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SESSION 11

FRAUD, DEBARMENT AND SUSPENSION—PART I: FRAUD

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1. STATISTICS – FISCAL YEAR 2017

TOTAL RECOVERIES		**FY 2017**	**FY 2016**	**FY 2015**
Total Settlements & Judgments		$3.7 Billion	$4.76 Billion	$3.14 Billion
Qui Tam Settlements & Judgments	Where U.S. Intervened	$3.01 Billion	$2.8 Billion	$1.90 Billion
	Where U.S. Declined	$426 Million	$106 Million	$512 Million
	Total Qui Tam	$3.44 Billion	$2.92 Billion	$2.41 Billion
Non-*Qui Tam* Settlements and Judgments		$265 Million	$1.86 Billion	$732 Million
Total Relator Share Awards		$393 Million	$527 Million	$482 Million
Relator Share Awards Where U.S. Declined to Intervene		$43.6 Million	$29.7 Million	$138 Million
Relator Share Awards Where U.S. Intervened		$349 Million	$497 Million	$344 Million
All New Matters		**799**	**853**	**750**
New *Qui Tam* Matters		674	706	639
New Government Led Matters (Non-*Qui Tam*)		125	147	111
Recovery in Healthcare FCA Cases (HHS)		$2.5 Billion	$2.6 Billion	$2.1 Billion
Recovery in Procurement Fraud (DoD)		$220 Million	$122 Million	$283 Million
Recovery in Non-DoD, Non-HHS Cases		$1.0 Billion	$2.04 Billion	$739.88 Million

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HHS FCA RECOVERIES		FY 2017	FY 2016	FY 2015
Total Settlements & Judgments		$2.5 Billion	$2.6 Billion	$2.2 Billion
Qui Tam Settlements & Judgments	Where U.S. Intervened	$2.06 Billion	$2.44 Billion	$1.49 Billion
	Where U.S. Declined	$380 Million	$72.9 Million	$472.6 Million
	Total Qui Tam	$2.44 Billion	$2.5 Billion	$1.96 Billion
Non-*Qui Tam* Settlements and Judgments		$32.6 Million	$97.5 Million	$154.7 Million
Total Relator Share Awards		$282.8 Million	$457.3 Million	$405.1 Million
Relator Share Awards Where U.S. Declined to Intervene		$32.5 Million	$20.5 Million	$132.2 Million
Relator Share Awards Where U.S. Intervened		$250.3 Million	$436.8 Million	$258.8 Million
All New Matters		**544**	**572**	**452**
New *Qui Tam* Matters		491	503	426
New Government Led Matters (Non-*Qui Tam*)		53	69	26

DoD FCA RECOVERIES		FY 2017	FY 2016	FY 2015
Total Settlements & Judgments		$220 Million	$122 Million	$283 Million
Qui Tam Settlements & Judgments	Where U.S. Intervened	$209 Million	$47.9 Million	$146 Million
	Where U.S. Declined	$500,000	$13.6 Million	$26.6 Million
	Total Qui Tam	$209 Million	$61.5 Million	$172.6 Million
Non-*Qui Tam* Settlements and Judgments		$10.9 Million	$60.6 Million	$110 Million
Total Relator Share Awards		$42.8 Million	$13.7 Million	$27.1 Million
Relator Share Awards Where U.S. Declined to Intervene		$135,000	$3.9 Million	$2.6 Million
Relator Share Awards Where U.S. Intervened		$42.7 Million	$9.8 Million	$24.6 Million
All New Matters		**47**	**40**	**43**
New *Qui Tam* Matters		28	31	36
New Government Led Matters (Non-*Qui Tam*)		19	9	7

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NON-HHS/NON-DoD RECOVERIES		FY 2017	FY 2016	FY 2015
Total Settlements & Judgments		$1.0 Billion	$2.04 Billion	$739.8 Million
Qui Tam Settlements & Judgments	Where U.S. Intervened	$738.4 Million	$325.4 Million	$258.9 Million
	Where U.S. Declined	$45.0 Million	$19.4 Million	$13.1 Million
	Total Qui Tam	$783.4 Million	$344.9 Million	$272 Million
Non-*Qui Tam* Settlements and Judgments		$222 Million	$1.7 Billion	$467.7 Million
Total Relator Share Awards		$67.3 Million	$55.7 Million	$49.7 Million
Relator Share Awards Where U.S. Declined to Intervene		$10.9 Million	$5.2 Million	$3.2 Million
Relator Share Awards Where U.S. Intervened		$56.4 Million	$50.0 Million	$46.6 Million
All New Matters		**208**	**241**	**255**
New *Qui Tam* Matters		155	172	177
New Government Led Matters (Non-*Qui Tam*)		53	69	78

Key takeaways from this year's numbers:

- **Overall Recoveries are Fairly Consistent with Prior Years.** In the years leading up to 2014, it seemed like the amount of FCA recoveries year-over-year had only one place to go—up. In the past three years, however, the DOJ's total annual recoveries have tapered off to between $3 billion and $5 billion. This year's recoveries are consistent with the "tapering off" we have observed.

- **Non-Qui Tam Settlements and Judgments are Down.** In both DOD and HHS cases, cases filed by DOJ have been less successful in 2016 than 2015. This trend has continued into 2017. This figure bodes well for entities defending FCA lawsuits against the DOJ. It suggests that despite vigorous enforcement efforts, defendants are faring well.

- **DOD Qui Tam Filings Are Down, But Government Initiated Cases Are Up.** This is an interesting trend. DOD recoveries are typically less than HHS recoveries, but the DOJ appears to have pursued more cases against defense contractors year-over-year since 2015. Although this might be concerning to those in the defense industry, we note that the trendline on Non-Qui Tam Settlements and Judgments is down. In other words, although the DOJ may be pursuing recoveries in the defense industry with increasing vigor, DOJ's increased efforts has not resulted in increased success.

- **Health Care Cases Continue to Constitute the Lion's Share of the Government's Recoveries.** Health care recoveries have historically been the marquee of these statistics. This year is no different. More than half of all FCA recoveries came from HHS cases in 2017.

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- **Non-DOD/Non-HHS Filings Are Down Overall.** It has been almost a decade since the financial meltdown of 2008. Most of the false certification cases against financial institutions arising out of activity that occurred during the subprime mortgage crisis have, at the very least, been filed—many have been settled or have otherwise concluded. It is no surprise, therefore, that the total number of non-DOD/non-HHS cases continue to go down since many of those cases have, at least during the last decade, targeted financial institutions.

2. ENFORCEMENT PRIORITIES

In November, RACmonitor, an online news and information source for healthcare providers, reported the following:

> The U.S. Department of Justice (DOJ) said that when it concludes that a qui tam case lacks merit, it will file a motion to dismiss the case rather than allowing the relator to continue.
>
> The surprise announcement was made by Michael Granston, director of the commercial litigation branch of the fraud section in the DOJ's civil division, during the Health Care Compliance Association's Health Care Enforcement Compliance Institute in Washington, D.C. on Monday.

https://www.racmonitor.com/developing-story-doj-will-dismiss-qui-tam-cases-lacking-merit.

Shortly after the article was posted, the DOJ press office contacted RACmonitor, explaining that the news outlet "misunderstood Mr. Granston's remarks" and asked RACmonitor to "run a correction." RACmonitor then reported the following:

> I asked the press officer if there were examples of situations in which the government had intervened to dismiss qui tam cases in the healthcare industry. Her initial response was that it did not matter [sic] there were any examples.
>
> Since it clearly does matter, I pushed hard on this point. I ultimately received a list of eight cases in which the government had intervened to dismiss a qui tam FCA case. Several of these cases were highly unusual, and totally unrelated to the healthcare industry. My favorite was a case asserting that since Barack Obama wasn't eligible to be president, all of his actions violated the False Claims Act. Another of the cases involved an argument that torture by the Central Intelligence Agency (CIA) resulted in submission of false claims. The bottom line is that most of the cases weren't really applicable to the discussion.
>
> But I concede that there were two notable cases involving healthcare fraud, one from 2011 and one from 2013. I was not previously aware of either.
>
> So it is certainly possible that the Department's policy changed sometime in the past. Whenever the policy was reversed, I appreciate that the DOJ made the change. When a case lacks merit, it takes time from the court and money from defendants who need to defend it.
>
> While as a defense lawyer I have a financial self-interest in a case being allowed to proceed, my sense of justice vastly outweighs that incentive. Clients should not need to retain counsel to defend a frivolous case.

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> We have no way of knowing how often the DOJ will exercise its option to intervene and dismiss a case. It is possible that this will remain a rarity. But the fact that it is an option is good news for both the industry and society in general.

https://www.racmonitor.com/developing-story-doj-will-dismiss-qui-tam-cases-lacking-merit-part-ii.

So what can we make of this? A few things. First, regardless of what Mr. Granston said (or intended to say), members of the defense bar thought it would be "news" for the Department of Justice to announce it would seek to dismiss unmeritorious *qui tam* cases. The reason members of the defense bar thought this was "news" was not because Mr. Granston said it—it was because experience has counseled the defense bar that in a generic *qui tam* case, the Department of Justice's default move is to not intervene. The real news here is not that the defense bar misunderstood the DOJ — it is that the DOJ seemed surprised by the defense bar's reaction.

Second, do not expect any policy announcements regarding intervention decisions from the DOJ any time soon. It is likely that this incident only encourages the DOJ's practice of not explaining its reasons for intervening in FCA cases.

Third, the incident demonstrates an unfortunate disconnect between the policy priorities of the DOJ and the goals of the FCA. From the defense bar's perspective, the *qui tam* provisions do not provide enough of a deterrent to opportunistic, parasitic litigants. The only deterrent is the attorneys' fees provision, but that can be triggered only if (1) the government does not intervene; (2) the defendant "prevails," which requires a decision in its favor; and (3) the court finds the action was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4). If the DOJ dismissed more unmeritorious cases, then the health care industries and government contractors would be able to spend less money on lawyers, and more money on providing quality health care, services, and products to the American taxpayers. This would enable the FCA to better strike a balance between empowering relators to recover fraudulently obtained federal dollars and overburdening industry with an overly aggressive statute that ultimately passes its costs down to the very taxpayers it is designed to protect.

3. SIGNIFICANT SETTLEMENTS

a. Mylan Inc. and Mylan Specialty LP Agreed to Pay $465 Million to Resolve Claims that they Violated the FCA by Knowingly Misclassifying the EpiPen as a Generic Drug. On August 17, 2017, the DOJ announced that it had settled civil fraud claims arising out of allegations that pharmaceutical companies Mylan Inc. and Mylan Specialty LP violated the FCA by knowingly misclassifying EpiPen as a generic drug to avoid paying rebates owed primarily to Medicaid. The settlement resolves allegations that Mylan, by reporting EpiPen as a generic drug to Medicaid, was able to demand a massive price increase in the private market while avoiding its corresponding rebate obligations to Medicaid under the Medicaid Drug Rebate Program. Specifically, between 2010 and 2016, Mylan increased the price of EpiPen by approximately 400%, but paid only a fixed 13% rebate to Medicaid during that same period. Mylan will pay the United States $465 million. https://www.justice.gov/opa/pr/mylan-agrees-pay-465-million-resolve-false-claims-act-liability-underpaying-epipen-rebates.

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b. Shire PLC and its Subsidiaries Agreed to Pay $350 Million to Resolve Civil Claims Relating to a Scheme to Pay Kickbacks to Clinics and Physicians to Use or Overuse Its Product. On January 11, 2017, the DOJ announced it had settled federal and state FCA claims against Shire Pharmaceuticals LLC and other subsidiaries of Shire PLC arising out of allegations that Shire and the company it acquired in 2011, Advanced BioHealing, employed kickbacks to induce clinics and physicians to use or over its product, "Dermagraft." Specifically, claims allege that Shire treated clinics and physicians to lavish dinners, drinks, entertainment, and travel as well as medical equipment, supplies, cash, credits, rebates, and unwarranted payments for purported speaking engagements and bogus case studies. In addition, this settlement resolves allegations that Shire unlawfully marketed its product for uses not approved by the FDA, made false statements to inflate the price of its product, and caused improper coding, verification, or certifications of product claims and related services. The DOJ considers this to be a "landmark civil settlement" and it is the largest FCA recovery by the United States in a kickback case involving a medical device. https://www.justice.gov/opa/pr/shire-plc-subsidiaries-pay-350-million-settle-false-claims-act-allegations.

c. Celgene Corporation Agreed to Pay $280 Million to Resolve Fraud Allegations Relating to the Promotion of Cancer Drugs for Uses Not Approved by the Food and Drug Administration (FDA). On July 24, 2017, the DOJ announced it had settled federal and state civil fraud charges against Celgene Corporation, a pharmaceutical manufacturer, arising out of allegations relating to the promotion of two cancer treatment drugs, Thalomid and Revlimid, for uses not approved by the FDA and not covered by federal or state health care programs. It was also alleged that the Company made false and misleading statements about the drugs and paid kickbacks to physicians to induce them to prescribe the cancer treatment drugs. This settlement also resolves allegations that Celgene submitted false claims to Medicare and that Celgene violated the laws of 28 states and the District of Columbia by submitting fraudulent claims to state health care programs. Celgene will pay $259.3 million to the United States and $20.7 million to the 28 states and the District of Columbia, with $4.7 million going to the state of California. https://www.justice.gov/usao-cdca/pr/celgene-agrees-pay-280-million-resolve-fraud-allegations-related-promotion-cancer-drugs.

d. eClinicalWorks Agreed to Pay $155 Million to Settle FCA Misrepresentation Allegations and Scheme to Pay Kickbacks to Customers in Exchange for Promoting its Software. On May 31, 2017, the DOJ announced it had settled civil fraud claims against eClinicalWorks ("ECW"), one of the nation's largest vendors of electronic health records software. The settlement arose out of allegations that ECW misrepresented the software's capabilities and that ECW falsely obtained HHS-adopted accreditation for its software by concealing that the software did not comply with various requirements. In addition, the settlement also resolves allegations that ECW paid kickbacks to certain customers in exchange for their promoting ECW's product. ECW and three of its founders agreed to pay $154.92 million to the United States. This is the largest FCA recovery in the District of Vermont and the largest financial recovery in the history of the state of Vermont. https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-155-million-settle-false-claims-act-allegations.

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e. Chemed Corporation Agreed to Pay $75 Million for Submitting False Hospice Services Claims to Medicare for Reimbursement. On October 30, 2017, the Department of Justice ("DOJ") announced it had settled civil fraud claims against Chemed Corporation and its various subsidiaries, including Vitas Hospice Services LLC and Vitas Healthcare Corporation, arising out of allegations that the Chemed Corporation and its subsidiaries knowingly submitted, or caused to be submitted, hospice claims for patients who were not terminally ill and therefore did not qualify for hospice. The settlement resolves allegations that Vitas knowingly submitted or caused to be submitted false claims to Medicare for services to hospice patients that were not terminally ill and also that Vitas knowingly submitted or caused to be submitted false claims to Medicare for continuous home care services that were not necessary, not actually provided, or not performed in accordance with Medicare requirements. This is considered to be the largest amount ever recovered under the False Claims Act ("FCA") from a provider of hospice services. https://www.justice.gov/opa/pr/chemed-corp-and-vitas-hospice-services-agree-pay-75-million-resolve-false-claims-act.

f. PHH Corporation Agreed to Pay Over $74 Million to Resolve Allegations that the Company Knowingly Originated and Underwrote Mortgage Loans Insured by the U.S. Department of Housing and Urban Development's ("HUD") Federal Housing Administration ("FHA"), Guaranteed by the United States Department of Veterans Affairs ("VA"), and Purchased by Fannie Mae and Freddie Mac that Did Not Meet Applicable Requirements. On August 8, 2017, the DOJ announced it had settled civil fraud claims against PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans arising out of allegations that PHH failed to comply with certain Fannie Mae, Freddie Mac, VA, and FHA origination, underwriting, and quality control requirements in relation to mortgage loans. PHH admitted that because of PHH's conduct and omissions, HUD insured loans endorsed by PHH that were not eligible for FHA mortgage insurance and that, if not for PHH's conduct and omissions, HUD would not have otherwise insured those mortgage loans. PHH also admitted that HUD subsequently incurred substantial losses when it paid insurance claims on those loans. The settlement also resolves allegations relating to PHH's reckless origination and underwriting of VA guaranteed mortgage loans. https://www.justice.gov/usao-edny/pr/phh-agrees-pay-over-74-million-resolve-alleged-false-claims-act-liability-arising.

g. Walgreens Agreed to Pay $50 Million to Resolve Allegations Relating to a Scheme to Pay Kickbacks to Induce Beneficiaries of Government Healthcare Programs to Fill Their Prescriptions at Walgreens' Pharmacies. On January 19, 2017, the DOJ announced it had settled federal civil fraud claims and numerous state law civil fraud claims against Walgreens arising out of allegations that Walgreens violated the federal Anti-Kickback Statute and the FCA by enrolling hundreds of thousands of beneficiaries of government healthcare programs in its Prescription Savings Club program. The settlement resolves allegations that Walgreens provided government beneficiaries with discounts and other monetary incentives under the Prescription Savings Club program in order to induce these individuals to use Walgreens' pharmacies for all of their prescription drug needs. The settlement further resolves allegations that Walgreens marketed the program to government beneficiaries and paid its employees bonuses for each customer they enrolled in the program, without verifying whether the customers they enrolled were actually government beneficiaries. Under the

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settlement, Walgreens agreed to pay $50 million and admit to the conduct alleged in the government's Complaint. https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-50-million-settlement-walgreens-paying-kickbacks-induce.

h. ADS Inc. Agreed to Pay $16 Million to Settle FCA Claims Relating to False Claims for Payment in Connection to Fraudulently Obtained Small Business Contracts and Improper Bid Rigging. On August 10, 2017, the DOJ announced that it had settled civil fraud claims arising out of allegations that ADS Inc. and its subsidiaries knowingly conspired with and caused purportedly small businesses to submit false claims for payment in connection with fraudulently obtained small business contracts. This settlement also resolves allegations that ADS Inc. engaged in illegal bid rigging schemes that inflated or distorted prices charged to the government under certain contracts. This settlement is one of the largest recoveries involving fraud in connection with small business contracting eligibility. https://www.justice.gov/usao-dc/pr/defense-contractor-ads-inc-agrees-pay-16-million-settle-false-claims-act-allegations.

i. Triple Canopy Agreed to Pay $2.6 Million to Settle Allegations that the Company Submitted False Claims for payment to the Department of Defense ("DOD"). On October 16, 2017, the DOJ announced it had settled civil fraud claims against Triple Canopy, Inc. arising out of allegations that the company had submitted false claims for payment to the DOD for unqualified security guards stationed in Iraq. The settlement resolves allegations that Triple Canopy knowingly billed the United States for security guards who could not pass contractually required firearms proficiency tests and that Triple Canopy concealed the guards' inability to satisfy the firearms testing requirements by creating false test scorecards that Triple Canopy was required to maintain for government in order to induce the government to pay for the unqualified guards. This settlement signals the end of a highly watched FCA case because its interpretation of the implied false certification theory after *Escobar*. https://www.justice.gov/usao-edva/pr/government-contractor-pays-26m-settle-false-claims-act-suit.

4. U.S. SUPREME COURT CASES

a. U.S. ex rel. Campie v. Gilead – In July 2017, the Ninth Circuit reversed the district court's dismissal, raising questions about materiality and falsity in the implied certification context. Gilead's petition to rehear the case was denied on September 27, 2017. The Court then granted Gilead's motion seeking stay of the mandate to allow it to file a certiorari petition with the Supreme Court. On December 26, 2017, the day the certiorari petition was due, Gilead filed a letter with the Ninth Circuit indicating a certiorari petition had been filed. We have not been able, however, to locate the certiorari petition as of this writing.

b. Triple Canopy, Inc. v. United States, No. 17-247 – Back in 2016, Triple Canopy had filed a petition for a writ of certiorari at the same time that Universal Health Services appealed the First Circuit's ruling in *Escobar*. The court granted both petitions, issued an opinion on *Escobar*, and then sent the *Triple Canopy* matter back to the Fourth Circuit for further consideration in light of its *Escobar* holding. The Fourth Circuit reaffirmed its original holding, finding the government had sufficiently alleged both falsity and materiality. On August 14, 2017, Triple Canopy again petitioned the Supreme Court, this time raising the issue of whether a contractor's request for pay-

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ment constitutes an implied certification of compliance with all contractual provisions sufficient to satisfy the FCA's falsity requirement. The Supreme Court, however, denied the petition on October 20, 2017.

c. U.S. ex rel. Purcell v. MWI Corporation, No. 16-361 – On September 16, 2016, a relator, Purcell, petitioned the Supreme Court for a writ of certiorari, raising the question of how *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S.Ct. 1923 (2016) affected the FCA's knowledge requirement for defendants accused of breaching an ambiguous contract or regulation. The relator sought review of the D.C. Circuit's dismissal, believing the pre-*Halo* decision was in contrast to the Supreme Court's holding that subjective bad faith by a patent infringer is sufficient to show willfulness. Analogizing the patent law willfulness standard to the FCA knowledge element, the relator argued the D.C. Circuit should have considered defendant's subjective intent. The relator also alleged the D.C. Circuit's holding created a circuit split with the Eighth and Ninth Circuits, which have held ambiguous regulations can result in FCA liability if a defendant knew at the time the parties had different interpretations of the regulations. In contrast, in MWI, the D.C. Circuit held that there is no FCA liability for a contractor's "objectively reasonable" interpretation of an ambiguous contract provision when the government is silent regarding its interpretation. The Supreme Court denied the petition on January 9, 2017.

5. COURT OF APPEALS CASES

a. 7th Circuit – United States v. Luce, 873 F.3d 999 (7th Cir. 2017) – The Seventh Circuit recently overruled a 1992 precedent adopting a "but-for" causation standard in FCA cases, instead holding that FCA plaintiffs must prove a defendant's false claim was both the but-for and proximate cause of government loss. The United States brought an FCA action against mortgage company owner Luce, alleging he defrauded the government by falsely asserting he had no criminal history so his company could participate in the Fair Housing Act's insurance program. Adopting a common law fraud approach to FCA allegations, the court held that merely "but-for" causation does not adequately fulfill the FCA's causation requirement, as it does not rise to the level of common law fraud causation. The court remanded to the district court to determine whether Luce's alleged false certifications were both the but-for and proximate cause of government loss.

b. 5th Circuit – U.S. ex rel. Harman v. Trinity Indus., Inc., 872 F.3d 645 (5th Cir. 2017) – In 2014 a jury verdict was entered against defendant Trinity Industries, resulting in a $682 million FCA judgment. On appeal, the Fifth Circuit reversed the jury's verdict on the issue of materiality, noting the Federal Highway Administration's ("FHWA") continued payment after notice of allegations of noncompliance with FHWA guidelines. Specifically, FHWA released a memorandum in June 2014 finding defendant's guardrails had been sufficiently compliant for reimbursement. The government's decision to continue paying Trinity Industries was strong evidence the alleged noncompliance was not material.

c. 5th Circuit – U.S. ex rel. King v. Solvay Pharmaceuticals, Inc., 871 F.3d 318 (5th Cir. 2017) – A relator brought an FCA action alleging Solvay Pharmaceuticals induced false Medicaid claims through a nationwide off-label marketing and kickback scheme. Accordingly, the relator alleged the marketing scheme caused physicians to prescribe three drugs for off-label uses, which were reimbursed by the federal government through Medicaid.

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First, the Fifth Circuit affirmed the district court's dismissal under the FCA's pre-Affordable Care Act amendment's public disclosure bar, holding the relator's PowerPoint presentation to the Food and Drug Administration, discussing potential Federal Food, Drug, and Cosmetic Act, and Anti-Kickback Act violations, was not an "original source," because it made no mention of the FCA or any false claims presented to the federal government as a result of the scheme. Second, the Fifth Circuit held the relator's causation evidence for off-label marketing did not create genuine issues of material fact. The court reasoned the relator's circumstantial evidence was speculative at best, demonstrating only a causal link between the marketing scheme and allegedly false Medicaid claims, especially considering physicians regularly prescribe medications for off-label use. This speculative evidence was insufficient to establish materiality.

d. 9th Circuit – U.S. ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890 (9th Cir. 2017) – Tightening a defendant's ability to argue lack of materiality based on government knowledge, the Ninth Circuit held the FDA's drug approval is insufficient to defeat materiality. In *Campie*, a relator alleged Gilead Sciences made false statements about its compliance with FDA regulations, actively concealing its use of illicit products prior to FDA approval, resulting in government payment through various programs, including Medicare, which condition payment for drugs upon FDA approval. Acknowledging proof of materiality can include whether "the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated," the court cautioned reading too much into the FDA's continued approval in this instance, because (1) doing so would allow the company to use the allegedly fraudulently-obtained FDA approval as a shield against liability; (2) there are many conceivable reasons the FDA would choose not to withdraw drug approval; and (3) Gilead ultimately stopped using the drug in question, negating the significance of the government's decision to keep paying for complaint drugs. Another critical blow to the defendant's government knowledge argument was the lack of evidence clarifying the government's "actual knowledge" of noncompliance. The court was reluctant to find "actual knowledge" when the relator sufficiently pled allegations that the defendant deliberately misled the government. The Ninth Circuit also found the relator sufficiently alleged falsity under factually false certification and implied false certification theories. The court reasoned the relator adequately alleged Gilead affirmatively misled the government about the drugs it was selling by detailing its fraudulent scheme, and connected these false statements to claims submitted for payment for "FDA approved" drugs. As mentioned earlier, Gilead has petitioned the Supreme Court for a writ of certiorari on December 26, 2017.

e. 11th Circuit – U.S. ex rel. Phalp v. Lincare Holdings, Inc., 857 F.3d 1148 (11th Cir. 2017) – A relator alleged the defendants falsely certified compliance with Medicare regulations, which were a condition for government payment. The Eleventh Circuit affirmed the District Court's grant of the defendant's motion for summary judgment, holding the relator failed to present sufficient evidence of scienter. The court reasoned, however, scienter requires a determination that the defendant actually knew or should have known that its alleged conduct violated a regulation, "in light of any ambiguity." Noting that liability does not attach to innocent mistakes or simple negligence, the court dismissed the district court's finding that scienter could be precluded by the defendant's reasonable interpretation of an ambiguous regulation, finding "a defendant could avoid liability by relying on a 'reason-

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able' interpretation of an ambiguous regulation manufactured post hoc" to avoid liability. Nonetheless, the court found the evidence presented by the relator was insufficient for a reasonable jury to determine the defendants knowingly submitted false claims, in light of the Medicare ambiguity.

f. 4th Circuit – U.S. ex rel. Badr v. Triple Canopy, Inc., 857 F.3d 174 (4th Cir. 2017) – On remand, the Fourth Circuit held the government sufficiently alleged both falsity and materiality, further remanding the case to the district court for further consideration. The court determined the *Escobar* opinion did not alter its original ruling. *See U.S. ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015) (earlier opinion). The government sufficiently alleged falsity by alleging that although Triple Canopy knew its "guards" failed to meet contract requirements, the defendant nonetheless requested payment each month for these guards. The court determined the word "guard" on the invoices qualified as a representation that the guards met contractual requirements. This "half-truth," according to the Fourth Circuit, was the type of "omission" contemplated by the Supreme Court in *Escobar*. This omission was also material, as the court determined it was "capable of influencing the Government's decision to pay." As the court articulated, "Guns that do not shoot are as material to the Government's decision to pay as guards that cannot shoot straight." Aiding in this consideration were the government's decision to not renew Triple Canopy's contract, and to "immediately" intervene in the litigation. "Both of these actions are evidence that Triple Canopy's falsehood affected the Government's decision to pay."

g.3rd Circuit – U.S. ex rel. Petratos v. Genentech, Inc., 855 F.3d 481 (3d Cir. 2017) – A relator alleged pharmaceutical manufacturer and parent corporation submitted false statements to the Food and Drug Administration ("FDA"), in violation of the FCA, when it concealed information about the drug Avastin's health risks in seeking FDA approval. As a result, the company caused physicians to submit Medicare claims for drugs that were not "reasonable and necessary" as required by Medicare regulations, in violation of Medicare's statutory requirements. The Third Circuit held the relator failed to allege materiality because the relator did not allege the government would not have reimbursed Medicare claims for Avastin had it known about Genentech's allegedly withheld information. According to the court, "a misrepresentation is not 'material to the *Government's payment decision*,' when the relator concedes that the Government would have paid the claims with full knowledge of the alleged noncompliance." *Petratos*, 855 F.3d at 490 (emphasis in original). Further defeating materiality, the court considered the fact that the relator provided the government with non-public information to support his allegations, yet neither the FDA nor the DOJ intervened or took action against Genentech.

h. 5th Circuit – Abbott v. BP Exploration & Production, Inc., 851 F.3d 384 (5th Cir. 2017) – The relators brought suit against BP alleging BP had falsely certified its designs were in compliance with regulatory requirements, in violation of the FCA and Outer Continental Shelf Lands Act ("OCSLA"). The Department of the Interior ("DOI") began reviewing BP's compliance with regulatory requirements in May 2009, culminating in a 2011 report concluding the relator's allegations were without merit. Because the DOI Report considered many of the same arguments advanced by the relators, the Fifth Circuit found "when the DOI decided to allow the Atlantis to continue drilling after a substantial investigation into Plaintiffs' allegations, that decision represents "strong evidence" that the requirements in those regulations are not material."

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i. D.C. Circuit – U.S. ex rel. McBride v. Halliburton Co., 848 F.3d 1027 (D.C. Cir. 2017) – A relator filed a qui tam FCA action against Halliburton, alleging that Halliburton overbilled the government based on inflated "headcount" data, which was supposed to track how many troops frequented Halliburton-operated U.S. Army recreation centers in Iraq. The D.C. Circuit affirmed the district court's grant of summary judgment, finding the relator failed to allege an inaccurate headcount was relevant, let alone material, to the government's decision to pay the contractor. The court also acknowledged the DCAA's investigations into the relator's allegations, noting the DCAA "did not disallow and charged costs," and the contractor continued to receive an award fee for exceptional performance after the government learned of the allegations, as "very strong evidence" that the alleged actions were not material.

j. 4th Circuit – U.S. ex rel. Michaels v. Agape Senior Community, Inc., 848 F.3d 330 (4th Cir. 2017) – In a much anticipated decision, the Fourth Circuit declined to decide whether statistical sampling can be used to prove FCA liability. The relators brought FCA actions against 23 eldercare facilities, alleging fraudulent Medicare billing. The Fourth Circuit reasoned that the relators' appeal "does not present a pure question of law that is subject to our interlocutory review under § 1292(b)," leaving intact, for now, the United States District Court for the District of South Carolina's refusal to allow statistical sampling.

k. 6th Circuit – U.S. ex rel. Hirt v. Walgreen Co., 846 F.3d 879 (6th Cir. 2017) – The relator, a competing pharmacy owner, brought an FCA action against Walgreen alleging the company distributed kickbacks to Medicare and Medicaid recipients when they transferred their prescriptions to Walgreens, and sent allegedly fraudulent insurance claims to the government. Analyzing the relator's claims under Rule 9(b)'s pleading standards, the court affirmed the district courts grant of Walgreen's motion to dismiss. The court reasoned that "[t]he identification of at least one false claim with specificity is 'an indispensable element of a complaint that alleges a [FCA] violation in compliance with Rule 9(b),'" but the relator failed to identify a single false claim arising from any allegedly induced customer.

6. DISTRICT COURT CASES

a. United States ex rel. Swoben v. Scan Health Plan, 2017 U.S. Dist. LEXIS 174308 (C.D. Cal. Oct. 5, 2017) – The relator, a former employee of Senior Care Action Network Health Plan, brought a FCA action in the Central District of California against UnitedHealth Group Inc. alleging that UnitedHealth had obtained inflated payments from the government based on inaccurate information about the health status of patients enrolled in Medicare Advantage. Specifically, the allegations revolve around Medicare Advantage's "risk adjustment" payments, which increase if insurers cover sicker patients. The relator alleged that UnitedHealth turned a "blind eye" to a defective chart review process, resulting in the government being billed for unsubstantiated diagnoses. This case was the first time that the DOJ intervened in a whistleblower suit alleging Medicare Advantage fraud. The court dismissed the case without prejudice finding that the government's arguments were "conclusory" and that the government had failed to identify material FCA violations as required under *Escobar*. First, the court noted that the complaint failed to identify corporate officers who had signed the claims or any allegations that those individuals knew or should have known

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that the claims were false. Second, the court noted that the government must plead more than just "conclusory" statements regarding materiality in order to survive a Rule 12(b)(6) motion. Finally, the court emphasized that the government's complaint was a "classic 'shotgun pleading'" that failed to identify how each and every defendant violated the FCA and their role in the fraudulent scheme.

b. United States ex rel. Futrell v. E-Rate Program, LLC, 2017 U.S. Dist. LEXIS 135256 (E.D. Mo. Aug. 23, 2017) – The relators, two former employees, brought a FCA action against the defendant E-Rate Program, LLC alleging that E-Rate intentionally submitted false or fraudulent claims seeking funds from the federal Library Universal Service Support Program, commonly known as the "E-Rate Program." The E-Rate Program was established by the 1996 Telecommunications Act and is administered by the Universal Services Administrative Company ("USAC") under the direction of the FCC. The USAC is an independent, non-profit organization, designated by the FCC to administer the E-Rate Program and is funded by mandatory contributions from private interstate telecommunication carriers. The defendant E-Rate Program contracted with numerous schools and school districts to assist in obtaining funds under the E-Rate Program. Such assistance includes counseling regarding the regulations for compliance with the competitive bidding requirements and the paperwork required to request and obtain funds under the E-Rate Program. The defendant filed a motion for judgment on the pleadings arguing that E-Rate funds are provided by private telecommunication carriers, not the government, and these funds are distributed by an independent, non-profit organization and therefore, no claims were presented to an "officer, employee, or agent of the United States." The court rejected these arguments and concluded that "[w]hen the USAC administers the E-Rate Program, it is done on behalf of the government and subject to the control of the FCC" and that, as a result, the USAC acts as an "agent" of the United States for FCA purposes. In other words, the court found that FCA liability may exist in such circumstances, even though the USAC funds are not direct government dollars. The court's conclusion is part of an on-going split between the 5th Circuit, the Western District of Pennsylvania, and the Eastern District of Wisconsin as to whether non-government entities with federal ties, such as the USAC, are subject to the FCA.

c. United States ex rel. Lisitza et al. v. Par Pharm. Cos., 2017 U.S. Dist. LEXIS 131248 (N.D. Ill. Aug. 17, 2017) – The relator, in his fourth *qui tam* action relating to the same alleged scheme to defraud Medicaid, brought FCA action alleging that Par Pharmaceutical Companies, Inc. caused national pharmacy chains to submit false claims for reimbursement from state and federal government agencies. Specifically, the relator alleged that Par "orchestrated an illegal prescription-switching scheme by producing generic drugs in forms and dosage strengths not covered by existing Medicaid reimbursement limits, and then marketing its drugs to pharmacies based on their ability to obtain higher reimbursements amounts." The relator argued that these claims were false because the pharmacies failed to state on their Medicaid reimbursement claim forms whether the dispensed drugs were handed out based on medical necessity or cost. The court issued two opinions on the same day. In one opinion, the court dismissed the case because it found that the relator, a retired pharmacist, was not the original source for the prescription-switching allegation because critical portions of the allegations were publicly disclosed. In the other opinion, the court found that the reimbursement claims had not been shown to be false or misleading.

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Specifically, the relator failed to identify with precision a misleading half-truth caused by the omission of material facts in the reimbursement claim form. The court emphasized that merely omitting information from a claim form is not enough to determine the truth or falsity of the representations on the claim form itself. It noted that, although there was no doubt that Par Pharmaceuticals attempted to exploit a loophole in the Medicaid reimbursement system, this motivation was not enough to demonstrate that the claims were false. The relator, as emphasized by the Seventh Circuit in *Sanford-Brown II*, needed to show "specific representations" that the claims were actually false in order to maintain the suit.

d. Forcier v. Comput. Sci. Corp., 2017 U.S. Dist. LEXIS 128140 (S.D.N.Y. Aug. 10, 2017) – A relator brought a FCA action against the City of New York and Computer Sciences Corporation ("CSC") alleging that they had violated the FCA by submitting false claims to Medicaid by (1) failing to adhere to Medicaid secondary payor requirements concerning New York's Early Intervention Program, which pays for services to children with developmental delays; and (2) that the compensation provisions of the contract between CSC and New York City failed to comply with Medicaid requirements, thereby fraudulently inducing the government to approve CSC's enrollment as the City's billing agent Playing into an ongoing circuit split, the court held that *Escobar*'s two-part test for determining falsity in an implied false certification case is *mandatory*, not merely advisory, in the Second Circuit. The court noted that an implied certification claim may proceed only if the relator made specific representations that were rendered misleading by its failure to disclose noncompliance with material regulatory requirements. Significantly, the court noted that *Escobar*'s two-part test would not control for a fraudulent inducement claim, relying instead on *Escobar*'s holding concerning "misleading half-truths." The court noted that it was unclear whether CSC had may any specific representation about its services and that even if it had, undisclosed noncompliance with a ban on incentive-based compensation would not have rendered those representations misleading. The court emphasized that the compensation arrangement with the City had nothing to do with the services provided. The court granted the defendants' motion to dismiss in part and denied it in part.

e. Mateski v. Raytheon Co., 2017 U.S. Dist. LEXIS 122685 (C.D. Cal. Aug. 3, 2017) – The relator, a former Raytheon employee, brought a FCA action against Raytheon Company. Specifically, the relator alleged that Raytheon billed the government for work despite knowingly deviating from the requirements of the contract. The relator also alleged that Raytheon failed to conduct proper testing, falsified test records, and forged planning operation signoffs weeks after the fact. The relator based these allegations on three things: (1) his general experience as an aviation engineer; (2) violations of two FAR provisions; and (3) Raytheon's refusal to produce the requests for payment to Mateski's counsel. The court noted that under either a factually false theory or an express false certification theory, the relator must identify an overtly false representation in the claim for payment. The court determined that identifying vague and broad contract standards that Raytheon allegedly breached without identifying a single representation that Raytheon made to the government was insufficient to plead a FCA claim. Due to the relators lack of specificity, the court dismissed the case for the fifth time, but this time without leave to amend.

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f. United States v. DynCorp Int'l, LLC, 253 F. Supp. 3d 89 (D.D.C. 2017) – A relator brought a FCA action against DynCorp International alleging that DynCorp overcharged the government by charging unreasonable rates for lodging and labor provided under its contract. The government intervened and further alleged that DynCorp made false statements and omitted material information about its labor rates. The District Court found that the government had sufficiently pled falsity. Significantly, the court held that *Escobar*'s two-part test for determining falsity in an implied certification theory claim was *not mandatory*. It found that, even after *Escobar*, the D.C. Circuit's decision in *SAIC* concerning falsity was still controlling. In *SAIC*, the D.C. Circuit held that a plaintiff need not allege falsity with specific representations in an implied certification case. Based on *SAIC*, the *DynCorp* court found that falsity exists if noncompliance is (1) concealed or withheld and (2) the concealed or withheld information is material. The court emphasized that the focus of the materiality inquiry is on the government's likely or actual behavior in response to a misrepresentation. The court then concluded that "a claim for costs that are significantly higher than reasonable satisfies the materiality requirement."

g. United States ex rel. Oberg v. Penn. Higher Edu. Assistance Agency, 2017 U.S. Dist. LEXIS 68616 (May 3, 2017) – A relator brought FCA action in 2007 against multiple student loan companies alleging that they had overcharged the government by approximately $200 million by submitting fraudulent claims to the Federal Family Education Loan Program. After the Supreme Court's ruling in *Escobar*, PHEAA sought a judgment on the pleadings, arguing that the government continued paying claims after becoming aware of PHEAA's billing practice. The defendant argued that, under *Escobar*, misrepresentations are material under the FCA only if they would affect the government's decision about whether to pay the defendant's claim. Accordingly, something is not material if the government had actual knowledge that certain requirements were violated but paid the claims in full anyways. The court denied the motion for reconsideration. Specifically, the court noted that although *Escobar* provided guidance on materiality, "that [] guidance did not constitute a departure from already existing law." In the court's view, *Escobar* did not redefine the statutory definition of materiality under the FCA. Furthermore, the court suggested that *Escobar* applies only to implied false certification cases. *Escobar* did not, the court explained, "indicate a significant change in the law" relating to express certification cases, such as this one (this was an express certification case because PHEAA was expressly required by regulation to represent that its claims for payment complied with the law).

h. United States v. BAE Sys. Tactical Vehicle Sys, LP, 2017 WL 1457493 (E.D. Mich. Apr. 25, 2017) – The government brought a FCA action alleging that BAE Systems Tactical Vehicle Systems ("BAE-TVS") defrauded the government by not providing "accurate, current, and complete" cost and pricing when negotiating a contract to build thousands of military vehicles for use in Iraq in 2008 (*i.e.*, "defective pricing" under the Truth in Negotiations Act). The government's case was based on a Defense Contract Audit Agency's post-award audit, which an Army contracting officer ("CO") adopted in full as the CO's final decision ("COFD")). Interestingly, after the case was filed, the Army's successor CO abruptly ***rescinded*** the COFD and BAE-TVS immediately moved to compel discovery on the CO's knowledge and reasoning behind that decision in light of the materiality requirement of the FCA. In determining whether the government was obligated to turn over the CO's

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rationale, the court held that a COFD is tantamount to an agency's correction of a decision reached by administrative adjudication and that the documents and communications were created to satisfy the CO's "public requirement" that she document her decision on rescinding the COFD.

7. CRIMINAL CASES

a. A federal jury convicted William Whyte, the owner and CEO of Armet Armored Vehicles of Danville, Virginia, of three counts major fraud against the United States, three counts of wire fraud, and three counts of criminal false claims. Whyte was indicted in July 2012 for his role in a scheme to provide the DOD with armored gun trucks that failed to meet contractual ballistic and blast protection requirements. Armet was awarded a $4.78 million contract in 2006 for 24 armored trucks, and another $1.59 million for another eight trucks shortly after. Whyte and his employees represented in each quote to the U.S. Joint Contracting Command in Baghdad, Iraq that the trucks were adequately armored, though evidence showed the trucks were deliberately under armored. Whyte is currently seeking a new trial.

b. In August, Texas doctor Jacques Roy, known for orchestrating a $374 million Medicare fraud – the largest in U.S. history – was sentenced to 35 years in prison. At sixty years old, U.S. District Judge Sam A. Lindsay expects a term of 35 years to be "effectively a life sentence." Roy, who owned Medistat Group Associates PA, was accused of fostering a large home health care fraud, involving more than 11,000 patients given unnecessary treatments. In 2016, the court found Roy guilty as the "mastermind" of the conspiracy, ultimately ordered restitution of more than $268 million. Both sides plan to appeal: Roy contests the underlying convictions, and prosecutors believe the 35-year sentence is "unreasonable and illegal."

c. Dr. Ona M. Colasante, convicted last year on 162 counts of health care fraud, was sentenced in August to one year and a day in prison, ordered to pay approximately $3 million in fines, restitution, and forfeiture, and perform 1,200 hours of community service. Dr. Colasante was convicted in 2016 of healthcare fraud by giving her patients unapproved drugs from abroad and billing the government for more expensive FDA approved drugs. Dr. Colasante ultimately submitted false claims to Medicare, Medicaid, and Blue Cross Blue Shield of Florida.

d. In September, the U.S. District Court for the Southern District of Florida convicted pharmacy owner, Serge Francois, and his "right-hand man," Patrick Tonge, of healthcare fraud. Francois and Tonge were engaged in a fraudulent scheme to fulfill unnecessary prescriptions, divesting $30 million from Tricare. Francois is accused of using the fraudulently received money to purchase a $3.6 million mansion, among other luxury items. According to prosecutors, the conspiracy was accomplished by doctors fulfilling prescriptions based on patient notes, without ever seeing the patient. Pharmacists then set the prescriptions to automatically refill, even for patients who never requested the drugs, in hopes the drugs would not be returned. 17 people have pled guilty or been convicted for their involvement in the conspiracy, including receiving kickbacks related to the conspiracy.

e. In May, Riaz Mazcuri was convicted of one count conspiracy to commit health care fraud and five counts of health care fraud in Texas. According to allegations, from 2006 to February 2012, Mazcuri, and others, participated in a scheme to defraud Medicare by submitting approximately $158 million

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in false and fraudulent claims for partial hospitalization program ("PHP") services. Riverside General Hospital paid bribes or kickbacks to nursing home employees in exchange for sending Medicare patients to Riverside's PHP. Many of these patients suffered from mental illness and were therefore unable to actually participate in the treatment's offered by Riverside's PHP. Mazcuri falsified medical records and documents, showing these patients received PHP treatment, yet evidence showed Riverside did not actually provide any PHP services to these patients. Individually, Mazcuri billed fraudulently billed Medicare approximately $4.5 million, but Mazcuri's falsified documents permitted Riverside to fraudulently bill for approximately $55 million of the total $158 million billed for fraudulent PHP services. 15 others have been convicted of offenses based on their roles in this fraudulent scheme.

f. Gerald Daneshvar was convicted of conspiracy to commit health care fraud involving a $17.1 million Medicare fraud scheme in Detroit. Daneshvar visited patients who did not qualify for visiting physician services, but billed Medicare using the highest billing codes, and ordered unnecessary tests. The company Lake MI Mobile Doctors, including Leonard Van Gelder and Stephen Mason, has billed Medicare approximately $17.1 million as a result of this scheme. Van Gelder and Mason each plead guilty to conspiracy to commit health care fraud in March.

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FRAUD, DEBARMENT AND SUSPENSION—PART II: SUSPENSION AND DEBARMENT

I. THE INTERAGENCY SUSPENSION AND DEBARMENT COMMITTEE REPORT

The Annual Report of the Interagency Suspension and Debarment Committee for FY 2016, filed with Congress on January 12, 2017, reported government wide, 715 suspensions, 1,855 proposed debarments, and 1,676 debarments, for a total number of 4,249 exclusionary actions. In its FY 2015 Report, the ISDC had reported 918 suspensions, 2,196 proposed debarments, and 1,873 debarments, for a total of 4,987 – indicating a 15% decline in FY 2016 exclusionary actions. (The ISDC Report for FY 2017, not available as of this writing, should be available by the time of the conference.)

Although the FY 15 Report had noted a decline from FY 2014 and suggested "a plateauing of the numbers of suspension and debarment actions," the FY 16 Report did not note the further decline from FY 15. Instead. the FY 16 Report states, accurately, "[d]ata on agency actions shows a significantly greater number of suspension and debarment actions in each of the past seven years when compared to FY 2009."[2]

As in prior reports, the ISDC noted the important caveat that it "does not consider the overall number of suspensions and debarments to be a metric of success," rather, the appropriate level is "purely a function of need" – i.e., "what is necessary to protect [the] agency and the government's business interests." In this connection, the Reports adds that these are "not punitive measures," but rather "tools…which must be applied following principles of fairness and due process" set for in the regulations.

"Equally important," the ISDC has "encouraged" consideration of "alternative tools…that do not necessarily require or result in the imposition of suspension or debarment." The Report states, with approval, that "[a]s a result, agencies again reported significant use of Show Cause Letters, Requests for Information, or other pre-notice investigation engagement letters." The Report also noted an increase of administrative agreements, based on "enhanced internal corporate governance practices and procedures and/or use of independent third part monitors."

The Report pointed out that "industry also has shown an interest in reaching out proactively" to SDOs, "particularly when a company has identified possible misconduct within its operations." This "proactive engagement" allows both sides to focus on corrective measures," along with efforts "to improve internal controls, enhance compliance programs; and to promote a culture of ethics." The ISDC noted an increase in "instances of proactive engagement."

II. THE NAVY AND THE "FAT LEONARD" SCANDAL

The Navy's suspension and debarment statistics have an interesting history – until 2009 the number of exclusion actions lagged behind its DoD counterparts, then beginning in 2009 the Navy became more active (as did its counterparts). However in recent years, as other agencies' statistics plateaued and even declined, the Navy has continued at an aggressive level. This relevant history is explained, at least in part, by the Navy Secretary's response to the infamous "Fat Leonard Scandal," first known to the Navy and DOJ investigators in 2010, made public in 2013, and apparently coming to closure in 2017.

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A. A Brief History.

On April 28, 2009, the Navy announced its program for "Acquisition Integrity," headed by the Naval Audit Service, the Acquisition Integrity Office, the Naval Criminal Investigative Service, the latter with a Guam Resident Agency and a Hawaii Field Office. In 2010, Navy officials became suspicious of bills submitted by Glenn Defense Marine Asia (GDMA). An investigation was opened in May 2010. The investigation was kept secret, and contracts continued to be awarded to GDMA, so as not to compromise the investigation.

In April 2011, Navy Secretary Mabus, referring to an unrelated fraud, announced a special review team to investigate procurement fraud. Secretary Mabus said, "We will not accept any impropriety, kickbacks, or bribery of any kind." He also said the Navy had expanded its use of fact-based suspension and debarment actions. Reuters, April 11, 2011. The Navy's reported total exclusion actions increased from 95 in 2009 to 1,156 in 2015.

In the course of the GDMA investigation, the NCIS learned that many Naval officers were implicated, including accepting bribes in the form of cash, travel, entertainment, prostitutes, and other benefits in return for inside information and favored treatment. The Navy also learned that a NCIS special agent had received cash and prostitutes from GDMA and Leonard Glenn Francis, in return for reports on the status of the investigation. This information was eventually turned over to the prosecutors in the Justice Department. DoD News Transcript, December 20, 2013.

The scandal broke in mid-September 2013 when Francis was encouraged to meet with Navy officials in San Diego by a bogus report that the investigation was coming to a close, planted by NCIS with the dishonest agent. When Francis arrived, he was met by law enforcement officials who arrested him. Francis was charged with conspiracy to commit bribery, as were the NCIS agent and the former deputy director of operations for the Seventh Fleet.

On December 20, 2013, Secretary Mabus met with the press to discuss the GDMA investigation. Mabus said that, so far, it had led to charges against six senior Navy officers and the investigator and that there would be "more disclosures." He added that, to the extent federal prosecutors decided not to pursue criminal charges, but instead to refer cases to the Navy for disposition, those cases would be resolved through a Consolidated Disposition Authority headed by a "fully vetted" four-star admiral and a team of professionals.

Addressing the Navy's efforts to prevent future frauds, Secretary Mabus said:

> Soon after I took office, I made several changes to crack down on company and individuals who attempt to defraud the government. Some examples. We have dramatically increased suspension and debarment proceedings to address misconduct and poor performance by Navy contractors. Since 2009, Navy has suspended 252 contractors and debarred 400. And where seriousness of the misconduct warranted it, more than 120 of the debarments were for periods longer than the three year default period.

The Secretary also predicted: "I expect we will continue to see headlines resulting from the discovery and disposition of the GDMA investigation. He repeated his instruction: "Take this investigation wherever it leads."

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B. Results of the Investigation.

By 2017, the "Fat Leonard" investigation began to wrap up with convictions, sentencings, pending prosecutorial actions, plus the separate Navy review and resolution of actions on which the DOJ had deferred.

The best reportage of these results has been by Craig Whitlock in the Washington Post and referenced in the Wikipedia summary of the "Fat Leonard Scandal." As of this writing, Wikipedia gave this summary.

> Since 2013, 31 people have been criminally charged in connection with the Fat Leonard bribery and corruption scandal. According to investigators, more than 200 people – including 30 admirals – have come under scrutiny under the inquiry. As of September 2017, eighteen people have pleaded guilty; 14 others have been charged (including eight Navy officers who were indicted in March 2017); four admirals were disciplined by the military, two others are known to be under investigation; and more than 150 other unidentified people have been scrutinized)…
>
> Among the eighteen people who have pleaded guilty to federal crimes, one was Francis himself, two others were his deputies, and fifteen others were Navy personnel. The highest ranking was Rear Admiral Robert Gilbean, who was convicted in June 2016 after pleading guilty to making false statements to investigators about his contacts with Francis, becoming the first Navy Admiral in modern American history to be convicted of a felony while on active duty.

On May 17, 2017, the Admiral was sentenced to 18 months in prison and a $150,000 fine, although, as Wikipedia notes, he can keep his $10,000 monthly pension. For more detailed information, Wikipedia also presents an eight-page chart identifying each individual, position/roles, details of the offenses, and outcome.

On November 5, 2017, the Washington Post published an article entitled "Prostitutes, vacations, and cash: The Navy officials 'Fat Leonard' took down." It summarized:

> Leonard Glenn Francis, a Malaysia defense contractor, has pleaded guilty to bribing scores of Navy officials with cash, prostitutes and other gifts . . . so that they would feed him classified or inside information, which he used to defraud the Navy. The slowly unfolding investigation has exposed a staggering degree of corruption within the 7th Fleet.
>
> Civilian authorities have filed criminal charges against 29 people. According to the Navy, an additional 440 active-duty and retired military personnel – including about 60 admirals – have come under scrutiny. The Navy says it has cleared many of those personnel, but has substantiated misconduct by more than 40 people so far. It is keeping most of the names secret.

Thus, "what is known": 19 have pleaded guilty in court, 10 have criminal cases pending, 5 have been charged under military law, and 5 admirals have been disciplined or admonished by the Navy.

C. Related Exclusionary Actions.

SAM data, reviewed by my colleague David Robbins, indicates how the four categories of individuals have been treated by the Navy and DOJ authorities in terms of exclusion from government contracts:

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> 1. The Nineteen Guilty Pleas. Four of the GDMA executives have been suspended based on their guilty pleas, the fifth debarred until 2028. Of the fourteen Navy officials entering guilty pleas, four have been debarred, two have been suspended, three subjected to DOJ exclusion. (The corrupt NCIS agent was excluded by DOJ until 2021 and debarred by the Navy until 2036.) Three others – Naval officers – were debarred for significantly more than three years. Two guilty parties were suspended. With respect to six, there is no indication of suspension or debarment.
>
> 2. The Nine Not Guilty Pleas. Six of those awaiting trial were suspended; with respect to three, no action indicated.
>
> 3. The Five With Court Martials Pending: There is no suspension or debarment action indicated.
>
> 4. The Five Admirals That Have Been Admonished and Disciplined: There is no suspension or debarment action indicated.

GDMA and 55 of its affiliates were excluded. San Diego Union-Tribune, July 31, 2017.

III. LEGISLATION

A. Congressional Review Act.

Under the Congressional Review Act, 5 U.S.C. Chapter 8, House Joint Resolution 37 was signed into law, Pub.L. 115-11, on March 27, 2017 to disapprove the FAR rule, 81 F.R. 58, 562, 59 GC ¶68, 94, which had implemented President Obama's controversial Executive Order 13573, "Fair Pay and Safe Workplaces." The law states that the rule shall have no force and effect.

On the same date, President Trump signed E.O. 13782, which revoked President Obama's rule. On November 28, 2017, the FAR Council issued a final rule removing the prior FAR implementation which would have required contractors to make disclosures of certain labor law violations, to be used by contracting officers in responsibility determinations. See 82 F.R. 51773 (November 8, 2017). The Department of Labor rescinded its previously issued "guidance." 82 F.R. 51358 (November 6, 2017).

Notwithstanding, Sen. Warren (D. Mass.) and Rep. Pocan (D. Wis.) have introduced the Contractor Accountability and Workplace Safety Act, S.1440, H.R. 4112, to reinstitute requirements of E.O. 13673. 59 GC ¶351.

B. FY 2018 National Defense Authorization Act.

The House and Senate Approved the FY 2018 NDAA, 59 GC ¶357, with several relevant provisions. President Trump signed the law on December 12, 2017.

1. Report on Defense Contracting Fraud. In Section 889, the Act requires the Defense Secretary to submit to congressional defense committees, within 180 days of enactment, a report with these elements,

a. A summary of fraud-related criminal convictions and civil judgments or settlements over the previous years;

b. A listing of contractors that within the previous five years performed contracts for them and "were debarred or suspended from Federal contracting based on a criminal conviction of fraud;"

c. An "assessment of the total value" of DoD contracts entered into during the previous five years with contractors that have been indicted for,

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settled charges of, been fined by any Federal department or agency for, or been convicted of fraud in connection with any contract or other transaction entered into with the Federal Government.

Recommendation by the Inspector General or other appropriate Department of Defense official regarding how to penalize contractors repeatedly involved in fraud in connection with such contracts.

2. Contractor Responsibility Watch List. Section 1612 requires the Commander of the Air Force Space and Missiles Command to establish and maintain "a watch list of contractors with a history of poor performance on space procurement contracts or research, development, test, and evaluation space program contracts." The basis for listing is a determination that the contractor's performance ability is "uncertain" due to these "issues": a) poor performance in award fee scores below 50 percent; b) financial concerns, c) felony convictions or civil judgments, d) security or foreign ownership and control. Determinations about which contractor to list, whether an entire company or a specific division should be included, and when to remove a contractor from the list, are within the "discretion of the Commander."

The effect of listing is a prohibition of solicitation, award, changes, or options on any space program of the Air Force. Also, a prime contractor on a Air Force space contract may not enter into a subcontract valued the lesser of $3,000,000 or five percent of prime contract value with a listed contractor, without prior approval of the Commander.

Section 1612(a) adds as a "rule of construction" – "the inclusion on its watch list shall not be construed as a punitive measure or de facto suspension or debarment."

3. Prohibition of Kaspersky Lab Products and Services. Section 1634 bars the use of any hardware, software, or service developed or provided, in whole or in part by Kaspersky Lab (or any successor entity), any entity that controls or is subject to controlling Kaspersky, or any entity of which Kaspersky has a majority ownership. This prohibition shall take effect on October 1, 2018.

Prior to that, the Secretary of Defense, in consultation with relevant agencies, is required to conduct a review of procedures for removing suspect products or services from IT networks of the Federal Government. A report is required within 180 days of enactment on the authorities that may be used to exclude the use of suspect products or services, including "the authorities of a suspension and debarment official to exclude the use of such products or services," "authorities relating to supply chain risk management" and that "provide for continuous monitoring of networks" and "assessment of any gaps in the authorities." Report is also required to make recommendations for "improving the authorities and capabilities of the Federal Government for removing prohibited products or services from IT networks."

Previously, the Department of Homeland Security had issued an order banning Kaspersky from government computer systems. The September 13 rule barred civilian agencies from using Kaspersky products, citing concerns about Russian involvement. On December 18, Kaspersky sued to enjoin the order, citing constitutional due process rights. Kaspersky Lab Inc. v. DHS, D.D.C. No. 1: 17-cv-02697.

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IV. JUDICIAL DECISIONS

Two unusual judicial decisions issued in 2017 relied on principles of review under the Administrative Procedure Act and FAR procedural requirements to vacate debarments. In both cases the debarments exceeded the normal three year period contemplated by the regulations. They each reflect, perhaps surprisingly, the willingness of District Judges to scrutinize agency processes and decisions, enforce FAR procedural requirements, and apply limited ADA case law in the debarment context. As such they are instructive to both contractors and agency officials.

A. International Exports, Inc. v. Mattis, D.D.C., CA No. 14-2064 (RBW) (decided July 17, 2017), 2017 WL 3025837.

1. Background Facts and Procedures

DLA's decision to debar plaintiffs International Exports, Suzanne Itani, and Ziad Itani was in part a consequence of the indictment and conviction in July 2009 of Samir Itani, the owner of S&S Itani Inc., based on false trucking charges in connection with the export of food and non-food products to countries in the Middle East.

When Samir was indicted, DLA suspended him, as well as his wife, Suzanne, and S&S Itani "based on their affiliation" with him. When Samir pleaded guilty to the false trucking charges, DLA in March 2011 proposed the debarment based on this conviction not only of Samir and S&S Itani, but also Suzanne as an affiliate of S&S Itani under FAR 9.406-2(c). Suzanne responded that "during the time covered by the indictment," she "played no significant role in the operational aspects of S&S Itani." Although in 2009 she "assumed the title of CEO of S&S Itani," she in 2010 "made the decision" to close the business and thereafter had no connection with S&S Itani. Subsequently she established International Exports, a commercial business having nothing to do with government contracting, to generate income while Samir was incarcerated.

However, while the criminal case was unfolding, a civil qui tam case was proceeding under seal. The defendants were Samir, Suzanne, and Ziad Itani, Samir's brother. The relator, a former employee from 1996 to 2003, alleged a fraudulent scheme to modify expiration dates on food to be delivered "to military contractors for consumption by thousands of U.S. troops in Iraq, Kuwait, and Saudi Arabia."

In 2010 Samir and Suzanne settled the civil action agreeing to pay $15 million, but "by its express terms, the settlement agreement [was] neither an admission of liability by [the] [d]efendants nor a concession by the United States." Instead the settlement was intended "[t]o avoid the delay, uncertainty, inconvenience, and expense of protracted litigation." The United States agreed to release any claims under the False Claim Act pertaining to the alteration of expiration dates and falsified halal and USDA certificates.

2. The 15-Year Debarment of Plaintiffs

The debarring official imputed the misconduct underlying Samir's 2009 criminal conviction to S&S Itani and then debarred the plaintiffs as affiliates of S&S Itani. The Final Decisions further stated that "..[i]n addition to the fraud conviction, the seriously improper conduct of mislabeling food to extend shelf life, [and] providing falsified halal and USDA certificates warrants an additional term to protect the [g]overnment's interest." On this basis of ag-

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gravating circumstances the Final Decisions imposed a 15-year debarment period terminating in 2026 on each of the plaintiffs.

3. The District Court's Ruling

The District Court sustained debarment of Plaintiffs, based on a combination imputation and affiliation, but vacated the extension of the normal term of three years, based on the debarring officials' failure to hold a hearing to resolve disputed facts relating to the qui tam allegations.

Imputation and Affiliation. The Court sustained DLA's imputation of Samir's criminal conduct to S&S Itani, an entity owned and operated by Samir. This was in accordance with FAR 9.406-5(a): the criminal conduct of any officer "may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor…" "Plainly," the Court stated, "S&S Itani was debarred not as an 'affiliate' of Samir Itani, but because Samir Itani's misconduct was imputed to S&S Itani."

In contrast, the plaintiffs – Suzanne, Ziad, and International Exports – were debarred as affiliates of S&S Itani. Applying the definition of "affiliates" in FAR 9-406-1(b), the Court noted the debarring official's findings of "interlocking management or interest" and "identity of interests among family members," as "indicia of control." The Court approved of the debarring official's finding that International Exports, a business entity organized following the proposed debarment of S&S Itani with the same staff, labor force, and management in the person of Suzanne Itani "squarely fits in the FAR's definition of 'affiliates'."

The Court found "nothing in the affiliate provision requiring the debarring official to make an independent finding of the affiliate's wrongdoing." The Court relied on "Agility Def. & Govt. Services v. U.S. Dept. of Def., 739 F.3d 586, 590 (11th Cir. 2013) ("the whole text of the FAR provides that an affiliate can be suspended solely based on its affiliate status… the present responsibility of an affiliate is irrelevant')." And rejected "OSG Prod. Tankers LLC v. United States, 82 Fed. Cl. 570, 578 (2008) (stating, without citation, that '[a]ffiliates must have been involved in or affected by the contractor's wrongdoing to be named in the debarment.)"

The Qui Tam Allegations and the Extended Term. However, the Court was willing to examine the question of the Plaintiffs' wrongdoing in connection with the debarring official's extension of debarment period to 2026, which was based on the qui tam allegations of mislabeling food to extend shelf life and falsified certification. The Plaintiffs contended that it was "arbitrary and capricious" to rely on the qui tam allegations because they were "insufficient to constitute substantial evidence" and "because the settlement agreement disposing of the qui tam complaint expressly disclaimed any liability for the allegations of mislabeling food and falsifying certificates." Plaintiffs challenged the qui tam materials as unreliable evidence. In response to Plaintiff's "complaints of impermissible hearsay," the Court noted "a settled principle" that relevant and material hearsay is admissible in administrative proceedings and may constitute substantial evidence. But the Court's examination did not end there, instead the Court found inconsistent evidence and missing exhibits, "compelling the conclusion that the debarring official did not actually review the exhibits." Furthermore, Ziad submitted a declaration that product expiration dates were altered for "innocent reasons." The Court concluded that

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> These inconsistencies between the allegations in the qui tam amended complaint, Ziad Itani's declaration, and the emails contained in the record raise a significant question as to the reliability of the evidence as to why the shelf life dates were modified.

Having come this far in its analysis, the Court raised a cautionary question "whether challenges to the materials made here were adequately raised before the Agency." "Under the APA, this Court's role is limited to review of "the agency's handling of the objections put before it, not to provide a forum for new arguments based upon different facts that the petitioner could have but did not bring out below." The Court observed that the responses before the agency did not "delve to the level of detail provided in plaintiffs' summary judgment related filings," and therefore the Court could "not resolve their challenges at this juncture."

"That said," reliance on unproven allegations in the qui tam complaint, challenged as unproven and untested, was arbitrary and capricious – and contrary to the FAR's provision regarding fact-finding:

> The Court concludes that the debarring official should have discerned a genuine dispute over material facts with respect to the qui tam materials, and consequently, should have complied with FAR 9.406-3(d)(2), which expressly requires written findings of fact on disputed issues.

Accordingly, the Court vacated the extended 15-year term and remanded for further proceedings on the "aggravating circumstances."

B. Ariel Friedler v. GSA, D.D.C. No 15-cv-2267 (KBJ) (decided Sept. 21, 2017)

In this case, the Court concluded that GSA's five-year debarment of Friedler was arbitrary, capricious, and not otherwise in accordance with law, and therefore must be set aside under the APA.

1. Background Facts and Procedures

Friedler, the founder and sole shareholder of Symplicity Corporation, a supplier of software solutions and information-management services, first met with GSA Debarring Officials in July 2012, when he was under investigation by the FBI for illegally conspiring to access pass-word protected computers in order to obtain competitors' information. After this disclosure, GSA opted to take no action and continued to award contracts to Symplicity. Two years later, Friedler agreed to plead guilty to a one-count violation of 18 U.S.C. §§371 and 1030.

A "complex series of negotiations" between GSA and Friedler and Symplicity ensued, the goal of which was to determine the extent to which Friedler and/or the company would be excluded because of the criminal conviction. The company proposed separating itself from Friedler, through a controlling Voting Trustee. The proposal contemplated an Administrative Compliance Agreement separating Friedler from the company for three years and the appointment of a monitor to provide independent verification. At a May 2014 meeting, the GSA SDO listed conditions as part of the proposed agreement, including that Friedler and Symplicity have no communications for the duration of ACA. The SDO also required engagement of an Independent Monitor to verify the trustee's independence.

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In the midst of these negotiations, on the same day that Friedler's guilty plea was entered, GSA formally suspended Friedler on the only identified causes of the "alleged actions and the Criminal Information against" him. Friedler requested an opportunity to meet with the SDO to avoid debarment by demonstrating his present responsibility. Further negotiations followed, in which Friedler proposed that, in exchange for the revocation of his suspension, a new Voting Trustee and Independent Monitor would be retained with GSA approval, and Friedler would voluntarily abstain from further Government contracting for 12 months. The SDO, citing the failure to appoint an acceptable Voting Trustee up to that point, declared that she would "proceed to the next steps of the process" -- issuing a notice of proposed debarment. This Notice identified as its sole bases Friedlier's criminal conviction and the illegal actions underlying that conviction, citing FAR 9.405-2(a)(5) and 2(c).

Further negotiation followed, when Friedler proposed a suitable voting Trustee and executed the Voting Trust Agreement, which, as described by the Court, provided that

> All communications between Friedler and Symplicity employees, written or otherwise, had to be authorized and made available for review by the Independent Monitor, and Friedler was prohibited from "communicating directly with the Corporation's employers" concerning contracts or work with the federal government.

With these agreements in place, Friedler and GSA began negotiating an ACA which would resolve the suspension, avoid his debarment, and shield both Friedler and the company from further administrative action. As the Court described,

> For a time, it appeared as though these negotiations had born fruit. In August of 2015, after several weeks of negotiations, [the SDO] was on the brink of executing separate ACAs with Friedler and Simplicity, and indeed, Friedler was specifically informed that "the SDO is poised to sign the ACAs.. as they are, with no edits."

But "just before the ACA's were to be signed," the SDO was informed that Friedler was considering changing the replacement CEO and the Trustee intended to resign. The SDO deferred signing and set a September 30 deadline for resolution of these developments.

"The debarment-resolution process then hit yet another roadblock." At a meeting in late August, the SDO was informed that Friedler "was physically back at Symplicity working" and "talking to employees." The trustee, the CEO, and the Monitor "all added that the Monitor had approved Friedler's return and that Friedler's presence at Symplicity's offices was not prohibited under the suspension and debarment provisions of the FAR." The SDO, "surpris[ed] at the news" and by an allegation that he was studying federal markets, had a different view.

2. The Final Debarment Notice.

Just days later, on September 4, 2015, the SDO issued a Final Debarment Notice to Friedler, which debarred him until May 20, 2019, a date which was five years retroactive to the original suspension date. FAR 9.406-4(a)(2). As the Court observed,

> Unlike the original Notice of Proposed Debarment, which had only cited Friedler's prior criminal conviction and the actions underlying that conviction as the sole basis for the proposed debarment…

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the Final Debarment Notice expressly set forth three different justifications for the ultimate debarment decision.

In addition to the sole cause for the proposed debarment, the Final Debarment Notice listed a) the fact that Friedler was "back physically working at Symplicity and talking to employees" and b) that Friedler had "also violated [his] agreement not to operate in the Government space while [he was] either excluded or voluntarily abstaining from conducting business with Government by attempting to be involved in controlling, or influencing Federal Government business."

3. The District Court's Decision.

Friedler's Complaint, filed December 30, 2015, charged that GSA violated his constitutional and regulatory due process rights by debarring him on the basis of "two purported new causes – (1) his physical presence at Symplicity's office and (2) certain communications he had with the Voting Trustee – without giving him notice of and opportunity to respond to those causes." Friedler argued that the record did not support these causes. Friedler moved for summary judgment.

GSA cross moved based on these contentions: (a) there were no "new causes" for debarment of which Friedler was unaware; the Notice merely referred to an additional finding that Friedler violated the SDO's direction to remain separated from control of Symplicity, considered to be "continuing demonstration" lack of present responsibility; (b) the actions referred were merely "aggravating factors" in the imposition of a longer debarment period and (3) the SDO could have debarred Friedler "based solely on his admission of guilt and conviction."

Before addressing the specific defenses, the Court rejected GSA's general contention that its interpretation of the FAR debarment procedures should be presumed to be valid and was entitled to substantial deference. Citing D.C. Circuit decisions, the Court held that such deference is inappropriate because the FAR debarment procedures were written by many agencies' not just GSA. <u>Caiola v. Carroll</u>, 851 F.2d 395, 399 (D.C. Cir. 1988), <u>Novicki v. Cook</u>, 946 F.2d 935, 941 (D.C. Cir. 1991) (regulation a joint product of and must be interpreted by different agencies); <u>MCI Worldcom, Inc. v. GSA</u>, 163 F.Supp 28, 31 (D.D.C. 2001) ("only minimal deference is due").

Applying minimal deference, the Court then analyzed GSA's specific arguments, concluding that GSA failed to provide Friedler with notice and an opportunity to respond to all the cited reasons for his debarment, which rendered the debarment decision arbitrary and capricious, in violation of the APA, citing <u>Old Dominion Dairy Prods. Inc. v. Secretary of Defense</u>, 631 F2d, 953, 968 (D.C. Cir. 1980).

<u>Not "New Causes" for Debarment</u>. The "unambiguous and controlling" language of the Final Notice doomed GSA's assertion that "new causes" were merely "additional evidence" or a "continuing demonstration of his lack of present responsibility." The repeated references to "new causes," "additional" causes, a "second cause," and other indicators lead "inexorably to the conclusion that the non-conviction related 'causes' that the letter discusses constitute new and independent grounds on which the debarment was based…"

The Court further observed: "Undaunted, GSA attempts to bolster its tenuous position by arguing that it could not possibly have violated Friedler's

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due process rights because it is the agency's ordinary practice to afford due process to contractors it debars." The court rejected this reasoning as "entirely circular" and "thus too clever by half."

The Court credited Friedler's argument that, given the opportunity he could have rebutted the "new causes," making this interesting observation:

> This outcome is entirely plausible given that final debarment is by no means an automatic sanction, and apparently, in a sizeable number of instances, FAR 9.406.3's due process requirements result in "the proposed debarment not being finalized… In the instant case, however, "the reasons given [in the Notice of Proposed Debarment] were later modifie[d]" and thus Friedler's chance to present information in connection with the original sole basis for the proposed debarment – his conviction – was "a meaningless one."

The court cited and quoted Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 324 (6 Cir. 1981).

"Aggravating Factors" Extending the Debarment Term." The Court characterized "GSA's alternative attempt to characterize the purported new causes mentioned in the Notice as mere aggravating factors" that justify a longer debarment period "as bold, but ultimately unavailing." Even if it were so, "GSA would still have been required to provide Friedler with prior notice of the reasons for this extension." Noting that the FAR establishes that the period of debarment generally should not exceed three years, see FAR §9.405-4(a)(1)(i), the relevant FAR provision then goes on to state that the SDO may extend, but that "it also mandates, critically, that [i]f debarment for an additional period is determined to be necessary, the procedures of [FAR] §9.405-3 shall be followed to extend the debarment. Id. §9.405-4(b)

GSA argued that these notice procedures do not require an additional opportunity to be heard when a debarment is extended "providing no support whatsoever." In the Court's view, this unsupported position contradicted the FAR language and "defied logic."

> But an extended period of debarment aggrieves the excluded contractor in the same manner as the initial period of exclusion, and in this Court's view, it makes no sense to conclude that the FAR's drafters intended for the regulation's extensive procedural mandates to apply only with respect to the initial limited period of debarment, and that no procedural safeguards whatsoever are required in connection with the imposition of an extended (and potentially unlimited) debarment period.

Advance notice of the new reasons for imposing the five year term was required by the FAR's procedural mandates, and failure to observe them violated the APA, "no matter how well reasoned and seemingly well-supported its ultimate conclusion might be." The Court cited International Exports v. Mattis, 2017 W.L. 3025837.

GSA's Harmless Error Theory. GSA alternatively argued that its debarment decision should be upheld, despite the procedural defects, because Friedler could have been debarred "based solely upon his admission of guilt and conviction." The Court acknowledged that "a criminal conviction is a valid basis on which to impose a debarment, FAR §9.406-2(a)," -- indeed, it may be seen as "a prima facie cause for imposing debarment under the FAR." The Court also acknowledged that even if some of the cited causes for debarment are invalid, a court may nonetheless sustain the decision, but

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only if "the agency would clearly have acted on the remaining ground," citing Casino Airlines, Inc. v. Nat'l Transp. Safety Bd., 439 F.3d 715, 717 (D.C. Gr. 2006); Alf v. Donley, 666 F.Supp. 2d 60, 67 (D.D.C. 2009) (vacated on other grounds). Recounting that the SDO was "poised to sign" an agreement that would have permitted Friedler to avoid being debarred notwithstanding his criminal conviction, the Court concluded:

> And this being the case, this Court cannot say that GSA would debarred Friedler at all, much less for a period longer than the general maximum of three years, based solely on his criminal conviction and without regard to the additional conduct that comprises the two (invalid) causes for debarment.

1 Matthew W. Turetzky, an associate in the San Francisco office of Sheppard, Mullin, Richter & Hampton LLP, and Ariel E. Debin and Anne P. Brickates, associates in the Washington, DC office of Sheppard, Mullin, Richter & Hampton LLP, contributed to the preparation of these materials.

2 The ISDC annual reports are based upon an interagency effort to collect the number of suspensions, proposed debarments, and debarments by federal government agencies. This traditional and official approach thus measures the number of actions, not the number of parties excluded. The System For Award Management provides data that permits an analysis of the number and nature of the parties excluded. My colleague David Robbins has analyzed FY 2017 SAM data, concluding, for example, that the exclusions are predominantly of individuals and, where firms are involved, of small businesses. See Robbins, "Suspension and Debarment: FY 2017 By the Numbers," Law 360 (November 3, 2017). He also notes the Navy's practice of entering multiple spellings of listed individuals, apparently to protect against evasions of the exclusions, which make it difficult to use the Navy numbers for comparison purposes.

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