



FEDERAL CONTRACTS



REPORT

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Contractor Accountability

Analyzing the Past and Future of the National Procurement Fraud Task Force in Light of Its Expanded 2010 Mission

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A. Introduction.

Over the past three-and-a-half years, the National Procurement Fraud Task Force (NPFTF or Task Force) has targeted and pursued government contractors in criminal and civil cases for engaging in procurement fraud, utilizing traditional law enforcement techniques and extensive cooperation among relevant agencies. The NPFTF has also pursued legislative and regulatory enactments to expand procurement and grant fraud enforcement. The Task Force's enforcement efforts signal to both companies and individuals involved in procurement within the United States and abroad, across a wide array of industries, that companies commit fraud against the government at their peril.

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With government contractors in mind, we evaluate the Task Force's record to date, forecast what is to come in light of recent events that will impact the Task Force's resources and priorities, and discuss how companies can proactively prevent problems in this area.

B. Overview and Recent Developments. The NPFTF is a partnership of over 50 federal and state investigative and law enforcement agencies, focused on allocating resources and streamlining processes for combating procurement fraud. The NPFTF has pursued its mission to promote the detection, prevention, and prosecution of procurement and grant fraud since starting operations in 2006. The Task Force draws on the prosecutorial resources of several parts of the DOJ, including the Fraud Sections of the Criminal and Civil Divisions, the Public Integrity Section and the Asset Forfeiture and Money Laundering Section of the Criminal Division, and United States Attorneys' Offices throughout the country—as well as the investigative resources of the Federal Bureau of Investigation and special agents of Offices of Inspector General, who have the authority to serve subpoenas and make arrests.

In 2010, the Department of Justice outlined an expanded mission for the NPFTF. The NPFTF became the operational arm for the Financial Fraud Enforcement Task Force (FFETF) chaired by Attorney General Eric Holder and led by the DOJ. The FFETF began in late 2009 to target financial crisis and Recovery Act fraud. Therefore, it appears that the NPFTF's investigators

and prosecutors will be tackling fraud which underlay the financial crisis and fraud perpetrated under the Recovery Act. According to the DOJ, the FFETF will “build upon efforts already underway to combat mortgage, securities and corporate fraud” in the financial system, in response to the recent “financial meltdown” and “to prevent another financial meltdown from happening.”² Given the Task Force’s new responsibilities and mission, it remains to be seen whether the Task Force will continue to sustain its prior levels of enforcement in the traditional areas of procurement and grant fraud, and to what extent Recovery Act fraud efforts will diverge from the work previously undertaken by the Task Force. In a practical sense, the Task Force will not displace the longstanding efforts to combat corporate fraud by the United States Attorneys’ Offices and the Criminal Division, which will also continue vigorously.

In an effort to evaluate the Task Force’s current enforcement practices with an eye toward the impact of its new role as the operational arm of the FFETF, we analyzed data we collected from the almost 900 Task Force cases reported in its press releases during its first three-and-a-half years. The data provide potential Task Force targets with a window into the Task Force’s past actions and insight into its future prosecutions—exhibiting its areas of experience and showing the likely agencies with which it will coordinate its efforts. The data detail the Task Force’s approach since its creation, with resources targeted primarily in the armed services, construction/real estate, transportation/shipping, education and public works areas.

The Task Force is only one part of a large system and a number of cooperating agencies in place to curb procurement fraud and, now, financial fraud. Congress has undertaken efforts to help executive agencies prosecute fraud, and the Task Force now faces focusing its efforts to achieve legislative changes tailored to Recovery Act fraud. As we discuss in greater detail below, the Task Force’s proposals have resulted in an expansion of the available tools to detect and limit fraud and it is likely to continue these efforts in at least some form.

C. Data Trends. The NPFTF has set a strong precedent of enforcement. In an effort to better understand the Task Force’s allocation of attention and resources, we analyzed data from Task Force investigations from October 2, 2006 (when the group posts its first press release) through April 2, 2010. We identified almost 900 Task Force cases, which showcase the Task Force’s aggressive enforcement efforts, that its press releases describe.³ The data reveal that the Task Force employed a

variety of traditional investigative techniques, including wiretaps,⁴ search warrants,⁵ and informants.⁶

Within its array of cases, certain enforcement trends predominated, as we describe below. The Task Force pursued both civil and criminal cases against individuals and companies, directing most cases against individuals and pursuing criminal charges. It pursued a variety of criminal charges, and many of its cases involved conspiracies, showing the involvement of multiple individuals. Stern penalties have been imposed on individuals at various levels of companies and including prison sentences of over 17 years—with particularly severe penalties appearing in bribery cases—and the Task

maintained at another stage, for example), this sometimes created separate cases. Because the source of our data is DOJ’s self-reporting, we encountered some limitations where the Department’s press releases failed to detail characteristics of a case—and, again, our data set covers only press releases distributed through the NPFTF website. Those characteristics for which we did not have data are noted as “unknowns” in our data set. For the other categories we exercised our best judgment to label the press releases according to the information that they contained.

⁴ See, e.g., Press Release, FBI, *Dirty Business: Mob-Infested Industry Cleaned Up* (Nov. 4, 2008), available at <http://www.justice.gov/criminal/npftf/pr/2008/nov/11-04-08galantegUILTY.pdf>; Press Release, United States Attorney, District of Connecticut, *Danbury Man Involved in Trash-Hauling Conspiracy is Sentenced* (Sept. 17, 2008), available at <http://www.justice.gov/criminal/npftf/pr/2008/sept/09-17-08novellagUILTY.pdf>; Press Release, United States Attorney, Northern District of Illinois, *Developers, Contractors and Seven City Employees Among 15 Charged in Federal Bribery Probe of City Building Permits* (May 22, 2008), available at http://chicago.fbi.gov/dojpressrel/pressrel08/may22_08.htm; Press Release, U.S. Attorney’s Office for the District of Connecticut, *Former Owner of Danbury Trash Company Pleads Guilty to Federal Racketeering Conspiracy Charge* (Apr. 10, 2007), available at <http://www.justice.gov/usao/ct/Press2007/20070410-4.html>; Press Release, U.S. Attorney’s Office for the District of Connecticut, *Jury Finds Computer Executive Involved in Public Corruption Scheme Guilty on Nine Counts* (Apr. 3, 2007), available at <http://www.justice.gov/usao/ct/Press2007/20070403.html>; Press Release, U.S. Attorney’s Office for the District of Connecticut, *Trash Company Manager Pleads Guilty to Federal Racketeering Conspiracy Charge* (Mar. 26, 2007), available at <http://www.justice.gov/usao/ct/Press2007/20070326-2.html>;

⁵ See, e.g., Press Release, U.S. Attorney’s Office for the Western District of Texas, *Final Defendant Sentenced in Multi-Million Dollar U.S. Army Medical Information Systems and Services Agency Bribery Scheme* (May 8, 2008), available at http://www.justice.gov/usao/twx/press_releases/2008/strout%20jr%20press%20release.pdf; Press Release, DOJ, *Eight Executives Arrested on Charges of Conspiring to Rig Bids, Fix Prices, and Allocate Markets for Sales of Marine Hose* (May 2, 2007), available at http://www.justice.gov/opa/pr/2007/May/07_at_322.html.

⁶ See, e.g., Press Release, United States Attorney’s Office for the Southern District of Texas, *Former TxDOT Employees Convicted in Bribery Scheme* (May 30, 2008), available at <http://www.justice.gov/usao/txs/releases/May%202008/053008TXDOT.htm>; Press Release, U.S. Attorney’s Office for the District of Connecticut, *Former New Haven Police Lieutenant Sentenced to 38 Months in Federal Prison* (Apr. 28, 2008), available at <http://newhaven.fbi.gov/dojpressrel/2008/nh042808.htm>; Press Release, U.S. Attorney’s Office for the Southern District of New York, *U.S. Army Captain Arrested for Accepting \$50,000 Bribe to Steer Military Contracts in Iraq* (Aug. 23, 2007), available at <http://justice.gov/criminal/npftf/pr/2007/aug/08-23-07key-arrest.pdf>.

² Press Release, *President Obama Establishes Interagency Financial Fraud Enforcement Task Force* (Nov. 17, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-opa-1243.html>.

³ See DOJ, *NPFTF Press Releases*, available at <http://www.justice.gov/criminal/npftf/pr/newstatement.html> (formerly http://www.justice.gov/criminal/npftf/pr/press_releases/). When cataloging the results, we defined a distinct “case” as a series of events or a related set of facts leading to a Task Force investigation. Accordingly, if a single press release reported on multiple investigations involving different facts, each investigation was classified as a separate case. In addition, when we gathered additional data on certain defendants (when a subsequent press release indicated that they had been sentenced, whereas another defendant in the case re-

Force has recovered significant payments such as settlements up to \$407 million, in large part from the construction industry. The cases relate to conduct in at least 46 states and U.S. territories and 40 different countries, with domestic activity and entities being the most common targets.

Almost twenty percent of cases were against companies, and eighty percent of defendants were individuals from across various industries. Almost 20% of defendants were companies, while approximately 80% were individuals. Although the Task Force jointly charged a corporate and individual defendant in just about three percent of cases, several larger investigations resulted in both corporate and individual defendants being charged over time. Moreover, cases frequently involved not only a single company but also multiple individuals. For example, in a long-running investigation into price fixing in the marine hose industry (involving a rubber hose used to transfer oil between tankers and storage facilities), at least four companies and nine individuals have pleaded guilty to fraud charges.⁷ Given the collateral consequences of charging companies and the significance to prosecutorial discretion of the factors outlined in the Principles of Federal Prosecution of Business Organizations, it is particularly noteworthy that almost 20% of the defendants are companies.

The Task Force pursued mostly criminal cases, with only a handful of cases involving joint criminal and civil charges. The Task Force pursued more criminal than civil cases; just under 90% of the cases were criminal, and we identified only a handful of cases where the Task Force reached joint civil and criminal resolutions. As examples, the government claimed criminal violations, which included the submission of false claims, and civil False Claims Act violations related to the Big Dig project (described further below). In another case, National Air Cargo (NAC) agreed to pay the United States \$28 million to settle both civil and criminal allegations that it defrauded the Department of Defense by submitting fraudulent claims for payment to the DOD for shipment of freight—either by not using the required method of shipment or by misrepresenting the delivery date. NAC pleaded guilty to one count of knowingly making a material misstatement and agreed to pay a criminal penalty of \$8.8 million, criminal restitution of \$4.4 million, and \$11.75 million to resolve the civil allegations, and to forfeit assets in the amount of \$3.05 million.⁸ Illinois-based defense contractor MPC Products Corporation agreed to pay a \$2.5 million criminal fine and a \$22.5 million civil judgment to settle allegations that it overcharged the government, in a series of military contracts, for the electronic and mechanical parts it manufactured. The government charged it with wire fraud and a False Claims Act viola-

tion for overbilling.⁹ Within the civil cases it pursued, the Task Force pursued False Claims Act allegations almost exclusively—often through the government’s intervention after an initial *qui tam* or whistleblower suit had been filed.

The Task Force’s criminal cases covered a number of criminal charges, and a significant portion of the cases involved conspiracies. In its criminal investigations the Task Force pursued a variety of charges, including more than 25 types of statutory violations. Bribery and kickbacks, false statements, and fraud (as well as conspiracies to commit the same) were the most prevalent.¹⁰ Common conspiracy charges also included bid rigging.¹¹ (Conspiracies to commit fraud, conspiracy to commit bribery, and conspiracy to rig bids accounted for over 80% of the conspiracy charges.) Other types of criminal conspiracy charges included conspiracy to commit extortion, conflicts of interest, and conspiracy to steal trade secrets. The prevalence of conspiracy charges shows an emphasis on cases where multiple individuals were involved.

The Task Force has reported severe penalties imposed on individuals, at various levels of companies and in different industries and locations—with the longest sentences occurring in bribery cases. The penalties imposed have been severe. Of the approximately 800 criminal cases, just under 200 cases (involving over 200 individuals, because more than one individual was sometimes sentenced in a single case), or about 25%, involved at least one defendant that received a prison sentence longer than one year. The bulk of these individuals received sentences within the one-to-two year range, but a substantial portion of sentences exceeded five years, including sentences over 17 years in prison. For the time period we examined, the average prison sentence was approximately three years long.

Bribery investigations, in particular, have resulted in significant prison sentences for corporate contractor employees. For instance, in August and November of 2009, a pair of employees of two Afghan general contracting firms were sentenced to four years in prison for their roles in a bribery scheme involving a U.S. Army contracting official in Afghanistan.¹² The Army was soliciting bids to design and build a road in the Logar Province, and both men submitted bids on behalf of their companies. In an effort to secure the contract, the men met with the Army Captain managing the contract’s award and offered him \$1 million in bribes if he would agree to disqualify lower bidders on the contract and influence the award of the contract to their companies. The investigation was conducted by the FBI, U.S. Army Criminal Investigative Division, Special Inspector

⁹ Press Release, DOJ, *Skokie-based Defense Contractor MPC Products Corp. to Pay U.S. \$25 Million to Settle Criminal and Civil Contract Fraud Claims* (Oct. 15, 2009), available at http://www.justice.gov/usao/iln/pr/chicago/2009/pr1015_01.pdf.

¹⁰ “Fraud” includes mail and wire fraud, along with any other general fraud charges.

¹¹ We use “conspiracy to rig bids” in our data set to include Task Force Press Releases that involved antitrust conspiracy claims, notably Sherman Act bid rigging and price fixing.

¹² Press Release, DOJ, *Two Individuals Sentenced to Prison for Offering to Bribe U.S. Army Contracting Official in Afghanistan* (Nov. 13, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-crm-1225.html>.

⁷ Press Release, DOJ, *Italian Subsidiary of U.S.-Based Company Agrees to Plead Guilty for Participating in International Price-Fixing Conspiracy* (Feb. 16, 2010), available at <http://justice.gov/opa/pr/2010/February/10-at-144.html>.

⁸ Press Release, DOJ, *National Air Cargo to Pay U.S. \$28 Million to Resolve Allegations of Defrauding the Department of Defense* (Mar. 26, 2008), available at http://www.justice.gov/criminal/npftf/pr/2008/mar/03-26-08_nac-pay-us2rslv-dod-alg.pdf.

General for Iraq Reconstruction (SIGAR), Defense Criminal Investigative Service (DCIS) and the International Contract Corruption Task Force (ICCTF).

The individual defendants who received sentences longer than one year have been diverse. These individuals range from high-level privately-employed individuals to high-level government-employed individuals to owners of local businesses and lower-level employees. These individuals worked for the government and private sectors and in a variety of industries and locations. The most common industries that these individuals' cases involved were armed services, construction/real estate, public works, and education. The crimes underlying the majority of these cases occurred domestically, in over half the states.

During the several months it operated in 2006, the Task Force's investigations resulted in about 10 individuals being sentenced to a term of longer than one year. Subsequently, there were approximately 60 individuals sentenced in 2007, 65 in 2008, and 40 sentenced in 2009 to such a term.

The Task Force has recovered significant payments, with the largest coming from the construction industry. Not only have many investigations resulted in prison sentences, but the Task Force succeeded in securing payments totaling over \$2 billion. The primary types of penalties have been fines imposed by courts in civil and criminal cases, restitution ordered by courts in criminal cases, and negotiated settlements. Although companies have been subject to all three forms of monetary penalties—fines, restitution, and settlements—settlements accounted for the bulk of payments. Among corporate defendants, approximately half of their cases were settled with the government, accounting for almost \$1.5 billion in recovery. These civil corporate settlements ranged widely, from \$12,000 to \$407 million, and approximately two-thirds of the settlements were over \$1 million. Corporate defendants received fines in over a quarter of the cases, accounting for about \$438 million, while corporate restitution payments accounted for over \$30 million.

The Big Dig project in Boston, Massachusetts produced the largest settlement. The companies managing the construction of the project, Bechtel/Parsons Brinckerhoff, Bechtel Infrastructure Corp., and PB Americas, Inc., agreed to pay a settlement of \$407 million to resolve civil and criminal liability related to the collapse of part of the I-90 Connector Tunnel's ceiling and defects in the slurry walls of the Tip O'Neill Tunnel.¹³ In addition to publicly admitting wrongdoing, as part of their settlement the companies agreed to enact corporate compliance programs, submit to reviews of their corporate ethics and quality assurance programs, improve training for employees, and conduct internal investigations to uncover further wrongdoing.¹⁴ Although this settlement addressed the primary civil and criminal liability of the companies, the companies could still be held liable, for example, for catastrophic events causing more than \$50 million in damages until 2018.¹⁵ In addition, numerous other small companies also agreed to

pay an additional \$51 million to resolve cost recovery issues with the government.¹⁶ In sum, these settlements brought the total recoveries associated with the Big Dig project to over \$500 million.¹⁷ These settlements highlight the Task Force's efforts to investigate construction and management projects.

The Task Force has pursued procurement fraud in a variety of industries, with identifiable focal points in armed services and construction. The Task Force investigated defendants in a variety of industries, but the top five industries accounted for nearly 80% of all cases. They were: armed services, construction/real estate, transportation/shipping, education and public works. Other significant industries included technology and health care.¹⁸ Given that the United States has significant war and reconstruction operations in Iraq and Afghanistan, it is unsurprising that the armed services industry alone accounted for approximately one quarter of all cases.

The conduct underlying Task Force cases primarily occurred domestically and in certain states, with an international focal point in the Middle East. The alleged criminal conduct occurred domestically in close to 80% of the cases, and the leading state for Task Force investigations was New Jersey—followed by California, Texas and New York. In New Jersey, at the Federal Creosote Superfund site, for example, the Task Force conducted one of its largest environmental investigations, dealing with allegations of kickbacks, fraud and money laundering.¹⁹ Three companies and eight individuals had pleaded guilty as part of the investigation through April 2, 2010. One of the companies was sentenced to pay criminal fines and restitution totaling more than \$2.66 million, and one of the individual defendants was sentenced to serve almost two years in jail.²⁰ The remaining defendants await sentencing.²¹ Almost two-thirds of all international investigations—which totaled approximately 200 cases, including cases that had both domestic and international components—involved conduct that occurred in the Middle East. Among the cases involving corporate entities, over 80% involved a domestic company (or companies), about 15% involved a foreign company (or companies), and a handful of cases involved both U.S. and foreign entities pursued together.

D. Task Force Legislation Committee Efforts Portend Future Legislative Action. Acting in parallel to the Task Force's enforcement efforts, the NPFTF's Legislation Committee proposed a number of legislative and regulatory changes to enhance the ability of government agencies to target procurement fraud—and its success in promulgating these changes, many of which were enacted and others of which at least garnered serious at-

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ The Department of Justice pursued many health care cases that the NPFTF's press releases do not show, such as through the Civil Fraud Section in the Civil Division, Commercial Litigation Branch.

¹⁹ Press Release, DOJ, *Former Subcontractor Representative Pleads Guilty to Indictment Involving Conspiracy at New Jersey Superfund Site* (Oct. 28, 2009), available at <http://www.justice.gov/opa/pr/2009/October/09-at-1167.html>.

²⁰ *Id.*

²¹ *Id.*

¹³ Press Release, DOJ, *Big Dig Management Consultant and Designers to Pay \$450 Million* (Jan. 23, 2008), available at <http://www.justice.gov/criminal/npftf/pr/2008/jan/01-23-08bigdig-pay.pdf>.

¹⁴ *Id.*

¹⁵ *Id.*

tion, suggests that its proposals warrant considered attention and monitoring. At a minimum, the Task Force recommendations can serve as good predictors of what may be implemented.

The Legislation Committee proposals in its “White Paper on Procurement Fraud: Legislative and Regulatory Reform Proposals” tracked significant new rules affecting government contractors, in particular.²² The White Paper proposed legislative changes in three broad categories: (1) ethics and internal controls; (2) prosecution and enforcement; and (3) prevention and detection of procurement fraud. The proposals provide a useful focal point for examining the enforcement ideology of the NPFTF’s initial years and the likelihood of success—or simply timeliness before comparable provisions follow—of Task Force proposals.

Ethics and Internal Controls. The White Paper first addressed ethics and internal controls among contractors. The Committee recommended requiring contractors to implement written ethics codes if the contractors had aggregate sales under government contracts exceeding \$5 million in the year prior to any new contract award. Each contractor would need to come into compliance within 30 days of its contract award. In addition, the White Paper recommended obligating contractors to notify the government of overpayments, as well as all instances of actual and suspected violations of criminal law related to government contracting within 30 days of the contractor’s discovery of the conduct.

Adaptations of these proposed requirements appeared in the Federal Acquisition Regulations even before the public release of the White Paper.²³ While the Task Force Committee’s recommendations would have applied more strict controls on government contractors than the revisions to the FAR, the relevant provisions were significantly strengthened in any event.

Aiding the Prosecution of Procurement Fraud. In their next category of proposals, the Task Force Committee requested changes to aid the prosecution of procurement fraud. The Committee recommended expanding the power of IGs by granting them subpoena authority to compel witness interviews and clarifying the scope of the IGs’ subpoena authority to include documents or other tangible items and electronic evidence. Additionally, the Committee advocated detailing IG lawyers to DOJ procurement fraud prosecutions, to facilitate training and awareness.

²² NPFTF Legislation Comm., *Procurement Fraud: Legislative and Regulatory Reform Proposals* (June 9, 2008), available at <http://oig.gsa.gov/otherdocs/NPFTFLegWhitePapervFinal.pdf>.

²³ The FAR amendment regarding written ethics codes is similar to the Legislation Committee’s proposal, but only requires that a contractor implement the compliance program if it has been awarded a single contract of more than \$5 million and a greater-than-120-day performance period. Contractors have 90 days from the date of the contract award to implement these programs. Yet, the FAR exempts certain contractors from maintaining a compliance program. The FAR amendment is also similar to the Legislation Committee’s proposed reporting requirement for overpayments and violations of criminal law (again, the requirement only applies if a contractor has been awarded a contract of more than \$5 million and a greater-than-120-day performance period). FAR 52.203-13 (Contractor Code of Business Ethics and Conduct); see also FAR 3.1004 (Contract clauses).

5 U.S.C. § 6(a)(4), which governs the IGs’ subpoena power, has since been amended to include “tangible things” and electronic evidence.²⁴ In addition, Section 1515 of the Recovery Act granted the OIG authority and access to interview any officer or employee of a contractor, grantee, subgrantee, or state or local agency regarding transactions funded with Recovery Act funds, while Section 902 of the Recovery Act provides the Government Accountability Office similar authority.²⁵

The Task Force also urged expanding and reforming the Program Fraud Civil Remedies Act (PFCRA), which enables recovery of civil penalties for the false or fraudulent submission of claims.²⁶ For instance, the Task Force Committee’s White Paper suggested expanding 31 U.S.C. §§ 3801-3812 to endow all OIGs, rather than only certain OIGs, with the authority to utilize the provisions of the PFCRA. This proposal was adopted; 31 U.S.C. § 3801 now includes “designated federal entities” and thereby additional OIGs.²⁷

Preventing and Detecting Procurement Fraud. Finally, the White Paper detailed proposals to expand the government’s ability to prevent and detect procurement fraud by advocating that contractors have to notify the government of overpayments or duplicate payments—which the law now demands. These provisions, which went into effect on December 12, 2008, require contractors to “timely” self-disclose significant government overpayments and when they have “credible evidence” of a violation of the FCA or of criminal law provisions involving fraud, conflict-of-interest, bribery, or gratuities found in Title 18 of the United States Code.²⁸ Debarment and suspension penalize failures to comply.²⁹ This is an extensive expansion of these requirements.³⁰

Indeed, the NPFTF Chair predicted in December 2009 that “vigorous enforcement of [the new FAR self-disclosure] provision can be a very effective weapon in [their] efforts to stop and deter fraud.”³¹ Whether this strong rhetoric will be matched by reality remains to be seen, however, because disclosures had been made to only seven Inspectors General at the beginning of this year.³² The Committee further proposed that contractual clauses pertaining to this required reporting be included in all solicitations and contracts exceeding \$5 million—but this text does not yet appear in the FAR.³³

The Committee also advocated extending the criminal conflict-of-interest requirements under 18 U.S.C. § 208 to include contractors performing acquisition-assistance functions on behalf of the government, in addition to employees of the government directly. The law

²⁴ See 110 Pub. L. No. 409, 122 Stat. 4302 (2008).

²⁵ See 111 Pub. L. No. 5, § 1515, 123 Stat. 115 (2009); see also *id.* § 807.

²⁶ 31 U.S.C. §§ 3801-12.

²⁷ See 110 Pub. L. No. 409, 122 Stat. 4302 (2008); see also 5 U.S.C. § 8G(a)(2) (defining “designated Federal entity” to include additional entities).

²⁸ See FAR 3.1003(a)(1), (3) (Requirements).

²⁹ FAR 3.1003(a)(1), (3); FAR 32.008 (Notification of overpayment); see also FAR 9.406-2(vi) (Causes for debarment), 9.407-2(a)(8) (Causes for suspension).

³⁰ See FAR 12.215 (Notification of overpayment).

³¹ Memorandum from Lanny A. Breuer, Assistant Attorney Gen. for the Criminal Div., DOJ (Dec. 17, 2009) available at <http://www.justice.gov/criminal/npftf/pr/speeches-testimony/2009/12-17-09breuer-statement.pdf>.

³² *Id.*

³³ See FAR subpart 52.2 (Text of Provisions and Clauses).

would treat such contractors as having prohibited financial conflicts-of-interest if the acquisition involves an individual or entity that was related to the acquisition contractor or consultant—to eliminate perceived favoritism in such circumstances. The new provisions would place the burden on contractors, rather than on agency employees, to screen for and eliminate such conflicts of interest.³⁴ NPFTF members and affiliated IGs have testified in Congress that IGs strongly support such provisions.³⁵

Several other proposals from the Committee remain under consideration. The White Paper suggested that the government reinstate broad audit rights for the General Services Administration IG for price information submitted during negotiations under the GSA and Veterans Administration (VA) Multiple Award Schedule (MAS) Program, in order to ensure that contractors provide current, accurate and complete pricing information. These audit rights were discontinued for MAS contracts in 1997, and the Committee indicated that their deterrent effect warranted their re-inclusion.³⁶

The White Paper also suggested amendments and greater coordination between federal and state personnel regarding information on contractors, which would include compiling a national procurement fraud database to contain adverse action data on contractors (including suspension and debarment information) and requiring that contractor personnel undergo extensive background checks. Similarly, it proposed enhanced tools for identifying parties on the Excluded Parties Lists System (EPLS), which is a federal system that identifies suspended and debarred individuals and companies.³⁷

E. Information-Sharing and Cooperation Among Agencies, The Commission on Wartime Contracting, And Increased Government Contractor Accountability. The Task Force works jointly with a variety of government agencies, and such coordination and information-sharing has facilitated the Task Force's pursuit of investigations in at least 46 states and U.S. territories and 40 different countries, as mentioned above. In addition to broad cooperation within the DOJ, the Task Force works closely with the ICCTF, the Defense Finance Accounting Service (DFAS), and the Logistics Civil Augmentation Program (LOGCAP) Working Group—and in parallel with

³⁴ 73 Fed. Reg. 15,961 (Mar. 26, 2008).

³⁵ Statement of J. Anthony Ogden, Inspector General, "Improving the Ability of Inspectors General to Detect, Prevent, and Help Prosecute Contracting Fraud," Apr. 21, 2009, U.S. Senate, available at <http://www.ignet.gov/pandele/ogdentest042109.pdf>.

³⁶ Statement of Hon. Brian D. Miller, Inspector General, GSA, to Ad Hoc Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Apr. 21, 2009, available at <http://www.gsaig.gov/otherdocs/FINAL%20TESTIMONY%20FOR%20APRIL%2021.pdf>.

³⁷ E.g., Statement of J. Anthony Ogden, *supra*; see also Statement of Charles W. Beardall, Deputy IG for Investigations, DOD, before the Senate Homeland Security and Governmental Affairs Committee, Subcommittee on Contracting Oversight, on "Improving the Ability of Inspectors General to Detect, Prevent, and Prosecute Contract Fraud," Apr. 21, 2009, available at http://www.dodig.mil/IGInformation/IGInformationReleases/DoDIGStatementonProcurementFraud_04-21-09.pdf.

private auditors. These groups will continue to be influential in combating procurement fraud.

The ICCTF, an offshoot of the NPFTF, is a joint task force that investigates contract fraud specifically relating to the Global War on Terror and, like the NPFTF, pools resources to serve a common mission. The DFAS, along with the DCIS, DOD OIG, Defense Contract Audit Agency, U.S. Army Audit Agency, and the FBI, is working to compile seven million DOD payment vouchers totaling over \$10 billion. The DFAS aids in the detection of fraud by retaining and retrieving vouchers and reviewing them for potential red flags, which the Task Force can then investigate further. The LOGCAP Working Group, working out of the United States Attorney's Office for the Central District of Illinois, has pursued both criminal and civil procurement fraud cases, supplementing the work of U.S. Attorneys' Offices throughout the country.

While the Task Force has partnered with various domestic and international entities to remedy past procurement violations, the Commission on Wartime Contracting (CWC) has highlighted areas that need to be changed in future government contract awards and audits. Congress mandated the CWC to investigate the disposition of billions of dollars of government contract spending in Iraq and Afghanistan. The CWC's broad mandate also includes investigating federal reliance on contracting; contractor performance and accountability; contractor use of force; contract management and oversight by government agencies; and waste, fraud and abuse.³⁸ The CWC has conducted multiple audits and hearings and has reported on findings regarding contingency contracting in Iraq and Afghanistan. In the coming months, investigations in the armed forces arena are likely to increase as the CWC continues to probe for procurement fraud violations in the war theater.

F. The Recovery Act and the Terrain Ahead. In accordance with its expanded mission to tackle fraud with the FFETF, the NPFTF will likely prioritize fraud involving the Troubled Asset Relief Program (TARP) bailout funds. However, with finite resources at its disposal and the Task Force's lack of experience pursuing cases involving the Recovery Act and TARP, it remains to be seen whether the Task Force's new agenda will be fulfilled without strain or diminishing its investigative and prosecutorial abilities in the procurement and grant fraud areas.

Nevertheless, Recovery Act efforts are underway. On March 15, 2010, for instance, the United States Attorney's Office for the Southern District of New York announced what it said "mark[ed] the first time that criminal charges have been brought in connection with a direct attempt to steal the taxpayers' investment in TARP."³⁹ According to the April 20, 2010 Quarterly

³⁸ *Lessons from the Inspectors General: Improving Wartime Contracting* (Feb. 2, 2009) (joint statement of Michael Thibault and Grant Green, Co-Chairs, Comm'n on Wartime Contracting in Iraq and Afghanistan), available at http://www.wartimecontracting.gov/images/download/documents/hearings/20090202/Joint_Statement_MichaelThibault_GrantGreen.pdf.

³⁹ Press Release, U.S. Attorney's Office for the Southern District of New York, *Manhattan U.S. Attorney Charges Former President of the Park Avenue Bank with Self-dealing, Bank Bribery, Embezzlement of Bank Funds, and Fraud* (Mar.

Report to Congress by the Special Inspector General appointed to oversee the usage of TARP funds (SIG-TARP), SIGTARP had 84 open criminal and civil investigations. The cases include accounting, securities, bank and mortgage fraud, insider trading, public corruption, false statements, money laundering, and tax-related investigations.⁴⁰

The amendments to the civil False Claims Act in 2009 may facilitate efforts to pursue TARP fraud and other fraud arising under the release of federal government recovery funds, as well.⁴¹ The Fraud Enforcement and Recovery Act (FERA) expanded liability to requests for funds by a “contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest.”⁴² These amendments also expanded the scope of the FCA’s private whistleblower provisions by broadening the definition of “claim” in the statute, widening liability so that it covers submissions by subcontractors and others who are not submitting claims directly to the government, and covers failures to refund overpayments to the government in addition to requests for funds. The 2010 health care bill further strengthened whistleblower protections, such as by providing that the “public disclosure bar”—which prevents whistleblowers from recovering based on information that is already publicly available—only bars recovery based on information contained in federal government investigative reports, not, for example, state investigative reports.⁴³ FERA also broadened who may file Civil Investigative Demands in order to promote information-sharing in support of private and public enforcement at both the federal and state levels.

In addition, FERA’s provisions promoted criminal enforcement by increasing funding for investigative and prosecutorial agencies, expanding the definition of “financial information” under criminal law to include mortgage lending businesses, enabling the “relation-back” of later-added claims to fall within the statute of limitations for original complaints, and otherwise expanding coverage to address more kinds of fraud. The DOJ recovered \$2.4 billion from FCA cases in fiscal year 2009,⁴⁴ and these recoveries are likely only to increase. Procurement fraud enforcement, in particular, accounted for a quarter of these recoveries, or \$608.4 million in settlements and judgments.⁴⁵

15, 2010), available at <http://www.justice.gov/usao/nys/pressreleases/March10/antonuccicharlesarrestpr.pdf>.

⁴⁰ SIGTARP, *Quarterly Report to Congress* (Apr. 20, 2010), at 9, 15, available at http://www.sig tarp.gov/reports/congress/2010/April2010_Quarterly_Report_to_Congress.pdf; Statement of Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, before the Committee on Homeland Security and Governmental Affairs, U.S. Senate, *Follow the Money: An Update on Stimulus Spending, Transparency, and Fraud Prevention: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (2009), available at <http://www.justice.gov/atr/public/testimony/250274.htm>.

⁴¹ See 31 U.S.C. §§ 3729-33.

⁴² FERA, Pub. L. No. 111-21, § 4(a), 123 Stat. 1617 (2009).

⁴³ 31 U.S.C. § 3730(e)(4)(A).

⁴⁴ Press Release, DOJ, *Justice Department Recovers \$2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than \$24 Billion Since 1986* (Nov. 19, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html>.

⁴⁵ *Id.*

G. Corporate Practices. As the Task Force takes on its expanded mission, uncertainty will remain within the government contracting community to see how it will proceed. This community should take steps to protect itself from unwanted scrutiny in the wake of this uncertainty. Taking proactive measures to prevent, detect, and remedy any potential fraud-related issues may prevent a prolonged and costly investigation down the line. Above all, by implementing an effective internal compliance program, appointing an adept and active compliance officer, training employees, and proactively and quickly investigating high-risk and vulnerable areas within the company, contractors can meaningfully prepare for government investigations and organically institute a culture of compliance within the organization. With the recent amendments to the Federal Sentencing Guidelines,⁴⁶ having in place an effective and up-to-date compliance program has become even more critical. These amendments provide expanded “compliance credit” for companies that have implemented and maintained an effective compliance and ethics program⁴⁷ and provide guidance on the remediation steps suggested to receive such credit if wrongdoing is identified—such as providing restitution to identifiable victims.⁴⁸

As a general matter, to decrease the risks of fraud, companies should: (1) remedy any structural and operational defects that make them susceptible to internal fraud; (2) ensure that they have in place personnel and accounting practices that limit the likelihood of fraud committed by employees; and (3) identify and internally investigate the common red flags of fraud. A corporate structure that discourages fraud includes: having a proactive tone-at-the-top and management commitment to combating fraud; educating employees about fraud, corruption and conflicts of interest and how to detect and prevent them; having effective security in place to protect assets and data; maintaining detailed, accurate and up-to-date records; ensuring a segregation of duties so that no employee has too much control over one area, particularly in contracting; and responding immediately to red flags, including through discipline of employees, where necessary.

Companies should specifically address risks for procurement and other fraud in their codes of conduct, and a separate anti-bribery and anti-corruption compliance standard may be advisable in certain circumstances. Companies should also generally establish confidential hotlines to facilitate whistleblower reporting with accompanying protections, and conduct internal and external audits. Audits will facilitate identification and prevention of fraud and the appropriate notification of

⁴⁶ The amendments will become effective November 1, 2010 in the absence of action by Congress.

⁴⁷ Proposed U.S. Sentencing Guidelines Manual § 8C2.5(f)(3). U.S. Sentencing Commission, Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary 17-18, 20 (Apr. 30, 2010), available at <http://www.ussc.gov/2010guid/finalamend10.pdf> (eliminating the automatic bar to compliance credit when “high level personnel” are involved in wrongdoing).

⁴⁸ Proposed U.S. Sentencing Guidelines Manual § 8B2.1, Application Note 6. U.S. Sentencing Commission, Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary 17 (Apr. 30, 2010), available at <http://www.ussc.gov/2010guid/finalamend10.pdf> (outlining appropriate remediation steps).

the government of overpayments or duplicate payments received by companies and violations of criminal law, as the FAR self-disclosure provision now requires for certain laws. Legal counsel can assist in identifying the FAR provisions and other requirements that apply to individual companies, and how best to approach the government, including inspectors general, if the need arises. Companies should learn how to timely and effectively respond to internal red flags and government inquiries. Counsel will also be able to assist in monitoring developments from the many agencies active in this area and through the Task Force, and responding to those developments.

While each company must tailor these best practices to fit its needs, making management aware of the inherent risks in failing to investigate problem areas is an important step in the compliance process. Taking proactive measures to prevent, detect, and remedy any potential fraud-related issues and risks may prevent a prolonged and costly investigation in the future.

H. Conclusion. The National Procurement Fraud Task Force's investigations and prosecutions are characterized by strength and breadth. Cases frequently involve both companies and individual defendants, with individuals at all levels being subject to inquiry and enforcement. Both in the criminal and civil realms, contractors have been targeted with numerous charges,

and the penalties are severe both in terms of prison time and monetary sanctions. Task Force investigations cover a variety of industries, with cases predominating in armed services, construction/real estate, transportation/shipping, education and public works. Moreover, cases have arisen around the country and the world, with no area being immune from attention.

The Task Force's expanded mission suggests broader enforcement going forward, at the same time as it remains to be seen whether the Task Force can continue to be effective in combating fraud in procurement in addition to coordinating with the FFETF's activities and goals. Financial fraud, generally, has not been a focus of the Task Force to date. But the Task Force's efforts in the legislative arena, and its ability to coordinate with other entities in the procurement and grant fraud areas so far, show that the Task Force can act proactively in managing and cultivating the resources it has.

In light of the continuing aggressive enforcement environment, it is imperative that government contractors adopt measures to diminish the risk of fraud. By decreasing susceptibility to procurement fraud, engaging in effective accounting and personnel practices, and adopting internal controls, including audits, government contractors can shield themselves from procurement fraud and the risk of scrutiny from the Task Force.