

28th Annual Ounce of Prevention Seminar

# Welcome

## Predicting the Future: Federal Contracting in an Election Year

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# INVESTIGATIONS

Philip Inglima

Andy Liu

Raja Mishra

# CURRENT ENVIRONMENT

- Increased complexity of investigations for government contractors
  - Mandatory Disclosure rules
  - Parallel proceedings for civil or administrative enforcement
  - Government and shareholder pressure on corporations to cooperate and disclose
- Higher Stakes
  - Pressure on agencies to suspend and debar
  - Threat of derivative litigation

# PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (THE FILIP MEMORANDUM)

- USAM §9-28.100 et seq, August 2008
  - Guides prosecutorial decision-making
- “The Value of Cooperation”
  - Timely and voluntary disclosure
- “Cooperation: Disclosing the Relevant Facts”
  - “Facts” must be disclosed; not “legal work”
- Corporate compliance programs will be evaluated

# COORDINATION OF PARALLEL CRIMINAL, CIVIL AND REGULATORY PROCEEDINGS (THE HOLDER MEMO )

- January 2012
- Encourages information sharing within DOJ, among multiple investigations
- Goal: “realize all of the remedies available to the United States”
- FAR Contract Clause allows inter-agency sharing of disclosed materials

# FAR MANDATORY DISCLOSURE

- Contract Clause
  - Contractor Code of Business Ethics and Conduct, FAR § 52.203-13
- Suspension and Debarment policy
  - Timely self-disclosure of credible evidence of fraud, etc., FAR § 9.406-2(b)(1)(vi)

# DEVISING INVESTIGATION STRATEGIES THAT MEET THE NEED

- Why?
  - Identify and eliminate misconduct
  - Fulfill disclosure obligations
  - Avoid or resolve enforcement proceedings
- Who?
  - Role of in-house and outside counsel
  - Participation of business people
  - Overseen by:
    - Management
    - Audit Committee
    - Special Committee

# DEVISING INVESTIGATION STRATEGIES THAT MEET THE NEED

- How?
  - To partition privilege from facts
  - To deal with agencies simultaneously, for both disclosure and settlement
- When?
  - To remediate and revise systems
  - To disclose
  - To push-back



# DEALING WITH PARALLEL PROCEEDINGS – CRIMINAL, CIVIL AND ADMINISTRATIVE

- Coordination issues
  - Timing, content of disclosures
  - Application of discovery rules (*e.g.*, FRCP 6(e) versus administrative record and FOIA)
- Planning Issues
  - Seeking non-disclosure agreements
  - Securities disclosure implications

## DISCLOSURE CONSIDERATIONS – PRIVILEGE IN DOUBT, EVEN WHEN DOJ AGREES TO PROTECT

- *Control Components, Inc. Subpoenas Litigation* (April 2012): Federal judge ordered CCI counsel Steptoe & Johnson to turn over correspondence with DOJ re internal FCPA investigation; disclosed materials found not to be privileged.
- *United States v. Thompson*, 562 F.3d 387 (D.C. Cir. 2009): notwithstanding “non-waiver” agreements between disclosing company and US, defendant in resulting criminal case entitled to documents necessary to his fair trial rights.

# CASE STUDY ON CONDUCT OF IN-HOUSE COUNSEL: *U.S. V. STEVENS*

- GlaxoSmithKline in-house counsel indicted for allegedly misleading FDA about company marketing, including “pro-con” memo. Stevens faced more than 20 years in prison.
- Court granted a judgment of acquittal.
- Lessons learned