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# Investigations Part II – Interacting with Regulators

## A discussion with:

**Maria Swaby**, General Services Administration  
Suspending and Debarring Official\*

**Brian Persico**, Senior Counsel for  
Investigations, Special Inspector General for  
Afghanistan Reconstruction\*

**Kelly Currie**, Partner, Crowell & Moring

**David Hammond**, Partner, Crowell & Moring

## Moderated by:

- **David Robbins**, Partner Crowell & Moring



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## \* Important Note

- The views expressed during this session by Ms. Swaby and Mr. Persico are their own. They do not necessarily represent the views of the General Services Administration, the Special Inspector General for Afghanistan Reconstruction, or any other government agency.



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## Introduction

- The changing enforcement climate:
  - Regulator communication in series (criminal, then civil, then administrative) is no longer the norm;
  - Proactive engagement is advisable, and in many cases, required
    - Mandatory Disclosure Rule
    - Combatting Trafficking in Persons
    - Counterfeit Parts
    - Supply Chain Risk Assessments,
    - And more.



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# Benefits of Communication with Regulators

- Disclosure required in certain instances
- Sentencing Guideline and FAR 9.406-1(a) credit may be earned
- Suspension/debarment risk may be mitigated:
  - Large companies notably absent from suspension/debarment list in System for Award Management
  - Individuals predominate (stats Oct 1, 2015 to Apr 19, 2016):
    - Army: 359 actions, 20% companies, 80% individuals
    - Air Force: 55 actions, 22% companies, 78% individuals
    - Navy: 373 actions, 9% companies, 91% individuals
    - EPA: 85 actions, 40% companies, 60% individuals
  - Air Force 2015 Procurement Fraud Remedies Report states at p. 6 that it “did not initiate suspension or debarment actions against a domestic large business concern in FY15,” crediting the decline in exclusions to an increase in Mandatory Disclosures disclosures and collaboration with contractors in these situations.



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## Benefits of Communication with Regulators (continued)

- Given the benefits of, importance of, and requirements to communicate with regulators, we will discuss best practices for communication:
  - When the government is unaware of the misconduct;
  - When the government is aware of some, but not all, of the misconduct;
  - After the inception of a formal enforcement action; and,
  - About ethics and compliance programs relevant to mitigation of future misconduct, and sentencing credit.



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# When the Government is Unaware of the Misconduct

- Setting the scene: hotline complaint causes internal investigation. Investigation reveals misconduct, and possible whistleblower risk. Company chooses to make a disclosure.
- Which regulator do you go see?
  - DoJ, what agents might be expected?
  - SDO, which agency?
  - IG, when are they interested?
- What do you say?
  - What are you required to say?
  - What is beneficial to say?
  - What is expected?



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## When the Government is Unaware of Some of the Misconduct

- Setting the scene: whistleblower calls with a partial picture of misconduct, internal review had disclosed two additional areas of problems. One directly related, one unrelated.
- What do you disclose?
  - Legal analysis of requirements to disclose.
  - Risks of less-than-full disclosure.
- Who do you speak with, and in what order?
  - How to manage siloed communities/lack of government wide communication.
- Impact of media or Hill inquiries on this process?
  - What is beneficial to say?
  - What is expected?



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## When a Formal Enforcement Proceeding is Ongoing

- Setting the scene: whistleblower reprisal matter, and an apparent *qui tam* matter are ongoing, criminal investigation is also possibly underway.
- Managing criminal defense with ongoing disclosure/candor to other branches of the government.
  - Will an SDO agree to limit communication and avoid discussions that could implicate criminal defense?
  - Role of ethics and compliance program in those discussions?
- Managing discussions with firewall between DOJ criminal and other enforcement bodies/agencies





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## Ethics and Compliance Program

- What is the importance of ethics and compliance programs to regulators?
  - SDO view?
  - IG view?
- Importance of policies and procedures to prevent misconduct, and mitigate chance of recurrence?
- What do regulators look for when evaluating these programs?



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## Contacts



David Robbins  
Partner  
202-624-2627  
[drobbins@crowell.com](mailto:d Robbins@crowell.com)



David Hammond  
Partner  
202-624-2510  
[dhammond@crowell.com](mailto:dhammond@crowell.com)