

# Internal Investigations: Best Practices for Mitigating False Claims Act Risk

June 23, 2022

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# Importance of Internal Investigations



Establishes a tone of ethics and compliance



Encourages reporting



Decreases likelihood of litigation or regulatory penalties



Decreases risk of liability (especially FCA liability)



Protects company *and* employees

# Types of Internal Investigations

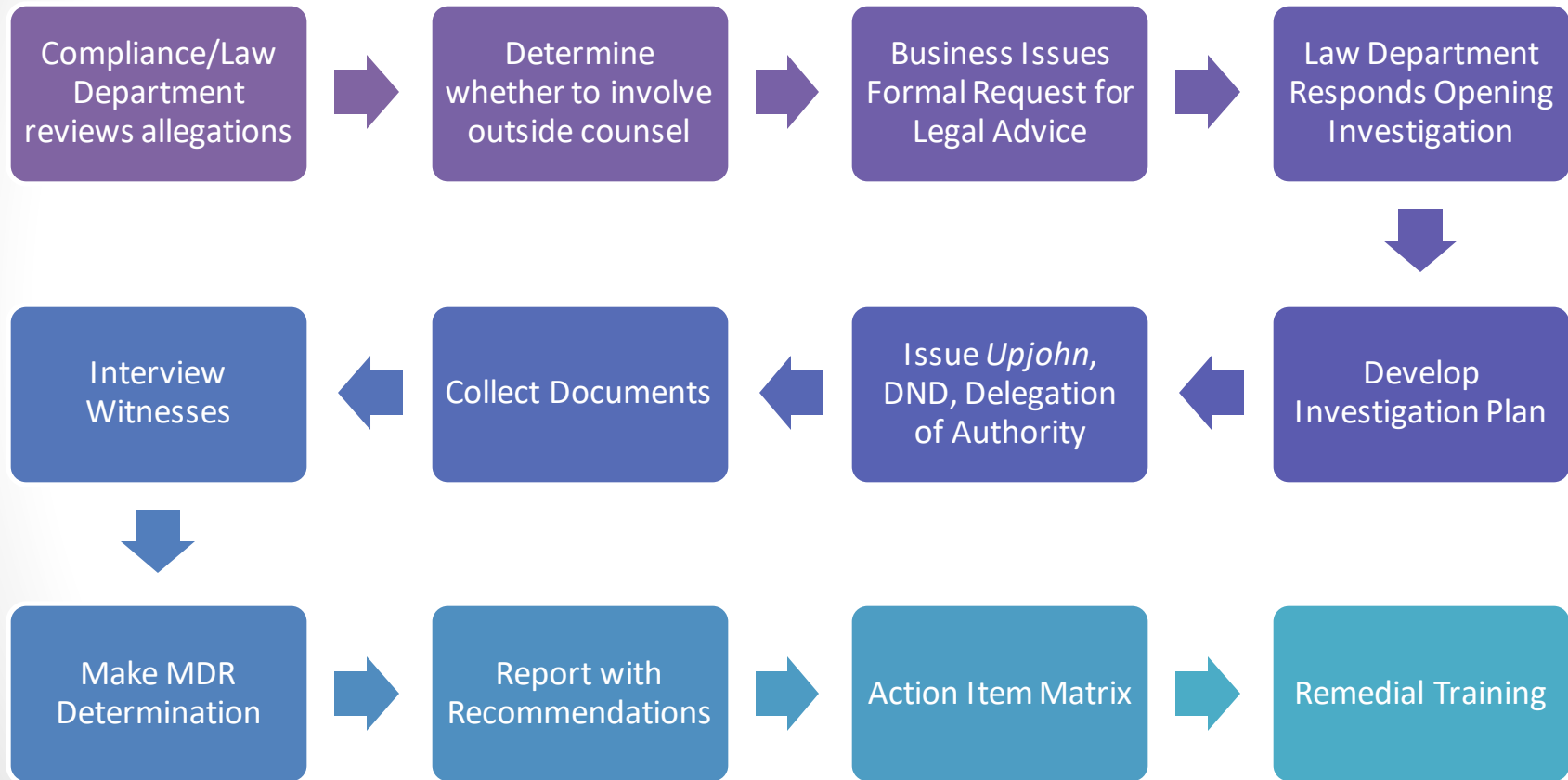
- Reactive: Caused by Adverse External Events
- Proactive: Company's Initiative
  - Executive Oversight: spot and address trends
  - Target training: clear enforceable standards/policies
  - Deterrence, monitoring, and auditing
  - Protect Reputation
  - Whistleblower program and investigation process
- Combination

# Triggering Events

- Government
  - Subpoenas, warrants, agency requests, administrative audits
- Third Parties
  - Threatened or actual lawsuits (Government, Competitors, Suppliers, Consumers)
  - Whistleblower (former employee, competitor)
- Internal
  - Complaints/Hotline Calls
  - Audits or reviews (Regular compliance, accounting, product assurance)



# Mechanics of an Internal Investigation



# Best Practices to Mitigate Risk

Understand the False Claims Act

Take Detailed Steps to Preserve the Privilege

Develop an Investigation Plan

Recognize Disclosure Obligation Under the MDR

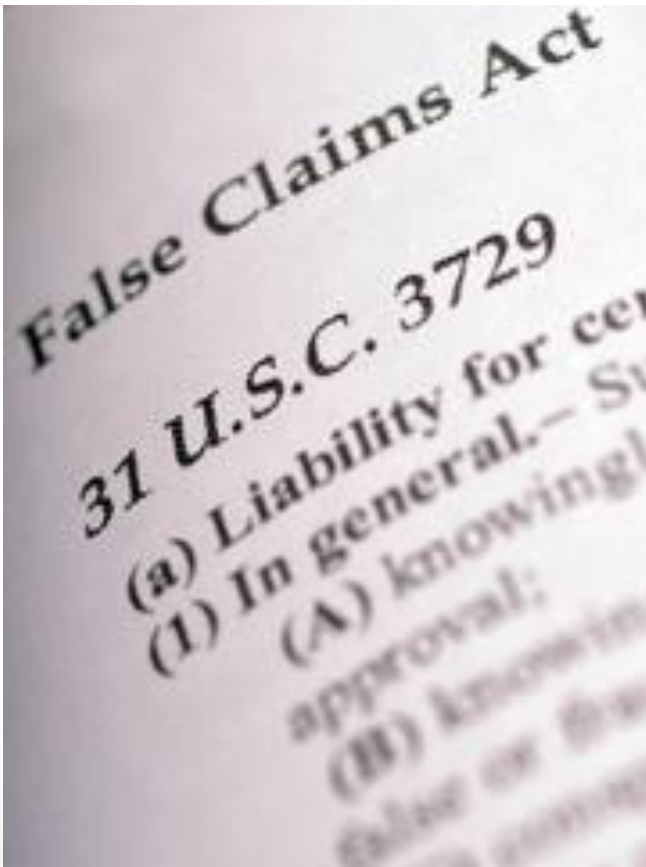
Create a Communications Plan

Evaluate your Compliance Program Regularly

# Understand the False Claims Act

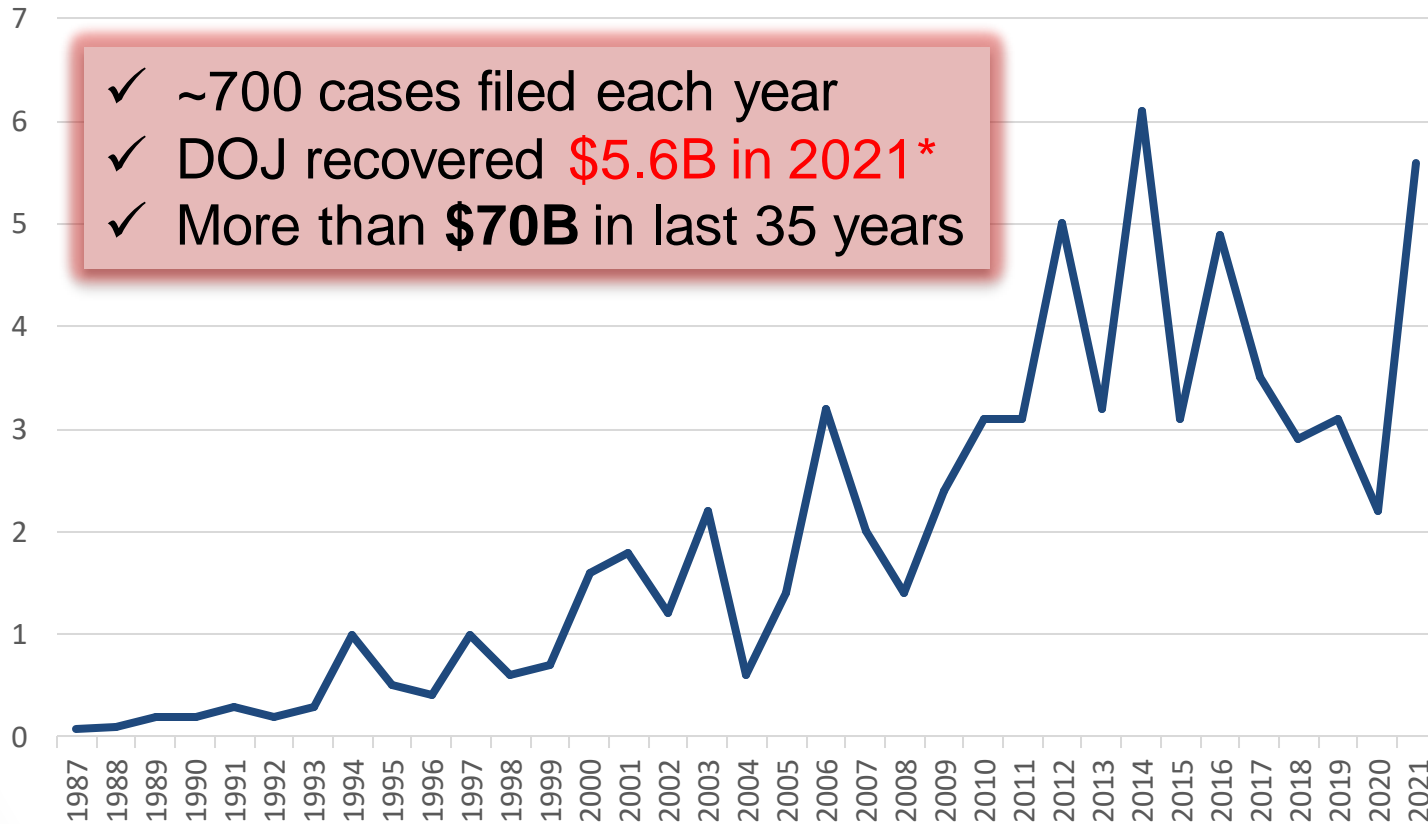


# Federal False Claims Act Basics



- Civil War era statute
  - 31 U.S.C. §§ 3729-3733
- Currently the Federal Government's primary civil fraud statute
- "*Qui Tam*" provisions permit suits to be brought by "relators" (whistleblowers) on behalf of Government
- Relators can be part of the alleged fraud
- Significant damages and penalties
- Statute of limitations is either 6 or 10 years, depending on the facts

# Federal FCA Recoveries



- ✓ ~700 cases filed each year
- ✓ DOJ recovered **\$5.6B in 2021\***
- ✓ More than **\$70B** in last 35 years

\*Second-highest year of FCA recoveries since 1986 and highest since 2014

# Qui Tam Provisions of the Federal FCA

- Federal FCA authorizes “private persons” to bring actions on behalf of the United States
- Who can be a Relator?
  - Former employees
  - Current employees
  - Competitors and competitors’ employees
  - State and local governments
  - Special interest groups
  - Some Government employees
  - Attorneys and law firms
- Relators responsible for over 80% of FCA recoveries since 2017



# Polling Question #1!



# Federal FCA: Theories of Liability

False Claim for Payment	Submission of a claim for payment that was expressly false
Fraudulent Inducement	Contractor induces the Government to enter into a transaction through false representations
False Certification	Falsely certifying compliance with a contract clause, regulation, or statute
Implied False Certification	Contractor knowingly fails to disclose noncompliance with a statutory, regulatory, or contractual requirement
False Record or Statement	Contractor makes a false statement or creates a false record to obtain payment on a false claim
Reverse False Claim	Contractor fails to return funds belonging to the Government
Conspiracy	Contractor conspires with others to violate the False Claims Act
Retaliation	Contractor retaliates against a whistleblower engaged in protected activity

# Common Examples of “False Claims”

Goods	Services	Contract Compliance
✓ Billing for goods that were never delivered	✓ Billing for services that were never provided	✓ Failing to report an overpayment
✓ Charging more than once for the same goods	✓ Billing for mischarged labor time	✓ Presenting false test or progress reports
✓ Failing to report known product defects in order to be able to continue to sell or bill the Government for the product	✓ Billing for employees who did not meet the education or experience requirements of their billed labor categories	✓ Submitting a false certification that a contractor complies with a material contract term
✓ Charging the Government for rights in technical data when the Government already has such rights	✓ Failing to obtain the necessary employee certifications	✓ Implying compliance with a material contract term

# FCA Penalties

- Government entitled to recover both penalties and damages
  - Fines/Civil penalties range from \$12,537 to \$25,076 *per claim*
  - Treble (3x) the amount of the Government's actual damages
- Example: \$1 overcharge on 100 individual invoices
  - \$300 damages
  - \$2,507,600 in penalties
  - Plus
    - Plaintiff's attorneys' fees in some cases
    - Your own attorneys' fees
    - Collateral consequences



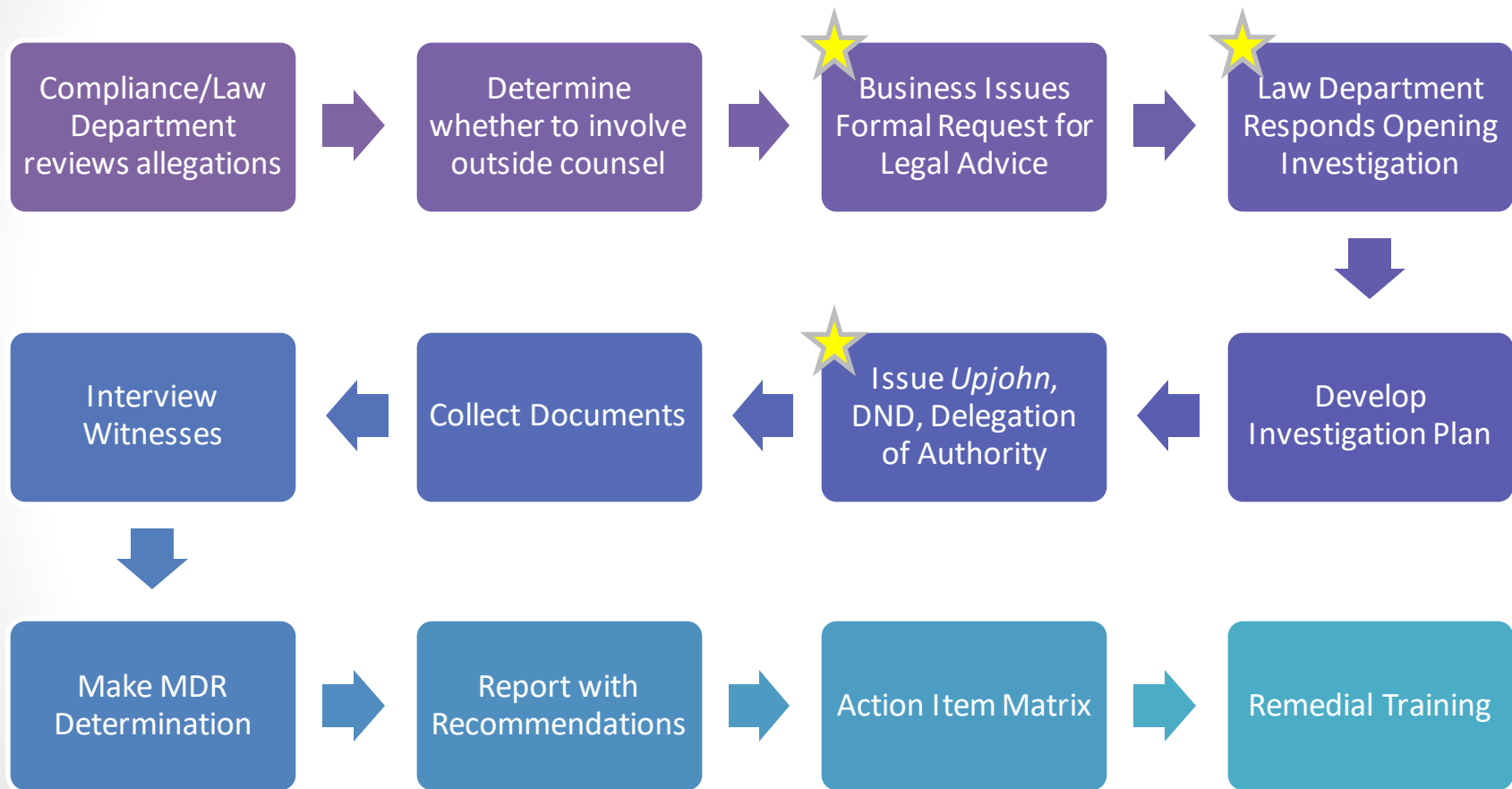


# Collateral Consequences

- Suspension or debarment (reciprocity in some states)
- Potential for criminal liability for intentional violations
  - Antikickback Statute
  - Title 18 offenses
- The Yates Memo
  - Seeks consistency in “efforts to hold to account individuals responsible for illegal corporate conduct”
- Related Employment Claims
  - False Claims Act Retaliation Claim (31 U.S.C. § 3730(h))
  - State Law Employment Claims

# Take Detailed Steps to Preserve the Privilege

# Mechanics of an Internal Investigation



# Develop an Investigation Plan

# Details of Investigation Plan

- Intake process is key
  - Triggering event should dictate your first steps (e.g., hotline call vs. subpoena)
  - First contact should give the reporter the benefit of the doubt
- Plan should be thoughtful and methodical
  - Don't ask questions first and then plan later
  - Don't randomly turn over stones
- Define the question you need to answer
  - Answer question from the perspective of an enforcement authority:  
*might the Government argue we have violated the law?*
- At conclusion, ask whether your investigation addressed the entire problem or only a symptom of a larger systemic issue
  - If you determine a broader, systemic issue may exist, then you may need to broaden your review

# Recognize Disclosure Obligations Under the MDR

# What is the Mandatory Disclosure Rule?

FAR Part 9

Suspension/Debarment  
Disclosure Rule

FAR 52.203-13(b)

FAR Disclosure Clause

FAR 52.203-13(c)

Internal Control System  
Disclosure Rule

# Cause for Suspension/Debarment

Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or subcontract thereunder, credible evidence of . . .



# The Three Reportable Categories

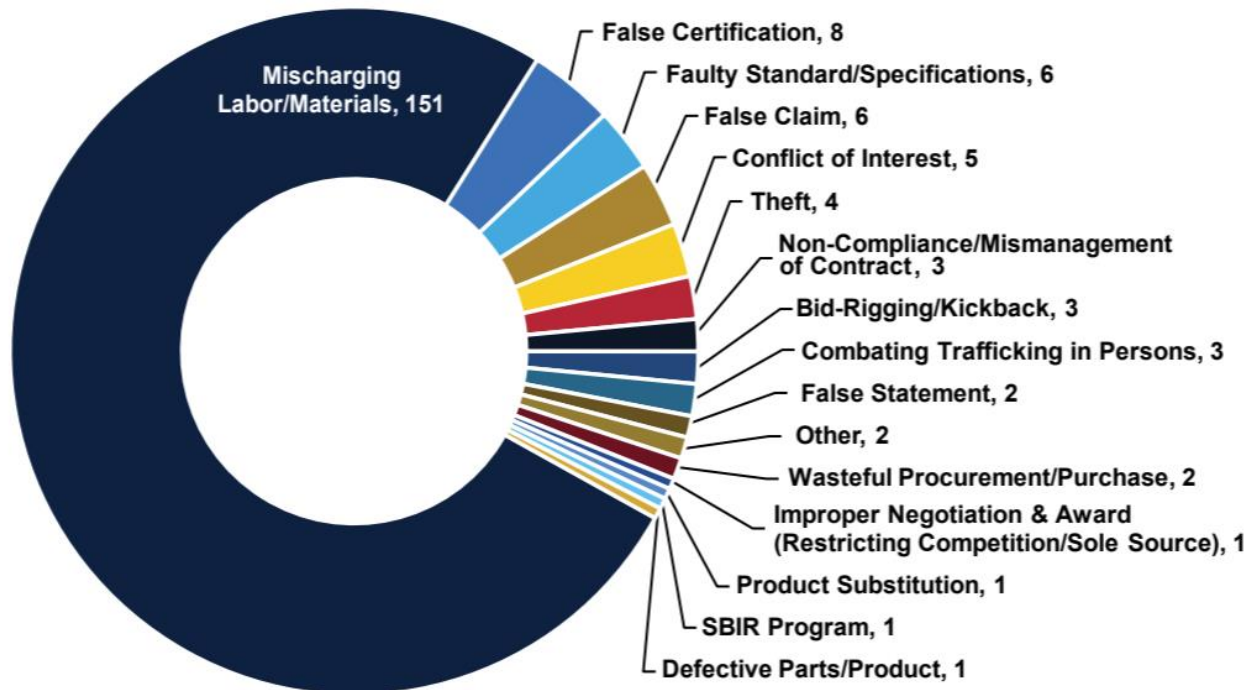
Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in FAR 32.001.

# Polling Question #2!

# DOD IG Disclosures (10/19 – 3/20)



# Best Practices for Internal MDR Reporting

- Document *Upjohn* warning given
- Summary of relevant facts and law
- Analysis of potential liability
  - May include data analysis
- Determination of disclosure obligations
- Corrective action or preventive measures taken or planned
- Risk assessment



# Best Practices for External Reporting

- Avoid characterizing disclosure or conduct
  - No 52.203-13
  - No FAR Part 9
  - No MDR
  - No FCA violation admission
- Stick to the facts
  - “The following facts have come to our attention . . . , which we are reporting to you out of an abundance of caution . . . .”
  - Not: “We have identified conduct covered by the MDR . . . .”
- Note that OIGs are wary of everything being characterized as an “overpayment”



# Best Practices for Disclosures (cont'd)

- Provide adequate details in initial disclosure
  - The nature and extent of the offense
  - The contract and CO involved
  - The individual(s) responsible for the conduct
- Be prepared to share unprivileged white papers and raw data
- Do **not** share privileged reports
- Agree upon a schedule with the agent and keep agent apprised of progress

# How much detail must I disclose?

- Preamble: “All pertinent information known by the organization.”
- Two-Part Test: Is the information provided sufficient to permit the Government to determine:
  - (1) The nature and extent of the offense; and
  - (2) The individual(s) responsible for the conduct
- Disclosure of privileged information is NOT required

# Create a Communications Plan



# Communications Plan

- Two Parts: Internal and External
  - To whom, when, and how much detail?
- Internally
  - Determine appropriate stakeholders
    - Whistleblower
    - Affected employees and day-to-day management
    - C-Suite and Board Members
  - Avoid creating whistleblowers
    - Investigation details and remedial action items
- Externally
  - Don't view the Government as a single actor – have a plan to coordinate with each affected entity (e.g., customer, agency leadership, OIG, DOJ)
  - Determine whether external requirement to report exists (e.g., SEC filings)
  - Evaluate whether public disclosure may create a defense under the FCA

# Evaluate Internal Compliance Programs Regularly

# Polling Question #3!

# Effective Internal Compliance Programs

- P.T.S.D.
  - Policies
  - Training
  - Supervision
  - Discipline
- Building a Compliant Infrastructure
  - FAR 52.203-13, Code of Ethics + Mandatory Disclosure
  - DOJ *Evaluation of Corporate Compliance Programs* Guide (2019)
- Establish internal processes to avoid creating whistleblowers
- Training!



# Questions?



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