

ALERT

# Final Rule and Correction On Public Access to FAPIIS Released With Additional Protections for Contractors

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January 11, 2012

On January 3, 2012, the FAR Councils issued a final rule implementing Section 3010 of the Supplemental Appropriations Act of 2010, Pub. L. No. 111-212, providing for public access to information (other than past performance reviews) in the Federal Awardee Performance and Integrity Information System (FAPIIS). 77 Fed. Reg. 197 (Jan. 3, 2012). On January 11, 2012, the FAR Councils issued a correction to that rule, 77 Fed Reg 1640 (Jan. 11, 2012), that extends the applicability date to January 17, 2012.

The final rule, as corrected, contains additional protections for contractors that were not included in the interim rule released in January 2011. Most prominently, the final rule provides contractors a seven-calendar-day period after information is posted to the non-public segment (to which the Government and only the contractor have access) to identify information that they believe is covered by a disclosure exemption in the Freedom of Information Act (FOIA). The contractor must make the FOIA exemption assertion in writing, cite FAR 52.209-9, and request removal within seven calendar days of the posting to FAPIIS. In the event a contractor makes such an assertion, the information will be removed within seven calendar days, and the issue resolved in accordance with the agency's FOIA procedures prior to reposting. In addition, the final rule includes additional admonitions that Government officials should not post information to FAPIIS that is covered by an exemption under FOIA and instructs officials to use the 14-day review-and-removal process if information to be posted may be covered by a FOIA exemption.

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## Practice Areas

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Government Contracts

The FAR Councils also resisted calls to narrow the prohibition on the public posting of "past performance reviews" only to information that poses "a legitimate threat to commercial proprietary or personal privacy interests." 77 Fed. Reg. at 198. The Councils noted that the FAR case uses the definition of past performance in FAR part 2 and the discussion of contractor performance information in FAR subpart 42.15, both of which were familiar to Congress when it passed the Supplemental Appropriations Act that generated the public posting requirement. Thus, the final rule identifies "past performance reviews required by [FAR] subpart 42.15" as the information that should not be publicly posted in FAPIIS. See new FAR 9.105-2(b)(iii)(B)(1).

In addition, the final rule reiterates that contractors have the opportunity to post comments upon information that is posted in FAPIIS and increases the field provided for making comments. Contractor comments will be retained as long as the associated information is retained and will remain part of the record unless the contractor revises them.

Finally, the final rule added FAR 52.209-9 under FAR 52.212-5, the provision that lists contract terms and conditions required to implement statutes or Executive Orders for commercial item contracts.

The January 11, 2012 correction to the final rule retains the effective date, but delays application of the final rule in new solicitations and resulting contracts until January 17, 2012, to provide time for the Government to complete necessary system changes to support the 14-day wait period in the final rule. According to the correction, FAPIIS, as currently designed, automatically transfers to the publicly-available segment of FAPIIS all information posted by the Government (other than past performance reviews). Consequently, the correction states that until the change is implemented, there will not be an opportunity for a contractor to request withholding of the information before it is posted to the publicly-available segment of FAPIIS. Moreover, the correction clarifies that any information entered into FAPIIS by the Government on or after January 17, 2012 (other than past performance reviews), will be subject to the 14-calendar-day delay before transfer to the publicly-available segment of FAPIIS, regardless whether the contract involved includes the January 2012 version or the January 2011 version of FAR 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters. Thus, the correction notes that all contractors will have the opportunity to assert within seven calendar days of posting to the non-public segment of FAPIIS that information is covered by a FOIA exemption.

The final FAPIIS rule reinforces the importance for contractors to monitor regularly information that is posted to FAPIIS. The final rule provides contractors the opportunity to request removal of commercially-sensitive or other information exempt from disclosure under FOIA, but the window for asserting an objection to posting is short. Moreover, contractors may need to track any assertions they make to ensure that the Government removes the information while it considers the contractor's exemption assertion. Wiley Rein routinely counsels contractors on contractor performance evaluation issues and protecting information exempt from disclosure under FOIA.