

Implementing the Mandatory Disclosure Rule

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The Contractor Code of Ethics and Business Conduct and Mandatory Disclosure Rule – Recent Developments

The Contractor Code of Ethics and Business Conduct and Mandatory Disclosure Rule (MDR) – Recent Developments

- The MDR was published on November 12, 2008, and took effect on December 12, 2008
- Considerable attention was paid during the first year on how the MDR would be implemented by agencies and contractors
- ABA Public Contract Section (Mike Mutek) formed a Task Force to study implementation of MDR. The Task Force published its Guide to the MDR in January 2010
- The Guide addresses 14 areas involved in implementing the MDR:
 - Identifying types of reportable conduct
 - The “credible evidence” standard
 - Contractor obligations with respect to “principals”
 - Disclosures regarding subcontractors and agents
 - Obtaining information regarding potentially reportable events
 - “Timely disclosure” and “look-back” requirements
 - The form, content, and recipients of disclosures
 - Voluntary disclosures
 - “Full cooperation”
 - Preserving confidentiality and privilege and preventing disclosures to third parties
 - Dealing with company employees and officers
 - Past performance and contractor responsibility determination requirements
 - Structuring ethics awareness programs and internal control systems
 - Nonprocurement transactions

The Contractor Code of Ethics and Business Conduct and Mandatory Disclosure Rule (MDR) – Recent Developments

- To date, there have been approximately 220 disclosures pursuant to the MDR. Of these, more than 200 involve DOD
- All of these disclosures have been forwarded to and reviewed by a committee that includes agency (client) representatives as well as DOJ civil and criminal attorneys
- These disclosures have also been forwarded to the relevant agency SDOs
- Of the 220 disclosures, approximately 40 are the subject of DOJ civil or criminal investigation (or both)
- It is DOD's intent to notify the contractor when these investigations have been closed out or when a decision has been made not to investigate. However, this process has been slow for several reasons

The Contractor Code of Ethics and Business Conduct and Mandatory Disclosure Rule (MDR) – Issues for the Government

- How much should a contractor's internal investigation be relied upon in deciding whether to initiate an investigation?
- How to distinguish between an actionable fraud and a matter for the CO without conducting an investigation?
- How can the investigative and decision process be expedited to encourage contractor disclosure?
- How can the government reward contractors who disclose to encourage contractor disclosure?

The Contractor Code of Ethics and Business Conduct and Mandatory Disclosure Rule (MDR) – Recent Developments

■ Other issues under the MDR include:

- Role of DCAA
- Suspicions raised by too few disclosures or too many disclosures
- Application or non-application of de minimis rule
- Situations involving multiple disclosures (subcontractors, etc.)
- Role of MDR in qui tam relator suits and Government investigations (attorney-client privilege)
- Disclosure obligations arising out of discovery
- FOIA
- Potential suspensions or debarments for failure to make timely disclosure
- Meaning of credible evidence

Internal Control Systems and the DCAA

- Some DCAA auditors have taken very aggressive positions in reviewing contractor internal control systems
- DCAA auditors have sought to “verify that system provides disclosure to DCAA and the ACO of all findings that significantly impact government contracts within 5-10 days of identification”
- DCAA auditors have requested a list of violations of the code of conduct/ethics as well as all hotline and other reports of misconduct that occurred in prior 12 months
- DCAA auditors have requested copies of all internal policies and procedures for timely reporting as well as documents relating to “management overrides”

DCAA Policy Guidance

- DCAA Headquarters has issued audit guidance that addresses verification of contractor internal control systems and new mandatory disclosure rules (DCAA Audit Guidance Mem. 09-PAS-014(R) (July 23, 2009))
- This guidance is much less specific and sweeping than some earlier DCAA requests
- Guidance:
 - “Request a copy of any disclosures made and verify that the contractor complied with their policies and procedures.”
 - “Auditors should ensure that the contractor’s policies and procedures include a reasonable definition of credible evidence, and a reasonable timeframe for disclosure once credible evidence is obtained.”

DCAA Policy Guidance

■ Guidance (cont'd):

- “Contractors are allowed to take time for preliminary examination of the evidence to determine its credibility prior to disclosure.”
- “Once the contractor has had sufficient time to take reasonable steps to determine that the evidence is credible, the contractor should disclose the violation in a timely manner.”
- “Auditors should verify that the contractor did not delay disclosing the violation once it was determined that credible evidence exists.”
- “If the auditor finds that the contractor failed to disclose the violation in a timely manner, an internal control deficiency should be reported.”
- “Review any disclosures reported to the OIG and contracting officer and ascertain if the contractor has taken the necessary corrective actions to protect the Government’s interests.”
- “If the contractor has not taken the appropriate corrective action, the auditor should report this as an internal control deficiency.”



Interrelationship of MDR and FCA Amendments

FCA Amendments

- The Civil False Claims Act (“FCA”) has been amended twice in the past year
 - Fraud Enforcement and Recovery Act (“FERA”) – May 20, 2009
 - Patient Protection and Affordable Care Act (“PPACA”) – March 23, 2010
- The FCA is about to be amended again as part of the pending financial reform legislation
 - Restoring American Financial Stability Act of 2010 (the Senate Bill)
 - Wall Street Reform and Consumer Protection Act of 2009 (the House Bill)
- Further FCA amendments are possible down the road
 - Relaxation of Rule 9(b) for qui tam
 - Relators sharing administrative and other non-FCA settlements
 - Other changes?
- Potential Program Fraud Civil Remedies Act amendments to raise ceiling from \$100,000 to \$1,000,000

FCA Amendments

- Before FERA, a company would be liable under the Act if it:
 - Knowingly presented, or caused to be presented, to a government official a false or fraudulent claim for payment or approval
 - Knowingly made, used, or caused to be made or used, a false record or statement to get a false or fraudulent claim paid or approved
 - Conspired to defraud the government by getting a false or fraudulent claim allowed or paid; or
 - Knowingly made, used or caused to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government

FCA Amendments – Intent for U.S. to Pay Claim

- Supreme Court issued Allison Engine decision in 2008
 - FCA Section (a)(1) imposes liability only when a claim is directly presented to the United States
 - FCA Sections (a)(2) and (a)(3) impose liability where claims submitted to intermediary, provided that claimant “intended” that false statement be used to get U.S. Government to pay claim
 - Not clear what kind of proof necessary to show “intent”
 - FCA should not be read as an “all-purpose anti-fraud statute”

FCA Amendments – FERA

- “FERA” Statute enacted May 20, 2009 (S. 386)
- Key stated goals of legislation
 - Overturn Allison Engine
 - Ensure all Stimulus and TARP funds protected by FCA
- Overall effect
 - Expanded liability provisions
 - New anti-retaliation provision
 - Expanded CID provisions
 - New procedural provisions

FCA Amendments – FERA

- FERA broadens scope of liability to indirect claims
 - Words “to get” and “getting” removed from former subsections (a)(2) and (a)(3)
 - New definition of “claim” includes claims to grantees and other recipients if U.S. Government provides the funds
 - Claims are covered if they seek money “to be spent or used on the Government’s behalf or to advance a Government program or interest”
 - Unclear how broadly this standard will be interpreted
 - Exception for claims made to Social Security recipients and federal employees
 - Overturns Allison Engine and removes “presentment” requirement

FCA Amendments – Reverse False Claims

- FERA broadens scope of liability for reverse false claims
 - Reverse false claim provision expanded to impose liability where a person (including a company) “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money for property to the Government”
 - No false statement or record needed for liability
 - No affirmative act required for liability
 - “Improper” unclear
 - New unclear definition of “obligation”:
 - “Established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment”
 - Broad new sources of duties, including all statutes and regulations and the “retention of any overpayment”

FCA Amendments – FERA

- FERA expands use of civil investigative demands
 - Permits Attorney General to delegate authority to issue
 - Delegated to Assistant Attorney General for Civil Division
 - Delegated to individual U.S. Attorneys
 - Permits DOJ to share information with relators
 - Permits use of information in any subsequent proceeding, including non-intervened qui tam actions
 - No internal DOJ policy guidance
- Enormous practical implications
 - CIDs permit pre-intervention depositions and interrogatories
 - Tremendous difficulties for defendants and counsel
 - Employees may take the 5th, and adverse inferences may be drawn
 - Employees may need separate counsel

FCA Amendments – “PPACA”

- The 2010 Patient Protection and Affordable Care Act (“PPACA”) amended the FCA’s “public disclosure” bar
- As amended, the public disclosure bar now reads as follows:

The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

- (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
 - (ii) in a congressional, Government Accountability Office or other Federal report, hearing, audit or investigation; or
 - (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
- (B) For purposes of this paragraph, “original source” means an individual who either
- (i) prior to a public disclosure under subsection (e)(4)(A), has voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based, or
 - (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions and who has voluntarily provided the information to the Government before filing the action

FCA Amendments – “PPACA”

- Principal changes to Public Disclosure Bar
 - The bar is no longer labeled as jurisdictional in nature, so it may be difficult to get early, targeted discovery
 - The DOJ has a veto over any defendant’s motion to dismiss on public disclosure grounds
 - Unclear how and when this must be exercised
 - Public disclosures are narrowed to disclosures in federal proceedings, not state proceedings
 - Public disclosures do not include disclosures in private litigation
 - “Original Source” exception broadened
 - A relator can meet the standard if he/she has knowledge independent of the disclosure that “materially adds” to the disclosed information
 - No requirement for “direct” knowledge of information

FCA Amendments - Financial Reform Legislation

- Financial Reform law likely to include provisions amending FCA
 - Bill would fix ambiguities in anti-retaliation provision enacted in FERA, principally by clarifying that the protected conduct includes efforts by a relator taken “in furtherance of” a *qui tam* action, as well as “other efforts to stop” violations of the FCA
 - Bill would provide a uniform 3-year statute of limitations for anti-retaliation claims, measured from the date the retaliation occurred
 - Current law - most analogous state limitations period (usually 1-3 years)
- Financial Reform law likely to include other whistleblower provisions
 - Bill includes two provisions modeled on IRS whistleblower law
 - Bill would provide guaranteed bounties of up to 30 percent for whistleblowers providing information about violations of the securities laws or the commodities trading laws
 - Not a true *qui tam* regime, because the whistleblower cannot file suit, only provide information



Questions?

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