



U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

SEP 3 2014

Ms. Danielle Brian
Executive Director
Project on Government Oversight
1100 G Street, NW, Suite 500
Washington, D.C. 20005

Dear Ms. Brian:

Thank you for your letter requesting the Attorney General to investigate “federal fund recipients using confidentiality or non-disclosure agreements that infringe” on employees’ whistleblower rights under the False Claims Act, the Federal Acquisition Regulation, and other federal whistleblower protection laws. Your letter was forwarded to me for response.

As a preliminary matter, let me say that we share your concerns about the potential of some confidentiality agreements to inhibit fraud reporting. As you know, there are a number of safeguards in place to ensure that contractors apprise employees of their rights to report fraud and that protect whistleblowers who suffer reprisals for exercising those rights. Even so, the abuse of confidentiality agreements is a concern and we will continue to evaluate whether there are additional measures we can take to address it.

Although the False Claims Act does not provide the government with a remedy against companies that illegally inhibit their employees from disclosing fraud, government attorneys can and do compel testimony from those with knowledge of fraud notwithstanding confidentiality agreements. To the extent contractors have tried to enforce such agreements to prevent employees from taking reasonable steps to uncover or disclose wrongdoing, we have argued that they are against public policy and, therefore, unenforceable. Moreover, were we to discover in the course of an investigation that a defendant was obstructing the government’s investigation, we would refer the matter for consideration of possible criminal action.

In addition, as noted in your letter, the False Claims Act provides protection for whistleblowers. Many of the *qui tam* suits we receive include claims by the relators for retaliation and seek relief, as authorized by the statute, in the form of reinstatement, twice the amount of back pay, special damages, and litigation costs and attorneys’ fees. See 31 U.S.C. § 3730(h).

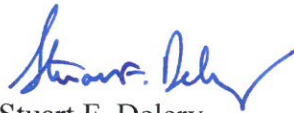
You also suggest that the Department issue guidance or propose legislation or regulatory reform. We work with our client agencies in an ongoing effort to ensure that fraud and false claims are exposed and that whistleblowers are aware of their rights to report fraud free of

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retaliation. For example, the Department worked closely with the Department of Defense and other agencies to put into place the Federal Acquisition Regulation's mandatory disclosure rule that requires contractors to report to the inspector general of the cognizant agency any credible evidence of fraud or false claims, whether reported internally by their employees or otherwise uncovered. *See* 48 C.F.R. § 52.203-13(b)(3). Failure to report such conduct in a timely manner may result in suspension or debarment. 48 C.F.R. § 3.1003(a)(2). The Federal Acquisition Regulation also requires contractors to have a code of ethics in place and to inform their employees of their whistleblower rights, *see, e.g.*, 48 C.F.R. § 52.203-17, including information on how to report fraud to the government, *see, e.g.*, 48 C.F.R. § 52.203-14. The Department will continue to work with its client agencies to ensure that these requirements are followed and, when they are not, pursue appropriate action.

I hope this information is helpful. Please do not hesitate to contact the Department of Justice if we may be of further assistance with future matters.

Sincerely,



Stuart F. Delery
Assistant Attorney General