

Client Alert

December 2, 2008

The New "Mandatory Disclosure Rule" Raises the Stakes for Government Contractors and Subcontractors**Areas of Interest****Government Contracts****United States**

On December 12, 2008, the controversial "Mandatory Disclosure Rule" will become effective — a year after its proposed promulgation. (FAR Case 2007-006, *Contractor Business Ethics Compliance Program and Disclosure Requirements*.)

The final rule is a result of the May 23, 2007, request to the Office of Federal Procurement Policy from the Department of Justice seeking a mandatory disclosure requirement for government contractors and the *Close the Contractor Fraud Loophole Act, Public Law 110-252, Title VI Chapter 1* (the Act). The Act extends coverage of the mandatory disclosure requirements to both commercial item contracts and contracts performed entirely overseas.

The final rule amends the Federal Acquisition Regulation (FAR) to establish mandatory disclosure requirements for certain violations of federal criminal law and also for violations of the civil False Claims Act for federal government contracts and subcontracts in an amount greater than \$5 million and more than 120 days in duration. The rule requires a contractor or subcontractor to make a disclosure if it has "credible evidence" of a violation. The term "credible evidence" is not defined. In addition, the final rule requires government contractors to establish a business ethics awareness and compliance program, and it mandates the minimum requirements of an internal control system.

However, although the new mandatory disclosure requirements apply to commercial item contracts and to small businesses, the rule's requirements for a business ethics awareness and compliance program, and an internal control system do not apply to commercial item contracts and small businesses.

Significantly, the rule also requires federal prime contractors to flow down the mandatory disclosure requirements to subcontracts with the above value and duration levels, including commercial item subcontracts. Companies that normally do not think of themselves as federal contractors may, nevertheless, be required to comply with this requirement if they have even a single covered subcontract.

The rule adds to the potential causes for suspension and debarment the failure to timely disclose potential violations of the applicable federal criminal law and potential violations of the civil False Claims Act, as well as significant overpayments. In this regard the rule is retroactive as this new "cause" for suspension and debarment applies to the knowing failure to report under all contracts, including current contracts entered into prior to the effective date of the rule and until three years after final payment. The final rule does not define "timely" or "significant overpayment." The lack of clarity regarding these key terms imposes additional risk on contractors.

Now more than ever, the key to successful contract performance will hinge on effective contractor compliance programs. Firms with government contracts or subcontracts will need to pay particular attention to ensuring that they have robust business ethics and compliance programs, and internal control systems. In particular, ethics training for employees performing government contracts will be critical to

the success of any business ethics and compliance program or internal control system.

[Get a copy of the final rule.](#)

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