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UNITED STATES OF AMERICA

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August 26, 2015

VIA ELECTRONIC FILING: www.regulations.gov

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RE: RIN 9000-AM81, Federal Acquisition Regulation; Fair Pay and Safe Workplaces; FAR Case 2014-025; Docket No. 2014-0025; Sequence No. 1
ZRIN 1290-ZA02, Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces"

Dear Madams:

The U.S. Chamber of Commerce ("Chamber") submits these comments in response to the rule proposed by the Department of Defense ("DOD"), General Services Administration ("GSA"), and National Aeronautics and Space Administration ("NASA") (collectively, "the Agencies") amending the Federal Acquisition Regulation ("FAR")[1] (the "Proposed Rule") and the guidance proposed by the Department of Labor ("DOL")[2] (the "Proposed Guidance") to implement the policies set forth in the President's July 31, 2014 "Fair Pay and Safe Workplaces" Executive Order 13673 ("Executive Order"),[3] as published in the *Federal Register* on May 28, 2015 (collectively, the "Proposals" or "Proposed Rule and Guidance"). Because the issues

[1] Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 80 Fed. Reg. 30,548 (proposed May 28, 2015).

[2] Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces," 80 Fed. Reg. 30,574 (proposed May 28, 2015).

[3] Executive Order 13673, "Fair Pay and Safe Workplaces," 79 Fed. Reg. 45,309 (Aug. 5, 2014).

presented by both Proposals are so intertwined, we have chosen to submit our comments in a unified document rather than separate documents with cross references.

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STATEMENT OF INTEREST

The United States Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. The Chamber's mission is to advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility. An important function of the Chamber is to represent the interests of its members in federal procurement and employment matters before the courts, Congress, the Executive Branch, and independent federal agencies. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,900 business people participate in this process. A significant portion of Chamber members are federal contractors and subcontractors. The Chamber also represents many state and local chambers of commerce and other associations who, in turn, represent many additional contractors and subcontractors. Should the Proposed Rule and Proposed Guidance be adopted, they will have a significant impact on these members.

INTRODUCTION

The Chamber and its members have long supported the goals of achieving economy and efficiency in federal government procurement. The Proposed Rule and Guidance ─ which would subject government contractors to a vast new array of onerous recordkeeping, reporting, and compliance requirements ─ do nothing to advance those goals. Rather, in a number of important ways, the Proposed Rule and Guidance would severely undercut both the Government's and contractors' interests in the federal procurement system. This is based both on the constitutional infirmities with the Proposed Rule and Guidance, as well as with their likely damage to federal procurement economy and efficiency.

This rulemaking steps well outside the bounds of any constitutional or statutory support. As a result, the Proposed Rule and Guidance are an improper attempt to usurp legislative powers that violate the separation of powers, due process rights of contractors, and principles of federalism and should result in the withdrawal of the Proposal.[4] In addition, the Proposed Rule and Guidance are preempted by the extensive and detailed set of federal statutes passed by Congress to control and punish violations of labor laws. *See* Section I.B.

The Proposed Rule and Guidance fare no better when examined for their impact on the economy and efficiency of federal procurements. This is the case because the proposed implementation of the Executive Order creates a highly complex, dispersed, and cumbersome set of standards and a bureaucratic structure that will strain federal procurement resources, increase contractor costs, and make the procurement system simply more inefficient to the point of potential paralysis. *See* Sections II.A. and B. For example, the Proposed Rule and Guidance:

[4] The Chamber recognizes that the Proposals flow directly from the Executive Order, which should also be withdrawn, but because the Chamber had no opportunity to comment on Executive Order 13673, these comments focus on the withdrawal of the Proposals.

- Will delay the processing of contract awards, and impose on contractors an expensive and confusing set of compliance requirements.

- Is guaranteed, given its design, to produce disparate, conflicting, and redundant decisions by federal contracting professionals on the issue of contractor responsibility. Such decisions run the substantial risk of violating constitutional protections of due process that have been consistently applied to combat *de facto* suspension or debarment of contractors.

- Likely will increase the number of pre-award bid protests, hobbling the ability of agencies to timely award new contracts.

- Will require that many companies retain additional staff to research, track, and report covered violations. This additional staff will need to track and disclose not just the company's own alleged violations as a prime contractor but also those of subcontractors, setting up a multi-layered and unwieldy system of oversight that will add delay and cost to federal procurements.

- Are squarely at odds with the federal government's recent efforts to establish a streamlined, one-stop source for responsibility information and with the Government's ongoing initiatives to reform federal contracting to achieve greater levels of effectiveness and cost efficiency.

- Fail to adequately identify the state laws determined to be equivalent to the federal laws implicated by these Proposals, forcing the public to operate under substantial uncertainty as to the scope and burdens of the Proposals.

- Is unnecessary, because current responsibility determinations already include consideration of labor law violations, and contracting officers already have access to data on which companies have violations, which given the inefficiencies, increased costs, and legal issues it will create, makes the Proposed Rule particularly unjustified.

In short, the Proposed Rule and Guidance, if implemented, will undermine, rather than enhance, the economy and efficiency of federal procurements. Instead of cost savings, the substantial costs and unreasonable administrative burdens they will impose on federal contractors will lead to significantly higher procurement costs for the federal government. In the end, the Proposed Rule and Guidance are a losing proposition for the Government and its contractors. Accordingly, the Proposals must be withdrawn.

DISCUSSION

I. There Is No Constitutional or Statutory Basis for the Executive Order or the Implementing Proposed Rule and Guidance

The President lacked the authority to issue the Executive Order, and therefore the Agencies lack the authority to issue the Proposed Rule and Proposed Guidance. In order to pass

muster, the President's authority must derive either from the Constitution or from some other statutory delegation by Congress.[5]

A. The Proposed Rule and Guidance Are Not Authorized By the Procurement Act

Neither the statutory basis specifically identified by the Administration ─ the Federal Property and Administrative Services Act ("the Procurement Act"), 40 U.S.C. § 121 ─ nor any other provision of the Procurement Act provides the authority to implement the proposed regulatory scheme. The main purpose of the Procurement Act is "to provide the Federal Government with an economical and efficient system" for, *inter alia*, "the [p]rocur[ement] and supply[ ] [of personal] property and nonpersonal services."[6] The Procurement Act was designed to address broad concerns directly related to government procurement ─ very different from the more focused questions of personnel management in the contracting workplace that characterize the laws and executive orders listed in the Executive Order. Regarding the specific Congressional intent behind the Act, courts have explained:

> The text of the Procurement Act and its history indicate that Congress was troubled by the absence of central management that could coordinate the entire Government's procurement activities in an efficient and economical manner. The legislative history is replete with references for the need to have an "efficient, businesslike system of property management."[7]

The Procurement Act does not authorize the President to act in pursuit of non-procurement objectives.[8] The courts have repeatedly held that while the Procurement Act provides broad authority to pursue procurement goals, it does not provide a "blank check for the President to fill in at his will."[9] When the D.C. Circuit upheld an Executive Order requiring contractors to commit to wage and price controls to combat inflation in *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979), the majority and two separate

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[5] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

[6] *See* 40 U.S.C. § 101 (2002).

[7] *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996) (quoting S. Rep. No. 475, 81st Cong., 1st Sess. 1 (1949); H.R. Rep. No. 670, 81st Cong, 1st Sess. 2 (1949)).

[8] Proponents of the Executive Order and these Proposals might argue they are no different conceptually than Executive Order 11246, which also imposes employment obligations on federal contractors. In upholding that Order, however, the Third Circuit emphasized that its requirements were aimed at preventing the costs and delays associated with excluding qualified workers from the labor pool. *Contractors Ass'n of East Pa. v. Sec'y of Labor*, 442 F.2d 159, 170 (1971) ("No less than in the case of defense procurement it is in the interest of the United States in all procurement to see that its suppliers *are not over the long run increasing its costs and delaying its programs* by excluding from the labor pool available minority workman.") (emphasis added). As the discussion herein makes clear, this Executive Order and its implementing regulations and guidance have no such nexus to economy and efficiency in government procurement.

[9] *Id*. at 1330-31 (quoting *AFL-CIO v. Kahn*, 618 F.2d 784, 793 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979)).

concurring opinions stressed the indispensable presence of a "nexus between the wage and price standards and likely savings to the Government."[10]

Here, however, the Administration has acted without any "nexus" between the Proposed Rule and Guidance and the Procurement Act's goals of "economy" and "efficiency." Instead, the stated purpose of the Executive Order is to regulate substantive conduct, and the Proposals refer to and modify other substantive legal standards, making no attempt (successful or otherwise) to tailor the various requirements to achieve economic efficiency.

In numerous admissions throughout the Proposed Rule and Guidance, the Agencies readily concede that the true aim of the proposed scheme is regulation and compliance, not efficient and economical procurement:

- "The objective of the Order is to help contractors come into compliance with federal labor laws, not to deny them contracts."[11]

- "By contracting with employers who are in compliance with labor laws, the Federal Government can ensure that taxpayers' money supports jobs in which workers have safe workplaces, receive the family leave they are entitled to, get paid the wages they have earned, and do not face unlawful workplace discrimination."[12]

- "The Order's goals are to provide contractors and subcontractors with additional incentives to come into compliance with Labor Laws . . . ."[13]

- "Entering into a labor compliance agreement indicates that the contractor or subcontractor recognizes the importance that the Federal Government places on compliance with the Labor Laws."[14]

- "Where action is required, the focus will be on helping the contractor come into compliance, and taking mitigating steps which may include the development of a labor compliance agreement."[15]

By their express text, the Proposals reveal themselves and the Executive Order as an effort to regulate the workplace, not an attempt to safeguard the procurement process. As such, the Order and Proposals exceed the authority granted by Congress under the Procurement Act.

In all events, the very suggestion that this byzantine new scheme of restrictions, record-keeping, and reporting requirements might result in a penny of "likely savings to the

[10] *Kahn*, 618 F.2d at 793.

[11] 80 Fed. Reg. at 30,574; *see also id.* at 30,550.

[12] *Id*. at 30,575.

[13] *Id*. at 30,578.

[14] *Id*. at 30,590.

[15] *Id*. at 30,550.

Government,"[16] or will result in more efficient procurements, is in itself, absurd. In fact, as detailed in Section II., the Proposed Rule will have the exact opposite effect on the procurement process ─ among other things, its deprivation of contractor due process rights and imposition of high costs on contractors will force certain contractors to exit government contracting altogether, increasing costs to the Government and the American taxpayers. Put another way, there is no evidence that the imposition of these bureaucratic, burdensome, and costly obligations on contractors and Contracting Officers will decrease procurement costs and increase procurement efficiencies.[17]

Moreover, the Administration has failed to provide adequate justification for imposing an expensive and extensive system on all contractors, including the large majority of law-abiding contractors. The three studies cited by the Administration and the Agencies do not justify the extent to which these unnecessary regulations will burden contractors. For example, the Administration cites a report from the Center for American Progress for its finding "that one quarter of the 28 companies with the top workplace violations that received Federal contracts had significant performance problems ─ suggesting a strong relationship between contractors with a history of labor law violations and those with performance problems."[18] These "performance problems," however, involve mere allegations or Government findings of wrongdoing ─ there is no evidence that the named contractors were at fault for performance issues.[19] As the Proposed Guidance makes clear: only a "a small number of federal contractors have been responsible for a significant number of labor law violations in the last decade," and "most federal contractors comply with applicable laws and provide quality goods and services to the [G]overnment and taxpayers."[20]

Overall, despite its bare, self-serving assertion of some vague plausible connection, there is no reasonable nexus between the Proposed Rule and Guidance and likely savings to the Government ─ i.e., economy and efficiency in procurement. Furthermore, there obviously is no independent Constitutional basis for the President to legislate a comprehensive scheme of labor law reporting and enhanced remedial measures for the tens of thousands of employers in the United States. No express provision of the Constitution permits the President to create additional

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[16] *Kahn*, 618 F.2d at 793.

[17] What little effort there has been to demonstrate economic feasibility is significantly flawed, as described in detail in Section III.A. and Appendix A., by the Agencies' failure to comply with the requirements of Executive Orders 12866 and 13563 and the Regulatory Flexibility Act ("RFA"), each of which is intended to ensure that all federal rulemaking proposals are informed by a thorough, accurate and objective economic impact analysis, and in the case of the RFA, that agencies have properly taken into account impacts on small business.

[18] 80 Fed. Reg. at 30,549.

[19] *See* Center for American Progress, *At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers*, 1 n.4 (Dec. 2013), *available at* https://www.americanprogressaction.org/issues/labor/report/2013/12/11/80799/at-our-expense/ (stating that its findings of performance problems are not limited to a firm making an admission of fault and includes "all Government findings of performance problems, lawsuits accusing performance violations where companies have settled, pending cases where the Government has accused a company of performance problems, and cases where an employee was found guilty of misconduct while carrying out contract duties").

[20] 80 Fed. Reg. at 30,574-75.

remedies for labor and employment statutes created by Congress, nor, for that matter, to control procurement. To the extent that the Administration might rely upon some notion of "inherent" or "implied" Constitutional authority, passage of the comprehensive legislative scheme of the Procurement Act has negated any suggestion ─ dubious to begin with ─ that there might exist some inherent, implied presidential proprietorship power. As explained above, in the absence of this foundation for the Proposed Rule, the Administration and thus the Agencies have exceeded their statutory authority to issue the Proposals, and they should be withdrawn in their entirety.[21]

B. The Executive Order and the Related Regulatory Proposals Conflict with a Variety of Long-Standing, Comprehensive Statutes

While often arising in the context of federal supremacy over state or local action, principles of preemption have been applied equally to federal government behavior that interferes with and encroaches into the regulatory territory of other well-established federal statutory schemes.[22] The Administration's actions in connection with the Executive Order encroach upon the provisions of fourteen federal labor laws and executive orders and may also encroach on countless additional as yet unidentified "equivalent" state laws.[23]

By way of example, the preemption principles set forth in *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959), forbid "regulation of activities that are 'protected by Sec. 7 of the [National Labor Relations Act ("NLRA")], or constitute an unfair labor practice under Sec. 8.'"[24] So-called *Garmon* preemption extends well beyond precluding an unauthorized entity "from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own *regulatory* or judicial *remedies* for conduct prohibited or arguably prohibited by the Act."[25] In *Garmon*, Justice Frankfurter broadly explained:

> Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy and administration.[26]

Relying heavily on that rationale, in *Wisconsin Department of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282 (1986), the United States Supreme Court struck down a

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[21] *See Kahn*, 618 F.2d at 791 n.40 ("[M]uch uncertainty attends any claim of 'implied' or 'inherent' presidential authority under the Constitution.").

[22] *Reich*, 74 F.3d at 1334.

[23] The list and specific content of the "equivalent state laws" is still unknown as DOL has yet to provide this. Without this list, which the Agencies had more than a year to develop, the current Proposals can only be seen as incomplete.

[24] *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I. (Boston Harbor)*, 507 U.S. 218, 224 (1993) (quoting *Garmon*, 359 U.S. at 244).

[25] *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986) (emphasis added).

[26] *Garmon*, 359 U.S. at 243.

regulatory scheme similar ─ yet far less convoluted, far-reaching, and unworkable ─ than that created by the Executive Order here.[27] The regulation at issue in *Gould* provided *debarment* as a remedy for state Government contractors who were found to have violated the NLRA three times in five years. In striking down the scheme, the Court held in no uncertain terms:

> …[O]n its face the debarment statute serves plainly as a means of enforcing the NLRA. * * * The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA.[28]

The Administration concedes that its purpose is identical here: "The objective of the Order is to help contractors come into compliance with federal labor laws."[29] As with the Order struck down by the court in *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), "[i]t does not seem . . . possible to deny that [the Executive Order] seeks to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers."[30] Nor is it coincidental that this very proposal was included in the regulatory wish list presented to this Administration by the AFL-CIO, one of its biggest campaign supporters who support this E.O. as a way of targeting specific businesses.[31]

The fact that the Administration here has attempted to cloak its comprehensive, supplemental regulatory scheme in "procurement" concerns is not only disingenuous, but also is inconsequential. When the Government purports to act as a purchaser of goods and services in order to mask a true regulatory objective, preemption principles remain equally relevant.[32] We are not faced here with the facts of *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island (Boston Harbor)*, 507 U.S. 218 (1993) ("*Boston Harbor*"), where a Government agency was acting strictly as a proprietor ─ akin to a singular general contractor ─ whose actions were "specifically tailored to one particular job, the Boston Harbor cleanup project."[33] Here, rather, the Administration proposes a detailed, comprehensive regulatory scheme which levies significant new record-keeping, reporting, and remedial requirements, not to mention the threat of disastrous financial consequences, upon such a significant portion of the American economy.

In several ways, the Proposals would alter and conflict with the carefully crafted statutory schemes enacted by Congress.

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[27] *Gould*, 475 U.S. at 282.

[28] *Id*. at 287-91.

[29] 80 Fed. Reg. at 30,574.

[30] *Reich*, 74 F.3d at 1337.

[31] "*Turn Around America*," *AFL-CIO Recommendations for the Obama Administration, Procurement and Regulatory Policy, Departments/Agencies Covered: Office of Management and Budget, Office of Federal Procurement and Office of Information and Regulatory Affairs*, Dec. 11, 2008, *available at* http://op.bna.com/env.nsf/r?Open=rdae-9wyrwu.

[32] *Reich*, 74 F.3d at 1334-35 (citing *Gould*, 475 U.S. at 282).

[33] *Boston Harbor*, 507 U.S. at 232.

1. The President and the Agencies Seek To Amend Existing Statutes By Establishing New Categories of Violations Without Any Delegation of Congressional Authority

The Agencies, under direction from the Executive Order, have proposed the creation of completely new classifications of violations ─ i.e., "serious," "willful," "repeated," "pervasive" ─ for fourteen labor laws and executive orders, the provisions of which have already been set, properly, by Congress. None of the covered statutes use or define the term "pervasive" violation; the Fair Labor Standards Act ("FLSA") mentions "willful" but does not define it; the Occupational Safety and Health Act ("OSH Act") mentions "willful" and "repeated" violations but only defines a "serious" violation.[34] The President cannot use an Executive Order to create new categories of violations that amend these statutes; nor can he use executive authority to direct DOL to propose "guidance"[35] to assist the Agencies in making decisions based on these new categories of violations.

DOL creates out of whole cloth a series of charts to offer guidance to contracting agencies for defining and assessing these new penalty thresholds. The charts ─ which are appended to the Proposed Guidance ─ contain examples of violations of the various statutes that DOL considers to be "serious," "willful," "repeated," or "pervasive."[36] Certainly, DOL has no authority to impose these definitions on other Agencies.[37] Nor do the Agencies have the authority to apply these new definitions to statutes they do not regulate or enforce. The very fact that DOL felt compelled to create such charts shows that the use of the terms "serious," "willful," "repeated," and "pervasive" in the Order was never included in these statutes, and thus runs contrary to the will of Congress as expressed in the covered statutes.

Congress included penalties for "serious" violations of the OSH Act. It did not, however, provide penalties for "serious" violations of the FLSA, Title VII, the NLRA or any other statute. The same holds true for the other combinations of terms and covered statutes.

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[34] It is telling that neither the terms "repeated" nor "pervasive" are defined in any of the labor related statutes included in the Executive Order. In fact, the term "repeated" is not even discussed in either of the two cases cited by DOL in support of its proposed definition. Neither *United States v. Washam*, 312 F.3d 926 (8th Cir. 2002) (addressing whether two controlled substances were "substantially similar" for purposes of a conviction under the Analogue Statute section of the Controlled Substances Act), nor *Almeda Mall, L.P. v. Shoe Show, Inc.*, 649 F.3d 389 (5th Cir. 2011) (addressing whether two stores had "substantially similar" trade names in violation of a lease agreement) have any bearing whatsoever on the relevant labor and employment statutes. Even more concerning, DOL offers absolutely no case support to define "pervasive," but simply relies on the Executive Order itself.

[35] Guidance documents are generally considered to be "interpretive rules" which do not have the force and effect of law. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015). The fact that the Executive Order has directed the FAR Council to issue "rules" and DOL to act through "guidance," clearly indicates DOL's lack of authority to suggest ─ no less impose ─ its view on what constitutes "serious," "willful," "repeated," or "pervasive" violations for these fourteen labor laws and executive orders. DOL's decision to subject this "guidance document" to public notice and comment cannot alter the nonbinding nature of its action.

[36] *See* 80 Fed. Reg. at 30,593-604.

[37] DOL does not even have the regulatory authority to create and impose new penalties under its own statutes. For example, if DOL's Wage & Hour Division ("WHD") has no independent authority to impose a new category of penalty under the FLSA, clearly it has no authority to do so pursuant to a mere Executive Order.

Congress has created a balanced scheme of violations and remedies in each of the various areas covered by the statutes listed in the Order. The Proposals' attempt to create new levels of severity and expand those penalties is contrary to those statutory mandates.

2. The President and the Agencies Seek To Impose New Penalties in the Face of Comprehensive Penalty Schemes Established By Congress for the Covered Statutes.

The Agencies propose severe penalties for violations of these fourteen labor laws and executive orders ─ disqualification, suspension, and debarment from federal contract eligibility ─ none of which were included by Congress in the remedial provisions of the statutes. For example:

- The FLSA provides the Government with the authority to fine employers up to $10,000 per statutory violation, to collect an amount equal to the unpaid wages, plus liquidated damages, and to imprison for up to six months.[38]

- The Family and Medical Leave Act ("FMLA") provides remedies including compensation lost or for time denied, interest, liquidated damages, and "equitable relief as may be appropriate, including employment, reinstatement, and promotion."[39]

- Title VII, the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA") provide for civil recovery of damages up to certain limits, equitable relief, and fines for certain behavior.

The OSH Act provides for a range of monetary penalties ranging from $1,000 to $70,000 per violation, and imprisonment for up to one year, depending on the nature of the violation.[40] Being the one statute at issue here that *does* expressly include references to "serious," "willful," and "repeated" violations, Congress also expressly spelled out exactly what range of penalties is appropriate for each of them, respectively. Of course, disqualification, suspension, and/or debarment are not among those penalties. Notably, when Congress has determined that the procurement process should be used as a mechanism to enforce employment requirements, it has provided for that expressly in the underlying statute. For example, both the Davis-Bacon Act and the Service Contract Act specifically provide for debarment as a remedy for lack of compliance.

None of the statutes listed above include disqualification, suspension, and debarment among their congressionally delegated enforcement remedies. As discussed above, any effort to impose these remedies under those statutes is contrary to the express and implied will of Congress.

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[38] 29 U.S.C. § 216(a)-(b).

[39] 29 U.S.C. § 2617(a)(1)(B).

[40] 29 U.S.C. § 666.

Moreover, these very penalties created by the regulatory scheme envisioned by the Executive Order and the related Proposals have previously formed the basis for proposed legislation ─ pursued properly, but unsuccessfully, by Congress. The Labor Reform Act of 1977 (H.R. 8410, S. 2467, 95th Cong.), for example, would have amended the NLRA to provide that "willful" violators of the Act would be suspended from seeking Government contracts for three years.[41] It was passed by the House, and reported by Committee to the Senate, but went no further. On account of this legislative failure to amend the labor law to include these consequences, in *dicta* to its 1979 *Kahn* decision, the D.C. Circuit expressed doubt about the viability of an Executive Order which would debar contractors for "willful" violations of the NLRA ─ exactly like the Proposals here.[42]

3. The President and the Agencies Would Have These Penalties Imposed Not By the Agencies To Which Regulatory Authority Has Properly Been Delegated, but By the Contracting Agencies

The proposed regulatory regime for implementing new penalties is equally deficient. The contracting agencies would monitor labor law compliance and impose penalties for violation of these statutes despite clear Congressional delegation of those responsibilities to specific agencies, as set forth in the respective statutes. For example:

- Title VII, the ADA, and the ADEA are enforced by the Equal Employment Opportunity Commission ("EEOC").[43]
- The National Labor Relations Act is enforced by the National Labor Relations Board ("NLRB").[44]
- The OSH Act is enforced by the Occupational Safety and Health Administration ("OSHA"), as part of DOL under the direction of the Secretary of Labor,[45] and the Occupational Safety and Health Review Commission.[46]
- The FLSA, FMLA, the Service Contract Act, and the Davis-Bacon Act are enforced by DOL's WHD.[47]

4. The President and the Agencies Would Change the Threshold for Violating Congressionally Enacted Statutes By Assigning Consequences

[41] Labor Law Reform Act, S. 2467, 95th Cong. (1977); Labor Reform Act, H.R. 8410, 95th Cong. (1977).

[42] *See AFL-CIO v. Kahn*, 618 F.2d 784, 793 n.50 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979).

[43] 42 U.S.C. §§ 2000e, 12117; *see also* 29 U.S.C. § 626.

[44] 29 U.S.C. § 153.

[45] 29 U.S.C. § 650 *et seq*.

[46] 29 U.S.C. § 661(a).

[47] 29 U.S.C. § 204 (FLSA); 29 U.S.C. § 2617 (FMLA); 41 U.S.C. §§ 351-358 (Service Contract Act); 40 U.S.C. §§ 3141-3148 (Davis-Bacon Act).

To Mere "Administrative Merits Determinations" Without Affording Contractors Specific Statutory Rights and Opportunities

Finally, the Proposals would allow contracting agencies to exclude contractors from contracting (e.g., find them nonresponsible) based upon "administrative merits determinations" ─ a term which does not appear in any federal law, and is itself an unauthorized creation of the Executive Order. As defined in the Proposed Guidance, "administrative merits determinations" are generally the lowest level of enforcement action taken by an agency, federal or state. The Proposed Guidance further concedes that these may be subject to further review or challenge by the contractor, but must nonetheless still be reported. These include such actions as OSHA citations or imminent danger notices, Office of Federal Contract Compliance Programs ("OFCCP") notices to show cause for failure to comply with the laws under its jurisdiction, or "EEOC letters of determination that reasonable cause exists to believe an unlawful employment practice has occurred or is occurring."[48] The one minor exception to administrative merits determinations being the lowest level of agency enforcement action are the NLRB complaints that must be reported which follow from the filing of charges.[49]

The Administration defends this extraordinarily broad concept by claiming that these represent the product of investigations by the relevant agencies and therefore are worthy of some level of deference.[50] This claim is rebutted by the thousands of agency "determinations" that have been overturned, dismissed, vacated, or in some way invalidated.[51] This term is, therefore, extremely misleading and amounts to an exercise in sophistry.

Allowing the Agencies to disqualify, suspend, or debar contractors based on these non-adjudicated "notices and findings" of labor law violations would deny the contractors specific statutory rights and opportunities expressly provided by Congress. As a few examples illustrate:

- Under the NLRA, an employer against whom a Regional Director of the NLRB has issued a complaint:

  > *[S]hall have the right* to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. . . . Any such

[48] 80 Fed. Reg. at 30,579.

[49] *Id.*

[50] *Id.*

[51] Even the threat that an agency could issue something that would qualify as an administrative merits determinations is troubling as the Proposals provide the Agencies tremendous leverage to extract settlement or conciliation agreements from federal contractors. For example, pursuant to the Proposed Rule, OFCCP could use a show cause notice at even the earliest stages of a desk audit based on its unilateral determination that "acceptable data" was not submitted by the federal contractor. Such unfettered discretion would give OFCCP significant power to compel a federal contractor to accept a conciliation agreement regardless of the merits of OFCCP's position. Similarly, an EEOC reasonable cause determination would be considered to be a reportable violation under the Proposed Rule, and the threat of this sanction would create significant leverage for the EEOC to extract settlement agreements from federal contractors regardless of the merits of the EEOC's allegations.

> proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.[52]

- Under the OSH Act, an employer issued a citation for an alleged violation, has 15 days to indicate the intent to contest the citation and is entitled:

> [A]n opportunity for a hearing [authorized by the Occupational Safety and Health Review Commission] (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section).[53]

- Section 554 of title 5, in turn, provides that such a hearing must allow the employer an opportunity for:

> [T]he submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit . . . .[54]

Holding contractors accountable before they have had their opportunity to exhaust their specific statutory rights and opportunities is further evidence that the Administration's actions here are incompatible with the express will of Congress.[55]

C. The Proposals, Like the Executive Order On Which They Are Based, Violate the Separation of Powers Doctrine and Therefore Are Unconstitutional

As demonstrated above, the Executive Order and its implementing Proposals raise significant concerns about the separation of powers between the legislative and executive branches of government. Under our system of government, Congress makes the laws. The role of the President, often through agencies, is to "faithfully execute" them.

Here, the President has directed the Agencies, with "interpretative guidance" from DOL, to propose implementation of a regulatory and remedial scheme that significantly deviates from and effectively amends numerous federal statutes, in the absence of any expressed or implied Congressional authority. Rather than "faithfully execute" the law, the President has usurped legislative powers by ordering these Agencies to create new categories of violations (e.g., "serious," "willful," "repeated," "pervasive") and impose new penalties (disqualification,

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[52] 29 U.S.C. § 160(b) (emphasis added).

[53] 29 U.S.C. § 659(c).

[54] 5 U.S.C. § 554(c)(1); *see also* 5 U.S.C. §§ 556-557.

[55] Nor is there any provision for a contractor to correct the record if they have successfully contested an enforcement action. Contractors who defeat a citation or allegation should be able to have any record of the "violation" expunged from their record so that it can no longer be accessed and held against them.

suspension, and debarment) through a process that is found nowhere else in federal law and deprives contractors of specific statutory rights and opportunities expressly provided by Congress. Without a proper delegation from Congress, the contracting agencies have no authority to create new categories of violations nor impose new penalties pursuant to these statutes. Therefore, the Proposed Rule that establishes them and the Proposed Guidance that defines them violate the separation of powers. This can only be described as executive overreach and cannot be accepted.[56]

By virtue of all of the foregoing, the Administration's efforts here are undertaken completely without Constitutional authority, and violate the separation of powers doctrine central to our constitutional system of Government. For these reasons as well the Executive Order, Proposed Rule, and Proposed Guidance should be withdrawn in their entirety.

II. The Proposed Rule and Guidance Reduce Economy and Efficiency in Procurement and Impose an Unworkable and Unfair Process

A. The Proposed Rule Runs Counter To the Government's Stated Objective of Promoting Economy and Efficiency in Procurement

The stated purpose of the Proposed Rule, and indeed the statutory authority upon which the entire Executive Order depends, is to "promote economy and efficiency in procurement by awarding contracts to contractors that comply with labor laws."[57] The reporting regime established by the Proposed Rule, however, will throw sand in the gears of the procurement process, bringing it, in some instances, to a complete stop. Thus, the effect of the Proposed Rule is directly contrary to: the Government's stated objectives; the President's authority under the Procurement Act; and a number of other recent Government initiatives to streamline the procurement process and acquisition lifecycle.

Under the Proposed Rule's new reporting regime, before the award of *every single contract* over $500,000 (including solicitations for many commercial items), contractors and Contracting Officers must meet the following requirements:[58]

- **Contractor Reporting of Labor Law Violations to the Contracting Officer:** Prior to contract award, contractors must represent at the submission of their bid,

[56] As noted in Justice Jackson's oft-cited concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952): "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.[] Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." 343 U.S. at 637-38 (Jackson, J., concurring).

[57] 80 Fed. Reg. at 30,548.

[58] *Id*. at 30,566.

whether, in the preceding three years, they have violated labor laws.[59] If the Contracting Officer initiates a responsibility determination, the Contracting Officer is required to request and the contractor must provide, typically through the System for Award Management ("SAM"),[60] more detailed information on the violation, including: the labor law violated; the violation's unique identification number, e.g., the case number, docket number, or charge number; the name of the entity rendering the violation determination, e.g., the court or agency; and the date the determination was rendered.[61] The contractor, if it wishes, may provide to the Contracting Officer evidence of mitigating circumstances or measures taken to remediate the violation, including "labor compliance agreements," e.g., signed agreements indicating how the contractor is prepared to abide by the terms of compliance and abatement as specified by the enforcing agency.[62] The Contracting Officer then will need to furnish the reported information to his/her agency Labor Compliance Advisor ("LCA")[63] and request an LCA recommendation.[64]

- **LCA Recommendation Regarding Responsibility:** The agency LCA will provide a recommendation, stating whether the contractor's reported violations are "serious," "repeated," "willful," or "pervasive" and recommending whether the contractor "could be found to have a satisfactory record of integrity and business ethics if the process to enter into or enhance a labor compliance agreement is initiated," or "could be found to not have a satisfactory record of integrity and business ethics, and the agency Suspending and Debarring Official should be notified."[65] The LCA is required to provide the advice and recommendation "within three business days of the request, or another time period required by the contracting officer."[66]

- **Labor Law Responsibility Determination:** Based on the LCA's recommendation, the Contracting Officer will decide if the prospective contractor is responsible.[67]

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[59] *Id*. at 30,566. The reporting obligation, as discussed, *supra*, and further below, includes the requirement to report agencies' bare allegations that the contractor violated one of the covered labor laws, without that alleged violation having been confirmed through any adjudicative proceeding.

[60] SAM is a publicly accessible online system that houses federal procurement information, including contractor representations and certifications and information regarding contractor eligibility.

[61] 80 Fed. Reg. at 30,566.

[62] *Id*.

[63] Like the "administrative merits determinations" described in Section I.B.4. above, this new position is a compete invention of the Executive Order, and as such is an unauthorized extension of regulatory authority. *See id*. at 30,549 ("[A]gency labor compliance advisors (ALCA), [is] a new position created by the E.O.").

[64] *See id*. at 30,566.

[65] *Id*. at 30,566.

[66] *Id*.

[67] 80 Fed. Reg. at 30,567.

- **Periodic Reporting of New Labor Law Violations:** Post-contract award, the contractor will be required to submit updates on its labor law violations every six months for ***every contract***.[68]

- **Subcontractor Reporting of Labor Law Violations, Subcontractor Responsibility Determinations, and Subcontractor Updates**: Covered contractors also must require that any prospective subcontractors "at any tier submitting an offer for subcontracts where the estimated subcontract value exceeds $500,000 for other than commercially available off-the-shelf items" report labor law violations from the preceding three years.[69] The contractor then must analyze the subcontractor violations and determine whether the subcontractor is responsible.[70] Once a subcontract is awarded, the subcontractor must semiannually update its disclosure.[71]

This process injects inefficiency into the procurement process and will inevitably create backlogs and delays and will increase costs to the Government and the American taxpayers. The reasons why are eight-fold.

First, the reach of this new reporting regime is vast and will affect tens of thousands of contract awards. The FAR Council, for example, calculates that for Fiscal Year 2013, there were 25,079 contract awards that would have been covered by the Proposed Rule.[72] The FAR Council also estimates that 20,139 awards "will be covered contracts for which contractors will have to determine whether updated information needs to be provided. . . ."[73]

Second, the duties of the Contracting Officer and the LCA are not necessarily limited to one contractor per procurement. If a prospective awardee is deemed nonresponsible, the Contracting Officer and LCA must continue analyzing the labor law violations of the other offerors until a responsible contractor is found.

Third, the Proposed Rule imposes the responsibilities listed above upon an acquisition workforce that already is overworked, due in part, to the innumerable responsibilities already placed upon this workforce. At the highest level, Contracting Officers are responsible for "ensuring performance of all necessary actions for effective contracting, ensuring compliance

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[68] *Id.*

[69] *Id*. at 30,570.

[70] *Id*. at 30,570-71.

[71] *Id*. at 30,571.

[72] Federal Acquisition Regulation (FAR) Case 2014-025, Fair Pay and Safe Workplaces, Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563 at 11, *available at* http://www.regulations.gov. There is no reason to doubt that the number of contract awards that will be covered by the Proposed Rule, if implemented, will be similar to this number. Although the FAR Council's Regulatory Impact Analysis states that the Proposed Rule's reporting requirement will apply only to contract and purchase order awards, and not to the award of task and delivery orders, the Proposed Rule, itself, does not clearly make this distinction. Should the FAR Council decide not to withdraw the Proposed Rule, at the very least, it should make clear that the reporting requirement does not apply during the award of task and delivery orders.

[73] *Id*. at 17.

with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships."[74] Specifically, Contracting Officers' responsibilities, include but are not limited to: awarding and executing contracts; approving changes or modifications to contracts; monitoring contract performance; interpreting contracts; resolving contract disputes and other issues that arise during contract performance; and terminating contracts. Despite this overwhelming workload, the Proposed Rule places yet another set of responsibilities on Contracting Officers. Due to their extensive number of responsibilities, Contracting Officers will need a significant window of time to make a single responsibility determination, assuming reasonable contracting officer due diligence, which often may not occur for the reasons below.

Fourth, the Proposed Rule requires Contracting Officers to perform tasks for which they likely have no prior experience or knowledge. Specifically, they are being asked to make responsibility determinations based upon state and federal labor laws, a subject matter that generally is not part of their experience or training. As Contracting Officers endeavor to learn and understand the intricacies of state and federal labor law to make these determinations, they will be distracted from their core functions and the procurement process will suffer.

The Proposed Rule itself appears to recognize that Contracting Officers are ill-equipped to evaluate labor law violations, while at the same time forcing them into the position of evaluating those alleged violations. The introductory comments to the Proposed Rule state:

> Even if information regarding labor violations is made available to the agency, contracting officers lack the expertise and tools to efficiently and effectively evaluate the severity of the violations brought to their attention and therefore cannot easily determine if a contractor's actions show a lack of business ethics and integrity.[75]

Despite this express concession, the Proposed Rule goes on to allocate to the Contracting Officer the obligation to perform the work that the FAR Council acknowledges is neither within the Contacting Officer's expertise nor consistent with the available tools.

Fifth, while the Proposed Rule and Guidance proposes a new system of LCAs in an attempt to support Contracting Officers and contractors in carrying out the Executive Order's mandate, it is unlikely that an LCA will be able to provide the requisite recommendation to the Contracting Officer within three business days. Not only is there no reason to expect these LCAs to be fully informed of all the intricacies, nuances, case law, history, and possible interpretations of all the laws covered by the Executive Order,[76] but it appears that most agencies

[74] FAR 1.602-2.

[75] 80 Fed. Reg. at 30,548-49.

[76] Even the most skilled and experienced labor and employment attorneys would not be qualified for these roles. When the state law issues are added to this mix, the likelihood of these LCAs having adequate knowledge and familiarity with this vast array of issues diminishes even further. Thus, it will cost the Government and the taxpayers time and money to train these LCAs – another major problem with the Proposed Rule and Proposed Guidance.

will designate only *one* LCA.[77] That *one* LCA will be responsible for making recommendations on *every* agency procurement. This is on top of their many other responsibilities enumerated in the Executive Order.[78] There is no way that the LCA will be able to timely meet all of his or her obligations in three business days, resulting in one of two potential outcomes, neither of which are beneficial to the Government or contractors. Either the Contracting Officer will need to extend the amount of time allotted for the recommendation, further slowing down the procurement process, or the LCA and the Contracting Officer will be forced to make snap judgments regarding the contractor's responsibility, depriving the contractor of its due process.[79]

Sixth, contractors unhappy with an LCA's recommendation or a Contracting Officer's affirmative or negative responsibility determination (especially those inconsistent with determinations made by other Contracting Officers) will file bid protests challenging that determination.[80] A protest frequently can extend the procurement process, for at least 100 days, if not longer.[81]

Seventh, the responsibility determination for each contractor is made on a procurement-by-procurement basis. Therefore, even if another Contracting Officer already has determined that a contractor is responsible, the process listed above still must be completed for each successive procurement. In other words, the Proposed Rule is establishing not only a time-consuming process, but a duplicative one at that.

Eighth, the Proposed Rule appears to impose detailed obligations for reporting on subcontractors at every tier. The burden of this reporting obligation will fall in the first instance on upper tier contractors but invariably the Government will need to resolve disagreements between contractors and their subcontractors.[82] This will be one more dimension to the substantial burden placed on the Government's contract professionals.

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[77] *See* Memorandum from Beth F. Cobert, Deputy Director for Management, OMB, and Christopher P. Lu, Deputy Secretary, DOL, Implementation of the President's Executive Order on Fair Pay and Safe Workplaces, M-15-07 (Mar. 5, 2015).

[78] Exec. Order No. 13673, 79 Fed. Reg. 45,309, 45,311-12 (Aug. 5, 2014).

[79] This deprivation of due process is described more fully in Sections I.B.4. and II.B.1.

[80] *See, e.g.*, *Rotech Healthcare, Inc.*, B-409020 et al., Jan. 10, 2014, 2014 CPD ¶ 28 (denying protest of Contracting Officer's nonresponsibility determination). This is especially so given that Contracting Officers may *consider mere allegations of wrongdoing* that contractors have not yet had a chance to challenge. *See supra* Section II.B.1.; *see also* 80 Fed. Reg. at 30,579 ("For purposes of the Order, the term 'administrative merits determination' means any of the following notices or findings – whether final or subject to appeal or further review . . . .").

[81] While GAO protest decisions must be issued 100 days after a protest is filed, 4 C.F.R. § 21.9, there is no such time restriction on protests filed at the Court of Federal Claims.

[82] The FAR Council offers an alternative to the requirement that prime contractors collect, review, and then make responsibility determinations based upon a subcontractor's labor law violations. Even the alternative requires significant Government involvement. As explained therein, under the alternative, subcontractors would disclose their labor law violations directly to DOL, and DOL would provide advice to the prime contractor, including whether the violations are "serious," "willful," "repeated," or "pervasive." *See* 80 Fed. Reg. at 30,555-56. For further discussion *see infra* at Section II.C.

By inserting inefficiency into the procurement process, the Proposed Rule runs directly counter to the Administration's recent initiatives to cut costs and streamline the acquisition process. For example in April 2015, DOD announced the agency's Better Buying Power 3.0 program and issued its implementing directive. The program is part of DOD's "continuing effort to increase the productivity, efficiency, and effectiveness of the Department of Defense's many acquisition, technology, and logistics efforts."[83] The core goals of the program center on: increasing productivity in industry and Government; incentivizing innovation in industry and Government; eliminating unproductive processes and bureaucracy; and promoting effective competition.[84] Similarly, in December 2014, the Office of Management and Budget ("OMB") issued a memorandum entitled, "Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings," demonstrating the Administration's focus on simplifying the procurement process, improving efficiency, and reducing bureaucracy to drive greater innovation and improved contract performance.[85] The removal of regulatory barriers, including the elimination of ineffective or unnecessarily burdensome requirements, is one of the key parts of this initiative.[86] The Proposed Rule's imposition of a complex, unwieldy, and inefficient new bureaucracy, with its attendant burdens on contractors throughout the Government's supply chain, directly contradicts the Administration's better thought out and more effective procurement reform initiatives.

For the reasons stated above, the Proposed Rule inevitably will slow and make less efficient the Government's procurement process. The result of this slowdown will be increased costs to contractors, and the Government, and thus the American taxpayers. Specifically, the longer these procurements take, the more money the Government must expend to ensure that its needs are met, such as entering into expensive bridge contracts to hold the Government over until a contract award can be made. Therefore, the Proposed Rule fails to meet the statutory requirements under the Procurement Act claimed by the Government, namely, to promote efficiency and economy in Government contracting.

B. The Proposed Rule Denies Contractors Their Constitutionally Protected Due Process Rights and Imposes Upon Them Costly Obligations

The Proposed Rule creates a reporting regime that: (1) deprives contractors of their due process rights; and (2) will require contractors to expend significant resources to achieve compliance. This is particularly egregious given that the regime is unnecessary, as described in more detail below in Section II.D., because there are already processes in place to exclude bad actors from contracting, protect the Government's interests, and protect contractors' constitutionally-protected interests.

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[83] Memorandum from Frank Kendell, Undersecretary of Defense, Implementation Directive for Better Buying Power 3.0 ─ Achieving Dominant Capabilities through Technical Excellence and Innovation (Apr. 9, 2015).

[84] *Id.*

[85] Memorandum from Anne E. Rung, Administrator, Executive Office of the President, OMB, Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings (Dec. 4, 2014).

[86] *Id.* at 5-6.

1. The Proposed Rule Denies Contractors and Prospective Contractors of Their Constitutional Rights

The proposed scheme violates the Fifth Amendment protection that no person shall be "deprived of life, liberty, or property, without due process of law."[87] Procedural due process requires "some form of hearing . . . before an individual is finally deprived of a property interest."[88] "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[89]

There is no doubt that Contracting Officers' determinations of nonresponsibility under the Proposed Rule have the potential to deprive contractors of constitutionally-protected interests. Courts have held that the Government deprives a contractor of a protected liberty interest when it effectively bars it from winning contracts through inappropriate action affecting the contractor's reputation, thereby threatening its livelihood.[90] An injury to reputation occasioned by the Government's precipitous and unsupported disqualification, suspension, or debarment of the bidder may give rise to the denial of such a protected liberty interest.[91] In fact, courts have long held that an agency may not impose even a temporary suspension without providing the "core requirements" of due process: adequate notice and a meaningful hearing.[92]

The Contracting Officer's responsibility determination process under the Proposed Rule deprives contractors of these "core requirements" in a number of ways:[93]

- **Inability To Challenge "Administrative Merits Determinations":** Under the Administration's Proposals, any Contracting Officer or LCA will be empowered to deem prospective contractors nonresponsible, and constructively debar them, solely

[87] U.S. Const. amend. V.

[88] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[89] *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[90] *See, e.g., Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953, 966-67 (D.C. Cir. 1980).

[91] *Frequency Elecs., Inc. v. U.S. Dep't of Air Force*, 151 F.3d 1029 (4th Cir. 1998) (unpublished) (citing *Vanelli v. Reynolds School Dist. No. 1*, 667 F.2d 773, 777-78 (9th Cir. 1982) (eligibility for federal contracts is a status, the alteration of which by the Government through reputational injury may give rise to a protected liberty interest)).

[92] *See Commercial Drapery Contractors v. United States*, 133 F.3d 1 (D.C. Cir. 1998); *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 595, 599-602 (D.C. Cir. 1993); *ATL, Inc. v. United States*, 736 F.2d 677, 682-84 (Fed. Cir. 1984); *Old Dominion Dairy Prods., Inc.*, 631 F.2d at 967-69; *Art-Metal USA, Inc. v. Solomon*, 473 F. Supp. 1, 4 (D.D.C. 1978).

[93] That contractors would have the ability to protest a negative responsibility determination is little solace to these constitutional infirmities. Challenges to negative responsibility determinations are rarely sustained due to the significant deference given to Contracting Officers on issues of contractor responsibility. *Rotech Healthcare, Inc.*, 2014 CPD ¶ 28 at 6 ("determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer who, in making that decision, must necessarily rely on his or her business judgment. [GAO] therefore will not question a negative determination of responsibility unless the determination lacks a reasonable basis.").

on the basis of reported "administrative merits determinations"[94] — non-adjudicated allegations that are not final and may be subject to further review or appeal — prior to the contractor having any opportunity to have a hearing or to challenge the findings.[95] For example, the Proposed Rule and Guidance would have contractors and prospective contractors report EEOC merits determinations, which are either a determination that "reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring" or the filing of a civil action on behalf of the EEOC.[96] The Proposed Guidance itself acknowledges that this required disclosure does not establish any actual violation of the law. The Proposed Rule and Guidance also would have contractors report an NLRB complaint, which represents nothing more than the allegation of unlawful conduct by an employer and is merely a set of allegations that need to be tried at a hearing.[97] In fact, the NLRB's own case handling manual instructs Regional Offices to issue complaints in cases where they are simply unable to resolve credibility conflicts. Preliminary WHD notices and OSHA citations also will be reportable prior to any actual adjudication.[98]

- **Inability To Adequately Present Mitigating Circumstances:** Because LCAs will need to consider reported information and make recommendations to Contracting Officers within three days, contractors will be deprived of their opportunity to fully explain the remedial measures and other mitigating circumstances surrounding alleged labor law violations.

The deprivation of due process is especially problematic given:

- **The Reporting Regime Allows For Inconsistent Determinations:** The Proposed Rule, by empowering every federal Contracting Officer to interpret the evidence on a contract-by-contract basis, will lead to inconsistent findings of nonresponsibility. This approach is in direct conflict with the decades-old recognition that improvisation is inappropriate on such a foundational issue as one's liberty interest in competing for federal contracts, without an opportunity to rebut charges.[99]

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[94] The Proposed Rule requires that contractors disclose "administrative merits determinations" as defined by the Proposed Guidance, despite that Congress has not defined this term and neither the Department of Labor nor the FAR Council have the express authority to do so.

[95] In fact, GAO has found it improper to rely on unproven allegations when making a responsibility determination. *See RQ Constr., LLC*, B-409131, Jan. 13, 2014, 2014 CPD ¶ 30 at 5 (rejecting protester's challenge to an affirmative responsibility determination where challenge was based on a wrongful termination suit filed in California state court, finding that the protester's argument was "based upon unproven allegations in a complaint that is the subject of litigation, and not upon facts establishing that [the awardee had] been convicted of any federal, state, or local crime or subject to civil or administrative penalties.")

[96] 80 Fed. Reg. at 30,579.

[97] 29 U.S.C. § 160(b).

[98] 80 Fed. Reg. at 30,579.

[99] *Art-Metal USA, Inc.*, 473 F. Supp. at 4; *Horne Brothers, Inc. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972).

- **The Reporting Regime Allows For Multiple Exclusions Based On The Same Set Of Violations And Exposes Contractors To Potential *De Facto* Debarments For An Indefinite Amount of Time:** On the other hand, in carrying out their duties under the Proposed Rule, due to overwhelming workloads and always-impending deadlines, Contracting Officers may decide to rely upon the potentially flawed responsibility determinations of other Contracting Officers.[100] This means that the contractor may not have an adequate chance to prove its responsibility prior to each contract award and is, in effect, being debarred, i.e., a *de facto* debarment. There is no telling how long this will last; it could even last longer than the three-year time limit on debarments set forth in FAR 9.5. Not only have courts held that *de facto* debarments are improper,[101] the Comptroller General also has stated that continued refusal to award contracts as a result of nonresponsibility determinations based on the same alleged violations, without invoking the debarment procedures at the earliest practicable date, is of doubtful validity.[102]

In sum, the Proposed Rule will result in determinations based on mere allegations and in *de facto* debarments without due process, without a limit on repeated use of the same information, and without the FAR Part 9 three-year time limit on the debarment.

2. The Proposed Rule Places Upon Contractors Unknowable and Costly Requirements

In addition to being denied their constitutional rights, contractors will be forced to expend significant time, money, and resources to ensure compliance with the Proposed Rule and Proposed Guidance. The Proposed Rule wholly underestimates or entirely ignores these costs, as highlighted in Section III.A. and as further explained in detail in Appendix A.

In order for contractors and subcontractors to accurately represent their alleged labor law violations, they must have processes and systems ("controls") in place to record and monitor all allegations of labor law violations down to the lowest level of agency enforcement action, regardless of whether the allegation: (1) is accurate, *see supra* Section II.B.1.; (2) pertains to a federal or state law violation;[103] (3) involves conduct during the performance of a Government contract; or (4) involves conduct by a business entity or division engaged in Government contracting. Thus, to comply with the Proposed Rule's requirements, contractors will need to, among other things: implement new controls; maintain these controls; designate or hire personnel responsible for implementation and oversight; audit these controls; and train personnel

[100] The Proposed Rule sets up a system that will result either in inconsistent responsibility determinations or the improper rubber stamping of prior responsibility determinations. Either way, contractors are harmed in the process. A system that perpetuates flawed determinations is just as onerous and inadequate as a system that fails to protect against inconsistent determinations.

[101] *See, e.g.*, *Phillips v. Mabus*, 894 F. Supp. 2d 71, 81 (D.D.C. 2012).

[102] *See Cadwalader, Wickersham & Taft*, B-175845, 1973 WL 8012 (Comp. Gen. Mar. 9, 1973); *see also* To the Administrator, GSA, B-151269, 43 Comp. Gen. 140 (Aug. 8, 1963).

[103] The tracking of state labor law violations will be especially burdensome given that the labor laws vary dramatically between states and are more likely to change than federal laws.

on the controls. This will be extremely burdensome and costly for contractors, particularly in light of contractors' need to ensure that their systems meet the high levels of compliance necessary to avoid liability under such statutes as the civil False Claims Act, 31 U.S.C. § 3729 *et seq*. Contractors, therefore, will not be able to just "check the box" in complying with these provisions. The attendant compliance burdens, costs, and risks are significant.

Moreover, contractors will need to educate and train their procurement personnel on labor law violations and keep them constantly up-to-speed on the company's violations and associated remedial measures in order to ensure that contractors make adequate representations and disclosures under the Proposed Rule. Not only will this be expensive, but it will be an administrative nightmare because procurement personnel generally have no insight into labor law issues, and for large companies, the scope of their operations will make this a daunting, if not impossible, task.

The full scope of this burden is unknowable because of two major areas of uncertainty ─ the types of state law violations to be disclosed and the definitions of "contractor" and "subcontractor:"

- Without a full listing of the "equivalent state laws," contractors cannot identify the range of violations that will have to be reported. Also, they cannot determine the extent of the systems they will have to implement to handle this requirement.

- In the one "equivalent state law" identified by DOL, the concept of "equivalent" is pushed beyond recognition. The Proposed Guidance's identifies OSHA approved state plans as the one state law DOL currently deems to be "equivalent." State OSHA plans by definition, however, are not equivalent to the federal OSHA plans. The 22 states and jurisdictions that administer approved plans do so because their plans have been approved as being "at least as effective" as the federal OSHA program. Even OSHA notes substantial differences between state and federal plans and concedes that "[e]mployers can face different results based on which agency has jurisdiction: the State Plan on Federal OSHA."[104] Some state plans, like California's Occupational Safety and Health Administration ("Cal/OSHA"), impose requirements (like ergonomics or state specific exposure thresholds) that are not required by, or differ from, federal law. Other states have adopted their own OSHA plans simply because "they believe that the power to require job safety and health rightly belongs to the states pursuant to the Tenth Amendment."[105] For the Administration to use these state OSHA plans as the clearest example of "equivalent state laws" does not bode well for the forthcoming proposed Guidance.[106]

[104] *See* OSHA Federal Regulations vs. Individual State Plans, *available at* http://etraintoday.com/blog/osha-federal-regulations-vs-individual-state-plans/.

[105] *Id*.

[106] Notably, DOL did not even list state-based minimum wage laws which function more like their federal counterparts than do state safety and health plans.

- The Proposed Rule does not clearly define the terms "contractor" or "subcontractor." For example, it is unclear whether the term "contractor" is limited to the legal entity executing a contract, the legal entity performing the contract, or is broader, requiring a company to disclose the labor law violations of all subsidiaries and its parent company. Similarly, it is unclear whether the term "subcontractor" refers solely to a subcontractor providing goods and/or services directly used in the performance of a prime contract or also includes a supplier of goods and services indirectly used in the performance of a government contract, such as services the cost of which are indirect costs.[107] How this question is resolved may add significantly to the already substantial burden this reporting requirement will impose.

The burden does not end there, though. There are additional significant risks and ramifications, including costs, such as:

- **Endless Reporting:** Because contractors, after contract award, must report labor law violations every six months, each individual contract will have its own reporting due date. Contractors with multiple contracts[108] will be transformed into reporting factories and will be forced to utilize personnel and time collecting and reporting violations, or not violations,[109] which could and should be spent ensuring impeccable contract performance. Should the Proposed Rule be implemented, the Chamber recommends that it be modified to impose a unified reporting schedule wherein contractors semi-annually report labor law violations at set times based on the contractor fiscal year regardless when a particular contract was awarded.

- **Contract Termination:** The representation regarding whether a contractor has labor law violations "is a material representation of fact upon which" the Government relies when making a contract award.[110] If the Government determines that a contractor "knowingly rendered an erroneous representation, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract. . . ."[111]

- **Reputational Harm:** The Proposed Rule requires contractors to make their representations as to compliance on SAM and then to upload information requested

[107] Should the Proposed Rule be implemented, the Chamber recommends that it be modified to clearly define the term "contractor" as the entity that legally executes a contract with the Government and not including affiliated legal entities. *See* FAR 9.403. The Chamber also recommends that the Proposed Rule be modified to clearly define "subcontractor" as a supplier of goods or services the costs of which are allocated as direct costs to a prime government contract or a lower-tier subcontract under a prime government contract and does not include a supplier of goods or services the costs of which are classified as indirect costs, such as overhead or general and administrative.

[108] The effect on the Government's largest contractors will be especially egregious given that the contractors have thousands of contracts, each with their own reporting due date under the Proposed Rule.

[109] The effort needed to discover violations is the same regardless of whether any are uncovered.

[110] 80 Fed. Reg. at 30,569.

[111] *Id*.

by the Contracting Officer to SAM. The Proposed Rule has no indication that this compliance and responsibility information will be protected by "For Official Use Only" status. Moreover, "[d]isclosure of basic information about labor violations will be made publicly available in [Federal Awardee Performance and Integrity Information System ("FAPIIS")]."[112] As a result, the information will be available to competitors, members of the public, and media outlets. In other words, contractor reporting effectively will be public disclosure of: (1) the alleged violations, and (2) the contractor's information submitted in response to those allegations. The public disclosure of alleged labor violations or negative responsibility determinations[113] undoubtedly will affect the public reputation of contractors. Members of the public who learn of the disclosure may refuse to do business with that company. If contractors have alleged labor law violations and now must publicly report them before they have had a chance to clear their name, they will be forced to spend substantial amounts of money to combat any potential reputational harm arising from the reporting. For these reasons, among others, there should be no public disclosure of any labor violations, including the mere fact of an alleged violation.

- **Bid protests:** A losing bidder may use publicly reported violations to challenge an agency's award decision by filing a bid protest. Awardees will incur legal costs to protect their contract award, and protesters will incur legal costs to win the protest.

Moreover, under the Proposed Rule, contractors must: require prospective covered subcontractors to "represent to the best of the subcontractor's knowledge and belief"[114] whether they have any labor law violations within the preceding three years; make a determination regarding whether the subcontractor is responsible; and then report this determination.[115] This process must be repeated semi-annually.[116] The time, money, and manpower required to meet these requirements is substantial. Among other things, contractors will need to amend their standard subcontract forms, to require disclosure and will need to monitor their subcontractors' performance, not just on their one subcontract, but on all contracts and subcontracts.

These increased costs will make their way back to the Government and thus the American taxpayers. At best, contractors will charge the Government for the increased costs and burdens associated with compliance. At worst, contractors will bow out of Government contracting altogether, reducing competition, reducing innovation, driving up costs, and reducing jobs directly supported by federal contracting. These costs and the attendant effects are unjustifiable, given, among other reasons that the Proposed Rule: (i) will not in any way benefit the Government, *see supra* Section II.A.; and (ii) are unnecessary, *see infra* Section II.D.

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[112] *Id*. at 30,549.

[113] While a contractor may be successful in arguing that the details surrounding a labor law violation and a negative responsibility determination are business confidential and/or proprietary exempt from public disclosure, the mere fact of a negative responsibility determination will cause reputational harm to contractors.

[114] This certification is similar to that used for claim certification. *See* 41 U.S.C. § 7103(b)(1)(B).

[115] 80 Fed. Reg. at 30,570-71.

[116] *Id*. at 30,571.

C. The Proposed Rule's Subcontractor Responsibility Determination Requirement Is Unworkable and Counterproductive

The Proposed Rule's requirement that contractors analyze and report on subcontractor responsibility[117] is unworkably broad, will create significant issues and potential adversity between industry partners, and is divorced from the reality of the federal contracting marketplace, as discussed in detail below.

First, the scope of the Proposed Rule's obligation to collect and report subcontractor compliance data is, at best, unclear, and at worst, impractically broad. The Proposed Rule does not expressly limit the requirement to subcontractors who provide goods or services in support of a Government prime contract.[118] Therefore, as written, the Proposed Rule would require a large systems integrator to make a subcontractor responsibility determination for vendors providing services to the company as a whole, unrelated to the Government contract, such as business-wide IT systems support (if purchased on a non-COTS basis), so long as the services provided were in excess of $500,000.

The Proposed Rule also does not limit the requirement to first-tier subcontractors. Thus, the requirement will need to be flowed down to all contract levels. It is not entirely clear, however, how this requirement practically will be applied.

Second, placing on a prime contractor the responsibility to make a subcontractor responsibility determination and then to disclose the results of this determination to the Contracting Officer puts the prime contractor in an uncomfortable, and at times untenable, position with respect to other members of industry. Subcontractors and contracting partners who receive a nonresponsibility determination likely will refuse to do business in the future with the prime contractor who made the determination, both for commercial and Government work. Thus, the Proposed Rule has the potential to sour otherwise good working relationships between contractors.

Third, prime contractors and subcontractors often compete to win the same contracts or operate in the same market. In fact, many times to resolve a bid protest, the awardee will agree to subcontract some of the contract work to a protester. To then require these subcontractors to provide their competitors with information regarding their labor law violations and the status of any negotiations with DOL is inconsistent with how the federal contracting marketplace operates.[119] The prime contractor would be in a position to use the information to the detriment of the subcontractor, such as using the information to protest a separate procurement.

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[117] *Id*. at 30,570-71.

[118] As explained above, *supra* Section II.B.2., the Proposed Rule does not clearly define "subcontractor."

[119] Under the Proposed Rule, subcontractors are required to disclose, and prime contractors are required to consider in conducting responsibility determinations, any DOL notice "advising that the subcontractor has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of an existing agreement." 80 Fed. Reg. at 30,571.

Subcontractors will refuse to provide that data, as they should, because frequently there will be proprietary and confidential data embedded in any information concerning the violations.[120]

To address the issues surrounding a subcontractor's disclosure of sensitive, confidential, and harmful information to a prime contractor, the FAR Council in the proposed rulemaking has outlined an alternative procedure for subcontractors to deal directly with DOL in resolving their "labor violations."[121] Under the proposed alternative, a subcontractor must represent whether it has any labor law violations to the prime contractor, and if it does, must disclose its labor law violations to DOL.[122] The prime contractor then will make a subcontractor responsibility determination based, in part, upon DOL's advice regarding whether the subcontractor has "serious," "willful," "repeated," or "pervasive" violations and whether the subcontractor has entered into or has agreed to enter into a labor compliance agreement to address disclosed violations.[123] If DOL does not provide advice to the subcontractor within three business days, the prime contractor may, although is not required to, make a responsibility determination absent DOL's input.[124]

This alternative approach is unworkable and does not solve the problems it is intended to solve. Among other problems are the following:

- A subcontractor still must disclose whether it has labor law violations to the prime contractor. This information, in and of itself, could be used by the prime contractor to the subcontractor's detriment.

- DOL is not required to provide its advice within any particular time frame. As a result, the alternative process of calling for DOL guidance could take weeks or months to resolve. This result is clearly out of step with the time frames for most procurements and will be disruptive to contractors' ability to depend on subcontractor availability and to rationally plan their proposals or bids.[125]

- On the other hand, permitting prime contractors to make a separate responsibility determination if DOL has failed to respond to the subcontractor's submission within

[120] This is in contrast to the submission of subcontractor cost data where subcontractors have the option to provide such data directly to the Government's auditors for review and audit; under the Proposed Rule there is no such option. The rulemaking is clear that Contracting Officers and LCAs roles will be severely limited in dealing with subcontractor labor violation data, only permitting the Contracting Officers and LCAs "to furnish[] assistance such as access to the DOL Guidance and the appropriate contacts at DOL." *Id*. at 30,553.

[121] *Id*. at 30,556.

[122] *Id*.

[123] *Id*.

[124] *Id*.

[125] The designation of subcontractors for major procurements frequently is a time sensitive matter. Subcontractors are often included in the prime contractor's proposal and the subcontractor's qualifications often can be integral to the Government's evaluation of proposals. This means that the FAR Council's suggested alternative of having subcontractors deal directly with DOL will keep prime contractors in suspense waiting for DOL's advice.

three days, leaves the prime contractor at substantial risk of being second-guessed later if DOL eventually comes out with an adverse determination.

- The alternative process is likely to place undue pressure on subcontractors to come to terms with DOL on labor compliance agreements that, if negotiated without the immediacy of a pending procurement, would likely come out very differently.[126]

Fourth, there is a risk that, under the Proposed Rule, prime contractors will refuse to subcontract with companies with very minor violations in order to stay in the Government's good graces or to ensure that they are not liable for subcontracting with nonresponsible parties. In other words, prime contractors likely will be forced to bypass a subcontractor with minor violations, even if that subcontractor otherwise is a responsible and well performing contractor. This means that the Government will be deprived of getting the best goods or services at the lowest price from a generally responsible contractor. It also could disrupt longstanding business relationships and even drive generally responsible small and middle-tier subcontractors out of business.

Fifth, the Proposed Rule does not set out procedures through which subcontractors can challenge prime contractors' responsibility determinations. Unlike the challenge of a Contracting Officer's negative responsibility determination, a subcontractor would not be able to submit a challenge at the Government Accountability Office ("GAO") or the Court of Federal Claims.[127] Also, it is unclear whether there is any legal basis under which a subcontractor would be able to recover for an allegedly defective responsibility determination. This need for relief, combined with a lack of clear avenues for obtaining that relief, invariably will lead to inefficient and costly litigation as subcontractors are forced into a variety of courts to obtain the review they are seeking. That subcontractors will have no clearly defined avenue to challenge a nonresponsibility determination being made by a prime contractor is manifestly contrary to the principle that contractors can seek redress when they have been improperly excluded or debarred, and in the end will be detrimental to both the subcontractor, the prime contractor, and the Government.

Sixth, the Proposed Rule does not provide a mechanism to ensure that multiple prime contractors make the same responsibility determination regarding a single subcontractor. There is the risk, therefore, that a single company will be deemed responsible under one subcontract but nonresponsible under a second subcontract, despite the fact that the labor law violations (alleged or otherwise) underlying the responsibility determinations are the same.

In sum, the Proposed Rule's provision requiring subcontractor responsibility determinations places an additional set of burdens on contractors and subcontractors and brings with it an array of problems ─ the potential destruction of contractor/subcontractor relations, the

[126] The Government's leverage against a contactor facing some enforcement action to coerce a labor compliance agreement and avoid a contractor pursuing a challenge is one of the most pernicious, if subtle, impacts of the entire scheme represented by the Executive Order and the Proposals.

[127] *See* 4 C.F.R. § 21.5(h) ("GAO will not consider a protest of the award or proposed award of a subcontract except where the agency awarding the prime contract has requested in writing that subcontract protests be decided . . . .").

required disclosure of confidential business information, and the deprivation of an adequate avenue to challenge a nonresponsibility determination ─ further support that the Proposed Rule is arbitrary and capricious.

D. The Proposed Rule and Guidance Are Unnecessary

The burdensome reporting regime set out in the Proposed Rule is completely unnecessary to meet the Government's stated objectives of economy and efficiency in procurement ─ the Government currently has a number of tools in its toolbox to ensure that it only contracts with responsible parties. Because the reporting regime is unnecessary, any possible benefits of the regime are greatly outweighed by its burdens.

1. The Current Suspension and Debarment Regime Is Perfectly Adequate

FAR 9.4 sets out a suspension and debarment regime through which the Government can preclude bad-acting contractors, *including those with labor law violations*, from doing business with the Government. This well-established regime not only protects the Government's interests but also meets the Proposed Rule's stated objectives of promoting economy and efficiency in contracting.

The Government has the authority to bar contractors from contracting with the Government for a *conviction or civil judgment* for an "offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor."[128] The Government also has the ability to exclude from contracting with contractors based on "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor."[129] Pursuant to these authorities, the Government already has the ability to exclude from contracting with contractors that have labor law violations. Furthermore, under the current regime, contractors would preserve their due process rights to challenge citations or other enforcement actions.

Moreover, the Government already has the ability to exclude from contracting contractors whose failure to comply with the terms of their contract is sufficiently serious. This includes contractors who "willfully" fail to comply or have a history of failing to comply with their contracts.[130] Thus, if the Government truly wants to enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods, as stated in the Proposed Rule, then the Government already has the tools to do so and nothing in the Proposed Rule will improve the system currently in place.

[128] FAR 9.406-2(a)(5).

[129] FAR 9.406-2(c).

[130] FAR 9.406-2(b)(1)(i).

2. Current Responsibility Determinations Include Consideration of Labor Law Violations

Under the FAR, prior to contract award, Contracting Officers must affirmatively determine that the prospective contract awardee is a responsible contractor.[131] In fact, the default assumption is that contractors are not responsible: "In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility."[132] To be determined responsible, contractors must have "a satisfactory record of integrity and business ethics."[133]

Contracting Officers are required, when making responsibility determinations, to review FAPIIS, an online system through which contractors disclose certain convictions and findings of fault and liability.[134] This system was "designed to improve the Government's ability to evaluate the business ethics and expected performance quality of prospective contractors and protect the Government from awarding contracts to contractors that are not responsible sources."[135] It contains disclosures by contractors of convictions and findings of fault and liability in certain civil and administrative proceedings where the conduct was in connection with the award to or performance by the offeror of a Federal contract or grant and has been the subject of a proceeding, at the Federal or State level, *including those arising from violations of labor laws*.[136]

The FAPIIS system was implemented by regulation in 2010 and its existence and the standards it employs help illustrate the flaws in the current Proposed Rule and Guidance.

FAPIIS was expressly created under Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 ("NDAA"), Pub. L. 110-417, to create a "one-stop" resource for Contracting Officers reviewing the background of prime contract offerors.[137] In implementing Section 872, the FAR Council expressly stated that "[t]o the extent feasible, the [Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council] identified existing sources of information that would not require the creation of additional information submissions. If no existing source was found, preference was given to obtaining information from Government sources rather than contractors."[138] In sharp contrast, and without justification, the Proposed Rule and Guidance seeks to impose the burden of information collection in the first instance on contractors. This reversal in approach is directly contrary to the

[131] FAR 9.103(b).

[132] *Id*.

[133] FAR 9.104-1(d).

[134] FAR 9.104-6.

[135] Federal Acquisition Regulation; FAR Case 2008-027, Federal Awardee Performance and Integrity Information System, 75 Fed. Reg. 14,059 (Mar. 23, 2010).

[136] FAR 52.209-7(c).

[137] 75 Fed. Reg. at 14,060.

[138] Federal Acquisition Regulation; FAR Case 2008-027, Federal Awardee Performance and Integrity Information System, 74 Fed. Reg. 45,579, 45,579-80 (proposed Sept. 3, 2009).

statutorily-mandated approach from the 2009 NDAA and wholly inconsistent with the professed justification of seeking economy and efficiency in the procurement process.

FAPIIS applies only to reporting covered proceedings "in connection with the award to or performance by the offeror of a Federal contract or grant."[139] This limits the scope of FAPIIS reporting to matters that have a nexus to a contractor's *contracting* relationship with the federal Government—a limitation that tends to capture proceedings that have a higher likelihood of connection to a offeror's suitability as a contracting partner for the Government. The Proposed Rule discards this limitation and appears to contemplate that *all* labor law "violations" are reportable, regardless of whether such "violations" bear *any* relationship to an offeror's labor compliance practices under its federal contracts. The lack of any clear nexus between a "violation" reportable under the Proposed Rule and an offeror's federal contracts further undermines the validity of the reported information as a basis for responsibility determinations, and further distances the Proposed Rule's reporting requirements from any relationship to improving "economy and efficiency" in federal procurements.

The Proposed Rule and Guidance also then inexplicably create an altogether new and far more invasive set of standards for the reporting of relevant matters than was just adopted in the establishment of FAPIIS. FAPIIS requires the reporting of covered information if the contractor has contracts or grants together totaling greater than $10 million. The use of this type of threshold amount serves an important purpose in this context. It helps limit the burden of reporting to the class of contractors for whom the Government justifiably may have concerns over present responsibility.

Contractors with $10 million in aggregate business with the Government are likely to be repeat providers of goods and services to the Government. Meanwhile, a contractor with a single award exceeding the lower amount of $500,000 is far more likely to be a one-shot provider of such goods or services. The absence of any similar applicability standard in the Proposed Rule and Guidance results in a blanket being thrown over all contractors even if the data being collected will be irrelevant to a large share of those contractors who will only have passing, and relatively limited intersection with the Government as suppliers of goods or services. This type of undifferentiated data collection is clearly counterproductive to the twin stated aims of the Proposed Rule and Guidance: economy and efficiency.

The implementation of FAPIIS also correctly focused on collecting information from contractors concerning *adjudicated* violations of the covered laws and regulations. In sharp contrast, the Proposed Rule and Guidance would require contractors to identify, collect, and report information on *non-adjudicated* assertions of liability made by Government agencies, *see supra* Section II.B.1. The FAR Council, in implementing the FAPIIS rule, recognized the importance of basing any system in which Contracting Officers are considering a contractor's responsibility on either an adjudicated proceeding or one in which the contractor expressly

[139] FAR 52.209-7(c)(1).

provided an acknowledgement of fault.[140] In rejecting the type of approach adopted by the Proposed Rule and Guidance, the FAR Council stated:

> Requiring the collection of information on all proceedings, regardless of outcome, could potentially create instances where negative judgments on contractors' responsibility are made regardless of the outcome of the referenced proceedings. *If information regarding yet-to-be-concluded proceedings were allowed, negative perceptions could unfairly influence contracting officers to find a contractor non-responsible, even in situations that later end with the contractor being exonerated*. The Councils are strongly committed to helping contracting officials avoid these types of situations.[141]

The type of improper influence on responsibility determinations identified by the FAR Council in implementing FAPIIS is precisely the risk presented by the Proposed Rule and Guidance. By forcing contractors to report, non-final, non-adjudicated proceedings (many of which only arise to the level of bare allegations by an enforcement agency), there is the substantial risk, if not certainty, that "negative perceptions could unfairly influence contracting officers to find a contactor non-responsible, even in situations that later end with the contractor being exonerated."[142] This improper result correctly convinced the FAR Council to steer away from suggestions that non-adjudicated allegations or proceedings be part of the FAPIIS scheme. The FAR Council should reject the approach recommended in the DOL Guidance and continue with the approach represented by the current use of FAPIIS.

The landscape of Federal enforcement actions under the labor laws covered by the Proposed Rule and Guidance illustrate well the risk of basing responsibility determinations on non-adjudicated proceedings or the mere allegations by an agency that there has been a violation. By way of example, for FY 2014, of the total 19,936 NLRB unfair labor charges, 7,251 were withdrawn (36.4%) and 5,055 were dismissed (25.4%), meaning 61.8% of the total labor charges brought were either withdrawn or dismissed.[143] Similarly, in FY 2014, of 20,415 unfair labor practice charges, only 1,216 complaints were issued or only 6% of the charges led to a formal complaint.[144] These statistics demonstrate the risk inherent in reliance on non-adjudicated allegations and proceedings as a purported basis for Contracting Officer determinations on responsibility. Additionally, the EEOC receives nearly 100,000 charges a year, but not even 0.5% of those charges mature into lawsuits. Once again, it makes no sense to require contractors

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[140] *See* FAR 52.209-7(c).

[141] 75 Fed. Reg. at 14,060 (emphasis added).

[142] *Id.*

[143] For supporting statistics *see* Disposition of Unfair Labor Practice Charges in FY14, *available at* http://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/disposition-unfair-labor-practice-charges.

[144] For supporting statistics *see* Charges and Complaints, *available at* http://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints.

and subcontractors to report mere allegations as "merits determinations." Allegations simply are not anything of the sort.[145]

The issues with the lack of consistency and the use of reliable indicators of contractor responsibility issues in the Proposed Rule and Guidance are compounded by the fact that it runs directly contrary to the longstanding division of responsibilities between the federal procurement and federal labor enforcement agencies. Under the current scheme, federal Contracting Officers are directed to refer substantive issues on application of the federal labor laws to the responsible offices within DOL. For example, the FAR recognizes that all questions as to the application and interpretation of wage determinations ─ an essential predicate to any decision on whether employees have been underpaid and are owed back wages ─ must be referred to DOL's WHD.[146] The Proposed Rule and Guidance confuses this established allocation of responsibilities for enforcement of federal labor standards as to federal contractors without providing any clear, substantive justification.

3. Enforcement Mechanisms Within Pre-Existing Labor Laws Are the Appropriate Penalties for Violations

The Proposed Rule's reporting requirement also is unnecessary to protect the Government's interests because the labor laws covered by the Proposed Rule already dictate specific penalties for contractors who fail to abide by them.[147] Several of the statutes, such as the OSH Act and the NLRA, specifically provide mechanisms for the Government to enforce the requirements of the statute, including collection of fines and enforcement of declarative and injunctive relief. Perhaps equally importantly, some of the statutes, such as Title VII, the ADA, the ADEA, the FLSA, and the FMLA provide for private causes of action. In such actions, plaintiffs may recover actual and compensatory damages as well as, in some cases, punitive damages. Moreover, some of the statutes already provide that a violation of the statute may result in suspension or debarment.[148] To the extent that the Government truly seeks to encourage employers to comply with federal labor and employment laws, such "encouragement" is already embodied in the statutes themselves. These statutes, which were debated and enacted by Congress, are their own enforcement mechanisms. Adding an additional layer of penalties (not

[145] EEOC Litigation Statistics, FY 1997 Through FY 2014, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

[146] *See, e.g.,* FAR 22.403-4(c) (determination of prevailing wages for construction projects); FAR 22.1004 ("[u]nder the Service Contract Labor Standards statute, the Secretary of Labor is authorized and directed to enforce the provisions of the [SCA], make rules and regulations, issue orders, hold hearings, make decisions, and take other appropriate action.").

[147] OSHA (up to $70,000 per statutory violation. *See* 29 U.S.C. § 666(a)); the FLSA (up to $11,000 per statutory violation. *See* 29 U.S.C. § 216(e)); the MSPA (up to $1,000 per statutory violation. *See* 29 U.S.C. § 1853(a)); the NLRA (up to $10,000 per statutory violation. *See* 29 U.S.C. § 186(d)); the ADA (a fine not exceeding $50,000 for a first violation, and not exceeding $100,000 for subsequent violations. *See* 42 U.S.C. § 12188)); and the ADEA (a fine of no more than $500, or by imprisonment for not more than one year, or both. *See* 29 U.S.C. § 629)) all permit a court of the enforcing agency to impose fines on a contractor/employer who is found to violate the law.

[148] *See* 40 U.S.C. § 3144 (listing exclusion from government contracting as penalty for failing to pay wages under the Davis-Bacon Act); 41 U.S.C. § 6706 (listing exclusion from government contracting as penalty for failing to pay compensation due under the Service Contract Act).

to mention bureaucracy) not only is unconstitutional, *see supra* Section I., but is simply unnecessary.

III. There Are Additional Major Issues with the Proposed Rule and Guidance

A. The FAR Council's Economic Analysis Lacks Credible Data and Grossly Underestimates the Cost and Impact of the Proposed Regulation

The Administration's failure to establish a "nexus" here between the Proposed Rule and Guidance and the Procurement Act's goals of "economy" and "efficiency" is underscored by its flawed and incomplete economic impact analysis. As detailed in the Chamber Report at Appendix A, neither the Regulatory Impact Analysis ("RIA") nor the clearance package submitted by the Agencies as part of the Paperwork Reduction Act Information Collection Request adequately demonstrates that further regulation and reporting ─ beyond what is already required under existing law ─ is justified by market failure or other public purpose.

The inability of the RIA to establish an empirical link between labor law compliance and efficient performance of contractors (and their subcontractors) as suppliers of goods and services to the federal Government is fatal to the Administration's authority to order the regime change proposed by the FAR Council and the DOL Guidance. Unsupported and speculative assertions that federal contractors are more likely than other employers to violate labor laws are inadequate justifications for regulatory action. Instead of speculating, the Agencies should have presented an empirical description of the baseline conditions of the federal contracting economic sector to establish whether further regulation is necessary and justified.

The Agencies also should have conducted a full benefit/cost analysis of available alternative approaches, as required by Executive Orders 12866 and 13563. What little effort was expended to discuss alternatives is incomplete and merely qualitative. Failure to conduct a full benefit/cost analysis of alternatives violates a primary requirement of Executive Order 12866, to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."[149] Failure to do so also undermines another important goal of regulatory analysis, "to clarify how to design regulations in the most efficient, least burdensome, and most cost-effective manner."[150]

As noted in the Chamber's Report, the Agencies based their limited cost analysis on overly optimistic and unfounded assumptions about the capabilities of contractors to respond to the proposed disclosure requirements. Had they sought readily available data they might have presented a credible empirical basis for cost estimates. However, their failure to consider the scale differences in compliance costs between small and large contractors, in terms of size and location of workforce skewed their results to the detriment of large contractors, especially those

[149] Exec. Order No. 13563, 76 Fed. Reg. 14 (Jan. 21, 2011) (reaffirming the principles, structures, and definitions established in Executive Order 12866).

[150] *Regulatory Impact Analysis: A Primer*, *available at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

with tens of thousands of employees in hundreds of locations, and with thousands of subcontractors and suppliers. Correcting these flaws could result in annual large contractor compliance costs as much as five to ten times greater than those presented in the RIA.

The RIA's discussion of the impact of the Proposed Rule on small business and other affected small entities is equally flawed. Despite acknowledging the existence of a significant economic impact on a substantial number of small entities,[151] both the Proposed Rule and the RIA fail to provide any detailed analysis of the scope of that impact. Nor do they consider alternatives to mitigate impact as required by the Regulatory Flexibility Act.

The required estimates of information collection burdens mandated by the Paperwork Reduction Act are similarly unfounded, inaccurate, and fundamentally flawed. As with the RIA, the Agencies failed to obtain accurate data through readily available means. As a result, they underestimated the hourly opportunity costs of redirected compliance activities by a factor of three. Correction of this error yields an increase in the Agencies' estimate of annual total costs to the public for information collection from $89.8 million to $266.7 million.

Numerous other errors and omissions permeate the Agencies' recordkeeping and reporting calculations. Examples include failure to consider initial cost of designing and developing new self-reporting systems, omission of initial costs for prime contractors to assess and audit subcontractors' labor and compliance, unrealistic estimates of total contractor costs for the initial and subsequent years, and failure to consider costs associated with the increased risk of litigation or reputational harm caused by the regulations' added requirements, including the risk that a subcontractor may file suit to challenge a responsibility determination.

Lastly, the Agencies completely neglected to comply with the Unfunded Mandates Act, which requires any regulation with an expected total annual compliance cost of $140 million, (after adjustments for inflation) to publish a detailed analysis of costs imposed on States, local government, and tribes. Many state, local, and tribal schools, universities, hospitals, and other institutions are federal contractors. Failure to address this impact is yet another example of the Agencies' failure to demonstrate the required "nexus" between the Proposed Rule and Guidance and the Procurement Act's goals of "economy" and "efficiency."

Were time an excuse for the Agencies' inability to collect accurate data, correct errors, and conduct a full benefits/cost analysis, the public comment period could have been extended for an additional 90 days, as requested by the Chamber and others, instead of the meager 30-day extension that was granted in increments. A realistic extension, at the very least, would have allowed *the public* the opportunity to do the analysis the FAR Council did not. The Chamber even offered to sponsor an independent research organization to collect the needed data, at no cost to the Government, but to no avail. As a result, the Proposed Rule and Guidance are not supported by sound regulatory and economic analysis necessary to make the case that they will advance the goals of achieving economy and efficiency in federal Government procurement.

[151] This is the threshold impact that triggers an Initial Regulatory Flexibility Analysis required by the RFA.

B. The Proposals Raise Federalism Concerns and Have Not Been Reviewed as Required by Executive Order 13132

Serious federalism concerns also arise out of this Executive Order's directive that the Agencies address and that DOL issue guidance relating to violations of yet-to-be-identified state laws that are "equivalent" to the 14 federal labor laws and executive orders identified in the Order. Regardless of which laws are included, there is no doubt that the same levels of severity used to describe federal violations will be applied to the "equivalent state laws." It seems unlikely that the terms "serious," "repeated," "willful," and "pervasive" will have been included in each of the state statutes. Thus, the same questions regarding the Proposals' authority to impose conflicting *regulatory* or judicial *remedies* for conduct regulated by the states apply in this federalism context as well.

The question of federal policy and rulemaking actions intruding on state laws and the states' control over their laws is not a new one. It was the subject of Executive Order 13132 issued by President Clinton, August 10, 1999.[152] This Administration's failure to review these Proposals for federalism implications in accordance with Executive Order 13132 is deeply disturbing, particularly since DOL has done so with other recent proposals.[153]

At the very least, the Agencies will have to certify compliance with federalism policies as required by Executive Order 13132 when transmitting the draft final regulations to the Office of Information and Regulatory Affairs ("OIRA"), which has primary authority for implementing the Federalism Executive Order.

C. The Proposed Ban On Pre-Dispute Arbitration Clauses Conflicts with Federal Statutory Law and Violates a Series of Supreme Court Cases Upholding the Use of Arbitration Clauses To Resolve Disputes

The same separation of powers and lack of authority defects established above regarding the Executive Order and the Proposed Rule and Guidance apply to the proposed ban on pre-dispute arbitration clauses. There is no constitutional or statutory support for the requirement set forth in section 6 of the Executive Order and repeated nearly verbatim in sections 22.2006, 22.2007, and 52.22YYY of the Proposed Rule that, in federal contracts exceeding $1 million, claims arising under Title VII or any tort related to or arising out of sexual assault or harassment by employees and independent contractors will not be arbitrated without their voluntary post-dispute consent. Moreover, the requirement is unworkably vague by failing to clarify whether the prohibition applies solely to employees working under a covered contract or applies to all employees (regardless whether they are under the contract).

Article II, section 3, of the Constitution, which compels the President to "take care that the laws be faithfully executed," does not provide the Executive Branch any constitutional

[152] Exec. Order 13132, Sec. 4(a), 64 Fed. Reg. at 43,257.

[153] *See* Department of Labor Wage and Hour Division proposed rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 29 C.F.R. pt. 541, 80 Fed. Reg. 38,516, 38,608 (July 6, 2015).

authority to ban pre-dispute arbitration clauses. Similarly, the Procurement Act authorizes the Executive Branch "to provide for the Government an economical and efficient system," but both the Executive Order and the Proposed Rule fail to establish any nexus between banning mandatory arbitration and promoting efficiency and economy in the procurement process. Nor do they attempt to rationally explain why employers with federal contracts worth more than $1 million should be barred from using mandatory arbitration in civil rights and sexual harassment claims. Their failure to demonstrate ─ or even suggest ─ how mandatory arbitration in any way interferes with the economical and efficient performance of a contract is not surprising, in light of arbitration's long-supported track record of fair, fast, and efficient resolution of disputes.[154]

The lack of Presidential authority to ban pre-dispute arbitration is underscored by the preamble to Proposed Rule § 22.2006 which offers the dubious ─ if not irrational ─ explanation that a ban on pre-dispute arbitration agreements will enhance efficiency in federal contracting because limiting or eliminating arbitrations will result in less discrimination. Congress obviously thought otherwise when it enacted the Federal Arbitration Act in 1925 "[t]o overcome judicial resistance to arbitration"[155] and § 118 of the Civil Rights Act of 1991, which expressly states that "the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."[156]

The Supreme Court clearly and unequivocally recognized the congressional endorsement of arbitration, on numerous occasions, stating, for example, that "[t]he [Federal] Arbitration Act . . . establishes a 'federal policy favoring arbitration.'"[157] The Court recently reiterated that "our cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as 'embody[ing] [a] national policy favoring arbitration . . . and 'a liberal federal policy favoring arbitration agreements, notwithstanding any state or procedural policies to the contrary.'"[158]

In the course of recognizing and endorsing federal policy favoring arbitration, the Court has also held that the FAA requires that arbitration agreements be enforced according to their terms, "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'"[159] The Court also has been clear that

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[154] *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.").

[155] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

[156] Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991).

[157] *Shearson/Am. Express, Inc. v. McMaho*n, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

[158] *AT&T Mobility LLC*, 131 S. Ct. at 1749 (quoting *Buckeye Check Cashing, Inc.*, 546 U.S. at 443 and citing *Moses H. Cone*, 460 U.S. at 24 and *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008)).

[159] *CompuCredit Corp.*, 132 S. Ct. at 669 (internal quotations and citations omitted).

"[t]he burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue . . . If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' . . . or from an inherent conflict between arbitration and the statute's underlying purposes."[160] Congress' supremacy regarding the use of arbitration, therefore, is well established.

The President's efforts to ban pre-dispute arbitration clauses related to Title VII and harassment claims conflicts with rather than executes existing law and established federal policy. By functioning as a regulator under the guise of his procurement authority, the President has overstepped the bounds of his executive authority and has acted without any relevant statutory authority and without developing or articulating any evidentiary basis for doing so.

Notwithstanding congressional and judicial validation of arbitration, the Preamble to the Proposed Rule points to an alleged three-part economic public benefit that would derive from banning pre-dispute arbitration clauses in contracts that exceed $1 million, none of which are justified by the Proposed Rule.[161] For example, with respect to the "benefits" of public exposure through litigation, the Proposed Rule fails to consider that the vast majority of cases that are filed in court are resolved by private settlement[162] or unpublished disposition.[163] It also fails to appreciate that claimants — especially alleged harassment victims — may be less willing to raise complaints to the extent that they must do so in open court. Nor does the Proposed Rule preclude private dispositions in court or in arbitration; it merely bans pre-dispute agreements to use arbitration entirely. Moreover, the Proposed Rule expressly exempts employees covered by a collective bargaining agreement, without regard to whether arbitrations involving unionized employees are subject to any "public exposure." If the Rule were a serious attempt to require "public exposure," this exemption would not exist. Finally, the Preamble's claim regarding "benefits" of the availability of higher damages awards in court than in arbitration also is offered without any evidence. In fact, damages under Title VII are limited by statute regardless of the forum in which those claims are litigated.[164]

If there were any evidence to support the Executive Order's and FAR Council's alleged interest in efficiency ─ even assuming elimination of arbitration were an answer to the inefficiency of discrimination ─ the Proposed Rule would have precluded all arbitration agreements, and not just pre-dispute agreements, and for all contracts, not just those over $1 million. The Preamble offers no suggestion that arbitrations held pursuant to pre-dispute arbitration agreements are different in any material regard from those held pursuant to post-

[160] *Shearson/Am. Express, Inc.*, 482 U.S. at 227 (internal citations omitted).

[161] 80 Fed. Reg. at 30,558.

[162] According to the Federal Judicial Center, "fewer than one out of twenty cases ever goes to trial." *See* How Cases Move Through Federal Courts, *available at* http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/207.

[163] "[T]he federal judiciary disposes of more than three-quarters of its cases by unpublished opinions." Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 Geo. L. J. 621, 622 (2009).

[164] *See* 42 U.S.C. § 1981.

dispute agreements. The specific features of arbitration that allegedly foster discrimination do not depend on the stage at which the parties agree to arbitrate. Nor is there any support, economic or otherwise, for banning mandatory arbitration for winners of large contracts but allowing it for smaller contracts.

Congress has spoken through the FAA and the Civil Rights Act of 1991. Based upon these statutes, the validity of pre-dispute arbitration clauses has been upheld in every case where they have been challenged.

Finally, the Franken Amendment demonstrates that Congress ─ through its proper exercise of congressional authority ─ knows how to limit arbitration agreements contrary to the general national policy of using arbitrations to foster more efficient dispute resolution, in contrast to the President decreeing *sua sponte* that these clauses will no longer be permitted on certain contracts.[165] To the extent the President has authorized the FAR Council to similarly ban pre-dispute arbitration clauses, he has overstepped the bounds of his executive authority and has failed to execute the law as commanded by the Constitution, in accordance with the separation of powers doctrine.

D. The Proposed Rule's Paycheck Transparency Requirements Not Only Will Be Burdensome, but Will Unnecessarily Subject Contractors and Financial Institutions To Increased Litigation

The Proposed Rule's provision for "paycheck transparency" would require covered contractors and subcontractors, and derivatively the financial institutions processing their payrolls, to provide certain employees with wage and hour information every pay period, including hours worked, overtime hours, pay, and any additions or deductions from pay "so that individuals will know if they are being paid properly for work performed."[166] Covered contractors and subcontractors also must, among other things, notify independent contractors of their status as independent contractors. These notifications must be provided in English and languages other than English if "a significant portion of the workforce is not fluent in English."[167]

These requirements place yet another costly and unsupported burden on contractors, subcontractors, and their financial institutions. The FAR Council's proposed regulations would require, if the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), that the hours worked and overtime hours contained in the wage statement be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid. If the hours

[165] The so-called Franken Amendment, enacted as part of the FY 2010 Defense Department Appropriations (Pub. L. No. 11-118) and which is the source for the prohibition on the use of pre-dispute arbitration clauses for defense contracts over $1 million, demonstrates the contrast between Congress changing the laws and the President claiming authority to change the law he does not have.

[166] 80 Fed. Reg. at 30,551, 571. These requirements are derived directly from Section 5 of the Executive Order, 79 Fed. Reg. at 45,314.

[167] 80 Fed. Reg. at 30,572.

worked and overtime hours are aggregated in the wage statement for the entire pay period as opposed to being broken down by week, the worker may not be able to understand and evaluate how the overtime hours were calculated. For example, if the pay period is bi-weekly and the worker is entitled to overtime pay for hours worked over 40 in a week, then the wage statement must provide the hours worked and any overtime hours for the first week and the hours worked and any overtime hours for the second week.

Moreover, the Proposed Rule provides that a contractor can comply with the paycheck transparency requirements by complying with equivalent state laws. It is unclear, however, whether complying with a state requirement (e.g., the California state requirement) means that the contractor has met the federal requirement for all employees or just employees in that state (i.e., California employees). The potential cost impact of state-by-state compliance is obvious. The Chamber recommends that, if the paycheck transparency provision is finalized, contractors be deemed to be in compliance with the federal requirement if they adopt one state's version nationwide.

Additionally, plaintiffs' attorneys will capitalize on these required disclosures and increase litigation, such as challenges to employee status determinations[168] under the FLSA. Inadvertent misclassifications of employees as exempt from overtime compensation can subject even the most conscientious employer to vexatious ─ and often copycat ─ lawsuits, involving huge damage awards or costly settlement demands.[169] Existing penalties for FLSA violations include liquidated damages (double back wages), attorneys' fees, and court costs, making the filing of collective actions particularly attractive to the trial bar. Recent efforts by the Administration to make even more employees eligible for overtime will make monitoring paycheck disclosures the first step in litigation strategy.[170]

IV. <u>This Type of Regime Previously Was Proposed and Rescinded for Good Reason</u>

In December 2000, the Clinton Administration issued regulations similar to what has been proposed here – regulations that precluded contractors from doing business with the Government based on labor law violations and violations under other laws such as environmental and tax laws.[171] The regulations elicited outcries from various sectors such as the contracting

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[168] Employees whose jobs are governed by the FLSA are either "exempt" or "nonexempt" under the overtime rules.

[169] "In recent years, the employer community has been inundated by an ever-growing tidal wave of FLSA litigation." *See* Brief for Chamber of Commerce of the U.S. of Am. et al. as *Amici Curiae* Supporting Petitioner, *Integrity Staffing Solutions, Inc. v. Busk, et al.*, 135 S. Ct. 513 (2014) (No. 13-433), 2014 WL 2536514, at *17 (comparing a total of 4,055 FLSA actions filed during a 12-month period in 2003, with 7,764 FLSA actions filed during a 12-month period in 2013).

[170] On July 6, 2015, DOL issued a proposed rule that would extend overtime benefits to an estimated 5 million people. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,515 (proposed July 6, 2015).

[171] Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. 80,256 (Dec. 20, 2000). *See also* U.S. Chamber of Commerce, "Statement in Support of the Repeal of the Federal Acquisition Regulation, published December 20, 2000 (65 FR 80256)," FAR Case 2001-014 (June 18, 2001) (testimony of Randel Johnson, Vice President for Labor & Employee Benefits). A

{footnote continued}

community, including the Chamber,[172] and even agencies within the Clinton Administration.[173] In fact, the Chamber, together with a number of other industry groups, such as the Business Roundtable and the Associated General Contractors of America, Inc., filed suit to have the regulations overturned.[174] The complaints about the regulations in 2000 are similar to those we have today: the regulations deprived contractors of due process, were extremely burdensome, were unnecessary, and placed upon Contracting Officers the responsibility to "perform a function, [for] which they lack[ed] the experience, procedures, and resources to perform."[175]

Following the outcry, at the end of 2001, the regulations were rescinded.[176] First, the Bush Administration recognized that there was no evidence that the benefits of the regulations outweighed the significant burdens associated with the regulations:

> [T]he FAR Council reassessed the advantages and disadvantages of the changes made by the . . . final rule, to determine if the benefits of the rule are outweighed by the burdens imposed by the rule. In this regard, it was not clear to the FAR Council that there was a justification for including the added categories of covered laws [including labor and employment laws] in the rule and its implementing certification, that the rule provided contracting officers with sufficient guidelines to prevent arbitrary or otherwise abusive implementation, or that the final rule was justified from a cost-benefit perspective.[177]

Second, it found that there were significant practical problems with implementing the regulations: namely, the Government and contractors were not given "sufficient time to meet the new obligations and responsibilities imposed by the final rule."[178] "Government contracting officers did not have sufficient training. Offerors did not have sufficient time to establish a

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key distinction, however, between the Clinton regulation and the current effort is that the Clinton regulation did not include consideration of any state laws.

[172] *See, e.g.*, Steven Greenhouse, *U.S. Issuing New Rules to Gain Contracts*, N.Y. Times, July 9, 1999, *available at* http://www.nytimes.com/1999/07/09/us/us-issuing-new-rules-to-gain-contracts.html.

[173] Comments to the docket strongly opposing the proposed regulation were submitted by the General Services Administration and the Environmental Protection Agency. The GSA argued that the proposed regulation would be extremely burdensome for contracting officers and would discourage commercial companies from contracting with the government. The EPA comments focused on the proposal being duplicative of the existing debarment remedy and less efficient to implement.

[174] Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 66 Fed. Reg. 66,984, 66,985 (Dec. 27, 2001).

[175] Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings ─ Revocation, 66 Fed. Reg. 66,986, 66,988-89 (Dec. 27, 2001).

[176] *Id*. at 66,986-88.

[177] *Id*. at 66,985 (terminating stay of final rule).

[178] *Id*.

system to track compliance with applicable laws and keep it current, in order to be able to properly fill out the certification."[179] "The FAR Council recognized that it will take more time than it anticipated for businesses to put the systems in place."[180]

Third, in terminating the stay of the final rule, the FAR Council found that the regulations were unnecessary:

> The requirement that contractors must be responsible is statutory, and the stay did not relieve offerors of the requirement to have a satisfactory record of integrity and business ethics. Contracting officers continued to have the authority and duty to make responsibility decisions. Agency debarring officials continued to have the authority and duty to make determinations whether to suspend and debar a contractor.[181]

All of the problems associated with the 2000 regulations are present in today's Proposed Rule and Proposed Guidance. First, there is no evidence that the Proposed Rule will provide any significant benefit to the Government. Second, even assuming *arguendo*, there is some benefit, that benefit is undeniably outweighed by the significant burdens on contractors, subcontractors, and the Government. Third, the Proposed Rule is unnecessary given, among other things, the current suspension and debarment regime in FAR 9.4 and the Congressionally-mandated enforcement mechanisms currently present in labor laws. Finally, there are similarities in how contractor due process rights are abrogated. Therefore, the Proposed Rule and Proposed Guidance should be withdrawn.

CONCLUSION

In conclusion, the Chamber believes that the Proposed Rule and Proposed Guidance are unconstitutional, unnecessary, and will wreak havoc on, not only the contracting community, but on the Government acquisition process. We urge the Agencies to abandon their stated intent to implement the Proposed Rule and ask that DOL rescind its published Guidance.

[179] *Id*.

[180] *Id*.

[181] 66 Fed. Reg. at 66,985.

Thank you very much for your consideration of these concerns. Please do not hesitate to contact us if the Chamber may be of assistance as you consider these important issues.

Sincerely,

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APPENDIX A

THE U.S. CHAMBER OF COMMERCE REPORT ON THE FUNDAMENTAL FLAWS AND INADEQUACIES OF THE REGULATORY IMPACT ANALYSIS AND PAPERWORK REDUCTION ACT INFORMATION COLLECTION REQUEST

This Report section examines economic impact analysis issues arising from the Proposed Rule published by the Department of Defense, General Services Administration and National Aeronautics and Space Administration (FAR Council) and the accompanying Department of Labor Proposed "Guidance for Executive Order 13673." The FAR Council and Department of Labor are collectively referenced as "the Agencies" in this section. The analysis and comments presented herein focus, particularly, on these documents:

1. "Federal Acquisition Regulation (FAR) Case 2014-025, "Fair Pay and Safe Workplaces Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563," hereafter referenced as "the RIA," and

2. "Fair Pay and Safe Workplaces (FAR Case 2014-025) Supporting Statement" comprising "Tab C" of the Paperwork Reduction Act Information Collection Request clearance package submitted by the Agencies to the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA).

These comments have been developed with the input of member companies who are committed to high ethical standards as Federal contractors, including careful observance of laws and regulations that protect the health, safety, and employment rights of workers. Our members also are interested to ensure that all Federal rulemaking proposals and final decisions are informed by a thorough, accurate, and objective economic impact analysis as required under Executive Orders 12866 and 13563, and under the Regulatory Flexibility Act. The Chamber and its members are committed to the principles that:

- regulatory decisions should be based on sound scientific, statistical and economic evidence;

- regulatory approaches, when regulation is justified, should be selected to achieve needed benefit by imposing the least practical burden;

- regulatory economic impact analysis promotes effective and efficient rulemaking when the decision maker is presented with a thorough, accurate and objective analysis of the costs and benefits of all available alternatives before a favored approach is selected;

- meaningful public participation in regulatory decisions, including the adequate opportunity to present data, arguments and views is essential to ensure that regulatory decisions are based on full information and sound reasoning; and

- regulatory choices and decisions should be based on a transparent process of reasoned determinations.

These principles reflect the requirements and intent of Executive Orders 12866 and 13563. They reflect the foundation of the concept of reasoned rulemaking implicit in the Administrative Procedure Act. They also reflect a commonsense understanding of efficient governance and responsible exercise of rulemaking power that transcends narrow legal formulations. These principles provide a framework for reasoned rulemaking against which the performance of the Agencies in this rulemaking can be judged.

Summary

The Regulatory Impact Analysis presented by the Agencies in justification and support of the proposed rulemaking is significantly flawed:

- The Agencies have not adequately demonstrated that regulation is justified by market failure or other public purpose. They have not produced empirical evidence that Federal contractors are more likely than other employers to violate labor laws. They have not demonstrated a sufficient empirical link between labor law compliance and efficient performance of contractors as suppliers of goods or services to the government. Their speculative assertion of such links is unsupported by credible empirical evidence.
- Related to the inadequacy of the justification for regulatory action is the Agencies' failure to present a thorough empirical description of the relevant baseline conditions of the Federal contracting economic sector/market, which the contemplated regulatory actions may affect or modify. For any regulation a thorough baseline description is the essential foundation for analysis of regulatory benefits and costs.
- The Agencies did not conduct a full benefit cost analysis of available alternative approaches as required by Executive Order 12866 and generally accepted decision making principles for both public and private decisions. To the extent that alternatives are discussed, the assessment is incomplete and only qualitative. The lack of a full benefit/cost analysis of alternative regulatory approaches means that there is no assurance that the proposed approach yields the supposed benefit at the least cost, which is the requirement under Executive Order 12866.
- The cost analysis presented by the Agencies is based on overly optimistic and unfounded assumptions about the capabilities of contractors to respond to the proposed disclosure requirements, and the Agencies failed to seek readily available data that would have provided a credible empirical basis for cost estimates. Also, the Agencies failed to consider the scale differences in compliance cost between small and large contractors in terms of numbers of employees and establishment locations. Large contractors, especially those with tens of thousands of employees, hundreds of establishment locations, and thousands of subcontractors and suppliers, will face costs of operating self-disclosure processes and of coordinating and assessing subcontractor disclosures that are exponentially larger than the costs for small contractors. Correction of these flaws will likely reveal the annual operational compliance cost items to be five to ten times greater than the estimates presented in the Agencies' RIA.
- Related to the general cost analysis flaws, the required estimates of information collection burdens under the Paperwork Reduction Act are inaccurate, are based on unfounded assumptions, and are underestimated by similar orders of magnitude. The Agencies failed to seek readily available means of obtaining more accurate data to inform

these burden estimates. In particular, the Agencies underestimated the hourly opportunity cost of labor redirected to compliance activities by a factor of three,[182] and correction of this error alone changes the Agencies' estimate of $88.9 million in annual total cost to the public for information collection to $266.7 million per year. The underestimation of unit labor opportunity cost is an error that pervades every cost calculation in the RIA.

- Most contractors do not have currently in place systematic management recordkeeping and reporting procedures to track and consolidate information about labor law compliance sufficiently to comply with the proposed disclosure requirement. The Agencies omitted consideration of the initial costs of designing and developing new or refined procedures to fulfill the requirement for their own reporting.
- Similarly, the Agencies omitted the initial costs of designing and developing necessary procedures and management information systems to coordinate subcontractor reporting of labor law compliance and to assess subcontractor labor law compliance responsibility in accordance with the prescribed DOL guidance.
- The Agencies also omitted the significant legal costs of negotiating with the Department of Labor the compliance improvement agreement described in the proposal as a means of mitigating adverse compliance responsibility assessments.
- The Agencies' estimate of total contractor costs of $106.6 million for the initial year and $91.5 million in subsequent years is overly optimistic; information provided by our Federal contract managers, reflecting their experience implementing similar prior responsibility determination and audit requirements and other available information suggests that the actual direct compliance costs the first year could be over $1.0 billion, including the costs of developing new information and reporting systems, described above. Some, perhaps most, of these added costs will ultimately be borne by American taxpayers in the form or higher costs for military and civilian procurement of goods and services.
- The Agencies neglected to conduct the required analysis of the impact of the cost of the Proposed Rule under the Unfunded Mandates Act. The Act requires for any regulation with an expected total compliance cost in any year of approximately $140 million[183] that the regulating agency publish a detailed analysis of the particular costs that will be imposed on State or local governments or tribes. Many State, local, or tribal schools, universities, hospitals, and other institutions are Federal contractors (as distinguished from grantees). While some of the costs imposed by the regulation may be shifted back to the Federal government in higher contract overhead charges, it is not certain that all will be refunded. The Agencies, therefore, are required to address the question of impact on State and local governments and tribes.

[182] The Chamber compiled and analyzed data from existing Federal contracts administered by GSA for government-wide procurement of management services and found that the government reimburses contractors for management and clerical labor at rates over three times the amount of direct labor compensation (wage plus fringe benefits). Therefore, the government routinely pays over $189 per hour for the services of a contract manager who is paid $63 per hour in wages and fringe benefits by her contractor employer.

[183] The statute sets the compliance cost threshold at $100 million, adjusted for inflation.

- In addition to the direct costs, the Agencies failed to consider significant ancillary risks, uncertainties and costs of the Proposed Rule, including (1) increased incidence of protests and attendant delays in the procurement process; (2) capital markets economic impacts associated with increased due diligence expense during merger and acquisition negotiations; (3) pressure on companies to settle meritless citations, allegations, and claims to create a mitigating agreement to counter reportable labor law violations; (4) cost and quality impacts on Federal procurements to the extent that high cost of compliance with the Proposed Rule causes some potential competitors to withdraw from the Federal marketplace; (5) similarly, the cost and quality impact on Federal procurement driven by disruptions to longstanding relationships with subcontractors that are displaced due to reported, or reportable, labor law violations; (6) loss of job opportunities for American citizens as a result of the competitive advantage that contractors with operations predominately abroad (and not subject to U.S. labor laws) will gain under the Proposed Rule compared to contractors whose non-Federal manufacturing or other operations are predominately in the U.S.
- The RIA and the Proposed Rule inadequately analyze the impact of the Proposed Rule on small businesses and other affected small entities as required by the Regulatory Flexibility Act. The Agencies acknowledge that there is a significant economic impact on a substantial number of small entities, but they fail to provide any detailed analysis of the dimensions of that impact, and they fail to consider alternatives to mitigate the impact as required by the Regulatory Flexibility Act. The cursory treatment in the NPRM of the required Regulatory Flexibility Act analysis is insufficient to support a reasoned determination of a regulatory approach that recognizes and responds to small entity burdens.
- The Agencies' estimates of the benefits of the Proposed Rule are speculative, ambiguous, and unsubstantiated. The benefits ascribed to the Proposed Rule have not been examined in sufficient detail to differentiate them from the benefits that could accrue from available alternative approaches. The lack of quantitatively detailed benefits analysis and the uncertainty attached to the qualitative descriptions of putative benefits creates doubt that the social value of benefits would match even the low estimates of cost presented by the Agencies. Consideration of the likely true magnitude of costs suggests clearly that the Proposed Rule's costs will significantly exceed its benefits.
- The Agencies failed to include in their proposal or in the RIA consideration of measures of effectiveness and outcomes of the Proposed Rule that may provide a basis for retrospective evaluation of a final regulation in the future. Executive Order 13563 directs agencies to conduct retrospective analyses of regulations after they have been implemented to identify ineffective or overly burdensome rules. A well designed regulation should include at the proposal stage consideration of how its effectiveness will be subsequently evaluated.[184]

Discussion

The fundamental flaw in the Agencies' analysis that underlies each specific erroneous cost estimation item is the failure to conduct field research, surveys or experiments to provide

[184] This is not explicit in the EO, but it is a commonsense principle of good regulation that should be endorsed.

credible empirical estimates of the key parameters of the cost calculations. The Agencies could have done more to collect and apply credible information, but they apparently chose not to allocate the necessary time and resources to the effort.

The failure of the Agencies to allocate their own resources to the research needs of an adequate regulatory impact analysis is compounded by their failure to accommodate the willingness of the public to provide the needed data, *gratis*, by simply extending the comment period for an additional 90 days. The Chamber and others wrote to the Agencies on June 15, describing our concern that the regulatory impact analysis presented by the Agencies was based on flawed and inadequate data. We offered to sponsor an independent research organization to conduct the needed data collection and analysis to correct the analysis provided in the rulemaking. We explained in our Report that the independent research organizations whom we had contacted confirmed that doing the necessary data collection and analysis work would require an additional 90 days beyond the original July 27, 2015, public comment deadline to October 26, 2015. At no cost to the government, the Agencies could have obtained independent, credible research to inform a reasoned regulatory decision by postponing the rulemaking process a mere 90 days. Instead, the Agencies granted a useless and ineffectual two week extension. In the limited time available we were able to conduct interviews with nearly fifty knowledgeable contract managers and compliance officers from Federal contractors across the spectrum of manufacturing, services, information technology and communications industries. The information that we have been able to collect and to apply to the regulatory analysis problem is limited compared to what could have been obtained had our 90 day extension request been granted, but it still significantly exceeds the zero number of field interviews that the Agencies apparently conducted themselves.

Also egregious is the Agencies' failure to understand and apply the significant differences between small, simply organized, single establishment contractors and large contractors with tens of thousands of employees, hundreds of domestic production and logistical establishments, hundreds or thousands of subcontractors and suppliers. The assumptions about contractors' operations, labor law compliance history, numbers of contracts held and other key cost calculation parameters in the Agencies' RIA reflect the context one might find for very small companies with a single line of business, a single location, few subcontractors, and fewer than 100 employees. Nowhere in the RIA does it appear that the Agencies conducted a thorough analysis of the size related characteristics of government contractors. Our interviews of managers and general legal counsel of companies across the spectrum of small to large in this and other regulatory analysis contexts reveals that total costs of compliance often increase exponentially with the size and complexity of the company. For the Proposed Rule, the terms of coverage bias the cost of compliance toward the case of larger companies. This reality is in conflict with the tendency in the RIA to assume "average" time burdens that might be more appropriate for a very small entity.

The attached appendix provides detailed discussion and examples of the flaws, omissions and errors in the Agencies' regulatory impact analysis of the Proposed Rule. The findings from interviews with managers and staff of member companies who have specific expertise and experience implementing previous similar Federal contractor disclosures and audit requirements are described and applied to present improved estimates of compliance costs whenever possible.

Appendix A: Analysis of Regulatory Impact Analysis

Section 1 provides further elaboration of the framework of reasoned regulatory analysis and decision. Section 2 describes the failure of the Agencies to adequately describe the pre-regulation baseline of conditions affecting the Federal contracting sector that the Proposed Rule purports to address. Section 3 presents a detailed critique of the cost calculations presented by the Agencies. Section 4 describes significant direct cost drivers omitted from the Agencies' calculations. Section 5 examines the Agencies' failure to adequately assess the full costs and benefits of available regulatory alternatives. Section 6 examines the potential indirect adverse impacts of the Proposed Rule and the failure of the Agencies to explicitly assess risk and uncertainty as a factor in its regulatory decision process. Section 7 addresses problems related to how the benefits of the Proposed Rule have been measured.

Section 1. A Framework for Reasoned Regulatory Analysis

A thorough, accurate, objective and quantitatively detailed regulatory impact analysis is the foundation for reasoned rulemaking. Executive Orders 12866 and 13563 require agencies to conduct a thorough analysis of the economic basis of the need for regulatory intervention in markets, to compare the costs and benefits of each alternative regulatory approach, including the approach of no new regulation, and to select among the alternatives a proposed approach that will yield the maximum net benefit, which implies the necessity to calculate or otherwise assess the expected net benefits of each alternative considered:

> "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits…" E.O. 12866, Section 1(a).
>
> "Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees, or marketable permits, or providing information upon which choices can be made by the public." E.O. 12866, Section 1(b)(3).
>
> "Each agency shall tailor its regulations to impose the least burden on society…" E.O. 12866, Section 1(b)(11).[185]

[185] These principles are restated, albeit with slight modifications, in E.O. 13563 sec. 1(b) (Executive Order 13563, "Improving Regulation and Regulatory Review," January 18, 2011, 76 Fed. Reg. 3821.)

The regulatory impact analysis is a decision making aid. It should present to the decision making regulatory executive an array of alternatives. E.O. 12866 specifies that these should include the alternative of no regulatory action and at least one alternative that provides for public information or education in lieu of direct regulation of behavior or non-prescriptive incentives. E.O. 12866 specifies that the analysis should present an assessment of both costs and benefits for each available alternative. The presentation of a prior thorough, accurate, objective and quantitatively detailed analysis ensures that the executive decision maker can chose a proposed regulatory approach that maximizes expected net benefits, as required by E.O. 12866, and that appropriately adjusts the decision to account for considerations of uncertainty and risk.

E.O. 12866, which provides the framework for all executive agency rulemakings, was conceived in the late 1970s and early 1980s in part as a bulwark against the charge of arbitrary and capricious rulemaking.[186] The framework provided by the Executive Order was designed to ensure that rulemaking decisions were made on the basis of demonstrated evidence and that the reasoning underlying a decision was documented and could be replicated. Rather than adding a burden to regulators, the requirements of the Executive Order, including the requirements for thorough, accurate, objective and quantitatively detailed regulatory impact analysis of all available alternatives that flow from the Order, should be seen as a means of protecting the agency from charges of arbitrary and capricious action. If an agency diligently follows the requirements and intent of E.O 12866 by making regulatory decisions based on rigorous regulatory impact analysis, the risk of costly litigation and attendant delay of needed action is reduced.

Inherent in the requirements of the Executive Orders is the expectation that the analysis will be conducted **prior** to the decision of the cognizant executive to select and propose a particular approach.[187] Logically, the analysis precedes the decision to select any particular regulatory approach, and the analysis provides a basis of evidence from which the cognizant regulatory executive selects for proposal the best among the alternatives presented. It is the foundation for a reasoned decision by the regulatory executive.

Thoroughness is a critical requirement for an adequate regulatory impact analysis.

- An analysis that fails to include the full range of available alternatives introduces a hidden bias to the eventual decision process.
- A regulatory analysis that presents only the most likely outcomes but omits to show the range of outcomes and assessments of risk among alternatives subtly biases the selection of regulatory approach by the decision maker.
- The regulatory impact analysis should be sufficiently thorough that an independent reviewer can replicate the reasoned decision of the regulatory executive from the

[186] *See* Jim Tozzi, "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding," Administrative Law Review, vol. 63 (special edition) 37 (2011), pp 37 – 69, for a thorough review of the background.

[187] A regulatory impact analysis concocted after the selection decision has been made is evidence of an intent by the regulatory authority to deceive the public and Congress by concealing an arbitrary/capricious rulemaking in the fabricated garb of reasoned decision making.

information presented. If a piece of information is critical, its omission from the analytical record may render the ultimate decision uncertain, not replicable and capricious.

Accuracy is a critical requirement for an adequate regulatory impact analysis.

- Erroneous, incomplete or imprecise information in the regulatory impact analysis can lead to the selection of an ineffective or too costly regulatory approach.
- False accuracy can be as misleading as inaccuracy. When tendencies, relationships or effects are uncertain, it is better practice to provide ranges and variances rather than point estimates.

Objectivity is a critical requirement for an adequate regulatory impact analysis.

- Error, omission or bias in the presentation of alternatives in the regulatory impact analysis impairs the ability of the regulatory executive to make a reasoned decision. From this perspective, the duty of the regulatory analyst to provide thorough, accurate, objective and detailed information to the executive decision maker is similar to the duty of the financial adviser toward her client.
- It is not the task of the regulatory impact analyst to select or to advocate for any one among the regulatory approach alternatives: that is the role of the decision making regulatory analyst.
- Ideally, the presentation of each alternative should be parallel and consistent in terms of the detail of analysis of benefits and costs. The decision maker needs to be able to draw from the regulatory impact analysis detail sufficient to distinguish between alternatives in terms of the kinds and quantities of benefits offered, the nature and complexity of costs imposed and the uncertainties and risks associated with each alternative.

Detailed quantification of facts and comparisons is a critical element of regulatory analysis.

- It is important that outcome expectations, risks and uncertainties of each alternative regulatory approach be presented and quantified to the greatest extent possible because comparison between alternatives is seldom a simple matter of finding one approach that yields the greatest excess of benefits over costs, and qualitative comparisons alone are often insufficient to provide a basis for choosing between complex alternatives.
- A quantitatively detailed presentation of the justification and baseline contributes to the ability to distinguish between different regulatory alternatives in terms of benefits and choices. Lack of sufficient detail hampers the ability of the decision maker to identify among alternatives a unique approach that maximizes net benefits while minimizing regulatory risk.
- For each alternative the benefits and costs will typically be uncertain, i.e., expected values based on probabilities associated with each of several outcomes across a range. Even if probabilities of outcomes are subjective, the presentation of a range of likely outcomes and associated probabilities based on explicit reasoning is a more realistic and prudent aid to decision making than the presentation of a single outcome value as if it is certain but that hides from the decision maker and the public the real underlying variability and uncertainty.
- A rational and prudent decision maker may chose a regulatory alternative that yields a slightly lower but less risky outcome in terms of net benefit, just as some investors may

choose a security that offers a smaller gain but that exposes them to less risk of loss of principal. The level of detail in the analysis should be sufficient to facilitate such decision making distinctions.

- Reliance on qualitative descriptors can introduce hidden bias into the analysis. Quantitative estimates of proportions should be provided whenever possible rather than descriptions like "many," "most," "usually" or "often."
- An analysis in which qualitative descriptions of conditions, relations, or outcomes predominate may indicate that the problem at hand requires further study and empirical investigation before regulatory decisions can be made with confidence.
- It is notable that E.O. 12866 directs agencies to quantify estimates to the greatest extent possible, not just to the extent convenient. The government has at its disposal the advantage of resources and time to devote to the process of detailed regulatory research and analysis.

Some argue that because the Executive Orders referenced here are not judicially enforceable statutes that the principles expressed are not enforceable and therefore are legally meaningless. That argument misses the real point. The principles of reasoned decision making informed by thorough, accurate, objective and quantitatively detailed benefit cost analysis are generally accepted principles for prudent and responsible decisions across the spectrum of public and private contexts. Regulators by their decisions allocate, transfer, influence, and dispose of significant economic resources. Their decisions intimately impact the well-being, property and rights of every citizen. They exercise regulatory power as a public trust, and they owe the public a fiduciary duty to exercise that power with caution, knowledge and reason. The principles of regulatory analysis and reasoned decision making are applicable regardless of Executive Orders or judicial doctrines. They are principles reflecting the duties of public trustees.

Section 2. The Proposals Lack an Adequate Regulatory Justification and Baseline Description

The Agencies proposing this regulation primarily base the justification for the Proposed Rule on the fact that the addition of labor law compliance justification to the list of required FAR procurement offer representations was mandated by Executive Order 13763. A similar justification is sometimes presented by agencies responding to regulatory requirements arising from statutory mandates: the agency inquires no further regarding the question of regulatory need or whether to proceed. Executive Order 12866 and common sense require more. Inquiry into the need/justification for regulation before proceeding to design a regulatory plan in detail provides useful insights to help identify approaches that may be efficient and effective and those that may not. Restatement or clarification of the putative Congressional or Executive motive or intent behind a statute or order through analysis of the justification for regulation question as described in E.O. 12866 (e.g., market failure, information asymmetry), may help focus regulatory action on essential elements of the problem. Sometimes a Congress or a President may have missed, or overstated, key issues, and in the context of attempting to implement an ill-conceived statute or order, regulators can serve legislators and executives also by reporting through their analyses the errors, complications or inconsistencies in fact or logic that they find.

An accurate representation of the existing, baseline, conditions in the market under regulatory consideration is an essential part of the justification analysis and provides a benchmark for consideration of costs and benefits of a rule. It is especially important for the regulatory analyst to learn if any of the actions that might be required by regulation are already, voluntarily, conducted. That information helps inform assessment of effectiveness of regulatory alternatives, and it also informs deductions from the cost impact of the regulation: The regulation cannot be responsible for costs parties are already voluntarily incurring for some reason.

The Agencies have made some basic attempts to describe the market context, but these attempts are of questionable adequacy:

- The Agencies examined data from the Federal Procurement Data System for FY 2013 and have putatively identified 22,153 unique prime contractors whom they estimate to be the population of prime contractors with contracts valued over $500,000 covered and affected by the Proposed Rule. Erroneously, the analysts have assumed that the data they examined identified contracts, but in reality the FPDS identifies procurement funding actions. In this data system, a basic ordering agreement contract of a GSA government-wide procurement vehicle contract worth millions cumulatively over multiple years (and, thus, subject to the Proposed Rule) may appear only in terms of multiple incremental purchase or task orders each recorded at less than the threshold $500,000 amount. This error means that the Agencies' analysts may have significantly underestimated the population of covered contractors. In FY 2013, the reference year used in the Agencies' analysis, there were over 158,000 unique contractors represented by procurement funding actions in the FPDS database. To determine how many of these contractors are subject to the Proposed Rule, the analysts should have selected a sufficiently large random statistical sample of these 158,000 unique contractors, representative by contracting agency, examined all contracts associated with each of the sampled contractors, and identified as covered by the Proposed Rule any contractor who held a contract in her portfolio of contracts with a value over $500,000 regardless of whether the contract funding was prescribed on a single action basis or in terms of multiple ordering actions. Our interviews of contractors and Federal procurement experts indicate that relatively few contracts have a value under $500,000. Absent more thorough analysis by the Agencies as described here, the value of 158,000 potentially covered contractors should be used in cost analyses to calculate the upper range of cost estimates, with the 22,153 value used only to calculate the lower range estimates, leaving the likely mean estimate uncertain.[188]

[188] A contractor may also hold multiple basic contracts each valued less than $500,000 but together aggregating to much more than $500,000. Would such a contractor who held, perhaps $10 million dollars in aggregate value spread over 20 plus contracts each under $500,000 value be exempt from the Proposed Rule while her small business competitor who holds only a single contract valued at $500,001 and would be subject to the Proposed Rule? This would seem to put the actually smaller contractor at an unfair competitive disadvantage.

- The Agencies examined data from the Federal Procurement Data System for FY 2013 and have putatively identified 3,622 unique subcontractors whom they estimate to be the population of subcontractors with contracts at any tier, valued over $500,000 and, thus subject to the Proposed Rule. It is relatively rare for a subcontractor to be paid directly by the associated Federal agency and, thus, to appear through a procurement action recorded in the FPDS. Subcontractors are more typically paid by the associated prime contractor, or next tier up contractor, rather than by the prime's Federal agency. The estimate of 3,622 affected subcontractors is very likely to be inaccurate. To accurately estimate the population of subcontractors subject to the Proposed Rule, the Agencies should have selected a significantly large random sample of the prime contractors subject to the rule and requested information from each to identify their subcontractors related to the subject Federal work on all of their subject contracts and further requested identification of the subset with subcontracts having a potential value, cumulatively across task or product purchase orders over the term of the subcontract, in excess of $500,000.

- The Agencies attempted to estimate the incidence of violations, charges, administrative merit determinations or other reportable labor law compliance matters under the Proposed Rule based on reports from five agencies regarding number of firms overall with violations in those agency records. Incidence rate percentages were calculated by dividing the number of violations reported by each agency by an estimated universe of the number of firms subject to each agency's enforcement authority. These computed incidence rates, ranging from 0.7% for NLRB to 2.55% for OSHA are inaccurate for application to the subject for the following reasons:

    - The numbers appear to represent only final determinations of liability and do not include settlements between the charged company and the agency. For example, the total annual number of "violations" reported for OFCCP (296) for the three year reference period represent only "completed" enforcement actions. They do not include charges under review, contest or appeal, and they do not include charges settled by agreement between OFCCP and the contractor before final adjudication. Both of these omitted categories of cases would be subject to disclosure under the Proposed Rule.[189] Most OFCCP and other agencies' charges are settled in this way, but would nevertheless be reportable under the Proposed Rule. The data displayed in Table 1 of the RIA, therefore, significantly understates the relevant incidences.

    - The incidence percentages are calculated based on the total number of employers "covered" by each agency's enforcement authority. The calculation incorrectly assumes that all employers are equally likely to be

[189] *See* for example, http://www.dol.gov/opa/media/press/ofccp/OFCCP20140010.htm, an OFCCP press release touting its successful settlement of charges with a large contractor.

investigated or be subject to enforcement charges. No attempt to validate this crucial assumption is made in the RIA. Indeed, there is good reason to suspect that the assumption is wrong. For example, the 5,682,424[190] number for the EEOC, NLRB and WHD "universes" reported in Table 1 on page 9 of the RIA include 3,532,058 firms with fewer than five employees, 978,993 firms with only 5 to 9 employees, and 592,963 firms with 10 to 19 employees. If the Agencies had conducted normal due diligence to validate their data and analysis, they would have discovered that most labor compliance law enforcement activity involves firms with 20 or more employees, and that enforcement investigations initiated, charges entered, settlements and final violation determination rates increase significantly across employment size categories: larger employment total companies experience more charges per company because their larger employment base generates more opportunities for errors and complaints. Large firms may have fewer charges per employee, but still have significantly more total charges per firm simply because of the larger total employment numbers. Since contractors covered by the Proposed Rule are overwhelmingly larger employment companies, the incidence rates calculated and shown in Table 1 on page 9 of the RIA are inaccurate for application to the subject analysis. It was within the capability of the Agencies to obtain data on the incidence of cases that would be reportable under the Proposed Rule by employment size of the company, but they did not.

- The information reported in Table 1 is further corrupted by the use in the OSHA incidence calculation of 7,354,043 as the denominator in the percentage calculation. The number used is the number of establishments subject to the OSH Act, not the number of distinct companies. Many firms operate multiple establishments and the appropriate denominator for an incidence calculation is therefore significantly smaller than the number shown in Table 1. Furthermore, the number of violations shown is only Federal OSHA citations, it does not include citations by state OSH programs which operate in 26 states.[191] Federal OSHA generally does not inspect or issue citations in "state plan" states. Adjustment for this discrepancy would further and significantly reduce the calculation denominator and increase the incidence rate shown in Table 1 of the RIA.

- As the Agencies admit in the RIA, the data in Table 1 was calculated to represent incidences of labor law violations across all firms, not exclusively Federal contractors. The Agencies assume, without evidence to support their assumption, that Federal contractors have the same incidence of labor compliance violations as all other firms. Whether or not Federal contractors

[190] The RIA authors apparently transcribed data from the cited Census report incorrectly. The correct total number of employer firms reported in the 2011 Census report is 5,68**4**,424, not the 5,68**2**,424 number reported in the RIA.

[191] OSHA approved state plans are currently the only identified "equivalent state laws."

have higher or lower labor law compliance rates than other employers is a fundamental question that goes to the heart of the analysis of the need for the Proposed Rule, to the calculation of benefits of regulation, and to the design of cost-effective regulatory schemes.

- The incidence rates presented in Table 1 are additionally flawed by the fact (admitted by the Agencies in the RIA, p. 9) that the incidence rates do not include state/local labor law violations and they do not include civil judgements, settlements or arbitration awards arising from private actions. These omitted categories likely overwhelm reported Federal enforcement cases in number. Consideration of these additional sources of reportable compliance cases cannot be ignored. The impact on the amount of work that contractors will be required to undertake for full reporting may add many orders of magnitude to the compliance costs of the Proposed Rule.

The Agencies clearly have the capability to conduct research to determine relevant non-compliance incidence rates for Federal contractors in comparison to other employers, and to construct estimates of incidence by employment size of the firm. These are dimensions of the baseline regulatory analysis that were clearly needed and that the Agencies failed to estimate. The failure to conduct this elemental research and the other errors noted above regarding the incidence rates shown in Table 1 render the results useless, meaningless and misleading for purposes of estimating the costs and benefits of the Proposed Rule. The inaccurate incidence rates shown in RIA Table 1 are used throughout the cost calculations presented by the Agencies, and these errors render all of the affected cost calculations inaccurate and invalid.

Section 3. Inaccurate Cost Calculations Result in Useless Estimates

The RIA presents calculations of compliance costs that will be imposed on contractors by the Proposed Rule for 15 distinct compliance elements. In addition, the RIA presents an estimate of government costs for administering the Proposed Regulation. The RIA presents these calculations for both the initial compliance year, to reflect one-time familiarization and start-up activities, and for subsequent years, reflecting on-going compliance activities. Errors, omissions and questionable assumptions for each of the 15 calculations are presented in this section. In addition, there are errors and omissions that are common to all of the fifteen computations. These common items include: (1) failure to conduct empirical research needed to inform key compliance cost parameters, (2) omission of overhead cost and profit contribution in the estimation of unit opportunity cost of labor time, and (3) failure to account for differences in cost dimensions by employment size and organizational complexity of the contractor. These three common error items are explained below.

Three Common Errors Across All Cost Calculations

Research. Throughout the compliance cost section of the RIA one finds estimates of compliance time and other cost parameters that are not based on any cited evidence or source, on empirical data, field interviews of experienced respondents, experiments or other relevant research. Labor time estimates that the Agencies applied to their cost calculations were

universally characterized as unrealistically low when reviewed by experienced human resource managers, compliance audit managers, contract managers and corporate counsel managers for major government contractors who participated in the Chamber's field research interviews. These knowledgeable and experienced experts characterized the government's cost calculations as uninformed and as not reflecting understanding of the context of the compliance problem being addressed. They estimated that the government's compliance time parameters were erroneous by factors of five to ten in many cases. In addition, the interview respondents noted that the calculations presented in the RIA frequently omitted significant elements of the compliance problem, such as the need to review and audit representation responses and reports. Too often the Agencies assume that a lone worker can handle an important compliance task without recognizing the prudent necessity that someone else check the work product before it is submitted.

These flaws in the RIA cost calculations seem to flow from a single source: Failure of the Agencies to conduct research necessary to understand the compliance problem and to estimate the difficulty, complexity and time parameters involved. Did the Agencies interview any government contractors regarding their current practices or steps they would need to take to comply with the Proposed Rule? Did the Agencies conduct experiments to test assumptions about any key parameters? Did the government conduct retrospective studies of previous rulemakings that added disclosure or representation requirements to contracts to determine comparable time and cost impacts? The apparent answer to all of these questions based on the information in the RIA is "no." Not undertaking basic and simple field research to inform its regulatory economic impact analysis has resulted in inaccurate cost estimates that are meaningless as a basis for regulatory decision making.

Overhead Cost. Throughout the cost calculations used in the RIA there appear estimates of unit labor costs per hour of labor time devoted to a compliance activity. These costs are typically listed as $63 per hour for management type labor or $37 per hour for administrative support labor, and the amounts are calculated by the Agencies to include both direct wages and the cost of the average typical "fringe" benefits included in employee compensation (e.g., employer taxes and contributions for social security, unemployment insurance, workers compensation insurance, health insurance, paid leave, etc.). The limitation of the amounts to these elements omits an important element of the economic opportunity cost of shifting labor from productive activities to regulatory compliance activities: the worker's contribution to physical and administrative overhead and to enterprise profits. Each worker's productivity contributes to cover her own wage and direct compensation, but each worker also requires infrastructure (office space, telephone and information technology network, electricity, lighting, etc.) and administrative/management support services (payroll processing, human resource administrative services, management supervision, security services, facilities maintenance services, etc.)

The government recognizes that overhead (physical and services) and profit are necessary and appropriate elements of the cost of labor resource allocation, and this is reflected in the cost reimbursements found in government contracts for management and other services. Examination of a sample of current government contracts of the General Services Administration reveals that the government routinely pays $189 to $225 per hour for the contract management services of the type described in the RIA as appropriate for the management labor associated with

compliance activities under the Proposed Rule. This is 3.0 to 3.6 times the direct labor compensation rate of $63 per hour cited by the Agencies in the RIA and also reported by BLS as average compensation for managers.[192] This markup reflects the typical multiples over direct labor cost for overhead and "fee" (profit) that the government allows to contractors.

Analysis of contract data shows identical markups applied to clerical/administrative support labor services compared to the BLS average compensation amounts for such labor categories. Adjusting for the understatement of unit labor cost because of omission of the overhead cost component alone increases the reported total compliance costs estimated in the RIA by a factor of between 3 to 3.6, increasing the first year cost for contractors based the RIA calculation from the $106.6 million presented to a corrected value of $319.8 million to $383.8 million, and the subsequent yearly cost estimated in the RIA at $91.5 million, by this correction becomes $274.5 million to $329.4 million per year.

Contractor Size and Complexity. The compliance cost calculations in the RIA consistently present a single "average" time burden estimate for calculation of each of the compliance cost elements. An "average" value for a time parameter can be credibly presented only if it is based on underlying data describing the various time values for a meaningful sample of the subject respondents that is representative of the meaningful differences among them. No such sample data is presented in the RIA. The parameters presented as averages are merely subjective guesses by analysts who do not even report documented expertise or experience on which to base an expert opinion. The RIA frequently includes references to "program experience," but there is no information provided to identify what program or to delineate the details of the experience.

The Agencies failed to consider the scale differences in compliance cost between small and large contractors in terms of numbers of employees and establishment locations. Large contractors, especially those with tens of thousands of employees, hundreds of establishment locations, and thousands of subcontractors and suppliers, will face costs of operating self-disclosure processes and of coordinating and assessing subcontractor disclosures that are exponentially larger than the costs for small contractors. *Correction of these flaws will likely reveal the annual operational compliance cost items to be five to ten times greater than the estimates presented in the Agencies' RIA.*

The contractors affected by the Proposed Rule also vary significantly in terms of organizational complexity, and types of goods or services produced. It is inconceivable that a single parametric value can be applied across the variety of affected contractors. For example,

- A contractor whose operations also include production of goods or services for non-government markets may face different compliance complications than will a contractor who serves only the Federal procurement market.

[192] The $63 per hour compensation rate that the Agencies arrived at by a unique calculation method for this RIA is approximately the same as the cost of employee compensation amount reported by BLS for managers based on their employer cost of employee compensation survey data series.

- A contractor whose operations are dispersed across hundreds of locations in different States, subject to different State and local labor laws, will face a more costly compliance burden than a contractor with only one location.

Without consideration of how compliance costs vary in relation to size and complexity of the affected organization, the cost calculations presented in the RIA are inaccurate and meaningless for informing regulatory decision making.

Inaccuracies in Detail

The RIA presents detailed cost calculations for each of 15 compliance elements. Each of these calculations is the multiplicative product of at least three parameters, such as number of contractors, labor time to complete a task for the typical contractor, and labor cost per hour. In many cases the computation involves up to six additional layers of multiplied parameters. In most cases the underlying parameters in the cost calculation are subject to considerable uncertainty. Experienced managers of Federal contract compliance auditing who were interviewed by the Chamber said that the uncertainty was as great as two, five or even ten times greater than the parameter values presented in the RIA calculations. Even a small uncertainty, for example 50%, across several variables that are multiplied in a computation can result in large variations in the result. For example, a simple cost calculation that assumes 100 people will engage in an activity, and that the activity takes 1 hour to complete, and that their time to complete the activity is worth $50 results in 100 x 1 x $50 = $5,000 cost. If each of the three parameters is uncertain and each could be 50% greater than the assumed value, then the computation becomes 150 x 1.5 x $75 = $16,875, more than three times, or 200% greater than, the original cost estimate. Inaccuracies in underlying components of a calculation are magnified in the result. The effects of inaccurate estimates are apparent in each of the 15 cost calculations presented in the Agencies' RIA. In the calculations below we present the results using an illustrative example of a 50% variation in the key parameters above the values assumed by the Agencies. The point of these calculations is not to suggest any specific amount as the actual cost of the Proposed Rule, but, rather, to demonstrate that the RIA's cost estimates are so riddled with inaccuracy and uncertainty as to make them meaningless as a guide to reasoned rulemaking decisions. The 50% variation is a useful illustration, but interview responses from experienced contract managers suggest that 50% may be a conservative adjustment.

- **Time to review.** The Agencies properly recognize that any regulation initially imposes a cost on the affected parties simply to read the rule and assess its implications. The Agencies assume that 25,775 contractors will each expend 8 hours to read and assess the things that each will need to do to comply, and that the cost per hour for this effort will be $63. The result, 25,775 x 8 x 63 = $12,990,600, is their estimated cost of familiarization. The number of contractors is not certain. It is an estimate based on a tabulation of data from the FPDS database, and our comments previously in this letter suggest why the number is very uncertain and considerably lower than the actual number of contractors. We have also described why the $63 per hour labor cost parameter is too low by a factor of 3 – the real cost may be $189 per hour or more. Finally, the 8 hour time assumption is extremely questionable. No data is cited to support this estimate. If the first two parameters are subject to variation by just 50 percent, the computation becomes 12 x

38,663 x $63 = $29.3 million, and correction of the hourly labor cost parameter raises the total to $87.7 million, more than six times, or 500% greater than, the RIA's estimate. Eight hours might be an appropriate estimate of familiarization time for the smallest of affected contractor companies, but the time required is likely to increase exponentially for larger and more complex companies. The variability in the result illustrates why it is important for Agencies conducting regulatory impact analysis to do the detailed research needed to present accurate estimates of key parameters rather than guesses that are subject to significant uncertainty. There are multiple evaluation research strategies that could have been applied through experiments, surveys, or retrospective evaluation of previous rulemakings to have discovered better and less uncertain parameter estimates for this calculation.

- **Offeror initial representation.** The Agencies' estimate of $53,087,227 annual cost is the result of an assumption of 6.72 hours per contractor to make the initial representation regarding labor law compliance, across an estimated 25,079 awards made annually and assuming five bidding contractors per award competition, with labor hours valued at $63 per hour. Correcting the $63 unit labor cost to $189 per hour and increasing each of the other parameters by a 50% uncertainty margin increases the resulting annual cost to $537.5 million per year. If, as suggested by some experienced contract managers and legal counsel, the time for the initial representation were 33.6 hours (5 times greater than the 6.72 hours per bidder assumed by the Agencies), the annual cost would be $1.8 billion per year for this compliance element. This is a compliance cost element for which the variability of compliance time effort across the range of small to very large companies is of critical importance. The Agencies can not present a credible estimate of "average" time without having developed and analyzed detailed data regarding the distribution of awards and bids across the various size categories and without having researched in detail the variations in typical incidences of reportable cases and time to assess and validate representations across the various size categories of bidders.

- **Offeror additional information.** The computation presented for this compliance element includes the additional multiplicative complication of assuming a 4.05% rate of contractors having reportable labor law violations in the past three years. As discussed previously, this assumption is very flawed and subject to uncertainty for numerous reasons, including the fact that the Agencies, by their own admission, did not do the needed research to estimate the rates of private settlements and judgments and the rates of reportable State/local labor law compliance cases. The estimated annual cost of $168,000 becomes $2.9 million when the underlying assumptions are increased by 50% to account for uncertainty in the rate of reportable cases, in the assumed 2.8 hours average labor time to assemble and deliver supporting documents and information for the responsibility determination. The revised computation also includes correction of the erroneous unit labor cost assumption of $37 per hour for a junior administrative level employee with the more appropriate assignment of this critical task to a management level employee ($63 per hour x 3 = $189 per hour full opportunity cost, including overhead).

- **Prospective subcontractor initial representation.** The RIA estimate of $16.2 million becomes $165.6 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50% as is reasonable under the above analysis for contractors.

- **Prospective subcontractor additional information.** The RIA estimate of $96,644 becomes $1.7 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

- **Contractor conducts determination.** The RIA estimate of $847,463 becomes $8.6 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

- **Contractor determines if update needed.** The RIA estimate of $7.1 million becomes $71.9 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

- **Contractor provides updates.** The RIA estimate of $84,499 becomes $5.5 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

- **Subcontractors determine if updates needed and provide updates.** The RIA estimate of $1.2 million becomes $12.2 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

- **Contractor considers subcontractors updated information.** The RIA estimate of $129,548 becomes $1.9 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

- **Status notice implementation.** The RIA estimate of $1.2 million becomes $14.7 million for the initial year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

- **First status notices and recurring status notices.** The RIA estimate of $1.7 million becomes $3.5 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

- **Wage Statement Generation Related to Paycheck Transparency under Sec. 5 of E.O. 13673.** The RIA estimate of $4.9 million becomes $9.8 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

- **Wage Statement distribution.** The RIA estimate of $5.2 million becomes $45.8 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

- **Recordkeeping costs.** The RIA estimate of $1.5 million becomes $10.3 million per year if the erroneous unit labor cost assumption is corrected and the other uncertain parameter values are increased by 50%.

Altogether, the RIA's estimated total cost to contractors of $106,571,022 for the first year implementation of the Proposed Rule balloons to $979,770,356 based on correction of the erroneous unit labor cost assumption and by increasing each of the remaining underlying parameters by 50% to account for uncertainty. The estimated annual cost of $91.5 million for subsequent years presented in the RIA would increase to $894 million per year. The actual underestimation of these underlying assumptions in the cost calculation is likely much more than is accounted for by a 50% adjustment. In many cases experienced contract management professionals who were interviewed regarding the Proposed Rules' impact on their companies cited orders of magnitude of 2 times, 5 times or 10 times for correction of underestimates.

The point of these calculations is not to determine the specific actual cost of the Proposed Rule, but, rather, to demonstrate that the RIA's cost estimates are based on unrealistic assumptions and fail to include many key cost factors. Thus, the estimates provided in the RIA are so riddled with inaccuracy and uncertainty as to make them meaningless as a guide to reasoned rulemaking decisions. Therefore, the Proposed Regulation is based on a cost analysis that is closer to being arbitrary than authoritative.

Section 4. Significant Cost Elements Omitted from Regulatory Analysis

In addition to the errors and uncertainties in the cost calculations presented by the Agencies described in the previous section, the RIA omits two very significant cost elements: (1) the cost of designing and developing management procedures and information systems to identify, track and report reportable labor compliance matters; and (2) the cost of designing and developing management procedures and information systems by prime contractors to audit and assess the labor law compliance of subcontractors. Both of these omitted costly tasks imposed by the Proposed Rule will primarily apply as initial year costs of the regulation, but some element of these design and development costs will continue in future years as new entrants into the Federal contracting marketplace must design their own procedures and systems to comply with the regulation. Existing contractors will incur future new design and development costs as their organizations grow in size or complexity. The procedures and systems needed to facilitate compliance with the Proposed Regulation will likely be customized by each contractor, reflecting unique size, operations, and organizational complexity characteristics of each company.

- Most contractors do not currently have in place systematic management recordkeeping and reporting procedures to track and consolidate information about labor law compliance sufficiently to comply with the proposed disclosure requirement, i.e. to capture the issuance of every citation, allegation, claim, complaint, or initial enforcement action as would be required under the definition of an "administrative merits

determination." The Agencies omitted consideration of the initial costs of designing and developing new or refined procedures to fulfill the requirement for their own reporting. The costs presented in the RIA for initial representations attached to each bid, for providing additional information in connection with responsibility determinations, and to update information during performance of each contract are operational costs that assume that management reporting procedures and information systems needed are already in place. Our interviews and surveys of affected government contractors confirms that such procedures and systems are not generally in place. The costs of designing and developing these procedures and systems will vary significantly in relation to employment size, number of operating facilities, organizational complexity, lines of business and other characteristics of each contractor. A proportionate amount of design and development cost will continue in future years as new companies enter the market and as existing companies expand and change.

- Similarly, the Agencies omitted the initial costs of designing and developing necessary procedures and management information systems to coordinate subcontractor reporting of labor law compliance and to assess subcontractor labor law compliance responsibility in accordance with prescribed DOL guidance. The costs presented in the RIA for reviewing initial representations by candidate subcontractors, for compiling and reviewing supplementary information from subcontractors, for applying DOL guidance to assess the responsibility of potential subcontractors, for reviewing and evaluating subcontractors' information updates, and for keeping records of the subcontractor responsibility auditing process are operational costs that assume that management reporting procedures and information systems needed are already in place. Our interviews and surveys of affected government contractors confirms that such procedures and systems are not generally in place. The costs of designing and developing these procedures and systems will vary significantly in relation to employment size, number of operating facilities, organizational complexity, lines of business and other characteristics of each contractor.

  Design and development costs will continue to be incurred in future years as new companies enter the market as prime contractors and as existing companies grow in terms of their use of subcontractors.

  There will also be ongoing costs for prime contractors of litigation costs and liability insurance to indemnify subcontractors who claim damages resulting from errors or omissions in the process of assessing and auditing subcontractors' labor law compliance. Additionally, if a contractor has to replace a subcontractor due to a determination of it being non-responsible, any replacement subcontractor will necessarily be more costly.

Section 5. The RIA Did Not Adequately Assess Available Alternatives

The Agencies did not conduct full benefit cost analysis of available alternative approaches as required by Executive Orders 12866 and 13563, and generally accepted decision making principles for both public and private decisions. To the extent that alternatives are discussed, the assessment is incomplete and only qualitative. The lack of full benefit/cost analysis of alternative regulatory approaches means that there is no assurance that the proposed

approach yields the supposed benefit at the least cost, which is the requirement under Executive Orders 12866 and 13563.

A regulatory impact analysis should present the regulatory decision maker with a menu of options from which to make a reasoned choice after considering the costs, benefits, uncertainties and risks associated with each. In this rulemaking, no such selection process is presented. Only the one preferred approach is presented in a full analytical presentation, and that presentation is short on the benefits side even for the preferred alternative.

Our interviews with experienced contract managers and legal counsel to contractors revealed several elements of the Proposed Rule where concerns may point to alternatives worthy of consideration through more detailed analysis.

- The necessity to look back three years at the inception of regulatory compliance was noted by many interview participants as potentially quite burdensome and costly. In some cases for very large and complex companies it may be nearly impossible to reconstruct with certainty the history necessary to make unambiguous and full representations. A better approach may be to impose the reporting requirement with a time lag so that companies are only required to report matters arising after the effective date of the regulation. This alternative has the potential to significantly reduce disclosure costs.

- The requirement for prime contractors to serve as agents for the contracting Agencies to audit the labor law compliance responsibility of subcontractors was identified as having numerous adverse impacts, including exposure of prime contractors to litigation and liability for reputational damage arising from assessments of responsibility and divulging of proprietary confidential information to competitors.

- The uncertainty surrounding both costs and benefits of the Proposed Rule suggest that a cautious approach that would apply the Proposed Rule, or some variant, experimentally as a pilot project for only one agency for a period of several years. The Department of Labor would be the obvious pilot testing subject. By requiring labor law compliance reporting and assessment to Department of Labor contractors for a test period of 3 to 5 years, a significant body of empirical data could be developed to evaluate whether or not the Proposed Regulation is feasible, cost-effective and beneficial. That information would then provide the basis for a reasoned decision of whether the concept should be retained and expanded to cover contracts in other agencies.

- Executive Order 12866 requires that each regulatory proposal include detailed benefit/cost examination of the alternative of no regulation and of an alternative that uses information or incentives to achieve policy goals instead of prescriptive mandates. To encourage labor law compliance of Federal contractors, an alternative fitting the non-prescriptive category required by E.O. 12866 would be to establish a voluntary recognition/awards program to recognize contractors who present excellent records of labor law compliance or novel and effective programs of promoting labor law compliance excellence within their organizations and among their subcontractors.

Section 6. Risk, Unfunded Mandates and Evaluation

In addition to the inadequacy of the estimation of direct costs, the Agencies failed to consider significant ancillary risks, uncertainties and costs of the Proposed Rule, including (1) increased incidence of protests and attendant delays in the procurement process; (2) capital markets economic impacts associated with increased due diligence expense during merger and acquisition negotiations; (3) pressure on companies to settle meritless citations, allegations, and claims to create a mitigating agreement to counter reportable labor law violations; (4) cost and quality impacts on Federal procurements to the extent that high cost of compliance with the Proposed Rule causes some potential competitors to withdraw from the Federal marketplace; (5) similarly, the cost and quality impact on Federal procurement driven by disruptions to longstanding relationships with subcontractors that are displaced due to reported, or reportable, labor law violations; (6) loss of job opportunities for American citizens as a result of the competitive advantage that contractors with operations predominately abroad (and not subject to U.S. labor laws) will gain under the Proposed Rule compared to contractors whose non-Federal manufacturing or other operations are predominately in the U.S. These potential risks of the proposed approach should be considered and may suggest the advisability of alternative approaches, including the alternative to no regulation.

The Agencies neglected to conduct the required analysis of the impact of the cost of the Proposed Rule under the Unfunded Mandates Act. The Act requires for any regulation with an expected total compliance cost in any year of approximately $140 million that the regulating agency publish a detailed analysis of the particular costs that will be imposed on State or local governments or tribes. Many State, local, or tribal schools, universities, hospitals, and other institutions are Federal contractors (as distinguished from grantees). While some of the costs imposed by the regulation may be shifted back to the Federal government in higher contract overhead charges, it is not certain that all will be refunded. The Agencies, therefore, are required to address the question of impact on State and local governments and tribes.

The Agencies failed to include in their proposal or in the RIA consideration of measures of effectiveness and outcomes of the Proposed Rule that may provide a basis for retrospective evaluation of a final regulation in the future. Executive Order 13563 directs agencies to conduct retrospective analyses of regulations after they have been implemented to identify ineffective or overly burdensome rules. A well designed regulation should include at the proposal stage consideration of how its effectiveness will be subsequently evaluated.[193]

Section 7. The FAR Council's Regulatory Flexibility Act Analysis Lacks the Required Details and Discussion About Small Business Impacts

The Regulatory Flexibility Act requires agencies to conduct an analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities unless the agency can certify, with a supporting factual basis, that such an impact will not

[193] This is not explicit in Executive Orders 12866 or 13563, but it is a commonsense principle of good regulation that should be endorsed.

occur.[194] If such an impact is anticipated, the agencies must further examine in detail the dimensions of the impact on small entities (e.g. businesses of various employment or revenue size categories) through an Initial Regulatory Flexibility Analysis (IRFA). The Small Business Administration's Office of Advocacy publishes size standards in terms of employment level and revenue to assist regulatory agencies in identifying affected small entities by industry and comparing cost impacts imposed by a proposed or final rule on small businesses compared to other businesses. Agencies must also consider the feasibility of adapting regulatory requirements to provide exceptions or to ease the compliance burdens on affected small entities. Typically, the regulatory flexibility analysis is included as a separate section in the over-all regulatory impact analysis document that is prepared to inform proposed and final regulatory approach decisions by the regulatory executive. The regulatory flexibility analysis section of a thorough regulatory impact analysis should include a detailed analysis of the number and characteristics of affected small entities and analysis of the nature of the impacts.

In the case of this Proposed Rule by the FAR Council Agencies, the Notice of Proposed Rulemaking (NPRM) does acknowledge that the Proposed Rule will "have a significant economic impact on a substantial number of small entities," but it fails to take the necessary next steps to analyze in detail the compliance burden on affected small businesses, to consider whether or not the burden on a typical small business (or other small entity) in each affected industry is disproportionate in comparison to the compliance burden imposed on larger businesses, and to consider alternatives to mitigate any disproportionate burdens found.

The Agencies also fail to consider that in addition to small businesses some of the affected small contractors may be small entities of other kinds: small towns, small non-profit organizations, small school systems, etc. These small entities face challenges to comply with the requirements of the Proposed Rule that may be different from the challenges faced by small for-profit businesses, and their burdens and ways to mitigate them under the Proposed Rule should be considered separately in a thorough regulatory flexibility analysis.

The separate RIA document published to accompany the NPRM does not contain any distinct analysis of small businesses or other small entities affected. References to "small" businesses appear only in two footnotes of the RIA, numbers 15 and 20, which refer to an assumption that "small businesses (60%) have less volume of information (2 hour) and other than small businesses (40%) have a greater volume (4 hours)." (RIA, n.15 at 12 and repeated verbatim at n.20 at 15). No data, empirical survey research or other source is cited for the assumption that 60% of affected businesses are "small." In fact, the demarcation of small versus other businesses varies significantly by industry according to available published SBA Office of Advocacy data, a fact which the Agencies proposing this rule completely ignore. It would be impossible to derive a credible estimate of the overall percentage of affected businesses which are small without first determining the percentage of affected contractors who are members of each distinct industry sector and then applying the separate and distinct proportions of firms in each industry that meet the specific small business definition specified by the SBA Office of Advocacy. None of this necessary analysis is anywhere to be found in the RIA or in the body of the NPRM.

[194] 5 U.S.C. §§ 603, 605(b).

The section of the NPRM entitled "VI. Regulatory Flexibility Act" is wholly inadequate to meet the requirements for an IRFA. The NPRM text merely summarizes and restates the general regulatory impact analysis with only cursory reference to "small" business. The calculation on p. 30560 of the NPRM purports to estimate the total number of small business offerors based on the number of unique small business with procurement funding actions of $500,000 or more that were identified in the 2013 Federal Procurement Data System reports, but this estimate alone is meaningless without further data and analysis to compare the resulting burden on the typical small business in relevant terms (e.g., proportion of revenue or profits) to the burden on other affected businesses.

The cursory treatment in the NPRM of the required Initial Regulatory Flexibility Act analysis is insufficient to support a reasoned determination of a regulatory approach that recognizes and responds to small entity burdens. In particular, the analysis presented by the Agencies fails to consider the likely large and disproportionate impact on small businesses of implementing and managing the required program of labor compliance responsibility determination for their subcontractors. In many cases small prime contractors have larger firms as subcontractors, and the assessment of labor compliance responsibility of a large firm by a small size prime may be especially burdensome for the small prime contractor. In addition, the Agencies have not assessed at all the direct impact of the proposal on small subcontractors. The Federal Procurement Data System, which the Agencies cited as a source of data regarding the number of small prime contractors affected by the Proposed Rule, does not provide comprehensive information regarding the numbers of small versus other sized subcontractors.

Section 8. Questionable Benefits

The Agencies' estimates of the benefits of the Proposed Rule are speculative, ambiguous, and unsubstantiated. The benefits ascribed to the Proposed Rule have not been examined in sufficient detail to differentiate them from the benefits that could accrue from available alternative approaches. The lack of a quantitatively detailed benefits analysis and the uncertainty attached to the qualitative descriptions of putative benefits creates doubt that the social value of benefits would match even the low estimates of cost presented by the Agencies. Consideration of the likely true magnitude of costs suggests clearly that the Proposed Rule's costs will significantly exceed its benefits.

Conclusion

The Proposed Rule is not supported by a thorough, accurate, objective, and detailed regulatory economic impact analysis on the basis of which a reasoned regulatory decision can be based. The failure of the Agencies to consider adequately the benefits and of alternative approaches and to consider the substantial ancillary risks of the proposed approach are particular concerns. The uncertainty and lack of proper research to inform the estimates of costs, renders the analysis meaningless. These flaws cannot be remedied except by a complete withdrawal of the proposal and a thorough new examination of the benefits and costs of alternative approaches, including the alternative of no regulation, consistent with the requirements of E.O. 12866.