

# PUBLICATION

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## Cooperation Issues in Government Contractor Investigations – Part 1

June 30, 2019

**Recent Department of Justice (DOJ) pronouncements, as well as older Federal Acquisition Regulation (FAR) requirements, present both duties and opportunities for government contractors to investigate and report fraudulent or other misconduct. Contractors may find with the opportunities the FAR and DOJ guidance provide, there are also costly obligations to achieve compliance and mitigation of exposure. In part one of this article series, we provide recommendations about how to best comply with these obligations and take advantage of these related opportunities to mitigate risk.**

Government contractors have an affirmative FAR obligation to:

timely disclose, in writing, to the Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor [employee or agent] has committed:

- (A) A violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
- (B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733). See FAR 52.203-13.

In addition to the FAR's Mandatory Disclosure Rule, the DOJ's recent changes to the "Yates Memo," originally issued in 2015, highly incentivize contractors to fully investigate potential criminal violations, coordinate their investigations with the government, and share all of the results with the government. [In comments on November 29, 2018](#), announcing the DOJ's changes to the "Yates Memo," Deputy Attorney General Rod Rosenstein said:

A[ny] company seeking cooperation credit in criminal cases must identify every individual who was substantially involved in or responsible for the criminal conduct. (Emphasis added.)

While the qualification to report only "substantially involved" employees narrowed the Yates Memo's requirement, much time and effort to investigate are still the obligation of government contractors.

The Sentencing Guidelines also take into consideration cooperation-type factors to reduce corporate fines. ([USSG § 8B1](#)) Steps a company can take include restitution and effective compliance programs, including enhancements to the program and prevention of future conduct.

Even if criminal conduct is not at issue, exposure may exist under the civil False Claims Act (FCA) and possibly under state FCAs. The DOJ recently raised the stakes for achieving favorable resolution in these situations.

On May 7, the DOJ provided guidance to companies targeted for civil FCA prosecution. Credit may be obtained by disclosing individuals whose conduct is suspect, especially if the disclosure is voluntary. With this cooperation, remediation of the conduct, and compliance enhancements, companies may pay less, possibly

even single damages, to resolve the matter. The changes are codified in [Section 4-4.112 of the DOJ's Justice Manual](#).

On April 30, the DOJ refined how it can evaluate compliance programs in making charging decisions and possible sentencing credit recommendations. [See \*Evaluating the Effectiveness of Corporate Compliance Programs – What the Government is Looking For\*](#).

How far cooperation for credit under the May 7 guidance must go to qualify, however, remains to be seen. Key factors for establishing "material assistance" under the new guidance include:

- is disclosure timely and voluntary;
- is it truthful, complete, and reliable;
- what are the details; and
- how significant and useful it is.

Remaining questions for government contractors to consider for taking advantage of opportunities to mitigate FCA liability by full cooperation include, but are not limited to:

- when to make a voluntary disclosure;
- how to measure "substantial involvement";
- whether and when to disclose third-party (agent, competitor, vendor, customer) conduct;
- what documents to preserve and for how long;
- whether to provide witnesses for interviews or testimony or to name sources;
- whether to affirmatively (and even publically in press releases and settlement documents) accept responsibility; and
- how to anticipate and weigh the costs in attorney's fees and experts; distraction of employees, management, and board members; and adverse publicity, including effects on investor and customer relations/disclosure.

With the opportunities provided by the FAR and DOJ guidance, there are costly obligations to achieve compliance and mitigation of exposure. How to best take advantage efficiently requires clear objectives and sequencing of steps to take, good communication with the government, and teamwork between management and the board, inside and outside counsel, and their third party advisors.