

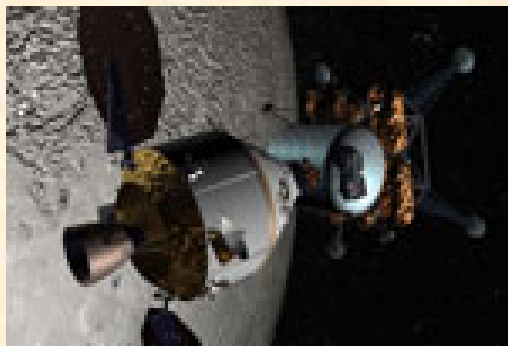
NATIONAL CONTRACT MANAGEMENT ASSOCIATION

A PRACTICAL GUIDE TO THE NEW FAR MANDATORY DISCLOSURE RULE FAR 52.203-13



SPACE CITY CHAPTER

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Background - DOJ Criminal Division Letter 2007

- ❑ Background - “This case is in response to a request to the Office of Federal Procurement Policy from the Department of Justice...”
 - DOJ experienced low voluntary disclosure rate and high procurement fraud caseload

- ❑ DOJ letter - “...the 1980s witnessed significant innovations in the federal procurement system. Many of those reforms, including corporate compliance programs and corporate self-governance, were adopted with industry cooperation, and were later incorporated into evolving regulatory schemes in other business sectors and industries. In fact, the U.S. Sentencing Guidelines’ treatment of corporations, adopted in 1991, borrowed heavily from the reforms that were first instituted for government contractors in 1986. However, since that time, our government’s expectations of its contractors have not kept pace with reforms in self-governance in industries such as banking, securities, and healthcare.”
 - <http://www.usdoj.gov/criminal/npftf/far/docs/2007/may/5-23-07-Fisher-Denett.pdf>

The Final Rule

- ❑ Final Rule and FAR 52.203-13 Contractor Code of Business Ethics and Conduct
 - Go to <http://edocket.access.gpo.gov/2008/E8-26953.htm>

- ❑ Final Rule contains 142 page “Discussion and Analysis” summarizing numerous public comments and the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council responses
 - Discussion and Analysis provides Counsel's insight into need for new rule and guidance to contractors

- ❑ Effective date: December 12, 2008
 - “Various respondents were concerned about whether the rule can apply to violations that occurred before the effective date of the rule...”
 - The look back:
 - “If violations relating to an ongoing contract occurred prior to the effective date of the rule, then the contractor must disclose such violations, whether or not the clause [Referring to 52.203-13] is in the contract and whether or not an internal control system is in place, because of the cause for suspension and debarment in Subpart 9.4.”

Covered Contracts

❑ FAR 52.203-13 Contractor Code of Business Ethics and Conduct

- covered contract ``any contract in an amount greater than \$5,000,000 and more than 120 days in duration."
- Proposed rule exception for “commercial” contracts eliminated

❑ Subcontracts

- The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value in excess of \$5,000,000 and a performance period of more than 120 days.
- There is no requirement for the contractor to review or approve its subcontractors' ethics codes or internal control systems. Verification of the existence of such code and program can be part of the standard oversight that a contractor exercises over its subcontractors.
- The prime contractor is subject to debarment only if it fails to disclose known violations by the subcontractor.
- The clause does not require disclosure through the prime contractor.

Major Requirements

- New Grounds for Suspension & Debarment
- Retroactive Disclosure
- Broad Mandatory Disclosures
- Mandatory “Full Cooperation”
- Expands Requirements for Codes of Business Ethics and Conduct
- Business Ethics and Awareness & Compliance; Internal Controls

Grounds for Suspension and Debarment

- ❑ 9.406-2 Causes for debarment.
 - (b)(1) A contractor, based upon a preponderance of the evidence, for any of the following-- * * * * *
 - (vi) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of–
 - (A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
 - (B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or
 - (C) Significant overpayment's on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.
- ❑ Causes of suspension similarly defined in 9.407-2.
- ❑ Neither 9.406-2 of 407-2 apply to subcontractors
 - Prime contractors must disclose violations of subcontractors if known by contractor's principal

Retroactive Disclosure Elements

- “Principal”** - Paragraph (a)(2) of the clause at **FAR 52.209-5, Certification Regarding Responsibility Matters**, defines “principals” to mean “officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g. , general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions)
- ❑ **“Final Payment”** - Consider **4.804-5 Procedures for closing out contract files**.
 - (b) When the actions in paragraph (a) of this subsection have been verified, the contracting officer administering the contract must ensure that a contract completion statement, containing the following information, is prepared:
 - (8) Voucher number and date, if final payment has been made.
 - ❑ **“Disclose to the Government”** - Neither 9.406-2 or 9.407-2 state who within the Government the disclosure must be made
 - FAR 52.203-13 states specifically – “The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer disclosure required to IG with copy to CO...”

Retroactive Disclosure Elements

- ❑ **“Credible Evidence”** – Undefined higher standard
 - Discussion and Analysis – “...the Councils believe that using the standard of “credible evidence” rather than “reasonable grounds to believe” will help clarify “timely” because it 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 to the Government. Until the contractor has determined the evidence to be credible, there can be no “knowing failure to timely disclose.”
 - Viewed from contractor’s perspective

- ❑ **“Timely”** – Undefined
 - Discussion and Analysis – “... the timely disclosure would be measured from the date of determination of credible evidence or the date of contract award, whichever event occurs later.”

- ❑ **Title 18 Violations** - Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code
 - Chapters:
 - Chapter 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST
 - Chapter 63—MAIL FRAUD
 - Others? – “Your query *fraud* returned 101 results.”
 - “..in connection with the award, performance, or closeout of the contract or a subcontract...”

Retroactive Disclosure Elements

❑ Civil False Claims Act violations ([31 U.S.C. § 3729–3733](#))

- The Act provides that any person (including a corporate entity) who knowingly submits, or who knowingly causes someone else to submit, false claims for payment of government funds is liable for treble damages and civil penalties of \$5,500 to \$11,000 per false claim
- Allows people who are not affiliated with the government to file actions against federal contractors claiming fraud against the government
- Discussion and Analysis – “... the Councils note that the *mere filing of a qui tam action* under the civil FCA is not sufficient to establish a violation under the statute, nor does it represent, standing alone, credible evidence of a violation.”

Retroactive Disclosure Elements

- ❑ **Contract Financing Part 32, FAR 32.001, Definitions “Contract financing payment”** means an authorized Government disbursement of monies to a contractor prior to acceptance of supplies or services by the Government.
 - (1) Contract financing payments include—
 - (i) Advance payments;
 - (ii) Performance-based payments;
 - (iii) Commercial advance and interim payments;
 - (iv) Progress payments based on cost under the clause at [52.232-16](#), Progress Payments;
 - (v) Progress payments based on a percentage or stage of completion (see [32.102\(e\)](#)), except those made under the clause at [52.232-5](#), Payments Under Fixed-Price Construction Contracts, or the clause at [52.232-10](#), Payments Under Fixed-Price Architect-Engineer Contracts;
 - (vi) Interim payments under a cost reimbursement contract, except for a cost reimbursement contract for services when Alternate I of the clause at [52.232-25](#), Prompt Payment, is used.

- ❑ **“Significant” - Undefined**

Mandatory Disclosure

- ❑ FAR 52.203-13 Contractor Code of Business Ethics and Conduct
- ❑ “One respondent stated that this rule is a major departure from long-standing and proven Federal policies that encourage voluntary disclosures.”
- ❑ FAR 52.203-13 (3)(i) The Contractor shall timely disclose, *in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer*, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed –
 - (A) 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
 - (B) A violation of the civil False Claims Act (31 U.S.C. 3729- 3733).
 - Note (c) of 9.406-2 and 9.407.2 regarding significant overpayments is missing
 - Note, it reads if the Contractor has knowledge rather than a principal
- ❑ Includes employee, agent, or subcontractor
 - Agent – “Agent means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.”

The Disclosure

- ❑ Full Cooperation – “(ii) At a minimum, the Contractor's internal control system shall provide for the following:
 - (G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions. “
 - “Full cooperation--(1) Means disclosure 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 for documents and access to employees with information; (2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract.”
- ❑ Waiver of Privileges/Protections/Rights
 - Full cooperation “... does not require-- (i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or (ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights “

The Disclosure

□ Protection of Contractor Disclosures

- “(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked “confidential” or “proprietary” by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.”

□ NASA Office of Inspector General FAR Contractor Reporting Form

- “The purpose of this form is to allow the Contractor to notify, in writing, the agency Office of the Inspector General whenever the contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of the civil False Claims Act or a violation of Federal criminal law in connection with the award or performance of a contract or any related subcontract. The individual completing this form must be an officer or manager within the company for whom this report is being made and empowered to speak for the company by filing this report. If the information you wish to provide does not fall within these guidelines, please refer to the Inspector General Hotline/Fraud Reporting form”

See <http://oig.nasa.gov/contdiscw.html>

How to disclose?

- ❑ Agency website disclosure?
- ❑ National Defense Industrial Association letter:

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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December 22, 2008

The Honorable Lesley Fields
Administrator (Acting)
Office of Federal Procurement Policy
1650 Pennsylvania Avenue, Room 273.5
Washington, D.C. 20504

Mr. Ted Haddad
Chief Acquisition Officer
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Mr. Shay Assad
Director, Defense Procurement and Acquisition Policy
Office of the Secretary of Defense
3060 Defense Pentagon
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Arlington, Virginia 20301-3060

Mr. William P. McNally
Assistant Administrator for Procurement
NASA
300 E Street, SW
Washington, D.C. 20546

Dear Sirs and Madam:

The Council of Defense and Space Industry Associations¹ has a deep interest in, and concern about the implementation of the new regulations and clauses for the disclosure by contractors to the government of criminal violations of certain laws that pertain to government contracts. While we appreciate the thoroughness of the FAR Council in responding to questions concerning the proposed rule and the extensive explanatory

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), the Information Technology Association of America (ITAA) and the Chamber of Commerce of the United States of America. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

preamble to the rule, a number of questions regarding implementation remain. One issue of immediate concern is the requirement of the GSA IG website reporting form (<http://oig.gsa.gov/integritycover.htm>) that a contractor "certify that the information contained herein is true and correct to the best of my knowledge" and the Department of Defense IG website form (www.dodig.osd.mil/Inspections?IPO/voidis.htm) requirement that the contractor in signing attests that "this Contractor Disclosure Program submission is true and accurate to the best of my knowledge as of the date of its submission."

Neither the rule nor the statute requires use of an electronic submission system or a certification or attestation to accompany a report of covered information. To our knowledge, no information collection clearance authorizing these requirements has been submitted to, reviewed by, or approved by the Office of Information and Regulatory Affairs; nor has a waiver been proposed or approved.

Respectfully we submit that given the extensive reach of this rule, the time it will take both the government and contractors, most likely through trial and error, to learn the parameters of such terms as "credible evidence," combined with the punitive ramifications of not complying correctly with the new disclosure requirements, a certification or attestation requirement is overkill. The latter imposes yet another unauthorized and unwarranted risk upon a contractor.

We request that each Department and/or Agency immediately remove the official certifications or statements requirements from the reporting forms. In addition, given the sensitive nature of the information to be submitted, we respectfully request information regarding the site security protocols and whether written submissions will be authorized as an alternative.

If you have any questions, please do not hesitate to contact the CODSIA project officer, Colleen Preston, Executive Vice President, Policy and Operations, Professional Services Council and she can be reached at 703-875-8059.


Sincerely,



Alan Chvotkin
Executive Vice President & Counsel
Professional Services Council



Cynthia Brown
President
American Shipbuilding Association



Peter Steffes
Vice President, Government Policy
National Defense Industrial Association



R. Bruce Josten
Executive Vice President for
Government Affairs
U. S. Chamber of Commerce

Ethics Compliance and Internal Controls

- ❑ “The Contractor shall establish the following within 90 days after contract award, ...
 - (1) An ongoing business ethics awareness and compliance program.
 - (i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.
 - (ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.
 - (2) An internal control system.”

- ❑ Small Business and Commercial Item contractors are exempt from ethics awareness and compliance program requirement and establishment of internal control system

Internal Controls

- ❑ (i) The Contractor's internal control system shall:
 - (A) Establish standards and procedures to facilitate timely discovery of improper conduct
 - (B) Ensure corrective measures are promptly instituted and carried out

- ❑ (ii) At a minimum, the Contractor's internal control system shall provide for:
 - (A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

 - (B) Reasonable efforts not to include an individual as a principal, 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.

 - (C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including:
 - (1) Monitoring and auditing to detect criminal conduct;
 - (2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and
 - (3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

 - (D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

H.R. 5712 Close the Contractor Fraud Loophole Act

- ❑ Summary – “Requires the Federal Acquisition Regulation to be amended within 180 days after enactment of this Act to include provisions that require timely notification by federal contractors of violations of federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial items.”
 - Passed April 2008

- ❑ Defines the term "covered contract" to mean any contract in an amount greater than \$5 million and of more than 120 days' duration.

- ❑ Note the Act's Cosponsors:
 - Rep. Edolphus Towns [D-NY]
 - Rep. Bruce Braley [D-IA]
 - Rep. Brad Sherman [D-CA]
 - **Rep. John Sarbanes [D-MD]**
 - Rep. Paul Hodes [D-NH]
 - Rep. Christopher Murphy [D-CT]
 - Rep. Henry Waxman [D-CA]

Proposed Rule and Sarbanes-Oxley (SOX) Comparison

| Proposed FAR RULE 2006-007 | SARBANES – OXLEY ACT of 2002 |
|--|---|
| <p>Legislation such as the Sarbanes- Oxley Act of 2002 (Pub. L. 107–204), cited by some of the respondents, applies only to accounting firms and publicly traded companies. Sarbanes-Oxley focuses on auditor independence, corporate governance, internal control assessment, and enhanced financial disclosure.</p> <p>Sarbanes-Oxley provides broad definition of a “code of ethics” but does not specify every detail that should be addressed. It only requires publicly-traded companies to either adopt a code of ethics or disclose why they have not done so.</p> | <p>Section 406 - Code of Ethics <u>for Senior Financial Officers</u></p> <p>Code of Ethics Disclosure. The Commission shall issue rules to require each issuer...to disclose whether or not, and if not, the reason therefore, such issuer has adopted a code of ethics <i>for senior financial officers...</i></p> <p>Changes in Codes of Ethics. The Commission shall revise its regulations concerning matters requiring prompt disclosure on Form 8-K ... to require the immediate disclosure...of any change in or waiver of the code of ethics for senior financial officers.</p> <p>Definition. In this section, the term “ethics” means such standards as are reasonably necessary to promote--</p> <p>honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;...</p> <p>compliance with applicable governmental rules and regulations.</p> |

Proposed Rule and SOX Internal Controls Comparison

| <p align="center">Proposed FAR RULE – INTERNAL CONTROLS</p> <p>“THE COUNSEL NOTE THAT THE MOST CONROVERSIAL PARAGRAPHS ARE EXAMPLES OF WHAT A CONTRACTOR INTERNAL CONTROL SYSTEM SHOULD INCLUDE.” CASE 2006-007</p> | <p align="center">SARBANES – OXLEY ACT of 2002</p> |
|--|--|
| <p>The Contractor’s internal control system shall—</p> <p>(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and</p> <p>(B) Ensure corrective measures are promptly instituted and carried out.</p> <p>(ii) At a minimum, the Contractor’s internal control system shall provide for the following:</p> <p>(A) Assignment of responsibility at a sufficiently high level of the organization and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.</p> <p>(B) Reasonable efforts not to include within the organization principals whom due diligence would have exposed as having engaged in conduct that is illegal or otherwise in conflict with the Contractor’s code of business ethics and conduct.</p> <p>(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor’s code of business ethics and conduct and the special requirements of Government contracting, including—</p> <p>(1) Monitoring and auditing to detect criminal conduct;</p> <p>(2) Periodic evaluation of the effectiveness of the organization’s business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and</p> <p>(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.</p> <p>(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.</p> <p>(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.</p> | <p>Section 404 -- Management Assessment of Internal Controls</p> <p>The Commission shall prescribe rules requiring each annual report... to contain an internal control report, which shall--</p> <p>state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and</p> <p>contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.</p> |

Industry and Analyst Recommendations for Implementation

Perform a compliance assessment

Partial Assessment Matrix

FAR 52.203-13 Contractor Code of Business Ethics and Conduct Mandatory Self-Disclosure Regulation effective 12-12-08

| FAR | Ethics Program | Internal Audit | Other (Legal, External Investigations, Contracts, Subcontracts, Finance, etc.) | Actions |
|--|---|---|---|---------|
| (b) * * * | | | | |
| (1) * * * | | | | |
| (i) Have a written code of business ethics and conduct; | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | |
| (ii) Make a copy of the code available to each employee engaged in performance of the contract. | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | |
| (2) The Contractor shall -- | | | | |
| (i) Exercise due diligence to prevent and detect criminal conduct; and | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | |
| (ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | |
| (3) (i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contacting Officer, whenever, in connection with an award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733). | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | |
| (c) Business ethics awareness and compliance program and internal control system. | | | | |
| (1) An ongoing business ethics awareness and compliance program. | <u>In place:</u> <u>'09 Actions:</u> | <u>In place:</u> <u>'09 Actions:</u> | | |

Industry and Analyst Recommendations for Implementation

- ❑ Train employees in new rule and update policy and procedures
 - Give examples of conduct that must be reported

- ❑ Discuss rule with your Contracting Officer and local IG

- ❑ Create a record to demonstrate to the Government that your company collected or attempted to collect and assess possible violations and significant overpayments
 - Develop standard form to document employee's internal disclosure and open a "case file"
 - Document interviews
 - Document evidence and means to determine if credible
 - Record employees involved in deliberations and decisions
 - Consider issuing document/litigation hold orders to employees involved

- ❑ Consider Freedom of Information Act disclosure when disclosing violations

Recommendations for Implementation

- ❑ Inform principals assigned to Internal Control responsibilities of requirement to perform “Reasonable efforts not to include an individual as a principal, 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.”
- ❑ Question exiting employees during exit interview whether they have knowledge of a violation or overpayment
- ❑ See NCMA’s January 2009 magazine
- ❑ Engage outside counsel?

Questions?

- ❑ Should the prime contractor require a subcontractor to certify compliance with business ethics requirements or disclose violations to the prime contractor? It is not necessary
 - The final rule reads “The clause flow down in paragraph(d)(2)states that in altering the clause to identify the appropriate parties, all disclosures of violations of the civil FCA or of Federal criminal law shall be directed to the agency OIG, with a copy to the contracting officer. The clause does not require disclosure through the prime contractor.”
 - The rule also states “There is no requirement for the contractor to review or approve its subcontractors’ ethics codes or internal control systems. Verification of the existence of such code and program can be part of the standard oversight that a contractor exercises over its subcontractors.”

- ❑ Do retroactive disclosures that have been to the OIG need to be delivered to the Contracting Officer? There is no generally accepted answer. Question your Contracting Officer.
 - “The rule reads in part re retroactive disclosures “Knowing failure by a principal...to timely disclose *to the Government*...credible evidence of...”

Questions?

- ❑ Can disclosures be released to the public? It depends.
 - The rule provides for protection of contractor confidential or proprietary information and allows for FOIA exemptions.
 - The rule reads: “The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the contractor’s disclosure as confidential where the information has been marked “confidential” or “proprietary” by the company.”
 - “To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, et seq., without prior notification to the contractor. The Government may transfer documents provided by the contractor to any department or agency within the Executive Branch if the information relates to matters within the organization’s jurisdiction.”

Will the Rule Achieve its Purpose?

“We are concerned that under an approach which is ‘rules-based’ rather than ‘culture based’, the numbers of ‘mandatory disclosures’ could be even fewer than the numbers of ‘voluntary disclosures’, as contractors might focus on the ambiguities of the letter of the rule (including, of course the word ‘fraud’), rather than the spirit of our mutual commitment to fair and honest dealing.”

Defense Industry Initiative on Business Ethics and Conduct, 2006 Annual Public Accountability Report, 7-11, 49 (January 2007)

[Contact me if you want a Power Point file of the presentation and the compliance assessment matrix]