

TABLE OF CONTENTS

	<u>Page</u>
ACKNOWLEDGMENTS	viii
ACRONYMS	x
INTRODUCTION	1
GUIDE TO THE GUIDE.....	5
OVERVIEW OF THE MANDATORY DISCLOSURE RULE.....	9
I. Introduction.....	9
II. Summary of the Mandatory Disclosure Rule.....	10
A. New Contractor Code of Business Ethics and Conduct Clause.....	10
B. New Ground for Suspension or Debarment.....	16
C. New Definition of “Principal”	16
D. New Requirements for Contractor Responsibility and Past Performance	17
II. Background of the Mandatory Disclosure Rule.....	17
A. The FAR Councils Propose a Contractor Code of Ethics and Business Conduct Without a Mandatory Disclosure Requirement.....	17
B. The Department of Justice Requests Mandatory Disclosure	19
C. The First Proposed Mandatory Disclosure Rule.....	21
D. Comments on the First Proposed Mandatory Disclosure Rule.....	22
E. The Second Proposed Mandatory Disclosure Rule	25
F. The “Close the Contractor Fraud Loophole Act”	26
G. Comments on the Second Proposed Mandatory Disclosure Rule	26
H. The Final Rule and its Preamble.....	28
SECTION 1: IDENTIFYING TYPES OF REPORTABLE CONDUCT	31
I. Introduction.....	31
II. Meaning of “In Connection With the Award, Performance, or Closeout” of a Government Contract or Subcontract	32
A. Reporting Another Contractor’s Possible Violation.....	34
B. Violations Arising from Indirect Costs	35
C. Direct Costs Under a Fixed Price Contract.....	35
D. A Supplier With No Direct Sales to the Government	36
E. A Supplier With Minimal Sales to the Government	36
F. Reportable Conduct in the Absence of Award	37
III. Reportable Criminal Conduct	37
A. Background.....	38
B. Conflict of Interest, Bribery, and Gratuity Violations Under Title 18	39
C. Fraud Violations Under Title 18	40
D. Violations Not Found in Title 18	44

TABLE OF CONTENTS

	<u>Page</u>
IV. Reportable Violations of the Civil False Claims Act	46
A. Overview	46
B. Types of FCA Violations	48
V. Significant Overpayments	56
A. Definition of “Significant Overpayment”	58
B. Overpayments and the False Claims Act	61
VI. Conclusion	61
SECTION 2: THE “CREDIBLE EVIDENCE” STANDARD	63
I. Introduction	63
II. The Meaning of Credible Evidence	64
A. Guidance Found in the Preamble	65
B. The Use of the Term “Credible Evidence” in Other Contexts	67
C. Interpretation Based on the Regulatory History	69
D. The Role of Affirmative Defenses in Making a “Credible Evidence” Determination	70
E. Relationship of “Credible Evidence” to “Reasonable Grounds to Believe” and “Preponderance of the Evidence”	71
III. Guidelines for Applying the Credible Evidence Standard	72
SECTION 3: CONTRACTOR OBLIGATIONS WITH RESPECT TO “PRINCIPALS”	75
I. Introduction	75
II. Meaning of “Principal”	75
III. Practical Considerations	78
SECTION 4: DISCLOSURES REGARDING SUBCONTRACTORS AND AGENTS	83
I. Introduction	83
II. Key Issues Relating to Subcontractors and Agents	85
A. The Definition of “Subcontractor” or “Agent”	85
B. Verification of Subcontractor Codes, Compliance Programs, and Internal Controls	86
C. Obligation to Train Subcontractors and Agents “As Appropriate”	88
D. Other Obligations a Contractor May Want to Impose on its Subcontractors	90
E. Mandatory Reporting Requirements	90
F. Implications of the “Credible Evidence” Standard and Potential Liability for Erroneous Reports	91
G. Subcontractor Disclosure to the Government	93
III. Best Practices for Implementing Subcontractor and Agent Provisions	94

TABLE OF CONTENTS

	<u>Page</u>
SECTION 5: OBTAINING INFORMATION REGARDING POTENTIALLY REPORTABLE EVENTS	97
I. Introduction.....	97
II. Key Concepts and Best Practices.....	97
III. Sources of Information for Potentially Reportable Events.....	101
A. Employees’ Role in the Reporting Process.....	102
B. Managers’ Role in the Reporting Process.....	108
C. Hotline Reports.....	113
D. Internal Audits, Testing and Monitoring, Periodic Surveys, and Certifications.....	113
IV. Keeping Track of Allegations of Potential Misconduct.....	113
A. Use of a Registry.....	114
B. Access to the Registry.....	116
C. What Should Not Be on the Registry.....	117
D. Monitoring and Updating the Registry.....	118
SECTION 6: “TIMELY DISCLOSURE” AND “LOOK-BACK” REQUIREMENTS	119
I. The Sources of the Timely Disclosure Obligation.....	119
II. The Meaning of “Timely” Disclosure.....	120
A. No Definition.....	120
B. How Soon Reporting is Required.....	120
C. How a Contractor Should Determine Whether an Investigation is Necessary.....	121
D. What is a Reasonable Amount of Time to Investigate.....	123
III. The “Look-Back” Requirement.....	125
A. Possible Scrub of All Contracts Within Three Years of Closeout.....	127
B. Reasonable Good Faith Efforts.....	127
SECTION 7: THE FORM, CONTENT, AND RECIPIENTS OF DISCLOSURES.....	129
I. Form of Disclosures.....	129
II. Content of Disclosures.....	130
A. Government Agency Expectations as to the Content of Disclosures.....	130
B. Contractor Considerations in the Content of Disclosures.....	132
C. FOIA Markings.....	133
D. Disclaimers.....	134
III. Recipients of Disclosures.....	134
A. Reporting to the Agency Inspector General.....	135
B. Multiple Contracts, Multiple Agencies, Multiple Contracting Officers.....	136
IV. What to Expect Upon Making Disclosure.....	137

TABLE OF CONTENTS

	<u>Page</u>
SECTION 8: VOLUNTARY DISCLOSURES	139
I. Introduction.....	139
II. Three Circumstances in Which Voluntary Disclosure May Be Appropriate	140
A. “Abundance of Caution” Disclosures	141
B. Pre-Internal Investigation Disclosures.....	142
C. Disclosure of Determination That No Credible Evidence Exists.....	143
III. Factors to Consider in Deciding Whether to Make a Voluntary Disclosure	144
IV. Recommended Contents of a Voluntary Disclosure	145
V. Recipients of a Voluntary Disclosure.....	146
VI. Conclusion	146
SECTION 9: “FULL COOPERATION”	147
I. Introduction.....	147
II. Frequently Asked Questions	149
SECTION 10: PRESERVING CONFIDENTIALITY AND PRIVILEGE AND PREVENTING DISCLOSURES TO THIRD PARTIES.....	165
I. Introduction.....	165
II. Potential Government Disclosures Under FOIA	165
A. Government Contractual Commitment to Protect Disclosures From Disclosure Under FOIA	165
B. Potential Limitations on the Government’s Protection of Contractor Mandatory Disclosures Under FOIA	166
III. Potential Waivers of the Attorney-Client Privilege and Work Product Protection.....	174
IV. Practical Internal Steps That Contractors May Take.....	178
A. Contractor Steps in Conducting Internal Investigations That May Protect Disclosures from Release	178
B. Employee Steps to Help Protect Disclosures from Release.....	179
V. Practical External Steps That Contractors and the Government May Take.....	180
A. Contractor Steps When Making Submissions that May Protect Disclosures from Release	180
B. Government Steps That May Help Protect Contractor Proprietary and Confidential Information.....	181
VI. Considerations from the Government’s Perspective.....	182

TABLE OF CONTENTS

	<u>Page</u>
SECTION 11: DEALING WITH COMPANY EMPLOYEES AND OFFICERS	183
I. Introduction.....	183
II. When Attorneys Conduct Inquiries: Rules of Professional Responsibility	183
A. Identify the Client	183
B. Additional Disclosure Obligation in Light of the Mandatory Disclosure Rule.....	185
C. Questions That May Arise	186
III. When Non-Attorneys Conduct Inquiries	187
SECTION 12: PAST PERFORMANCE AND CONTRACTOR RESPONSIBILITY DETERMINATION REQUIREMENTS	189
I. Introduction.....	189
II. Methods of Collecting Past Performance Information	190
III. Evaluation of Past Performance.....	193
A. The Rule Does Not Diminish Agencies’ Discretion to Determine How Past Performance Will Be Evaluated	193
B. Practical Considerations and Limits on Agency Discretion in the Evaluation of a Contractor’s Record of Integrity and Business Ethics	195
IV. Present Responsibility.....	198
V. Practitioner Guidelines.....	200
SECTION 13: STRUCTURING ETHICS AWARENESS PROGRAMS AND INTERNAL CONTROL SYSTEMS	203
I. Ethics Awareness Programs	203
A. Background.....	203
B. Company Values	204
C. Code of Business Ethics.....	204
D. Inquiry and Reporting Mechanisms.....	204
E. Information and Awareness Program	205
F. Program Assessment and Evaluation	205
G. Leadership Commitment.....	205
H. DII Guidance on Creating and Maintaining an Effective Ethics and Business Conduct Program	206
II. Internal Control Systems.....	206
A. Regulatory Requirements.....	206
B. Guidance for an Effective System	208
C. Action Items for Consideration.....	211
D. Potential Impact of the Rule on External Audits and Financial Reporting.....	211

TABLE OF CONTENTS

	<u>Page</u>
E. Disclosures and Accruals in Company Financial Statements Under Current FAS 5	212
F. Disclosures and Accruals in Company Financial Statements Under the Proposed Amendments to FAS 5	213
G. Factors the DCAA Will Likely Examine When Evaluating Internal Controls	215
SECTION 14: NONPROCUREMENT TRANSACTIONS	219
I. Introduction	219
II. The Recovery Act Disclosure Requirement	221
A. The Recovery Act Disclosure Requirement	222
B. Similarities and Differences Between the Recovery Act and FAR Mandatory Disclosure Rule Requirements	223
C. Identifying the “Other Persons” for Whom a Grantee Must Disclose Violations	224
D. Types of Violations to Be Disclosed	226
E. Absence of Time Limitation on Disclosing Past Violations	228
F. Application of Disclosure Requirement to Recovery Act Funding Received from State Grants	229
G. Enforcement of the Recovery Act’s Disclosure Obligation	229
III. The Potential Common Rule Disclosure Requirement	230
A. Differing Definitions of “Principal”	230
B. Time Limitations and Looking Back	232
IV. Identifying Areas of Risk and Mitigating Damages	233
V. Making a Disclosure	234