

**Hotline Call to Press Release:
Perspectives on Investigations and
Disclosures**

SCCE Compliance and Ethics Institute
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The Fact Pattern

United Pickle Supply (UPS) is a global distributor of pickled cucumbers, with pickling factories all over the world. As part of its commitment to compliance, UPS maintains a global Help Line, which allows employees to provide anonymous information to the company about its operations, and compliance with global pickle laws. One of UPS's largest customers of pickles is the US Department of Defense, which serves UPS pickles in all of its canteens around the world.

On October 15, 2012, an anonymous caller from UPS's pickle factory in Beijing, China calls the UPS Help Line, and makes a report.

The caller complains about his manager, Mr. Vlastic, and claims that the manager is telling employees to label some of the pickle packages for sale to the US Department of Defense without the "Made in China" reference on the container... The caller believes, rightly, that the US Department of Defense requires US-made pickles under the Champion US-made Key Edibles (CUKE) Act of 1934.

In addition, the caller believed that Mr. Vlastic was running a small pickle business on the side (Gherkin World) and is using UPS resources to offset his costs. The caller claims that he's seen emails from Mr. Vlastic to UPS customers, claiming to undercut UPS's prices if those customers start buying pickles from Gherkin World.

Finally, the caller stated that the manager was bribing Chinese customs officials to ensure that pickles from UPS would pass easily through inspections.

The contents of the Help Line call were passed to the UPS Corporate Legal Department to investigate.

Perspectives from In-House

Seth Bruckner

First Steps
Initiate and "Protect" the Investigation

- Who will conduct the investigation?
 - Internal (Audit, Compliance, Legal)
 - External (Law Firm, Accounting Firm)
- Investigation Memo
 - Confidential Investigation
 - Directed by Legal Department
 - Documents properly marked (Privileged/Work Product)



Who is On the Team? What are the Relevant Documents?
Preserve the Data

- Paper Files
- Electronic Files
 - Emails
 - Hard Drive Documents
- Retention Schedule
- Location
 - Data Privacy Issues
 - Document Review Issues



Substantive Investigation Concerns

Impact to the Company:

- Regulatory Impacts
 - CUKE Act (Buy American)
 - FCPA & UK Bribery Act (Bribes)
- Self-dealing
 - Gherkin World Business

Disclosure Considerations FCPA

- Foreign Corrupt Practices Act (FCPA) criminalizes improper payments to foreign government officials. Enforced by DOJ and SEC.
- Dodd-Frank Act provides new whistleblower incentives to employees who report SEC violations, including FCPA.
 - Bounty can be substantial
 - Relates to "new information"
 - Depending upon the level of concern, it may be beneficial to disclose
- Employees should be aware of Company Policy relating to Duty to Disclose
- Review internal disclosure obligations to Audit Committee, Board of Directors and possibly shareholders



Maintaining Culture of Compliance No Retaliation

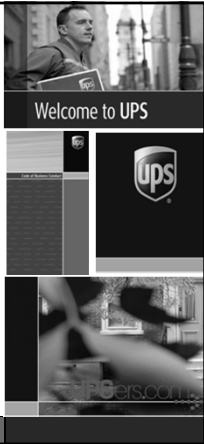
- Violations should be reported without fear of retribution
- Reporting violations will not result in disciplinary action, loss of a job, or retaliation
- Employees should not be discouraged from using any of the avenues available
- Zero tolerance – retaliation is subject to discipline, including dismissal




Engage Outside Resources as Necessary

While maintaining a robust and capable internal investigation program is critical for ensuring a Company's commitment to compliance, when findings indicate a systemic or material concern, outside resources should be engaged.

Often, involving a third-party can bring credibility to an investigation or dealings with regulators.






Perspectives from Outside Counsel

Jeff Belkin


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Receiving the Call

- Issue Spotting
 - CUKE Act remedies (criminal labeling, civil, or both?)
 - FCPA
 - False Claims Act
 - Civil self-dealing claims
- Identifying parties
 - Government Agencies
 - DOD
 - Customs
 - Third Party Stakeholders
 - Customers: DOD CO
 - Employees: Hotline Caller
 - Competitors / Claimants: Mr. Vlasic, Gherkin World


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Receiving the Call


- Identify Obligations
 - Corporate Policies
 - Investigation, Employer actions
 - Disclosure obligations
 - CCBEC
 - FAR, SOX
- Nature of Review or Investigation to date
 - Who involved
 - Compliance, Legal, HR, Mgmt
 - Documents only, or interviews?
 - Contact with outside
- **Congratulations! You are Pregnant!**

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Government Procurement

- Contractor's Code of Business Ethics and Conduct
 - Have a compliance plan that meets requirements
 - Execute and audit performance on that plan
 - Mandatory disclosure



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Business Ethics

If value of the contract is expected to exceed \$5,000,000 and the performance period is 120 days or more, then -

- Must have written code of business ethics and conduct;
- Must devise business ethics awareness and compliance program and internal control system; and
- Subject to mandatory disclosures.

(FAR 52.203-13 Contractor Code of Business Ethics and Conduct)

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Mandatory Disclosures

- The contractor must timely disclose in writing to the agency OIG and Contracting Officer any credible evidence that a principal, employee, agent, or subcontractor of the Contractor has, in connection with the contract, committed:
 - 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
 - A violation of the civil False Claims Act.

(FAR 52.203-13(b)(3)(i) Contractor Code of Business Ethics and Conduct)
- **Suspension & Debarment**
 - Knowing failure to timely disclose credible evidence of any of the above violations, or a **significant overpayment**, is a cause for suspension and/or debarment until 3 years after final payment on contract


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Common Questions Regarding Disclosure

- What “fraud” crimes are included?
- When is “timely”?
- What is “credible evidence”?
- Who is a “principal”?
- What is an overpayment and when is it “significant”?
- When is it mandatory and when voluntary?
- What is an “abundance of caution” disclosure?
- What is an “early notification” disclosure?
- What do I have to disclose, and what remains protected?

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Liability Under the FCA

Types of Cases

- Eligibility for procurement contract (WOSB).
- False pricing (GSA Schedule Basis of Award).
- False quality / testing.
- Product substitution.
- Truth in Negotiations Act
- Buy American Act / Trade Agreements Act

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Liability Under the FCA

The FCA provides for the following damages and penalties:

- Triple damages; plus
- A civil penalty of \$5,500 to \$11,000 for each false claim.
- Calculation of damages.
 - Restitution.
 - Consequential damages.
 - Counting penalties.


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Process of the Investigation

- Establish Plan and Outline Objectives
 - Scope of inquiry
 - CUKE Act? FCPA? Claim against Gherkin?
 - Timing obligations
 - CCBEC “timely”
 - Freeze / seize bad pickles
- Conduct Review
 - Review Documents
 - How broad a net (timeliness versus comprehensiveness)?
 - Interview Key Current Employees
 - Targeted interviews, Internal only
 - Upjohn warning
 - Presence or absence of in-house counsel


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Process of the Investigation

- Summarize Findings and Make Recommendations
 - What is the right question?
 - Is there “credible evidence”?
 - Oral or written?
 - Discuss before writing to ensure facts are accurate
 - To in-house counsel or others?
 - Include recommendations for future risk mitigation
 - Address disclosure obligations

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Mandatory Disclosure

- Prepare disclosure that meets obligations
 - Be prepared to reveal all facts
 - Be prepared to consider producing analyses
 - Offer remedy if appropriate along with disclosure
 - Know to whom disclosure must be made (IG, CO)
 - Know who will be involved (DOJ)
 - Know who might be involved (Relator counsel, Congressional oversight, other customers/third parties)
 - Understand implications
 - 10K obligations
 - Other related investigations or stakeholders
- Make disclosure if appropriate, and cooperate

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Form of Disclosure



- What do I have to disclose, and what remains protected?
 - OIG web-based forms have different questions, content, implications from a response
 - DOD "Disclosure Program" versus DOT's "Mandatory Disclosure" form
 - Commonalities provide a clue

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Forms of Disclosure – DOT OIG



Incident

Initial Incident Date: Apr 28 2011

Is the incident on-going?: Yes No

Date Contractor learned of potential violation: Apr 28 2011

Estimated Dollar Amount of Loss to the Government: \$1,000,000.00

Impact on which USDOT Operating Administration(s):

- FAA - Federal Aviation Administration
- FHWA - Federal Highway Administration
- FMCSA - Federal Motor Carrier Safety Administration
- FRA - Federal Railroad Administration
- FTA - Federal Transit Administration


The incident includes the following:

- Violation of Criminal Law
- Violation of the Civil False Claims Act
- Significant Overpayment

Check all that apply.

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Forms of Disclosure – DOT OIG



Has an investigation been conducted? (More than Preliminary Inquiry): Yes No

If yes, please describe the scope of the investigation:

Employees interviewed, positions, records reviewed, etc.):

Is the company willing to provide a copy of the investigative report?: Yes No


Measures taken or planned to prevent recurrence:

Details

Provide a full description of the nature of the violation(s) being disclosed, including the period during which the violation(s) occurred, dates, locations, how the matter was discovered, potential addresses, names of individuals involved, an explanation of their roles in the allegations and the relevant periods of their employment, and any corrective action taken or planned by the company. Please be sure to provide the business email addresses and business phone numbers for all individuals and/or potential witnesses involved.

Description:

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Forms of Disclosure – GSA OIG

Incident

Estimated Amount of Loss:

Loss Description:

Initial Incident Date: 01 / 01 /


Is the incident ongoing?
 Yes No

Date contractor learned of potential violation: 01 / 01 /

Comments

Please provide a complete description of the facts and circumstances surrounding the reported activities, including the evidence forming the basis of this report, identities of the individuals involved, dates, location, how the matter was discovered, potential witnesses and their involvement and any corrective action taken by the company.
NOTE: Please provide only the names, business email contact, and business phone for any individuals involved and/or potential witnesses.


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Forms of Disclosure – VA OIG

Incident

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Form of Disclosure

- What do I have to disclose, and what remains protected?
 - Facts, not conclusions or characterizations
 - What happened and who involved
 - When discovered
 - What corrections made
 - Records, not interview or legal memoranda
 - Assist with investigation – make fact sources available
 - Does not require waiver of attorney-client privilege
 - Ensure internal investigation handled properly, with warnings to employees about privileges

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Perspectives from the Government Attorney

Randy Chartash

Sources of Cases

- Disgruntled Employee
- Newspaper Reports
- Bankruptcy Filings
- Class Actions
- Victim Complaints
- Company Self-Referral
- Industry Working Group
- Whistleblowers
- Data-Mining (SARS etc.)

Unclassified

Investigative Techniques

- GJ Subpoenas
- Victim Documents
- Tax Records
- SAR (limitations)
- Whistleblower
- Cooperating Co-Conspirator

Unclassified

More Aggressive Techniques

- Search Warrants
- Wiretaps
- Undercover Investigations
- Cooperating Co-Defendants
- Sharing Grand Jury Information (3322)

Unclassified

Questions?
