

## *Congressional Scrutiny Likely to Result in Toughening of Proposed Rule on Government Contractor Ethics*

*by Robert R. Stauffer and J. Alex Ward*

In December 2007, we advised you about proposed Federal Acquisition Regulation (FAR) provisions (the Proposed Rule) that would impose detailed requirements on government contractors' ethics training programs and internal controls and would institute a mandatory disclosure requirement for violations of federal criminal law in the performance of government contracts and subcontracts.

Consistent with existing Department of Defense FAR Supplement (DFARS) provisions and with the Federal Acquisition Streamlining Act, the Proposed Rule did not extend to commercial item contracts or to contracts performed outside the United States. With support from government watchdog groups and, to an extent, the Department of Justice, several members of Congress have subjected these exceptions to close scrutiny and criticism.

On April 15, the House Oversight and Government Reform Committee held a hearing focused in large part on the exceptions to the Proposed Rule. At the hearing, David Drabkin, the General Services Administration's acting chief acquisition officer, testified that the exceptions were a "drafting error." Soon after the hearing, the House passed H.R. 5712, a bill

introduced by Representative Peter Welch (D-Vt) and entitled "Close the Contractor Fraud Loophole Act," to eliminate the exceptions for commercial item and overseas contracts. The Senate has also joined the fray, with two similar bills introduced by Senators Claire McCaskill (D-Mo) and Hillary Clinton (D-NY).

Whether these provisions will be enacted into law is unclear. Regardless of whether they become law, however, the FAR Councils appear likely to issue a revised version of the Proposed Rule that would eliminate the exception for overseas contracts and possibly the commercial item exception as well. Moreover, at the Department of Justice's urging, the revised version of the Proposed Rule is also likely to extend the mandatory disclosure requirement to cover not just violations of federal criminal law, but also violations of the civil False Claims Act. This revision could have even more sweeping consequences than the elimination of the commercial item and overseas exceptions.

Interested parties on both sides of these issues no doubt will weigh in vociferously during the notice and comment process when the FAR Councils publish the revised version of the Proposed Rule.

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