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COMMENTARY

Introduction to the federal security clearance process (Part 2)

Attorney R. Scott Oswald of The Employment Law Group provides a comprehensive guide to federal security clearance in a two-part article. Part 2 describes the process of appealing an adverse security clearance decision for several U.S. agencies. It also gives instruction for shaping an argument against a security clearance denial or revocation.

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FALSE CLAIMS ACT

Oracle pays \$200 million to end pricing case

Software giant Oracle Corp. has paid \$199.5 million to the United States to settle a suit claiming it failed to offer government agencies the same or better prices on products it also sold to favored commercial customers.

United States ex rel. Frascella v. Oracle Corp., No. 07-CV-529, settlement announced (E.D. Va. Oct. 6, 2011).

The settlement sum is the highest ever recovered by the General Services Administration under the False Claims Act, 31 U.S.C. § 3729, according to the Justice Department.

The FCA is the government's primary tool for fighting procurement fraud.

The Justice Department says the settlement ends a lawsuit that former Oracle employee Paul Frascella filed against the company in the U.S. District Court for the Eastern District of Virginia in 2007.

He alleged Oracle violated the FCA while holding a "multiple award schedule" contract with the government.

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REUTERS/Robert Galbraith

Under an MAS contract, a contractor's products are placed in a catalog, known as the General Services Administration schedule. Federal agencies can directly order MAS-scheduled products and bypass the usual government procurement requirements.

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Introduction to the federal security clearance process (Part 2)

By R. Scott Oswald, Esq.
The Employment Law Group

DENIAL OR REVOCATION OF CLEARANCE

A candidate denied a security clearance will be notified of the reason and have an opportunity to file an appeal.¹ Each agency has its own appeal process. This section contains examples of the processes used by several departments and agencies that issue the majority of security clearances.

Department of Defense appeals process

The U.S. Department of Defense Office of Hearings and Appeals processes security clearance denials for U.S. Department of Defense components.² DOD federal employees may not be fired for denial of a clearance until the adjudication process is complete. It is very common, though, for the employee to be placed on 30 days' administrative leave with pay, followed by an indefinite period of administrative leave without pay until the matter is adjudicated.

Applicants denied a security clearance receive a "statement of reasons" from the government and may submit a rebuttal to DOHA within 20 days.³ The rebuttal must admit or deny every item in the SOR. An applicant who admits to an item in the SOR should provide extenuating or mitigating information.

An applicant who admits to an item in the statement of reasons should provide extenuating or mitigating information.

Upon receipt of the SOR rebuttal, DOHA sends the applicant a "file of relevant material." The applicant has 30 days from receipt of the FORM to submit a written response. If a review of the rebuttal or response shows that allegations are unfounded or evidence is insufficient for further processing, the DOHA will withdraw the SOR and grant or continue the clearance.

If the DOHA does not withdraw the SOR, the applicant may request a hearing before an administrative judge. The AJ then provides notice of the time and place of the hearing at least 15 days in advance. The hearing is held at a location in a major city near the applicant's place of employment or home.

The DOHA attorney and applicant may request that the opposing party provide information in advance about witnesses to appear and evidence to be presented. The applicant must appear at the hearing and may bring an attorney. Hearings are generally open, except when the applicant requests it be closed or when the AJ determines there is good cause to close the proceeding. Each party may cross-examine witnesses during the hearing, and the AJ keeps a verbatim transcript of the proceeding.

Following a hearing, the AJ will issue a written decision on the security clearance and the veracity of the allegations in the SOR. The applicant can file an appeal brief with the DOHA Appeal Board within 15 days, but the appeal board will not consider new evidence. Appeals must be based on errors made by the AJ. The appeal board may affirm or reverse any portion of the AJ's findings and may remand the case to the AJ. The DOHA Appeal Board, however, affirms most security clearance denials, and usually, their decision is final.

Once a security clearance has been denied or revoked through this process, the applicant is barred from reapplying for a clearance for one year from the date of the initial adverse clearance decision. Applicants do not have a right to appeal security clearance denials or revocations in the federal or state courts.

Department of Energy appeals process

The U.S. Department of Energy also has an Office of Hearings and Appeals, which it describes as its "quasi-judicial arm." An applicant whose security clearance is denied or revoked may ask the DOE OHA to convene an appeal panel.

The appeal panel consists of three members who are DOE headquarters employees with the highest security clearance classification. DOE's deputy chief for operations, in the Office of Health, Safety and Security, serves as a permanent member of the appeal panel as the appeal panel chairman. The second member of the panel is a DOE attorney designated by the general counsel. The head of the DOE headquarters element for which the applicant works may designate an employee to act as the third member on the appeal panel; otherwise, the third member will be designated by the chairman. Only one member of the appeal panel will be from the security field.⁴

Applicants do not have a right to appeal security clearance denials or revocations in the federal or state courts.

The appeal panel may investigate any statement or material in the request for an appeal panel review and use the information to make their final decision. The appeal panel may solicit and accept submissions that are relevant to the final decision process from either the applicant or DOE officials. The panel may establish appropriate time frames to allow for such submissions. The appeal panel may also consider other sources of information, provided both parties have an opportunity to respond. All information the appeal panel obtains becomes part of the administrative record.⁵

Within 45 work days of the closing of the administrative record, the appeal panel must render a final written decision in the case based on the administrative record, findings for each of the allegations in the notification letter and any new evidence submitted. If a majority of the appeal panel members determine it will not endanger the common defense and security and will be clearly consistent with the national interest,

Security Clearance Issues	Possible Mitigating Factors
Association with questionable organization	<ul style="list-style-type: none"> unaware of unlawful aims severed ties upon discovery
Contact with foreign citizens	<ul style="list-style-type: none"> casual and infrequent approved by U.S. security agency
Dual citizenship	<ul style="list-style-type: none"> due to foreign birth or parents' citizenship renouncing dual citizenship
Questionable sexual conduct	<ul style="list-style-type: none"> private, consensual, legal and discreet
Unfavorable financial circumstances	<ul style="list-style-type: none"> due to factors beyond control, such as job loss reacted responsibly given circumstances
Substantial debt	<ul style="list-style-type: none"> good-faith efforts to repay or resolve debt
Unexplained affluence	<ul style="list-style-type: none"> proof money came from a legal source
Illegal drug use	<ul style="list-style-type: none"> disassociation from drug-using contacts avoiding places where drugs were used appropriate period of abstinence signed statement of intent with automatic revocation of clearance for any violation
Prescription drug abuse	<ul style="list-style-type: none"> occurred after drugs were prescribed for severe or prolonged illness abuse has ceased
Psychological condition	<ul style="list-style-type: none"> participating in treatment that readily controls condition condition resolved
Period of emotional instability	<ul style="list-style-type: none"> caused by upsetting situation, such as death, illness or marital breakup situation resolved and applicant emotionally stable
Illegal act	<ul style="list-style-type: none"> coerced to commit the act and no longer associated with the coercer evidence that act was not committed
Improper handling of classified information	<ul style="list-style-type: none"> due to improper or inadequate training positive response to remedial security training
Outside employment	<ul style="list-style-type: none"> terminated employment upon learning it conflicted with security responsibilities
Information technology misconduct	<ul style="list-style-type: none"> misuse minor and done for efficiency, such as using another's password or computer when no other option was available

the deputy chief for operations will grant or reinstate access authorization for the individual. The appeal panel written decision is made part of the administrative record.⁶

Department of Homeland security appeals process

The U.S. Department of Homeland Security, which includes agencies such as the U.S. Secret Service, gives a notice of review to employees who appeal a revocation or denial of a security clearance. Employees or contractors appealing a security decision by the DHS or one of its agencies go before a security appeals board, convened by the Office of the Chief Security Officer.⁷

Department of Justice appeals process

When the U.S. Department of Justice or one of its agencies, including the FBI and

the Bureau of Alcohol, Tobacco, Firearms and Explosives, denies or revokes a security clearance, it must do the following:

- Provide the applicant with as comprehensive a written explanation for that decision as the national security interests of the United States and other applicable law permit and inform the applicant of the right to counsel at one's own expense.
- Permit the applicant 30 days from the date of the written explanation to request any documents, records or reports included in the investigative file upon which the denial or revocation was based.
- Provide the applicant copies of documents requested within 30 days

to the extent such documents would be provided if requested under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a, and as the national security interests and other applicable law permit.⁸

The applicant then files a written request for review of the determination within 30 days after written notification of the determination or receipt of the copies of the documents requested, whichever is later. The applicant then receives:

- Written notice of, and reasons for, the results of the review.
- The identity of the deciding authority.
- Written notice of the right to appeal.⁹

Within 30 days of receiving this information, the applicant or employee may appeal the determination in writing to the Justice Department's Access Review Committee, established under 28 C.F.R. § 17.15. The applicant or employee may also request an opportunity to appear personally, with an attorney or other representation, before the ARC to present relevant information.¹⁰

The ARC consists of the deputy attorney general, the assistant attorney general for National Security, and the assistant attorney general for administration, or their designees. The attorney general, however, must approve any designations.¹¹ The ARC must issue its decision "as expeditiously as possible,"¹² and its decision is final unless the attorney general "personally exercises appeal authority."¹³

CIA appeal process

When the CIA denies or revokes a security clearance, the applicant is:

- Provided as comprehensive a written explanation for that determination as the national security interests of the United States and other applicable law permit.
- Informed in this written explanation of the right to counsel at one's own expense; to request any documents, records or reports upon which the denial or revocation was based; and, to request the entire investigative file as permitted by the national security and other applicable law.
- Provided any documents, records and reports within 30 days upon request

to the extent the documents would be provided if requested under the Freedom of Information Act or the Privacy Act.

- Provided an opportunity to reply in writing to request a review of the determination within 45 days of receipt of the relevant documentation.
- Provided written notice of, and reasons for, the results of the review, the identity of the deciding authority in accordance with operational requirements and written notice of the right to appeal.
- Provided an opportunity to appeal in writing to a high level panel, appointed by the senior officials of the intelligence community, comprising at least three members, two of whom shall be selected from outside the security field. Decisions of the panel are in writing and final, except when the SOIC chooses to exercise the appeal authority personally, based on a recommendation from the panel.
- Provided an opportunity to appear personally to present relevant information before an adjudicative authority, other than the investigating entity, as determined by the SOIC. A written summary or recording of the appearance will be made part of the applicant's or employee's security record, unless it occurs in the presence of the appeals panel, in which case the written decision of the panel shall be made part of the applicant's or employee's security record.¹⁴

A senior adjudicator who reaches an unfavorable outcome upon reviewing the decision will forward a documented proposal to deny or revoke a clearance to the center chief of security. A CCS who disagrees with the decision may remand the decision to the senior adjudicator with recommendations for areas of expansion or clarification. If agreeing with the recommendation, the CCS will notify the applicant in writing.

The applicant may request a review of the decision and provide new information for consideration. The CCS must conduct another review, considering any new information provided. If, after conducting this review, the CCS continues to recommend denial or revocation, the complete case file and the CCS recommendation go to the director of Security Management Office, which may do one of the following:

- Remand the case to the CCS for further work.
- Make a favorable adjudication of the information.
- Provide written notice to the applicant of the security clearance.

If the SMO director provides notice of denial or revocation and the applicant requests an appeal, the NASA administrator will appoint the Security Adjudication Review Panel. The SARP is made up of three NASA employees who have demonstrated reliability and objectivity in their official duties. SARP members must have been the subjects of a favorable single scope background investigation, and only one of the panel members may be a security professional.

If a majority of the Energy Department appeal panel members determine it will not endanger the common defense and security, the deputy chief for operations will grant or reinstate access authorization for the individual.

This process may take up to five years, and the deciding officials will consider only new evidence directly related to the events that formed the basis of the initial decision. They will not consider any mitigating events that occurred after the initial denial.

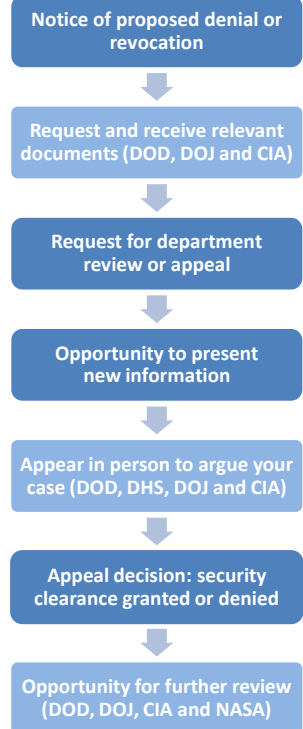
NASA appeals process

NASA follows the process laid out in its Directive 201.10 when denying or revoking a security clearance.

If the administrator believes it would be inappropriate to use a NASA security professional, an outside security expert may sit on the SARP.

Prior to finalizing the decision, a panel member or the SMO director may refer the SARP-proposed decision to the administrator for an additional level of review. If the SARP or SMO director does not request this review, the SARP's decision is final. If a review is requested, the administrator's decision is final.

Federal Security Clearance Appeals Process



PRACTICAL TIPS

Before submitting an application

Applicants might think if they forget to include information in the application, they may simply explain the error at a later point, perhaps during their interview with the investigator. The investigator, however, will likely view this omission as a deliberate attempt to conceal damaging information, which will often lead to a denial. Therefore, use care to disclose all information in the application, including potentially damaging information. If you realize that you have submitted an incomplete application, **volunteer to supplement the application before the interviewer asks you about the omission.** Once the interviewer asks about the omission, you have no longer voluntarily provided the information, which is generally considered to be a mitigating factor in a security clearance decision.

After your security clearance is granted

Everyone with a security clearance has a responsibility to inform the agency of any event that might affect eligibility to maintain that clearance, such as a criminal conviction. An agency is less likely to revoke a security clearance if the individual voluntarily discloses this information. Look to the

security clearance guidelines in Part 1 of this article for potentially disqualifying events.

If your security clearance is denied

If your security clearance is denied, you will have the opportunity to appeal the decision as explained above. After reviewing the SOR or equivalent document setting forth the reasons for the denial, collect the necessary evidence to correct any mistakes in the document. If there are no mistakes, collect evidence to prove mitigating factors for the reasons of your denial. In order to establish mitigating factors, ask yourself the following questions:

- Has a great deal of time elapsed between the conduct in question and the application for a security clearance?
- Did you voluntarily report the conduct in question?
- Did you make good-faith efforts to promptly correct any misstatements or omissions in the application?
- Was the misstatement or omission based on good-faith reliance on improper or inadequate advice by agency personnel or legal counsel?
- Have you voluntarily taken steps to change unfavorable behavior, such as substance abuse or a gambling addiction, possibly by seeking professional counseling? Are there clear indications that the behavior is changing or under control?

citizenship or birth in a foreign country? Have you expressed an interest in renouncing the dual citizenship?

- In the case of questionable sexual conduct, was the behavior in question private, consensual, legal and discreet?
- In the case of unfavorable financial circumstances, did the problems occur due to factors beyond your control, such as loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation? If so, did you react responsibly given the circumstances?
- In the case of substantial debt, did you make good-faith efforts to repay overdue creditors or otherwise resolve the debts?
- In the case of unexplained affluence, can you prove that the money came from a legal source of income?
- In the case of illegal drug use, have you demonstrated any or all of the following behaviors:
 - disassociation from drug-using associates and contacts?
 - changing or avoiding the environment where drugs were used?
 - an appropriate period of abstinence?
 - a signed statement of intent with automatic revocation of clearance for any violation?

If you realize that you have submitted an incomplete application, volunteer to supplement the application *before* the interviewer asks you about the omission.

or marital breakup? If so, has the situation been resolved and are you now emotionally stable?

- In the case of a criminal act, did someone pressure or coerce you to commit the act? If so, is this person no longer present in your life? Can you provide evidence that you did not commit the offense in question?
- In the case of improper handling of classified information, did you respond favorably to counseling or remedial security training and do you now demonstrate a positive attitude toward the discharge of security responsibilities? Was the violation a result of improper or inadequate training?
- In the case of an outside employment or activity, did you terminate the employment or cease the activity upon learning that it was in conflict with your security responsibilities?
- In the case of information technology misconduct, was the misuse minor and done only in the interest of organizational efficiency and effectiveness, for example, another person using one's password or computer when no other timely alternative was readily available?

The process may take up to five years, and the deciding CIA officials will consider only new evidence directly related to the events that formed the basis of the initial decision.

- Was the conduct in question unintentional or inadvertent and followed by a prompt, good-faith effort to correct the situation?
- In the case that you were associated with a questionable organization, were you aware of the organization's unlawful aims? Did you sever ties upon learning of the organization's unlawful aims?
- In the case of contact with foreign citizens, was the contact in question casual and infrequent? Was the contact approved by a U.S. security agency?
- In the case of dual citizenship, is this status based solely on a parent's
- In the case of abuse of prescription drugs, did the behavior in question occur after a period of severe or prolonged illness during which a doctor had prescribed the drugs? If so, have you since ceased the abuse?
- In the case of a psychological condition, is the condition in question readily controllable with treatment and are you participating in such treatment? Has the condition been resolved?
- In the case of a past period of emotional instability, was the period in question caused by a temporarily upsetting condition such as a death, illness

Why do I need an attorney?

If you are in the process of appealing an adverse security clearance decision, an attorney can assist you in framing your arguments consistent with the protocols listed above or in showing that the penalty is not consistent with your violation. You may also want an attorney to represent you at your hearing and help you prepare for that hearing by gathering evidence and presenting it in a persuasive manner.

An attorney with experience examining and cross-examining witnesses can be invaluable during a hearing. An experienced attorney may also have handled security clearance cases with your particular agency and will be

able to frame your case consistent with your agency's expectations. **WJ**

NOTES

¹ Without explicit authorization from the president or Congress, an agency may fire an agency employee or government contractor employee only after a proceeding affording safeguards of confrontation and cross-examination. *Greene v. McElroy*, 360 U.S. 474 (1959).

² DOD components include the Office of the Secretary of Defense, the Military Departments, chairman of the Joint Chiefs of Staff, directors of defense agencies and the unified and specified commands. 32 C.F.R. § 154.3(f).

³ The DOHA may grant an extension with good cause.

⁴ 10 C.F.R. § 710.29(b).

⁵ 10 C.F.R. § 710.29(e).

⁶ 10 C.F.R. § 710.29(f).

⁷ Instruction for the Office of the Chief Security Officer (Sept. 3, 2008).

⁸ 28 C.F.R. § 17.47(a).

⁹ 28 C.F.R. § 17.47(b) and (c).

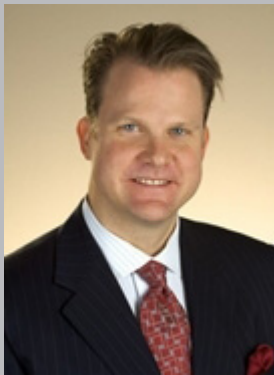
¹⁰ 28 C.F.R. § 17.47(d) and (e).

¹¹ 28 C.F.R. § 17.15(b).

¹² 28 C.F.R. § 17.47(f).

¹³ 28 C.F.R. § 17.15(a).

¹⁴ Director of Central Intelligence Directive 6/4 ANNEX D: Appeals Procedures – Denial or Revocation of Access



R. Scott Oswald is the managing principal at **The Employment Law Group** in Washington, where he litigates employment-related actions on behalf of employees, including the employees of the federal government and federal contractors. The author gratefully acknowledges the assistance of Kellee Boulais Kruse, an associate at The Employment Law Group, and Andrew Moyer, a legal assistant, in drafting the article. The author can be reached at www.employmentlawgroup.com and 888-603-0983.

Oracle

CONTINUED FROM PAGE 1

According to the terms of an MAS contract, a contractor must offer the government the same or better price as is given to the contractor's most favored commercial customer.

The government joined Frascella's suit in July 2010. It said that during contract negotiations Oracle knowingly failed to give the GSA accurate information about its commercial customer pricing.

The company made false statements about its sales practices and discounts that it gave to its private industry customers, according to the suit.

The United States also said that once Oracle obtained the MAS contract, the company did not give the government discounts that were as high as those the company's commercial customers received.

As a result the government paid higher prices for the company's products than it should have, the Justice Department said.

"To get access to hundreds of government purchasers, companies participating in the Multiple Award Schedule program must disclose their best prices," U.S. Attorney Neil H. MacBride of the Eastern District of Virginia said in a statement.

The FCA provides that private citizens who sue to alert the government to possible fraud can share in any recovery that is obtained. The Justice Department said Frascella will receive \$40 million out of Oracle's payment.

WJ

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SECURITIES LITIGATION & REGULATION

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Contractors end space center fraud case for \$22.6 million

Two companies, an executive and two federal workers will pay the United States a total of \$22.6 million to settle a lawsuit alleging they schemed to rig the award of a contract for support services at the Stennis Space Center in Mississippi.

United States ex rel. Magee v. Science Applications International Corp. et al., No. 09-CV-324, settlement announced (S.D. Miss. Sept. 29, 2011).

The Justice Department announced the settlement Sept. 29 with Science Applications International Corp., Applied Enterprise Solutions and its CEO Dale Galloway, and federal employees Stephen Adamec and Robert Knesel.

Magee, a former NAVO MSRC employee, claimed that the defendant companies and Galloway worked with Adamec and Knesel to influence the government's choice of the contract winner.

Adamec is the former director of the NAVO MSRC and Knesel is its former deputy director, according to the Justice Department.

The government joined the suit in July 2009 and with Magee alleged that Adamec and

the system to get undeserved taxpayer dollars for themselves and their friends," Assistant Attorney General Tony West of the Justice Department's Civil Division said in a statement.

Under the terms of the settlement SAIC will pay the government \$20.4 million, and Applied and Galloway will pay a total of \$2.1 million.

The Justice Department said Adamec and Knesel will pay a total of \$110,000 to resolve the case.

Magee will receive a share of the settlement proceeds. A court will determine the exact amount, according to the stipulation of dismissal.

The FCA allows whistle-blowers who alert the United States to possible fraud to share in any recovery.

Lockheed paid the government \$2 million to settle the suit in January 2011.

The contractors' payments end a False Claims Act suit filed on behalf of the government by former federal employee David Magee.

The agreement ends a False Claims Act suit filed on behalf of the government by former federal employee David Magee in the U.S. District Court for the Southern District of Mississippi in 2009.

The FCA, 31 U.S.C. § 3729, is the government's primary tool for fighting procurement fraud.

Magee alleged that SAIC, Applied and Galloway, along with co-defendant Lockheed Martin Inc., conspired to win a contract worth up to \$3.2 billion.

The contract involved providing support services for the National Center for Critical Information Processing and Storage.

The center is run by the Naval Oceanographic Major Shared Resource Center High Performance Computing Center, known as NAVO MSRC, at the Stennis Space Center in Hancock County, Miss.

Knesel shared private federal procurement information with SAIC, Lockheed and Applied so the companies, which were working as a contracting team, would have an advantage over other bidders.

The suit also said the two men gave the companies some information about the contract before the government shared that information with the rest of the bidders.

The government awarded the contract to the defendant companies in April 2004, the complaint said.

The United States paid SAIC, as head contractor, a total of \$116 million for its work, the according to the Justice Department.

"We expect those who contract for the privilege of doing the public's business to act fairly and abide by the rules, not game

Scan this code with your QR reader to see the government's first amended complaint on Westlaw.



The suit said the companies improperly calculated the royalties owed to the United States.



The payment resolves allegations that BP Amoco and its affiliates violated the False Claims Act.

REUTERS/Suzanne Plunkett

FALSE CLAIMS ACT

BP Amoco pays \$20.5 million to settle False Claims Act case

BP Amoco Corp. will pay \$20.5 million to settle a lawsuit alleging it underpaid royalties owed to the government for natural gas produced on federal land.

United States ex rel. Wright v. BP Amoco Corp. et al., No. 03-CV-264, settlement announced (E.D. Tex. Sept. 16, 2011).

The Justice Department said Sept. 16 that the payment resolves allegations that the company and its affiliates violated the False Claims Act, 31 U.S.C. § 3729.

The FCA is the government's primary tool for fighting fraud against the public fisc.

The Justice Department negotiated the settlement after joining a suit filed against BP Amoco in the U.S. District Court for the Eastern District of Texas by Harrold E. Wright, a businessman in the natural gas industry.

Wright alleged the defendants violated the FCA by knowingly under-reporting the value of the natural gas they produced on land leased from the government.

Each month lessees must report the value of natural gas produced and pay a percentage

as a royalty, according to the Justice Department.

The suit said the companies improperly deducted the cost of boosting gas up to pipeline pressure when they calculated the royalties due to the United States.

Wright also said the companies classified processed gas as unprocessed gas so they could reduce their royalty payments.

As a result, the companies paid less in royalties than they actually owed to the Interior Department, which oversees leases of government land, he said.

"Natural gas royalties provide an important source of income for the United States, Native Americans, and various states, and help support critical programs from which we all benefit," Assistant Attorney General Tony West of the Justice Department's Civil Division said in a statement.

BP Amoco Corp.'s \$20.5 million settlement also ends claims against these affiliates:

- Amoco Production Co.
- Atlantic Richfield Co.
- BP America Inc.
- BP Exploration & Oil Inc.
- Vastar

The FCA allows plaintiffs who bring fraud to the government's attention to share in any recovery. Because Wright is deceased, his heirs will receive \$5.3 million of the \$20.5 million settlement sum, the Justice Department said. **WJ**

Supreme Court asked to weigh in on 'legal falsity' theory under FCA

A medical device provider is asking the U.S. Supreme Court to decide the scope of allegations of the "legal falsity" theory of liability under the False Claims Act.

Blackstone Medical Inc. v. United States ex rel. Hutcheson, No. 11-269, petition for cert. filed (U.S. Aug. 30, 2011).

A split among the circuit courts mandates that the high court settle the conflict, Blackstone Medical Inc. says.

The premise of the legal-falsity theory is that although claims submitted to the government may be factually accurate, they are legally false because they expressly or implicitly represent a false compliance with regulatory requirements.

Blackstone markets and distributes spinal implants and other surgical products. In 2004 a former employee filed a *qui tam* suit in the U.S. District Court for the District of Massachusetts, alleging the company violated the federal anti-kickback statute, 42 U.S.C. § 1320a-7b, by paying doctors to use its devices in their surgeries.

Blackstone then caused the hospitals where the surgeries were performed to submit "legally false" claims that were tainted by its alleged violation of the anti-kickback statute, the suit said.

The *qui tam* provision of the False Claims Act, 31 U.S.C. § 3729, allows private citizens to file suit on behalf of the government in cases involving federal funds fraud and to share in any consequent settlement or court award.

The District Court dismissed the complaint, ruling that the theory of legal falsity should be limited to situations involving compliance with expressly stated preconditions of payment.

The court said any certifications of compliance by the hospital spoke only to its compliance but did not expressly or impliedly certify that Blackstone's interactions with doctors had complied with the anti-kickback statute.

The hospital was under no obligation to determine whether every medical device and product manufacturer complied with the anti-kickback statute, the court said.

The 1st U.S. Circuit Court of Appeals reversed.

The appeals court held that conduct by a party somewhere in the supply chain may render a federal claim for payment false even if the claim is submitted by a third party, such as a hospital, with no connection to the alleged wrongdoing.

In its *certiorari* petition to the Supreme Court, Blackstone argues that the 1st Circuit's broad interpretation of liability under the FCA for legal falsity is unprecedented.

The appeals court itself acknowledged that its decision conflicted with those of several other circuits, according to the petition.

The 1st Circuit's decision represents a radical extension of the theory that is wrong and should be reversed, Blackstone says. [WJ](#)

Attorneys:

Petitioner: Catherine E. Stetson, Peter S. Spivack, Jonathan L. Diesenhaus and Jessica L. Ellsworth, Hogan Lovells US, Washington

Related Court Document:

Certiorari petition: 2011 WL 3860767

See Document Section A (P. 19) for the *certiorari* petition.



The 1st Circuit's broad interpretation of liability under the FCA for legal falsity is unprecedented, the petitioner argues to the U.S. Supreme Court.

Guidant settles feds' fraud claims for \$12 million

Guidant has agreed to pay \$12 million to settle an eight-year-old lawsuit filed by a former salesman who claimed the medical device maker defrauded Medicare by hiding rebate discounts from the hospitals where implantations were performed.

Fry v. Guidant Corp. et al., No. 3:03-cv-0842, settlement entered (M.D. Tenn., Nashville Div. Sept. 26, 2011).

U.S. Attorney Jerry E. Martin of the Middle District of Tennessee announced the settlement Sept. 26. Under the deal, Guidant will pay more than \$9 million to the federal government, and former employee Robert Fry, who initiated the suit, will receive \$2.3 million.

Guidant, a subsidiary of Boston Scientific Corp., also agreed to pay \$2.75 million to cover attorney fees and costs in connection with the whistle-blower action Fry filed in 2003.

Fry filed a *qui tam* suit against Guidant and predecessor Cardiac Pacemakers Inc. in the U.S. District Court for the Middle District of Tennessee. He alleged that for the 16 years before he left Guidant in 1997, the company engaged in a systematic scheme to defraud Medicare by concealing its own rebate and credit policies for replacement medical devices.

The scheme allegedly inflated Medicaid reimbursement payments by the Department of Health and Human Services

for cardiac rhythm management devices sent to hospitals nationwide.

Fry said Guidant kept hospitals from learning about such credits by having its sales representatives, who are usually present during implantation procedures, discard the devices' product packaging and warranty papers.

The company backed its marketing efforts by touting "the generous credits available should a device need to be replaced while covered under warranty," the charges said.

Martin said that from 1981 to July 2007, Guidant, however, offered the warranty credits while simultaneously maintaining a policy of failing to grant the credits because,

For 16 years, Guidant systematically defrauded Medicare by concealing its rebate and credit policies for replacement medical devices, the plaintiff said.

The federal government intervened in the suit in 2006 after a federal judge in Nashville, Tenn., denied Guidant's motion to dismiss the case.

The judge said Fry met pleading requirements as a *qui tam* plaintiff by providing data showing that Guidant violated the False Claims Act, 31 U.S.C. § 3730(b).

Federal prosecutors said Guidant "actively promoted the longevity and reliability of its pacemakers and defibrillators" to get physicians to select their products over those of its competitors.

in a large number of cases, implantable medical devices that were purchased failed while under warranty. [WJ](#)

Attorneys:

Plaintiff (Fry): Richard Fisher, Cleveland, Tenn.

Plaintiff (United States): Assistant U.S. Attorney Ellen Bowden McIntyre, Nashville, Tenn.

Defendant: David L. Douglass, Shook, Hardy & Bacon, Washington

Related Court Documents:

Second amended complaint: 2006 WL 2791167
Guidant's memorandum in support of motion to dismiss: 2006 WL 2791168



FALSE CLAIMS ACT

Former workers at medical supply delivery firm can amend FCA claim

A Michigan federal judge has allowed three former employees of a Michigan home health medical supply delivery company to amend their 2008 complaint to provide additional details on the company's alleged fraudulent billing of Medicaid and Medicare.

United States ex rel. Yannity et al. v. J&B Medical Supply Co., No. 08-11825, 2011 WL 4484804 (E.D. Mich., S. Div. Sept. 27, 2011).

Noting that defendant J&B Medical Supply Co. lodged no objection, U.S. District Judge Julian Abele Cook Jr. of the Eastern District of Michigan granted the motion by whistleblowers Alice C. Yannity, Maureen C. McNabb and Tracee Urquhart to amend their complaint.

with annual Medicaid billings totaling \$7.8 million.

The FCA's *qui tam* provisions allow private citizens to file suit on behalf of the government in cases involving federal funds fraud and to share in any consequent settlement or court award.

The suit alleges J&B engaged in a variety of fraudulent billing schemes and tried to cover

The company moved to dismiss the complaint on the ground that it failed to identify the circumstances of the alleged fraud, such as specific false billings, the names of patients involved, and the dates and types of services rendered. It also sought dismissal of the retaliation claims.

Judge Cook denied both dismissal motions, finding that his grant of the plaintiffs' bid to amend the complaint rendered the defendant's motions moot.

J&B also moved to unseal the entire case file, arguing that it was entitled to access it to prepare a proper defense.

The government opposed the motion, asserting that details of its ongoing investigation are confidential.

Judge Cook rejected the government's reasoning, saying it did not sufficiently demonstrate a risk of harm to its investigation if the records were unsealed.

He granted J&B's motion to unseal the file, subject to an *in camera* review. [WJ](#)

Related Court Document:
Order: 2011 WL 4484804

See Document Section B (P. 34) for the order.

The defendant is one of the nation's largest home health medical supply delivery firms, with annual Medicaid billings totaling \$7.8 million.

After granting the motion to amend, Judge Cook denied the company's motion to dismiss the complaint as moot.

The plaintiffs, all former billing department workers, filed a *qui tam* action April 29, 2008 under the False Claims Act, 31 U.S.C. § 3729.

The complaint alleges that J&B engaged in fraudulent billing and also fired the plaintiffs in retaliation for their unwillingness to participate in the fraudulent billing scheme.

The company is one of the nation's largest home health medical supply delivery firms,

up its fraudulent practices by firing anyone who refused to comply with the scheme.

When the suit was filed, the federal government asked that the case be sealed while it conducted an investigation. In August 2010 the government still was undecided on whether to intervene but allowed the plaintiffs to proceed with the action. Its investigation is ongoing.

Portions of the case file were unsealed in October 2010, and J&B was served with the complaint.

Plaintiff, feds can't keep docs sealed in dismissed FCA suit

A federal judge in Maryland has denied requests by the federal government and a whistle-blower to keep documents sealed in a voluntarily dismissed False Claims Act lawsuit filed against two pharmaceutical companies.

United States ex rel. Littlewood v. King Pharmaceuticals Inc. et al., No. 10-973, 2011 WL 3805607 (D. Md. Aug. 29, 2011).

U.S. District Judge Ellen Lipton Hollander of the District of Maryland said the public's right of access trumped any concerns by the plaintiff whistle-blower or the government.

Plaintiff Lauri Littlewood formerly was a sales representative with Alpharma Inc. and currently works for King Pharmaceuticals, the opinion says.

In April 2010 she filed a *qui tam* complaint under the False Claims Act, 31 U.S.C. § 3729, alleging both companies entered into an illegal scheme to promote off-label uses of an anti-inflammatory drug called the Flector patch.

She alleged the companies knew the off-label promotion would cause fraudulent claims for reimbursement to be submitted to government health care programs.

The False Claims Act's *qui tam* provision allows private citizens to file suit on behalf of the government in cases involving federal funds fraud and to share in any consequent settlement or court award.

In April this year the federal government declined to intervene, and Littlewood voluntarily dismissed her claim.

The government then moved to unseal the complaint but asked the court to maintain the seal on all other documents.

Littlewood opposed lifting the seal for all case documents, and the government challenged her opposition to unsealing the complaint.

Littlewood argued that unsealing the case would not serve the public interest and could do significant harm to her case since she is still employed by King and could suffer severe repercussions.

She noted the defendants had never been served with the complaint and presumably were unaware of the lawsuit.

Judge Hollander denied both motions to keep the documents sealed, noting the strong public interest in favor of the public disclosure of records can only be overcome in limited circumstances.

FCA cases inherently implicate the public interest because they allege a fraud involving public fiscal matters, she explained.

Section 3730(b)(3) of the FCA provides that *qui tam* complaints be sealed for 60 days to allow the government time to investigate the allegations and determine whether to intervene, Judge Hollander said.

In support of her ruling she cited *United States ex rel. Herrera v. Bon Secours Cottage House Services*, 665 F. Supp. 2d 782 (E.D. Mich.



2008), involving a relator who sought to keep records sealed following the voluntary dismissal of a *qui tam* complaint.

In *Bon Secours*, the court determined that the imposition of the 60-day period for sealing complaints reflected Congress' desire to have the seal lifted following the government's initial investigation.

Although acknowledging Littlewood's concerns of employer retaliation, Judge Hollander noted the FCA provides a cause of action for employees who suffer retaliation after filing a *qui tam* suit.

In addition the government failed to present any reason to maintain the seal, the judge added. [WJ](#)

Related Court Document:
Order: 2011 WL 3805607

DOJ sues town over service member's job rights

In a lawsuit the Department of Justice says a Minnesota town violated an Army reservist's job rights by failing to return him to the position he held before going on active military duty.

Schutz v. City of Truman, Minn., No. 11-CV-2841, complaint filed (D. Minn. Sept. 30, 2011).

The government says the city of Truman did not assign reservist Michael Schutz to a full-time police officer position when he finished his military service and instead gave him a part-time job.

The city also took retaliatory actions against Schutz after he claimed he was being treated unfairly based on his military service, according to complaint filed in the U.S. District Court for the District of Minnesota.

The DOJ says the city violated the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301.

USERRA forbids employers from discriminating against employees because of military obligations and requires them to offer service members their old jobs or comparable positions upon their return from military duty.

In the complaint the government says Schutz worked 40 hours a week for the city as a full-time police officer.

The Army called Schutz up for active duty in July 2009 and notified him that he would be serving in Kuwait beginning Nov. 27, 2009, the suit says.

The DOJ says Schutz notified the city about his upcoming military service as soon as he heard from the Army.

After his return from Kuwait the city placed Schutz in a part-time police officer position



The government says the city did not assign the plaintiff to a full-time police officer position when he finished his military service and instead gave him a part-time job.

Nov. 29, 2010, the suit says. This position had a 30-hour weekly schedule, according to the DOJ.

The government says the city violated USERRA by failing to re-employ Schutz in the job he would have had but for his military service.

The suit also says that in December 2010 Schutz contacted the Labor Department's Veterans' Employment and Training Service about the city's failure to place him in his prior full-time job.

"The men and women who wear our nation's uniform need to know that they do not have to sacrifice their job at home in order to serve our country," Thomas E. Perez, assistant attorney general for the DOJ's Civil Rights Division, said in a statement.

The government is asking the District Court to order the city to return Schutz to a position comparable in status, pay and

The city of Truman, Minn., retaliated against reservist Michael Schutz based on his military service, the Justice Department says.

The city subsequently took retaliatory actions against Schutz because he contacted the Labor Department, the government says.

The DOJ says the municipality suspended Schutz from his job Dec. 30 and began proceedings to terminate his employment March 17.

The suit says Schutz is currently challenging the city's plan to terminate him from the police force.

The DOJ says the city's retaliatory actions were willful and were the result of Schutz's assertion of his USERRA job rights.

benefits to the one he held before leaving for active duty.

The suit also seeks an award of Schutz's lost wages and benefits plus interest, as well as unspecified damages for the willful violation of USERRA.

The government says it filed the suit on Schutz's behalf after the Labor Department was unable to resolve the matter with the city. **WJ**

Related Court Document:
Complaint: 2011 WL 4748943

See Document Section C (P. 39) for the complaint.

Pentagon kills Boeing Army radio program

WASHINGTON, Oct. 14 (Reuters) – The Defense Department said Oct. 14 it had terminated Boeing Co.'s top U.S. Army radio program, kicking off an expected new round of cutbacks as the Pentagon trims spending in an austere budget climate.

Full-rate production of the Joint Tactical Radio System's "Ground Mobile Radio" was once estimated to be worth nearly \$20 billion.

But the Boeing contract was merely for development and to certify two companies to compete to produce the radio.

"Our contract specifically restricted Boeing from production," said Matthew Billingsley, a company spokesman.

A notice from Frank Kendall, the acting under secretary for acquisition, was sent to the House of Representatives' and Senate Armed Services Committees the night of Oct. 13, she said.

The Army plans to conduct a full and open competition early next year for a lower-cost alternative, Army spokesman Maj. Christopher Kasker said.

"This investment was fully harvested, as GMR has spawned key breakthroughs in related software and hardware technologies" making it possible to go a cheaper route, the statement said.

Boeing is disappointed by the decision to end the development effort, but its contract was scheduled to end in March 2012 anyway, the company said.

The decision by the Pentagon simply "confirms that fact," Billingsley said, adding, "We look forward to applying our experience and knowledge in future competitions."

President Obama and Congress agreed to a deal in August that requires as much as \$450 billion in cuts to security-related spending over 10 years compared with previous Pentagon projections.

Defense Secretary Leon Panetta warned Congress Oct. 13 that any cuts over the \$450 billion "will truly devastate our national security."

The Army and Navy have proposed to terminate a multibillion-dollar joint air-to-ground missile program, InsideDefense.com, a trade publication, reported this week.

But Kasker, the Army spokesman, said Oct. 14 that the competition was still under way for the program's engineering, manufacturing and development phase. Lockheed Martin Corp. is competing for the deal against a team of Raytheon and Boeing. [WJ](#)

(Reporting by Jim Wolf)

Full-rate production of the Joint Tactical Radio System's "Ground Mobile Radio" was once estimated to be worth nearly \$20 billion.

The program was canceled in line with the Nunn-McCurdy statute, 10 U.S.C. § 2433, said Air Force Lt. Col. Melinda Morgan, a Pentagon spokeswoman. The statute was triggered after the planned purchase was slashed over the summer from 86,209 radios to 10,293.

The law calls for a program's termination once unit-procurement costs exceed the original estimate by 25 percent unless it is deemed essential to national security.

In this case, the Pentagon also would have had to certify the lack of a viable alternative and that problems that led to the cost growth are under control.

"I can confirm the program has been terminated," Morgan said.

Prior investment in "software-defined" radios through the program has fostered competitive alternatives, he said in an emailed statement.

"The Army has committed to a new way of doing acquisition – an agile approach that emphasizes affordability, embraces innovation, supports competition and rewards technological maturity," the statement said.

"The decision to cancel GMR is fully consistent with this approach," it said.

The Pentagon's joint program office that oversees the program estimates that GMR's 10-year development has incurred about \$1.6 billion in research and development costs, the Army said.

Pentagon turns to Silicon Valley for leads

SAN FRANCISCO, Oct. 14 (Reuters) – When the Department of Defense decided it needed a device that could detect heartbeats from hundreds of feet away, it didn't know where to look. So it turned to some tech-savvy friends: venture capitalists.

Using its little-known “DeVenCI” – Defense Venture Catalyst Initiative – the Department of Defense can tap into a network of venture capitalists when it needs new ideas. The reasoning: Pentagon types aren't experts in ferreting out emerging technology, and companies with technology that might help the Pentagon don't know how to reach it.

Enter Silicon Valley matchmakers who serve as consultants for two-year terms. Through their colleagues, they get to hear about companies and technologies they might not otherwise be aware of, and the Pentagon gets to tap their expertise.

Since the program launched in 2006, partners from firms including Kleiner Perkins, Greylack Partners and the Mayfield Fund have participated.

“The government is looking for solutions beyond what they typically find from defense contractors,” said Matt Howard of Norwest Venture Partners in Menlo Park, Calif., one of the 25 venture capitalists currently working with DeVenCI.

His recommendations include Sentilla, a company that helps data centers reduce energy use, and Avere, which provides data storage.

Conceived in 2005, DeVenCI was intended to look for ways to slash the cost of building equipment from scratch. Many of its needs since have tended toward the prosaic – efficient data centers and renewable energy for instance. But some aren't, such as heartbeat sensors, which eventually led the program to Virginia-based Digital Signal.

Then, on Oct. 14, the hitherto obscure five-year-old initiative received a little unwelcome attention. The Wall Street Journal reported one of its advisers, Kevin Kopczynski of RockPort Capital, had pitched a company from his firm's own portfolio: Solyndra, the failed solar firm at the center of a controversy over the government's renewable energy financing programs.

Solyndra went bankrupt in September after receiving a \$535 million Department of Energy loan in 2009. Critics have questioned the White House's close ties to investors in the company.

But the fledgling program dodged a bullet. Solyndra made it through months' worth of vetting before the Pentagon learned the company was on the verge of bankruptcy and dropped the solar firm from consideration for a \$1 million pilot program, the Journal reported. A Navy spokeswoman confirmed Solyndra's participation in its DeVenCI workshops.

“There had to be commercial technologies that went a long way toward solving problems the DOD faced,” said DeVenCI adviser Roger Novak of Novak Biddle in Bethesda, Md.

Typically, advisers recommend companies outside their own portfolios, VCs involved with the program say, but it's not unheard of to pitch one of their own bets.

Unlike an in-house INQTel fund at the Central Intelligence Agency that invests directly in companies, the DeVenCI program seeks to purchase field-ready products and services rather than investing.

Because the government is increasingly facing the same problems as enterprise, including malware and dealing with large amounts of data, it makes sense to look in the same places businesses often find solutions.

PURCHASES, NOT INVESTMENTS

Close shaves aside, Defense Department officials think they might have the beginnings of a formula to go high-tech.

The program's VCs specialize in a broad range of investment areas and serve as unpaid consultants for two-year terms. They in turn work with a small team of full-time DeVenCI staff members.

Not all of the program's needs are geared toward direct warfare and more efficient bloodshed. It was the call for solar technology earlier this year – to power, say, Army bases – that provided RockPort's opening.

Because the government is increasingly facing the same problems as enterprise, including malware and dealing with large amounts of data, it makes sense to look in the same places businesses often find solutions, VCs argued.

“The goal is not to provide R&D funding,” a DeVenCI spokeswoman said. She said the program is contracting with about 25 companies that it found through the program.

Around Silicon Valley, there's not much concern about the government snooping around companies and getting an early look at their technology, said Geoff Yang, a partner at Redpoint Ventures who is not involved in DeVenCI.

The biggest concern is that a young company might end up tailoring its product to the military, he said, in a way that wouldn't be applicable to other customers. “The government is a market of one,” he said.

VCS VISIT MILITARY BRANCHES

It took a year or two for the program to find its feet and identify appropriate VCs, given that the freewheeling culture of Silicon Valley can clash with the rigid practices of the military.

One venture capitalist experienced in the ways of Washington recalled a presentation dealing with computer systems attached to the Global Information Grid, a military communications initiative, when another venture capitalist unfamiliar with the military chimed in with a complaint.

"This is so general," the more experienced VC recalled his novice colleague complaining. "I need to know how many computers you run, and what's connected to what."

A stunned pause ensued before the presenter composed himself and told the VC he couldn't disclose that information. The less experienced VC left the group after a single two-year term.

Another early glitch involved sending the VCs reams of data to pore through, until the DeVenCI office realized it made more sense to have the participating VCs visit various branches of the military and evaluate their needs.

Sometimes, the visits provide vivid illustrations of those needs. Don Rainey, a partner at Grotech Ventures in Vienna, Va., recalls a group of VCs attending a training session for Marines in Twenty Nine Palms, Calif., in the hope the excursion would spark ideas for technology for use in hostile environments.

The VCs watched the exercise unfold in a Hollywood-like set designed to look like a street in the Middle East, complete with actors playing locals.

As Marines patrolled, shopkeepers quickly started closing up their stores, and then an abandoned car blew up. An actress who was also an amputee flew through the air screaming, fake blood pouring from her missing leg.

"It's so moving, to think of what they do, the risks they're subjected to," Rainey said of the Marines. **WJ**

(Reporting by Sarah McBride)



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NEWS IN BRIEF

DEFENSE AGENCY PICKS 3 FIRMS FOR FOOD SERVICE JOBS

The Defense Logistics Agency has awarded food and beverage service contracts to three companies, according to an Oct. 17 Defense Department announcement. Georgia-based US Foodservice won a \$58 million contract, and Alabama-based Sysco Foodservice's contract is worth \$27 million. Both firms will supply the Army and Air Force. The Defense Department said Reinhart Foodservice of Georgia won the third contract, which is worth \$27 million and involves supplying the Navy.

GENERAL DYNAMICS UNIT GETS \$429M FOR SUBMARINE WORK

The government is paying General Dynamics Electric Boat Corp. \$429 million in additional funds under an existing contract for work on the Navy's active nuclear submarines. The Defense Department said Oct. 14 that the company will continue to provide engineering and technical support services at facilities in Groton, Conn.; Kings Bay, Ga.; Bangor, Wash.; Quonset, R.I.; and Newport, R.I. The company should finish the job by October 2012, the Defense Department said.

EX-DEFENSE WORKER SUBMITTED FALSE EXPENSE CLAIMS

The Justice Department said Oct. 13 that former civilian Defense Department employee John R. Brock, 52, has admitted that he gave false travel expense claims to the government to obtain \$485,500. Brock entered his guilty plea before Judge Robert L. Wilkins in the U.S. District Court for the District of Columbia. The Justice Department said in charges filed Oct. 5 that between 2007 and 2011 Brock requested reimbursement for expenses that were never incurred while he worked as a budget analyst for the Defense Department's Armed Forces Institute of Pathology. Brock faces up to five years in prison, a \$250,000 fine and a restitution order when he is sentenced in January.

United States v. Brock, No. 11-CR-302, guilty plea entered (D.D.C. Oct. 13, 2011).

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