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REPORT

Contractor Accountability

The FAR mandatory disclosure rule: Emerging practices and recurring issues

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Introduction. The Federal Acquisition Regulation Mandatory Disclosure Rule (the rule), which went into effect December 12, 2008, established a new and demanding compliance obligation for government contractors — to ''timely'' report ''credible evidence'' of violations of the civil False Claims Act and violations of federal criminal law involving fraud, conflict of interest, bribery, or gratuity laws under Title 18 of the United States Code.[1] At the time the rule was promulgated, many commentators feared that this reporting obligation, characterized by the FAR councils as a ''sea change'' from existing law,[2] would swamp both contractors and the government with investigations and reports. In the second year of the rule's existence, contractors' experiences in implementing the rule have led to some common practices among contractors, and some informal, but practical, advice from government representatives. Nonetheless, there remain a number of areas of uncertainty in interpreting the rule that continue to present contractors with considerable risk.

Summary of the Rule's Requirements. The Mandatory Disclosure Rule, published in the Federal Register on November 12, 2008, arose from FAR case 2007-006, entitled the ''Contractor Business Ethics Compliance Program and Disclosure Requirements.''[3] This ''program'' is set forth in four sections of the FAR,[4] and includes, *inter alia*, the following requirements and consequences:

- For contracts awarded after Dec. 12, 2008, all contractors, even commercial item contractors and small businesses, must have a written code of business ethics and conduct. Contractors must make a copy of the code available to each employee engaged in contract performance; exercise ''due diligence'' to prevent

[1] *See* 73 Fed. Reg. 67,064 – 67,093 (Nov. 12, 2008), *available at* http://www.pubklaw.com/facs/fac2005-28.pdf.

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[2] *Id.* at 67,069. The ''FAR councils'' are the Civilian Agency Acquisition Council and the Defense Acquisition Council.

[3] *Id.* at 67,064.

[4] FAR 3.1003 (Requirements); FAR 9.406-2 (Causes for Debarment); FAR 9.407-2 (Causes for Suspension); and FAR 52.203-13 (Contractor Code of Business Ethics and Conduct).

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and detect criminal conduct; and ''promote an organizational culture that encourages'' ethical conduct and compliance with the law.

■ For contracts and subcontracts awarded after Dec. 12, 2008, with a contract value that exceeds $5M and has a period of performance of 120 days or more, contractors must implement an ''internal control system'' that, *inter alia,* assigns compliance program responsibilities at a sufficiently high level and with sufficient resources to ''ensure effectiveness'' of the program. The internal control system must provide for periodic review of company business practices and procedures, and include a method for periodic evaluation of the effectiveness of the system.

■ A federal contractor or subcontractor must make a ''timely'' disclosure to the government, in writing, whenever there is ''credible evidence'' of (1) any violation of the civil False Claims Act, 31 U.S.C. § § 3729-3733, or (2) any violation of Title 18 of the United States Code involving fraud, conflict of interest, bribery or the gratuity laws (''covered conduct'' or ''violation''), in connection with the award, performance, or closeout of a government contract or subcontract. Contactors are required to provide ''full cooperation'' to ''any government agencies responsible for'' audits, investigations, or corrective actions.''

■ The rule provides for suspension or debarment for a ''knowing failure by a principal'' of a government contractor to timely disclose credible evidence of an FCA violation, covered conduct under Title 18, or a ''significant overpayment'' under a government contract or subcontract. This requirement applies from the effective date of the rule, Dec. 12, 2008, ''until three years after final payment'' under the contract. The suspension and debarment provisions apply to contractors regardless of the size of the contract or company, and effectively requires contractors to report violations that occurred prior to implementation of the rule.[5]

Recurring Issues and Open Questions.

1. What Constitutes 'Credible Evidence?' The phrase ''credible evidence of a violation'' is not defined in the rule, since the FAR councils recognized that the circumstances surrounding allegations of wrongdoing vary widely. The Preamble to the rule, published in the *Federal Register*,[6] states that the term ''credible evidence'' is intended to be a narrower standard than ''reasonable grounds to believe:''[7]

> The Councils have replaced ''reasonable grounds to believe'' with ''credible evidence.'' . . . This term indicates a higher standard, implying 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 to the government.
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> This does not impose upon the contractor an obligation to carry out a complex investigation, but only to take reasonable steps that the contractor considers sufficient to determine that the evidence is credible.[8]

The Preamble also states that the contractor is not expected to report a ''potential'' violation, unless there is ''credible'' evidence that a violation in fact has occurred.[9] The credibility of the complaining witness itself does not determine the existence of credible evidence, nor does the existence of a *qui tam* action alone create credible evidence.[10]

While some commentators have noted that the phrase ''credible evidence'' is defined in other statutes or regulations, there is risk in relying on case law definitions or fact patterns from other contexts when deciding whether the facts disclosed by an investigation reach the threshold of ''credible'' evidence under the Mandatory Disclosure Rule. For example, in *Safeco Ins. Co. v. Burr*,[11] a case brought under the Fair Credit Reporting Act (FCRA), the Supreme Court resolved a long-standing interpretation issue regarding ''reckless disregard,'' an element of statutory liability derived from common law. The Court found that a company is liable under the FCRA for reckless disregard of a statute or regulation only if the company ran ''a risk of violating the law substantially greater than the risk associated with a reading [of the statute or regulation] that was merely careless.''[12] Since ''reckless disregard'' is used in the FCA in an identical context, commentators expected that courts would adopt the *Safeco* test in FCA cases. To date, however, district courts presented with the issue have reached differing conclusions as to whether the *Safeco* test should be extended to cases under the FCA.[13] The lesson *Safeco* teaches is that until the Mandatory Disclosure Rule itself is the subject of judicial interpretation, or further guidance emerges as to the government's practice of interpreting ''credible evidence,'' contractors run a practical risk in relying on definitions of that term from other sources. There generally is cold comfort in winning a legal battle after years of costly litigation.

''Credibility'' of evidence is an inherently judgmental standard. ''Credible evidence'' under the Mandatory Disclosure Rule lies somewhere along the spectrum between ''reasonable belief'' and the FCA liability standard of ''preponderance of the evidence.'' Even after the contractor has conducted an investigation and/or analysis commensurate with the gravity of the allegations and the character of the evidence, there often will be a gray zone around any determination of ''credibility.''

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[5] There are many more details and nuances to the rule than can be discussed in this article. Contractors who are setting up a compliance system, or faced with a reporting decision, or should seek guidance from inside or outside counsel.

[6] *See generally* 73 Fed. Reg. at 67,064 – 67,090.

[7] 73 Fed. Reg. at 67,073.

[8] *Id.* at 67,074.

[9] *Id.* at 67,075.

[10] *Id.* at 67,081. Note that the Preamble also states that the government's decision not to intervene in a *qui tam* action does not negate the existence of credible evidence of a violation. *Id.* This statement begs the question of when a Mandatory Disclosure Rule reporting obligation, and the resulting requirement for ''full cooperation'' with the government investigation, *ends.*

[11] 551 U.S. 47 (2007)

[12] *Id.* at 69, 70 n.20.

[13] *Compare, e.g., United States ex rel. K&R Ltd. P'ship v. Massachusetts Hous. Fin. Agency,* 530 F.3d 980, 983 (D.C. Cir. 2008) and *United States v. Sodexho, Inc.*, No. 03-6003, 2009 U.S. Dist. LEXIS 51469, at *53-*54 (E.D. Penn. Mar. 6, 2009) (applying *Safeco's* test for reckless disregard to FCA action), *with United States ex rel. Fry v. Health Alliance,* No. 1:03-CV-00167, 2009 U.S. Dist. LEXIS 14963, *14 (S.D. Ohio Feb. 26, 2009) (refusing to certify *Safeco* issue for interlocutory appeal in FCA case).

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2. What Conduct is Reportable Under the Rule? The Mandatory Disclosure Rule defines reportable conduct in three sections of the FAR:

- FAR 3.1004(a) requires that new contracts awarded after December 12, 2008 contain the ''Contractor Code of Business Ethics and Conduct'' clause, set forth at FAR 52.203-13.
- FAR 52.203-13(b)(3)(i) requires the contractor to disclose credible evidence that a ''principal, employee, agent, or subcontractor'' has 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 9.406-2 (debarment) and FAR 9.407-2 (suspension) require a ''principal''[14] to report of the same conduct covered in FAR 52.203-13, as well as any ''significant overpayment.''

a. Violations of the Civil False Claims Act

Determining whether there is credible evidence of a ''violation'' of the civil False Claims Act is a particular risk for contractors. FCA case law is often inconsistent, trial outcomes are unpredictable, and meritless actions abound. As one commentator on the Mandatory Disclosure Rule tactfully noted, ''the contractor and the government are not always aligned on whether a violation of the civil FCA has occurred.''[15]

The Preamble states that ''genuine disputes'' over the appropriate application of the FCA may be considered in determining whether the contractor knowingly failed to make a disclosure. Following that comment, however, the Councils stated,

The Councils do not agree that the requirements of the civil FCA cannot reasonably be ascertained and understood by contractors, and expect that contractors doing business with the government are taking appropriate steps to ensure their compliance with that statute and all other applicable laws. The most recent amendments to the statute were made in 1986, and a significant body of case law interpreting the statute . . . has developed in that time period.[16]

Since that comment was made, the FCA has been amended twice, first through the Fraud Enforcement and Recovery Act of 2009 (FERA)[17] and then through the Patient Protection and Affordability Act (Patient Protection Act).[18] These amendments clarified a few provisions of the FCA, but muddled others. For example, under the 1986 version of the FCA, most courts judicially implied a ''materiality'' predicate to liability, but circuit courts were split on the appropriate test for materiality.[19] FERA expressly adopted materiality as an element of liability for at least some categories of FCA liability, and defined ''material'' conduct as a claim or statement ''having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.''[20] However, FERA does not adopt materiality as an express requirement for liability for *all* categories of FCA misconduct, and so there is uncertainty as to whether all categories of conduct under the FCA still must be material in order to be actionable.[21]

Given this and other significant changes to the FCA made by the FERA amendments and the Patient Protection Act, it is reasonable to expect that the FAR councils' category of ''genuine disputes'' over the FCA's liability provisions will broaden.[22] As a matter of practical risk mitigation, though, contractors often are choosing to err on the side of caution and report conduct that may not ultimately be found to fall within the revised FCA's boundaries.

b. ''Significant'' Overpayments

There are several FAR clauses requiring contractors to identify and return overpayments by the government. The Prompt Payment clause, for example, requires contractors to remit overpayments to the government's payment office and provide a description of the circumstances of the overpayment to the contracting officer.[23] When an overpayment reaches the threshold of a ''significant'' overpayment, however, it becomes a reportable event under the suspension and debarment provisions of the Mandatory Disclosure Rule.[24]

The FAR councils provided a limited explanation in the Preamble as to when an overpayment becomes ''significant:''

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[14] FAR 52.203-13(b)(3)(i)(A) – (B). A ''principal'' is defined in FAR 52.203-13(a) as ''an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity . . . .'' ''Principal'' is not defined in the suspension and debarment provisions of the rule, but it is clear from the context that it is the contractor which must make the disclosure. It is less clear as to whether the contractor has failed to make a required disclosure if the ''credible evidence'' reaches only a level of management not clearly within the definition of ''principal,'' notwithstanding a sound internal ethics compliance system.

[15] 73 Fed. Reg. at 67,081.

[16] *Id*.

[17] Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[18] Pub. L. No.111-148, 124 Stat. 119 (2010). Notwithstanding the name of the Patient Protection Act, the amendments to the FCA made therein apply to all ''claims'' under the FCA, not just claims relating to health care issues.

[19] *Compare*, *e.g.*, *United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008)(''natural tendency'' test) *with Costner v. URS Consultants*, 153 F.3d 667, 677 (8th Cir. 1998) (''outcome materiality'' test).

[20] 31 U.S.C. § 3729(b)(4).

[21] For example, 31 U.S.C. § 3729(a)(1)(B) limits ''false statement'' liability to any person who ''knowingly makes . . . a false record or statement *material* to a false or fraudulent claim,'' while Section 3729(a)(1)(A), which governs liability for ''false claims for payment,'' contains no express reference to materiality. (Emphasis added.) Similarly, 31 U.S.C. § 3729(a)(1)(G) imposes liability on any ''person'' who ''knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government . . . .'' (Emphasis added.) The word ''material'' appears in the first category of misconduct under subsection (G), but not in the second or third categories.

[22] Title 31 of the United States Code contains the 1986 version of the civil False Claims Act at 31 U.S.C. § § 3729-3733. Until Title 31 is revised to include the FERA and Patient Protection Act amendments, contractors may need to look at three difference sources for the current FCA provisions to determine whether conduct is reportable: the U.S. Code, FERA, and the Patient Protection Act.

[23] FAR 52.232-25(d).

[24] *See, e.g.*, FAR 9.406-2. The suspension and debarment provisions expressly exclude ''overpayments resulting from contracting financing payments as defined in [FAR] 32.001.'' Thus progress payments, interim payments, advance payments and other types of contract financing payments are excluded by the rule as reportable events.

[I]t is appropriate to limit the application of suspension or debarment to cases in which the unreported overpayment is significant. . . . [S]ignificant overpayments . . . implies more than just dollar value and depends on the circumstances of the overpayment as well as the amount.[25]

''Significance'' is another subjective, judgmental standard for which government representatives to date have provided no guidance. In practice, contractors have been assessing ''significance'' in the context of the FAR's present responsibility standard for suspensions and debarments, as well as evaluating the circumstances surrounding the overpayment. Contractors should consider also that if their investigation reveals credible evidence of fraud, recklessness or deliberate indifference in connection with the retention of an overpayment, of any amount, an analysis should be done of potential liability under the FCA, as amended by FERA.

3. Is There a DeMinimus Threshold for Reporting? If there is one point of practical clarity provided by Federal regulators since the rule was implemented, it is the view of the OIG Offices that there is no *de minimus* dollar threshold to the rule's disclosure requirements. Some contractors have imposed a ''rule of reason'' where the evidence appears to fall short of the ''credible evidence'' standard, and the practical threat of FCA/Title 18 prosecution, or suspension and debarment, appears to be very low; other contractors aggregate minor matters near the threshold of credible evidence, and report them at periodic intervals.

4. What Kinds of Misconduct Are Being Reported? Since the Mandatory Disclosure Rule was implemented, there have been over 200 disclosures, primarily to the Department of Defense. A recent OIG presentation on the Contractor Disclosure Program stated that labor mischarging events account for approximately 50 percent of disclosures to date. Reports of FCA violations and nonconforming material comprise another 20 percent of disclosures. ''Other'' violations accounted for 14 percent, with incidents of procurement integrity violations, anti-kickback violations, theft of government property, and bribery reported in smaller percentages.[26]

Misconduct may comprise a reportable matter under more than one of the Mandatory Disclosure Rule's categories. Employee mischarging under a government conduct, for example, might be a reportable violation of 18 U.S.C. § 1001, if it results in a false statement to the government (whether or not the reporting contractor might also be legally culpable). That same mischarging might be a reportable event under the civil FCA, if the misconduct leads to a ''false claim'' or ''false statement'' in support of a ''claim'' for Federal fund or property.[27] The mischarging also might lead to a ''significant overpayment'' by the government. In making a decision about whether to disclose, contractors need to ensure that their investigation not only covers factual information but considers how the statutes and standards under the rule apply to that information.

5. What is a 'Timely'Disclosure? The Preamble states that ''[u]ntil the contractor has determined the evidence to be credible, there can be no 'knowing failure to timely disclose.' ''[28] The contractor's decision as to how to conduct its investigation appears to be afforded considerable discretion. The Preamble states:

> In the normal course of business, a company that is concerned about ethical behavior will take reasonable steps to determine the credibility of allegations of misconduct within the firm. It is left to the discretion of the company what these reasonable steps may entail.

In practice, most contractors appear to be taking a ''rule of reason'' approach to the interval for investigation. An allegation of misconduct that may have potential product impact, or charges of serious ongoing misconduct, should be investigated promptly, with resources adequate to minimize potential adverse impact to the customer even before a conclusion is reached as to reportability. On the other hand, it appears reasonable to commence an investigation of an allegation of minor, but potentially reportable, misconduct with a more limited and less urgent level of effort and resources. As a practical matter, contractors may wish to apply the same litmus test to Mandatory Disclosure Rule investigations as they do to whistleblowing activity: if the allegation is reasonably specific and is of a nature that might be expected to lead to a *qui tam* complaint, the contractor's investigation ideally would be sufficiently prompt and broad that a jury would not fault the contractor for not having taken the allegation seriously.

The Preamble says clearly that once a contractor has determined that there is credible evidence of a violation of covered conduct or significant overpayment, a report must be made.[29] That determination may be, and often is, appropriately made prior to the conclusion of the contractor's investigation.

6. The 'Look-back' Requirements. The Mandatory Disclosure Rule's suspension and debarment provisions' disclosure obligations continue ''until 3 years after final payment on any government contract.''[30] Since contract closeouts and ''final'' payments can take years af-

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[25] 73 Fed. Reg. at 67,080.

[26] *See* ''Contractor Disclosure Program'' presentation by Jeff Bennett, DOD Office of Inspector General, Investigative Policy & Oversight (June 4, 2010), *available athttp://www.asmconline.org/wp-content/uploads/2010PDIPresentations/54-DoDIG-DCMA.ppt*.

[27] Further complicating an already complex disclosure standard, there is a significant question whether FERA's changes to false statement liability, which were made retroactive, are constitutional. *See, e.g., United States ex rel. Sanders v. Allison Engine Co.*, , 667 F. Supp. 2d 747 (S.D. Ohio 2009) (retroactive application unconstitutional if retroactive provision applied to ''cases'' rather than ''claims''). As to the other amended provisions of the FCA, contractors must determine whether the conduct potentially actionable under the FCA falls under the 1986 version or the version post-FERA, in effect as of May 20, 2009.

[28] 73 Fed. Reg. 67,074.

[29] Small businesses should note that the FAR councils expressly rejected one commentator's suggestion that the rule would disproportionately affect small contractors. 73 Fed. Reg. 67085. While the rule inherently provides some margin for contractors to assert that a limited investigation is reasonable where the contractor has fewer resources, a good-faith effort to comply with the rule would seem to imply some level of inquiry. Once ''credible evidence'' of a violation or significant overpayment is discovered, the rule imposes the same reporting requirement on large and small contractors regardless of the sum at issue or the size of the contractor.

[30] *See, e.g.,* FAR 9.406-2(b)(1)(vi).

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ter performance is completed, this requirement on its face appears to be overly burdensome. Since promulgation of the rule, however, government officials have stated that, in practice, they do not expect an unreasonable review by contractors of all contracts that literally might fall within the rule, although contractors are expected to conduct look-back evaluations for violations and significant overpayments that were or reasonably should have been discovered in connection with the award, performance or close-out of the contract or subcontract thereunder.

Practices implemented by contractors vary, but a reasonable approach might include the following:

- Identify a person or committee to perform the look-back.
- Develop a written protocol for the look-back.
- Identify management points of contact for each contract or program, and seek information about known or alleged conduct that might fall within the rule's reportable conduct.
- For ''significant'' refunds or credits to the government, determine whether the circumstances warrant further investigation. Because the ''significance'' of an overpayment involves factors other than the amount of the overpayment or the size of the contract, setting an arbitrary dollar threshold for matters to investigate is risky.
- Identify categories of company documents to review for indications of potentially reportable conduct, such as internal investigation reports; audit reports; accounting reserves; or *qui tam* actions.

''Look-back'' activity is not limited to the suspension and debarment provisions. Once the clause at FAR 52.203-13 is included in a contract or flowed down to a subcontract, and if the contractor is subject to the requirement for an internal control system, the contractor must disclose credible evidence of violations of the FCA or covered conduct under Title 18 ''in connection with'' the award, performance, or close-out of *any* of the contractor's contracts or subcontracts, until three years after final payment on each such contract.[31]

7. How Are Disclosures to Be Made? FAR 52.203-13 provides that disclosures are to be made to the ''agency OIG'', with a copy to the contracting officer.[32] As of December 29, 2008, DOD internally designated the DOD Office of Inspector General as the ''agency IG for [all] DOD contracts,'' regardless of the particular agency involved. The recipient of disclosures under the suspension and debarment provisions, FAR 9.406-2 and 9.407-2, appears to be different under the literal terms of those provisions. There is no reference to ''agency IG'' under FAR 9.406.2 and 9.407-2; these provisions state only that disclosures are to be made to ''the government.'' Following implementation of the rule, however, OIG representatives quickly made it clear that they expect reporting under the suspension and debarment provisions to both the contracting officer and the OIG. Until such time as courts determine whether the difference in the language used 52.203-13 and the FAR Part 9 provisions implies a distinction in reporting requirements, the prudent course of conduct for a contractor is to report any kind of mandatory disclosure to both the OIG and the contracting officer.

In 2009, nearly all offices of inspector general published on-line reporting forms, some with accompanying instructions.[33] While those forms offer a convenient and less expensive disclosure mechanism than disclosure by letter, the electronic forms require unequivocal statements from reporting contractors at a point when the contractor still may have genuine uncertainty concerning significant facts. For example, the DOD ''sample report'' form requires the contractor to ''describe the scope of the investigation (records reviewed, number and positions of employees interviewed, etc.);'' ''list all federal agencies currently doing business with'' the contractor, whether or not those agencies awarded the contract at issue; and provide the ''estimated financial impact to the government.''[34] The DOD form also requires a *certification* that ''this Contractor Disclosure is true and accurate to the best of my knowledge as of the date of its submission.'' The GSA electronic form requires statements, *inter alia*, of the ''estimated amount of loss,'' whether the ''incident'' is ongoing, and ''potential witnesses and their involvement.''[35]

While OIG electronic or sample forms have been used by some contractors, others are making all disclosures by letter. Letters better enable a contractor to disclose known facts—and only factual information is required by the rule—without making an unwarranted admission of liability, or speculating as to matters such as the amount of ''loss'' the government has sustained by reason of reported conduct.

8. What is ''Full Cooperation'' Under the Rule? If a contract includes the clause set forth at FAR 52.203-13, and the contract reaches the monetary and performance threshold that triggers the requirement to have an internal control system,[36] the contractor is required to provide ''full cooperation'' with the government's audit or investigation. ''Full cooperation'' is defined in the FAR to mean

> [D]isclosure to the government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to government auditors' and investigators' request[s] for documents and access to employees with information; . . . .[37]

The FAR expressly states that ''full cooperation'' does not include waiver of the attorney client privilege or the attorney work product doctrine, or waiver of Fifth Amendment Rights. Full cooperation also does not restrict a contractor from conducting an internal investigation, or ''[d]efending a proceeding or dispute'' that arises from the contract or from a Mandatory Disclo-

[31] FAR 52.203-13(c)(2)(ii)(F)(3).

[32] FAR 52.203-13(c)(2)(ii)(F).

[33] The DOD's Contractor Disclosure Program Guide contains the sample report at http://www.dodig.mil/inspections/ipo/ContractorDisclosure/Contractor%20Disclosure%20Program%20Guide%20030509.pdf .

[34] *Id.*

[35] *See* GSA Form at http://www.gsaig.gov/integrityreport.htm .

[36] Internal control systems are required for contracts with a value in excess of $5M and a period of performance of 120 days or more. FAR 3.1004(a). Contractors are required to flow down FAR 52.203-13 to subcontracts with a value in excess of $5M and a period of performance of *more than* 120 days. FAR 52.203-13(d).

[37] FAR 52.203-13(a)(1).

sure Rule disclosure.[38] One question that commonly arises is whether a report of a statutory violation involving fraud that requires a report to the government, such as the Anti-Kickback Act,[39] must also be reported under the Mandatory Disclosure Rule. The government's informal position is that such conduct must be reported to the relevant OIG as well as to the agency, contracting officer, or other government official specified by the statute.

The Preamble provides additional examples of what the government expects from ''full cooperation'' by contractors, including ''timely and thorough'' responses to the government's inquiries; ''encouraging'' employees to cooperate with the government's investigation; and providing ''all pertinent information'' requested by the government, whether or not the information is helpful or harmful to the contractor.[40]

As a practical matter, ''full cooperation'' disputes between contractors and the government appear to be falling primarily into three categories: (1) ''access'' to employees; (2) requests for documents by auditors, investigators or other government representatives without a subpoena duces tecum; and (3) requests by auditors or IG agents for ''informal'' explanations. Again, contractors are best guided by a rule of reason. Providing ''access'' to employees is one thing; compelling employees to attend government interviews is another. While a company should make it clear to employees that the company is cooperating in the government's investigation, the contractor need not, and should not, require employees to speak with government investigators. Employees are entitled to make an independent decision and evaluate their own risks in attending government interviews.

Requests for documents and other kinds of information should be measured against the reasonableness of the request, in the context of the rule's broad cooperation requirement and the practical realities of a government investigation. Considering that a request refused might lead to a broad civil investigative demand,[41] subpoena duces tecum, or search warrant, it is generally in the contractor's best interest, as a practical matter, to respond to reasonably focused and relevant informal requests for documents and information. Note that any information provided to the government falls outside of the attorney-work product doctrine and the attorney-client privilege, so contractors should ensure that the information provided to government representatives is strictly factual, or make an informed advance decision as to whether the company is willing to risk waiver of privilege or work product protections.

9. How Extensive Does an ''Internal Control System'' Have to Be? It is an inevitable fact of contractor life that occasional events of misconduct go unreported despite the company's best efforts to implement and train employees under a internal control system; but a fulsome internal control system can offer some protection even when compliance goes wrong. The most important elements of an internal control system are: (1) a reporting system well designed to encourage ground-level reporting of suspected misconduct; (2) thorough training and periodic refresher training of employees regarding their responsibilities to report misconduct; and (3) allocation by the Company of sufficient resources to assure a robust system.

The rule itself requires the following:

- assignment of responsibility at a sufficiently high level and with adequate resources to ''ensure'' effectiveness of the internal control system.[42]
- periodic reviews of the company's practices, policies and internal controls for effectiveness and compliance.
- an internal reporting mechanism such as an open-line, through which employees may report suspected misconduct.
- disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect misconduct.
- timely disclosure of reportable conduct.
- full cooperation with government auditors and investigators responsible for audits, investigations or corrective actions.[43]

A robust and well-documented internal control system is costly, but it has long-term advantages. First, the better the system, the more likely that misconduct will be identified before it escalates, or before a *qui tam* action is filed or an independent government investigation is commenced. Second, as the Preamble notes, a strong self-reporting system ''gives the honest contractor employees necessary leverage over those who may seek to shield the employer when wrongdoing is noticed or suspected.''[44] Third, even if an action is filed, the existence of a strong internal control system may be useful evidence in an FCA action in which the company is alleged to have been ''deliberately ignorant'' of a false claim.[45] Fourth, the adequacy of an internal control system bears on the suspension and debarment authority's present responsibility determination. Finally, the contractor's internal control system may be a consideration under the U.S. Attorneys' charging decisions as to the company, or under the Federal Sentencing Guidelines.

Conclusion. The FAR Mandatory Disclosure Rule is clear in its central concepts; the rule is less clear in circumstances where the facts learned during an investigation appear to have marginal ''credibility.'' While the rate of contractor disclosures has increased following implementation of the rule, there is as yet no reliably safe path to tread when deciding where to look, how to look, or when to report suspected misconduct under the rule. Too little ''necessary'' disclosure activity will result in violation of the rule; too much ''unnecessary'' disclosure activity could overwhelm a contractor with unnecessary cost and disruptive government follow-up. Until Mandatory Disclosure Rule practices become more settled, on the contractor side and on the government side, contractors will continue to be at compliance risk

[38] *Id.* at 52.203-13(a)(3)(ii)

[39] 41 U.S.C. § § 51, *et seq.*

[40] 73 Fed. Reg. at 67,078.

[41] Pursuant to FERA, on March 24, 2010, the Department of Justice delegated its broadened CID issuance authority to the United States Attorneys, as well as the Assistant Attorney General for the Civil Division. This action likely will increase the use of CIDs in FCA investigations by the government.

[42] This includes making ''reasonable efforts not to include an individual as a principal'' in the internal control system ''whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct. FAR 52.203-13(c)(2)(ii)(B).

[43] FAR 52.203-13(c)(2).

[44] 73 Fed. Reg. 67,072.

[45] 31 U.S.C. § 3729(b)(1).

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when ''credibility'' of evidence of a violation of covered conduct is not clear. The best approach is to be proactive in implementing a well-documented and thorough reporting system; approach allegations of reportable conduct with a reasoned and documented investigation; and maintain a consistent reporting practice.