

# **2023 Federal Contracts Symposium**

**October 24, 2023**



# **Year in Review: Federal Compliance Case Law Update**

Reggie Jones, Partner – Fox Rothschild LLP  
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# Key SCOTUS Cases

- *Students for Fair Admissions, Inc. v. President & Fellows of Harvard*, 600 U.S. 181 (2023)
- *United States ex. rel. Schutte v. SuperValu Inc.*, 598 U.S. 739 (2023)
- *United States ex. rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023)
- Coming soon: *Loper Bright Enterprises v. Raimondo*, No. 22-451





# Students for Fair Admissions, Inc. v. President & Fellows of Harvard, 600 U.S. 181 (2023)

- Struck down the admissions programs used by the University of North Carolina and Harvard College as violative of the Equal Protection clause of the 14<sup>th</sup> Amendment, which bars racial discrimination by government entities
- Does not impact federally mandated Affirmative Action Programs (AAP) for federal contractors and subcontractors as those programs have been established by Executive Order and subsequent implementing regulations



Are Section 1981 of the Civil Rights Act of 1866 challenges coming?





# False Claims Act Recoveries

Some of the largest FCA recoveries occurred after the government stimulated the economy following the financial crisis of 2008

- More than \$2.2 billion in settlements and judgments for FY 2022
- During the first half of 2022, DOJ announced FCA resolutions totaling more than \$500 million
- More than \$70 billion in recoveries since 1986 with more than \$39 billion occurring in the last 10 years
- More than 652 New Relator (Qui Tam) suits (cases brought by whistleblowers) filed in FY 2022 – averaging 12 new cases a week
- More than \$488 million paid to whistleblowers in FY 2022





# Required Compliance Framework

## **FAR 52.203-13 (Contractor Code of Business Ethics & Conduct)**

- (1) Implement a written code of business ethics. FAR 52.203-13(b)
- (2) Establish an ongoing business ethics awareness and compliance program and
- (3) Establish an Internal control system. FAR 52.230-13(c); and
- (4) Report violations of “federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code” or the “civil False Claims Act.” FAR 52.203-13(b)(3)(i)

### **Who is covered?**

- Contractors who have contracts expected to exceed \$6 Million and which will last 120 days or more. FAR 3.1004(a)
- Subcontractors who have contracts that exceed \$6 Million and which will last more than 120 days. FAR 52.203-13(d). Exceptions for small businesses and commercial items





# False Claims Act (Civil)

## 31 U.S.C. 3729 et seq.

### Essential Elements of an FCA Violation:

(1) Falsity of the claim submitted to the federal government	(2) Scierter (i.e., knowledge of the claim’s falsity)
(3) Materiality to payment	(4) Causing the government to make a payment

### Penalties:

(1) Civil penalties (after 1/30/2023: \$13,508 to \$27,018 for each false claim)	(2) Three times the amount of damages sustained by the government
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### Who Can Bring an FCA Action?

(1) The US Attorney General	(2) A private party, known as a <i>qui tam</i> relator, in the name of the United States
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### Liability Extends to Anyone Who:

(1) Knowingly presents, or causes to be presented, a false or fraudulent <b>claim</b> for payment or approval	(2) Knowingly makes, or causes to be made, a false <b>statement or record</b> material to a false claim
(3) Knowingly conceals or decreases an obligation to pay money to the Government	(4) Participates in a conspiracy to commit (1), (2), or (3)





# United States ex. rel. Schutte v. SuperValu Inc., 598 U.S. 739 (2023)

- Subjective beliefs determine the outcome of FCA actions – **not** “objectively reasonable” beliefs
- Focus on what the defendant **actually thought** when submitting a claim, not what the defendant may have thought **after** submitting a claim
- If there is evidence of actual knowledge of an FCA violation, an “objective, reasonable person” defense will be unsuccessful



“What matters for an FCA case is whether the defendant knew the claim was false.”





# United States ex. rel. Polansky v. Executive Health Resources, Inc., 599 U.S. 419 (2023)

- If the Government initially declines to intervene in an FCA action, it may still intervene and move to dismiss an action at a later point in time, even over a relator's objection
- Motions to dismiss are assessed under the rule governing voluntary dismissal of suits: Fed. R. Civ. Pro. 41(a)
- The Government can intervene and dismiss an FCA action (long after the 60-day seal period) if the action will not vindicate the Government's interests



“Today, we hold that the Government may seek dismissal of an FCA action over a relator’s objection so long as it intervened sometime in the litigation, whether at the outset or afterward.”



# Loper Bright Enterprises v. Raimondo, No. 22-451

- Argument expected Fall 2023
- At issue: whether SCOTUS should overrule *Chevron*
- Private fishing industry in *Loper* is seeking a ruling that “controversial powers expressly but narrowly granted elsewhere in the statute” do not produce ambiguities that require deference
- SCOTUS is set to review the *Chevron* deference standard, which may influence judicial interpretation of future executive agency decisions.



In the face of statutory ambiguity, a court will generally **defer** to an agency’s reasonable interpretation (*Chevron*)





# Key Federal Circuit Courts of Appeals Cases

- *United States ex. rel. Victoria Druding et al. v. Care Alternatives, Inc.*, 2023 WL 5494333 (3d Cir. 2023)
- *United States ex. rel. James Aldridge v. Corporate Management*, 78 F.4th 727 (5th Cir. 2023)
- *Piacentile v. U.S. Oncology, Inc.*, 2023 WL 2661579 (2d Cir. 2023)
- *United States ex. rel. Toledo v. HCA Holdings, Inc.*, 2023 WL 2823899 (5th Cir. 2023)
- *ECC Int'l Constructors, LLC v. Sec'y of Army*, No. 21-2323 (Fed. Cir. 2023)





# United States ex. rel. Victoria Druding et al. v. Care Alternatives, Inc., 2023 WL 5494333 (3d Cir. 2023)

## False Claims Act actions must prove that the defendant:

- 1) Made a false statement
- 2) With scienter
- 3) That was material
- 4) Causing the government to make a payment

- Violations of FCA must be a **material** factor in the Government's decision to pay
- Action dismissed in lower court due to continued reimbursement of Defendant's claims **after** Government acquired knowledge of Defendant's regulatory noncompliance
  - i.e., the noncompliance was not sufficiently **material**
- On appeal: **all four** elements of FCA allegations must be considered holistically, and no one factor should be treated as dispositive

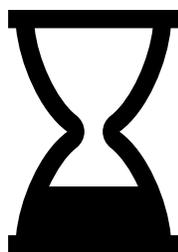
“As this Court and our sister circuits have repeatedly recognized, this is a “holistic”, totality-of-the-circumstances inquiry.”





## United States ex. rel. James Aldridge v. Corporate Management, 78 F.4th 727 (5th Cir. 2023)

- Government extended litigation eighteen times and delayed intervention for over eight years
- Court refused to dismiss action despite Government’s “inexcusable” delay. Dismissal of FCA actions due to Government delay is **unsupported by current precedent**
- Instead, judgment against the Appellants was reduced by over 50%
- Do not interpret Government delay to mean an FCA case has come to an end – but it may impact recovery



“We decline to break new ground today by [dismissing the action] ... The consequence of the Government’s dilatory conduct is the reduction by over half of the judgment entered against Appellants.”





# Piacentile v. U.S. Oncology, Inc., 2023 WL 2661579 (2d Cir. 2023)

## Original Sources:

(1) Prior to a public disclosure, has voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based OR

(2) Has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions

AND

(3) Who has voluntarily provided the information to the Government before filing an action under this section

- Public disclosure bar: Dismissal of False Claims actions that are based “in **any part** upon publicly disclosed allegations or transactions”
- **Applies to relator even if prior disclosure does not identify defendant by name**
- Balance between promoting relator suits and avoiding parasitic claims
- Public disclosure bar does **not** apply if relator is an “original source”
- Research publicly available information when pursuing or defending an FCA claim





# United States ex. rel. Toledo v. HCA Holdings, Inc., 2023 WL 2823899 (5th Cir. 2023)

## Retaliation Claims Require Three Elements:

1) Engagement in protected activity?

2) Employer knowledge of protected activity?

3) Retaliation due to protected activity?

- FCA prohibits retaliation against relators
- Employer had no knowledge of protected activity
- **If employer lacks knowledge of protected activity, retaliation claim fails**
- Monitor compliance programs, stay in touch with employees, and root out any instances of retaliation

“Because Toledo has not presented a genuine dispute of material fact as to whether the relevant decisionmakers knew of her allegedly protected conduct or whether her allegedly protected conduct contributed to her termination, her retaliation claims fail.”





# ECC Int'l Constructors, LLC v. Sec'y of Army, No. 21-2323 (Fed. Cir. 2023)

- Sum-certain requirement of CDA is **not** a jurisdictional requirement
- No mention of “sum-certain” in CDA provision at issue
- Supreme Court guidance: courts must inquire whether Congress has **clearly stated** that a requirement bears on a court’s jurisdiction
- Lack of Congressional clarity provides avenues to challenge jurisdiction over an FCA suit



“[T]he sum-certain requirement is an element of a claim for relief – in other words, it is an element of a CDA claim that a claimant must satisfy in order to recover, rather than a jurisdictional rule that a party can challenge after trial on the merits.”





# Notable FCA Settlements with the U.S. Department of Justice

- *Booz Allen*
- *Amphenol Corporation*
- *Verizon Business Network Services, LLC*





# Notable FCA Settlements with the U.S. Department of Justice

## Booz Allen

- \$377,453,150
- Includes \$209,696,195 in restitution
- Improperly billed commercial and international costs in government contracts
- **Must be a nexus between costs charged to government and objective of that contract**
- One of the “largest procurement fraud settlements in history,” says U.S. Attorney Matthew M. Graves

## Amphenol Corporation

- \$18,000,000
- Failure to comply with regulations and contract specifications
- **Failure to complete retention of qualification testing – stay up to date!**
- Pay attention to initial and ongoing compliance requirements

## Verizon Business Network Services, LLC

- \$4,091,317
- Includes \$2,727,545 in restitution
- Failure to meet cybersecurity requirements in connection with IT services provided to federal agencies
- Defendant took “significant steps” entitling it to **credit for cooperating with government**





# Other Notable FCA Recoveries

Additional notable examples in 2022 include:

- On March 7, a construction contractor agreed to pay \$10 million to resolve allegations it overbilled the government. The government asserted that the contractor presented false invoices for non-existent materials submitted by a subcontractor to the contractor. According to the government, the contractor's employees received kickbacks from the subcontractor to submit the claims
- On May 12, a construction company agreed to pay \$2.8 million to settle FCA allegations that the company improperly manipulated a subcontract reserved for SDVOSBs. The company admitted that it negotiated with a non-SDVOSB for the subcontract and then entered into a subcontract with an SDVOSB for the same work, but with an additional 1.5% fee. The company further admitted that it should have known the SDVOSB was a pass-through for the non-SDVOSB, which provided all of the work under the subcontract. The settlement resolves allegations originally brought in a qui tam lawsuit; the whistleblower received approximately \$630,000 for its share of the recovery
- On June 14, four companies agreed to pay \$13.7 million to resolve FCA and AKS allegations that the companies rigged the bidding process for subcontracts to perform logistics support services for the military in Iraq and that employees entered into arrangements with a foreign contractor under which the companies would receive a kickback for every subcontract awarded to the foreign entity





# Key Court of Federal Claims Cases

- *Accura Engineering & Consulting Services, Inc. v. United States*, 2023 WL 5761365 (Fed. Cl. 2023)
- *Myriddian, LLC v. United States*, 165 Fed.Cl. 650 (Fed. Cl. 2023)





# Accura Engineering & Consulting Services, Inc. v. United States, 2023 WL 5761365 (Fed. Cl. 2023)

## What is a “firm”?

“An individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture or engineering.”

- 40 U.S.C. § 1102(3)
- FAR § 36.102

- Bid protest: Brooks Act
- Only A&E **licensed firms** are permitted to participate in Brooks Act procurements
- Contractor must have license – subcontractor licenses are not enough
- Joint venture **might** have qualified, but no claim of JV existence in *Accura*
- Inquire into, and verify, the licenses held by subcontractors

“By definition, in other words, only legal entities with relevant licensures may participate in Brooks Act procurements.”





# Myriddian, LLC v. United States, 165 Fed. Cl. 650 (Fed. Cl. 2023)

- Awardee failed to maintain SAM registration between offer submission and contract award
- Loss of potential work and profits from a government contract constitutes **irreparable harm** to bid protestors
- Preliminary injunction granted
- Offerors must continue to be registered with SAM at all times of a solicitation – seemingly minor FAR noncompliance threatens the success of a contract



“[D]iscretion would disqualify some offerors altogether while disregarding the avoidable blunders of others.”





# Key Board of Contract Appeals Cases

- *Appeal of StructSure Projects, Inc.*, ASBCA No. 62927, Aug. 8, 2023.
- *Appeal of MVP Network Consulting, LLC*, ASBCA No. 63466, Aug. 30, 2023





# Appeal of StructSure Projects, Inc., ASBCA No. 62927, Aug. 8, 2023

## Sovereign Acts Defense:

1) Government's sovereign act is public, general, and only incidentally falls upon the contract or order

2) Sovereign act renders performance by government, acting akin to a private contractor, impossible or impracticable under contract law

- Construction designated non-mission essential due to COVID-19, work stopped until later notice
- Schedule and rental-related equitable adjustment sought
- Contractor provided itemized sheet of cost impacts due to the delay – claim denied
- Decision: sovereign acts defense does not apply
- Potential for recovery of other COVID related costs

For the sovereign acts defense to apply, “the government acting as a contractor must have breached the contract.”





# Appeal of MVP Network Consulting, LLC, ASBCA No. 63466, Aug. 30, 2023

July 28, 2022: Army emailed notice of termination for cause to MVP

August 24, 2022: MVP replied to email

October 26, 2022: 90-day appeal window officially closed based on July 28 correspondence

November 25, 2022: notice of appeal filed – **untimely!**

- Replying to an email provides proof of receipt, **even if the reply is sent at a later date**
- Proof of receipt begins the CDA's 90-day appeal window
- Monitor correspondence timeline with Government, and stay on top of deadlines to avoid losing appeal opportunities

“MVP’s August 24, 2022 email reply clearly indicated that it was aware of the contract’s partial termination.”





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# Cost Accounting Compliance

Ryan Byrd, Managing Director – BRG

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Laura Semple, Assistant General Counsel - Amentum



# Honeywell International, Inc.

## ASBCA No. 63286 (June 8, 2023)

- A Honeywell segment, SPG, manufactured gyros that it incorporated into products for government contracts and transferred to a commercial segment, which incorporated them into products for commercial customers
- Honeywell SPG transferred the labor, material, and overhead costs associated with the interorganizational transfers to the commercial segment, but **all G&A costs remained with SPG**
- CAS 410-40(a) provides that the G&A expenses of a business unit (or segment) must .... be allocated to final cost objectives “by means of a **cost input base representing the total activity of the business unit . . .**” CAS 410-40(b)(1)
- Defense Contract Management Agency (DCMA) claims Honeywell violated CAS 410 by not including significant interorganizational transfer costs in the G&A base
  - DCMA issued a claim for \$151,139,355, consisting of \$56,180,190 plus interest
- Honeywell contends that since transfer costs are “interorganizational and intermediary,” such costs are not covered under CAS 410
- ASBCA denied Honeywell’s motion to dismiss, stating that total cost input base includes “all significant elements”, “total cost”, and “total activity”





# Sikorsky Aircraft Corporation COFC No. 21-2327 (August 2022)

- Sikorsky Aircraft claimed that the Defense Contract Management Agency (DCMA) failed to reimburse the company for Independent Research and Development (“IR&D”) and Bid and Proposal (“B&P”) costs incurred
- DCMA contended that **Sikorsky failed to comply with CAS 420** which requires a contractor to allocate IR&D/B&P costs to correct business segment
- The DCAA concluded that the home office did not allocate IR&D and B&P costs to segments on the basis of a beneficial of causal relationship between IRD and B&P costs and the segments reporting to the home office as required by CAS 420
- Federal Claims Court **denied Sikorsky’s motion to dismiss** and supports government’s position to not reimburse costs





# Northrop Grumman ASBCA 62165 (July 2023)

- At issue is Northrop Grumman's reimbursement requests for certain nonqualified defined-benefit "pay-as-you-go" pension plans
- These plans utilized a Retirement Benefits Formula that includes as a factor the plan participants' actual compensation earned and does not exclude compensation in excess of the compensation limits
- The government claimed the pension costs attributable to the amounts of compensation in excess of the compensation limits were unallowable pursuant to FAR 31.205.6(p)
- Northrop Grumman followed this process for decades and the costs had not previously disallowed a portion of the pension plan costs
- The ASBCA found a portion of the pension costs to be unreasonable as they were based on compensation above the salary cap





# Washington River Protection Solutions LLC CBCA 7056 (June 2023)

- In 2008, the Department of Energy (DOE) awarded Washington River Protection Solutions (WRPS) a Tank Operations Contract over a ten-year performance period
- DOE claims that staff augmentation costs totaling \$6 million were unreasonable for several reasons:
  - Rates WRPS paid to subcontractors were higher than hiring a full-time employee
  - Personnel that WRPS hired failed to meet certain qualifications making increased staff costs unjustifiable
  - Overnight rate increases were unreasonable since rates increased from one contract to another without explanation
- Civilian Board of Contract Appeals (CBCA) rules in favor of WRPS, stating that cost increases were justified due to increased scope of work
  - CBCA found that only one individual was deemed unqualified and the costs were unreasonable
  - WRPS required to repay \$80,275 of \$6 million disallowance





# DCAA MRD 23-PAC-009(R) Revised Guidance on Cost Impact Calculations (October 2023)

Key changes to audit guidance on the cost impact calculation for unilateral cost accounting practice changes include:

- When calculating the increased cost to the Government “in the aggregate” for a unilateral cost accounting practice (CAP) change, auditors should not automatically combine impacts of fixed price and flexibly priced contract and subcontract groups
- Special consideration is needed when a unilateral CAP change results in increased cost to both the flexibly priced and/or fixed price contract/subcontract groups to ensure the estimated increased cost to the Government “in the aggregate” is equitable
- DCAA will no longer recommend settlement alternatives. It is the Cognizant Federal Agency Official’s (CFAO)’s responsibility to administer the resolution of cost impacts
- The DCAA Contract Audit Manual (CAM) 8-503 Guidance on Evaluation of Cost Impact Proposals and the Cost Impact Statement (Price Adjustment) audit program have been updated to reflect the change in guidance





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Amentum



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ATTORNEYS AT LAW

# **Networking Break**

**10:30 – 10:45 am**



**Fox Rothschild** LLP  
ATTORNEYS AT LAW



## **Domestic Preferences on Federal Projects**

**How the Buy American Act; Trade Agreements Act; Infrastructure Investment and Jobs Act (IIJA); Build America, Buy America Act (BABA); and Inflation Reduction Act (IRA) Impact Federal Contractors in 2023 and Beyond *and What's in it for You?***

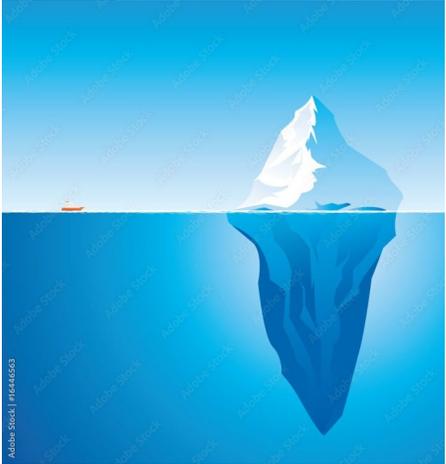
Doug Hibshman, Partner – Fox Rothschild  
Dana Molinari, Associate – Fox Rothschild  
Jane Han, Associate – Fox Rothschild



# Presentation Outline

## How the IIJA and IRA will Impact Federal Contractors in 2023 and Beyond

- **Refresher** – Overview of the Buy American Act (BAA) and the Trade Agreements Act (TAA)
  - Restrictive – requires “Domestic End Products” or “Designated Country End Products”
- **“Buy America 2”** – How do things change under the Infrastructure Investment and Jobs Act (IIJA) / Build America, Buy America Act (BABA) *and what’s in it for you?*
- **The Inflation Reduction Act (IRA)** – *and what’s in it for you?*





# Domestic Preference Statutes – Why and What?

- **Federal Government requires domestically manufactured “things” on:**
  - Federal contracts
  - Contracts with federal /BABA funding – federal, state, local
  - To get certain IRA tax incentives – mix of federal & commercial
- Made in the US really matters – strings attached to federal dollars
- Protects American businesses, but leads to offshoring ??
- Exceptions swallow the rules in many cases
- It’s complicated! Buy American, Buy America, BABA, IRA – inconsistent rules and application
- Requirements are getting more rigid – growth in domestic content requirements will go from 60% to 75%





# What Regulations Matter?

## 30,000 Foot View

- **The Buy “American” Act**
  - Requires use of domestically manufactured “things” on federal contracts – “Domestic End Products”
- **The Trade Agreements Act**
  - Broad exception to BAA to permit use of Items from 140 “Designated Countries” for federal contracts – “Designated Country End Products” – negates BAA requirements
- **Buy “America”**
  - Preferences for US DOT contracts, railcars, rolling stock, terminals
- **“Buy America 2” – Build America, Buy America**
  - Federally funded infrastructure contracts have domestic preference requirements – similar to BAA, but no TAA exceptions ??
- **Inflation Reduction Act**
  - Requires domestic preferences to get federal tax incentives





# **The Buy American Act**

**41 USC §§ 8301 - 8305 (1933)**

**FAR Part 25**





# The Buy American Act – The Basics

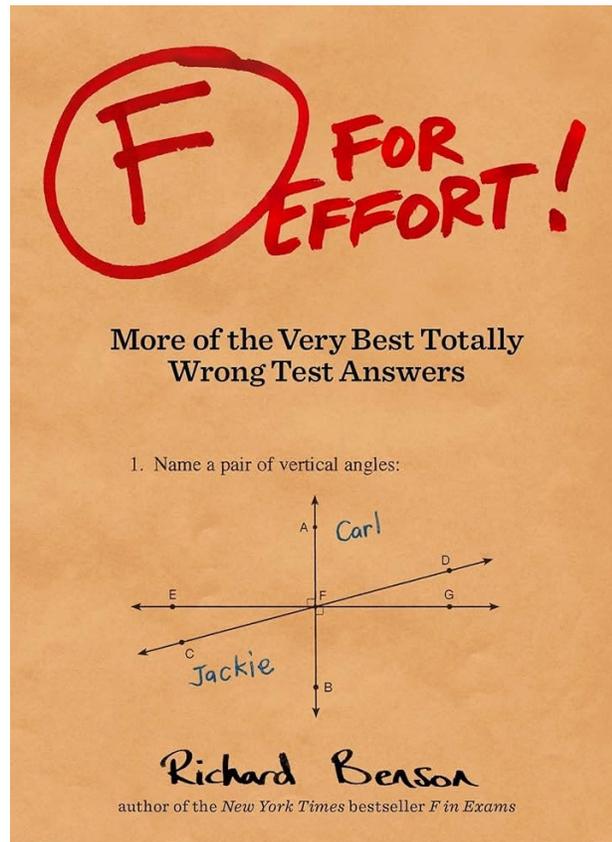
- The Buy American Act (BAA) is **everywhere** if you do federal work
- BAA is “incorporated in” almost all federal contracts over \$10k where you provide two primary types of “things”:
  - **FAR 25.101 – Supplies**
    - “Means all property except land or interest in land”
    - Translated – any physical “thing” not a construction material
  - **FAR 25.201 – Construction Materials**
    - “Means an article, material, or supply brought to the construction site by contractor or subcontractor for incorporation into building or work”
- The BAA must be flowed down to all subcontractors/suppliers providing “things”
- The BAA applies to “non-federal” contracts where federal money is involved, even just \$1 – state DOT, regional transportation projects, grants, etc.
- Penalties for non-compliance are severe
  - Applies to any entity the US can exercise jurisdiction over, i.e., foreign companies





# The Buy American Act – The Tests

- **Cost of Components Test:**
  - 60% threshold October 25, 2022 – Going to 75% in 2029
  - Hard to satisfy – Must be **manufactured in US** and **60% US components**
  - 4 Steps: Determine the “End Product”/Determine the components of the End Product
  - Determine if components are domestic vs. foreign/Determine cost of all components
  
- **Commercially Available Off the Shelf Item**
  - Much easier to satisfy – source of components don’t matter
  - Must be manufactured in US and COTS item
  - A commercial product, sold in substantial quantities, not modified
  
- **“Wholly or Predominantly Iron or Steel” Test**
  - Very difficult to satisfy – Cost of Components Test on steroids
  - Must be **manufactured in US**
  - Any Item that is 50% or more iron, steel, or both
  - Must meet **95% Cost of Components test** where 95% all iron/steel must be domestic
  - Remember, COTS exception does not apply (but COTS fasteners ok)





# **The Trade Agreements Act**

## **19 U.S.C. § 2501**

### **FAR Part 25**





# The Trade Agreements Act – The Basics

- **The Trade Agreements Act (TAA)**
  - The TAA Act is a monster exception to the BAA
  - Based on dollar value of contract
    - Applies to all Supply contracts over \$25k - \$183k
    - Construction contracts over \$7M to \$12M
- **“Designated Country End Products” are ok**
  - Items from “Designated Countries” are treated “**equally**” as domestic Items
  - Approximately 140 countries
    - World Trade Organization (WTO), Free Trade Agreement (FTA), Least Developed, Caribbean Basin, Israeli Trade Act
- **Allows contractors to use**
  - (1) Domestic Supplies/Construction Materials, or
  - (2) “Designated Country” Supplies/Construction Materials
  - Check the contract and the clauses
- **But, doesn’t apply to**
  - Small business set-aside contracts. Why? BAA applies to all
  - Indispensable national security/defense Items
  - Acquisition of products for resale
  - Sole source acquisitions





# The Trade Agreements Act – Designated Countries

- **Designated Countries: Not China, India, Russia, Brazil, Turkey – Check origin of materials**

- WTO Countries
  - Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as "the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)"), Ukraine, or United Kingdom
- FTA Countries
  - Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore
- Least Developed Countries
  - Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia
- Caribbean Basin Countries
  - Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago





**Infrastructure Investment and  
Jobs Act (“IIJA”),  
Build America, Buy America Act  
 (“BABA”)**

**Pub. L. No. 117-58, §§ 70901-70953**





# IIJA – What’s in it for Contractors?

- IIJA authorizes **\$1.2 trillion** for transportation and infrastructure spending, which includes around **\$550 billion** in “new” investments, such as building America’s roads and bridges, water infrastructure, internet and more
- **General Rule:** Applies to federally assisted infrastructure projects and requires that **all of the following are produced in the United States**
  - **the iron and steel,**
  - **manufactured products, and**
  - **construction materials**
- **Applies to Infrastructure Projects:** The structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; ... and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging
- **Manufactured Materials:** “Articles, materials, or supplies that have been: (i) Processed into a specific form and shape; or (ii) Combined with other articles, materials, or supplies to create a product with different properties....” – not iron / steel or construction materials
- **Produced in the United States:** “(i) The product was manufactured in the United States; and (ii) The cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than **55 percent of the total cost of all components** of the manufactured product....”



## The Infrastructure Investment and Jobs Act

• **is a \$1.2 Trillion** •  
**Bipartisan Infrastructure Bill**  
and includes funding for our:

 BRIDGES	 ROADS	 TRANSIT SYSTEMS	 DAMS
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# Build America, Buy America Act – How Does it/Will it Apply?

- **Manufactured Products**

- **§ 184.5 Determining the cost of components for manufactured products.**

In determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, use the following instructions:

(a) **For components purchased by the manufacturer**, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(b) **For components manufactured by the manufacturer**, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the manufactured product

- The final guidance's definitions closely align with the FAR's definition of the cost of components (replacing the term *contractor* with *manufacturer* and the term *end product* with *manufactured product*)





# Build America, Buy America Act – How Does it/Will it Apply?

- Construction Materials: Include Non-Ferrous Metals; Plastic and Polymer-based products; Glass; Fiber optic cable (including drop cable); Optical fiber; Lumber; Engineered wood; and Drywall
  - **Produced in the United States:** “All manufacturing processes for the construction material occurred in the United States....”
  - **For Example:**
    - **“Glass:** All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States”
    - **“Non-ferrous metals:** All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States”





# Build America, Buy America Act – How Does it/Will it Apply?

- Iron or Steel Products: articles, materials, or supplies that consist **wholly** or **predominantly** of iron or steel or a combination of both
  - **Produced in the United States:** “All (not 95%) manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States”
  - **Predominantly of iron or steel or a combination of both:** “the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components”
- Waiver may be justified for (1) public interest; (2) unreasonable cost; and (3) nonavailability
  - For example, U.S. Department of Transportation finalized a BABA waiver on August 15, 2023:
    - “The total value of the non-complaint products is no more than the lesser of \$1,000,000 or 5% of the total applicable costs for the project;” or
    - “The total amount of Federal financial assistance applied to the project, through awards or subawards, is below \$500,000”





# Build America, Buy America Act – How Does it/Will it Apply?

## No Commercial Off-The-Shelf (COTS) Exceptions in BABA

*However*, according to the final guidance, OMB provided that:

“Regarding the comment requesting a COTS exemption, OMB notes that the waiver process, not part 184, would be the appropriate mechanism to address concerns on this topic. OMB observes that Federal agencies have not previously found such a waiver to be in the public interest, but COTS items may potentially fall under other public interest waivers that agencies have issued, such as de minimis or minor component waivers as described in Memorandum M–22–11.”





# Inflation Reduction Act “IRA” of 2022



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# IRA – The Basics and Funding Overview

**Purpose:** to accelerate the deployment of clean energy, vehicles, buildings, and manufacturing, and reduce carbon emissions through \$370 billion in investments, \$270 billion of which is in tax incentives

**Clean Energy Production and Investment Tax Credits:** “A project facility can earn **bonus** credits if it [1] meets Davis-Bacon prevailing wage and registered apprenticeship requirements, [2] meets certain domestic content requirements, and/or [3] is located in an energy community....”

- more than 20 tax incentives and loan programs

- **Prevailing Wage Rate/Apprenticeship Bonus Credit**

- Local prevailing wages per trade; total labor hours of construction/alteration to be performed by qualified apprentices
  - [12.5%](#) projects starting between 12/31/2022-1/1/2024; 15% project starting after 12/31/2023

- **Domestic Content Bonus Credit** (as a component of a qualifying facility)

- **Steel and Iron:** Manner consistent with FTA’s Buy America Requirements as stated in 49 C.F.R. § 661.5 – “**All** steel and iron manufacturing processes” must take place in the U.S.
- **Manufactured Product:** not less than the adjusted percentage of total cost of all manufactured products of the facility [40% for manufactured product; 20% for an offshore wind facility].
  - Note: some domestic preference requirements for manufactured projects are set to steadily increase for projects beginning after January 1, 2025





# IRA – Tax and Loan Incentives

## Tax Incentives:

- Production Credit for Electricity from Renewables (§13101)\*^
- Investment Tax Credit for Energy Property (§13102)\*^
- Energy credit increase for solar and wind facilities – low-income communities (§13103)\*^
- Zero-Emission Nuclear Power Production Credit (§13105)\*^
- Clean Electricity Production Credit (§13701)\*^
- Clean Electricity Investment Credit (§13702(h))\*^
- Advanced Energy Project Credit (§13501)\*^
- Advanced Manufacturing Production Credit (§13502)\*^
- Clean Vehicle Credit (§13401)^, Previously-Owned Clean Vehicle Credit (§13402)^
- Credit for Qualified Commercial Clean Vehicles (§13403)\*
- Alternative Fuel Vehicle Refueling Property Credit (§13404)\*^
- Clean Fuel Production Credit (§13704)\*^
- Energy Efficient Commercial Buildings Deduction (§13303)



\* **Eligible for direct pay:** traditionally tax exempt entities can benefit through direct payments of the credited amount

- State, local, tribal governments, non-profits, other tax-exempt organizations

^ **Eligible for transfer:** taxpayers can transfer all or some of the credits to a third party in exchange for cash

**\$40 billion in loan authority** to guarantee loans for innovative clean energy technologies such as:

- Renewable energy systems, carbon capture, nuclear energy, and critical minerals processing, manufacturing, and recycling



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# IRA – Tax Incentive Examples

## Clean Electricity Production Credit

- **Eligibility:** For facilities (with greenhouse gas emissions rate not greater than 0) placed into service after 12/31/2024; to be phased out in 2032 or when US greenhouse gas emissions from electricity are 25% or lower of 2022 emissions levels
- **Bonus credit:** increased 5x for projects meeting prevailing wage and apprenticeship requirements; increase credit by 10% for meeting domestic preference requirements

## Energy Efficient Commercial Buildings Deduction

- **Eligibility:** owners and long-term lessees of commercial buildings; designers of energy efficient building property; and tax-exempt owners of commercial properties (pending additional Treasury guidance on deduction allocation)
- Base credit of \$0.50-\$1 per square foot over 4 years, capped at \$1/square foot (Adjusted for inflation)
- **Bonus credit:** 5x base deduction amount if project meets prevailing wage, apprenticeship requirements
- Secretary “shall promulgate” regulations or guidance on the allocation of deduction to person “primarily responsible for designing the property in lieu of the owner of such property” 26 USC 179D(d)(3)(A)

## Proposed Guidance on the New Clean Vehicle Provisions of the IRA (published 4/17/2023)

- Qualifying individuals can get up to \$7,500 credit:
  - \$3,750 if the percentage value of the battery critical mineral is extracted/processed in the U.S. or a free trade agreement country (40% for 2023);
  - \$3,750 if percentage value of the battery components manufactured or assembled in North America (50% for 2023)





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# Everything You Thought You Knew About CDA Jurisdiction Just Changed – And for the Better

Dirk Haire, Partner – Fox Rothschild  
Jane Han, Associate – Fox Rothschild



# Agenda

- CDA Jurisdiction – Background Information
- Recent SCOTUS and Federal Circuit Cases
- Case Study – *ECC Int’l Constructors, Inc. v. Army*, 79 F.4th 1364 (Fed. Cir. 2023)
- Practical Takeaways and Predictions





# The Problem

- Labeling CDA issues as “jurisdictional” rather than “procedural” allows the Government to avoid responsibility and dismiss legitimate contractor claims for lack of jurisdiction.
- Example: ASBCA annual reports from FY2021 and FY2022
  - FY2021: 102 pending dismiss for lack of jurisdiction motions out of 954 pending cases
  - FY2022: 101 pending dismiss for lack of jurisdiction motions out of 957 pending cases
  - Government filed motions to dismiss in over 10% of pending cases in last two years





# Background: Contract Disputes Act

## Contract Disputes Act (CDA) of 1978

- Congressional reform of complicated procurement contract disputes by streamlining the process. Previously, access to meaningful judicial review relied on arbitrary jurisdictional distinctions between breach of contract claims and claims “arising under” contract clauses.
- Decades of varied judicial and administrative interpretations of the CDA have left it with procedural issues, many of which have been labeled by the Federal Circuit as jurisdictional.





# Background: CDA Requirements

- **Claim Submission:** Every claim for payment must include a “sum certain” (i.e., the amount of relief sought in the claim). These must be made with sufficient specificity (i.e., “approximately”) when describing the amount asserted.
- **Certification:** Under the CDA, a contractor “shall certify” claims for more than \$100,000. They must certify that: (1) the claim is made in good faith; (2) the supporting data are accurate and complete to the best of their knowledge and belief; (3) the amount requested accurately reflects the adjustment for which they believe the government is liable; and (4) the person asserting the claim is duly authorized to certify the Claim.
- **CO’s Final Decision:** Once a contractor submits a claim satisfying all regulations and requirements, the CO reviews it and issues a Contracting Officer’s Final Decision (COFD).
- **Timely Appeal:** A contractor can either appeal to the appropriate Board of Contract Appeals or to COFC. For the Boards, the contractor must file a notice of appeal within 90 days of its receipt of the CO’s final decision. For COFC, the contractor must file within 12 months of its receipt of the CO’s final decision.
- **Six-year Statute of Limitations:** All claims under the CDA must be submitted within six years of the time when all events establishing alleged liability for an injury were known or should have been known.





# Background: CDA Requirements

- Claim Submission

**The “sum certain” element was ruled non-jurisdictional in 2023 in *ECC International Constructors, LLC v. Secretary of the Army***

- Certification

- Issuance of a CO’s final decision

- Timely Appeal

- Six-year statute of limitations

**Ruled non-jurisdictional in 2014 in *Sikorsky Aircraft Corp. v. United States***





# Background: Claim Processing

## Claim Processing Rules vs. Non-Claim Processing Rules

- Claim Processing Rules:
  - Non-jurisdictional procedural rules that must be promptly raised or risk being forfeited.
  - “Rules that seek to promote the orderly process of litigation by requiring that the parties take certain procedural steps at certain specified times.” *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)
- Non-Claim Processing Rules:
  - Jurisdictional Rules – i.e., whether the court has the authority to decide a case





# Background: Jurisdictional Issues

- Jurisdictional requirements create more problems than solutions for contractors
  - Jurisdictional objections can be raised at any time and cannot be waived/conceded.
  - The Government can move at any time to dismiss for lack of jurisdiction, even after a contractor's opportunity to cure any potential jurisdictional issue has passed or a claim has already been heard on the merits.
  - The jurisdictional label carries the risk of “disruption and waste.” *Wilkins v. United States*, 143 S. Ct. 870 (2023).
- If CDA issues were not jurisdictional but claim processing rules instead, then the Government would have to plead them as affirmative defenses (early in the litigation stage), or else risk waiving those issues.





# Recent Trends: *Wilkins v. United States*

## *Wilkins v. United States*, 143 S. Ct. 870 (2023)

- **Holding:** A 12-year statute of limitations under the Quiet Title Act is nonjurisdictional and an alleged failure by a claimant to file within the limitations period does not deprive a relevant court of jurisdiction to review and rule on the claim.
- **Key Takeaways**
  - “Given the risk of disruption and waste that accompanies the jurisdictional label, ***a procedural requirement will be construed as jurisdictional only if Congress ‘clearly states’ that it is.***”
  - Clear distinction between subject matter jurisdiction and “nonjurisdictional claim-processing rules, which seek to promote the orderly process of litigation by requiring that the parties take certain procedural steps at certain times.”
  - “This Court has often explained that Congress’s separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional.”





## Recent Trends: *CACI, Inc.-Fed v. United States*

### ***CACI, Inc.-Fed v. United States*, 67 F.4th 1145 (Fed. Cir. 2023)**

- **Holding:** The Federal Circuit determined that the statutory language “interested party” under the Tucker Act, 28 U.S.C. § 1491(b)(1) implicates a “statutory standing” that should not be treated as jurisdictional.
- **Key Takeaways**
  - The Court distinguished Article III standing from “statutory standing.” In overturning tradition treating the interested party issue as jurisdictional, the Court held that “the issue of prejudice is no longer jurisdictional unless it implicates Article III considerations.”
  - “Our prior caselaw treating the interested party issue as a jurisdictional issue is no longer good law in this respect.”





## Recent Trends: *M.R. Pittman Grp., LLC v. United States*

### ***M.R. Pittman Grp., LLC v. United States*, 68 F.4th 1275 (Fed. Cir. 2023)**

- **Holding:** “We hold that waiver under *Blue & Gold* does not deprive the Court of Federal Claims of subject matter jurisdiction.”
  - The *Blue & Gold* waiver rule is “more akin to a non-jurisdictional claims-processing rule since it ‘seeks to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.’”
- **Key Takeaways:**
  - The Court highlighted the Supreme Court’s emphasis on a “distinction between ‘jurisdictional prescriptions’ and ‘nonjurisdictional claim-processing rules.’”





# Recent Trends: Post-*Wilkins*

- The Supreme Court's holding and reasoning in *Wilkins* have major implications for CDA jurisdictional issues.
- The Federal Circuit has already incorporated this new direction in its decision in *ECC International*.





## Case Study: *ECC Int’l Constructors, Inc. v. Army*

### ***ECC Int’l Constructors, Inc. v. Army*, 79 F.4th 1364 (Fed. Cir. 2023)**

- **Holding:** The court agreed with ECCI that because Congress’s only statement on the matter (the CDA text) did not clearly specify that the “sum certain” requirement was jurisdictional, it was therefore non-jurisdictional.
- **Key Takeaways:**
  - The “sum certain” requirement is not jurisdictional, but still a “mandatory rule that claimants must follow”
  - “Rules outside the statutory text are not jurisdictional”





# What's on the Horizon and Key Takeaways

- Recent SCOTUS and Federal Circuit rulings indicate a significant shift in precedent.
- SCOTUS guidance to “treat a procedural requirement as jurisdictional only if Congress ‘clearly states’ that it is” could make many issues in the CDA non-jurisdictional based on the plain language of the statute.
- Remaining CDA jurisdictional issues:
  - Certification
  - Issuance of CO’s final decision
  - Timely appeal





# What's on the Horizon and Key Takeaways

- The three remaining CDA jurisdictional issues may face similar *Wilkins*-based challenges.
- Contractors now have strong grounds to challenge agency attempts to dismiss legitimate CDA claims for lack of jurisdiction. If agencies try to dismiss for lack of jurisdiction, claimants should cite to *Wilkins* and *ECC International*.





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# **Networking Lunch**

## **Crystal Room**

**11:45 am – 12:15 pm**



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# How Will AI and ChatGPT Transform the Federal Contracts Landscape?

Mark McCreary, Partner - Fox Rothschild LLP

Dr. Hasan Jackson, CTO & Director of Data Science – Sancorp Consulting LLC

Robbie Pratt, Counsel - Fox Rothschild LLP

# Don't Stop Listening Just Because this is Exciting Stuff!

- We will discuss: what is AI and how you can use AI tools in your business
- That use has very specific guardrails around it
- These AI tools, and the guidance and rules around, will be fluid for some time







# What are Artificial Intelligence Tools?

- Artificial intelligence (AI) is intelligence—perceiving, synthesizing, and inferring information—demonstrated by machines, as opposed to intelligence displayed by non-human animals and humans
- Example tasks in which this is done include maps and navigation, facial detection and recognition, text editors and autocorrect, chatbots, digital assistants, and social media





# What are Artificial Intelligence Tools? (Everyday World)

- AI applications include
  - advanced web search engines (e.g., Google Search)
  - recommendation systems (used by YouTube, Amazon and Netflix)
  - understanding human speech (such as Siri and Alexa)
  - text auto-complete on your smartphone
  - self-driving cars





# What are Artificial Intelligence Tools? (Chatbots)

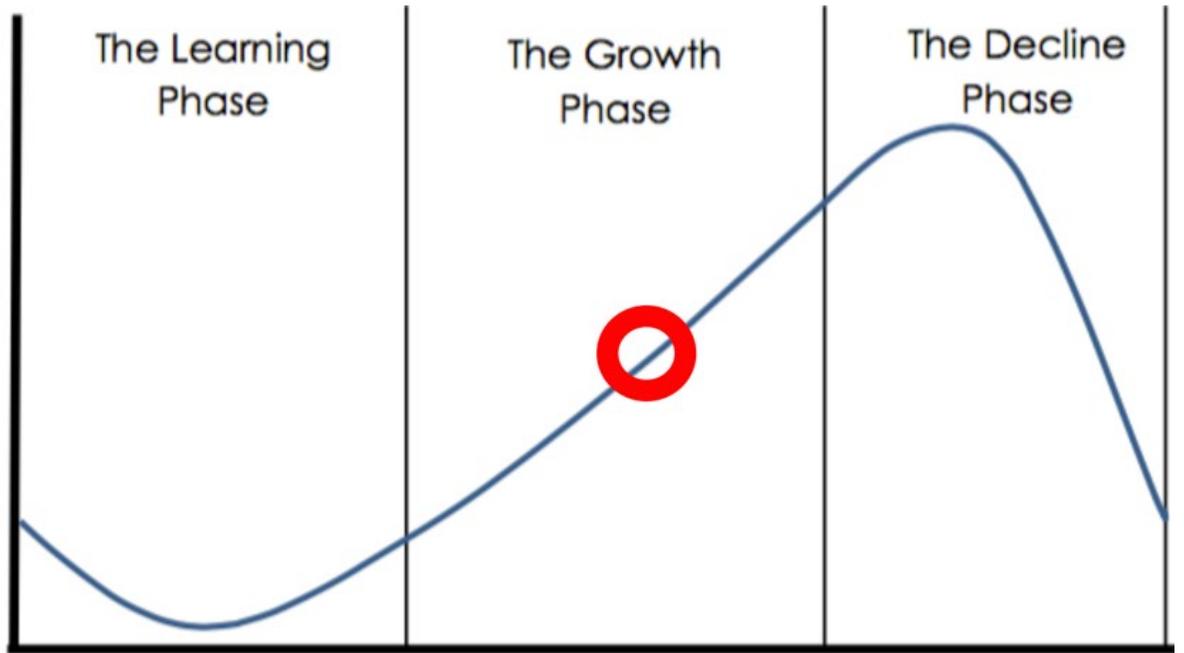
- Brings us to chatbots like OpenAI ChatGPT
- It is hard to overstate this moment
- This is a disruptor like:
  - Email
  - Social Media
  - Mass adoption of the Internet
    - think just how fast that happened
    - think about industries it destroyed (travel agencies, music industry, video rentals)
  - Smartphones – what has really changed since then?





# Where are We with AI Tool Development

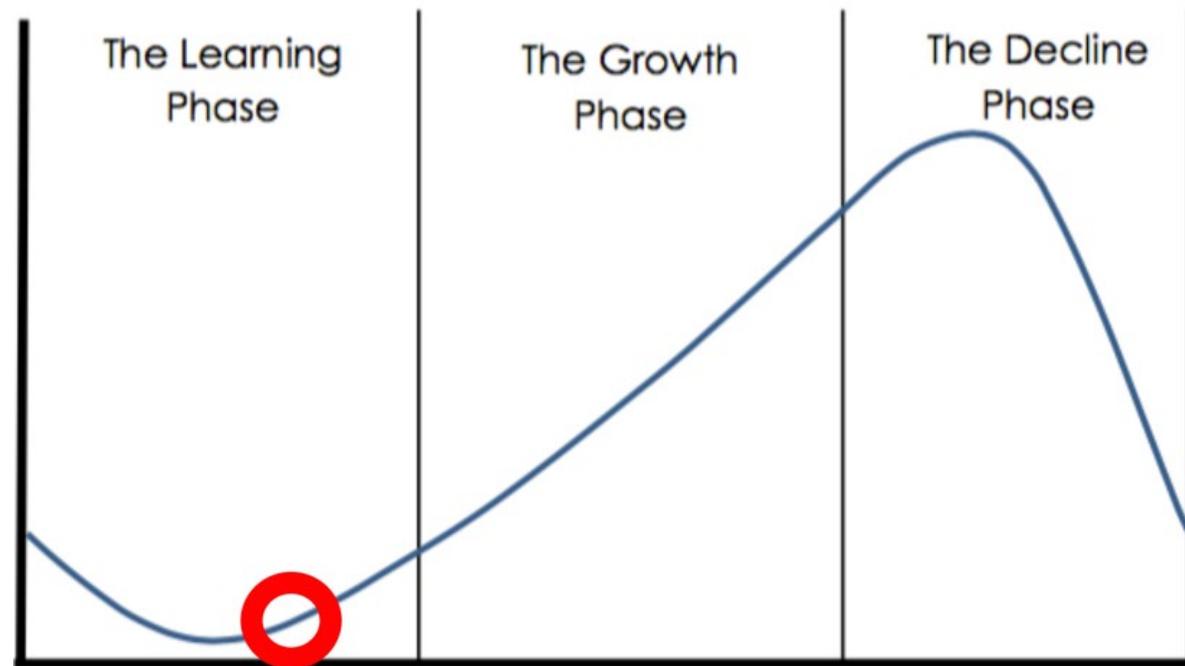
- Technologies generally follow a Sigmoid Curve
- Are we in the middle, and will some interesting new technologies emerge?
- Suddenly Siri is worthwhile, and Bing is a thing? We have easier/different search now?





# Where are We with AI Tool Development

- Are we at the beginning, and the industries disrupted and changes to daily life are unknowable?
  - Is this receiving sending mobile email (BlackBerry)?
  - Is this selling books on the Internet (Amazon)?
  - Is this downloading free music (Napster)?
  - Is this the flashlight app on your iPhone?





# Where are We with AI Tool Development

- The truth is we have no idea where we are with AI tool development
- The one thing everyone agrees on is that everything is about to change
- People 40 years old or younger grew up immersed with the Internet and related technologies
  - Everything they know will be transformed in some way or many ways





# Where are We with AI Tool Development

- What is different this time is we are aware of what is happening
- It may be unknowable, but we are all witnesses
- We all have control over how these new technologies and applications will be used
- We are sitting here today, hearing about the benefits and risks, we have foundational knowledge of threats from existing technologies – we have choices going forward, eyes wide open





# ChatGPT

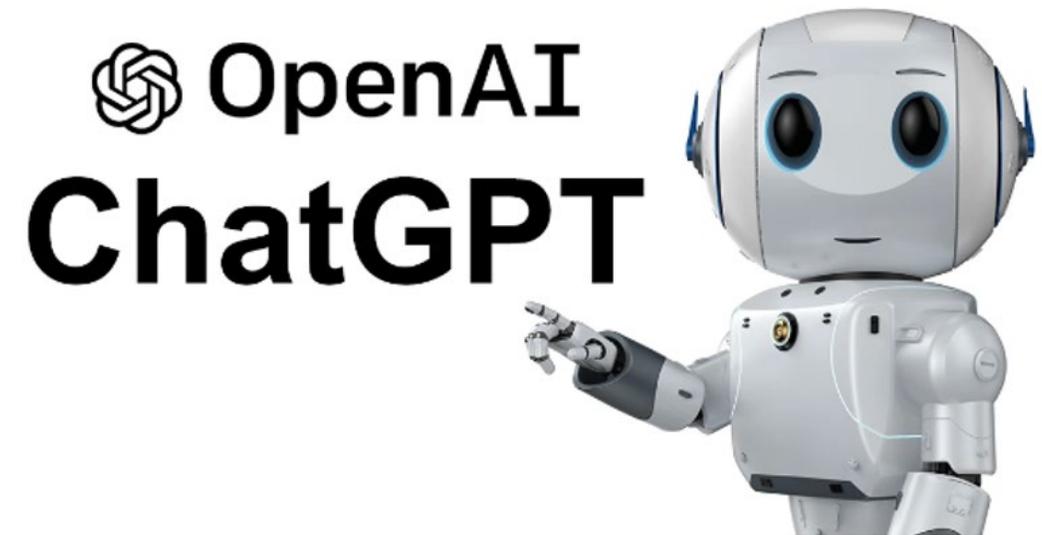
- Let's answer the first question people have
  - Chat Generative Pre-trained Transformer
- A chatbot developed by OpenAI, launched in November 2022
- Has been fine-tuned using both supervised and reinforcement learning techniques (both by humans)
  - Supervised learning - the model was provided with conversations in which the trainers played both sides: the user and the AI assistant
  - Reinforcement learning step, human trainers first ranked responses that the model had created in a previous conversation





# ChatGPT

- Boiled down, this technology is just a thing that predicts what the next word will be
- But that is NOT what it feels like when using ChatGPT
- It “talks” and interacts like a human very convincingly



# ChatGPT

- 3.5 years for Netflix to get 1M subscribers
- 2 years for Twitter to get 1M users
- ChatGPT took 5 days

## ChatGPT Sprints to One Million Users

Time it took for selected online services to reach one million users



\* one million backers \*\* one million nights booked \*\*\* one million downloads  
Source: Company announcements via Business Insider/LinkedIn



statista

# ChatGPT – How to access?

The screenshot displays the ChatGPT web interface. On the left is a dark sidebar with navigation options: '+ New chat', 'Clear conversations', 'Upgrade to Plus' (with a 'NEW' badge), 'Dark mode', 'Updates & FAQ', and 'Log out'. The main content area is titled 'ChatGPT' and is divided into three columns: 'Examples', 'Capabilities', and 'Limitations'. Each column contains three items, each with an icon and a text box. At the bottom of the main area is a text input field with a send button and a disclaimer: 'ChatGPT Feb 13 Version. Free Research Preview. Our goal is to make AI systems more natural and safe to interact with. Your feedback will help us improve.'

Examples	Capabilities	Limitations
"Explain quantum computing in simple terms" →	Remembers what user said earlier in the conversation	May occasionally generate incorrect information
"Got any creative ideas for a 10 year old's birthday?" →	Allows user to provide follow-up corrections	May occasionally produce harmful instructions or biased content
"How do I make an HTTP request in Javascript?" →	Trained to decline inappropriate requests	Limited knowledge of world and events after 2021

<https://chat.openai.com/chat>

# ChatGPT – What Kind of Queries

## Is common law marriage recognized in Pennsylvania?

RE

Is common law marriage recognized in Pennsylvania



No, Pennsylvania does not recognize common law marriage. Common law marriage is a type of informal marriage that is created by the agreement and behavior of two individuals without a formal ceremony or license. While some states recognize common law marriage, Pennsylvania does not.



In Pennsylvania, a valid marriage requires a marriage license and a ceremony performed by an authorized officiant. Couples who live together in Pennsylvania without being formally married are not considered to be married under Pennsylvania law, regardless of how long they have lived together or how committed their relationship is. However, Pennsylvania recognizes common law marriages that were established in other states that do recognize them.

It's worth noting that even if a couple is not considered to be married under Pennsylvania law, they may still have legal rights and obligations with respect to each other, such as property rights or the right to receive support in the event of a separation.

# ChatGPT – What Kind of Queries

**Write a demand letter to Elon Musk that he pays me no later than Friday the \$50 that I loaned him**

RE Write a demand letter to Elon Musk that he pays me no later than Friday the \$50 that I loaned him

Elon Musk  
Tesla, Inc.  
3500 Deer Creek Road  
Palo Alto, CA 94304  
United States

Subject: Demand for Repayment of Loan

Dear Mr. Musk,

I am writing to remind you of an outstanding debt of \$50 that you owe me. On [Date], I loaned you the aforementioned amount, but it remains unpaid despite my previous attempts to contact you.

I kindly request that you repay the loan in full no later than Friday, [Date]. You can use my preferred payment method, [state your preferred method], by transferring the funds to the following account:

[Provide your account details]

I expect you to honor this request and settle the debt promptly. Failure to do so may result in legal action to recover the outstanding amount.

Please acknowledge this letter and provide me with a repayment confirmation by [Date]. I hope we can resolve this matter amicably and maintain a positive relationship.

Thank you for your attention to this urgent matter.

Yours sincerely,  
[Your Name]



# ChatGPT – What Kind of Queries

## Write a love letter to my wife Jenni



Dear Jenni,



As I sit down to write this love letter to you, my heart is overflowing with love and gratitude. You are the most important person in my life, and I want to take this opportunity to tell you just how much you mean to me.

Jenni, you are the most beautiful person I know, both inside and out. Your smile lights up my day, and your laughter fills my heart with joy. You have an incredible spirit, a heart full of kindness and compassion, and a determination to make the world a better place. I am in awe of you every day.

I am so grateful for the way you support me, challenge me, and inspire me to be the best version of myself. You are my best friend, my confidante, and my soulmate. I can't imagine going through life without you by my side.

Jenni, you make every day better just by being in it. Your love and devotion have been a constant source of strength and comfort, and I can't thank you enough for all that you do for me and for our family. You are an amazing wife, a wonderful mother, and a true partner in every sense of the word.

I love you more than words can express, and I promise to spend the rest of my life showing you just how much you mean to me. You are the love of my life, Jenni, and I am so grateful for every moment we spend together.

Forever and always,  
[Your Name]



# ChatGPT – What Kind of Queries

**Write a biblical verse in the style of King James bible explaining how to remove a peanut butter sandwich from a VCR**



And it came to pass that a man was troubled by a peanut butter sandwich, for it had been placed within his VCR, and he knew not how to remove it. 👍 🗨️

And he cried out to the Lord, saying, "Oh, Lord, how can I remove this sandwich from my VCR, for it is stuck fast and will not budge?"

And the Lord spoke unto him, saying, "Fear not, my child, for I shall guide thy hand and show thee the way. Take thy butter knife, and carefully insert it between the sandwich and the VCR, and gently pry them apart. And with patience and perseverance, the sandwich shall be removed, and thy VCR shall be saved."

And the man did as the Lord commanded, and lo and behold, the sandwich was removed from the VCR, and the man was saved.

And the Lord said, "Verily I say unto thee, seek not to put thy peanut butter sandwiches in thy VCR, for it is not a suitable place for such things. Rather, keep thy sandwiches in thy refrigerator or on thy plate, where they belong."

And the man heeded the Lord's words, and from that day forth, he kept his sandwiches in their proper place, and was saved from trouble and woe. Amen.



# Copyright and Intellectual Property Issues

**Write a poem in the style of Edgar Allen Poe about clowns**

RE

Write a poem in the style of Edgar Allen Poe about clowns



Amidst the shadows of the night  
A fearsome figure comes in sight  
A jester with a painted face  
A haunting presence, full of grace



His eyes, they gleam with fiendish light  
As he dances in the pale moon's sight  
His twisted smile a crooked grin  
That chills the bones and shakes the skin

This clown, a mockery of mirth  
A jester of the grimmest worth  
He laughs with malice in his heart  
And tears your sanity apart

His jests are cruel, his pranks obscene  
And yet you cannot help but keen  
As he draws you in with wicked glee  
And toys with you relentlessly

Beware, my friend, of this dark clown  
For once he's got you, you'll be down  
In madness and despair and fright  
Forever lost in his cold, cold sight.



# Copyright and Intellectual Property Issues

## Write a song in the style of Lizzo about climate change

RE Write a song in the style of lizzo about climate change

 Verse 1: 👍 🗨️

Listen up, y'all, gotta tell you something real  
The world is heating up, it's a big deal  
We gotta act fast, can't just stand still  
Gotta make some changes, gotta change our will

Chorus:  
Climate change is real, we can't deny  
We gotta take action, gotta try  
Reduce our carbon footprint, don't be shy  
Let's save our planet, before we die

Verse 2:  
We gotta ride bikes, take public transit too  
Gotta recycle, there's so much we can do  
Gotta use less water, gotta conserve  
We gotta act now, before it's too late to preserve

Chorus:  
Climate change is real, we can't deny  
We gotta take action, gotta try  
Reduce our carbon footprint, don't be shy  
Let's save our planet, before we die

Bridge:  
The Earth is our home, our only place to live  
We gotta protect it, gotta give and give  
It's not just for us, it's for generations to come  
We gotta act now, it's time to get it done

Chorus:  
Climate change is real, we can't deny  
We gotta take action, gotta try  
Reduce our carbon footprint, don't be shy  
Let's save our planet, before we die

Outro:  
We can do it, y'all, we gotta try  
Let's make a change, let's amplify  
We can save our planet, we can survive  
Let's come together, let's thrive.



# Google Bard

- Companies are not going to let OpenAI feast alone
- Google is not going to let Microsoft make Bing a thing
- Companies will go too fast, guardrails will be limited, mistakes will be made

## Introducing Bard

It's a really exciting time to be working on these technologies as we translate deep research and breakthroughs into products that truly help people. That's the journey we've been on with large language models. Two years ago we unveiled next-generation language and conversation capabilities powered by our Language Model for Dialogue Applications (or LaMDA for short).

We've been working on an experimental conversational AI service, powered by LaMDA, that we're calling Bard. And today, we're taking another step forward by opening it up to trusted testers ahead of making it more widely available to the public in the coming weeks.

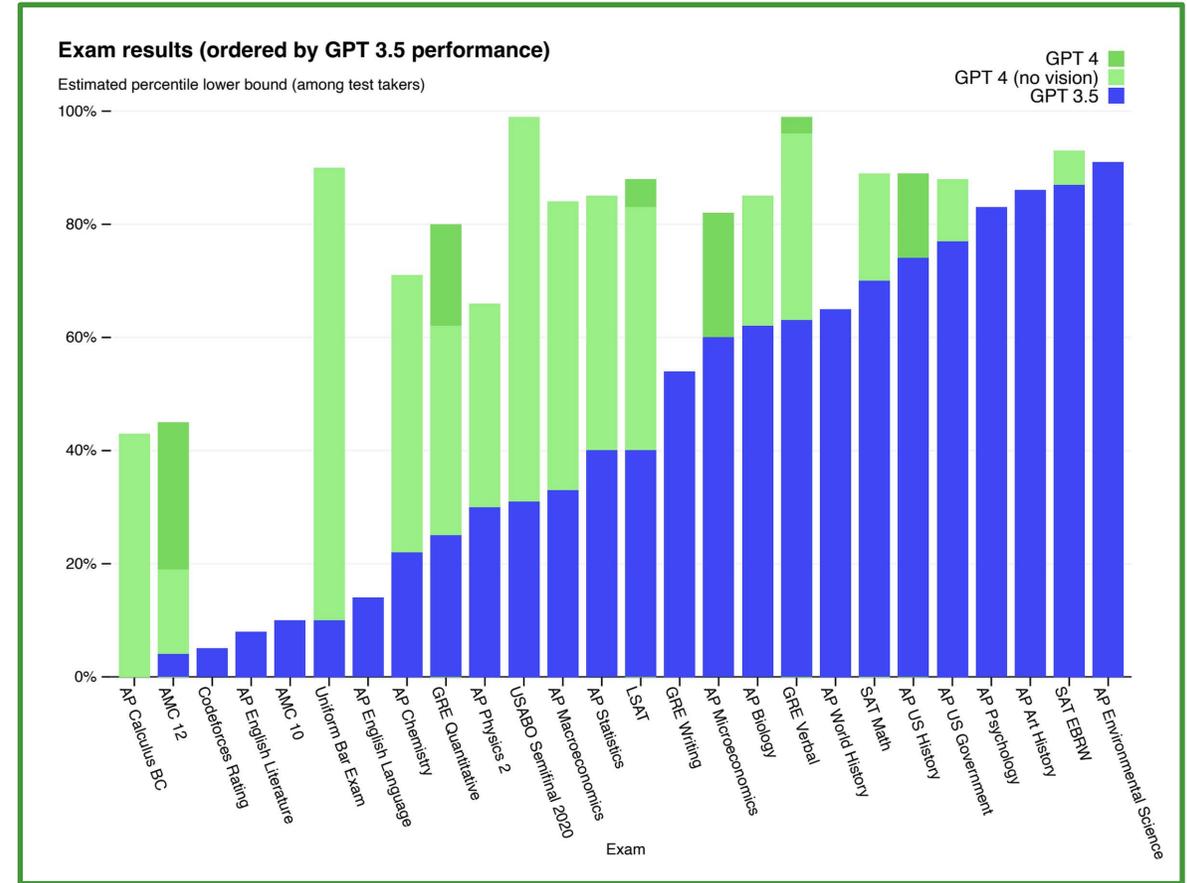
Bard seeks to combine the breadth of the world's knowledge with the power, intelligence and creativity of our large language models. It draws on information from the web to provide fresh, high-quality responses. Bard can be an outlet for creativity, and a launchpad for curiosity, helping you to explain new discoveries from NASA's James Webb Space Telescope to a 9-year-old, or learn more about the best strikers in football right now, and then get drills to build your skills.





# GPT-4

- Released on March 14, 2023
- GPT-4 is a large multimodal model (emphasis on multimodal), it can accept both text and image inputs and output human-like text
- The new model is more capable in terms of reliability, creativity, and even intelligence as seen by the higher performance on benchmark exams above





# GPT-4

- OpenAI's own technical report is NOT transparent or "open"
- The sole author of the report is listed as the company rather than specific researchers
- "Given both the competitive landscape and the safety implications of large-scale models like GPT-4, this report contains no further details about the architecture (including model size), hardware, training compute, dataset construction, training method"
- Complete 180 from OpenAI's founding principles as a nonprofit, open-source entity





# Benefits of AI Tools

- Quick information
  - Don't have to sift through millions of hits
- Often a great first draft
  - “Draft” is a great description
- Unparalleled knowledge
  - With some limitations
- Free
  - For now
  - ChatGPT already has a paid model





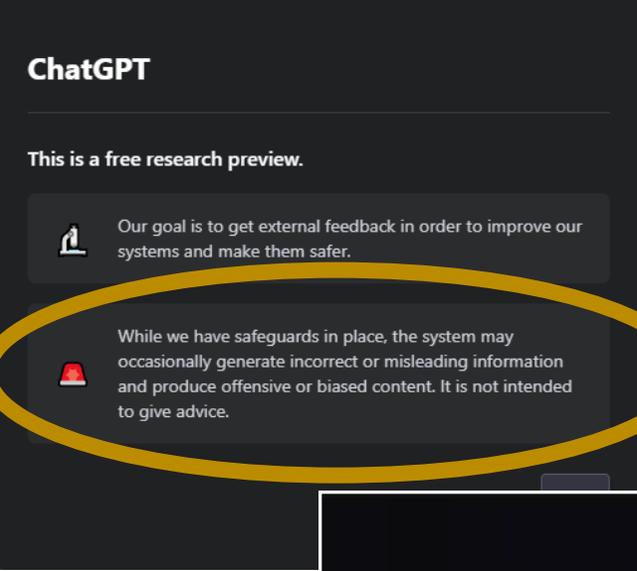
# Concerns with AI Tools

- With ChatGPT, data cut-off in 2021
  - Does not have the most recent data
  - This will change, but will come at a huge cost
- Often wrong but overly confident

Examples	Capabilities	Limitations
"Explain quantum computing in simple terms"	Remembers what user said earlier in the conversation	May occasionally provide incorrect information
"Got any creative ideas for a 10 year old's birthday?"	Allows user to provide follow-up corrections	May occasionally produce harmful instructions or biased content
"How do I make an HTTP request in Javascript?"	Trained to decline inappropriate requests	Limited knowledge of world and events after 2021



# Concerns with AI Tools



**ChatGPT:**

- Against the death penalty
- Pro-abortion
- For a minimum wage
- For regulation of corporations
- For legalization of marijuana
- Pro gay marriage, immigration, sexual liberation, environmental regulations, and for higher taxes on the rich.

- Bias
  - Technology is powered by human generated information, which is inherently biased
  - Some technology (ChatGPT) is also trained by humans training what those humans think is the “best” answer
- The publication Reason scientifically analyzed ChatGPT responses and found it to be left leaning



# Concerns with AI Tools

- What happens to data input?
  - Depends on tools
  - May end up training the AI
  - We know it can be viewed
- Used for nefarious purposes
  - Like all disruptor technologies, bad people will find bad uses
- Coming for your job?
  - How many video store employees do you know?
  - What's the last time you bought a CD?
  - How close is the Fotomat to your house?

## 5. Who can view my conversations?

- As part of our commitment to safe and responsible AI, we review conversations to improve our systems and to ensure the content complies with our policies and safety requirements.

## 6. Will you use my conversations for training?

- Yes. Your conversations may be reviewed by our AI trainers to improve our systems.





# Concerns with AI Tools

In AI, a hallucination or artificial hallucination is a confident response by an AI that does not seem to be justified by its training data.



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# Concerns with AI Tools

- Man sued the airline Avianca, injured when a metal serving cart struck his knee during a flight to JFK International Airport
- Martinez v. Delta Air Lines, Zicherman v. Korean Air Lines, and Varghese v. China Southern Airlines, discussing federal law and “the tolling effect of the automatic stay on a statute of limitations”

The New York Times

## *Here's What Happens When Your Lawyer Uses ChatGPT*

A lawyer representing a man who sued an airline relied on artificial intelligence to help prepare a court filing. It did not go well.

Anyone who has worked designing products knows that users don't read *anything*—warnings, footnotes, any form of microcopy will be studiously ignored. This story indicates that even lawyers won't read that stuff!

People **do** respond well to stories though. I have a suspicion that this particular story is going to spread far and wide, and in doing so will hopefully inoculate a lot of lawyers and other professionals against making similar mistakes.

- Simon Willison, Programmer



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# Concerns with AI Tools

- In March 2023, more than 1,000 tech leaders and researchers signed an open letter calling for six month moratorium on the development of AI
- Days later the Association for Advancement of Artificial Intelligence published a letter warning of the risks of AI, including Microsoft's Chief Scientific Officer
- May 29, 2023, Center for AI Safety released a statement signed by executives from OpenAI and DeepMind, Turing Award winners, and other AI researchers

***'The Godfather of A.I.' Leaves Google and Warns of Danger Ahead***

For half a century, Geoffrey Hinton nurtured the technology at the heart of chatbots like ChatGPT. Now he worries it will cause serious harm.

**"I think it's quite conceivable that humanity is just a passing phase in the evolution of intelligence.**

- Geoffrey Hinton

*Mitigating the risk of extinction from AI should be a global priority alongside other societal-scale risks such as pandemics and nuclear war.*



# Concerns with AI Tools

- AI is likely to reduce income going to low-skilled labor, increasing inequality in society
- AI-induced productivity growth would cause employment redistribution and trade restructuring, leaving to increased inequality both within countries and between them
- “What humans can do in the AI era is just to be human beings, because this is what robots or AI cannot do.”
  - Jeffrey Sachs, economist





# Policy on Artificial Intelligence Tools

\*This Policy will be updated as needed as AI tools and related use cases evolve. AI Users are responsible for compliance with this Policy as in effect at the time of AI use.

**Purpose:** This policy should set out guidelines for use of AI by the Firm's employees that will use this technology.



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# Policy on Artificial Intelligence Tools

**Purpose (continued):** The policy should help ensure that the use of AI tools in connection with client and Firm matters is ethical, efficient, and complies with applicable laws, regulations, rules, and codes of professional conduct, as well as client contractual obligations.





# Policy on Artificial Intelligence Tools

**Scope:** The policy should apply to all employees using AI tools for the Firm.





# Policy on Artificial Intelligence Tools

## Legal and Ethical Considerations

Legal professionals must always consider the legal and ethical implications of using AI tools in their work.

Legal professionals may not use AI tools in place of the exercise or application of individual's own professional judgment or work product.





# Policy on Artificial Intelligence Tools

## Privacy and Privilege Considerations

AI users must not transmit data that identifies a client or other individual or a client's confidential information to a third-party AI tool.





# Policy on Artificial Intelligence Tools

## Quality Control

By their own admission, AI tools may generate incorrect information. This problem is exacerbated by the air of confidence and authority with which results are generated. Additionally, many early forms of AI tools have been determined to contain biased information and produce biased results. All AI users must make reasonable efforts to help ensure that the AI tools they use are generally accepted to be accurate and reliable, and critically review the results returned for accuracy and completeness.





# Policy on Artificial Intelligence Tools

## Training and Expertise

Businesses should provide training to AI users on the use of AI tools. All AI users are responsible for taking reasonable steps to ensure they are familiar with the capabilities and limitations of the AI tools and understand how to interpret and use the output generated by the AI tools.





# Policy on Artificial Intelligence Tools

## Client Communication

Legal professionals are encouraged to discuss the benefits and limitations of AI tools with clients in advance of using AI tools for client-related work.



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# Policy on Artificial Intelligence Tools

## Data Security

AI users must take steps to help ensure that all data used to train and operate the AI tools is secure and protected from unauthorized access or use. AI users must comply with all applicable data protection and privacy laws and take reasonable steps to help ensure that the data used to train and operate AI tools is accurate, relevant, unbiased, and up-to-date.





# Policy on Artificial Intelligence Tools

## Record-Keeping

AI users shall use reasonable efforts to keep accurate records of their use of AI tools, the instructions given to the AI tools, the output generated by the AI tools, and any follow-up research and analysis related to such output.





# Policy on Artificial Intelligence Tools

## Continuous Improvement

AI users must continually evaluate the effectiveness of the AI tools they use, take reasonable steps to update their knowledge of technological developments with those AI tools, and seek to improve their use of the AI tools.





# Policy on Artificial Intelligence Tools

## **Enforcement**

Violations of the policy should result in disciplinary action, up to and including termination of employment.





# AI & Federal Procurement

## **AI Will Impact Every Aspect of the Procurement Process**

- Contract Inception
- Solicitation and Contract Drafting
- Vetting Vendors
- Pricing
- Day-to-Day Performance
- Administration
- False Claim Act Actions





# AI & Federal Procurement

## Current Examples of Agency Use of AI in Procurement

- Department of State issued a Request for Information in June 2023 regarding the use of AI to write contracts
- Department of Defense has a working prototype program to draft contracts using AI
- Internal Revenue Service uses AI to review solicitations and contract documents for missing or outdated contract clauses
- Health & Human Services uses AI to identify discrepancies in prices paid for similar goods





# AI & Federal Procurement

## **AI Will Become a Valuable Tool for Federal Contractors**

- Identifying Ideal Contracts for the Company
- Creating an Ideal Company for a Contract
- Proposal Drafting
- Pricing
- Subcontractor Management
- Compliance





# AI & Federal Procurement

## What Federal Contractors Can Use AI?

- Short Answer: Everyone can use free programs like ChatGPT
- Longer Answer: A more limited number of companies have the advanced programs necessary to fully take advantage of the benefits of AI
- Longest Answer: Overtime, smaller companies may get squeezed out because of a technical disadvantage





# AI & Federal Procurement

## Federal Contractor Risks & Risk Management

- Risks:
  - Inaccurate Information
  - Biased Output
  - Human Error
- Risk Management
  - Clear Company Policy on AI
  - Training on Use of AI





# AI & Federal Procurement

## Will the Robots Replace Us?

- Federal Contractors – Estimated 5% AI Replacement
- Government Contract Specialists – Estimated 60% AI Replacement
- Procurement Specialist – Estimated 50% AI Replacement
- Contract Administrator – Estimated 30% AI Replacement
- Contract Analyst – Estimated 15% AI Replacement

Source: [www.theresanaiforthat.com](http://www.theresanaiforthat.com)



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# AI & Federal Procurement

## Federal Government Procurement of AI

- Improved Government Understanding of How to Use AI
- Over \$3.3B in Federal Contracts in 2022
- Examples:
  - Full scope project for Chief Digital and Artificial Intelligence Office
  - USDA use of AI in understanding agricultural holdings
  - DHS use of AI to address supply chain issues





# AI & Federal Procurement

## Risks of Government Use of AI

- Skynet?
- Weighting Models
- Access
- Data Sources/Fake Information
- Spillage





# AI & Federal Procurement

## The Human Flaw in Artificial Intelligence

- Training Issues
- Data Classification Issues
- Assigning “Blame”



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# AI & Federal Procurement

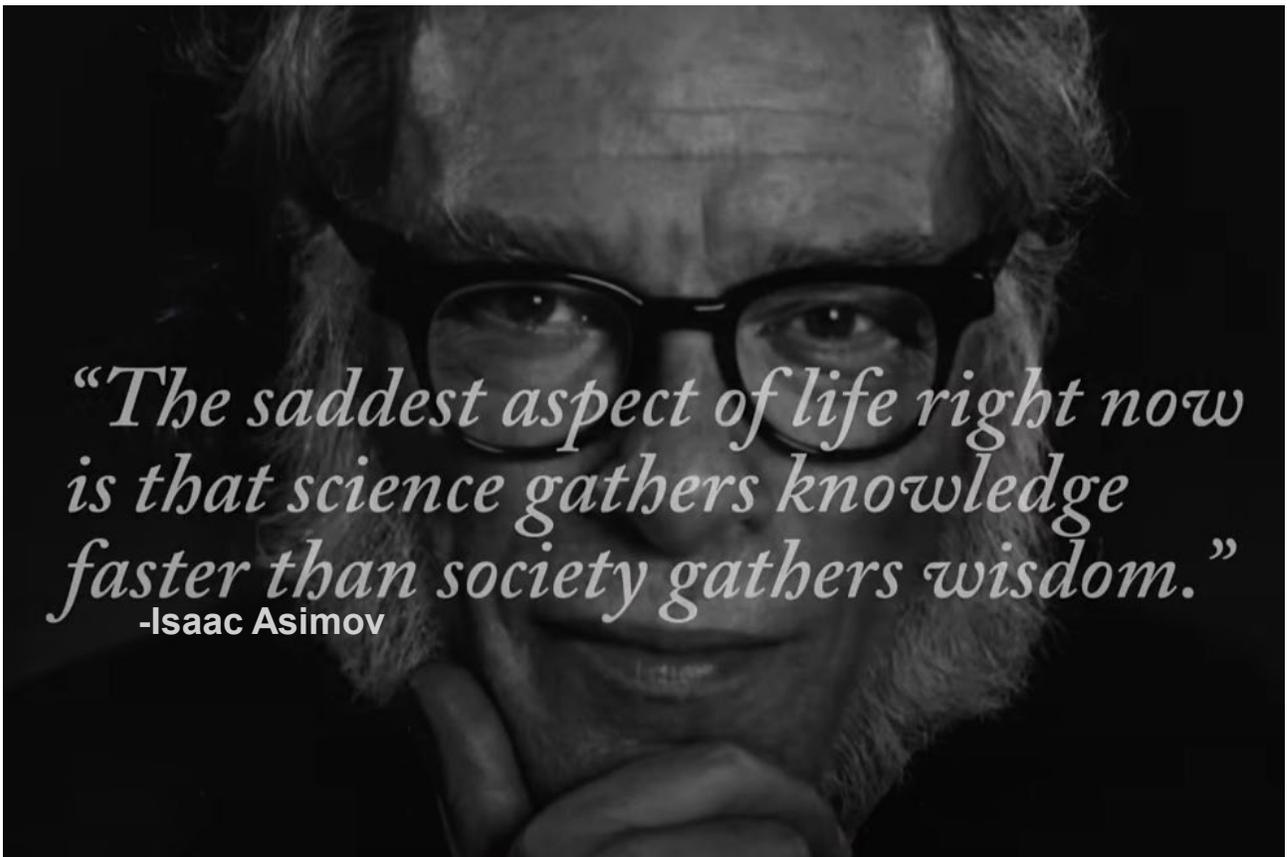
## **Government AI – Impact of User**

- User Bias
- Agency Compartmentalization of Data
- AI Programs “Learn” From its Users





# Questions



### ChatGPT

☀ Examples	⚡ Capabilities	⚠ Limitations
"Explain quantum computing in simple terms" →	Remembers what user said earlier in the conversation	May occasionally generate incorrect information
"Got any creative ideas for a 10 year old's birthday?" →	Allows user to provide follow-up corrections	May occasionally produce harmful instructions or biased content
"How do I make an HTTP request in Javascript?" →	Trained to decline inappropriate requests	Limited knowledge of world and events after 2021

ChatGPT Feb 13 Version. Free Research Preview. Our goal is to make AI systems more natural and safe to interact with. Your feedback will help us improve.



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# Changes in DOJ's Enforcement: Preparing for Increased Government Scrutiny and Oversight

Sean Milani-Nia, Partner – Fox Rothschild



# Why are We Here?

- Significant penalties
  - Suspension/debarment from federal contracting;
    - First mitigating factor is whether contractor had effective standards of conduct and internal control systems
  - 3x Damages
  - Criminal penalties (including jail-time)
- Effective Compliance Program can prevent potential misconduct and reduce penalties
  - Strength of compliance program, or lack thereof, is a significant factor considered





# Increased Government Scrutiny

## Procurement Collusion Strike Force (2019)

- As of October 1, 2023
  - **31k** agents and procurement officials trained
  - **115** investigations opened
  - **50+** guilty pleas and trial convictions
  - **\$60 M** in criminal fines and restitution

## 2022 False Claims Act Settlements

- \$2.2 Billion+
- **351** settlements and judgments
- Second highest number of settlements and judgments in a single year

## Monaco Memo

- Suggests increase in enforcement actions, greater focus on individual actors, and more timely enforcement actions





# Code of Business Ethics and Conduct

FAR 52.203-13 - within 30 days after contract award, Contractors must establish a written code of business ethics and conduct (Code) and make it available to each employee engaged in the performance of the contract.

Contractors must:

- Exercise due diligence to prevent and detect criminal conduct
- Promote an organization culture that encourages ethical conduct and commitment to compliance with the law
- Disclose timely in writing “credible evidence” of violation of criminal law involving fraud, conflict of interest, bribery, or gratuity violations and violations of the civil False Claims Act



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# First Requirement: Ethics Code

The Code should address the following:

- False Claims Act
- Illegal and Improper Payments
- Anti-Kickback Act
- Anticompetitive Policy
- Procurement Integrity
- Anti-Retaliation and Whistleblower Policy
- Conflicts of Interest
- Prohibited Personal Actions
- Meals, Social Activities, Gifts, & Favors
- Recruitment of Government Personnel
- Buy American Act and Trade Agreements Act
- Cybersecurity Compliance
- Small Business Utilization
- Workplace Safety





# Second Requirement: Establish Ongoing Compliance Program

Must take reasonable steps to educate principals and employees:

- Communicate “periodically” and in a “practical manner”
  - Conduct training programs
  - Disseminate information regarding roles and responsibilities





# Third Requirement: Internal Control System

Must establish procedures to:

- Monitor and detect improper conduct
- Conduct periodic reviews of business practices
- Establish confidential hotline for reporting
- Ethics checks for new principals
- Ensure corrective measures carried out – disclose and discipline





# Mandatory Disclosures

Must timely disclose “credible evidence” of improper conduct, in writing, to the agency Office of the Inspector General, with a copy to the contracting officer involving:

- Criminal Violations including:
  - Fraud
  - Bribery
  - Gratuities
- Violations of the civil False Claims Act





# What is DOJ Evaluation of Corporate Compliance Programs (ECCP)?

- DOJ guidance to assist prosecutors in evaluating corporate compliance programs in making decisions on resolutions, monetary penalties sought, and compliance obligations in a criminal resolution
- Evaluates whether the compliance program is:
  - Well designed;
  - Adequately resourced and empowered to function effectively; and
  - Works in practice





# Monaco Memo

- Expressed a substantial shift towards more aggressive approach
  - Increased focus on individual actors;
  - Increased pace of enforcement actions/corporate internal investigations and disclosures
- Cannot receive “full cooperation credit” unless corp. provides all relevant, non-privileged facts and evidence “on a timely basis”
  - May lose its eligibility for cooperation credit if corporation delays disclosure of significant facts
- To receive full cooperation credit, must provide all information concerning all persons involved in corporate misconduct regardless of their position, status or seniority





# Monaco Memo

- Evaluation of Corporation's Compliance Program
  - “Although an effective compliance program and ethical corporate culture do not constitute a defense to a prosecution of corporate misconduct, they can have a direct and significant impact on a corporation's potential resolution with the Department”
  - “Evaluate the corporation's commitment to fostering a strong culture of compliance at all levels of the corporation – not just within its compliance department”
- Directs prosecutors to consider:
  - Compensation Structures that Promote Compliance
  - Use of Personal Devices and Third-Party Applications
- Requires each DOJ component that prosecutes corporate crime and develop a formal voluntary self disclosure policy





# Monaco Memo

- Compensation Structures
  - Impose financial penalties / incentivize compliant conduct
  - Are non-disclosure agreements or non-disparagement provision in compensation agreements, severance agreements, etc., used to inhibit public disclosure of criminal misconduct?





# Monaco Memo

- Use of Personal Devices and Third-Party Applications
  - Use of personal smartphones, tablets, laptops, and other devices poses significant compliance risks – both to monitor use for misconduct and recover relevant data during a subsequent investigation
  - Has the company implemented policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved?
  - All corporations with robust compliance programs should have effective policies governing the use of personal devices for corporate communications – and should provide clear training to employees about such policies





# Is the Program Well Designed?

## Risk Assessment

- Risk Management Process
  - Is it designed to detect and prevent the types of misconduct most likely to occur?
    - Procurement Collusion Strike Force
    - No cookie cutter programs
- Risk-Tailored Resource Allocation
  - Police high risk or low risk areas?
  - Greater scrutiny to high-risk transactions?
- Updates and Revisions
  - Subject to periodic review and updates?
- Lessons Learned
  - Process for tracking and incorporating lessons learned from own or other companies in same area?





# Is the Program Well Designed (Cont.)?

- Policies and Procedures
  - Design – what is the process for designing and implementing new policies? Who is involved and consulted?
  - Comprehensive – efforts to monitor and update based on changes in risks and legal/regulatory changes?
  - Accessibility – How available is it? Barriers – linguistic or otherwise?
  - Gatekeepers - What training has been provided to those with approval authority/certification responsibilities?





# Is the Program Well Designed (Cont.)?

- Training and Communications

- Risk Based Training – tailored training for high-risk employees/areas.
- Form/Content/Effectiveness of Training
  - Online/in-person
  - Q&A opportunity
  - Testing
- Availability of Guidance – do employees know where to go with questions and concerns?





# Is the Program Well Designed (Cont.)?

## Confidential Reporting Structure and Investigation Process

- “Confidential reporting mechanisms are highly probative of whether a company has established a corporate governance mechanism that can effectively detect and prevent misconduct”
- Effectiveness of the Reporting Mechanism
  - How is reporting mechanism publicized? Has it been used? Testing on knowledge of reporting and use?
- Properly Scoped Investigation by Qualified Personnel
  - How does the company determine which complaints/red flags merit further investigation
  - Develop guidelines for when and how to investigate types of complaints
- Investigation Response – timing metrics to ensure responsiveness?
- Resources and Tracking of Results
  - Adequately funded?
  - Tracking results to identify patterns of misconduct or other red flags?
  - Testing of reporting system? Track report from start to finish





# Is the Program Well Designed (Cont.)?

- Third Party Management
  - “A well-designed compliance program should apply risk-based due diligence to its third-party relationships”
  - Appropriate Controls
    - Process to ensure contract terms specify work performed, payment terms appropriate, and the work was performed?
  - Real Actions and Consequences
    - Track red flags identified during diligence?





# Adequately Resourced and Empowered?

- Adequately Resourced and Empowered?
  - Commitment by Senior and Middle Management
  - Autonomy and Resources
  - Incentives and Discipline





# Adequately Resourced and Empowered?

- **Commitment by Senior and Middle Management**
  - Emphasize compliance in high leverage situations
  - Compliance sessions with the Board
  - Include management in messaging about compliance

“Company’s top leaders – the board of directors and executives – set the tone for the rest of the company”





# Adequately Resourced and Empowered? (Cont.)?

- Autonomy and Resources
  - Structure – where is the compliance function house, to whom does compliance report, designated chief compliance officer?
  - Seniority and Stature – how does compliance compare with other strategic functions in the company?
    - Status, compensation levels, rank/title, reporting line, resources, access to decision makers
  - Experience and qualifications
  - Funding and Resources – sufficient staffing? Denied requests for resources?
  - Autonomy – Access to board of directors / how does the company ensure independence and control?





# Adequately Resourced and Empowered? (Cont.)?

- Compensation Structures and Consequence Management (NEW)
  - Hallmark of effective implementation of compliance program is incentives and disincentives
    - Types of disciplinary actions available to management
    - Consistent application
    - Transparency
  - Compensation structures play important role
    - Consider whether a company has incentivized compliance (defer/escrow compensation tied to conduct consistent with values)
    - Contract provisions that permit company to recoup previously awarded compensation if individual is responsible for corporate wrongdoing
    - Rewards, promotions, bonuses for improving compliance program or demonstrating ethical leadership
      - Is Compliance a significant metric for bonuses?





# Does the Compliance Program Work in Practice

## Does the Compliance Program Work in Practice

- Continuous Improvement, Periodic Testing, and Review
- Investigation of Misconduct
- Analysis and Remediation of Any Underlying Misconduct
- Perfection is not the standard. No compliance program can prevent all criminal activity.





# Does the Compliance Program Work in Practice (Cont.)

- Continuous Improvement, Periodic Testing and Review
  - Must evaluate adequacy of the program at the time of the offense and charging decision/resolution
  - Failure to update compliance program to prevent misconduct before charging decision will be viewed very negatively
  - Evolving updates
    - Updated risk assessments and reviewed policies and procedures?
    - Application of lessons learned?
  - Culture of Compliance – how often does the company measure its culture of compliance?





# Does the Compliance Program Work in Practice (Cont.)

- Investigation of Misconduct
  - Properly Scoped Investigation by Qualified Personnel
    - Proper training
    - Avoid conflicts of interest
    - Document steps and conclusions
  - Response to Investigations
    - Process for responding to investigative findings? How high do the findings go?
  - Independence and Empowerment





# Does the Compliance Program Work in Practice (Cont.)

- Personal devices
  - Consider corporation policies governing use of personal devices, communications platforms, and messaging applications
  - How does the company manage and preserve information?
    - BYOD – what are the policies governing preservation of and access to corporate data and communications on personal devices – including data on messaging platforms?
  - What are the consequences for employees who fail to comply with the policy?
  - Prosecutors will not simply accept a company's inability to produce messages from personal devices





# Analysis and Remediation of Underlying Misconduct

- Company is required to evaluate root cause of misconduct and timely and appropriately remediate
  - Root cause of misconduct
  - Prior weaknesses – where controls failed?
  - Payment systems – how was misconduct funded?
  - Prior indications – were prior opportunities to identify misconduct missed? Why?
  - Remediation – what specific changes has the company made to reduce risk?
  - Accountability





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# **Contractor Compliance and Internal Investigations: Practical Strategies for 2023 and Beyond**

Diana Lyn Curtis McGraw, Partner – Fox Rothschild

Nicholas T. Solosky, Partner – Fox Rothschild

Amy Yurish, Managing Director - J.S. Held LLC



# Overview

- DOJ Perspectives
- Triggering Events
- Conducting an Investigation
- Best Practices





# There is a new sheriff in town!

## Key Takeaways

- (1) Timeliness of self-reporting
- (2) Develop policies and procedures to quickly engage the right people
- (3) Re-evaluate programs and policies to ensure effectiveness

Department of Justice announced a series of updates to its guidance related to compliance programs:

- Evaluation of Corporate Compliance Programs,
- Voluntary Self-Disclosure Policy;
- Revised Memorandum on Selection of Monitors in Criminal Division Matters, and
- The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks

The DOJ is focused on incentivizing corporations with strong compliance programs that are tested, effective, adequately resourced, and fully implemented.





# Dept. of Justice

## Key Takeaways

(1) Implement robust compliance programs

(2) Review internal controls related to investigating reported misconduct

(3) Reconsider internal benchmarks for voluntary self-disclosure

- **Self report!**
- DOJ perceives self-disclosure as “a sign that the company has developed a compliance program and fostered a culture to detect misconduct and bring it forward”
- Self reporting saves money: less fines, penalties, and costs (and you may receive credits)
- Self-reporting preserves goodwill
- Don’t just check boxes





# DOJ - Specific Issues

Aerojet Rocketdyne:  
\$9M settlement in  
July 2022 for  
cybersecurity  
violations

- ← • Cybersecurity: vast majority of government contracts contain cybersecurity requirements

Business acquisitions  
may alter status as a  
small business – stay  
up to date

- ← • Small business fraud: small businesses often lack robust compliance departments

Baseline understanding  
of domestic preferences  
can avoid violations

- ← • Buy American Act: DOJ continues to enforce false certification of domestic sourcing





# DOJ Evaluation of Compliance Programs: Three Fundamental Questions

- Is the corporation's compliance program well designed?
- Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
- Does the corporation's compliance program work in practice?

U.S. Dept. of Justice, *Evaluation of Corporate Compliance Programs* (March 2023)



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# DOJ Evaluation of Compliance Programs



- Successful programs require commitment by senior and middle management
- Compliance programs require autonomy, authority, and resources
- Assess adequacy of incentives for compliance, and consequences for non-compliance
- A well-designed program is useless if it does not function **in practice**
- Programs must evolve over time to address emerging issues, such as cybersecurity





# DOJ Procurement Collusion Strike Force



- Response to large spending bills: Infrastructure Investment and Jobs Act, Inflation Reduction Act of 2022, and the Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022
- Concerns over bid rigging, customer allocation, and price fixing
- Four law enforcement entities added in 2022: Offices of Inspector General for the U.S. DOE, DOI, DOT, and EPA
- Investigations are essential to maintain compliance in the face of heightened DOJ scrutiny





# Recent Example of DOJ Enforcement



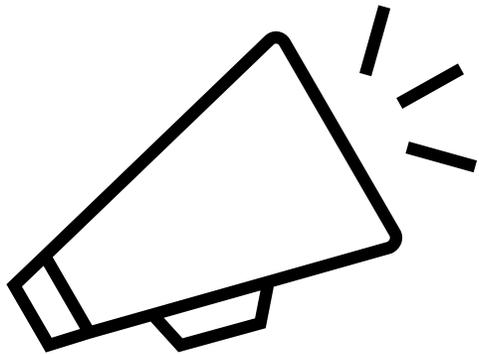
- False Claims Act settlement with Victory Automotive Group (VAG)
- VAG knowingly provided false information in support of a Paycheck Protection Program loan forgiveness application
- \$9M payment to resolve allegations
- Application claimed small business status with fewer than 500 employees
- In truth, VAG shared control with dozens of other entities – over 3,000 employees in total

*U.S. Dept. of Justice, Victory Automotive Group Inc. Agrees to Pay \$9 Million to Settle False Claims Act Allegations Relating to Paycheck Protection Program Loan (Oct. 11, 2023)*





# Triggering Events



- Employee complaints and whistleblower reports: establish internal mechanisms such as hotlines that ensure anonymity
- Retaliation concerns may cause employees to hesitate before reporting – retaliation is prohibited by state and federal law!
- Foster an environment that promotes reporting
- Incorporate existing audit and financial report procedures into future compliance efforts





# Conducting an Investigation

- Choosing a Team
- Soft Skills
- Witness Interviews
- Upjohn
- Reporting
- Mandatory Disclosures
- Cooperation Credit





# Choosing a Team



- Internal investigators or outside counsel?
- Internal investigators may have rapport with witnesses – on the flip side, this may threaten neutrality
- Outside counsel upholds neutrality, but may lack working knowledge of the company
- Balance these interests to determine the proper approach for your investigation
- Consider investigators' experience, previous employment, and relationship with prosecutors





# Soft Skills

## Attention to Detail

Document review  
Identifying patterns  
Creating a timeline of events

## Objectivity, Free of Bias

Don't jump to conclusions  
Investigators must remain neutral  
Keep an open mind

## Interpersonal Skills

Build rapport  
Witnesses are nervous  
Elicit information

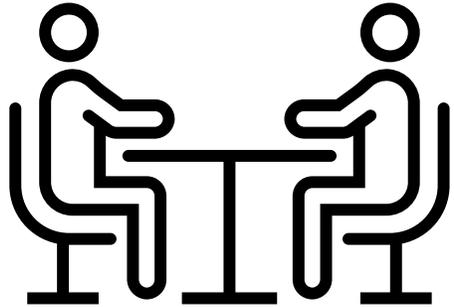
## Good Judgement of Character

Assess credibility of sources  
Actively listen  
Read the room





# Witness Interviews



- Not all witnesses are forthcoming
- Identify key documents *before* conducting interviews
- Documents can be used to corroborate, or refute, witness claims
- Generally, save important interviews for last – build information as you go
- In-person interviews are best
- Research witnesses beforehand – don't go in blind





## Investigators must inform corporate interviewees of the scope of the investigation and representation

Explanation of general subject matter and retention of legal counsel

Clear notice that attorney represents company, **not the interviewee**

Statement that interview is confidential and privileged, but the privilege belongs to company employer

Explanation that company may choose to waive privilege to third parties

Direction that interviewee should treat interview as confidential

Opportunity for interviewee to ask questions about these recitals and confirmation of understanding

*Upjohn Co. v. United States*, 449 U.S. 383 (1981)



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# Upjohn Cont.



- Failure to provide *Upjohn* warnings could lead to:
- (1) company client losing exclusive right to privilege;
- (2) loss of cooperation credit in connection with DOJ investigation; and
- (3) discipline by attorney's local bar for violation of professional conduct
- In short: be precise and diligent with *Upjohn* warnings





# The Report

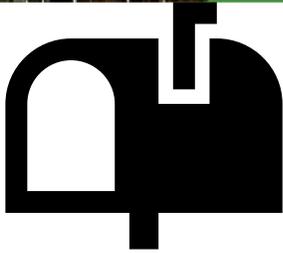


- Privilege and work-product protection is not automatic
- If purpose of report is to provide legal advice, privilege will likely apply
- Burden to protect document is on party seeking privilege
- Avoid inadvertent waiver of protections
- **Note: providing report to DOJ will likely waive protections – not all courts recognize selective waiver**
- Ask the government for a subpoena or confidentiality agreement!





# Mandatory Disclosures

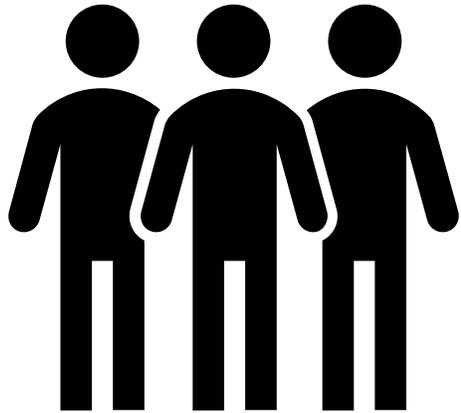


- Obligation to timely report credible evidence of federal criminal law violations (fraud, conflicts of interest, bribery, gratuity violations, or False Claims Act)
- Obligation to report evidence of significant overpayments received – obligation lasts **three years** after final payment!
- Mischarging labor and material will continue to be the focus of mandatory disclosures
- Email, hand delivery, or physical mail – **must be in writing**





# Cooperation Credit



- Mitigating factor
- Credit for cases that are otherwise appropriate for indictment/prosecution
- Must identify all individuals substantially involved in or responsible for misconduct
- Individual culpability and accountability is a DOJ priority
- Undue or intentional delay = credit reduction (or worse, elimination)





# Investigations Checklist

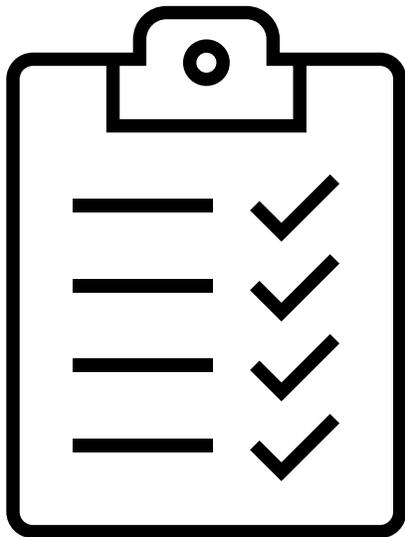
Is an investigation necessary? When should it be conducted?	In-house or outside counsel?	Do we need consultants?	To whom will investigators report?	How do we establish (and maintain) attorney-client privilege and work product protection?	Where do we begin document review, and how do we monitor it?
Should we enter a joint defense agreement?	What are employee expectations of privacy in their work-related documents?	How do we initiate employee interviews?	Should we retain (and pay for) individual counsel for employees?	Should we take corrective action against the wrongdoer? How?	How do we prepare a final report? Should we report to the government?

Last, but not least: are our current policies good enough?





# Recommended Practices



- Corporate Investigative Counsels should discover essential facts using investigative, technological, and professional techniques
- Raise matters that expand the scope of the initial inquiry
- Standardize reporting procedures and protocols before and during an investigation
- Monitor compliance with litigation holds
- Retain experts and consultants as needed
- For a complete list, see American College of Trial Lawyers, *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations* (Aug. 2020)





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# Networking Break

2:45 – 3:00 pm



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# Navigating Section 301 Tariffs on Chinese Products

Current State of the Trade War Between China  
and the United States

Lizabeth Levinson, Partner – Fox Rothschild

Brittney Powell, Partner – Fox Rothschild



# Overview

- Background and History of Section 301 Tariffs on China
- Previous Exclusion Process
- Current Status of Tariffs
- Section 301 CIT Appeal
- Statutory Four-Year Review
- Emerging Trade Issues





# Background

- In 2018, the Trump Administration imposed four rounds of tariffs (also called “duties”) on imports from China
- Over \$300 billion worth of products are currently subject to the tariffs. About 2/3 of all imports from China
- Duties range from 7.5 percent to 25 percent of the dollar value of the imported merchandise
- Duties are paid by the U.S. importer, not by the Chinese exporter. Wide range of industries impacted -- steel, aluminum, plastics, agricultural products, auto parts, chemicals, flooring, textiles, consumer goods etc.
- To date, the Biden Administration has retained all tariffs





# What is Section 301?

- President Trump relied on Section 301 of the U.S. Trade Act of 1974 (19 U.S.C. § 2411) to support the imposition of duties
- Section 301 authorizes the President to take action against a foreign government that violates international trade agreements or engages in conduct that is unjustified, unreasonable or discriminatory and that burdens or restricts U.S. commerce
- The Office of the U.S. Trade Representative found that China's acts, policies, and practices related to technology transfer, intellectual property, and innovation were unreasonable or discriminatory and burdened or restricted U.S. commerce





# Exclusion Process

- To mitigate injury to certain U.S. industries, the Office of the U.S. Trade Representative introduced a policy allowing U.S. companies to ask for an exclusion from the tariffs
- Each request for exclusion was considered individually, after both written and detailed oral submissions
- Our clients were at the forefront of this war and have the battle scars to show it. We obtained many exclusions for several clients who came to Washington to plead their cases, but most exclusions have now expired. Lots of chatter among renewal
- The role of USTR was very controversial, .Some Members of Congress have questioned USTR's ability to pick "winners & losers" by granting or denying requests. Very little insight on why the USTR chose to grant certain requests, but deny others





# Court Challenge

- Over 4000 importers who paid Section 301 have sought refund of those duties through litigation at the U.S. Court of Appeals in New York City
- Legal issue: whether President Trump exceeded the Congressional delegation of authority provided in Section 301 when he ordered the imposition of certain duties. Also challenged: whether the USTR had provided a meaningful opportunity for comments
- On May 16, 2023, the Court found that the imposition of the duties satisfied the terms of Section 301 and that a meaningful opportunity for comment had been granted to importers and other interested parties





# The CIT Decision

- Judge Barnett recognized that “[t]he tariffs are part of a continuation of actions taken in conjunction with ongoing negotiations with China...Vacating the determinations would disrupt a complex and evolving process that was designed by Congress to allow for ongoing negotiations. For now, the court declines to unscramble this egg”
- Case is now pending before the U.S of Appeals for the Federal Circuit in Washington D.C.
- If importers prevail at the Court of Appeals for the Federal Circuit, the Government will be responsible for refunding over \$81 billion





# How Have Importers Coped with the Trade War?

- Tariff engineering—many importers have sought to classify their product under tariff codes numbers that are not subject to Section 301
- Many importers have put pressure on Chinese manufacturers to lower prices, thereby lowering duties
- Much customs litigation regarding whether products fall within the exclusions or not





# Four-Year Review of China Tariffs

- Section 301 of the Trade Act of 1974 mandates a review of whether the tariffs should continue after a four-year period
- Phase 1 - Concluded on September 2, 2022, receiving 489 total comments from the public (mainly domestic companies) supporting continuation of tariffs
- Phase 2 – Interested parties objecting to continuation of tariffs were able to comment between November 15, 2022 – January 17, 2023. Received nearly 1,500 comments with the vast majority supporting removing tariffs





# Four-Year Review of China Tariffs

- The USTR has discretion to modify or eliminate tariffs on entire lists of products or specific products
- No timeline to conclude review of the comments. Congress informed the review would be completed sometime this fall
- Expectation is tariffs will continue in some form, perhaps with certain modifications, exclusions, etc.
- Possibility of the USTR reducing the tariffs or aligning them with the Biden Administration's priorities





# Reinstatement of Certain Exclusions

- There are currently 549 “product exclusions” that are exempt from the tariffs through December 31, 2023. They were initially set to expire on September 30, 2023, but were further extended until December 31, 2023
- Given the ongoing 4-year review, certain exclusions were reinstated that had previously expired, including certain COVID-related exclusions
- There is a possibility that the USTR will again extend current exclusions until it issues a final decision following the 4-year review
- We expect that the USTR may eventually open a new or separate product exclusion process following the 4-year review decision





# Emerging Trade Issues - UFLPA

- The Uyghur Forced Labor Prevention Act was signed into law by President Biden on December 31, 2021, after passing with overwhelming Congressional support
- The law took effective on June 21, 2022
- UFLPA creates a rebuttable presumption that all products manufactured in China's Xinjiang Uyghur Autonomous Region (XUAR or Xinjiang) – or produced by companies on a list designated by the interagency Forced Labor Enforcement Task Force - are produced with forced labor, and thus barred from entry into the United States
- Importers must present “clear and convincing evidence” the product has not been tainted by the use of forced labor. There is no *de minimis* exception





# Emerging Trade Issues - UFLPA

- From FY22-FY23 to date, CBP has detained 5,346 shipments, denying entry to 2,325 and releasing 2,033
- Top 3 industry areas: 1) Electronics; 2) Industrial and Manufacturing Metals; 3) Apparel, Footwear, and Textiles
- Originally, UFLPA's targeted products were polysilicon, tomatoes, and cotton. Target products now include automotive components, copper, steel, aluminum and their downstream products, lithium-ion and lead-acid batteries, polyvinyl chloride products, and growing
- Goods have largely been detained from Malaysia, Vietnam, China, Thailand, Mexico, among other countries





# Emerging Trade Issues - UFLPA

- Options for Detained Shipments:
  - 1) Re-Export; 2) Destroy; **3) Respond to the detention notice to demonstrate admissibility**
- 1. Importers may request an applicability review to determine that the goods are not within the scope of UFLPA
  - Provide supply chain tracing documentation to show neither finished goods nor inputs are sourced from Xinjiang and have no connection to a UFLPA Entity List party
  - Need to show the supply chain for every raw material and component.
    - Invoices, Payment Records, Transportation Documents, Production Records





# Emerging Trade Issues - UFLPA

## 2. Importers may attempt to rebut the presumption of forced labor

- Evidence of supply chain tracing
  - Chain of custody of raw material to finished goods
- Evidence of supply chain due diligence and management measures
  - Supplier codes of conduct, training, and monitoring of supplier compliance
  - Supply chain mapping and risk assessments
- Evidence showing the goods were not made with forced labor
  - Details of production workers, including wages, recruitment and internal controls, audits to identify forced labor indicators





# Emerging Trade Issues - UFLPA

- Nearly impossible to rebut the presumption
- Greater chance of success of demonstrating UFLPA does not apply to the imported goods
- U.S. companies with supply chains in China, or in SE Asia involving high-risk products/components should:
  - Understand their risk profile
  - Engage suppliers/obtain supply chain tracing information
  - Revise supplier codes of conduct and contract terms
  - Train and educate stakeholders
  - Determine whether alternate sourcing will be necessary





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**Thank you!**



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