

# INTRODUCTION

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The publication of this Guide to the Mandatory Disclosure Rule continues the tradition of the American Bar Association Section of Public Contract Law providing the contracting community with valuable resources to assist in addressing new regulatory regimes.

The FAR Mandatory Disclosure Rule represents a significant change in contractor governance. Since 1986, contractors have operated under a principle of voluntary disclosure. At that time, the concept of voluntary disclosure was instituted as an element of contractor self-governance found in a recommendation of the Packard Commission<sup>1</sup> and adopted by many contractors through involvement with the Defense Industry Initiative on Business Ethics and Conduct,<sup>2</sup> better known as the “DII.” The DII provides six principles to foster business ethics and conduct, including the fourth principle, which addresses the adoption of procedures within companies to make voluntary disclosures of violations of federal procurement laws. In 1986, the Section wrote to the Packard Commission to support the concept of contractor self-governance.<sup>3</sup>

In 1986, the Department of Defense instituted a Voluntary Disclosure Program, and the Public Contract Law Section of the American Bar Association formed a committee comprised of representatives from the public and private sectors to promote a better understanding of the “issues relating to voluntary disclosures under the DOD Program” and to “issue a report

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<sup>1</sup> President’s Blue Ribbon Commission on Defense Management, *A Quest for Excellence* 101, 110-111 (1986).

<sup>2</sup> Available at <http://www.defenseethics.org/charter.html>.

<sup>3</sup> Public Contract Law Section letter (March 18, 1986), found as Exhibit 1 to American Bar Association, Section of Public Contract Law, *Report by the Special Committee on Voluntary Disclosure* (Aug. 1994).

containing practical guidelines, which could be used as a framework for contractor and Government representatives in dealing with voluntary disclosures.” In November 1987, the Public Contract Law Section published the committee’s final report as a monograph on voluntary disclosure and updated the monograph a few years later.<sup>4</sup>

Not surprisingly, the 2008 FAR Mandatory Disclosure Rule generated a great deal of interest and raised many questions. The Section stepped up to help address the interest and questions through timely programs, which pulled together experts from both the public and private sectors to facilitate discussion of the Rule, its purpose, and compliance. The Section’s Procurement Fraud and Debarment and Suspension Committees held meetings on the new Rule, and well-attended Section-sponsored programs provided valuable information.

Part of the Section’s response to the new Rule involved the creation of a Task Force comprised of representatives from Government, industry, and law firms. This is similar to the Section’s response in 1986 to the Voluntary Disclosure Rule. I asked Robert Huffman and Frederic Levy to serve as co-chairs of this Task Force. My invitation included two requests. First, I asked that this Task Force be comprised of individuals from the public and private sectors so that the stakeholders to this new process would be represented. Second, I asked that this Task Force seek to promote a better understanding of the issues to be faced during the Rule’s implementation through the creation of a work product to assist in the compliance process.

Bob and Fred exceeded expectations. They sought out competent and knowledgeable individuals to serve on the Task Force. They served as able and strong leaders and understood the value of the task to all the stakeholders in the public procurement process. Finally, they marshaled and managed the collection of working group efforts in order to achieve the

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<sup>4</sup> See American Bar Association, Section of Public Contract Law, *Report by the Special Committee on Voluntary Disclosure*, I-1 (Aug. 1994).

completion of this Guide to the Mandatory Disclosure Rule. It is through the dedication of many people who served on the Task Force that this Guide came to be. Their efforts are appreciated by all who have a stake in the public procurement process.

It should be noted that the Section's involvement with this new Rule preceded the issuance of the final Rule. The first proposed disclosure Rule was issued on November 14, 2007.<sup>5</sup> The Section submitted comprehensive comments that addressed key issues including the issue of statutory authority.<sup>6</sup> Several of the Section's comments were discussed in the commentary section of the second proposed Rule, which was issued on May 16, 2008.<sup>7</sup> During the comment period, Congress addressed the lack of statutory authority through enactment of the Close the Contractor Loophole Act.<sup>8</sup> In its comments, the Section noted that the second proposed Rule represented "a substantial modification of the rule first proposed." The Section focused on the second proposed Rule's expansion of the reporting requirement and the addition of the grounds for suspension or debarment.<sup>9</sup> In addition, the American Bar Association Task Force on Attorney-Client Privilege submitted comments on the second proposed Rule. Fred Levy served as the Section's liaison to this task force and contributed to the comments, which

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<sup>5</sup> Appendix E, FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64,019 (Nov. 14, 2007).

<sup>6</sup> Appendix H, Public Contract Law Section letter (Jan. 18, 2008). Available in PDF format at <http://www.abanet.org/contract/federal/regscmm/home.html> under the topic "Ethics."

<sup>7</sup> Appendix I, FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting (Second Proposed Rule), 73 Fed. Reg. 28,407 (May 16, 2008).

<sup>8</sup> Appendix K, Pub.L. No. 110-252. This statute mandates that the FAR include provisions "that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial items."

<sup>9</sup> Appendix N, Public Contract Law Section letter (July 15, 2008). Available in PDF format at <http://www.abanet.org/contract/federal/regscmm/home.html> under the topic "Ethics."

addressed the Rule's impact on the attorney-client privilege, the proposed "reasonable grounds to believe" standard for mandatory disclosure, and the "full cooperation" requirement of the proposed FAR Rule.<sup>10</sup>

The involvement of the Section in reviewing the proposed rules was an effort to provide the Section's collective experience and expertise to aid the drafters. The publication of this Guide is an effort to bring together the public procurement community's experience and expertise to aid in the implementation of the Rule and in compliance efforts.

I want to close by expressing my sincere thanks to all who contributed to this Guide, and to personally thank Bob Huffman and Fred Levy for their dedication in leading this effort.

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<sup>10</sup> Appendix J, ABA letter (June 20, 2008.) Available as an attachment to the Section's comments on the second proposed rule in PDF format at <http://www.abanet.org/contract/regscmm/home.html> under the topic "Ethics."

