



Credibility: Evaluating Allegations and Reporting Requirements for Nonprofit Federal Grantees

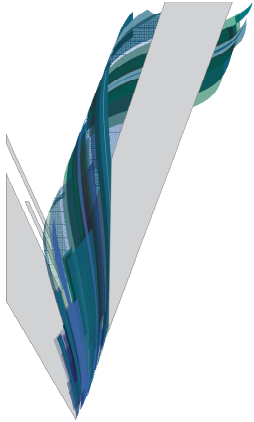
November 19, 2015

Speakers

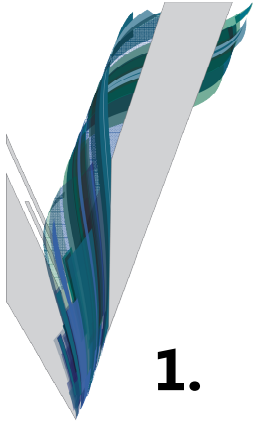
Jeffrey S. Tenenbaum, Esq.,
Partner and Chair of the Nonprofit Organizations Practice, Venable LLP

Dismas Locaria, Esq., Partner, Venable LLP

Doreen Martin, Esq., Partner, Venable LLP



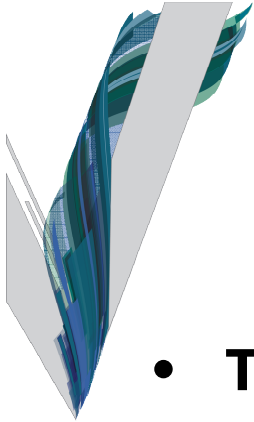
The Federal Government's Reporting Requirements



The Federal Government's Reporting Requirements

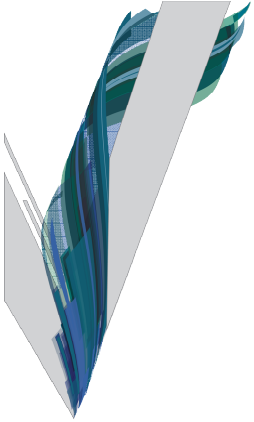
1. The Federal Acquisition Regulation

- Specifically applicable to federal contractors
- Requires the “timely” disclosure of “credible evidence” when a contractor determines that it or its subcontractor(s) have:
 - Violated a federal criminal law involving fraud, conflicts of interest, bribery, or gratuity violations found in Title 18 of the U.S. Code;
 - Violated the civil False Claims Act; or
 - Caused the federal government to make a “significant overpayment”*
- “Timely” in conjunction with “credible evidence” implies that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose
 - Not a complex investigation
 - “Reasonable steps”



The Federal Government's Reporting Requirements (*cont'd*)

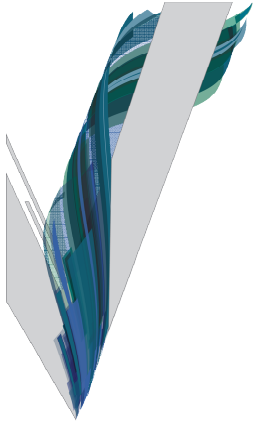
- **The Uniform Guidance**
 - Specifically applicable to non-federal recipients of grants and cooperative agreements
 - Requires organizations to disclose “in a timely manner” and in writing “all violations of federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the federal award.”
 - “Timely manner” – no explanatory language
- **The FAR v. The Uniform Guidance**
 - The FAR is broader
 - The FAR provides more guidance
- **Practical Implications** – Follow the standards of the FAR
- **Other Reporting Obligations?**
 - Review your funding agreements



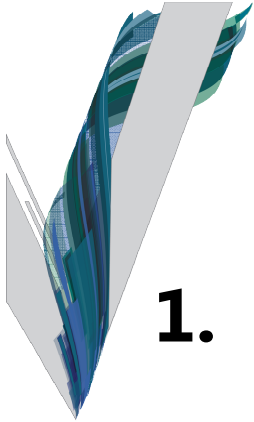
Credible: Worthy of belief; believable; trustworthy
—*Black's Law Dictionary*

Credible Evidence:

Something greater than “reasonable grounds”



How Do You Determine Whether an Allegation Is Credible?



Evaluating Allegations

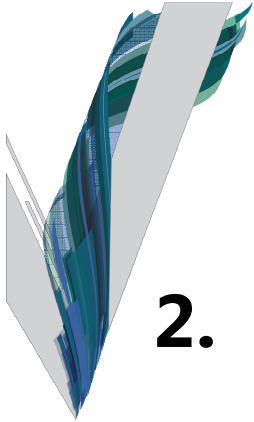
1. Consider the Source of Information

A vast majority of allegations come from Internal Sources:

- Employees
- Management or board of directors
- Human resources or legal department
- Internal controls/external auditors

Allegations can be made by External Sources:

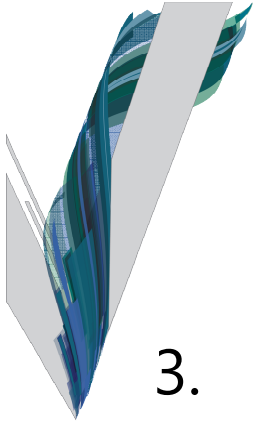
- Media, social media, local newspaper article
- Third party – entity in the same line of business
- Former employees
- Requests from government agencies



Evaluating Allegations

2. Identify the Real Issue or Violation of Law or Policy

- Allegations are not always clearly articulated and often lack detail
- Dissect and aggregate the points being made to determine if the suspected activity would constitute a violation of the organization's policy and/or code of conduct, industry standards, or federal or state law



Evaluating Allegations

3. Determine If Allegation Is Plausible

- Does the allegation make sense?
- Is the allegation believable at face value?
- Is the allegation reasonable, detailed, and consistent with known facts about the business?

High level of plausibility

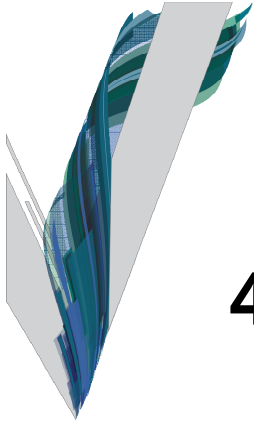
Allegation: An employee was bribed with an all-expenses-paid trip to the Caribbean in exchange for execution of a contract.

Known facts: A contract, in fact, was recently entered into with third party and employee just returned from two-week vacation in St. Barts.

Low level of plausibility

Allegation: Employee received kickback from vendor.

Known facts: Internal audit just completed a clean vendor audit of that vendor or company ceased doing business with the vendor.



Evaluating Allegations

4. Gather Corroborating Evidence:

Internal Documents:

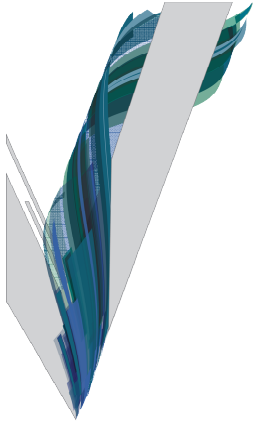
- Phone records
- Computer files
- E-mails
- Financial records
- Security cameras
- Personnel files
- IT system assess records

External Documents:

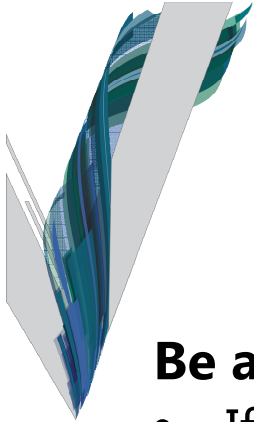
- Public Records
- Customer/vendor information
- Media reports
- Information held by third parties

Interviews:

- Complainant
- The accused
- Possible co-conspirators
- Other witnesses



How Do You Assess the Credibility of a Witness?



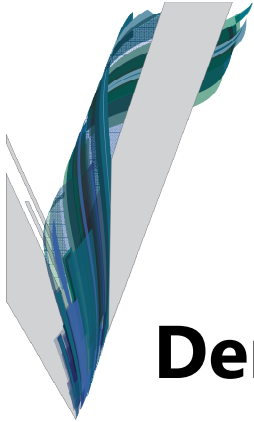
Witness Interviews – Assessing Credibility

Be as Prepared as Possible:

- If complaint comes in through a live hotline, intake should gather as much information as possible, because there are no guarantees that you will get to speak to this witness again:
 - When and where did transaction/occurrence/conversation take place?
 - Who was present – did witness participate, or did witness learn about this from another person?
 - Describe the precise details of the transaction/occurrence/conversation.
 - Background or context of the transactions/occurrence/conversations.
 - Ask for corroboration – other witnesses, documentary support.

Bias and Motive:

- Is the witness biased or impartial?
- Does the witness have a motive to lie or exaggerate?
- Does the witness have a special loyalty or a grudge against anyone involved?



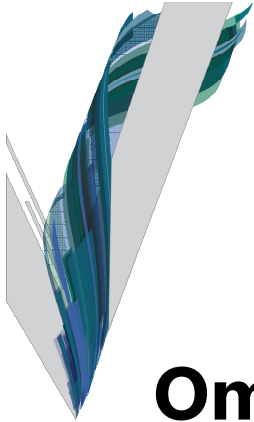
Witness Interviews – Assessing Credibility

Demeanor:

- How did witness act during the interview?
- Were any of the reactions unusual, based on their typical demeanor or behavior?
- Judging demeanor is difficult for even the most experienced investigators and should not be solely relied on in making a determination of credibility.

Prior Incidents:

- Has the complaining witness made unfounded complaints in the past?
- Has the accused individual ever been the subject of a complaint in the past?



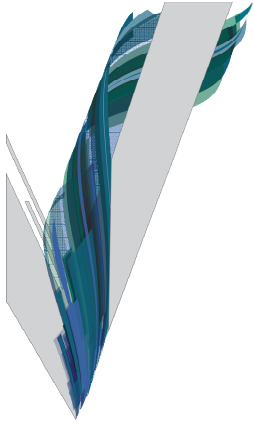
Witness Interviews – Assessing Credibility

Omissions/Contradictions:

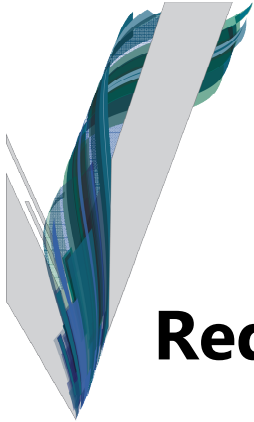
- Did any witness leave out important information?
- Did witness admit an important detail only after being confronted with it?
- Did witnesses contradict themselves during the interview?

Corroboration:

- Did witness provide any evidence to corroborate the allegation?
- Does the evidence support the allegation?



What Do You Do If You Discover Credible Evidence of a Reportable Issue?



Making a Disclosure

Requirements:

- Credible evidence
- Timeliness
- In writing
- Contracting officer and agency's inspector general
- Funding agreement-specific requirements

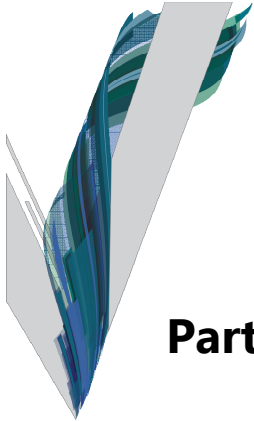
Practical Considerations:

- Do not follow government form
- Multi-disclosure approach
- Minimalistic v. completeness
- Improvements and enhancements
- Passive v. proactive
- Privilege issues



Resolution?

- **Varying outcomes to a disclosure**
 - No action
 - Many disclosures result in no action
 - Can seek a letter of no action, but not always provided
 - Agency review and resolution
 - If overcharges are at issue, likely required to repay the overcharged amount
 - May necessitate further assurances to the agency
 - Could result in contractual actions (e.g., termination of agreement)
 - Referral for further action
 - Civil enforcement (e.g., False Claims Act)
 - Criminal enforcement
 - Administrative action (e.g., suspension and/or debarment)



Questions?

**Jeffrey S. Tenenbaum, Esq.,
Partner and Chair of the Nonprofit Organizations Practice, Venable LLP**

JSTenenbaum@Venable.com

t 202.344.8138

Dismas Locaria, Esq., Partner, Venable LLP

DLocaria@Venable.com

t 202.344.8013

Doreen Martin, Esq., Partner, Venable LLP

DSMartin@Venable.com

t 212.983.1179

To view an index of Venable's articles and presentations or upcoming programs on nonprofit legal topics, see www.Venable.com/nonprofits/publications or www.Venable.com/nonprofits/events.

To view recordings of Venable's nonprofit programs on our YouTube channel, see www.YouTube.com/VenableNonprofits or www.Venable.com/nonprofits/recordings.

Follow [@NonprofitLaw](https://twitter.com/NonprofitLaw) on Twitter for timely posts with nonprofit legal articles, alerts, upcoming and recorded speaking presentations, and relevant nonprofit news and commentary.