*, before issuing the *solicitation*, submit for approval to the chief of the *contracting office* (unless a higher level official is designated by the agency)-

(1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section;

(2) A draft *solicitation* provision (see 9.507-1); and

(3) If appropriate, a proposed *contract clause* (see 9.507-2).

(c) The approving official *shall*-

(1) Review the *contracting officer*'s analysis and recommended course of action, including the draft provision and any proposed clause;

(2) Consider the benefits and detriments to the Government and prospective contractors; and

(3) Approve, modify, or reject the recommendations *in writing*.

(d) The *contracting officer shall*-

(1) Include the approved provision(s) and any approved clause(s) in the *solicitation* or the contract, or both;

(2) Consider additional information provided by prospective contractors in response to the *solicitation* or during negotiations; and

(3) Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the *head of the contracting activity*.

(e) If, during the effective period of any restriction (see 9.507), a *contracting office* transfers *acquisition* responsibility for the item or system involved, it *shall* notify the successor *contracting office* of the restriction, and send a copy of the contract under which the restriction was imposed.

9.507 Solicitation provisions and contract clause.

9.507-1 Solicitation provisions.

As indicated in the general rules in 9.505, significant potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected *solicitations shall* contain a provision that-

(a) Invites *offerors*' attention to this subpart;

(b) States the nature of the potential conflict as seen by the *contracting officer*;

(c) States the nature of the proposed restraint upon future contractor activities; and

(d) Depending on the nature of the *acquisition*, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

9.507-2 Contract clause.

(a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor *must* agree to some other restraint, the *solicitation shall* contain a proposed clause that specifies both the nature and duration of the proposed restraint. The *contracting officer shall* include the clause in the contract, first negotiating the clause's final terms with the successful *offeror*, if it is appropriate to do so (see 9.506(d)).

(b) The restraint imposed by a clause *shall* be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction *shall* specify termination by a specific date or upon the occurrence of an identifiable event.

9.508 Examples.

The examples in paragraphs (a) through (i) of this section illustrate situations in which questions concerning organizational conflicts of interest *may* arise. They are not all inclusive, but are intended to help the *contracting officer* apply the general rules in 9.505 to individual contract situations.

(a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (*i.e.,* turbines, drive shafts, propellers, etc.). Company A *should* not be allowed to supply any powerplant *components*. Company A can, however, supply *components* of the submarine unrelated to the powerplant (*e.g.,* fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying *components* is limited to those for the system only.

(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A *may* supply system Y or its *components*.

(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A *may* supply the equipment.

(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific *acquisition*. These companies *may* supply the item.

(e) Before an *acquisition* for *information technology* is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A *should* be excluded from the initial follow-on *information technology* hardware *acquisition*.

(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A *may* not be awarded this follow-on contract.

(g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A *may* not be awarded a contract to conduct the training.

(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract *must* require Company A to-

(1) Enter into agreements with these firms to protect any proprietary information they provide; and

(2) Refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it was intended.

(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X *should* be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.

Subpart 9.6 - Contractor Team Arrangements

9.601 Definition.

Contractor team arrangement, as used in this subpart, means an arrangement in which-

(1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or

(2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or *acquisition* program.

9.602 General.

(a) *Contractor team arrangements may* be desirable from both a Government and industry standpoint in order to enable the companies involved to-

(1) Complement each other's unique capabilities; and

(2) *Offer* the Government the best combination of performance, cost, and delivery for the system or product being acquired.

(b) *Contractor team arrangements may* be particularly appropriate in complex research and development *acquisitions*, but *may* be used in other appropriate *acquisitions*, including production.

(c) The companies involved normally form a *contractor team arrangement* before submitting an *offer*. However, they *may* enter into an arrangement later in the *acquisition* process, including after contract award.

9.603 Policy.

The Government will recognize the integrity and validity of *contractor team arrangements*; *provided*, the arrangements are identified and company relationships are fully disclosed in an *offer* or, for arrangements entered into after submission of an *offer*, before the arrangement becomes effective. The Government will not normally require or encourage the dissolution of *contractor team arrangements*.

9.604 Limitations.

Nothing in this subpart authorizes *contractor team arrangements* in violation of antitrust statutes or limits the Government's rights to-

(a) Require *consent to subcontracts* (see subpart 44.2);

(b) Determine, on the basis of the stated *contractor team arrangement*, the responsibility of the prime contractor (see subpart 9.1);

(c) Provide to the prime contractor data rights owned or controlled by the Government;

(d) Pursue its policies on competitive *contracting*, subcontracting, and *component* breakout after initial production or at any other time; and

(e) Hold the prime contractor fully responsible for contract performance, regardless of any team arrangement between the prime contractor and its subcontractors.

Subpart 9.7 - Defense Production Pools and Research and Development Pools

9.701 Definition.

Pool, as used in this subpart, means a group of concerns (see 19.001) that have-

(1) Associated together in order to obtain and perform, jointly or in conjunction with each other, defense production or research and development contracts;

(2) Entered into an agreement governing their organization, relationship, and procedures; and

(3) Obtained approval of the agreement by either-

(i) The Small Business Administration (SBA) under section 9 or 11 of the Small Business Act (15 U.S.C.638 or 640) (see 13 CFR125); or

(ii) A designated official under Part V of Executive Order 10480, August 14,1953 (18 FR4939, August 20,1953) and section 708 of the Defense Production Act of1950 (50 U.S.C. App.2158).

9.702 Contracting with pools.

(a) Except as specified in this subpart, a *pool shall* be treated the same as any other prospective or actual contractor.

(b) The *contracting officer shall* not award a contract to a *pool* unless the *offer* leading to the contract is submitted by the *pool* in its own name or by an individual *pool* member expressly stating that the *offer* is on behalf of the *pool*.

(c) Upon receipt of an *offer* submitted by a group representing that it is a *pool*, the *contracting officer shall* verify its approved status with the SBA District Office Director or other approving agency and document the contract file that the verification was made.

(d) *Pools* approved by the SBA under the Small Business Act are entitled to the preferences and privileges accorded to small business concerns. Approval under the Defense Production Act does not confer these preferences and privileges.

(e) Before awarding a contract to an unincorporated *pool*, the *contracting officer shall* require each *pool* member participating in the contract to furnish a certified copy of a *power of attorney* identifying the agent authorized to sign the *offer* or contract on that member's behalf. The *contracting officer shall* attach a copy of each *power of attorney* to each signed copy of the contract retained by the Government.

9.703 Contracting with individual pool members.

(a) *Pool* members *may* submit individual *offers*, independent of the *pool*. However, the *contracting officer shall* not consider an independent *offer* by a *pool* member if that *pool* member participates in a competing *offer* submitted by the *pool*.

(b) If a *pool* member submits an individual *offer*, independent of the *pool*, the *contracting officer shall* consider the *pool* agreement, along with other factors, in determining whether that *pool* member is a *responsible prospective contractor* under subpart 9.1.

52.203-13 Contractor Code of Business Ethics and Conduct.

As prescribed in 3.1004(a), insert the following clause:

Contractor Code of Business Ethics and Conduct (Nov 2021)

(a) *Definitions. As used in this clause—*

Agent means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.

Full cooperation-

(1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require-

(i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a Contractor from-

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business *segment*; and similar positions).

Subcontract means any contract entered into by a *subcontractor* to furnish *supplies* or services for performance of a prime contract or a *subcontract*.

Subcontractor means any supplier, distributor, vendor, or firm that furnished *supplies* or services to or for a prime contractor or another *subcontractor*.

United States, means the 50 States, the District of Columbia, and *outlying areas*.

(b) *Code of business ethics and conduct.*

(1) Within 30 days after contract award, unless the *Contracting Officer* establishes a longer time period, the Contractor *shall—*

(i) Have a written code of business ethics and conduct; and

(ii) Make a copy of the code available to each employee engaged in performance of the contract.

(2) *The Contractor shall-*

(i) Exercise due diligence to prevent and detect criminal conduct; and

(ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

(3)

(i) The Contractor *shall* timely disclose, *in writing*, to the agency Office of the Inspector General (OIG), with a copy to the *Contracting Officer*, whenever, in connection with the award, performance, or closeout of this contract or any *subcontract* thereunder, the Contractor has credible evidence that a principal, employee, *agent*, or *subcontractor* of the Contractor has committed-

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the *United States* Code; or

(B) A violation of the civil False *Claims* Act (31 U.S.C. 3729-3733).

(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government *may* transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.

(iii) If the violation relates to an order against a *Governmentwide acquisition contract*, a *multi-agency contract*, a multiple-award schedule contract such as the Federal Supply Schedule, or any other *procurement* instrument intended for use by multiple agencies, the Contractor *shall* notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.

(c) Business ethics awareness and compliance program and internal control system. This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the *acquisition* of a *commercial product* or *commercial service* as defined at FAR 2.101. The Contractor *shall* establish the following within 90 days after contract award, unless the *Contracting Officer* establishes a longer time period:

(1) An ongoing business ethics awareness and compliance program.

(i) This program *shall* include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.

(ii) The training conducted under this program *shall* be provided to the Contractor's principals and employees, and as appropriate, the Contractor's *agents* and *subcontractors*.

(2) An internal control system.

(i) The Contractor's internal control system *shall*—

(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and

(B) Ensure corrective measures are promptly instituted and carried out.

(ii) At a minimum, the Contractor's internal control system *shall* provide for the following:

(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.

(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government *contracting*, including-

(1) Monitoring and auditing to detect criminal conduct;

(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and

(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees *may* report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.

(F) Timely disclosure, *in writing*, to the agency OIG, with a copy to the *Contracting Officer*, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a *subcontract* thereunder, the Contractor has credible evidence that a principal, employee, *agent*, or *subcontractor* of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False *Claims* Act (31 U.S.C. 3729-3733).

(1) If a violation relates to more than one Government contract, the Contractor *may* make the disclosure to the agency OIG and *Contracting Officer* responsible for the largest dollar value contract impacted by the violation.

(2) If the violation relates to an order against a *Governmentwide acquisition contract*, a *multi-agency contract*, a multiple-award schedule contract such as the Federal Supply Schedule, or any other *procurement* instrument intended for use by multiple agencies, the contractor *shall* notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract, and the respective agencies' *contracting officers*.

(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.

(4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.

(G) *Full cooperation* with any Government agencies responsible for audits, investigations, or corrective actions.

(d) *Subcontracts*.

(1) The Contractor *shall* include the substance of this clause, including this paragraph (d), in *subcontracts* that exceed the threshold specified in FAR 3.1004(a) on the date of *subcontract* award and a performance period of

more than 120 days.

(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False *Claims* Act or of Federal criminal law *shall* be directed to the agency Office of the Inspector General, with a copy to the *Contracting Officer*.

(End of clause)

Parent topic: 52.203 [Reserved]

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

(Updated September 2024)

Introduction

The "Principles of Federal Prosecution of Business Organizations" in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision" and the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one." JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. *See* U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11). Moreover, Criminal Division policies on monitor selection instruct prosecutors to consider, at the time of the resolution, whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems and whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future to determine whether a monitor is appropriate.

This document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (*e.g.*, monitorship or reporting obligations).

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations, that might impact its compliance program. There are, however, common questions that we may ask in the course of making an individualized determination. As the Justice Manual notes, there are three "fundamental questions" a prosecutor should ask:

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?

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3. Does the corporation's compliance program work in practice?

See JM 9-28.800.

In answering each of these three "fundamental questions," prosecutors may evaluate the company's performance on various topics that the Criminal Division has frequently found relevant in evaluating a corporate compliance program both at the time of the offense and at the time of the charging decision and resolution.[1] The sample topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient given the particular facts at issue and the circumstances of the company.[2] Even though we have organized the topics under these three fundamental questions, we recognize that some topics necessarily fall under more than one category.

I. Is the Corporation's Compliance Program Well Designed?

The critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or permitting employees to engage in misconduct. JM 9-28.800.

Accordingly, prosecutors should examine the comprehensiveness of the compliance program, ensuring that there is not only a clear message that misconduct is not tolerated, but also policies and procedures – from appropriate assignments of responsibility, to training programs, to lines of reporting and communication, to systems of incentives and discipline – that ensure the compliance program is well-integrated into the company's operations and workforce.

A. Risk Assessment

The starting point for a prosecutor's evaluation of whether a company has a well-designed compliance program is to understand the company's business from a commercial perspective, how the company has identified, assessed, and defined its risk profile, including specific factors that mitigate the company's risk, and the degree to which the program devotes appropriate scrutiny and resources to the remaining spectrum of risks. This evaluation should account for emerging risks as internal and external circumstances impacting the company's risk profile evolve. In short, prosecutors should endeavor to understand why the company has chosen to set up the compliance program the way that it has, and why and how the company's compliance program has evolved over time.

Prosecutors should consider whether the program is appropriately "designed to detect [and prevent] the particular types of misconduct most likely to occur in a particular corporation's line of business" and "complex regulatory environment []." JM 9-28.800.[3] For example, prosecutors should consider whether the company has analyzed and addressed the varying risks presented by, among other factors, the location of its operations, the industry sector, the competitiveness of the market, the regulatory landscape, potential clients and business partners, transactions with foreign

governments, payments to foreign officials, use of third parties, gifts, travel, and entertainment expenses, and charitable and political donations. Where relevant, prosecutors should consider the technology—especially new and emerging technology—that the company and its employees are using to conduct company business, whether the company has conducted a risk assessment regarding the use of that technology, and whether the company has taken appropriate steps to mitigate any risk associated with the use of that technology.

Prosecutors should also consider "[t]he effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment" and whether its criteria are "periodically updated." *See, e.g.*, JM 9-47-120(2)(c); U.S.S.G. § 8B2.1(c) ("the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement [of the compliance program] to reduce the risk of criminal conduct").

Prosecutors may credit the quality and effectiveness of a risk-based compliance program that devotes appropriate attention and resources to high-risk transactions, even if it fails to prevent an infraction. Prosecutors should therefore consider, as an indicator of risk-tailoring, "revisions to corporate compliance programs in light of lessons learned." JM 9-28.800.

- **Risk Management Process** – What methodology has the company used to identify, analyze, and address the particular risks it faces? What features of the company reduce its exposure to such risks? Is the company's approach to risk management proactive or reactive? What information has the company identified and collected to help detect the type of misconduct in question? How has that information informed the company's compliance program?

- **Risk-Tailored Resource Allocation –** Does the company deploy its compliance resources in a risk-based manner, with greater scrutiny applied to greater areas of risk?

- **Updates and Revisions** – Is the risk assessment current and subject to periodic review? Is the periodic review limited to a "snapshot" in time or based upon continuous access to operational data and information across functions? Has the periodic review led to updates in policies, procedures, and controls? Do these updates account for risks discovered through misconduct or other problems with the compliance program?

- **Lessons Learned** – Does the company have a process for tracking and incorporating into its periodic risk assessment lessons learned either from the company's own prior issues or from those of other companies operating in the same industry and/or geographical region?

- **Management of Emerging Risks to Ensure Compliance with Applicable Law** – Does the company have a process for identifying and managing emerging internal and

external risks that could potentially impact the company's ability to comply with the law, including risks related to the use of new technologies? How does the company assess the potential impact of new technologies, such as artificial intelligence (AI)[4], on its ability to comply with criminal laws? Is management of risks related to use of AI and other new technologies integrated into broader enterprise risk management (ERM) strategies? What is the company's approach to governance regarding the use of new technologies such as AI in its commercial business and in its compliance program? How is the company curbing any potential negative or unintended consequences resulting from the use of technologies, both in its commercial business and in its compliance program? How is the company mitigating the potential for deliberate or reckless misuse of technologies, including by company insiders? To the extent that the company uses AI and similar technologies in its business or as part of its compliance program, are controls in place to monitor and ensure its trustworthiness, reliability, and use in compliance with applicable law and the company's code of conduct? Do controls exist to ensure that the technology is used only for its intended purposes? What baseline of human decision-making is used to assess AI? How is accountability over use of AI monitored and enforced? How does the company train its employees on the use of emerging technologies such as AI?

B. Policies and Procedures

Any well-designed compliance program utilizes policies and procedures to give both content and effect to ethical norms and to mitigate risks identified by the company as part of its risk assessment process. As a threshold matter, prosecutors should examine whether the company has a code of conduct that sets forth, among other things, the company's commitment to full compliance with relevant Federal laws that is accessible and applicable to all company employees. As a corollary, prosecutors should also assess whether the company has established policies and procedures that incorporate the culture of compliance into its day-to-day operations.

- **Design** – What is the company's process for designing and implementing new policies and procedures and updating existing policies and procedures, and has that process changed over time? Is there a process for updating policies and procedures to reflect lessons learned either from the company's own prior issues or from those of other companies operating in the same industry and/or geographical region? Is there a process for updating policies and procedures to address emerging risks, including those associated with the use of new technologies? Who has been involved in the design of policies and procedures? Have business units been consulted prior to rolling them out?

- **Comprehensiveness** – What efforts has the company made to monitor and implement policies and procedures that reflect and deal with the spectrum of risks it faces, including changes to the legal and regulatory landscape and the use of new technologies?

- **Accessibility** – How has the company communicated its policies and procedures to all employees and relevant third parties? If the company has foreign subsidiaries, are there linguistic or other barriers to foreign employees' access? Have the policies and procedures been published in a searchable format for easy reference? How does the company confirm that employees know how to access relevant policies? Does the company track access to various policies and procedures to understand what policies are attracting more attention from relevant employees?

- **Responsibility for Operational Integration** – Who has been responsible for integrating policies and procedures? Have they been rolled out in a way that ensures employees' understanding of the policies? In what specific ways are compliance policies and procedures reinforced through the company's internal control systems?

- **Gatekeepers** – What, if any, guidance and training has been provided to key gatekeepers in the control processes (*e.g.*, those with approval authority or certification responsibilities)? Do they know what misconduct to look for? Do they know when and how to escalate concerns?

C. Training and Communications

Another hallmark of a well-designed compliance program is appropriately tailored training and communications.

Prosecutors should assess the steps taken by the company to ensure that policies and procedures have been integrated into the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners. Prosecutors should also assess whether the company has relayed information in a manner tailored to the audience's size, sophistication, or subject matter expertise. Some companies, for instance, give employees practical advice or case studies to address real-life scenarios, and/or guidance on how to obtain ethics advice on a case-by-case basis as needs arise. Other companies have invested in shorter, more targeted training sessions to enable employees to timely identify and raise issues to appropriate compliance, internal audit, or other risk management functions. Prosecutors should also assess whether the training adequately covers prior compliance incidents and how the company measures the effectiveness of its training curriculum.

Prosecutors, in short, should examine whether the compliance program is being disseminated to, and understood by, employees in practice in order to decide whether the compliance program is "truly effective." JM 9-28.800.

- **Risk-Based Training** – What training have employees in relevant control functions received? Has the company provided tailored training for high-risk and control employees, including training that addresses risks in the area(s) where misconduct occurred? Have supervisory employees received different or supplementary training?

What analysis has the company undertaken to determine who should be trained and on what subjects?

- **Form/Content/Effectiveness of Training** – Has the training been offered in the form and language appropriate for the audience? Are the company's training and communications tailored to the particular needs, interests, and values of relevant employees? Is the training provided online or in-person (or both), and what is the company's rationale for its choice? Has the training addressed lessons learned from prior compliance incidents? Has the training addressed lessons learned from compliance issues faced by other companies operating in the same industry and/or geographical region? Whether online or in-person, is there a process by which employees can ask questions arising out of the trainings? How has the company measured the effectiveness of the training? Has the company evaluated the employees' engagement with the training session and whether they have learned the covered subject matter? How has the company addressed employees who fail all or a portion of the testing? Has the company evaluated the extent to which the training has an impact on employee behavior or operations?

- **Communications about Misconduct** – What has senior management done to let employees know the company's position concerning misconduct? What communications have there been generally when an employee is terminated or otherwise disciplined for failure to comply with the company's policies, procedures, and controls (*e.g.*, anonymized descriptions of the type of misconduct that leads to discipline)?

- **Availability of Guidance** – What resources have been available to employees to provide guidance relating to compliance policies? How has the company assessed whether its employees know when to seek advice and whether they would be willing to do so?

D. Confidential Reporting Structure and Investigation Process

Another hallmark of a well-designed compliance program is the existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or suspected or actual misconduct. Prosecutors should assess whether the company's complaint-handling process includes proactive measures to create a workplace atmosphere without fear of retaliation, appropriate processes for the submission of complaints, and processes to protect whistleblowers. Prosecutors should also assess the company's processes for handling investigations of such complaints, including the routing of complaints to proper personnel, timely completion of thorough investigations, and appropriate follow-up and discipline.

Confidential reporting mechanisms are highly probative of whether a company has established corporate governance mechanisms that can effectively detect and prevent misconduct. *See* U.S.S.G. § 8B2.1(b)(5)(C) (an effectively working compliance program will have in place, and have publicized, "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation").

- **Effectiveness of the Reporting Mechanism** – Does the company have an anonymous reporting mechanism and, if not, why not? How is the reporting mechanism publicized to the company's employees and other third parties? Has it been used? Does the company test whether employees are aware of the hotline and feel comfortable using it? Does the company encourage and incentivize reporting of potential misconduct or violation of company policy? Conversely, does the company use practices that tend to chill such reporting? How does the company assess employees' willingness to report misconduct? How has the company assessed the seriousness of the allegations it received? Has the compliance function had full access to reporting and investigative information?

- **Commitment to Whistleblower Protection and Anti-Retaliation –** Does the company have an anti-retaliation policy? Does the company train employees on both internal anti-retaliation policies and external anti-retaliation and whistleblower protection laws? To the extent that the company disciplines employees involved in misconduct, are employees who reported internally treated differently than others involved in misconduct who did not? Does the company train employees on internal reporting systems as well as external whistleblower programs and regulatory regimes?

- **Properly Scoped Investigations by Qualified Personnel** – How does the company determine which complaints or red flags merit further investigation? How does the company ensure that investigations are properly scoped? What steps does the company take to ensure investigations are independent, objective, appropriately conducted, and

properly documented? How does the company determine who should conduct an investigation, and who makes that determination?

- **Investigation Response** – Does the company apply timing metrics to ensure responsiveness? Does the company have a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations?

- **Resources and Tracking of Results** – Are the reporting and investigating mechanisms sufficiently funded? How has the company collected, tracked, analyzed, and used information from its reporting mechanisms? Does the company periodically analyze the reports or investigation findings for patterns of misconduct or other red flags for compliance weaknesses? Does the company periodically test the effectiveness of the hotline, for example by tracking a report from start to finish?

E. Third Party Management

A well-designed compliance program should apply risk-based due diligence to its third-party relationships. Although the need for, and degree of, appropriate due diligence may vary based on the size and nature of the company, transaction, and third party, prosecutors should assess the extent to which the company has an understanding of the qualifications and associations of third-party partners, including the agents, consultants, and distributors that are commonly used to conceal misconduct, such as the payment of bribes to foreign officials in international business transactions.

Prosecutors should also assess whether the company knows the business rationale for needing the third party in the transaction, and the risks posed by third-party partners, including the third-party partners' reputations and relationships, if any, with foreign officials. For example, a prosecutor should analyze whether the company has ensured that contract terms with third parties specifically describe the services to be performed, that the third party is actually performing the work, and that its compensation is commensurate with the work being provided in that industry and geographical region. Prosecutors should further assess whether the company engaged in ongoing monitoring of the third-party relationships, be it through updated due diligence, training, audits, and/or annual compliance certifications by the third party.

In sum, a company's third-party management practices are a factor that prosecutors should assess to determine whether a compliance program is in fact able to "detect [and prevent] the particular types of misconduct most likely to occur in a particular corporation's line of business." JM 9-28.800.

- **Risk-Based and Integrated Processes** – How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company? How has this process been integrated into the relevant

procurement and vendor management processes? Does the third-party management process function allow for the review of vendors in a timely manner? How is the company leveraging available data to evaluate vendor risk during the course of the relationship with the vendor?

- **Appropriate Controls** – How does the company ensure there is an appropriate business rationale for the use of third parties? If third parties were involved in the underlying misconduct, what was the business rationale for using those third parties? What mechanisms exist to ensure that the contract terms specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?

- **Management of Relationships** – How has the company considered and analyzed the compensation and incentive structures for third parties against compliance risks? How does the company monitor its third parties? Does the company have audit rights to analyze the books and accounts of third parties, and has the company exercised those rights in the past? How does the company train its third-party relationship managers about compliance risks and how to manage them? How does the company incentivize compliance and ethical behavior by third parties? Does the company engage in risk management of third parties throughout the lifespan of the relationship, or primarily during the onboarding process?

- **Real Actions and Consequences** – Does the company track red flags that are identified from due diligence of third parties and how those red flags are addressed? Does the company keep track of third parties that do not pass the company's due diligence or that are terminated, and does the company take steps to ensure that those third parties are not hired or re-hired at a later date? If third parties were involved in the misconduct at issue in the investigation, were red flags identified from the due diligence or after hiring the third party, and how were they resolved? Has a similar third party been suspended, terminated, or audited as a result of compliance issues?

F. Mergers and Acquisitions (M&A)

A well-designed compliance program should include comprehensive due diligence of any acquisition targets, as well as a process for timely and orderly integration of the acquired entity into existing compliance program structures and internal controls. Pre-M&A due diligence, where possible, enables the acquiring company to evaluate more accurately each target's value and negotiate for the costs of any corruption or misconduct to be borne by the target. Flawed or incomplete pre- or post-acquisition due diligence and integration can allow misconduct to continue at the target company, causing resulting harm to a business's profitability and reputation and risking civil and criminal liability.

The extent to which a company subjects its acquisition targets to appropriate scrutiny is indicative of whether its compliance program is, as implemented, able to effectively enforce its internal controls and remediate misconduct at all levels of the organization.

- **Due Diligence Process** – Was the company able to complete pre-acquisition due diligence and, if not, why not? Was the misconduct or the risk of misconduct identified during due diligence? Who conducted the risk review for the acquired/merged entities and how was it done? What is the M&A due diligence process generally?

- **Integration in the M&A Process** – How has the compliance function been integrated into the merger, acquisition, and integration process? Does the company account for migrating or combining critical enterprise resource planning systems as part of the integration process? To what extent did compliance and risk management functions play a role in designing and executing the integration strategy?

- **Process Connecting Due Diligence to Implementation** – What has been the company's process for tracking and remediating misconduct or misconduct risks identified during the due diligence process?

- **Post-Transaction Compliance Program** – What is the company's process for implementing and/or integrating a compliance program post-transaction? Does the company have a process in place to ensure appropriate compliance oversight of the new business? How is the new business incorporated into the company's risk assessment activities? How are compliance policies and procedures organized? Are post-acquisition audits conducted at newly acquired entities?

II. Is the Corporation's Compliance Program Adequately Resourced and Empowered to Function Effectively?

Even a well-designed compliance program may be unsuccessful in practice if implementation is lax, under-resourced, or otherwise ineffective. Prosecutors are instructed to probe specifically whether a compliance program is a "paper program" or one implemented, resourced, reviewed, and revised, as appropriate, in an effective manner. JM 9-28.800. In this regard, prosecutors should evaluate a corporation's method for assessing and addressing applicable risks and designing appropriate controls to manage these risks. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. Prosecutors should also determine "whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it." JM 9-28.800; *see also* JM 9-47.120(2)(c) (criteria for an effective compliance program include "[t]he company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated").

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

(Updated September 2024)

A. Commitment by Senior and Middle Management

Beyond compliance structures, policies, and procedures, it is important for a company to create and foster a culture of ethics and compliance with the law at all levels of the company. The effectiveness of a compliance program requires a high-level commitment by company leadership to implement a culture of compliance from the middle and the top.

The company's top leaders – the board of directors and executives – set the tone for the rest of the company. Prosecutors should examine the extent to which senior management have articulated the company's ethical standards, conveyed and disseminated them in clear and unambiguous terms, and demonstrated rigorous adherence by example. Prosecutors should also examine how middle management, in turn, have reinforced those standards and encouraged employees to abide by them. *See* U.S.S.G. § 8B2.1(b)(2)(A)-(C) (the company's "*governing authority* shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight" of it; "[*h*]*igh-level personnel* … shall ensure that the organization has an effective compliance and ethics program" (emphasis added)).

- **Conduct at the Top** – How have senior leaders, through their words and actions, encouraged or discouraged compliance, including the type of misconduct involved in the investigation? What concrete actions have they taken to demonstrate leadership in the company's compliance and remediation efforts? How have they modelled ethical behavior to subordinates? Have managers tolerated greater compliance risks in pursuit of new business or greater revenues? Have managers encouraged employees to act unethically to achieve a business objective, or impeded compliance personnel from effectively implementing their duties?

- **Shared Commitment** – What actions have senior leaders and middle-management stakeholders (*e.g.*, business and operational managers, finance, procurement, legal, human resources) taken to demonstrate their commitment to compliance or compliance personnel, including their remediation efforts? Have they persisted in that commitment in the face of competing interests or business objectives?

- **Oversight** – What compliance expertise has been available on the board of directors? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have the board of directors and senior management examined in their exercise of oversight in the area in which the misconduct occurred?

B. Autonomy and Resources

Effective implementation also requires those charged with a compliance program's day-to-day oversight to act with adequate authority and stature. As a threshold matter, prosecutors should evaluate how the compliance program is structured. Additionally, prosecutors should address the sufficiency of the personnel and resources within the compliance function, in particular, whether those responsible for compliance have: (1) sufficient qualifications, seniority, and stature (both actual and perceived) within the organization; (2) sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis; and (3) sufficient autonomy from management, such as direct access to the board of directors or the board's audit committee. The sufficiency of each factor, however, will depend on the size, structure, and risk profile of the particular company. "A large organization generally shall devote more formal operations and greater resources . . . than shall a small organization." Commentary to U.S.S.G. § 8B2.1 note 2(C). By contrast, "a small organization may [rely on] less formality and fewer resources." *Id.* Regardless, if a compliance program is to be truly effective, compliance personnel must be empowered within the company.

Prosecutors should evaluate whether internal audit functions are conducted at a level sufficient to ensure their independence and accuracy, as an indicator of whether compliance personnel are in fact empowered and positioned to effectively detect and prevent misconduct. Prosecutors should also evaluate "[t]he resources the company has dedicated to compliance," "[t]he quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk," and "[t]he authority and independence of the compliance function and the availability of compliance expertise to the board." JM 9-47.120(2)(c); *see also* U.S.S.G. § 8B2.1(b)(2)(C) (those with "day-to-day operational responsibility" shall have "adequate resources, appropriate authority and direct access to the governing authority or an appropriate subgroup of the governing authority").

- **Structure** – Where within the company is the compliance function housed (*e.g.*, within the legal department, under a business function, or as an independent function reporting to the CEO and/or board)? To whom does the compliance function report? Is the compliance function run by a designated chief compliance officer, or another executive within the company, and does that person have other roles within the company? Are compliance personnel dedicated to compliance responsibilities, or do they have other, non-compliance responsibilities within the company? Why has the company chosen the compliance structure it has in place? What are the reasons for the structural choices the company has made?

- **Seniority and Stature** – How does the compliance function compare with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers? What has been the turnover rate for compliance and relevant control function personnel? What role has compliance played in the company's strategic and operational decisions? How has the

company responded to specific instances where compliance raised concerns? Have there been transactions or deals that were stopped, modified, or further scrutinized as a result of compliance concerns?

- **Experience and Qualifications** – Do compliance and control personnel have the appropriate experience and qualifications for their roles and responsibilities? Has the level of experience and qualifications in these roles changed over time? How does the company invest in further training and development of the compliance and other control personnel? Who reviews the performance of the compliance function and what is the review process?

- **Funding and Resources** – Has there been sufficient staffing for compliance personnel to effectively audit, document, analyze, and act on the results of the compliance efforts? Has the company allocated sufficient funds for the same? Have there been times when requests for resources by compliance and control functions have been denied, and if so, on what grounds? Does the company have a mechanism to measure the commercial value of investments in compliance and risk management?

- **Data Resources and Access** – Do compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls, and transactions? Do any impediments exist that limit or delay access to relevant sources of data and, if so, what is the company doing to address the impediments? Do compliance personnel have knowledge of and means to access all relevant data sources in a reasonably timely manner? Is the company appropriately leveraging data analytics tools to create efficiencies in compliance operations and measure the effectiveness of components of compliance programs? How is the company managing the quality of its data sources? How is the company measuring the accuracy, precision, or recall of any data analytics models it is using?

- **Proportionate Resource Allocation –** How do the assets, resources, and technology available to compliance and risk management compare to those available elsewhere in the company? Is there an imbalance between the technology and resources used by the company to identify and capture market opportunities and the technology and resources used to detect and mitigate risks?

- **Autonomy** – Do the compliance and relevant control functions have direct reporting lines to anyone on the board of directors and/or audit committee? How often do they meet with directors? Are members of the senior management present for these meetings? How does the company ensure the independence of the compliance and control personnel?

- **Outsourced Compliance Functions** – Has the company outsourced all or parts of its compliance functions to an external firm or consultant? If so, why, and who is responsible for overseeing or liaising with the external firm or consultant? What level of access does the external firm or consultant have to company information? How has the effectiveness of the outsourced process been assessed?

C. Compensation Structures and Consequence Management

Another hallmark of effective implementation of a compliance program is the establishment of incentives for compliance and disincentives for non-compliance. Prosecutors should assess whether the company has clear consequence management procedures (procedures to identify, investigate, discipline, and remediate violations of law, regulation, or policy) in place, enforces them consistently across the organization, and ensures that the procedures are commensurate with the violations. Prosecutors should also assess the extent to which the company's communications convey to its employees that unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct. *See* U.S.S.G. § 8B2.1(b)(5)(C) ("the organization's compliance program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct").

By way of example, prosecutors may consider whether a company has publicized disciplinary actions internally, where appropriate and possible, which can have valuable deterrent effects. Prosecutors may also consider whether a company is tracking data relating to disciplinary actions to measure effectiveness of the investigation and consequence management functions. This can include monitoring the number of compliance-related allegations that are substantiated, the average (and outlier) times to complete a compliance investigation, and the effectiveness and consistency of disciplinary measures across the levels, geographies, units, or departments of an organization.

The design and implementation of compensation schemes play an important role in fostering a compliance culture. Prosecutors may consider whether a company has incentivized compliance by designing compensation systems that defer or escrow certain compensation tied to conduct consistent with company values and policies. Some companies have also enforced contract provisions that permit the company to recoup previously awarded compensation if the recipient of such compensation is found to have engaged in or to be otherwise responsible for corporate wrongdoing. Finally, prosecutors may consider whether provisions for recoupment or reduction of compensation due to compliance violations or misconduct are maintained and enforced in accordance with company policy and applicable laws.

Compensation structures that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance. At the same time, providing positive incentives, such as promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership, can drive compliance. Prosecutors should examine whether a company has made working on compliance a means of career advancement, offered opportunities for managers and employees to serve as a compliance "champion", or made compliance a significant metric for management bonuses. In evaluating whether the compensation and consequence management schemes are indicative of a positive compliance culture, prosecutors should consider the following factors:

- **Human Resources Process** – Who participates in making disciplinary decisions, including for the type of misconduct at issue? How transparent has the company been with the design and implementation of its disciplinary process? In circumstances where an executive has been exited from the company on account of a compliance violation, how transparent has the company been with employees about the terms of the separation? Are the actual reasons for discipline communicated to employees in all cases? If not, why not? Is the same process followed for each instance of misconduct, and if not, why? Has the company taken steps to restrict disclosure or access to information about the disciplinary process? Are there legal or investigation-related reasons for restricting information, or have pre-textual reasons been provided to protect the company from whistleblowing or outside scrutiny?

- **Disciplinary Measures** – What types of disciplinary actions are available to management when it seeks to enforce compliance policies? Does the company have policies or procedures in place to recoup compensation that would not have been achieved but for misconduct attributable directly or indirectly to the executive or employee? What policies and practices does the company have in place to put employees on notice that they will not benefit from any potential fruits of misconduct? With respect to the particular misconduct at issue, has the company made good faith efforts to follow its policies and practices in this respect?

- **Consistent Application** – Have disciplinary actions and incentives been fairly and consistently applied across the organization? Does the compliance function monitor its investigations and resulting discipline to ensure consistency? Are there similar instances of misconduct that were treated disparately, and if so, why? What metrics does the company apply to ensure consistency of disciplinary measures across all geographies, operating units, and levels of the organization?

- **Financial Incentive System** – Has the company considered the impact of its financial rewards and other incentives on compliance? Has the company evaluated whether commercial targets are achievable if the business operates within a compliant and ethical manner? What role does the compliance function have in designing and

awarding financial incentives at senior levels of the organization? How does the company incentivize compliance and ethical behavior? What percentage of executive compensation is structured to encourage enduring ethical business objectives? Are the terms of bonus and deferred compensation subject to cancellation or recoupment, to the extent available under applicable law, in the event that non-compliant or unethical behavior is exposed before or after the award was issued? Does the company have a policy for recouping compensation that has been paid, where there has been misconduct? Have there been specific examples of actions taken (*e.g.*, promotions or awards denied, compensation recouped or deferred compensation cancelled) as a result of compliance and ethics considerations?

- **Effectiveness** – How has the company ensured effective consequence management of compliance violations in practice? What insights can be taken from the management of a company's hotline that provide indicia of its compliance culture or its management of hotline reports? How do the substantiation rates compare for similar types of reported wrongdoing across the company (*i.e.* between two or more different states, countries, or departments) or compared to similarly situated companies, if known? Has the company undertaken a root cause analysis into areas where certain conduct is comparatively over or under reported? What is the average time for completion of investigations into hotline reports and how are investigations that are addressed inconsistently managed by the responsible department? What percentage of the compensation awarded to executives who have been found to have engaged in wrongdoing has been subject to cancellation or recoupment for ethical violations? Taking into account the relevant laws and local circumstances governing the relevant parts of a compensation scheme, how has the organization sought to enforce breaches of compliance or penalize ethical lapses? How much compensation has in fact been impacted (either positively or negatively) on account of compliance-related activities?

III. Does the Corporation's Compliance Program Work in Practice?

The Principles of Federal Prosecution of Business Organizations require prosecutors to assess "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision." JM 9-28.300. Due to the backward-looking nature of the first inquiry, one of the most difficult questions prosecutors must answer in evaluating a compliance program following misconduct is whether the program was working effectively at the time of the offense, especially where the misconduct was not immediately detected.

In answering this question, it is important to note that the existence of misconduct does not, by itself, mean that a compliance program did not work or was ineffective at the time of the offense. *See* U.S.S.G. § 8B2.1(a) ("[t]he failure to prevent or detect the instant offense does not mean that the program is not generally effective in preventing and deterring misconduct"). Indeed, "[t]he Department recognizes that no compliance program can prevent all criminal activity by a

corporation's employees." JM 9-28.800. Of course, if a compliance program did identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was working effectively.

In assessing whether a company's compliance program was effective at the time of the misconduct, prosecutors should consider whether and how the misconduct was detected, what investigation resources were in place to investigate suspected misconduct, and the nature and thoroughness of the company's remedial efforts. Prosecutors should also consider whether the company's compliance program had a track record of preventing or detecting other instances of misconduct, and whether the company exercised due diligence to prevent and detect criminal conduct. *See* U.S.S.G. § 8B2.1(a)(1).

To determine whether a company's compliance program is working effectively at the time of a charging decision or resolution, prosecutors should consider whether the program evolved over time to address existing and changing compliance risks. Prosecutors should also consider whether the company undertook an adequate and honest root cause analysis to understand both what contributed to the underlying misconduct and the degree of remediation needed to prevent similar events in the future. Prosecutors should also assess how the company has leveraged its data to gain insights into the effectiveness of its compliance program and otherwise sought to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. *See* U.S.S.G. § 8B2.1(a)(2).

A. Continuous Improvement, Periodic Testing, and Review

One hallmark of an effective compliance program is its capacity to improve and evolve. The actual implementation of controls in practice will necessarily reveal areas of risk and potential adjustment. A company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the applicable industry standards. Accordingly, prosecutors should consider whether the company has engaged in meaningful efforts to review its compliance program and ensure that it is not stale. Some companies survey employees to gauge the compliance culture and evaluate the strength of controls, and/or conduct periodic audits to ensure that controls are functioning well, though the nature and frequency of evaluations may depend on the company's size and complexity.

Prosecutors may reward efforts to promote improvement and sustainability. In evaluating whether a particular compliance program works in practice, prosecutors should consider "revisions to corporate compliance programs in light of lessons learned." JM 9-28.800; *see also* JM 9-47-120(2)(c) (looking to "[t]he auditing of the compliance program to assure its effectiveness"). This can include analysis of how the company responded to other instances of misconduct in addition to how the company addressed reports of potential misconduct and risks over time. Prosecutors should likewise look to whether a company has taken "reasonable steps" to "ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct," and "evaluate periodically the effectiveness of the organization's"

program. U.S.S.G. § 8B2.1(b)(5). Proactive efforts like these may not only be rewarded in connection with the form of any resolution or prosecution (such as through remediation credit or a lower applicable fine range under the Sentencing Guidelines), but more importantly, may avert problems down the line.

- **Internal Audit** – What is the process for determining where and how frequently internal audit will undertake an audit, and what is the rationale behind that process? How are audits carried out? What types of audits would have identified issues relevant to the misconduct? Did those audits occur and what were the findings? What types of relevant audit findings and remediation progress have been reported to management and the board on a regular basis? How have management and the board followed up? How often does internal audit conduct assessments in high-risk areas?

- **Control Testing** – Has the company reviewed and audited its compliance program in the area relating to the misconduct? More generally, what testing of controls, collection and analysis of compliance data, and interviews of employees and third parties does the company undertake? How are the results reported and action items tracked?

- **Evolving Updates** – How often has the company updated its risk assessments and reviewed its compliance policies, procedures, and practices? Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training? What steps has the company taken to determine whether policies/procedures/practices make sense for particular business segments/subsidiaries? Does the company review and adapt its compliance program based upon lessons learned from its own misconduct and/or that of other companies facing similar risks? If the company is using new technologies such as AI in its commercial operations or compliance program, is the company monitoring and testing the technologies so that it can evaluate whether they are functioning as intended and consistent with the company's code of conduct? How quickly can the company detect and correct decisions made by AI or other new technologies that are inconsistent with the company's values?

- **Measurement** – How and how often does the company measure the success and effectiveness of its compliance program?

- **Culture of Compliance** – How and how often does the company measure its culture of compliance? How does the company's hiring and incentive structure reinforce its commitment to ethical culture? Does the company seek input from all levels of employees to determine whether they perceive senior and middle management's commitment to compliance? What steps has the company taken in response to its measurement of the compliance culture?

- **Data and Transparency** – To what extent does the company have access to data and information to identify potential misconduct or deficiencies in its compliance program? Can the company demonstrate that it is proactively identifying either misconduct or issues with its compliance program at the earliest stage possible?

B. Investigation of Misconduct

Another hallmark of a compliance program that is working effectively is the existence of a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents. An effective investigations structure will also have an established means of documenting the company's response, including any disciplinary or remediation measures taken.

- **Properly Scoped Investigation by Qualified Personnel** – How has the company ensured that the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented?

- **Response to Investigations** – Have the company's investigations been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory managers and senior executives? What has been the process for responding to investigative findings? How high up in the company do investigative findings go?

- **Independence and Empowerment** – Is compensation for employees who are responsible for investigating and adjudicating misconduct structured in a way that ensures the compliance team is empowered to enforce the policies and ethical values of the company? Who determines the compensation, including bonuses, as well as discipline and promotion of compliance personnel or others within the organization that have a role in the disciplinary process generally?

Messaging applications have become ubiquitous in many markets and offer important platforms for companies to achieve growth and facilitate communication. In evaluating a corporation's policies and mechanisms for identifying, reporting, investigating, and remediating potential misconduct and violations of law, prosecutors should consider a corporation's policies and procedures governing the use of personal devices, communications platforms, and messaging applications, including ephemeral messaging applications. Policies governing such applications should be tailored to the corporation's risk profile and specific business needs and ensure that, as appropriate and to the greatest extent possible, business-related electronic data and communications are accessible and amenable to preservation by the company. Prosecutors should consider how the policies and procedures have been communicated to employees, and whether the corporation has enforced the policies and procedures on a regular and consistent basis in practice. In conducting this evaluation, prosecutors should consider the following factors:

- **Communication Channels** – What electronic communication channels do the company and its employees use, or allow to be used, to conduct business? How does that practice vary by jurisdiction and business function, and why? What mechanisms has the company put in place to manage and preserve information contained within each of the electronic communication channels? What preservation or deletion settings are available to each employee under each communication channel, and what do the company's policies require with respect to each? What is the rationale for the company's approach to determining which communication channels and settings are permitted?

- **Policy Environment** – What policies and procedures are in place to ensure that communications and other data is preserved from devices that are replaced? What are the relevant code of conduct, privacy, security, and employment laws or policies that govern the organization's ability to ensure security or monitor/access business-related communications? If the company has a "bring your own device" (BYOD) program, what are its policies governing preservation of and access to corporate data and communications stored on personal devices—including data contained within messaging platforms—and what is the rationale behind those policies? How have the company's data retention and business conduct policies been applied and enforced with respect to personal devices and messaging applications? Do the organization's policies permit the company to review business communications on BYOD and/or messaging applications? What exceptions or limitations to these policies have been permitted by the organization? If the company has a policy regarding whether employees should transfer messages, data, and information from private phones or messaging applications onto company record-keeping systems in order to preserve and retain them, is it being followed in practice, and how is it enforced?

- **Risk Management** – What are the consequences for employees who refuse the company access to company communications? Has the company ever exercised these rights? Has the company disciplined employees who fail to comply with the policy or the requirement that they give the company access to these communications? Has the use of personal devices or messaging applications—including ephemeral messaging applications—impaired in any way the organization's compliance program or its ability to conduct internal investigations or respond to requests from prosecutors or civil enforcement or regulatory agencies? How does the organization manage security and exercise control over the communication channels used to conduct the organization's affairs? Is the organization's approach to permitting and managing communication channels, including BYOD and messaging applications, reasonable in the context of the company's business needs and risk profile?

C. Analysis and Remediation of Any Underlying Misconduct

Finally, a hallmark of a compliance program that is working effectively in practice is the extent to which a company is able to conduct a thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes.

Prosecutors evaluating the effectiveness of a compliance program are instructed to reflect back on "the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned." JM 9-28.800; *see also* JM 9-47.120(3)(c) ("to receive full credit for timely and appropriate remediation" under the FCPA Corporate Enforcement Policy, a company should demonstrate "a root cause analysis" and, where appropriate, "remediation to address the root causes").

Prosecutors should consider "any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program." JM 98-28.800; *see also* JM 9-47-120(2)(c) (looking to "[a]ppropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred" and "any additional steps that demonstrate recognition of the seriousness of the misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risk").

- **Root Cause Analysis** – What is the company's root cause analysis of the misconduct at issue? Were any systemic issues identified? Who in the company was involved in making the analysis?

- **Prior Weaknesses** – What controls failed? If policies or procedures should have prohibited the misconduct, were they effectively implemented, and have functions that had ownership of these policies and procedures been held accountable?

- **Payment Systems** – How was the misconduct in question funded (*e.g.*, purchase orders, employee reimbursements, discounts, petty cash)? What processes could have prevented or detected improper access to these funds? Have those processes been improved?

- **Vendor Management** – If vendors were involved in the misconduct, what was the process for vendor selection and did the vendor undergo that process?

- **Prior Indications** – Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations? What is the company's analysis of why such opportunities were missed?

- **Remediation** – What specific changes has the company made to reduce the risk that the same or similar issues will occur in the future? What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?

- **Accountability** – What disciplinary actions did the company take in response to the misconduct and were they timely? Were managers held accountable for misconduct that occurred under their supervision? Did the company consider disciplinary actions for failures in supervision? What is the company's record (*e.g.*, number and types of disciplinary actions) on employee discipline relating to the types of conduct at issue? Has the company ever terminated or otherwise disciplined anyone (reduced or eliminated bonuses, issued a warning letter, etc.) for the type of misconduct at issue? Did the company take any actions to recoup or reduce compensation for responsible employees to the extent practicable and available under applicable law?

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[1] Many of the topics also appear in the following resources:

- Justice Manual ("JM")
  - JM 9-28.000 Principles of Federal Prosecution of Business Organizations, Justice Manual ("JM"), *available at* https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.
  - JM 9-47.120 and the Criminal Division Corporate Enforcement Policy, *available at* https://www.justice.gov/criminal-fraud/file/1562831/download.
- Chapter 8 – Sentencing of Organizations - United States Sentencing Guidelines ("U.S.S.G."), *available at* https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN.Memorandum entitled "Selection of Monitors in Criminal Division Matters," issued by Assistant Attorney General Brian Benczkowski on October 11, 2018, *available at* https://www.justice.gov/criminal-fraud/file/1100366/download; updated Memorandum entitled "Selection of Monitors in Criminal Division Matters,"

issued by Assistant Attorney General Kenneth A. Polite, Jr., on March 2, 2023, *available at* https://www.justice.gov/criminal-fraud/file/1100366/download.

- Criminal Division corporate resolution agreements, *available at* https://www.justice.gov/news (the Department of Justice's ("DOJ") Public Affairs website contains press releases for all Criminal Division corporate resolutions which contain links to charging documents and agreements).

- A Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA Guide"), published in November 2012 by the DOJ and the Securities and Exchange Commission ("SEC"), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

- Good Practice Guidance on Internal Controls, Ethics, and Compliance, adopted by the Organization for Economic Co-operation and Development ("OECD") Council on February 18, 2010, *available at* https://www.oecd.org/daf/anti-bribery/44884389.pdf.

- Anti-Corruption Ethics and Compliance Handbook for Business ("OECD Handbook"), published in 2013 by OECD, United Nations Office on Drugs and Crime, and the World Bank, *available at* https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf.

- Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, published in July 2019 by DOJ's Antitrust Division, *available at* https://www.justice.gov/atr/page/file/1182001/download.

- A Framework for OFAC Compliance Commitments, published in May 2019 by the Department of the Treasury's Office of Foreign Assets Control ("OFAC"), *available at* https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf.

- AI Risk Management Framework, released on January 26, 2023, by the National Institute of Standards and Technology ("NIST"), *available at* https://www.nist.gov/itl/ai-risk-management-framework.

[2] Prosecutors should consider whether certain aspects of a compliance program may be impacted by foreign law. Where a company asserts that it has structured its compliance program in a particular way or has made a compliance decision based on requirements of foreign law, prosecutors should ask the company the basis for the company's conclusion about foreign law, and how the company has addressed the issue to maintain the integrity and effectiveness of its compliance program while still abiding by foreign law.

[3] As discussed in the Justice Manual, many companies operate in complex regulatory environments outside the normal experience of criminal prosecutors. JM 9-28.000. For example, financial institutions such as banks, subject to the Bank Secrecy Act statute and regulations, require prosecutors to conduct specialized analyses of their compliance programs in the context of their anti-money laundering requirements. Consultation with the Money Laundering and Asset Recovery Section is recommended when reviewing AML compliance. *See* https://www.justice.gov/criminal-mlars. Prosecutors may also wish to review guidance published by relevant federal and state agencies. *See* Federal Financial Institutions Examination Council/Bank Secrecy Act/Anti-Money Laundering Examination Manual, *available at* https://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_online.htm).

[4] The term "artificial intelligence" has the meaning set forth in the OMB Memo M-24-10 at pages 26-27, *available at* https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf, and includes the following:

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.
3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
4. A set of techniques, including machine learning, that is designed to approximate a cognitive task.
5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.

Additionally, the following technical context should guide the interpretation of the definition:

1. This definition of AI encompasses, but is not limited to, the AI technical subfields of machine learning (including, but not limited to, deep learning as well as supervised, unsupervised, and semi-supervised approaches), reinforcement learning, transfer learning, and generative AI.
2. This definition of AI does not include robotic process automation or other systems whose behavior is defined only by human-defined rules or that learn solely by repeating an observed practice exactly as it was conducted.

3. For this definition, no system should be considered too simple to qualify as a covered AI system due to a lack of technical complexity (*e.g.*, the smaller number of parameters in a model, the type of model, or the amount of data used for training purposes).

This definition includes systems that are fully autonomous, partially autonomous, and not autonomous, and it includes systems that operate both with and without human oversight.