

January/February 2009

• Issue 7, Vol. 1



Government Contractors Council



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Dot Your “I’s” and Cross Your “T’s”: A Draft Checklist to Comply with FAR Mandatory Disclosure Rules

By [Eric W. Leonard, Esq.](#) and [Jon W. Burd, Esq.](#), [Wiley Rein LLP](#)

On November 12, 2008, the FAR councils issued a sweeping new final rule requiring any government contractor to disclose violations (including some past violations) of certain Federal criminal laws in connection with a Federal contract, violations of the civil False Claims Act, and significant overpayments on a contract. Contractors who knowingly fail to report these violations or overpayments where there is “credible evidence” of a covered violation may face suspension or debarment. See 73 Fed. Reg. 67,064-67,093 (Nov. 12, 2008), available at <http://www.pubklaw.com/facs/fac2005-28.pdf>. The rule further requires some contractors to implement basic internal control and compliance procedures, such as excluding as “principals” any person who is known to have violated the company’s standards of business ethics and conduct, or providing compliance training to subcontractors or consultants “as necessary.” According to the FAR councils, the new final rule was necessary because although “[t]here is no doubt that mandatory disclosure is a ‘sea change’ and ‘major departure’ from voluntary disclosure . . . DoJ and the OIGs point out that the policy of voluntary disclosure has been largely ignored by contractors for the past 10 years.”

The final rule went into effect on December 12, 2008 and, according to informal feedback from agency Inspector Generals (“IGs”), disclosures are beginning to trickle in – although in far fewer numbers than initially anticipated. Nevertheless, the new final rule and its mandatory disclosure obligation has arrived and contractors can ill afford not to fully understand and adapt to the rule. To do otherwise – even for potential violations that may not be material from a monetary perspective or otherwise – may place a contractor in the unenviable position of fighting potential suspension or debarment.

In light of these new obligations, offered below is a checklist for assessing a contractor’s current compliance program in order to determine what changes, if any, are necessary ensure compliance with the new final rule. While each contractor’s compliance program and company structure are unique and may require a different or a more tailored approach than identified below, these pointers should provide a baseline to help contractors tackle the inevitable – preparing for and facilitating mandatory disclosure of credible evidence of violations of certain Federal criminal laws in connection with a Federal contract, violations of the civil False Claims Act, or a significant overpayment.

MANDATORY DISCLOSURE — COMPLIANCE PROGRAM STRUCTURAL CONSIDERATIONS

Define the Scope of Any Reporting Requirement

1. Compile an inventory of current Government contracts and any contract for which final payment was received after December 12, 2005 – the “trigger” date for disclosure of past violations. Determine whether instances of past covered conduct under these contracts must be disclosed and whether documentation exists describing past instances of covered conduct (audits reports, etc.).
2. Compile an inventory of prior disclosures of violations/overpayments on contracts within the relevant period (#1 above), including to whom such disclosures were made; determine whether the new rule requires renewed disclosure to the cognizant IG.
3. Identify all personnel within the organization who are “principals” within the broad definition provided in the revised FAR clause (FAR 52.203-13(a)), including personnel who may be principals for a particular contract or project.

Establish or Identify Internal Procedures for Investigation and Reporting

1. Review and/or establish internal procedures for reporting possible violations or significant overpayments within the organization, including designated reporting channels. This may require centralized reporting mechanisms within an organization's various business units, with a defined "funnel point" at the organizational/corporate level to whom individual business unit collection points will report any information of a possible violation/overpayment. Communicate procedures and internal channels to all principals.
2. Identify a principal point of contact within the organization, such as a compliance officer, who is responsible for internal investigations, credible evidence determinations and required reporting.
3. Review and/or establish policies and procedures to capture, process, investigate, assess and report possible violations from a wide variety of sources (such as a hotline calls, information provided by auditors, workplace reports to management, news media, etc.); if necessary, revise procedures to ensure they are adequately documented and are likely to result in standardized, documented and sound investigations and/or "credible evidence" reporting determinations.
4. In reviewing internal investigation procedures, consider the need to implement best practices that address various issues, but tailored to the unique circumstances of each individual investigation situation, including, among others: (a) developing essential information and preliminary assessments during intake; (b) taking effective steps to preserve the *status quo* or take immediate corrective actions when necessary; (c) developing and implementing an investigation plan; (d) properly conducting and documenting employee interviews; (e) effectively preserving records and documents as necessary; and (f) effectively managing attorney-client privileges where appropriate, and taking steps to maintain any privilege through the disclosure process.
5. Determine whether existing internal controls and investigation/reporting mechanisms have effectively captured violations or overpayments known to principals; if not, consider requiring all principals to verify that they are unaware of pre-existing possible violations/overpayments for any contracts within the relevant time period.

Prepare and Implement Procedures to Minimize Risks of Non-Disclosure

1. Communicate new mandatory disclosure requirements to all principals within the organization (if not to all employees).
2. Review internal training policies and procedures to determine whether additional or specific internal training is required, particularly among principals, to promote awareness of corporate code of ethics and business conduct.
3. Review model subcontract or teaming agreements to ensure that the revised FAR 52.203-13 clause is flowed-down where appropriate/necessary and any nondisclosure obligations do not prevent mandatory disclosures to the Government. Consider whether these standard terms should include a clause that requires subcontractors and teaming partners to participate in internal investigations of possible violations and overpayments, including access to relevant records.
4. Evaluate contract administration procedures to determine if more emphasis can or should be placed on the contract closeout process to raise final payment and closeout as a contract administration priority and hasten the 3-year mandatory disclosure "look back" period for existing and future contract efforts.

Ensure that "Principals" are Adequately Qualified

1. Identify all personnel within the organization who are "principals," including personnel who may be principals for a particular contract or project.
2. Revise Human Resources ("HR") procedures to include adequate background checks to vet current and prospective principals in connection with any hiring and promotion decisions. This may require some centralization of hiring and promotional decision-making within the organization to ensure proper background checks are conducted before an individual is selected as a principal—*i.e.*, to limit "battlefield promotions."
3. Review HR policies to ensure that employee misconduct involving violations of the contractor's code of business ethics and compliance and/or violations of Title 18 criminal provisions are adequately documented in the organization's and the employee's HR/employment files so that those violations are tracked and considered in subsequent promotion decisions involving potential principals.
4. Provide HR staff with notice of new obligations and HR procedures.

Review Subcontractor Controls

1. Review subcontractor selection procedures to ensure that due diligence is exercised to exclude subcontractors who have engaged in illegal acts. If subcontractor selection procedures are not adequately documented, they should be memorialized.
2. Establish controls to verify whether a subcontractor has a training program and provide subcontractor (including agents, such as consultants) training if necessary. This may also require revision of standard subcontract terms and conditions to include training "as necessary."

Seize the Opportunity to Review Standards of Ethics and Business Conduct

1. Review existing Standards of Ethics and Business Conduct and internal controls and compare to FAR 52.203-13 compliance matrix to determine what revisions need to be made to existing code.

CONCLUSION

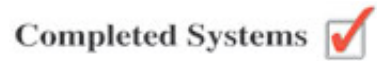
Carefully considered caution must be the words of the day when it comes to mandatory disclosures. While contractors need not (and should not) run to the nearest agency IG with trivial and non-covered disclosures in hand, the obligations under the new final rule cannot be taken lightly. Moreover, ambiguities and “grey areas” yet to be adequately addressed as to the scope and definition of certain terms in the new final rule, further cement the need for contractors to approach this new reporting obligation carefully. In this age of aggressive government enforcement, contractors can ill afford to do otherwise.

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Eric W. Leonard, Esq. is a Partner in the Government Contracts Group at [Wiley Rein LLP](#) in the firm’s McLean, VA office; Jon W. Burd is an Associate with the Group in the firm’s Washington, DC office. They can be reached at eleonard@wileyrein.com and jburd@wileyrein.com.

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The GovCon Report is produced by the Greater Washington GovCon Council’s communications committee: Co- chairs: Anne Crossman ([Completed Systems](#)) and Dave Lundsten ([Cherry Bekaert & Holland LLP](#).) If you wish to submit an article for consideration by the communications committee, send them to govconarticle@fcc.org.



The Government Contractors Council Report is a monthly newsletter distributed by the Greater Washington Government Contractors Council, an initiative of the Fairfax County Chamber of Commerce for Washington, DC metropolitan area government contractors.

Fairfax County Chamber of Commerce
8230 Old Courthouse Road Suite 350
Vienna, VA 22182
P: (703) 749-0400 • F: (703) 749-9075
www.fairfaxchamber.org