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New Supreme Court Case Could Be a False Claims Act Game-Changer

By Mark B. Sweet

The Supreme Court of the United States agreed this week to hear a new case that tests the viability and scope of one of the most controversial theories of liability under the False Claims Act: implied certification. The case, *Universal Health Service v. United States ex rel. Escobar*, could have profound effects on how aggressive the government and *qui tam* relators can be in stretching breaches of contract into false claims, and conversely how much pressure a contractor faces when deciding whether to settle or litigate such a case.

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The theory of implied certification is that a party can violate the False Claims Act for more than just making a false statement on the face of an invoice or in the express language of a certification. Implied certification means that a party can be liable for seeking payment from the government while knowingly violating a contractual provision or administrative regulation, even in the absence of an express certification of compliance with that standard. The idea is that by seeking payment from the government, the contractor is impliedly certifying that it is complying with all relevant laws and contractual provisions.

For example, under the theory of implied certification, a minority-owned small business was liable under the False Claims Act for submitting progress payment vouchers on a construction project—all of which were accurate and true on their face—because the company knowingly failed to comply with the requirements of the Section 8(a) small business program during performance. *See Ab-Tech Const., Inc. v. United States,* 31 Fed. Cl. 429, 434 (Fed. Cl. 1994). Similarly, a company providing photography services to the Air Force was liable under the False Claims Act for submitting invoices—all of which were for a fixed price under the contract—because the company knowingly failed to dispose of equipment in accordance with federal environmental guidelines and standards. *See Shaw v. AAA Eng'g & Drafting, Inc.,* 2 13 F.3d 519, 533 (10th Cir. 2000).

Most, though not all, circuits recognize the theory of implied certification. The Seventh Circuit has rejected the theory, and the Fifth Circuit has declined to adopt the theory on several occasions without ruling definitively. Of the circuits that do recognize the theory, some have limited the use of implied certification to situations where the contractor violates a provision or regulation that is a "condition of payment" under the contract or program.

In *Escobar*, the defendant operated a mental health clinic that received reimbursement through Medicaid, and the *qui tam* relators had a family member die while receiving treatment at the clinic.

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See Escobar, 780 F.3d 504 (1st Cir. 2015). The First Circuit held that the *qui tam* relators plausibly alleged that the clinic failed to supervise its staff and employ adequate psychiatric staff in violation of state health regulations that were conditions of payment under Medicaid. In other words, even though the clinic never expressly certified compliance with those state health regulations in its requests for reimbursement to Medicaid, the court held that the clinic could nonetheless be liable under the False Claims Act for impliedly certifying that it was adhering to the regulations governing mental health services in that state.

The petitioner in *Escobar* has asked the Supreme Court to rule on whether the theory of implied certification is viable. And if that theory is viable, the petitioner has asked the Supreme Court to at least limit its scope to situations where the violation affects an express condition of payment.

The Supreme Court has taken up several False Claims Act cases in recent years, often deciding in favor of defendants and curtailing expansive interpretations of the statute. Earlier this year, the Supreme Court ruled that a *qui tam* relator could not stretch the False Claims Act statute of limitations under a statute giving the government more time to prosecute criminal fraud cases in wartime. *See Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter,* 135 S. Ct. 1970 (2015). Before that, the Supreme Court warned against "expand[ing] the FCA well beyond its intended role" and "transform[ing] the FCA into an all-purpose antifraud statute." *Allison Engine Co. v. United States ex rel. Sanders,* 553 U.S. 662, 669, 672 (2008).

For those doing business with the government, the advent of implied certification has created the risk that the government will treat any known—or even knowable—breach of contract as fraud. For those participating in government programs or receiving federal grants, the advent of implied certification has created the risk that the government will treat any known or knowable failure to comply with technical regulations as fraud. In either case, the implication is that whenever a contractor or program participant is aware of noncompliance—no matter how insignificant—there is a risk of treble damages for all of the funds received from the government.

That heightened exposure has changed the calculus for many companies facing a government investigation or a *qui tam* suit. What may be worth litigating for single damages is simply too risky when damages are trebled. As a result, many companies choose to settle cases where the government or a relator has an aggressive interpretation of the False Claims Act rather than challenge the theory in court.

A Supreme Court decision striking down the theory of implied certification, or at least clarifying that the relevant contractual provision or regulation must be an express condition of payment, could rein in the Department of Justice and relators' bar and restore a common sense definition of "civil fraud" to the False Claims Act.

Escobar will be briefed in the next few months, with a decision expected later this year.

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No Timeliness Safe Haven for Contractors in CBCA's *Safe Haven* Decision

By Philip J. Davis and George E. Petel

The decision to file an appeal with one of the Boards of Contracts Appeals often involves a difficult choice for contractors between enforcing their legal rights and maintaining their customer relationships, particularly with their contracting officer (CO). Once the notice of appeal is filed, any further decision on a claim is generally out of the CO's hands. It can be tempting, then, for contractors to keep communicating with their CO about the issues in the claim for as long in the process as possible, even after the CO has issued a final decision and the clock for filing the notice of appeal is running. That clock can be stopped if the CO "reconsiders" the final decision, but as the Civilian Board of Contract Appeals (CBCA or the Board) said in its recent decision, *Safe Haven Enterprises, LLC,* 2015 WL 5750006 (Sept. 29, 2015), "it is difficult to pinpoint precisely when the CO's review of a request transforms into a reconsideration process." Contractors, then, need to be aware, as emphasized in *Safe Haven*, that there are, at best, "murky" factual boundaries that define when a CO is undertaking a reconsideration that allows them to safely wait to file their appeal beyond the original time frame.

Two Contract Disputes Act (CDA) claims were at issue in *Safe Haven,* which arose from various task orders under a State Department Indefinite Delivery/Indefinite Quantity (ID/IQ) construction contract. The CO issued two final decisions, both of which included the required appeals language from FAR 33.211(a)(4)(v), noting the 90-day time limit to file an appeal with the Boards. Well within 90 days of the second claim (and likely within 90 days of the first), the CO reached out to Safe Haven's then-counsel to discuss undefined "outstanding issues" relating to those task orders. After a series of meetings, email exchanges, and telephone phone calls with the original CO and his successor, Safe Haven filed its notices of appeal with the CBCA 617 and 661 days after the final decisions, respectively, on a theory that these various communications signaled that the CO was reconsidering the final decisions, and thus vitiated the running of the appeals clock. After an extensive review of case law highlighting the virtually innumerable factual contexts in which reconsideration issues could arise, the CBCA agreed with that theory and denied the Government's motion to dismiss. Because of the critical practical implications for the contractor of a correct decision whether reconsideration has begun, the Board's decision merits careful consideration.

When Is the CO Actually "Reconsidering" the Final Decision?

COs may reconsider their decisions at any time until the appeal period ends. But, short of a statement in writing either withdrawing the decision or indicating it is under reconsideration, there are almost no magic words that a contractor can rely on to know for sure if the reconsideration process has begun so that it can safely delay filing an appeal. The test Boards apply in determining whether the CO started the reconsideration process is an objective one based on the reasonable person standard; it is not what the contractor subjectively thought. Instead, the Boards determine, based on an inquiry into all the facts surrounding the interaction between the CO and the contractor, whether a reasonable person would conclude that the CO was actually reconsidering the decision. The inquiry looks beyond just the words the CO uses, and into the substance of the CO's expressed intent.

The only way to be absolutely sure that the appeals clock has been stopped is if the CO affirmatively withdraws the final decision in writing. Likewise, if the CO states in writing that the final decision is being reconsidered, that has essentially the same effect. Although this may be the clearest means for the parties to be assured the final decision is under reconsideration, COs rarely issue such written statements. On the other hand, even if the CO tells the contractor that the appeal clock is still running, subsequent actions may still negate the decision's finality.

As *Safe Haven* discusses in detail, the Boards can determine that there was a reconsideration even absent a written statement of reconsideration. But, it is clear that a contractor's

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mere request for reconsideration without any response from or action by the CO will not satisfy the elements necessary to vitiate the final decision. It is in the middle ground between a clear written response and no response at all where the facts must be carefully analyzed to assess whether a reconsideration has begun, and where contractors struggle to decide whether to file and preserve their appeal. Noting that there is no guidance in the CDA or in the FAR identifying when a CO's actions are sufficient to constitute reconsideration, the CBCA in *Safe Haven* punted the creation of a bright-line rule to the FAR Council: "it seems impossible to identify a clear bright-line rule defining exactly when, in every situation, the [CO's] review of (or meeting following) a request for reconsideration of a purportedly 'final' decision will suspend an appeal deadline. . . . Without FAR guidance, the determination is 'driven by facts unique to each case and is necessarily ad hoc.'" Indeed, the CBCA in *Safe Haven* acknowledged that the Boards and the Court of Federal Claims have "struggled to define in a consistent manner exactly when a purportedly final decision is no longer 'final' for appeal purposes."

Citing a 1972 Court of Claims decision, *Roscoe-Ajax Construction Co. v. United States*, 458 F.2d 55 (Ct. Cl. 1972), the CBCA outlined the broad elements of an implied reconsideration: 1) an agreement by the CO to discuss the merits of an already decided claim; and 2) "action to revisit and reconsider the prior 'final' decision." In *Roscoe-Ajax*, the contractor presented the CO with a letter from its subcontractor requesting a meeting after the final decision to discuss the problem at issue in the claim. After the meeting, the Government conducted additional tests of the material at issue, and the CO subsequently informed the contractor that he would not modify the prior decision. The Court of Claims held that the combination of the agreement to meet and the additional test "served to keep the matter open and necessarily destroyed any finality the decision theretofore had." Roscoe-Ajax's appeal was thus timely filed within 90 days of the CO's subsequent statement that he would not change the decision.

Another scenario that illustrates how difficult these elements can be to assess is where the contractor submits a request for reconsideration (which, by itself, is insufficient), and the CO responds by denying the request. Here, the nuances of the CO's response may be dispositive. For example, if the CO makes clear that he is not engaging, has not engaged, and will not engage in any reevaluation or reconsideration—beyond merely reading the contractor's request for reconsideration regardless of the length or complexity of the request—the date of the original final decision marks the beginning of the appeals clock. But, if the CO does more, and if the contractor is made aware of these actions (two big "ifs"), the *Roscoe-Ajax* elements may be satisfied. In *Safe Haven*, the CBCA found that the contractor satisfied these elements with evidence that the CO indicated in the post-decision interactions that he would "take a look" at the allegations of error in the decisions raised by Safe Haven. A corollary example is where the CO, after receiving the request for reconsideration, requests additional information from the contractor. That request alone will not trigger the reconsideration process unless the contractor provides the requested response.

Even more frustrating for contractors, post-decision meetings between the contractor and the CO alone may not be enough to satisfy the objective test for reconsideration. The CBCA in *Safe Haven* discussed cases from other Boards where multiple post-decision meetings occurred between the CO and the contractor that nonetheless failed to "clearly constitute reconsideration of the [final] decision." In one case, the contractor's appeal failed to clearly differentiate pre- and post-decision meetings regarding the claim so as to illustrate the CO's willingness to reconsider. In another case, the CO told the contractor during the meeting that he would consider "new claims," but the contractor's new submission had no additional information, and thus the original final decision stood.

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Does Reconsideration Just Pause the Appeals Clock or Reset It Entirely?

Upon issuance of a new final decision on reconsideration, the entire appeals clock starts to run again, that is, it runs from zero. The State Department in *Safe Haven* unsuccessfully argued that even where there is a bona fide reconsideration, the appeals clock is merely paused until the CO issues the reconsideration decision—*i.e.,* that 77 days had passed between the final decision and when the reconsideration process started, and thus Safe Haven only had 13 days after that new decision to file its appeal with the Board. This argument, the CBCA found, flies in the face of the Board's precedent, as well as the binding precedent from the *Roscoe-Ajax* case discussed above and the general federal court rules for reconsideration.

When Does the CO Lose the Authority to Reconsider a Final Decision?

Once the appeals clock expires, the parties' rights in the final decision vest, and the CO loses the authority to reconsider the final decision at that point. But when do the parties' rights vest? The ASBCA and some CBCA predecessor Boards have repeatedly found that once the 90-day appeals clock has run, any reconsideration by the CO would be untimely. Per the Board's *Safe Haven* decision, however, the CO's authority to reconsider a decision on a CDA claim expires only once the decision is no longer appealable in *any forum*. The CDA provides two appeal clocks: contractors have 90 days to file with the Boards, but have 12 months to file with the Court of Federal Claims. It would be inconsistent to treat the finality of the CO's decision differently depending on the contractor's choice of forum. Thus, at least before the CBCA under *Safe Haven*, the CO retains the authority to reconsider the final decision for the entire 12-month period.

Final Take

Although *Safe Haven* provides an excellent survey of the factual landscape contractors must consider when deciding whether the CO has undertaken a reconsideration and the appeal timeline has stopped, the decision makes clear that these determinations are necessarily fact specific. In short, the Board, based on *Safe Haven*, will look to some timely affirmative conduct by the CO—either express or implied—that indicates to the contractor, on an objective, reasonable person basis, a willingness to revisit the previously issued "final" decision. Because the Boards strictly interpret their timeliness requirements, contractors need to avoid making assumptions regarding reconsideration that are factually problematic and that could cause them to unwittingly miss appeal deadlines. If there is any uncertainty, contractors should seek confirmation in writing from the CO that a reconsideration has begun, thus rendering the decision not final. Failing such a clear written confirmation withdrawing the final decision, contractors should meet the initial deadline and get their appeals on file. ■

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Coming to Terms with the Yates Memo: Implications for Government Contractors

By: Ralph J. Caccia, Paul F. Khoury, Kara M. Sacilotto, P. Nicholas Peterson

On September 9, 2015, Deputy Attorney General Sally Yates issued a new policy memorandum designed to give teeth to the Department of Justice's (DOJ) oft repeated promise to hold individuals criminally and/or civilly liable for corporate misconduct. Largely motivated by a belief that adequate deterrence of corporate crime is best achieved through prosecution of individuals, the DOJ policy is also likely a response to criticism leveled against it that large corporate resolutions fail to hold those individuals responsible for the misconduct accountable for their conduct.

In determining whether to charge a corporation, it has long been the DOJ's policy, as most recently articulated in the DOJ's 2008 Filip Memo, to evaluate whether a corporation has "cooperated" with the government's investigation. That evaluation has traditionally included an assessment of whether the corporation has identified the wrongdoers, taken remedial action and cooperated with the DOJ in its investigation and prosecution. The Yates Memo clearly amps up the volume with regard to cooperation.

Without question, an understanding of the Yates Memo and how it will operate in practice is of immediate concern to corporate America and its counsel. It is of particular moment to government contractors who are obligated to investigate, and where appropriate, disclose fraud, conflict of interest, bribery, or gratuity violations of Title 18 as well as violations of the civil False Claims Act.

The Yates Memo

The Yates Memo is addressed to DOJ attorneys, and it outlines six "key steps" in any investigation of corporate misconduct. These six steps are:

1. To qualify for cooperation credit, corporations must provide the DOJ with all relevant facts relating to the individuals responsible for the misconduct;
2. Criminal and civil corporate investigations conducted by the DOJ should focus on those individuals responsible for the misconduct;
3. DOJ civil and criminal attorneys handling corporate investigations should be in routine communication with one another;
4. Absent extraordinary circumstances, the DOJ will not release culpable individuals from civil or criminal liability when settling a matter with a corporation;
5. DOJ attorneys should not settle matters with a corporation without a clear plan to resolve related individual cases; and
6. DOJ civil attorneys should focus on individuals as well as corporations and evaluate whether to bring suit against an individual based on considerations beyond an individual's ability to pay.

In November 2015, the policies articulated in the Yates Memo were incorporated into the United States' Attorneys' Manual (USAM) and resulted in substantial revisions to the DOJ's Principles of Federal Prosecution of Business Organizations. Notably, the Principles were revised to include a new section describing the foundational principles of corporate prosecution. This new section emphasizes that one of the most effective ways to combat corporate misconduct "is by holding accountable all individuals who engage in wrongdoing" and that prosecutors "should focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct." USAM § 9-28.010. The revised Principles also make clear that high-level corporate officers should be a primary target of prosecutors, even if the corporation intends to plead guilty or otherwise settle the charges. *Id.*

Implications for All Companies

The Yates Memo raises a number of practical issues for any company that is faced with allegations of wrongdoing. The manner in which an investigation is conducted, the nature of a disclosure and the timing of a resolution are all directly impacted by the change in policy.

<u>Identifying Responsible Individuals.</u> The Yates Memo makes clear that for a corporation to

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receive credit for cooperation, the company must provide the DOJ "all relevant facts" relating to the individuals responsible for the misconduct. In articulating this policy, the DOJ clearly has sought to end the discussion as to what constitutes "cooperation." No longer can a company simply assert that it deserves cooperation credit by sharing the facts developed in an internal investigation, providing documents and making witnesses available while leaving it to the government to determine whether there was sufficient evidence to hold individuals culpable under the law.

In a continued and uncomfortable trend to deputize every corporate counsel, the DOJ now makes clear that a company must make determinations as to who is responsible for any misconduct and provide the government with all relevant facts relating to that misconduct. This presumably includes facts, documents or witnesses that might lie outside the subpoena power of the DOJ. Indeed, the revised Principles state that a company seeking cooperation credit bears the burden of explaining why evidence cannot be accessed by the company or disclosed to the government. USAM § 9-28.700. Certainly, it would seem incumbent on company counsel in these circumstances to also provide evidence that may support an alleged wrongdoer's claims of innocence.

Complicating a company's ability to provide all relevant facts relating to responsible individuals is the lack of a clear standard to be used when determining whether one is "responsible" for alleged misconduct. Is the standard the same as what the government must prove in court? Or does some lower standard apply? Deputy Attorney General Yates recently attempted to assuage these concerns by clarifying that "cooperation does not require a company to characterize anyone as 'culpable'" but instead requires a company to simply provide "all facts about all individuals involved." Despite such assurances, it is apparent that there will be tremendous pressure on a company and its counsel to deliver responsible actors.

There will also likely be a tendency for a company to paint with a very broad disclosure brush to avoid a downstream suggestion by the government that the company failed to make an adequate and complete disclosure. As a result, the Yates Memo will unquestionably complicate internal investigations because there can be little doubt that it sharpens the divergent interests of a company and its employees, officers, and directors. While it is clear that in most circumstances an employee has a duty to cooperate as a condition of employment, it is nonetheless now more likely that an individual will request counsel early in this process. An employee may also only agree to be interviewed with his counsel present or only agree to cooperate if he is first provided documents and information bearing on his conduct.

<u>Earlier Representation Decisions.</u> As a matter of course, corporate counsel often seeks to delay a decision on whether an individual requires separate counsel until a determination is made that the interests of the company and the individual diverge. Often that decision is precipitated by a communication from the government that it wishes to interview an individual. In the post-Yates world, however, companies can expect individuals to demand counsel far earlier in the investigatory process. In the context of an ongoing DOJ investigation, this means that a company will now have to make decisions about potential individual culpability far earlier in the investigative process.

Relatedly, companies should reexamine their by-laws, articles of incorporation and relevant D&O policies relating to the advancement and indemnification of legal costs for officers, directors, or employees. The Yates Memo makes it far more likely that a greater number of individuals will need counsel and that such a need will arise earlier in an investigation than in the past. At the very least, this will lead to increased defense costs, but it could also impact a company's ability to defend against allegations of wrongdoing. A company, its board and its executives need to make important policy determinations regarding payment of legal fees for individual counsel in the event of an investigation.

<u>Revised Defense Strategies.</u> Once it is determined that an individual needs separate representation, a company will have to carefully determine how to involve that individual in the company's defense strategy. Companies and individuals regularly "circle the wagons" and jointly defend against allegations of wrongdoing. Often, such a united front results in favorable resolutions for both

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companies and individuals. The Yates Memo makes such joint defense arrangements a less attractive option for both parties. Companies will now have to evaluate more closely the level of cooperation they can expect from any implicated individuals and whether a joint defense arrangement is still even possible. One is hard pressed to imagine a situation where counsel for an individual will provide any relevant factual information in the context of a joint defense beyond that which clearly exculpates the client. In addition, the company will need to assess whether it is in its best interests to share arguably exculpatory information with an implicated individual when the company believes that individual has engaged in misconduct.

Investigations of Sufficient Scope. A company will be required to conduct internal investigations of sufficient scope as to identify ***all*** potentially culpable individuals. Deputy Attorney General Yates said shortly after the release of the Yates Memo that the government is "not going to be accepting a company's cooperation when they just offer up the vice president in charge of going to jail." Whereas a company could previously have chosen to identify only individuals who were clearly at fault, a company does not have that luxury in light of the Yates Memo—especially where responsibility for a particular issue is diffuse. The revised Principles of Federal Prosecution of Business Organizations now say that a company can earn cooperation credit only if it identifies "***all individuals*** involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority." USAM § 9-28.700 (emphasis added).

The initial scoping of an internal investigation also becomes important as individuals may become uncooperative during the course of the investigation. For instance, an individual who understands that the information he provides will be turned over to the government may refuse to cooperate with internal investigations lest he implicate himself. He may also determine that he stands to benefit more from talking exclusively with prosecutors rather than cooperating with his current or former employer. Accordingly, though always important, it is now critical for a company to speak with all relevant individuals as early in the process as possible.

Specific Considerations for Government Contractors

In addition to the above, government contractors will face some additional issues specific to the government contracting realm.

Mandatory Disclosure Rule. The Yates Memo will impact how a contractor complies with the Mandatory Disclosure Rule. In general, the Mandatory Disclosure Rule, included in FAR 52.203-13, requires government contractors to disclose, among other things, whenever there is "credible evidence" of a fraud, conflict of interest, bribery, or gratuity violation of Title 18 or when there is a violation of the civil False Claims Act (FCA). Although contractors do not typically make such mandatory disclosures to the DOJ, Inspectors Generals (IGs) and Suspension and Debarment Officials (SDOs) routinely forward such disclosures to the DOJ. Thus, it has long been a best practice to draft such mandatory disclosures with the assumption that a DOJ attorney will be reviewing the disclosure. With the advent of the Yates Memo, government contractors should consider including all information about all responsible individuals so they can position themselves to secure cooperation credit from the DOJ. Although prior mandatory disclosures may have provided some information about individuals, the Yates Memo will require contractors to reevaluate how they draft disclosures so as to ensure the DOJ's stated interest in individual misconduct is addressed.

The failure to draft mandatory disclosures to address the DOJ's interest in individual accountability may complicate any later efforts to achieve cooperation credit from the DOJ. If this information is not collected initially, a contractor simply may not be able to obtain such information at a later date, as individuals may refuse to cooperate—a scenario that becomes more likely as time passes and the government starts conducting its own investigation. The failure to collect such information may also cause the DOJ to question the adequacy of a contractor's internal investigation and the contractor's commitment to discovering culpable individuals. Even if the information is collected, the DOJ may view with disfavor a contractor's decision to withhold this

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information from an initial disclosure. In short, a contractor should not view a mandatory disclosure as akin to a preliminary disclosure that can be supplemented only if and when the DOJ comes knocking. Rather, contractors should endeavor to provide comprehensive disclosures sufficient to satisfy the DOJ's desire for information on individuals involved in any alleged wrongdoing.

When making disclosures that include information about a number of individuals with varying levels of culpability, contractors should assess the suspension and debarment impact on those individuals. Contractors should be prepared to engage with SDOs to address and explain the culpability of individuals identified in the disclosure as necessary.

FCA Liability for Executives and Employees. The Yates Memo specifically directs government attorneys to focus on criminal ***and civil*** proceedings against culpable individuals, and the FCA is likely to feature prominently in the government's attempts to hold individuals accountable—especially as to individuals associated with government contractors. Traditionally, the government has not pursued FCA actions against individuals opting instead to focus its efforts on prosecuting the company. This made practical sense from the government's perspective as pursuing individuals requires the government to meet additional burdens of proof, and few individuals are likely to be able to pay a significant amount in damages. The Yates Memo could significantly change this approach. Not only are civil attorneys being instructed to focus on individuals, but civil attorneys are also being directed not to base enforcement decisions solely on an individual's ability to pay a judgment. *See* USAM § 4-3.100. Thus, executives and employees of government contractors face the very real possibility that they could be liable for treble damages and penalties for violations of the FCA, even if they did not personally benefit from any wrongdoing.

Takeaways

Counsel for government contractors should familiarize themselves with the Yates Memo and its implications and should ensure that their directors, executives and employees are also educated on the Yates Memo. It provides government contractors an opportunity to reevaluate and strengthen compliance programs and to convey to individuals that they truly have "skin in the game" and could be held criminally and civilly accountable by the government for any misconduct. Effectively communicating the implications of the Yates Memo can serve to strengthen a company's culture of compliance.

Government contractors should analyze their current procedures regarding internal investigations. Internal investigation teams should work under the direction of counsel to properly scope such investigations with an eye towards obtaining cooperation credit from the DOJ. Contractors should also review and revise company indemnification policies and other practices regarding the provision of legal services so these issues can be promptly addressed when they arise during internal investigations.

Finally, contractors should review their practices when making disclosures pursuant to the Mandatory Disclosure Rule. Such disclosures should be made with the understanding that the DOJ will review the disclosure and will be interested in all individuals involved in the misconduct. Contractors should also assess the potential impact on suspension and debarment arising from the identification of individuals in their disclosures. ■

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Office of Government Ethics Proposes New Rules on Gifts to Federal Employees

By Jennifer S. Zucker, Mark B. Sweet, Robert L. Walker, and Moshe B. Broder

Just in time for the holiday gift-giving season, the Office of Government Ethics (OGE) is proposing to revise and update the rules governing gifts to federal employees. The proposed changes to the Standards of Ethical Conduct for Executive Branch Employees have the potential to impact a broad range of a contractor's interactions with the Government. While Government employees are the primary subject of the proposed rules, contractors are affected by virtue of doing business with the Government and are considered a "prohibited source" under the rules. In addition to OGE's rules, contractors and federal agencies may have their own internal code of ethics, which should also be consulted in planning any gift-giving to Government employees.

The rule's proposed amendments revise the existing regulations to encourage Government employees to consider declining otherwise permissible gifts where a "reasonable person" would question their integrity if they were to accept the gift. The rule also proposes clarifications or changes to whether a Government employee may: attend a contractor's holiday party, gathering, or conference, receive gifts from a contractor with whom they are friends with on a social-networking website, and receive cash-equivalent gift cards.

First and most notably, the proposed OGE rule adds a new provision that encourages Government employees to consider whether an otherwise permissible gift should nonetheless be refused because of the perceived harm to the integrity and credibility of the agency's programs. Under this provision, employees are to consider whether a "reasonable person with knowledge of the relevant facts" would question their integrity. Although the proposed rule recognizes that this is a flexible, non-binding standard, it articulates a series of factors that an employee should consider, such as the market value of the gift, the donor's interests in the employee's performance or non-performance of official duties, the gift's fostering a sense of obligation, and whether the gift reflects preferential treatment.

For example, even though it is otherwise permissible for a contractor to give a $20 national coffee chain gift card to a Government employee, it may be objectionable if the contractor targets specific senior leadership or if it has a matter currently pending before the receiving employee. Because this proposed rule is subjective and fact-specific, contractors are encouraged to consult with counsel to ensure that potential gifts do not create the *appearance* of calling into question the Government's integrity.

While this new provision is non-binding and subjective, the proposed rule further clarifies that notwithstanding this guidance, a Government employee may not solicit or accept a gift in a manner that would violate the federal bribery statute. For example, a contractor may extend an invitation to an employee to attend the contractor's holiday party at which modest food and refreshments are served. On the other hand, a contractor should not extend an invitation to attend the same party if the invitation is conditional on the employee performing or not performing some official duty, such as permitting the contractor to present a demonstration of their product for the agency.

The proposed rule contains a number of assorted changes and codifications of previous guidance (some of which seem to require further clarification).

Holiday Parties, "Widely Attended Gatherings," and Conferences

With holiday season around the corner, contractors are advised to be mindful of the many rules pertaining to gifts to Government employees. Contractors should be sure to consult with counsel early to avoid the many pitfalls of gift-giving and seek clarification as to the rules.

On the topic of "widely attended gatherings,"[1] the proposed rule now requires that a Government employee must obtain written authorization from the agency ethics designee to attend a widely attended gathering. Under the proposed rule

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written authorization would be required prior to a Government employee attending any such gathering, regardless of whether the person or organization extending the invitation has interests that may be substantially affected by the performance or non-performance of the employee's official duties. OGE is "sympathetic" to the administrative burden generated by this broadened requirement, but maintains that it will promote the public's confidence in Government operations.

The rules surrounding "widely attended gatherings" extend to situations in which the contractor is not the host of the event. For example, if a trade association is holding a conference, a contractor may not provide funds to the association for the purpose of extending invitations to specified Government employees. However, a contractor may provide funds to the association to sponsor the attendance of *any* unspecified Government employees, so long as the employees receive written authorization from their Government ethics designee.

For holiday parties, the proposed rule is ambiguous as to whether a Government employee may accept an invitation to a contractor's party where alcohol is served. While the rule suggests that the purpose of the revision is to clarify that *consumption* of alcohol constitutes an impermissible gift, the rule's proposed example implies that mere *attendance* at a party where alcohol is served is itself an impermissible gift under the gift exclusion for "modest items of food and refreshments." On the other hand, given the new emphasis in the proposed rule that "an opportunity to exchange ideas and views among invited persons" is an essential requirement for an event to qualify under the "widely attended gathering exception," it appears that a holiday party where alcohol is served could qualify under this latter exception if all other criteria of the exception are met. The proposed rule, however, does not make this point sufficiently clear.

The proposed rule also clarifies long-standing OGE guidance relating to Government employees accepting free attendance at a conference or trade show on the day they are presenting information on behalf of their agency. The Government employee's attendance and participation at the conference is considered customary and necessary to permit the employee to carry out official duties. Under the proposed rule, free attendance provided under these specific circumstances would be excluded from the definition of "gift." The Government presenter may also accept a meal ancillary to their attendance, so long that meals are provided to all presenters, and that the meal is hosted by the event's sponsor. The contractor may provide the Government employee with a momentum, such as a mug, plaque, or other "presentation" item with little intrinsic value. Subject to certain conditions, the Government employee's spouse may also attend the conference.

Personal Relationships with Government Employees, and Prospective and Former Employees

If a contractor is interested in hiring a Government employee and has interests that could be affected by that employee's performance or non-performance of his job, the contractor may provide customary hiring accommodations—such as airfare, hotels, and meals—if the employee disqualifies himself from work on matters affecting the contractor.

Conversely, if a contractor extends an invitation for a dinner or reception to a *former* employee who now works for the Government, it may do so only if it invited other former employees and it is clear that the invitation was based on the former employment relationship and not otherwise enhanced or extended. As the proposed rule illustrates, if a contractor hosts an annual holiday dinner party, and seeks to invite a former employee who now works for the Government, it may only do so if it typically extends invitations to its current or former employees *regardless* of their current employment.

Contractors and Government employees working in concert may form personal relationships, and there is a long-standing exception for gifts based on "personal relationships," including "personal friendship." The proposed rule updates the application of this exception in some important ways.

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First, the proposed rule appears to recognize that the "qualitative" nature of a personal relationship may be as important as the "quantitative" nature; the proposed rule does this by making explicit that, in determining whether a gift is motivated by personal relationship, Government employees and their ethics officials may consider "not only the 'history of the relationship' but also the 'nature of the relationship.'" For example, if a contractor's employees have tickets to a private golf tournament and intend to invite a Government employee with whom they have developed a friendship, they cannot do so if the contractor pays for the tournament entry fees, as that makes it clear the gift is not of a personal nature but rather motivated by a business relationship.

Second, in a twenty-first century illustration of this exception, OGE notes that if an employee and a contractor are "friends" on a personal social-networking website, but otherwise do not communicate extensively outside of work or meet up for social purposes, their relationship does not qualify as a "personal friendship" and the "personal relationship" exception would not apply. On the other hand, the proposed example suggests, if the two communicate extensively with each other in their personal capacities, or meet socially outside of work, the relationship may be considered "personal" and a gift under the "personal relationship" exception may be permissible. Because the proposed rule requires that the circumstances "make it *clear*" that the gift is motivated by a personal relationship, however, contractors would be well advised to exercise caution when considering giving gifts under these circumstances or under this exception.

Other Types of Gifts

The proposed rule contains an interesting distinction relating to a contractor giving gift cards to a Government employee. The proposed rule, by illustration, explains that gift cards for particular stores, such as a national coffee chain or movie theater, are permissible (so long as they are $20 or less). However, gift cards issued by a "credit card company or other financial institution" are impermissible because they are a cash equivalent. While it is clear that some gift cards are issued for use at specific stores, and others are issued by financial institutions and are clearly cash-equivalent, a certain number fall into a gray area and have broad, yet non-universal use. Contractors are advised to seek advice of counsel before giving such gift cards.

The proposed rule adds a new exception for unsolicited "gifts of informational materials" where the materials are provided primarily for "educational or instructive, rather than entertainment" purposes. Where the value of such materials exceeds $100, the proposed rule would require a written determination from the agency ethics designee that acceptance would be permissible.

The proposed rule clarifies that a Government employee may accept an award or honorary degree for meritorious public service, and an item incident to that award, under two conditions. First, the person or organization giving the award must not have interests that will substantially be affected by the employee's performance or non-performance of his job. Second, the item may not exceed $200, or else an agency ethics official must make a written determination that the award is part of an established program of recognition. ■

If you want to understand how these new rules could apply to your business, please contact us.

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[1]According to the proposed rule, a gathering is widely attended "if it is expected that a large number of persons will attend, that persons with a diversity of views or interests will be present . . . and that there will be an opportunity to exchange ideas and views among invited persons."

Fair Pay Rules Are Coming

The Office of Personnel Management (OPM) most recent semi-annual regulatory agenda reported that the Federal Acquisition Regulatory (FAR) Council is targeting April 2016 for release of the final rule implementing Executive Order 13673, Fair Pay and Safe Workplaces. Wiley Rein has deep experience with these proposed regulatory developments. Most notably, Wiley Rein represented a coalition of defense contractors in assisting the Aerospace Industries Association in commenting on the proposed rule and associated proposed guidance form the Department of Labor. Among other issues, the comments highlighted the host of compliance challenges that contractors will face both before and after implementation of the final rule and guidance. We encourage contractors to take OPM's agenda as a reminder to review policies, procedures, and data reporting ahead of the final rule's implementation this coming year.

SPEECHES & PUBLICATIONS

"Federal Circuit Year-In-Review 2014: Where Rubber Meets the Road"
Brian Walsh, Tara L. Ward, Gary S. Ward, Authors
Public Contract Law Journal, Vol. 44, No. 4
Summer 2015

"A Bad Day for Proposal Consultants – GAO Finds Agency May Reasonably Prohibit Use of Consultants for Proposal Preparation Purposes"
Paul F. Khoury, Brian Walsh, Authors
Pratt's Government Contracting Law Report
September 2015

"USAID Grant Regulations Continue USAID's Practice of Treating Foreign Organizations Differently Than U.S.-Based Grantees & Clarify Which Cost Principles Apply to For-Profit Grant Recipients"
Brian Walsh, Margaret E. Matavich, Authors
Wiley Rein Alerts
September 23, 2015

"'Offered for Sale' Headed for the Scrap Heap? Proposed DFARS Rule May Change Requirements for Commercial Item Determinations and Price Reasonableness Evaluations"
Nicole J. Owren-Wiest, Author
Pratt's Government Contracting Law Report
October 2015

"View from Wiley Rein: SBA Opens Its Arms to More Large Businesses to Help Foster Its Small Business Mission"
John R. Prairie, George E. Petel, Authors
Bloomberg BNA's Federal Contracts Report
October 6, 2015

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"Claims, Disputes, and Terminations"
Paul F. Khoury, Moderator
PubKLaw Year in Review
October 15, 2015 I Washington, DC

"Contract Claims and Appeals: Practice Tips and Perspectives from Young Lawyers"
Tara L. Ward, Panelist
ABA Section of Public Contract Law Young Lawyers Committee and Contract Claims and Dispute Resolution Committee Program
October 21, 2015 I Washington, DC

"View from Wiley Rein: The Federal Circuit's (Accidental?) Expansion of Interested Party Status in Tinton Falls Lodging Realty, Inc. v. United States"
Phillip J. Davis, Brian Walsh, Nina S. Rustgi, Authors
Bloomberg BNA's Federal Contracts Report
October 27, 2015

"Reaching Out Without Getting Burned: Understanding the Impact of the TCPA on Health Plan Member Communications"
Dorthula H. Powell-Woodson, Rachel A. Alexander, Authors
Privacy In Focus
November 2015

"Building Bridges to Succeed in Federal Contracting and Grants"
Tara L. Ward, Co-Chair, Nicole J. Owren-Wiest, Speaker
ABA Section of Public Contract Law Fall Education Program
November 12-13, 2015 I Charleston, SC

"Individual Accountability and Corporate Wrongdoing: New Policy Memo from Deputy Attorney General Sally Yates"
George E. Petel, Speaker
ABA Section of Public Contract Law Council Meeting
November 14, 2015 I Charleston, South Carolina

"Contract Claims Quantum: Claims Pricing 101"
John R. Prairie, Speaker
ABA Public Contracts Law Section, Young Lawyers Committee and the Accounting, Cost & Pricing Committee
November 18, 2015 I Washington, DC

"The Opportunities and Risks of GSA Schedule Contracting"
Kevin J. Maynard, Speaker
Federal Publications Seminars
November 19, 2015 I San Jose, CA

"Federal Contract Claims and Appeals Practice: An Introduction"
Tara L. Ward, Speaker
ABA Center for Professional Development and Section of Public Contract Law
November 20, 2015

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Speeches & Publications *continued from page 14*

"Mitigating Fraud Risks Throughout the Grants Life Cycle: A View From Both Sides of the Table"
John R. Prairie, Speaker
Federal Publications Seminars
December 3, 2015 | Washington, DC

"Intellectual Property Panel"
Nicole J. Owren-Wiest, Speaker
Federal Bar Association North Alabama Chapter: 43rd Annual Symposium on Government Acquisition
December 2, 2015 | Huntsville, AL

"Cost & Pricing: Commercial Pricing and Other Recent Developments"
Nicole J. Owren-Wiest, Speaker
Federal Bar Association North Alabama Chapter: 43rd Annual Symposium on Government Acquisition
December 2, 2014 | Huntsville, AL

"Small Business Size Protests"
John R. Prairie, Speaker
ABA Public Contracts Law Section, Contract Claims and Dispute Resolution Committee and the Small Business and Other Socioeconomic Programs Committee
December 9, 2015 | Washington, DC

"Small Business Issues,"
John R. Prairie, Speaker
ABA Public Contracts Law Section, Bid Protest Committee and Small Business and Other Socioeconomic Programs Committee
December 14, 2014 | Washington, DC

"View From Wiley Rein: Best Practices for Finding and Obtaining Federal Grants"
Tara L. Ward, Margaret E. Matavich Authors
Bloomberg BNA's Federal Contracts Report
December 15, 2015

Committee meeting on the challenges associated with application of the Service Contract Act to contracts for commercial services
Eric W. Leonard, Speaker
2015 ABA Public Contracts Commercial Products Committee
January 21, 2016 | Washington, DC

"Significant Developments in Regulations Controlling Government Contracts"
Rand L. Allen, Speaker
West 2015 Year in Review Conference
February 16, 2016 | Washington, DC

"Effective Trial Techniques"
Paul F. Khoury, Panelist
Court of Federal Claims Judicial Conference
May 3, 2016 | Washington, DC

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