



THE ABA TASK FORCE ON THE
MANDATORY DISCLOSURE RULE
&
THE NEW FCA AMENDMENTS

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ABA Public Contract Section Task Force on Implementation of the Contractor Code of Business Ethics and Conduct and Mandatory Disclosure Rule

■ Mission Statement

- ◆ The objective of the Task Force is to develop guidance that will assist in the interpretation and application of the new rule. While the exact form of any work product will be decided by the Task Force, we are hopeful of preparing a "best practices" manual for implementation of all aspects of the rule, including the requirements pertaining to Contractor Codes of Business Ethics and Conduct, Business Ethics Awareness and Compliance Programs, Internal Controls, and Mandatory Disclosure obligations.

ABA Public Contract Section Task Force on Implementation of the Contractor Code of Business Ethics and Conduct and Mandatory Disclosure Rule

■ Mission Statement

- ◆ To achieve this objective, we are attempting to assemble a Task Force that represents all components of the federal contracting community affected by the new rules, including representatives from the government, including DOJ, the Offices of Inspector General and Suspension and Debarment Officials, private industry, law firms and accounting firms.

Task Force Guide Content

- Implementation of the Rule
 - ◆ Section 1: Types of Reportable Conduct
 - ◆ Section 2: The “Credible Evidence” Standard
 - ◆ Section 3: “Principals” and their Obligations
 - ◆ Section 4: Obtaining Information Regarding Potentially Reportable Events
 - ◆ Section 5: “Timely Disclosure” and “Look Back” Requirements

Task Force Guide Content

■ Implementation of the Rule

- ◆ Section 6: Determining the Form and Content of Disclosures and to Whom Disclosures Should be Made
- ◆ Section 7: “Full Cooperation”
- ◆ Section 8: Voluntary Disclosures
- ◆ Section 9: Preserving Confidentiality and Privilege and Preventing Disclosures to Third Parties
- ◆ Section 10: Disclosures Regarding Subcontractors and Agents

Task Force Guide Content

- Implementation of the Rule
 - ◆ Section 11: Past Performance and Contractor Responsibility Determination Requirements
 - ◆ Section 12: Dealing with Company Employees and Officers
 - ◆ Section 13: Structuring Ethics Awareness Programs
 - ◆ Section 14: Internal Control Systems
 - ◆ Section 15: Non-Procurement Transactions

Task Force Schedule

June 15, 2009	-	Task Force Meeting on Path Forward
June 22, 2009	-	Task Force Meeting to Review Section Drafts Prepared by Groups
July 8, 2009	-	Revised Section Drafts Due
July 13 and 14, 2009	-	Task Force Meetings to Review Revised Section Drafts
July 14-31, 2009	-	Prepare Final Product – Seek Wider Input
August 1, 2009	-	Present Final Product to Public Contract Section Council



Functions of Guide

- Identify Issues
- Identify Sources of Guidance
- Answer FAQs
- Recommend Best Practices
- Provide Structure for Continued Dialogue

Functions of Guide

- Identify Issues
 - ◆ Preamble
 - ◆ Other Publications
 - ◆ Task Force Member Experience

Issues for Contractors

- When I become aware of an allegation, do I conduct an internal investigation before deciding whether to disclose?
- How conservative do I want to be on disclosures – only clear instances of a violation?
- Do I help myself by hiring outside counsel to conduct an internal investigation? To render an opinion on whether there is credible evidence?
- What do I tell my employees in the process of conducting an internal investigation?
- Can the matter be disclosed to the CO as an overpayment only and meet the disclosure to the IG requirements? Any risks?

Issues for the Government

- How much to rely on a contractor's internal investigation 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?

Functions of Guide

- Identify Sources of Guidance
 - ◆ Preamble
 - ◆ Case Law
 - ◆ Agency Practice
 - ◆ DII
 - ◆ Other Industry Practice
 - ◆ Prior ABA Presentations and Monographs
 - ◆ Task Force Member Judgments

Functions of Guide

- Answer FAQs

When I make disclosures in the course of “full cooperation,” do I have to identify people other than those responsible for the conduct?

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- No. The rule requires only that you identify the “individual(s) responsible for the conduct.” Nonetheless, the Government subsequently may request additional information. For example, auditors and investigators often request the names of potential witnesses. Some OIGs may view a company that knowingly refuses to provide such information in response to specific Government requests as non-cooperative. In responding to such requests, you should keep in mind that the new rule defines “full cooperation” as “providing timely and complete response to Government auditors’ and investigators’ request for” “access to employees with information.”

What Does The FAR Clause Mean When It Says That I Must Provide Government Auditors And Investigators “Access To Employees With Information”?

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- FAR 52.203-13 requires that companies subject to the clause implement an Internal Control System that provides for “full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.” The Clause defines “full cooperation” as, among other things, “providing . . . access to employees with information” This does not mean, however, that you must compel your employees to speak to auditors and investigators. Employees may have reasonable and lawful reasons to avoid speaking to the Government. A reasonable course of action in most situations would be to advise your employees that the company intends to fully cooperate in any audit or investigation, but that you recognize that whether they want to meet with the Government is up to them; and that they will not be disciplined for exercising their right to or not to speak to the Government. You should consider having a second person with you when you have such conversation to preclude any future dispute regarding what you said and/or how you said it.



Will my company be penalized for an employee's decision not to speak to the Government? DRAFT

- No. Unless you actually *discourage* your employees from cooperating with the Government, you will not be penalized for an employee's independent decision not to cooperate. The commentary to the new rule makes clear that cooperation is measured by the actions of the company itself, not by the actions of the individuals within the company. Employees may have reasonable and lawful reasons to avoid speaking to the Government. You should not, however, discourage your employees from speaking to the Government. Discouraging your employees from speaking to the Government may be viewed by the Government as a lack of cooperation, or, in some circumstances, as obstruction of justice.

Functions of Guide

- Recommend Best Practices

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Best Practices

- Will my company be penalized for an employee's decision not to speak to the Government?
 - ◆ A reasonable course of action in most situations would be to advise your employees that the company intends to fully cooperate in any audit or investigation, but that you recognize that whether they want to meet with the Government is up to them; and that they will not be disciplined for exercising their right to or not to speak to the Government. You should consider having a second person with you when you have such conversation to preclude any future dispute regarding what you said and/or how you said it.

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Best Practices

- A Review Of Best Practices Indicate That The Following Processes Should Be Considered For Compliance With The MDR:
 - ◆ **All employees are informed of their personal obligation to identify and report instances of potentially noncompliant conduct.**
 - ◆ **The personal obligation is disseminated through written/electronic communication, explained and reinforced through training, and refreshed through periodic communication from an appropriate source within the Company (e.g., Compliance Officer, staff meetings, bulletins, newsletters, Company, or Division management).**
 - ◆ **Multiple avenues for reporting noncompliance are made available to employees. These include a hotline, an individual's manager, the legal department, a compliance officer or organization, and/or internal audit. Employees are more likely to report matters of non-compliance when they have multiple avenues.**



Functions of Guide

- Provide Structure For Continued Dialogue
 - ◆ Web Portal Postings
 - ◆ Electronic Updating
 - ◆ Periodic Meetings
 - ◆ Seminars & Conferences

Interplay of MDR/Internal Control System Requirements With:

- FCA Amendments
- Freedom of Information Act
- Section 872 Contractor Database
- Financial Accounting Standards and Disclosure Requirements

FCA Amendments

- “FERA” Statute Enacted May 20, 2009 (S. 386)
 - ◆ Broader bills introduced in prior Congress
 - ◆ FERA introduced by Senator Grassley to expand liability provisions
 - ◆ Senator Kyl added one clarifying amendment regarding reverse false claims
 - ◆ House of Representatives added several amendments concerning anti-retaliation provision and procedural provisions
- Key stated goals of legislation
 - ◆ Overturn *Allison Engine*
 - ◆ Ensure all Stimulus and TARP funds protected by FCA

FCA Amendments

- Overall Effect
 - ◆ Expanded Liability Provisions
 - ◆ New Anti-Retaliation Provision
 - ◆ Expanded CID Provisions
 - ◆ New Procedural Provisions

FCA Amendments – Reverse False Claims

- Broadens Scope of Liability for Reverse False Claims
 - ◆ Reverse false claim provision expanded to include knowing concealment and knowingly and improperly avoiding or decreasing an obligation
 - No false statement or record needed for liability
 - “Improper” unclear

Civil False Claims Act 31 U.S.C. §§ 3729-3733

- (7G) knowingly makes, uses, or causes to be made or used, a false record or statement material to ~~conceal, avoid, or decrease~~ an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note: Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person, ~~except that if~~.

FCA Amendments – Reverse False Claims

- Broadens Scope of Liability for Reverse False Claims
 - ◆ 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 in CFR

Civil False Claims Act 31 U.S.C. §§ 3729-3733

- (3) the term “obligation” means an 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, and

FCA Amendments – Reverse False Claims

- Broadens Liability to Include Retention of Overpayments
 - ◆ Potentially broad effect
 - ◆ No explicit exemption for normal-course overpayments retained pending normal-course repayment, e.g.:
 - Forward pricing rates
 - Pension costs based on CAS 412 & CAS 413 estimates
 - ◆ Helpful legislative history in Senate Report and Senator Kyl floor statements
 - ◆ Qui tam attorneys are salivating

“The FCA now says that if you know of an overpayment and fail to comply with a duty to report or refund it, you are on the hook for treble the amount of the overpayment.”

Relator’s Counsel
Shelley Slade
As quoted in BNA Daily Report
for Executives, June 13, 2009

“The rule has criminal ramifications that you may want to include in the report. First, anyone who makes disclosure to a CO only as an overpayment to conceal the fraud or FCA is exposed to a concealment charge under 1001 and second, anyone who receives an overpayment and fails to repay is exposed to 18 U.S.C. 641. While certainly collateral to the central purpose of the paper, maybe someone should include at least a big footnote.”

Government Attorney
Task Force Member
E-Mail, May 29, 2009



FCA Amendments – Conspiracy

- Broadens Conspiracy Provision
 - ◆ Redrafted to encompass any conspiracy to violate other liability subsections
 - ◆ Previously did not cover a reverse false claims conspiracy
- Arguably still requires showing of intent, not lesser showing of “knowing” conduct
 - ◆ Term “conspiracy” connotes intent
 - ◆ However, word “defraud” is removed from provision
 - ◆ DOJ believes that government need only establish “intent” to enter into agreement, not “intent” to commit underlying violation

Possible Additional Amendments

- Eliminating Public Disclosure Defense
 - ◆ Only DOJ could seek to dismiss, not defendants
 - ◆ Both bills limit reach of defense
 - Senate bill – Actions would be dismissed only if substantially the same matters were in an indictment, an active investigation or audit, or a news report that led to an investigation or audit
 - House bill – Actions would be dismissed only if “all essential elements of liability” were “exclusively” derived from public disclosures that are “disseminated broadly to the general public”
- DOJ opposes bills, as drafted
- Practical effect: Public disclosure defense dead

Possible Additional Amendments

- Weakening Rule 9(b) for Qui Tam Lawsuits
 - ◆ House bill provides that relators need not identify specific claims, if the allegations provide a “reasonable indication” that violations “likely occurred” and the allegations provide “adequate notice” of the misconduct
 - ◆ In practice, new standard would be a significant weakening of current pleading standard in several jurisdictions, including 1st, 7th, 8th, and 11th Circuits
 - ◆ Not applicable to direct DOJ complaints

Possible Additional Amendments

- Statute of Limitations Extension
 - ◆ Senate bill extends statute from 6 years to 10 years
 - ◆ House bill extends statute from 6 to 8 years
- New statute of limitations would apply to anti-retaliation claims as well

Possible Additional Amendments

- Permitting Government Employees to File Qui Tam Lawsuits
 - ◆ House and Senate bills both permitted
 - ◆ DOJ was strongly opposed
 - ◆ Removed from House bill
 - ◆ Senator Grassley is the key proponent
 - ◆ Terrible policy

Questions?

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