STATEMENT OF DEBBIE NORRIS

VICE PRESIDENT, HUMAN RESOURCES

MERRICK & COMPANY

DENVER, COLORADO

ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

PRESENTED TO THE

HOUSE SMALL BUSINESS COMMITTEE HEARING

THE BLACKLIST: ARE SMALL BUSINESSES GUILTY UNTIL PROVEN INNOCENT?

TUESDAY, SEPTEMBER 29, 2015

Good afternoon, I am Debbie Norris, Vice President of Human Resources at Merrick & Company, a federal contractor headquartered in Greenwood Village, Colorado, just outside Denver. I am pleased to be here today on behalf of the Society for Human Resource Management, or SHRM, to discuss my significant concerns with the proposed rule issued by the Federal Acquisition Regulatory (FAR) Council and guidance issued by the Department of Labor (DOL) to implement the Executive Order on Fair Pay and Safe Workplaces.

SHRM and our members have also sent comments to the FAR Council and to the DOL in response to the proposed rule and guidance. SHRM's comments were submitted in conjunction with our affiliate, the Council for Global Immigration (CFGI) and the College and University Professional Association for HR (CUPA-HR).

Founded in 1948, SHRM is the world's largest HR membership organization devoted to human resource management. SHRM has more than 575 affiliated chapters within the United States and more than 275,000 members, a significant percentage of whom work in organizations that currently hold contracts with the federal government or seek to enter the federal contracting field.

Merrick & Company is an employee-owned company. We have been in business for over 60 years and have a broad scope of services that we provide to federal and commercial clients. Our primary federal clients are the departments of Defense, Education, Agriculture and Homeland Security; the National Science Foundation; and the U.S. Antarctic Program. In Fiscal Year 2014 we managed 329 federal contracts. Like many in the contracting community, our company serves as both a prime contractor and a subcontractor on various contracts.

Let me first make clear that the President's goal of providing fair pay and a safe workplace is a shared goal—after all, who isn't for that? In fact, as Vice President of Human Resources at Merrick, I work to provide a safe workplace and to help make us an employer of choice—not just because it is the right thing to do but because it provides us a competitive advantage in our industry. We have been recognized as a Best Company to Work for in Colorado on five different occasions. We have also been recognized nationally as a Best Firm to Work For through the ZweigWhite conference. Our internship program has been recognized as a Best Practice in the Denver Metro Area. I mention these awards because, despite the fact that my company invests significant time and resources on compliance and creating a sought-after work environment, we believe the new FAR rules will have a significant and negative impact on our ability to maintain current contracts and compete for new ones.

As a small business working in the federal contracting world, we must track a variety of employee size thresholds just to determine which federal, state, or local laws and regulations apply to us. As noted before, we not only try to be an employer of choice, but we also spend a tremendous amount of time ensuring that we are in compliance with all applicable laws. In addition, we are required to meet the current FAR requirements in all of our contracting activities and are subject to Defense Contract Audit Agency (DCAA) audits and pricing requirements. In order to meet DCAA time-keeping requirements as well as other reporting requirements, Merrick has invested millions of dollars in a new enterprise system to track information and meet all of our federal contracting requirements. The existing standards, in which we have invested significant resources to ensure compliance, already provide the government with ample information about our fitness as a federal contractor.

The proposed regulations and guidance to implement the Executive Order on Fair Pay and Safe Workplaces raise many issues for those of us who work as contractors, especially smaller federal

contractors. In my testimony today, I will address key concerns with the proposals including the role that the newly-created position of Agency Labor Compliance Advisor (ALCA) will play in the contracting process; the expansive and vague definitions used in the proposals; the burden of recordkeeping and ongoing reporting requirements; and the damage to relationships between prime and subcontractors and delay in the contracting process that will result from these proposals.

First, as described in the DOL guidance, the ALCAs will be layered onto the existing relationship between Merrick and our contracting officers in order to provide guidance on "whether contractors' actions rise to the level of a lack of integrity or business ethics" after reviewing reported violations and assessing whether those violations are "serious, repeated, willful, or pervasive. …" The definition of "violation" used by DOL is expansive. In addition, the DOL guidance purports to narrow that expansive definition of violation by excluding violations that are not considered "serious, repeated, willful, or pervasive." The problem with these definitions is that they are vague as applied to specific situations. On top of what is already required by individual statutes, DOL has added these terms and definitions and given a great deal of discretion to the ALCAs to interpret these terms.

For example, under the proposed definition of "repeated," a violation will be deemed a "repeat" violation if the violations are "substantially similar"—meaning they share "essential elements in common" but need not be "exactly the same." Under this definition, would a Title VII claim for sexual harassment be considered a repeat violation if the contractor previously had an Office of Federal Contract Compliance Programs (OFCCP) show cause notice on a sex-based hiring discrimination claim? The definitions provide no clear guidance as to which violations and what number and type of violations could prevent an employer from contracting with the government. Contractors are left not knowing with any certainty what situations will yield a recommendation by the ALCA that a contractor lacks "integrity and business ethics" or a determination of "not responsible" by the contracting officer based on that recommendation.

In addition, ALCAs, by the nature of their duties, will be interpreting labor laws at both the federal and state levels. Assigning federal agency employees the responsibility to not only interpret federal law but also state law is curious—particularly given the complexity of the overlapping and sometimes conflicting state and federal laws. The federal contractors who are required to interact with the ALCAs are greatly exposed when they take advice regarding legal compliance with these laws.

For example, can a contractor rely on the advice that the ALCA provides for compliance and will such reliance constitute a good-faith defense? It is unclear from the proposed regulations whether the enforcement agencies will be bound by and follow the same interpretation that the ALCAs provide. If federal contractors are not able to appeal the determinations of the ALCAs, they are unable to properly present their views to a neutral body. Small businesses, in particular, will be at risk since they are less likely to have in-house legal counsel or access to outside counsel, leaving them completely reliant on the ALCA's determination, possibly to their great detriment. I also believe that adding ALCA review and consultation with contracting officers onto the process will inevitably lead to delay in contracting, an issue I will discuss in more depth later.

I am equally, if not more concerned, about the requirement to report non-final agency actions. The proposal requires reporting of any "administrative merits determination, civil judgment, or arbitral award or decision rendered against [a federal contractor] during the preceding three-year period for violations of any of 14 identified Federal labor laws and executive orders or equivalent State laws," although which state laws are implicated by this proposal is yet undefined.

It is not uncommon for companies to undergo agency investigations and even be issued a notice of a violation that turns out to be unfounded. I am concerned that if non-final agency actions are considered by the ALCA and contracting officer as part of the responsibility determination, companies like mine could lose a contract as a result of cases or investigations that are not yet final or are eventually dismissed. For example, in fiscal year 2014, the Equal Employment Opportunity Commission received 88,778 charges. In that same year, well over half of charges filed were found to have "no reasonable cause" and less than one-half of one percent of those charges matured into lawsuits.

An unfortunate outcome of considering non-final agency actions is that federal contractors will feel pressured to settle a claim, even if they feel they have done nothing wrong. If a contractor has a big contract award coming up, it will fear that even an unfounded and unresolved issue could reflect poorly on it during the decision-making process. In our experience, government investigations and processes typically take a long time to resolve complaints or investigations.

I would like to offer one example. As a federal contractor, Merrick files an annual Equal Employment Opportunity, or EEO-1, report and Affirmative Action Plan. We are audited by the OFCCP whenever it deems necessary but not on any regular schedule. We are currently part of a desk audit that started in September 2014, and we have provided all requested documentation to the agency. After a year, we have still not received a determination from the OFCCP.

The desk audit takes weeks of preparation and, depending on the timing of the audit, we may need to complete a mid-year Affirmative Action Plan that requires us to spend many more hours in addition to hiring a consultant for assistance working on a mid-year affirmative action plan. In the meantime, if the proposed rule were to go into effect as drafted, it is not clear to us whether this is a reportable agency action, although we strongly feel it should not be reportable. We are concerned that unresolved actions will have a negative impact on future federal contracts. For these reasons, SHRM believes that the regulations should only require the reporting of final, non-appealable adjudications.

Other major areas of concern are the recordkeeping and ongoing reporting burdens created by the proposals. Collecting and reporting on information deemed a "labor violation" under 14 different federal laws and an as-yet-untold number of state laws will not be an easy task. This is compounded by the need to oversee the labor law compliance of our subcontractors. Doing so will require federal contractors to create a company-wide, centralized electronic record of federal, and eventually state, violations over the past three years. Federal contractors will also have to require their subcontractors to collect this data, as well. In addition, contractors will have to determine, in consultation with the DOL contracting officers and labor compliance officers, whether a subcontractor is a "responsible source," take remedial action when necessary, and report this information every six months.

Merrick has 18 different offices in eight states and the District of Columbia as well as offices in Mexico and Canada. We run our HR department from our headquarters in Colorado, tracking violations on a corporate-wide basis although other federal contractors do not currently keep this data in a centralized place. Even though Merrick collects the information corporate-wide, the proposal places an additional burden of ensuring that each office is accurately reporting this information to us.

Additional compliance and tracking requirements may cause my company to hire more staff, resulting in costs that will ultimately be passed on to the federal government. Currently whenever the OFCCP requests an audit, for example, it means my employees will work overtime to meet the

demanding 30-day requirement to respond. When staff time is directed to responding to compliance requirements, it takes away from the HR department's focus on the needs of our employees and meeting our business objectives. Federal contractors will likely handle this situation in one of two ways: They will either try to make do with existing staff, which may result in a failure to meet the contracting obligations, or they will hire additional staff, which will end up costing the government more.

The proposed FAR regulations require an employer that has been awarded a contract to submit information on violations every six months during the life of the contract in order to determine whether to permit the contractor to continue performing. The proposed regulations, however, do not say when this six-month reporting requirement begins or whether contractors can update the information to cover the reporting requirements for all of their contracts at the same time.

As a federal contractor, Merrick already reports information to the federal government. Rather than placing additional and duplicative data collecting and reporting requirements on federal contractors, the federal government should seek to use the data it already collects. The additional and duplicative reporting requirements we will force us to find another way to manage compliance reporting. I doubt that we will have the staff in-house to manage this and will instead have to hire additional staff to meet the requirements. While it is unlikely we will have any violations since we have not had any in the past, we still have to track and report against 14 different federal laws plus state laws that have their own set of compliance standards.

We are also concerned about the significant delays that these proposals will cause in the procurement process. Contractors will be required to report violations occurring within the previous three years along with the contract proposal, including reports on the subcontractors within their supply chain. In order to avoid jeopardizing the timeliness of their bid or proposal, prime contractors will have to start very early to collect the information needed from subcontractors. The agencies will also have to factor in time for the ALCA to review and evaluate the reports being provided by all competitors in a particular procurement, determine when to seek mitigating information, assess that information, and work with the contractor, subs, and other enforcement agencies to enter into labor compliance agreements and make recommendations. Given that each contracting agency will have only one ALCA to evaluate all of the disclosures, the process, by design, will take significant time.

When we are trying to negotiate a contract through the contracting officer, it can already take longer than anticipated to get a working contract. In the meantime, we have employees who are idle waiting to work. When these employees are not working on projects, revenue is lost to the organization.

We also believe that the information requested through the proposed rule could damage the relationships between prime contractors and subcontractors. As a company that has been both a prime and a sub on different federal contracts, we understand the burdens these proposals create for both roles. Prime contractors should not be placed in an enforcement or legal interpretation role; that should instead be handled directly between subcontractors and the government. Reporting of a labor violation could be a competitive advantage to the prime contractors and lead to blacklisting of subcontractors. On the other hand, a prime contractor will not want to do business with a subcontractor with any kind of labor violation, no matter how minor, because it could slow down the evaluation and awarding of the potential contract or jeopardize the award of the contract altogether. For these reasons, SHRM believes that the final regulations should create a process for subcontractors

to report their violations directly to the government—hopefully through a process that will not intensify delay.

In conclusion, SHRM believes that the proposals create a vague and unworkable system that will harm the federal contracting process and impose requirements on contractors and subcontractors that are impractical and hugely expensive. For these reasons, we believe the Executive Order should be withdrawn or substantially modified.

Again, I appreciate the opportunity to express my concerns with the proposed rule on behalf of SHRM and our 275,000 members. The burdens presented by the proposals are substantial. I hope that the federal government will make modifications to ensure that businesses, and small businesses in particular, can afford to remain federal contractors.