August 26, 2015

SUBMITTED ELECTRONICALLY

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F Street NW., 2nd Floor
Washington, DC 20405

Tiffany Jones
U.S. Department of Labor
Room S-2312, 200 Constitution Avenue NW.
Washington, DC 20210

Re: FAR Case 2014-025, Comments on the Proposed Federal Acquisition Regulation; Federal Pay and Safe Workplaces (RIN 9000-AM81), and Comments on the Proposed Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" (ZRIN 1290-ZA02)

Dear Ms. Flowers and Ms. Jones:

Littler's Workplace Policy Institute (WPI) submits these comments in response to the above-referenced notice of proposed rulemaking ("proposed rule"), published in the Federal Register on May 28, 2015 by the Federal Acquisition Regulatory (FAR) Council, and in response to the Department of Labor's proposed guidance ("proposed guidance"), which was also published on May 28, 2015 (collectively, "the proposals"). Because the proposals are essentially dependent on one another, WPI submits these consolidated comments in response to both.

Your proposed rulemaking and guidance should be rescinded immediately. The proposals represent an unprecedented Executive overreach that attempt to rewrite 14 federal labor laws and an untold number of "state law equivalents," while saddling thousands of contractors, subcontractors, and federal agents with monitoring responsibilities that will grind the procurement system to a halt. Your "guilty until proven innocent" reporting approach finds no basis in American jurisprudence. The proposals are intended to increase efficiency and cost savings in federal contract work but will have the exact opposite effect. By issuing the proposals before they were complete, important issues were not addressed and the public was not provided the opportunity to contemplate the full costs. There are four primary reasons you should withdraw these proposals:

- Agencies that lack the statutory responsibility to administer the 14 labor laws cannot alter them;

- Due process rights guaranteed by the Constitution are a nullity if an entity can be punished before it has had an opportunity to vindicate itself;

- The time, resources, and infrastructure that the private and public sector must expend will strangle the federal contracting system, yet these costs go unaccounted for in the proposals; and,

- Unknown future additions to the proposed overhaul, regarding, for example, the "state law equivalents" and subcontracting reporting requirements, prevent the public from understanding what the final rule may look like, in blatant violation of the Administrative Procedure Act.

The proposed rule and guidance are intended to implement Executive Order 13673 ("Fair Pay and Safe Workplaces"), by amending 48 C.F.R. parts 1, 4, 9, 17, 22, and 52. Among other things, the proposals: (1) require federal contractors and subcontractors for the first time to disclose any "violations" of 14 federal labor laws occurring in the three years prior to any procurement for government contracts/subcontracts exceeding $500,000, in addition to requiring updated disclosures of labor law violations every six months while performing covered government contracts; (2) require contractors/subcontractors to include among their disclosed violations an unprecedented list of court actions, arbitrations, and "administrative merits determinations" set forth in the proposed guidance, including so-called violations that have not yet been fully adjudicated in the courts; (3) require each contracting agency's contracting officers (COs) for the first time to attempt to determine whether companies' reported violations of the above referenced labor laws render such bidders "non-responsible" based on "lack of integrity and business ethics;" (4) require each contracting agency to designate an agency labor compliance advisor (LCA) to assist COs in determining whether a company's actions rise to the level of a lack of integrity or business ethics; (5) require each contractor/subcontractor who is forced to report violations of labor laws to demonstrate "mitigating" efforts and/or enter into remedial agreements or else be subject to a finding of non-responsibility for contract award, suspension, debarment, contract termination, or nonrenewal, all in a manner inconsistent with due process under the 14 federal labor laws referenced in the proposed rule.

The proposed rule and guidance also require, for the first time, that covered contractors and subcontractors report to their employees detailed information including hours worked, overtime hours, pay, and any additions to or subtractions from pay, as well as notifying individuals whether they are independent contractors. Finally, the proposals seek to prohibit covered entities from requiring their employees to agree to submit to arbitration any Title VII claims in addition to sexual assault and sexual harassment claims, in direct violation of the Federal Arbitration Act.

All of the proposed changes are contrary to existing federal law and violate the U.S. Constitution, for the reasons explained below. They will delay the federal procurement process. Similarly, the costs associated with these proposals will cause contractors to leave the market, thereby lessening competition and choice. Less competition translates into higher prices passed on to taxpayers. The proposals and the Executive Order they implement should be rescinded in their entirety.

Background

WPI facilitates the employer community's engagement in legislative and regulatory developments that affect their workplaces and business strategies, including the labor laws at issue in the proposed rule and guidance. WPI taps the deep subject-matter knowledge of Littler Mendelson, P.C., the country's largest employment and labor law firm devoted exclusively to representing management. Among other activities, WPI regularly delivers live workshops and presentations for employers, provides input on legislation including testimony before Congress, and addresses agency regulations and case decisions including preparing official comments like these.

WPI is filing these comments on behalf of concerned government contractors who believe the new proposals wrongfully punish companies who have merely been accused of labor law violations. Although Congress has carefully crafted the nation's labor laws to compel compliance by employers, it has not authorized agencies to add the hefty sanctions envisioned in the proposed rule and guidance.

As explained in more detail below, the FAR Council's and DOL's proposals will decrease efficiency and cost savings in procurement, and impermissibly encroach on the labor law schemes established by Congress. The sanctions proposed are unprecedented in scope and exceed the President's authority. The proposals deprive the regulated community of due process by punishing them for a host of non-final administrative determinations. The implementation of the proposals is a moving target and contrary to the Administrative Procedure Act: the "phased in" approach to subcontractor obligations and a later proposed rule on "state law equivalents" fail to provide notice on the ultimate sweep of the proposals, if they are finalized. The proposals should be withdrawn to avoid the illegal and costly intrusion into the nation's procurement system.

The Proposals Supplant 14 Labor Laws Created by Congress with a New Enforcement and Sanction Scheme Made from Whole Cloth

The proposed rule and guidance disrupt laws established by Congress, violating the Constitution's separation of powers doctrine. To be sure, the 14 federal labor laws already ensure "fair pay and safe workplaces." In the first sentence of its fact sheet to Executive Order 13673, the White House *admitted* that "the vast majority of federal contractors play by the rules."[1] The FAR Council and DOL have failed to conduct sufficient research to determine, first, that a real problem exists; second, if there is a real problem, the proposals are the proper solution; and third, the benefits of the solution outweigh the collateral costs.[2] To the contrary, the Order and the proposed rule and guidance are demonstrably a solution without a problem.

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[1] The White House, "FACT SHEET: Fair Pay and Safe Workplaces Executive Order" (July 31, 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order (last visited Aug. 7, 2015).

[2] *See* Letter to DOL and FAR Council from Eight Representatives, pages 2-4 (July 15, 2015) (explaining that the proposals primarily rely on reports that lack empirical evidence to support the new reporting regime, and seek to "fix a problem that simply does not exist"). *See also Motor Vehicles Mfr.'s Ass'n v. State Farm Mutual Automobile Ins. Co*., 463 U.S. 29, 43 (1983) (requiring that agencies examine the relevant information and set forth a satisfactory explanation for their actions, including a rational connection between the facts determined and the choice made).

The labor laws are interpreted by agencies and courts in highly complex regulations and case law. Indeed, each law sets forth the damages a violator may owe – some of which specifically permit debarment (after a hearing) and others which permit other damages but exclude sanctions like debarment. The Constitution requires the FAR Council and the DOL to implement the President's Executive Orders in a manner that is consistent with Congressional intent, and to refuse to implement an Executive Order to the extent that it violates the laws written by Congress.[3] Yet the proposed rule and guidance, if finalized, will impermissibly dispense with each law's hearing, adjudication, and appeals protections, contractor-reinstatement processes, and other statutory safeguards.

Furthermore, the new proposals transfer authority from the agencies Congress created to enforce its laws to COs and LCAs, who will be tasked to determine whether reported violations of the 14 cited labor laws are "serious," "willful," "repeated," or "pervasive." Some of these terms have already been defined by Congress in the labor laws, some such as "pervasive" do not appear in any of the statutes, and others are defined in the proposals in ways that are inconsistent with legislative intent. The proposed definitions are vaguely defined, leaving these officials substantial discretion to assess violations.[4] And *none* of the labor laws contemplate "labor compliance agreements," which COs and LCAs may take into account as a mitigating circumstance.[5]

The 14 labor laws discussed in the proposals fall into two categories with regard to disqualification of employers from providing government contracts. Eight laws apply broadly to private employers, regardless of whether they perform government contracts, and these laws contain *no* provisions authorizing disqualification of government contractors who violate their provisions. Six laws are limited in their coverage to government contractors, and within those limits explicitly authorize suspension and/or debarment of contractors who violate their provisions under limited circumstances that include full protection of due process rights and final adjudications. WPI maintains that the proposals violate both categories of laws:

(A) <u>Laws of General Application</u>

The President may not issue regulations that conflict with laws duly enacted by Congress.[6] In each of the laws in this section, Congress established "unusually elaborate enforcement provisions,"[7] which—remarkably—lack any authorization for any government agency to disqualify employers from performing federal government contracts. Certainly absent is any Congressional authorization for such disqualifications to occur in the absence of final adjudication of liability against such contractors in a court of law. The new proposals violate the plain language of each of the statutes they cite as grounds

[3] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
[4] *E.g.,* 80 Fed. Reg. at 30586 (to determine whether a violation is "willful," the "focus is on whether the enforcement agency, court, arbitrator, or arbitral panel's findings support a conclusion that, based on all of the facts and circumstances discussed in the findings, the contractor or subcontractor acted with knowledge or reckless disregard of its legal requirements"); *id.* at 30587 (whether a violation is "repeated," "turns on the nature of the violation and underlying obligation").
[5] 80 Fed. Reg. at 30590.
[6] *See Chamber of Commerce v. Reich*, 74 F.3d 1322 (1996).
[7] *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999).

for potential disqualification of contractors.[8] By enacting a "broad policy governing the behavior of thousands of American companies and affecting millions of American workers," the President has clearly acted not as a market participant, but to impose his "regulatory" will on the public.[9] The proposals should be withdrawn on this basis alone.

(1) The National Labor Relations Act (NLRA):

It is well settled that the National Labor Relations Board (NLRB) is the sole and exclusive authority designated by Congress to address and remedy any claimed violations of the Act.[10] Furthermore, Section 10(c) of the NLRA restricts the NLRB itself to issuing "make whole," *non-punitive* remedial orders tailored to the unfair labor practices being redressed.[11]

Based on these principles, the Supreme Court has expressly held that sanctions like debarment are not permissible remedies for violations of the NLRA.[12] Significantly, in *Gould*, the Court declared unlawful Wisconsin's attempt to disqualify even those contractors who had been found by *judicially enforced orders* to have violated the NLRB on multiple occasions over a 5-year period.[13] The proposed rule and guidance at issue are measurably worse than Wisconsin's preempted system, of course, because they threaten contractors with disqualification merely upon issuance of an *unadjudicated* administrative complaint.

The *Gould* preemption doctrine is not limited to *state* government actions inconsistent with the NLRA. To the contrary, the same legal principles have been applied to the federal executive branch. In *Reich*, the D.C. Circuit found that regulations issued under an executive order issued by President Clinton dealing with striker replacements "promise[d] a direct conflict with the NLRA, thus running afoul" of preemption doctrine.[14]

Also significant is the fact that in both *Gould* and *Reich*, the courts rejected the government's claims to being exempt from preemption under the "market participant" doctrine and/or the Federal Procurement Act. In both cases, the courts stressed that the government's actions were "regulatory" in nature because they "disqualified companies from contracting with the Government on the basis of conduct unrelated to any work they were doing for the Government."[15]

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[8] *See also Anderson v. Sara Lee Cop.*, 508 F.3d 181, 191 (4th Cir. 2007).
[9] *See Reich*, 74 F.3d at 1337.
[10] *Garmon v. NLRB*, 359 U.S. 236 (1959).
[11] *See, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984); *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938).
[12] *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986).
[13] *Id.* (holding that the NLRA forecloses "regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [NLRA]."); *see also Garmon*, 359 U.S. at 247 ("[T]o allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.").
[14] *Reich*, 74 F.3d at 1322 (expressly rejecting the government's claim that the Executive Order at issue was somehow authorized by Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. §101).
[15] *See Building & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2003).

The FAR Council and DOL seek to enact precisely what courts prohibit: their own regulatory sanctions for employers that commit NLRA "violations." The proposals should be withdrawn because they run headlong into settled law.

(2) The Fair Labor Standards Act (FLSA), 29 U.S.C. chapter 8:

Depending on the violation, the FLSA permits both civil awards and criminal prosecution and fines, but *not* the debarment and other sanctions the proposed rule and guidance would allow.[16] That Congress set forth these criminal and civil damages in detail forecloses the extra-statutory debarment scheme proposed by the FAR Council and DOL.

(3) The Occupational Safety and Health Act (OSH Act) of 1970:

The OSH Act imposes a number of civil awards, many of which may be exacted for types of violations the FAR Council and DOL purport to define (e.g., "serious"), for example:

a) "Serious" violations: $0-$7,000 per violation.[17]

b) "Repeated" violations: $0-$70,000 per violation.[18]

c) "Willful" violations: $5,000-$70,000 per violation.[19]

d) "Willful" violations that causes death to an employee: criminal prosecution and up to $10,000 in fines or up to six months imprisonment, and for a second conviction up to $20,000 in fines or up to one year imprisonment, or both.[20]

The Occupational Safety and Health Review Commission (OSHRC) is designated as the only authority authorized to determine whether violations of the OSH Act have occurred. The proposed rule and guidance impermissibly substitute these legislatively defined violations for new definitions interpreted not by the agency Congress so designated, but by individual COs and LCAs.

[16] *See* 29 U.S.C. § 201, § 216(a) (criminal prosecution and fines up to $10,000 for certain "willful" violations; possible imprisonment after second violation); *id.* § 216(b) (civil awards including liquidated damages for violations of minimum wage and overtime pay requirements set forth in Sections 206 and 207); *id.* § 216(e)(2) (civil awards not to exceed $1,100 for each "repeated" or "willful" violation of Sections 206 and 207); *id.* § 216(e)(1)(A)(i) (civil awards not to exceed $11,000 for each employee who was the subject of a Section 212 or 213(c) child labor law violation); *id.* § 216(e)(1)(A)(ii) (civil awards of up to $50,000 for each employee who was the subject of a Section 2012 or 213(c) child labor law violation that caused the death or serious injury of any employee under 18 years old; awards may be doubled when the violation is determined to be "willful" or "repeated").

[17] 29 U.S.C. § 666(b).

[18] 29 U.S.C. § 666(a).

[19] *Id.*

[20] 29 U.S.C. § 666(e).

(4) Title VII of the Civil Rights Act of 1964 (Title VII);
(5) The Americans with Disabilities Act of 1990 (ADA); *and*
(6) The Family and Medical Leave Act (FMLA):

For similar reasons, the new proposals violate these three statutes, which the FAR Council and DOL cite as potentially disqualifying to government contractors who violate them. Thus, Title VII and the ADA allow for equitable and make-whole relief (including reinstatement and back pay), attorney's fees, and punitive damages, depending on the nature of the violation.[21] Civil awards under the FMLA include equitable and make-whole relief, compensatory damages up to 12 weeks of the employee's wages, and, if the employer acted in bad faith, liquidated damages.[22]

(7) The Age Discrimination in Employment Act of 1967 (ADEA):

Under the ADEA, a plaintiff may obtain equitable and make-whole relief, in addition to attorney's fees. If the employer commits a "willful" violation of the ADEA, the plaintiff may recover liquidated damages.[23] An employer acts "willfully," when it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[24] Again, Congress was clear about the remedies this statute provides, thereby foreclosing the new sanctions proposed by the FAR Council and DOL.

(8) The Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA):

Like Congress's other remedial schemes, the MSAWPA and the regulations implementing it permit civil awards the amount of which depends on several factors, which the FAR Council and DOL should not disturb:

a) Previous history of violations;

b) The number of workers affected by the violation or violations;

c) The gravity of the violation or violations;

d) Efforts made in good faith to comply;

e) Explanation of person charged with the violation(s);

f) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously committed a violation(s); and,

[21] 42 U.S.C. § 2000e-5(g), (k); 42 U.S.C. § 12117; 43 U.S.C. § 1981a(a)(1-2), (b)(1).
[22] 29 U.S.C. § 2617(a)(1).
[23] 29 U.S.C. § 626(b).
[24] *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128-29 (1985).

g) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.[25]

Generally, administrative actions include sanctions of up to $1,000 per violation and, concerning farm labor contractors, revocation or suspension of existing certificates and denial of future certificates of registration. The Secretary of Labor can initiate both court injunctions to prohibit further violations in addition to criminal charges. Courts can assess fines up to $10,000 and prison terms of up to three years. The statute also permits private causes of action in federal court for damages.[26] Clearly Congress has created a detailed scheme to deter violation of the MSAWPA, which leaves no room for the added sanctions set forth in the new proposals.

(B) <u>Laws Covering Government Contractors</u>

(1) <u>40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act</u>:

Under the Davis-Bacon Act, violators may have payments on their contracts withheld or be debarred for a period of three years, *but only after a hearing has been held* in which the DOL proves a "willful" or "aggravated" violation.[27] Debarred contractors are entitled to judicial review of the DOL's suspension and debarment decisions.[28]

The post-hearing findings of the ALJ and the agency must be thorough, not "general and conclusory."[29] For example, the DOL Administrative Review Board upheld the ALJ's determination that a contractor and its president committed willful or aggravated violations of the Davis-Bacon Act and should be disbarred where the record revealed, among other things, that payrolls showing worker misclassifications were signed and certified, other payroll records were manipulated, and ongoing violations were not corrected.[30] The FAR Council and DOL dispense with a hearing of this nature, instead proposing to punish contractors without the process they are due.

The Davis-Bacon Act also allows a debarred contractor or subcontractor, six months after debarment, to request that the Administrator of the Wage and Hour Division permit it to contract with the government. The Administrator considers, among other factors, the contractor or subcontractor's "severity of the violations, the contractor or subcontractor's attitude towards compliance, and the past compliance history of the firm." If the Administrator denies the contractor's request, the contractor

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[25] 29 C.F.R. § 500.143. *See also* 29 U.S.C. § 1853(a)(2) (in determining civil awards, the Secretary of Labor shall take into account the person's previous record of compliance with the MSAWPA and the Farm Labor Contractor Registration Act of 1963, and the gravity of the violation).

[26] *See* 29 U.S.C. §§ 1851-1855, 1862, 1872 ("Any findings under the Farm Labor Contractor Registration Act of 1963 may also be applicable to determinations of willful and knowing violations under this chapter."); *see also* Wage and Hour Division, Fact Sheet #49: The Migrant and Seasonal Agricultural Worker Protection Act, http://www.dol.gov/whd/regs/compliance/whdfs49.htm (last visited Aug. 3, 2015).

[27] 40 U.S.C § 3144; 29 C.F.R. § 5.12; *e.g., Facchiano Constr. Co. v. Dep't of Labor*, 987 F.2d 206, 214 (3d Cir. 1993) (requiring knowledge on the part of the corporate officer).

[28] *Facchiano Constr.,* 987 F.2d at 208.

[29] *Griffin v. Reich*, 956 F. Supp. 98, 110 (D.R.I. 1997).

[30] *Pythagoras General Contracting Corp., Stanley Petsagourakis v. Dep't of Labor*, 2011 WL 1247207, at *13 (Mar. 1, 2011).

can petition for review by the Administrative Review Board.[31] The proposed rule and guidance do not permit a reinstatement assessment by a Davis-Bacon expert – let alone hearing and appellate review procedures. The proposals improperly conflict with the statute's and DOL's longstanding regulations while denying contractors their right to due process.

(2) 41 U.S.C. chapter 67, formerly known as the Service Contract Act:

The proposals similarly conflict with longstanding suspension and debarment procedures under the Service Contract Act. For example, under this statute a hearing is required before a contractor can be debarred.[32] Also similar to the Davis-Bacon Act, the Service Contract Act affords the contractor an opportunity to show that it should not be debarred based on "unusual circumstances," including the (lack of) history of violations and aggravated circumstances.[33] Contrary to the Service Contract Act, the proposed rule and guidance permit neither a hearing before a contractor can be disbarred, nor an opportunity for the contractor to reverse a debarment order where unusual circumstances exist.

(3) Section 503 of the Rehabilitation Act of 1973;
(4) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 (VEVRAA) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974; *and*
(5) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity):

The proposed rule and guidance are at loggerheads with the longstanding affirmative action obligations pursuant to these three authorities. Again, contractors who violate these statutory and regulatory provisions may be debarred under aggravated circumstances from receiving future contracts or terminated from ongoing government work. However, a contractor is entitled to a formal hearing before any of these sanctions can be imposed.[34] Again, the proposed rule and guidance at issue run directly counter to these statutory and regulatory schemes.

(6) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors):

Similar to the affirmative action rules described immediately above, pursuant to the regulation implementing Executive Order 13658, the Secretary of Labor may deem a contractor who violates the Order ineligible to be awarded any contract or subcontract for up to three years, but only after "an opportunity for a hearing before an Administrative Law Judge."[35] Again, the proposals dispense with the hearing requirement.

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[31] 29 C.F.R. § 5.12(c).
[32] 41 U.S.C. 6706(b); *Dantran, Inc. v. Dep't of Labor*, 246 F.3d 36, 45-46 (1st Cir. 2001).
[33] 29 C.F.R. § 4.188; *Bither v. Martin*, 995 F.2d 230 (9th Cir. 1993).
[34] 41 C.F.R. § 60-741.66(a-d) ("Sanctions and penalties;" Section 503); 41 C.F.R. § 60-300.66(a-d) ("Sanctions and penalties;" VEVRAA); 41 C.F.R. § 60-1.27(a-b) ("Sanctions"); Executive Order 11246 §§ 208(b), 303(c). *See also, e.g., OFCCP v. O'Melveny & Myers LLP*, ARB Case No. 12-014, 2013 WL 4715032 (2013) (remanding to ALJ allegations that respondent violated Section 503, VEVRAA, and Executive Order 11246); *OFCCP v. Bridgeport Hospital*, ARB Case No. 00-034, 2003 WL 244810 (2003) (upholding order of ALJ dismissing citation of noncompliance with Section 503, VEVRAA, and Executive Order 11246).
[35] *See* 29 C.F.R. § 10.44(c) ("Remedies and sanctions.").

In sum, the proposed rule and guidance do not describe how the new assessments will be made in a manner that is consistent with congressional intent underlying each of the 14 labor laws. Whereas the hearing safeguards and appellate review procedures in the statutes promote fairness and consistency, the FAR Council charts an arbitrary course whereby COs and LCAs decide on their own whether reported labor law violations are "serious," "willful," "repeated," or "pervasive." Against the backdrop of settled legislative enforcement schemes, the proposals cannot stand.

The Proposed Rule's Paycheck "Transparency" Requirement Is Unlawful

For the first time, the proposed rule requires contractors to provide a document informing individuals of their independent contractor status, in addition to a wage statement. Yet the DOL's proposed guidance acknowledges that the determination of independent contractor status under a particular law is governed by that law's definition of employee, leaving employers uncertain as to what definition should be used.[36] The proposed requirements are burdensome and unlawful, and should be withdrawn.

The Proposed Rule's Ban on Arbitration Agreements Is Contrary to Settled Law

Arbitration agreements are widespread among contractors yet the proposed rule prohibits those that cover Title VII and sexual assault and harassment tort claims. These restrictions are at odds with the U.S. Supreme Court's decision in *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012), and similar rulings upholding the enforceability of arbitration agreements pursuant to the Federal Arbitration Act. The FAR Council and DOL should rescind their proposals.

The Proposed Rule Violates Due Process by Punishing Contractors Based on Non-Final Decisions and Without the Opportunity for a Hearing

Contractors will be deprived of their rights to due process under the U.S. Constitution if the reporting requirements form the basis for agency responsibility determinations, as the proposed rule contemplates. The proposed rule requires contractors to report many types of administrative merits determinations that are not final—where no hearing has been held and no ultimate agency determination has been issued or reviewed by the courts. Contractors must report arbitration decisions and civil determinations, including preliminary injunctions, which are not final or are subject to appeal. The FAR Council should with haste withdraw this "guilty until proven innocent" reporting approach.

Non-final labor law allegations are not an indicator of a would-be contractor's "integrity and business ethics." It is not at all uncommon for agency complaints against employers to be withdrawn or settled without any ultimate finding of wrongdoing by the employer. Such charging documents cannot form the basis for disqualifying any contractor from performing government work. Agencies may modify their interpretation of the laws they enforce, such that innocent conduct on Day 1 may be held to violate a labor law on Day 2. Moreover, the new proposals do not limit reporting "violations" to those disputes involving employees working on a government contract. Simply put, the FAR Council

[36] 80 Fed. Reg. at 30593.

cannot establish that it has examined the relevant data and articulated a satisfactory explanation for its proposal, including a rational connection between the facts found and the choice made.[37]

For example, an EEOC letter of determination that reasonable cause exists to believe an unlawful employment practice has occurred or a complaint issued by a NLRB Regional Director must be reported, even though the allegations in them are based solely on investigatory findings without judicial or quasi-judicial safeguards. A Regional Director's complaint does not constitute final agency action and is not a "finding" of any violation of the NLRA. Only the Board at the agency level can make a "finding" that any entity violated the NLRA.[38] Even the Board's own determinations are not self-enforcing, as Section 10 of the NLRA makes clear, because only a court of appeals can enforce orders of the Board, not the Board itself and certainly not any other federal agency.[39]

OSHA citations and other non-final findings by a single agency official do not constitute binding agency "determinations" of violations under any definition and should not be considered in contracting decisions. To contest even decisions by full agency boards, an employer must generally exhaust the administrative process through the agency before challenging the agency action in federal court.[40] It is hardly a consolation that DOL proposes that COs and ALCAs give "lesser weight" to violations that have not resulted in a final judgment, determination, or order.[41] Unadjudicated agency or judicial allegations should be given no weight at all in determining whether a contractor should be disqualified from providing government services.

Indeed, previously the FAR Council rejected the notion that non-final allegations should influence the procurement process:

> "Requiring the collection of information on all proceedings, regardless of outcome, could potentially create instances where negative judgments on contractors' responsibility are made regardless of the outcome of the referenced proceedings. *If information regarding yet-to-be-concluded proceedings were allowed, negative perceptions could unfairly influence contracting officers to find a contractor non-responsible, even in situations that later end with the contractor being exonerated.* The Councils are strongly committed to helping contracting officials avoid these types of situations."[42]

In *Gate Guard Services v. Perez*, No. 14-40585, 2015 WL 4072105, __ F.3d __, slip. op., page 14 (July 2, 2015), some five years after DOL investigated the company for violating the FLSA, the Fifth Circuit awarded the company attorneys' fees as a result of DOL's frivolous and "oppressive" conduct

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[37] *See Motor Vehicles Mfr.'s Ass'n v. State Farm Mutual Automobile Ins. Co*., 463 U.S. 29, 43 (1983).

[38] *See Independent Stave Co*., 287 NLRB 741 (1987), explaining that the Board is alone vested with lawful discretion to determine the merits of a complaint and whether any violation of the Act has occurred.

[39] 29 U.S.C. 160. Federal appeals courts have reversed more than 30 percent of Board decisions over the past 40 years. http://www.nlrb.gov (Appellate court decisions 1974-2013).

[40] *E.g., NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124-26 (1987) (decision of NLRB General Counsel to file a complaint does not constitute final agency action); *Northeast Erectors Ass'n v. Secretary of Labor*, 62 F.3d 37, 40 (1st Cir. 1995) (finding that federal courts lack jurisdiction to review pre-enforcement challenge to OSHA citation).

[41] 80 Fed. Reg. at 30590.

[42] Federal Acquisition Regulation, FAR Case 2008-027, Federal Awardee Performance and Integrity Information System, 75 Fed.Reg. 14059-01, 14061 (Mar. 23, 2010) (emphasis added).

investigating and litigating the matter. The court held that, among other things, the DOL deliberately shredded investigation notes, employed an investigator unqualified to undertake the investigation, surprised an employee at the facility when it was known company attorneys would not be present, inflated the damages calculation by about $4 million, and continued litigating the case "despite overwhelming contradictory evidence".[43]

If the FAR Council's and DOL's proposals are implemented, contractors must report pending "violations" like those in *Gate Guard*, even though years later they may be vindicated, or even demonstrate that the investigation was frivolous.[44]

Because covered entities may not be vindicated until years later, requiring them to make public non-final allegations is patently intrusive and unfair. Ironically, the NLRB General Counsel recently issued a memorandum announcing that his office will redact from certain case documents individuals' names, titles, phone numbers, addresses, and online identifiers, including e-mail and other electronic data identifying individuals, in a stated effort to protect them from "potential embarrassment, public opprobrium, or damaged employment prospects."[45] Notwithstanding the General Counsel's sudden concern for privacy, the new proposals would require contractors to tell the world they have been *accused* of labor law violations.[46] The potential for misunderstanding is great for the public who could, based on the proposed rule's broad scope, understandably construe mere allegations as fully-adjudicated violations. Providing this data to the public without the appropriate context may lead to unnecessary damage to the entity's reputation, related loss of business and jobs, and misallocation of resources by both taxpayers and industry.

If a contractor is vindicated, the new proposals provide no remedy. The contractor will have lost the right to bid on a contract, or worse, will have been debarred. The reputational damage will be done As a practical matter, reputational harm will be magnified for publicly-traded companies, as both the contractor and its shareholders must answer to heightened scrutiny based on non-final

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[43] *Gate Guard*, slip. op., pages 15-16.

[44] *See also, e.g., Nichols Aluminum, LLC v. NLRB,* Nos. 14-3001, et al., 2015 WL 4760303, __ F.3d __ (8th Cir. Aug. 13, 2015) (denying enforcement of NLRB order holding that the employer, three years earlier, violated the NLRA by discharging employee who gestured toward another employee by drawing his thumb across his neck in a "cut throat" motion); *EEOC v. Kaplan Higher Education Corp.*, 748 F.3d 749, 754 (6th Cir. 2014) (affirming, years later, the dismissal of the EEOC's lawsuit, which was brought 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 only by the witness himself."); *EEOC v. Propak Logistics, Inc.*, 884 F. Supp. 2d 433, 441 (W.D.N.C. 2012), *appeal dismissed*, Case No. 12-2249 (4th Cir. Feb. 22, 2013) (holding that the doctrine of laches barred an EEOC lawsuit initiated 7 years after the filing of the underlying EEOC charge), 746 F.3d 145 (4th Cir. 2014) (ordering the EEOC to pay attorney's fees).

[45] Memorandum GC 15-07, "Modifying Interpretation of Section 102.117(b)(1) Regarding Redaction of Formal Documents Before the Opening of a NLRB Public Hearing or Forwarding to the Board on a Stipulated Record," pages 1, 5-6, n.13 (Aug. 12, 2015) ("In considering privacy interests, the agency should consider the universe of possible consequences that release of the information might trigger, since the issue is not simply what the requester might do with the information, but 'what anyone else might do with it.'") (citation omitted).

[46] In contrast to the General Counsel's concern for privacy, the NLRB in its new election rules requires employers to produce the full names, work locations, shifts, job classifications, home addresses, and contact information, including available personal email addresses and available home and personal cell phone numbers, of all eligible voters in a union representation election. *See* 29 C.F.R. § 102.67(l).

accusations. And years of revenue and jobs will have been lost based on those accusations, which may turn out to be just that—accusations.

The DOL would require a contractor to report as an "administrative merits determination" a FLSA letter determination from the Wage and Hour Division,[47] yet the agency has vigorously argued that such letters do not constitute final agency action that a company can challenge.[48]

In that case, Rhea Lana, a small Arkansas business that organizes consignment sales brought a lawsuit to challenge the DOL's determination that it violated the FLSA by relying on volunteer workers. The DOL had issued a letter to individuals associated with the company that it may owe them back wages for violating the FLSA and that they had a right to file their own lawsuits. The agency sent another letter to the company explaining that while no penalty was being assessed at the time, penalties could be assessed in the future. The DOL chose not to bring an enforcement action, leaving the company in limbo. The letters, the company argued, "effectively outlawed its business model."[49] During the ensuing litigation the DOL argued – successfully in District Court – that its determination letter does not constitute reviewable "final agency action" within the meaning of the Administrative Procedure Act.[50]

It defies fairness that the DOL may, through an unreviewable determination letter, hold an enforcement action over a company's head like the sword of Damocles, while requiring that the letter be reported as a "violation," which could cause the company to lose a federal contract. The company has no way of challenging the letter, unless and until the DOL decides to "drop the hammer" with an enforcement action.[51]

DOL determination letters are not the only reportable "violations" that cause businesses to change their behavior yet are not normally reviewable until much later.[52] In fact, the EEOC may decline to settle a case before it makes a reasonable cause determination (a "pre-determination" settlement). In such instances, this means that even well-intentioned contractors who wish to settle early must nonetheless report the EEOC's letter of determination, which the settlement has rendered moot. In such a case, the contractor may not want to settle, instead subjecting the parties and taxpayers to litigation costs.

The new specter of contract debarment will distort the approach contractors take to litigating matters pending before enforcement agencies in other ways. Contractors may be encouraged to settle matters rather than seek vindication of their position and thereby risk a reportable "violation" that

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[47] 80 Fed. Reg. at 30579.
[48] *See Rhea Lana, Inc. v. DOL*, 74 F. Supp. 3d 240 (D.D.C. 2014), *appeal pending,* Case No. 15-5014 (D.C. Cir.).
[49] *Id.* at 243.
[50] *Id.* at 242, 246; *see also* 5 U.S.C. § 704.
[51] *Rhea Lana,* 74 F. Supp. 3d at 245 (citing *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012)) (noting that "administrative notifications are frequently more than simply friendly reminders; rather, agencies often issue them instead of initiating formal proceedings in order to achieve their enforcement goals more quickly and less expensively than through litigation.").
[52] *Compare, e.g.,* DOL's proposed guidance, 80 Fed. Reg. at 30579 (deeming reportable EEOC letter of determination that reasonable cause exists to believe that a violation has occurred), *with AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (holding that EEOC letters of determination do not constitute final agency action that may be reviewed).

could affect their contract rights. Yet if a settlement agreement that states that the contractor admits to the violation is reportable (an "admissions clause"), then the contractor may not wish to settle. Certainly if a settlement contains a non-admissions clause, the contractor should not have to report it.

Although settlements are designed to allow the parties to move on, the proposals discard this conventional wisdom such that even closed cases may come back to haunt contractors. Ironically, the proposals may even cause contractors to report cases in which the government itself has violated the settlement agreement.[53]

Plaintiffs' attorneys and unions engaged in corporate campaigns can file baseless labor law allegations merely to meet their financial and public relations goals, thereby leveraging the proposals' settlement incentives. A related problem is that unions can threaten contractors with NLRB bad-faith bargaining charges or grievances that could lead to arbitration to gain leverage during negotiation sessions. Congress has prohibited the government from placing its thumb on the scale of labor-management disputes[54] yet it seems that the FAR Council and DOL attempt to do just that.

The DOL's guidance permits COs to punish contractors based on "similar information obtained through other sources," by, among other things, terminating the contract and referring the matter to the agency's suspending and debarring official.[55] The unknown "source" may be a labor union seeking to organize the contractor, and who might therefore have an incentive to file meritless labor law allegations. Consequently agencies may rely on the proposed rule's requirements to reject a bid or cancel an existing contract – as well as initiate suspension and debarment proceedings – based on allegations of violations that wholly lack merit, or that a contractor may be in the process of resolving, or that have not been fully adjudicated.

A similar problem is that a CO may conclude that a contractor should not be awarded a contract based on its failure to comply with labor laws. When that contractor applies for another contract, a second CO may use the first CO's unfavorable determination to reduce his new workload and/or avoid inconsistency, thereby causing *de facto* debarment without permitting the contractor due process.[56]

In the alternative, different COs might reach different conclusions after assessing identical "violation" submissions. Currently, it is the experience of employers that individual DOL investigators reach different conclusions on very similar FLSA claims. COs and LCAs are not subject-matter experts in the 14 labor law schemes or the potentially *thousands* of "state law equivalents." If DOL investigators who work with one statute every day reach uneven conclusions, there is no reason to

[53] *E.g., Secretary of Labor v. Int'l Shipbreaking Ltd., LLC*, Nos. 14-0031 &14-0032, 2015 WL 4620231, at *18 (Occupational Safety Health Review Commission ALJ June 23, 2015) (holding that DOL was estopped from pursuing OSHA case where it scheduled an inspection two weeks after entering into a settlement agreement, and explaining that the agency "recklessly, if not intentionally, misrepresented its intent to abide by the terms of the Agreement. In so doing, Complainant has fallen short of any standard of decency, honor, or reliability in its dealings with Respondent, no matter how minimal.").
[54] *See H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).
[55] 80 Fed. Reg. at 30577.
[56] *See* Testimony of Angela B. Styles, House Committee on Education and the Workforce, U.S. House of Representatives, pages 9-10 (Feb. 26, 2015).

think that COs will reach consistent ones. Even well-trained and well-intentioned government officials will be unable to properly complete their new responsibilities.

Because the CO's analysis of the severity of the violation will be inherently based on subjective considerations ("serious," "willful," etc.), there will be more bid protests alleging favoritism. A company may question why it was passed over for a bid when the contractor selected has a similar record of labor law "violations." The procurement system should aim to avoid costly bid litigation—not increase it.

Regional inconsistency in labor law enforcement is another problem the new proposals fail to take into account. It may be easier to establish a violation in one judicial circuit than another, based on varying precedent of the several Federal Circuit Courts. Or, in the case of "state law equivalents," a state with more laws on the books and/or enforcement resources increases the likelihood that a contractor in that state will incur a violation compared to another state. Consequently, a CO may determine that the contractor based in the state where violations flow more readily is a "repeat" offender whereas a contractor in a state where courts issue fewer violations has a clean record—even though the two contractors conduct similar business practices. The arbitrary hierarchy of violations proposed by DOL ensures apples-to-oranges comparisons.

The new proposals are unfair in other significant ways. For example, federal agencies like the NLRB generally decline to acquiesce in the decision of one or more Circuit Courts, unless and until all Circuits or the Supreme Court disagree with the agency. The Second, Fifth, Eighth, and Ninth Circuit all deemed invalid the NLRB's conclusion in *D.R. Horton* that employee class action waivers violate the NLRA.[57] Nonetheless, the Board recently issued *Murphy Oil USA, Inc.* and *Countrywide Financial Corporation*, in which it reaffirmed the holding in *D.R. Horton*.[58] Accordingly, a NLRB complaint issued pursuant to *D.R. Horton* must be reported by the contractor as an "administrative merits determination" – even though the contractor may obtain review from a circuit that has expressly disavowed those cases. The proposals improperly require contractors to report a complaint based upon rejected legal theories.

In sum, the new proposals are patently unfair and should be withdrawn immediately.

The Proposed Rule Imposes Substantial Compliance Burdens on Contractors and Taxpayers

The new process envisioned by the FAR Council and DOL is unrealistic and extremely burdensome. The proposals requires a time-consuming "look back" of 14 labor law "violations" for the period of three years before a contract is offered, which must be updated every six months. The look-back period should be rescinded in its entirety not just because it is overbroad but because it gives retroactive effect to non-final "violations." At the very least the update period should be on a yearly basis.

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[57] *See D.R. Horton, Inc. v. NLRB,* 737 F.3d 344, 362 (5th Cir. 2013).

[58] *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, 2014 WL 5465454 (Oct. 28, 2014); *Countrywide Financial Corp.*, 362 N.L.R.B. No. 165, slip op. (Aug. 14, 2015). *See also* NLRB Member Johnson's dissent in *Countrywide Financial Corp.*, slip op. at page 8, n.5 ("The courts resoundingly disagree with [*Horton*].") (citing cases).

The $500,000 contract coverage threshold also casts too wide a net. In fiscal year 2014 alone, the federal government executed 99,822 different contracts over $500,000.[59] Even companies that hope to contract with the government must consider the disclosure requirements. Agencies will not be able to fund this endeavor. They will be forced to hire and train countless staff members to serve as or assist LCAs, which current budgets do not support.

These proposals create a host of other practical problems that destroy the procurement process as we know it. For example, assuming the proposed rule is made final, consider a bid that an agency solicits in 2016. At that point the contractor performs a three-year look-back (to 2013) and submits the initial reporting data the rule requires. As occurs with some frequency, three years pass before the agency actually awards the bid to the contractor. Now, in 2019, the contractor performs another three-year assessment – back to 2015. All the while, from 2013 to 2019, the contractor conducted 12 updates (one every six months). Furthermore, the contractor would have been required to monitor its subcontractors' labor law activities. Finally, the agency will incur enormous costs, as they would be required to weigh whether the contractor's changing mix of "violations" amount to a "severe" or another degree of damage.

This constant, years-long monitoring is hardly a "check the box" exercise. To the contrary, administrative proceedings must be rigorously analyzed under the proposed rule's amorphous lens. One day a contractor may have 17 "violations" of varying labor laws at different stages of litigation; 10 months later the contractor may have 12 violations involving other laws at other points of litigation. If a Circuit Court vacates just one agency order, that could change the make-up of a contractor's violations (e.g., are they no longer "repeated?").

Or, for months a Regional Office of the NLRB may undertake an investigation into alleged unfair labor practices. The investigation alone is not reportable. Then, when the investigation is complete, the Region decides to issue complaint, which is reportable. But what happens if, two days after the Region issues complaint, the contractor decides to settle the matter with the Region? Irrelevant, says the proposed rule. The contractor is branded with a scarlet letter and must report the moot complaint. And both the contractor and the agency must weigh this new violation in the context of the contractor's other violations. There is no end to the reporting obligations or the harm it would bring to contractors.

The FAR Council and DOL have no plan, nor could they, as to how COs, LCAs, and the regulated community will obtain the resources and training to effectively maintain up-to-date analyses of tens of thousands of complex violations whose weight are in constant flux. The FAR Council failed to even consider these vast, recurrent costs in its proposed rule.

There is no reward in any of this for the good corporate citizen. The contractor that proactively frontloads its reporting obligations by reporting all violations on the day it offers a bid is not rewarded for its good citizenship or expedient compliance. Again, it must update its reporting every six months. Because, as explained above, it is unclear in any given case when a non-reportable violation morphs into a reportable one, and how much weight it should be assigned ("severe," etc.), contractors, COs,

[59] Styles, at page 3, n.2 (citation omitted).

and LCAs will work to exhaustion to comply with the rule. No regulation has ever distracted industry and government from their actual mission the way these proposals do.

The FAR Council acknowledges that it has access to most reportable information yet, without support, asserts that its sprawling disclosure scheme is a more efficient approach.[60] The federal government also already has a robust system in place for suspension and debarment of government contractors who willfully disregard their obligations to comply with labor laws specified by Congress.[61] Resources should not be expended by the government or private industry to effectuate the enormous procurement overhaul envisioned in the new proposals.

The HR, IT, and compliance infrastructure necessary to adequately monitor, identify, and report a contractor's "violations" is enormous. Expenditures will significantly increase for in-house and outside legal counsel, in addition to employment practices liability insurance (EPLI). Because no guidance on "equivalent state laws" was issued, tracking systems must be updated and personnel retrained if and when a rule is finalized on this subject. Regulated entities will have to hire officials knowledgeable in both the procurement and the labor/employment law fields.

The proposed rule also requires contractors to litigate their defense to claimed violations in duplicative forums: at the agency that administers the statute and at the procurement phase. This is because the proposed rule states that when contractors and subcontractors report administrative merits determinations, they may also discuss mitigating factors including that the agency finding has been challenged.

Increased red tape and expense will drive innovators from contract work, with ominous consequences for industries like defense and national security that help keep our people safe. Government should be in the business of encouraging and attracting innovation to help solve critical problems, rather than driving contractors from the marketplace.

Costs would multiply if the proposed reporting requirement imposed on prime contractors regarding their subcontractors is finalized. The time requirements alone are burdensome and unrealistic. If the prime contractor awards the subcontract, or the subcontract becomes effective, within five days of executing the prime contract, then it must conduct the same analysis the contracting agency performed of the contractor within 30 days of awarding the subcontract. For all other subcontracts, review of possible reportable subcontractor violations must occur prior to the subcontract award.

Moreover, contractors will be in the untenable position of policing their subcontractors, and subcontractors will be in the untenable position of sharing sensitive or proprietary information with prime contractors with whom they compete on other projects. It is unclear how long the contractor

[60] 80 Fed. Reg. at 30562; *see also* Testimony of Stan Soloway, *The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat*, House Committee on Education and the Workforce, U.S. House of Representatives, at page 7 (Feb. 26, 2015) ("[T]he administration would be better served by focusing on improving its own data collection and information sharing efforts rather than adopting another costly, complex compliance and reporting regime…much of the information collection that the E.O. imposes on contractors is information that the government already has.").
[61] *See* 80 Fed. Reg. at 30548; 48 C.F.R. pt. 9; Styles, at pp. 8-9; Soloway, at pages 5-6.

must retain the information, and whether it would be required to disclose it under federal and state public information statutes. It is also unclear how far "down the chain" subcontractor reporting would go. A prime contractor whose employees occasionally eat food from a vendor with a contract worth over $500,000 apparently must report the activities of the vendor, even though the vendor's relationship to the prime federal contract is tangential at best. The proposed subcontractor self-reporting scheme is unworkable.

Requiring subcontractors to report directly to the DOL is not a better option. Pursuant to the proposed rule, a prime contractor must consider whether the subcontractor is a responsible source during the term of the subcontract. If based on the DOL's advice the contractor concludes that the subcontractor should not be retained, it would have to quickly find a subcontractor without "violations" – in the middle of the project, at a new bid price. Suffice it to say the delays would be significant and the costs would be passed along to the innocent contractor.

Small businesses including women-, veteran-, and minority-owned companies will be disproportionately impacted by these burdens. As a result of the new proposals, contractors have already likely decided that they cannot take the risk of subcontracting with these businesses because the risk is too great that they will not have the resources to comply with the rule, if finalized. Contractors do not want to be held potentially liable for a subcontractor's (understandable) failure to comply with these complex regulations. The proposals should be withdrawn to avoid setting back the growth of small minority-owned businesses in the procurement system.

The FAR Council has greatly underestimated the cost of the proposed rule. It does not explain how it reached $70.4 million in initial "violation" reporting and $8.5 million in update reporting.[62] The proposed rule does not account for the complex compliance systems that must be built (discussed above) to gather the information in the first place. As noted above, in fiscal year 2014, the federal government executed 99,822 contracts over $500,000.[63] If the FAR Council's estimated 25,775 covered contractors[64] spend an average of $2,000 each to build, test, and implement a compliance system to monitor the proposals' "violations," that alone will cost about $51.5 million. This figure does not account for the many entities that are not yet federal contractors but may at some time bid on a contract, and therefore must incur the costs associated with the proposals. It also does not account for the cost contractors must spend to analyze not only their own "violations," but those of their subcontractor(s), if the final rule requires subcontractors to submit their violations to contractors. Finally, there is no accounting for the additional tracking costs of the as-yet-unknown "state law equivalent" violations.

[62] 80 Fed. Reg. at 30558.
[63] Styles, at page 3, n.2 (citation omitted).
[64] 80 Fed. Reg. at 30557.

The Proposed Rule Unfairly Seeks to Implement in Multiple Phases the Executive Order's "Equivalent State Laws" and Subcontracting Reporting Requirements

The FAR Council and DOL hastily published their proposals yet put off for a later proposed rule the "equivalent state law" reporting requirements.[65] A new proposed rule on this subject might cover hundreds or thousands of state laws.[66]

Similarly, while the FAR Council intends to "phase in" subcontractor reporting requirements, it appears unlikely that it will issue a later proposed rule before implementing those requirements, as it has stated it will do for the state laws. Rather, the FAR Council intends to implement the phased approach either in its proposed form or in an alternative form where subcontractors report directly to the DOL as opposed to the prime contractor.[67]

These delays make it impossible for the public, the FAR Council, and the DOL to effectively assess the massive changes to the procurement system that will result from the proposals, if they are finalized in current form. The lack of fair notice violates well-established principles of administrative law.

The Administrative Procedure Act requires that an agency's proposed rulemaking includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[68] This notice requirement is fulfilled only if the final rule is a "logical outgrowth" of the proposal. The public cannot be asked to "divine" the agency's "unspoken thoughts."[69]

Here, there is no telling what the specific parameters of a final rule on equivalent state laws and subcontractor reporting may look like.[70]

In addition, the new proposals shed no light on whether a contractor must report the "violations" of its parent, subsidiaries, and/or affiliates.[71] The public has been afforded no opportunity to assess how "parent," "subsidiary," and "affiliate" may be defined, let alone that such entities may be subject to a final rule. Absurd results would occur if, for example, a subsidiary without a record of "violations" must report solely because its parent or affiliate has violations. In any event, given the

[65] 86 Fed. Reg. at 30554.
[66] *See* Letter to DOL and FAR Council from 21 Representatives Supporting the Proposals, page 2 (Aug. 7, 2015) (speculating as to what state laws may be included).
[67] 86 Fed. Reg. at 30554-55.
[68] 5 U.S.C. § 553(b)(3).
[69] *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (citation omitted).
[70] *See, e.g., CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009) (finding that commenters could not have anticipated which "particular aspects of [the agency's] proposal [were] open for consideration."); *Int'l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1260-61 (D.C. Cir. 2005) (finding that agency did not provide proper notice where it failed to propose a maximum air velocity but the final rule set forth a specific maximum).
[71] *See* Letter to DOL and FAR Council from 21 Representatives Supporting the Proposals, page 1 (Aug. 7, 2015) (urging FAR Council to require such reporting).

proposals' silence on this issue, it would be unfair to force these requirements on the public in a final rule.[72]

The public – particularly the regulated community who will be forced to live with the final rule – should not be left to guess what byzantine requirements may be looming. There are far too many holes in the proposals to allow the public to perform an accurate analysis, economic and otherwise, of a final rule. This Frankenstein regulatory approach cannot stand. The proposals should be rescinded for lack of fair notice.

Conclusion

WPI urges the FAR Council and DOL to immediately withdraw their unlawful and arbitrary proposals for each of the reasons set forth above. Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

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[72] *United Mine Workers, supra*, 407 F.3d at 1260-61.