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1050 Connecticut Ave, NW, 2nd Flr
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(202) 955-8536

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Donald G. Featherstun
560 Mission St, Ste 3100
San Francisco, CA 94105
(415) 397-2823

BUDGET AND FINANCE OFFICER

Carol N. Park-Conroy
7404 Rippon Rd
Alexandria, VA 22307
(703) 681-8507

SECTION DELEGATES

John S. Pachter
8000 Towers Crescent Dr, Ste 900
Vienna, VA 22182
(703) 847-6260

Mary Ellen Coster Williams
717 Madison Pl, NW, Ste 612
Washington, DC 20005
(202) 357-6660

IMMEDIATE PAST CHAIR

Michael A. Hordell
600 14th St, NW, 5th Flr
Washington, DC 20005
(202) 220-1232

PREVIOUS PAST CHAIR

Robert L. Schaefer
1049 Camino Dos Rios
Thousand Oaks, CA 91360
(805) 373-4608

COUNCIL MEMBERS

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Charles A. Weiss
St. Louis, MO

SECTION DIRECTOR

Marilyn Neiforas
321 N Clark St, M/S 19.1
Chicago, IL 60610
(312) 988-5596

July 15, 2008

VIA FACSIMILE AND FIRST CLASS MAIL

General Services Administration
Regulatory Secretariat (VIR)
Attn: Ms. Laurieann Duarte
1800 F Street, N.W.
Washington, DC 20405

**Re: FAR Case 2007-006, Contractor Compliance Program
And Integrity Reporting (Second Proposed Rule), 73 Fed.
Reg. 28407 (May 16, 2008).**

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting supplemental comments on the above-referenced proposed rule ("Second Proposed Rule"). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.¹

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of

¹ Mary Ellen Coster Williams, a Delegate representing the Section of Public Contract Law in the ABA House of Delegates, and Sharon Larkin, a member of the Section's Council, did not participate in the consideration of these comments and abstained from voting to approve and send this letter.

Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.²

COMMENTS

A. Introduction

The Second Proposed Rule represents a substantial modification of a rule first proposed on November 14, 2007 (72 Fed. Reg. 64019) (“First Proposed Rule”). The Section submitted comments on the First Proposed Rule on January 18, 2008. *See* Attachment A. The Second Proposed Rule does not address or take into account those comments, but rather than repeat them, the Section urges the Councils to consider those comments together with the supplemental comments provided here. In addition, the ABA Task Force on Attorney-Client Privilege submitted comments on the Second Proposed Rule on June 20, 2008. *See* Attachment B. The Section incorporates those comments by reference.

The focus of these supplemental comments is on the Second Proposed Rule’s expansion of the First Proposed Rule to (1) require a contractor to report instances where it has “reasonable grounds to believe” that a violation of the civil False Claims Act (“FCA”) by a principal, employee, agent, or subcontractor of the contractor has occurred in connection with the award or performance of its contracts or subcontracts, and (2) add to the grounds for suspension and debarment the contractor’s “knowing failure to timely disclose” any possible violation of the civil FCA. 73 Fed. Reg. at 28409 (May 16, 2008). As discussed below, the addition of mandatory disclosure requirements for potential civil FCA violations (1) appears to be an afterthought not supported by any of the justifications advanced by the Department of Justice (“DoJ”) for the First Proposed Rule; (2) would put contractors in the untenable position of guessing, under penalty of suspension or debarment if they guess wrong, which situations the Government or a *qui tam* relator might subsequently assert constitute a civil FCA violation; and (3) would unfairly subject contractors to potential *qui tam* suits if they err on the side of disclosure. The Section believes that such uses of the Government’s suspension and debarment authority are unfair and would constitute an abuse of that authority.

² This letter is available in pdf format at <http://www.abanet.org/contract/regscomm/home.html> under the topic “Ethics.”

B. The Second Proposed Rule's Extension of Mandatory Disclosure Requirements To Potential Civil FCA Violations Appears To Be An Afterthought Not Supported By The Justifications For The Rule.

The First Proposed Rule resulted from a request by the DoJ that was conveyed in a May 23, 2007, letter from the Assistant Attorney General for the Criminal Division, Alice Fisher, to the Administrator of the Office of Federal Procurement Policy ("DoJ Letter"). The DoJ Letter did not mention the civil FCA, and the mandatory disclosure rule that she sought was limited to potential violations of federal criminal law (and overpayments). More importantly, the justifications offered by DoJ for adopting a mandatory disclosure rule for potential criminal violations do not apply to the civil FCA, and the rule is not necessary to alert the Government to potential civil FCA violations.

As an initial matter, DoJ's professed concern with the alleged decline in the number of voluntary disclosures pursuant to the Department of Defense ("DoD") Voluntary Disclosure Program has no bearing on enforcement of the civil FCA. That statute, unlike federal criminal statutes, contains a private enforcement mechanism — the provision for civil FCA suits to be instituted and prosecuted by private persons referred to as *qui tam* relators. See 31 U.S.C. § 3730(b). The FCA's *qui tam* provisions have resulted in hundreds of civil FCA suits being filed by *qui tam* relators each year alleging millions of dollars of overcharges and other civil FCA violations by defense, healthcare, and other government contractors and subcontractors. Indeed, so many *qui tam* suits have been filed that a "backlog" has developed. See "A Backlog of Cases Alleging Fraud," *The Washington Post*, July 2, 2008. Accordingly, the alleged decline in contractor use of the DoD Voluntary Disclosure Program — whatever its relevance for the enforcement of federal criminal laws — has had absolutely no effect on the enforcement of the civil FCA.

DoJ's other purported justification for the First Proposed Rule — that it would bring contractors into line with other industries currently required by statute or regulation to report potential violations of certain federal criminal laws — is also inapplicable to the civil FCA. No statute or regulation currently requires any entity to report potential violations of the civil FCA to the Government. Thus, rather than being "careful not to ask contractors to do anything that is not already expected of their counterparts in other industries, and . . . avoiding imposing any unnecessary burdens on small businesses or creating any expensive paperwork requirements," DoJ Letter at 1, the Second Proposed Rule would do precisely that.

Although the preamble to the Second Proposed Rule states that DoJ proposed the expansion of the Rule to cover potential civil FCA violations, it offers

no justification for this significant expansion, and neither did DoJ.³ Indeed, the proposed expansion of the mandatory disclosure rule to potential civil FCA violation appears to have been an afterthought on DoJ's part. The Section believes that this expansion would have significant adverse effects on contractors and the integrity of the suspension and debarment process.

C. The Second Proposed Rule Would Put Contractors In The Untenable Position Of Guessing, Under Penalty Of Suspension Or Debarment, Which Situations *Might* Constitute A Potential Civil FCA Violation.

The FCA imposes civil liability on persons who "knowingly" present "false claims" to the United States, 31 U.S.C. § 3729(a)(i), or who "knowingly" make or use a false statement or record to get a claim paid or approved by the Government. 31 U.S.C. § 3729(a)(2). The elements of a civil FCA violation thus include, at a minimum, a "claim," "falsity," and "knowledge." The courts have interpreted the civil FCA also to require a showing of materiality, *i.e.*, that the alleged falsity affected or would have affected the Government's decision to pay the claim. *See, e.g., Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) ("Liability under each of the provisions of the False Claims Act is subject to the further, judicially imposed requirement that the false statement or claim be material."). In addition, the United States Supreme Court recently held that a *qui tam* relator alleging that a subcontractor had violated the civil FCA by making or using a false statement or record to get a claim paid by the Government must show that the subcontractor *intended* that the false statement or record be material to the Government's decision to pay or approve a false claim. *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2008 WL 2329722 (June 9, 2008). Given the multiple elements required to establish a civil FCA violation, and the numerous and sometimes conflicting court decisions interpreting those elements, it is unreasonable and oppressive to demand that contractors undertake to determine whether there are "reasonable grounds to believe" that one or more of its employees, principals, or agents may have violated the civil FCA.⁴

³ DoJ's comments on the First Proposed Rule state only that "[s]ince the proposed regulation already includes the knowing failure to disclose an overpayment as well as violations of federal criminal law as a basis for suspension and debarment, it would be an obvious omission to not include the FCA." As explained in this letter, the omission of the FCA is appropriate.

⁴ Even DoJ recognized in its May 2007 letter that "to limit the scope of the [proposed rule], it may be necessary to include guidance that defines terms such as reasonable grounds." No such guidance, however, was included in the First or Second Proposed Rule.

Further, many civil FCA actions arising out of federal procurements hinge on questions of contract interpretation. In many such cases, although the Government or a *qui tam* relator might state a potential cause of action, the contractor's actions ultimately are vindicated by a ruling that there was no violation of the civil FCA. *See, e.g., United States ex rel. Wilson v. Kellogg Brown & Root, Inc.* 525 F.3d 370 (4th Cir. 2008). Yet, the Second Proposed Rule would penalize contractors for failing to disclose actions that could well result in an ultimate finding of no liability.

The task of discerning a possible civil FCA violation would be compounded where the contractor is required to determine whether there are reasonable grounds to believe that a *subcontractor* may have violated the FCA. It could be extremely difficult for a contractor to obtain access to the facts necessary to assess whether a subcontractor "knowingly" made or used an allegedly false record or whether the subcontractor made or used an allegedly false record with the intent to materially affect the Government's decision to pay or approve a claim. *Allison Engine, supra*. This task will be even more difficult with respect to foreign and commercial item subcontractors, both of which the Second Proposed Rule proposed to add to the coverage of the mandatory disclosure rule.

The civil FCA *qui tam* provisions would further exacerbate the challenges and uncertainties that a mandatory disclosure requirement for potential FCA violations would create for contractors. These *qui tam* provisions allow private entities to allege, on behalf of the United States, facts that can give rise to an FCA violation. The size of the potential awards to *qui tam* relators incentivizes them to develop novel theories of liability under the FCA. *Cf. Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than public good. . . . *Qui tam* relators are thus less likely than is the Government to forego an action based on a mere technical nonconformance with reporting requirements that involve[] no harm to the public fisc."). The Second Proposed Rule would, as a practical matter, require contractors to guess what theories of liability a *qui tam* relator might conceivably argue and whether those arguments would survive a motion to dismiss. A contractor that guesses incorrectly could be subject to potential suspension or debarment for failure to timely disclose a situation where a *qui tam* relator might allege a potential civil FCA violation. Under these circumstances, contractors would be pressured to err on the side of disclosure, with substantial risks, described below.

D. The Second Proposed Rule Would Unfairly Subject Contractors Who Err On The Side of Disclosure To *Qui Tam* Suits Based Upon Their Disclosures.

A contractor making a mandatory disclosure of a potential civil FCA violation pursuant to the Second Proposed Rule would face the risk of *causing* the filing of a *qui tam* suit based upon its disclosure. The civil FCA contains a provision — commonly referred to as the “public disclosure bar” — that deprives the court of jurisdiction over a *qui tam* suit if the allegations in the suit are based upon public disclosures. 31 U.S.C. § 3730(e)(4). Most courts, however, do not recognize disclosures to an agency Inspector General or contracting officer as a “public disclosure” that bars the *qui tam* suit. Therefore, a contractor making a mandatory disclosure would not be protected by the civil FCA’s “public disclosure” bar unless the disclosures were subsequently published in the media, a lawsuit, or an administrative or congressional hearing or audit report. Relators who had access to the disclosures other than through these sources could file a *qui tam* complaint based upon the contractor’s disclosures.

This risk will be magnified if the proposed amendments to the FCA currently pending in the House and Senate become law. Both the Senate amendments (S.2041) and the House amendments (H.4854) would strip defendants of their current ability to raise the public disclosure jurisdictional bar as a defense in a *qui tam* suit. Instead, DoJ would be able to file a motion to dismiss based on the public disclosure bar, or the court might also dismiss *sua sponte*. Because DoJ lacks the incentive to file such motions, relators would be able to file *qui tam* suits based upon public disclosures, including mandatory disclosures reported in the media or in a government report. Moreover, the amendments would overturn the long line of decisions that preclude government employees from acting as *qui tam* relators. This change would allow the very government officials to whom the mandatory disclosures were made to bring a *qui tam* suit against the contractor based upon its mandated disclosures.

E. Threats of Suspension and Debarment Should Not be Used to Enforce Mandatory Disclosure of Possible Civil FCA Violations.

For the reasons set forth above, use of the FAR suspension and debarment authority to compel contractors to disclose possible civil FCA violations is not warranted. Suspension and debarment are remedies designed to protect the Government from doing business with contractors that are not presently responsible — that is, that lack the integrity or systems adequate to ensure that they conduct business in an ethical and compliant manner. A contractor’s reasonable determination that conduct does not justify a possible civil FCA action, *e.g.*, that its

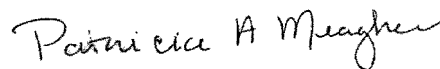
conduct was permitted under the contract, that the questioned conduct was not material, or that it was not undertaken with the requisite level of intent, should not be taken as reflecting a lack of business integrity or adequate compliance systems. Moreover, exposing contractors (and their employees and subcontractors) to potential *qui tam* suits based upon mandatory disclosures is not consistent with the goals of the FAR's suspension and debarment provisions. There is no need or justification for employing the suspension and debarment authority to assist relators in identifying and prosecuting *qui tam* suits.

CONCLUSION

As indicated in the Section's comments on the First Proposed Rule, there is substantial interest within the Section in the Proposed Contractor Compliance Program and Integrity Reporting rule. The Section is concerned that the Second Proposed Rule fails to address or take into account many of the issues identified in the Section's comments to the First Proposed Rule. These concerns now include the extension of mandatory disclosure obligations to cover possible civil FCA violations. We urge the Councils to eliminate the requirement that contractors disclose potential civil FCA violations or face potential suspension and debarment if they do not.

The Section appreciates the opportunity to provide these comments and is available to provide additional information and assistance as the Councils may require.

Sincerely,



Patricia A. Meagher
Chair, Section of Public Contract Law

cc: Michael W. Mutek
Karen L. Manos
Donald G. Featherstun
Carol N. Park-Conroy
John S. Pachter
Michael A. Hordell
Robert L. Schaefer
Council Members, Section of Public Contract Law
Chair(s) and Vice Chair(s) of the Procurement Fraud Committee
Chair(s) and Vice Chair(s) of the Suspension and Debarment Committee

General Services Administration
July 15, 2008
Page 8

Scott M. McCaleb
Kara M. Sacilotto



AMERICAN BAR ASSOCIATION

Section of Public Contract Law
Writer's Address and Telephone

2007-2008

CHAIR

Patricia A. Meagher
582 Market St, Ste 301
San Francisco, CA 94104
(415) 362-6517

CHAIR-ELECT

Michael W. Mutek
1200 S Jupiter Rd
Garland, TX 75042
(972) 205-5177

VICE-CHAIR

Karen L. Manos
1050 Connecticut Ave, NW, 2nd Flr
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(202) 955-8536

SECRETARY

Donald G. Featherstun
560 Mission St, Ste 3100
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717 Madison Pl, NW, Ste 612
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IMMEDIATE PAST CHAIR

Michael A. Hordeff
600 14th St, NW, 5th Flr
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Charles A. Weiss
St. Louis, MO

SECTION DIRECTOR

Marilyn Neforas
321 N Clark St, M/S 19-1
Chicago, IL 60610
(312) 988-5596

January 18, 2008

VIA FACSIMILE AND U.S. MAIL

General Services Administration
Regulatory Secretariat (VIR)
Attn: Ms. Laurieann Duarte
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

**Re: FAR Case 2007-006, Contractor Compliance Program
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2007).**

Dear Ms. Duarte:

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Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.²

Introduction

The Section applauds the FAR Council and Department of Justice (DoJ) for their efforts to promote honesty, integrity, and fair dealing in government contracting, goals shared in the Section's principles as expressed in, for example, the Model Procurement Code. In furtherance of these goals, the Section generally believes that any contractor doing business with the Government would benefit from a code of ethics and business conduct and compliance procedures. The Section's comments relate not to the foregoing basic goals, but rather with the means of carrying them out.

The Proposed Rule includes a number of provisions that would significantly alter existing FAR rules regarding contractor compliance and ethics programs, including provisions that would (i) require contractors to establish and maintain a mandatory code of ethics and business conduct and internal controls (building upon the recent finalization of FAR Case 2006-007 and its compliance program requirements); (ii) require contractors to notify the Inspector General and Contracting Officer whenever they have "reasonable grounds" to believe that a violation of federal criminal law has occurred in connection with the award or performance of a government contract or subcontract; and (iii) subject contractors to suspension or debarment for any failure to "timely disclose" an "overpayment" or "[v]iolation of Federal criminal law in connection with the award or performance of any Government contract or subcontract." *See* 72 Fed. Reg. at 64022-23.

At the outset, the Section notes that there is no statutory authority for the FAR Council to issue a regulation providing for mandatory disclosure of criminal acts. The FAR Council therefore lacks the authority to issue the regulation. *See Am. Fed. of Labor & Congress of Indus. Orgs. v. Alfred E. Kahn*, 472 F. Supp. 99 (D.D.C. 1979), *rev'd*, 618 F. 2d 784 (D.C. Cir. 1979). This is particularly important in light of the DoJ's reliance upon the example of other statutorily-mandated disclosure programs (Sarbanes-Oxley, Foreign Corrupt Practices Act, etc.) as justification for this regulatory initiative.³

In addition, the Section finds little factual analysis of the need for the Proposed Rule. The Section suggests that the Council set forth additional analysis

² This letter is available in pdf format at <http://www.abanet.org/contract/regsgcomm/home.html> under the topic "Ethics."

³ This rationale is cited in its May 23, 2007 letter to the Office of Federal Procurement Policy proposing the subject Proposed Rule.

and explanation. As discussed in more detail below, the Section finds provisions of the Proposed Rule that are vague or ambiguous, and that appear more likely to cause compliance issues than to resolve them. The Section also questions the need for the additional disclosure and other requirements specified in this Proposed Rule, particularly given the recent implementation of more expansive contractor compliance standards in the FAR (*see* 72 Fed. Reg. 65873 (Nov. 23, 2007)) and the existence of other voluntary disclosure programs and incentives such as those in the Federal Sentencing Guidelines and the existing suspension/debarment regime. If the FAR Council nonetheless elects to proceed with rulemaking based upon this proposal, it is the view of the Section that substantial revisions in both the substance and rationale in support of the Proposed Rule are necessary to make the Proposed Rules both reasonable and enforceable.

A. The Proposed Rule Does Not Provide The Requisite Explanation Of Need For Additional Disclosure Obligations

The Section maintains that the Proposed Rule is unsupported because the rationale for the mandatory disclosure requirement is unexplained. The DoJ states that the mandatory disclosure provision is required “because few companies have actually responded to the invitation of DoD that they report or voluntarily disclose suspected instance of violations of Federal criminal law relating to the contract or subcontract.” 72 Fed. Reg. at 64020. We presume this statement refers to participation in the DoD Inspector General’s (“DoD IG”) Voluntary Disclosure Program. But this statement concerning the level of activity in the DoD IG Voluntary Disclosure Program does not establish that there is a need for a mandatory disclosure program. No supporting data is cited in support of this assertion and, indeed, the available data suggests the contrary is true – that voluntary disclosures remain a viable and regularly-used tool to address violations of law discovered by government contractors.

The number of contractor disclosures to the DoD IG voluntary disclosure program has been fairly level over the past several years, according to DoD IG reports. Further, to the extent that DoJ’s claim is based upon a comparison of the level of disclosures over the past several years to the larger numbers reported when the program was initiated 20 years ago, its assumptions about the reason for that decrease are misplaced. By assuming that the level of illegality continues to be the same after 20 years and is simply not reported, the DoJ appears not to have given consideration to whether this may better be explained by the discussions below regarding other positive influences on the contractor community and the use of other approaches to address findings of noncompliance with law.

The Section believes a more careful analysis of the status of compliance programs will reveal that there has not been an overall decrease in contractor disclosures of violations of law. Although electing not to seek admission to the DoD IG Voluntary Disclosure Program, consistent with the program's voluntary nature, contractor disclosures continue to be made by other means – directly to contracting officers or heads of contracting activities, or to audit agencies like DCAA and DCMA, or to other disclosure programs that are more relevant to the kinds of illegality being found these days, such as those maintained by the DoJ Antitrust division and by the Department of State Directorate of Defense Trade Controls (“DDTC”). These disclosures are consistent with the voluntary disclosure policies many contractors have adopted as part of their ethics and compliance programs and do not reflect decreased vigilance or willingness to report illegality when appropriate. Indeed, the Section understands that in recent years voluntary disclosures to the DDTC regarding export control violations are very common and have increased as disclosures to the DoD IG program have decreased (*see* GAO-05-234 (Feb. 2005)), and that the DoJ Antitrust division's Corporate Leniency Program likewise has been very successful at inducing voluntary disclosures. *See* <http://www.usdoj.gov/atr/public/speeches/227740.htm>. Enforcement actions for violations of the Foreign Corrupt Practices Act also have grown, again largely due to voluntary disclosures made by corporations. *See* “U.S. Targets Bribery Overseas Globalization, Reforms Give Rise to Spike in Prosecutions,” *The Washington Post* (Dec. 5, 2007).

Further, in recent years the DoJ program has not been very effective in achieving timely resolution of disclosures, and a further concern that the program often results in DoJ pursuit of the full consequences of all matters disclosed through criminal, civil or administrative actions, resulting in limited net benefit from the voluntary disclosure.

Thus, the growth in disclosures elsewhere, without similar growth in the DoD IG Voluntary Disclosure Program, suggests the Program's uncertain consequences may be persuading contractors to pursue other disclosure alternatives. Indeed, it appears more likely that the trend of the Program to trigger aggressive enforcement reactions rather than keeping open the possibility of cooperative resolutions and reduced penalties (such as more reliance on administrative remedies or no trebling of penalties in appropriate cases, as occurred more often in the early years of the Program) has put it in disfavor. The Section suggests that a better alternative would be to reassess and revise the Voluntary Disclosure Program rather than impose a new program as envisioned in the Proposed Rule.

The Section believes that the increased emphasis on compliance over the past decades also has resulted in a decrease in the number of reportable issues – matters are addressed and resolved before they can become major fraud matters. Thus more issues are being resolved quickly and administratively under particular contracts rather than growing over time into major compliance issues. Thus, decreasing use of the Voluntary Disclosure Program reflects the greatly enhanced contractor compliance programs implemented since the Voluntary Disclosure Program began. Common sense would suggest that, at some point, there would be a natural, and indeed desired, decline in Voluntary Disclosure reports as contractors put in place effectively-operated compliance and training programs, which were virtually non-existent in 1986 but are generally quite robust now (and have been so for over a decade). Indeed if voluntary disclosures stayed at the levels of the late 1980s and early 1990s, it would be an indication that the preventative effects of sound contractor training and compliance programs were not being realized. Section members who have been involved with training and compliance programs at the company level have witnessed the seriousness with which these programs are regarded and can attest to the impact these programs have in preventing the need for disclosures. These programs are working and have generally been working for quite some time.

Thus even if DoJ were correct regarding a claimed decrease in contractor participation in the DoD IG Voluntary Disclosure Program, it has not demonstrated a need for the proposed mandatory disclosure rule. Before such a major rule is adopted, the Section recommends that DoJ should offer factual support for its thesis that crimes are occurring and being found and yet not being reported voluntarily, and further should explain why other less burdensome changes – such as improving the existing voluntary disclosure programs – cannot be used to achieve the desired results.

B. The Proposed Rule Does Not Address Overlap and Inconsistency With Existing Disclosure Regimes

The existing regulatory and statutory schemes in place to encourage government contractors and other corporations to voluntarily disclose criminal behavior provide ample incentive to contractors and suggest that the mandatory disclosure requirement of the Proposed Rule would contribute little, if any, overall improvement in the number of disclosures made to the Government. The present regulatory system encourages government contractors to self-report wrongdoing by providing mitigating credit in suspension/debarment and criminal proceedings for such disclosures. Indeed, the Proposed Rule's mandatory disclosure scheme is sufficiently inconsistent with the present voluntary disclosure incentives that it could be viewed as making government contractors incapable of making

“voluntary” disclosures that other regulatory and statutory schemes seek to encourage. This would be an unfortunate consequence of the Proposed Rule.

1. Existing Suspension And Debarment Regulations Provide Strong Incentives For Contractors To Voluntarily Disclose Criminal Behavior

Pursuant to the FAR requirements that a prospective contractor be presently responsible, a contractor must demonstrate, *inter alia*, “a satisfactory record of integrity and business ethics.” FAR 9.104-1(d). Under the FAR suspension and debarment provisions, the Government may assess a *de facto* blanket determination of non-responsibility when a contractor commits fraud or a criminal violation in connection with a federal contract. *See* FAR 9.406-2(a)(1) (Debarment); 9.407-2(a)(1) (Suspension).

As noted in the FAR, however, suspension and debarment are “serious” steps that are not to be imposed for “purposes of punishment,” but “only in the public interest for the Government’s protection.” FAR 9.402(b). Suspension and debarment are therefore not intended as automatic responses but, instead, are protective measures that should be taken only after deliberative consideration of a host of designated mitigating factors and the exercise of due discretion. Mitigating factors may enable a contractor to demonstrate that, notwithstanding its underlying wrongdoing, the contractor is presently responsible. Suspension and debarment are inherently discretionary acts of the agency officials based on their judgment as to the pertinent circumstances. *See* FAR 9.406-1(a) (Debarment); FAR 9.407-1(b)(2) (Suspension).

Among the most important mitigating factors that the Government must consider in a debarment proceeding, and may consider in a suspension proceeding, is whether the contractor has voluntarily disclosed the grounds for suspension or debarment:

The existence of a cause for debarment, however, does not necessarily require the contractor to be debarred; the seriousness of the contractor’s acts or omissions and any remedial measures or mitigating factors should be considered . . . such as . . .

- (2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner [and]

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

FAR 9.406-1(a) (Debarment); FAR 9.407-1(b)(2) (Suspension).

Given the prominence of disclosure as a mitigating factor for both debarment and suspension, contractors already have a substantial incentive to voluntarily disclose the same violations of federal criminal law that the Proposed Rule's mandatory disclosure requirement is geared toward.

The Proposed Rule's mandatory disclosure requirement would supersede a contractor's ability to voluntarily disclose the same wrongdoing and could be viewed as effectively eliminating the above-quoted two mitigating factors available for the Government's consideration in any suspension/debarment proceeding. Thus, not only would the mandatory disclosure requirement impose an unnecessary burden on contractors, it could also contradict the existing suspension/debarment scheme. The Section believes that the Proposed Rule inappropriately seeks to elevate suspension and debarment from its protective role to that of a penalty. In the absence of an authorizing statute, such a result well may be invalid. In any event, the claim of need for mandatory disclosure does not establish a statutory basis for it.

2. The Federal Sentencing Guidelines Provide Strong Incentives For Contractors To Voluntarily Disclose Criminal Behavior

Contractors also have a strong incentive to voluntarily disclose violations of federal criminal law because they can achieve dramatically-reduced penalties under the Federal Sentencing Guidelines for doing so. *See* U.S. Guidelines Manual, § 8C2.5(g). Because this incentive applies only if the corporate disclosure is rendered "prior to an imminent threat of disclosure or government investigation," timely voluntary disclosure by the contractor is critical to establish eligibility for this relief. *Id.*

The Proposed Rule could make it more difficult for a government contractor to be deemed to have made any "voluntary disclosure" under the Federal Sentencing Guidelines. A disclosure made in accordance with the Proposed Rule would arguably not be a "voluntary" disclosure. The Proposed Rule may therefore cast doubt on government contractors' ability to fully participate in the sentencing regimen established by Congress and implemented by the U.S. Sentencing Commission, and further, may contradict Congressional intent in enacting these policies regarding voluntary disclosures.

Further, because the Proposed Rule could effectively write out of the Sentencing Guidelines the benefits of voluntary disclosure, it is not 'more' consistent with the Sentencing Guidelines than the current compliance regime, as suggested in the supporting discussion for the Proposed Rule, but actually contradicts them. *See* 72 Fed. Reg. 64019.

3. The False Claims Act Provides Strong Incentives For Contractors To Voluntarily Disclose Fraudulent Behavior

The FCA also provides contractors with an incentive to report potentially fraudulent behavior. The FCA authorizes private individuals to file *qui tam* actions on behalf of the Government in those instances where the private relator has non-public information regarding contractor fraudulent billing or claims. Even in cases in which the Government does not elect to intervene and prosecute a FCA claim itself, *qui tam* actions can be costly and damaging to contractors.

Where a contractor knows of potential false claims exposure, it is often in the contractor's best interest to voluntarily disclose such wrongdoing to the Government because, *inter alia*, such disclosures can trigger the "public disclosure" bar to *qui tam* suits. While *qui tam* suits are frequently litigated in costly public litigation, a contractor's early disclosure to the Government can foster mutually-agreeable settlement among all the interested parties with little to no damaging public exposure.

Furthermore, voluntary disclosure under the FCA can dramatically reduce the potential liability of a contractor in the event the Government ultimately pursues a FCA claim. Rather than facing a per-event penalty of \$5,500 to \$11,000 and treble damages, a contractor that makes a voluntary disclosure pursuant to 31 U.S.C. § 3729(a) can reduce its potential liability to double damages. The benefits of voluntary disclosure can be substantial, and provide a strong incentive for contractors to make a voluntary disclosure of fraudulent behavior.

Finally, as with the Federal Sentencing Guidelines, the mandatory nature of the Proposed Rule again may call into question whether any disclosure would qualify as "voluntary" under the FCA, and therefore may reduce contractors' incentive to make such disclosures.

4. The Proposed Rule May Eliminate Important Incentives To Voluntarily Disclose Wrongdoing

As suggested above, the Proposed Rule may eliminate any mitigation that contractors might obtain in suspension/debarment, criminal, or FCA proceedings

by virtue of voluntarily disclosing wrongdoing. As a consequence, especially in cases involving serious fraud or criminal behavior, the Proposed Rule might actually create a perverse incentive for contractors to *refrain* from disclosing wrongdoing, notwithstanding the mandatory reporting mechanism. This is so because in those cases where suspension or debarment is the likely result of the contractor's underlying behavior requiring disclosure, the penalty for failing to disclose the underlying behavior may be no different: the risk of non-disclosure (*i.e.*, potential suspension/debarment) is no different from the risk of waiting to see if the Government detects the underlying wrongdoing on its own. Thus, without the incentive of some sort of consideration for a voluntary disclosure – through which the contractor might be able to avoid or reduce the impact of suspension or debarment through proactive voluntary steps – contractors may be inclined not to report wrongdoing. The Section believes such a result, albeit unintended, is not good public policy.

By eliminating these incentives, the Proposed Rule could cause contractors to adopt a protective posture in the face of evidence of potential criminal behavior, rather than pursuing disclosure. The Proposed Rule does not reflect consideration of these concerns or evaluation of the extent to which eliminating incentives to voluntary disclosure will affect a contractor's decision to disclose underlying behavior—mandatory or not.

5. Current Mandatory Disclosure Programs Are Not Instructive

DoJ cites to a number of existing statutory mandatory disclosure programs as support for the promulgation of the Proposed Rule, and also points to the National Reconnaissance Office's (NRO) claims regarding its own contractual disclosure program. However, in the Section's view this reliance is misplaced, as those programs are targeted towards a particular public need, and in most cases are the product of legislation that was enacted in response to a specific scandal or important national need. The Proposed Rule lacks both a targeted particular public need or statutory authority.

First, most of the mandatory programs which DoJ cites to support the need to promulgate the sweeping, government-wide mandatory disclosure program of the Proposed Rule were the product of legislation – Sarbanes Oxley, the Anti-Kickback Act, and the Foreign Corrupt Practices Act, and banking laws. In enacting these statutory schemes, Congress saw a particular need and targeted legislation to address that particular need. The result was not a sweeping and burdensome program but a specific and narrow requirement. The Anti-Kickback Act and Foreign Corrupt Practices Act, for example, limit their mandatory disclosure provisions to a very limited class of activity and present therefore a

limited burden on covered companies. These DoJ examples further contemplate at least some careful review and investigation by reporting entities before reports are made — Sarbanes Oxley, for example, contemplates internal reporting mechanisms and review mechanisms involving management at the highest levels before any reporting occurs, without a pre-emptive trigger of “whenever there is reasonable basis to believe” as in the Proposed Rule.

Second, in general, these mandatory disclosure programs were enacted by Congress in response to one or more specific scandals or series of scandals. The broadest of these legislative fixes, Sarbanes Oxley, came in response to perhaps the greatest series of corporate scandals and omissions the post-Depression era has ever seen. Untold numbers of innocent people were demonstrably and permanently damaged by the corporate scandals; Congress had to act, and it did, in a way that was targeted to prevent the specific problems that surfaced during the scandals.

Similarly, while the NRO’s mandatory disclosure program was not the product of legislation, it was the direct product of an obvious and public awareness that we live in a different world after 9/11, and after some of the limited number of lapses that have occurred in the classified world in recent years. In fact, the unique nature of the NRO and its responsibilities are major reasons cited as justification for its disclosure program.

Further, it is far from clear at this point whether the NRO mandatory disclosure program is or will be productive.⁴ However, it is quite evident that the NRO program is implemented in the world of classified contracts and anti-terrorism, again, an area in which both Congress and the Administration have made specific findings and are attempting to employ every possible tool to enhance national security, circumstances which are not present when promulgating a procurement rule of general applicability such as the Proposed Rule. The Section further notes that the NRO clause was not subject to notice and comment.

Similar justifications have not been proffered for the Proposed Rule. The mandatory disclosure provisions in the Proposed Rule are neither the product of specific Congressional findings or legislation nor any perceived critical national need and thus are not appropriately compared to other existing mandatory disclosure programs.

⁴ The Section understands that at least some affected government contractors believe that the NRO’s mandatory disclosure program suffers from the same defects that attend the sweeping mandatory disclosure program that is advanced in the Proposed Rule. Anecdotal reports from the contractor community suggest the program is not as effective as the NRO may claim and is extremely burdensome.

6. Overpayments Are A Matter Of Contract Administration And Should Not Be Grounds For Suspension Or Debarment

In a July 1999 report, GAO raised a concern that at the time there was “no requirement for contractors who have been overpaid to notify the government of overpayments or to return overpayments prior to the government issuing a demand letter.” GAO/NSIAD-99-131 at 1 (July 1999). In 2002, the FAR Council responded by adding the requirement in FAR Clause 52.232-25(d) that contractors report overpayments:

Overpayments. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment.

See also 66 Fed. Reg. 65353 (Dec. 18, 2001). A year later, the FAR Council extended this requirement to commercial item contracts. *See* FAR Clause 52.212-4(i)(5); 68 Fed. Reg. 56682 (Oct. 1, 2003). Within this scheme, overpayments have, until now, been a matter of contract administration. *See* FAR 12.215 and FAR 32.008 (requiring Contracting Officer to oversee disposition of overpayment); FAR 52.216-7(g) (authorizing the Contracting Officer to audit contractor’s invoices for overpayment); FAR 15.407-1(b)(7)(iii) (authorizing Contracting Officer to assess penalties for knowing submission of defective cost or pricing data resulting in overpayment).

In view of the obligations imposed on contractors and the remedies provided to the Government in these FAR provisions, it is the Section’s view there is no need to specifically create additional suspension and debarment triggers to maintain the integrity of the procurement process with respect to overpayments. Although the Proposed Rule includes such an additional ground for suspension or debarment, it provides no predicate establishing either (i) the need for such a rule or (ii) the need to treat overpayments as anything other than a matter of contract administration.

First, this new basis for suspension or debarment comes with no explanation, and it is unclear how or why contractor notification of overpayments is related to the other issues of contractor integrity or compliance programs addressed elsewhere in the Proposed Rule, or why this rule is necessary to improve the procurement process at all. In addition, the Proposed Rule does not connect overpayments to the criminal law violations upon which the rest of the Proposed Rule is focused. Except for the brief statement that the new basis for suspension or

debarment was “requested by DoJ,” the FAR Council has not indicated any reason to propose this severe sanction for overpayments. Furthermore, there is no demonstration that present FAR provisions requiring the disclosure of overpayments are ineffective, or that the FAR Council (or DoJ, for that matter) expects the additional threat of suspension or debarment to materially improve reporting of overpayments under the existing regulatory regime.

Second, there is no explanation why overpayments need to be treated as anything other than matters of contract administration, as they traditionally have been. To the extent the Proposed Rule may have been intended to focus upon disclosure of fraudulently-induced overpayments, the resulting language is much too broad and makes no distinction between the normal business of contract administration and criminal behavior. This question is of particular concern because, as noted above, the FAR Council looked at issues involving contract overpayments as recently as 2003 and determined at that time to treat overpayments strictly as a matter of contract administration, not suspension or debarment. The Section respectfully suggests that if the FAR Council is revisiting this determination, there should be an accompanying explanation and justification.

Ultimately, the Section believes that the Proposed Rule does not contain an adequate showing that the present procedure for contractor reporting of overpayments is ineffective or requires enhancement. Mandatory disclosure provisions have been in effect for more than five years, and the FAR Council and DoJ have not shown that the present reporting mechanisms do not adequately result in proper disclosures and resolutions of overpayments. The Section notes that the Proposed Rule provides no evidence, empirical or otherwise, to suggest that contractor overpayments are systemically unreported or that additional measures would improve the information reported to the Government. Accordingly, there is neither a demonstrated need for this provision of the Proposed Rule; nor any likely benefit from its implementation. Accordingly, in the Section’s judgment, this provision of the Proposed Rule should be withdrawn.

C. The Mandatory Disclosure Provision Will Result In Increased Burdens On Contractors And The Government

The Proposed Rule will impose a highly burdensome obligation on contractors — to make their own assessments whether there has been a violation of federal criminal law that must be disclosed. This places responsibility on a contractor to make the decision whether a federal criminal violation or some lesser civil or administrative violation has occurred, and whether it is related in some manner to a federal contract or subcontract. Each element of that analysis is subject to discretionary judgments — deciding whether an act is criminal involves

assessment of available facts, weighing countervailing theories, determining whether all elements of a crime are present and what facts are sufficient to establish intent or reckless disregard versus negligence. While there will be obvious cases where only one conclusion is possible, the reality is that most cases that will require this analysis will not be clear, and the conclusion about criminality will not be obvious. Each will require careful assessment, and more importantly, each will expose contractors to possible suspension or debarment under the Proposed Rule if government investigators later disagree with a contractor's conclusion – however reasonable – that a criminal violation did not occur.

Under the current voluntary disclosure programs, a contractor has the flexibility to make assessments about whether violations of law constitute criminal conduct, and whether such potential criminal conduct could be addressed without initiating a formal voluntary disclosure. The contractor can assess the risks and benefits of disclosure through various alternatives, without risking further consequences from that decision alone. Under the Proposed Rule, where suspension or debarment awaits those whose judgments about criminality and reporting methods are challenged by the government, contractors that doubt whether conduct rises to the level of disclosure as criminal conduct would necessarily have to err on the side of reporting even the least suspicious of events, which would impose significant burdens on the contractor as well as on federal agencies.

Effectively requiring that every potential violation be reported also will tie up government resources unnecessarily. With a mandatory disclosure requirement and a contractor need to minimize risk of debarment, the government is at risk of being inundated with minor allegations that will have to be sorted through before the truly significant problems can be identified and addressed. In addition, the contractor and government expenses (both in terms of time and money) to implement such a sweeping disclosure program will increase with the need to investigate, disclose, and address every potential issue under the Proposed Rule. While the Section does not oppose the government expending resources where a true need is identified and benefits will be achieved, there is no indication that the mandatory disclosure requirement does either.

Finally, the new reporting regime would impair the procurement systems of the government. Assuming contractors err on the side of reporting even minor matters to reduce risk, the Inspector General will be required to investigate each such matter and then refer the matter to DoJ, under the same standard. This new reporting regime will deprive the Contracting Officer of his or her authority to manage many contract issues, even those matters for which there is only a slight chance of actual criminality. This has the potential to add months or even years to

the process of sorting out even the least significant of noncompliance issues, and to transfer responsibility for such routine compliance matters away from the contracting personnel who are most knowledgeable about the impact of compliance issues on program needs.

D. The Initial Regulatory Flexibility Analysis Does Not Fully Identify And Address The Burdens The Proposed Rule Will Impose On Small Business

1. The Proposed Rule's Disproportionate Impact on Small Business is Not Recognized

The Section notes favorably that the Proposed Rule specifically exempts small businesses from the requirement to have a formal ethics awareness program and an internal control system, a provision appearing reasonable to the Section. The letter from the DoJ Criminal Division to the Administrator of the Office of Federal Procurement Policy (OFPP) dated May 23, 2007, makes note of this. Nevertheless, the Section notes that the Proposed Rule's primary enforcement mechanism – suspension or debarment – will necessarily have a disproportionate impact on small businesses. First, small businesses generally do not have the same financial, human, or other resources as large businesses to institute the substantial compliance programs compelled by the Proposed Rule. Further, unlike their large business counterparts, many small businesses serve in a less critical role in the procurement process and, thus, lack the leverage to negotiate agreements in lieu of debarment. The very real likelihood, therefore, is that small businesses will bear the brunt of the suspension/debarment remedy postulated in the Proposed Rule. Thus, the Proposed Rule's reliance upon suspension and debarment as an enforcement mechanism for implementation of much more substantial compliance and disclosure measures than they currently are required to maintain has the potential to disproportionately damage small business interests, a disparate outcome that is not reflected in the Regulatory Flexibility Analysis.

2. Regulatory Flexibility Analysis Requirements

Although the FAR Council conducted an initial regulatory flexibility analysis ("IRFA") in support of the Proposed Rule, as summarized at 72 Fed. Reg. 64020-21, the IRFA does not adequately address all of the factors required to be considered under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 603. In particular, the IRFA:

- (i) does not evaluate adequately the Rule's compliance costs or the number of small entities to which the rule will apply;

- (ii) does not articulate the need for the Proposed Rule;
- (iii) does not estimate adequately the projected reporting, recordkeeping and other compliance requirements of the rule; and
- (iv) does not consider the extent to which the Proposed Rule overlaps other rules.

As a consequence, full consideration has not been given to the substantial impacts of the Proposed Rule on small businesses, as required by law. The Section believes that the IRFA is invalid for this reason and the Proposed Rule should be withdrawn pending further examination and explanation.

a. **The IRFA Does Not Adequately Evaluate The Proposed Rule's Compliance Costs Or Reasonably Estimate The Number Of Small Businesses Affected By The Proposed Rule**

The RFA was enacted to "require[] an agency promulgating a rule to consider the effect of the proposed regulation on small businesses and to design mechanisms to minimize any adverse consequences." *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1433 (M.D. Fla. 1998). To ensure that this goal is met, the RFA requires an agency to conduct an IRFA before it may issue a rule which is expected to have a "significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b).

The primary shortcoming with the IRFA for the Proposed Rule is the disconnect between the FAR Council's conclusion, on the one hand, that "[t]he changes may have a *significant economic impact on a substantial number of small entities* within the meaning of the Regulatory Flexibility Act," and its finding, on the other hand, that the Proposed Rule's mandatory reporting requirement is *not* expected "to be a significant burden on small businesses, because it *only impacts those small businesses that need to report* violations of Federal criminal law in connection with the award or performance of a Government contract." 72 Fed. Reg. at 64020-21 (emphasis added). The inconsistency in these two findings suggests that the IRFA focused *solely* on the burdens associated with *actually reporting* violations of law (which were deemed minimal) and did not address the significant costs and burdens required to establish and maintain the comprehensive compliance program needed to fully comply with the rule, even when a mandatory disclosure is ultimately determined not to be required.

As a result of this narrow focus, the FAR Council estimated that the new rule would affect *only 28 small businesses* in the course of a year pursuant to the

mandatory disclosure requirements of the proposed FAR 52.203-XX(b)(3). 72 Fed. Reg. at 64021. This number is strikingly low. The estimate considers only “the number of small business concerns that will be required to submit the report of violation of Federal criminal law with regard to a Government contract or subcontracts.” *Id.* Thus, the IRFA does not address the extent to which small businesses will be required to expend financial and managerial resources to determine whether allegations or suspicions of wrongdoing are covered by the mandatory disclosure requirement or not. For example, the IRFA does not consider the substantial time and expense associated with a small business’s determination of whether an allegation or suspicion of potential wrongdoing (i) rises to the level of “reasonable grounds” requiring disclosure, (ii) is a “violation of Federal criminal law,” or (iii) is “in connection with the award or performance” of a federal contract.

The Section believes that there is a misconception inherent in the IRFA -- that small businesses will spend time and resources to comply with the proposed FAR 52.203-XX(b)(3) *only* when they actually have a reporting obligation. For every company that discloses a wrongdoing under the mandatory requirement, however, many more will confront situations involving allegations or suspicions of wrongdoing that do not ultimately require disclosure under the Proposed Rule. The company will be required to expend substantial human and financial resources to determine whether the alleged wrongdoing falls within the scope of the Proposed Rule even if it ultimately determines it does not. Perhaps most significantly, the limited resources of small businesses will necessarily be diverted to conducting internal investigations, often requiring the commitment of time by senior management and other employees and the significant expense of engaging outside legal counsel. Contractors are not experts in federal criminal law and will likely require the advice and assistance of legal counsel to determine if a “violation of Federal criminal law” is even at issue. Many small businesses may find the cost of outside legal advice and assistance to be unduly burdensome.

Thus, the conclusion in the IRFA that only an estimated 28 small businesses would be affected per year by the Proposed Rule is unreasonable because the subset of contractors on which the IRFA focused is too narrow. The Section believes the lack of consideration of the significant necessary effort prior to any reporting results in an underestimation of the magnitude of the business impact that the Proposed Rule would have on small business entities.

b. There Is No Demonstrated Need for the Proposed Rule and the IRFA Does Not Articulate One

The RFA requires that an IRFA include “a description of the reasons why action by the agency is being considered.” 5 U.S.C. § 603(b)(1). In this case, and

as discussed above, the IRFA does not reflect a rational basis for the decision to undertake the proposed changes, other than the brief statement that “[t]his case is in response to a request to the Office of Federal Procurement Policy from the Department of Justice.” 72 Fed. Reg. at 64019. There is no empirical or anecdotal evidence to explain why the mandatory disclosure requirement is required for the proper functioning of the procurement system.

The IRFA states, without explanation or justification, that in the absence of the proposed disclosure requirement, “only 1 percent of those contractors/subcontractors that are aware of a violation of Federal criminal law in regard to the contract or subcontract will voluntarily report such violation to the contracting officer.” 72 Fed. Reg. at 64021. The one percent figure used in the IRFA suggests that the FAR Council believes that the mandatory disclosure requirement could lead to a 100-fold increase in the number of reported violations above those that are reported under the present voluntary disclosure system. Nothing in the IRFA, however, supports this estimate. Thus, there is no rational basis to support a claim that this disclosure requirement is needed for the effective functioning of the procurement system.

c. The Projected Recordkeeping And Compliance Requirements Are Far More Burdensome Than Reflected In The IRFA

Under the RFA, an IRFA must include “a description of the projected reporting, recordkeeping and other compliance requirements of the Proposed Rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record” 5 U.S.C. § 603(b)(4). The IRFA also does not reflect this RFA requirement.⁵

In analyzing the compliance requirements of the Proposed Rule, the IRFA only repeats the reporting requirement of the Proposed Rule and suggests that the report “would probably be prepared by company management, and would probably involve legal assistance to prepare.” 72 Fed. Reg. at 64021. Pursuant to the requirements of the RFA, however, an analysis must be done of the recordkeeping or compliance burdens that the Proposed Rule would impose.

Considering the severe suspension/debarment sanction that a contractor may face under the Proposed Rule, contractors (with some exceptions for small businesses) will be required to establish comprehensive compliance programs and

⁵ The Section notes that the underestimation of burden applies equally to the Paperwork Reduction Act analysis at 72 Fed. Reg. at 64020-21.

maintain extensive records any time they investigate allegations or suspicions of such violations. Even if a company determines that disclosure is not required, the contractor must still document its investigation to enable it to demonstrate later the *bona fides* of its investigation and explain why it did not believe that there had been a violation of federal criminal law that required disclosure. If the contractor fails to keep adequate records of its decision-making process, and it is later determined that the contractor was in fact required to disclose the purported wrongdoing, the contractor would be hampered in defending itself against a threatened suspension/debarment.

Thus, good business sense will require that contractors develop and keep far more extensive records to comply with the Proposed Rule than the reporting function set forth in the IRFA. Notwithstanding this practical implication of the Proposed Rule, the IRFA has not addressed these compliance and recordkeeping functions that the Proposed Rule will require, focusing on the limited instances in which an actual report to the Government disclosing wrongdoing is required. Because a report to the Government likely will be involved in only a minority of instances in which contractors investigate suspicions or allegations of wrongdoing, the compliance requirements addressed in the IRFA do not reflect the entirety of the compliance obligations imposed. In this regard, the Section views the IRFA as incomplete and lacking a reasonable estimation of the compliance requirements that contractors will face.

**d. The IRFA Does Not Consider Adequately The Overlap
Or Conflict With Numerous Federal Laws**

Under the RFA, the FAR Council is required to “identify[y], to the extent practicable, all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule.” 5 U.S.C. § 603(b)(5). In this case, the Council concluded that “[t]he rule does not duplicate, overlap, or conflict with any other Federal rules.” 72 Fed. Reg. at 64021. In the Section’s judgment, this conclusion is incorrect. As discussed more fully below, the IRFA does not address the inconsistency between the Proposed Rule and the Federal Sentencing Guidelines, existing suspension and debarment regulations, and the False Claims Act (“FCA”), 31 U.S.C. § 3729 *et seq.*

First, the Proposed Rule is inconsistent with the Federal Sentencing Guidelines. Despite the statement in the Preamble to the Proposed Rule that it was intended to harmonize, or “more closely match” with the Federal Sentencing Guidelines, the mandatory disclosure requirement not only deviates from the Guidelines, but it would preempt and nullify important mitigating consideration given in the Guidelines to the voluntary disclosure of corporate criminal action. *See* U.S. Guidelines Manual, § 8C2.5(g). Under the Proposed Rule’s mandatory

disclosure scheme, a government contractor could not make a *voluntary* disclosure of the type contemplated by the mitigation provisions of the Guidelines, thereby eliminating a contractor's ability to fully participate in the Federal Sentencing Guideline process.

Second, the mandatory disclosure requirement is inconsistent with the mitigation considerations established in the FAR for debarment or suspension proceedings. Consistent with the Federal Sentencing Guidelines, the FAR suspension and debarment provisions require the Government to consider voluntary disclosures of contractor wrong-doing as a mitigating factor in any debarment proceeding (and may give consideration in a suspension proceeding). *See* FAR 9.406-1(a) (Debarment); FAR 9.407-1(b)(2) (Suspension). In requiring mandatory disclosure of criminal conduct, the Proposed Rule would eliminate a contractor's long-standing ability to receive mitigating credit for a voluntary disclosure in any resulting suspension or debarment proceeding.

Third, the mandatory disclosure requirement would eliminate an important incentive for voluntary disclosure under the FCA. Presently, a contractor that voluntarily discloses false claims can reduce its damage exposure from treble damages to double damages, and can avoid entirely substantial per-offense penalties. 31 U.S.C. § 3729(a). The Proposed Rule's mandatory disclosure scheme is inconsistent with those statutory provisions and government contractors would be effectively foreclosed from availing themselves of an important provision of the Act.

The IRFA, however, does not address these conflicts, and, as a consequence, the IRFA is incomplete and lacks a proper assessment of the likely impact of the rule on small businesses. In addition, the focus of the IRFA is too narrow, and the analysis relies on assumptions and estimates regarding the nature of the Proposed Rule's impact on small businesses that in the Section's opinion are unsupportable.

For these reasons, the Section believes that the Proposed Rule is not in accordance with the law and should be withdrawn so that the impacts on small businesses can be fully and adequately considered.

E. The Vagueness Of The Proposed Rule Will Cause Implementation Problems And Raises Possible Constitutional Concerns

The Proposed Rule provides unduly vague mandates for disclosure of matters with criminal penalties, under threat of suspension or debarment. A rule with insufficient standards as to what is considered a discloseable violation, or when that duty to disclose will arise, poses the risk of creating more harm than

good. The Section believes that the Proposed Rule should be rewritten to define more clearly what is reportable and when the obligation to report is triggered.

Specifically, the Proposed Rule provides that:

The Contractor shall notify, in writing, the agency Office of Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent or subcontractor of the Contractor has committed a violation of Federal criminal law in connection with the award or performance of this contract or any subcontract thereunder.

Proposed Rule at 52.203-XX(b)(3). Further, a contractor could be suspended or debarred for:

Knowing failure to timely disclose -- (A) An overpayment on a Government contract; or (B) Violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract.

Proposed Rule at 9.406 2(b)(1)(v) and 9.407-2(a)(7).

Both provisions use sweeping language with severe potential consequences, without providing sufficient clarity. For example:

- The Proposed Rule does not define what constitutes a possible criminal violation that would require mandatory disclosure. It is not clear whether the Proposed Rule intends to encompass all felonies and misdemeanors of any nature.
- The standard of “reasonable grounds to believe” a criminal violation has occurred is also too vague. Would a contractor be forced to disclose something that appears “reasonable” before it has had the opportunity to investigate an allegation made through an anonymous hotline complaint? Or does “reasonable” allow a company to conduct an investigation of the complaint to determine whether such an allegation had any substance? The Proposed Rule does not specify when in the commission, discovery and investigation continuum there would be sufficient knowledge to require a disclosure.
- ⇒ Where virtually any performance error has the potential for criminal consequences under the FCA or the False Statements Act, the line between disclosing every possible violation that

someone might claim could be treated as a criminal violation — billing errors, misreported time, quality issues and the routine business of administering contracts — and disclosing truly criminal behavior is far from clear.

- Prosecutors and contractors will surely differ regarding what is a “reasonable” belief that a criminal violation has occurred, which creates the potential for misunderstandings and abuse.
- The Proposed Rule is silent as to who within the contractor entity would have to have knowledge sufficient to establish the “knowing” standard for a contractor. Would a contractor be subject to punishment for nondisclosure where only a lower-level employee has reasonable knowledge that someone else has violated criminal law? To punish the contractor — a corporate body — the Proposed Rule at least should require specific knowledge of a particular criminal violation by someone at a significant managerial level, before a contractor could be punished for a “knowing” failure to disclose.
- Another potential source of confusion is the interplay of individual and corporate suspension and debarment remedies under the Proposed Rule. For example, if a lower-level employee does not disclose what turns out to be a reportable violation to his or her superiors, will he or she be exposed to individual debarment or suspension if the matter is discovered and reported by others? The Proposed Rule potentially could impose debarment on an employee who merely suspects something is wrong, but may not have the knowledge or training to ascertain whether the problem constitutes a covered “criminal violation.” The sweeping disclosure and compliance obligations and the potential for remedies applied to individuals have great potential for misunderstanding.
- The Proposed Rule is silent about whether it is meant to cover past acts or only acts going forward from the effective date the Proposed Rule is incorporated into a contract. To impose a rule that would punish entities going forward for past acts would violate constitutional ex post facto prohibitions.

Accordingly, the Section respectfully suggests that the Proposed Rule will create substantial implementation concerns because of the vagueness of its requirements.

In addition, the vagueness of the Proposed Rule may deprive contractors and their employees of their due process rights.

F. Any Final Rule Must Confirm A Reasonable Scope For “Mandatory Cooperation” With Government Investigations

The Proposed Rule mandates cooperation with the Government. In providing such “cooperation,” companies and company employees must be permitted the opportunity to continue their own investigations and preparation of defenses to criminal allegations. The Proposed Rule should make clear that cooperation does not foreclose any contractor rights.

The charging guidelines contained in the Thompson Memorandum (January 2003) were revised in 2006 in recognition of the need to support the “sanctity of attorney-client privilege” and “encourage full and frank communication between corporate employees and their lawyers.” *See, e.g.*, Department of Justice Press Release, “U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud,” December 12, 2007 (www.usdoj.gov/opa/pr/2006/December/06_odag828.html). Consistent with that announcement by the DoJ, the Proposed Rule should make clear that no waiver of the attorney-client privilege is either required or imputed from the making of a disclosure under the Proposed Rule, and that assertion of the privilege in subsequent proceedings is not a failure to cooperate in an investigation.

In light of the current state of the law on this topic, the Section believes the implication in the Federal Register notice that the privilege should be at risk at all under the Proposed Rule is simply inappropriate. *See* 72 Fed. Reg. at 64020. The attorney-client privilege is a fundamental right that is critical to companies’ ability to effectively address compliance issues and should not lightly be dismissed, particularly in a broad-ranging regime that would effectively put at risk all privileged communications about any law that could affect the performance of a government contract.

Similarly, the ability of companies to pursue their own investigations should not be impaired. Generally, companies want to cooperate with proper government investigations into suspected criminal violations within their companies. Indeed, they have a fiduciary duty to do so to protect shareholder/owner interests. At the same time, and for the same reasons, companies need to be able to pursue their own investigations to determine if there are defenses to mitigate or explain the events that resulted in a disclosure of possible criminal activity. It is fundamental to our legal system that the investigation into and preparation of a defense should not be construed as a failure to cooperate.

Thus, the Proposed Rule should make clear that “cooperation” does not bar companies from conducting their own investigations, defending themselves and their employees, or indemnifying their employees’ defense. Without this clarification, the Proposed Rule will have an undesirable chilling effect on company communications between company employees and counsel. *See* Department of Justice Memorandum, “Principles of Federal Prosecution of Business Organizations,” by Deputy Attorney General Paul McNulty (Dec. 12, 2006).

G. The Proposed Rule Will Have A Chilling Effect On Internal Investigations

A further concern is the likely chilling effect of the Proposed Rule on company compliance programs. Communicating the obligation to disclose essentially every event that might be criminal, along with providing appropriate training and other compliance program enhancements, beyond what has already been implemented pursuant to existing FAR requirements, would quickly make clear that reporting even a suspicion will have immediate unpleasant consequences rather than creating an opportunity to improve processes and fix mistakes. This has substantial potential to decrease rather than enhance cooperation with company compliance efforts.

In addition, the likelihood of severe consequences will necessarily change the relationship of the company and its employees. Where the company is obligated to disclose every potentially criminal violation (particularly if it must do so before it has the opportunity to fully investigate and make an informed determination about criminality and responsibility), it will no longer have the benefit of cooperative work with its employees to identify and correct problems – every interview will have the potential of resulting in employees being reported as part of a mandatory disclosure of an apparent criminal violation, just to protect the company. Employee entitlement to counsel under state law or company bylaws, or at least warnings that they may need counsel and reminders that company counsel are not there to protect them, will make matters more cumbersome, slowing and even directly impairing the ability of a company to investigate compliance matters.

Further, where company investigations and reporting are required as a matter of law, the specter of state action arises — and if the company is deemed to be acting on behalf of the Government in investigating and disclosing criminal activity, it is possible that investigative targets would not only be entitled to counsel but also to *Miranda* warnings. The Section notes that a 1986 proposal from DoD to make fraud disclosures mandatory also foundered on state action grounds.

H. The Proposed Rule Does Not Properly Address the Exemption for Commercial Item Vendors and Overseas Contracts

Although the FAR Council has indicated that it does not intend for certain aspects of the Proposed Rule to apply to contracts or subcontracts for “commercial items,” the Section is concerned that the rule, as currently drafted, does not clearly reflect that intent. As explained below, the Proposed Rule could be interpreted as subjecting commercial item contractors and subcontractors to the same substantive provisions of the Proposed Rule as non-commercial item contractors — including, most importantly, the provisions requiring contractors to maintain internal policies and controls and report suspected violations of law — because the provisions relating to suspension/ debarment do not exempt commercial item vendors.

Consistent with the approach taken in connection with the recently-issued rule regarding “Contractor Code of Business Ethics and Conduct,” FAR Case 2006-007, the FAR Council has indicated that the Proposed Rule is not intended to apply to contracts for commercial items:

The Councils do *not* recommend application of the *clause* to contracts for the acquisition of commercial items. Requiring commercial contractors to comply with the rule would not be consistent with Public Law 103-355 that requires the acquisition of commercial items to resemble customarily commercial marketplace practices to the maximum extent practicable. Commercial practice encourages, but does not require, contractor codes of business ethics conduct. In particular, the intent of FAR Part 12 is to minimize the number of Government-unique provisions and clauses. The *policy* at FAR 3.1002 of the proposed rule *does apply* to commercial contracts. All Government contractors must conduct themselves with the highest degree of integrity and honesty. However, consistent with the intent of Pub. L. 103-355 and FAR Part 12, the clause mandating specific requirements contractor compliance program and integrity reporting is not required in commercial contracts.

72 Fed. Reg. at 64020 (emphasis added); *see also* 72 Fed. Reg. 65873, 65876 (Nov. 23, 2007) (rejecting suggestions that current contractor ethics and compliance rule should apply to commercial item contractors).

The Section agrees that the Proposed Rule should not apply to contracts or subcontracts for commercial items. But, the rule as currently drafted does not

adequately reflect the stated intent to exempt commercial item contracts. First, the only exception for commercial item contracts is contained in proposed section 3.1004, which requires use of a mandatory contract clause in contracts “except when the contract . . . [w]ill be for the acquisition of a commercial item awarded under FAR Part 12 . . .” 72 Fed. Reg. at 64022. The Proposed Rule would not exempt commercial item contracts from the provisions at proposed section 3.1002, which provides in part that “[a] contractor may be suspended and/or debarred for knowing failure to timely disclose a violation of Federal criminal law in connection with the award or performance of any Government contract performed by the contractor or a subcontract awarded thereunder . . .” *Id.* Similarly, the Proposed Rule would not exempt commercial item contracts from proposed sections FAR 9.406-2 or FAR 9.407-2, which would subject contractors to suspension or debarment proceedings for “[k]nowing failure to timely disclose--(A) [a]n overpayment on a Government contract; or (B) [v]iolation of Federal criminal law in connection with the award or performance of any Government contract or subcontract.” *Id.*

Because commercial item contracts would be explicitly exempt from the mandatory contract clause but would not be explicitly exempt from the provisions regarding suspension and debarment for failure to report suspected misconduct, the Proposed Rule as currently drafted could be interpreted as requiring commercial item contractors to maintain internal policies and controls and/or to report suspected misconduct. The Proposed Rule thus could be interpreted as requiring commercial item contractors and subcontractors to maintain the same mandatory policies, procedures, and internal controls for reporting suspected misconduct as non-commercial item contractors.

In addition, the Proposed Rule may not adequately exempt all acquisitions of commercial items, as it phrases the exemption as limited to FAR Part 12 procurements. *See* Proposed Rule 3.1004. Limited in this manner, the exemption does not include contractors that participate in other procurement methods used to acquire commercial items. By contrast, the Proposed Rule exempts all subcontracts for commercial items and is not limited to those awarded under FAR Part 12-type procedures. To be consistent, the Proposed Rule should make clear that the exemption for commercial item prime contracts covers *all* commercial item prime contracts, not just those awarded under FAR Part 12. *See* Proposed Rule 52.203XX(d).

To the extent that the Proposed Rule could be interpreted as requiring commercial item contractors or subcontractors to adopt specific compliance programs, report suspected misconduct, or both, such a requirement would be contrary to existing statutes and regulations regarding commercial item contracts,

which prohibit the use of government-unique terms and conditions and call for the use of terms and conditions that more closely resemble those customarily found in the commercial marketplace. In fact, the FAR Council expressly recognized that “[r]equiring commercial contractors to comply with the rule would not be consistent with Public Law 103-355 that requires the acquisition of commercial items to resemble customarily commercial marketplace practices to the maximum extent practicable.” 72 Fed. Reg. at 64020.

The Section respectfully requests that the Proposed Rule be revised to clearly provide an exemption for commercial item contracts and subcontracts in the manner outlined above.

As a final point, the Section notes that the Proposed Rule excludes from its scope contracts performed overseas. Although the Section realizes that some U.S. laws are inapplicable and/or unenforceable overseas, there is no explanation provided as to why a basic policy of a code of ethics and business conduct should not apply to contracts performed overseas, and thus the Section is limited on its ability to comment on this provision.

I. Adding Disclosure Obligations To Subcontracts Will Adversely Affect Contract Performance And Imposes Inappropriate Burdens On Prime Contractors

Although contractors and subcontractors need cooperation in contract performance, the threat of debarment or suspension can sour such relationships quickly. The Proposed Rule will create a contractual relationship, via the flowdown of the proposed clause, under which prime contractors will have a contract obligation to ensure their subcontractors perform this aspect of their contract. In expressly contemplating application of the clause to the prime contractor’s agreement with its subcontractor, the Proposed Rule mandates that the disclosures go directly to the Government and not through the prime contractor; otherwise, the balance of the contract clause becomes a subcontract performance obligation. This is a significant burden that appears not to have been considered in the drafting of the Proposed Rule.

The flowdown to subcontractors also helps crystallize a significant liability issue (although it is equally applicable with regard to disclosures regarding individuals) – while prosecutors may demand that every possible criminal wrongdoing be disclosed, contractors must worry about potential liability for disclosures concerning subcontractors that turn out to be in error. The consequences of any disclosure are assured to be substantial, even if criminal liability is never found, and the consequences for reasonable but erroneous

disclosures may not be significantly less. The FAR Council should consider whether damages assessed against contractors for erroneous reports would be allowable costs. The potential cost burden to the Government of increased indirect costs was not addressed and should be considered before implementing the Proposed Rule.

Also, it is unclear why the Proposed Rule requires disclosure of criminal actions by a prime contractor's principals, employees, or agents, but is less specific about subcontractor violations. To the extent disclosure obligations are imposed, the FAR Council should consider parallel coverage that refers to actions of the contractor's and subcontractor's principals, employees, and agents (at an appropriate managerial level) to limit potential confusion over the scope of the obligations.

Conclusion

As this letter indicates, there is substantial interest within the Section on the proposed rule "Contractor Compliance Program and Integrity Reporting." It is an important subject and deserves careful review and consideration by the FAR Council. The Section appreciates the opportunity to provide these comments and trusts they will be helpful to the FAR Council. The Section is available to provide additional information and assistance as the FAR Council may require.

Sincerely,



Patricia A. Meagher
Chair, Section of Public Contract Law

cc: Michael W. Mutek
Karen L. Manos
Donald G. Featherstun
Carol N. Park Conroy
John S. Pachter
Michael A. Hordell
Robert L. Schaefer
Council Members, Section of Public Contract Law
Chair(s) and Vice Chair(s) of the Professional Responsibility and Contracting Ethics Committee
Scott M. McCaleb
Kara M. Sacilotto



AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
 Washington, DC 20005-1022
 (202) 662-1760
 FAX: (202) 662-1762

June 20, 2008

General Services Administration
 Regulatory Secretariat (VPR)
 Attn: Ms. Laurieann Duarte
 1800 F Street, N.W., Room 4041
 Washington, D.C. 20405

Re: Preserving the Attorney-Client Privilege, the Work Product Doctrine, and Employee Legal Protections in Connection with FAR Case 2007-006, "Contractor Compliance Program and Integrity Reporting," 72 Fed. Reg. 64019 (November 14, 2007; Original Proposed Rule) and 73 Fed. Reg. 28407 (May 16, 2008; Second Proposed Rule)

Dear Ms. Duarte:

On behalf of the American Bar Association ("ABA") and its more than 413,000 members, I write to express our concerns over certain key provisions in the above referenced revised proposed FAR rule, "Contractor Compliance Program and Integrity Reporting," and to urge the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council ("Councils") to add language to the rule that would better protect companies' attorney-client privilege, work product, and employee legal rights. As Chair of the ABA Task Force on Attorney-Client Privilege, I have been authorized to express the ABA's views on these important issues.

Although the ABA has not taken a position on the overall proposed rule,¹ we urge the Councils to delete language in the revised proposed rule that requires contractors to disclose to the Office of Inspector General and the Contracting Officer when they have "reasonable grounds to believe" that a violation of federal criminal law or the civil False Claims Act has occurred. In addition, we urge the Councils to add language to the final FAR rule clarifying that federal officials may not pressure contractors to waive their attorney-client privilege or work product protections or take certain unfair punitive actions against their employees during any audit, investigation, or corrective action. Enclosed is specific proposed language that we believe would achieve these goals without impairing the effectiveness of the revised proposed rule in any way.

**The Importance of the Attorney-Client Privilege, the Work Product
 Doctrine, and Employee Legal Rights**

The attorney-client privilege enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance in how to

¹ While the ABA has not taken a position on the overall proposed rule, the ABA Section of Public Contract Law filed comments expressing its views regarding the original proposed rule on January 18, 2008. The Section's comments were not reviewed or considered by the ABA House of Delegates or Board of Governors and therefore should not be construed as representing the views of the full ABA. Those comments are available at http://www.abanet.org/contract/federal/regscomm/conflicts_003.pdf

conform their conduct to the law. The privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

The ABA strongly supports the preservation of the attorney-client privilege and the work product doctrine and opposes governmental policies, practices and procedures that have the effect of eroding the privilege or doctrine. In addition, the ABA believes that it is equally important to protect employees' constitutional and other legal rights—including the right to effective counsel and the right against self-incrimination—when a company or other organization is under investigation. Unfortunately, both the vague “reasonable grounds to believe” mandatory disclosure standard and the “full cooperation” requirement of the proposed rule threaten to undermine these fundamental rights in different ways.

Problems with the Proposed “Reasonable Grounds to Believe” Mandatory Disclosure Standard

The revised proposed FAR rule requires contractors to notify the Office of the Inspector General and the Contracting Officer of the relevant federal agency in writing “whenever the Contractor has reasonable grounds to believe 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 any Government contract performed by the Contractor or a subcontract thereunder.” *See* 73 Fed. Reg. 28409 (May 16, 2008). Although the term “reasonable grounds to believe” is not defined in the revised proposed rule, any knowing failure to timely disclose this information is cause for debarment or suspension of the contractor, a draconian penalty that could make the contractor ineligible to receive further government contracts.

The ABA is concerned that the vague nature of the “reasonable grounds to believe” disclosure standard in the revised proposed rule will undermine the confidential relationship between contractors and their attorneys. Under existing federal statutes and regulations governing federal procurement—as well as broad criminal statutes such as the False Claims Act and the False Statements Act—virtually any noncompliance in connection with a federal government contract *may*, depending on the circumstances, constitute a violation of federal criminal law. On the other hand, these same procurement rules are complex and often esoteric, giving rise to defenses against allegations of non-compliance or criminal conduct.

As a result, the revised proposed rule will often require contractors to seek and rely upon the legal advice of their counsel in order to make the judgments necessary to comply with the rule's notification requirement. At the same time, the rule will often require contractors to disclose the results of their counsel's legal advice—or the legal advice itself—resulting in waiver of the attorney-client privilege. In addition, once the contractor is forced to disclose its legal advice, the disclosure is likely to be followed by a demand from the Office of Inspector General for all underlying information, including information that is protected by the attorney-client privilege and/or the work product doctrine.

Even in those instances in which a contractor determines that disclosure is not required under the revised proposed FAR rule, the contractor still may be forced to waive its attorney-client privilege and work product protections if the government disagrees with the contractor's determination and decides to initiate a suspension or debarment action. In order to justify the "reasonableness" of its determination that certain conduct did not meet the reporting threshold of the law, the contractor may need to disclose the basis for its determination. In many such cases, the contractor may be required to disclose information protected by the attorney-client privilege or work product doctrine, including communications between company counsel and employees and the actual legal advice that the contractor received.

Compounding this problem is the procedural fact that a suspension may occur without any opportunity for a contractor to be notified in advance. Since the mere act of suspension can start a chain reaction of contract cancellations and consequent adverse impact on the value of the contractor's stock, the rule as proposed would subject a contractor to immense pressure to waive the privilege rather than risk being second guessed and penalized.

For all of these reasons, the vague "reasonable grounds to believe" disclosure standard in the revised proposed FAR rule is likely to seriously erode the contractor's attorney-client privilege and work product protections regardless of whether the contractor discloses or declines to disclose possible violations under the rule. Therefore, the ABA urges the Councils to delete the mandatory disclosure provisions from the proposed rule, as shown in the attached suggested amendments. If the Councils decide not to remove that requirement from the final FAR rule in its entirety, then the ABA recommends that the "reasonable grounds to believe" standard be replaced with an "actual knowledge that a civil False Claims Act or Federal criminal law violation has occurred" standard.

Problems with the "Full Cooperation" Requirement of the Proposed FAR Rule

Although the proposed FAR rule does not specifically require contractors to waive their attorney-client privilege, work product, or employee legal protections during investigations, the ABA is concerned that the rule's requirement that contractors establish an internal control system and give "full cooperation...(to) any Government agencies responsible for audit, investigation, or corrective actions" could be read to require waiver of these protections. *See* 72 Fed. Reg. 64023 (November 14, 2007). In addition, we are concerned that the "full cooperation" language in the proposed rule could embolden agencies to demand such waiver from companies.

The ABA believes that a broad interpretation of the "full cooperation" language in the proposed FAR rule, like the more explicit waiver policies adopted by the Justice Department, the Securities and Exchange Commission (SEC), and other agencies², could lead to a number of profoundly negative consequences.

² The Justice Department's cooperation standards—outlined in the 1999 "Holder Memorandum," 2003 "Thompson Memorandum," and 2006 "McNulty Memorandum"—pressure companies to waive attorney-client privilege and work product protections in many cases in return for receiving cooperation credit during investigations. The Justice Department standards also pressure companies to take certain punitive actions against their employees in many cases—such as not sharing information with them, terminating them, or in certain "rare" cases, not paying their attorneys fees—in return for such credit. Similar policies also have been adopted by the SEC, the EPA, HUD, and other agencies, and these materials are available at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

First, the ABA believes that this language in the proposed rule could lead to the routine compelled waiver of attorney-client privilege and work product protections. Although the proposed rule does not explicitly state that waiver is required in every situation, the sweeping “full cooperation” language in the proposal is likely to encourage federal agency staff, directly or indirectly, to pressure contractors to waive their privileges on a regular basis as a condition for receiving cooperation credit during investigations. From a practical standpoint, contractors will have no choice but to waive when encouraged or requested to do so because the risk of being labeled as “uncooperative” will have a profound effect not just on the federal agencies’ enforcement action decisions, but on the contractor’s public disclosure obligations, credit worthiness, stock price, and image. In this way, the broad “full cooperation” language of the proposed rule will likely exacerbate the “culture of waiver” problem caused by the existing Justice Department, SEC, and other federal agency policies.³

Second, the ABA is concerned that the broad “full cooperation” language in the proposed rule, like the similar policies adopted by the Justice Department and other federal agencies, will further weaken the attorney-client privilege between contractors and their lawyers, erode the work product doctrine, and undermine the contractors’ internal compliance programs. By making the privilege uncertain in the corporate context, these policies discourage contractors from consulting with their lawyers, thereby impeding the lawyers’ ability to effectively counsel compliance with the law. In addition, by creating an environment in which contractors are expected to waive their work product protections, these policies discourage the contractors from conducting internal investigations that are designed to quickly detect and remedy misconduct. The ABA believes that federal officials can obtain the information they need from a cooperating contractor without pressuring it to waive these protections. For all these reasons, the ABA believes that the proposed rule will undermine, rather than enhance, compliance with the law.

Third, the ABA is concerned that the broad “full cooperation” language of the proposed rule—like the cooperation standards adopted by the Justice Department, the SEC, and other federal agencies—could erode employees’ constitutional and other legal rights by pressuring contractors to not pay their employees’ legal fees during investigations in violation of the employees’ Sixth Amendment right to counsel, to fire them for not waiving Fifth Amendment right against self-incrimination, or to take other punitive actions against the employees long before any guilt has been established.⁴ By pressuring contractors to punish their employees long before any guilt has been shown, the proposed rule will weaken the presumption of innocence, overturn basic corporate governance principles, and violate the Constitution.

³ According to a March 2006 survey of over 1,200 corporate counsels, almost 75% believe that a “culture of waiver” has evolved in which federal agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. The detailed survey results are available at <http://www.acc.com/Surveys/attyclient2.pdf>. Although the Justice Department revised its waiver policy in December 2006 as part of the “McNulty Memorandum,” prosecutor demands for waiver have continued unabated. Numerous specific examples of post-McNulty demands for waiver are outlined in the September 2007 Report of former Delaware Chief Justice Norman Veasey, available at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>

⁴For a full discussion of the Justice Department and other federal agency cooperation standards that erode employees’ constitutional and other legal rights, please see the ABA’s September 18, 2007 statement to the Senate Judiciary Committee, pgs. 11-15, available at http://www.abanet.org/poladv/priorities/privilegewaiver/20070918_mcnulty.pdf

June 20, 2008

Page 5

Finally, "full cooperation" may be interpreted by the government to include an admission of guilt or liability when in fact there may be substantial legal and factual reasons not to do so. Yet, for a contractor to try to raise potentially dispositive defenses may be regarded as less than "full cooperation" and thus subject the contractor to the extreme risks inherent in suspension and debarment.

The ABA Task Force on Attorney-Client Privilege has prepared suggested changes to the revised proposed FAR rule that would preserve fundamental attorney-client privilege, work product, and employee legal protections during investigations while ensuring federal agencies' continued ability to obtain the important factual information that they need to effectively enforce the law.

The proposed amendment to the proposed FAR rule enclosed herewith would accomplish these objectives by: (1) preventing federal agencies and their staff from seeking privilege waiver from contractors during audits, investigations, or corrective actions; (2) preserving the agencies' ability to request important factual information from contractors as a sign of full cooperation without implicating broader privilege waiver concerns; (3) clarifying that a waiver of privilege should not be considered when assessing whether the contractor provided full cooperation; and (4) recognizing that full cooperation credit can be given for providing factual information. The proposed amendment also would clarify that while federal agencies and their staff may consider a contractor's reasonable efforts to secure its employees' cooperation as a factor in determining whether the contractor has fully cooperated during an audit, investigation, or corrective action, the contractor should not be asked or expected to punish any employee who chooses to assert his or her legal rights.

We believe that the proposed amendment, if adopted by the Councils, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product, and employee legal protections, and we urge you to consider it.

If you or your staff have any questions or need additional information about this vital issue, please ask your staff to contact me at (404) 527-4650 or Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

Thank you for considering the views of the American Bar Association on this subject, which is of such vital importance to our system of justice.

Sincerely,

A handwritten signature in black ink, appearing to read "R. William Ide, III". The signature is fluid and cursive, with a stylized "R" and "I".

R. William Ide, III, Chair
ABA Task Force on Attorney-Client Privilege

enclosure

cc: Patricia A. Meagher, Chair, ABA Section of Public Contract Law
Thomas M. Susman, Director, ABA Governmental Affairs Office
R. Larson Frisby, Senior Legislative Counsel, ABA Governmental Affairs Office

**PROPOSED AMENDMENT TO REVISED PROPOSED FAR RULE TITLED
“CONTRACTOR COMPLIANCE PROGRAM AND INTEGRITY REPORTING,”
FAR CASE 2007-006, 72 FED. REG. 64019 AND 73 FED. REG. 28407**

**PREPARED BY THE AMERICAN BAR ASSOCIATION TASK FORCE ON
ATTORNEY-CLIENT PRIVILEGE**

(Excerpts of the proposed FAR rule are reprinted below to provide context;
proposed additions are underlined in blue; proposed deletions are ~~struck through in red~~)

JUNE 20, 2008

**PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF
INTEREST**

...3.1002 Policy.

~~(c) A contractor may be suspended and/or disbarred for knowing failure to timely disclose a violation of the civil False Claims Act or Federal criminal law in connection with the award or performance of any Government contract performed by the contractor or a subcontract awarded thereunder (see 9.406-2(b)(1)(v) and 9.407-2(a)(7)).~~

PART 9—CONTRACTOR QUALIFICATIONS

...4. Amend section 9.406—2 by revising the introductory text of paragraph (b)(1) and adding paragraph (b)(1)(v) to read as follows:

9.406—2 Causes for debarment

* * * * *

(b)(1) A contractor, based upon a preponderance of the evidence, for any of the following—

* * * * *

~~(v) Knowing failure to timely disclose—~~
 ~~(A) An overpayment on a Government contract; or~~
 ~~(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733) in connection with the award or performance of any Government contract or subcontract; or~~
 ~~(C) Violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract.~~

...5. Amend section 9.407—2 by adding paragraph (a)(7) to read as follows:

9.407—2 Causes for suspension

(a)* * *

~~(7) Knowing failure to timely disclose—~~

~~(i) An overpayment on a Government contract; or~~

~~(ii) Violation of the civil False Claims Act (31 U.S.C. 3729-3733) in connection with the award or performance of any Government contract or subcontract; or~~

~~(iii) Violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract.~~

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Amend section 52.203—13 by—

a. Revising the date of clause;

~~b. Adding paragraph (b)(3);~~

c. Revising the introductory text of paragraph (c) and (c)(2)(ii);

~~d. Adding paragraph (c)(2)(ii)(F); and~~

e. Revising paragraph (d).

52.203—13 Contractor Code of Business Ethics and Conduct

As prescribed in 3.1004, insert the following clause:

CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (DATE)

...(b) *Code of business ethics and conduct.* ...

~~(3) The Contractor shall notify, in writing, the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe 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 this contract or any subcontract thereunder...~~

...(c) *Business ethics awareness and compliance program and internal control system.* ...The Contractor shall establish the following within 90 days after contract award, unless the contracting officer establishes a longer time period—

...(2) An internal control system.

...(ii) At a minimum, the Contractor's internal control system shall provide for the following:

~~...(F) Timely reporting, in writing, to the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever the~~

~~Contractor has reasonable grounds to believe that a principal employee, agent, or subcontractor of the Contractor has committed a violation of the civil False Claims Act (31 U.S.C. 3729-3733) or a violation of Federal criminal law in connection with the award or performance of any Government contract performed by the Contractor or a subcontract thereunder; and~~

~~...(G)(F)~~ **Full cooperation with any Government agencies responsible for audit, investigation, or corrective actions, subject to the conditions established in subsection (iii) below.**

(iii) Protection of Attorney-Client Privilege, Work Product, and Employee Legal Rights.

(A) Staff of Government agencies responsible for audit, investigation, or corrective actions ("Agency staff") shall not take any action or assert any position that directly or indirectly demands, requests or encourages a contractor or its attorneys to waive its attorney-client privilege or the protections of the work product doctrine.

(B) In assessing a contractor's cooperation, Agency staff shall not draw any inference from the contractor's preservation of its attorney-client privilege and the protections of the work product doctrine. At the same time, the voluntary decision by a contractor to waive the attorney-client privilege and/or the work product doctrine shall not be considered when assessing whether the contractor provided effective cooperation. Agency staff may consider, however, in assessing whether a contractor has provided effective cooperation, the degree to which the contractor has provided factual information to the Agency staff in a manner, to be worked out by the contractor and the Agency staff, that preserves the protections of the attorney-client privilege and work product doctrine to the fullest extent possible.

(C) Notwithstanding the general rule set forth in subsection (iii)(B) above, Agency staff may, after obtaining in advance the approval of their respective agency's Director of Enforcement or his/her designee, seek materials otherwise protected from disclosure by the attorney-client privilege or the work product doctrine if the contractor asserts, or indicates that it will assert, an advice of counsel defense with respect to the matters under investigation. Moreover, Agency staff also may seek materials respecting which there is a final judicial determination that the privilege or doctrine does not apply for any reason, such as the crime/fraud exception or a waiver. In circumstances described in this subsection (iii)(C), Agency staff shall limit their requests for disclosure only to those otherwise protected materials reasonably necessary and which are within the scope of the particular exception.

(D) Although Agency staff may consider whether a contractor has asked its current or former officers, directors, employees, or agents ("Employees") to

cooperate with Agency staff and/or whether the contractor has made reasonable efforts to secure such cooperation as factors in determining the contractor's degree of cooperation, a contractor should not be asked or expected to take any of the following punitive actions against its Employees in return for cooperation credit:

(i) terminating or otherwise sanctioning an Employee who exercised his or her Fifth Amendment rights against self-incrimination in response to a government request for an interview, testimony, or other information;

(ii) declining to provide counsel to an Employee or pay for such counsel;

(iii) declining to enter into or ceasing to operate under a joint defense, information sharing and common interest agreement with an Employee or other represented party with whom the contractor believes it has a common interest in defending against the investigation; or

(iv) declining to share its records or other historical information relating to the matter under investigation with an Employee.