Companion Material to OOPS Investigations Seminar - Part II

IMPORTANCE OF DISCLOSURES AND COOPERATION DURING AND AFTER INTERNAL INVESTIGATIONS

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The rules, regulations, and incentives for government contractors facing investigations (whether internal or external) have changed dramatically in the last year. From the new demands of the "Yates Memorandum" to the Fair Pay & Safe Workplaces proposed rule to the shift from exclusion-driven interactions with Suspending and Debarring Officials (SDOs) to show cause letter and voluntary disclosure-driven interactions, a confluence of factors are raising new concerns—and new opportunities—for government contractors investigating or being investigated following allegations of corporate wrongdoing.

However, despite regulatory changes that may cause more inbound communication from industry to various government enforcement officials, communication among government stakeholders remains stovepiped. Therefore, contractors that wish to obtain potentially significant credit for cooperation across the enforcement spectrum need to tune their various communications to the specific needs of each stakeholder group that is, or might in the future be, reviewing the matter.

Some of the more significant, recent changes impacting government contractor investigations and disclosures follow.

Yates Memorandum

In a well-publicized September 9, 2015, Individual Accountability for Corporate Wrongdoing memorandum issued by the Deputy Attorney General ("Yates Memorandum"), the Department of Justice announced that "in order to qualify for any cooperation credit, corporations must provide to the Department [of Justice] all relevant facts relating to the individuals responsible for the misconduct," and "absent extraordinary circumstances or approved departmental policy, the Department [of Justice] will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation," and that "Department [of Justice] attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases. . . ."

Among the immediate impacts of the Yates Memorandum, three stand out as potentially significant for government contractors. First, government contractors facing ongoing criminal investigations have had settlement discussions slow in order to review individual involvement. Second, in some cases the Department of Justice has referenced the Yates Memorandum as it has attempted to obtain guilty pleas from perhaps more borderline subjects and/or targets of ongoing investigations under pain of personal charges for executives. And third, when planning or reacting to new investigations, contractors are considering the Yates Memo when deciding on breadth of investigations as well as how to treat current employees with, for example, Upjohn warnings and their own counsel.

Over the longer term, because government contractors are required by the Federal Acquisition Regulation ("FAR") to have written codes of business ethics and conduct that, among other things, require "[f]ull cooperation with any Government agencies responsible for . . . investigations . . . ." the scope of internal investigations and disclosures to the government to demonstrate "[f]ull cooperation" are likely to be expanded. *See* FAR 52.203-13.

Implied Certification at the Supreme Court

Universal Health Services, Inc. v. United States ex rel. Escobar came before the Supreme Court on April 19, 2016. At issue was (1) whether the "implied certification" theory of False Claims Act (FCA) liability is ever viable, and (2) if it is, whether a government contractor's reimbursement claim can be false if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment. If the Justices' questions are any indication of the case's eventual outcome, there were very few questions regarding the viability of the implied certification theory. The Supreme Court therefore appears likely to hold that an implied certification may give rise to FCA liability in some cases, but many of their questions focused on where the line should be drawn—*i.e.*, when does a regulatory or statutory violations fall within the ambit of the FCA?

At the time of this writing, the Supreme Court has not issued a decision. However, given the thrust of the questions from the Justices, implied certification appears here to stay. Therefore, it is reasonable to assume that alleging violations of the FCA based on implied certifications will remain a viable strategy for plaintiffs, and government contractors receiving FCA cases (including those alleging implied certifications) will need to continue evaluating whether and how to communicate these allegations across the government in the form of certifications, disclosures, and proactive communications.

Fair Pay & Safe Workplaces

By now, government contractors are largely aware of the information gathering and reporting requirements of the Fair Pay & Safe Workplaces Proposed Rule ("Fair Pay"), but whether and how to package the information proactively for the government has received less attention. Contractors would also be well served to consider their messaging and outreach efforts in proposals and, if necessary, in meetings with Suspending and Debarring Officials (SDOs) before the Fair Pay final rule issues or shortly after its effective date.

Assuming the final Fair Pay rule to be issued later this year mirrors the proposed rule, it will require disclosure of a variety of adverse findings, including "administrative merits determination," "arbitral award or decision," or "civil judgment" decisions rendered against the contractor within the preceding three-year period for violations of 14 enumerated federal labor laws and "equivalent state laws." Multiple disclosures are necessary before award and every six months during contract performance. Gathering and reporting this information is a Herculean task and has consumed significant legal department time in recent months. But legal departments should also consider how the government will use the information, and whether proactive outreach and messaging to government customers is also necessary to protect the company.

After the government receives Fair Pay disclosures, the contracting officer will request analysis from a new category of official – a labor compliance advisor – who will focus on whether the violations are serious, repeated, willful, or pervasive. The contracting officer can then decide whether to award a contract, exercise an option, terminate a contract, or refer the matter to the agency SDO.

There are three federal officials of note who will interact with a contractor's history of labor violations: the contracting officer, the labor compliance advisor, and the SDO. Two of those officials – the contracting officer and the SDO – can materially, directly, and detrimentally impact the contractor. So contractors should be considering how to shape their communications and disclosures to address the needs of both of these officials.

While it is possible that the eventual Fair Pay final rule will contain more information concerning how these officials should review a contractor's history of labor violations, the norms for these evaluations are more likely to develop over time. Over the short- to medium-term, the government is likely to rely on familiar evaluation and enforcement methods that are predictable in their application and afford contractors several avenues for proactive communication to reduce risk.

Contracting Officer

In assessing Fair Pay information, contracting officers will likely be conducting an analysis similar to making a FAR 9.1 present responsibility determination. Specifically, the contracting officer must consider whether the prospective contractor has "a satisfactory record of integrity and business ethics" (FAR 9.104-1(d)) and "the necessary organization . . . and operational controls" to perform the contract (FAR 9.104-1(e)). Accordingly, contractors with more than *de minimis* histories of labor violations have at least two risks under FAR 9.1. They may be found lacking in business integrity or operational controls and lose a contract, or the contracting officer might fail to reasonably consider the history of labor violations and the award may be lost in a protest. Therefore, it may make sense to consider providing relevant contracting officers with an easy to follow summary of the labor violation information and appropriate remediation in order to address any concerns and mitigate protest risk.

Suspending and Debarring Official

The wild card in Fair Pay process is the role of the SDO, who may receive referrals from contracting officers (or perhaps directly from labor compliance advisors) for suspension and debarment consideration. The unknown in the process is how these referrals will be packaged and presented to the SDOs. It is likely that the process will evolve in an agency-specific manner, following the norms for each agency's internal referral system. However, the referral is likely to be accompanied by some government analysis for why suspension and/or proposed debarment is in order. These referrals are commonly less-than-balanced, and contain advocacy for excluding the contractor. In some cases, contracting officers may refer a matter to the SDO to avoid any criticism.

Three different dynamics impacting SDO consideration of Fair Pay information create risk for contractors when reporting violation and mitigation information.

- First, SDOs receiving one-sided records are more likely to engage with the contractor either through Show Cause Letters or suspensions/proposed debarments. Recent history is full of examples of exclusions based on one-sided agency records that are terminated once the contractor provides its "side of the story."

- Second, SDOs will eventually receive inquiries from oversight agencies such as offices of inspectors general, Congress, or others concerning their level of engagement with Fair Pay information. "No involvement" will not be a comfortable answer for the SDOs. An answer will be needed, even if that answer is limited to a series of Show Cause Letters to obtain clarity concerning contractors' labor compliance operations.

- Third (though intertwined with the prior dynamic), labor compliance violations qualify for proposed debarment and/or suspension under FAR 9.406-2(c) ("[a] contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor."). Once one federal agency begins excluding or sending show cause letters based on Fair Pay data, others in the government are likely to follow suit.

While suspensions and proposed debarments are not likely immediately after the effective date of the final Fair Pay rule, show cause letters are more probable. And suspensions and/or proposed debarments will eventually happen. Proactive engagement with cognizant SDOs can help shape the SDO's impression of Fair Pay violations and reduce the risk of more significant, and formal SDO engagements later.

The Fair Pay and Safe Workplaces Rule poses significant challenges for contractors who must collect and report substantial amounts of historical data with their proposals and during contract performance. Contractors have spent considerable time preparing to comply. They should not overlook other common sense protection measures such as those identified here in order to reduce the risk of adverse government action. Of course, if the Executive Branch happens to change political parties in November, the longevity of any final rule issued before the election is likely to be short.

Declining Suspension and Debarment Numbers Against Large Businesses, Crediting to Enhanced Disclosures and Proactive Communication

In a perhaps unique moment of candor, the Air Force Office of the Deputy General Counsel for Contractor Responsibility and Conflict Resolution announced that it took zero suspension or debarment actions against domestic large business in 2015 and instead engaged with larger businesses solely through Show Cause Letters or other requests for information. *See* Annual Report to the Secretary of the Air Force of the Air Force Procurement Fraud Remedies Program for 2015 at pp. 5-6. Moreover, the Air Force announced a reduction in overall suspension and debarment action numbers from a high of 750 in 2012 to a total of 241 in 2015.

A review of the System for Award Management shows that the trend of fewer actions overall, and a higher percentage of actions geared to individuals, continues in 2016. Through the first half of fiscal year 2016, the Air Force suspended, proposed for debarment, or debarred a total of 55 "contractors" including only 12 companies and, of those companies, only five had DUNS numbers and other indicia of being government contracts focused businesses as opposed to commercial companies that the Air Force saw fit to exclude. Of the 43 individuals, 9 appeared to have similar names (*i.e.*, aliases).

The Air Force's explanation for the lower number of actions against companies is the record high levels of ethics and compliance in industry operations, the 2013 Ethics Resource Center 2013 National Business Ethics Survey. *Id.* at p. 6. The relatively higher number of actions against individuals is explained as a natural outgrowth of the Mandatory Disclosure Rule process. *Id* at p. 5.

Other federal agencies have similarly low numbers of suspension and debarment actions against companies during the first half of Fiscal Year 2016.

Agency	Total Exclusions (first half FY16)	Companies	Individuals	Similar Names/ Aliases Included
Air Force	55	12	43	6
USAID	20	9	11	
Army	359	73	286	4
DLA	45	21	24	
Commerce	14	4	10	
Energy	11	4	7	
Interior	16	1	15	

State	27	14	20	
DOT (combined)	40	15	27	
Education	35	1	34	
EPA	85	34	51	
GSA	25	14	11	
NASA	1	0	1	
Navy	373	36	336	Approximately 100 unique last names, many aliases
NSF	17	6	11	
OPM	173	2	171	
USPS (combined)	12	6	6	
SBA	14	2	12	

Although not formally tracked and reported, SDOs credit early engagement and disclosures by industry with the declining number of actions against companies. Stated more directly, the current trend is that proactive disclosure of actual (or, sometimes, suspected) wrongdoing may be the best method of protecting the business and avoiding the oftentimes disproportionate action of exclusion from federal contracting.

Going forward, contractors should consider the following dynamics in order to fully protect themselves in this disclosure-driven suspension and debarment model:

- Self-disclosure, including a robust policies and procedures review and training, is a critical factor in avoiding suspension or proposed debarment, as is an appropriate, non-combative tone when approaching an SDO using, if appropriate, different lawyers than those leading the criminal defense;

- Understanding specific agency preferences for when administrative agreements are used is important to shorting an SDO's inquiry;

- Calibrating remedial measures to the size and resources of the company, and the expectations of the federal agency, is essential to achieve an affordable resolution.

- When contractors name responsible individuals in communications with regulators, those individuals are likely to hear from SDOs shortly thereafter. In order to avoid inadvertent miscommunication that might confuse the SDO or cause the SDO to doubt the completeness of the company's disclosure, in the current disclosure-driven climate, companies should consider affording counsel to individuals to assist with SDO inquiries. The focus of the individuals' lawyer should be protecting the individual without inadvertently straining the SDO's impression of the credibility of the company so that future disclosures will be accepted at face value. This will likely be more of a delicate balance when deciding to provide counsel to former employees if they were involved in the alleged wrongdoing.

This past year has seen a number of potentially profound changes to the regulatory and enforcement environment facing government contractors. Communication with the government and cooperation with investigations remains not only a regulatory requirement but, if done properly, an important tool for protecting contractors and their stakeholders.