

## New Federal Regulation Makes Government Contractors Policemen

The Federal Acquisition Regulations have been amended to assure that government contractors and subcontractors report suspected fraudulent behavior to the federal government. There are three main components to this amendment: (1) a new “mandatory disclosure rule;” (2) new grounds for suspension or debarment; and (3) new requirements regarding a company’s business ethics awareness and compliance program and the internal control system. This article addresses the main components of the new regulations; however, you should seek additional counsel regarding the more technical requirements.

### I. Mandatory Disclosure Rule

Governmental contractors and subcontractors must now timely disclose when they have “credible evidence” of (1) a “violation of Federal criminal law involving fraud, conflict of interest, bribery or gratuity violations;” or (2) a violation of the Civil False Claims Act. These requirements apply to government contracts that are expected to “exceed \$5 million and the performance period is 120 days or more” (qualifying contract) and to any subcontracts thereunder, if the subcontract is also a qualifying contract.

### II. Suspension or Debarment

The new regulations provide that, if a principal of the contractor knowingly fails to timely disclose credible evidence, in addition to failing to disclose any significant overpayment by the federal government on the contract, the contractor is subject to suspension or debarment. This component applies to all government contractors, even if a contractor does not have a qualifying contract. It is unclear, however, if these disciplinary measures also apply to all subcontractors underneath a prime government contract.

### III. Contractor Code of Business Ethics and Conduct

All contractors with a qualifying contract and subcontractors thereunder with qualifying subcontracts must also follow the Contractor Code of Business Ethics and Conduct, which requires contractors to maintain an Internal Control System and a Business Ethics Awareness and Compliance Program. This amendment removes the exemptions previously provided to commercial items contracts and

contracts performed entirely outside the United States. However, small businesses and commercial item acquisitions are still exempt from a formal ethics awareness program and internal control system.

**i. Internal Control System:** The regulations demand numerous changes to a contractor’s Internal Control System; particularly, a contractor or subcontractor must now sustain an internal control system that complies with the Mandatory Disclosure Rule. That system must also provide for the contractor’s full cooperation with any government agencies responsible for audits, investigations, or corrective action. It should be noted, full cooperation does not require waivers of attorney-client privileges, privileged work product, waiver of Fifth Amendment rights, or relinquishment of the ability to internally investigate and defend an allegation of a violation. These regulations establish other extensive requirements for a contractor’s internal control system and you should seek guidance regarding the full scope of these requirements.

**ii. Business Ethics Awareness and Compliance Program:** Under the business ethics awareness and compliance program, contractors must “communicate periodically” with employees, agents, and subcontractors by providing “effective training programs,” or otherwise disseminating the requirements of the Code.

### IV. Practical Considerations

If your company contracts with the government, or subcontracts with companies that contract with the government, you will likely need to revise your ethics and compliance program and internal control system. Further, additional training programs may be needed to fully comply with the new amendment. In particular, your company’s principals must be sufficiently trained to determine when there is “credible evidence” of a violation, and what constitutes “full cooperation” with governmental agencies.

*If you have questions about the ordinance, please contact Chris Harney (312-540-7622) or Bruce Schoumacher (312-540-7046).*

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