GOVERNMENT CONTRACTS ISSUE UPDATE

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DOD Updates Regulations and Guidance for Commercial Item Procurements

By Tracye Winfrey Howard and Cara L. Lasley

Complying with congressional direction to increase the acquisition of commercial items, the Department of Defense (DOD) recently issued a final rule amending Defense Federal Acquisition Regulation Supplement (DFARS) clauses related to the procurement of commercial items. The rule implements Section 831(a) of the Fiscal Year 2013 (FY13) National Defense Authorization Act (NDAA), commercial items provisions in the FY16 NDAA, and Section 848 of the FY18 NDAA. At the same time, DOD issued its revised Guidebook for Acquiring Commercial Items, which provides practical tips for contracting personnel making commercial item determinations and evaluating commercial item pricing. The final rule and related Guidebook instructions contain many provisions that are important and relevant to the industry. This article highlights five key take-aways.

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Wiley Rein's prominent Government Contracts Practice has been named a 2017 "Practice Group of the Year" by *Law360* in one of the publication's hallmark annual awards. Selected for the honor for four years running, Wiley Rein earned a spot on the prestigious list with the successful culmination of several novel and complex matters.

"We were asked by our clients to solve some of the most unique cases that we have ever seen," said practice co-chair Scott M. McCaleb. "They were huge cases, they were bet-the-company cases, and in each instance we were able to provide our clients with the result that they wanted." *Law360's* profile of the Government Contracts Team can be found on our **website**.

GSA & OMB Implement E-Commerce Provision

By Nina Rustgi, J. Ryan Frazee, and Lindy Bathurst

On December 12, 2017, the President signed the FY18 NDAA ("the Act"). One of its notable provisions is Section 846, "Procurement Through Commercial E-Commerce Portals," which establishes an e-commerce portal program for the acquisition of commercial items throughout the federal Government. This article looks at initial steps the General Services Administration (GSA) and Office of Management and Budget (OMB) have already taken to implement this initiative.

Background: NDAA Section 846

The goal of Section 846 is to create an online platform that functions like Amazon or Overstock.com to enhance competition, expedite procurement, enable market research, and ensure reasonable prices for commercially available off-the-shelf (COTS) items. The Act defines an e-commerce portal as "a commercial solution providing for the purchase of commercial products aggregated, distributed, sold, or manufactured via an online portal." This definition specifically excludes "online portal[s] managed by the Government for, or predominantly for use by, government agencies." This means the portals should be modelled after private, commercial, online marketplaces. Commercial e-commerce marketplaces are usually structured through a provider that can either fulfill orders directly or provide a platform for third-party vendors to feature and sell products. Part of the initiative will involve defining the technologies and business processes best suited for federal acquisitions of COTS items.

The Act requires GSA to establish the e-commerce portal program by entering into "multiple contracts with multiple commercial e-commerce portal providers." OMB is tasked with primary oversight and reporting requirements set forth in the Act. Section 846 Act establishes a three-phase implementation plan:

- **Phase I, Implementation Plan**: GSA must establish an implementation plan and schedule within 90 days, including "discussion and recommendations" regarding the policies, requirements and procedures required for successful implementation.
- **Phase II, Market Analysis & Consultation:** GSA and OMB must report to Congress within one year of the Implementation Plan their recommendations and information "necessary for effective implementation." These recommendations will address the following six factors:
    - Technical considerations for e-commerce portal functionality;
    - Unique department/agency needs;
    - Product suitability for the platforms;
    - Safeguarding federal information from cybersecurity threats;
    - Application of standard commercial terms & conditions in the federal context; and
    - Impact on other existing federal programs, such as Federal Supply Schedule contracts and small business set-asides.

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DOJ Continues Defense-Friendly Trend: Failure to Follow Agency Guidance Is No Longer Evidence of a False Claims Act Violation

By Mark B. Sweet and Michelle B. Bradshaw

The Department of Justice (DOJ) has announced a change in the way it approaches False Claims Act (FCA) cases, stepping back from the aggressive practice of using noncompliance with agency guidance as evidence that a defendant violated the law. On January 25, 2018, in a **memo from Associate Attorney General Rachel Brand**, the DOJ Civil Division made clear that it would not use its enforcement authority to "effectively convert" agency guidance into binding rules. The policy change extends **Attorney General Jeff Sessions' November 16, 2017 announcement** that prohibited DOJ from using its *own* guidance documents to create *de facto* obligations, standards, or rights. The Brand memo expands this prohibition to cases where DOJ treats noncompliance with another agency's guidance as a legal violation in affirmative civil enforcement cases.

The Brand memo broadly defines a "guidance document" as "any agency statement of general applicability and future effect, whether styled as 'guidance' or otherwise, that is designed to advise parties outside the federal Executive Branch about legal rights and obligations." It clearly delineates improper use of agency guidance documents in affirmative civil enforcement. The Brand memo bars DOJ from relying on noncompliance with agency guidance to prove violations of the law. "That a party fails to comply with agency guidance expanding upon statutory or regulatory requirements does not mean that the party violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations."

This new policy will have significant implications in FCA cases, which often turn on whether the defendant knowingly failed to comply with a regulation or contract provision. Where regulations or contract provisions are not clear or do not reach the particular conduct at issue, the Government and relators have used non-binding agency guidance to bolster their position that a defendant's certification of compliance was false.

Agency guidance will still have some relevance to FCA cases. Even under the new policy, DOJ can use evidence that a defendant read agency guidance to show intent. In FCA cases, the intent element requires the person to have submitted, or caused the submission of, the false claim with actual knowledge of the falsity or with reckless disregard or deliberate ignorance of the truth or falsity of what was submitted. DOJ has previously argued that if an agency guidance "warned" a defendant away from the defendant's incorrect interpretation of a requirement, that could satisfy the knowledge element of an FCA case. *See, e.g., United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 290 (D.C. Cir. 2015). Conversely, courts have relied on the lack of any agency guidance "warning" a defendant away from its interpretation to undercut the knowledge element. *See, e.g., United States ex rel. Donegan v. Anesthesia Assoc. of Kansas City, PC,* 833 F.3d 874, 878-79 (8th Cir. 2016); *United States ex rel. Johnson v. Golden Gate Nat'l Senior Care, L.L.C.*, 223 F. Supp. 3d 882, 891 (D. Minn. 2016) ("[I]f a regulation is ambiguous, a defendant may escape

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Commercial Item Determinations and Price Reasonableness

The final rule revises DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. The revised clause provides a commercial item exception, but in so doing it intertwines the commercial item determination with an agency's price reasonableness determination. The clause now requires contractors seeking an exception from the requirement to provide certified cost or pricing data to also provide information demonstrating price reasonableness. A contractor will thus need to submit data pertaining to price reasonableness at the same time it seeks a commercial item determination. This requirement muddies what should technically be separate commerciality and price reasonableness determinations, and may lead to further confusion among the acquisition community about the analysis that should go into each issue. It also imposes a burden on offerors to submit pricing data at the front-end of a procurement in which they might not otherwise participate if the contracting officer does not grant the commercial item exception. In response to public comments, the drafters acknowledged those concerns, but nevertheless included the requirement in the interest of not delaying acquisitions with a two-step commerciality/price reasonableness process.

Additional Requirements When Prices are Based on Catalog Pricing

The proposed version of the rule would have required offerors to include a certification when proposed pricing was based on an offeror's catalog prices. The "catalog pricing provision" would have required them to certify whether the catalog pricing supporting the proposal was consistent or inconsistent with "all relevant sales data." During the comment period, industry identified two concerns with the catalog pricing provision: (1) it was unclear how offerors would determine whether catalog pricing was consistent with all relevant sales data; and (2) the provision imposed a new certification not required by statute.

In response to these concerns, the final rule removed the certification requirement, but left the remainder of the provision essentially unchanged, leading to much of the same ambiguity initially identified by industry. Specifically, when offerors are relying on a commercial item exception from the requirement for certified cost or pricing data and the items are "priced based on a catalog," offerors will be required to submit a copy of the catalog that shows the pricing. The final rule also imposes an additional requirement: "if the catalog pricing . . . is not consistent with all relevant sales data," offerors must provide a description of the differences and inconsistencies between the relevant sales data and the catalog price. Although offerors no longer have to certify whether the catalog pricing is consistent with "all relevant sales data," they will still be required to make that same judgment and describe any differences. According to the drafters, this requirement applies even if the proposed price is ***lower*** than the catalog price. This disclosure requirement imposes an additional burden on contractors that is not necessary to determine whether the price is reasonable—particularly a price that is below the published catalog price.

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Reliance on Prior Commercial Item Determinations

The final rule allows DOD contracting officers to rely on a prior commercial item determination by a ***DOD component*** when making commercial item determinations for subsequent procurements of the same item. This presumption should allow for a more streamlined approach to commercial item determinations and speed up the process.

The rule could have gone further to allow DOD contracting officers to rely on prior commercial item determinations across the Government. Industry had encouraged expanding the reliance on prior commercial item determinations to include commercial item determinations by non-DOD agencies, particularly General Services Administration (GSA) determinations for items on the Federal Supply Schedules (which by definition, must be commercial items). The drafters determined that the FY16 NDAA did not mandate that DOD contracting officers rely on commercial item determinations made by civilian agencies, and they declined to exercise their own discretion to make that change.

Increased Acquisition of Commercial IT Products or Services

The final rule includes a specific policy for the acquisition of information technology (IT) products or services. Under the new rule, a contracting officer must procure commercial IT products or services unless the head of the contracting activity determines that no commercial items are suitable to meet the agency's needs based on market research. This new policy should result in a major uptick in the acquisition of commercial IT products and services.

Advantages for Nontraditional Defense Contractors but Not Subcontractors

The final rule allows DOD contracting officers to treat as commercial items any goods and services provided by nontraditional defense contractors. A "nontraditional defense contractor" is one that is neither currently performing nor has previously performed any DOD contract or subcontract for at least one year preceding DOD's solicitation of sources. In responding to public comment, DOD clarified that the provisions relating to nontraditional defense contractors do not extend to subcontractors that otherwise meet the definition of a nontraditional defense contractor. According to the drafters, the FY16 NDAA did not authorize expanding the definition of a nontraditional defense contractor to include a subcontractor.

Conclusion

Notably missing from the final rule are changes to address the commercial item provisions in the FY17 and FY18 NDAAs. The FY17 NDAA includes several provisions directed at DOD's commercial item contracting. Of note, it includes a preference for procuring certain ***services*** (facilities-related, knowledge-based, construction, medical and transportation services) as commercial items—similar to the preference for commercial item IT products and services. These types of services cannot be procured as non-commercial items unless either the Undersecretary for Acquisition, Technology and Logistics or the contracting officer (depending on the value of the contract) makes a written determination, after conducting market research, that no commercial services are available to meet the agency's needs. Additionally, the FY17 NDAA

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provides for two pilot programs allowing DOD to acquire "innovative" commercial items, technologies, and services through streamlined acquisition procedures.

For its part, the FY18 NDAA takes the reliance on prior commercial item determinations one step further and provides that DOD's acquisition of an item through commercial item procedures constitutes a prior determination that is binding on future DOD acquisitions. Thus, a contracting officer can presume an item is commercial if DOD previously purchased it under a commercial item contract, even if the prior acquisition did not include a specific determination of commerciality. The FY18 NDAA also requires DOD to contract with multiple commercial online marketplaces for the procurement of certain commercial-off-the-shelf products. These marketplaces must provide procurement oversight controls, including the ability to screen suppliers and products to ensure compliance with existing laws.

Because the final rule does not address these provisions, we expect further DOD rulemaking involving commercial item procurements in the future. Ideally, those changes will consider the spirit of the congressional mandate to increase DOD's use of commercial item procurements.

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liability if its interpretation of the regulation was reasonable in light of available official guidance[.]").

This policy change is effective immediately, applying to all future affirmative civil enforcement actions and pending matters "wherever practicable."

In sum, this policy shift provides defendants with new arguments to narrow False Claims Act liability. The memo also constitutes the second significant policy shift DOJ has announced in 2018. On January 10, the Department issued a new internal **memo** directing DOJ attorneys to consider the merits of seeking dismissal of *qui tam* actions when the Government declines to intervene. More on this FCA policy change is also discussed in this Newsletter.

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Granston Memo: DOJ's New Internal Policy on Dismissing FCA Cases

By Roderick L. Thomas and Colin J. Cloherty

DOJ issued an internal memo in January 2018 that may lead to dismissal of more *qui tam* complaints filed under the FCA. The memo outlined seven issues for DOJ attorneys to consider when deciding whether to seek dismissal of a *qui tam* action. A more proactive approach by DOJ may result in more cases being dismissed because courts are highly deferential to the Government's motions in *qui tam* suits and because relators' counsel may voluntarily dismiss cases to avoid the Government's motion. At a minimum, the policy provides FCA defendants with additional ammunition to press DOJ to decline intervention and seek dismissal in *qui tam* cases.

DOJ's New Policy

Michael Granston, the Director of the Civil Fraud Section of the Commercial Litigation Branch of DOJ, issued an internal memorandum directing attorneys to evaluate the dismissal in *qui tam* actions under various factors. As the memo notes, DOJ's dismissal power is an "important tool to advance the Government's interests, preserve limited resources and avoid adverse precedent." While the Government has always had the authority to move for dismissal, it currently files motions to dismiss in less than 1% of relator cases.

The memo outlined seven issues for government attorneys to consider when deciding whether to seek dismissal of current and future *qui tam* actions:

1. **Curbing Meritless *Qui Tams***
2. **Preventing Parasitic or Opportunistic *Qui tam* Actions**
3. **Preventing Interference with Agency Policies and Programs**
4. **Controlling Litigation Brought on Behalf of the United States**
5. **Safeguarding Classified Information and National Security Interests**
6. **Preserving Government Resources**
7. **Addressing Egregious Procedural Errors**

These issues generally fall into three categories affecting DOJ's interests in *qui tam* litigation: the merit of the claim, the Government's interest, and the burden of litigation.

DOJ's focus on the merits of a case comes against a sharp increase in the number of *qui tam* complaints filed in recent years. In 2017 alone, there were approximately 600 such filings. But despite this increase, the rate of DOJ interventions has remained relatively static, suggesting that many new FCA cases lack merit. The memo instructed attorneys to meet this issue head-on, and consider moving to dismiss where DOJ determines a *qui tam* complaint lacks legal or factual merit (No. 1). DOJ explained that a complaint may be facially meritless when it is filed, or may be revealed to be meritless after the Government conducts its investigation. Regardless, DOJ instructed attorneys to consider moving for dismissal, in addition to declining intervention, if the attorney concludes that no fraud occurred. The memo also instructed attorneys to consider advising a relator's counsel when a dismissal request may be forthcoming absent further evidence

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in support of the *qui tam* complaint, which may increase the rate of voluntary dismissals.

DOJ's focus on parasitic or opportunistic *qui tam* actions (No. 2) also implicates the merits of a relator's claim, separate from the accuracy of any allegations. The memo instructed government attorneys to consider moving for dismissal if the *qui tam* action "adds no useful information" to a pre-existing government investigation, thereby preventing a windfall for an unhelpful relator. This instruction is consistent with congressional intent for the FCA to reward relators that identify otherwise undetected or unreported fraud.

The second broad category of factors focuses on the Government's interests and the impact of ongoing litigation where the Government declines to intervene but the *qui tam* relator continues litigating in the name of the United States. The memo enumerated several instances where the Government's interest may support motions for dismissal, including preventing interference with agency policies and programs (No. 3), controlling litigation brought on behalf of the United States (No. 4), and safeguarding classified information and national security issues (No. 5).

The memo advised government attorneys to consider the interests of the parties affected by the litigation, including DOJ and the relevant agency. The memo instructs government attorneys to consider moving for dismissal where an agency concludes that a *qui tam* action threatens to interfere with an agency's policies (No. 3). In FCA cases, DOJ or the relevant U.S. Attorney's Office litigates the case for a client agency. DOJ should consider the agency's policies or administrative imperatives when litigating a *qui tam* action. This may include operational issues, such as the "risk of significant economic harm" to contractors that are critical partners for the Government.

The memo also instructed the Government to protect its "litigation prerogative" by considering steps to rein in cases that lack a legal or factual basis (No. 4) and may interfere with the Government's ability to litigate other intervened claims, or may lead to unfavorable precedent from the Government's perspective. Likewise, the memo's instruction to consider dismissal in relator cases that may lead to the disclosure of classified information or national security secrets (No. 5) highlights the Government's interest in broader or collateral interests that may outweigh a single FCA case.

Finally, the third category of factors focuses on the expense and burden of litigation and directed government attorneys to consider moving to dismiss when that burden is unreasonably high. The memo encouraged attorneys to conduct a cost-benefit analysis to ensure that the Government's recovery justifies the expense of litigation (No. 6). Indeed, under this factor, the memo provided an example where dismissal was appropriate "even if the allegations could be proven" because the "amount of money involved did not justify the expense of litigation." The memo also allowed government attorneys to consider moving to dismiss when the relator's actions, or lack thereof, increases the Government's litigation burden, including frustrating its investigative efforts (No. 7).

The memo emphasized that the foregoing enumerated considerations are not exhaustive and encouraged DOJ attorneys to evaluate

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additional grounds for seeking dismissal. These grounds could include the first to file bar, the public disclosure bar, and failure to plead fraud with particularity under Federal Rule of Civil Procedure 9(b), among others. This policy statement, alone, is remarkable because these are defenses that typically are not affirmatively raised by DOJ.

Will the New Policy Have an Impact on FCA Cases?

It is too early to tell whether DOJ will robustly implement the new policy, or how the impact will be measured if it does. While the memo indicates that DOJ will internally track the number of cases where DOJ has moved to dismiss, that statistic may be incomplete. Prior to filing a motion to dismiss, the memo encourages communication between government attorneys and relator's counsel. The Government's notification to relator's counsel of a potential motion to dismiss may lead to more voluntary dismissals before DOJ pursues its own dismissal motion.

When the Government does move to dismiss, however, it generally should be successful because courts defer to the Government's views in this area. The exact level of deference is subject to a circuit split. Some courts hold that the United States has an "unfettered right" to dismiss a *qui tam* action, *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), while other courts hold that the Government must identify a "valid government purpose" that is rationally related to dismissal. *United States ex. rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998).

Even in circuits that require the Government to demonstrate a "valid government purpose," the memo articulates a range of government interests that may warrant dismissal, even if the underlying *qui tam* complaint is facially viable. Going forward, those courts holding the Government to a higher standard for dismissal could test DOJ's proffered justification or attempt to weigh the respective interests, but that would seem inconsistent with the general deference the Government receives in this area.

Prospective Impact of the Policy Change

It remains to be seen how DOJ will implement the memo's policy and thus, whether the policy will lead to dismissal of more relator cases. At a minimum, the policy provides companies facing FCA allegations a new angle for declination presentations to DOJ. Armed with the seven factors on which the Government will focus, defendants can present compelling reasons for DOJ to not only decline intervention, but seek dismissal to avoid FCA litigation altogether.

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- **Phase III, Program Implementation:** GSA and OMB will submit guidance on how to implement and govern the program, and address issues such as oversight protocols and compliance with "product screening requirements, data security, and data analytics."

GSA & OMB Begin Phase I

On January 9, 2018, GSA and OMB held a town-hall style public meeting with industry, marking the beginning of Phase I efforts. The meeting allowed GSA to gather information from industry on commercial e-commerce portals and initiate dialogue between industry and Government regarding the implementation of Section 846.

The meeting was divided into three panels: (1) General Program Design; (2) Buying Practices; and (3) Implementation. Each panel contained "question panelists" from GSA and OMB, and "discussion panelists" from industry and industry groups. Each panel began with a presentation of the discussion panelists' backgrounds and their overarching recommendations for the e-commerce portals, within their panel topic. The GSA and OMB question panelists and audience then posed questions to the discussion panelists.

The General Program Design panel focused on the overall design of the program. Industry urged GSA to adhere to commercial practices (within reason). Most of the discussion focused on: (1) increasing competition and value by creating threshold vendor standards while still allowing as many vendors who can qualify to participate; (2) the potential pitfalls of using an aggregator model (comparable to websites like Kayak); and (3) where the burden of compliance with applicable procurement regulations and preferences should fall. As to the last point, there were differences of opinion between whether the responsibility for compliance should fall on the Government, or companies should incorporate compliance mechanisms into their code.

During the Buying Practices panel, the discussion panelists emphasized several key points, some of which overlapped with the discussion in the General Program Design panel: (1) GSA should reduce barriers to entry, including minimizing onerous terms and conditions and compliance requirements, to encourage competition on the e-commerce platform; (2) the regulatory implementation schedule is too slow, and the prototype development phase should begin as soon as possible so GSA can begin seeing the pros and cons of various models; (3) the prototypes should focus on commodity products that are not highly configurable and also feature areas where the Government has the biggest spend; and (4) there is no single e-commerce platform or model that will necessarily work best, as the "preferred" model depends on what government buyers want.

The Implementation panel reiterated that implementation will depend largely on what GSA would like to achieve with this program. That is, does GSA want to purely replicate the efficiency of the COTS marketplace, or does it want to introduce some efficiency but maintain the public policy goals attendant to traditional procurements? The discussion panelists emphasized that GSA should decide what it wants to achieve, and share it with industry. Industry can then provide helpful comments that allow GSA to achieve its goals

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while making the marketplace successful. To facilitate GSA's thinking, the panelists offered some topics for GSA to consider, including how government-specific terms and conditions fit into the program, whether the program should expand beyond COTS items, the role of third parties, whether piloting should take place, and the tradeoffs associated with having multiple portal providers (versus, for example, how the GSA Schedules program is structured).

Recommendations Moving Forward

There is no doubt that Section 846 has created a stir in the procurement community. We suggest contractors consider the following to prepare for the development and implementation of a commercial e-commerce portal:

- **Stay aware of the program's development and implementation schedule**. The first formative steps of this initiative could unfold quickly, with Phase I scheduled to conclude in March 2018.
- **Look for opportunities to participate**. GSA and OMB have just begun the initial stages of gathering information and forming an implementation plan. The overall structure of the program is uncertain and will depend on industry input and the goals GSA wants to ultimately achieve. GSA and OMB plan on hosting additional town hall meetings in the future to continue soliciting industry input.
- **Be aware of how the program will interact with other established procurement programs and preferences.** GSA and OMB are tasked with assessing the program's impact on other federal procurement programs. The development of the e-commerce portal program will no doubt affect companies' business decisions and processes for selling COTS products to the Government.

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Five Compliance Challenges Clients Face When Implementing NIST 800-171

Matthew J. Gardner and Megan L. Brown

Over the last several months, the acquisition community has been working to implement DFARS 252.204-7012, and in particular, the requirement to provide "adequate security" as set forth in the 110 security controls in NIST 800-171. In the course of advising clients on the December 31, 2017, deadline to implement these security requirements, many common themes and challenges emerged. This article highlights five of those issues involving the scope and documentation of compliance, and resolving ambiguities among the security controls.

Can I Segregate My Covered DOD Information System from my Commercial Systems?

This is possible and, for some contractors, may be a viable way to harden a system used for DOD contracting while avoiding a complete redesign of other existing commercial systems. The challenge is determining where one system ends and others begin. NIST provides some guidance on determining information system boundaries in NIST SP 800-37r1 Section 2.3, which provides factors to consider such as whether systems have the same management control, mission objectives, and operating environment. This guidance, however, is high level and does little to address the complexities of network architecture in the real world. Contractors looking to segregate a DOD system would be prudent to document clearly how they determine the boundaries between information systems.

What Information Systems Are Covered?

Often the hardest challenge contractors face is determining whether an information system is processing covered defense information (CDI) and is therefore within the scope of DFARS 252.204-7012 and must meet NIST 800-171. For contractors with multiple information systems, determining which systems process CDI may not be obvious. The definition of CDI includes Controlled Technical Information as well as Controlled Unclassified Information, as defined by the registry maintained by the National Archives and Records Administration. For information that is marked in the contract, this is an easy determination. But, the DFARS clause also includes CUI that is "collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract." This could sweep in wide swaths of information that is created or received by the contractor, but not marked. Contractors may benefit from focusing on other aspects of the CDI definition to narrow the scope of information that may be within its scope, such as whether the information is "in support of the performance of the contract," which may help clarify if the information at issue brings an information system into the scope of the DFARs clause.

How Do I Determine If I Have Complied With NIST 800-171?

NIST 800-171 has both the virtue and vice of being flexible. The security controls were purposefully designed to be technology-neutral and to allow for a range of solutions, giving contractors the ability to right-size and tailor the controls. While that has the clear benefit of allowing contractors to implement NIST 800-171 in the manner that works

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Update on NDAA FY18 Cyber Provisions

By Megan L. Brown and Moshe B. Broder

The FY18 NDAA encompasses a broad range of cybersecurity issues that play an important role in DOD's priorities and budget. For industry, the Department's cyber plans offer both opportunity and peril. This article highlights several of the key cyber provisions and initiatives that will affect industry.

Notably, we expect that DOD will work closely with the Department of Homeland Security (DHS) on a number of key cyber issues, including DOD's requirement to rid certain defense and homeland security systems of any telecommunications equipment and services produced by Huawei, ZTE, or any other telecommunications equipment or services produced or provided by an entity owned, controlled by, or otherwise connected to the Chinese or Russian government. Section 1656 of the NDAA, which restricts the use of such equipment and services in certain defense and homeland security infrastructure, was referenced by DHS at a recent Cybersecurity Working Group (CSWG) meeting as an area in which DHS will be active. DHS will also play a role in drafting a comprehensive cyber posture review, which will set out the near-term policy and strategy for cyber deterrence. More generally, we also expect increasing attention to cybersecurity and cyber compliance throughout federal procurements, as contractors must begin to comply with the requirements in DFARS 252.204-7012 and NIST SP 800-171, and as congressional proposals, such as the Warner-Gardner IoT bill, percolate.

The NDAA also reflects a focus on continued government investment in cyber capabilities and resources. Section 1078, for example, establishes a Technology Modernization Fund and Board designed to improve and replace through acquisitions existing and obsolete Federal IT and cybersecurity systems. Continued funding for cybersecurity research and development contracts and cooperative agreements, as well as funding for cybersecurity education and scholarships, is also provided. The NDAA also is notable for ***prohibiting*** the Government from acquiring certain products and services. As noted above, pursuant to Section 1656, certain DOD systems must not include telecommunications equipment or services produced by Huawei, ZTE, or any company owned, controlled by, or "otherwise connected to" the Chinese or Russian government. Similarly, Section 1634 permanently bans Kaspersky Lab's products from use by any federal agency.

The NDAA also impacts private investment. We expect cyber to play an increasingly important role in the Committee on Foreign Investment in the United States (CFIUS). Cybersecurity and IT acquisitions have come under close scrutiny by CFIUS in recent years, particularly transactions having any nexus to China or Chinese State Owned Entities (SOE). Moreover, in transactions across a spectrum of industries, CFIUS continues to pay close attention to the data privacy, information access, and cybersecurity implications of those transactions. The NDAA, Section 1069, builds on this trend by calling on DOD, with other agencies, to develop a plan and recommendation to improve the effectiveness of CFIUS, while focusing on the "major vulnerabilities of the defense industrial base pertaining to foreign investment, including in the areas of cybersecurity [and] reliance on foreign suppliers in the defense supply chain."

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best for their company, the downside is that compliance is not always readily apparent. DOD does not certify compliance, and it has not authorized a third-party certification process. Given this lack of formal certification, industry has turned to a variety of methods to document compliance, including structured internal audits and consulting with outside vendors who can provide a level of external verification.

What Do I Do If I Have Identified Gaps?

DOD has recognized that not all contractors will meet all NIST 800-171 security controls. The preferred method for identifying gaps is to create a System Security Plan (which is required by control 3.12.4) and document any gaps in Plans of Action and Milestones (POAMs). These POAMs will vary in detail based on the nature and scope of controls to be implemented and should reflect the realities and challenges of implementing these controls. At a minimum, they should provide some indication that the company has a workable path to address the gaps and implement required controls. While POAMs provide short-term relief for some gaps, DOD's guidance suggests that it considers these controls to be a "minimum," and is expecting contractors to be realistically working towards implementation.

How Do I Address Ambiguities in the Security Controls?

Many of the security controls in NIST 800-171 are ambiguous. Given the risk of breaching contractual duties and potential False Claims Act liability for failing to implement these controls when required, this ambiguity makes it all the more important to document the good faith steps contractors are taking to comply. While there may be no silver bullet solution, the controls in NIST 800-171 are mapped to NIST 800-53, which provides additional structure to the controls. First, each control in NIST 800-53 has "Supplemental Guidance" that provides a level of further description. Also, most of the controls in NIST 800-171 map to a only couple of the "Control Enhancements" in each control in NIST 800-53. It may be reasonable for contractors to conclude that any Control Enhancements that are not expressly mapped are not required, which would limit the burden and ambiguity in implementing NIST 800-171.

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Federal Court Orders Production of Internal Investigation Memoranda to Third Parties Following Oral Disclosure to Government

By Kevin B. Muhlendorf and Shane B. Kelly

A federal magistrate judge in Florida recently ordered that witness interview memoranda from an internal investigation be produced to third parties in related civil litigation, finding that attorneys had waived attorney work product protection when they disclosed the contents of the memoranda to the Government. While this was a single magistrate judge's opinion, it has the potential to impact standard practices for witness interviews and cooperation in government investigations in the event other courts reach similar conclusions. Regardless of its wider adoption, this opinion should remind companies and their counsel of the care needed when conducting internal investigations, memorializing interviews, and making oral or written disclosures to the Government.

The case at issue, *SEC v. Herrera*, Case No. 17-CV-20301 (S.D. Fl. Dec. 5, 2017), involved allegations that employees of General Cable Corporation (GCC) concealed the manipulation of accounting systems at the Brazilian operations of GCC. The company hired Morgan Lewis & Bockius LLP (Morgan Lewis) to provide advice regarding these irregularities, and Morgan Lewis subsequently commenced an internal investigation and informed the U.S. Securities and Exchange Commission (SEC) of the investigation. As is standard practice in white-collar investigations, Morgan Lewis attorneys then conducted interviews of relevant witnesses and memorialized the substance of these interviews in memoranda. Following these interviews, undoubtedly as part of an effort to demonstrate cooperation with the SEC's investigation, attorneys for Morgan Lewis orally shared the content of some of the interview memoranda with the government lawyers. Subsequently, GCC settled with the SEC, and the SEC initiated a civil enforcement action against individual GCC employees in federal court in Florida. The individual defendants subpoenaed Morgan Lewis, seeking the production of all the interview memoranda related to the internal investigation. When the law firm refused, the defendants brought a motion to compel their production.

Magistrate Judge Jonathan Goodman partially granted the defendants' request, ordering the production of the interview memoranda that had been summarized for the SEC. The court found that the information sharing conducted by Morgan Lewis constituted a waiver of work product protection over the interview memoranda. The court noted that the work product doctrine is primarily about protecting materials from adversaries, and in this context the SEC—like any government enforcement agency—was an adversary. In the court's view, Morgan Lewis had "disclosed [the interview memoranda] in a manner which is either inconsistent with maintaining secrecy against opponents or substantially increases the opportunity for a potential adversary to obtain the protected information." The court found that an "oral download" of the content of the interview memoranda to an adversary was the functional equivalent of disclosing the documents themselves, as Morgan Lewis went beyond providing "only detail-free conclusions or general impressions" in the oral conversations. The court rejected the

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argument that an oral description was distinct from disclosing the document itself and found that Morgan Lewis had waived work product protection. On that basis, the court ordered that the interview memoranda discussed with the SEC be produced to the defendants in the SEC civil enforcement action.

Magistrate Judge Goodman's opinion requiring production of the interview memoranda is a startling—if not ultimately surprising—decision, as it implicates a common practice of sharing information with the Government following an internal investigation. Indeed, it seems to put corporations in a nearly impossible position when trying to both cooperate with the Government and maintain all legal protections over internal investigation materials. For example, in November 2017 (just days before this opinion), DOJ released its Corporate Enforcement Policy related to the Foreign Corrupt Practices Act (FCPA). The chief aim of that policy is to incentivize companies to cooperate with DOJ, including conditionally offering presumptions of declination for voluntary self-disclosures of FCPA violations. But to receive any credit under the new guidelines, companies must give "full cooperation" to DOJ, including proactive disclosure of "all relevant facts gathered during the company's independent investigation" and "attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of facts."

In addition, DOJ policy as laid out in the "Yates Memo" (formally titled Individual Accountability for Corporate Wrongdoing and currently under review by DOJ) requires that organizations provide DOJ with "all relevant facts relating to the individuals responsible for the misconduct" in order to receive any cooperation credit in either civil or criminal matters. Because witness interviews are a primary way that a corporation or its outside counsel conducts internal investigations and learns information about misconduct, DOJ guidance virtually requires a disclosure of the substance of individual witness interviews in order to gain cooperation credit. Despite these expectations, the court in *Herrera* found such behavior forfeited legal protections over interview memoranda. *Herrara* thus sets up an inherent conflict between maintaining work product protection over witness interviews and cooperation of the type expected by DOJ.

This conflict is heightened in the government contracts context, where mandatory disclosure obligations require the disclosure of credible evidence of violations of certain laws, including the civil False Claims Act. *See* FAR 52.203-13(b). Because extensive information sharing as a part of a mandatory disclosure could constitute a waiver of protection over interview memoranda if *Herrara's* logic is adopted elsewhere, companies now more than ever need to consider how the manner in which those disclosures are made has the potential to impact later civil discovery involving the company.

As it stands, Magistrate Judge Goodman's opinion was initially appealed, but that matter has settled, leaving his opinion in place. Given the risk that this approach may be adopted by other courts, it is advisable to consider adapting internal investigation best practices to minimize the risk of potential production of interview memoranda.

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Federal Court Orders Production of Internal Investigation Memoranda to Third Parties Following Oral Disclosure to Government

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Government contractors, which often find themselves answering any number of governmental investigative inquiries—be it from DOJ, SEC, various IGs, or Congress—are subject to rigorous government oversight and as a result should have robust internal investigation functions. They and their counsel should now be even more sensitive to the format and content of interview memoranda. Consideration should be given to restricting editorializing or commentary in interview memoranda, omitting statements made by counsel and focusing on the statements made by the witness. That way, if a disclosure made to the Government is later deemed to be a "waiver," the production of the underlying interview memorandum itself will not reveal the mental impressions of counsel on the factual or legal issues involved in the investigation. Additionally, when making a disclosure to the Government, detailed records of exactly what is disclosed should be maintained, to combat any overbroad waiver arguments.

Finally, contractors need to be mindful about the level of detail they are providing to the Government and at what stage of resolving an issue. In an ideal world a contractor would avoid altogether the kind of detailed disclosure that could even arguably result in a waiver of work product, neutralizing the *Herrera* issue, but this may not be possible when satisfying the mandatory disclosure rules and dealing with suspension and debarment officials. In the voluntary cooperation paradigm, however, contractors should attempt to gain whatever cooperation credit is available while seeking to avoid an "oral download" that could potentially result in a waiver. When given more flexibility, contractors should avoid a read-out of specific statements made by individuals, instead trying to summarize the overall factual conclusions from an investigation. That balancing act will be challenging, and companies subject to investigations, as well as their counsel, will need to be intentional about their approach. As Magistrate Judge Goodman noted in the opening line of the opinion, "[v]ery few decisions are consequence-free events." Government contractors would be wise to be mindful of the consequences of these decisions.

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Pay to Play: Federal Contractor Penalized for Prohibited Contributions to Super PAC

By D. Mark Renaud and Kenneth Daines

A Massachusetts corporation, Suffolk Construction Company (Suffolk), agreed in September to pay a civil penalty of $34,000 to the Federal Election Commission (FEC) because it made prohibited political contributions as a federal contractor to a federal super PAC in 2015. According to media sources, this is the first time a federal contractor has been fined by the FEC for contributing to a super PAC.

Although Suffolk works primarily as a general contractor and construction manager for privately funded projects, a small portion of its work has included federal contracts. According to FEC Matter Under Review (MUR) 7099, from December 2015 to August 2016 it completed two construction projects for the U.S. Army Corps of Engineers (USACE) stemming from an earlier contract. On July 7, 2015, Suffolk received USACE's modified contract (MOD 28) for the first project; on September 18, 2015, USACE then issued an amendment to MOD 28 for a second project.

On July 20, 2015, just 13 days after receiving USACE's modified contract, Suffolk contributed $100,000 to Priorities USA Action, an ideologically progressive federal super PAC. Suffolk then made a second $100,000 contribution to Priorities USA on December 17, 2015.

After a complaint was brought against Suffolk, the FEC in an enforcement matter found reason to believe that Suffolk's contributions as a federal contractor violated the Federal Election Campaign Act (FECA). Relevant federal campaign finance law states that "any person . . . [w]ho enters into any contract with the United States . . . for the rendition of personal services or furnishing any material, supplies, or equipment to the United States" is prohibited from making a contribution "to any political party, committee, or candidate for public office or to any person for any political purpose or use." This prohibition applies at the beginning of contract negotiations or when proposal requests are sent out, whichever occurs first, and ends when the contract is performed or when negotiations are terminated, whichever occurs last.

Specifically, in MUR 7099 the FEC found that it could reasonably infer that MOD 28 in July was "either a contract proposal or a negotiated work order, thus making Suffolk a federal contractor" when it made its July 20, 2015 contribution to Priorities USA. Further, Suffolk's work on these projects was apparently already underway when it made its second contribution on December 17, 2015. Thus, Suffolk's contributions to the super PAC violated FECA. The FEC also rejected Suffolk's argument that its federal contract work represented only a "small fraction" of its total business: although the value of its federal contract work may have been a *de minimis* portion of Suffolk's overall work, its $200,000 contribution to Priorities USA was certainly not *de minimis*.

On September 20, 2017, the FEC accepted Suffolk's conciliation agreement in which it acknowledged that its contributions violated the law and agreed to pay a $34,000 fine to the FEC. Because the record indicated that Priorities USA did not "knowingly solicit the . . . contributions at issue," however, no enforcement was brought against the committee.

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A Tale of Two Cities: Mayors Veto Pay-to-Play Ordinances, Only to Be Overridden by City Councils

By D. Mark Renaud and Kenneth Daines

After Mayor Tom Henry vetoed a recent Fort Wayne, Indiana pay-to-play ordinance, the City Council voted by a 6-3 margin on December 12, 2017 to override his veto, thus reinstating the ordinance. Designed to avoid the appearance of impropriety and cronyism in city government, the ordinance bars businesses that contribute over $2,000 per calendar year to elected city officials from bidding on city contracts. Included are donations to local officials' campaigns from so-called "key employers," or those individuals owning over 7.5% of a given company, which will count toward that firm's $2,000 ceiling. Contributions from key employers' spouses and children will likewise be counted as contributions from their respective firms.

In a letter explaining his veto to the council, Mayor Henry noted that while he agreed with the council's "admirable" intent, he had several concerns with the ordinance, including that it 1) violates a provision in Indiana's Home Rule Act that local governments have no regulatory power over campaign finance; 2) violates state law because local governments cannot regulate conduct that has been assigned by the Indiana General Assembly to other units and agencies of the state government; and 3) violates both the Indiana and federal constitutions. Instead, he proposed returning the bill to the City Council to make the appropriate adjustments that would avoid likely legal challenges while also making the campaign contribution process more transparent through stricter disclosure requirements.

The council was unpersuaded, however. According to *The Journal Gazette*, ordinance proponents argued that the measure is necessary to help restore citizens' faith in the local government contracting process, especially given the negative publicity that can ensue when large contributors receive lucrative contracts to be city vendors. Proponents also argued that it does not actually impair free speech or limit how much any donor can give to an elected city official's campaign, but rather simply limits the city's ability to contract with certain large contributors. One of the ordinance's sponsors on the council further observed, "Our ordinance is not perfect and cannot stop all money influence in government. But it will help . . . . The alternative is to throw up our hands, saying we cannot do anything" because "it might not be legal and it's not perfect . . . . But seeing a problem and not trying to do your best to fix what you can by declaring it hopeless is just a form of cowardice."

Separately, on the West Coast, a similar ordinance was recently vetoed by the mayor of Spokane, Washington, but the veto was then overridden by the Spokane City Council on January 8, 2018. The ordinance prohibits any company with more than $50,000 in contracts with the City of Spokane from contributing to local campaigns, while also imposing new reporting requirements and lowering the maximum campaign contribution limit to half of what the State of Washington currently allows. In explaining his veto to the Inlander, Mayor David Condon asserted that the ordinance violated free speech because it imposes contribution restrictions on city contractors but not on city unions, and that campaign finance restrictions should be handled at the state level.

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Pay to Play: Federal Contractor Penalized for Prohibited Contributions to Super PAC *continued from page 18*

As this case illustrates, violations of "pay-to-play" laws can result in costly penalties to contributors. Wiley Rein's Election Law and Government Ethics Practice has extensive experience assisting companies seeking or holding federal or state contracts in complying with federal, state, and local pay-to-play laws. Additionally, our State and Municipal Pay-to-Play Survey provides a comprehensive summary of pay-to-play laws in states and major municipalities, as well as the pay-to-play policies that many public agencies have adopted on their own, and is available as a subscription service for a fee. To order, please contact D. Mark Renaud at the email or phone number listed below.

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Update on NDAA FY18 Cyber Provisions

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Finally, Section 1633 of the NDAA calls on the President to develop a national policy relating to cyberspace, cybersecurity, and cyber warfare; a report on the policy is to be submitted to the appropriate congressional committees. This policy will address the instruments of national power available to deter or respond to cyber attacks, available response options and capabilities that may impose costs on foreign powers, and enhanced attribution and offensive cyber capabilities.

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A Tale of Two Cities: Mayors Veto Pay-to-Play Ordinances, Only to Be Overridden by City Councils

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The same six city council members who initially voted in favor of the ordinance then voted to override the veto, clearing the necessary five-vote hurdle to reinstate the ordinance without Mayor Condon's backing.

The ordinances took effect on January 1, 2018, in Fort Wayne and on February 7, 2018, in Spokane.

Wiley Rein's Election Law and Government Ethics Practice has extensive experience assisting companies seeking or holding federal or state contracts in complying with federal, state, and local pay-to-play laws.

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2018 Lobbying and Gift Law Guide 50 States Plus the District of Columbia

Wiley Rein's **State Lobbying & Gift Law Guide** provides a comprehensive summary of lobbying, gift, and relevant ethics laws in all 50 states plus the District of Columbia.

Revised in full each year, our Guide provides an invaluable reference for corporate counsel and others in determining whether your organization's contemplated state-level activities are permissible and what registration and reporting requirements might apply, in addition to pertinent gift rules. Unlike many other products on the market, our in-depth Guide includes citations to relevant authority as well as analysis based on advisory opinions and relevant interpretations of law issued on a state-by-state basis.

Our Survey is available through an online portal that includes timely updates. View a sample of the portal at **https://lobbying-and-gift-survey.wileyrein.com**, which contains 2014 information for Illinois and North Dakota. The username is **wileydemo**, and the password is **demo123**.

For more information on the 2018 Lobbying and Gift Law Survey or to order, please contact Carol A. Laham at 202.719.7301 or claham@wileyrein.com.

Speeches & Publications

Bid Protest Committee Monthly Meeting

May 15, 2018 | Washington, DC

ABA Public Contract Law Section

Brian G. Walsh, Moderator

Final Rule on Paid Sick Leave for Federal Contractors and Subcontractors

May 8, 2018 | Online Webinar

Lorman Education Services

Eric W. Leonard and Craig Smith, Speakers

Federal Circuit Bar Association Government Contracts Summit

April 13, 2018 | Washington, DC

Paul F. Khoury, Moderator

John R. Prairie, Speaker

Current Enforcement Environment for Federal Grantees

April 3-5, 2018 | Arlington, VA

Annual Grants Training (AGT) 2018

John R. Prairie and Brian Walsh, Speakers

2018 Federal Circuit Judicial Conference

March 16, 2018 | Washington, DC

Scott M. McCaleb, Moderator

Short Talks on Putting Procurement Law to Work

March 14-17, 2018 | Annapolis, MD

24th Annual ABA Federal Procurement Institute

Craig Smith, Moderator

Diversity & Inclusion in the Legal Profession: Why It's Important and What You Can Do

March 14-17, 2018 | Annapolis, MD

24th Annual ABA Federal Procurement Institute

Tara L. Ward, Moderator

How Courts and Tribunals Approach Their Roles in the International Procurement System

March 5, 2018 | London, England

Colloquium on Trade in Government Procurement Co-Sponsored by GW Law, LAWTTIP, and King's College London

Paul F. Khoury, Panelist

2018 Government Contracts Year in Review Conference

February 20-23, 2018 | Washington, DC

Rand L. Allen, Speaker

Innovation in Government Procurement

February 19, 2018 | Online Webinar

Dcode

John R. Prairie, Speaker

Applying New Department of Justice Compliance Standards to the Managed Care Context

February 12, 2018 | Scottsdale, AZ

2018 Managed Care Compliance Conference

Ralph J. Caccia, Speaker

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Speeches & Publications *continued from page 22*

Top 5 Risks Confronting Defense and Aerospace Industries: Resource Allocation Amid Enforcement Trends and Budgetary Pressures

January 30, 2018 | Washington, DC

ACI's 3rd Networking and Leadership Forum on Women in Defense and Aerospace Law & Compliance

Kara M. Sacilotto, Speaker

Materiality and Implied False Certification: Split Circuit Decisions and the Impact of Escobar on Pending and Future False Claims Cases

January 29-30, 2018 | New York, NY

5th Advanced Forum on False Claims & Qui Tam Enforcement

Roderick L. Thomas, Panelist

Fraud Section Under New Management: Takeaways From 2017

January 2018 | ARTICLE

Law360

Kevin B. Muhlendorf and Madeline J. Cohen

Statute of Limitations Tolling in SEC Enforcement Actions Post-Kokesh – An Offer You Can Refuse

December 2017 | ARTICLE

FCPA Professor

Kevin B. Muhlendorf and Michelle B. Bradshaw

Statutes, Regulations, Executive Orders and Policies

December 7, 2017 | Online Webinar

PubKGroup's Annual Review

Rand L. Allen, Speaker

Claims, Disputes, and Terminations

December 7, 2017 | Online Webinar

PubKGroup's Annual Review

Paul F. Khoury, Speaker

Federal Grants Symposium

December 6-7, 2017 | Orlando, FL

Public Contracting Institute

John R. Prairie, Speaker

Health Care Fraud Anti-Kickback Statue & Stark Compliance

December 7, 2017 | Atlanta, GA

Georgia Health Care Fraud Institute

Ralph J. Caccia, Speaker

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