

***False Claims Act
and
Mandatory Disclosure Requirements
for Federal Contractors***



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False Claims Act: Recent Developments and Their Impact on Compliance and Enforcement

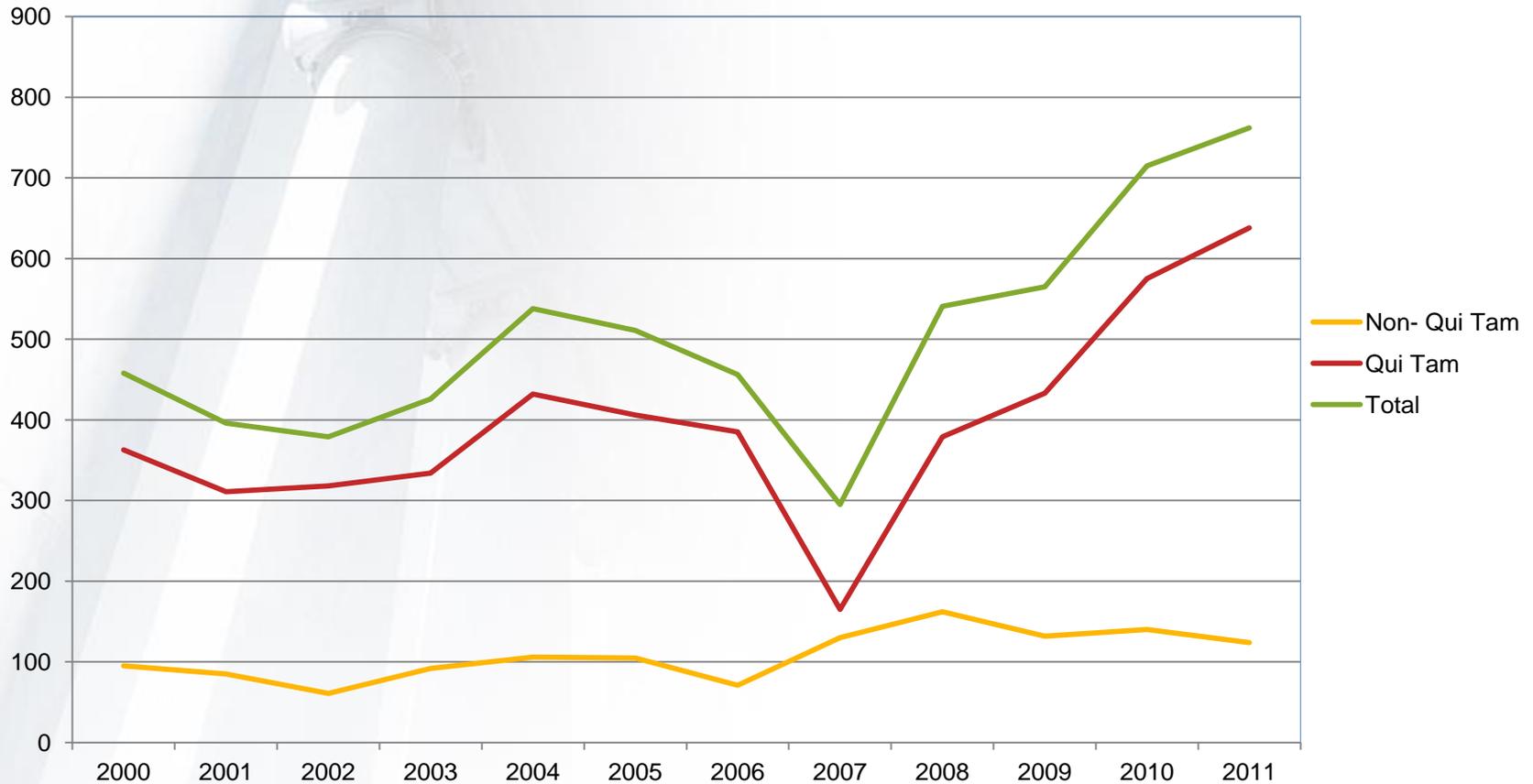
- Recent FCA and *Qui Tam* Enforcement Statistics
- FCA Basics and Liability Provisions
- Recent Cases and Their Impact on Compliance & Enforcement
- Recent Settlements and Their Impact on Compliance & Enforcement
- Mandatory Disclosure Requirements

FCA Statistics: FY 2011

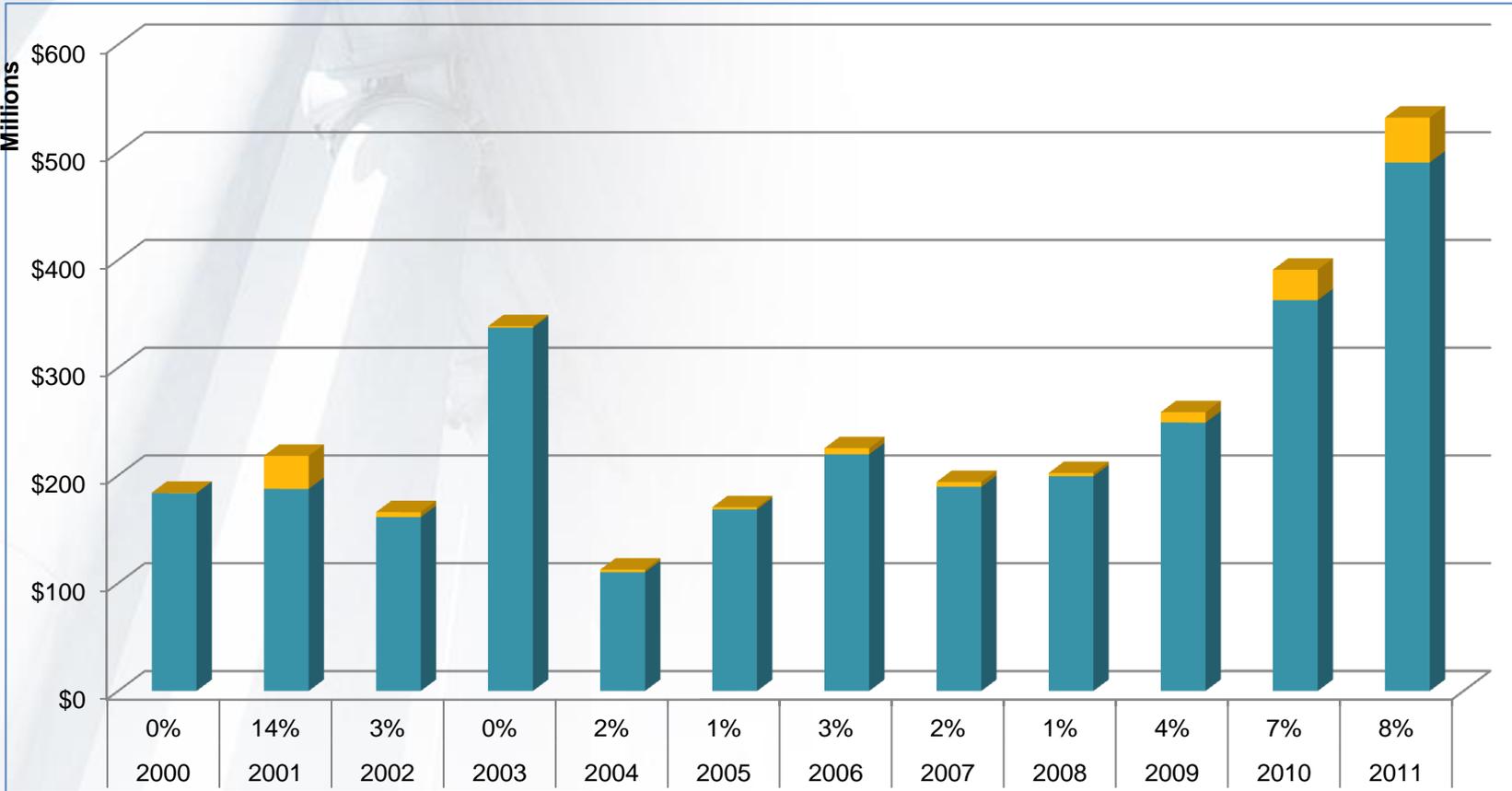
	FY 2011	Total since 1986
New matters	762	12,132
<i>Qui tam</i>	638	7,843
Recoveries	\$3,029,249,933	\$30,315,593,792
Relator share	\$532,193,735	\$3,418,672,503

New Matter Filings 2000-2011

New Matters 2000-2011

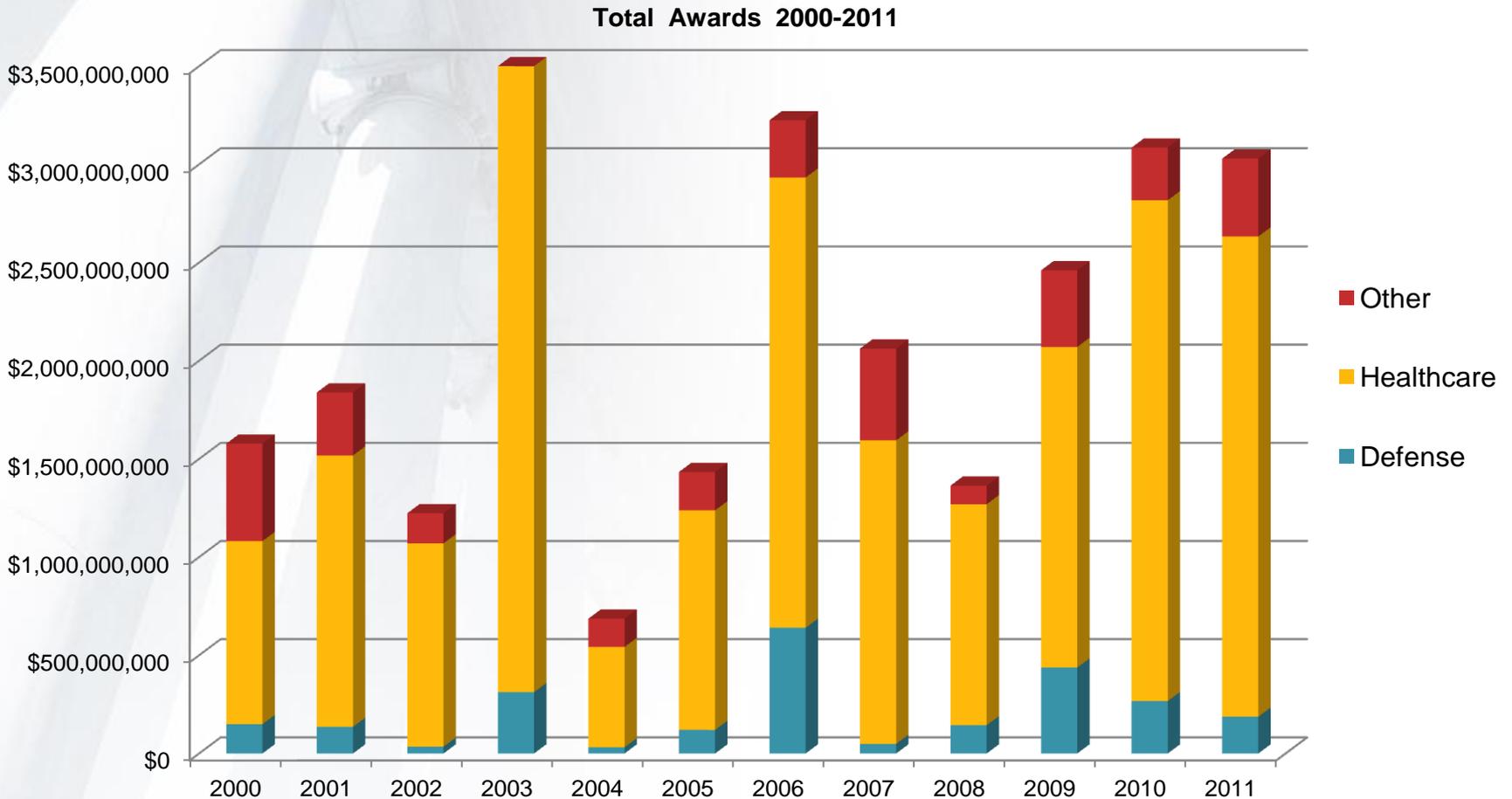


Relator's Share of Awards 2000-2011



■ Sum of Where U.S. Intervened ■ Sum of U.S. Declined

Total Awards by Industry 2000-2011



Heightened Enforcement Under Obama Administration

■ Obama Administration

- Since January 2009, \$8.7 billion
- Largest three year recovery total in DOJ History
- 28 percent of DOJ recoveries since 1986

■ Task Forces

- National Procurement Fraud Task Force (2006), now focused on Recovery Act fraud
 - Inspectors General
 - FBI and Defense investigative agencies
 - Federal prosecutors from U.S. Attorney's offices
 - DoJ's Antitrust, Civil, Criminal, Environmental & Natural Resources, National Security and Tax Divisions
- Financial Fraud Enforcement Task Force (2009)
- Financial Institutions and Public Sector Fraud Unit (DOJ – Nov. 2010)
 - Mortgage, bank, government procurement fraud
 - Contracting fraud in Afghanistan



The False Claims Act

FCA Liability:

Common Theories of Liability

- 1. False Claim** – *when a contractor **knowingly submits** a false claim to the Government or a recipient of Government funds, like another contractor, or causes another to submit a false claim.*
- 2. False Record or Statement** – *when a contractor **knowingly makes** a false record or statement material to a false claim.*
- 3. Reverse False Claim** – *when a contractor **knowingly makes** a false record or statement material to an obligation to pay money to the Government, or **knowingly and improperly avoids** an obligation to pay money to the Government.*
- 4. Conspiracy** – *when a contractor **conspires to do** any of the above: (1) submit a false claim, (2) make a false statement, or (3) submit a reverse false claim.*

FCA – *Qui Tam* Provisions

- FCA actions may be initiated by individuals under the FCA's qui tam provisions
 - “Relators” (a/k/a “whistleblowers”)
- Procedure:
 - Relator must file a complaint under seal
 - Relator must also serve written disclosures on DoJ describing “substantially all material evidence and information the person possesses”
 - DoJ has 60 days to investigate and make intervention decision (extensions are common)

FCA – *Qui Tam* Provisions

- Government Action (following investigation)
 - Intervene in the case and assume primary responsibility for the litigation
 - Decline intervention, allowing relator to proceed
 - Move to dismiss the case (even if relator objects)
 - Seek settlement
- Bars to *Qui Tam* Actions
 - Public Disclosure
 - First-To-File Rule
 - Previous Government Action

FCA Damages and Penalties

- Fines/civil penalties can be between \$5,500 and \$11,000 **per “claim.”**
- Treble (3x) the amount of the Government’s actual damages
- Suspension or debarment of the offending contractor



*The False Claims Act also provides the Government with the option of seeking criminal penalties for intentional violations.

FCA – Damages & Penalties

- In *qui tam* cases, qui tam relators (“whistleblowers”) are entitled to:
 - “Relator’s Share” of up to 25% of recovery in intervened cases and up to 30% of recovery in non-intervened cases;
 - Attorneys’ fees and costs; and
 - Where retaliation claim is involved:
 - Reinstatement;
 - Double back pay + interest

FCA – Collateral Consequences

- Corporate “Death Penalty”
 - Suspension & Debarment (Gov’t Contractors)
 - Exclusion (Health Care) from federal health programs (e.g., Medicaid and Medicare)
- Criminal Conviction & Fines
 - If parallel proceedings under the “Criminal” Federal False Claims Act, 18 U.S.C. § 287

FCA Liability: 4 Elements of a *False Claim*

- The Contractor submits (or *causes* to be submitted) a “**claim**” for payment; and
- The Contractor’s claim is **false or fraudulent**; and
- The Contractor **knew** that the claim was false or fraudulent; and
- The falsehood was **material** to the decision to pay the claim—*i.e.*, it was “capable of influencing” the payment.

FCA Liability: What is a “Claim?”

- **Claim**: The FCA defines a “**claim**” as any request or demand for money or property that is:
 1. Presented to an **officer or employee** of the United States; OR
 2. Made to a **contractor, grantee or other recipient**, if the Government paid for or is obliged to reimburse the claim to the contractor, grantee or other recipient (e.g., a subcontractor submits an invoice to a prime contractor that holds a federal contract).

Note - a claim is not a false claim unless it is false and that falsehood is material.

FCA Liability: What is a “Claim?”

- **Claim**: Encompasses virtually all demands or requests for money that are made to a Government agent, a contractor or a grantee, provided that the Government has provided some portion of the money sought.
 - Any action by the Contractor that has the **purpose and effect** of causing the Government or a recipient of Government funds to pay out money it is not obligated to pay, or any action that **knowingly deprives** the Government of money it is lawfully due.
 - Each separate submission that seeks payment from the Government or a recipient of Government funds is a claim for purposes of the FCA, even if each submission is under the same contract.

Note - a claim is not a false claim unless it is false and that falsity is material.

FCA Liability: Knowledge Requirement

- The FCA requires the defendant to “knowingly” submit or cause to submit a false claim.
- A claim is made “knowingly” if:
 - The Contractor has **actual knowledge** that information in the claim is false;
 - However, a specific intent to defraud the Government is not required for civil liability under the FCA.

Note - the submission of a claim known to contain false information is still not a violation of the False Claims Act unless the falsity is also material.

FCA Liability: Materiality

- To be material, a falsity must either:
 1. have a “**natural tendency to influence**,” OR
 2. be “**capable of influencing**,”the payment or receipt of money or property.
- Examples:
 - The Government relied upon the false information in deciding to pay the claim; or
 - The falsity had the potential to influence the Government’s payment decision.

FCA Liability: Types of False Claims

- **Direct False Claims** – A knowingly false representation that causes the Government or a recipient of Government funds to pay more than it would have absent the misrepresentation.
 - *Example:* A Contractor submits invoices to DoD for services that were not actually performed.
- **Express False Certification Claims** - Where a Contractor expressly and specifically certifies compliance with a required contract provision, statute, regulation, or Governmental program.
 - *Example:* A Contractor falsely certifies to the NRO that no organizational conflicts of interest exists with respect to a proposed Government contract.

FCA Liability: Types of False Claims

- **Implied False Certification Claims** – Liability is imposed on the premise of contractual breach or implied responsibility, even if the Contractor doesn't certify compliance.
 - *Example: A Contractor submits an accurate bill for construction, but fails to adhere to a specific contract term requiring waste disposal per EPA regulations.*
- **Fraud-in-the Inducement** – False representations made by a contractor to induce the Government to enter into a contract that it would not have entered into absent the misrepresentation.

Case Law Developments

- Public Disclosure Bar
- Implied Certifications
- Damages & Penalties
- Attorney's fees & costs

Public Disclosure Bar

- ***Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011)**
 - Federal agency’s written response to a FOIA request constitutes a “report” within the meaning of the FCA’s public disclosure bar
- ***United States ex re. Baltazar v. Warden* (7th Cir. 2011)**
 - Where the relator adds “vital” “defendant specific facts” that were “not in the public domain,” Government reports of industry wide practices are insufficient to require dismissal of a *qui tam* suit under the FCA’s public disclosure bar
- ***U.S. ex rel. Jones v. Collegiate Funding Services, Inc.* (4th Cir. March 14, 2011)**
 - SEC filings may constitute “administrative reports” triggering the FCA’s public disclosure bar

Implied Certifications

- ***United States ex rel. Hutcheson v. Blackstone Medical, Inc.* (1st Cir. 2011)**
 - Claims can be impliedly false or fraudulent under the FCA where they “represent[] compliance with a material condition of payment that was in fact not met,” *even if the precondition of payment is not expressly stated in a statute or regulation.*
 - Non-submitting third parties may be liable if they knowingly cause submitting entities to present a materially false or fraudulent claim through their submissions.
 - Supreme Court denied *certiorari* on Dec. 5, 2011
- ***United States ex rel. Wilkins v. United Health Group* (3d Cir. 2011)**
 - Claims can be fraudulent even without an express certification of compliance, so long as compliance with the particular statute or regulation is a condition of government payment.
 - Monthly requirement to certify compliance with Medicare guidelines was pre-requisite for eligibility under Medicare and compliance was express condition of payment.

Implied Certifications: Circuit Split

- **Accept Implied Certification Theory**

- Precondition of payment need not be expressly stated in a statute or regulation.
 - First
 - Tenth
 - District of Columbia
- Precondition of payment must be expressly stated in a statute or regulation.
 - Second
 - Ninth
 - Third
 - Sixth
- Eleventh Circuit

- **Reject Implied Certification Theory**

- Fifth Circuit
- Fourth Circuit

Damages & Penalties

- ***United States v. SAIC*, 626 F.3d 1257 (D.C. Cir. 2010)**
 - Calculation of damages
 - the amount the government paid out based on the false claims over and above what it would have otherwise paid must take into account any value of the services received
- ***U.S. ex rel. Bunk v. Birkart Globistics GmnH & Co., et al.* (E.D.V.A)**
 - Eighth Amendment's Excessive Fines Clause
 - Declined to impose statutory penalties on jury's finding of 9,136 false claims that would have amounted to between \$50.2 million and \$100.4 million
 - such penalties violate Eighth Amendment where relator failed to establish that the government suffered any economic harm or damages.

Attorneys' Fees & Costs

- Three-pronged attack for defendants:
 - 31 U.S.C. § 3730(d)(4)
 - Relator liable for clearly frivolous, vexatious, or harassing lawsuit
 - 28 U.S.C. § 1927
 - Attorneys liable for multiplying the proceedings unreasonably and vexatiously
 - In *United States ex rel. Levesky v. ITT Educational Services Inc.* (S.D. Ind.), the court granted defendant's motion for attorneys' fees and sanctions against relator's attorneys – *individually and against their law firms.*
 - Inherent Power of the Court
 - Both relator and counsel may be liable

Trends

- Boundaries of FERA (2009) and PPACA (2010) amendments continue to be litigated
 - Public disclosure bar
 - Possible impact of SCOTUS holding *State of Florida v. U.S. Department of Health and Human Services*
- Expanded theories of third party liability
 - Caremark (5th Cir.) and Hutcheson (1st Cir.) add to potential theories of FCA liability for third parties that have no direct dealings with the government



Mandatory Disclosure Requirement

Mandatory Disclosure

- Amendments to the Federal Acquisition Regulation (FAR) add the following:
 - New basis for Suspension/Debarment
 - New FAR Clause for use in Government Contracts and Subcontracts

Suspension and Debarment

SUSPENSION AND DEBARMENT PENALTY

- Immediate effects on Contractor's Federal business
 - No new federal contracts *or subcontracts or options*
 - No new orders under IDIQ contracts
 - Penalty can last 3 years or more
- Collateral consequences on Contractor's other business
 - Disclosure on state and local government procurements
 - Some commercial companies use the debarment list for non-government purchases

New Basis for Suspension/Debarment – Retroactive Disclosure

Knowing failure by a principal, until the passage of three (3) years time after final payment on any Government contract, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or subcontract, 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 False Claims Act; or
- (C) Significant overpayment(s) on the contract.

(A) Fraud, Conflict of Interest, Bribery, or Gratuity Violations Found in 18 USC

- Examples Include:
 - Violations of Post-Employment Restrictions (Revolving Door Rules)
 - Providing Meals, Entertainment, or Gifts to Government Officials or Employees
 - False Statements, *e.g.*, false invoices, false information in a letter or oral presentation to the Government



(B) Violation of the False Claims Act

- 1. False Claim** – *when a contractor **knowingly submits** a false claim to the Government or a recipient of Government funds, like another contractor, or causes another to submit a false claim.*
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(C) Significant Overpayments

- “Significant” is not a defined term, but it is not the same as “material”
- Does not include contract financing payments under FAR 32.001 (e.g., payments before final acceptance of goods/services)
- “This rule is aimed at the type of overpayment that the contractor knows will result in unjust enrichment, and yet fails to disclose it.”
- Beware of potential overlap with “false claims”
 - *Examples:* claims for reimbursement under progress payments, incurred costs

Retroactive Disclosures

The new suspension/debarment rule in the FAR has a “look back” requirement. As a result, “[i]f violations relating to an ongoing contract occurred prior to the effective date of the rule (12 December 2008), then the contractor must disclose such violations, *whether or not the clause [FAR 52.203-13] is in the contract . . . because of the cause for suspension and debarment in Subpart 9.4.*”

Retroactive Disclosures

“Knowing failure by a *principal* . . . to timely disclose to the Government . . . credible evidence of . . .”

- “*Principal* means an officer, director, owner, partner, or person having primary management or supervisory responsibilities within a business entity (e.g., general manager, plant manager; head of a subsidiary, division, or business segment; and similar positions).”
- If you are taking this training course, the Government would probably consider you as a principal.

Retroactive Disclosures

“Knowing failure by a principal . . . to *timely* disclose to the Government . . . credible evidence of . . .”

- “[T]imely disclosure of credible evidence as required by the rule as cause for suspension or debarment would be measured from the date of determination by the Contractor that the evidence is credible, or from the effective date of the rule, whichever event occurs later.”

Credible Evidence

“Knowing failure by a principal . . . to timely disclose to the Government . . . **credible evidence** of . . .”

- *Credible Evidence* is not defined in the FAR
- According to the drafters of the FAR amendments: The term “credible evidence” indicates a higher standard than “reasonable grounds to believe” (which was used in the proposed rule), “implying that the Contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government.”

What should be disclosed?

- False statements
 - False price certification
 - Concealment of a material fact
 - Incomplete OCI disclosures
- Theft of Government source selection information
- Mischarging
- Failure to perform required tests
- Trade Agreements Act / Buy American Act violations
- Kickbacks
- Retaliation against an employee who raises an issue involving contract non-compliance or fraud

Types of Internally Reportable Events

Contract Award

- a **false statement** – orally or in writing – made to the Government, directly or indirectly, including false certifications and representations, in a proposal or during an oral presentation to the Government, etc.
 - misstatements of contractor or employee qualifications or performance results
 - false independent price certification
 - concealment of a material fact

Types of Internally Reportable Events

Contract Award

- **bribery** of or providing a **prohibited payment** or gratuity to a Government official or his/her family/household member (exceptions: gifts or other things of value that are permitted under law and company policy)
- **employment discussions** between a Government employee and the contractor giving rise to a conflict of interest

Types of Internally Reportable Events

Contract Award

- **knowing failure to disclose** required information, such as cost, pricing, or other information requiring such disclosure, *examples:* cost or pricing data under the Truth in Negotiations Act (TINA); organizational conflict of interest information; commercial sales practices under GSA Schedule requirements, etc.
- **unlawfully obtaining or possessing** Government source selection information or contractor bid or proposal information prior to award of a contract that is related to the protected information.

Types of Internally Reportable Events

Contract Performance

- **mischarging** under a Government contract
- **failure to perform** required processes or tests required by the contract, or falsification of test results
- **failure to deliver** products or services that conform to contract requirements
- a **false statement** – orally or in writing – made to the Government, directly or indirectly, concerning contract performance (includes concealment of a material fact).

Types of Internally Reportable Events

Contract Closeout

- **false statements** – orally or in writing – made to the Government, directly or indirectly, concerning contract claims or entitlement
- **false or fraudulent claims**, *examples*: invoices for payment containing overstated progress payment requests or for incurred costs; inclusion of unallowable costs in indirect cost rate submissions; etc.
- **falsification or unauthorized destruction** of Contractor's books and records

Types of Internally Reportable Events

Other

- Performance of prohibited activities by a former Government employee on behalf of the Contractor contrary to post-employment restrictions, *i.e.*, “switching sides”
- Offering or accepting illegal kickbacks in connection with Government subcontracts, at any tier
- Retaliation against an employee who raises an issue involving Contractor non-compliance with any governing authority

Reporting Violations

- When does a Contractor have to report?
 - For contractual purposes, the timeliness of a disclosure to the Government is measured from the date a Contractor determines that there is credible evidence of a violation.
- How long does the disclosure requirement apply?
 - The mandatory disclosure requirement applies to all current contracts and all closed contracts until three (3) years after final payment.

Cooperation with Audits and Investigations

- The contractor is required to give “full cooperation” to Government agencies involved with audits, investigations or corrective actions
 - Employees should always confer with Corporate Compliance as soon as they become aware of an investigation or audit
 - Review Company Policy & Procedure regarding audits and investigations
- Only the company’s designated POC is authorized to respond to Government audits and investigations, e.g., Compliance, Legal, Program Management, Finance.

New FAR Clause for use in Government Contracts Requires Mandatory Disclosure

- FAR 52.203-13
 - This new FAR contract clause also (redundantly) requires Contractors to disclose certain violations.
 - The new FAR contract clause substantially overlaps with the requirements of the new mandatory disclosure requirements.
 - The new mandatory disclosure requirements apply, and disclosures must be made, even if the new FAR contract clause is not in your contract or subcontract.

Mandatory Reporting

Bottom Line:

- Critical that all employees report concerns internally to Corporate Compliance
- Not all internal reports will lead to disclosure to the Government
- Government has already begun to audit
 1. disclosures
 2. non-disclosures
- Assessment of meeting disclosure requirement will factor into
 1. present responsibility
 2. past performance

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