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Getting Disclosures Right: Navigating Risks and Inconsistencies Between Regulations and Agency Expectations

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Having served as investigators, auditors, and lawyers – for the Federal government and now in private practice[1] – we have seen firsthand many of the tricky issues surrounding the government's mandatory disclosure rules and expectations around disclosures and investigations. We have also seen the aftermath of organizations running afoul of USAID and its OIG on these issues – to the point of having major awards and programs cancelled, being suspended, and even being put out of business.[2]

This article is the first in a two-part series designed to assist contractors and recipients of grants/cooperative agreements (collectively "implementing partners") to better understand and navigate USAID's disclosure framework. A second article will be published soon focusing on best practices for implementing partners conducting internal investigations in coordination with the USAID OIG.

Regulatory Standards for Mandatory Disclosures

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[2] Louisa Loveluck, *Suspecting Fraud, U.S. Suspends Some Syrian Aid Programs*, WASH. POST, July 26, 2016; Scott Higham and Steven Rich, *USAID Suspends IRD, Its Largest Contractor in Iraq and Afghanistan*, WASH. POST, Jan. 26, 2015; Dana Hedgpeth and Josh Boak, *USAID Suspends District-Based Nonprofit AED from Contracts Amid Investigation*, WASH. POST, Dec. 8, 2010.

Various regulations require implementing partners to disclose to their cognizant agencies and OIG particular instances of potential non-compliance with laws, regulations, and assistance agreements/contracts. This article addresses the two overarching, government-wide mandatory disclosure provisions. One addresses contractors and the other addresses recipients of grants/cooperative agreements.[3]

In 2008, the government issued a mandatory disclosure rule for contractors to report fraud and criminal conduct. FAR 52.203-13(b)(3)(i) provides:

> The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed –
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> > (A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
> >
> > (B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

Five years later, in December 2013, the government issued a similar mandatory disclosure rule governing recipients that receive grants and cooperative agreements as part of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. Section 200.113 of 2 C.F.R. requires recipients to disclose to the awarding agency or pass-through entity, in a timely manner, "all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award."

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[3] Other mandatory disclosure requirements that pertain to particular issues include: (1) contractor must also disclose any significant overpayment that it has not returned (FAR 52.212-4(i)(5), 52.232-25(d), 52.232-26(c), and 52.232-27(I)); (2) a recipient must notify the agency of developments that "have a significant impact on the award-supported activities" and "problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award" (22 C.F.R. § 226.51(f)); (3) a recipient must disclose, in writing, any potential conflict of interest to the agency or pass-through entity in accordance with applicable federal awarding agency policy (2 CFR § 200.112); and (4) a recipient must immediately notify the cognizant Agreement Officer and USAID OIG of credible information regarding a violation of trafficking in persons, procurement of a commercial sex act during the period of the award, use of forced labor in the performance of the award, and acts that directly support or advance trafficking in persons (ADS 303 Standard Clause M20). These requirements are not the subject of our analysis, although many of the same principles apply equally to them.

Also, in the Standard Provisions for Non-Governmental Organizations, at section M28, USAID sets forth nearly verbatim the disclosure requirements of 2 CFR § 200.113, and specifies that the disclosure requirement also applies to subrecipients.

For the purposes of this article, we refer to FAR 52.203-13 as the "FAR standard" and 2 CFR § 200.113 as the "CFR standard." Two aspects of these regulations are pertinent to this analysis.

- First, the two standards cover overlapping but different types of violations in connection with the award: the FAR standard applies to certain violations of criminal laws and the civil False Claims Act, whereas the CFR standard applies *only* to violations of select federal criminal laws and not to False Claims Act violations.
- Second, the two standards provide different thresholds for when a disclosure is mandatory: the FAR standard requires disclosure upon determination of *credible evidence* of a covered violation, whereas the CFR standard requires disclosure where there has been a determination of an *actual violation*.

As lawyers working across federal agencies, we typically see agencies recognizing and applying the distinctions between the two standards. As a practical matter, this means the agencies expect contractors to disclose in more instances than recipients do (credible evidence versus an actual violation). They do not expect implementing partners to report any and all allegations of mere suspected covered violations. And they allow implementing partners an opportunity to perform diligence on an allegation to demonstrate whether the applicable threshold is met for mandatory disclosure.

As we discuss next, however, the USAID and OIG appear to interpret the disclosure requirements differently and more broadly – or at least have expectations that vary from these regulatory standards. This circumstance can make it challenging for implementing partners to reliably operationalize their disclosure processes. Nevertheless, implementing partners act at their peril if they ignore the agency's and OIG's expectations, risking a loss of trust, heightened scrutiny, and, at worst, enforcement actions.

Agency and OIG's Disclosure Expectations Are Broader Than Implementing Partners' Mandatory Duties

In 2011, the USAID OIG and the USAID Compliance and Oversight of Partner Performance (COPP) Division released a guidance memo entitled "Fraud Reporting Guidance For USAID Implementing Partners." This "COPP Memo," as it is sometimes referred, postdated the issuance of the FAR standard and predated the CFR standard. It contains guidance for both contractors and recipients.

The COPP Memo begins:

> USAID contractors and implementing partners [presumably recipients] have an affirmative obligation to report allegations

> of fraud related to USAID projects under both the Federal Acquisition Regulations (FAR) and USAID regulations. The timely reporting of fraud allegations allows the OIG, USAID, and the implementing partner to efficiently protect taxpayer funds while moving forward with important program activities.

This introduction appears to obligate all implementing partners to report all "allegations of fraud." Citing the FAR standard, the COPP Memo next instructs contractors to report "potential situation[s] involving fraud, corruption, or false claims." This exceeds the FAR standard, which requires disclosure only where there is "credible evidence." The COPP Memo also relies on loose terms such as "fraud" and "corruption" rather than incorporating the more particularized violations found in the FAR standard.

Moreover, the COPP Memo provides the following standard for recipients: "When a USAID implementing partner becomes aware of a potential situation involving fraud, corruption, or false claims related to a USAID project, the OIG should be notified as soon as possible." This goes farther than the CFR standard, published two years later, which only requires reporting of (a) an actual violation and *not* a "potential situation" of (b) "Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award" and *not* false claims violations.

Thus, on its face, the Memo appears to expand the duty of contractors and recipients to report every allegation of fraudulent-type behavior (a vague standard) without first ascertaining whether there is credible evidence or an actual violation. In light of the promulgation of the CFR standard two years later, one might assume the agency has updated its policy to reflect the CFR standard. We have seen no update to the Memo, though, and USAID has neither officially rescinded nor updated it, though it is no longer available on the USAID website.[4]

Additionally, on March 31, 2018, the OIG issued "Compliance and Fraud Prevention: A Pocket Guide for Program Implementers."[5] The OIG Guide refers to contractors and recipients as "implementers" and does not distinguish between them, stating at page 18:

> When a USAID implementer becomes aware of a potential situation involving fraud, corruption, false claims, or other criminal activity related to a USAID project, it should notify the OIG as soon as possible.

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[4] It can be found at http://clarokc.net/wp-content/uploads/Fraud+Reporting+Guidance+for+USAID+Implementing+Partners+Office+of+the+Inspector+General+PDACR319.pdf

[5] Available at https://oig.usaid.gov/sites/default/files/2018-10/OIG-Fraud-Prevention-and-Compliance-Handbook-103018.pdf.

In other words, the OIG Guide reaffirms the agency's expectation that implementing partners will report to the OIG all "potential situations" of wrongdoing – regardless of whether credible evidence, let alone an actual violation, exists, and without reference to actual covered violations.

For contrast, compare the guidance in these two documents with direction from other agencies on the same topic. The U.S. Department of Energy's order establishing requirements and responsibilities for reporting fraud, waste, abuse, misuse, corruption, criminal acts, and mismanagement to the DOE OIG states that contractors "are not expected to report allegations based on mere suspicion or speculation."[6] Similarly, guidance from the U.S. Department of Defense also anticipates contractors performing an internal investigation, at least to some degree, prior to disclosure.[7]

Neither the COPP Memo nor the OIG Guide acknowledges that their disclosure instructions substantively broaden an implementing partners' disclosure duties under the applicable regulations. We do not know if the USAID and OIG intended to create expanded, enforceable disclosure rules, or whether they simply intended to explain their unenforceable expectations. As a legal matter, though, this ambiguity is troubling. An agency is supposed to follow formal rulemaking procedure – providing public notice and a comment period – before expanding duties and liabilities in this way, and there is a likelihood that a court would not uphold the agencies' interpretation should the question ever come before a federal judge.[8]

Furthermore, many implementing partners are reluctant to assume the COPP Memo and OIG Guide are just "guidance." The OIG has enforced its expectations during many compliance reviews and meetings with individual implementing partners and industry groups. The expectations provided in the COPP Memo and OIG Guide are seen by many as mandatory and serve as a basis for some organizations' internal disclosure protocols.

We shared an advanced draft of this article with the OIG and the agency to seek feedback on our assessment of this paradigm. Based on those discussions, we believe that the guidance described above expresses a *preference* is for implementing partners to immediately report any allegation that *has the possibility of being true* – to allow the OIG's special agents to perform their jobs most effectively. We understand that viewpoint. At the

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[6] DOE Order O 221.1B, Reporting Fraud, Waste and Abuse to the Office of Inspector General, Sep. 27, 2016.

[7] DoD OIG, Contractor's Guide to Submitting a Disclosure, June 2017.

[8] Notably, in the so-called Brand Memorandum issued on January 25, 2018, the Department of Justice made clear that such agency guidance documents cannot be converted into binding rules that can be enforced. (available at https://www.justice.gov/file/1028756/download).

same time, we also recognize that this preference is inconsistent with regulatory standards and can often lead to other problems.

In the next section, we consider the pros and cons of deviating from the actual legal requirements.

Balancing the Agencies' Expectations Against the Operational Realities of Implementing Partners

It is easy to appreciate why USAID and the OIG hold heightened expectations around disclosures. For starters, government officials do not like surprises, especially newspaper articles informing them for the first time about compliance issues involving their agency. The OIG will also point out that early disclosures allow them to determine the best course of investigation. And implementing partners, they will say, lack the experience to assess whether or not an allegation is credible, lack the expertise to conduct quality internal investigations, lack investigative tools available to the government (e.g., subpoena power), and sometimes make the OIG's job harder by inadvertently tipping off potential wrongdoers.

The OIG usually will also warn implementing partners not to interfere with their investigation. This is not, and cannot be, a directive – the OIG has *no* legal authority to prohibit an implementing partner from legitimately investigating and stopping wrongdoing within its organization. Yet, the OIG's expectations following a disclosure can have a chilling effect on the implementing partner.

Implementing partners often feel significant pressure to accede to USAID's and OIG's expectations. And there are potentially severe consequences for getting off on the wrong foot. We have seen several instances where the OIG thought an implementing partner should have disclosed an allegation. This has occasionally led to suspicions of cover up or, at least, poor relations, heightened scrutiny, and an exhaustive (and costly) investigation. There can even be referrals for suspension or debarment.

At the same time, implementing partners have legitimate concerns about making hasty disclosures. As OIG investigators know, the vast majority of allegations end up being unsubstantiated. Worse yet, baseless allegations may be made by disgruntled employees or competitors to harm an individual or organization. Disclosing every allegation without at least some preliminary assessment can set off a chain of events that actually reduces the likelihood of a speedy, accurate, cost efficient resolution.

We have seen several instances where an implementing partner made a quick disclosure without adequate diligence, and that disclosure precipitated a very costly OIG investigation that led nowhere. A preliminary review conducted by the contractor or NGO before making the disclosure, when done with a good grasp of investigative skill and sensitivity, could have saved time and money for both the implementing partner and the

OIG. Simply put, the implementing partner is often in the best position to quickly gather the facts that allow swift action to stop loss of funds or other ongoing criminal conduct.

In sum, we are aware that many large contractors and recipients have adopted a policy of making voluntary disclosures to the USAID OIG of *every compliance allegation* that arises – even before they perform *any* diligence on the allegation. Why? They believe it is safer to do so, to ensure that they not run afoul of the agency's or OIG's expectations. (Mid-sized and smaller implementing partners, in our experience, generally have not adopted that approach.) Yet fixed adherence to the OIG's expectations and approach can also be unnecessarily costly and risky.

How Partners Can Navigate the Disclosure Expectations

The better approach, in our view, is for implementing partners to recognize the inconsistencies between the mandatory disclosure regulations and the expectations of USAID and the OIG around disclosures – and to follow the regulations while making accommodations to the government that are mutually beneficial. In our experience, the OIG appreciates that some implementing partners, by themselves or with the assistance of counsel, can conduct responsible, preliminary diligence to assess the credibility of allegations. Of course, this requires a more thoughtful set of considerations and processes.

The most sophisticated implementing partners will have prepared internal protocols that they follow to reliably navigate these issues – and they discuss their protocols transparently with the USAID Compliance Division and the OIG to ensure a meeting of the minds. That approach usually avoids problems downstream. Such a protocol should address at least the following sections:

1. Criteria for mandatory disclosures based on the FAR standard of "credible evidence" and the CFR standard of actual "violations"

2. The implementing partner's recognition of the agency's and OIG's expectations that exceed the mandatory disclosure regulations, as well as its internal criteria for making voluntary disclosures, and steps that the implementing partner will take in recognition of those interests

3. Processes and procedures for conducting a preliminary investigation, including who conducts the fact finding, how it would be done, whether and how it should be conducted under the attorney-client privilege, and memorializing those activities

4. Processes and procedures for determining whether an allegation meets either the mandatory (or voluntary) disclosure thresholds, resolving any disagreements, and memorializing those activities

5. Milestones and timelines for deciding whether and when to make the disclosure and how to make it

6. Developing a plan of action for further investigation as necessary, corrective actions as necessary, and cooperation with the OIG

7. Standards for preparing a preliminary disclosure such as background of the issue, steps taken to investigate to date, steps taken to mitigate risk pending completion of the investigation, and an estimate of potential loss (if possible). The preliminary disclosure should take care not to understate or overstate the circumstances.

The next article in this series, to be published soon, will focus on the standards and best practices for implementing partners to conduct internal investigations – even where the OIG has differing interests and expectations around the investigation process.