Defending a Client in a Mandatory Self-Disclosure World:

Representing Federal Government Contractors in Parallel Criminal, Civil, and Administrative Investigations

In most criminal investigations, representing a target company typically requires a complex analysis of whether the organization should disclose and cooperate, or deny and defend. Representing a federal government contractor changes this analysis because federal regulations may mandate the client to report possible wrongdoing, including criminal conduct, to the federal government. Counsel must take these regulatory requirements into account when formulating a defense strategy or risk the client's debarment from federal contracting or other funding. For many organizations, this is a fatal outcome.

Federal contractors often face a "three-headed monster" of parallel criminal, civil False Claims Act, and administrative investigations. Each investigation involves different procedures, different obligations, and different potential sanctions. Counsel defending federal contractors in these parallel investigations must develop strategies to manage risk on three different fronts, keeping in mind the unique regulatory disclosure requirements at play.

This article will provide practical approaches to developing these strategies. It will first provide an overview of the federal self-reporting regulations that apply to federal contractors. Next, it will describe the basics of the three types of investigations and the two primary ways in which they arise. It then will analyze how the mandatory self-reporting obligations implicate Fifth Amendment and attorney-client privilege protections. Finally, it will offer seven key strategy considerations for defense counsel in these situations to help avoid a potentially fatal regulatory trap.

I. Overview of Federal Mandatory Self-Reporting Obligations

To understand a client's disclosure obligations, it is necessary to distinguish between federal contracts on the one hand, and federal grants and cooperative agreements or other types of federal funding on the other. While this may seem like a distinction without a difference to criminal defense lawyers, it is a key factor to evaluate mandatory disclosure obligations.

When the federal government acquires goods or services, it must follow the procurement system defined in the Federal Acquisition Regulations (FAR)[1]. Entities awarded contracts for these goods and services are "contractors." In addition to buying goods and services, the federal government may transfer government funds or other items of value to nongovernmental entities to carry out a public purpose. This may happen through a grant, loan, cooperative agreement, or other type of agreement. These agreements are not subject to the FAR but instead governed by the

BY SARA KROPF AND MARGARET M. CASSIDY

"Uniform Guidance,"[2] the commonly used name to describe the web of laws and regulations that define the award and execution of nonprocurement government funding. So, for example, educational institutions and hospitals that receive federal funding are regulated by Uniform Guidance. Entities that receive funds through this "nonprocurement" system are known as "recipients" rather than "contractors." Under both regulatory schemes, though, organizations are required to report instances of wrongdoing. Despite these differences, for purposes of this article, the term "contractor" means both contractors and recipients.

The FAR and the Uniform Guidance apply across all federal agencies. Complicating matters slightly, each federal agency must implement agency-specific regulations for both procurement and nonprocurement transactions. So, when defending an organization, whether a contractor or a recipient of federal funds, it is vital to review and consider the specific agency's regulations in addition to the FAR or Uniform Guidance.

As for reporting requirements, the Uniform Guidance requires that recipients of federal funds must disclose in writing, in a *timely manner*, to either the awarding agency or the pass-through entity *violations* of criminal law involving fraud, bribery, or gratuities that have the potential to impact the government funding.[3] A pass-through entity is the entity to which the federal government had directly provided the funds. For example, a state may receive federal funds to fight COVID-19. If that state "passes through" the federal funds to a local community health center, then the health center could disclose wrongdoing to the agency or the state.

Contractors must disclose under a broader standard. The FAR requires that federal government contractors with contracts expected to exceed $5.5 million with a period of performance of 120 days or longer to disclose wrongdoing or "credible evidence of wrongdoing" to the government. Contractors must disclose not only *violations* of criminal law but also credible evidence of (a) criminal violations involving fraud, conflicts of interest, bribery, or gratuities under Title 18 U.S.C. § 201; (b) Civil False Claims Act violations; and (c) "significant overpayment" to the government that occurred in connection with the award, performance, or closeout of any government contract or subcontract.[4]

Disclosures are made to the agency's Office of Inspector General and to the contracting officer. Most agencies have electronic portals for filing mandatory disclosure reports. In addition to meeting the disclosure requirements, contractors must fully cooperate with the government by disclosing information "sufficient for law enforcement to identify the nature and extent of the offense and the individual's response for the conduct."[5] This includes "providing timely and complete response to government auditors' and investigators' requests for documents and access to employees with information."[6]

The penalty for nondisclosure is severe. Under both the Uniform Guidance and the FAR, failing to disclose in a timely manner may result in suspension, debarment, agreement termination, or demand for reimbursement of funds.[7] Disclosure requirements are in place to assure that contractors comply with the terms of their contracts, comply with the law, and "conduct themselves with the highest degree of integrity and honesty," which essentially requires that the organizations have, among other things, adequate internal controls to comply with the contract and the laws and regulations.[8]

Unfortunately, these regulations do not define what makes a disclosure "timely." Likewise, the FAR does not define "credible evidence." The lack of definitional guidance offers defense counsel some latitude on the timing and scope of disclosure, as explained further below.

II. The Ways Parallel Investigations May Be Launched

Defense counsel should understand that the way in which the organization learns about the potential wrongdoing will often determine the strategy.

The client may learn about the government's criminal investigation from a search warrant at the organization or grand jury subpoenas. The organization may also learn of an investigation from a subcontractor facing a government investigation.

Complying with mandatory disclosure requirements is less fraught if the government already knows about the wrongdoing. In those circumstances, self-reporting to the agency will not trigger a new investigation into past conduct; it usually "only" instigates an administrative investigation that is forward looking. The word "only" is relative: for those clients whose revenue is primarily derived from government contracts, suspension or debarment could effectively destroy the company.

A second way in which a parallel investigation may begin is when the organization learns of potential wrongdoing internally, such as through a hotline report, internal audit, discovery of an overpayment during invoice review, or a financial reconciliation process. In this situation, before starting an internal investigation, an organization needs to assess whether it may be mandated to disclose the conduct to the government given the nature of the incident.

No matter how the organization learns of wrongdoing, the first step is generally some type of internal investigation to find out what happened and stop any additional misconduct. The internal investigation will involve the typical steps. Inside or outside counsel will distribute a litigation hold letter to key custodians and oversee a search for documents and communications about the matter. Counsel will then interview witnesses. When defending the government contractor, this process should also identify any gaps in the contractor's controls, policies, and procedures that resulted in the possible wrongdoing because this type of information will be needed when disclosing to the federal government.

If an internal review concludes that the FAR or Uniform Guidance mandates disclosure, then the organization should define the scope of the investigation and the possible ramifications of disclosure. For example, contractors must disclose significant overpayments to the government. If a contractor determines it inadvertently doubled-billed the government and that is the extent of the issue, generally the contractor need only document its finding, credit the government the amount of the overbilling, and disclose the incident to the government. In this scenario, criminal, civil or administrative sanctions are unlikely.

However, if the contractor determines that there is a possibility of criminal violations or possible violations of the civil False Claims Act, the contractor needs to conduct a broader internal investigation in anticipation of making a mandated disclosure to the government. Indeed, regulations require that contractors have a procedure for investigating and disclosing to the government.[9]

Unless it is clear to the organization that its disclosure will not result in either a criminal or civil investiga-

tion based on the nature of the finding, defense counsel must develop a legal strategy for defending the organization in a criminal, civil, and administrative investigation.

III. The Three-Headed Monster — Basics of Criminal, Administrative, and False Claims Act Investigations

There is a very important difference between criminal/civil FCA investigations and the administrative process. Criminal and FCA investigations are *backward looking*. In other words, DOJ will evaluate whether the organization did something wrong in the past, and DOJ will seek to punish the organization for the past wrongdoing. The conduct may have ended, and the company may have instituted improved internal controls, but that does not mean that the client is off the hook. In contrast, administrative suspension and debarment proceedings are *forward looking*. The agency must determine whether the federal contractor or recipient is "responsible" for purposes of continuing to perform federal government contracts or receive federal government funds. This section will provide a brief overview of these three types of proceedings to set the stage for the strategic considerations described in more detail below.

Criminal Investigations. Since readers of *The Champion* are familiar with the procedure used in federal criminal investigations, this article will not describe this procedure. Instead, it will discuss defense strategies when making a disclosure.

First, from a practical perspective, what is considered "fraud" in government contracting is broadly defined. Because federal contracts include terms and conditions that are defined by extremely specific regulations, a federal government contractor is more at risk for committing a fraud than other businesses. For example, the federal government contractor may be considered to have violated the criminal False Claims Act[10] or acted fraudulently if it mischarged for labor or materials, if pricing methods were "defective," or if it misrepresented its compliance with regulatory requirements.

Contractors deal with government officials and employees all the time, exposing them to a higher risk for violating bribery, conflict of interest, and gratuity laws. These violations include schemes by which the client may have provided something of value to a contracting officer or other federal employee to obtain the contract or gain approval of an invoice or contract modification. They would also include kickback schemes in which an employee receives remuneration in return for agreeing to use a certain subcontract to perform the contract. These could be charged under federal bribery and gratuity statutes.[11]

For government contractors or recipients of federal funds, a criminal conviction usually leads to debarment. A conviction may have other collateral consequences, such as defaults on loans or lines of credit.

Finally, conflict of interest laws and regulations limit or prohibit government employees and officials from receiving, for example, outside compensation or other items of value, such as travel, and even training as well as regulating their job search in certain situations.[12] A federal contractor could face criminal or administrative sanctions for its actions in these situations.

False Claims Act Investigations. The False Claims Act[13] provides for civil liability for any person who knowingly (a) submits a false claim to the federal government, (b) causes another to submit a false claim to the federal government, or (c) knowingly makes a false record or statement to get a false claim paid by the federal government. A provision also exists that imposes liability on those who conspire to violate the FCA.[14]

A federal contractor's invoice for payment to the government unquestionably falls within the definition of a "claim" for FCA purposes. Since federal contractors submit invoices with certain express or implied certifications of compliance with the laws and regulations that define both the procurement and the nonprocurement process, the truthfulness of those certifications of compliance may be a significant factor in a civil FCA investigation.

The knowledge requirement is a key element of the FCA. As a general matter, knowledge may be proven by actual knowledge, "deliberate indifference" to the truth or falsity of a claim (*i.e.*, burying one's head it the sand), or "reckless disregard" for the truth or falsity of a claim. The damages authorized by the FCA are high. There is a civil penalty of $5,500 to $11,000 per false claim plus treble damages. Relevant to the self-disclosure obligation, if a person reports the wrongdoing to the government in certain circumstances, then the potential damages are reduced to double damages from treble damages.

The combination of the lower knowledge requirement, lower burden of proof, and high financial penalty makes an FCA case an attractive fallback option for a prosecutor who cannot prove criminal liability against a contractor. Thus, it is not uncommon for defense counsel to convince a prosecutor not to charge a corporate client with a crime and then turn around and face a civil FCA case.

FCA cases may be instituted not only by the federal government but by a whistleblower through the statute's *qui tam* provisions. A whistleblower — known as a "relator" — can file an FCA complaint under seal in the name of the United States. DOJ will investigate the case and decide whether to intervene to take over the case. Even if the DOJ decides not to intervene, the case may continue with the relator counsel taking the lead.

Administrative Investigation. There are two primary types of administrative investigations. First are Office of Inspector General (OIG) investigations into waste, fraud, and abuse at federal agencies that includes the procurement process and the work contractors do. OIGs run robust hotline programs and are often the first recipient of information about possible wrongdoing. Although OIGs can run their own investigations, DOJ will often oversee civil and criminal investigations into fraud and False Claims Act violations by government contractors. In fact, OIGs routinely refer matters to the Department of Justice for criminal charges.

The second type of administrative procedure is more directly related to mandatory reporting requirements and is essentially a review to determine if the contractor and its leaders, owners, and employees are "responsible." The federal

government has the right to suspend and/or debar a contractor or an individual that is not responsible from future contracting or from receiving federal funds.[15] A federal government suspension and/or debarment usually also results in states suspending or debarring the organization.[16]

Suspension. A suspension renders a contractor temporarily unable to pursue or perform procurement contracts or nonprocurement transactions, pending completion of an investigation or legal proceedings.[17] Generally, the government must notify a contractor that it is proposed for suspension and give it an opportunity to respond.[18] A suspension is temporary, has a one-year limit, and is usually imposed before a debarment.[19] Suspended contractors may be ineligible to continue performance and the government may determine it will not pay the contractor during suspension.[20]

To impose a suspension, the government must have "*adequate evidence*" that there may be a cause to debar and must conclude that "*immediate action*" is necessary to protect the government's interests.[21] When deciding to suspend, the government considers:

- Whether there has been an indictment or conviction.
- Whether there is civil judgment for fraudulent or unethical practices.
- Whether any federal, state, or local government has made either factual or legal determinations against the contractor.
- The credibility of available facts.
- Whether any allegations are corroborated.
- Any inferences that may reasonably be drawn from the facts.[22]

In the instance of an indictment or conviction, the official not need gather additional facts to support suspension and instead may rely on the fact that there is an indictment or conviction.[23]

Debarment

A debarment prohibits a contractor from obtaining or performing procurement contracts or receiving federal funding for a specified period, usually three years, based on the government finding that the entity is not *presently responsible* to perform for the government.[24] Generally, the government imposes debarment after giving notice of the action and an opportunity to contest the proposed debarment.[25]

To debar, the government must find that based on a *preponderance of the evidence*, the contractor engaged in conduct that demonstrates the entity or individual is not responsible.[26]

An entity or individual may be debarred for:

- Conviction of fraud or criminal offense.
- Violation of antitrust statutes.
- Committing embezzlement, tax evasion, obstruction of justice, or any other offense that indicates a lack of business integrity.
- Violation of the terms of a public agreement.
- Engaging in activities that impact the integrity of the government's program.[27]

However, regulations make clear that the existence of a reason to debar does not mean that debarment is automatic; instead, the government should debar only when it is necessary to protect the government's interests.[28] Suspension and debarment are not for purposes of punishment.[29] Accordingly, the debarring official must consider the seriousness of the misconduct and any remedial or mitigating factors in determining if the organization or individual is responsible.[30]

Imputing Behavior

The regulations permit suspension and/or debarment based on the individual's actions.[31]

A contractor's misconduct may be "imputed" to the contractor based on the misconduct of the contractor's officers, directors, shareholders, partners, employees, or other individuals associated with the contractor.[32] Misconduct of an individual may be "imputed" to the contractor if the conduct occurred in connection with the individual's performance of duties for the contractor.[33] Misconduct may also be imputed if the contractor knew, approved, or acquiesced to the individual's misconduct.[34]

Likewise, the government may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, association, or similar arrangement, or when the organization to whom the improper conduct is imputed had the power to direct, manage, control, or influence the activities of the organization responsible for the improper conduct.[35] If an organization accepts the benefits of the misconduct, it is considered evidence of knowledge, approval, or acquiescence.[36] Counsel will thus need to determine how the organization may have benefited from any misconduct to evaluate the scope of administrative liability.

IV. Maintaining the Attorney-Client Privilege and Asserting Fifth Amendment Rights

The FAR's mandatory self-reporting requirement raises issues related to the attorney-client privilege, the attorney work product protections, and Fifth Amendment rights. For example, must the client waive these protections during the mandatory disclosure process? Do Fifth Amendment protections apply?

A. Attorney-Client Privilege and Attorney Work Product Protections

Although contractors are required in certain instances to disclose and cooperate, regulations make clear that a contractor may still exercise rights it has as defined in acquisition regulations or the contract.[37] For example, it may challenge the facts based on the terms of its contract or it may challenge the government on issues related to how the government is interpreting the contract. The regulations also provide that a contractor need not waive its attorney-client privilege or its right to assert materials are covered by attorney work product protections.[38] According to the regulations, a contractor may still conduct its own investigation and may defend itself in proceedings or disputes arising under the contract or related to the disclosure.[39]

B. Fifth Amendment Protections

When considering Fifth Amendment rights, regulations state that officers, directors, owners, and employees are not required to waive their attorney-client privilege or Fifth Amendment privilege.[40] Since Fifth Amendment protections apply only to natural persons and not to companies, entities may not take advantage of

those rights.[41] A company must self-disclose, even if that disclosure will result in effectively confessing a crime. Neither regulations nor precedent permit individuals to stop their employer from disclosing wrongdoing even if the disclosure exposes the individuals to criminal liability.

Given this, counsel representing the organization may find themselves in an unresolvable ethical conflict of interest. This may occur, for example, when representing a small business, and those in the business who engaged in reportable wrongdoing, are the owners, directors, or executives. Counsel for the organization is faced with the regulatory mandate to report. However, the authorized constituents may insist counsel not report since they will be exposed to personal criminal liability, and they have Fifth Amendment rights. It is beyond the scope of this article to further discuss this situation, but counsel should stay alert to this conflict and take steps to manage it.

V. Strategic Considerations in Parallel Investigations for Federal Contractors

A. Managing Employees and Business Partners

Government investigations often have consequences well beyond the initial focal point. The government may begin the investigation by targeting a company. But that investigation may soon shift to consider the role of a client's employees and business partners. Defense counsel must keep in mind that as discussed above, the misconduct of a client's officers, directors, employees, and agents may be imputed to the organization if the conduct occurred while performing duties for the organization or if the federal contractor knew, approved, or acquiesced in the misconduct.[42]

Because of these risks, company counsel should strongly consider obtaining separate counsel for employees and encourage business partners to obtain counsel. A joint defense or common interest agreement will allow company counsel to talk freely with counsel for individuals — or business partners — to learn what questions the agents or prosecutors asked during witness interviews.

A company must also manage the risk of an internal whistleblower who may decide to file an FCA lawsuit. A robust internal reporting process, such as a hotline, will help mitigate this concern. However, in managing reports to a hotline, the company must not retaliate against the reporting employee in any way.

B. Protecting the Attorney-Client Privilege and Attorney Work Product

Counsel must guard both the attorney-client privilege and its work product zealously. As a start, when making the mandated disclosure, counsel should be sure to convey to the government that the client is not waiving these protections. From there, counsel should not turn over memoranda of witness interviews nor disclose confidential communications with employees. Instead, counsel should draft a summary of findings when disclosing to the government. All witness interviews should include a robust *Upjohn* warning that advises employees that company counsel does not represent the employee individually and that the company may choose to waive the privilege over that interview. Generally, counsel should not label disclosures "voluntary" since that may reduce the protections down the road — these are "mandatory" disclosures.

A recent Fourth Circuit case illustrates some of the dangers of regulatory disclosures. In *In re Fluor Intercontinental, Inc.*, the Fourth Circuit preserved the attorney-client privilege in a mandatory disclosure case.[43] There, an employee sued his employer, a government contractor, for wrongful termination, following his firing after an internal investigation into conflict of interest issues. Fluor conducted the investigation and then provided a summary of the investigative findings to the Department of Defense as part of a mandatory disclosure. In the civil litigation, the employee moved to compel the production of documents related to Fluor's internal investigation. The district court concluded that the disclosures were voluntary and constituted the legal conclusions of the company's counsel. Therefore, the court held that the company waived the attorney-client privilege.

On appeal, Fluor argued that a government contractor does not waive when it discloses facts under the FAR's mandatory reporting requirement. The appellate court held that there was no waiver because the disclosure had not revealed attorney-client communications. Here, "the statements" made in the disclosure "do no more than describe Fluor's general conclusions about the propriety of [the employee's] conduct."[44] The court of appeals drew the distinction between "disclosures based on the advice of an attorney, on the one hand, and the underlying attorney-client communication itself, on the other."[45] Only the latter result in a waiver, and the court refused to infer a waiver simply because lawyers had provided advice on the same topic as the disclosure.[46]

Perhaps even more important, the Fourth Circuit explained that "requiring Fluor to produce privileged materials is particularly injurious here, where Fluor acted pursuant to a regulatory scheme mandating disclosure of potential wrongdoing. Government contractors should not fear waiving attorney-client privilege in these circumstances."[47]

C. Weigh the Risks of Each Type of Investigation

Defense counsel should evaluate the risks of each investigation against the client's goals to determine the best strategy. In many respects, this analysis is subject to how heavily the client's revenue depends on government contracts.

When the client is a person, a criminal case always presents the biggest danger because one outcome is the loss of freedom. For a company, of course, freedom is not at stake, so defense counsel may be tempted to underestimate the seriousness of a criminal conviction for a company. For government contractors or recipients of federal funds, though, a criminal conviction usually leads to debarment. Whether debarment means the end of the company depends on whether government contracts form a significant part of its revenue stream. In addition, a conviction may have other collateral consequences for an organization, such as defaults on loans or lines of credit or termination of a subcontract if the client works for a prime contractor.

An FCA case may seem like a relatively low risk for a company since the only possible "bad" outcome is payment of a fine and damages. Since the statute provides for treble damages, though, what may seem like a relatively small amount could easily put the company out of business. As part of resolving an FCA case, the Department of Justice will engage in an "ability to pay" analysis to determine the amount to be paid as part of a settlement. DOJ's evaluation of a client's "ability to pay" is often quite different from the client's evaluation. In addition, government contractors may be debarred if they are found liable (or admit liability) in an FCA case. And, again, this may result in business partners, like prime contractors or lenders, terminating agreements for cause. As a

result, even a civil judgment could have disastrous consequences.

Finally, the administrative investigation does not result in money damages or a criminal conviction but leads most directly to suspension or debarment. The good news is that if the organization improved its internal compliance because of the wrongdoing, it may be able to establish that it is responsible and avoid suspension or debarment.[48]

Defense counsel must explain these risks to the client and listen closely to the client's goals. Within each context, depending on the situation, larger companies may negotiate agreements with the government so that either a subsidiary or an office accepts the suspension or debarment, thus avoiding "end-the-company" dangers. Smaller government contractors likely do not have this same luxury.

In addition, defense counsel should anticipate that the various investigators — criminal prosecutors, civil lawyers within DOJ, and the contracting agency — will share information among each other. The criminal prosecutors will be limited by grand jury secrecy, but the agency and the civil prosecutors can serve document requests though their own procedures to obtain the documents. Voluntary witness interviews or proffer sessions could include both the civil and criminal side of DOJ as well. Any strategy by defense counsel should not depend on keeping information as secret from the other investigators.

D. The Value of Cooperation in Criminal Investigations

Voluntary, as opposed to mandated, disclosure and cooperation by a company in a criminal investigation can have enormous benefits. While a full description of this benefit is beyond the scope of this article, defense counsel should be familiar with the Department of Justice's *Principles of Federal Prosecution of Business Organizations*.[49] This publication makes clear that "[c]ooperation is a mitigating factor, by which a corporation — just like any other subject of a criminal investigation — can gain credit in a case that otherwise is appropriate for indictment and prosecution," and it makes clear that it is easier to enter into a global resolution of the criminal and civil investigations.[50] Further, DOJ acknowledges that there are times when "the goals of punishment, deterrence, and rehabilitation may be satisfied through civil or regulatory actions against the corporation" rather than through criminal charges.[51]

A cooperative relationship allows company counsel to advocate for why DOJ should evaluate the stated factors in support of a civil or regulatory action instead of a criminal charge: "the strength of the civil or regulatory authority's interest; the civil or regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the civil or regulatory authority's enforcement action is upheld; the effect of a noncriminal disposition on criminal law enforcement interests; and the interests of any victims."[52]

A noncooperative posture generally makes the process more difficult. This is not to say that cooperation is always the right strategy. Either way, defense counsel should conduct a detailed analysis of DOJ's position on voluntary cooperation; examine previous settlements in which a company has cooperated with DOJ; and evaluate the organizational client's appetite for risk, its mission, and values when deciding whether to cooperate.

Even if disclosure is not mandated, a federal contractor's board of directors may determine that it is consistent with the organization's values or its risk tolerance to disclose to the government. Counsel should have extensive and detailed discussions with a contractor's board when determining if a voluntary disclosure is appropriate. These can be challenging discussions, as the board will unquestionably ask pointed questions about how the problem arose and company officers will feel defensive about their own conduct.

Finally, even if a contractor is not mandated to disclose and thus decides not to disclose, the government may still suspend or debar a contractor for failing to disclose or failing to cooperate because the government may consider failing to disclose and failing to cooperate as not being responsible.[53]

E. Defending the Administrative Case, Suspension, or Disbarment

When defending against suspension and debarment, it is important to understand and to advise the client that the government's goal in suspension and debarment is different from the government's goal when prosecuting a criminal or civil case. Suspension and debarment actions are not punitive and backward looking but instead are preventative and forward looking.

Once the government has determined that an entity or individual has engaged in conduct that is cause for suspension and/or debarment, to avoid suspension/debarment the government contractor must prove that it is responsible.[54] The government contractor must demonstrate that it can be trusted to perform its contracts, comply with applicable law, and conduct its business with integrity in the future.[55]

One method to demonstrate to the government that the improper conduct will not occur again is by taking actions to assure that an offending individual may not exercise influence over government work (such as by terminating him) and thereby demonstrating that a future risk to the government may be negated.[56]

Another consideration in a debarment proceeding is whether the contractor has sufficient explanation for why the misconduct occurred and how it has engaged in adequate remediation. Both factors may demonstrate to the government why the conduct is unlikely to happen again.[57] Courts have held that "[a]ffording the contractor [the] opportunity to overcome a blemished past assures that the agency will impose debarment only in order to protect the government's proprietary interest and not for the purpose of punishment."[58] Essentially, contractors need to demonstrate that they have taken measures to "sufficiently protect the government's interests in doing business only with [organizations] who conduct business with honesty and integrity."[59]

When deciding whether to suspend or debar, the government also considers if the contractor had "reason to know" about the misconduct. Factors that may demonstrate to the government that either the contractor or its principals had "reason to know" and whether the contractor may be responsible despite the misdeeds include:

- Details on how the improper actions took place.
- The source of any funds that were used for the improper payments.
- What, if any, actions were taken to conceal the improper conduct?
- What process or methods were used to make the improper payments?
- Who knew of the wrongful acts while the misconduct was occurring?
- How and when did others learn of the misconduct? Did they learn while the activity was occurring?
- When they learned, could they have stopped the misconduct?[60]

If challenging the facts upon which the government is relying to support a suspension/debarment, the contractor must identify:

- Facts that contradict the government's stated reasons for suspension/debarment.
- Any existing, proposed, or prior conclusions a government agency made that the contractor should be excluded from government work.
- Any criminal and civil proceedings related to the government's reasons for suspension.[61]

In place of a debarment, a government agency may reach an administrative agreement with the contractor, if in the government's best interest and if the entity:

- Generally admits its wrongful conduct and cooperates in the investigation.
- Agrees to restitution.
- Agrees to separate offending employees.
- Implements or improves its compliance program to include retaining auditors or attorney to oversee the program.
- Trains employees and encourages them to raise concerns.
- Permits agency access to contractor records.[62]

Once an organization determines it should make a disclosure, it should generally disclose to the OIG, the contracting officer, and to the suspension and debarment officials to engage in discussions *before* any suspension and/or debarment action begins. The information disclosed generally includes a description of the wrongdoing; an explanation of why the wrongdoing occurred; how the contractor investigated the wrongdoing; and the contractor's plans to remediate the causes for the wrongdoing.[63] These efforts ideally demonstrate the contractor's responsibility in handling government transactions currently and in the future.

F. Keeping the Various Investigating Entities Up to Date

One of the trickiest parts of this process is when and how to notify three different investigative bodies about important developments, both positive and negative. This does not mean that counsel needs to inform all three investigators of every step taken by the other but does mean that important events should be shared among them.

For example, defense counsel should consider providing a copy of any mandated self-disclosure to the civil and criminal DOJ lawyer once counsel sends it to the agency. Since it is possible that the agency and DOJ are already in contact, providing a copy of it does not create any additional risk and gives the appearance of transparency and cooperation. Similarly, if the government indicts a client's officer, director, or employee, then company counsel should provide a copy of the indictment to the agency overseeing the disclosure. Or, if the agency decides to suspend or debar a company, counsel should provide DOJ a copy of the notification.

Keeping the various investigative agencies updated may prove affirmatively beneficial to the organization. For example, if agency suspension and debarment officials determine that the organization should not be suspended or debarred, this is information worth sharing with prosecutors. Although it is not a complete defense to a criminal prosecution or to a civil False Claim allegation, this development certainly will cause prosecutors to pause and reflect on the merits of their case against the organization.

Providing these updates is uncomfortable, and the client may ask if it is really necessary. While it may not be required, this information sharing can be helpful for a company that seeks to cooperate with the government and obtain the maximum benefits of that cooperation. No prosecutor or agency official likes to be surprised, so keeping them updated on key events helps on that front.

G. Getting Help From Others

As psychologist Abraham Maslow said in 1966, "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." It may appear at first glance that a criminal defense lawyer can handle an investigation involving a federal contractor. But that is not the case. To best represent a client in these matters, defense counsel needs to consider partnering with others, for example:

- Counsel with experience developing and improving FAR and Uniform Guidance required ethics and compliance programs who can assist in defending the administrative investigation and can develop the internal controls to demonstrate that the contractor will be "responsible," obviating the need for the government to suspend or debar the contractor.
- Insurance coverage counsel can help the client evaluate whether its Errors and Omissions, Directors and Officers, or Employment Practices Liability policies may provide coverage for the internal investigation or the government investigation.
- If terminating employees, employment law counsel can advise on mitigating legal risks and can negotiate the right separation agreement.
- Federal government contract accountants may also be an indispensable member of the defense team if the situation involved improper accounting, pricing, or invoicing. Government contract accountants are often vital in developing internal controls for complying with regulatory requirements related to accounting procedures.

The nuances of navigating mandatory disclosure and defense obligations are better understood with a team of professionals ready to help the client emerge (relatively) unscathed from these parallel investigations.

Notes

1. 48 C.F.R. Title 48.
2. 2 C.F.R. Title 2.
3. 2 C.F.R. 200.113.
4. 48 C.F.R. 52.203-13; 48 C.F.R. 3.1003.
5. *Id.*
6. *Id.*
7. *Id.*; 48 C.F.R. Part 9.4; 2 C.F.R. Part 180 App. G, App. H; 31 U.S.C. 3321.
8. 48 C.F.R. 3.1002; 2 C.F.R. 200 et seq.; *see, e.g.,* 48 C.F.R. 9.1; 48 C.F.R. 52.209-5-9.
9. 48 C.F.R. 52.203.13.
10. 18 U.S.C § 287.
11. 18 U.S.C. § 201.
12. *See, e.g.,* 18 U.S.C. § 208; 5 C.F.R. § 2635 et seq.
13. 31 U.S.C. §§ 3729-3733.
14. 31 U.S.C. § 3729(a)(1)(C).
15. *See generally* 48 C.F.R. 9.1; 48 C.F.R. 9.4; 48 C.F.R. 52.209-5-9; 2 C.F.R. Part 200 et seq.
16. *See,* e.g., MD. CODE ANN. STATE FIN. &

PROC. § 16.203(c). If a government suspension and debarment official or contracting officer determines that contractor is not "responsible," then, depending on the reason, the contractor may be suspended or debarred from performing or receiving cooperative agreements or any other type of federal government awards such as contracts, grants, or loans. 2 C.F.R. 180.130; 48 C.F.R. 9-104.1. The goal of suspension and debarment is to assure that the government is doing business with contractors that are "responsible," which essentially means the contractors can comply with the law; to comply with the terms of any government contract; and to conduct their business ethically. Procurement regulations define responsibility in more detail. Specifically, to be considered "presently responsible" to perform on a government contract, the contractor must:

17. 48 C.F.R. Part 9.4; 2 C.F.R. Part 180, App. H.
18. *Id.*
19. 48 C.F.R. Part 9.4.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. 2 C.F.R. Part 180, App. H.
25. *Id.*
26. *Id.*
27. *Id.*
28. 48 C.F.R. Part 9.4.
29. *Id.*; *see also* FAR 9.402.
30. *Id.*; *see also* FAR 9-406.1, 2.
.31. *Id.*
32. 2 C.F.R. 180.630; 48 C.F.R. 9-406.5.
33. *Id.*
34. 2 C.F.R. 180.630; 48 C.F.R. 9-406.5; *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir.1991).
35. *Id.*
36. *Id.*
37. 48 C.F.R. 52.203-13.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Braswell v. United States*, 487 U.S. 99, 104 (1988).
42. 2 C.F.R. 180.630; 48 C.F.R. 9-406.5; *see also Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991).
43. 803 F. App'x 697, 698 (4th Cir. 2020).
44. *Id.*
45. *Id.*
46. The Fourth Circuit cited *United States v. O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986) ("[A] client does not waive his attorney-client privilege 'merely by disclosing a subject which he had discussed with his attorney.' In order to waive the privilege, the client must disclose the communication with the attorney itself.").
47. 803 F. App'x. at 700.
48. 48 C.F.R. 9.104-3.
49. https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700.
50. *Id.* § 9-28.700 (Value of Cooperation).
51. *Id.* § 9-28.1200 (Civil or Regulatory Alternatives).
52. *Id.*
53. *See, e.g.*, 2 C.F.R. Part 180 App. G, App. H; 48 C.F.R. 3.1003(a)(2).
54. 48 C.F.R. Part 9.4; 2 C.F.R. Part 180, App. G, App. H.
55. *Id.*
56. *See, e.g., Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. 1989).
57. *See, e.g., id.*
58. *Id.*
59. *Id.*
60. *See, e.g., id.; see also Novicki v. Cook*, 946 F.2d 938, 942 (D.C. 1991).
61. 2 C.F.R. Part 180, App. G; 48 C.F.R. Part 9.4.
62. *Id.*
63. *See, e.g.,* 2 C.F.R. 180.730. ■

About the Authors

Sara Kropf is a trial lawyer who defends individuals and companies accused of fraud and conspiracy in both civil and criminal contexts.

NACDL MEMBER

Sara Kropf
Kropf Moseley PLLC
Washington, DC
202-627-6900
EMAIL sara@kmlawfirm.com
WEBSITE https://kmlawfirm.com

Margaret Cassidy founded Cassidy Law to provide businesses legal counsel and to defend clients under government investigation or prosecution.

Margaret Cassidy
Cassidy Law PLLC
Washington, DC
202-266-9928
EMAIL m.cassidy@cassidylawpllc.com
WEBSITE http://cassidylawpllc.com