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## 2013 NDAA Expands Whistleblower Protections

2013-01-11

The 2013 National Defense Authorization Act ("2013 NDAA"),<sup>1</sup> one of the first bills signed into law this year, extends the whistleblower protections available to employees of government contractors, subcontractors, and grant recipients. The new law continues the trend toward greater protections for whistleblowers, highlighted in WilmerHale's [2012 False Claims Act Year-in-Review](#), coming less than two months after the Whistleblower Enhancement Protection Act of 2012 strengthened existing protections for federal workers.<sup>2</sup> While employees of contractors already enjoyed some protections, such as under the False Claims Act's anti-retaliation provision, the new law considerably expands whistleblower protections for millions of non-government workers with knowledge of potential False Claims Act violations and other claims against contractors doing business with the government.

### Who is Covered?

The 2013 NDAA permanently strengthens whistleblower protections for contractors working with the Department of Defense and NASA, and authorizes for a four-year pilot program the same protections to the employees of contractors working with other agencies. Congress has commissioned a year-long Government Accountability Office study starting in 2016 to evaluate the implementation of the pilot program and to make recommendations. As in the past, however, Congress declined to extend any of the new protections to employees of contractors working with the "intelligence community."<sup>3</sup>

### Key Provisions

Most importantly, the law forbids reprisals against an employee of a contractor for disclosing information that the employee reasonably believes is evidence of "gross mismanagement" of a federal contract, a "gross waste" of federal funds, or a "violation of law, rule, or regulation related to a Federal contract." The law protects disclosures including, but not limited to, those made to Congress, the Government Accountability Office, an Inspector General, a court or grand jury, or to a federal employee or employee of the contractor with responsibility to investigate and remedy misconduct. The 2013 NDAA also requires that agencies ensure that their contractors provide employees with written notice of their rights and remedies under the Act.

Upon a finding by the Inspector General of a prohibited reprisal, the head of the agency has authority to award the whistleblower lost employment benefits as well as legal fees. Furthermore, a whistleblower may go to federal district court (and seek a jury trial) within two years of an agency's failure to act or a denial of relief. An agency, contractor, or "aggrieved party" may also challenge administrative decisions in the appropriate Court of Appeals. Together, these changes will likely increase the willingness of some whistleblowers to come forward.

The new protections will apply only to contracts awarded 180 days or more from January 2, 2013. With respect to any "major" modifications to contracts awarded before that time, the 2013 NDAA calls for the head of the contracting agency to "make best efforts" to include a clause which applies the 2013 NDAA's amendments to the contract.

The new whistleblower protections are not without controversy, however. President Obama expressed constitutional separation of powers reservations about the provisions in a signing statement, saying he "will interpret those sections consistent with [his] authority to direct the heads of executive departments to supervise, control, and correct employees' communications with the Congress in cases where such communications would be unlawful or would reveal information that is properly privileged or otherwise confidential."<sup>4</sup> The extent to which the Obama administration will resist these protections remains to be seen, but the law tasks the independent Inspectors General of the agencies with investigating alleged reprisals taken against whistleblowers.

### **False Claims Act Implications**

The enhanced whistleblower protections in the 2013 NDAA will likely lead to yet further increases in whistleblower-initiated investigations and litigation, including under the False Claims Act. Furthermore, under the new law, internal disclosures—to an employee of the contractor with responsibility to investigate misconduct—constitute protected conduct. These provisions underscore the need for government contractors to ensure that they have vigorous internal oversight, including not only appropriate internal reporting protocols and robust investigation of plausible claims, but also effective training to detect waste, fraud, and abuse as early as possible.

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 2013, H.R. 4310 (112th), §§ 827, 828.

<sup>2</sup>See [WilmerHale Client Alert: Whistleblower Protection Enhancement Act of 2012 Signed into Law](#).

<sup>3</sup> Including ODNI, CIA, NSA, DIA, and others, as defined in 50 U.S.C. § 401a(4).

<sup>4</sup> Statement by the President on H.R. 4310, *available at* <http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310> (last visited Jan. 9, 2012).

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