NATIONAL ASSOCIATION OF Manufacturers

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August 26, 2015

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Submitted via Federal Rulemaking Portal: http://www.regulations.gov

Re: Proposed Federal Acquisition Regulation: Fair Pay and Safe Workplaces, (FAR Case 2014–025; RIN 9000-AM81); and Department of Labor "Guidance for Executive Order 13673: Fair Pay and Safe Workplaces" (ZRIN 1290-AZ02) Comments from the National Association of Manufacturers

Dear Ms. Flowers and Ms. Jones:

The National Association of Manufacturers ("NAM") welcomes this opportunity to submit written comments in response to the Federal Acquisition Regulatory ("FAR") Council's Proposed Rule ("Proposed Rule") and the Department of Labor ("DOL") Proposed Guidance ("Guidance") issued on May 28, 2015.[1] The Proposed Rule and Guidance implement the "Fair Pay and Safe Workplaces" Executive Order ("EO 13673") issued by President Barack Obama on July 31, 2014.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association and represents manufacturers in every industrial sector and in all 50 states. The NAM is the voice of manufacturing in the United States and informs policymakers about manufacturing's vital role in the U.S. economy. Many of the NAM's members are also federal government contractors and subcontractors (together "contractors") who have a direct interest in Executive Order 13673 and its implementing regulations.

[1] Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548 (May 28, 2015); Guidance for Executive Order 13673, Fair Pay and Safe Workplaces, 80 Fed. Reg. 30,574 (May 28, 2015).

The NAM fully supports and fosters compliance by its members with federal and state labor laws. However, as explained in detail below, EO 13673, the Proposed Rule, and the Guidance, if adopted, would create an unlawful, unfair, and unworkable framework for assessing contractor compliance with federal and state labor laws and would not enhance the efficiency or efficacy of the nation's federal procurement processes. The Proposed Rule and Guidance are substantively flawed because it will not be feasible for contractors and the acquisition workforce community to comply with the requirements of the Proposed Rule and are procedurally defective because the FAR Council's regulatory analysis is insufficient. For the reasons set forth below, the NAM urges the FAR Council and DOL to rescind the Proposed Rule and Guidance.

I. The Proposed Rule and Guidance Encroach On Congressional Authority and Are Contrary To Law

The Proposed Rule and associated Guidance seek to amend federal labor law and, as a result, encroach upon the specific delegations of authority that Congress has made over the last century. Specifically, the Proposed Rule, if adopted, would effectively and improperly amend the federal laws identified in the EO 13673 by altering the enforcement procedures set forth in those laws and by imposing new remedies for violations that are both beyond and contrary to congressional intent. The Proposed Rule is also in direct conflict with the Federal Arbitration Act.

A. The Proposed Rule and DOL Guidance Interfere with the Authority Vested in Specific Agencies by Congress

EO 13673, the Proposed Rule, and the Guidance cite the Federal Property and Administrative Services Act[2] ("Procurement Act") as the legal basis for the new labor law compliance framework. While that statute authorizes the FAR Council to implement regulations with respect to various procurement statutes, it does not provide the FAR Council with authority to interpret and enforce the labor law statutes identified in EO 13673. Rather, Congress assigned the authority to interpret and enforce the federal labor laws at issue to specific agencies, namely the National Labor Relations Board ("NLRB"), the Equal Employment Opportunity Commission ("EEOC"), the Occupational Safety & Health Commission ("OSHA"), the Wage and Hour Division ("WHD") and other offices within the DOL. For example, NLRB is the only government body vested with the "responsibility and broad discretion to devise remedies that effectuate the policies of the [NLRA]," subject only to limited judicial review.[3] If enforced, the Proposed Rule would give contracting officers ("COs") the authority to interpret and enforce the National Labor Relations Act ("NLRA") and the other statutes, effectively usurping authority

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2 40 U.S.C. § 121.

3 *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984).

Congress delegated to other agencies. Courts have consistently held that such encroachment of authority is impermissible.[4]

B. The FAR Council and DOL Propose to Amend Substantive Labor and Employment Laws Improperly Through Administrative Fiat

Through the Proposed Rule and associated Guidance, the FAR Council and DOL seek to effectively amend federal labor and employment law by creating a new enforcement scheme and new punitive sanctions that are inconsistent with congressional intent.

After assessing an employer's violations and alleged violations of federal labor laws, as well as the as-yet-undefined state law equivalents,[5] to determine whether the employer has a "satisfactory record of integrity and business ethics,"[6] the CO, in consultation with newly-created Agency Labor Compliance Advisors ("ALCAs"), has authority to recommend suspension and debarment, disqualifying the employer from being awarded or retaining government contracts worth potentially tens of millions of dollars.[7] As such, EO 13673 creates a new enforcement scheme, with punitive remedies, that is unnecessary and contrary to existing federal law.

Extensive, unique, and robust enforcement schemes already exist for each of the impacted federal laws identified in EO 13673. After careful deliberation, Congress determined that certain of the statutes, such as Title VII of the Civil Rights Act ("Title VII"), the American with Disabilities Act ("ADA"), the Family Medical Leave Act ("FMLA"), and the Fair Labor Standards Act ("FLSA") should be enforced by both federal agencies and private causes of action, while others, such as the NLRA and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"), should be enforced exclusively by federal administrative agencies. History shows that the existing enforcement procedures have been effective. In fiscal year 2014, for

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4 *Herman B. Taylor Constr. Co. v. Barram*, 203 F.3d 809, 811 (Fed. Cir. 2000) (holding that a contracting officer of General Services Administration "has no jurisdiction itself to determine a labor provisions dispute or to review the Labor Department's ruling on that issue"); *Cape May Greene Inc. v. Warren,* 698 F.2d 179, 190 (3d. Cir. 1983) (recognizing that agency action may be questioned when it is "not clearly mandated by the agency's statute [and] begins to encroach on congressional policies elsewhere"); *see also True Oil v. Commissioner*, 170 F.3d 1294, 1304 (10th Cir. 1999) ("FERC has no Congressional authority to interpret any provision of the Internal Revenue Code").

5 The DOL announced in its Guidance that it will define "equivalent state laws" as part of a future rulemaking. Without this critical definition, the Proposed Rule and Guidance are incomplete and prevent companies from fully understanding the scope of the new requirements. Until the DOL has identified the "equivalent state laws" that will be covered under the requirements of EO 13673, the FAR Council and DOL should postpone the issuance of the final rule and guidance.

6 E.O. § 2(a)(iii).

7 E.O. § 2(a)(vi).

example, the EEOC, which is charged with enforcing Title VII, the ADA, the Age Discrimination in Employment Act ("ADEA"), and the FMLA, received 88,442 private sector charges and resolved more than 98 percent of them.[8] By inserting a new remedial scheme, centered upon Contracting Officers and ALCAs who have previously had no role in enforcing these statutes, the Proposed Rule and Guidance will disrupt a well-functioning enforcement regime.

Nothing in the proposed regulations suggests that the existing enforcement procedures followed by the EEOC, NLRB, OSHA, the Office of Federal Contract Compliance Programs ("OFCCP"), or other offices within the DOL are any less effective with regard to federal contractors or subcontracts than they are with other employers who are not federal contractors or subcontractors. Nor does anything in the Proposed Rule or Guidance justify the need for the newly created "labor compliance agreements" that contractors will be expected to execute to demonstrate efforts to mitigate the alleged violations under the scheme set forth in the Proposed Rule and Guidance.

In addition to robust enforcement procedures, Congress also created unique remedial schemes for each of the relevant federal statutes, consistent with each statute's history and purpose. For example, several of the statutes identified in EO 13673, including the NLRA, are intended to be purely remedial in nature, not punitive. Accordingly, the NLRB provides "make-whole" relief, which is intended to restore the status quo prior to the violation. Congress gave the NLRB no authority to issue punitive economic sanctions. By contrast, Congress established a remedial scheme for violations of Title VII, ADA, and FMLA, pursuant to which the EEOC and private plaintiffs can seek punitive damages in addition to make-whole relief. With a vast array of remedies at its disposal and decades of experience, Congress decided long ago that sanctions under the federal contracting process were *not* appropriate remedies for violations of the NLRA, OSHA, Title VII, ADA and many of the other laws identified in EO 13673. Congress determined that the suspension and debarment remedy should be available for violations of only two of the statutes identified in EO 13673: the Davis-Bacon Act and the Service Contract Act. If Congress had intended for federal contracting remedies, such as debarment, to apply to violations of the other laws cited in EO 13673, it would have provided them.[9]

Moreover, history shows that the specific remedies provided by each of the relevant labor laws were adopted by Congress as a matter of conscious choice. All of the federal statutes within the scope of EO 13673 and Proposed Rule have existed for decades, affording Congress the opportunity to assess, reassess, and amend the statutes' remedial provisions if it believed such

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[8] EEOC Issues FY 2014 Performance Report, *available at* http://www.eeoc.gov/eeoc/newsroom/release/11-18-14.cfm

[9] *Meghrig v. KFC W, Inc.*, 516 U.S. 479, 485 (1996) ("Congress . . . demonstrated in CERCLA that it knew how to provide for recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy").

action was warranted. And Congress has, in fact, taken the opportunity to amend the remedial provisions of several of the statutes identified in EO 13673, the Proposed Rule, and the Guidance. For instance, Congress amended Title VII and the ADA in 1991 to allow for the recovery of compensatory and punitive damages. But in so doing, Congress placed specific caps on the amount of damages that could be awarded, limiting the potential liability of even the largest employers to $300,000 in combined compensatory and punitive damages. [10] Applying the debarment remedy, a punitive sanction that could amount to tens of millions of dollars or more, to violations of Title VII or the ADA would clearly be contrary to congressional intent.

In fact, one need look no further back than four months ago for an example of Congress re-assessing the remedial schemes available under federal labor laws. In April 2015, the House of Representatives revisited the issue of whether debarment should be a remedy available under the FLSA, and decided against such a remedy. That is only the most recent example of Congress considering, and deciding against, modifying the remedial scheme established by the federal labor laws at issue here.[11]

In short, EO 13673 and the Proposed Rule are contrary to law because they effectively amend existing federal statutes by erecting new enforcement procedures and imposing new and punitive sanctions that Congress never envisioned or intended.[12]

C. The Proposed Regulations Conflict with the Federal Arbitration Act

Congress enacted the Federal Arbitration Act ("FAA") in 1925 to establish a strong federal policy in favor of arbitration.[13] The Supreme Court has recently reconfirmed the vitality

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[10] 42 U.S.C. § 1981a (a)(1) & (d)(1)(B).

[11] On April 30, 2015, the House rejected an amendment offered by Representative Mark Pocan (D-Wis) to the FY 2016 Military Construction and Veterans Affairs Appropriations Bill (H.R. 2029) that would have automatically debarred any contractor that reported an FLSA violation over the past five years.

[12] *See, e.g., Wisconsin Dept of Indus. Labor & Human Relations v. Gould Inc*, 475 U.S. 282, 286 (1986) (executive has no authority to prescribe his "own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [NLRA]"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) ("When the President "takes measures incompatible with express or implied will of Congress, his power is at its lowest ebb.").

[13] *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983) (the FAA is "a congressional declaration of a liberal policy favoring arbitration agreements . . . . as a matter of federal law, any doubts conceding the scope of arbitrable issues should be resolved in favor of arbitration"); *Arciniaga v. GMC*, 460 F.3d 231, 234 (2d Cir. 2006 ("it is difficult to overstate the strong federal policy in favor of arbitration" embodied in the FAA).

of the FAA in *AT&T Mobility LLC v. Concepcion*, confirming that states cannot pass laws inconsistent with the FAA's mandate to broadly enforce agreements to arbitrate.[14]

Consistent with the strong federal policy favoring arbitration, courts have consistently held that employers have the right under the FAA to require employees to agree to pre-dispute arbitration agreements covering Title VII claims.[15] The Proposed Rule prohibits companies with federal contracts or subcontracts of $1 million or more from requiring employees to sign arbitration agreements for disputes alleging violations of Title VII (including sex, race, national origin, and religious discrimination claims) or "any tort related to or arising out of sexual assault or harassment."[16] By limiting rights granted by the FAA, the Proposed Rule conflicts with federal law and cannot be enforced.

The pre-dispute arbitration ban found in Section 6 of EO 13673 is clearly modeled after the "Franken Amendment," which prohibits Department of Defense contractors from using pre-dispute arbitration agreements in certain circumstances. However, the Franken Amendment, unlike EO 13673, is valid because Congress approved the provision as part of the Department of Defense Appropriations Act of 2010. Here, the Administration is effectively attempting to amend the FAA through executive order. Such action, which will likely be codified through the Proposed Rule, should be accomplished only through Congressional legislation.

D. The Proposed Rule Exceeds the Statutory Authority Provided by the Procurement Act

The Proposed Rule exceeds the President's authority under the Procurement Act,[17] the cited statutory authority for EO 13673 and the Proposed Rule. The Procurement Act provides the President authority to prescribe policies and directives necessary to carry out the goals of providing the government with an "economical and efficient" public procurement system.[18] However, a President cannot simply issue an executive order under the guise of making procurement more efficient. Instead, there must be a "manifestly close nexus between the Procurement Act's criteria of efficiency and economy" on the one hand, and the requirements imposed by the Proposed Rule on the other.[19] Here, there is no such nexus. Rather, the requirements of the Proposed Rule will almost certainly make the procurement system more

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14 563 U.S. 321 (2011).

15 *Ashbey v. Archstone Prop. Mgmt., Inc*., 2015 U.S. App. LEXIS 7819 (9th Cir. May 12, 2015); *see generally Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (confirming that employment contracts are subject to the FAA unless an employee falls within one of the specifically enumerated exceptions stated in the Act).

16 *See, e.g., Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.,* 191 F.3d 198, 204-06 (2d Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365 (7th Cir. 1999).

17 40 U.S.C. § 121.

18 *Id*.

19 *Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981).

expensive and less efficient. Thus, the requirements imposed by EO 13673 and the Proposed Rule are not authorized by the Procurement Act and are not valid.

When one examines the claim that the proposed new regime will render procurement more efficient, one can readily see that claim is without basis in fact, and the intent behind EO 13673 and the Proposed Rule becomes clear: the Administration is seeking to set national labor policy, in a clear "end run" around Congress. For instance, Section 1 of EO 13673 states that "[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government."[20] While this articulated policy rationale is based on several recent reports that examine labor violations by federal contractors, it is clear that the FAR Council's reliance on these reports is misplaced. The proposed rule cites a study conducted by the Center for American Progress ("CAP")[21] for the proposition that there is a "strong relationship between contractors with a history of labor law violations and those with performance problems."[22] Yet, when the author of the report testified before Congress in February, she conceded that there was no provable linkage between performance and labor violations.[23] At best, the CAP report is a case study, rather than an empirical analysis of the correlation between the labor compliance record of a federal contractor and contract performance, as the CAP study only analyzed 28 companies (equal to .001 percent of the companies that will be affected by the Proposed Rule). In other words, the Administration's attempts to link this labor-related policy with the Procurement Act's goals of economy and efficiency are based on unfounded speculation. In all likelihood, the Proposed Rule will have the opposite effect of what is intended – it will increase costs and bog down the procurement process.

II. The Proposed Rule and Guidance are Unworkable

The NAM has significant concerns with the practical application and far-reaching scope of the Proposed Rule and Guidance, which will necessitate a costly reporting regime for contractors regardless of their record of labor law compliance. Indeed, the NAM is concerned that the Administration fails to appreciate the impact of the Proposed Rule and Guidance, both

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20 EO 13673, Fair Pay and Safe Workplaces 79 Fed. Reg. 45,309 (Aug. 5, 2014).

21 Karla Walther and David Madland, At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers (December 2013).

22 Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548, 30,549 (May 28, 2015).

23 "The report finds that one in four contractors with these problems []—also have performance problems. We cannot establish a causal relationship; that would be very difficult." Transcript from The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat from Feb 26, 2015 before the Subcommittee On Workforce Protections Jointly With The Subcommittee On Health, Employment, Labor, And Pensions.

from a cost perspective and from the impact of the Proposed Rule and Guidance on the contracting process.

The Administration has stated that "the vast majority of federal contractors play by the rules"[24] and that contracting officers will only take into account "the most egregious violations."[25] However, the Administration's claim that the requirements of Fair Pay and Safe Workplaces will be a "check the box"[26] exercise for the majority of contractors – *i.e.*, that most contractors will be able to report no labor law violations – is contradicted by the DOL's broad definition of reportable labor violations. As noted in Section 3, the Proposed Rule would require contractors and subcontractors to report non-final initial assessments which are a far cry from determinations of guilt. The broad definitions in the Proposed Rule and Guidance will cast a wide net for contractors who will be required to check "yes" when asked to certify whether they have had any labor violations in the past three years. In fact, there is no question that even the Federal Government itself would need to check "yes" under the framework outlined in the Proposed Rule.[27] Moreover, regardless of which box a contractor checks, the contractor will be required to comply with the onerous data collection requirements, described below, for itself and its subcontractors.

The relatively low threshold for compliance ($500,000) means that the requirements of "Fair Pay and Safe Workplaces" will affect a significant portion of the contracting community. For most contractors, just the initial step of determining whether their company has any violations to disclose will be a significant undertaking. This is especially true at large companies that will need to collect information about citations, complaints, and arbitral awards across various geographic locations and business units within the bidding entity. But it is equally true of small businesses, many of whom have prime contracts of $500,000 or more, and would face the prospect of diverting critical resources to focus on complying with the new burdens imposed by the Proposed Rule. These small businesses would be tasked with collecting and reporting labor compliance information not only for themselves, but for their subcontractors, including in many cases large businesses performing as subcontractors. The heavy data collection burden is compounded by the fact that the process needs to be repeated every six months after award. Such compliance burdens will undoubtedly add delay to the acquisition of manufactured goods, ranging from weapons systems to life-saving medical equipment.

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[24] Fact Sheet: Fair Pay and Safe Workplaces Executive Order Jul 31, 2014, http://www.dol.gov/asp/fairpay/FPSWFactSheet.pdf (last visited July 2, 2015).

[25] *Id*.

[26] Secretary of Labor Tom Perez, "Reviewing the President's Fiscal Year 2016 Budget Proposal for the Department of Labor." Mar 18, 2015.

[27] *Martin et al. v. United States of America*, 1:13-cv-00834 (Fed. Cl. Jul. 31, 2014) ("It is the view of the court that the government's payment to employees two weeks later than the scheduled paydays for work performed during the October 2013 budget impasse constituted an FLSA violation.")

A. The Rule will Force Contractors to Create New Databases and Procedures

At present, most companies do not have systems in place to implement the new information collection and reporting requirements of the Proposed Rule. In fact, the NAM surveyed its members on this issue and found that 68 percent do not currently have systems in place to track the information required under the proposed rule. Further illustrating the burden this rule will impose, 61.7 percent of those surveyed indicated the initial cost of developing a system to monitor the information for reporting would cost between $25,000 and $1,000,000 depending on the operations of the manufacturer. In order to comply, contractors will be required to create new databases and collection mechanisms to account for information subject to disclosure.[28] Moreover, contractors would be required to develop new internal policies and procedures and hire and train new personnel to ensure compliance with the proposed requirements.

The imposition of this burden is not merely a cost to the business community; it is also a cost that will be shouldered by the American taxpayer. As contractors are forced to expand their compliance departments, much of this expense will get passed on to the government through cost contracts and higher fixed prices. Moreover, many commercial contractors may decide that the cost of doing business with the government has simply become too high and leave the market entirely. In a 2014 survey of our members, 75.6 percent cited rules and regulations as the biggest obstacles to bidding on a federal contract.[29] In response to the issuance of EO 13673, 25 percent said they would be less likely to bid on a federal contract if the EO's requirements were implemented.[30] Similarly, potential new entrants to the government contracts market may be deterred by the up-front investment that will be required to comply with the Proposed Rule and Guidance. A reduction in the number of companies competing for federal contracts will reduce competition and raise prices. The Procurement Act gives the President authority to implement changes that will increase economy in the procurement system, but the clear impact of the Proposed Rule will be *increased* costs to the public whenever the federal government procures goods or services.

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[28] For contractors performing work on classified contracts, the new databases will need to be securely designed to protect against the unauthorized disclosure of classified information.

[29] NAM/Industry Week 3Q 2014 Survey of Manufacturers: Special Questions on Labor Regulations, Health Insurance, Sept. 5, 2014, results available at http://www.industryweek.com/regulations/namindustryweek-3q-2014-survey-manufacturers-special-questions-labor-regulations-health- (last visited July 31, 2015).

[30] *Id.*

B. Certifying Subcontractor Compliance

In addition to requiring contractors to certify their own labor law compliance on each and every contract exceeding $500,000, the Proposed Rule envisions that contractors will also certify subcontractor and supplier labor law compliance. Implementing this requirement will be impractical — if not impossible — for the entire contracting community, from large defense companies to the small manufacturers of key components further down the supply chain. The FAR Council and DOL recognized this impracticality, at least implicitly, by requesting input on potential "alternatives" to this requirement.[31]

For even the most sophisticated government contractors, the collection and reporting of *subcontractor* labor compliance data creates an unprecedented data collection and reporting burden. On large federal projects—such as manufacturing a weapons system—a prime contractor might enter into hundreds of subcontracts during the performance of the contract. Consider the contract award to a major defense contractor to provide combat vehicles to the Army.[32] Since it first signed the contract in 2011, the contractor has entered into subcontracts with more than 200 companies.

Given that the contractor is performing a $300M contract to build combat vehicles, it is not surprising that most of the subcontracts will be covered by the Proposed Rule – *i.e.*, they are valued at over $500,000 and fall outside the exception for commercially available off-the-shelf ("COTS") items. In fact, some sub-awards are so large (*e.g.*, a $19M subcontract) that there are almost certainly covered subcontracts at several tiers down the supply chain.

Under the requirements of the Proposed Rule, the contractor would be charged with collecting, reporting, and updating information about its own labor law compliance, *and* collecting, reporting, and updating labor compliance information from all of the subcontractors, and evaluating whether they have a satisfactory record of integrity and business ethics based on the reported three-year labor violations history, prior to awarding them work. Moreover, the contractor would be required to monitor each subcontractor's responsibility throughout the duration of the contract, reviewing the subcontractors' labor compliance information every six months. And all of this data collection and diligence would represent just one of the hundreds of contracts that the contractor held in FY 2014 that would be covered by the Proposed Rule. When applied across a company's portfolio of covered contracts, the reviewing of subcontractors' labor violations will be a crushing burden. Moreover, the reporting requirements envisioned in the

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[31] For example, the FAR Council is considering using alternative language in paragraph (c) and (d) of FAR 52.222-BB in which subcontractors would be required to disclose details of violations to DOL rather than the prime contractor.

[32] This example is based on real contract data obtained from USASpending.gov.

Proposed Rule would create an avalanche of reports to COs and other government officials charged with evaluating contractor labor compliance.

Satisfying the requirements of the Proposed Rule will be even more difficult for small businesses when asked to make responsibility determinations for their subcontractors. Small businesses, including Service-Disabled Veteran-owned, Women-owned, and HUBzone small businesses, frequently serve as prime contractors while subcontracting with large contractors that are household names. In such situations, the small businesses will be ill-equipped to collect and evaluate information about labor law violations from a multi-national Fortune 500 company in order to decide whether that company has taken sufficient remedial steps to improve labor practices. If forced to put such data collection and reporting mechanisms in place, it is likely that many small businesses will not be able to bid on the work. This impediment to the participation of small businesses is in contravention of the government's long-standing policy of maximizing procurement opportunities for small businesses.

In addition to the practical difficulties of collecting data from subcontractors, there are competitive reasons as to why the proposed prime-sub reporting regime is problematic. It is not uncommon for contractors to team on one project only to be competitors on the next procurement. Forcing subcontractors to disclose confidential and competitively sensitive information to primes – who may be their competitors on the next procurement – will alter the prime/sub relationship because the prime will learn information about violations that it can use against subcontractors in subsequent competitions. In other words, the Proposed Rule could fundamentally alter the prime/subcontractor relationship that the government depends on for the delivery of innovative products and solutions.

C. The Proposed Rule will Introduce Substantial Inefficiency and Unfairness into the Procurement Process

1. Inefficiency

Not only will the requirements of "Fair Pay and Safe Workplaces" be impractical for contractors, but they will also be unworkable for the Federal acquisition workforce to implement. In order to meet the requirements of the Proposed Rule, a CO will be required to take the following steps for every contract award over $500,000 in which an offeror reports a labor violation:

- First, the CO must check to see if the contractor has disclosed any violations in the System for Award Management ("SAM") as part of the initial certification;
- Second, the CO must request all relevant information about the administrative merits determination, civil judgment, or arbitral award;

- Third, the CO must furnish the ALCA with all of this information and request that the ALCA provide written advice and recommendations within three business days of the request;
- Fourth, the CO must review the DOL Guidance and the ALCA's recommendation;
- Fifth, the CO must consider the mitigating circumstances such as the extent to which the contractor has remediated the violation or taken steps to prevent its recurrence;[33]
- Sixth, the CO must make a responsibility determination as to whether the contractor is a responsible source with a satisfactory record of integrity and business ethics.
- Lastly, the CO will need to take the time to document the various stages of this process in order to develop a more favorable administrative record in preparation for bid protests regarding the responsibility determination.

The administration estimates that the steps above will only take COs two hours per contract.[34] In reality, it will take COs far longer to complete these steps even with the help of the ALCA. The Proposed Rule requires that COs ask offerors for all relevant information about the labor law violations at the time that the CO initiates a responsibility determination. In practice, most responsibility determinations are made between the source selection decision and the award of the contract. Accordingly, most contractors will interpret this request for information about the violations as an indication that they are well-positioned to receive the contract. With key awards on the line, most contractors will undoubtedly inundate the CO with information about mitigating factors and remedial measures in light of the fact that EO 13673 requires the CO to consider such information. This point is proven when 45.9 percent of NAM members surveyed indicated it would take more than ten hours to gather the relevant mitigating information to submit to the ALCA and CO. This will be especially true in cases in which a disputed labor violation is still on appeal at the time of the disclosure. In such circumstances, contractors will be best served by submitting in-depth briefing on the matter to the ALCA and CO in order to show that the contractor is likely to prevail on appeal. Giving contractors the option to supply such information is absolutely necessary to ensure some degree of fairness. Of course, by providing this necessary opportunity, the Proposed Rule and Guidance put the onus on the ALCA and the CO to carefully consider the full record submitted by the contractor. This will be no small feat, given the number of contract actions that will be subject to this process and, without a doubt, will result in a less efficient and more cumbersome procurement process in total. If the ALCA and

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[33] Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548 (May 28, 2015) ("The Executive Order (E.O.) requires that prospective and existing contractors disclose certain labor violations and that contracting officers, in consultation with labor compliance advisors, consider the disclosures, including any mitigating circumstances, as part of their decision to award or extend a contract.")

[34] The "Government Costs" section of the RIA analysis only allots two hours for the CO to perform this task.

CO dedicate too little time to this critical part of the process, the unfairness to the contractor is self-evident.

2. Unfairness

We have a number of concerns about the fundamental unfairness of the Proposed Rule and Guidance. First, our members have found that enforcement of the labor statutes can be uneven. For example, two companies might maintain identical safety practices, but Company A is not subject to an OSHA inspection, whereas Company B is visited by OSHA and receives citations. Under the Proposed Rule and Guidance, the labor record of Company B may render it ineligible for government contracts while Company A will remain eligible, not because Company A's safety practices are any better than Company B's, but simply because the necessarily uneven enforcement scheme has worked in Company A's favor.

Second, due to the enormous demands on a CO's time, and because of the complexity of making responsibility determinations, the requirements of the Proposed Rule will likely result in *de facto* debarment. For instance, CO #1 may find a contractor to be non-responsible based on his or her interpretation of the contractor's labor compliance data. CO # 2, in order to reduce his or her increased workload, could understandably decide to follow CO #1's responsibility determination—about the same underlying facts—without conducting the required analysis. If this were to occur, the government would have improperly effectuated a *de facto* debarment of the contractor from federal contracting without due process or the procedural protections embedded in Subpart 9.4 of the FAR. While it is true that contracting with the government is a privilege and not a right, it is equally true that contractors have a due process liberty interest in avoiding the damage to their reputation and business caused by the stigma of broad preclusion from government contracting.[35]

As the United States Court of Appeals for the District of Columbia Circuit has held, for each contract award, procedural due process requires that the contractor be "notified of the specific charges concerning the contractor's alleged lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer . . . that the allegations are without merit" before being denied a contract award.[36] In sum, the requirements of the Proposed Rule could lead to the "blacklisting" of companies – effectively

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35 *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993).

36 *Old Dominion Dairy Prods. Inc. v. Sec'y of Def.,* 631 F.2d 953, 968 (D.C. Cir. 1980); see also, FAR Subpart 9.4 (prescribing "policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2.").

preventing them from competing for Federal contracts – based upon the opinion of one contracting officer.[37]

III. The Proposed Rule Is Unreasonable and Impractical and Will Exclude Responsible Contractors From Doing Business With The Federal Government

A. The Definition of "Administrative Merits Determination" in the Proposed Rule and Guidance is Unreasonable

The Proposed Rule and Guidance define the term "administrative merits determination" to include, among other things,[38] unfair labor practice complaints issued by the NLRB, probable cause determinations issued by the EEOC, and OSHA citations. Treating such initial agency decisions as the functional equivalent of proven violations of law is fundamentally unfair for a variety of reasons.

First, requiring employers to report and certify to NLRB unfair labor practice complaints, EEOC probable cause determinations, and OSHA citations as "violations" of law is unreasonable, because such initial assessments are not final, and in many cases not even close to being final determinations of guilt or fault made by a neutral arbiter. The NLRB's own regulations recognize that unfair labor practice complaints are issued when a "charge *appears* to have merit and efforts to dispose of it by informal adjustment are unsuccessful."[39] Similarly, when the EEOC issues a "Letter of Determination," it only suggests that there is "reasonable cause to believe" a violation may have occurred, and such determinations are based on a limited record.[40] An employer's eligibility to contract with the federal government, with potentially tens of millions of dollars hanging in the balance, should not rest on the mere "appearance" of a violation or an EEOC investigator's belief based on a review of a limited record that must be completed in a matter of days under the Proposed Rule.[41]

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37 *Phillips, et. Al, v. Mabus et. al,* Civ. Action No. 11-2021, 2012 WL 476539 (D.D.C.) ("*De facto* debarment occurs when a contractor has, for all practical purposes, been suspended or blacklisted from working with a government agency without due process, namely, adequate notice and a meaningful hearing.") citing *Trifax Corp. v. Dist. Of Columbia*, 314 F.3d 641, 643-44 (D.C. Cir. 2003).

38 Several of the other agency actions defined to be "administration merits determinations" suffer from the same flaws identified here with regard to unfair labor practice complaints, EEOC cause determinations, and OSHA violations. We have, for simplicity's sake, not referenced each of those agency actions here.

39 NLRB Rules of Practice & Procedure, 29 C.F.R. §101.8.

40 *See* EEOC Charge Handling Process *available at* http://www.eeoc.gov/employers/process.cfm.

41 It is also worth noting that an EEOC determination that no probable cause of a violation exists has no preclusive effect on the complaining party; the party filing the discrimination charge may file a lawsuit after receiving the EEOC's no probable cause determination.

Second, none of the initial so-called "merits determinations" referenced in the Proposed Rule and Guidance are based on evidence that has been subject to a hearing or cross-examination, much less any kind of judicial review. For example, the EEOC typically investigates charges of discrimination by reviewing information that is provided by the charging party and the employer, interviewing the charging party and in some, but not all, cases, interviewing other relevant witnesses.[42] Neither the accuser nor the accused employer is afforded the opportunity to confront the other party directly during the investigative process prior to a reasonable cause determination being made, and neither party has the opportunity to subject the evidence of the alleged violations – or the employer's defenses – to cross-examination. In fact, courts have dismissed EEOC lawsuits because the EEOC conducted only a cursory investigation – or no investigation at all – before finding reasonable cause to believe a violation existed and filing suit.[43]

Moreover, the ultimate determination of guilt or innocence in most employment cases filed under Title VII, ADA, ADEA and/or NLRA depends on whether the employer acted with discriminatory intent, making witness credibility of paramount importance. The Proposed Rule violates notions of fundamental fairness by treating employers as if they have violated the law before they have had any opportunity to subject their accuser's evidence to cross-examination before a neutral decision maker. And by requiring certification of initial agency determinations, the Proposed Rule is far more expansive than the "blacklisting" contractor responsibility rule proposed during the Clinton Administration. That rule, which only required employers to report felony "convictions" and "adverse court judgments," was ultimately withdrawn by the FAR Council as being "unworkable and defective."[44]

Third, construing the term "administrative merits determination" as anything short of a final order is fundamentally unfair, given the frequency with which agency non-final administrative "merits" determinations are overturned in court. For example, during the forty-year period 1974 through 2014, the federal courts of appeal have overturned or remanded for further consideration in almost 30 percent of all NLRB decisions that were appealed.[45] The

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42 *See* EEOC Charge Handling Process *available at* http://www.eeoc.gov/employers/process.cfm.

43 *See, e.g., EEOC v. Pierce Packing Co.*, 669 F.2d 605 (9th Cir. 1982) (dismissing EEOC lawsuit because the EEOC had conducted no investigation at all before bringing suit); *EEOC v. Sterling Jewelers Inc.*, 3 F. Supp. 3d 57 (W.D.N.Y. 2014) (dismissing nationwide class action because the EEOC failed to conduct a proper investigation of the allegations before filing suit).

44 *See* 65 Fed. Reg. 40830 (June 30, 2000); *see also* 66 Fed. Reg. 66986, 66987 (Dec. 27, 2001).

45 NLRB Appellate Court Decisions, 1974-2014, *available at* https://www.nlrb.gov/news-outreach/graphs-data/litigations/appellate-court-decisions-1974-2014.

EEOC's recent track record is no better, as courts have repeatedly rejected EEOC positions on significant matters affecting employers nationwide.[46]

Fourth, the relevant agencies, particularly the NLRB and EEOC, have routinely issued complaints that are based on novel, untested theories and that seek to expand or overturn existing law, often reflecting the political leanings of the administration then in place. For example, in recent years, the EEOC has filed several complaints, based on highly questionable theories and evidence, challenging employer use of criminal and credit background checks to screen prospective employees. In *EEOC v. Kaplan Higher Education Corporation,* for instance, the EEOC filed a complaint against an employer that was using the very same credit checks that the EEOC itself was using.[47] The Sixth Circuit Court of Appeals dismissed the EEOC's action, and in so doing commented:

> The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted by only by the [EEOC's] witness himself.[48]

The Fourth Circuit Court of Appeals recently issued a similar rebuke in dismissing the EEOC's challenge to an employer's criminal background and credit history checks in *Equal Employment Opportunity Commission v. Freeman.*[49] In *Freeman,* Judge Agee wrote a concurring opinion chastising the EEOC and cautioning the agency:

> The EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress as its "significant resources, authority, and discretion" will affect all "those outside parties they investigate or sue . . . The Commissions' conduct in this case suggests that its exercise of vigilance has been lacking. It would serve the agency well in the future to reconsider how it might

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46 *See, e.g., Mach Mining v. EEOC*, __ U.S. __ (2015) (rejecting EEOC position on pre-litigation enforcement procedures); *EEOC v. Honeywell Int'l, Inc.* 2014 U.S. Dist. LEXIS 157945 (D. Minn. Nov. 6, 2014) (denying EEOC request for TRO relating to the Company's wellness program under ADA).

47 748 F.3d 749 (6th Cir. 2014).

48 *Id.*

49 2015 U.S. App. LEXIS 2592 (4th Cir. Feb. 20, 2015).

> better discharge the responsibilities delegated to it or face the consequences for failing to do so.[50]

The fundamental unfairness associated with labeling initial agency findings as reportable violations should be readily apparent, as demonstrated in cases such as *Kaplan* and *Freeman*. If the Proposed Rule were already in place, the employers in those cases would have been required to certify as labor law violators, putting them at risk of losing federal government contracts, even though neither employer violated the law.[51] The *Kaplan* and *Freeman* cases are particularly illustrative of the perils of the Proposed Rule because the employers were alleged to have violated the law, in a reportable "administrative merits determination," for conducting background checks that they believed would help them avoid hiring individuals with a demonstrated lack of "integrity or business ethics."

Additionally, the Proposed Rule and Guidance are particularly unfair, and could lead to inconsistent results, with respect to NLRB complaints, given the NLRB's well-known non-acquiescence policy. Pursuant to its non-acquiescence policy, the NLRB will continue to pursue legal positions that have been expressly rejected by a circuit court of appeals or even by several circuit courts of appeals. For instance, in *D.R. Horton, Inc., v. NLRB*,[52] the Fifth Circuit Court of Appeals overturned a highly controversial decision in which the NLRB prohibited the use of class action waivers and held that employers will be deemed to have violated NLRA if they require employees to sign such waivers. The NLRB confronted the very same issue again, a year later, in *Murphy Oil USA, Inc.*, where the NLRB reaffirmed the position it took in *D.R. Horton*, despite recognizing its decision had been expressly overturned by Fifth Circuit, and also rejected by the Second and Eighth Circuits.[53] If the Proposed Rule were in place now, the employer in *D.R. Horton* would not be required to certify as a labor law violator, given the Fifth Circuit's

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50 2015 U.S. App. LEXIS 2592, at *22-23.

51 The EEOC has filed numerous other frivolous complaints that would constitute reportable "administrative merits determinations" under the Proposed Rule and Guidance. *See,e.g. EEOC v. West Customer Mgmt.*, 2014 U.S. LEXIS 125126 (N.D. Fla. Sept. 8, 2014) (attorneys' fees awarded *against* the EEOC, after court concluded that the EEOC's evidence "was not sufficient to make out a prima facie case" and the EEOC's continued prosecution of the case "was plainly frivolous for the lack of evidence supporting the claim"); *EEOC v. TriCore Reference Labs*, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012) (an award of attorneys' fees imposed against EEOC in ADA case because court determined "[t]he EEOC continued to litigate the . . . claims after it became clear there were no grounds upon which to proceed" and the EEOC's pursuit of the claims were "frivolous, unreasonable, and without foundation"); *see also* U.S. Senate Committee on Health, Education, Labor and Pensions, *EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency*, (Nov. 24, 2014) (identifying instances of EEOC litigation abuse) at http://www.help.senate.gov/imo/media/doc/FINAL%20EEOC%20Report%20with%20Appendix.pdf.

52 737 F.3d 344 (5th Cir. 2013).

53 361 NLRB No. 72, slip op. at 2 (Oct. 28, 2014).

decision, while other employers that use class action waivers would continue to receive NLRB complaints, be required to certify as labor law violators, and be subject to potential debarment.

B. Responsible Contractors May Be Required to Report as Labor Law Violators, and Be Disqualified from Contracting, For Excessive Periods

Requiring employers to certify as labor law violators based on alleged but unproven violations of law is particularly improper because employers must fully exhaust agency administrative processes before obtaining judicial review, which can take years or even decades. Pursuant to the Proposed Rule, an employer could be required to certify as a labor law violator for a period of three years after receiving an agency's initial determination, an interim agency decision, and an agency board decision, all before obtaining a court decision that might vindicate the employer of any wrongdoing. As a result, an accused but innocent employer could be disqualified or otherwise disadvantaged from federal contracting for an extended period based on meritless allegations while it exercises its right to appeal the unjust ruling.

The NLRB case *Erie Brush & Mfg.* is illustrative.[54] There, the NLRB issued an unfair labor practice complaint in 2006 alleging that the employer unlawfully refused to bargain by declaring impasse in negotiations prematurely.[55] An NLRB administrative law judge ("ALJ") issued a decision finding a violation in 2007 and the NLRB, in a divided decision, affirmed the ALJ's decision in 2011.[56] The employer appealed, and the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") reversed the NLRB's decision in 2012, finding that the employer had not violated the law.[57] Pursuant to the Proposed Rules and Guidance, the employer in *Erie Brush* would have been required to self-report as a labor law violator from 2006 through 2012 – putting its ability to win or retain government contracts at risk for almost six years – even though it committed no violation.

The timeline in *Erie Brush* is not remotely unique. Indeed, history is replete with cases in which the NLRB, EEOC, and OSHA have issued initial findings of wrongdoing against employers, only to have those findings overturned more than a decade later. For instance, in *E.I. DuPont de Nemours & Company v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012), the employer made changes to a benefit plan consistent with its past practice and pursuant to the reservation of rights language set forth in the benefit plan itself. The NLRB issued a complaint in March 2005, claiming the employer violated the NLRA by not first bargaining with the employer's union. An NLRB ALJ issued an opinion in December 2005 finding a violation, which was affirmed by the

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54 *Erie Brush Mfg*. 357 NLRB No. 46 (Aug. 8, 2011).
55 *Id.*
56 *Id.*
57 *Erie Brush & Mfg. Co. v. NLRB*, 700 F.3d 17 (D.C. Cir. 2012).

NLRB approximately five years later in August 2010. The D.C. Circuit reversed that decision in June 2012, and remanded the case back to the NLRB where it has remained pending for the last three years. As in *Erie Brush*, the employer in *E.I. DuPont de Nemours* would have been required to self-report as a labor law violator, based on a single violation, for a five-year period, March 2005 through December 2008, and August 2010 through June 2012, even though the violation has been overturned.[58]

C. Innocent Employers May Be Coerced Into Unfavorable Settlements

Applying the definition of "administrative merits determination" contained in the Proposed Rule is also ill-conceived because it will likely result in innocent employers being coerced into settlements. Faced with the potential loss of federal contracts potentially totaling tens of millions of dollars, responsible employers that receive unmeritorious allegations or citations may decide to capitulate and enter into "labor compliance agreements" rather than contest the violations, given the new potential remedy – debarment – imposed under the EO. In other words, upon receiving an OSHA citation, EEOC probable cause determination, NLRB complaint or other "administrative merits determination," even the most principled and innocent employer will likely decide to preserve its eligibility to receive and retain federal contracts, rather than exercise its legal right to appeal such determinations, irrespective of the merits.

To the extent contractors make a considered judgment to not pursue an appeal, simply to stay in the contracting game, this outcome runs the risk of further emboldening regulators to overreach, perhaps with more experimental legal theories, knowing that most contractors will enter into labor compliance agreements rather than risk a non-responsibility determination. Indeed, the Proposed Rule states that the extent to which an employer has remediated a "violation" – which includes entry into a "labor compliance agreement" – "will typically be the most important single factor that can mitigate the existence of a violation." That fact only increases the likelihood that innocent employers will feel the need to settle allegations of wrongdoing that they might otherwise contest. Under such circumstances, neither the agency's "administrative merits determination" nor the contractor's entry into a "labor compliance agreement" will, in reality, bear any relationship to whether the employer is a responsible contractor. In short, while employers that choose to do business with the federal government can

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[58] *See also SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281 (2d Cir. 2013) (innocent employer would have been required to self-report as labor law violator for almost four years under the Proposed Rule based on NLRB unfair labor practice complaint issued May 2009, an ALJ decision issued in June 2009, and an NLRB decision issued in August 2010, when those decisions were ultimately rejected by the Second Circuit Court of Appeals in March 2013).

and should be required to abide by certain obligations as a "price of doing business" with the government, those employers should ***not*** be compelled to sacrifice their legal rights to do so.

Treating initial agency determinations as reportable violations is particularly problematic in the union setting, because doing so may tip the balance of labor relations impermissibly in favor of unions and in violation of federal labor law. It is no secret that unions have engaged in "corporate campaigns" in an attempt to coerce employers to accede to union demands. As part of the corporate campaign strategy, unions often file a barrage of questionable or meritless claims of wrongdoing under several of the statutes identified in EO 13673. Indeed, OSHA complaints and unfair labor practice charges are a stock in trade of many corporate campaigns.[59] Permitting judicially-untested allegations of wrongdoing to serve as "administrative merits determinations," carrying the potential to disqualify employers from federal contracting, will simply provide organized labor with an even greater incentive to file meritless allegations as leverage in any labor dispute with a federal contractor or subcontractor.

D. Contracting Officers and Agency Labor Compliance Advisors Cannot Possibly Assess Potential Violations in an Accurate, Timely, Consistent, and Fair Manner

EO 13673 requires COs and ALCAs to assess reported violations of fourteen complex federal labor laws to make a responsibility determination based on an employer's record of integrity and business ethics.[60] In making their assessments, the COs and ALCAs must take into account whether the reported violations are "serious, repeated, willful, or pervasive" as defined in the Guidance. Further, the Proposed Rule and Guidance require that each reported violation "be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors." The NAM believes that it will be infeasible for COs and ALCAs to perform the function delegated to them under the Proposed Rule in any meaningful, consistent, or even-handed way. Once COs and ALCAs have to consider "equivalent state laws," the task will surely be impossible given that the 20,000 plus unique contractors subject to the proposed rule operate in all 50 states and are therefore covered by countless—and sometimes conflicting—equivalent state laws. For instance, if the FAR Council and DOL determine that each state has even just ten "equivalent

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[59] *See* Jarol B Manheim, Trends in Union Corporate Campaigns (U.S. Chamber of Commerce 2005); U.S. Gov't Accountability Office, GAO/HEH5-00-144, *Worker Protection: OSHA Inspections at Establishments Experiencing Labor Unrest*, at 5 (Aug. 2000) (noting that employers experiencing labor unrest are 6.5 times more likely to be inspected by OSHA than those not experiencing labor unrest); Howard Mavity, *Multiple Embarrassing OSHA Citations: The Next Union Organizing Tactic?* (June 1, 2010).

[60] E.O. § 2(a)(i)(O).

state laws," the ALCAs and COs will be required to consider as many as 200 additional statutory requirements in making responsibility determinations.

1. The EO and Proposed Rule Cover an Extraordinarily Broad Array of Laws that COs and ALCAs Cannot be Expected to Master

As an initial matter, each of the fourteen federal laws identified in EO 13673 is extremely complex and highly nuanced. Taken together, the agencies that administer those fourteen federal laws have issued thousands of pages of substantive administrative regulations pertaining to those laws. The fact that COs and ALCAs must also consider yet-to-be-identified "equivalent state laws" further expands the universe of relevant statutes with which the COs and ALCAs must become familiar. And the relevant statutes are subject to an ever-changing body of judicial interpretation, consisting of thousands upon thousands of decisions. It is wholly unreasonable to assume that any CO or ALCA will have a sufficient understanding of the universe of relevant laws to be able to make the required assessments and to make them consistently. Indeed, it is fair to say that most experienced, full-time labor and employment practitioners cannot claim to have expertise with respect to each of the fourteen identified federal labor and employment laws, much less all of their state law equivalents, regardless of how the state law equivalents are ultimately defined.

The task delegated to COs and ALCAs under EO 13673 and the Proposed Rule is made even more difficult because employers that are required to report violations will likely feel compelled to submit voluminous evidence showing the absence of a violation, their good faith, past remedial measures, and damages-related evidence. Such submissions would almost certainly include all or large portions of a factual record developed in any given matter, including statements of position, affidavits, deposition transcripts, hearing testimony, trial exhibits, and/or legal memoranda. Requiring COs and ALCAs to sift through such materials to assess reported violations and make determinations would be daunting for even the most seasoned labor and employment lawyer. The COs' and ALCAs' responsibility would be even more difficult (and unreliable) in cases where the violations reported are based on initial agency determinations and lack any judicial analysis of the relevant evidence. This monumental task, never before required of COs, simply cannot be undertaken in a consistent, meaningful, or fair way.

2. The Definitions of "Serious, Repeated, Willful and Pervasive" Will Not Assist the COs and ALCAs in Making Reasonable and Accurate Determinations

Although DOL has ostensibly identified criteria to assist COs and ALCAs in determining whether reported "violations" of the labor laws are "serious, repeated, willful or pervasive," the Guidance provided is ill-conceived on many levels.

First, the Guidance states that a violation may be considered "serious" if it affects 25 percent of an employer's workers. That standard is unworkable. The NLRB has issued complaints in recent years challenging as unlawful employer policies regarding employee use of social media and, as noted above, the EEOC has filed lawsuits based on employer background check polies.[61] Social media policies arguably affect each and every employee in the workplace, and background policies typically apply to most or all applicants for employment. According to the Guidance, NLRB complaints or EEOC reasonable cause determinations challenging employer policies of broad application – often testing the outer boundaries of existing law and/or providing a vehicle through which existing laws are applied to new circumstances in the workplace – would be considered "serious."

Second, the Guidance also states that violations may be considered "serious" if fines or penalties of at least $5,000 or back wages of $10,000 are "assessed." The Proposed Rule is ambiguous because it does not define the term "assessed." While the NLRB often seeks economic remedies in the form of back pay, front pay, and interest, those remedies are rarely, if ever, quantified or "assessed" in the NLRB's complaint or at any time prior to the entry of a final order. Similarly, EEOC probable cause determinations typically do not assess damages in any specific dollar amount. At various points, the Guidance indicates that the threshold dollar amounts will be reached if a violation has "resulted" in a fine of $5,000 or $10,000 in back wages, suggesting that an actual judgment must have been entered, but the Guidance is unclear on this point. Regardless of whether the term "assessed" is construed to mean "alleged," "sought," or actually "awarded," virtually every case brought under Title VII, the ADA, or the ADEA, and almost every NLRB case seeking back pay, would trigger a finding of a "serious" violation, given the exceedingly low thresholds identified.

Third, the Guidance also states that any reported "violation involving an adverse action or unlawful harassment for exercising any right protected by law is a serious violation." That sweeping definition will ensnare nearly every NLRB unfair labor practice complaint issued against an employer involving any "adverse action." Virtually all NLRB complaints issued against an employer include the allegation that the employer has violated Section 8(a)(1) of the Act, which provides that it is unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the [NLRA]." Since Section 8(a)(1) allegations are included in essentially every complaint issued by the NLRB, it would be

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[61] *See, e.g., Durham School Servs., L.P.*, 360 NLRB No. 85 (Apr. 25, 2014); *Bettie Page Clothing*, 361 NLRB No. 79 (Oct. 31, 2014).

absurd to treat every NLRB violation involving alleged violations of Section 8(a)(1) of the NLRA as being "serious."

Fourth, the Guidance with regard to "willful" violations is equally unhelpful and is, in fact, counterproductive. For example, the Guidance states that an employer will be considered to have engaged in a "willful" violation if the employer maintains an employee handbook stating that the employer provides unpaid leave to employees with serious health conditions as required by the FMLA, but then is alleged to have failed to provide such FMLA leave. The Proposed Rule, if enforced, would effectively penalize those employers that maintain policies advising employees of their legal rights by increasing the gravity of any associated violation or alleged violation.

Fifth, the Guidance with respect to "pervasive" violations is similarly flawed. As part of determining whether a violation is "pervasive," the Guidance requires CO's and ALCAs to assess whether an employer has violated the relevant laws with the explicit or implicit approval of "higher-level management." The Guidance fails to define what constitutes "higher-level management" and provides no workable Guidance to the COs or ALCAs as to what constitutes implicit approval.

Sixth, the Guidance provided to COs and ALCAs regarding "repeated violations" is incomplete and overly simplistic. EO 13673 requires the CO and ALCA to consider whether an employer required to report a violation has had "one or more additional violations of the same or substantially similar requirement in the past three years."[62] In describing a "substantially similar" violation under the NLRA, the Guidance states that two violations of the same provision, *e.g.*, two violations of Section 8(a)(5), requiring union recognition and good faith bargaining, should be treated as similar violations, while violations of different provisions (*e.g.*, Section 8(a)(2) and Section 8(a)(3)), should not be considered substantially similar violations. This analysis fails to appreciate that not all violations of the same statutory provisions are similar in degree of seriousness or culpability.

For instance, there are a variety of potential Section 8(a)(5) violations varying widely in terms of seriousness and impact on employees. One may violate Section 8(a)(5) by changing employees' terms and conditions of employment unilaterally without bargaining, by failing to respond adequately to union information requests, or by failing to negotiate in good faith with the employees' union. Not all Section 8(a)(5) violations are of equal gravity, however. Indeed, employers may knowingly commit a technical refusal to bargain in violation of Section 8(a)(5) simply because that is the only way they are able to appeal NLRB rulings in representation cases. NLRB decisions in representation cases are not final, appealable orders, so if a union wins an

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[62] E.O. § 4(b)(i)(B)(2).

election, to contest an NLRB election ruling, an employer must first refuse to bargain with the union that wins the election, committing an unfair labor practice in violation of Section 8(a)(5). The NLRB then issues a complaint, which allows the employer to raise its objections to the election as a defense to the unfair labor practice complaint. The NLRB will almost always reject the employer's defense, permitting the employer to litigate its election objections in the context of the unfair labor practice case before a circuit court of appeals.[63] Unfair labor practice complaints issued in "test of certification" cases should not be treated as a violation of law at all, much less a serious, willful or repeated violation, as they bear no relationship whatsoever to whether an employer is or would be a responsible federal contractor. Simply put, in those cases, employers are required by the law to violate provisions of the NLRA in order to exercise their rights under the Act.

While experienced practitioners may be expected to understand the subtle and not so subtle differences between various types of labor law violations, it is wholly unreasonable to expect COs and ALCAs to appreciate such differences or make proper and consistent determinations as to whether violations are serious, willful, repeated, or pervasive as required by the Proposed Rule.

The fact that CO's and ALCA's will be expected to make such assessments with regard to "equivalent state laws" further exacerbates the problem and virtually guarantees inconsistent determinations. For example, just one government contractor might have operations in a dozen states which could very well subject the contractor to over a hundred equivalent state laws. It will be near impossible for the CO and ALCA to understand the subtle differences and nuanced terminology across states. Many state discrimination laws provide protections that are similar to, but broader than, those set forth in Title VII or sister jurisdictions. The District of Columbia prohibits discrimination based on appearance and political affiliation, two characteristics that are not embodied in Title VII.[64] Similarly, California law prohibits discrimination based on sexual orientation and gender identity, while New York law prohibits discrimination based on sexual orientation but not gender identity.[65] Title VII currently prohibits discrimination based on gender identity but not sexual orientation. Accordingly, COs and ALCAs may be confronted with violations of state law based on conduct that would not violate federal law or the laws of several other states. Moreover, California's Occupational Safety and Health State Plan is more stringent than the federal OSHA requirements. For instance, the California plan requires employers to comply with requirements on ergonomics. It is difficult to discern how a violation of one state's law could provide any meaningful measure of whether an employer is responsible if the conduct at issue is perfectly lawful under federal law.

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63 *See Aloft Chicago O-Hare,* 355 NLRB No. 117 (Aug. 24, 2010).

64 D. C. Human Rights Act, D.C. Code, § 2-1401.11 (a) (2000).

65 *See* Cal. Gov't Code §12940 (West, 2014); N.Y. Exec. Law §296 (McKinnon 2010).

E. The Paycheck Transparency Provisions of the Proposed Rule Are Burdensome and Unnecessary.

The requirement under the Proposed Rule and Guidance that federal contractors provide all workers with a detailed written pay stub showing hours worked, overtime hours, pay rate and any payroll deductions on weekly basis is unnecessary and burdensome. As an initial matter, many responsible contractors use a bi-weekly payroll system that provides the required information in an easily-understandable form. There is no justification for requiring such contractors to make costly adjustments to their payroll processing systems to provide an overtime breakdown on a weekly basis. Specifically, neither FAR Council nor the DOL cites to any evidence to suggest that employees who currently receive payroll information on a bi-weekly basis are being deceived or deprived of any of their substantive rights.

While EO 13673 states that contractors shall be deemed to have fulfilled the written pay stub requirement if they are complying with "substantially similar" state or local wage payment laws, the DOL has not identified which laws it considers "substantially similar." While the NAM does not believe that any "Paycheck Transparency" requirements are necessary, no paycheck requirements should be put into effect until the DOL has specifically identified the so-called "substantially equivalent" state and local laws and provided an opportunity for public comment with respect to the laws identified.

Additionally, contractors often use temporary or contingent labor provided through staffing agencies. In such cases, the temporary workers are neither independent contractors nor employees of the contractor. Ordinarily, the contract between the contractor and staffing agency specifies the employment status of the temporary worker, and the staffing agency rather than the contractor is responsible for payroll. The NAM believes it would be duplicative and unduly burdensome to require contractors to provide individual temporary workers of notice of their status and/or to require contractors to provide temporary workers with written pay stubs in addition to those provided by the staffing agency employer.

Finally, the Proposed Rules and Guidance require that contractors provide each worker with notice of their independent contractor status after the effective date of EO 13673 and again before the worker performs work on a covered contract, even if the services the worker provides have not changed. This requirement is burdensome and unnecessary. Simply stated, there is no logical reason why a contractor must repeatedly inform a worker of his or her independent contractor status when there has been no change in either the nature of the parties' contractual relationship or the nature of the work being performed by the independent contractor.

IV. The Proposed Rule and Guidance Contain Flawed Regulatory Analyses

In addition to the substantive flaws described above, the Administration's economic analysis and consideration of regulatory alternatives fall woefully short of the obligations imposed by EO 12866, the Paperwork Reduction Act, and the Regulatory Flexibility Act to produce regulatory analyses that are comprehensive, transparent, and thorough. Due to the defects described below, the Proposed Rule should be abandoned or sent back to the FAR Council for further, more rigorous analysis.

A. RIA Based on Erroneous Projections

Accompanying the Proposed Rule is a Regulatory Impact Analysis ("RIA") that is required under EO 12866 (and, by adoption, EO 13563). EO 12866 directs federal agencies to assess the economic effects of their proposed significant regulatory actions, including consideration of reasonable alternatives.

Here, the RIA's assessment of the Proposed Rule's economic effects is deficient because of a flawed methodology for projecting the number of contractors who will be required to check "yes" when asked if they have had any labor violations in the past three years based upon the Proposed Rule and Guidance as currently drafted. In order to estimate the percentage of government contractors with violations subject to disclosure, the RIA extrapolates from the percentage of all businesses (according to 2011 census data) with violations subject to disclosure. Such an approach is inherently misleading because the RIA is considering a universe—all employer firms—that is not representative of the characteristics of the typical government contractor. Namely, government contractors tend to have more employees than the vast majority of employer firms in the census data, and therefore government contractors are more likely to have minor violations that will need to be reported under the Proposed Rule and Guidance.

The impact of this flawed methodology on the FAR Council's projections is apparent by looking at NLRB violations as an example. According to the 2011 Census, there were 5,682,424 employer firms in the country. Of those firms, (62 percent) employed four or fewer employees. Given that employer firms with four or fewer employees are not generally unionized, it is not surprising that only 3,735 employer firms have NLRB violations. Using the large denominator (5,682,424), the RIA calculates that only .07 percent of employer firms nationwide have violations that would trigger disclosure. But it certainly does not follow that only .07 percent of government contractors would have to disclose: (1) a complaint filed by an NLRB regional director, or (2) a finding from the NLRB that a contractor violated the law.[66] Indeed, a survey of

[66] Federal Acquisition Regulation (FAR) Case 2014-025, Fair Pay and Safe Workplaces Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563, at 9.

the NLRB's docket from the past three years reveals that NLRB regional directors have filed complaints against 18 of the country's 100 largest contractors (18 percent).[67] The percentage is far higher among the ten largest contractors—five of which have had complaints filed against them in the past three years (50 percent). And this significant underestimation is just one of the 14 laws covered by EO 13673.

Similarly, the RIA projection falls far short when estimating the number of contractors who will have to disclose OSHA citations. According to the RIA's estimate, only 2.55 percent of contractors will have citations. But OSHA's database reveals that fourteen of the twenty-five largest government contractors have had OSHA citations within the past three years, and 27 of the top 100 have received citations.[68]

The RIA's flawed methodology skews the numbers for the top 100 contractors but also for small businesses that sell to the government. According to the census data, 98.3 percent of employer firms have 99 or fewer employees. In contrast, many government contractors qualify as "small" according to the SBA's industry-based definition if they have 500 or fewer employees. In other words, even "small" government contracts dwarf the size of the employer firms that the FAR Council used to make its calculation. Not surprisingly, small business contractors that are 100 times larger than most employer firms in the census are statistically more likely to have minor labor violations.

The RIA estimates that contracting officers will initiate 40,126 responsibility determinations in a given year. However, the RIA projects that only 1,625 offerors will undergo responsibility determinations after affirmatively disclosing violations—a figure based on the FAR Council's estimate that only 4.05% of contractors will have violations to disclose. By relying on such a wild underestimate, the FAR Council has masked a significant cost of the Proposed Rule.

As described above, over 30% of the top 100 contractors—as measured by obligated contract dollars—will have to report OSHA and NLRB violations under the Proposed Rule. Data about the other labor laws are not publicly accessible, but one can only assume that the RIA underestimates these projections as well. As such, it is likely that 30-50 percent of the country's top contractors would have reportable violations under the Proposed Rule. Assuming that the average government contractor has fewer employees than contractors in the top 100, it makes sense to use the lower bound of the range to extrapolate across all contractors. Thus, if 30% of all contractors have to check the box "yes," then, in any given year, over 12,000 offerors will undergo responsibility determinations after disclosing violations. As such, the actual cost of the

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[67] Data obtained from NLRB's "Cases & Decisions," https://www.nlrb.gov/cases-decisions (last visited July 2, 2015).

[68] According to FY 2014 data from the Federal Procurement Data System, https://www.fpds.gov/fpdsng_cms/index.php/en/ (last visited July 2, 2015).

Proposed Rule to industry and the government will increase exponentially due to: (1) the number of contractors who will feel compelled to assemble materials about remedial measures and mitigating factors as part of the responsibility determination; and (2) the burden on COs who are required by law to consider the mitigating circumstances. In sum, the RIA has dramatically underestimated the number of contractors who will be required to check the box "yes" and who will spend time and money providing information as part of the responsibility determination.

Not only does the FAR Council's faulty estimate undermine the analysis of the RIA, but it also taints the analysis of the Paper Work Reduction Act and Regulatory Flexibility analysis, discussed below, which rely on the disclosure rate as a defective input in their analysis.

B. RIA Fails to Consider Reasonable Feasible Alternatives

As part of the required analysis under EO 12866, the FAR Council's RIA is supposed to consider feasible regulatory alternatives. This analysis must include an assessment of the costs and benefits of any reasonable feasible alternatives and an explanation as to why the proposed action is preferable to the potential alternatives. Here, the Proposed Rule fails to adequately consider several reasonable alternatives.

1. Failure to Consider Existing Process for Responsibility Determinations

If there is truly a problem with the procurement system that needs to be fixed (a proposition that the Administration has failed to demonstrate), the FAR Council must first consider making improvements to the existing system. Rather than creating a vast new bureaucracy with ALCAs and labor compliance agreements, and forcing over-worked COs to perform a contract-by-contract analysis, the FAR Council should revisit the mechanisms already in place to help COs make responsibility determinations.

It is worth noting that COs already have the authority to consider labor violation information reported by DOL when making a responsibility determination about a contractor's record of integrity and business ethics. FAR 9.105 states that when making the responsibility determination, the CO can consider "other sources such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations."[69] In other words, nothing currently prevents a CO from going to the OSHA website to determine if an offeror has had serious violations in the past three years.

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[69] FAR 9.105-1(c)(5) (emphasis added).

According to the FAR Council's own estimate, the requirements of the Proposed Rule will cost the government about $7.6M per year.[70] As explained above, the likely cost is far higher. Even assuming that the number is accurate, those federal dollars would be far better spent investing in improvements to the existing system rather than adding on a burdensome new layer. For instance, rather than creating the new ALCA positions (at a cost of $4,692,245 per year), a fraction of these funds could be used to provide robust training to COs on the scope of their authority when making responsibility determinations. Such a reasonable alternative would almost certainly be less burdensome for contractors and far less expensive for the government.

Moreover, FAR 9.4 already gives COs the ability to take action against a contractor who demonstrates a serious lack of business integrity by referring the contractor for a responsibility determination review by an agency's suspension and debarment official. Nonetheless, the FAR Council fails to point out any deficiencies with the suspension and debarment system that makes the Proposed Rule necessary. This failure to consider the existing system as an alternative to the Proposed Rule is even more striking considering the Council's reasoning in 2001 when it rescinded a similar rule—the "blacklisting" rule.[71] As a stated ground for rescinding the rule, the FAR Council concluded:

> [T]he current regulations governing suspension and debarment provide adequate protection to address serious waste, fraud, abuse, poor performance, and noncompliance. Any one of these concerns may authorize suspension or debarment under appropriate conditions and circumstances, subject to judicial review.[72]

The Council's decision to propose a new rule might be justifiable if there was evidence that the suspension and debarment system was no longer a valid tool to protect the government from non-responsible contractors. But in the fourteen years since the blacklisting rule was rescinded, the use of the suspension and debarment system has grown exponentially.[73] With the existence of such a robust suspension and debarment system, there is simply no need to create a new layer of bureaucracy.

2. Failure to Consider Measures to Improve Information-Sharing

The Proposed Rule also fails to adequately consider how the objectives of "Fair Pay and Safe Workplaces" could be achieved by improving information-sharing between DOL, COs, and

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70 Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548, 30,558 (May 28, 2015).

71 Contractor Responsibility—Revocation, 66 Fed. Reg. 66,986 (Dec. 27, 2001).

72 *Id*. at 66,988.

73 Interagency Suspension and Debarment Committee's Annual Report to Congress (Mar 31, 2015), https://isdc.sites.usa.gov/files/2015/04/873report2014.pdf (last visited July 2, 2015).

Suspension and Debarment Officials. Under the present system, DOL already reviews federal contractors' compliance with federal labor laws through the Wage and Hour Division, the Occupational Safety and Health Administration, and the Office of Federal Contract Compliance Programs. DOL collects data from these enforcement agencies and makes much of it publicly available through its Online Enforcement Database ("OED"). Rather than requiring contractors to collect and report data that the government already has in its possession, the government could improve its own information-sharing channels so that COs can have the information they need at their finger-tips when making responsibility determinations.[74]

The FAR Council's failure to consider improvements to information-sharing is puzzling in light of the recommendations of the Harkin Report on which the Proposed Rule purportedly relies.[75] The Proposed Rule cites the report for the proposition that contract awards have been made to contractors with safety and wage-and-hour violations. However, the Proposed Rule ignores 4 of the 7 recommendations contained in that report which address measures to improve information-sharing.

- Recommendation #1: The Department of Labor should take steps to improve the quality and transparency of information on workplace safety violations.

- Recommendation #2: The Department of Labor should annually publish a list of contractors that violate federal labor law.

- Recommendation #3: The Government Services Administration should improve contracting databases by increasing public transparency and expanding the amount of information included in the databases.

- Recommendation #4: The President should issue an Executive Order to allow the Department of Labor to input additional information into FAPIIS concerning contractor compliance with labor law.[76]

Notably, these recommendations do not call for contractors to supply this information. Rather, the recommendations call for the government to become more transparent about the data it has already collected. The recommendations suggest that already-collected information be

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[74] Of course, such a database would not have information about arbitral awards and civil judgments, but first the Administration should see if the information from the enforcement agencies would be sufficient for satisfying the goals of the rule before expanding the scope of the data collection.

[75] Majority Staff of Senate Committee on Health, Education, Labor and Pensions, Acting Responsibly? *Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk* (2013).

[76] *Id*. at 30-32.

included in the Federal Awardee Performance Integrity & Information System ("FAPIIS") so that a CO could access the data about labor violations when making a responsibility determination.

The Proposed Rule, however, gives short shrift to all of these recommendations. The Proposed Rule acknowledges that in an "ideal scenario," an agency would have access to a government database with information about a contractor's labor violations.[77] However, the Proposed Rule dismisses this as "cost-prohibitive" without any discussion of how much this would cost and how the costs compare to the Proposed Rule. Accordingly, the RIA should analyze how much the government would save if the ALCA position was eliminated and these funds were channeled towards information-sharing improvements so that COs could consider information that the government already has in its possession.

C. Flawed Paperwork Reduction Act Analysis

The primary purpose of the Paperwork Reduction Act ("PRA")[78] is to minimize the paperwork and recordkeeping burden that the government imposes on private businesses and citizens. In order to meet the PRA's requirements, the FAR Council must measure the recordkeeping "burden" in terms of the "time, effort, or financial resources" the public will need to expend in order to comply with the requirements of Fair Pay and Safe Workplaces. This includes:

- reviewing instructions;
- using technology to collect, process, and disclose information;
- adjusting existing practices to comply with requirements;
- searching data sources;
- completing and reviewing the response; and
- transmitting or disclosing information.

Here, the FAR Council's PRA analysis is deficient because it fails to encompass several of the burdens associated with the Proposed Rule and Guidance. *First*, the PRA analysis estimates that it will only take contractors 6.26 hours to gather the information needed to make the initial certification. This estimate ignores the fact that any contractor who has to make a representation will be required to conduct thorough diligence to mitigate the risk of reporting false information and violating the False Statement Act or False Claims Act.

Second, the PRA fails to calculate the costs to contractors to create data collection systems. The largest federal contractors have operations spread across the country, and there is

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77 Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548, 30,562 (May 28, 2015).
78 44 U.S.C. §§ 3501–3521.

currently no requirement for contractors to collect and aggregate information on violations of the enumerated labor laws. Accordingly, most contractors will need to create new data collection systems and hire and train employees to ensure that the company is complying with the new requirements across all geographic locations. Putting such systems and procedures in place could cost each larger contractor millions of dollars.

Third, the RIA estimates that the "cost of providing additional information" will only be $168,350 per year. This estimate is based on a projection that only 1,625 contractors will have to check "yes" and provide additional information once the CO initiates the responsibility determination. As explained above, the 1,625 figure was calculated using the 4.05% disclosure rate based on the projections of the relevant enforcement agencies. Not only will there be more contractors checking "yes," but these contractors will spend far more time than the 2.8 hours estimated by the RIA. With so many contract dollars on the line, outside counsel will undoubtedly advise their clients to submit lengthy statements contextualizing violations and explaining the remedial measures that have been put in place.

Fourth, if contractors do not have systems in place to collect this aggregated information about their own labor law violations, they most certainly do not collect the same data from their subcontractors. As such, contractors will need to create systems capable of handling large volumes of information from subcontractors who will have the same incentives as prime contractors to contextualize reportable violations. As noted above, a large prime might enter into hundreds of subcontracts, and even if only a small percentage of the subcontractors have reportable violations, the prime will be forced to collect, review, and retain information about the allegations, the proceedings, the judgment, remedial measures, and mitigating factors. Moreover, contractors will need to review and analyze the updated information that is submitted by subcontractors during contract performance to determine if additional action is required. Amazingly, the FAR Council estimates that the total annual cost will be only $129,548. This is not the cost per contractor but rather the RIA's estimate of what it will cost all higher-tier contractors that need to review updated information from subcontractors.[79]

Fifth, the RIA underestimates the continuing cost of complying with the Proposed Rule and Guidance by assuming that contractors will only need <u>one employee</u> to review the Proposed Rule and Guidance in the first year. Based on conversations with our members, the NAM believes that the Proposed Rule and Guidance will affect multiple departments within each organization such as human resources, contract management, compliance, legal, and supply chain management. As such, cross-functional teams will need to review and understand the Proposed Rule and Guidance. Moreover, the RIA ignores the fact that contractors will need to continually review the requirements and train their employees to ensure compliance in subsequent years after the Proposed Rule and Guidance are implemented. The RIA allocates no

[79] Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548, 30,563 (May 28, 2015).

costs for future year training and maintenance of systems that responsible contractors will expend to ensure continuing compliance. Clearly, the projection woefully underestimates the true cost of operationalizing the Proposed Rule.

D. Flawed Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act ("RFA")[80] requires that federal agencies analyze the impact of their regulatory actions on small entities, and if there is going to be a significant impact on a "substantial number" of these small entities, the agency must seek less burdensome alternatives. As a procedural matter, the RFA sets out precise specific steps an agency must take when conducting an Initial Regulatory Flexibility Analysis ("IRFA"). Namely, an agency must address the following considerations:

- a description of the reasons why action by the agency is being considered;
- a succinct statement of the objectives of, and legal basis for, the Proposed Rule;
- a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- a description of the projected reporting, recordkeeping and other compliance requirements of the Proposed Rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and
- a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.[81]

As detailed below, the FAR Council's IRFA failed to adequately consider several of the elements identified by the RFA. As a result, the Council ignored the impact that the Fair Pay and Safe Workplaces requirements will have on businesses across the country.

1. The FAR Council Failed to Articulate Any Rational Reason for "Why Action by the Agency

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80 5 U.S.C. § 605(b).

81 5 U.S.C. §§ 603(b)(1)-(5), 603(c).

Is Being Considered" and Ignored Less Costly "Significant Alternatives"

The FAR Council fails to articulate any rational basis in the IRFA for its decision to promulgate the Proposed Rule. Instead, the FAR Council regurgitates the substance of EO 13673 and summarily claims that the proposed changes will reinforce protections for workers and ensure that the Government contracts with companies with a satisfactory record of business ethics. Nothing in the IRFA provides a basis to support this claim.

Relatedly, the Council ignored its obligations under the RFA to identify less costly alternatives. As explained above, there are significant alternatives to the Proposed Rule which accomplish the stated objectives of Fair Pay and Safe Workplaces while minimizing any significant economic impact on small entities.[82] The Council's failure to seriously consider available alternatives is almost certainly attributable to the fact that the there is simply no need for the Proposed Rule in the first place. Had the FAR Council considered less costly alternatives, the Council would have concluded that federal dollars would have been better spent improving existing processes rather than requiring data collection and self-reporting which will only increase costs for small businesses.

2. The FAR Council Failed to Address Whether the Proposed Regulations "Overlap or Conflict" with Other Federal Laws

In its IRFA, the FAR Council fails to address whether the Proposed Rule overlaps or conflicts with other federal laws. Indeed, the Council ignores the fact that the Proposed Rule directly overlaps with the FAR's existing suspension and debarment procedures. For example, the Proposed Rule identifies causes for a non-responsibility determination that overlap with the existing causes for debarment.[83] Moreover, each of fourteen labor laws already includes its own complex enforcement mechanisms and remedial schemes—and only some of those allow for the denial of federal contracts as a result of a violation. In fact, in some areas, Congress has explicitly rejected the denial of federal contracts as a remedy, and none of these areas of overlap are identified or addressed in the IRFA.

3. The FAR Council Failed to Consider the "Compliance Requirements" on Small Entities

Rather than analyzing the compliance requirements of the Proposed Rule, the Council's IRFA simply repeats the certification requirements of EO 13673 without analysis of the

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82 5 U.S.C. § 603(c).

83 Despite the similarity, the proposed rule lacks the procedural protections embodied in the existing suspension and debarment procedures.

recordkeeping or ongoing compliance requirements that will be imposed on small businesses. In particular, the FAR Council failed to consider the fact that most small businesses are not equipped to monitor the labor violations of their subcontractors, especially when their subcontractors are large corporations. In fact, most small businesses do not maintain systems that would allow them to examine their own labor violations over a period of three-years' time, let alone the violations of a multi-national corporation they may or may not do business with in the future. Unfortunately, the FAR Council apparently made little effort to consider the impact of these compliance requirements on small businesses.

E. Costs of Proposed Rule Clearly Exceed the Benefits

Not only does the FAR Council fail to meet the requirements of EO 12866 and the PRA, which are implemented by the Office of Information Regulatory Affairs, the FAR Council also falls short of its own standards for promulgating rules. FAR 1.102-2(b) directs that amendments to the FAR should be promulgated only when "the benefits clearly outweigh the costs of development, implementation, administration and enforcement." Here, the FAR Council is attempting to do the opposite. The average costs imposed on all contractors—at least $106,571,022 by the government's own analysis, which, as we have demonstrated, is grossly inaccurate—are disproportionate to any benefit the Administration may obtain by targeting a small number of firms.

The Administration concedes that the Proposed Rule is aimed at "the most egregious violations"[84] caused by a few bad actors:

> Although most federal contractors comply with applicable laws and provide quality goods and services to the government and taxpayers, a small number of federal contractors have been responsible for a significant number of labor law violations in the last decade.[85]

If the problem the FAR Council is trying to solve stems from the actions of a small percentage of contractors,[86] then the Administration fails to demonstrate why the burdensome system envisioned by the rule should be applied to 24,000 contractors—the "vast majority" of

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[84] Fact Sheet: Fair Pay and Safe Workplaces Executive Order Jul 31, 2014, http://www.dol.gov/asp/fairpay/FPSWFactSheet.pdf (last visited July 2, 2015).

[85] Guidance for Executive Order 13673 "Fair Pay and Safe Workplaces," 80 Fed. Reg. 30574, 30574-75 (May 28, 2015). (emphasis added).

[86] The Harkin report states that there are 49 contractors with significant labor violations. In other words, of the 24,000 contractors who would be impacted by this regulation only 0.002% have significant violations. This hardly suggests that the procurement system is replete with labor law violators. *See*, Majority Staff of Senate Committee on Health, Education, Labor and Pensions, Acting Responsibly? *Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk* (2013).

which "play by the rules." Without question, the goal of increasing workplace safety is worthwhile, but the FAR Council fails to show how the benefits from this rule (if any) will outweigh the enormous compliance and reporting costs imposed on all contractors.

V. Recommendations

For all the reasons stated above, the FAR Council and DOL should withdraw the Proposed Rule and Guidance. As written, the rule is unlawful, unfair, and unworkable and should not be implemented. If, however, the Administration insists on implementing the rule, it should consider the following changes:

1. Only final adjudications should be reportable. The proposed definition of "administrative merits determinations" should be changed to include only final determinations after an opportunity for hearing and after all appeals are exhausted, rather than mere allegations leveled by federal agencies.

2. Refrain from future rulemaking re: "equivalent state law." The Administration's decision not to define "equivalent state law" as part of this rulemaking is a clear acknowledgement of just how unworkable such a rule would be. The Administration should abandon this requirement entirely and refrain from future rulemaking or pursuing sub-regulatory activity such as issuing guidance documents, policy statements, or advisory notices on the subject.

3. The COTS exemption should extend to prime contracts. Applying the requirements to primes selling COTS items to the government runs the risk of driving commercial companies out of the federal marketplace. For good reason, the Administration exempted COTS subcontracts from the requirements of "Fair Pay and Safe Workplaces." The FAR Council should extend this exception to contracts at all levels.

4. Subcontractors should report directly to DOL. The NAM supports the Administration's decision to stagger the effective dates for the application of the rule and Guidance to subcontractors. We do not think subcontractors should be required to report violations, but if the FAR Council insists on implementing this requirement, then the reporting chain should be to DOL rather than a higher-tier contractor.

5. Raise the dollar threshold. As noted above, the current dollar threshold of $500,000 is far too low and means that the requirements of "Fair Pay and Safe Workplaces" will affect a significant portion of the contracting community. Pursuant to the Regulatory Flexibility Act, the FAR Council must consider the impact of Fair Pay and Safe Workplaces on small businesses and consider less burdensome alternatives. If

the FAR Council were to raise the threshold to somewhere between $1-5 million, the requirements would have less of an impact on small businesses.

6. Clarify Scope of Reporting. Currently, the Proposed Rule is unclear as to whether the contracting entity, when part of a larger corporate enterprise, must report violations for the contracting entity alone or for the entire enterprise. Given that many contracting entities are owned by much larger parent companies, with separate data collection systems, the requirements of the proposed rule should be limited to the bidding entity.

7. Clarify Reporting Timeline. At present, the Proposed Rule is not clear as to when the semi-annual reporting is expected to occur. Rather than requiring that the reporting occur based on the date of contract award, the reporting should be consistent across all contracts—*e.g.*, all reporting to occur April 1 and October 1. Such an approach will ease the administrative burden on contractors, many of whom will have to report information across hundreds of contracts, and might otherwise be required to report information almost every day of the year.

VI. Conclusion

For the aforementioned reasons, we respectfully urge the FAR Council to withdraw both the Proposed Rule and Guidance. We appreciate the opportunity to submit these comments. If we can be of further assistance on this matter, please do not hesitate to contact us. The DOL announced in its Guidance that it will define "equivalent state laws" as part of a future rulemaking. Without this critical definition, the Proposed Rule and Guidance are incomplete and prevent companies from fully understanding the scope of the new requirements. For this reason, the FAR Council and DOL should postpone the issuance of the final rule and guidance until the DOL has identified the "equivalent state laws" that will be covered under the requirements of EO 13673.

Sincerely,

Joe Trauger
Vice President, Human Resources Policy
National Association of Manufacturers