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CONTRACTOR RESPONSIBILITY: TOWARD AN INTEGRATED APPROACH TO LEGAL RISK MANAGEMENT

By Steven A. Shaw, Mike Wagner, and Robert Nichols

In this era of heightened Government demands for contractor responsibility, Government contractors face myriad risks. The authors of this BRIEFING PAPER have been involved, in one capacity or another, in some of the largest Government enforcement actions facing contractors. They have prosecuted and defended criminal and civil actions against contractors, negotiated the resolution of civil actions involving substantial fines and penalties, and handled suspension and debarment actions with multi-billion dollar contracting implications. They have also seen shareholder suits against board members and executives and have witnessed c-suite executives lose their jobs (and a few companies go out of business) due to their failures to comprehend and manage the risks relating to contractor responsibility. This BRIEFING PAPER is designed as a guide for Government contractors—including their boards of directors, c-suite executives, and legal counsel who bear fiduciary duties for managing corporate risks—for undertaking risk management strategies to avoid such problems.

In the 1980s, "Operation Ill Wind" exposed widespread corruption by U.S. Government officials and defense contractors. The scandal, which resulted in the conviction of over 100 contractors and individuals, is often cited as *the* defining moment for increased contractor responsibility. Yet the past decade has seen criminal, civil,

IN BRIEF

Steven A. Shaw, Senior of Counsel at Covington & Burling LLP, previously served in the federal senior executive service as the Air Force's Suspending and Debarring Official and as deputy general counsel for contractor responsibility and also managed the Air Force's Fraud Remedies Program. Prior to his position at the Air Force, he was a partner at two international law firms, specializing in civil fraud and white-collar criminal litigation, and was a prosecutor in the Department of Justice. Mike Wagner is an associate in Covington's Washington, D.C. office, focusing on Government contracts and white collar defense and investigations. Prior to joining Covington, he served as a law clerk on the U.S. Court of Appeals for the Third Circuit and the U.S District Court for the District of Maryland. Robert Nichols is a partner and co-chair of Covington's Government Contracts practice group.

and administrative enforcement actions against most major defense contractors and a plethora of civilian and commercial contractors. Many of these contractors also have been surprised by Government enforcement actions that have had little relationship to their Government business lines but nonetheless have had ripple effects across their entire companies. And the criminal and civil liability attendant to these enforcement actions is only part of the story. Indeed, in the past year alone, several large contractors have negotiated settlements with enforcement authorities, only to unexpectedly find themselves facing potentially crippling suspensions or debarments from Government contracting in an agency setting.

This Briefing Paper describes the recent legislative developments and trends in enforcement priorities that have forced companies doing business with the Government to contend with ever-expanding liability exposure, in particular to enforcement actions under the civil False Claims Act[1] and the Foreign Corrupt Practices Act,[2] as well as international anticorruption laws such as the UK Bribery Act.[3] Next, it reviews the administrative suspension and debarment process and tracks developments that have led to increased activity in that area. The Paper then focuses on questions of corporate law, addressing trends in recent legislative and regulatory reforms and analyzing the liability exposure of corporate directors who fail to properly oversee a company's operational and administrative risks. Finally, the Paper argues for an integrated approach to managing contractor responsibility and presents several discrete risk mitigation steps that should be taken by Government contractors.

Increased Enforcement Actions Against Contractors

Companies doing business with the Government are required to abide by a host of laws, rules, and regulations, and the failure to achieve compliance may result in drastic consequences. Two of the most significant enforcement statutes governing Government contractors are the civil False Claims Act[4] and the Foreign Corrupt Practices Act.[5] As discussed below, given recent legislative amendments and enforcement trends, the FCA and the FCPA, along with the UK Bribery Act[6] and similar international anticorruption laws, present seemingly limitless risks for Government contractors.

■ False Claims Act

The FCA imposes civil liability on any person or entity that improperly receives from or avoids payment to the Federal Government.[7] The Act prohibits, *inter alia*, knowingly presenting a false claim for payment.[8] For contractors, the most frequent FCA cases involve situations where the contractor submits an invoice that is inflated, is based on work that is not performed as the contractor alleges (*e.g.*, defective products or services), or is based on some falsehood. First enacted in 1863 to combat contractor fraud during the Civil War, the FCA was overhauled in 1986 to increase recoverable damages and to incentivize private attorneys general to enforce its provisions through *qui tam* actions.[9] In its modern form, the FCA imposes liability in the form of monetary penalties and treble damages[10] on any recipient of federal funds who knowingly submits a false claim or knowingly makes a false statement material to a false claim.[11]

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An FCA action may be initiated either by the DOJ or by a private whistleblower, known as a *qui tam* relator, who is entitled to recover a percentage of any judgment or settlement.[12] Whistleblower actions are brought in the name of the Federal Government, and the DOJ has the option to take over the prosecution of these *qui tam* actions if it so chooses.[13] If the DOJ does not intervene, however, the whistleblower can pursue the action on his or her own and may recover a larger share of any award or settlement.[14]

FCA recoveries are often substantial, especially in recent years. Since January 2009, recoveries under the FCA have exceeded $13.3 billion, the largest four-year total in the DOJ's history.[15] Nearly $5 billion of this total was recovered in 2012 alone, constituting a single-year record for FCA recoveries.[16] Many of these actions relate to fraud within the health care industry, with several major drug makers agreeing to settlements in the billion dollar range in 2012.[17] And while Government contractors in the health care field have long been aware of compliance risks under the FCA, in recent years the FCA has once again been increasingly applied to other fields, particularly the financial services and defense industries. For example, in the last three years alone, federal procurement fraud cases have led to recoveries topping $1.7 billion, a figure that exceeds the amount recovered in any comparable period.[18] In light of these numbers, it is little wonder that Stuart Delery, the Acting Assistant Attorney General, recently declared the FCA "the government's most potent civil weapon in addressing fraud."[19]

Although the FCA is not new, in recent years companies doing business with the Government have been forced to grapple with increasing risk under the FCA. There are many possible explanations for this trend, but four are particularly worthy of discussion. First, the Government is increasingly pursuing FCA cases for irresponsible contractor conduct that might normally be considered an "innocent mistake." Second, recent amendments to the FCA have dramatically expanded contractors' exposure to liability for so-called "reverse false claims." Third, an increasing number of courts have begun to impose FCA liability under an "implied certification" theory. And fourth, recent legislative enactments have eroded the public disclosure bar to whistleblower filings. These trends, along with the fact that *qui tam* relators have become increasingly sophisticated and opportunistic, have driven a sharp increase in the number of FCA filings in recent years. This PAPER discusses each of these developments in turn.

(1) *Reckless Disregard vs. "Innocent Mistakes"*—To prevail in an FCA case, the Government or *qui tam* relator need only show that the contractor acted "knowingly," which is defined as acting in "reckless disregard of the truth" even in the absence of actual knowledge.[20] This is a very low threshold. For example, contractors have inadvertently violated this standard by (a) providing incorrect answers on certifications and representations, (b) submitting invoices for work that did not meet contract specifications, (c) failing to ensure adequately that parts comply with Buy American Act restrictions, and (d) failing adequately to verify the sufficiency of subcontractor performance or to investigate and disclose subcontractor fraud. These examples, based on cases handled by the authors of this PAPER, show that the Government requires a level of diligence from contractors that, if not met, can be regarded as reckless disregard by the Government in an FCA action. Seemingly innocent mistakes are not always treated as such where contractors are held to a heightened standard of diligence before submitting any invoice.

(2) *Reverse False Claims Liability*—In 2009, Congress implemented substantial amendments to the FCA when it passed the Fraud and Economic Recovery Act.[21] Among other things, FERA announced an unprecedented expansion of the definition of "reverse false claims" by creating liability for contractors who knowingly retain an overpayment from the Government, even absent a false statement or claim.[22] In other words, FERA eliminated the requirement of an affirmative act; instead, all that is required to subject a contractor to FCA liability is the knowing retention of an overpayment. This provision is particularly dangerous for entities doing business with the Government given the "reckless disregard of the truth" standard that applies even in the absence of actual knowledge.[23] Consequently, if a contractor's internal compliance and accounting systems are not sophisticated enough to effectively track

possible overpayments, then it may face fines and treble damages under the FCA even where it neither intentionally makes a false statement nor intentionally retains an overpayment.

(3) *Implied Certification Liability*—In addition to the developments related to reverse false claims, the growing acceptance of the "implied certification" doctrine also has contributed to the increasing exposure faced by contractors under the FCA. As a general matter, when an entity submits a claim to the Government for payment, it often will be required to certify that it has complied with all federal laws and requirements applicable to the contract. Traditionally, a company could be held liable under the FCA for falsely certifying that it was in compliance with the applicable federal regulations. Thus, a company could avoid so-called "certification liability" under the FCA by ensuring that its certifications were true and accurate. In recent years, however, a growing number of courts of appeals have adopted a rule, known as the "implied certification" doctrine, that imposes FCA liability for false certifications even where the contractor does not actually provide a certification.[24] This doctrine holds that "the act of submitting a claim for reimbursement itself *implies compliance* with governing federal rules."[25] Thus, under this theory, "the mere request for payment by a noncompliant government contractor can result in significant legal liability."[26] As a result, a contractor may be subjected to treble damages under the FCA even in the absence of an affirmative misrepresentation. Moreover, because the FCA authorizes penalties of $11,000 for *each* false claim[27]—even where the Government fails to prove any actual damages[28]—a company that submits regular invoices could quickly find itself facing potentially massive fines under the implied certification theory.[29] For companies doing business with the Government, the risk posed by this doctrine is obvious.

(4) *Legislative Developments and the Rise of Qui Tam Relators*—A fourth cause of the increased risk of liability under the FCA is the recent adoption of certain legislative provisions making it easier for savvy and opportunistic *qui tam* relators to bring whistleblower suits. The number of *qui tam* FCA actions has exploded in recent years. In 2012, relators filed 647 new *qui tam* suits under the FCA, an increase of nearly 50% from 2009.[30] These whistleblower actions accounted for over 83% of FCA prosecutions, and *qui tam* relators recovered nearly half a billion dollars in 2012 alone.[31]

In part, this surge in FCA prosecutions may be due to FERA, which broadened the definition of a "claim" subject to the FCA,[32] softened the statute of limitations bar on DOJ interventions into *qui tam* complaints,[33] and expanded whistleblower protections to a company's agents and contractors, in addition to employees.[34] But the 2010 Patient Protection and Affordable Care Act[35] may have an even greater impact, as it has recast the FCA's public disclosure bar and "original source" exception in three ways that favor would-be whistleblowers.[36] First, the U.S. Supreme Court previously had held that the public disclosure bar prevented relators from bringing suit based on information contained in state or local "administrative reports, audits, and investigations."[37] But the PPACA narrowed this interpretation by establishing that the public disclosure bar applies only to whistleblower actions based on *federal* filings, thereby clearing the way for *qui tam* relators to bring suit based on information contained within *state* reports or audits.[38] Second, the "original source" exception to the public disclosure bar previously required a relator to have "direct and independent knowledge" of operative facts to qualify as an original source, but the PPACA scaled back this language. To qualify as an original source, the revised statutory language requires only that a relator have knowledge that "is independent of and materially adds to" the publicly disclosed information that is the subject of the suit.[39] Third, the PPACA opened the door for the maintenance of *qui tam* suits based on publicly available information even where the relator does *not* qualify as an original source. Formerly, an absolute jurisdictional bar prevented courts from hearing such cases; after the PPACA, however, the statute provides that "the court shall dismiss [such an] action . . . *unless opposed by the Government*."[40] In short, by both narrowing the public disclosure bar and expanding the original source exception, the PPACA has made it easier than ever for a whistleblower to maintain so-called "parasitic" *qui tam* suits.

In addition to the fact that recent legislation has lowered the hurdles to bringing *qui tam* suits, the promise of astronomical FCA recoveries[41] has contributed to a cottage industry of attorneys seeking out would-be whistleblowers in the hopes of obtaining a windfall. While some of these claims undoubtedly have merit, many other *qui tam* actions are little more than nuisance suits. Indeed, as the Supreme Court itself has noted, it cannot be denied that *qui tam* relators "are motivated primarily by prospects of monetary reward rather than the public good."[42]

Looking ahead, the enormous risks posed by the FCA to Government contractors show no sign of abating. The Attorney General himself made this abundantly clear in a recent speech in which he reiterated that FCA enforcement would continue to occupy a place at the top of the DOJ's priorities:[43]

> Particularly in these challenging economic times—when resources are scarce, government budgets are on the chopping block, and so many of us have been asked to do more with less—the need to act as sound stewards of every taxpayer dollar—and to aggressively pursue those who would take advantage of their fellow citizens—has never been more clear or more urgent.

Given this political and regulatory climate, the risks posed to contractors by the FCA seem almost limitless.

■ Foreign Corrupt Practices Act

The FCPA[44] represents another source of risk to Government contractors, particularly as U.S.-based contractors continue to expand their global presence. Broadly speaking, the FCPA's antibribery provisions outlaw corrupt payments to foreign officials with the intent to obtain or retain business.[45] Additionally, the FCPA also includes recordkeeping and accounting provisions that require issuers of publicly traded securities to make and keep accurate books, records, and accounts, as well as to maintain sufficient internal accounting controls.[46] The SEC and the DOJ Criminal Division share enforcement authority under the FCPA. Sanctions for FCPA violations can range from fines and penalties—sometimes totaling hundreds of millions of dollars—to incarceration for individual corporate officers.[47] Although the risk to contractors doing business abroad is clear, several trends in anticorruption enforcement warrant further discussion. First, the number and cost of FCPA enforcement actions has sharply increased in recent years. Second, recent guidance from the SEC and the DOJ indicates that even companies that have instituted FCPA compliance programs may be at risk if they fail to update these programs regularly.[48] And third, consistent with the trend of more aggressive anticorruption policing in the United States, the passage of the UK Bribery Act[49] and other international anticorruption laws signals a similar emphasis on global anticorruption enforcement, representing an added layer of risk to contractors doing business abroad.

(a) *Increased FCPA Enforcement*—The number of enforcement actions brought by the SEC and the DOJ has increased sharply in recent years, causing the risk posed by the FCPA to companies doing business abroad to spiral to unprecedented levels. For instance, during the three-year period from 2004 to 2006, just 32 FCPA enforcement actions were initiated. By comparison, the SEC and the DOJ instituted 162 FCPA actions during the three years from 2009 to 2011, an increase of over 500%.[50] And while the total number of FCPA enforcement actions dipped in 2012 as federal resources were diverted to publishing a new FCPA Resource Guide,[51] the SEC and the DOJ have been adamant that the FCPA will remain a key enforcement priority in the coming years.[52] Recent legislative developments have further aided these aggressive enforcement tactics. Of particular note are the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which required the SEC to establish an Office of the Whistleblower and to pay monetary awards of up to 30% to whistleblowers who report information that leads to successful SEC enforcement actions, including those brought under the FCPA.[53] In the first full year following the adoption of these provisions, the SEC received 115 tips from whistleblowers related to suspected FCPA violations.[54] Nor do these actions go away cheaply. In 2008, Siemens AG paid out $800 million to settle a single FCPA action.[55] And in 2012 alone, Pfizer, Eli Lilly, Biomet, and Smith & Nephew all paid more than $20 million to settle FCPA allegations following an enforcement sweep in the medical device and pharmaceutical industry.[56] All signs are that FCPA enforcement will remain strong in the coming years, fueled by an increasing number of corporate voluntary disclosures, more aggressive prosecutorial techniques, greater cooperation among international regulators, and a rise in the number of whistleblowers reporting potential FCPA violations.

(b) *Emphasis on Updating of Compliance Programs*—Aside from the increasing frequency and cost of FCPA actions, the Resource Guide to the FCPA released by the DOJ and SEC in November 2012 highlights an additional cause for concern for contractors. Although many large companies reacted to the recent surge in FCPA enforcement by instituting a compliance program, the DOJ's Resource Guide "marks a shift of emphasis from putting a compliance program in place… to conducting ongoing risk assessments, monitoring performance, auditing for effectiveness, and making appropriate modifications to the program going forward."[57] Recognizing that "[a] company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its industry," the Resource Guide emphasizes that "a good compliance program should constantly evolve."[58] The import of this statement is clear: without constant review and retooling of compliance programs to keep up with changing business conditions, the mere presence of an FCPA compliance program on the books is not sufficient to shield a company from FCPA liability. Additionally, as discussed further below, contractors would be well advised to complement robust compliance programs with a meaningful commitment to values-based ethics.

■ UK Bribery Act & Other International Anticorruption Laws

In a trend mirroring the rise in FCPA enforcement in the United States, other countries have begun to step up their anticorruption enforcement efforts in recent years. The most significant of these developments is the enactment of the UK Bribery Act, the sweeping legislation that serves as the United Kingdom's principal tool for anticorruption enforcement. The Bribery Act, which took effect in July 2011, creates two general offenses in §§ 1 and 2, which cover the payment and acceptance of bribes, respectively.[59] Additionally, the Act creates a stand-alone offense for the payment of a bribe to a foreign government official (§ 6), as well as a separate corporate offense for the "fail[ure] to prevent bribery on behalf of a commercial organi[z]ation" (§ 7).[60] For contractors with a presence in global markets, the compliance risks presented by this law are immense.

The Bribery Act's jurisdictional reach is breathtaking, as even contractors with only tenuous connections to the United Kingdom may find themselves exposed to liability under the Act. Jurisdiction under Sections 1, 2, and 6 extends to bribery occurring anywhere in the world as long as the person committing the offense has a "close connection" with the United Kingdom—that is, they are a citizen or resident of the United Kingdom or, in the case of company, are incorporated in the United Kingdom.[61] Incredibly, jurisdiction under the "corporate offense" provision of § 7 is even more expansive, as "the requirement of a close connection with the UK does not apply."[62] Rather, "provided…that the organi[z]ation carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed) then UK courts will have jurisdiction."[63] As a result, even where a bribe is paid *outside the United Kingdom* by a *non-UK person* on behalf of a *non-UK company*, jurisdiction still exists under § 7 as long as the contractor meets the vague test of "carr[ying] on…part of a business in the UK."[64] In the words of Richard Alderman, the former Director of the UK's Serious Fraud Office, "[c]orruption by [a] foreign entity abroad will be within our jurisdiction even if it has nothing to do with UK activities."[65]

The Bribery Act's stringent substantive provisions should give even more pause to contractors with a global presence, as they go further than the FCPA in several respects. First, the Bribery Act outlaws bribery in the private sector as well as bribes paid to government officials.[66] Second, unlike the FCPA,[67] the Bribery Act makes no exception for so-called "facilitation payments"—small payments made to further routine governmental action, such as processing visas, obtaining permits, or providing public utilities.[68] Third, whereas the

FCPA provides an affirmative defense to bribery charges for reasonable and bona fide promotional expenditures,[69] the Bribery Act contains no such explicit exception.[70] And fourth, the Bribery Act provides for up to a ten-year term of imprisonment for individual violators,[71] whereas the FCPA maximum prison term is five years.[72] Given its harsh provisions, as well as its extraordinary jurisdictional reach, the compliance risk posed by the Bribery Act should be clear.

Yet the Bribery Act is hardly the only international anticorruption measure that should be of concern to contractors with global operations. In February 2011, for instance, China amended its criminal code to outlaw the payment of bribes "to any foreign public official or official of an international public organization."[73] Because the amended law is spare on details, its ultimate impact will likely depend on the manner in which it is interpreted and enforced. What is clear, however, is that the law's reach extends beyond China's borders, as its provisions apply to joint ventures formed under Chinese law by a Chinese company and a foreign organization.[74] Another representative example is a powerful new anticorruption measure currently being debated by the Brazilian national legislature that would apply to both Brazilian companies and local offices of foreign companies. If enacted, draft bill 6826/2010 would impose severe monetary penalties—up to 20% of a company's gross annual revenue—on any company found to have paid bribes to domestic or foreign government officials.[75] Further, the bill would require the debarment of offending companies for up to five years, a provision that should be of particular concern to Government contractors.[76]

In sum, the recent trend in the United States towards greater anticorruption enforcement is now beginning to play out in other countries across the globe. For Government contractors with international business operations, this unprecedented emphasis on global anticorruption enforcement represents a similarly unprecedented compliance risk.

Administrative Suspensions & Debarments

The increased liability risks under the FCA, the FCPA, and other statutes may result in particularly harsh consequences for Government contractors because, in addition to the potential loss of hundreds of millions of dollars in fines, Government contractors who are found to have committed legal violations (and even less serious misconduct) face the possibility of administrative suspension and debarment.[77] Indeed, debarment may be imposed even in the absence of a conviction based upon evidence of a violation of law, or even where a contractor is found merely to have performed negligently on a Government contract.[78] These administrative suspension and debarment actions restrict contractors from securing any new contract from any governmental agency or prime contractor under a Government contract, and they carry collateral consequences at the state and local level and in some commercial areas.[79] Particularly for companies that do regular business with the Government, the direct and indirect consequences of suspension and debarment may be devastating.

■ Suspension & Debarment Policy

Suspension refers to the temporary disqualification of a person or company from Government contracting during the pendency of an investigation and ensuing legal proceedings. Absent earlier termination by the suspending official, suspension will last as long as the legal proceedings against the contractor remain pending, although it is terminated if no proceedings are initiated within 12 months of the date of suspension.[80] Debarment, meanwhile, refers to a final decision to exclude a contractor from Government contracting for some specified period.[81] The FAR provides that debarment "generally" should not exceed three years, but the debarring official has the discretion to impose a longer ban if doing so is necessary to protect the Government's interest.[82] In the event of a debarment, a contractor may continue to perform under an existing contract, but an agency may not extend or renew the contract, or in most cases issue task orders against an existing contract, unless the agency's head "states in writing the compelling reasons justifying continued business dealings between that agency and the contractor."[83]

Contrary to its occasional portrayal in the mainstream media,[84] the intended purpose of suspension and debarment is not to punish wayward Government contractors. Rather, suspension and debarment are tools that protect the interests of the Government by ensuring that federal agencies do not do business with nonresponsible contractors.[85]

■ Bases For Suspension & Debarment

As set forth in the FAR, agencies may suspend or debar contractors for any number of causes.[86] Perhaps the most common cause of debarment is a contractor's violation of criminal or civil law, including the following offenses: fraud offenses related to securing or performing Government contracts, antitrust violations related to the submission of offers, embezzlement, theft, tax evasion, bribery, or falsification of records, falsely labeling products manufactured abroad as being "made in America," or the "[c]ommission of any other offense indicating a lack of business integrity or business honesty"—even where it does not relate to a Government contract—"that seriously and directly affects the present responsibility of a Government contractor."[87]

But even if a contractor is not convicted of a particular offense, it may also be subject to debarment for serious violations of the terms of Government contracts, including a willful failure to perform or a documented track record of nonperformance under one or more contracts.[88] Additionally, a contractor may be suspended or debarred for failing to abide by the FAR mandatory disclosure rule.[89] This rule is discussed in greater detail below, but in a nutshell, it obligates a contractor to make a timely disclosure to the Government whenever it has "credible evidence" that it or one of its employees or agents has committed a violation of the civil FCA or certain criminal laws, including the FCPA.[90] And finally, the FAR includes a catch-all provision authorizing the debarment of a contractor "based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor."[91] This provision vests suspending and debarring officials (SDOs) with wide discretion to take action in response to conduct that may not amount to a violation of law, but nevertheless reflects poorly on a contractor's present responsibility. For example, debarment proceedings could be initiated under this provision for a violation of law that did not result in a conviction and for a contractor's negligent performance (or willful nonperformance) of even a private commercial contract.[92]

Significantly, however, "the existence of a cause for debarment…does not necessarily require that the contractor be debarred."[93] Rather, the FAR provides that in light of the "serious nature of debarment and suspension," these sanctions should be "imposed only in the public interest for the Government's protection and not for purposes of punishment."[94] Thus, under the FAR, suspension and debarment are discretionary actions,[95] and "[i]t is the debarring official's responsibility to determine whether debarment is in the Government's interest."[96] In making this determination, the debarring official is required to consider all relevant mitigating factors—examples of which are listed in FAR 9.406-1—in addition to the severity of the contractor's misdeeds.[97]

■ Trends In Suspension & Debarment

Debarment is appropriate only when (1) there is cause for debarment, (2) the contractor has failed to demonstrate its present responsibility, and (3) debarment is in the Government's interest.[98] As such, the debarment and suspension regimes depend upon agencies and debarring officials "exercising [their] powers fairly and with balance, through the careful exercise of discretion."[99] Yet as discussed below, recent political and legislative developments have begun to upset this balance, causing a sudden spike in the number of suspensions and debarments.

(a) *Political Influence on Discretionary Debarments*—As federal dollars have become increasingly scarce in light of the recent economic downturn and accompanying budget crisis, public officials have clamored to stake out progressively tougher stances on procurement fraud. The latest of these efforts, announced on February 7, 2013, is the Stop Unworthy Spending ("SUSPEND") Act, a draft bill proposed by Representative Darrell Issa (R-Cal.) that would consolidate agency-level suspension and debarment efforts under the auspices of a single Government-wide board. According to Issa, the bill would further drive home the message that Congress has "zero tolerance for fraudsters, criminals, or tax cheats receiving taxpayer money through grants or contracts."[100] And while many of the concerns about the integrity of the procurement process are legitimate, the overheated rhetoric employed by some public officials appears to be aimed more at scoring political points than ensuring that contractors comply with federal regulations.[101] According to commentators, some debarring officials have bowed to this political pressure by "seeking to increase their [suspension and debarment] statistics to show that they are tough with contractors, with little consideration of the contractor's present responsibility or the need to debar it."[102] Available statistics support this theory. One recent study showed that the number of administrative suspension and debarments jumped from just over 1,900 in 2009 to more than 3,300 in 2011, a nearly 75% increase.[103] And Joe Jordan, the Administrator of the Office of Federal Procurement Policy, recently issued a statement trumpeting the "decisive steps" taken by executive agencies to strengthen their suspension and debarment regimes.[104] Given the current political climate, contractors should expect the increase in suspensions and debarments to continue.

(b) *Legislative Trend Toward Mandatory Debarments*—In addition to urging agencies to make greater use of their suspension and debarment tools, elected officials have also taken matters into their own hands by enacting legislation that would *automatically* require debarment in response to wrongdoing. The most prominent example of this trend is the Consolidated Appropriations Act, 2012, which prohibits several agencies, including the Department of Defense, from using appropriated funds to contract with any corporation convicted of a felony within the preceding 24 months "unless the agency has considered suspension or debarment…and made a determination that this further action is not necessary to protect the interests of the Government."[105] Thus, the Act inverts the traditional debarment process: rather than imposing debarment *only if* a contractor is found to be nonresponsible, the statute requires the functional equivalent of debarment *unless* the contractor is found to be presently responsible.[106] Other proposals would go even further. In one extreme example, the New Jersey Senate recently approved a bill that calls for the automatic and permanent debarment of any person convicted of making false statements or claims in connection with a Government contract.[107] Incredibly, the New Jersey bill would impose this lifetime ban automatically and without affording the contractor any opportunity to present mitigating evidence. The full impact of these legislative developments is still being determined,[108] but the undeniable upshot is that more contractors than ever will find themselves disqualified from doing business with the Government.

Responsibilities & Liabilities Of Corporate Boards & Executives

Thus far, this Paper has traced two distinct trends: (1) the increased risks to Government contractors posed by the ever-expanding interpretation and application of the FCA, the FCPA, and global anticorruption laws; and (2) the sharp uptick in administrative suspensions and debarments in response to wrongdoing by contractors. The combined effect of these developments paints a worrisome picture for firms doing business with the Government. Yet this picture is still incomplete until a third trend in the law is considered: namely, the increasing scrutiny and potential exposure to liability of corporate boards and individual directors for failing to mitigate fraud and related risk. In the wake of the disintegration of Enron and other corporate scandals of the early 2000s, the last decade has seen an unprecedented focus on corporate governance and the imposition of additional statutory obligations on boards of directors. The roles and responsibilities of corporate directors are at the center of this focus. Government regulators are now more likely than ever to investigate the actions (or inactions) of a board of directors and their appointed c-suite executives when a company is found to have engaged in some wrongdoing. And although courts have traditionally been reluctant to impose civil liability on directors and senior managers who were not directly involved in wrongful conduct, in a post-Enron world, even *outside* directors are increasingly being targeted by Government regulators and private lawsuits whenever a company is found to have violated the law.

■ Civil Liability Of Corporate Directors

As a general matter, civil liability of corporate directors stems from the overarching fiduciary duties of care and loyalty that they owe to the corporation and its shareholders. The duty of care requires directors to "use that amount of care which ordinarily careful and prudent men would use in similar circumstances, and consider all material information reasonably available in making business decisions."[109] The duty of loyalty "imposes on a director an affirmative obligation to protect and advance the interests of the corporation and requires a director absolutely to refrain from any conduct that would harm the corporation."[110] A review of whether a board of directors or an individual director has breached either of these duties is subject generally to the business judgment rule, which creates a presumption that a director's actions were reasonably informed and prompted by a valid business purpose.[111] To recover, a plaintiff must adduce sufficient evidence to overcome this presumption, generally by proving that the director acted in bad faith. Significantly, however, the protection from civil suits afforded by the business judgment rule may not be available to a board of directors that, or a director who, failed to exercise proper oversight of a company's business practices.[112] In this respect, Delaware courts have made clear that directors are obligated 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…render a director liable for losses caused by non-compliance."[113] And while the standard for imposing liability on this basis remains high,[114] the jump in the number of debarments and Government enforcement actions—and the devastating consequences of these actions on companies and their shareholders—means that directors are increasingly at risk for being targeted by shareholder suits for oversight failure.

One illustration of this trend is the recent spate of shareholder derivative suits filed against companies alleged to have violated the FCPA. In one high-profile example, an internal investigation by Wynn Resorts, Ltd. determined that one of its directors had paid more than $110,000 in bribes to government officials in the Philippines.[115] That director, in turn, accused Wynn Resorts of attempting to buy influence in Macau, where the company has a gaming license, by making a $135 million donation to the University of Macau. These revelations touched off a flood of litigation, including five separate shareholder derivative suits alleging that Wynn Resorts directors breached their fiduciary duty by failing to establish sufficient anticorruption controls.[116] Four of these suits were consolidated, and they currently remain pending in Nevada federal court.[117] A similar example involves a shareholder suit filed against Alcoa, Inc. in the wake of allegations that the company paid bribes to government officials in Bahrain in an attempt to secure business. The suit, refiled in June 2012, alleges that "the director and officer defendants breached their duties of loyalty and good faith by allowing or by themselves causing [Alcoa] to pay illegal bribes that were facilitated by defendants' knowing and/or reckless failure to maintain an adequate system of internal controls."[118] In October 2012, Alcoa announced that it would pay $85 million to settle a civil racketeering suit based on the same alleged conduct,[119] but the derivative suit against Alcoa's directors remains pending. Yet another example of recent vintage is the shareholder suit filed against Maxwell Technologies Inc. based on the allegation that Maxwell directors "breached their duties to shareholders by failing to prevent the alleged bribery, which violated the Foreign Corrupt Practices Act."[120] In February 2012, Maxwell announced that it had settled the suit under terms that required it to strengthen its internal compliance program and pay $3 million in attorneys' fees.[121]

■ Statutory & Regulatory Developments

Notwithstanding the pervasiveness of oversight liability suits filed against corporate directors when companies engage in wrongdoing, the standard for director liability remains high. However, "[r]ecent legislative and regulatory developments have been filling the gap between what courts require and what shareholders and the public expect [from boards of directors] in the area of risk management."[122] In the wake of the Enron scandal, Congress passed the Sarbanes-Oxley Act of 2002,[123] which, among other things, imposed additional duties on corporate directors. Most notably, SOX mandates that the board form an audit committee comprised entirely of independent directors, at least one of whom qualifies as a "financial expert."[124] Among other things, SOX tasks the directors on the audit committee with accepting and responding to employee whistleblower complaints about accounting and internal control matters, a task which has been—and will continue to be—closely scrutinized, especially since SOX creates an express private right of action for employees who believe that they have been retaliated against for their complaints.[125] SOX also makes the directors on the audit committee responsible for ensuring that the company's chief executive officer and chief financial officer comply with all financial reporting and certification requirements,[126] and SEC rules adopted in accordance with SOX hold the audit committee accountable for the retention, compensation, and oversight of any accounting firm performing an audit for the company.[127] Additionally, the changes wrought by SOX were accompanied by a flurry of revisions to the New York Stock Exchange and NASDAQ listing standards, many of which imposed additional, specific duties on corporate directors with respect to risk management and internal controls.[128]

For all of its changes, recent legislative reforms have shown that SOX was just the beginning of a trend toward greater accountability and potential liability for corporate directors in the areas of risk management and fraud prevention. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, for example, requires certain banks and financial companies to establish board-level risk committees to construct a risk management plan for the company.[129] Similarly, the Emergency Economic Stabilization Act of 2008 requires the compensation committee of any firm receiving Troubled Asset Relief Program (TARP) funds to regularly assess compensation structures to ensure that they do not incentivize employees "to take unnecessary and excessive risks."[130] And the SEC has promulgated proxy rules requiring the disclosure of "the extent of the board's role in the risk oversight," including "how the board administers its oversight function, and the effect that this has on the board's leadership structure."[131]

Managing Contractor Accountability Risks In Today's Business Environment

As set forth above, Government contractors and their directors currently face a "perfect storm" of potential accountability risks: at the very time that the threat of compliance violations and administrative debarment is highest, corporate directors are finding that their efforts to mitigate risks and stave off potential crises have never been more scrutinized. This raises an obvious question: what steps can a board of directors and c-suite executives take to effectively mitigate the varied and multiplying risks faced by their company?

■ Creating Robust Compliance & Ethics Programs

The first, and arguably most crucial, step in mitigating the minefield of accountability and enforcement risks facing contractors is the development of a fully integrated approach to risk management. The most effective corporate risk management programs include two components: (1) a system of rules and internal controls designed to ensure compliance with applicable laws and (2) an aspirational code of ethics (and implementing program) that identifies the core values by which the company is defined. To illustrate the difference between these two concepts, consider the possible approaches to solving a more commonplace problem, schoolyard bullying. From a compliance perspective, bullying may be prevented by the school's adoption of strict rules against fighting and name-calling. From a values-based perspective, however, bullying is more successfully prevented by cultivating a culture of respect among the broader student population, which makes clear to any would-be bully that such conduct will not to be tolerated by his or her peers. These two concepts are not mutually exclusive, and companies (and presumably, schools) are well advised to incorporate elements of each to manage risk effectively.

In terms of compliance, the first step in developing a stout compliance program is for a company to look inwards and, through some form of enterprise risk management system, identify the largest compliance risks it faces in light of the unique characteristics of its industry and business. This is essential because, once the key risks to a company are known, it can tailor its compliance program accordingly. To guarantee the effectiveness of the program, however, the company also must make an effort to ensure that its employees are made aware of its key points of emphasis. To this end, a company is best served by incorporating the compliance program into its governance documents, employee handbooks, and codes of ethics, as well as ensuring that employees receive periodic training on the program requirements. Finally, as a structural matter, sophisticated companies should adjust their compensation schemes to incentivize compliance, such as by inserting clawback provisions into executive compensation plans.[132]

The other half of an effective risk management program involves a genuine commitment to instilling a culture of ethical conduct within a company. Achieving this goal requires more than merely putting pen to paper, and corporate directors and other senior management must set an example by demonstrating the company's commitment to honesty and integrity in their own actions and by rewarding employees who demonstrate a commitment to *promoting* ethical values (as opposed to merely rewarding ethical behavior). Making such a commitment to a values-based standard of ethical behavior is important for two reasons. First, it lessens the chance that an employee will commit wrongdoing that will put the company at risk. And second, in the event that a company finds itself facing fraud charges and possible debarment, its commitment to a robust values-based ethics program can weigh heavily in its favor during settlement negotiations with the DOJ, sentencing following a criminal conviction,[133] and debarment proceedings before an agency.[134] Prosecutors and judges, and many Government agencies, especially within the DOD, now expect these types of programs.[135] For example, a company's demonstrated commitment to promoting ethical conduct may convince a prosecutor that it is unnecessary to charge the company for the crimes of a rogue employee.[136] Just last year, the DOJ announced that even though Garth Peterson, the former managing director of Morgan Stanley, had pled guilty to FCPA violations, it would not be pursuing criminal charges against Morgan Stanley itself because the company had "constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials."[137] Conversely, failure to include such programs in a company's corporate governance system will increasingly be fatal to any effort to avoid conviction and debarment in the face of misconduct.

Most large Government contractors have already recognized the importance of a corporate governance program that effectively manages risk. At the time of a September 2009 Government Accountability Office report, 55 of the 57 largest U.S. defense contractors had adopted written codes of business ethics, 52 had conducted internal reviews or audits to test the reliability of their ethics programs, and 51 of these contractors required ethics training for employees and managers.[138] Yet, newspaper headlines are rife with stories of noncompliance by and enforcement actions against these same contractors. Clearly, it is not enough to merely adopt a risk management program. Rather, companies must continually monitor and retool their compliance and ethics programs to respond to changes in their company, the industry, and the regulatory and legal landscape. Although easily stated, developing and maintaining an integrated risk management program requires both creativity and meticulous planning, including continuous process improvement through steps such as benchmarking the effectiveness of their program through periodic employee surveys. For guidance, companies are best served by working with outside counsel who have experience in developing and promoting such ethics initiatives.

■ Conducting Internal Investigations

Even if a company has strong compliance and ethics programs in place, wrongdoing by the corporation (or more likely, by rogue employees or agents of the corporation) may still occur. When it does, corporate directors would be well advised to move quickly to authorize the initiation of an internal investigation. Internal investigations can benefit a company in several important ways. First, an internal investigation will permit the company to determine exactly what happened and why. Once the company is able to understand the exact extent of the misconduct, it can begin assessing its exposure to liability and evaluating whether voluntary disclosure to the Government is warranted. Additionally, conducting an internal investigation may leave a company better positioned to defend itself against possible suspension or debarment. To the extent that the company has already conducted a vigorous and objective internal investigation, it can point to these actions as a demonstration of its responsibility and good corporate citizenship during a presentation to a debarring official.[139]

(1) *Selecting an Investigator*—When an internal investigation is necessary, the first, and arguably most important, decision for a company involves the selection of the internal investigators. A company may be tempted to assign this task to its own in-house legal team, who are likely to be familiar with the company's business model, its accounting practices, and the key decisionmakers. While such a decision may be appropriate when a company faces minor or routine allegations, there are several significant drawbacks to relying on in-house attorneys to conduct internal investigations in the face of allegations that pose more serious risks to the company. First, corporate counsel often are too close to the company to offer impartial analysis of the business practices in question.[140] This is especially true where in-house counsel may have been involved in providing advice about the very business practices that are the focus of the investigation. Second, in a similar vein, because corporate counsel are so closely aligned with the company, Government investigators tend to view them as lacking the necessary independence and objectivity to conduct an effective investigation.[141] Thus, insofar as a vigorous internal investigation might be considered evidence of a company's corporate responsibility, Government regulators are likely to lend more credence to an investigation conducted by independent outside counsel.[142]

Just as important, the designation of in-house counsel to conduct an internal investigation may curtail the company's ability to assert the attorney-client privilege, leading to potentially disastrous results. In-house counsel often perform a variety of functions within a corporate organization, and it is not uncommon for such attorneys to function in the dual role of both business and legal advisers. The blurring of the line between these two roles, resulting in so-called "mixed communications," leads to thorny questions regarding the scope of the attorney-client privilege that have been "the subject of significant litigation, with varying results."[143] And while courts have not always found the privilege to be waived under such circumstances, as Justice Rehnquist famously observed, "[a]n uncertain privilege…is little better than no privilege at all."[144] Given the potential for inadvertent waiver when in-house attorneys conduct internal investigations, a company would be well advised to retain experienced outside counsel for these matters.

(2) *The Fact-Gathering Process*—The two principal aspects of an internal investigation involve capturing the relevant documents and interviewing key employees. As soon as a company "reasonably anticipates litigation," it is obligated to preserve all potentially relevant documents.[145] To help discharge this obligation, the company may issue a "litigation hold," a notice that warns all employees who may be in possession of relevant documents that the documents must not be destroyed. Preserving and collecting these documents at the outset not only ensures that the company will not later face sanctions for destroying evidence, but also minimizes the risk that the company will lose exculpatory evidence or be surprised at a later date by potentially incriminating documents of which it was not aware.

In conjunction with the collection of documents, an internal investigation also involves interviews of key employees. Assuming the company has retained outside counsel to conduct the investigation, it should coordinate with that firm to identify which employees will need to be interviewed and make scheduling arrangements. The company may wish to have a member of its in-house legal team sit in on these interviews, both to assist in explaining the company's document retention and/or compliance policies, as needed, as well as to place the information learned in the interview in the context of the company's business environment. Significantly, both outside counsel and company counsel should provide each employee with an "*Upjohn* warning," advising the employee that the interviewer represents only the company, and that the employee should retain another attorney if he or she desires separate counsel.[146]

(3) *Compiling the Investigation Report*—Once counsel has completed its interviews of key employees and reviewed all relevant documents, a report summarizing the results of the investigation should be prepared for company management. This is a vital step in the internal investigation, as the report will often provide management with the information it needs to chart the company's response to revelations of corporate misconduct. In some cases, an oral report may be preferable to guard against the possibility of a report being subject to discovery in the event of subsequent litigation.[147] Generally, however, a written report is preferred, especially in investigations involving complex factual scenarios. Where a written report is prepared, it should be clearly marked as a privileged and confidential attorney-client communication. Moreover, to guard against the possibility of inadvertent waiver of this privilege, company officials receiving the report should take extreme care to ensure that it is not disclosed outside of the company.[148]

(4) *Compliance With the FAR Mandatory Disclosure Rule*—As a result of its internal investigation, a contractor may conclude that a violation has occurred. Prior to December 2008, a contractor would have had to decide whether or not to voluntarily disclose these findings to the Government. Following the adoption of the FAR mandatory disclosure rule,[149] however, contractors are now obligated in most cases to disclose certain violations to the Government.

The origins of the mandatory disclosure rule can be traced to July 1986, when the DOD instituted its Voluntary Disclosure Program. This initiative encouraged Government contractors to voluntarily disclose potential fraud to the DOD Office of Inspector General, with the promise that contractors who did so would receive credit under the U.S. Sentencing Guidelines when fines were set as part of the sentencing process.[150] Yet while the program was unveiled to much fanfare, "the number of disclosures under the program was relatively small," and by 2004, it had become apparent that contractors were "rarely" disclosing potential fraud voluntarily.[151] In light of the relative ineffectiveness of the voluntary disclosure program, in November 2007 the DOJ formally requested that the Office of Management and Budget amend the FAR to mandate the disclosure of fraud in Government contracting. This request ultimately resulted in the implementation of the FAR mandatory disclosure rule, which became effective on December 12, 2008.[152]

The mandatory disclosure rule applies to all Government contractors that enter into contracts with a value in excess of $5 million and a performance period of at least 120 days.[153] All contractors meeting these criteria are required to (a) maintain a written code of business ethics, (b) exercise due diligence to prevent and detect fraud, (c) promote a culture of compliance with the law and ethical conduct, and (d) "timely disclose" to the agency OIG and the Contracting Officer whenever the contractor has "credible evidence" that "a principal, employee, agent, or subcontractor" of the contractor has committed (1) a "violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code"; or (2) a "violation of the civil False Claims Act."[154]

In addition to these requirements, all contractors that do not qualify as small business concerns are required to maintain an "ongoing business ethics awareness and compliance program" and an "internal control system" in accordance with myriad specifically enumerated requirements.[155] Furthermore, the FAR provides that the mandatory disclosure rule must be included in any subcontracts that exceed $5 million and 120 days.[156] Finally, as mentioned above, the FAR provides that a contractor's knowing failure to disclose a violation of law or "significant overpayment" in connection with a Government contract constitutes an independent cause for suspension or debarment.[157] The inclusion of such a powerful enforcement provision helps to ensure that any contractor that discovers a potential violation of significant overpayment actually does disclose the violation to the proper authorities.

■ Negotiating Settlements & Navigating Suspension & Debarment

In the event that alleged wrongdoing by a contractor comes to light—either as a result of the contractor's own internal processes or due to a Government investigation or audit—it is critical that the contractor work proactively with the Government in an effort to resolve any potential liability. A company under investigation should maintain steady communications with the Government enforcement agencies as part of an effort to achieve a favorable negotiated resolution. Often overlooked, however, is the equally critical step of "fronting" issues with the lead executive agency overseeing possible fraud cases and suspension and debarment proceedings. As discussed below, taking this step may benefit a contractor in two ways.

First, when a *qui tam* suit is filed under the FCA, it is not uncommon for the DOJ to consult the contracting agency (often the SDO) about whether the Government should intervene and, if so, what would be an appropriate settlement.[158] Although contractors under investigation routinely negotiate with the DOJ, they often overlook the importance of engaging with agency counsel on these same questions. This is a mistake, and contractors would be well advised to contact the agency directly in an effort to solicit support for structuring settlements in a way that is mutually beneficial to both the contractor and the agency, even if not favored initially by the DOJ. Consider, for example, the various options for structuring the payment of a $10 million settlement liability. A $10 million cash payment into the U.S. Treasury would be of no benefit to the agency, as fiscal law considerations would usually prevent it from directly receiving these funds, and it would have to draw on its own operating budget to repair the damages caused by the contractor. Recognizing this, a savvy contractor might engage directly with the agency to propose that the settlement be structured so as to require the payment of only $2 million in cash, to be followed by the performance of $8 million worth of corrective work. Because this structure would be more beneficial to the agency, it likely would join the contractor in urging the DOJ to accept the proposal, meaning that the contractor could escape with a much smaller cash payment.

Proactively reaching out to relevant agency officials may also prove enormously beneficial to a contractor in the context of administrative suspension or debarment proceedings. By openly engaging with SDOs, a company lends credence to the view that it is a responsible corporate citizen, even if it has had a slip in compliance. Moreover, establishing this dialogue will permit contractors to work with debarring officials to devise appropriate and creative solutions. For example, rather than the blunt instrument of debarment, an agency may be open to the implementation of an administrative agreement that imposes additional internal controls on a contractor and independent monitoring going forward. And in some cases, this dialogue may convince an agency to forgo administrative action altogether. From a contractor's perspective, the advantage to this approach is obvious: by escaping suspension or debarment, the contractor can continue to receive contract awards from the Government, as well as avoid the negative media coverage and numerous other collateral consequences that come with a debarment.[159] Yet such a resolution also is desirable for an agency, as it "serve[s] as both a 'carrot' by providing the contractor with an incentive to avoid debarment by improving its ethical culture, and the 'stick' by identifying the consequences for failure to do so."[160] Contractors should open lines of communication with SDOs as early as practicable; if a contractor waits until there has already been a conviction or finding of civil liability, it may be too late to derive much benefit from a dialogue with the agency.[161]

The authors of this Paper recognize that the advice to "front" these types of issues with agency SDOs goes against what has been the conventional wisdom and itself carries some risk. In the current age of information sharing, however, agency IGs and the DOJ often inform agency SDOs of self-reporting by contractors, ongoing investigations, and discussions to resolve or settle violations of the FCA, the FCPA, and other laws and regulations. In addition, agency SDOs are increasingly taking actions against contractors based upon reports of misconduct reported in the media. Clearly, any decision to be proactive in managing the risks of suspension and debarment must be thoughtfully considered. In the opinion of the authors, however, establishing working relationships with SDOs and "fronting" issues with them in most instances shows a degree of management responsibility that is helpful in avoiding a negative suspension and debarment action. The traditional tactic of "lying low" simply does not work in this era of real-time interagency information sharing and heightened media reporting of allegations of contractor indiscretions and violations.

Importance Of Coordinating Risk Management Efforts

This Paper has summarized the myriad risks faced by contractors as a result of legislative and enforcement developments in the Government's fight against fraud, more aggressive suspension and debarment actions, and increased scrutiny of corporate directors' and c-suite executives' risk management activities. In today's business environment, it has become clear that it is impossible to completely separate the various aspects of risk management. Accordingly, Government contractors are well advised to work with experienced counsel to develop an integrated and holistic risk management approach covering all aspects of contractor responsibility, including developing internal controls and ethics programs acceptable to the Government, investigating potential compliance violations, and navigating the process of disclosure to and negotiating with enforcement agencies and SDOs. Such a coordinated approach has undeniable benefits. For example, the firm retained to investigate alleged misconduct and lead efforts to mitigate the contractor's liability and debarment risk will be in the best position to assist a contractor in developing an ethics program and associated remedial measures. This approach, which enables a contractor to adopt remedial measures tailored to the unique facts surrounding its underlying misconduct, will demonstrate to Government officials that appropriate steps have been taken to mitigate the risk of future violations.

Moreover, it should be noted that on the Government side, the agencies responsible for pursuing fraud and ensuring contractor responsibility have already recognized the value of coordinated efforts in this area. For example, in an effort to synchronize debarment proceedings with criminal prosecutions, the DOJ has recently begun issuing quarterly reports to debarring officials listing all convictions, indictments, and deferred prosecution agreements. Additionally, the DOD and other agencies employ full-time staffs that focus exclusively on making sure that all available enforcement actions and sanctions are pursued and coordinated, so that a decision in one area does not affect the remedies available in others.[162] Contractors that fail to similarly adopt integrated approaches to their risk management strategy do themselves an enormous disservice, as they will find themselves behind the curve and forever playing catch-up with the Government.

GUIDELINES

These *Guidelines* are intended to assist contractors—and in particular their boards of directors, c-suite executives, and legal counsel—in understanding the heightened Government demands for contractor responsibility and the need for an integrated approach to managing contractor responsibility risk mitigation. They are not, however, a substitute for professional representation in any particular situation.

1. Be mindful that FCA liability may attach where a contractor (or its employee) acts in "reckless disregard of the truth," even in the absence of actual knowledge. Consequently, it is critical that contractor employees fully understand all contract terms, as even seemingly innocent mistakes may give rise to FCA liability in some circumstances.

2. Remember that, given the increasing focus on so-called "reverse false claims," a contractor may be liable under the FCA for knowingly retaining an overpayment even if it never makes a false statement or claim. It is therefore critical for contractors to implement robust compliance and accounting systems that will identify overpayments to allow for timely disclosure to the contracting authority.

3. Understand that the DOJ and the SEC have placed particular emphasis on FCPA enforcement in recent years and have broadly defined what types of payments fall within U.S. jurisdiction. Contractors doing business abroad should focus their compliance efforts on this risk, and exercise extreme diligence in how they engage with intermediaries. Be aware that anticorruption risk is not limited to the FCPA and other U.S. laws. Contractors should monitor developments in the antibribery laws of all countries in which they do business and tailor their compliance programs to comply with those laws.

4. Similarly, an increasing number of countries and nongovernmental organizations, such as the World Bank and the United Nations have, or are developing debarment and suspension regimes that contractors should account for in their programs.

5. In the event of a suspected violation, be mindful of the requirements of the FAR mandatory disclosure rule, which requires contractors to "timely disclose" wrongdoing to the Government whenever a contractor has "credible evidence" that certain kinds of violations have occurred. Remember that foot-dragging in the disclosure of suspected violations may constitute an independent basis for suspension and debarment.

6. Recognize that the increasing prevalence of *qui tam* actions means that compliance problems are more likely than ever to be reported to the Government. Given this trend, contractors should consider voluntarily disclosing suspected violations to their customers' debarring officials, even where disclosures have been made to other Government officials such as the customers' IGs, as opposed to simply hoping that the Government does not learn of the violation.

7. Remember that debarment risk is broader than most contractors realize. A contractor may be suspended or debarred, for example, even for conduct that has no relationship to a Government contract, and even where the conduct was not a violation of law or otherwise intentional, such as poor performance or nonperformance under Government or even private contracts.

8. Understand that agencies currently are under tremendous political pressure to increase the number of suspension and debarment actions. Accordingly, contractors at risk of suspension or debarment should work proactively with agency SDOs to devise alternative and politically acceptable resolutions to responsibility issues. Relationships with customer SDOs should be maintained even when there are no pending allegations of misconduct.

9. Recognize that high-profile corporate scandals in the last decade have led to an unprecedented focus on corporate governance. Recent legislative developments impose a host of specific duties and responsibilities on corporate boards of directors, and directors increasingly find themselves the targets of lawsuits whenever a company has a compliance slip. Corporate directors should work with legal counsel to ensure that the company has sufficient information and reporting systems to deter and detect compliance problems.

10. While the implementation of a robust compliance program is important, it should be complemented by a genuine commitment to values-based ethics. Understand that prosecutors, judges, and agency officials increasingly expect contractors to take steps to instill a culture of ethics within a company—in addition to ensuring mere technical compliance with the law—and the failure to do so may doom any effort to avoid conviction or debarment in the face of misconduct.

11. Be aware that agency fraud attorneys have a say in how the DOJ litigates and settles FCA and other fraud cases. Particularly when negotiating settlements, contractors should reach out to the agency that is affected by the alleged fraudulent conduct to solicit their support for settlements that would benefit both the contractor and the agency. The terms of such settlements could include, for example, agreements to perform in-kind work, rather than cash payments into the U.S. Treasury that would be costly to the contractor and provide little benefit to the agency.

12. Above all, recognize the importance of developing a coordinated approach to addressing the many facets of contractor responsibility and risk management. Not only does such a holistic approach ensure that contractors implement compliance and ethics policies tailored to their specific risk profile, but it also leaves contractors better positioned to engage with Government officials to cooperatively resolve any compliance issues that may arise.

★ REFERENCES ★

1/ 31 U.S.C.A. §§ 3729–3733.

2/ 15 U.S.C.A. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff, 78u.

3/ UK Bribery Act, 2010, c. 23.

4/ 31 U.S.C.A. §§ 3729–3733.

5/ 15 U.S.C.A. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff, 78u.

6/ UK Bribery Act, 2010, c. 23.

7/ 31 U.S.C.A. §§ 3729–3733.

8/ 31 U.S.C.A. § 3729(a)(1).

9/ See False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3513 (1986) (codified at 31 U.S.C.A. §§ 3729–3733).

10/ Damages may be reduced to double damages if a violator self-reports, 31 U.S.C.A. § 3729(a)(2), although this occurs relatively infrequently.

11/ 31 U.S.C.A. § 3729(a)(1).

12/ 31 U.S.C.A. § 3730.

13/ 31 U.S.C.A. § 3730(b)(2).

14/ If the Government proceeds with an action brought by a qui tam relator, the relator will receive between 15% and 25% of any award. If the Government does not intervene, the relator stands to receive between 25% and 30% of any amount recovered. 31 U.S.C.A. § 3730.

15/ DOJ Press Release No. 12-1439, "Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012" (Dec. 4, 2012).

16/ DOJ Press Release No. 12-1439, "Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012" (Dec. 4, 2012).

17/ See Taxpayers Against Fraud, "Top 30 False Claims Act Settlements of FY 2012," available at http://www.corporatecrimereporter.com/wp-content/uploads/2012/10/taf.pdf.

18/ DOJ Press Release No. 12-1439, "Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012" (Dec. 4, 2012).

19/ Acting Assistant Attorney General Stuart F. Delery, Address to American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), http://www.justice.gov/iso/opa/civil/speeches/2012/civ-speech-1206071.html.

20/ 31 U.S.C.A. § 3729(b)(1).

21/ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009).

22/ See 31 U.S.C.A. § 3729(a)(1)(G) (imposing liability on any person who "knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government"); see also 31 U.S.C.A. § 3729(b)(3) (defining "obligation" to include any "duty, whether or not fixed, arising…from the retention of an overpayment") (emphasis added).

23/ 31 U.S.C.A. § 3729(b)(1).

24/ United States ex rel. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377 (1st Cir. 2011); Mikes v. Straus, 274 F.3d 687 (2d Cir. 2001), 44 GC ¶ 2; United States ex rel. Wilkins v. United Health Group, Inc., 659 F.3d 295 (3d Cir. 2011); United States ex rel. Augustine v. Century Health Servs., Inc., 289 F.3d 409 (6th Cir. 2002), 44 GC ¶ 211; Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993 (9th Cir. 2010); United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211 (10th Cir. 2008); United States v. Sci. Applications Int'l Corp., 626 F.3d 1257 (D.C. Cir. 2010), 53 GC ¶ 25. See generally Mitchell, Abbott & Orozco, "Implied Certification Liability Under the False Claims Act," Briefing Papers No. 11-4 (Mar. 2011).

25/ Mikes, 274 F.3d at 699 (emphasis added).

26/ Holt & Klass, "Implied Certification Under the False Claims Act," 41 Pub. Cont. L. J. 1, 2 (Fall 2011).

27/ 31 U.S.C.A. § 3729(a)(1); Civil Monetary Penalties Inflation Adjustment, 64 Fed. Reg. 47099, 47104 (Aug. 30, 1999) (adjusting penalties for FCA violations to a minimum of $5,500 and a maximum of $11,000).

28/ See, e.g., Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 183 (3d Cir. 2001), 43 GC ¶ 260 (noting that "recovery under the [FCA] is not dependent upon the government's sustaining monetary damages"); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 n.7 (4th Cir. 1999), 41 GC ¶ 317 (explaining that while "some courts have asserted that there is an additional element that

the United States must have suffered some damages as a result of the false or fraudulent claim…[i]n fact there is no [such] requirement"); United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) ("No damages need be shown in order to recover the penalty.").

29/ See, e.g., United States v. Rule Indus., Inc., 878 F.2d 535, 538 (1st Cir. 1989) (upholding imposition of separate civil penalty for "each of 302 invoices submitted to [the Government] for payment"). But see United States v. Krizek, 111 F.3d 934, 939 (D.C. Cir. 1997) (refusing to count each of more than 8,000 false billing code entries as a separate claim and explaining that "[w]hether a defendant has made one false claim or many is a fact-bound inquiry that focuses on the specific conduct of the defendant"). Additionally, at least one court recently has refused to impose a separate statutory civil penalty for each invoice submitted by the contractor, holding that doing so would violate the Eighth Amendment's Excessive Fines Clause. See United States ex rel. Bunk v. Birkart Globistics GmbH & Co., No. 1:02cv1168 (AJT/TRJ) et al., 2012 WL 488256 (E.D. Va. Feb. 14, 2012), 54 GC ¶ 74 (refusing to impose statutory civil penalty exceeding $50 million based on defendant's submission of 9,136 false invoices where Government suffered no actual damages). This decision is currently on appeal to the Fourth Circuit, where the Government has sought to intervene to defend the constitutionality of the FCA's civil monetary penalties provision.

30/ DOJ, FCA Statistics—Overview, October 1, 1987– September 30, 2012, available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

31/ DOJ, FCA Statistics—Overview, October 1, 1987– September 30, 2012, available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

32/ 31 U.S.C.A. § 3729(b)(2).

33/ 31 U.S.C.A. § 3731(c).

34/ 31 U.S.C.A. § 3730(h).

35/ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010).

36/ The FCA's public disclosure bar is a statutory provision that "deprives courts of jurisdiction over qui tam suits when the relevant information has already entered the public domain through certain channels." Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396, 1401 (2010), 52 GC ¶ 137 (citing 31 U.S.C.A. § 3730(e)(4)). The "original source" exception provides that a suit otherwise subject to the public disclosure bar may nonetheless be maintained if the qui tam relator qualifies as an "original source" of the information. See 31 U.S.C.A. § 3730(e)(4).

37/ Graham County, 130 S. Ct. at 1400.

38/ See 31 U.S.C.A. § 3730(e)(4)(A) (providing that whistleblower suit should be dismissed "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed…in a congressional, Government Accountability Office, or other Federal report, hearing audit, or investigation…."). It should be noted, however, that the public disclosure bar still applies to suits based on information that has been disclosed in the news media. 31 U.S.C.A. § 3730(e)(4)(A)(iii).

39/ See 31 U.S.C.A. § 3730(e)(4)(B).

40/ 31 U.S.C.A. § 3730(e)(4)(A) (emphasis added).

41/ For instance, the whistleblowers in a recent high-profile FCA suit against GlaxoSmithKline reportedly will share an award approaching $250 million. Blackden, "Glaxo Whistleblowers To Share $250 Million Windfall," The Telegraph, July 4, 2012, http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/9374104/Glaxo-whistleblowers-to-share-250m-windfall.html.

42/ Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 949 (1997).

43/ Attorney General Eric Holder, Address at the 25th Anniversary of the False Claims Act Amendments of 1986 (Jan. 31, 2012), http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120131.html.

44/ 15 U.S.C.A. §§ 78m, 78u, 78dd-1, 78dd-2, 78dd-3, 78ff.

45/ 15 U.S.C.A. § 78dd-1 et seq.

46/ 15 U.S.C.A. § 78m(b)(2).

47/ See 15 U.S.C.A. §§ 78u, 78dd-2(g), 78dd-3(e), 78ff; 18 U.S.C.A. § 3571.

48/ See DOJ Criminal Division & SEC Enforcement Division, A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 14, 2012), available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

49/ UK Bribery Act, 2010, c. 23.

50/ See Covington & Burling LLP, Anti-Corruption Year in Review: 2012, at 3 (Feb. 2013), available at http://www.cov.com/publications/?pubtype=7&archiveyear=2013.

51/ DOJ Criminal Division & SEC Enforcement Division, A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 14, 2012), available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

52/ In November 2012, for example, then-Assistant Attorney General Lanny Breuer, currently the Vice-Chair of Covington & Burling LLP, characterized FCPA enforcement as a "critical mission" and declared that "robust FCPA enforcement has become part of the fabric of the Justice Department." See Assistant Attorney General Lanny Breuer, Address at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 26, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html.

53/ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010).

54/ SEC, Annual Report on the Dodd-Frank Whistleblower Program, Fiscal Year 2012 app. A (Nov. 2012), available at http://www.sec.gov/about/offices/owb/annual-report-2012.pdf.

55/ Other reported settlements of note include a payment of $579 million by Halliburton/KBR and a $400 million settlement fine levied against BAE Systems. See Tillipman, The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences, Briefing Papers No. 11-9 (Aug. 2011).

56/ See Covington & Burling LLP, Anti-Corruption Year in Review: 2012, at 3 (Feb. 2013), available at http://www.cov.com/publications/?pubtype=7&archiveyear=2013.

57/ Covington & Burling LLP, Client Advisory, An Analysis of the FCPA Resource Guide 9 (Nov. 2012), available at http://www.cov.com/publications/?pubtype=7&archiveyear=2012.

58/ DOJ Criminal Division & SEC Enforcement Division, A Resource Guide to the U.S. Foreign Corrupt Practices Act 61–62 (Nov. 14, 2012), available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

59/ UK Bribery Act, 2010, c. 23, §§ 1, 2.

60/ UK Bribery Act, 2010, c. 23, §§ 6, 7.

61/ UK Bribery Act, 2010, c. 23, § 12.

62/ UK Ministry of Justice, The Bribery Act 2010: Guidance 9 (Mar. 2011), available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

63/ UK Ministry of Justice, The Bribery Act 2010: Guidance 9 (Mar. 2011), available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (quoting UK Bribery Act, 2010, c. 23, § 12(5)).

64/ The phrase "carries on a business, or part of a business" is left undefined by the Bribery Act.

65/ Richard Alderman, Address at the 28th Cambridge International Symposium on Economic Crime (Sept. 6, 2010), available at http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2010/the-28th-cambridge-international-symposium-on-economic-crime.aspx.

66/ UK Ministry of Justice, The Bribery Act 2010: Guidance 10 (Mar. 2011), available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf ("[B]ribery in both the public and private sectors is covered.").

67/ 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

68/ UK Ministry of Justice, The Bribery Act 2010: Guidance 18 (Mar. 2011), available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf ("[T]he Bribery Act does not (unlike US foreign bribery law) provide any exemption for such [facilitation] payments.").

69/ 15 U.S.C.A. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

70/ It should be noted that although the Bribery Act does not contain an explicit liability carve-out, the UK Ministry of Justice has indicated that "it is not the intention of the Act to criminali[z]e" so-called "bona fide hospitality and promotional" expenditures. By the same token, however, the Ministry also has stated that it will judge the propriety of such expenditures on a case-by-case basis, depending on the intention of the party making the payments. UK Ministry of Justice, The Bribery Act 2010: Guidance 12 (Mar. 2011), available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

71/ UK Bribery Act, 2010, c. 23, § 11; UK Ministry of Justice, The Bribery Act 2010: Guidance 8 (Mar. 2011), available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

72/ See 15 U.S.C.A. §§ 78dd-2(g), 78dd-3(e), 78ff(c).

73/ Carlson et al., Covington & Burling LLP E-Alert, China Amends Criminal Law To Cover Foreign Bribery (Mar. 1, 2011), available at http://www.cov.com/publications/?pubtype=7&archiveyear=2011.

74/ Carlson et al., Covington & Burling LLP E-Alert, China Amends Criminal Law To Cover Foreign Bribery (Mar. 1, 2011), available at http://www.cov.com/publications/?pubtype=7&archiveyear=2011.

75/ Ellis, "Road to Corruption Overhaul: Brazil Revises Its Foreign Bribery Bill," FCPAméricas Blog, Mar. 23, 2012, http://mattesonellislaw.com/fcpamericas/road-to-a-corruption-overhaul-brazil-revises-its-foreign-bribery-bill.

76/ Friedman, "Brazil's Powerful New Anti-Bribery Law Stalled in Legislature, The FCPA Blog, Dec. 6, 2012, http://www.fcpablog.com/blog/2012/12/6/brazils-powerful-new-anti-bribery-law-stalled-in-legislature.html#.

77/ FAR 9.406-2, 9.407-2.

78/ FAR 9.406-2(b).

79/ FAR 9.405; see 9.405-1 (permitting continuation of current contracts).

80/ FAR 9.407-4(a), (b). The period of suspension may be extended to 18 months upon the DOJ's request. FAR 9.407-4(b).

81/ FAR 9.406-4.

82/ FAR 9.406-4.

83/ FAR 9.405-1, 9.406-1(c).

84/ See, e.g., Ivory, "BP Seen Escaping U.S. Contracting Ban After Oil Spill Settlement," Bloomberg News, Nov. 15, 2012, http://www.bloomberg.com/news/2012-11-16/bp-seen-escaping-u-s-contracting-ban-after-oil-spill-settlement.html (analogizing contractor suspension and debarment to a stint in a "maximum security federal prison" for convicted criminals).

85/ See FAR 9.402. See generally Shaw et al., American Bar Association Committee on Debarment and Suspension, The Practitioner's Guide to Suspension and Debarment (3d ed. 2002).

86/ FAR 9.406-2, 9.407-2.

87/ FAR 9.406-2(a).

88/ FAR 9.406-2(b).

89/ FAR 9.406-2(b)(1)(vi), 9.407-2(a)(8).

90/ FAR 52.203-13.

91/ FAR 9.406-2(c).

92/ Shaw et al., American Bar Association Committee on Debarment & Suspension, The Practitioner's Guide to Suspension and Debarment 69–70 (3d ed. 2002).

93/ FAR 9.406-1(a).

94/ FAR 9.402(b).

95/ FAR 9.402(a).

96/ FAR 9.406-1(a).

97/ FAR 9.406-1(a).

98/ See FAR 9.402.

99/ Shaw, "Don't Go Overboard Banning Military Contractors," Reuters, Aug. 8, 2012, http://blogs.reuters.com/great-debate/2012/08/08/dont-go-overboard-banning-military-contractors/.

100/ Weigelt, "Proposal Would Take Suspension, Debarment Powers From Agencies," FCW, Feb. 8, 2013, http://fcw.com/articles/2013/02/08/debar-suspend-bill.aspx.

101/ For example, during a public hearing of the Senate Homeland Security and Governmental Affairs Committee in 2011, one senator sharply criticized executive agencies for not debarring more contractors, declaring that "[w]e need to draw a line in the sand" because "[i]t's a matter of character for our nation." Clark, "Lawmakers, OMB Push To Ban More 'Bad-Actor' Contractors," Gov't Executive, Nov. 16, 2011, http://www.govexec.com/oversight/2011/11/lawmakers-omb-push-to-ban-more-bad-actor-contractors/35433/ (comments of Sen. Claire McCaskill (D-Mo.)).

102/ Shaw, "Don't Go Overboard Banning Military Contractors," Reuters, Aug. 8, 2012, http://blogs.reuters.com/great-debate/2012/08/08/dont-go-overboard-banning-military-contractors/.

103/ FY 2009 and FY 2010 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities 4 (2011); FY 2011 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities at 8 (Sept. 18, 2012), available at http://www.epa.gov/isdc/.

104/ Jordan, "Taking Contractor Accountability to the Next Level," OMBlog, Sept. 18, 2012, http://www.whitehouse.gov/blog/2012/09/18/taking-contractor-accountability-next-level.

105/ Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 8125, 125 Stat. 786, 837 (2011).

106/ Technically, the statute does not provide an independent basis for debarment; rather, it prohibits the award of contracts to affected contractors. For all intents and purposes, however, the practical effect of the statute is no different than that of an administrative debarment.

107/ New Jersey Bill No. S2167 (citing N.J. Stat. Ann. § 2C:21-34(a), (b)). See generally Wimberly, Plunkett & Harris, "What Government Contractors Need To Know About State False Claims Statutes," Briefing Papers No. 12-5 (Apr. 2012).

108/ For example, although the debarment decision of one agency (known as the "lead agency") is binding on other agencies in traditional debarment proceedings, under the Consolidated Appropriations Act, 2012, the decision of one agency is not binding upon others. This raises the specter of inconsistent responsibility determinations, as a contractor could presumably find itself eligible to obtain contracts from one agency but ineligible for contract awards from another. Consider, for example, a scenario in which a contractor that does business with both the EPA and the DOD is convicted of a felony. The EPA may find that debarment "is not necessary to protect the interests of the Government" and that it can continue to do business with the contractor, but this determination would not be binding upon the DOD, which could still decide to leave the automatic debarment in place. Although there is hope in the contracting community that the 2013 Appropriations Act will resolve this inconsistency (or better yet, abandon the provision in its entirety), the current law injects substantial uncertainty into the debarment process.

109/ In re Walt Disney Co. Deriv. Litig., 907 A.2d 693, 749 (Del. Ch. 2005) (citations omitted).

110/ Shocking Techs., Inc. v. Michael, C.A. No. 7164–VCN , 2012 WL 4482838, at *8 (Del. Ch. Sept. 28, 2012) (internal quotations omitted). It should be noted that directors also have a duty to act in good faith while discharging their corporate duties. Although this "duty of good faith" is sometimes "described colloquially as part of a 'triad' of fiduciary duties that includes the duties of care and loyalty," it is more properly understood as an element of the fiduciary duty of loyalty. Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006).

111/ Gimbel v. Signal Cos., 316 A.2d 599, 608 (Del. Ch. 1974).

112/ In re Walt Disney Co. Derivative Litig., 825 A.2d 275, 278 (Del. Ch. 2003).

113/ See In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996)

114/ In re Caremark Int'l, 698 A.2d at 971 (holding that a director will be subject to oversight liability only in the event of a "sustained or systemic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information reporting system exists").

115/ Internal Report of Wynn Resorts, Ltd. (Feb. 19, 2012), available at http://www.sec.gov/Archives/edgar/data/1174922/000119312512071603/d304177dex992.htm.

116/ Green, "Fifth Shareholder Suit Filed Against Wynn Directors," Las Vegas Sun, Apr. 18, 2012, http://www.vegasinc.com/news/2012/apr/18/fifth-shareholder-suit-filed-against-wynn-director/.

117/ Green, "Wynn Shareholder Lawsuits Reinstated," Las Vegas Sun, Oct. 10, 2012, http://www.vegasinc.com/news/2012/oct/10/wynn-shareholder-lawsuits-re-instated/.

118/ Bransford, "Alcoa Execs Face Shareholder Suit Alleging Bahrain Bribes," Law360, June 21, 2012, http://www.law360.com/articles/352578/alcoa-execs-face-shareholder-suit-alleging-bahrain-bribes.

119/ Bishop, "Alcoa Settles Alba's $1B Racketeering Suit For $85M," Law360, Oct. 9, 2012, http://www.law360.com/articles/385169.

120/ Stendahl, "Maxwell Tech To Exit Shareholder FCPA Action for $3M," Law360, Feb. 17, 2012, http://www.law360.com/articles/310876/maxwell-tech-to-exit-shareholder-fcpa-action-for-3m.

121/ Stendahl, "Maxwell Tech To Exit Shareholder FCPA Action for $3M," Law360, Feb. 17, 2012, http://www.law360.com/articles/310876/maxwell-tech-to-exit-shareholder-fcpa-action-for-3m.

122/ Gumbs & Qian, "Where Risk Management Meets Director Responsibility," Law360, Oct. 18, 2012, available at http://www.cov.com/publications/?pubtype=1&archiveyear=2012.

123/ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

124/ Pub. L. No. 107-24, §§ 301, 407.

125/ Pub. L. No. 107-24, § 806.

126/ Pub. L. No. 107-24, § 301.

127/ Rule 10A-3, Securities Exchange Act of 1934, 17 C.F.R. § 240.10A-3.

128/ See NYSE Listed Company Manual, Section 303A.07; NASDAQ Marketplace Rule 4350(d)(3).

129/ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 165(h), 124 Stat. 1376, 1429 (2010).

130/ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 111(b)(2)(A), 122 Stat. 3765, 3776–77 (2008).

131/ Item 407(h) of Regulation S-K, 17 C.F.R. § 229.407(h) (2010), SEC No. 33-9089 (Feb. 28, 2010).

132/ See Gumbs & Qian, "Risk Management from the Board's Perspective," Law360, Oct. 25, 2012, available at http://www.law360.com/articles/387133/risk-management-from-the-board-s-perspective.

133/ See U.S.S.G. § 8C2.5(f) (reducing an organization's culpability score if the organization had an effective compliance and ethics program, as defined in U.S.S.G. § 8B2.1).

134/ See FAR 9.406-1(a) (requiring debarring officials to consider certain mitigating factors, including "[w]hether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment").

135/ Evidencing the emphasis that it places on developing an organizational culture of ethics, the DOD has taken steps recently to implement its own values-based ethics program internally. The department conducted an extensive survey of more than 1.5 million employees in an effort to identify ways to improve its ethical culture and commissioned a detailed report from an outside ethics consultant recommending steps for implementing a more robust and comprehensive ethics program. See United States Department of Defense Survey Report (Aug. 31, 2010), available at http://www.safgc.hq.af.mil/shared/media/document/AFD-110809-024.pdf.

136/ See U.S. Attorneys' Manual 9-28.300 (listing "the existence and effectiveness of the corporation's pre-existing compliance program" among the factors to be considered by federal prosecutors when "conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements"). The UK Bribery Act goes further, creating a statutory affirmative defense to the "corporate offense" provision of § 7 where the company can show that it had "adequate procedures" in place to prevent bribery. UK Bribery Act, 2010, c. 23, § 7; see also UK Ministry of Justice, The Bribery Act 2010: Guidance 6 (Mar. 2011), available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf ("It is a full defen[s]e for an organi[z]ation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.").

137/ DOJ Press Release No. 12-534, "Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA" (Apr. 25, 2012).

138/ GAO, Defense Contracting Integrity: Opportunities Exist To Improve DOD's Oversight of Contractor Ethics Programs (GAO-09-591, Sept. 22, 2009).

139/ See Hubbard, "Responding to a Criminal Investigation," Briefing Papers No. 06-13 (Dec. 2006).

140/ See Hubbard, "Responding to a Criminal Investigation," Briefing Papers No. 06-13 (Dec. 2006).

141/ See Hubbard, "Responding to a Criminal Investigation," Briefing Papers No. 06-13 (Dec. 2006).

142/ See, e.g., Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (acknowledging the value of "the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers"); Copeland v. Lane, No. 5:11–cv–01058 EJD, 2012 WL 4845636 (N.D. Cal. Oct. 10, 2012) (rejecting claim that it was improper to retain outside counsel to investigate alleged corporate wrongdoing and stating that "[t]o the contrary, the involvement of outside counsel to assist in conducting the investigation is not uncommon").

143/ 1-11 Tax Controversies: Audits, Investigations, Trials § 11.02 (Matthew Bender & Co. 2012).

144/ Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

145/ Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

146/ See Upjohn, 449 U.S. 383.

147/ Even though a written report usually will be privileged, this privilege may be waived through inadvertent disclosure, an act of employee disloyalty, or disclosure as part of settlement negotiations with the SEC or other enforcement agencies. See Boltz, "The Increased Need for Internal Investigations by Public Companies and Their Audit Committees," presented at Rocky Mountain Securities Conference (May 30, 2003). Because the "selective waiver" doctrine is disfavored, disclosure of the report in any context is likely to be viewed as a global waiver of the attorney-client privilege. See, e.g., In re Pac. Pictures Corp., 679 F.3d 1121 (9th Cir. 2012).

148/ See Hubbard, Responding to a Criminal Investigation, Briefing Papers No. 06-13 (Dec. 2006).

149/ FAR 52.203-13. See generally West, Richard, Brennan, Barsalona, Koos & Meene, "Contractor Business Ethics Compliance Program & Disclosure Requirements," Briefing Papers No. 09-5 (Apr. 2009).

150/ Miller, The Federal Acquisition Regulation Mandatory Disclosure Rule Program at the U.S. General Services Administration Office of Inspector General 2 (June 2012), available at http://www.gsaig.gov/?LinkServID=DA671464-E1CB-543C-4E17C0DADEEE5485&showMeta=0.

151/ Miller, The Federal Acquisition Regulation Mandatory Disclosure Rule Program at the U.S. General Services Administration Office of Inspector General 2 (June 2012), available at http://www.gsaig.gov/?LinkServID=DA671464-E1CB-543C-4E17C0DADEEE5485&showMeta=0.

152/ See FAR 52.203-13; see also 73 Fed. Reg. 67064 (Nov. 12, 2008) (final rule).

153/ FAR 3.1004. For General Services Administration Schedule contracts, the dollar value of the contract is determined by totaling all contracts on the particular schedule. Thus, "as a practical matter, every Schedule contract will likely meet the threshold." American Bar Association Section of Public Contract Law, Guide to the Mandatory Disclosure Rule 11 n.5 (2010).

154/ FAR 52.203-13(b).

155/ FAR 52.203-13(c).

156/ FAR 52.203-13(d).

157/ FAR 9.406-2; 9.407-2. As for the concept of a "significant overpayment," the comments accompanying the promulgation of the mandatory disclosure rule make clear that "[i]t is within the discretion of the suspension and debarment official to determine whether an overpayment is significant and whether suspension or debarment would be the appropriate outcome for failure to report such overpayment." 73 Fed. Reg. at 67080.

158/ In the DOD, for example, there is a formal structure by which each military department and the Defense Logistics Agency manages fraud allegations and provides the agency's position on fraud litigation to the DOJ. Other than the Army, which is structured differently, the agency SDO is the agency's final authority on fraud litigation, in addition to being the SDO. Indeed, the DOJ policy prohibits line attorneys from settling fraud cases objected to by the victim agency, absent approval from a higher level DOJ official.

159/ Such collateral consequences include the debarred contractor's presumptive ineligibility for federal export licenses under the International Traffic in Arms Regulations (22 C.F.R pts.120–130), the denial or revocation of a debarred contractor's security clearance, and difficulties in obtaining commercial mortgages or loans. See American Bar Association Committee on Debarment & Suspension, The Practitioner's Guide to Suspension and Debarment 139-41 (3d ed. 2002).

160/ Shaw, "Don't Go Overboard Banning Military Contractors," Reuters, Aug. 8, 2012, http://blogs.reuters.com/great-debate/2012/08/08/dont-go-overboard-banning-military-contractors/.

161/ Many agencies have an informal policy against debarment where a contractor voluntarily brings the misconduct to the agency's attention. Moreover, even in the absence of a current compliance problem, sophisticated contractors will maintain open lines of communication with suspension and debarment officials through quarterly or semi-annual reports about the contractor's efforts to promote compliance and an ethical corporate culture.

162/ See Memorandum of Attorney General Eric Holder, Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings (Jan. 30, 2012) (reiterating the DOJ's "longstanding policy that ensures that Department prosecutors and civil attorneys coordinate together and with agency attorneys in a manner that adequately takes into account the government's criminal, civil, regulatory and administrative remedies"); see also DOJ OIG, Audit Report 12-25, Audit of Statutory Suspension and Debarment Activities Within the Department of Justice 19 (June 2012) (recommending "that the Criminal Division, the Antitrust Division, and the USAOs…[d]evelop and implement policies and procedures to accurately identify and track" cases warranting a DOD debarment).