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

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced proposed rule ("the 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

¹ Mary Ellen Coster Williams, the Section of Public Contract Law’s representative to the ABA House of Delegates, and Jeri K. Somers, 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.
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.

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/regscomm/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. 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.

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 wrongdoing 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.


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 . . . will 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