



## DOD Revolving-Door Rule Could Lead To New FCA Claims

By **Rachel Slajda**

Law360, New York (November 18, 2011, 3:41 PM ET) -- The U.S. Department of Defense finalized a rule Friday that will require defense contractors to certify that any former DOD officials they employ are complying with federal revolving-door laws, a rule that could have implications for future False Claims Act and bid protest cases.

Under the new rule, contractors must represent that their employees are not violating any restrictions on their post-government employment. Such restrictions include, for example, barring any official involved in the award of a contract worth more than \$10 million from working for that contractor for a year after their government service. Another restriction bars executive branch employees from lobbying government agencies on issues they worked on for two years.

The new rule doesn't change the restrictions themselves, but does put responsibility more squarely in the lap of defense contractors, Peter J. Eyre, an attorney in Crowell & Moring LLP's government contracts practice, told Law360 Friday.

"Historically, this is an obligation that has focused on the individual [employees]. Now the companies really have a significant role to play because [the new requirement] is a corporate certification," Eyre said.

By bidding for contracts, companies will be representing that their employees are in full compliance with revolving-door laws. That opens the companies up to potential False Claims Act actions if their employees are alleged not to be in the right, Eyre said.

Companies hit with such actions risk losing, or being on the hook for, the entire contract. Because it's a front-end certification, any allegations of wrongdoing will certainly call into question whether the contractor would have won the contract at all without the certification.

Four companies submitted public comments on the proposed rule. Some comments argued that the new rule will force contractors to implement expensive systems to keep track of which former DOD employees must stay off which projects.

The DOD, however, waved off the concerns, noting that the requirements are nothing new. Contractors, it said, should have been keeping track all along to make sure their employees were operating within the law.

Eyre recommended that contractors begin building a way to track their employees, making sure to screen potential hires and to make sure current employees are not assigned work that would violate the law.

“This is going to be something that contractors really need to focus on,” he said. “It's not a simple analysis. ... There are many traps for the unwary.”

The rule stems out of a 2008 U.S. Government Accountability Office report, which found that defense contractors “significantly under-reported the employment of former DOD officials” and employed many of them to work on assignments related to their former positions, according to the Federal Register notice.

The new regulation also comes as part of a long push to shore up the integrity of the military's contracting system. Earlier in November, the DOD and other agencies finalized a rule requiring contractors and subcontractors bidding on contracts to report potential conflicts of interest by their employees.

Contractors protesting awards to competitors have already successfully used the revolving-door laws. In one 2009 bid protest, Health Net Federal Services LLC successfully argued, among other things, that Aetna Government Health Plans LLC had an unfair competitive advantage because of an Aetna employee who was a former government official with inside information about the contract.

Also on Friday, the DOD finalized a revision to contractor requirements regarding human trafficking. The new rule requires contracting agencies to maintain surveillance over defense contractors to make sure they are complying with human trafficking requirements.

According to the requirements, which went into effect in February 2009, contractors must inform employees of the government's zero-tolerance policy for trafficking and must report any violations immediately to the contracting officer.

--Additional reporting by Dietrich Knauth. Editing by Kat Laskowski.

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