

**“Jamming the Revolving Door” by Stuart Nibley, published in The Procurement Lawyer, Volume 41, No.4, Summer 2006. © 2006 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.**

## Jamming the Revolving Door, Making It More Efficient, or Simply Making It Spin Faster: How Is the Federal Acquisition Community Reacting to the Darleen Druyun and Other Recent Ethics Scandals?

BY STUART B. NIBLEY

In October 2005, a coalition of public interest groups calling itself the “Revolving Door Working Group” (RDWG) published a significant contribution to the educational and analytical material available in the public domain relative to the problematic issue of the “revolving door” through which prized talent passes from industry to government, and often back to industry. The work, entitled *A Matter of Trust: How the Revolving Door Undermines Public Confidence in Government—And What to Do About It*, includes the following single-paragraph preamble quoted from *Federalist Paper No. 57* attributed to James Madison:

The aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust.

The Darleen Druyun revolving door scandal, and particularly the revelations she volunteered at her sentencing

hearing in October 2004 admitting that she had in fact favored the Boeing Company in her official capacity as the U.S. Air Force’s highest placed acquisition official, rocked the federal acquisition community in ways that still reverberate. However, it was more than merely the Druyun debacle and its intensity that has caused the acquisition community and its critics to reexamine the status of the ethics environment in the government contracting arena. Some of us are “experienced” enough to remember the fallout from the *Ill Winds* scandals of the 1980s. Not since then has the acquisition community been forced to examine itself in a way that pits acquisition efficiency against the need for oversight, accountability, and even the more amorphous concepts of integrity and respect. Not surprisingly, the responses from industry, within the government, and from outside are anything but uniform. This article examines some of these responses and some of the more

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## REVOLVING DOOR

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prickly issues government contractors face in addressing the challenges that are presented by the revolving door and its complex tale of laws and regulations.

### The Major Questions

#### *What Impact Has, and Will, the Revolving Door Scandals Have on the Procurement Process?*

Although the epicenter of the federal acquisition community's recent round of self-examination has unquestionably been the Darleen Druyun scandal, several other occurrences of ethical controversy have caused the community to engage in ever more intensified self-scrutiny. The RDWG lists several other situations that preceded Druyun's attempted jump to "the other side," each of which calls into question the effectiveness of the current legal constraints. According to the RDWG:<sup>2</sup>

#### **Revolving Door Case Studies Darleen Druyun and Boeing.**

E-mail exchanges between Druyun's daughter and Boeing officials revealed how all parties violated the conflict-of-interest and ethics system.

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On April 20, 2004, Druyun pleaded guilty to charges of conspiracy to defraud the United States. In her plea, Druyun acknowledged that she had favored Boeing in certain negotiations as a result of her employment negotiations and that other favors had been provided by Boeing to her. Druyun also admitted that Boeing's hiring, at her request, of her future son-in-law and her daughter in 2000, along with her own desire to be employed by Boeing, influenced her decisions—as a government employee—in several matters affecting Boeing. These included: the Boeing tanker deal (which she stated was a "parting gift to Boeing"), Boeing's \$100 million payment to restructure the NATO AWACS program, the selection of Boeing to upgrade the avionics of C-130 aircraft, and the agreement "to a payment of approximately 412 million dollars to Boeing" in connection with the C-17. In October 2004, Druyun was sentenced to nine months in prison, a \$5,000 fine, three years of supervised release, and 150 hours of community service.

The Associated Press reported on February 2005 that the Pentagon was investigating eight Air Force contracts handled by Druyun. Those contracts ranged in value from \$42 million to \$1.5 billion each, with a total value of about \$3 billion. That same month, the GAO released two Comptroller General opinions in which it found that Druyun had tainted the process in which Boeing was awarded contracts for the production of the Small Diameter Bomb and for various activities related to the avionics modernization upgrade program for C-130 aircraft. The GAO recommended that both contracts, or the

tainted portions therein, be put out for new competition.

#### **PETER ALDRIDGE AND LOCKHEED MARTIN.**

Edward C. "Pete" Aldridge formerly served as Undersecretary of Defense for Acquisition, Technology, and Logistics. He was also head of a DoD review board that made the decision to pursue procurement of the Lockheed Martin F/A-22 fighter jet. In January 2003, Aldridge approved the contract for the F/A-22 program. Two months later, he secured a position on the board of directors of Lockheed Martin, the federal government's top contractor and maker of the F/A-22. On March 15, 2004, the General Accounting Office (GAO) released a report documenting that the cost for the F/A-22 program continues to skyrocket, though DoD has failed to justify the need for this aircraft, given current and projected threats.

#### **DAVID HEEBNER AND GENERAL DYNAMICS.**

Army Lt. General David K. Heebner was a top assistant to the Army Chief of Staff, Gen. Eric Shinseki, and played a significant role in drumming up support and funding for Shinseki's plan to transform the Army. One of the key elements in Shinseki's transformation "vision" was a plan to move the Army away from tracked armored vehicles toward wheeled light armored vehicles. In October 1999, only three months before Heebner retired, Shinseki's "Army Vision" statement called for an interim armored brigade: "We are prepared to move to an all wheel formation as soon as technology permits." General Dynamics, which manufactures the wheeled Stryker, was the beneficiary of this new vision, essentially putting United Defense, which produced tracked vehicles, out of the running.

General Dynamics formally announced the hiring of Heebner, as Senior Vice President of Planning and Development, on November 20, 1999. That was just one month after Shinseki announced his "vision" and more than a month prior to Heebner's official retirement date of December 31, 1999. The \$4 billion Stryker contract was awarded to General Dynamics in November 2000. Heebner was present in Alabama for the April 2002 rollout of the first Stryker and was recognized by Shinseki for his work in the Army on the Stryker project.

#### **BOBBY FLOYD AND LOCKHEED MARTIN.**

In 1997, Air Force General Bobby O. Floyd led the government's investigation into a fatal HC-130P Hercules plane crash. According to press reports, in October 1998, Floyd was contacted by the plane's manufacturer, Lockheed Martin. He filed a letter of recusal, which disqualified him from taking any official actions involving Lockheed, in November 1998. Despite that recusal, Floyd continued to investigate the crash until March 1999, concluding that his new employer was free from blame. Despite that appearance of impropriety, the Air Force concluded that Floyd did not violate conflict-of-interest or ethics laws. Floyd then joined Lockheed Martin Aircraft & Logistics Centers in May 1999 as Deputy General Manager of the Greenville Aircraft Center. He was promoted to Vice President and General Manager in

May 2000, then to President and General Manager of Logistics for the Centers in November 2001.

**RICHARD PERLE AND BOEING.** Perle served as Assistant Secretary of Defense in the Reagan Administration and was a member of the Defense Policy Board from 1987 to 2004, serving as its Chair from 2001 to 2003. He resigned as Chairman in March 2003, after a conflict-of-interest controversy involving a consulting job he took with the bankrupt telecommunications firm Global Crossing Ltd. During the summer of 2003, Perle expressed his support for the Boeing tanker deal—a deal that would direct billions of dollars to Boeing. His support for the tankers came just 16 months after Boeing committed to invest \$20 million with Perle’s venture capital firm, *Trireme Partners*.

A *Washington Post* article described Perle as the “ultimate insider” and discussed his use of the revolving door and the access that it provides. William Happer, a former Energy Department official stated that the revolving door is “an old American tradition, and Richard Perle I think is doing it in an honest way. He’s one of hundreds and hundreds who do it.” Perle denied that he was hired by any company because of his connection to policy makers. Subsequently, Perle seemed to contradict himself when recounting his role in assisting a company to obtain a foreign contract: “Was [his contact with foreign ambassadors] a result of my influence? Yeah, it was. It was a result of the fact that they, the people I went to, knew me so they took my phone call.”

### Examples of the Revolving Door in Various Federal Agencies

Former federal officials can be found in key executive and board positions at many of the country’s largest corporations and trade associations. Here are some examples involving veterans of several Cabinet departments—Agriculture, Defense and Energy—as well as the EPA.

- **FRANCIS S. BLAKE**, Executive Vice President of Business Development and Corporate Operations for Home Depot and a director of The Southern Company (a “superregional” energy company), formerly served as Deputy Secretary of Energy.
- **LINDA FISHER**, Vice President and Chief Sustainability Officer for chemical giant DuPont, formerly served in various positions at the EPA, including Deputy Administrator, Assistant Administrator and Chief of Staff.
- **L. VAL GIDDINGS**, Vice President for Food and Agriculture of the Biotechnology Industry Organization, formerly served as the Senior Staff Geneticist, International Team Leader, and Branch Chief for Science and Policy Coordination with the biotechnology products regulatory division of the Animal and Plant Health Inspection Service of the Department of Agriculture.
- **JAMIE S. GORELICK**, a director of defense con-

tractor United Technologies, was formerly Deputy Attorney General and General Counsel of the Department of Defense (as well as a member of the 911 Commission and the Defense Science Board).

- **PAUL LONGSWORTH**, who recently joined Fluor Corp. as executive director of environmental/nuclear business development, was formerly deputy administrator at the Energy Department’s National Nuclear Security Administration.
- **CHARLES J. (JOE) O’MARA**, President of O’Mara & Associates, an international trade consulting firm, formerly served as Counsel for International Affairs to the Secretary of Agriculture and as Special Trade Negotiator for the agency.
- **DR. JAMES G. ROCHE**, a director of Orbital Sciences Corp., a leading space and rocket company, and a consultant for his former employer, Northrop Grumman, was formerly Secretary of the Air Force.
- **JAMES SCHLESINGER**, a director of British Nuclear Fuel, formerly served as Secretary of Defense, Secretary of Energy, and Director of the Central Intelligence Agency.
- **CHRISTINE TODD WHITMAN**, a director of United Technologies, which aside from being a military contractor is deeply involved in global warming because of its ownership of the air-conditioning company Carrier Corp., formerly served as Administrator of the Environmental Protection Agency.
- **JOHN WILCZYNSKI**, Vice President of Corporate Development at British Nuclear Fuels, formerly served as the Department of Energy’s Director of the Office of Field Management.

### Conclusion

Each of the [first] five foregoing examples illustrates how decisions involving billions of taxpayer dollars have been shaped by those with revolving-door conflicts of interest. In some cases, such as the Druyun affair, it became clear that corruption was involved and laws were broken. In other cases, the culpability is less apparent.

Whether the prospect of lucrative private sector employment actually causes an official to violate his or her public trust or whether there is simply the appearance of a conflict, the revolving door does tend to create problems for integrity in government. The existing laws and regulations that address this problem are complex but ultimately inadequate. In the conclusion of this paper we offer some recommendations for restoring a greater degree of public confidence in the operations of the public sector.<sup>3</sup>

The “revolving door” is merely one structure in the pantheon of ethics that is causing the acquisition community renewed concern (although it is unquestionably still at the front of the building). Observers recently reacted with a mixture of shock and admiration at Boeing Company General Counsel Doug Bain’s willingness to allow the

media to report his uncut tongue-lashing of Boeing executives he delivered at a Boeing executive meeting on January 5, 2006. Bain spared no prisoners in dragging company executives back through the horrors and transgressions some of their peers on the government side of the business had visited upon the company in the past few years. Selected portions of Bain's speech published by the *Seattle Times* include the following:

Good morning. As I walk up here, I think I heard [Boeing Chairman and CEO] Jim McNerney mutter, "Here comes Dr. Death."

Jim asked me to give you kind of a candid assessment of our major scandals and how we got there.

My overall message is fairly simple; we as the leaders of the Boeing Company get to choose what kind of culture we are going to have. And we make these choices every day by what we do and frankly what we choose not to do. But the consequences of all those choices are our collective responsibility.

I want to talk about these scandals not so much from the perspective of how we have tried to argue them or spin them, but from the perspective of the prosecutors and what they have told us.

The recurring message we have gotten from the prosecutors and frankly everybody else we deal with is one of shock and surprise.

They say, "You guys are the Boeing Company. You build things that are larger than life. You do things that are larger than life. You're not a sleazy company. How did this happen?" And the question that they always ask: Where was the leadership?

\* \* \*

Nine years ago, Ken Branch went to work as a non-management engineer at the McDonnell Douglas facility in Cape Canaveral, Fla. And he traveled frequently to Huntington Beach, Calif. He brought with him approximately 25,000 pages of documents, many of which had proprietary markings from Lockheed Martin and other employers.

Of these 25,000 documents, about a dozen pages became important and two pages became critical to the prosecutors. About a dozen people saw some of these documents, and this went on for a period of two and a half years before anybody said anything.

Finally, in June 1999, an employee came forward and complained. We launched an investigation. We did a poor job of the investigation, did a poor job of disclosing it to the government.

\* \* \*

Were these documents in fact offered during the interview process as a quid pro quo for being hired? And last, but not least: What was the internal control system for the bidding practices that were going on? Why didn't somebody say something?

The cultural questions that these events raise are as follows:

Was there a culture of win at any cost? We now know what that cost is.

Was there a culture of silence?

And last, but not least: Where was management throughout this?

\* \* \*

Sears/Druyun:

On October 17, 2002, Mike Sears [then chief financial officer of Boeing] flew in a company airplane down here to Orlando and met with Darleen Druyun (then chief acquisitions officer for the Air Force) and offered her a job.

\* \* \*

The next day, Mike sent an e-mail that said "I had a 'non-meeting' with Darleen Druyun."

\* \* \*

So, the cultural questions: How come nobody said to Mike, "What in the hell do you mean by a non-meeting?" How come in the year 2000 nobody said, "Should we really be hiring the relatives of our chief procurement officer for the largest customer we

have on the defense side?"

It also raises the question, Do we have a culture of silence—don't ask the tough questions?

\* \* \*

These are not ZIP codes. These are the federal prisoner numbers for Mike Sears and Darleen Druyun.

Prisoner 70040, Mike Sears, pled guilty to one felony count of aiding and abetting a violation of the conflict-of-interest laws.

He served four months in the federal correctional center in Oxford, Wis. He was released this past June 29.

\* \* \*

Prisoner 47614, Darleen Druyun. Darleen pled guilty to one felony count of violation of the conflict-of-interest laws. She served nine months at the federal correctional center here in Marianna, Fla. She was released Sept. 30.

\* \* \*

The numbers at the top [apparently referring to a chart] are the number of formal ethics cases the Ethics and Business Conduct [Committee] opened in 2004 and 2005.

What is astounding to me, of course, is that if you look at 2005, 900 of them were found to have substantiation.

So is the problem the rank and file? Or is the problem us?

We participated in a survey conducted by the Defense Industry Initiatives, and they surveyed our employees. Of the employees surveyed, 26 percent said they had observed abusive or intimidating behavior by management.

I also went back and counted the number of vice presidents who have been separated from the company for ethics violations over the last few years.

The total is 15. I found that to be an astronomically high number. While only two of the 15 were separated for committing crimes, among the other issues we've had are expense-account fraud, travel abuse, violating our procedures for hiring consultants, abusive behavior, surfing the Net for porn, sexual harassment and retaliation.

Whenever we hear that somebody has done some offense, I guess the question we really ought to ask ourselves is were we surprised? With 150,000 employees, you are going to get some surprises.

But the question is, if you were not surprised that somebody did something, the next question to ask is how did they get there? How did we tolerate their conduct for this long?

The cultural question we need to ask, of course, is are we going to model the leadership values? And are we going to hold accountable those of us in this room, our subordinates and even our superiors?

\* \* \*

Our job as the leaders of this enterprise is to establish a culture that ensures that there is no next time. And frankly the choice is ours.

Thank you.<sup>4</sup>

Both Bain's candor in addressing his colleagues and the willingness of Boeing management to allow not only the publication of the comments but the tenor of their tone, even had they been delivered behind closed doors, are remarkable. The comments and event stand in stark contrast to the "elevate the stock price and our own personal holdings at any cost" that has marked the extraordinary recent corporate scandals in the commercial arena. Government ethics officials will no doubt take note of Bain's candor, and the willingness of his superiors to loose him upon his colleagues.

Yet at the same time, Bain's window into the "little house of horrors" is indeed frightening, and quite disturbing from the standpoint of, certainly, Boeing, but also the

contracting community at large. As Bain notes, the possibility for missteps, especially in the revolving door arena, is daunting, ever-present and nearly impossible to monitor fully. Yet the pressures to make the entire acquisition system more responsive to the war-fighter, disaster-responder, and everyday procurer have never been greater. This is a massive clash—with no easy solution.

The consequences of the Darleen Druyun scandal were enormous for Boeing. Competitors filed successful protests against some of Boeing's most significant federal programs, including the C-130 AMP and small diameter bomb programs. The U.S. Air Force elected to examine several other programs to determine if they evidenced the taint that Druyun admittedly brought to her involvement with the previously mentioned programs. When the Druyun scandal hit, Boeing was just regaining its equilibrium from the scandal involving the theft of Lockheed Martin documents in connection with the evolved expendable launch vehicle (EELV) program that led to Boeing Launch Services' (and related units) 18-month suspension from government contracting. In response to questioning at a news briefing regarding the next award of EELV launches in March 2005, then-Acting Secretary of the Air Force Peter Teets noted:

Well, Tony, you will recall that in late September, which is kind of when I made the statement that we were close to being able to lift the suspension on Boeing, new information surfaced in a rather rapid way. When Darleen Druyun was sentenced and her plea agreement was made public, I believe in early October, there were new revelations that came forth that caused the Air Force to need to do some additional investigation. The Air Force has done that additional investigation, and we find that that did not cause us reason to question the ability of Boeing to be a responsible contractor today and to deal with ourselves. That investigation did take some time.

Now, having said that and having gone through the Darlene Druyun situation, very frankly, we wanted to wait until Mike Sears was sentenced and to see whether or not there was any new additional information that we hadn't considered before we lifted the suspension. And of course, last week he was sentenced, and to my knowledge there was not additional information that came forward at that time.<sup>5</sup>

Indeed, the interim administrative agreement Boeing executed with the Air Force was signed by Boeing Chief Executive Officer Harry Stonecipher on September 22, 2004, but not until March 4, 2005, by Air Force Deputy General Counsel for Contractor Responsibility Stephen Shaw. As Bain stated in his January 5, 2006, address, employee lapses in ethics cost Boeing staggering amounts of money, and, perhaps more important, considerable good will with its government customer.

#### ***How Are the Department of Defense and the Federal Acquisition Community in General Changing Processes and Procedures Relative to the Revolving Door Aspects of the Procurement Integrity Laws?***

Almost on the heels of the Druyun sentencing hearing revelations, Acting Under Secretary of Defense Michael

Wynne on November 12, 2004, chartered the Defense Science Board (DSB) to perform a comprehensive study to determine how the U.S. Air Force acquisition structure allowed Darleen Druyun to influence the Boeing and other Air Force awards in the manner she did, and to study DOD management of acquisition functions in general. The recommendations the DSB offered in its March 2005 report were not precisely what some had predicted.<sup>6</sup> In fact, one of the DSB's most repeated recommendations in the report calls for Congress, the administration, and the acquisition community to *reduce* the number and nature of restrictions that inhibit the operation of a robust revolving door.

DoD, the Administration, and Congress should:

- Work together to streamline nomination and confirmation processes
- *Avoid more restrictions limiting recruitment of experienced personnel*<sup>7</sup>

Indeed, virtually everyone and every organization that comes in contact with the labyrinth of laws and regulations that establish the revolving door rules agree that the labyrinth is simply too complicated. In its April 2005 report entitled *Opportunities Exist to Strengthen Safeguards for Procurement Integrity* the Government Accountability Office stated:

The federal government has a host of laws and regulations governing the conduct of its employees and contractors. The Compilation of Federal Ethics laws prepared by the United States Office of Government Ethics includes nearly 100 pages of statutes alone. For the purposes of this report, however, we note a few laws relevant to DOD officials whose responsibilities involved participation in DOD's acquisition process. The statutes are complex, and the brief summaries here are intended only to provide context for the issues discussed in this report.<sup>8</sup>

Not surprisingly, the RDWG concludes likewise but is more critical of the overall ethics infrastructure:

It has resulted in a highly complex but ultimately ineffective framework of ethics and conflict-of-interest regulations. Enforcing those regulations has become a virtual industry within the government, costing significant resources but rarely resulting in sanctions or convictions of those accused of violating the rules. As a result, ethics rules offer little or no deterrent to those who might violate the public trust. . . .<sup>9</sup>

RDWG has not only alleged the complexity of the labyrinth of laws and regulations, it has provided evidence; RDWG contributor Scott Amey of the Project on Government Oversight (POGO) provides at Appendix A of its treatise a daunting but very helpful complete listing entitled "Federal Revolving Door & Ethics Restrictions."<sup>10</sup> In fact, the first three of 12 recommendations that the RDWG offers to improve the revolving door conundrum involve simplification of the rules that govern the topic and consolidation of oversight responsibility.

- *Consolidation of ethics oversight entities in the executive branch and in Congress;*
- *Granting the consolidated entities greater oversight and enforcement powers;*
- *Standardization of conflict-of-interest rules throughout the federal government;*

- Adoption of procedures that would allow the Office of Government Ethics to rule a person ineligible for a certain post if that person's employment background would tend to create frequent conflicts with the rule requiring impartiality on the part of federal employees;
- Strengthening of recusal rules that bar appointees from handling matters involving their former employers in the private sector, including mandatory recusal on matters directly involving one's employers and clients during the 24-month period prior to taking office;
- Monitoring of recusal agreements by the Office of Government Ethics;
- Prohibiting, for a period of time, senior officials from seeking employment with contractors that may have significantly benefited from policies formulated by those officials;
- Restricting the granting of waivers that allow public officials to negotiate future employment in the private sector while still in office;
- Extending the period during which officials cannot engage in lobbying after leaving office and expanding the scope of prohibited activities;
- Requiring federal officials to enter into a binding ethics "exit plan" when leaving the public sector to clarify what activities will be prohibited;
- Revoking the special privileges granted to former members of Congress while they are serving as lobbyists; and
- Improving the reporting and disclosure of recusal agreements, waivers, lobbyist reports and other ethics filings.<sup>11</sup>

More than one governmental entity has taken a laudable stab at summarizing the complex revolving door restrictions in simplified fashion, including the Air Force Materiel Command Ethics and Fraud Remedies Office, the DOD's Standards of Conduct Office (SOCO), and the Office of Government Ethics (OGE). However, simplification of the revolving door restrictions is extremely elusive. It is probably this fact more than any other that explains why most of the largest, and, thus, arguably the most vulnerable, defense contractors have refrained from beefing up their publicly available training materials with regard to the practical guidance they provide to employees and the public at large regarding this topic. A student of the topic can access the larger defense contractors' Web sites and, in most instances, their ethics training materials. Examination of many of these Web sites and materials reveals that few if any of the contractors provide more than cursory guidance to employees regarding this tricky and prickly topic (or if they do, the materials are not particularly easy to locate).<sup>12</sup> Rather, most merely mention the topic and provide the safer default of directing employees to contact the company legal department if they encounter a situation that might invoke revolving door restrictions.<sup>13</sup>

This may be one reason why the GAO criticized the DOD in its April 2005 report for its lack of familiarity with the specifics of the revolving door ethics programs of the contractors whose ethics systems it is charged with overseeing.

DOD regulations provide that its contractors should have written codes of conduct, ethics training, and monitoring programs in place; however, the seven contractors we visited indicated that DOD, through its oversight activities, did not monitor these contractors' recruiting, hiring, and placement practices of current and former government employees. In fact a recent

independent review of one of DOD's largest contractors found both gaps in the company's procedures and a failure to follow written policy, in certain cases. For example, the company relied excessively on employees to self-monitor compliance with standards of conduct rules and in doing so increased the risk of noncompliance, due to either employees' willful misconduct or failure to understand complex ethics rules.

We are making three recommendations to the Secretary of Defense to take actions in order to raise the level of confidence that DOD conducts business with impartiality and integrity. Specifically, to improve DOD's knowledge and oversight, DOD should regularly assess training and counseling efforts for quality and content to ensure that individuals covered by conflict-of-interest and procurement integrity rules receive appropriate training, and DOD should ensure ethics officials track and report on the status of alleged misconduct. We further recommend that DOD assess, as appropriate, contractor ethics programs to facilitate awareness and mitigation of risks in DOD contracting relationships.<sup>14</sup>

Interestingly, while the Defense Science Board agrees with the GAO that the revolving door laws and regulations are too complicated and burdensome to monitor compliance effectively, it posits that the solution is not *more* monitoring but arguably *less* monitoring, or what it calls "the compliance focus of the system".<sup>15</sup>

Secondly, it appears to the Task Force that an excessive amount of resources is devoted to thwarting or uncovering relatively rare cases of fraud and abuse.<sup>16</sup>

\* \* \*

[Acquisition officials] should not be encumbered with more rules and regulations, since that would still not prevent a determined insider from illegal behavior.

\* \* \*

The Task Force was continually impressed with the number of people interviewed who were motivated not only to do things right, but also to do the right thing.<sup>17</sup>

### ***How Is the Department of Justice Handling the Latest Cases and What Can We Expect Going Forward?***

This is not exactly clear. On February 18, 2005, following the conviction and sentencing of Darleen Druyun, the U.S. attorney for the Eastern District of Virginia, Paul McNulty, rattled the government contracting community by announcing the creation of the Procurement Fraud Working Group to investigate procurement fraud, especially revolving door issues. The group, which includes the inspectors general for the most active procuring agencies, has indicated that it is pursuing novel and aggressive actions to uncover procurement fraud, such as embedding fraud investigators in agency procurement offices.

Notwithstanding this investigatory spike in activity relative to revolving door and other procurement compliance, it appears that the number of conflict-of-interest cases that have been pursued in recent years has not been particularly large. The Office of Government Ethics annually publishes summaries of cases the government has settled or tried involving conflict-of-interest criminal statutes (18 U.S.C. §§ 202-209). The report for 2003 included 10 cases and the report for 2004 included six cases, including

most notably, of course, that of Darleen Druyun.

Precisely how the Department of Justice and the agency inspectors general will pursue suspected revolving door violations in the near future is not clear. What is clear is that the entire government contracting community is attempting to learn 1) how to prevent, and, where appropriate, achieve early detection of, their own Darleen Druyun situations; and 2) what other types of “fringe” behavior may be occurring that could be the tip of a Darleen Druyun-type iceberg.

### **What Challenges Face Employers in Properly Vetting Candidates Who Are Current or Former Government Employees? What Checks and Balances Should Be Implemented?**

First, why do I use the word “fringe” in this context? Because the evidence in the Druyun case demonstrates that the defendant had violated conflict-of-interest laws, or at least the spirit of such laws, well before she had ever begun to discuss her own possible employment with Boeing—well before she had ever begun to violate the letter of any of the provisions of Title 18 of the United States Code. As Bain pointedly noted to his colleagues at Boeing, Druyun had arranged several years earlier for Boeing’s employment of her future son-in-law and her daughter, which, according to her own testimony at her sentencing hearing, put in motion a series of paybacks to Boeing in the form of favorable treatment on major government programs, to the detriment of taxpayers, Boeing’s competitors, subordinates and colleagues of Druyun’s in the Air Force, and the very fabric of the federal procurement system.

So how does a company see these things coming? Not easily—with foggy vision at best and with considerable reliance on employee and group self-monitoring, at least until we construct substantially more robust but reasonably priced compliance systems. Both the contracting community and the government procurement and ethics compliance community have discovered that there are few areas of compliance in which early discovery of a possible violation, or “fringe” behavior, is more difficult.

Here are some ideas and suggestions that have been discussed within the community; some, but not all, have been implemented by contractors:

**Organize, simplify, educate.** This can hardly be greeted as being a novel suggestion. Yet statistics published by various organizations such as the Ethics Resource Center<sup>18</sup> demonstrate that many contractor employees express that they feel uninformed about the revolving door and conflict-of-interest laws and how they are expected to address potential problems within their own companies. Similarly, one of GAO’s three major findings in its April 2005 report relates to gaps in DOD training and compliance:

DOD lacks department-wide knowledge of the content of training and counseling, how often these services are provided, which employees receive information on conflict-of-interest and procurement integrity, and reported allegations of potential misconduct. Specifically, ethics counselors were unable to tell us if people subject to procurement integrity rules were trained. Ethics officials also did not know of 53 reported allegations of potential misconduct referred to inspectors general offices.

Without knowledge of training, counseling and reported allegations of misconduct, DOD is not positioned to assess the effectiveness of its efforts.<sup>19</sup>

A logical place to start is by providing all employees with a good summary of the applicable restrictions and their basic meaning, much as the Air Force Materiel Command has attempted in its chart,<sup>20</sup> or as DOD Standards of Conduct Office has set forth in its summary.<sup>21</sup>

**Begin to Focus on Both Sides of the Equation, Not Merely the Obligations Placed on the Contractor Side.** It is increasingly clear that if even the most diligent companies are to detect and prevent potential revolving door violations, they must educate their personnel—at a minimum this includes appropriate personnel in human resources, procurement personnel, and technical personnel—about not only their own employees’ obligations but also about the obligations of those in the government with whom they might be speaking about potential employment. It is clear that it is no longer sufficient for contractors to claim they were relying on the government employee to follow the rules—for example, “I didn’t know that the government employee had not recused himself or herself from matters involving our company, or sought the appropriate ethics clearance letter(s). He/she told me she had done these things.” A company is well advised to include in its compliance training materials at least some description of the basic steps that government employees are required to take before *they* engage in employment discussions with the company. Most companies are now requesting that government employees provide them with a copy of the “safe harbor” or similar letter the government employees have obtained from the appropriate agency ethics advisor before the companies will permit employment discussions to commence.<sup>22</sup> Some contractors are going further and requesting that a government employee provide not only the safe harbor letter but the employee’s own letter upon which the agency ethics advisor based his or her letter. As they often warn, agency ethics advisors usually prepare their safe harbor letters substantially in the dark, relying only upon the information that the requesting employee brings to their attention. The potential hiring contractor often if not usually knows more than the agency ethics advisor does about how the government employee is actually involved in overseeing the contractor’s business. Thus, it is often the contractor and not the agency ethics advisor that can see that the government employee has omitted material information about the employee’s relationship with the contractor in the letter the government employee provided to the agency ethics advisor. In such instances, the agency ethics advisor’s letter becomes thin, if any, protection for the contractor:

3) If the requester [government employee] is advised in a written opinion by the agency ethics official that the requester may accept compensation from a particular contractor, and accepts such compensation in good faith reliance on that advisory opinion, then neither the requester nor the contractor will be found to have knowingly violated subsection 27(d) of the Act. *If the requester or the contractor has actual knowledge or reason to believe*

*that the opinion is based upon fraudulent, misleading, or otherwise incorrect information, their reliance upon the opinion will not be deemed to be in good faith.*<sup>23</sup>

In this vein, a contractor is well advised to educate employees who will engage in potential employment discussions with government personnel about the limitations that government employees will be under even if they are permitted to engage in employment discussions with the contractor.<sup>24</sup> More than once contractor personnel have proceeded with employment discussions with a government employee who has properly recused himself or herself, but without knowledge that the government employee will be extremely limited in what he or she can do for the company if the employment discussions are consummated.

At least one agency contractor responsibility official has indicated in discussions with us his concern that such a scenario can place pressure on contractors to exploit what he views are loopholes in the revolving door restrictions. He is concerned that the restrictions may not be sufficiently strong to deter contractors and former government employees from communicating with their former agencies through informal means. He is asking some contractors to prohibit such “backdoor” influencing even where it might not violate the letter of the law.

**Be Sure to Include Guidance in Your Compliance Program That Looks Forward as Well as Backward.** This point is similar to that expressed immediately above. Nearly all aspects of most contractors’ (and government) conflict-of-interest compliance systems focus on the conduct of the parties *before* the employment discussions reach fruition. Fewer compliance systems remember to place reporting and monitoring obligations on former government employees and their supervisors *after* the former government employee is hired by the contractor. In many instances, it takes little drifting for a former government employee to begin to run afoul of the restrictions that prohibit communication with personnel in the government agency for which the former government employee worked, in violation, for example, of 18 U.S.C. § 207. Contractor supervising personnel should be educated in advance of hiring former government employees of the limitations that they will be expected to monitor and enforce with regard to the former government employee.

In a different, but related, set of circumstances, we have seen contractors stumble. This involves situations in which the former government employee and his or her initial industry employer fully comply with all revolving door restrictions. However, the former government employee decides to move to a different government contractor. The former government employee sometimes does not, in my observation, return to his or her former agency ethics advisor for a new ethics advisory opinion. Nor in such instances do the former government employee or new contractor employer discuss the limitations that may still be in effect with regard to the former government employee.

**Sensitize Appropriate Personnel Within the Company**

**Regarding How to Recognize Signals That “Fringe” Activity May Be Occurring.** As Bain queried his colleagues—how is it that someone in Boeing and its human resources department or within management did not perk up at seeing the name of Druyun when Darleen Druyun’s daughter applied for a position with the company—or at least when some within the company became aware that Darleen Druyun’s daughter was employed by the company and Druyun was reportedly interceding on her behalf of the daughter’s continued employment by Boeing? The name is not like Smith or Jones. How is it that management personnel did not query Sears about what he meant by the term “non-meeting” when describing his meeting with Darleen Druyun before she had recused herself from involvement with Boeing matters?

Examine whether your hiring questionnaires should solicit information, if they do not already do so, regarding whether or not relatives of the former or current government applicant work either for the company or in government positions that might affect the company’s business.

**Analyze Whether Your Compliance Needs Are Best Served by Centralized Reporting or Decentralized Reporting.** Some companies, such as Lockheed Martin, for example, have instituted mechanisms that involve collection of compliance data from all or nearly all segments of the company. This is no small task. However, it affords the company the opportunity to view and analyze trends that it might otherwise miss in a less centralized compliance program. Spikes in reports of certain types of reported misconduct allow the company to take proactive steps to fashion training and compliance consultation aimed at arresting potential violations before they become actual violations.

Conversely, some contractors elect not to centralize certain aspects of their compliance programs. These companies may, for example, decide that the training aspect of revolving door compliance should be uniform throughout the company, but that reporting and counseling functions are more effective if delivered through a decentralized mechanism that promotes more face-to-face dialogue with advisors.

**Strengthen Your Company’s Immune System Against the “Back Door” of Conflict-of-Interest Prohibitions—the Organizational Conflict of Interest.** No compliance issue is more prominent on the screens of government compliance and bid protest officials at this time than that of the organizational conflict of interest.<sup>25</sup> With the federal procurement system awash in a flood of outsourcing that appears certain to increase, given the spate of retirements of government procurement personnel that is just around the corner, the opportunity for abuse and the difficulty in preventing and detecting organizational conflicts of interest are daunting. As one agency contractor responsibility official noted, the conduct that the prohibitions of Title 18 of the U.S. Code are designed to prevent is implicated in organizational conflict-of-interest situations in precisely the same way, meaning, contractors cannot be given unfair access to inside government information or agency personnel. The revolving door restrictions prevent contractors

from gaining such access by hiring former government employees in an inappropriate fashion. The organizational conflict-of-interest restrictions prevent contractors from gaining such access through contracting.

The GAO bid protest unit is highly attuned to the problem and continues to forge new case law in the area. Recently the GAO sustained a protest in which a competitor of a contractor complained that award to the contractor would provide the contractor with unfair advantage because the contractor would be making subjective judgments about its own products and those of its competitors in connection with other government work.<sup>26</sup> Last fall, the managing associate general counsel of GAO and head of the GAO bid protest unit, Dan Gordon, authored a comprehensive article in which he traced the origins of the organizational conflict-of-interest bid protest and noted its increasing importance in the GAO's bid protest function.<sup>27</sup>

## Conclusion

Revolving door and conflict-of-interest compliance is increasingly complex. Nearly all stakeholders in the procurement process, even the revolving door's most ardent critics, seem to agree that it is in no one's interest to fully jam the revolving door. Yet agreement on reforms is hard to come by. Most agree that the system does not need a new series of laws and regulations; rather, they all appear to agree that simplification and consolidation is needed.

If there is one theme that seems to mark all commentary, it is that a contractor cannot hope for meaningful compliance unless the contractor's management and leaders live and project compliance. The Ethics Resource Center publishes statistics gathered as part of its National Business Ethics Survey<sup>28</sup> that confirm Bain's strongly worded observation to his management colleagues, "Our job as the leaders of this enterprise is to establish a culture that ensures that there is no next time. And frankly, the choice is ours."<sup>29</sup>

## Endnotes

1. See Revolving Door Working Group, *A Matter of Trust: How the Revolving Door Undermines Public Confidence in Government—And What to Do About It*, Oct. 2005, <http://www.revolvingdoor.info> (RDWG Report). I had the good fortune to recently study the *Federalist Papers* and we see in Madison's comment from *Federalist Paper No. 57* perhaps a distrust of central authority that foreshadows his significant shift, after he and Alexander Hamilton succeeded in securing the ratification of the Constitution by the states, to the antifederalist movement led by his Virginian compatriot, Thomas Jefferson.

2. By including these accounts the author does not mean to indicate that he agrees with the manner in which the RDWG has characterized the events or the conclusions the RDWG draws from its characterizations of the events.

3. RDWG Report, at 31-34.

4. See *Transcript of speech by Boeing's Doug Bain*, SEATTLE TIMES, Jan. 31, 2006, available at <http://seattletimes.nwsources.com/html/home/> ("Bain Transcript")

5. See <http://www.defenselink.mil/transcripts/2005/tr20050304-2221.html>; *Air Force Lifts Boeing Suspension*, AIR FORCE PRINT NEWS, Mar. 4, 2005, available at <http://www.af.mil/news>.

6. See *Management Oversight in Acquisition Organizations* report.

Report of the Defense Science Board Task Force, Mar. 2005 (DSB Report), available at <http://www.acq.osd.mil>.

7. *Id.* at 3 (emphasis added).

8. GAO-05-341, *Defense Ethics Program: Opportunities Exist to Strengthen Safeguards for Procurement Integrity*, Apr. 29, 2005, at 4-5, <http://www.gao.gov> (GAO Report).

9. RDWG Report, at 8.

10. RDWG Report, *supra* at 1, available at <http://www.revolvingdoor.info>, Appendix A.

11. *Id.* at 9 (emphasis added).

12. See, e.g., <http://www.lmco.com>; <http://www.boeing.com>; <http://www.raytheon.com>; <http://www.northropgruman.com>; <http://www.bae.com>; <http://www.generaldynamics.com>.

13. This is not to suggest that these companies do not provide detailed training to employees regarding this topic. It is to point out that the area is so complicated that companies are reluctant to attempt to address in publicly available materials practical problems employees might face in dealing with this topic. Company counsel have suggested that they want to make sure that the legal department has the opportunity to help guide employees in this difficult area and employees are not left on their own to attempt to decide

what action and inaction comply with the law.

14. GAO Report, at 2-3.

15. The Office of Government Ethics revealed a similar conclusion in the January 2006 report it recently presented to the president and certain congressional committees, entitled *Report to the President and Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment*. Nearly all OGE's recommendations regarding the conflict-of-interest laws called for relaxation of certain portions of the laws or expansion of exceptions.

16. DSB Report, at 3; *see also id.* at 10.

17. DBS Report at 17. This language was repeated in DOD Secretary Rumsfeld's September 7, 2005, letter in which he publicized the findings of the DSB Report.

18. *See, e.g.*, National Ethics Survey, portions published in the November 11, 2005, materials from the ABA Public Contract Law Section's program entitled "How Effective Is Your Compliance Program?" at Tab K, Patricia J. Harned, president, Ethics Resource Center.

19. GAO Report, at 2.

20. *Ethics and Fraud Remedies Table of Statutory Comparisons*, Air Force Materiel Command Ethics, available at <http://www.afmc-pub.wpafb.af.mil/HQ-AFMC/JA/lo/lojaf/ethics/index.htm>.

21. *Post-Government Service Employment Restrictions (Rules Affecting Your New Job After DoD)*, Office of Government Ethics, [http://www.usoge.gov/pages/laws\\_regs\\_fedreg\\_stats/other\\_ethics\\_guidance.htm/](http://www.usoge.gov/pages/laws_regs_fedreg_stats/other_ethics_guidance.htm/).

22. *See* FAR 3.104-6, Ethics Advisory Opinions regarding prohibitions on a former official's acceptance of compensation from a contractor; *see generally* FAR 3.104-3.

23. FAR 3.104-6(d)(3) (emphasis added).

24. For example, the lifetime ban under 18 U.S.C. § 207(a)(1) (prohibiting certain agency officials from communicating on behalf of a specific party to an agency or court in connection with a particular matter in which both the official and specific party were personally and substantially involved during the official's employment with the government).

25. In its simplest manifestation, an organizational conflict of interest arises when a contractor is hired by the government in such a way that it is placed in a position that provides it with a material advantage over one or more competitors, either with regard to competitions for contracts, or with regard to approvals or other agency action that either the contractor or the competitors might require. *See, e.g.*, FAR Subpart 9.5.

26. *Alion Science & Technology Corporation*, B-29,7022.3 (Jan. 9, 2006).

27. Daniel J. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25 (Fall 2005).

28. *See, e.g.*, portions published in the November 11, 2005, materials from the ABA Public Contract Law Section's program entitled "How Effective Is Your Compliance Program?" at Tab K, Patricia J. Harned, President, Ethics Resource Center.

29. *See* Bain Transcript, SEATTLE TIMES, at 6, Jan. 5, 2006.

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