



A PilieroMazza Update for Federal Contractors and Commercial Businesses

The Mandatory Disclosure Rule: Mitigating Risk When the Requirement for Disclosure Is Not Clear

By Jackie Unger



Most federal contractors are aware that the mandatory disclosure rule requires that contractors timely disclose “credible evidence” of certain misconduct taking place in connection with the award, performance, or close out of a contract. Although the rule has

been in existence for nearly ten years, contractors still have questions about whether particular conduct must be disclosed and what steps should be taken to minimize the risk of penalties and administrative action resulting from disclosure, or an improper failure to disclose.

Conduct covered by the mandatory disclosure requirements includes violations of certain federal criminal laws involving fraud, bribery, conflicts of interest, and gratuities. Covered conduct also includes violations of the far-reaching False Claims Act (FCA), such as inaccurate billing, false certifications of size status, or misrepresenting compliance with Buy American requirements, to name a few common and growing areas of concern. Significant overpayments by the Government are also considered covered conduct.

Except in the case of blatant intentional misconduct, the answer to whether conduct must be reported is almost always: it depends. This is because the rule does not define key terms, such as what constitutes “credible evidence” of a violation or significant overpayment, leaving a fair amount of ambiguity as to when disclosure is necessary. The FAR Council has explained that “credible evidence” is a higher standard than “reasonable grounds to believe” that a violation has occurred,

meaning that mere allegations of misconduct will not trigger disclosure. Importantly, the rule anticipates that contractors will take time to conduct a preliminary internal investigation and determine whether there is sufficient reliable evidence to conclude that a violation or overpayment has occurred. However, contractors may not engage in an open-ended, exhaustive investigation in order to delay disclosure until the investigation is complete. The extent of the preliminary investigation will be dictated by the complexity of the legal issues, the time required to gather and review relevant evidence, and the reliability of the witnesses and evidence. For instance, it may be easier to identify whether a significant overpayment has been received than whether an FCA violation has occurred because an FCA violation requires consideration of whether the contractor acted with some level of intent.

Given the broad range of conduct that could result in a reportable violation, contractors would be wise to implement and follow procedures for handling alleged noncompliance, as such procedures likely would be reviewed by the Government as reflective of the contractor’s responsibility. These procedures should include a uniform definition of credible evidence that will trigger the disclosure requirement, a timeframe for disclosure once credible evidence is obtained, definition of roles and responsibilities for the investigation team, and steps for determining and taking corrective action if noncompliance is identified.

As Ms. Biggs mentions in her article discussing investigations in the context of FCA violations, best practice is to use outside counsel to conduct the investigation in order to ensure impartiality and protection of the attorney-client privilege. Additionally,

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because the result of the investigation often is not black-and-white as to whether credible evidence of reportable conduct exists and individuals within the company may disagree, it is important to seek advice from outside counsel to validate the decision of whether to disclose and to understand the potential repercussions should the company decide not to disclose.

The investigation, the basis for the determination as to whether credible evidence of misconduct exists, and any corrective action being taken should be well-documented, as this information can be used to demonstrate the contractor's present responsibility in potential suspension and debarment proceedings. Investigation materials and findings, as well as any final disclosure to the Government, should be treated and marked as confidential and proprietary, and access to these materials should be limited to prevent their use by a whistleblower in a *qui tam* action against the company.

If the contractor determines disclosure to the Government is necessary, the contractor should consider skipping the agency's online disclosure form and instead submit a narrative that can more fully describe the company's positive past performance, circumstances leading to the violation, and corrective action taken in order to demonstrate present responsibility. At the same time, contractors should carefully review the language used to protect against the disclosure being treated as an admission of liability.

Finally, because suspension and debarment may occur for a knowing failure to disclose violations or significant overpayments only within three years after contract closeout, contractors should seek prompt closeout and final payment on contracts to limit the period of exposure.

At one point or another, every contractor faces compliance issues. Implementing and following procedures for investigating and, when necessary, disclosing evidence of noncompliance go a long way to mitigating the risk of the most severe penalties and administrative action if and when such issues arise.

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