GOVERNMENT CONTRACTORS:
THE HAND THAT FEEDS YOU MAY BITE YOU

DOING BUSINESS WITH THE GOVERNMENT

INTERNAL INVESTIGATIONS

FALSE CLAIMS ACT UPDATE

RETALIATION GONE WILD

OFCCP ISSUES

OVERVIEW OF THE FEDERAL ACQUISITION PROCESS

FRIDAY, JANUARY 15, 2010

11:30 A.M. - 2:00 P.M.

Agenda

Arrival	Lunch
11:30-11:50	Doing Business With the Government .... Senator David Karnes
11:50-12:40	Top 10 Things You Hate to Hear During an Internal Investigation False Claims Act Update ... Edward G. Warin and Thomas J. Kenny
12:40-12:50	Break
12:50-1:20	Retaliation Gone Wild .... Alan Rupe
1:20-1:40	OFCCP Issues .... Juliana Reno
1:40-2:00	Overview of the Federal Acquisition Process .... Joseph Fuller

Please Note: If You Have Questions During the Seminar That You Would Like a Presenter to Address, Please E-mail Polls@KutakRock.com

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1. Top 10 Things You Hate to Hear During an Internal Investigation

   A. Internal Investigations—Avoiding Common Missteps

   B. Sample Employee Advisory

2. Recent False Claims Act and Federal Acquisition Rule Developments for Government Contractors

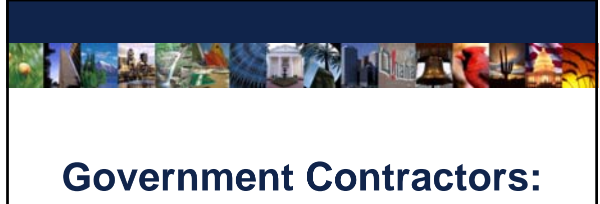
   A. Federal Acquisition Regulations

   B. Fraud Enforcement and Recovery Act of 2009

3. Retaliation in the Workplace: Current Issues

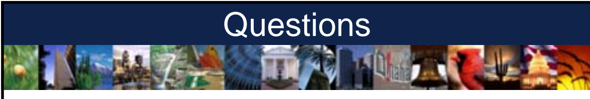
4. OFCCP Issues

5. Overview of the Federal Acquisition Process



Government Contractors: The Hand That Feeds You May Bite You

Questions



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Doing Business With the Government

David K. Karnes
Partner, Omaha

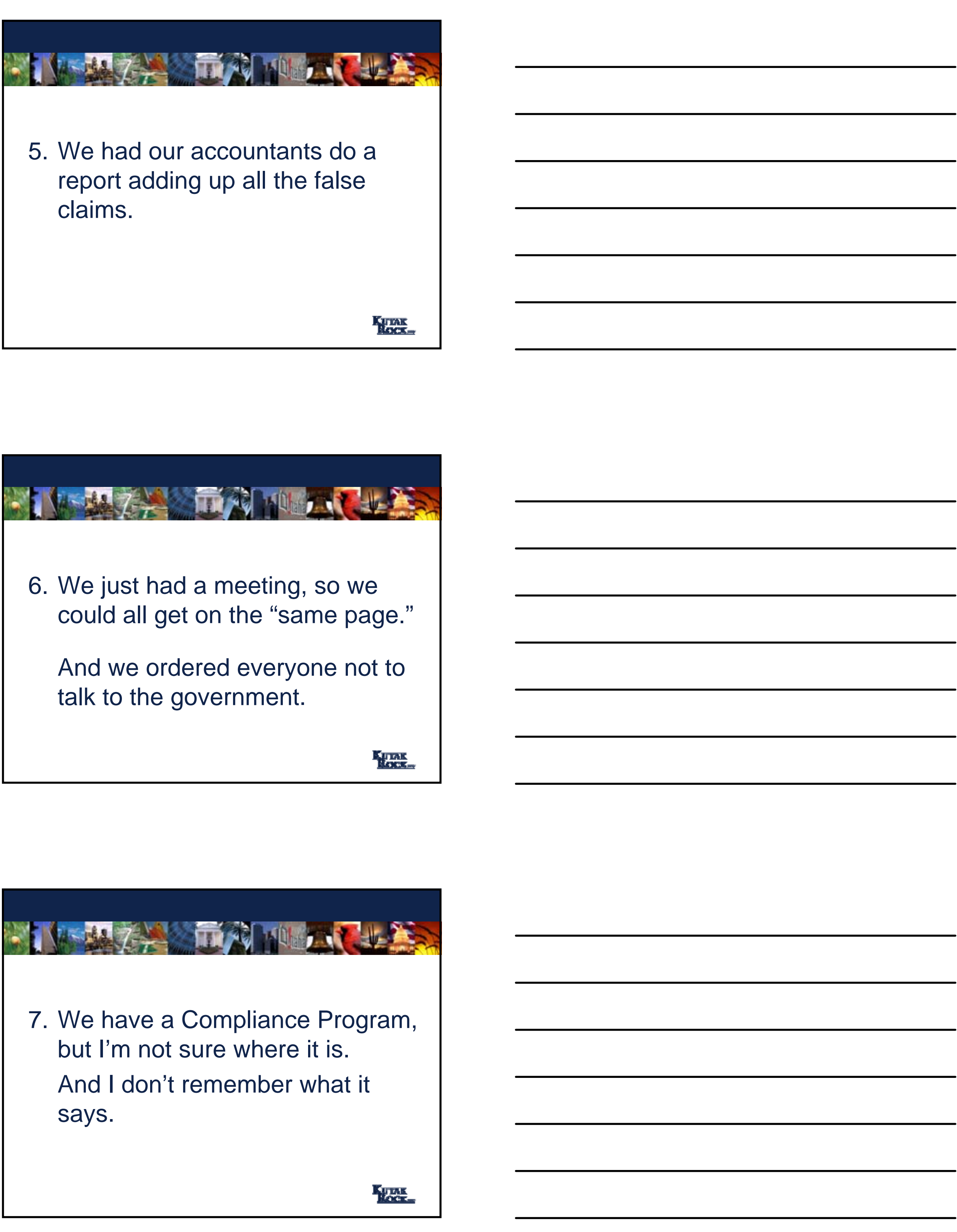
Top 10 Things We Hate To Hear During An Internal Investigation

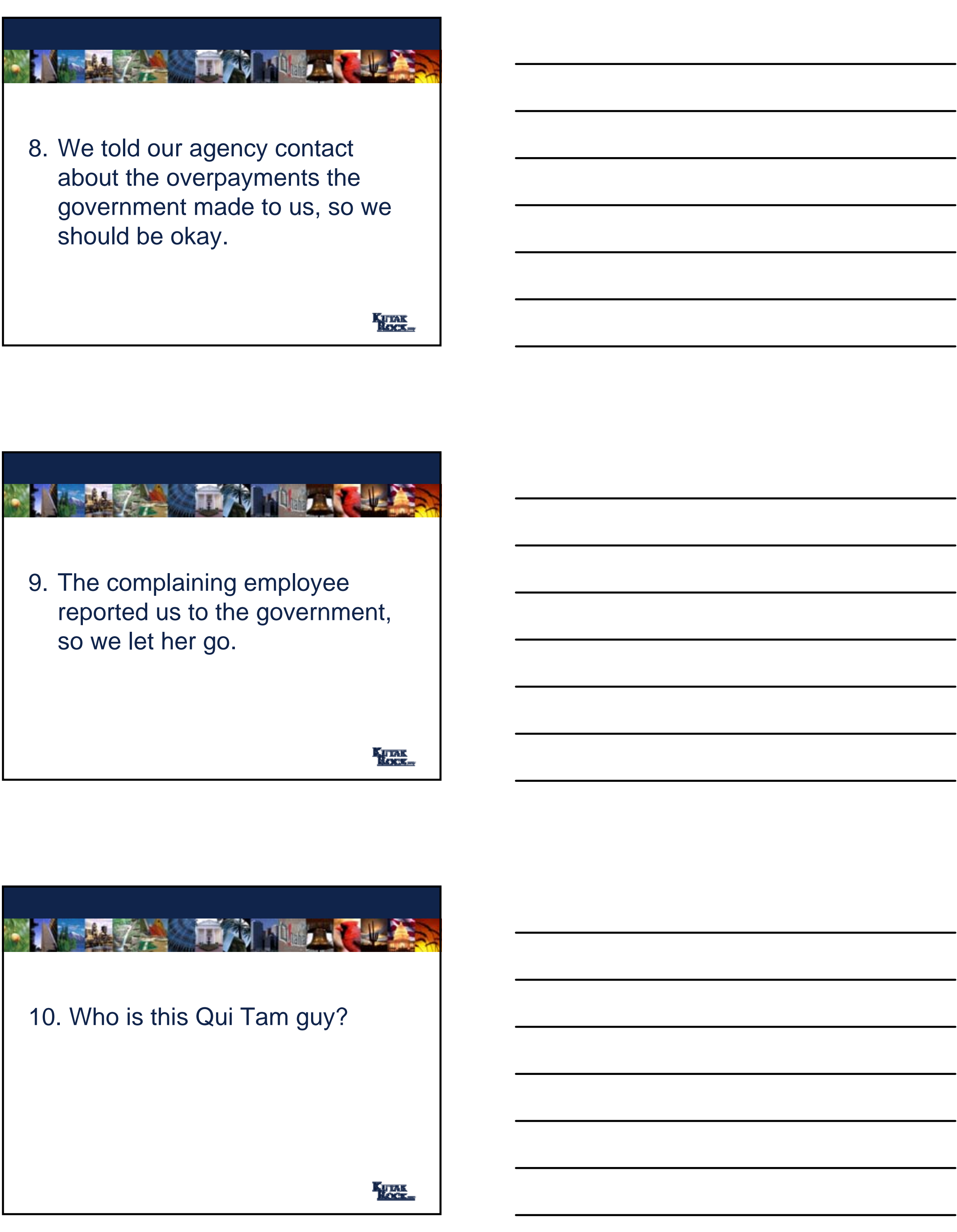
Thomas J. Kenny
Partner, Omaha

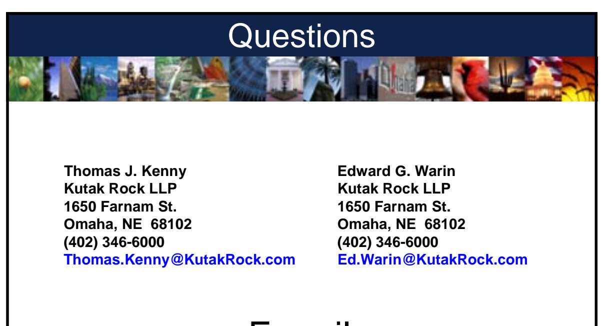
Edward G. Warin
Partner, Omaha

1. After we heard about the Compliance Report, we waited a few weeks to call you.

2. Human Resources began our investigation and wrote up excellent interview memos.
3. Our in-house lawyers advised us on the transaction, so we had them handle the investigation.
4. Our system automatically deletes our e-mails after 10 days. And we forgot how to suspend it.


5. We had our accountants do a report adding up all the false claims.
6. We just had a meeting, so we could all get on the “same page.”
And we ordered everyone not to talk to the government.
7. We have a Compliance Program, but I’m not sure where it is.
And I don’t remember what it says.


8. We told our agency contact about the overpayments the government made to us, so we should be okay.
9. The complaining employee reported us to the government, so we let her go.
10. Who is this Qui Tam guy?



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False Claims Act Update

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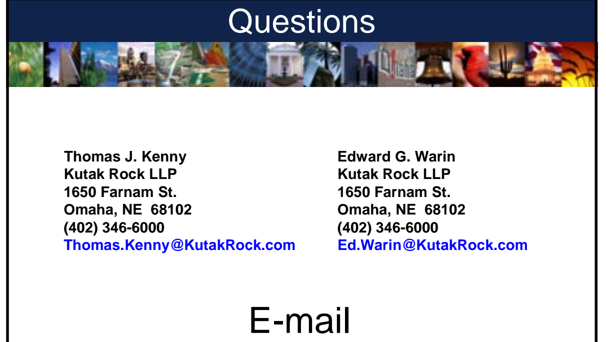

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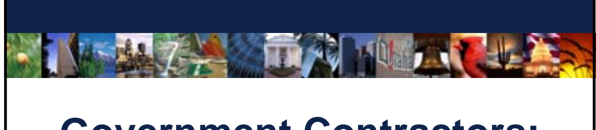

Government Contractors: The Hand That Feeds You May Bite You

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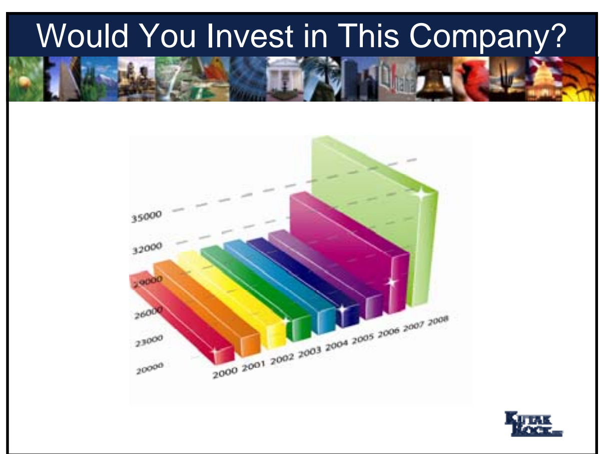
Retaliation in the Workplace: Current Issues

Alan L. Rupe
Partner, Wichita

Would You Invest in This Company?



Two Types of Retaliation Evidence

- Direct
  - “I’m firing you because you filed a discrimination claim.”
- Circumstantial
  - *McDonnell-Douglas* test

The *McDonnell-Douglas* Test for Discrimination

- The *prima facie* case:
  - Plaintiff belongs to protected class;
  - Plaintiff was qualified for the position;
  - Despite qualification, employee suffered adverse employment action; and
  - Employees who were not members of protected class were not subject to adverse employment action.

McDonnell-Douglas: Burden-Shifting

- Plaintiff – *prima facie* case of discrimination.
- Defendant – legitimate, nondiscriminatory purpose.
- Plaintiff - nondiscriminatory purpose was merely a pretext.

The *McDonnell-Douglas* Test for Retaliation

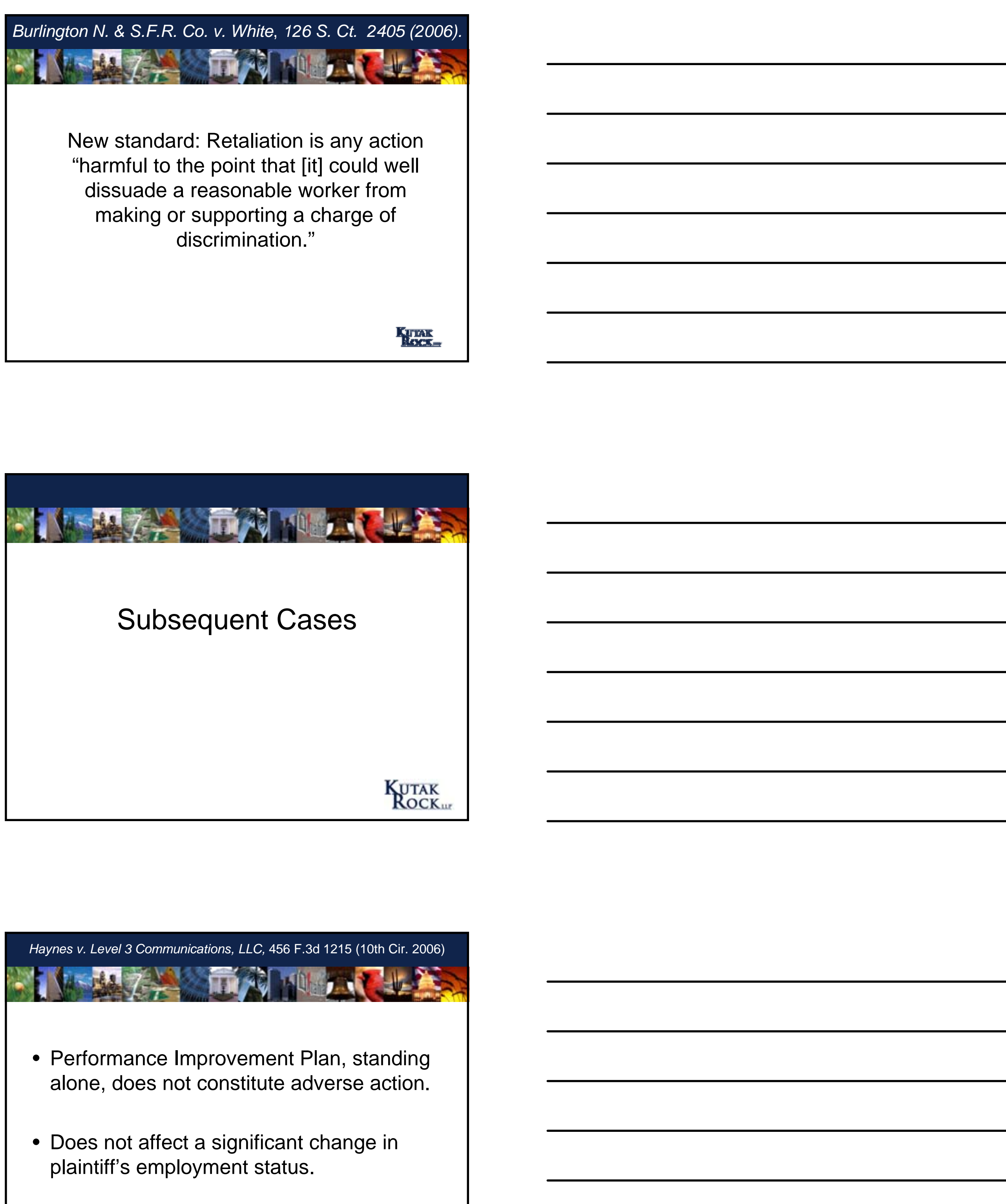
- The *prima facie* case:
  - Protected activity in opposition to discrimination;
  - Adverse employment action; and
  - Causal relationship between protected activity and adverse action.

McDonnell-Douglas: Burden-Shifting

- Plaintiff – *prima facie* case of retaliation.
- Defendant – legitimate, nonretaliatory purpose.
- Plaintiff - nonretaliatory purpose was merely a pretext.

Pre-*Burlington* Retaliation

Retaliation is a tangible job action that substantially affects the terms or condition of employment.


Burlington N. & S.F.R. Co. v. White, 126 S. Ct. 2405 (2006).
New standard: Retaliation is any action "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination."
Subsequent Cases
KUTAK ROCK LLP
Haynes v. Level 3 Communications, LLC, 456 F.3d 1215 (10th Cir. 2006)
• Performance Improvement Plan, standing alone, does not constitute adverse action.
• Does not affect a significant change in plaintiff's employment status.

Williams v. W.D. Sports, N.M., Inc., Case 497 F.3d 1079 (10th Cir., 2007)

Employer retaliated against employee by threatening to:

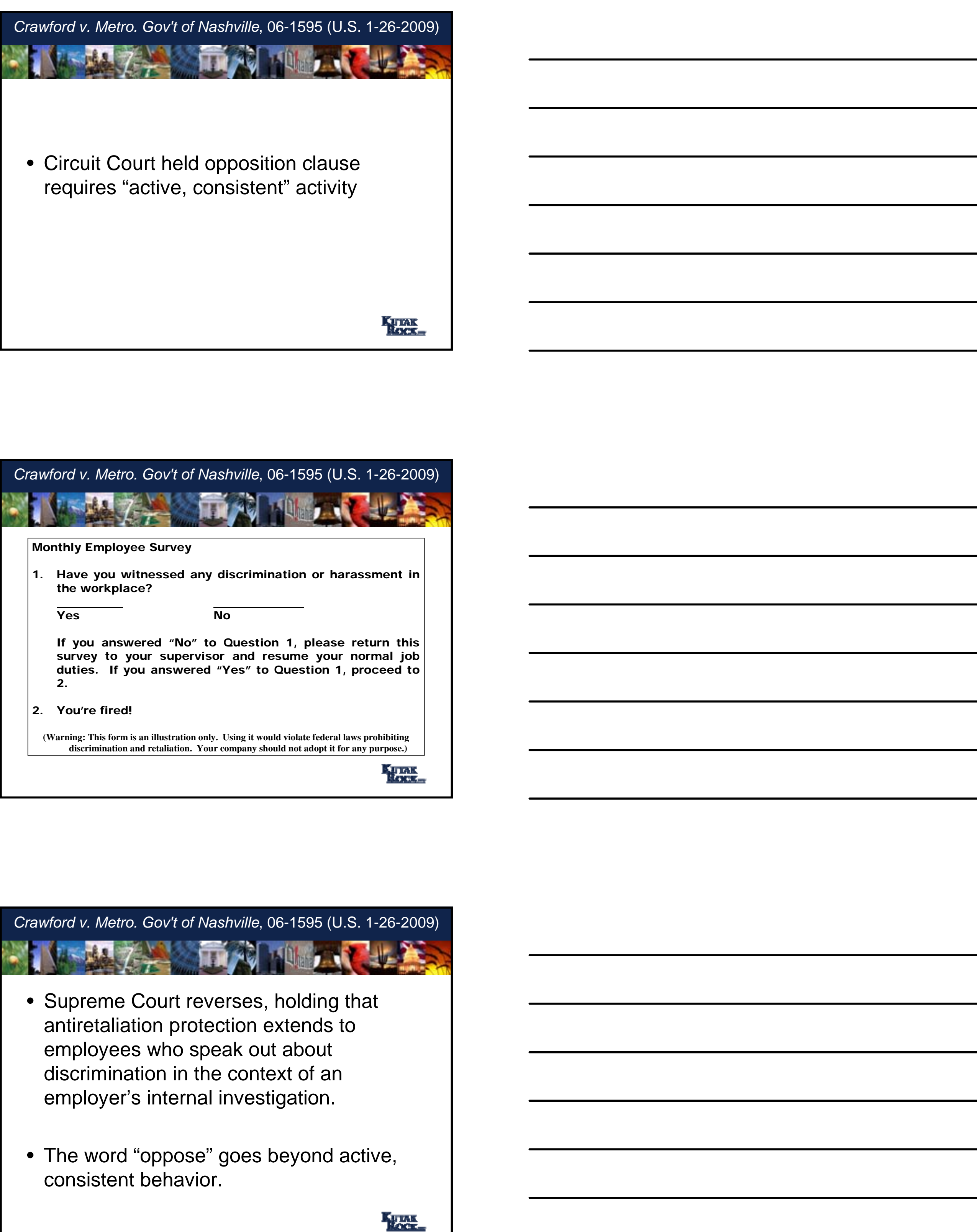
- Expose rumors about employee's personal life; and
- Continue opposition to unemployment application.

Somoza v. University of Denver, 513 F.3d 1206 (10th Cir. 2008).

- The Tenth Circuit refined the scope of *Burlington Northern*.
- *Burlington Northern* did not create a "general civility code for the American workplace."

Semsroth v. City of Wichita, 555 F.3d 1182 (10th Cir. 2009)

- Transfer denial is not adverse action when plaintiff offers nothing more than personal preference.
- Although temporary uncertainty about job status could amount to an adverse action, the adverse action must be realized.



Crawford v. Metro. Gov't of Nashville, 06-1595 (U.S. 1-26-2009)
• Circuit Court held opposition clause requires "active, consistent" activity

Crawford v. Metro. Gov't of Nashville, 06-1595 (U.S. 1-26-2009)
Monthly Employee Survey
1. Have you witnessed any discrimination or harassment in the workplace?
Yes
No
If you answered "No" to Question 1, please return this survey to your supervisor and resume your normal job duties. If you answered "Yes" to Question 1, proceed to 2.
2. You're fired!
(Warning: This form is an illustration only. Using it would violate federal laws prohibiting discrimination and retaliation. Your company should not adopt it for any purpose.)

Crawford v. Metro. Gov't of Nashville, 06-1595 (U.S. 1-26-2009)
• Supreme Court reverses, holding that antiretaliation protection extends to employees who speak out about discrimination in the context of an employer's internal investigation.
• The word "oppose" goes beyond active, consistent behavior.

Avoiding Retaliation
KUTAK ROCK LLP

Don’t become a “two-fer”
Belt and suspenders

Avoiding Retaliation: Prevention
Develop an antidiscrimination policy that includes an antiretaliation provision

Avoiding Retaliation: Prevention

Do not discourage complaints

Avoiding Retaliation: Prevention

Know the workplace culture:
What is desirable and what is not?

Avoiding Retaliation: Prevention

Recognize protected activity

Avoiding Retaliation: Prevention

Train
Train
Train

Avoiding Retaliation: Responding to Complaints

Promptly address the employee's claim

Avoiding Retaliation: Responding to Complaints

Avoid immediate employment actions

Avoiding Retaliation: Responding to Complaints

Communicate and interact

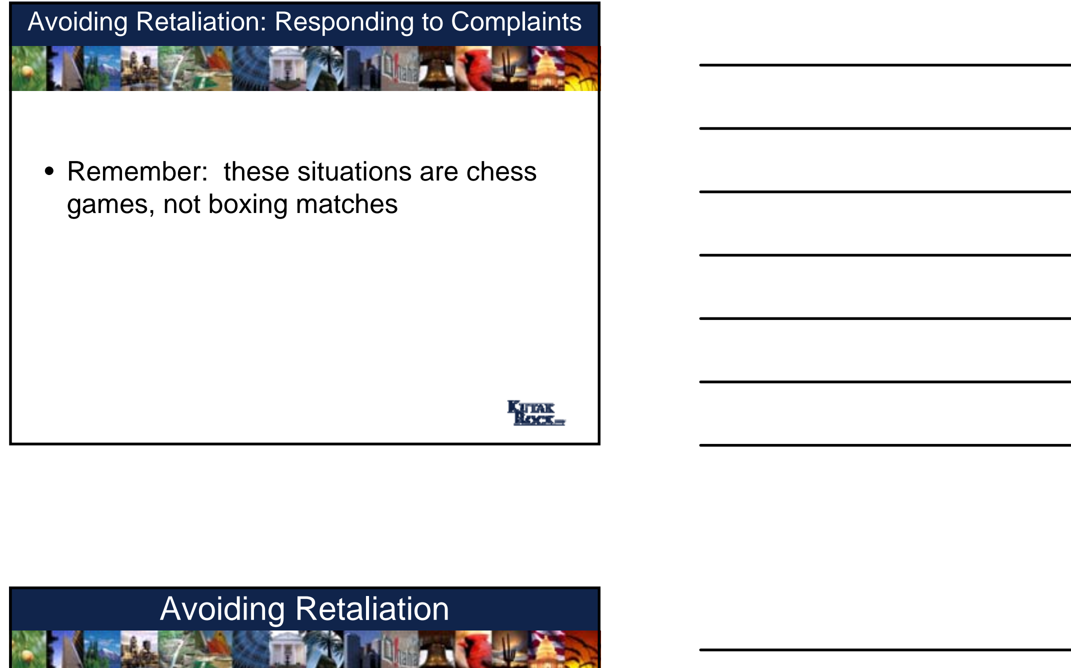
Avoiding Retaliation: Responding to Complaints

Show empathy
Treat equally
Speak no evil
Evaluate consistently and regularly

Avoiding Retaliation: Responding to Complaints

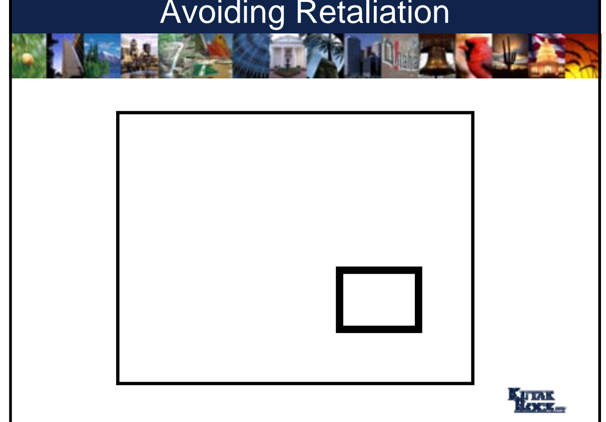
Document
Document
Document

Avoiding Retaliation: Responding to Complaints

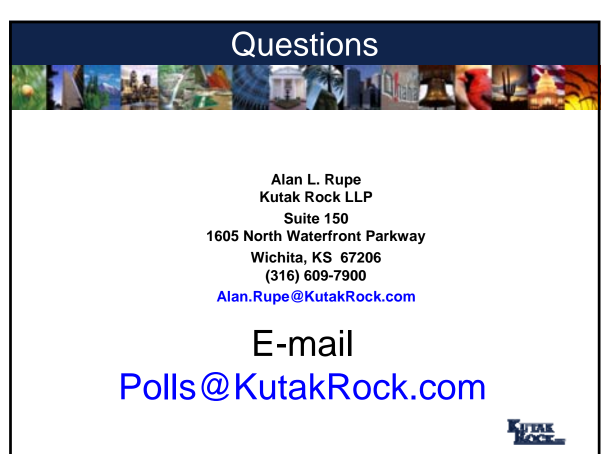


- Remember: these situations are chess games, not boxing matches

Avoiding Retaliation



Questions



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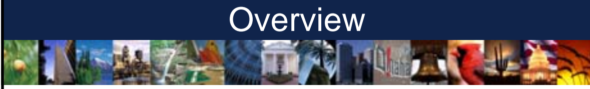
Office of Federal Contract Compliance Programs (OFCCP)

Juliana Reno
Partner, Omaha

Overview

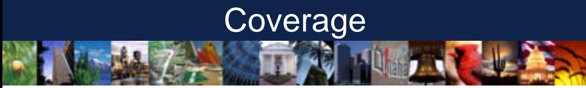


- Coverage
- Requirements
- Process
- Penalties

Overview

- Jurisdiction
  - Executive Order (EO) 11246
  - Rehabilitation Act (RHA) § 503
  - Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) § 4212
  - Americans with Disabilities Act
  - Executive Order 13201

Coverage

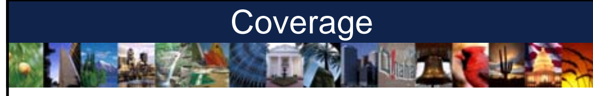


- EO 11246
  - Construction v. nonconstruction contracts
  - Contract means
    - federal or federally assisted
    - contract or subcontract
    - there are exceptions…

Coverage

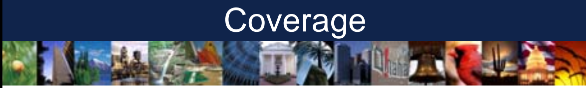
- "Construction" means
  - Construction, rehabilitation, alteration, conversion, extension, demolition or other changes or improvements to buildings, highways or other real property, including facilities providing utility services.
  - Supervision, inspection and other on-site functions incidental to construction.

Coverage



- EO 11246 – Construction
  - Contractors and subcontractors holding federal or federally assisted construction contracts in excess of $10,000.
  - Construction work on nonconstruction contracts, if the construction work is necessary to the performance of the nonconstruction contract.

Coverage

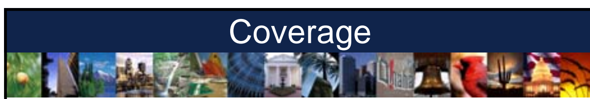


- EO 11246 – Nonconstruction
  - Contractor has ≥ 50 employees and
    - Has federal contracts of ≥ \$50,000;
    - Has government bills of lading of ≥ \$50,000 in a 12-month period;
    - Serves as a depository of federal funds (in any amount); or
    - Is a financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes (in any amount).

Coverage

- RHA 503
  - Affirmative action obligations: ≥ 50 employees and a contract of ≥ \$50,000.
  - Other obligations: contract of ≥ \$10,000 for nonpersonal services (including construction).

Coverage



- VEVRAA 4212
  - "Contract" for personal property or nonpersonal services (including construction).
  - Affirmative action obligations: ≥ 50 employees and a contract of ≥ \$50,000.
  - Other obligations: contract of ≥ \$100,000.

Requirements

- Caveat
  - This is not an exhaustive list.
  - I am trying to capture only the major requirements.

Requirements

- EEO Clauses
  - Specific language in the regulations
  - Not required for:
    - Construction contracts under $10,000;
    - Certain educational institutions;
    - Certain religious institutions; or
    - Work that was recruited and will be performed outside the U.S.
- EEO-1 and VETS-100 Reports

Requirements

- Record Retention
  - Time frames
    - Under 150 employees and under $150,000 in contracts – 1 year.
    - Otherwise – 2 years.
    - Time measured from the employment action.
  - Negative presumption
    - If the contractor fails to preserve records, the OFCCP may presume that the records would have been unfavorable.

Requirements

- Affirmative Action
  - "EOE"
  - Posters and notices
  - Access to records
  - Affirmative Action Plan (AAP)

Requirements

- AAP – Formal Elements
  - Organizational profile
  - Job group analysis
  - Placement of incumbents in job groups
  - Determination of availability
  - Comparison of incumbency and availability
  - Placement goals

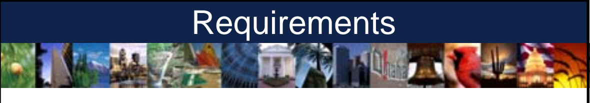
Requirements

- AAP – Procedures in the background
  - Job postings and advertisements
  - Applications and applicant flow log
    - Who is an applicant?
    - Opportunity for self-identification of race
    - Job descriptions, qualifications and testing
    - Selection process, rationale and result

Requirements

- AAP – Procedures in the background
  - Employment
    - Opportunity for self-identification of vet status
    - Opportunity for requesting reasonable accommodation
  - Promotions
  - Terminations
  - Antidiscrimination Training

Requirements



DOCUMENT, DOCUMENT, DOCUMENT

Enforcement

- OFCCP Process
  - Desk audit
  - Field audit
  - Predetermination notice
  - Notice of violation
  - Conciliation agreement
  - Notice to show cause

Enforcement

- OFCCP Substance – Violation Stage
  - Compare actual percentages to expected percentages. If deviation is too high, creates inference of discrimination.
  - Major work here is determining the list of relevant and affected persons.

Enforcement

- OFCCP Substance – Remedy Stage
  - Back pay
    - Formula damages. Calculated using data from the contractor to establish tenure, wages, benefits. Multiply by shortfall to get total conciliation amount.
    - Contact affected individuals. Those who respond get a share in the total conciliation amount.

Enforcement

- OFCCP Substance – Remedy Stage
  - Employment action
    - From the list of affected persons, take actions (hire, promote, etc.) to reverse the shortfall
  - Periodic reporting

Enforcement

- No agreement?
  - OFCCP issues notice to show cause.
  - Matter is transferred to Solicitor of Labor (SOL).
  - Parties have another chance to attempt settlement.
  - SOL decides whether to initiate administrative or judicial enforcement.

Enforcement

- Administrative Enforcement
  - SOL files complaint with the Office of Administrative Law Judges (ALJs)
  - ALJ holds hearing, issues recommended decision.
  - Contractor may challenge the recommended decision by filing suit in federal district court.

Enforcement

- Administrative Enforcement (cont'd)
  - Judicial Review
    - Administrative Procedure Act applies.
    - Was recommended decision supported by "substantial evidence"?
    - Did ALJ exceed statutory authority or jurisdiction?

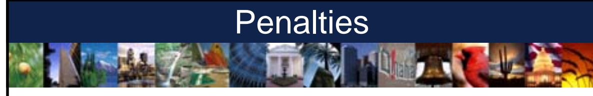
Enforcement

- Judicial Enforcement
  - SOL files complaint in federal district court
  - Standard litigation process

Penalties

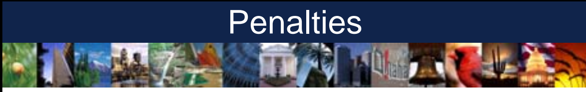
- Conciliation
  - Back pay
  - Remedial employment action
  - Periodic reporting

Penalties



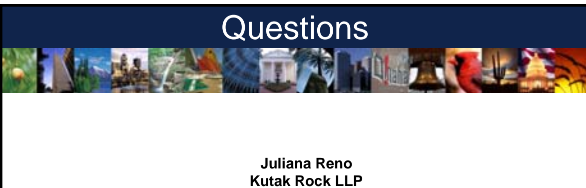
- Publication
- Recommend action by Department of Justice
  - criminal proceedings
- Recommend action by Equal Opportunity Commission
  - administrative proceedings

Penalties



- Cancel contract with current agency
- Prohibit future contracts with current agency
- Prohibit future contracts with any governmental entity (debarment)
  - Indefinite or fixed term
  - Fixed term has six-month minimum

Questions



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Overview of the Federal Procurement Process

Joey Fuller
Partner, Washington, D.C.

Overview of the Federal Procurement Process

- Federal Law
- Contract Formation
- Contract Administration
- Contract Disputes

Federal Law

- Federal Property and Administrative Services Act (41 U.S.C. § 251 et seq.)
- Armed Services Procurement Act (10 U.S.C. 2302 et seq.) – DoD, NASA, DHS
- Socioeconomic Laws
- Federal Acquisition Regulations and Supplements (48 C.F.R.)

Socioeconomic Laws

- Small Business
- 8(a), SDBs (price adjustment), Women-Owned, SDVOSBs
- Labor Laws
  - DBA, SCA, WHA
  - EEO-1, AAPs (50, $50,000), VETS-100 ($100,000)
- Buy American Act

Contract Formation

- Agency Direct or GSA Schedule
  - https://www.fbo.gov/
  - http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=8202
- Acquisition Planning
- Solicitation - Simplified Acquisition, Sealed Bidding and Negotiation
- Evaluation, Award and Debriefings
- Protests

Protests

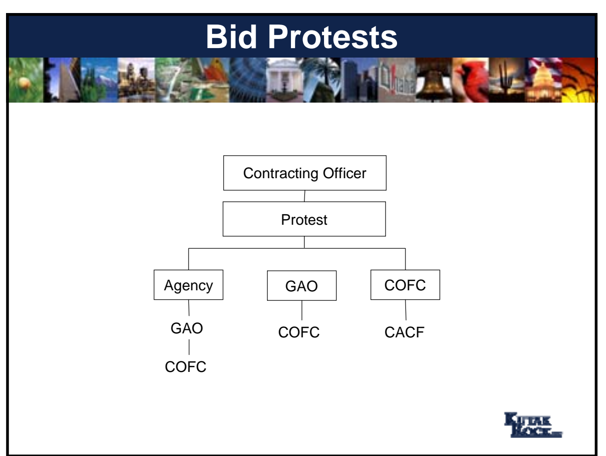
- Agency Protest (FAR 33.103)
- GAO Protest (FAR 33.104 and 4 C.F.R. Part 21)
- U.S. Court of Federal Claims Protest (Appendix C of Rules)

Agency Protest

- Least Formal
- Local (Contracting Officer)
- Timing
  - Improprieties in a solicitation
    - Before bid opening or closing for receipt of proposals
  - After basis of protest is known or should have been known
    - 10 calendar days
  - Automatic Stay
    - Pre-Award – Automatic
    - Post-Award – Within 10 days or five days of “required” debriefing
  - Resolution – 35 days after filing (best effort)

Overview of the Federal Procurement Process

- GAO Protest
  - More Formal
  - GAO in Washington, D.C.
  - Timing
    - Improprieties in a solicitation
      - Before bid opening or closing for receipt of proposals
    - After basis of protest is known or should have been known
      - 10 calendar days
    - After Agency Decision on Protest
      - 10 calendar days after actual or constructive knowledge of adverse agency action
    - Automatic Stay
      - Pre-Award – upon notice from GAO of timely filed protest
      - Post-Award – Within 10 days of award or five days of "required" debriefing
    - "Required" Debriefing
      - three days after notice of elimination or notice of contract award
    - Resolution – 100 days after filing (unless supplemented)



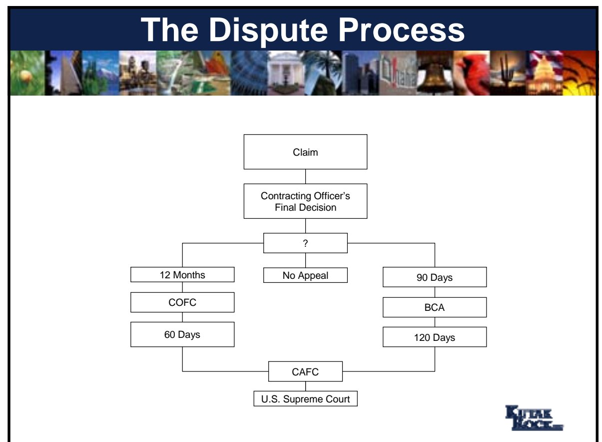
Contract Administration

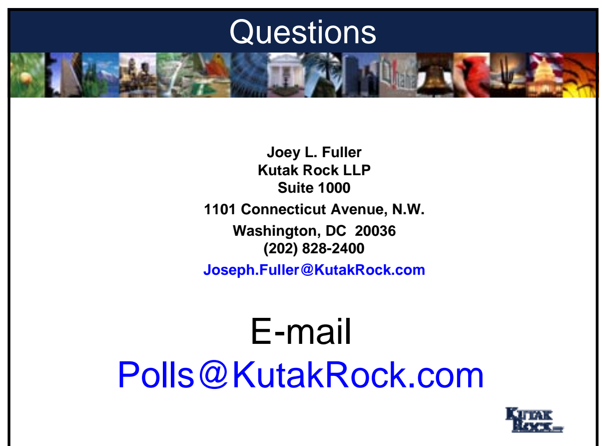
- Compliance Issues/Risk Assessment
- The KO, COR, Contract Specialist
- Contract Changes/Equitable Adjustments
- Termination Clauses
- Suspension and Debarment

Contract Disputes

- Claims
- Contracting Officer Final Decision
- BCA or Court of Federal Claims

The Dispute Process

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I. Purposes of Internal Investigations

A. *When to Conduct An Internal Investigation*. An internal investigation should be undertaken promptly when a company receives notice or legal risk. Such notice may come from a variety of sources: (*e.g*., lawsuits, subpoenas, complaints from employees, former spouses, internal or external auditors, media reports or government inquiries). When a company has an indication of the existence of a government investigation by a regulatory or investigative agency such as the OIG or FBI, the need for an internal investigation becomes absolute.

B. *Why Conduct an Internal Investigation*

1. An internal investigation is essential for the company to determine an appropriate course of action, evaluate and mitigate potential risks, and consider appropriate corrective action.

(a) Determine whether to take immediate action to stop any further improper conduct.

(b) Take immediate action to preserve, collect and organize documentary evidence (including electronic evidence such as email), direct employees to preserve such documents and to instruct IT personnel to suspend normal processes for destroying electronic documents as to potentially relevant information.

(c) Determine how to treat employees – should anyone be placed on leave, reprimanded or terminated; determine whether employees need separate counsel and whether the company advance their legal fees or indemnify them?

(d) Evaluate whether to self-report (or make repayment) to any relevant regulatory agency and/or cooperate with government. These decisions must often be made expeditiously; a prompt internal investigation is an essential tool to determine how to proceed.

(e) Analyze what remedial or corrective action should be undertaken, such as revisions to written policies, employee training, improvements to the company's compliance program and related systems.

2. An internal investigation undertaken promptly will lay the groundwork for the company to determine its response to

government regulators or private litigants, and may be important in seeking leniency from government in the resolution of any regulatory, civil or criminal proceeding.

(a) DOJ Thompson Memorandum: DOJ's 2003 Thompson Memorandum, "Principles of Federal Prosecution of Business Organizations," sets forth nine factors federal prosecutors should consider in determining whether to charge a corporation criminally and whether to exercise leniency such as in reaching plea agreements or civil settlements. Cooperation and voluntary disclosure is one cited factor, and has become in practice a significant if not the primary factor. In assessing the adequacy of the corporation's cooperation, the Thompson Memorandum set forth, among other things, the company's willingness to "disclose the complete results of its internal investigation; and to waive attorney-client and work product protection" in connection with the internal investigation and "communications between specific officers, directors and employees and counsel."

(b) DOJ McNulty Memorandum: The McNulty Memorandum (issued December 12, 2006) superseded the Thompson Memorandum, and became the operative DOJ guidance relating to corporate cooperation with DOJ criminal investigations. The McNulty Memorandum (Part VII) retains the consideration of a corporation's cooperation: "In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives." The McNulty Memorandum, however, made two changes: (i) as to circumstances in which waivers of privilege will be requested and considered in making charging decisions; and (ii) in taking into account whether a corporation advanced attorneys' fees and expenses to employees under investigation and indictment.

(c) DOJ Filip Memorandum: The Filip Memorandum (issued August 28, 2008) superseded the McNulty Memorandum, and again altered the framework for requesting and assessing privilege waivers. The Filip Memorandum focuses on the disclosure of "relevant facts" and requires that a corporation's cooperation credit be based on "disclosure of relevant facts," not on the waiver of any privilege. Moreover, the Filip Memorandum prohibits

prosecutors from requesting waivers of "core" attorney-client communications or work product or from crediting corporations that do waive privilege with respect to this information. To receive cooperation credit for providing factual information under the Filip Memorandum, a corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the company's investigative counsel.

(d) Health Care Guidance: Informal compliance guidance from the OIG sets forth recommended processes for responding to suspected wrongdoing by health care providers or their employees and agents. For example, the OIG Supplemental Compliance Program Guidance for Hospitals (*Federal Register* 4858, 1/31/05) advises hospitals to consider the following factors in evaluating the manner in which it responds to potential illegality:

- Has the hospital crated a response team, consisting of representatives from the compliance, audit, and any other relevant functional areas, which may be able to evaluate any detected deficiencies quickly?

- Are all matters thoroughly and promptly investigated?

- Are corrective action plans developed that take into account the root causes of each potential violation?

- Are periodic reviews of problem areas conducted to verify that the corrective action that was implemented successfully eliminated existing deficiencies?

- When a detected deficiency results in an identified overpayment to the hospital, are overpayments promptly reported and repaid to the FI?

- If a matter results in a probable violation of law, does the hospital promptly disclose the matter to the appropriate law enforcement agency?

(e) SEC Accounting and Auditing Enforcement Release No. 1407 (Oct. 23, 2001): In determining not to take action against a company, the SEC cited the company's responsiveness to reported accounting irregularities from its internal auditors. That response included, among other things, the Board's hiring of outside law firm to conduct an

internal investigation and cooperation with the SEC staff, including disclosure of the details of the internal investigation and background information (including interview transcripts) and waiver of privileges in connection with disclosure of the investigation. The SEC set forth thirteen (13) criteria it will consider "in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation" in its enforcement actions.

3. An internal investigation will be necessary to provide an objective report to company management, the audit committee and the Board of Directors.

   (a) The "up the ladder" reporting requirements for attorneys who practice before the SEC (which is broadly defined) of Section 307 of the Sarbanes-Oxley Act, 15 U.S.C. § 7245, (and the corresponding SEC regulations, 17 CFR § 205), have heightened the importance of internal investigations for this purpose in public companies.

4. Internal investigations assist companies in determining whether to self-disclose or return overpayments.

   (a) Effective December 12, 2008, government contractors with contracts valued at more than $5 million and with a performance period greater than 120 days must implement an internal control system under the Federal Acquisition Regulation ("FAR") pursuant to which contractors must disclose to the government whenever they have credible evidence of a False Claims Act violation, a violation of a criminal law involving fraud, conflict of interest, bribery, or gratuity violations, or of a significant overpayment on the contract. *See* 48 C.F.R. 52.203-13. Failure to timely disclose may result in suspension or debarment from government contracting.

   (b) Under the 2009 amendments to the federal False Claims Act, 31 U.S.C. § 3729, *et. seq.* ("FCA"), contractors may face civil liability for the knowing retention of overpayments received from the government. 31 U.S.C. § 3729(b)(3).

   (c) Courts in various jurisdictions have found that directors may be personally liable for wrongdoing associated with a corporation if a proper reporting system is not implemented and followed. *See In re Tower Air, Inc.*, 416 F.3d 229, 239

(3d Cir. 2005) ("inaction may lead to liability where no red flag monitoring system is installed and non-compliance with applicable legal standards results"); *Dellastatious v. Williams*, 242 F.3d 191 (4th Cir. 2001) ("directors can avoid liability by showing that they attempted in good faith to ensure that an adequate corporate information-gathering and reporting system was in place."); *In re Caremark Int'l, Inc.*, 698 A.2d 959. 970 (Del. Ch. 1996) ("a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.").

II. Who Should Conduct the Internal Investigation

A. *Conducting the Investigation*

Selecting the proper person to conduct an investigation depends on the circumstances. Generally, lawyers should conduct such investigations, thus allowing the company to benefit from the protection of the attorney-client privilege and attorney work-product doctrine, and allowing the company to receive immediate and ongoing legal advice relating to the proper conduct of the investigation and how the company should respond to the conclusions reached in the investigation.

B. *In-House Counsel*

1. In-house counsel may and often do conduct internal investigations, having the advantage of familiarity with the organization, its practices, systems and personnel. Investigations that are limited in terms of scope and personnel, do not implicate senior managers, and do not involve significant exposure to the company may be the most appropriate investigations to be conducted by in-house counsel.

2. The key disadvantage of having in-house counsel conduct an internal investigation is an appearance of a lack of independence and that the investigative report may thus appear less credible to prosecutors or regulators. A determination should also be made about whether in-house counsel's conduct and prior legal advice may be at issue; if so, he or she should not conduct the investigation.

3. Another disadvantage is that—although the same privileges apply to in-house counsel as to outside counsel—courts apply greater

scrutiny to claims of privilege made by in-house counsel as to whether a particular communication or task is primarily legal or business-related. *See, e.g., U.S. v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002); *Battelle Pac. Nw. Nat'l Lab.*, 194 F.R.D. 289, 295 (D.D.C. 2000); *City of Springfield v. Rexnord Corp.*, 196 F.R.D. 7, 9 (D. Mass. 2000).

4. Care should be taken by the company and counsel to establish a basis for any privileges the company may wish to assert. Recommended measures include:

   (a) Any documentary authorization for the investigation should state, among other things, that it is being undertaken for the purpose of obtaining legal advice and in anticipation of actual or potential litigation.

   (b) Notes, minutes of meetings, reports of interviews and other writings should be appropriately stamped as "privileged" and should be segregated in separate paper or electronic files.

   (c) Counsel should document to whom disclosures may be made (including all attendees at meetings where the internal investigation is discussed); disclosure within the company should strictly be limited to those with a "need to know."

   (d) Investigators, consultants or other agents assisting counsel in the investigation should be retained by counsel, and should be regularly advised about the privilege and instructed how to maintain it.

   (e) Any discussion of the investigation should be managed so as to preserve, and not undermine, a claim of privilege.

C. *Outside Counsel – Which One?*

1. With allegations raising significant exposure to the Company, where senior officials or the Board of Directors are implicated, or where a government investigation is in progress or anticipated, the company should retain outside counsel. Regulatory agencies and DOJ will generally believe an investigation conducted by outside counsel is more independent and therefore credible. Outside counsel should coordinate with and use the expertise and knowledge of in-house counsel, unless special circumstances dictate otherwise, such as where in-house counsel's previous involvement or advice has been placed at issue in the investigation.

2. The company should determine at the outset of an investigation the person to whom counsel should report within the company. A public company acting through its Board of Directors or some agent of the Board, usually its Audit Committee, should be the client for the internal investigation. The client may also designate an employee to act as contact or liaison for counsel, so long as such person is not implicated by the subject matter of the investigation.

III. Best Practices

A. *Scope of Investigation*: Counsel must develop a clear understanding of the scope of the investigation and advise management accordingly.

1. An overly broad investigation will undermine the goal of having the investigation concluded promptly; an investigation which is too narrowly defined will miss important issues, and possess less credibility.

2. Counsel should inform management if it believes the scope of the investigation should be altered as it moves forward.

B. *Management Directive to Employees*:

Management should distribute a clear written directive to all employees that they should cooperate with counsel performing the investigation and should take steps to preserve and identify relevant documents (and electronic data) and maintain confidentiality as instructed by counsel.

C. *Documents:*

1. Immediate steps should be taken to preserve and identify relevant documents, including electronic data. Counsel should consult with the company's I.T. department to develop procedures to do so and to halt routine procedures for deleting emails.

2. Clear direction should be given to all employees likely to have relevant or subpoenaed documents to identify and produce such documents, and to suspend any document destruction programs (including electronic systems). It may be helpful to develop a key word list for searching electronic documents and to determine if there are former employees or agents whose files or emails should be reviewed.

3. In connection with many document productions to government agencies, the company will be required to certify under penalty of perjury that a diligent search for documents has been undertaken.

It is desirable to identify the appropriate person to file this certification at the outset of the search.

4. A coding system should be developed to memorialize the origin of each document and its content.

5. Counsel should develop a system to identify which employees have responded and which have not.

D. Employee Interviews and Conflicts Between the Company and Employees/Officers

1. *Warnings to Employees*

(a) Counsel must clearly warn employees at the outset of interviews that they represent the company and not the employee. The interviewee should be told that the interview is confidential, but that the company alone will determine whether to assert or waive any privilege in connection with the interview. Such warnings should be memorialized by counsel, and a written statement of such warnings given to each interviewee.

(b) If the company has already decided to cooperate with a government investigation at the time of an employee interview, counsel should consider whether to disclose this expectation to employees, along with the warning that false statements during the interview could be prosecuted.

(c) Employees should be advised that government investigators may attempt to interview them (at work or at their homes) and advised of the "ground rules" for such interview requests.

2. *Privilege*

(a) Under *Upjohn v. U.S.*, 449 U.S. 383, 394-95 (1981), a corporation may claim attorney-client privilege for communications between its counsel and non-managerial employees in the context of an internal investigation. Interviews conducted by or at the direction of counsel are considered fact work product covered by the work-product privilege. *See, e.g.*, *In re Qwest Commc'n*, 450 F.3d 1179 (10th Cir. 2006); *In re Martin Marietta*, 856 F.2d 619 (4th Cir. 1988).

(b) Waiver of Privilege: In many cases involving a government investigation, the company may elect to waive

its privileges and produce its interview memoranda or investigation report to the government. A corporation may unilaterally waive the attorney-client and work-product privileges associated with an interview of an employee in an internal investigation. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985).

3. *Company Loss of Privilege*

If employees are ultimately prosecuted, they may be entitled to production of interviews memoranda prepared during the investigation, over the company's objection, if the company voluntarily disclosed them to the government .

4. *Separate Counsel for Employees*

(a) In warning employees that counsel conducting the interview represents the company and not the employee, counsel should consider advising the employee that he or she may retain separate counsel and, where appropriate, that the company will advance legal fees to such counsel.

(b) Companies are not required to advise employees as to whether they need separate counsel in connection with an internal investigation, and counsel may not be in a position to do so because of lack of information.

(c) If an employee has retained separate counsel, ethical rules applicable to attorneys may preclude interviews of represented persons without their counsel (so-called "*ex parte*" communications). *See,* e.g., Model Rules of Professional Conduct, Rule 4.2.

(d) In some cases, it may not be advisable for companies to enter into joint defense agreements with employees' separate counsel, because doing so could limit the company's ability to cooperate with the government by disclosing the employees' interviews.

5. *Indemnifying Employees for Legal Expenses for Separate Counsel*

(a) In the McNulty Memorandum, the DOJ reversed its previous position as articulated in the Thompson Memorandum and directed federal prosecutors not to take into account (in deciding whether to treat a culpable corporation leniently) whether the company has advanced attorneys' fees to employees or agents under investigation or indictment. The McNulty Memorandum left unclear

whether this would only be true where there was a contractual obligation or statutory requirement for the company to indemnify the employee, as the McNulty Memorandum specifically referenced such statutes and contracts, noting that "a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate."

(b) The government's change in position came in the wake of *U.S. v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), in which Judge Kaplan ruled, after an evidentiary hearing and in a lengthy opinion, that government pressure exerted under the Thompson Memorandum and by prosecutors in the case had led to KPMG's refusal to continue to pay legal fees and expenses for its indicted former partners and employees (and for those employees who had refused to cooperate with the government or exercised their Fifth Amendment rights against self-incrimination). The court ruled that this portion of the Thompson Memorandum constituted a violation of the defendant/former employees' Fifth Amendment due process rights and Sixth Amendment right to counsel.

(c) In 2008, The United States Court of Appeals for the Second Circuit affirmed Judge Kaplan's decision in *U.S. v. Stein*, 541 F.3d 130 (2nd Cir. 2008). On the same day that the Second Circuit decided *Stein*, the DOJ issued the Filip Memorandum which superseded the McNulty Memorandum. *See, supra*. In the Filip Memorandum, the DOJ clarified its position with respect to a corporation's indemnification of its employees for attorneys' fees in stating: "In evaluating cooperation . . . prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action."

6. *Joint Representation of Company and Employees*

(a) Joint representation of employees and the company may only be advisable where the employee, so far as the company is aware, is only a potential witness and not a target or subject of the inquiry. Where joint representation is a possibility, counsel should advise the employee at the outset that they may represent the employee only so long as there is no apparent conflict of interest with the company,

(or other employers) and that the decision to assert or waive any privilege rests solely with the company.

(b) Where company counsel also represents employees, there is a potential for conflicts of interest, especially where the company cooperates with a government investigation or intends to do so. Counsel should withdraw from representing the employee if such conflict arises or obtain a waiver from the employee.

E. *The Investigation Report*

1. The results of an investigation may be reported in writing or orally. Whether to prepare a written report or make an oral presentation to the company depends on the purpose for which the investigation was undertaken and the use the company will make of the results.

2. For companies that intend to cooperate with a government agency, a written report will generally be necessary to demonstrate a basis for leniency through cooperation and to demonstrate that the matter was taken seriously by management and addressed adequately. Companies must be advised and understand that producing a written report to the government will almost certainly waive any applicable privilege for any related litigation for the report and very likely any factual underlying material such as witness interview summaries.

3. Where companies do not intend to cooperate with a government investigation, where they do not intend to make public use of a report and/or where preservation of privilege in connection with the report is a goal, then an oral report may be advisable. Disclosure of the oral report, through notes or otherwise, may lead to waiver of privilege for underlying investigation materials such as interview summaries.

F. *Waiver of Privilege by Disclosure*

1. Generally No Selective Privilege Waiver

(a) If a company agrees to the government's request that it waive its attorney-client and/or work-product privileges for an investigative report and/or materials developed in connection with an internal investigation and produces otherwise privileged material to the government, the company should recognize that third parties will argue that in doing so it will have waived the privilege, will not later

be able to assert privilege and will have to produce the material and possibly other material on the same subject matter in other proceedings to other parties. *But see,* FRE 502 (below).

(b) Most federal circuit courts that have addressed this issue have rejected the argument that there may be a "selective waiver" or "limited waiver" of attorney-client and work-product privilege, other than possibly with respect to opinion work product (pure expressions of legal theory or counsel's mental impressions), in these circumstances. Voluntary disclosure to a government agency generally waives otherwise applicable privileges. *But See, Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978); *In Re Cardinal Health, Inc.*, 2007 WL 495150 (S.D.N.Y. 2007)

(c) Confidentiality or non-waiver agreements between companies and government agencies memorializing that the company is not waiving its privileges and that the government will not disclose the material except in limited circumstances in connection with its official duties (or words to that effect) are common. However, such agreements do not provide a guarantee that privilege will be preserved after disclosure to the government, and the law is not consistent across all federal circuits.

(d) Federal Rule of Evidence 502, enacted in September 2008, however, alters traditional rules on privilege waiver.

FRE 502(a) limits waiver of the privilege normally to the communication or materials disclosed, and not to the entire subject matter of the communication unless: 1) the waiver was intentional, and 2) the disclosed and undisclosed information concerning the same subject matter, and 3) they ought "in fairness" to be considered together. FRE 502(e) allows parties to enter into an agreement to limit the effect of any disclosure. The agreement is only binding on the parties unless the agreement is included in a court order.

(e) Although FRE 502 permits defendants in federal proceedings to avoid waiver where privileged documents are disclosed inadvertently, courts interpreting FRE 502 have held the privilege to be waived, even where documents were disclosed inadvertently, where the defendant failed to demonstrate it took reasonable steps to

prevent disclosure or to rectify its disclosure. *See Eden Isle Marina, Inc. v. U.S.*, 89 Fed. Cl. 480, 512-13 (Fed. Cl. 2009). Courts, however, have found that the subject-matter waiver of work-product protection pursuant to FRE 502 does not extend to materials protected by the opinion work product privilege. *See id.* at 520-21; *Chick-fil-A v. ExxonMobil Corp.*, No. 08-61422-CIV, 2009 WL 3763032, at *7 (S.D. Fla. August 28, 2009)

(f) *In re: Cardinal Health Inc*., No. C2 04 575 ALM, 2007 WL 495150 (SDNY Jan 26, 2007)

FIRM CONTACT INFORMATION

For more information regarding the internal investigations or how your organization should respond to them, please contact your regular Kutak Rock LLP contact or any member of our Governmental Disputes Group:

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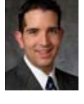

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EMPLOYEE ADVISORY

This Employee Advisory seeks to inform certain Company employees of the possibility that government investigators may attempt to speak with them in connection with an apparent investigation of practices of various health care providers. This Advisory attempts to outline some of the employees' rights and duties relating to any government contact. [The government recently subpoenaed records from the Company,] but has not taken any further action with respect to the Company or any of its employees. The government generally does not discuss the specific reasons for its investigative activities, and has not done so here.

Many government investigations conclude with the government taking no legal action whatsoever. Other investigations develop into "civil" litigation or negotiations concerning corporate business practices which the government believes should be changed. In rare cases, an investigation could result in potential criminal charges against the company or individual employees.

The fact that you are asked for an interview does not imply that you are personally under investigation. It only implies that the government believes you may possess of information relevant to its investigation.

Contacts by investigators could occur during off-hours—at your home or at other places away from the Company's premises. Such contacts are generally made by a team of two investigators, usually from the Office of Inspector General, the FBI or the Department of Human Services. Other investigative agencies, and/or personnel from the DEA, the Postal Service, the Secret Service, State Patrol, the United States Attorney's Office or various federal agencies or military investigators could also contact you. Occasionally, investigators may express an urgency to speak to you. Employees should feel comfortable in understanding the process and implications of an interview before agreeing to one.

In connection with the government's investigation, employees should be aware of the following:

1. Investigators have the right to contact employees and to request an interview.

2. Employees have the right to speak with investigators. They also have the right to decline to speak to investigators or be interviewed, and to request that any interviews take place at a time and location convenient to the employee.

3. Generally speaking, investigators do not possess subpoena power or have other legal authority by which to compel employees to speak with them or to submit to an interview. It is improper for investigators to resort to threats or intimidation, whether express or implied, in order to obtain an interview.

4. Employees should request appropriate identification from investigators and should record their identities or obtain business cards.

5. Employees have the constitutional right to consult with legal counsel before deciding whether to submit to an interview. Such consultation may help the employee understand (i) the nature of the investigation, (ii) any potential risks to the employee stemming from the investigation or the interview process, and (iii) the employee's right to have counsel present at the interview to provide advice during the interview, to be a witness to what is said, and to take notes on behalf of the employee to avoid future misunderstanding about the interview and comments made by the participants. There may be instances in which the investigators tell employees that they have no need for an attorney. However, it is the employee's decision to decide whether an attorney's assistance may be useful.

6. Company's legal counsel will be available to meet with employees in advance of any interview and, at an employee's request, to attend any interview to assure that it is conducted properly. Employees also may wish to consider retaining their own private counsel in advance of an interview.

7. Speaking to investigators in an interview will *not* prevent or foreclose compulsory grand jury testimony in the future if a grand jury is convened.

8. If employees choose to submit to an interview, they should also be aware of the following:

a. Statements made to investigators may constitute legal admissions which may later be used as evidence against the employee, the Company or both in a criminal, civil, administrative or other proceeding.

b. Employees should tell the truth and should state as facts only those matters they know from personal knowledge to be factual. Guesswork, conjecture or speculation should be avoided. Moreover, false statements may constitute a felony criminal offense. It is *IMPERATIVE* that employees tell the truth.

c. Employees must be sensitive to their responsibilities and obligations with respect to the Company's proprietary and classified information, and private health information about patients, including that potential under HIPAA. Employees should not assume that investigative procedures will protect such information.

d. Any requests for documents pertaining to the Company's business should be directed to [the law firm of Kutak Rock, 1650 Farnam Street, Omaha, Nebraska 68102].

10. If approached by investigators concerning the Company's business or employees, you may contact the Company's attorneys at Kutak Rock. Please feel free to contact **Edward G. Warin or Thomas J. Kenny at (402) 346-6000**. If you have counsel already, you may wish to contact him or her.

FIRM CONTACT INFORMATION

For more information regarding the FERA or how your organization should proactively address the government's heightened prosecutorial focus on program fraud, please feel free to contact your regular Kutak Rock LLP contact or any member of our Governmental Disputes Group:

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January 15, 2010

Recent False Claims Act and Federal Acquisition Rule Developments For Government Contractors

The most significant recent developments in the law affecting government contractors arise under the False Claims Act ("FCA") [1] and Federal Acquisition Regulations ("FAR").[2] On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act ("FERA"), a significant overhaul of the FCA.[3] In light of the amendments to the FCA, government contractors should also be aware of case law providing guidance regarding viable defenses to actions brought under the FCA. Finally, government contractors should analyze major changes to legally-required regulatory compliance programs and new *mandatory* reporting requirements.

I. False Claims Act Expansion Under the FERA

The False Claims Act has long been a primary tool used by government prosecutors to pursue government contractors, health care providers, and others suspected of submitting false claims for payment to the United States. Indeed, the Department of Justice ("DOJ") announced it had recovered $2.4 billion in civil FCA cases in 2009 alone.[4] Nearly $2.0 billion of that amount derived from claims first brought under the *qui tam*, or whistleblower provisions of the FCA. As described below, FERA enhances this already formidable prosecutorial weapon.

The FERA not only increases the types of conduct which prosecutors and whistleblowers may attack, but will likely add to the costs of litigating or resolving health care and other fraud cases, including "mere" overpayment matters.[5] Government contractors should carefully analyze the FERA's effect on existing compliance programs and repayment strategies and should redouble their efforts to avoid the long reach of this powerful enforcement tool.

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[1] False Claims Act of 1863, ch. 67, 12 Stat. 696 (1863), 31 U.S.C. § 3729-3733 (amended by Pub. L. 111-21, 123 Stat. 1621).

[2] Federal Acquisition Regulation, FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Rg. 67064 (Nov. 12, 2008) (codified at 48 C.F.R. pts. 2, 3, 9, 42 & 52).

[3] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111–21, 123 Stat. 1617.

[4] *See,* Press Release, DOJ, Nov. 19, 2009 (www.justice.gov).

[5] *See, e.g*., *White House Press Release*, dated May 20, 2009 ("to ensure that the knowing retention of an overpayment is a violation").

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The FERA markedly expands the reach of the FCA and greatly strengthens the government's already formidable weapons to combat health care and other program fraud. Under the new law, government contractors, health care providers and others now may face severe penalties for the knowing retention of government overpayments even though the provider or contractor made no false or improper claim for such payments. The FERA also overturned last year's Supreme Court decision, *Allison Engine Co. v. United States ex rel. Sanders*,[6] now making the FCA apply even if a false claim had *not* been submitted directly to the government. In addition, the FERA enhances whistleblowers' ability to investigate alleged FCA violations and provides them enhanced protections.

A. Liability for Overpayments

Under the FERA, contractors may be liable for "knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the government."[7] Defining "obligation" to include "an established duty . . . arising . . . from the *retention of any overpayment*"[8] from the government, prosecutors will likely interpret FERA to apply to the "knowing" retention of excessive Medicaid, Medicare or other government payments.[9] Indeed, the government may contend that a contractor violates FERA even without any affirmative fraudulent act, any false statement of record or any fraudulent intent to solicit an overpayment. However, under one provision, the FERA requires that the avoidance of an obligation may be actionable only if it is knowing and improper,[10] which arguably limits contractor liability in the overpayment arena. At this early stage, it is impossible to predict with certainty how courts will apply these important terms in the new law.[11]

B. Overturning Supreme Court Limitations

In 2008, the Supreme Court decided *Allison Engine Co. v. United States ex rel. Sanders*, which limited FCA liability to situations where a claimant intentionally submitted false claims for payment *directly* to the government. However, the FERA reverses the rule adopted in *Allison Engine Co.* by

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[6] *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008).

[7] 31 U.S.C. § 3729(a)(1)(G). Furthermore, Section 3729(a)(1)(D) could also result in liability for the retention of overpayments: "[Any person who] has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property [is liable]." Fines for Section 3729(a) violations include $5,500 to $11,000 per violation plus three times the amount of damages which the Government sustains resulting from the false claim.

[8] 31 U.S.C. § 3729(b)(3).

[9] Under the FERA, a "claim" includes "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 [that is presented to the government (or its contractors if the money is to be spent on the government's behalf)].

[10] *See* 31 U.S.C. § 3729(a)(1)(G) ("knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government . . . or knowingly and *improperly* avoids or decreases an obligation to pay or transmit money or property to the Government") (emphasis added).

[11] For example, if courts determine that § 3729(a)(1)(D) applies to the retention of overpayments, rather than § 3729(a)(1)(G), the former section has no "improperly" modifier; the mere "possession, custody, or control" of overpayments would subject an entity to FCA liability.

removing the language in the FCA on which the Supreme Court relied to limit the corporate liability.[12] And though the Supreme Court determined that FCA liability would be "boundless," without a clear link between a false claim and payment by the government, Congress eliminated the requirement for such a link.[13]

C. FCA Investigations

FERA now allows the Attorney General or his designee to disclose any information gathered through the Civil Investigative Demand ("CID") process with any whistleblower (qui tam relator) at the discretion of the Attorney General or designee.[14] Whistleblower investigations against health care entities may now proceed more quickly and with better access to government-obtained evidence. Because the FERA amended the FCA to allow for the collection of litigation expenses (in addition to the imposition of fines and treble damages required under the FCA), unsuccessful defendants may incur greater expense for their FERA violations.

D. Expansion of Whistleblower Protections

FERA extends broad protection to whistleblowers, defining "retaliation" as conduct directed not only against employees, but also against contractors and agents. The FERA thus eliminates the requirement that an employment relationship exist to safeguard a whistleblower.[15] Health care entities and government contractors should proceed with even greater caution after an FCA claim has been made or threatened by an employee, contractor or agent.

II. Other Developments in FCA Case Law

Although the FCA underwent significant expansion under the FERA, government contractors should be aware of case law providing guidance regarding several defenses against FCA claims, which in particular may assist government contractors in defending against frivolous suits brought by qui tam relators. We set forth below a sampling of legal defenses which may apply to FCA actions filed against contractors and health care providers.

A. Pleading with Specificity Under Rule 9(b)

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[12] Specifically, the FERA redacts the phrase "to get" from 31 U.S.C. § 3729(a), which the Supreme Court relied upon in *Allison Engine Co.*: "'To get' denotes purpose, and thus a person must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable under § 3729(a)(2)." *Allison Engine Co.*, 128 S. Ct. at 2130. Furthermore, Congress made § 3729(a)(1)(B) effective as of June 7, 2008, the date of the *Allison Engine Co.* decision. Congress may have intended to apply the new definition of "claim" retroactively to conduct occurring since June 7, 2008—a proposition that raises constitutional questions. As discussed infra, several courts, however, have refused to apply the FERA Amendments to claims arising prior to May 20, 2009.

[13] In addition, FERA expands the definition of "claims" to include not only requests for money to the government, but also to requests to any "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 or interest" if the United States will be providing or reimbursing any of the requested money. *See* 31 U.S.C. § 3729(a)(1)(G) and (b)(2)(A)(ii).

[14] 31 U.S.C. § 3733(a)(1).

[15] 31 U.S.C. § 3730(h).

Complaints alleging violations of the FCA must comply with the special pleading requirements of Federal Rule of Civil Procedure Rule 9(b).[16] Accordingly, a complaint under the FCA must plead such facts as the time, place and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result.[17]

In the Eighth Circuit, claims under the False Claims Act must meet the specific pleading requirements of Rule 9(b), or face immediate dismissal. For example, in *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*,[18] the relator alleged that a hospital submitted false claims for Medicare and Medicaid reimbursement for a physician's anesthesia services and that the physician had conspired with the hospital in a scheme to defraud the government. The Eighth Circuit Court of Appeals dismissed the allegations pursuant to Rule 9(b) because the relator failed to allege the details of any false claim with particularity:

> Absent from the complaint is any mention of . . . *who was involved* in the fraudulent billing aspect of the conspiracy, . . . *what services* were provided and to which patients the services were provided, . . . *what the content* was of the fraudulent claims, . . . *what dates* the defendants allegedly submitted the false claims to the government, . . . *what monies* were fraudulently obtained as a result of any transaction, or how [relator] Joshi, an anesthesiologist, learned of the alleged fraudulent claims and their submission for payment.[19]

The Eighth Circuit has also recently reaffirmed that allegations of a scheme to defraud the government alone will not be sufficient to plead an FCA claim. Instead, Rule 9(b) requires specific allegations regarding specific claims that were actually submitted to the government.[20]

B. Original Source/Subject Matter Jurisdiction

Under the FCA, the "public disclosure bar"[21] prohibits a court from exercising jurisdiction over an action based on public disclosure of the allegations or transactions in the suit, unless the plaintiff (called a "relator" in FCA cases) is an "original source" of the information and thus has "direct and independent knowledge of the information on which the allegations are based[.]"[22] Thus, if the complaint is based on public disclosure of the allegations and is not an original source, the court lacks subject matter jurisdiction, and the qui tam relator's FCA claim will be dismissed with prejudice. A

[16] *See, e.g., United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003).
[17] *See, e.g., United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 822 (8th Cir. 2009).
[18] 441 F.3d 552, 556 (8th Cir. 2006).
[19] *Id.* (emphasis added).
[20] *Hypoguard*, 559 F.3d at 822 (quoting *Joshi*, 441 F.3d at 556) ("FCA complaint 'must provide some representative examples of [the] alleged fraudulent conduct").
[21] 31 U.S.C. 3730(e)(4)(A).
[22] *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007).

relator's review of documents obtained by the government while case was pending under seal constitutes a "public disclosure."[23]

This defense often may not be apparent from the face of the complaint and may require expedited discovery to ascertain whether the complaint is vulnerable to dismissal. Where allegations are made on "information and belief," however, the relator may be basing the allegations on public information. The original source defense may be asserted at any time, including after an initial motion to dismiss. Accordingly, such a defense may be reserved for potential use after completion of initial discovery in the event that a qui tam relator successfully overcomes the hurdles of Rule 9(b).

C. Falsity

Under the FCA, relators must plead and prove that false claims were submitted to the government for payment. Case law supports findings of no liability where the alleged falsity depends on disputed interpretations of law, regulation, contracts or other instances in which there existed a lack of objective falsity.[24] Where disputed legal issues arise from vague provisions or regulations, a contractor's decision to take advantage of a position cannot result in his filing a "knowingly" false claim.[25] This principle helps protect government contractors making good-faith claims for payment from being surprised by FCA liability arising from a plaintiff's novel or overly restrictive interpretations of applicable rules.

D. Presentment

The FCA requires that a claim be "presented" to the government. In 2008, the Supreme Court held in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008) that liability under 31 U.S.C. 3729(a)(2) may arise only when "the defendant intended that the false record or statement be material to the Government's decision to pay." *Id*. at 2126.

This defense may still be viable for alleged FCA violations that took place prior to enactment of the FERA on March 20, 2009. In Section 4(f)(1) of the FERA, Congress sought to apply the FERA amendments retroactively to all claims under the FCA pending as of June 7, 2008, two days prior to the *Allison Engine* decision. Nonetheless, several district courts have recently refused to apply the newly amended provisions of Section 3730(a)(1)(B) retroactively contending that FERA's retroactivity provision violates the Ex Post Facto Clause of the Constitution.[26]

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[23] *United States ex rel. Montgomery v. St. Edward Mercy Medical Center*, No. 05-CV-00899, 2007 WL 2904111 at *9-11 (E.D. Ark. Sept. 28, 2007).
[24] *See, e.g.*, *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1019 (7th Cir. 1999) ("[I]mprecise statements or differences in interpretation growing out of a disputed legal question are ... not false under the FCA. . . . [T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations. The FCA is a fraud prevention statute; violations of [agency] regulations are not fraud unless the violator knowingly lies to the government about them.").
[25] *See United States ex rel. Siewick v. Jamieson Sci & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000).
[26] *See United States ex rel. Sanders v. Allison Engine Co.*, 2009 WL 3626773 (S.D. Ohio Oct. 27, 2009); *United States v. Science Applications Int'l Corp.*, 2009 WL 2929250 (D.D.C. Sept. 14, 2009).

E. False Certification Theory

The "false certification theory" is a wide-reaching theory that supports FCA liability for government contractors who falsely certify compliance with a federal regulation.[27] When an FCA claim is based on a false certification theory of liability, a key defense is whether the certification concerned a "condition of participation" or a "condition of payment."[28]

As the Tenth Circuit recently explained in *U.S. ex rel. Conner v. Salina Regional Health Center, Inc*., "Conditions of payment are those which, if the government knew they were not being followed, might cause it to actually refuse payment."[29] Accordingly, a government contractor may incur FCA liability where it falsely certifies compliance with rules which are conditions of payment. On the other hand, if the false certification merely concerns a condition of participation in a government program (e.g., Medicare), the government contractor will not be subject to FCA liability. "Conditions of participation, as well as a provider's certification that it has complied with those conditions, are enforced through administrative mechanisms, and the ultimate sanction for violation of such conditions is removal from the government program."[30]

III. Federal Contractor Regulations

New regulations applicable to federal contractors[31] contain two major requirements with which government contractors must be familiar: an ethics awareness and compliance program requirement, and a *mandatory* reporting requirement.[32] The new federal acquisition regulations ("FAR") apply to certain contracts valued at more than $5 million and with a performance period greater than 120 days.

The FAR now requires government contractors to establish ethics awareness and compliance programs that include elements such as a written code of conduct, distribution of the code to all employees working on the contract, efforts to raise awareness of and promote compliance with the code, and an internal controls system designed to detect and respond to any improper conduct in connection with federal government contracts. The internal controls required do not appear to be a significant departure from the elements of an effective ethics and compliance program set forth in the U.S. Federal Sentencing Guidelines. However, this new rule now adds the risk of suspension and debarment to the list of collateral consequences associated with failing to have an effective ethics and compliance program.

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[27] *See United States ex rel. Gross v. AIDS Research Alliance-Chicago,* 415 F.3d 601, 605 (7th Cir.2005). The Eight Circuit has not yet addressed this theory, but it is widely accepted in most other circuits. *See United States ex rel Thomas v. Bailey*, 2008 WL 4853630 (E.D. Ark. Nov. 6, 2008).

[28] *See U.S. ex rel. Conner v. Salina Regional Health Center, Inc*., 543 F.3d 1211, 1219 (10th Cir. 2008).

[29] *Id.*

[30] *Id.*

[31] Federal Acquisition Regulation, FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Rg. 67064 (Nov. 12, 2008) (codified at 48 C.F.R. pts. 2, 3, 9, 42 & 52).

[32] *See, Corporate Compliance Survey*, Business Lawyer, Nov. 2009.

The FAR now also permits suspension and debarment of government contractors who knowingly fail to timely disclose in writing:

•A violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations;

•A violation of civil False Claims Act (31 U.S.C. §§ 3729-3733); or,

•Significant overpayments on the contract.

If a principal[33] has "credible evidence"[34] of any of these offenses, the government contractor (or subcontractor) has an obligation to make a "timely"[35] report to the government, or face possible suspension or debarment. The use of the term "credible evidence" is a change from the originally proposed "reasonable grounds to believe," and the commentary discloses that this change "indicates a higher standard, implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the government."[36] Adding that "[u]ntil the contractor has determined the evidence to be credible, there can be no 'knowing failure to disclose'" and that "[t]his does not impose upon the contractor an obligation to carry out a complex investigation, but only to take reasonable steps that the contractor considers sufficient to determine that the evidence is credible."[37] In light of the new reporting requirement, government contractors should take steps to raise awareness in the organization of this new requirement and develop a process for receiving, evaluating and, if appropriate, reporting covered offenses.

The above reporting obligation applies to active contracts and to any other contract the final payment on which was received *in the three years prior to the new rules*.[38] Thus government contractors will need to evaluate whether they have any reportable matters. Issues brought to the contractor's attention prior to December 2005 for contracts not fully paid until after December 2005 will be subject to reporting requirements. For example, if a contractor is presently aware of an unreported False Claim Act violation from 2001 reported and resolved (without reporting) that same year as part of an Ethics Helpline report, but final payment on the contract was not received until 2007, the clock is now ticking on your mandatory reporting obligation. Therefore, government contractors should consider conducting a review of internal compliance records to determine if there are any matters that may need to be reported now.

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[33] The rule defines "principals" as "an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager, plant manager, head of a subsidiary, division or business segment, and similar positions)." 48 C.F.R. § 2.101(b)(2). The commentary accompanying the new rule indicates that this definition should be construed broadly and may include compliance officers or directors of internal audit. 73 F.R. at 67079. This broad definition means that a supervisory-level employee's knowledge will be imputed to the organization, whether or not it was reported through the proper internal channels.

[34] 48 C.F.R. § 3.1003(a)(2).

[35] *Id.*

[36] 73 F.R. at 67073.

[37] 73 F.R. at 67074.

[38] 48 C.F.R. §§ 9.406-2(b)(1)(vi), 9.407-2(a)(8), 52.203-13(c)(2)(ii)(F)(3); *see also* 73 F.R. at 67074.

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