



# Strategies for Handling Disclosures and Government Stakeholders

---

Tuesday, May 17, 2022 | 1:55-2:45

Stephen M. Byers, Peter J. Eyre,  
Rebecca Monck Ricigliano, Lorraine M. Campos



# Introductions

---



**Stephen M. Byers**

Partner  
Government Contracts; White Collar  
& Regulatory Enforcement  
Washington, D.C.  
+1 202-624-2878 | SByers@crowell.com



**Lorraine M. Campos**

Partner  
Government Contracts  
Washington, D.C.  
+1 202-624-2786 | LCampos@crowell.com



**Peter J. Eyre**

Partner  
Government Contracts  
Washington, D.C.  
+1 202-624-2807 | PEyre@crowell.com



**Rebecca Monck Ricigliano**

Partner  
White Collar & Regulatory Enforcement  
New York  
+1 212-895-4268 | RRicigliano@crowell.com

# Topics

---

- Mandatory Disclosure
- DOJ Corporate Cooperation Policies
- Post-Disclosure Cooperation
- Remediation
- Suspension and Debarment



# Mandatory Disclosure



# Mandatory Disclosure

---

- Mandatory Disclosure Rule is set forth in FAR contract clause (FAR 52.203-13) and suspension/debarment regulations (FAR 9.406-2)
- Contractors must disclose in a “timely” fashion “credible” evidence of:
  - Certain violations of criminal law
  - Violations of the False Claims Act
  - Significant overpayments
- Failure to disclose can be grounds for suspension and debarment



# Mandatory Disclosure

---

## **52.203-13 - Contractor Code of Business Ethics and Conduct**

(3)(i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(B) A violation of the civil False Claims Act

## **9.406-2 - Causes for Debarment**

(vi) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of —

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act ; or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001



# Mandatory Disclosure

---

- DoD Instruction 5505.15 (June 2021)
- Process and implications
- Distribution of disclosures, including
  - DOJ Civil and Criminal
  - DCAA/DCMA
  - Contracting Officer
  - SDOs
- Review by SDO



# Mandatory Disclosure

---

- Proliferation of other “mandatory disclosure” requirements
  - Critical safety items
  - Counterfeit parts
  - Cybersecurity incidents
  - Human trafficking
  - Anti-Kickback Act





# DOJ Corporate Cooperation Policies



# DOJ Corporate Cooperation Policies

---

- The Department of Justice's Approach to Corporate Cooperation
  - So many memos
- Fall 2021: Monaco Memo
  - Reverses course on the identification of individuals who are substantially involved
  - Prosecutors must consider the corporation's full history
  - Greater use of Monitorships
- Disclosure Process
  - Considerations
  - Violation-specific programs



# DOJ Corporate Cooperation Policies

---

- Justice Manual § 9-47.120 – FCPA Corporate Enforcement Policy
- Applies as “non-binding guidance” in all DOJ Criminal Division cases
- Three pillars:
  - **Disclosure** – timely; complete
  - **Cooperation** – all facts from internal investigation; pro-active cooperation; document preservation, collection and production; de-confliction; interviews
  - **Remediation** – root cause analysis; effective compliance program; discipline
- Presumption of declination of prosecution
- Limited credit for cooperation and remediation
  - Up to 25% reduction off low end of U.S.S.G. fine range



# DOJ Corporate Cooperation Policies

---

- Justice Manual § 4-4.112 – Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters
- Considerations
  - **Disclosure** – voluntary, pro-active and timely
  - **Cooperation** – timeliness, truthfulness, nature and extent, usefulness
  - **Remediation** – e.g., addressing root cause; improving compliance program to prevent reoccurrence; disciplining culpable employees
- Credit
  - Maximum credit – Down to floor of single damages and related costs
  - Partial credit – Available where defendant did not self-report



# DOJ Corporate Cooperation Policies

---

- Observations on the FCA Corporate Cooperation Policy
  - Lack of specificity regarding benefit
  - Little detail on quantum of cooperation necessary to secure single damages
  - Award of cooperation credit remains discretionary



# Post-Disclosure Cooperation



# Post-Disclosure Cooperation

---

- Forms of Cooperation
  - Presenting and explaining relevant documents
  - Sharing facts learned from internal investigation
  - Identifying all individuals involved
  - Producing documents from foreign jurisdictions (with translations)
  - Identifying other sources of evidence
  - Making employees available for interviews
  - Assisting in determining quantum of losses
- The Importance of Advocacy
  - Requires subtlety and finesse, but is essential to shaping government's thinking in order to achieve the best possible result.



# Post-Disclosure Cooperation

---

- Privilege Considerations

- DOJ policy explicitly states that waiver of privilege is not required to obtain cooperation credit
  - But also states that disclosure of internal investigation results should include “attribution of facts to specific sources rather than a general narrative of the facts.”
- Best practices
  - Communicate facts orally if possible
  - Avoid attribution if possible, avoid quoting witnesses, speak from talking points rather than interview memoranda
  - Attempt to present facts in the form of “attorney proffers” – hypothetical proffer of counsel’s understanding of what a witness would say if asked
  - Consider a confidentiality/non-waiver agreement
  - Remember the government may also have an interest in limiting the extent to which a corporate cooperator is a source of evidence for individual defendants





# Post-Disclosure Cooperation

---

- “Outsourcing” Issues
  - Government influence in conducting an internal investigation may amount to “state action.”
  - *See e.g., United States v. Connolly* (S.D.N.Y. 2019): Statements to counsel for cooperating corporation were effectively compelled statements to the government because corporate counsel appeared to have done “everything that the Government could, should, and would have done had the Government been doing its own work.” Citing *Garrity v. New Jersey*, 385 U.S. 493 (1967)
  - Thus, the government is normally very careful to steer clear of telling company counsel what and what not to do – with the exception of “deconfliction.”



# Remediation



# Remediation

---

Address the issue . . . Stop the bleeding

Develop or modify

- Written Code of Business Ethics and Conduct
- Compliance Program
- Internal Control System
- Training
- Ethics and awareness program modeled after the sentencing guidelines
- Subcontract Flowdowns
  - \$5+/120 days, including commercial item contracts under FAR Part 12



# Remediation . . . Best Practices

---

- Policy Updates
- Collecting and Analyzing Data
- Targeted Training
- Risk Assessments/Internal Audit
- Assessing Potential Disclosures
  - Disclosure may not be mandatory, but perhaps voluntary
- Focus on reporting internally and have a process for analyzing potential disclosures
- Disclosure Letters
  - Emphasize corrective actions?
- Prepare for SDO or other agency inquiry by enhancing/improving compliance program



# Suspension and Debarment



# Suspension and Debarment

---

- Purpose:
  - Administrative tool
  - To protect the public interest -- NOT to punish
  - Key concept of “present responsibility”
- Who can be suspended/debarred?
  - Individuals
  - Entities (*e.g.*, corporations, partnerships, divisions or business units within an entity)
  - Parent and affiliates
  - Prime contractors, subcontractors, or participants *at any tier*



# Suspension and Debarment

---

- No new contracts, orders, option exercises, or contract extensions
  - Agencies cannot solicit offers from, award contracts to, or consent to subcontracts
  - No “discussions” or placement in competitive range
- Continuation of current contracts
  - Agencies “may continue contracts or subcontracts . . .” (i.e., termination not required)
- Collateral consequences



# Suspension and Debarment

---

- Mandatory
  - Clean Water Act
  - Clean Air Act
- Discretionary
  - Knowing failure to disclose to the government certain misconduct (*e.g.*, credible evidence of a violation of a criminal conflict of interest law, false claim, or significant overpayment)
  - ***“any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor”***
    - What is “present responsibility”
    - Discussion of specific examples





# Suspension and Debarment

---

- Other key considerations
  - Formal notices
  - Pre-action letters
  - Administrative Agreements // Letter Agreements
  - Interagency Suspension & Debarment Committee
  - Appropriations Act restrictions
  - Role of the customer
    - Responsibility under FAR 9.1
    - Past performance
    - Bid protests



# Suspension and Debarment

---

## The ten mitigating factors under the FAR:

1. Effective standards of conduct/internal controls at the time of the misconduct
2. Did the contractor disclose?
3. Has the contractor fully investigated *and* shared the results with the government?
4. Has the contractor fully cooperated?
5. Has the contractor made full restitution?
6. Has the contractor taken appropriate disciplinary action?
7. Has the contractor adopted remedial measures?
8. Has the contractor adopted new control procedures and ethics training programs?
9. Has there been adequate time to eliminate the circumstances that led to the misconduct?
10. Does management recognize the seriousness and have they implemented programs to prevent a recurrence?



# Questions?

---



**Stephen M. Byers**

Partner  
Government Contracts; White Collar  
& Regulatory Enforcement  
Washington, D.C.  
+1 202-624-2878 | SByers@crowell.com



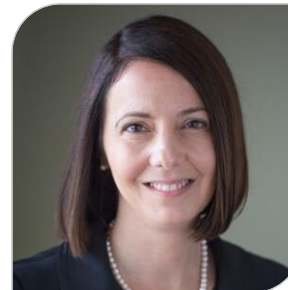
**Lorraine M. Campos**

Partner  
Government Contracts  
Washington, D.C.  
+1 202-624-2786 | LCampos@crowell.com



**Peter J. Eyre**

Partner  
Government Contracts  
Washington, D.C.  
+1 202-624-2807 | PEyre@crowell.com



**Rebecca Monck Ricigliano**

Partner  
White Collar & Regulatory Enforcement  
New York  
+1 212-895-4268 | RRicigliano@crowell.com