



The Current and Future State of Regulation: What Every Federal IT Professional Should Know

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Current/Future Regulation: What Every IT Professional Should Know

Mandatory Disclosure & False Claims Act Amendments

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Overview: The Contractor Business Ethics Compliance Program & Mandatory Disclosure Rule

- Effective December 2008
- Adds to the causes for suspension and debarment the knowing failure of a principal to timely disclose credible evidence of certain violations of federal criminal law, the civil False Claims Act or significant overpayments on federal contracts
- FAR 52.203-13 – Applies to contracts exceeding \$5 million and 120 days
 - Requires a contractor to have a written business code of ethics
 - Requires a contractor to have an internal control system and requires an ongoing business ethics awareness and compliance program
 - Requires mandatory disclosure by the contractor of “credible evidence” of certain violations of federal criminal law and the civil False Claims Act
 - Flows down to subcontracts exceeding \$5 million and 120 days
- However, small business concerns and commercial item contracts are exempted from the provisions mandating a business ethics awareness and compliance program and an internal control system

Suspension and Debarment

- FAR 9.406-2 and 9.407-2
 - knowing failure by a **principal** until 3 years after final payment on any government contract awarded to the contractor, to **timely disclose** to the government, in connection with the award, performance, or closeout of the contract or subcontract thereunder, **credible evidence** of
 - (i) violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity in Title 18 of the U.S. Code
 - (ii) violation of the civil False Claims Act
 - (iii) **significant overpayment(s)** on the contract
- applies to all current contracts and all contracts for which final payment was received within the last three years
- applies to all contracts and contractors regardless of size or type (**including** commercial item contracts, small businesses, and contracts below \$5 million or fewer than 120 days)

Online Disclosures

- DoD and GSA created online disclosure mechanisms (consistency and metadata)
 - Many agencies, including GSA, have disclosure forms. GSA's form is available at <http://oig/gsa.gov/integrityreport.htm>
 - DoD's online disclosure form is available at <http://www.dodig.mil/Inspections/IPO/voldis.htm>
 - Use of the form is *not* required by law. Disclosures can still be made via mail, fax or email

Past Performance

- FAR 42.1501
 - Now includes a contractor’s “record of integrity and business ethics” as one of the examples of past performance information that agencies should track and report to be used in future source selection past performance evaluations

Intersection of the Mandatory Disclosure Rule & the Civil False Claims Act

- **Fundamental Provisions**

- FCA (31 U.S.C. §§ 3729-3732) provides for recovery by the U.S. of treble damages and penalties from persons who “knowingly” present or cause to be presented a “false or fraudulent” claim to the government for payment
- “Knowingly” means that the defendant (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information

FCA, cont.

- Proof of specific intent to commit fraud not required
- Burden of proof is preponderance of the evidence – lower than in criminal fraud cases
- Cases may be brought by DOJ or by relators
 - Approximately 80% of FCA cases are filed by relators
 - DOJ may take over cases that it views as meritorious
 - Relator may obtain 25-30% of the recovery if DOJ does not intervene, which is reduced to 15-20% by DOJ intervention

FCA Expanded

- On May 20, President Obama signed the Fraud Enforcement & Recovery Act (FERA) which includes at Sec. 4 “Clarifications” to the FCA
- Overturns *Allison Engine, Totten, Custer Battles*
- Expands potential liability
 - New and broad definition of “claim” to mean “any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property”

FCA Expansion of Liability, cont.

- Clarifies that no “presentment” to a U.S. Official is required, and that the request or demand may be made to
 - A “contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program,” provided:
 - The U.S. “provides or has provided any portion of the money or property” or
 - The U.S. “will reimburse such contractor, grantee, or other recipient for any portion” of such money or property

FCA Expansion of Liability, cont.

- Impact of change
 - Actions (by DOJ or a *qui tam* relator) may be brought even if funds are not in custody of U.S. (e.g., Coalition Provisional Authority)
 - Actions (by DOJ or a *qui tam* relator) may be brought for claims made to lower tier subs, grantees or “other recipients” if the funds or property “advance a Government program or interest” and the U.S. has provided “any portion”
 - Unclear how far down the federal money must flow to still be actionable – many programs may involve a government interest
 - Very small portion of federal money is sufficient to allow action in mixed funding situations

FCA Expansion of Liability, cont.

- Language in prior 3729(a)(2) and (a)(3) relied upon in *Allison Engine* as showing intent that the defendant made a false record or statement “to get” a claim paid or approved by the government has been stricken (retroactive to June 7, 2008)
 - No longer necessary for relator to show intent to have the government pay or approve the claim
 - Greatly expands parties against whom an action may be brought

Expansion of Liability – Reverse False Claims

- Dramatically expands reach of reverse false claims – including express coverage of overpayments
 - Liability imposed where defendant knowingly makes or uses a false record or statement “material” to 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”

Reverse False Claims, cont.

- The term “obligation” is new and is defined as
 - “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 retention of any overpayment”
 - Relationship between Mandatory Disclosure Rule regarding overpayments and FCA – retention of an overpayment is now a basis for an FCA action

“Improvements” to FCA Actions

- Amendments make it easier for FCA actions to be brought and maintained
 - Creates a “relation back” provision that allows DOJ to intervene in a *qui tam* action to add claims that would otherwise be outside the statute of limitations, if the claims arise out of the “conduct, transactions, or occurrences set forth, or attempted to be set forth” in the *qui tam* complaint
 - Makes the *Allison Engine* fix retroactive to all claims pending on or after June 7 (the decision was rendered on June 9). (The Constitutionality of this change will be litigated)

“Improvements,” cont.

- The amendments greatly expand the use of Civil Investigative Demands (CID) by DOJ personnel (previously the Attorney General had to approve use of a CID)
 - A CID is an investigative tool that can mandate the production of contractor documents as well as permit the US to get sworn testimony in the form of a sealed deposition from the contractor and its employees
 - Also allows broad sharing of information obtained via CID with counsel for *qui tam* relators, and state and local authorities, and others
 - This includes information such as documents, information obtained from witness interviews and depositions, memoranda, briefs, and other materials

Conclusion

- These changes: (i) dramatically increase the ability of the IGs, prosecutors, and whistleblowers to challenge acquisition decisions by Contracting Officers and contractors; (ii) chill the use of discretion in contracting relationships; and (iii) expose contractors to enhanced risks of debarment and a multiplicity of FCA actions
- The government has already made it clear this is something they are serious about pursuing
- The DOJ reported significant recoveries from FCA settlements and judgments even before these changes – more than \$21 billion recovered since 1986; \$1.34 billion in fiscal year 2008 alone
- In addition to the federal FCA, many states have their own FCA statutes

Recent FCA Settlements

- *NetApp Inc.* agreed to pay \$128m plus interest in the largest contract fraud settlement involving GSA to date, in which NetApp, under contract with GSA to sell hardware, software and storage management services for computer network environments to government entities, is alleged to have knowingly failed to provide GSA with required information and knowingly made false statements to GSA concerning its commercial sales practices, including discounts offered to other customers.
- *AT&T Technical Svs. Corp.* agreed to pay \$8.3m in settlement of allegations it had engaged in non-competitive bidding practices for E-rate contracts, claimed and received E-rate funds for ineligible goods and services, overbilled the E-rate program, and facilitated a profit to the applicant from E-rate funds. (E-rate is a federal program that funds internet access for needy schools and libraries.)
- *Dallas Independent School District* agreed to pay \$750,000 and relinquish over \$150m in requests for federal funds for allegedly engaging in non-competitive bidding practices for E-rate contracts and receipt of gratuities from technology vendors. The school district's chief technology officer was also convicted of bribery related to the receipt of E-rate funds.

Pending FCA Cases

- *United States ex rel. Rille v. EMC Corp.*, pending in the Eastern District of Virginia, in which EMC Corp. is alleged to have made kickback payments to allied systems integration consultants and failed to disclose its commercial pricing practices during negotiation of GSA contracts. The U.S. has intervened.
- *United States ex rel. Magee v. Science Applications International Corp. (SAIC)*, pending in the Southern District of Mississippi, in which SAIC is alleged to have conspired with government employees and caused submission of false claims under a \$3.2 billion contract with GSA to provide support services. The U.S. has intervened.