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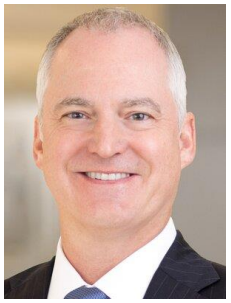
# Criminal Enforcement Considerations For Gov't Contractors

By **Stephen Byers, Agustin Orozco and David Favre** (July 11, 2024, 5:15 PM EDT)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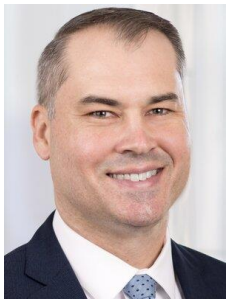
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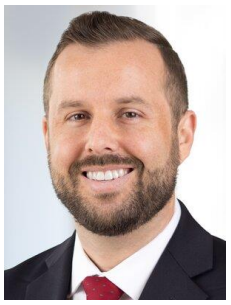
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The federal government's renewed focus on corporate misconduct and the recent expansion of its disclosure and whistleblower policies have thrust corporate criminal liability into the spotlight. It may come as no surprise that corporations are legal persons capable of committing crimes, but the scope of potential criminal liability for corporations is broader than one may realize.

Government contractors, in particular, operate in a highly complex regulatory environment and have additional motivations to detect and mitigate the risk of criminal liability.

Government contractors need to consider the broad scope of such liability, the importance of early detection of underlying misconduct, potential mandatory or voluntary disclosures, the effectiveness of their compliance programs in detecting and effectively addressing serious misconduct, and the risk of potential suspension and debarment.

**The scope of potential corporate criminal liability is broad.**

Corporate criminal liability can attach to a wide range of conduct. Generally, a company may be liable for the criminal wrongdoing of its employees and other agents under the doctrine of respondeat superior if the conduct is within the scope of the employee's duties and was intended to benefit the company in some respect — regardless of whether the misconduct mainly benefits the offending employee.[1]

The December 2020 settlement of a case against Schneider Electric Buildings Americas Inc. is a good example of the consequences faced by government contractors due to employee misconduct. Schneider Electric paid $11 million to resolve criminal and civil investigations by the U.S. Attorney's Office for the District of Vermont relating to kickbacks and overcharges.[2]

Schneider Electric held federally funded energy-savings performance contracts, under which its employees fraudulently charged the government for prohibited design costs disguised as allowable unrelated pricing components. A senior employee, Bhaskar Patel, also solicited and received over $2.5 million in kickbacks from subcontractors. Schneider Electric was held criminally liable for both the overcharges and the kickbacks.

The Schneider Electric settlement is just one example of how government contractors can be exposed to

criminal liability. Government contractors are not only vulnerable to the risks of employee misconduct that can arise in any commercial business, but are also exposed to additional risks in areas unique to government contracting.

This includes offenses such as small business fraud, defective pricing, nonconforming products and product substitution, labor mischarging, gifts and gratuities violations, and cost-accounting fraud.

The bottom line: When it comes to potential criminal liability, no government contractor should assume, "It can't happen here."

**Early detection is vital.**

Government contractors may uncover potential criminal wrongdoing through a variety of means, such as hotline complaints or audits — or worse, through a government subpoena.

Internal reporting and a "see something, say something" culture are key to any effective compliance program. But in order to report misconduct, employees need to understand the company's compliance obligations and risks when pursuing and performing under government contracts.

A strong compliance program should thus cover at least six core training topics: (1) employee responsibilities, (2) government contractor commitments, (3) doing business with the federal government, (4) working with government officials, (5) protecting data and government information, and (6) monitoring and disclosing misconduct.

Informed by the first five topics, the sixth core topic provides the best means to detect and address misconduct early. The compliance program should provide multiple avenues for anonymous reporting, such as a whistleblower hotline and a designated email address, coupled with a tone from the top that encourages employees to step forward.

Government contractors must take such internal complaints seriously and appropriately convey the company's response to those reporting misconduct, assuring them that their concerns are being addressed.

Now more than ever, whistleblowers have an incentive to turn to external reporting mechanisms, which is often the result if they feel disregarded within the company. The U.S. Department of Justice recently established a new whistleblower rewards program, offering those reporting certain types of criminal corporate misconduct a portion of any resulting recovery.[3]

Additionally, the U.S. attorney's offices in the Southern District of New York and the Northern District of California have implemented programs offering whistleblowers nonprosecution agreements, even if the whistleblower participated in the crime, as long as certain requirements are met.[4]

Government-initiated investigations are usually far more costly overall than situations in which a company can take the initiative to investigate, disclose and resolve provable serious misconduct.

In short, early detection can be the difference between manageable legal and financial risks versus a catastrophic crisis.

**Voluntary self-disclosure can lead to favorable outcomes.**

Government contractors should evaluate whether to voluntarily disclose criminal wrongdoing once detected and throughout any internal investigation as facts are developed. The DOJ has strongly incentivized companies to make such voluntary disclosures.

As Deputy Attorney General Lisa Monaco emphasized in a March 7 address, "no matter how good a company's cooperation, a resolution will always be more favorable with voluntary self-disclosure."[5]

Monaco's comments follow a steady evolution and continual expansion of the DOJ's voluntary self-disclosure, or VSD, policies. In January 2023, the DOJ's Criminal Division adopted a broad VSD policy that grew out of prior policies specific to particular offenses.[6]

Under the policy, the DOJ's assessment of whether a company should receive favorable treatment for self-disclosing misconduct turns on three central factors: disclosure, cooperation and remediation.

First, the disclosure must be timely and complete. Second, cooperation includes sharing all facts from an internal investigation and preserving relevant evidence. Third, remediation requires analyzing and addressing the root cause of the noncompliance, maintaining an effective compliance program and enhancing it if necessary, and disciplining culpable employees.

A company that checks all of these boxes is eligible for a range of substantial benefits depending on the circumstances, including a potential declination of prosecution by the DOJ — although disgorgement of any ill-gotten gains will always be required.

Other components of the DOJ with criminal-enforcement jurisdiction that also have VSD policies include the U.S. attorney's offices, the Tax Division, the Environmental Crimes Section and the National Security Division.

Although each office has its own parameters, the core focus remains on disclosure, cooperation and remediation. Thus, in order to obtain the promised benefits, not only must companies carefully evaluate whether voluntary self-disclosure is prudent, they must also determine which components of the DOJ have cognizance over the issues to be disclosed and what a component's particular VSD policies require.

**Mandatory disclosure must be front of mind.**

Government contractors must also consider potential mandatory disclosure requirements, imposed under the Federal Acquisition Regulations through the standard contract clause at FAR 52.203-13, and the FAR's suspension-and-debarment provisions at FAR 9.406-2 and FAR 9.407-2.

Taken together, these requirements are commonly referred to as the mandatory disclosure rule.

The mandatory disclosure rule contract clauses provide, among other things, that a government contractor must make a timely disclosure to the cognizant office of the inspector general when there is credible evidence that the civil False Claims Act or certain federal criminal laws have been violated in connection with a government contract.[7]

The standard mandatory disclosure rule contract clause at FAR 52.203-13 is included in all solicitations and government contracts where the value of the contract is expected to exceed $6 million and the performance period is 120 days or more. And regardless of whether a contract contains the standard

clause, a knowing failure to make such a disclosure can be a cause for suspension or debarment.[8]

Mandatory disclosures must be timely, and contractors are required to fully cooperate with any ensuing government investigation. Although "timely" is undefined, under the credible evidence standard, the contractor typically may take a reasonable amount of time to conduct an internal investigation in order to reach that determination.

Credit for full cooperation requires: (1) disclosure to the government of sufficient information to determine the nature and extent of the offense and the individuals responsible, and (2) timely and complete responses to government requests for documents, and access to employees with information.

In assessing whether to make a mandatory disclosure, several practical considerations come into play, including:

- At what point in the internal investigation do the findings establish credible evidence of a triggering violation;
- Whether and when to make a preliminary disclosure, to be followed by more detailed disclosures as the facts are developed;
- Whether to make a voluntary disclosure to the DOJ in conjunction with a mandatory disclosure to the office of inspector general, and, if so, which component of the DOJ to contact;
- Whether to proactively contact the cognizant suspension and debarment official, or SDO, in conjunction with a mandatory disclosure; and
- Which near-term remediation measures to undertake, including compliance program enhancements.

While the decision whether to make a mandatory disclosure can be complicated in many circumstances, one thing is clear: Failure to make a mandatory disclosure where the government later concludes it was required can be disastrous.

**A robust compliance program is essential to mitigating criminal enforcement risks.**

The DOJ's charging and resolution determinations will include an intense evaluation of the company's compliance program. Among the factors listed in the DOJ justice manual's "Principles of Federal Prosecution of Business Organizations" are the adequacy and effectiveness of a company's compliance program and the company's remedial actions, including implementation and improvement of the compliance program.[9]

The DOJ has issued written guidance for prosecutors on how to evaluate the merits of corporate compliance programs in the context of charging and resolution decisions, and it regularly updates the guidance based on new investigative trends — such as the increasing importance of evidence found on personal mobile devices and third-party messaging platforms.[10]

The guidance focuses on the evolution of compliance programs and begins with three fundamental questions:

1. Is the corporation's compliance program well designed?

2. Is the corporation's compliance program adequately resourced and empowered to function effectively?

3. Does the corporation's compliance program work in practice?

Prosecutors evaluate subtopics for each of those questions to determine the effectiveness of the compliance program. The DOJ Criminal Division's Fraud Section has an entire unit — the Corporate Enforcement, Compliance and Policy Unit — dedicated to working with and advising prosecution teams on the assessment of corporate compliance programs.[11]

This is consistent with the U.S. sentencing guidelines, under which an effective compliance program can reduce corporate criminal penalties.

It is thus important that government contractors invest in establishing and continually enhancing a robust compliance program that will withstand intense scrutiny in order to mitigate the severe legal and financial risks that arise when criminal and other serious misconduct is discovered.

**Pay attention to suspension and debarment risk.**

Government contractors in the midst of investigations into serious misconduct must keep an eye on suspension and debarment risks, and consider proactively engaging with cognizant agency SDOs.

Suspension and debarment actions are not punitive or backward-looking, but rather are aimed at determining whether the contractor is presently responsible. A disclosure by the contractor or a government investigation will often trigger such scrutiny.

Once debarred or suspended, the contractor is excluded from receiving new contracts or subcontracts from federal agencies without a compelling reason.[12]

To avoid suspension or debarment, a contractor must remediate, and bear the burden of presenting evidence of those remedial measures or mitigating factors when it has reason to know that a cause for suspension exists.[13]

The SDO considers factors that parallel the DOJ's considerations when assessing corporate compliance, such as the effectiveness of the contractor's internal control systems, and whether the contractor has implemented new or revised control procedures or ethics training programs.

The SDO will also consider whether the contractor disclosed the conduct in a timely manner and whether it fully cooperated with any related government investigation.

**Key Takeaways**

Many government contractors are aware of the risks of civil False Claims Act liability, given the prevalence of such cases. But the government is increasingly pursuing criminal investigations of government contractors, and contractors must be prepared.

Preparation starts with early detection of employee misconduct that might rise to the level of a criminal

offense. A prompt and thorough investigation must follow detection.

As facts develop, the contractor must constantly assess potential voluntary or mandatory disclosure, or both, and whether to proactively engage with an SDO. And the contractor must promptly and effectively remediate.

Undergirding all of these considerations is the need for a robust compliance program. This is vital from beginning to end — from early detection to achieving a favorable resolution with all government stakeholders by demonstrating the company's steadfast commitment to ethical and lawful conduct.

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[1] United States v. Agosto-Vega, 617 F.3d 541, 552-53 (1st Cir. 2010).

[2] https://www.justice.gov/opa/pr/government-contractor-admits-scheme-inflate-costs-federal-projects-and-pays-11-million.

[3] https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations.

[4] https://www.justice.gov/usao-sdny/sdny-whistleblower-pilot-program; https://www.justice.gov/usao-ndca/whistleblower-program#:~:text=The%20U.S.%20Attorney's%20Office%20for,information%20regarding%20other%20culpable%20parties.

[5] https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations.

[6] Justice Manual §9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy.

[7] FAR 52.203-13.

[8] FAR 9.406-2; FAR 9.407-2(a)(8).

[9] Justice Manual § 9-28.000.

[10] https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl.

[11] https://www.justice.gov/criminal/criminal-fraud/corporate-enforcement-compliance-and-policy-unit#:~:text=The%20Corporate%20Enforcement%2C%20Compliance%2C%20%26,of%20corporate%20resolutions%3B%20evaluating%20corporate.

[12] FAR 9.4.

[13] FAR 9.407-1.