

# **SPECIAL COMPLIANCE AND ETHICS CONSIDERATIONS FOR CONTRACTORS**

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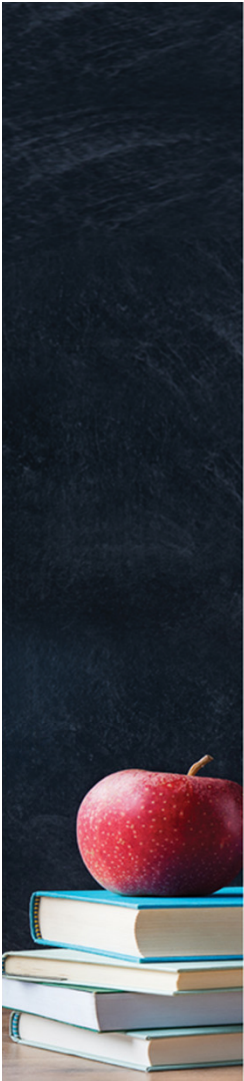
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**Nkechi Kanu**

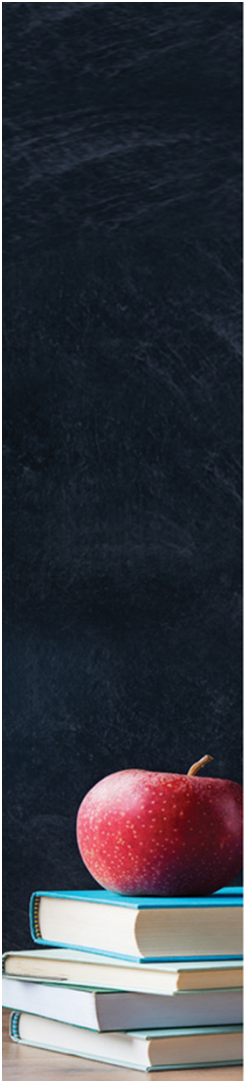
## Civil False Claims Act

- Civil False Claims Act (“FCA”)
  - 31 U.S.C. §3729 *et seq.*
  - Enacted in 1863 to punish contractors who defrauded the Union Army
  - Major amendments in 1986, 2009 and 2010
  - Since 1986, has become Government’s primary enforcement weapon for combating fraud, waste, and abuse
  - Rising number of actions, investigations, and referrals
- Also Criminal False Claims Act



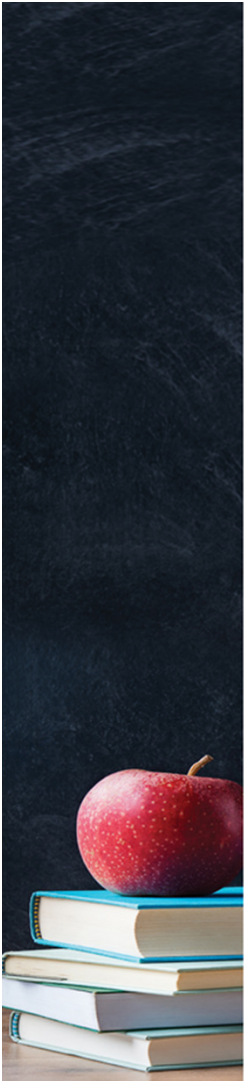
## Offenses under the FCA

- **False Claim** – **knowing submission** of a false claim to the Government or a recipient of Government funds, or causing another to submit a false claim.
- **False Record or Statement** – **knowingly making** a false record or statement material to a false claim.
- **Reverse False Claim** – **knowingly making** a false record or statement material to an obligation to pay money to the Government, or **knowingly and improperly avoiding** an obligation to pay money to the Government.
- **Conspiracy** – **conspiring to do** any of the above.



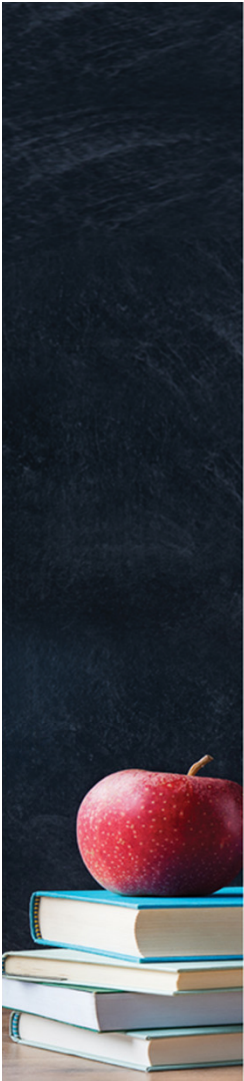
## *Qui Tam* Provisions

- FCA actions may be initiated by individuals under the FCA's *qui tam* provisions
  - “Relators” (a/k/a “whistleblowers”)
- Relator must file a complaint under seal
- Relator must also serve written disclosures on DOJ describing “substantially all material evidence and information the person possesses”
- DOJ has 60 days to investigate and make intervention decision (extensions are common)



## Damages and Penalties

- Measure of FCA damages: Difference between what the government actually paid and what it should have paid absent the alleged FCA violation ***trebled***
- FCA provided for penalties of \$5,500 to \$11,000 ***per claim*** and may be applied even in the absence of actual damages
- Increased to \$10,781 to \$21,563 for violations after November 2, 2015



## Common FCA Examples

- Labor and Material Overcharging
- False Certifications of Compliance
- Product Substitution
- Unauthorized Substitution of Personnel
- Misrepresentations in Proposals
- Implied Certifications
- Failure to Monitor Subcontractors
- Kickbacks



## Key FCA Trends

- Materiality post-*Escobar*
- “Knowing” ≠ intent to defraud
- Causation not required; instead tendency to influence
- Implied certifications
- New damages theories and use of statistical sampling



## Mandatory Disclosure

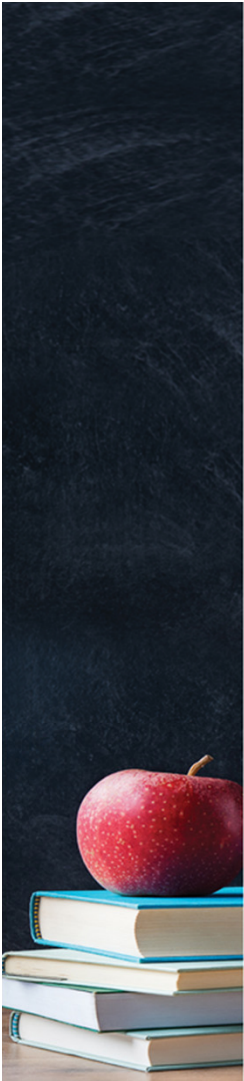
- Must disclose in a “**timely**” fashion “**credible evidence**” of:
  - Certain violations of criminal law
  - Violations of the Civil FCA
  - “Significant overpayments” that occur “in connection with the award, performance, or closeout” of a Government contract
- If fail to disclose when required, possible suspension/debarment
- Both a FAR contract clause and a requirement under the FAR suspension/debarment regulations





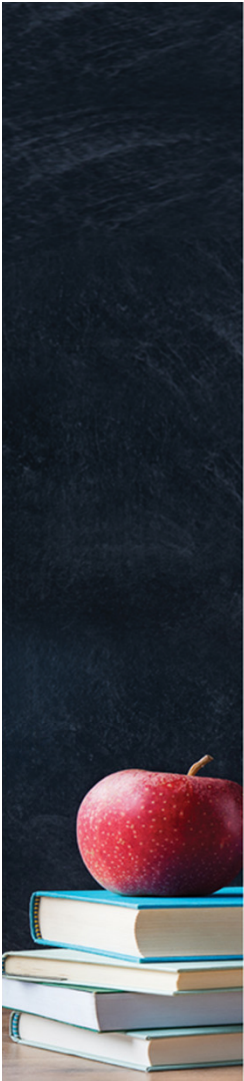
## Suspension and Debarment

- Administrative exclusions from government contracting
- No new contracts, orders, option exercises, or contract extensions
  - Agencies cannot solicit offers from, award contracts to, or consent to subcontracts with
  - No “discussions” or placement in competitive range
  - Cannot act as agent, representative, or surety
- Continuation of current contracts
  - Agencies “may continue contracts or subcontracts . . .” (i.e., termination not required)
  - Prevailing practice is not to terminate
- To protect the government’s business interests and not to punish



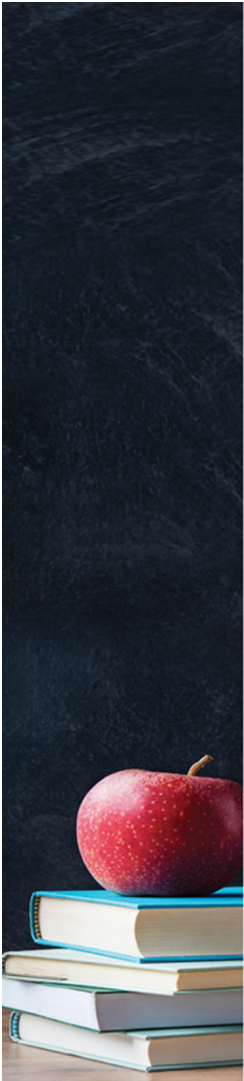
## Suspension and Debarment

- Key concept is “present responsibility”
  - Generally able to be trusted to deal fairly and honestly with the government customer on a going-forward basis
- Who can be suspended/debarred?
  - Individuals and entities (*e.g.*, corporations, partnerships, divisions, or business units within an entity)
  - Parents and affiliates, if warranted
  - Prime contractors, subcontractors, and/or participants at any tier
- Collateral impacts
  - State and local procurement reciprocity
  - Security clearances
  - Export licenses
  - Commercial customers



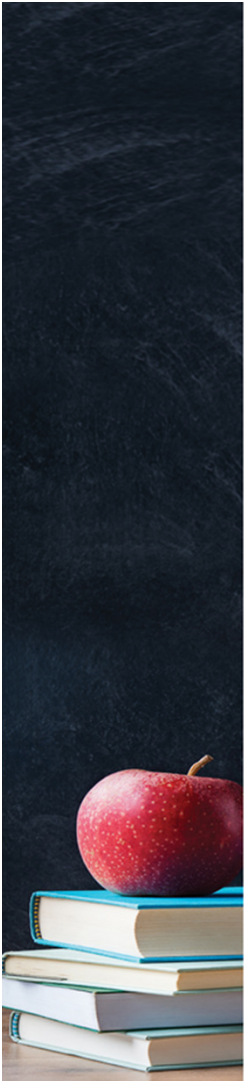
## Compliance & Ethics Hotspots

- Code of business ethics and conduct
- Gifts, gratuities & entertainment
- Anti-corruption statutes
- Off-limits information
- Hiring decisions



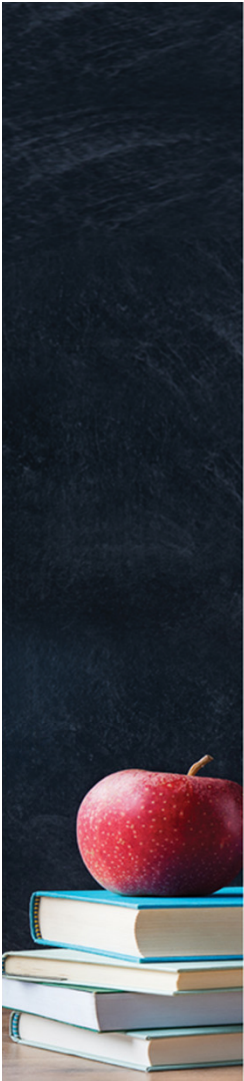
## Suspension and Debarment

- Currently active agencies
  - DoD / Army
  - DoD / Navy
  - DoD / DLA
  - EPA
  - SBA
  - GSA
- Recently active agencies currently on hiatus
  - DoD / Air Force
  - Commerce



## Service Contract Act

- Applies to contracts
  - In excess of \$2,500 with Federal Government
  - Performed in the “United States”
  - Principally for “service” through the use of “service employees”
- Requirements
  - Pay prevailing minimum wage and fringe benefits in accordance with an *incorporated* wage determination or collective bargaining agreement



## Service Contract Act

- Defining “Principally for Service”
- Identifying “Service Employees”
- Compliance Challenges
  - Wage Determinations and Mapping Issues
  - Collective Bargaining Agreements
  - Calculating Wages and Fringe Benefits
  - Flow-Down Requirements
  - Recordkeeping



## Davis-Bacon Act

- Applicability
  - Contracts in excess of \$2,000
  - With the Federal Government or District of Columbia
  - For Construction, Alteration, Repair
    - SCA/DBA Mixed Contracts
- Coverage
  - Laborers and Mechanics
  - “Site of Work”



## Davis-Bacon Act

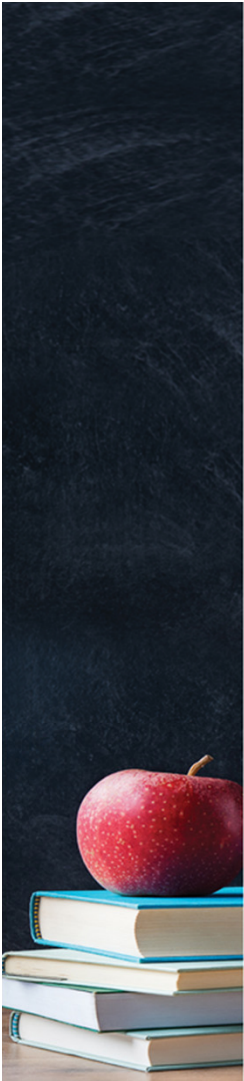
- Key Requirements
  - Pay wages and fringe benefits in accordance with wage determinations
  - Weekly submission of certified payroll
- DBA v. SCA





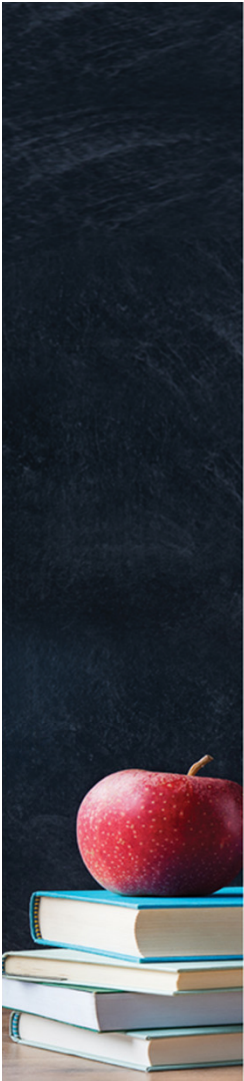
## Paid Sick Leave Executive Order

- Applicable to certain “new” contracts after 1/1/17
- Coverage: All employees who work “*on or in connection with*” covered contracts
- Accrual: One hour for every 30 hours worked or 56 hours per year granted up front
- Impact on general use PTO policies and CBAs



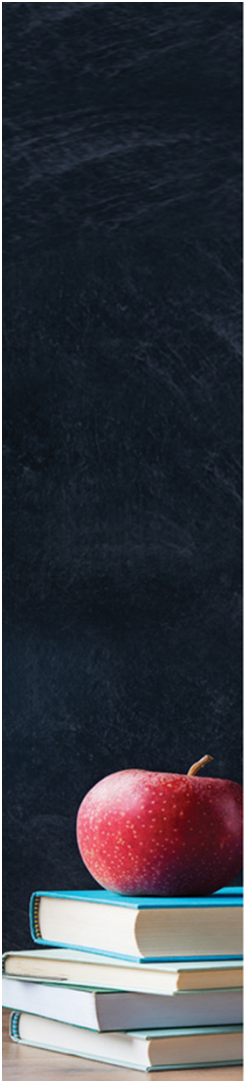
## A Few Other Obligations

- Federal Minimum Wage for Contractors
- Non-Displacement of Qualified Workers (Service Contracts)
- Anti-Discrimination/Affirmative Action/Pay Equity



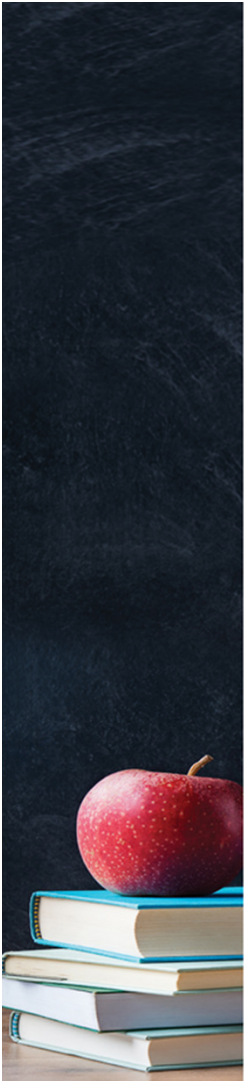
## Export Controls - Overview

- What are U.S. Export Controls and why do we care?
- Identifying export activity and applicable regulatory control
- Compliance steps



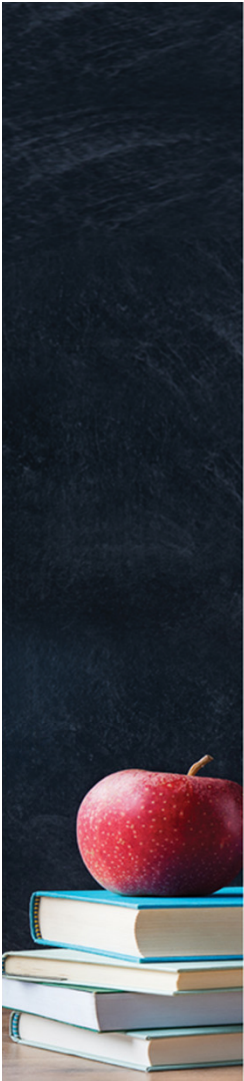
## What are U.S. Export Controls?

- **U.S. regulations that govern the cross-border transfer**
  - of certain goods, technical data/information, software, or services
  - to certain foreign countries, entities, and end-users
  - or for certain end uses
- **Why? National security, foreign policy**



## Why do we care?

- Long arm of U.S. jurisdiction -- attaches to U.S. Persons, and U.S. items, wherever located
- Strict liability standard for civil penalties
- Restrictions apply to export-controlled items
  - Even if data is not marked
  - Even if USG contract doesn't provide notice
  - Even if contracting officer says that activity is permissible



## Key Regulatory Authorities

- **United States**
  - **International Traffic in Arms Regulations (ITAR)**
    - Covers defense articles and related technical data and defense services that appear on the U.S. Munitions List (USML)
  - **Export Administration Regulations (EAR)**
    - Covers just about everything else - commodities, software, and technology
    - Many appear on the Commerce Control List (CCL)
    - EAR 99 designation for everything else 'subject to the EAR'



## What is an Export?

- Sending or taking a controlled commodity, software, or data across a national boundary
  - US to France = export
  - France to U.K. = reexport
- Oral or visual disclosure of controlled data or source code to a Foreign Person, even in the U.S.
- Defense Service: Providing assistance to Foreign Persons involving use of an ITAR-controlled item



## Export Controls: Big Picture

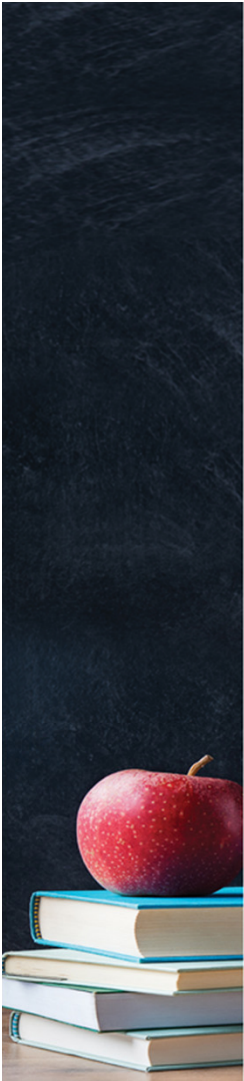
- (1) Evaluate - is the item (or service) potentially subject to U.S. export controls?
- (2) If yes, determine which agency(ies) has jurisdiction
  - Is the item identified on the U.S. State Department's International Traffic in Arms Regulations (ITAR)? or
  - Regulated by the U.S. Commerce Department's Export Administration Regulations (EAR)
- (3) Identify the item or technology's export control classification
  - USML entry or an Export Control Classification Number (ECCN)
- (4) Review whether that classification and the transaction being contemplated are subject to licensing or reporting requirements





## Compliance Steps

- Know your programs
  - Where are you providing services or sending items/data?
  - Nationality of program participants?
  - What kind of data are you receiving, transmitting, or creating?
- Safeguarding data
  - Electronic controls
  - Physical controls
- Formal compliance program
  - Classification & jurisdiction, licensing, recordkeeping, audits
- *Don't rely solely on prime contractors or contracting officers*



# QUESTIONS?

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