What To Do When The Feds Come Knocking

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Agenda

- Why talk about this?
- Corporate criminal liability
- The time of magical thinking: myths at the outset
- What is to be done?
- What is not to be done?
Why Talk About This?

- The risks are real and growing
  - Section 8a
  - ANC scrutiny
  - All it takes is a call

- How does this apply here?
  - TINA and DCAA
  - The False Claims Act
  - The Foreign Corrupt Practices Act ("FCPA")
  - Whistleblowers and self-disclosure requirements
Government Strategy to Decrease Costs
TINA and DCAA

- DoD Director of Defense Policy and Procurement Shay Assad
  - "Stepping up the game... on contract costs."
  - "Not looking to suppress contractors' profits"

- Goal = more informed about program costs and how to drive down those costs without affecting profit

- Front end strategy
- If intent is added, TINA becomes FCA (or reverse FCA)
- TINA provides a post-negotiation mechanism for the government to address certified cost and pricing

- To address fraud, it characterizes the categories of information that should have been disclosed more broadly

- Audits and investigations budgets increasing or staying stable

- DoD is planning on ramping up auditing arm significantly
  - Adding 1612 employees to oversee and audit contracts
  - DCAA is seeking (got) a a 16 percent increase in its budget from Congress
The False Claims Act
$34 Billion Recovered Since 1986

This administration has an "unparalleled focus" on "aggressive civil enforcement action aimed at fraud, including increased use of the False Claims Act."

— Tony West, Assistant AG Criminal Division, DOJ (June 2010)

<table>
<thead>
<tr>
<th>Company</th>
<th>Date</th>
<th>Total Paid</th>
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<tr>
<td>Oracle</td>
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<td>Accenture</td>
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<td>EMC Corp</td>
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The False Claims Act
Growing Risks and Recoveries

- Congressional expansion of the qui tam provisions
- Congressional pruning of defenses
- High visibility settlements and awards
- Broader and deeper relators' bar
The FCPA
Transparency International Index
The FCPA
Penalties and Recoveries

Corporations

- **Criminal:** $2 million fine (per violation) or twice the loss/gain; disgorgement of profits; possible debarment/suspension
- **Civil:** $16,000 fine (per violation)

Individuals

- **Criminal:** $250,000 fine (per violation) or twice the loss/gain; 5 years imprisonment
- **Civil:** $16,000 fine (per violation); cannot be paid by employer

### Company Settlement

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<th>Company</th>
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<td>Siemens AG</td>
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<td>BAE Systems</td>
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<td>Snamprogetti</td>
<td>$365M</td>
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<td>Technip</td>
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<td>Daimler AG</td>
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Whistleblowers and Self-Disclosure

- **Whistleblower Provisions**
  - False Claims Act
  - FCPA
  - Securities

- **Mandatory Self-disclosure for Government Contracts**
  - Just what it says – it’s in your contract
  - Timely written disclosure to the OIG with a copy to the contracting officer when there is credible evidence of an overpayment, as well as certain violations of federal criminal law and of the False Claims Act
  - Full cooperation with governmental audit or investigations (does not waive privilege)
  - Continues for 3 years after FINAL close out
Corporate Criminal Liability

- A corporation may (will) be liable for crimes committed by an employee
  - Within the scope of employment
  - With the intent to benefit the corporation

- As applied by the courts, this is virtually strict liability
  - Broad reading of both elements
  - No defense for corporate policies or compliance programs

- May lead to suspension and debarment
  - Discretionary
  - Agency determination (not DOJ)
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<tbody>
<tr>
<td>1.</td>
<td><strong>Nature and seriousness of offense, including harm to the public</strong></td>
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<td>2.</td>
<td><strong>Pervasiveness within the company</strong></td>
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<td>3.</td>
<td><strong>The company's history of misconduct</strong></td>
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<td>4.</td>
<td><strong>The collateral consequences, including the impact on third parties</strong></td>
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<td>5.</td>
<td><strong>The adequacy of other remedies: civil and regulatory remedies and prosecution of individuals</strong></td>
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<td>6.</td>
<td><strong>The company's timely and voluntary disclosure</strong></td>
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<td>7.</td>
<td><strong>The company's cooperation in the investigation</strong></td>
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<td>8.</td>
<td><strong>The effectiveness of the company's corporate compliance program</strong></td>
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<tr>
<td>9.</td>
<td><strong>The company's remedial actions</strong></td>
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The Time of Magical Thinking
Myths at the Outset

1. This is just a subpoena.

2. This is a good company with good people. Who could possibly believe we committed a crime?

3. The [insert government customer or regulator] loves us, so this won't go anywhere.

4. All we have to do is tell our side of the story and this will go away.

5. This is just like civil litigation.

6. There is nothing to be done.
What Is To Be Done?

- Have a compliance program – prevention is the best defense
- Plan ahead
- No Cousin Vinnie
- Stop any misconduct
- Preserve documents
- Respond to the subpoena – fully, completely and timely
- Investigate, investigate, investigate
- Consider suspension and debarment
- Defend yourself
What Is Not To Be Done

× Do not obstruct the investigation
× Do not make admissions
× Do not rush in to talk to the prosecutor
× Do not call your congressman
× Do not fire the whistleblower
× Do not alienate the prosecutor
× Do not talk to the press
Hallmarks of an Effective Corporate Compliance Program

- Commitment from senior management – tone at the top
- Written code of conduct, compliance policies and procedures
- A responsible person with oversight, autonomy, and resources
- Tailored assessment of risks

- Continued training and advice
- Confidential reporting and internal investigation;
- System of incentives and disciplinary measures
- Remediation
- Periodic testing and review
Christine Williams is an experienced attorney who is a member of the Government Contracts, Litigation and Construction practices at Perkins Coie, representing large clients in Alaska and in the Lower 48. Her government contracts practice encompasses both state and federal arenas and focuses on construction, including complex litigation against the government and/or subcontractors, preparing and defending complex claims, responding to termination notices, understanding and responding to surety issues before or as they arise, administration of government contracts, initiating and defending against bid protests, and dispute resolution, whether through mediation, arbitration or litigation. Christine represents clients in defending against federal investigations alleging misconduct connected to federal funding, including investigations/reports by the Office of the Inspector General or the Department of Justice. Christine is experienced in construction law outside of the government contracts arena as well, representing clients on private construction projects throughout Alaska, including many rural areas.

Christine also maintains an active practice advising clients on the 8(a) program, including many Alaska Native Corporations. Her understanding of the interplay between government contracting and the 8(a) program allows her to effectively represent 8(a) firms in pursuing, receiving, administering and productively completing government contracts. Christine carries this unique knowledge with her to the board room as well, advising clients on proposed regulation changes affecting their strategic planning, corporate compliance and oversight at the Board level, which includes security clearance issues and effective oversight of government contracting subsidiaries. Successfully representing ANCs means having in-depth knowledge of Alaska and the challenges faced by ANCs. She frequently makes trips to rural villages, experiencing first-hand the importance of the economic benefits of the 8(a) program.
Dave Taylor has 25 years of experience as a trial lawyer and litigator. Companies regularly retain Dave to lead their defense in high-stakes litigation and investigations, including False Claims Act litigation, Securities and Exchange Commission (SEC) enforcement matters, securities and corporate governance litigation, corporate white collar criminal matters, commercial disputes, and civil fraud and Racketeer Influenced and Corrupt Organization (RICO) actions. Dave's recent successes include the defense of a FORTUNE 100 company in a $720 million False Claim Act case, the defense of a senior corporate officer in securities-related investigations and litigation arising from the collapse of the country's largest mortgage lender, the defense a FORTUNE 100 biotechnology company in a federal grand jury investigation under the False Claims Act, and the defense of a FORTUNE 200 company in an SEC enforcement investigation for alleged accounting improprieties.

A former assistant U.S. attorney and former Co-Chair of the firm's Investigations & White Collar Defense Practice, Dave also leads internal corporate investigations and advises clients concerning corporate governance, directors and officers liability, employee misconduct and fraud, and the design and implementation of corporate compliance programs.

Dave has been recognized as a "Best Lawyer in America" and as a "Washington Super Lawyer". In 2006, he was recognized as "Washington's Civil Libertarian of the Year" for groundbreaking litigation to secure the Constitutional rights of indigent criminal defendants. A winner of the "Burton Award for Legal Writing", Dave regularly writes and speaks on matters relevant to high stakes litigation, enforcement and investigations.