August 26, 2015

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Subject: Fair Pay and Safe Workplaces – Federal Register Notice

AIA is pleased to provide the United States Department of Labor with the following comments in response to Federal Register Notice ZRIN 1290-ZA02, Guidance for Executive Order 13673, on Fair Pay and Safe Workplaces, May 28, 2015.

Sincerely,

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Aerospace Industries Association Comments on

FAR Case 2014–025, Fair Pay and Safe Workplaces, 80 Fed. Reg. 30548 (May 28, 2015)

ZRIN 1290–ZA02, Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces," 80 Fed. Reg. 30574 (May 28, 2015)

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APPENDIX I

Introduction:

The Aerospace Industries Association ("AIA") respectfully submits the following comments in response to Federal Acquisition Regulation ("FAR") Case 2014-025, titled "Fair Pay and Safe Workplaces," published at 80 Fed. Reg. 30548 (May 28, 2015), and the guidance issued by the Department of Labor ("DoL") under ZRIN 1290-ZA02, Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces," published at 80 Fed. Reg. 30574 (May 28, 2015) ("Proposed Rule" and "Guidance," respectively). The Proposed Rule and Guidance implement Executive Order No. 13673, Fair Pay and Safe Workplaces, issued July 31, 2014 (hereafter, "the Executive Order" or "EO 13673"). *See* 79 Fed. Reg. 45309 (Aug. 5, 2014).

AIA is a 501(c)(6) trade association representing U.S. aerospace and defense manufacturers. We represent over 380 member companies, large and small, in an industry that directly employs over one million U.S. workers. Our industry generated $228 billion in sales in 2014, and, led by robust commercial aircraft sales, we continue to be the nation's leading net exporter. While the sector makes a valuable contribution to the U.S. economy overall, it also maintains a unique contracting relationship with the U.S. Government in that it often acts more as a close partner with—not merely a passive supplier to—the Government in the development, manufacturing and deployment of systems critical to the domestic and global security of the United States. This relationship also drives within the industry a compliance-oriented approach to our responsibilities under all laws applicable to our operations.

Consistent with the spirit of the Executive Order, our member companies are committed to the safety, wellbeing, and fair treatment of their respective workforces. Indeed, our industry's ability to effectively support the U.S. Government is highly dependent upon a deeply committed and highly-skilled workforce to produce the most sophisticated and technologically-superior weapons systems for the nation's defense as well as commercial aerospace solutions that are unrivaled in the world marketplace. If the Proposed Rule and Guidance were adopted in their current form, they would have a significant negative impact on the U.S. industrial base as a whole, and the aerospace sector in particular, that far outweighs any perceived benefit to the Government or the contractor workforce.

Additionally, AIA asserts that the acquisition process is not an appropriate instrument for monitoring and enforcing labor law compliance. The suspension and debarment system exists in the acquisition process to restrict contractors that break laws from receiving future government contracts, while DoL, the Equal Employment Opportunity Commission ("EEOC"), and the National Labor Relations Board ("NLRB") each has its own statute-based mechanisms to deal with companies that violate labor laws. There is no policy rationale that warrants burdening the acquisition process with a complicated reporting scheme that not only duplicates existing mechanisms contractors have in place to ensure compliance with their legal obligations, but also imposes unnecessary costs on contractors, reflected in the Administration's own observations: As the White House recognized when issuing the Executive Order, "the vast majority of federal contractors play by the rules." 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 ("Fair Pay Fact Sheet"); *accord id*. ("The Department of Labor estimates that the overwhelming majority of companies with federal contracts have no

federal workplace violations in the past three years."). That statement certainly is true of our members.

We are equally concerned that this duplicative reporting scheme in effect, strips contractors of their statutory due process rights contained in the suspension and debarment process; it also substitutes the judgment of federal labor law officials (e.g., DoL) for that of suspension and debarment officers across the federal contracting agencies, with whom the requisite expertise resides as to contractors' ability to compete and participate in federal procurements.

Many of our 380 member companies provide supplies and services to the Government either directly as prime contractors or indirectly as part of the Government's supply chain. If the Proposed Rule and Guidance go into effect as currently drafted, they will create a significant burden on this sector that will lead to increased costs to taxpayers, result in unforeseen impacts on the commercial sectors these companies also serve, and lead many contractors to exit the federal marketplace, particularly small businesses and commercial-item contractors.

As our comments demonstrate, the Proposed Rule and Guidance are an unduly burdensome approach to addressing labor law compliance without any assurance, or even evidence that there will be corresponding benefits to the Government, industry and, most importantly, the workforce the requirements are intended to protect. Given this basis, we: (1) urge the FAR Council and DoL to reconsider the significant burdens and delays that will be imposed on an entire industry and the Government's contracting and subcontracting processes; and (2) urge the Administration to consider revisions to the Executive Order in light of those burdens and the comments that they receive. We recommend, at a minimum, that the FAR Council and DoL publish revised proposed rules in response to comments from affected stakeholders and delay implementation of any final rule until all affected stakeholders have a meaningful opportunity to weigh in on all of the issues raised by the Proposed Rule and Guidance.

I. <u>Executive Summary of Comments</u>

We urge the FAR Council and DoL to weigh the comments they receive on the Proposed Rule and Guidance and to engage the Administration on the scope and structure of the Executive Order and its impact on Government and industry. The Proposed Rule and Guidance attempt to implement a new regulatory scheme that has no current analogue. We believe that once the promulgating agencies hear from affected entities, they will reach a conclusion similar to that of industry: that the Executive Order's reporting and responsibility regime is not reasonably achievable in its current form and does not appropriately or effectively serve its purported ends.

Moreover, both the Proposed Rule and Guidance leave several vitally important issues open for future development, not the least of which are the processes for prime contractors to conduct Rule compliance determinations for their suppliers, the creation of a centralized database for reporting, and, perhaps most important, the identification of "equivalent state laws" that also must be captured in reporting obligations. Given the issues raised in these comments,

the anticipated significant response to the Proposed Rule and Guidance from other interested parties, and the number of open issues, the FAR Council and DoL should revise the proposed regulations and guidance, and reissue them for further notice and comment. Such revised proposed regulations and guidance must also include provisions addressing the designation of "equivalent state laws"; only then, after the FAR Council's and DOL's consideration of the comments received on the comprehensively revised proposed regulations and guidance should any Final Rule go into effect.

With regard to the current Proposed Rule and Guidance, the reporting obligations are overly broad with respect to both who must report and the scope of the reporting. Accordingly, we recommend that the FAR Council and DoL exclude commercial-item contracts from the scope of the rules. For the Executive Order's stated purposes, there is no principled distinction between commercial-item contracts, on the one hand, and commercial-off-the-shelf ("COTS") items, on the other. Furthermore, existing laws and policies are intended to reduce the burdens on commercial-item contracting so as to encourage providers of commercial goods and services to participate in the federal market. The Proposed Rules and Guidance are contrary to the objectives of those laws and policies.

We further believe that to achieve the Executive Order's goals and reduce the burden on industry, only those portions of businesses that have reportable labor events in their capacity as a federal prime contractor should be required to report their labor law matters - not distinct business units or subsidiaries whose compliance record cannot reasonably bear on the responsibility of business units and subsidiaries that actually execute federal prime contracts. At bottom, because they lack the requisite nexus to federal contracting, units, divisions, segments, and subsidiaries that operate primarily in the commercial space should not be included in the reporting requirement.

The Proposed Rule and Guidance also establish an overly broad scope of reporting under covered contracts and subcontracts. The requirement to track and report "administrative merits determinations," as currently defined, is onerous because it requires contractors to identify, track, and report matters that amount to agencies' notifications and mere allegations, not actual determinations on the merits—and requires Contracting Officers ("COs") and Agency Labor Compliance Advisors ("ALCAs") to sift through and evaluate all that information. With such a focus on notifications and mere allegations, the Proposed Rule and Guidance will not achieve the Administration's stated goal of identifying and addressing actual labor-law violators, much less the serious violators. Rather, expensive bureaucracy will inappropriately duplicate (and, in many instances, illegally supplant) enforcement mechanisms and due-process protections sanctioned by Congress in the underlying labor and employment statutes. For the same reasons, the definitions of "civil judgments" and "arbitral awards and decisions" likewise require narrowing.

Other revisions are needed to control the scope of analysis and reporting. The definitions of violations that are "serious," "willful," "pervasive," or "repeated" are overbroad and do not provide sufficient guidance to allow a rational evaluation of reported findings and allegations of violations. The reporting scheme also is not well thought out. Contractors will have to submit follow-up reports for each covered contract and subcontract every six months after contract award. Those contractors holding many covered contracts and subcontracts will find themselves gathering information and submitting reports on a near-constant basis. A better approach, which

we propose, is to allow contractors to choose two fixed dates each year on which to submit semi-annual reports for all covered contracts and subcontracts.

The Proposed Rule's required processes will have a significant and unpredictable impact on the management of contractors' supply chains. Under tight schedules, deadlines, and performance requirements of their contracts, prime contractors will be required to conduct compliance assessments for all suppliers that meet the reporting threshold. Unlike a determination made by a CO, defense contractors' processes and decision-making also will be subject to audit by the Defense Contract Management Agency ("DCMA") as part of the review of contractors' purchasing systems. Suppliers, in turn, will have to identify and track sensitive labor-related information and then report that information to their prime contractors, which may also be their competitors for other awards. These reporting obligations apply regardless of whether the subcontractor provides commercial items (other than commercial-off-the-shelf items) or is a small business.

For the many reasons stated herein, we object to the Proposed Rule's application of EO 13673's requirements to subcontracts, and attendant burdens on prime contractors. Nonetheless, at the least the FAR Council and DoL should consider delaying or phasing in any subcontractor-review requirements, as suggested in the Proposed Rule, for at least five years, and otherwise limiting the suppliers to which the Proposed Rule applies. The FAR Council also should consider a number of alternative methods outlined in Section III.D.2 that would lessen the costs and burden on the subcontracting process.

Given the scope of the proposed reporting obligations and the impact on supply-chain management, the FAR Council's and DoL's estimate of regulatory impact is significantly understated. Putting aside that the estimated impact of the Proposed Rule omits numerous costs, we expect that implementing the system in the first and subsequent years will exceed the Government's estimates by orders of magnitude. These higher costs undercut all purported benefits, which the FAR Council and DoL have not even attempted to estimate. We believe that before the FAR Council can proceed with any final rule, it must reconsider its approach or, at a minimum, consider how modifications to its current proposed approach can reduce cost and increase efficiency for both the Government and contractors.

One modification to be considered is eliminating the undue emphasis on "labor compliance agreements." These agreements are cited repeatedly throughout the Proposed Rule and Guidance, to the point that they seem to be a panacea for all alleged labor-law violations in the Government's eyes. They are ill-defined, however, and could be unwarranted duplicates of settlement agreements reached with agencies or of "administrative agreements" often executed to resolve suspension and debarment matters.

Another needed modification is to enhance and clarify protections of sensitive information. The Proposed Rule does not address a variety of data needing various forms of protection: (1) internal information transmitted from subcontractors to higher-tier contractors, who together may be competitors for other contracts; (2) personal information about individual employees involved in alleged labor-law violations; and (3) information concerning classified contracts.

In this submission, we also respond to the FAR Council's request for comments on the proposed "paycheck transparency" provisions. The requirement for notices to independent contractors is repetitive; ultimately, such notices communicate no more information than do the agreements giving rise to independent-contractor relationships in the first place. Also, as between the two contemplated options for defining "substantially similar" wage statements, we recommend the second option because it identifies a larger number of states with "substantially similar" requirements than does the first.

Finally, we raise several concerns about the validity of the Government's efforts to implement EO 13673 as a whole:

- The Proposed Rule and Guidance delegate to contracting agencies the authority to interpret and enforce federal labor laws for which Congress has delegated authority to other agencies, and to interpret and enforce state labor laws for which Congress has not delegated any authority to any agency. COs will be authorized to exclude contractors on account of alleged labor-law violations, or insist on onerous labor compliance agreements or other measures—and DoL will be tasked with giving such exclusions government-wide effect. This delegation of authority usurps the statutory responsibilities of the duly authorized agencies and in so doing violates our Constitution's separation of powers.
- The Proposed Rule and Guidance create remedies not provided for by Congress in the relevant statutes. Many of the covered labor laws do not provide for government-wide exclusion from contracting; the Proposed Rule and Guidance now provide for such exclusion, without any authorization from Congress.
- Through these exclusions, the Proposed Rule and Guidance also usurp the role of the existing statutory enforcement mechanisms, as well as agency suspension and debarment officials ("SDOs"), and will lead, by design, to "de facto debarment" of contractors without the due-process protections that contractors are normally afforded under FAR subpart 9.4. Our recommendations seek to eliminate this de facto debarment threat.
- The Proposed Rule and Guidance are arbitrary, capricious, and lack a rational basis. Both notices cite as their statutory foundations the Executive's authority to regulate the economy and efficiency of federal procurement. Yet neither notice demonstrates any economy or efficiency that will result from the imposition of the Executive Order's burdensome requirements. This gap in the rulemaking record leaves the Proposed Rule and Guidance without any appropriate basis.
- The Proposed Rule and Guidance violate the Administrative Procedure Act ("APA"). Without a doubt, the FAR Council's Proposed Rule creates new legal obligations for contractors. But these obligations are defined *by DoL* through interpretive guidance purportedly not subject to notice-and-comment rulemaking. The APA does not permit agencies to proceed in this fashion: to promulgate vague and incomplete rules while saving the actual definitions for so-called interpretive guidance.

To be sure, the President directed the FAR Council and DoL to propose the obligations at issue, and to do so through regulations and guidance, respectively. But the Executive Branch cannot insulate regulatory actions from statutory and constitutional standards by embedding them in Executive Orders. Fundamental aspects of the Administration's proposed approach, including

elements mandated by the Executive Order, are arbitrary, capricious, and contrary to law; in addition, the Executive Order omits critical elements without which the reasonableness of other aspects of the proposal cannot be meaningfully assessed. The Administration should therefore fundamentally reconsider its approach to pursuing improvements in labor-law compliance and re-propose a regulatory scheme consistent with law and public policy.

II. Background of EO 13673 and Existing Workforce Protections

The Executive Order requires agencies to consider a contractor's history of compliance with 14 federal labor laws and executive orders, including such distinct laws as the Service Contract Act ("SCA"), Fair Labor Standards Act ("FLSA"), Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and Occupational Safety and Health Act ("OSH Act"), as well as "state law equivalents," in determining, before award, whether a contractor is responsible under FAR subpart 9.1. In addition, agencies have the obligation to assess during performance any labor compliance information that may suggest that a contractor is no longer presently responsible. To effectuate this requirement, contractors are required to represent that they have no covered findings of labor-law violations to report for the past three years, or disclose the information that they do have, as part of the proposal process, and to update their representations semi-annually. COs, with the assistance of ALCAs, must render affirmative responsibility determinations before award and consider present responsibility during performance based on this information. The Executive Order applies to any solicitation over $500,000 and requires higher-tier contractors to make similar responsibility determinations for subcontracts over $500,000 except for those for COTS items. The Proposed Rule and Guidance are intended to implement the requirements of the Executive Order. The Guidance defines many of the terms used in the Executive Order, and the Proposed Rule incorporates the Guidance at length.

The protections that the Proposed Rule and Guidance seek to create already exist in numerous statutes and regulations that penalize contractors for violating labor laws and that prevent egregious violators from receiving federal contracts. For example, for some of the labor laws, Congress has prescribed civil and/or criminal penalties, including for violations of the FLSA, the OSH Act, and Title VII. For others, Congress has expressly delegated authority to agencies to debar violators, such as for the SCA and the Davis-Bacon Act ("DBA"). The existing suspension and debarment process under the FAR also could include examining potential responsibility issues under labor laws. In the Appendix to these Comments, we have identified the labor laws that already provide for debarment as well as the enforcement schemes available under each. The Appendix reinforces that the protections the FAR Council and DoL seek to enforce or create through the Proposed Rule and Guidance duplicate existing schemes and, therefore, are unnecessary. In addition, existing labor statutes provide the due process guarantees that the Proposed Rule and Guidance do not.

III. Comments on Proposed Rule and Guidance to Implement Reporting and Responsibility Determinations

Although we are conscious of the complex task that the FAR Council and DoL took on in implementing the Executive Order, many provisions in the Proposed Rule and Guidance require revision, as discussed later in these Comments. As our comments alone demonstrate, the sheer

volume of these issues, and the potential impact on industry and Government of these two notices, strongly support our request that the FAR Council and DoL delay final implementation of the Executive Order until these issues can be further assessed through notice and comment rulemaking.[1]

A. The Proposed Rule and Guidance Must Be Revised, Completed, and Re-Published for Comment Before Implementation.

1. The Proposed Rule and Guidance Have Too Many Flaws and Leave Too Many Issues Open to Be Finalized Without Major Revision and then Solicitation of Further Comments.

We urge the FAR Council and DoL to seriously consider the issues that have been raised by commenting parties regarding implementation of the Executive Order. The Executive Order imposes a government-wide and industry-wide process that improperly usurps existing enforcement regimes at the expense of due process, fails to address the issue of true violators of labor laws, and imposes additional costs and bureaucracy far exceeding any perceived benefit. In light of the Administration's acknowledgement that most federal contractors comply with labor laws applicable to them, the imposition of a costly and inefficient reporting requirement industry-wide is unreasonable.

We believe that the FAR Council and DoL must reissue the Proposed Rule and Guidance, once revised, as one or more proposed rules and afford interested parties further opportunity to comment upon them. Implementing the Executive Order, in its current form, is undeniably complex, if not impossible, and we believe that any final rules require additional public comment and participation.

Indeed, engaging in extended dialogue with stakeholders has been common when the FAR Council and other rulemaking entities have tried to implement complex reporting and regulatory requirements. When the FAR Council implemented the internal-controls and mandatory-reporting rules in FAR 52.2013-13, it engaged in three separate rounds of proposed rulemaking and public comment. *See, e.g.*, FAR Case 2006-007, Contractor Code of Ethics and Business Conduct, 72 Fed. Reg. 7588 (Feb. 16, 2007); FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64019 (Nov. 14, 2007); FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting (Second Proposed Rule), 73 Fed. Reg. 28407 (May 16, 2008). Similarly, when the Department of Defense ("DoD") recently issued rules requiring systems for detection and avoidance of counterfeit electronic parts, DoD held public meetings with industry and other interested parties, accepted comments in connection with the meeting, and solicited written comments on its proposed rules. *See, e.g.*, DFARS Case 2012-D055, Detection and Avoidance of Counterfeit Electronic Parts, 78 Fed. Reg. 28780 (May 16, 2013); Public Meeting, Detection and Avoidance of Counterfeit Electronic Parts-Further Implementation, 79 Fed. Reg. 26725 (May 9, 2014).

We note that the Administration also anticipated robust interaction with industry in addressing "fair and effective" implementation of the Executive Order. *See* Fair Pay Fact Sheet

[1] As noted in our comments, we believe the Government must impose these requirements through legislative rules and cannot rely upon "guidance" that can change at DoL's discretion.

("The Federal contracting community and other interested parties will be invited to participate in listening sessions with OMB, DOL, and senior White House officials to share views on how to ensure implementing policies and practices are both fair and effective."). We recommend that the FAR Council and DoL re-issue the requirements of the Proposed Rule and Guidance in response to the comments received here and then solicit public comments on its revised approach. We further recommend that the FAR Council hold public meetings that allow stakeholders to discuss implementation of the Executive Order with the agencies.

Putting aside whether comments would be beneficial, we believe that further rounds of rulemaking and comments are required under the APA because the Proposed Rule and Guidance leave numerous critical issues open for future rulemaking. With so many issues open, there is no way any final rule or guidance could be a "logical outgrowth" of this Proposed Rule and Guidance. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014) ("An agency may promulgate a rule that differs from a proposed rule only if the final rule is a 'logical outgrowth' of the proposed rule.") (citation omitted); *Am. Water Works Ass'n v. E.P.A.*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) ("The test we have developed for deciding whether a second round of comment is required in a particular case is whether the final rule promulgated by the agency is a 'logical outgrowth' of the proposed rule.") (citations omitted). One example of an issue on which the FAR Council solicits comments is "the need for and cost of setting up [a tracking database], how such costs [would] depend on contractors' size and organizational structure, and the extent to which setting up such systems would reduce recurring disclosure costs in the following years." 80 Fed. Reg. at 30555. This is a vitally important issue for which different contractors will necessarily have different views based on their size, organization, and geography. The Government also is in the process of developing a single website to use for contractor reporting, but has not yet developed that system or solicited public comment on its contours. *Id.*

DoL's Guidance also is in flux and reflects the arbitrary and capricious nature of the Proposed Rule. Most prominently, DoL has deferred entirely to a further proceeding defining "equivalent state laws." Other areas on which comments were requested also could lead to substantial changes in the Guidance. For example, DoL has requested comments on two components of the "serious" definition: the "25% of workforce at worksite" and $5,000/$10,000 thresholds, which would, in the normal course, not reflect serious transgressions even if established as an actual, rather than merely alleged, violation. *See id*. at 30583-84. The Guidance struggles to define how a CO or contractor should evaluate whether alleged violations are "pervasive" based on the contractor's size and seeks comment on "how best to assess the number of a contractor's or subcontractor's violations in light of its size." *Id*. at 30589. Furthermore, DoL seeks comments regarding its proposed definition of "substantially similar" for determining if a violation is "repeated." *Id*. at 30588.

Significant to our members, both the Proposed Rule and Guidance are silent on how the reporting process would be handled for classified contracts. We anticipate that the extensive review and conferring process between COs and ALCAs, on the one hand, and contractors and their subcontractors, on the other, will be far more complex for classified contracts where even the identity of the contracting agency and contractor may be classified information. We believe that the FAR Council and DoL should solicit public comment on this issue.

Additionally, the Proposed Rule does not address concerns regarding retroactive applicability to existing contracts. Without formal guidance, COs may attempt to include reporting requirements in contract modifications for existing contracts in contravention of the intent of Executive Order and FAR Council, thereby further increasing costs and burdens for contractors and subcontractors.

Contractors cannot be expected to expend the resources to develop systems to implement the Executive Order when so many factors that would affect development of such systems remain undefined. Our members do not currently have centralized systems in place to capture all of the information designated in the Proposed Rule and Guidance with the reliability needed to make representations as prime contractors, report the types of alleged violations identified in the promulgations, make representations and reports as subcontractors, or evaluate reports from subcontractors. It is simply not feasible, for example, for a contractor to develop information-technology solutions to identify, track, and report labor-law violations until it knows what a government website will require it to report and the format of that reporting. Even more, contractors cannot implement any solution until they know the scope of the state laws that will apply because any system would require significant modification, if not replacement, as a result. The challenge facing the Government is similar: neither contracting agencies nor DoL can develop reliable guidance or internal processes and procedures until they know the scope of review that they will be required to undertake.

Even where the FAR Council and DoL have proposed concrete alternatives, however, DoL has issued its views as "guidance" that it believes it can choose, but is not required, to make available for public comment. The Proposed Rule purports to incorporate the current Guidance by reference, but it does not codify any of the Guidance in the Proposed Rule. Thus, even where DoL has attempted to define terms used in the Executive Order, it seemingly asserts that it may choose to do so differently in the future without prior notice (or comments), upturning contractual expectations of the parties and potentially rendering useless the systems and processes that the agencies and contractors put in place. Such a fluid approach is neither sustainable nor fair. And as shown *infra* Section V.E, the approach also violates the APA.

2. The FAR Council Has Not Considered Alternatives That Would Increase Efficiency and Reduce The Impact on The Procurement System.

AIA members also believe that further notice and comment rulemaking is necessary to consider alternatives to the Proposed Rule and Guidance. If the Executive Order, Proposed Rule, and Guidance are intended to increase efficiency and economy in the procurement system, then it behooves the FAR Council to consider alternatives to its current unmanageable approach. We also believe that further notice and comment rulemaking is required because there is no evidence in the Proposed Rule or Guidance that the FAR Council or DoL considered any alternatives to their current approach or analyzed the costs and impacts of any possible variants to their current course. We believe several alternatives should be considered, most notably in the context of the Rule's applicability to subcontractor determinations. *See infra* § III.D.2. These alternatives would serve other goals of the Proposed Rule and Guidance and the procurement system: fostering consistent determinations; providing due process to contractors; increasing efficiency and reducing costs; and meeting agency mission imperatives.

For these reasons, as well as those discussed and elaborated below, if the FAR Council and DoL proceed further, we believe that the FAR Council and DoL should defer implementation of the Executive Order until further revisions to the Proposed Rule and Guidance are issued as proposed rules, public comment is received, and all of the currently undecided issues are addressed.

B. The Proposed Rule and Guidance Impose Overly Broad Reporting Requirements.

We believe that the Proposed Rule and Guidance are too broad both with respect to the entities that must report labor-law information and with respect to the information that they must report. We recommend that the FAR Council and DoL limit the Proposed Rule and Guidance in accordance with our comments.

1. The Proposed Rule and Guidance Extend Too Deeply Into Contractor Organizations.

The Proposed Rule and Guidance should be revised to exclude commercial-item contracts and subcontracts. In addition, the Proposed Rule and Guidance should exclude segments of a contractor's business that do not operate as federal prime contractors, as their compliance records are not significantly probative of the responsibility of the business unit that is a federal prime contractor. At a minimum, if the FAR Council rejects both alternatives, it should delay coverage of commercial segments and contracts for at least five years.

EO 13673 exempts subcontracts for COTS items. *See* 79 Fed. Reg. at 45310 (§ 2(a)(iv)). The Proposed Rule follows suit. *See, e.g.*, 80 Fed. Reg. at 30570 (Proposed FAR Clause 52.222-AB(b)). Although the Executive Order expressly exempts COTS items, it does not expressly *include* commercial items. Nor does the Executive Order state that it intended to sweep in commercial item subcontracts. Neither the Executive Order, nor the Proposed Rule, nor the Guidance offers any justification for exempting the Executive Order's terms on COTS subcontracts but not those for commercial items. In particular, the Government has not so much as suggested how excluding COTS subcontracts but not commercial-item subcontracts benefits the "economy and efficiency" of federal procurement. Many commercial items are based on minor modifications to COTS products, *see* FAR 2.101, eliminating any reasoned basis for distinguishing between them. In much the same way, many commercial-item services are virtually indistinguishable from services provided to commercial customers. The FAR Council and DoL should adopt this interpretation of the Executive Order.

Including commercial-item contracts in the Proposed Rule's coverage runs counter to a major government initiative: increasing acquisition of commercial items. Since the 1990s, Congress has adopted legislation intended to streamline acquisitions and encourage commercial-item contractors to enter the federal marketplace to allow the Government to reap the benefits of commercial innovation. In particular, the Federal Acquisition Streamlining Act of 1994 ("FASA"), Pub. L. No. 103-355, expressed Congress's policy that agencies should try "to the maximum extent practicable" to state requirements so that they could be met with commercial items. *See* 10 U.S.C. § 2377(a), 41 U.S.C. § 3307(b) (codification). As part of meeting FASA's goal, agencies were instructed to "revise [their] procurement policies, practices, and procedures

not required by law *to reduce any impediments in those policies, practices, and procedures to the acquisition of commercial items*." 10 U.S.C. § 2377(b)(5); 41 U.S.C. § 3307(c)(5) (emphasis added). FASA expanded the definition of commercial items and eliminated many of the government-unique rules and policies as applied to commercial-item contracts. Through implementing regulations, FASA, among other things, also initiated exemptions for commercial-item contractors from the requirement to submit cost or pricing data under the Truth in Negotiations Act ("TINA"),[2] limited the Government's technical data rights in commercial items and commercial computer software to rights no greater than those customarily provided to commercial customers, and allowed commercial-item contractors to rely on their existing quality assurance systems as a substitute for in-process inspection and testing, unless customary commercial practices for the item being procured allow for such inspections.

In 1996, Congress passed the Clinger-Cohen Act, Pub. L. No. 104-106, to further promote and streamline acquisition of commercial items by generally exempting commercial-item contracts from the requirement to comply with the Cost Accounting Standards ("CAS"), expanding the exemption from TINA for commercial-item contracts, eliminating audit rights previously granted under FASA, and limiting a CO's ability to ask for "other than cost or pricing data." In 2003, Congress passed the Services Acquisition Reform Act, Pub. L. No. 108-136, which further expanded use of commercial-item contracts by authorizing use of time-and-material commercial-item contracts and called for the creation of a panel to study the use of commercial-item contracts and make recommendations for improvement.

Although Congress has narrowed some provisions of FASA and the Clinger-Cohen Act, particularly as applied to DoD, Congress still recognizes the importance of regulations favoring procurement of commercial items. For example, the pending Senate version of the National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2016 has several provisions illustrating Congress' continued focus on removing barriers to commercial-item contracting. *See, e.g.*, S. 1376, 114th Cong. §§ 862, 866 (2015) (updating preference for commercial items and allowing items/services provided by nontraditional contractors to be treated as commercial items); *see also* S. Rep. No. 114-49, at 165 (2015) (describing the effort to "increase access to commercial innovation and competition" as a "theme" of the Act). We expect these and other legislative initiatives to continue to buttress and encourage further removal of roadblocks to commercial-item acquisitions.

Increasing participation of commercial-item contractors in federal contracting has been a clarion call of this Administration as well. For example, DoD's Better Buying Power 3.0 ("BBP 3.0") initiative expresses the concern that the United States is at risk of losing its technological superiority. *See* Memorandum from Frank Kendall, Implementation Directive for Better Buying Power 3.0—Achieving Dominant Capabilities through Technical Excellence and Innovation at Attachment 2 at 1 (Apr. 9, 2015). BBP 3.0 recognizes that technological innovation comes "increasingly" from the "commercial sector and from overseas." *Id.* Thus, "BBP 3.0 has a primary goal to incentivize greater and more timely innovation in the products DoD uses." *Id.* at 9-10. BBP 3.0 recognizes that "[a]chieving this objective will require identification and elimination of specific barriers to the use of commercial technology and products." *Id.*; *see also* Acquisition Reform Working Group, 2014 Legislative Working Packet at 2 (Mar. 31, 2014)

[2] TINA is codified at 10 U.S.C. § 2306a and 41 U.S.C. ch. 35.

("Rapid and cost-effective access to commercial items has long been, and remains a paramount objective of Government and industry alike.").

The goal of increasing participation from commercial-item contractors is not limited to DoD. The Office of Federal Procurement Policy ("OFPP") issued a policy memorandum with similar goals, "Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings," on December 4, 2014 ("OFPP Memo"). The OFPP Memo concluded that "greater attention must be paid to regulations related to procurements of commercial products and services, as the Government is typically not a market driver in these cases and the burden of government-unique practices and reporting requirements can be particularly problematic, especially for small businesses." OFPP Memo at 5-6. In fact, the memo called for OFPP to join the FAR Council and Chief Acquisition Officer Council in recommending "specific actions that can be taken to reduce burden in commercial-item acquisitions, especially for small businesses, and increase the use of effective commercial solutions and practices by the Government." *Id*. The Proposed Rule and Guidance hinder this DoD policy.

The Administration should consider and rationally address how and why it can take action contrary to FASA and its own frequently emphasized policy objective of attracting commercial-item contractors to the federal marketplace. The Proposed Rule and Guidance add a significant obstacle to entering the federal marketplace and remaining in it. Commercial item contractors that are considering selling their goods and services to the Government or even other prime contractors will have to absorb the cost of identifying and tracking retrospectively their labor-law violations, which will result in new, standalone costs that have no corollary in the commercial marketplace. Some commercial contractors, particularly innovative, high tech commercial-item contractors that can sell their products in the commercial marketplace or overseas, may be unwilling to enter the federal market until the three-year reporting period has passed for individual labor violations, and others may not be willing to enter at all because of the sheer costs of compliance and the competitive risk of disclosing sensitive labor-law compliance information and of increases in costs that do not apply to their commercial competitors. Although it may be difficult to quantify the impact of decreased competition and the loss of potential innovation, the Proposed Rule does not even recognize these costs, let alone attempt to quantify them.

We recommend that the FAR Council account for these similarities by following the lead of FAR provisions implementing laws that go to the heart of economy and efficiency in government contracting. The regulations implementing TINA and CAS both apply in only limited fashion to commercial items. *See* FAR subpart 15.4 (TINA); 48 C.F.R. chapter 99 (CAS); *see also* FAR 12.504(c) (noting limited application). The limited application recognizes that little economy and efficiency can be gained relative to the cost of applying those burdensome requirements to COTS and to other types of commercial-item contracts. The FAR Council should follow that lead here: applying EO 13673 to all commercial-item subcontracts will no more contribute to economy and efficiency in government procurement than would applying the requirements to COTS subcontracts.

Thus, the FAR Council should exempt all commercial-item subcontracts from EO 13673's implementation. In the alternative, the FAR Council should, at a minimum, delay

application of the rule to commercial-item subcontracts. Given the additional burden of including them and the negligible benefit, such coverage should not occur for at least five years after adoption of a final rule. Either change, but in particular a full and permanent exclusion, will aid the Government in attracting business from contractors offering commercial products and services.

The FAR Council and DoL also should reconsider how far the Proposed Rule and Guidance reach into contractor organizations. They have interpreted the Executive Order to require assessing any labor-law violation anywhere within the contractor organization, regardless of whether the violations involve employees with any connection to the company's federal contracting operations. Many AIA members, as well as contractors in other industries, operate near-independent divisions and business units that are purely or primarily commercial contractors or do not hold themselves out as federal prime contractors. These divisions and business units operate almost as mini-companies; they often have many separate systems and policies, including those related to labor, employment, and workplace safety, as well as separate management. Because of this separation, violations in one do not affect or reflect compliance or performance in another. Stated differently, there is no "nexus" between a labor violation that may be committed in connection with commercial operations of a commercial unit in a particular geographic location and the responsibility of an entirely different unit, division, or subsidiary under different management that performs a federal contract with different employees at an entirely different location. Thus, the Government should not impose onerous reporting and compliance requirements on parts of contractors' businesses that have so little to do with what the Executive Order, Proposed Rule, and Guidance purport to pursue: economy and efficiency in government contracting. To do otherwise, and maintain entity-wide reporting requirements, will drag commercial enterprise into government contracting for no good reason, and could introduce extraneous, irrational factors into the award of federal prime contracts. Tellingly, the current FAPIIS reporting requirements in FAR 52.209-7 do not sweep as broadly as the Proposed Rule and Guidance. This FAR clause requires reporting of only final adverse criminal, civil, and administrative determinations on the merits "*in connection with the award to or performance by the offeror of a Federal contract or grant*." FAR 52.209-7(c)(1) (emphasis added). We believe a similar nexus is both appropriate and required and thus supports excluding business segments or subsidiaries that operate primarily in the commercial space and not as prime federal contractors.

Moreover, the Proposed Rule and Guidance do not estimate the impact that the reporting regime will have on the commercial side of a contractor's business. If the Proposed Rule and Guidance are imposed company-wide, their impacts will be felt company-wide. Thus, contractors will find that their costs of doing business across all of their segments increase. Businesses that operate in both the commercial and government markets will be disadvantaged as compared to their purely commercial competitors and, of course, against foreign commercial companies in both the U.S. and international market. The Executive Order is directed at taxpayer money going to federal contractors who are serious labor-law violators. Nothing in the Executive Order claims a desire to also touch the separate commercial operations of companies that happen to be federal contractors. We believe it is unreasonable, particularly because all parties acknowledge that the vast majority of contractors comply with their labor-law obligations, to impose a solution that would harm parts of a contractor's business that do not

hold themselves out as federal contractors. It is even more unreasonable when the impacts of such an approach have not been studied.

2. The Definition of "Administrative Merits Determination" Is Too Broad and Requires Contractors to Report Mere Allegations of Non-Compliance.

As the Guidance defines "administrative merits determination," the term stretches far beyond any reasonable boundary. The definition includes many agency actions taken *before* the record is complete, before contractors can respond, and before conclusions can be reached on the merits. Under some circumstances, the definition could include actions that can be taken when the Government, rather than the contractor, was at fault. The definition also would require reporting the outcomes of appeals in addition to the initial determination, which may lead to varying results, such as in the case of disclosing a determination which leads to an adverse action against the contractor but which is then overturned by a fully successful petition for review to a district court which is affirmed on appeal. All these events would be disclosed but the contractor could be punished for a claim later adjudicated to be without merit. As a result, DoL's overbroad definition will require reporting far too many agency actions, to the point that managing the volume of reported incidents will consume so many contractor *and* agency resources that the purported benefits of EO 13673 will not be achieved.

Beyond consuming an excessive amount of resources, the large volume of reported violations created by such an expansive definition of administrative merits determination makes the exercise of an ALCA reviewing and providing a written recommendation (after collecting and reviewing all of the underlying determination documents) all within three days unrealistic. It is entirely unreasonable to expect one ALCA in each agency to be able to process and consider such a high volume of documentation within that time period. Not meeting the three-day timeframe will either: (1) delay the contracting process because the CO will have to wait for the ALCA's delayed recommendation; or (2) force the CO, who likely lacks expertise in the labor laws, to make a responsibility determination in the absence of a recommendation, risking inconsistent determinations by different COs based on the same information.

In most instances, DoL's identified determinations are either preliminary determinations or mere allegations. The determinations include charges, complaints, citations, and letters transmitting investigation results. *See* 80 Fed. Reg. at 30579 (identifying "documents, notices, and findings" that constitute administrative merits determinations). There need not be a developed record or an opportunity for the contractor to respond in many of these cases. By requiring contractors to report such matters, the Guidance gives enforcement agencies, as well as COs/ALCAs, undue leverage to force contractors into settling the underlying allegations and/or entering into labor compliance agreements regardless of the merits of the allegations. AIA members believe that this approach to reporting accusations, which presumes that all the accusations equate to violations that require a labor compliance agreement, is arbitrary and capricious and offends notions of due process. *See infra* Section V.C.

"Complaints" are among the preliminary determinations unreasonably included in the definition of administrative merits determinations. Even if complaints do "represent[] a finding by an enforcement agency following a full investigation that a Labor Law was violated," *see* 80

Fed. Reg. at 30580, that result is no different from any other administrative or civil complaint or criminal charge. If not dismissed, settled, or withdrawn, these complaints will, by definition, be adjudicated by neutral decision-makers based on a complete record with an opportunity for the complaint/charge target to respond. Such adjudications accordingly should not be covered as an "administrative merits determination" until the neutral decision-maker has rendered its judgment on the record, rather than earlier, when an enforcement agency has decided to initiate the proceeding.[3] To equate such complaints with "serious violations" reveals an intent to bypass due process and adjudication of the actual merits of the claim and to use such claims as a pretext to leverage contractors into accepting labor compliance agreements that could not otherwise be imposed.

NLRB practice aptly illustrates the unfairness of evaluating contractors' business ethics and integrity based on the issuance of mere complaints. Regional directors' complaints originate as "unfair labor practice" charges filed by unions, employees, or employers. *See* 29 U.S.C. § 160(b) (predicates and requirements for complaints). According to the NLRB, fewer than half of these charges are fully investigated by regional offices; the majority are dismissed or withdrawn.[4] *See* NLRB, *Charges and Complaints*, *available at* https://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints. Of those fully investigated, the NLRB may reach a finding of "probable merit" (as opposed to a finding on the merits), at which point the parties involved almost always resolve the dispute through negotiated settlement. *See id.* But if the parties cannot agree, then the cognizant NLRB regional director issues a complaint—based on a finding that the underlying allegations probably have merit. *See id.* Yet even at this stage, few regional directors' complaints result in final orders by the Board; in FY 2014, the number of NLRB orders equaled only 35% of the number of complaints issued by regional directors.[5]

That statistic means approximately two-thirds of regional directors' complaints—which, again, are reportable under the Guidance—are not adjudicated against a standard above "probable merit." And of the one-third of complaints that are so adjudicated, many result in orders in favor of the employer, further reducing the share of regional directors' complaints that lead to full-record merits determinations that a contractor violated the NLRA. Such a low rate of finding violations on the merits indicates that regional director complaints are not an appropriate trigger for contractors' disclosure requirements.

Regional directors' complaints are not the only example of NLRB practice that demonstrate why reporting of complaints as labor law violations is untenable. As another example, the NLRA compels employers to commit an unfair labor practice for refusal to bargain with their employees under 29 U.S.C. § 158(a)(5), in order to test the validity of the NLRB's certification of a representation election in federal court. Committing an unfair labor practice is

[3] For "complaints" filed in courts by agencies, the neutral decision-maker's ruling will be a civil judgment, not an administrative merits determination.

[4] A sampling of AIA member companies' experiences are generally consistent with the timing, statistics, and procedures in this paragraph.

[5] The NLRB has published datasets showing 1,216 complaints and 421 Board orders in FY 2014. One dataset shows consistent complaint totals over the prior nine fiscal years; the other relevant dataset does not include Board order totals for prior fiscal years. The datasets are available at https://www.nlrb.gov/news-outreach/graphs-data.

the exclusive method under the NLRA to "test certification." Thus, a contractor will have to report the fact that a complaint was issued even though the employer is following the only procedural method permitted by the NLRA for obtaining judicial review of a representation election. Accordingly, imposing a sanction of non-responsibility on this basis is illogical. AIA members believe that the same concerns would be borne out by reviewing statistics and enforcement procedures for the other labor laws as well.

DoL's definition is over-inclusive in other ways too. DoL unreasonably includes agency determinations that can be made without finding the contractor to be at fault or have committed any wrongdoing.[6] For example, the definition of administrative merits determination includes issuance of a WH-56 Statement of Unpaid Wages, a form generated by DoL's Wage & Hour Division ("WHD"). That form can be—and often is—issued to require payment of back wages when DoL determines that the *contracting agency* failed to include the appropriate SCA or DBA clause or wage determination(s) in a covered contract. The FAR recognizes the Government's responsibility in these circumstances by entitling contractors to equitable adjustments for any back wages or fringe benefits ordered by WHD. *See* FAR 22.1015 ("The contracting officer shall equitably adjust the contract price" if DoL orders payments resulting from the agency's failure to incorporate the SCA clause and correct wage determination(s)); FAR 22.404-9 (parallel requirement for DBA clause and wage determinations). Another example is where a contractor is issued an OSHA citation for a work condition caused by the government customer's control of the government location where the contractor is required to perform the work. Instances such as these are not reasonably reflective of a contractor's overall compliance with labor laws and its ethics and integrity. They should not be classified as reportable findings.

DoL cannot justify these overbroad elements of the definition by asserting, as it does, that contractors can submit mitigating information that explains how a determination was preliminary in nature, was reversed on appeal, or was not predicated on the contractor's fault. *See* 80 Fed. Reg. at 30580. Indeed, this is an unsatisfactory response for several reasons. For example, it presumes that contractors are guilty of a violation for which they need to seek relief based on "mitigating" factors--when in fact the so-called determination may be baseless. Nevertheless, contractors will still have to represent that they have been the subject of an administrative merits determination, when otherwise they would not; contractors will still have to prepare submissions on the determination and its surrounding facts and circumstances, when otherwise they would not; and COs and ALCAs will still have to review and analyze the submitted information, when otherwise they would not, and under circumstances in which they may not have the nuanced knowledge of the underlying labor laws and administrative proceedings to understand the posture of such a determination. Moreover, contractors will still have to endure three full years of potential stigma that accompanies reporting a "determination" of labor-law "violations" that may turn out to be wholly unjustified.

We accordingly recommend resolving these deficiencies by revising "administrative merits determination" to consist of only "adjudicated" and "uncontested" administrative determinations, as those terms are used and defined in DoL's proposed definition of "repeated" violations. *See* 80 Fed. Reg. at 30587. In addition, administrative merits determinations should include only those determinations in which the enforcement agency provides a written statement

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[6] These determinations could be on the agency's own initiative or based on a negotiated settlement.

of factual and legal findings, including an express finding of contractor fault. Furthermore, contractors should only be required to report administrative merits determinations for the cognizant business segment or location that holds or is competing for the relevant covered contract or subcontract. These changes will ensure that COs, ALCAs, and higher-tier contractors receive reports of administrative merits determinations only after the reporting contractor has had an opportunity to respond to allegations and findings on a complete record, and that the reporting contractor has a record of the agency's legal and factual basis for the determination—critical considerations for when the contractor prepares its submission of mitigating factors.

Such a revision also is consistent with--and in fact, duplicative of--existing reporting requirements relating to responsibility. FAR 52.209-7 requires contractors to represent whether a prospective contractor or any of its principals has within the last five years, in connection with the award to or performance by the offeror of a federal contract or grant, been the subject of a proceeding, at the federal or state level that resulted in any of the following dispositions: (1) with respect to criminal proceedings, a conviction; (2) with respect to civil proceedings, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of $5,000 or more; or (3) with respect to an administrative proceeding, a finding of fault and liability that results in-the payment of a monetary fine or penalty of $5,000 or more or reimbursement, restitution, or damages in excess of $100,000. This labor-compliance responsibility review should likewise be based on final merits determinations.[7]

Still further changes are needed to eliminate agencies' and contractors' obligations to consider stale labor-law violations. To start, the definition must be revised to eliminate ongoing reporting for contractors that exercise their rights to further review or appeal. Under DoL's proposed definition, each time an agency review function or a reviewing court renders an opinion of less than full reversal of the initial determination, the contractor must report the opinion as a "new" determination and thus start a new three-year reporting cycle, all while continuing to report the original determination. *See* 80 Fed. Reg. at 30580-81. We have three principal concerns:

- Practicality. This requirement imposes unduly duplicative reporting burdens on contractors and on contracting agencies. Contractors would be forced to report findings concerning the same conduct repeatedly, and COs and ALCAs would be required to reach determinations considering them repeatedly. DoL cannot reasonably expect that after years of finding a contractor to be responsible based on an initial administrative merits determination, a CO and ALCA will find the contractor to be non-responsible based on an unfavorable appeal decision.
- Timeliness. Contractors could be required to report violations upwards of a decade after the underlying conduct. For example, imagine that DoL WHD finds in 2015 that an agency failed to include the SCA clause and two wage determinations for contract performance from 2011 to 2013. The contractor appeals that decision to DoL's Administrative Review Board, which affirms the decision in 2016. At this point, the contractor will have to report the appeal into 2019, six years after the underlying conduct

[7] In fact, the FAR Council has presented no evidence that this existing reporting mechanism does not serve the purpose intended by the Executive Order already or has assisted the Government in assessing present responsibility.

ended, and that is *before* the contractor even considers whether to seek judicial review. There is no reason for reporting past the point in which the underlying conduct has grown stale.

- Fairness. A contractor's appeal, on its own, has no bearing on whether the contractor is complying, will comply, or will improve compliance with applicable labor laws. The appeal may, for example, be undertaken to clarify complex, confusing, or novel areas of the relevant labor law—considerations that are important to AIA members, which include many contractors with large, disparate workforces in which unusual and complex circumstances can frequently arise under both federal and state laws.

We thus urge DoL to exclude appeals, reviews, or any other determination after the initial determination that meets the definition of "administrative merits determination," as that term should be revised per the above recommendations.[8]

In addition, we recommend, in light of the point made above, that DoL add a timeliness requirement for the conduct underlying all administrative merits determinations. DoL should define administrative merits determination to encompass only those determinations based on conduct that occurred or ceased within the prior three years, even if an enforcement agency only recently issued a merits determination on a complete record. This change not only improves administrative efficiency, because responsibility determinations will not hinge on conduct that ended a half-decade earlier or more, but also fulfills the basic principle that exclusion from federal contracting is intended to be a prospective remedial measure, not punishment for prior bad acts. *Cf., e.g.*, *United States v. Hatfield*, 108 F.3d 67 (4th Cir. 1997) (holding debarment under FAR subpart 9.4 is a prospective remedy rather than punishment). The definition of administrative merits determination can be consistent with that principle only if limited to reasonably current conduct.[9]

Collectively, these changes urged by AIA members are consistent with EO 13673's directives. The changes would result in a definition of "administrative merits definition" that better fulfills principles of fairness, efficiency, and practicability—which in turn will reduce at least *some* of the unduly burdensome costs of reporting and responsibility determinations under the Executive Order, Proposed Rule, and Guidance. Further, COs and ALCAs can focus their limited resources on what the Executive Order purports to pursue, the small set of contractors

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[8] Consistent with the proposed definition, COs, ALCAs, and higher-tier contractors should still be required to consider the fact that determinations are under appeal or other review and to give weight to decisions reversing a determination in part. *See* 80 Fed. Reg. at 30580 (including among submittable information the fact that a determination has been challenged). For determinations reversed in full, contractors would no longer be obligated to report the underlying administrative merits determination, consistent with the proposed definition. *Cf. id.* (requiring reporting of determinations that a contractor is challenging, can still challenge, or is otherwise subject to further review).

[9] There is no tension between the need to define administrative merits determinations as encompassing only decisions made on a full record after a contractor's opportunity to respond and the need to set a time limit on the underlying conduct. As noted above, these changes are needed to satisfy requirements that contractors be given minimum due process and that they be judged for their *present* responsibility. That these changes may exclude some or many agency findings means only that the proposed definition includes some or many findings that are preliminary, not relevant to *present* responsibility, or both.

committing significant violations, and contractors can focus their resources on remediation and prevention rather than reporting.

3. The Definitions of "Civil Judgment" and "Arbitral Award or Decision" Require Comparable Revisions.

Concerns similar to those posed by the definition of "administrative merits determination" apply to the definitions of "civil judgment" and "arbitral award or decision." As with the definition of administrative merits determination, the definitions of civil judgment and arbitral award or decision are, in some instances, based on preliminary determinations or mere allegations. For example, "civil judgment" includes a "judgment or order that is not final" as well as preliminary injunctions. 80 Fed. Reg. at 30580. Likewise, "arbitral award or decision" includes an "award or decision that . . . is subject to further review in the same proceeding [or] is not final." *Id.* By requiring contractors to report such preliminary findings, the Guidance again short-circuits due process and gives undue weight to preliminary determinations.

Accordingly, we recommend the following revisions to the definitions of "civil judgment" and "arbitral award or decision":

- The definitions should be limited to judgments made on the basis of a complete record, including contractor response, a decision in writing, and a finding of fault. Thus, judgments, orders, awards, and decisions that are subject to further review in the same proceeding or are not final would be excluded from the definitions of "civil judgment" and "arbitral award or decision." Specific to "civil judgments," preliminary injunctions should be excluded from the definition because they are not based on a complete record and may be subject to lower standards; indeed, they may be based on nothing more than a complaint.
- Private and confidential arbitrations should be excluded from the definition of "arbitral award or decision" so that contractors are not exposed to suit for breach of a confidentiality provision. If DoL declines to do so, then DoL should exclude confidential or private arbitrations conducted under employment or arbitration agreements executed before the effective date of any final rule. This narrower exception would be consistent with the EO 13673 and Proposed Rule provisions limiting arbitration of certain employment disputes. Those provisions exclude from applicability employees or independent contractors who entered into a valid contract before a contractor bid on a covered contract, subject to certain exceptions. *See* 80 Fed. Reg. at 30572.
- Civil judgments and arbitral awards or decisions should concern conduct that occurred or ceased within the prior three years so that consideration is given only to reasonably current conduct.

4. The Terms "Serious," "Willful," "Pervasive," and "Repeated" Each Must be Narrowed or Redefined.

a. The Threshold for a "Serious" Violation is Too Low and All Encompassing.

Among many other examples, the Guidance includes as "serious" violations the following alleged violations and impacts:

- A violation of the OSH Act or an Occupational Safety and Health Administration ("OSHA") approved State Plan citation was designated as serious, there was a notice of failure to abate an OSH Act violation, or an imminent-danger notice was issued under the OSH Act or an OSHA-approved State Plan;
- The affected workers make up 25% or more of the workforce at the worksite;
- Fines and penalties of at least $5,000 were assessed or back wages of at least $10,000 were due or injunctive relief was imposed by an enforcement agency or a court; and
- The findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor interfered with the enforcement agency's investigation.

80 Fed. Reg. at 30582-83. DoL has expressly requested comments on two components of the "serious" definition: the "25% of workforce at worksite" and $5,000/$10,000 thresholds. *Id*. at 30583-84.

We believe these criteria in the definition should be revised. First, the criterion involving OSH Act violations designated as "serious" is overly inclusive. The proposed definition of "serious" includes OSHA citations labeled by the agency as "serious" under the OSH Act. According to the OSH Act:

> [A] serious violation shall be deemed to exist in a place of employment if there is a *substantial probability* that death or serious physical harm *could* result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 U.S.C. § 666(k) (emphasis added). The OSH Act's existing statutory definition of serious and the related, recognized tests under applicable Act case law are adequate and sufficient and are the only bases on which an OSHA citation should be deemed "serious" for purposes of the Proposed Rule.

The Proposed Rule, however, goes on to list examples of violations that OSHA has interpreted as "serious" to include citations when a date is missing on a certification form, a required sign is not posted, or guards on machines are only 1/16" of an inch out of alignment. Combined with the Guidance's broad definition of an "administrative merits determination," a significant percentage of all OSHA citations could be considered "serious" violations.

The Proposed Rule "serious" definition would also apply based only on the initial OSHA designation and does not direct any change in treatment of citations that are withdrawn, amended, or informally resolved. Notably, a survey of the OSHA Integrated Management Information System enforcement database reveals that, for the top ten contractors in FY 2014, OSHA found a total of 82 "serious" violations within the past three years.[10] However, of those 82 serious violations, 45 were contested, 12 were resolved through informal settlement, and one was deleted. *See* Establishment Search, U.S. Dep't of Labor, https://www.osha.gov/pls/imis/establishment.html. We note that informal agreements with OSHA frequently indicate that the employer does not admit any liability. Thus, many so-called "serious" violations turn out to be settled as not serious. As a result, we believe this criterion in the definition should be narrowed to require additional aggravating circumstances.

The 25-percent-of-the-workforce threshold for a "serious" violation also is too low and lacks any reasonable minimum for smaller sites. Many contractors provide services across multiple sites, some of which include only a small number of employees, such as a team that works at an agency's satellite office. At a location with four contractor employees performing program management or technical support onsite, for example, even a single violation for one employee would cross the "serious" threshold. To prevent these types of absurd results, any percentage-based threshold should, at the least, be balanced by a minimum number of employees to which it applies. The Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. §§ 2101-09, for example, includes a 50-person threshold for application. While we do not endorse that low threshold, we note that the WARN Act anticipated that a threshold should apply so that small work sites do not skew application of the law.

Regardless, even at larger sites, a 25 percent threshold may not necessarily indicate a "serious" violation, as shown by a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit. A few years ago, a large telecommunications company adopted a policy applicable to all of its customer-facing employees that precluded them from wearing T-shirts that said "Inmate" on the front and "Prisoner of" the company on the back. Although the decision does not identify the percentage of employees affected, it does state that on two occasions the union encouraged "hundreds" of employees to wear the shirts to work. The company levied one-day suspensions to 183 employees in response. The union filed an unfair labor practices charge, and the company cited the well-recognized "special circumstances" doctrine, a limitation on Section 7 of the NLRA. An administrative law judge ("ALJ"), and then a divided NLRB, found that the company committed an unfair labor practice by barring its employees from wearing the shirts. *See S. New England Tel. Co.*, 356 NLRB 118 (2011).

Upon review, the D.C. Circuit granted the company's petition for review and vacated the NLRB decision. *S. New England Tel. Co. v. NLRB*, No. 11-1099, 2015 WL 4153873 (D.C. Cir. July 10, 2015). And yet if the company had been subject to EO 13673 during these administrative and judicial proceedings, it could have had to report *three* separate "administrative merits determinations" that could well have been deemed "serious": the regional

[10] *See* Top 100 Contractors Report FY14, Federal Procurement Data System – Next Generation, https://www.fpds.gov/fpdsng_cms/index.php/en/reports.html (for top ten contractors in Fiscal Year 2014); Establishment Search, U.S. Dep't of Labor, https://www.osha.gov/pls/imis/establishment.html (for searching OSHA citations).

director's complaint issued in November 2009, the ALJ decision issued in June 2010, and the NLRB decision issued in March 2011, all for a finding that the D.C. Circuit characterized as lacking "common sense." *Id.* at *1 ("Common sense sometimes matters in resolving legal disputes. This case is a good example.").

Or consider a different example in which, while considering an unfair labor practice charge alleging the improper discharge of a single employee, the NLRB strikes down provisions of handbooks in non-union workplaces, taking the position that the handbook chills the employees' exercise of their Section 7 rights to engage in concerted activities. Even if the contractor was found to have lawfully discharged the complaining employee (based on, for example, discipline arising from different, unrelated misconduct), the handbook provision (which is corrected as part of the remedy in the case) would be a serious violation because it affected all the workers at the site. The 25% threshold necessarily would be met.

We also believe that the dollar thresholds are too low and should be increased and tied to the size of the contractor. DoL estimates that a third of the cases in which back wages are assessed exceed the $10,000 threshold. 80 Fed. Reg. at 30583-84. If, as the Guidance states, the new requirements for a CO's pre-award responsibility determination are intended to identify "the violations that are most concerning," then a third of all companies with back-wage assessments would be swept into the category of "serious" violators with the "most concerning" type of violation. This net is simply too wide to catch only those contractors with truly "serious" violations. Tellingly, there is no evidence that DoL actually treats such cases as "serious" either by debarring a third of the contractors with back-wage assessments or referring them to other agency SDOs for suspension and debarment proceedings, both remedies available to DoL today. Yet DoL would allow COs, unversed in labor laws, to reach a non-responsibility determination nonetheless.

The definition also does not factor in the size of a contractor. A contractor with 70,000 employees, performing under a variety of federal and state contracts and subject to a host of state and federal laws, could easily find itself faced with a demand for back wages of $10,000. Yet given the size of its workforce and the nature of its contracts, such a demand does not reflect "serious" defects in the contractor's compliance efforts. Moreover, for a contractor of this size, it may cost many multiples to challenge the alleged violation that back wages are owed than to pay the $10,000 demanded. This type of assessment is not an admission that the contractor views back wages as a "cost of doing business." *Cf.* 80 Fed. Reg. at 30588 (noting some contractors may view "sanctions for their violations as merely part of the 'cost of doing business'"). Rather, it reflects the application of common sense in light of the circumstances of the alleged violation and the size of the contractor. DoL's blanket approach ignores that there are many legitimate reasons for a contractor to receive, and accept without challenge, a $10,000 back-wage demand. We recommend that if a dollar threshold is used, it be tied to the size of the contractor and the size of the affected workforce.

The proposed definition also should be revised to remove any form of injunctive relief as a "serious" violation. For example, NLRB decisions that find against an employer include injunctive relief, regardless of the nature or severity of the violation (until the decision is overturned on appeal). In addition, NLRB decisions frequently require the employer to post a notice, but the requirement to post a notice--a routine injunctive remedy--hardly signals that the

underlying violation was "serious."[11] Thus, we recommend removing this criterion of a "serious" violation.

Furthermore, for multiple reasons, DoL should revise the Guidance with respect to findings that would "support" a conclusion that a contractor "interfered" with an agency's investigation. First, the Guidance does not explain what it means by "support" such a finding. A CO or ALCA, without the benefit of an entire record, sufficient familiarity with the law, and sufficient time cannot be expected to weigh some undefined body of evidence to determine whether it "supports" a finding of interference.

Second, the Guidance would deprive contractors of their well-settled rights to challenge the scope of an agency's investigation. Among the examples DoL provides of investigation interference are denial of access to conduct an on-site investigation, evaluation, or review as well as refusal to submit required documents or to comply with an information request. 80 Fed. Reg. at 30585. Yet there are numerous realistic and common examples on the other side of the coin. For example, an investigator could refuse a contractor's request for a one-week extension on providing significant volumes of electronic job-applicant data, taking the position that the contractor is "failing to cooperate" with the investigation at the desk-audit stage and threatening to commence a show-cause proceeding if the contractor does not submit all data on the date identified in the scheduling letter. Or an auditor could assert a "lack of cooperation" when a contractor refuses to produce broad, class-wide data in a case involving an individual charge with no allegations of class or pattern-and-practice violations and for which the auditor has not informed the contractor of any class-wide or pattern-and-practice or class-wide evidence. And an enforcement agency might assert that a contractor is "interfering" with an investigation when the contractor interviews employees as part of an internal investigation of labor-law violations that the agency is also investigating.

But what these examples really illustrate is that legitimate disputes frequently arise between contractors and government investigators and auditors over the scope of an investigation and requests for documents or information. Even if the contractor's objection ultimately is found not to be justified, the contractor has a right to challenge the scope of a subpoena, document request, or request for information. We note, for example, that under EEOC processes, employers have the right to challenge subpoenas issued by the EEOC. *See* 29 C.F.R. § 1601.16(b)(1). The Guidance suggests that advocating such a position, which a contractor is fully justified in taking, could be viewed as "interference," and therefore, would expose a contractor to being labeled a serious violator under the Guidance. When an agency has, and declines to use, its investigative tools or the contractor invokes its legal rights to challenge the scope of an investigation, the contractor's conduct should not be construed as "interference." Similarly, the Guidance should not divest contractors of their legal right to defend themselves and compel "cooperation," regardless of the particular facts of the investigation. At bottom, the concept of "interference" is so discretionary and nebulous that we recommend that DoL eliminate this criterion.

[11] OSHA also requires an employer to post a notices of citation before any informal conference or contest of the citations may occur so as to provide employees with notice of a pending matter.

b. The Definition of "Willful" Should Be Revised.

The Guidance seeks to tie a designation that a violation is "willful" with, when possible, standards established by statute. Thus, DoL defines "willful" violations of the OSH Act, the FLSA, the Age Discrimination in Employment Act ("ADEA"), Title VII, and the ADA by referring to legal standards under those statutes. *See* 80 Fed. Reg. at 30585-86. This approach will work only if a violation is deemed "willful" after an adjudication on the merits that is not subject to appeal. As examples of "willful" misconduct in Appendix B of the Guidance show, at a minimum, violations are not "willful" until there is *some* proceeding on the merits, even if that proceeding is still subject to appeal. By way of example, under the proposed definition of "willful" in the typical case of race discrimination under Title VII, there is no direct evidence of discrimination and the case turns solely on circumstantial evidence, such as disparate treatment. There is no way that a CO or ALCA could evaluate whether a reasonable cause determination under Title VII is "willful" without understanding the entire factual background of the allegation.

For violations of statutes that do not define "willful," DoL proposes that a violation is "willful" if the findings "support a conclusion" that the contractor "knew that its conduct was prohibited" by a labor law or "showed reckless disregard for, or acted with plain indifference" to whether its conduct was prohibited. *Id.* at 30586-87. As noted above, the "support" language is unduly vague and suggests that the CO and ALCA are to sift through the evidence to determine whether it might "support a conclusion" that the contractor's conduct was willful. For conduct under these statutes, a CO or ALCA would have no insight or evidence regarding the intent of the contractor, particularly for administrative merits determinations for which there is no adjudication on the merits. We believe that there must, at a minimum, be a formal finding by a decision-making body whose authority stems from the statute in question that the contractor's conduct rose to the level of "willful."

c. The Definition of "Repeated" Is Overly Broad and Arbitrary.

The Guidance's definition of "repeated" is overly broad and arbitrary in a number of ways. First, the definition is overly broad because it treats as similar very distinct violations. For example, the Guidance notes that, under the Family and Medical Leave Act ("FMLA"), any two violations would generally be considered substantially similar to each other, with the exception of violations of the FMLA's notice requirements. 80 Fed. Reg. at 30601, 30588. As a result, a failure to reinstate an employee to the same or an equivalent position would be considered substantially the same as a failure to maintain group health insurance. These violations are clearly not the same or substantially similar. Indeed, because the relevant labor laws generally concern the compensation and wages paid to employees, the hours of work for employees, employees' work environment and conditions, and the provision of a non-discriminatory workplace for employees, the level of generality employed by the Guidance could make it possible that any alleged violation of a federal or state labor law would be considered substantially similar to some prior matter in which a federal contractor was involved--a patently unreasonable result.

Second, the three-year lookback period undermines the goal of the Executive Order to promote contracting with responsible contractors and impermissibly discourages contractors from challenging alleged violations. The Guidance states that the civil judgment, arbitral award

or decision, or adjudicated or uncontested administrative merits determination for the prior (i.e., predicate) violation must have occurred within the three-year reporting period. *Id.* at 30587. But it is highly possible that the underlying conduct would have occurred more than three years before the later violation that is allegedly the same or substantially similar. Contractors would thus be branded repeat violators based on violations that occurred many years apart and also no longer reflect the contractor's current integrity and business ethics. In addition, the three-year lookback period deters contractors from challenging any civil judgment, arbitral award or decision, or adjudicated administrative merits determination for fear that the appeals process could take years to resolve and require never-ending reporting of appealed decisions.

Third, the requirement in the definition that prior violation(s) must be the subject of one or more separate investigations or proceedings is arbitrary. The Guidance provides that prior violation(s) must be the subject of one or more separate investigations or proceedings. *Id.* This distinction is unjustified and will surely unfairly designate some larger employers "repeat" violators while leaving their competitors untainted. For example, if an employee complains of both OSH Act and FLSA violations, and OSHA and DoL conduct separate investigations resulting in two violations, the employer is a "repeat" offender. But if the agencies jointly investigate the issues, and accordingly issue two violations, the employer may not be categorized as a "repeat" offender because there was only one investigation, even though the employer's actions in both instances were identical.

Fourth, the types of violations considered predicate violations are arbitrary. The Guidance states that the predicate violations must be civil judgments, arbitral awards or decisions, or adjudicated or uncontested administrative merits determinations. *Id.* Only the predicate administrative merits determination need be adjudicated or uncontested when determining whether a violation is repeated; subsequent administrative merits determinations need not be adjudicated or uncontested to be considered repeated. *See id.* Treating adjudicated and uncontested administrative merits determinations the same is unreasonable, as employers will be penalized for accepting minor reasonable punishments in "close calls" (which will be treated as uncontested violations) rather than expending excessive resources to contest the merits (and potentially prevail with the result that there is no predicate violation). This approach does not promote economy of resources. In addition, the Guidance offers no justification as to why a predicate administrative merits determination must be adjudicated or uncontested, but a subsequent violation need not be adjudicated or uncontested to be considered a repeated violation. As a result, the types of violations which are considered repeated are arbitrary and unsupported.

Fifth, the provision for company-wide consideration in determining whether violations are repeated is arbitrary and vague. The Guidance states that repeated violations may be considered on a company-wide basis, but that relative size of the contractor or subcontractor as compared to the number of violations may be a mitigating factor. *See id.* We believe that repeat violations should not be considered enterprise-wide. As noted above, many of our members are large conglomerates with disparate lines of business that are managed independently; as such, the violations of one particular business unit do not necessarily accurately reflect the responsibility of another. Moreover, the Guidance is unreasonably vague. The Guidance lacks any specific instruction as to how size would be considered as a "mitigating factor." Such ambiguous language encourages unfair and disparate treatment of larger contractors.

Sixth, "repeated" violations should not only be based on "the same provision of the same statute," but also should be confined to repeated conduct based on similar facts and findings. For example, the machine guarding requirement in OSHA regulations is rather generic, and applies to a myriad of situations, including devices such as saws, grinders, drills, etc. The fact that a contractor violated a machine guard requirement by not having a guard at all on a drill at one facility in one state, should not be deemed a "repeated" violation based on a prior finding of an inadequate machine guard at another facility in a different state. Similarly, a failure to train about fire safety at one facility in one state should not be deemed to be a repeat of a failure to train for, for example, decontamination of radioactive metal parts, at another facility in a different state, particularly where some laws, like OSHA, require forms of site specific training.

Finally, the Proposed Rule and Guidance should acknowledge and reflect the fact that certain statutory programs, particularly at the state level, e.g., Washington and California, have specific provisions that provide that "repeated" findings are ones wherein the regulator has made an express finding that a violation was a repeat. Conversely, if that express finding is not made, then the agency does not deem the violation to be "repeated." In other words, the violation is, or is not, repeated based on an express agency finding under the governing statutory regime, not by a distant contracting agency ALCA or CO who lacks expertise or proximate knowledge.

For the reasons above, we recommend that the definition of "repeated" should be limited to civil judgments, arbitral awards or decisions, or administrative merits determinations in which it has been finally determined that the contractor (or contractor's relevant sub-elements, if the contractor has multiple divisions and locations performing federal contracts) violated the same provision of the same statute under similar facts and circumstances. In addition, the Guidance should require subsequent administrative merits determinations to be adjudicated in order to be deemed repeated violations, consistent with the requirement that predicate administrative merits determinations be adjudicated or uncontested. And, we believe the FAR Council and DoL should consider our other suggestions regarding the term and revise it accordingly.

d. The Description of "Pervasive" Violations is Unworkably Vague and Should Be Modified.

DoL's Guidance acknowledges that none of the underlying labor laws include a standard for "pervasive," and that it is not used more broadly as a term of art. DoL does not remedy the issue, however. *See* 80 Fed. Reg. at 30588. Instead, it has identified a vague category of factors that leave COs with no guidance and virtually standardless discretion. As drafted, this category is ripe for misuse as a catch-all category, allowing COs to classify any violation as "pervasive." Examples of our concerns with the category include:

- The general description is that violations are "pervasive" if they demonstrate a "basic disregard" for labor-law compliance based on a "pattern of serious *or* willful violations, continuing violations, *or* numerous violations." *Id*. Thus, more than one "serious" violation, regardless of whether they are "willful," can be considered "pervasive." Likewise, "continuing violations," not defined in the Guidance, can be pervasive even if they are neither "serious" nor "willful." And "numerous violations" can be "pervasive," even if they are neither "serious," "willful," nor "continuing."

- The Guidance states that a "repeated" violation must be the "same or substantially similar" to another violation. 80 Fed. Reg. at 30587. This reflects some desire to place limits on the "multiplication" of offenses. Yet the Guidance provides that "pervasive" violations do not need to be substantially similar, may arise from the same investigation, and have no specific numeric threshold. 80 Fed. Reg. at 30589. As a result, essentially any small sample of alleged violations at three different locations—an OSHA citation, an EEOC cause determination, and a summary of unpaid wages from DoL's WHD—that collectively would not qualify as "repeated" violations can nevertheless be classified as "pervasive."

- As with the "repeated" definition, the Guidance for "pervasive" violations is also devoid of any instructions regarding how the size of a contractor could implicate a determination. The Guidance states that the "number of violations necessary will depend on the size of the contractor or subcontractor, as well as the nature of the violations themselves." Yet the Guidance does not define what constitutes a small, medium, or large contractor. And the Guidance states that there must be multiple violations to be pervasive and acknowledges that larger contractors will likely have more violations due to size, presenting a risk that larger contractors will be faced with more findings of "pervasive" violations based on size alone.

- Additionally, the Guidance suggests that contractors and ALCAs consult with DoL when determining whether violations are pervasive. Again, there is no standard by which DoL will be providing guidance. Given the vagueness of the category, the ALCA, CO, and DoL could all reach different determinations.

- DoL's Guidance vaguely states that the category is "intended to identify those contractors and subcontractors whose numerous violations of Labor Laws indicate that they may view sanctions for their violations as merely part of the 'cost of doing business,' an attitude that is inconsistent with the level of responsibility required by the FAR." 80 Fed. Reg at 30588-89. Yet there is no intent standard—and no "willfulness" requirement—that provides any standard for making this determination. As written, the guidelines allow the CO to simply classify violations as "pervasive" based on a unilateral, subjective determination that the employer harbors a "basic disregard" for the law.

- The category posits a small tool manufacturer with seven "serious" OSHA violations at a single location and in a single proceeding as evidencing a "basic disregard" for employee safety. 80 Fed. Reg. at 30589. But this example does not factor in the nature or complexity of the relevant standards, the experience of the company, whether any employee was actually harmed by any of the violations, and the manner and degree to which the violations were identified and have been documented, or the response by the contractor. We do not believe that violations can be considered "pervasive"--which means that the contractor has a fundamental disregard for labor-law compliance--without consideration of the context in which the alleged violations arise.

- The Guidance appears to require contractors to train their managerial workforce on all of the labor laws listed in the Executive Order regardless of the relevancy of those labor laws to the scope of their managerial duties. In particular, the Guidance states: "[I]f

managers actively avoid learning about labor-law violations (such as by failing to exercise appropriate oversight or "passing the buck" to others), this may also indicate that the violations are pervasive." 80 Fed. Reg. at 30590. The Guidance should add that contractors should have to train managers only to the extent needed for their managerial duties. For example, client-facing program managers would warrant much more training on non-discrimination requirements than the compensation requirements of the SCA.

AIA recommends that the term "pervasive" be eliminated from the Proposed Rule and Guidance altogether as vague, unworkable, and redundant for the reasons stated above. The Administration should recognize that although the Executive Order itself incorporates the category of "pervasive violations," there is simply no workable definition that does not fully overlap with the other three terms, and its inclusion in the Executive Order does not substitute for a rationale under the APA.

If DoL is not willing to eliminate the definition, then DoL should provide clear guidance on the standards involved in determining if a violation or violations will be deemed pervasive. The regulations should include specific instruction on how employer size could impact these determinations. Additionally, the regulations should remove as much subjectivity from the contracting officials' determination process. Clear guidance as to the standards that contractors will be held to will help ensure consistency from agency to agency and contracting official to contracting official. Otherwise, employers will be faced with inconsistent findings from different contracting officials, which undermines contractors' abilities to develop and implement training and compliance programs. Finally, DoL should consider revising the Guidance so that violations might be considered "pervasive" only if they are serious, willful, *and* repeated (as we recommend redefining those terms). In that case, we believe DoL should consider violations "pervasive"—meaning a finding that non-compliance is considered a "cost of doing business"—only if the contractor is also found to have been non-responsive to the findings and declined or failed to remediate the findings (essentially, where the contractor flouts them).

5. The Semi-Annual Reporting Requirements Are Overly Burdensome.

The semi-annual reporting requirements impose significant administrative burdens on contractors because they effectively require monitoring and reporting of covered violations continuously contract-by-contract rather than based on any currently used system for tracking such data. Under Proposed FAR Clause 52.222-BB, contractors and subcontractors will have to report, on a semi-annual basis throughout the life of the covered contract: (1) whether the contractor has been subject to any additional administrative merits determinations, arbitral awards or decisions, or civil judgments since its pre-award responsibility determination; and (2) updates to any previously disclosed findings of violations. 80 Fed. Reg. at 30570-71. Contractors also can provide additional information on the covered violations, e.g., mitigating circumstances, remedial measures, other steps taken to achieve compliance with the labor laws, and explanations for delays in entering into or for not meeting the terms of an existing labor compliance agreement. *Id.* For large defense contractors with numerous affected contracts and facilities worldwide, this semi-annual reporting requirement will require continuous development and deployment of unique systems for monitoring, tracking, organizing and reporting such data that have no other utility for either the contractor or the Government.

An unscientific sample of our larger members illustrates the point. Federal Procurement Data System ("FPDS") data for FY 2012 to FY 2014 suggest that large contractors received around 15 to 35 prime awards over $500,000 during that three-year period.[12] Assuming similar award rates in future years, these contractors would have to provide between 30 to 70 semi-annual updates at entirely irregular intervals just for its prime contracts. They would almost certainly have numerous covered subcontracts requiring reports as well. Thus, it is easy to contemplate a contractor being subject to weekly reporting requirements.

To minimize this burden, contractors should be permitted to report their semi-annual updates for all covered contracts and subcontracts on the same fixed dates each year. Contractors could select the dates for their semi-annual reports in the System for Award Management ("SAM"). For example, a contractor could select January 2nd and July 1st as the two dates every year it will enter its updates. Using these examples dates, a contractor pursuing a covered contract might submit information on labor law violations on March 1st in response to the CO's initiation of a responsibility determination, be awarded a contract on April 10th, and then make its first update on July 1st, followed by the next update on January 2nd of the following year. Although significant burdens of the overreaching Proposed Rule and Guidance would to a large extent remain, this option would at least allow contractors to synchronize reporting dates across multiple covered contracts and avoid the continuous reporting cycle. This option would also keep contractors from besieging COs and ALCAs with unduly burdensome reports, each of which would need to be received and considered to some degree.

6. The Emphasis on Labor Compliance Agreements Is Unreasonable.

Given the prominence of labor compliance agreements in the advice and responsibility determination process, contractors can reasonably expect that DoL will insist on labor compliance agreements in every case potentially covered by the Executive Order and Proposed Rule, regardless of the efficacy of or actual need for such an agreement under the circumstances. Yet, the Guidance does not provide any indication of what these labor compliance agreements will or must include. For example, DoL does not indicate whether an agreement need only address the alleged violation or must impose a broader ranging set of remedial requirements; whether the agreement would apply to the business unit or location with the alleged violation or apply company-wide; the expected duration of such agreements; whether a contractor with more than one violation would have a "global" labor compliance agreement or a labor compliance agreement for each individual alleged violation; how state law violations will be addressed (since DoL cannot compel state enforcement agencies to sign up to and administer labor compliance agreements on its behalf); and what happens to such agreements if the underlying allegation is ultimately determined on the merits to be unfounded.

From a contractor's perspective, the risk of being excluded from a competition and the potential government-wide impact of not entering into a labor compliance agreement also will likely compel them to enter into such agreements, again regardless of need or efficacy. For instance, COs, faced with choosing between a contractor with a "clean record" or an existing labor compliance agreement and one with a some alleged violations, but no labor compliance

[12] This unscientific study counted contracts awarded to contractors and their affiliates with the similar names. Thus, searches for a hypothetical Machine Corp. would also count contracts for Machine Flight Services Corp.

agreement, will likely find it easier to default to the selecting the offeror that does not require a labor-law evaluation.

The undue emphasis on labor compliance agreements is particularly onerous because of the risk and impact of violating a labor compliance agreement. It is foreseeable that a labor compliance agreement will include an acknowledgement that the contractor is going to comply with the relevant labor law. Despite the best of intentions, however, the complexity of some of these laws presents risks that a contractor may have a future violation. If the contractor violates the labor compliance agreement, even unintentionally, the risk of debarment is increased.

We believe the Guidance should be revised to de-emphasize the role of labor compliance agreements. If ALCAs and COs are truly going to evaluate a contractor's compliance record in a meaningful manner that considers the size of the contractor and the nature of the alleged violations, then a labor compliance agreement may be one remedial option, but the existence or willingness to enter into such an agreement should not be the sole indicator of responsibility. Moreover, FAR provisions already exist that require compliance with various labor laws making labor compliance agreements a redundant additional requirement. At the very least, labor compliance agreements under the Proposed Rule should not be used to modify or supplant existing remediation agreements the contractor has entered into independently of the Proposed Rule nor should they include terms and conditions that exceed those customarily included in remediation agreements under the relevant labor statutes. For example, if a contractor has entered into some type of settlement agreement with OSHA, and the contractor is complying with the terms, then the Proposed Rule should prohibit the CO from requiring a revised agreement or separate labor compliance agreement for the circumstances that gave rise to the violation.[13] Regardless of the role of labor compliance agreements, AIA maintains that DoL must provide more information on the anticipated terms and conditions of such agreements and a reasonable process for negotiating such agreements.

C. The Impact of the Proposed Rule on Supply Chain Management Will Be Significant and Warrants Reconsidering the Proposed Implementation.

1. The Subcontractor Responsibility Requirements Are Unmanageable.

AIA has significant concerns regarding the proposed obligations to evaluate subcontractors' labor law violations. We recognize the existing responsibility to subcontract with qualified and compliant suppliers. But neither statute nor regulation has ever required federal contractors to assess labor compliance at this breadth and in this level of detail, to the point that contractors must become deputized labor-enforcement agencies. This imposition is neither financially reasonable nor practically effective.

Many of our defense contractor members are subject to the DFARS business systems rules, including purchasing system requirements. *See generally* DFARS subpart 242.70; DFARS

[13] At the least, any labor compliance agreements in connection with OSHA matters under the Proposed Rule should not be required or imposed unless there is a unique fact situation wherein the required mitigations identified under the existing OSHA or equivalent state law regime have not been carried out. Absent unusual circumstances, the safety regulator's decisions about appropriate mitigations should not be second guessed in the government contract award procedure.

252.242-7005; DFARS 252.244-7001. Among many other things, a covered contractor's purchasing system must establish and maintain processes to select the most responsive and responsible sources and suppliers and to promote competitive sourcing among dependable suppliers. DFARS 252.244-7001(c)(21). Covered contractors also must maintain adequate policies and procedures to comply with the FAR and DFARS and establish and maintain adequate documentation to provide complete and accurate records of purchase transactions. DFARS 252.244-7001(c)(1) and (5). Contractor purchasing systems are subject to audit, and if a CO finds significant deficiencies, the CO can withhold contract payments until the contractor has corrected all significant deficiencies. These obligations are substantial, and yet they are dwarfed by what the Executive Order will require.

Given the current breadth of the Proposed Rule, aerospace defense contractors will have large numbers of reported incidents to sift through and document before making responsibility determinations. One of our members reports issuing over 500 purchase orders over the $500,000 in one year alone. Moreover, the process of evaluating subcontractors' labor-law reports is not a "check the box" exercise and cannot be performed by clerical employees. Under the currently proposed approach, contractor employees who manage the supply chain will need to have familiarity with 14 federal and numerous as-of-yet undefined equivalent state labor laws; sufficient experience, training, or background to determine whether violations are serious, willful, pervasive, or repeated; and the ability to assess mitigating factors. The timeline for such assessments also is tight: contractors have 30 days to conduct the full responsibility assessment, including obtaining information from prospective contractors, for subcontracts awarded or effective within five days of the prime contract award. In light of the complexity of the analysis required, we anticipate that only highly trained and skilled employees will be able to perform the review function, increasing the costs to contractors of the subcontractor responsibility review system. Regardless, we foresee that contractor employees also will need access to labor-law counsel (possibly multiple counsel given the inclusion of state law equivalents), which also increases the cost of implementation.

DoL's Guidance, moreover, does not identify how a contractor should "consider" a subcontractor's reports. With a lack of actual standards, one contractor may reach one determination while another reaches a different conclusion by considering the circumstances at a different level of granularity. Indeed, because contractors cannot feasibly coordinate their determinations, as the FAR Council and DoL encourage agencies to do, different contractors may reach different responsibility determinations based on the same information.

An additional complication is how contractors will "consider" labor-law violations for single- or sole-source subcontracts and for follow-on subcontracts. As of the initial implementation at least, these subcontractors have been performing without being subject to the proposed requirements to report their labor-law violations, and so higher-tier contractors have not undertaken the searching reviews that will be required in the future. If contractors must now evaluate the responsibility of single- or sole-source or follow-on subcontractors, contractors could find themselves without an eligible source for performing a contract or disrupting contract performance to find a new subcontractor to perform the follow-on work. Both results will delay contract performance and may present cost prohibitive risks to contractors in event that they cannot find a qualifying replacement.

These concerns underscore a feature missing from the Proposed Rule and Guidance. Neither includes a "compelling need" exception. Under FAR subpart 9.4, COs can still contract with a suspended or debarred entity if there is a compelling need to do so. We propose, at a minimum, that the Proposed Rule and Guidance must include the ability of contractors to make a determination that there is a compelling need to enter into a subcontract or continue a subcontract, regardless of reported labor-law incidents. Such an exception would expressly apply to circumstances such as those contemplated in Proposed FAR Clause 52.222-BB(d)(5), in which contractors must notify the CO if the contractor decides to continue a subcontract after learning that a subcontractor has been accused of not timely entering into a labor compliance agreement or not meeting the terms of the an existing labor compliance agreement. The clause provides for the contractor to send the CO the subcontractor's name and "[t]he basis for the decision." *Id.* No guidance is given on what may form the basis of the contractor's decision—again, the applicable requirements must provide for a contractor to invoke compelling needs related to performance of the contract and subcontract.

Without a compelling needs exception, contractors may be put in potentially difficult and untenable positions even with subcontractors that are not single sources, sole sources, or follow-on sources. On top of the reports concerning labor compliance agreements, the Proposed Rule requires contractors to consider subcontractors' semi-annual updates concerning covered findings and allegations of a labor-law violation. The Proposed Rule contemplates that in some instances, a subcontractor will report a new finding or allegation, or new information about a finding or allegation that, in theory, will warrant terminating the subcontract or taking other adverse action. *See, e.g.*, Proposed FAR 52.222-BB(d)(4). The Proposed Rule leaves contractors in a difficult position in these circumstances: if they terminate the subcontract, the prime will likely be liable to the Government for delay or non-performance. The CO may compound these delays or non-performance if the CO is required to approve subcontractor, *see* FAR 52.244-2, and refuses to approve the contractor's designated replacement subcontractor. The FAR Council and DoL do not appear to have considered these circumstances at all.[14]

2. AIA Recommends Alternatives to Those Offered in the Proposed Rule.

The Proposed Rule's approach to subcontractor responsibility is untenable. While comparatively better than the Proposed Rule's primary approach, we cannot embrace the Proposed Rule's alternative either, as constituted. *See* 80 Fed. Reg. at 30555-57 (discussing alternative Proposed FAR 22.2004-6). AIA members do not view this option as viable as constituted because there is no assurance that DoL can accomplish the reviews at the pace needed for subcontracting in the current federal environment. Indeed, pace makes for a significant difference between evaluating prime contractors and evaluating subcontractors, at least in the aerospace and defense industries. When an agency is evaluating a prime contractor offeror, performance has not commenced and no contract "clocks" have started. By contrast, subcontractors, especially those below the first tier or two, or those supplying critical items, may not be confirmed until after the prime contract has been awarded and performance has begun. In the aerospace and defense industries, multi-billion dollar contracts are common, meaning that the

[14] We are also concerned that disputes and litigation will arise between prime and subcontractors based on subcontractor allegations that a prime unreasonably found it "non-responsible."

$500,000 threshold for EO 13673 will reach many tiers into the supply chain. At that point, contractors and their higher-tier subcontractors cannot afford to wait for DoL, or any other central reporting entity, to make its evaluations—at the same time other prime-contract awards are being reviewed and coordinated, no less. We are also concerned that if DoL is charged with making a responsibility recommendation, but prime contractors are considering other factors such as the criticality of the supplier, schedule, and cost, that the contractor may justifiably reach a different ultimate responsibility determination from DoL. The Proposed Rule and Guidance also provide no assurance that the same DoL personnel would review a subcontractor's labor law compliance over multiple subcontracts, risking the possibility of inconsistent recommendations, and adding to the due process concerns discussed in our comments. Neither of the FAR Council's proposed options addresses any of these logistical or procedural issues.

The proposed alternative also contains other fatal flaws. Under the approach, DOL would retain significant latitude over each agency's contracting and subcontracting process, removing appropriate discretion from the CO and prime contractor as to which suppliers would provide the most productive and efficient solution for the Government. In addition, the proposed alternative as constituted does not provide adequate due process for the supply chain. *See infra* Section V.C. The proposed alternative contains no mention of a fair proceeding and opportunity for the subcontractor, or prime contractor for that matter, to challenge findings regarding the prospective subcontractor's labor-law violations and their impact on present responsibility.

In light of these issues, the FAR Council and DoL should consider a number of alternatives. First, they should consider further centralizing the data repository on labor law compliance within a Government system accessible to COs and prime contractors for their use in making labor law compliance recommendations and findings, but in a manner that does not impact the agency CO or a prime contractor's ultimate discretion to make its supplier choices that best serve the agency's mission and cost efficiency interests.[15] Although no government agency has all the reportable information gathered, neither does any contractor. A centralized government database would avoid the creation of thousands of individual contractor data gathering and reporting systems. In addition, prime contractors could consult the centralized system to obtain labor law compliance information for their suppliers rather than having to incur the costs of arranging for suppliers to provide that information in a complete and timely fashion. Under this alternative, reliance on a review of the information in the centralized government database would satisfy a CO's obligation as well as a prime contractor's obligation to obtain the requisite information from its suppliers. We believe the FAR Council and DoL should strongly consider analyzing this alternative at a minimum, but also in combination with the alternatives described below.

Second, the FAR Council and DoL have not considered ways to ensure due process rights are preserved in the course of the evaluation of the reported information concerning labor law compliance by subcontractors. The process should resemble and afford at least as much

[15] For example, prime contractors must retain the discretion to approve a subcontractor, despite the existence of labor law violations, if the supplier is critical to contract performance. The FAR currently recognizes similar "compelling needs" exceptions under FAR subpart 9.4. However, given the lesser processes that are being applied here and the purportedly limited scope of application of a labor-law review, contractors should not be subject to the extensive documentation requirements that accompany a decision to proceed with contracting with a suspended or debarred entity.

protection as the existing agency SDO procedures concerning a subcontractor's reported information and listing in the centralized reporting database, permitting challenges and appeals to listings and determinations, as well as CO or prime contractor overrides and waivers when necessary and appropriate.

Third, the Government could establish an optional process whereby contractors can choose to apply for a determination that the contractor is responsible from a labor law perspective, despite the existence of reportable events. The contractor could report information to a senior agency official, and they could review the information under fair procedures that align with due process to allow the contractor to make its case that it is responsible. Once it has been determined that a contractor is responsible, that contractor could use that determination to establish labor law responsibility for proposal purposes as a prime or for responsibility reviews as a subcontractor for an established period of time. Since it would be an optional process, during the interim while the information was under review or if a contractor chose not to invoke the process, the primary established labor law review process for primes and subcontractors would continue.

Fourth, as another alternative to streamline subcontractor reviews, the FAR Council should consider mechanisms to eliminate duplicative reviews by agencies and contractors of the same findings and allegations reported by the same subcontractors. For example, the FAR Council could significantly reduce the supply-chain burden of EO 13673 by allowing prospective subcontractors to represent to higher-tier subcontractors that: (1) the prospective subcontractor has no reportable findings or allegations of labor law violations or has at least one reportable finding or allegation of labor law violations; (2) if the subcontractor has reportable findings, then in the prior twelve months, then the subcontractor has reported all such findings and allegations to at least one CO in connection with a prime contract competition as required by EO 13673; and (3) notwithstanding the report(s), the CO awarded a new prime contract or elected not to take adverse action on an existing prime contract. To make these representations verifiable, the revised FAR provisions and flowdowns could require the prospective subcontractor to identify each covered contract and award by providing the contract number, the awarding agency, and the date(s) of reporting information to the agency. Prime contractors would be permitted to rely on such representations and be afforded a "safe harbor" for doing so.

This alternative gives common-sense primacy to the responsibility determinations of prime contractors. Allowing subcontractors to self-certify that one or more agencies have found them to be responsible thus reduces the burden of subcontractor management and reduces the possibility of inconsistent decisions by the Government and prime contractors. Such an approach also is consistent with other self-certifications permitted under the FAR, such as small businesses' size representations. *See* FAR subpart 19.3 (setting forth requirements). Furthermore, this alternative is also consistent with EO 13673's stated goals—affected prospective subcontractors will still be subject to responsibility assessments, just fewer unduly repetitive assessments. Prime contractors and higher-tier contractors will therefore be able to focus their resources on subcontractors that do not have federal prime contracts and thus are not subject to review by any COs and ALCAs. This change benefits all involved parties.

These are just four alternatives that the FAR Council and DoL have not considered. Undoubtedly, in response to comments, other stakeholders will have further suggestions for

alternative approaches. The FAR Council and DoL should consider these alternatives and conduct further outreach on them to avoid final regulations that are unreasonable, arbitrary, and ultimately infeasible. For these reasons, AIA members believe that further notice and comment rulemaking is necessary to consider alternatives to the Proposed Rule and Guidance. *See supra* III.A.

3. Application of the Proposed Rule and Guidance to Subcontractors Should Be Narrowed and Delayed.

If the FAR Council and DoL proceed to apply EO 13673's requirements to subcontracts as stated in the Proposed Rule, they should make three revisions to reduce the burdens of doing so.

First, the FAR Council should, as it is considering, phase-in subcontractor representation and disclosure requirements. *See* 80 Fed. Reg. at 30555 (requesting comments on phase-in). We recommend that the FAR Council phase-in implementation for both prime contractors and subcontractors. There are three reasons to do so: (1) to give prime contractors an opportunity to implement and refine their systems for their own representations and disclosures before they are saddled with the burden of considering subcontractors' labor-law compliance; (2) to allow covered subcontractors who are not prime contractors, which are more likely to be small businesses, time to prepare for the requirements; and (3) to allow COs, ALCAs, and DoL time to develop their systems and best practices before becoming responsible for timely managing disclosures under all contracts subject to the EO 13673.

An appropriate phase-in schedule would be to start at the implementation date and add one year for first-tier subcontracts, one more year for second-tier subcontracts, and one more year for lower-tier subcontracts. Because the subcontract phase-in periods are one year, COs will be able to incorporate flowdowns with new thresholds efficiently, at option exercise. In addition, the one-year subcontract phase-in periods allow prime contractors to have experience providing initial representations and disclosures plus at least one (and possibly two, depending on timing) cycles providing semi-annual updates before they must start managing first-tier subcontractor responsibility. Then first-tier subcontractor responsibility will also have one or two cycles of semi-annual updates before being required to manage second-tier subcontracts, and second-tier subcontractors will similarly have a year. By that point, most covered contractors should have developed enough experience making and evaluating disclosures to open the requirements to all remaining tiers.

As discussed above, we believe that the Proposed Rule should exclude commercial item prime and subcontracts altogether. Nonetheless, if the FAR Council declines to exclude these contract types, we propose a longer, five-year phase-in. We believe a longer phase-in period is more consistent with the Government's objectives of reducing burden on commercial item contractors and attracting them to the federal marketplace.

Second, in a similar way, and for similar reasons, the FAR Council should modify the Proposed Rule to phase-in the prime contracts to which it applies, which will offer even further relief to COs and ALCAs during implementation. A proposed schedule is set forth below, along

with an estimate of the covered prime contract awards during each time block based on FY 2013 FPDS data.[16]

Recommended Phase-In Schedule						
	0 – 6 months	6 – 12 months	12 – 24 months	24 – 36 months	36 months - forward	Five years
Prime	$10,000,000+ (Approx. 400 awards per year)	$5,000,000+ (Approx. 2,500 awards)	$2,500,000+ (Approx. 10,000 awards)	$1,000,000+ (Approx. 18,000 awards)	$500,000+ (Approx. 60,000 awards)	
1st Tier	n/a	n/a	$1,000,000+	$500,000+	$500,000+	
2nd Tier	n/a	n/a	n/a	$1,000,000+	$500,000+	
3rd+ Tier	n/a	n/a	n/a	n/a	$500,000+	
Commercial Prime and Subcontracts	n/a	n/a	n/a	n/a	n/a	$500,000+

We recommend that even before the first phase-in period begins for prime contractors (for $10,000,000+ prime contracts), these prime contractors should be allowed a grace period to develop systems and procedures to comply with the Proposed Rule's requirements. We expect that it will take at least 12 months to build and implement a tracking and reporting system to satisfy the rule's requirements. For enterprise systems for larger companies that will need to be accessed across hundreds of locations and be built to the specifications of a yet-to-be-defined set of standards, it will likely take even longer. Once this systems development grace period ends, reporting requirements would be phased in according to the above schedule.

Third, the FAR Council should add a safe-harbor provision to allow prime contractors and higher-tier subcontractors to rely on representations, information, and documents provided by prospective and actual subcontractors. Absent circumstances in which the receiving contractor has actual knowledge of a submission's falsity, no investigation should be required, and no adverse action should be permitted against a contractor that receives submissions and relies upon them without knowledge of their falsity.

Overall, these changes cannot eliminate all of the burdens that EO 13673 will impose on prime and higher-tier subcontractors and will not rehabilitate the significant legal shortcomings of the Proposed Rule and Guidance. These changes can, however, reduce duplicative

[16] The FAR Council and DoL estimate of covered prime awards per year excludes task and delivery orders on the grounds that they are not subject to responsibility determinations. *See* 80 Fed. Reg. at 30560; Regulatory Impact Analysis ("RIA") Estimate at 11, *available at* http://www.regulations.gov/#!documentDetail;D=FAR-2014-0025-0002. The Fair Pay FAR clauses are to be inserted in "contracts" and "solicitations." No exceptions are made in those clauses for certain types of contracts such as task and delivery orders. Nor are such exceptions included in the proposed FAR Part 22 provisions, either. And although an agency is not *required* to conduct responsibility determinations for task and delivery orders, "neither is an agency precluded from doing so." *ESCO Marine, Inc.*, B-401438, Sept. 4, 2009, 2009 CPD ¶ 234. If delivery orders are included in the dataset drawn from FPDS, an estimate of covered prime awards above $500,000 reaches approximately 60,000. The AIA recommends that task and delivery orders should be affirmatively excluded from the Proposed Rule.

submissions and reviews, allow all involved entities time to ramp up their implementation, and provide contractors reasonable assurances in their evaluations of proposed subcontractors. These changes are also consistent with EO 13673's requirements. We encourage the FAR Council to consider them.

D. Expected Costs are Vastly Underestimated and the Benefits of Proposed Rule are Significantly Overstated.

The FAR Council and DoL prepared cost-benefit analyses for implementing the Proposed Rule and Guidance. *See* 80 Fed. Reg. at 30557-58 (discussing one estimate); *id.* at 30563-64 (discussing another estimate). Both analyses show that the FAR Council and DoL project that EO 13673 implementation will cost approximately $100 million in the first year and $80-$90 million annually thereafter. One of the analyses, the Regulatory Impact Analysis ("RIA"), is publicly available in the rulemaking, and it offers a detailed breakdown of the estimate. *See* RIA Estimate, *available at* http://www.regulations.gov/#!documentDetail;D=FAR-2014-0025-0002. It shows that some costs have been substantially underestimated while others are not even considered, and potential benefits have not been calculated at all. At bottom, the RIA Estimate shows that the FAR Council and DoL misapprehend the burdens and benefits that EO 13673 will bring to federal contracting.

AIA members are well positioned to identify where and how the FAR Council and DoL have fallen short in their estimates. These companies, large and small, are mature enterprises with robust, comprehensive approaches to undertaking compliance with new and changed statutes and regulations—whether related to labor, employment, safety, or other areas. Many members have faced new wide-scale compliance programs in recent years, such as human-trafficking rules, conflict-minerals reporting, and mandatory disclosure, so they understand the resources needed to begin and then maintain compliance with major programs. Below are just some of the costs that several AIA members have identified as underestimated or wholly absent from the Government's estimate of start-up and recurring costs.

1. The FAR Council and DoL Ignore or Underestimate Significant Costs That Contractors Will Incur to Comply.

We have identified several critical areas in which the FAR Council and DoL have failed to develop reasonable estimates of contractors' costs of complying with EO 13673. These are not the only costs that the Government underestimated or failed to consider, but they are some of the most salient.

a. Underestimated Costs of Understanding the Proposed Rule and Guidance

At the outset, the FAR Council and DoL have underestimated how much covered companies will spend learning about the EO 13673 requirements. The Government estimates that 25,775 contractors and subcontractors will be covered and that each will have exactly one person spend eight hours learning about the new requirements during the first year, without any time spent in ensuing years. *See* RIA Estimate at 3. We find it implausible that only one person would need to understand the Executive Order's obligations initially at each member company,

some of which employ people at many locations. As agencies often contact individual sites for their various investigations and determinations, medium and larger-sized AIA members will have to train at least one person at each of their sites, which can number into the hundreds. Indeed, the Government's expectation ignores the myriad departments and functions that will need to understand at least some of the requirements to assist with initial implementation: human resources, legal, information technology, business development and capture, contracts management, and subcontracts/supply-chain management. Then other personnel will require training, such as business-oriented personnel who will need to understand the reasons that major awards and purchases will be persistently delayed by ALCAs' reviews and COs' responsibility determinations.

Several AIA members accordingly have provided conservative estimates of over 100 hours—ten or fifteen times the Government's estimate—for just one department in one contractor enterprise to learn about the rule. Estimates have also been provided of over 20 additional hours just to prepare training materials on requirements (separate from time to deliver and complete the training). Another member estimates a minimum of 40 hours to develop training content and more than 100 hours to develop online or interactive training given the complexity of the 14 covered federal laws. Affected contractors thus could collectively exceed the Government's estimates by a factor of ten or more very quickly—pushing the estimated start-up costs from approximately $13 million to over $130 million. This means that just learning about the rule will likely cost contractors more than the FAR Council and DoL have estimated for *all costs in the entire first year* of compliance. There are more startup costs, however.

b. Ignored Costs of Implementing New and Updated Systems

Indeed, among startup costs, the FAR Council and DoL have deferred a substantial one for now: databases and systems for tracking, storing, and reporting relevant data and documents. The Government asserted that "contractors and subcontractors *may* choose to set up internal databases to track violations subject to disclosure in a more readily retrievable manner." RIA Estimate at 36. In response to the Government's request for comments, several AIA members report emphatically that covered contractors will need to design and implement centralized systems to track and report findings and allegations in an efficient, effective, and accurate manner. These AIA members report equally emphatically that they are unaware of any contractor that has centralized systems of the type, complexity, and flexibility required by the Proposed Rule and Guidance. And why would they: contractors have never been required to track compliance with all the covered labor laws and EOs, and the forthcoming equivalent state laws, in a single system or dataset accessible to potentially hundreds of contracting professionals at larger member companies.

Several AIA members have identified gaps in their current systems that will require filling under EO 13673, including the following:

- Although companies generally retain records of all incidents related to their labor-law compliance (such as administrative merits determinations), we are not aware of any companies that track each type of incident in a single, systematic set of records that can be searched and updated easily. A contractor might have a robust database of all allegations and findings of Title VII violations but retain records of SCA issues in a

decentralized system, for example. Such contractors will need to develop new centralized tracking of all covered labor laws and issues, and would need to manually review the prior three years' records to identify any reportable findings or allegations. As a point of comparison, this "lookback" exercise proved to be one of the most time-consuming and expensive aspects of implementation of the FAR Mandatory Disclosure Rule, even though that Rule involved a far smaller and more discrete set of types of reportable violations.

- Covered contractors might track compliance with all covered labor laws and EOs across multiple databases and systems—thus requiring a new umbrella database or some other form of data integration to allow for efficient reporting. Several AIA members expect to need a lead time of approximately 12 to 18 months for system design, build, and implementation, once the requirements for the system are known.

- Within each database or other system, covered contractors might not track each data element required for compliance with EO 13673. For example, a contractor may have a database tracking findings and allegations of OSHA violations that lacks a data field or other method for connecting initial findings with subsequent reviews and appeals handled by the legal department.

- Contractors may need to modify existing systems to ensure that the appropriate personnel, including contract administrators potentially numbering in the hundreds at large contractors, have access to information they need for EO 13673 representations and reporting while also ensuring protection of attorney-client privilege and employee privacy.

Our members expect that these and other systems modifications could individually require hundreds or even over a thousand hours per system to develop new queries, add data fields, set access rights, create middleware, import data, and so on. These members expect even higher costs if they try to create a unified single system. For example, one AIA member reviewed its implementation of new systems for compliance with the FAR's Mandatory Disclosure Rule and identified expenditures of approximately $1 million for developing the new system and $500,000 in annual maintenance, security, and upgrade costs. Based on that experience, the contractor expects that design and development costs for a system to solely track reportable violations under EO 13673 would likely exceed the annual operating cost of the mandatory-disclosure system ($500,000) and take several months to implement depending on budget, resources, and prioritization of other enterprise system upgrades.

Several AIA members raise three additional factors that the Government must consider in evaluating systems costs. First, many personnel needed to build and modify the relevant systems are high-skill, high-demand technology professionals. Such personnel cost, on average, much more than the $63 per hour loaded cost that the FAR Council and DoL used to estimate most of the labor costs of EO 13673 compliance. *See, e.g.*, RIA Estimate at 3 (calculating and applying rate). Any estimate must account for these cost differences. Second, AIA members report that their cost estimates will skyrocket if contractors remain responsible, as proposed, for receiving and considering subcontractors' reported findings and allegations of labor-law violations. Contractors currently do not have systems to track and analyze each individual incident reported

through their supply chains, and they do not have the policies and procedures for documenting the resulting analyses, all of which DCMA would expect to be in place when reviewing a contractor's purchasing system. Third, the FAR Council has not addressed how contractors will pass on the costs of implementation. We believe the FAR Council should provide that the costs of implementation are allowable and allocable to the affected contracts. Without this assurance, the Proposed Rule will result in disputes, a further cost that the FAR Council has not considered.

Requiring contractors to expend these costs to implement tracking and reporting systems is particularly illogical because the Government already has access to much of the data it requests. The various agencies tasked with enforcing the labor laws already track and have the information that they now want contractors to provide. For example, OSHA already maintains an enforcement database that accumulates information on OSH Act citations. *See* OSHA Establishment Search, *available at* https://www.osha.gov/pls/imis/establishment.html. Thus, the costs described above can easily be avoided because these systems already exist within the Government and are already accessible by COs and SDOs.

Assuming contractors will be required to implement systems (rather than the Government using its systems that already exist), the considerations add up to substantial costs that covered contractors can expect to bear. The numbers scale quickly, too. If even just 2% of the expected 25,775 covered contractors spend $500,000 to build a single consolidated system for tracking and reporting all covered findings and allegations of labor-law violations, then systems-development costs will exceed $250 million even before the costs of the other 98% of covered contractors are considered.[17] The FAR Council and DoL must take these costs into account in any rational cost-benefit analysis.

c. Other Compliance Costs Ignored or Underestimated

The FAR Council and DoL have ignored or underestimated other costs:

First, the FAR Council and DoL have underestimated the time that contractors will spend on representations, reporting, and evaluating subcontractors each year. In the RIA Estimate, the FAR Council and DoL set forth their estimate of the total annual hours required for each stage of these activities:

Activity	Est. Annual Hours	RIA Page
Prime contractor representation plus preparation of submissions concerning any covered findings or allegations of violations	842,654.4	12
Prime contractor submissions concerning any covered findings or allegations of violations	4,550.0	13
Subcontractor representation plus preparation of submissions concerning any covered findings or allegations of violations	257,868.8	15

[17] 25,775 *x* 2% = 516 contractors (rounded) *x* $500,000/contractor = $258,000,000.

Activity	Est. Annual Hours	RIA Page
Subcontractor submissions concerning any covered findings or allegations of violations	2,612.0	15
Higher-tier review of subcontractor submissions	13,451.8	16
Semi-annual review for potential updates	112,778.4	17
Preparation and submission of semi-annual updates	2,283.76	18
Subcontractor semi-annual updates	19,132.3	18
Higher-tier review of subcontractor updates	2,056.3	19
Total Estimated Annual Hours	**1,257,387.76**	

These may seem like reasonable estimated total hours, but they are not. When the 1.26 million hours above are divided by the 25,775 contractors and subcontractors DoL expects to be subject to EO 13673 requirements, the result is an estimated average of **48.78 labor hours per covered contractor per year—just over one person for one week annually**. This figure is far too low to be plausible. AIA members have provided estimates, based on all the required activities described in these comments, of needing to add multiple full-time equivalents per year. Each covered contractor that adds just one full-time equivalent (at 2,080 hours per year) will bear labor costs *43 times* the costs that the FAR Council and DoL estimate for the average contractor (48.78 hours). Several AIA members expect that even the smallest covered contractor or subcontractor will incur weeks' worth of labor for data gathering and reporting, not the single week that the Government estimates.

Second, the FAR Council and DoL have not estimated future costs of maintaining compliance. As noted above, the Government estimates zero hours per contractor for learning about the EO 13673 requirements after the startup period, ignoring the need for personnel to address novel situations requiring review of applicable text, communicate with subcontractors regarding their data, and train personnel to replace knowledgeable personnel who take new positions, terminate employment, etc. The Government similarly does not estimate any annual refresher training for employees across enterprises holding covered contracts. As also noted above, by not estimating any costs of new or updated systems or databases, the Government has not estimated any ongoing maintenance and upkeep of systems specific to compliance with EO 13673. Nor does the Government consider the additional costs of documentation for contractors subject to DCMA contractor purchasing system reviews. Based on the complexity of the required monitoring and reporting, these costs are likely to significantly exceed those involved in implementing prior analogous requirements.

Third, the FAR Council and DoL have not estimated any costs of legal advice for contractors holding covered contracts. The Government thus has ignored contractors' expenses in, for example, determining whether a contract or subcontract is properly subject to EO 13673 requirements, assessing whether a particular agency finding constitutes a reportable administrative merits determination, resolving disputes with subcontractors regarding submittals, and reviewing submissions of mitigating information. These expenses will surely cost more per hour than the $63 per hour that the FAR Council and DoL have applied elsewhere.

Fourth, the FAR Council and DoL have not factored in the costs and disruption of increased bid protests and contract disputes. Protests will foreseeably arise over responsibility, non-responsibility, and inconsistent findings. Likewise, contract disputes could easily arise during the course of performance based on similar responsibility determinations and, if cost allowability is not addressed, over the allowability and allocability of implementation costs.

Finally, the FAR Council and DoL have not even attempted to estimate the cost impacts of expanding covered labor laws to include equivalent state laws. *See* RIA Estimate at 2. The Government must estimate the costs of tracking and reporting findings and allegations of violation of the state laws identified as equivalents to the fourteen federal statutes and EOs currently proposed for coverage. When these state laws are included, contractors will need broader review and reporting of violations, will encounter more and varied scenarios requiring resolution, and will simply have a higher volume of findings and allegations to report and address. Fundamentally, the addition of equivalent state laws adds a multiplier to all the costs identified above. Separately, the Government must estimate the cost of delaying its definition of equivalent state laws. With these delays, the FAR Council and DoL will force contractors into implementing piecemeal solutions, such as by implementing a new centralized tracking system and then substantially revising it to accommodate equivalent state laws. All these costs need to be estimated now: the Government otherwise games the cost-benefit analysis by deferring estimation of known major costs.

Overall, the FAR Council and DoL have ignored or underestimated millions upon millions of dollars in contractor costs. For its cost-benefit analyses to have any validity, the FAR Council and DoL should complete new cost estimates and publish them, along with a revised proposed rules (and guidance, if the Government continues this improper regulation; *see infra* Section V.E) for comment. When the true contractor costs come to light, they will be staggering.

2. The Government Has Not Considered Significant Systemic Costs.

The Government not only underestimates compliance costs, as shown above, it ignores other costs sure to follow EO 13673's implementation. Once a prospective awardee (prime or sub) reports a covered finding or allegation of a labor-law violation, an inflexible review and assessment mechanism springs to life, stopping award or option exercise. Nothing in the rulemaking record suggests that the Government has considered the costs and delays that will result.

The potential delays are readily identifiable. For each covered contract award, subcontract award, and option exercise, any or all of the following can occur. The agency or contractor will have to stop the award process to evaluate findings and allegations of labor-law violations by the prospective awardee. An ALCA will have to become an instant expert on multiple federal and state labor laws implicated by the reported findings or allegations—a challenge in particular for the lone ALCA the Government expects to cover all DoD procurements--and provide a recommendation within a mere three days.[18] If the three day turnaround is not met, the CO is faced with waiting or trying to evaluate the complex

[18] The FAR Council and DoL estimate one ALCA per agency and do not estimate any support personnel for them. *See* RIA Estimate at 19.

information alone, either of which will likely delay the procurement process. A contractor, an agency, and DoL will address, and perhaps disagree about, the need for a labor compliance agreement. The contractor and one or more subcontractors will address and resolve differences over disclosure and protection of sensitive information or resolve reporting of disputed information about the subcontractors' reported violations. A disappointed offeror will protest award to a company with publicly reported findings and allegations of violations. The awarding agency's ALCA may disagree with another agency's ALCA on the impact a particular violation has on a contractor's responsibility, delaying one agency's award until DoL can resolve the differences. The list goes on.

AIA members understand the cost impact that these delays can and do have. The prime contractor does not hire personnel needed to staff the contract, potentially losing skilled workers to other opportunities. Long-lead orders are not finalized, pushing out the critical path until those orders can be rescheduled. Tiers and tiers of subcontracts sit on hold, leading to re-negotiation of prices and other delivery terms because, for example, subcontractors' labor and commodity costs have increased. Contractor personnel knowledgeable about the program leave for other opportunities, as do knowledgeable agency personnel, leading to ramp-up costs. The list goes on here, too.

The Government has not estimated these delay costs, however, even though they are of an entirely different type than the compliance costs that the Government has (under-)estimated. AIA members believe consideration of delay costs is paramount. Delays keep the industrial base from providing cutting-edge aerospace and defense technologies to American warfighters. Delays extend the services' maintenance cycles, increasing wear and tear on existing aerial assets. Delays keep satellites on the ground. Delays, at bottom, can threaten the United States' air, space, and communications superiority. This is no small matter. The Government must assess these costs before agencies and contractors delay procurements to undertake complex and contentious reviews of reported labor-law violations.

At a finer level of granularity, another systemic cost will be the burden on COs implementing the Proposed Rule and Guidance. COs will be tasked with an entirely new duty for which there is no precedent in federal contracting. Under the Proposed Rule, they will have to coordinate the receipt of information reported to them, identify any missing information, confer with the ALCA on the information received, consider the recommendation of the ALCA, assure all the appropriate factors were considered in making a responsibility determination, and independently assess contractor responsibility under circumstances in which the FAR would now place a heavy thumb on the scale for labor-law considerations. Further, they will be faced with more disputes with contractors regarding their determinations of labor-law compliance. Again, these tasks will be in addition to the job duties to which they are already assigned—and which most COs would likely confess they lack the time and resources to complete. The Proposed Rule and Guidance only add further unwelcome burdens. This is the wrong direction to go for a government trying to strengthen the output of its acquisition workforce.

Formal contract disputes also will likely increase. We believe contractors and subcontractors will seek ways to obtain the due process remedies under the contract that are not adequately provided for in the Proposed Rule. The FAR Council and DoL do not consider this cost to the procurement system either.

Furthermore, several AIA members are concerned about the impact that the Proposed Rule and Guidance will have on their small-business subcontractors and suppliers. The FAR Council suggests that the threshold for subcontractor reporting of $500,000 minimizes the potential impact to small business because, by default, this would "exclude the vast majority of transactions performed by small businesses." We believe that this assertion is inaccurate. In the interest of efficiency and cost-savings, many prime contractors negotiate long term agreements with subcontractors, including small businesses, which over the life of the subcontract will exceed (and, in many cases, far exceed) the reporting threshold, regardless of the value of any individual transaction. Therefore, the requirements to comply with EO 13673 will have disproportionate cost impacts on small businesses.

Such entities often have very small legal departments or rely on outside counsel and may not have the size and scale of compliance functions capable of absorbing these new and burdensome requirements. Many of these small businesses thus may exit the federal market or curtail their activities. As a result, AIA members will have a smaller base available with which to subcontract, and thus will face a more difficult time meeting their small-business subcontracting plans. It will take more time and effort, and thus more cost, to meet existing goals. The FAR Council and DoL should work closely with the Small Business Administration ("SBA") to understand the impact of the compliance reporting requirements on small businesses that will be covered, or could become covered, by the Proposed Rule and Guidance. It is our position that an exemption for all small business concerns recognized by the SBA is appropriate and consistent with EO 13673's mandate to minimize impact to small business concerns. The exemption should cover small disadvantaged businesses, women owned small businesses, service disabled veteran owned small businesses, HUBZone small businesses, and historically black colleges and universities/minority institutions.

The Proposed Rule and Guidance raise, rather than remove, barriers to entry. The FAR Council and DoL must consider these impacts—which will counterbalance some if not all of the supposed "economy and efficiency" that animates EO 13673.

3. The Proposed Rule and Guidance Fail to Show That Any Benefits Will Result from Implementing EO 13673.

The burdens of implementing EO 13673 could in theory be justified if the FAR Council and DoL had identified more than illusory benefits to balance the substantial, and certain, costs that will result. Yet the White House, the FAR Council, and DoL have not tried to estimate the benefits of implementation, not even in the RIA ostensibly created as a cost-benefit analysis. Instead the Government has offered only generic and unsupported predictions of improved labor-law compliance and increased economy and efficiency in federal contracting. This is not rational or defensible.

AIA understands and supports the ultimate goal of ensuring a compliant contractor base. AIA member companies large and small are committed to providing safe workplaces, paying fair wages, and ensuring opportunities for all employees on the merits. To that end, AIA member companies each devote significant resources—totaling in the tens of millions of dollars annually at larger members—to creating, updating, and enforcing policies, procedures, and work environments intended to satisfy federal and state requirements.

In so doing, no member company has adopted programs akin to EO 13673 because there is no reason to think it would lead to better labor-law compliance instead of simply more reporting about labor-law compliance. Thus by extension, AIA members fail to see *how* implementing EO 13673 will achieve compliance in areas where the existing set of robust federal and state labor laws and regulations (as well as the reporting under FAPIIS and the FAR mandatory disclosure regimes and the posting of "significant violators" by the regulatory agencies) already apply.[19] All the implementation will do is duplicate and distract from the existing enforcement activities of the Government, not improve upon them.

Consider, for example, the robust powers and procedures to enforce workplace-safety requirements under OSH Act. *See* 29 U.S.C. § 651 *et seq.*; 29 C.F.R. Parts 1900-2400. DoL, through OSHA, has the authority to inspect workplaces to determine if employers have violated any standards promulgated under the OSH Act or violated a general duty to provide a place of employment free from recognized hazards. 29 U.S.C. § 657(a). OSHA may issue citations to the employer for violations of these standards or the general duty clause. *Id.* § 658(a). The employer and the cognizant OSHA area office may reach an "informal settlement agreement" within 15 working days of the citation's issuance. 29 C.F.R. § 1903.20. The employer has 15 working days to file a "notice of contest" regarding the citations. 29 U.S.C. § 659(a). After the employer has filed a notice of contest, the area director may enter into a "formal settlement agreement" with the employer. OSHA Field Operational Manual, ch. 8. Or if settlement is not availing, OSHA, through the Solicitor of Labor, can file a complaint with the Occupational Safety and Health Review Commission ("OSHRC") within 20 days of receiving the notice of contest. 29 C.F.R. § 2200.34. The complaint is first heard by an administrative law judgment ("ALJ") who makes findings and issues an order on the complaint. *Id.* § 2200.90. The employer may appeal the finding/order of the ALJ to the full OSHRC. *Id.* § 2200.91(b). The parties may enter into a settlement at any stage of these proceedings. *Id.* § 2200.100(a). Along the way, DoL publishes data on preliminary and final findings of violations for anyone to access. *See* OSHA Enforcement Data, *available at* http://ogesdw.dol.gov/views/data_catalogs.php;[20] OSHA Establishment Search, *available at* https://www.osha.gov/pls/imis/establishment.html.

In concert with OSHA, AIA members have their own robust practices for ensuring safe workplaces. As an example, multiple AIA members maintain a corporate-level department dedicated to tracking compliance with workplace-safety requirements, including the OSH Act and equivalent state laws. Nowhere does the Government attempt to identify where and how these robust investigation and enforcement mechanisms—from both OSHA and contractors—will fail to prevent or remediate OSH Act violations in circumstances in which implementation

[19] The current requirement for reporting of violations under FAR 52.209-7 includes *actual* determinations of labor law violations. The FAPIIS system achieves the overall purpose and intent of the Executive Order, without the creation of a duplicative and burdensome system as proposed. The information reported under FAPIIS is sufficient to support a CO's determination of "present responsibility" with respect to labor laws as well as in general. Under EO 13673, additional administration or reporting is necessary, and the proposed system is burdensome on both contractors and the Government's procurement officials.

[20] This dataset includes details for approximately 100,000 OSHA inspections conducted annually. The dataset lists the reason for the inspection as well as details on citations and penalty assessments resulting from violations of OSHA standards. Additionally, accident investigation information is included in the dataset.

of EO 13673's requirements will succeed in prevention or remediation.[21] The same can be said for the robust processes for investigation, enforcement, and remediation under the other identified federal labor laws, which AIA has illustrated in the Appendix. The Government has not shown the marginal preventive and remedial power of EO 13673 for these labor laws and EOs, either.

What is more, the FAR Council and DoL make no effort to quantify the value of the purported positive compliance effects. EO 13673 asserts that its implementation will "promote economy and efficiency in procurement by contracting with responsible sources who comply with labor laws." *See* 79 Fed. Reg. at 45309. The FAR Council and DoL repeat the assertions that implementation will create "economy and efficiency" for the Government and point to generic efficiencies in contractor operations, such as better performance, reduced employee turnover, reduced absenteeism, etc. *See, e.g.*, 80 Fed. Reg. at 30558 (citing these efficiencies, based on which "it is expected that the rule would lead to improved economy and efficiency in Government procurement."); RIA Estimate at 42-68 (describing academic research on how these efficiencies result generally in the workforce).[22] But the FAR Council and DoL decline to estimate *how much* employee turnover will decrease because of EO 13673, *how many fewer* performance problems will result, and the degree to which other efficiencies will arise. As a result, the FAR Council and DoL have placed nothing in the record to suggest how much "economy and efficiency" will result from imposition of the extensive disclosure and analysis requirements. The FAR Council and DoL give no inkling of whether they plan to require contractors to spend hundreds of millions, and federal agencies millions more, all to save $5 million, $250 million, or $500. The AIA members find this analytical failure to be deeply concerning.

E. The Proposed Rule Must Protect Sensitive Information.

Any information contractors provide to the Government as a prime contractor or to higher-tier contractors as a subcontractor should not be made publicly available. The Proposed Rule "requires prospective prime contractors to *publicly disclose* whether they have violations of covered laws within the last three years and, for prospective contractors being evaluated for responsibility, certain basic information about the violation." 80 Fed. Reg. at 30555 (emphasis added). Any additional information a contractor discloses, such as mitigating information, remedial measures, or other documentation the contractor deems necessary to demonstrate its responsibility, would not be made public under the regulation as proposed, but the FAR Council is considering requiring public disclosure of it. *See id.* (requesting comment on whether to make all information public). As for subcontractors, their violation information will be disclosed to at least one higher-tier contractor, and possibly many more if the contractor is an active subcontractor.

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[21] Even if the Government could identify such circumstances, it almost certainly could not show how the comprehensive and expensive EO 13673 implementation would achieve the improvements more cost effectively than revising the language of the OSH Act and its implementing regulations.

[22] The FAR Council and DoL also suggest that *contractors* will save money from implementation and reporting under EO 13673. *See* RIA Estimate at 52-54 (suggesting cost savings for contractors). The AIA members find it hard to fathom how any savings can be achieved that could come close to offsetting the substantial costs to be imposed on them, but in any event the FAR Council and DoL have declined to estimate these savings as well.

Public disclosure of this reported information presents myriad problems:

- The information that must be reported will include confidential information about contractor operations, such as how much a contractor spent on a compliance program or remedial measures in response to a violation. This information may be used by another contractor to gain insight into other contractors' approaches to labor compliance and confer on that contractor an unfair competitive advantage.
- The information may include sensitive information about the employees affected by a violation or alleged violation. This could violate employee privacy by forcing their employer to essentially provide a roadmap to the public (by providing the docket-type information) on how to find written documentation of what may be a sensitive issue for the employee.
- Some determinations/decisions—in particular arbitral decisions—may be subject to confidentiality restrictions or other restrictions on disclosure. Contractors may be exposed to suit for breaching confidentiality provisions and/or providing information that allows for identification of specific individuals.
- Likewise, public disclosure could compromise classified information, or may result in the inadvertent release of classified information during the labor law compliance review process. The Proposed Rule is silent on how contractors and COs would deal with this multi-billion dollar aspect of government contracting.
- Requiring centralized publication of all violations and potential violations will unfairly stigmatize contractors—especially because DoL has defined the reportable findings of violations to include so many preliminary findings and mere accusations.
- Protests likely will increase. Whenever a contractor gets awarded a contract, all a disappointed offeror would have to do is check SAM to determine if the awardee reported any labor-law violations. If so, the disappointed offeror will likely challenge the CO's responsibility determination. *See ESCO Marine, Inc.*, B-401438, Sept. 4, 2009, 2009 CPD ¶ 234 (The Government Accountability Office ("GAO") "as a general matter, will not consider a protest challenging an affirmative determination of responsibility, except under limited, specified circumstances—where . . . evidence is identified that raises serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation.") (citations omitted).

We strongly believe that no information should be publicly reported in SAM. The FAR Council must craft guidelines for internal handling of contractor-provided information and also must provide appropriate protections from disclosure under the Freedom of Information Act ("FOIA"), as it is not clear at this time whether Exemption 4 under FOIA would preclude disclosure of reported information. For information reported by subcontractors, the Proposed Rule must require restrictions on higher-tier contractors' handling and distribution of subcontractor-provided information. The Proposed Rule should be re-issued with these requirements incorporated for comment.

IV. Comments on Paycheck Transparency Provisions

The independent contractor notice requirements of the Paycheck Transparency provision are redundant and vague. Under Proposed FAR Clause 52.222-XX, contractors would have to provide to those individuals it treats as independent contractors a document informing the individual of his or her independent contractor status. 80 Fed. Reg. at 30572. The contractor must provide the document to the individual before commencement of work or at the time a contract is established with the individual. *Id.*

The independent contractor notices that would be required by the Proposed Rule are redundant because they must be provided separately from independent contractor agreements. In addition, because the contractor must provide the document to the individual before commencement of work or at the time a contract is established with the individual, a single worker who provides services as an independent contractor on multiple covered contracts would receive multiple notices, each providing him or her with the same information. Because there is no limit to the number of times the notice must be provided in any given period (*e.g.*, an annual notice), an independent contractor who provides services on multiple covered contracts on an intermittent basis could receive dozens of identical notices. Clearly, this result does not promote efficiency for the contractor or for the independent contractor. Furthermore, the Proposed Rule and Guidance fail to identify which workers would qualify as "independent contractors" and leave contractors questioning to whom they should send the notice. For these reasons, the AIA recommends that an independent contractor agreement suffice to satisfy the Proposed Rule's independent contractor notice requirement.

As for the wage statement requirements, the AIA recommends the FAR Council and DoL adopt the second option outlined at 80 Fed. Reg. at 30592. Under this option, state or local requirements would be substantially similar to the wage statement requirements outlined in the Proposed Rule and Guidance if the wage statement omitted overtime hours or earnings but instead included the rate of pay in addition to total hours, gross pay, and any additions or deductions. As this second option has more "Substantially Similar Wage Payment States" (13 states plus the District of Columbia) than does option one (6 states plus the District of Columbia) found on the same page of the Guidance, this option would reduce the burden of compliance and afford AIA members greater flexibility.

V. The Proposed Rule and Guidance Are Arbitrary, Capricious, and Contrary to Law and the Constitution.

We also urge the Administration to reconsider the Proposed Rule and Guidance in their entirety. We appreciate that the Executive Order directed the FAR Council and DoL to propose rules and guidance. But an executive order is not a license for the Executive Branch to exceed the authority granted to it by the Constitution and Congress. Here, the Executive Order, and the implementing Proposed Rule and Guidance, do just that.

A. The Proposed Rule Interferes with Congress's Delegations of Authority.

The Proposed Rule delegates to contracting agencies what Congress has not: authority to interpret and enforce labor laws. Congress has conferred authority on a discrete set of Executive

and independent agencies to enforce these federal laws. And Congress has not conferred authority on any agencies to interpret and enforce state labor laws. Accordingly, the Proposed Rule's efforts to do so violate our Constitution's separation of powers and statutory grants of authority to fellow agencies.

The Proposed Rule cites three statutory bases: 40 U.S.C. § 121(c), 10 U.S.C. chapter 137, and 51 U.S.C. § 20113. *See* 80 Fed. Reg. at 30564. The Guidance follows suit. *See id.* at 30576 (similar citations). Although these statutes authorize the FAR Council to promulgate regulations to implement various *procurement* statutes, they do *not* grant contracting agencies authority to interpret and enforce myriad federal statutes and regulations governing employment, labor relations, and workplace safety. The creation of an ALCA does nothing to cure this infirmity. Congress has neither authorized nor created the ALCA position, much less delegated to such position the authority to act as proxy for any congressionally authorized labor, workplace discrimination, or workplace safety and health enforcement agency. Instead, Congress has assigned responsibility for interpreting and implementing the law in each of these various areas to specific agencies, principally DoL and its component activities, the NLRB, and the EEOC.

If promulgated, the Proposed Rule would interject COs and ALCAs into areas of law that have been entrusted to the authority of these enforcement agencies, all under the guise of conducting pre-award responsibility determinations. COs and ALCAs can decide whether a contractor's purported labor-law violations warrant denial of a government contract, which through DoL coordination will prompt other COs to deny other government contracts, effectively excluding the contractor. *See infra* Section V.C. COs can condition a contractor's receipt and continued performance of a government contract on the contractor's entering into a settlement agreement with an enforcement agency, even if the enforcement agency did not find one necessary. *See id.* COs and ALCAs will adjudge purported labor-law violations against standards, such as "pervasive" violations, not found in any enforcement agencies' enabling statutes or implementing regulations, all subject to the discretion of an agency (DoL) charged with enforcing only some of the covered federal labor laws and none of the to-be-defined state laws. *See infra* Section V.B. This arrangement creates interpretation, enforcement, and punishment mechanisms not sanctioned by the underlying statutes, contradicts those statutes' transparent adjudication and due process requirements, and amounts to an extra-statutory grant of interpretative and enforcement authority to COs under non-procurement statutes.

This is precisely the type of encroachment that federal courts have rejected. In *Herman B. Taylor Construction Co. v. Barram*, DoL and a contractor settled allegations of DBA violations in which the contractor agreed to make certain payments but denied any wrongdoing. 203 F.3d 808, 811 (Fed. Cir. 2000). Based on the same underlying conduct, a General Services Administration ("GSA") CO terminated the contractor for default. *Id.* After an interim affirmance, the Federal Circuit vacated the termination, holding that GSA "has no jurisdiction itself to determine a labor provisions dispute or to review the Labor Department's ruling on that issue." *Id.* Similarly, in the context of the NLRA, the D.C. Circuit has explained that "[n]o state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996). Indeed, the NLRA's preemptive effect is so

strong that the D.C. Circuit found that not even the Secretary of Labor has authority to implement an executive order "promis[ing] a direct conflict with the NLRA." *Id.* at 1338.[23]

In short, the FAR Council and DoL have not heeded the warning that a "shadow is cast when agency action, not clearly mandated by the agency's statute, begins to encroach on congressional policies expressed elsewhere." *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 190 (3d Cir. 1983). The Proposed Rule and Guidance will hand COs and ALCAs broad, potentially unreviewable, discretion to make substantive determinations on areas of law that have been entrusted to other agencies, and with which COs have no familiarity or expertise. Due process cannot be swept aside in this fashion.

B. The Proposed Rule Creates Remedies Where Congress Did Not.

As an outgrowth of ignoring separation of powers, the Proposed Rule would authorize contracting agencies to exercise remedies not provided for by Congress. For each of the laws identified in the Executive Order, Proposed Rule, and Guidance, Congress has established specific remedies for violation of the statutes. For some of the relevant labor laws, Congress has prescribed civil and/or criminal penalties, including for the FLSA, OSH Act, and Title VII. For others, Congress has expressly delegated authority to agencies to debar violators, such as for the SCA and DBA. The particular remedial scheme for each of the labor laws is discussed in greater detail in the Appendix. The Proposed Rule threatens to disrupt the balance of designated remedies that Congress has created for each of these laws by allowing individual COs and ALCAs to determine whether to deny government contracts for actual or even alleged violations.

This encroachment is perhaps most glaring when it comes to the NLRB's available remedies. The NLRA sets forth a detailed remedial scheme for violations, which does not include the exclusion from government contracting for violators. It is not for lack of consideration. On multiple occasions, Congress has declined to pass legislation authorizing the NLRB to debar or otherwise exclude certain NLRA violators:

- In 1977, Congress declined to pass an NLRA amendment allowing "willful" violators to be excluded. *See* H.R. Rep. No. 95-637, at 51 (1977) (discussing proposed Labor Reform Act of 1977, H.R. 8410, 95th Cong.).
- In 1999, Congress declined to pass legislation that would have allowed DoL to suspend or debar contractors that violate the NLRA, FLSA, OSH Act, and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"). *See* H.R. 1227, 106th Cong. (1999) (Federal Procurement and Assistance Integrity Act); S. 1339, 106th Cong. (1999) (same title and language).
- In 2012, Congress declined to pass legislation requiring any person found by a final decision or order to have engaged in an unfair labor practice in violation of the NLRA to: (1) be proposed for debarment for five years from any federal contract or grant; and (2)

[23] *See also Wisc. Dep't of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282, 288, 291 (1986) (holding that a Wisconsin law which would have allowed state agencies to debar contractors for violations of the NLRA was invalid because "it conflict[ed] with the [NLRB's] comprehensive regulation of industrial relations" and "assume[d] for the State of Wisconsin a role Congress reserved exclusively for the [NLRB]."); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1334 (D.C. Cir. 1996) ("[P]re-emption' applies to federal as well as state action.").

be ineligible for five years to receive a federal subsidy or loan. *See* H.R.6668, 112th Cong. (2012) (Workers Solidarity Act).

Thus, Congress's considered refusal to add an exclusion remedy to the NLRA is clear.

Congress likewise has declined to add debarment or other exclusion remedies to other covered labor laws. In 1997, Congress declined to pass a bill that would amend the OSH Act to require debarment of individuals and contractors that violated the Act "with a clear pattern and practice." S. 781, 104th Cong. (1995) (Federal Contractor Safety and Health Enforcement Act of 1995); H.R. 2725, 104th Cong. (1995) (same title and substance). Congress declined again in 1999. *See* S. Rep. No. 106-202, at 4 (1999) (recording failed amendment to legislation proposed to modify the OSH Act). And as noted in the bullets above, Congress has considered and declined to create exclusion remedies for violations of other labor laws such as the FLSA.

Congress has not just declined to pass bills authorizing debarment, it has rejected the remedy expressly in some cases. For example, regarding the NLRA revision proposed in 1977, the Senate reported that "the debarment program cannot and should not be used by the affected department [within the executive branch] to achieve labor relations ends contrary to those established by Congress." H. Rep. No. 95-367, at 45 (emphasis added). Congress has been careful about the remedies it has chosen in this arena. Any attempt to add new ones by regulation puts the regulatory scheme at risk, because "[i]f Congress' intent is clearly at odds with the regulation, then [the regulation] must be struck down . . . ." *NLRB Union v. Fed'l Labor Relations Authority*, 834 F.2d 191, 199 (D.C. Cir. 1987); *see Campbell v. Apfel*, 177 F.3d 890, 898 n.6 (9th Cir. 1999) (quoting *Sierra v. Rubin*, 915 F.2d 1372, 1376 (9th Cir. 1990) ("[W]e may invalidate an agency regulation . . . if the legislative history reveals a clear expression of congressional intent that runs contrary to the regulation.")) (citation omitted). With this clear Congressional direction, the implementation of EO 13673 improperly attempts to expand the authority of the executive branch by creating impermissible new remedies not enacted by Congress.

C. The Proposed Rule Usurps the Role of the SDO and Will Lead to De Facto Debarment Without Due Process Protections.

Under the Proposed Rule and Guidance, contractors' right to due process would be seriously jeopardized. The Executive Order and Proposed Rule are designed such that agencies will decline to award contracts to contractors with findings of violations (or, under the Guidance, alleged violations) of federal and state labor laws. The Proposed Rule and Guidance further emphasize that ALCAs and DoL are to ensure that such decisions are made consistently across the Government. Thus, by design of the regulations, contractors found non-responsible by one ALCA or CO could (or, worse, *should*) be found non-responsible by other agency ALCAs and COs, regardless of the similarity of the procurements or the relevance of the alleged labor-law violations to any particular procurement. The design fosters de facto debarment, or agency conduct that *effectively* excludes a contractor from federal contracting without the due-process protections that are currently provided for contractors under FAR subpart 9.4. *See, e.g.*, *Leslie & Elliott Co. v. Garrett*, 732 F. Supp. 191 (D.D.C. 1990) (finding de facto debarment when the representatives of the Navy found a low bidder non-responsible on two contracts and made statements evidencing that the Navy did not want to do business with the contractor); *Shermco*

Indus., Inc. v. Sec'y of the Air Force, 584 F. Supp. 76 (N.D. Tex. 1984) (finding de facto suspension when the agency made repeated determinations of non-responsibility on the same basis).

Under the FAR, suspension and debarment are "serious" steps that should not be imposed for "purposes of punishment," but "only in the public interest for the Government's protection." FAR 9.402(b); *see also United States v. Hatfield*, 108 F.3d 67 (4th Cir. 1997) (same point). Just as existing labor laws already protect the Government from contractors that may violate them, the FAR's suspension and debarment regulations already allow the Government to exclude contractors that are not presently responsible because of serious violations of labor laws. For example, an SDO may debar a contractor based on a conviction or civil judgment for commission of an offense "indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility" of the contractor. FAR 9.406-2(a)(5). An SDO may *also* debar a contractor based on "any other cause of *so serious and compelling a nature* that it affects" the contractor's present responsibility. FAR 9.406-2(c) (emphasis added); *see also* FAR 9.407-2(a)(9), (c) (similar grounds for suspension). Thus, for those serious violators that the Proposed Rule and Guidance are intended to address, the current regulatory regime already provides an adequate exclusion remedy and implementation of enforcement and punishment mechanisms directed by the existing underlying statutes.

Notably, even when cause exists, suspension and debarment are not automatic responses to findings of illegal conduct or civil violations; instead, these protective measures should be taken only if necessary to protect the Government and only after consideration of ten different mitigating factors. *See* FAR 9.406-1. Indeed, application of the various mitigating factors in FAR 9.406-1 may lead an SDO to find that a contractor is presently responsible, notwithstanding the commission of an offense that may be "so serious and compelling a nature that it affects" the contractor's present responsibility. FAR 9.406-2(c); FAR 9.407-2(c). This regulatory structure recognizes that exercising suspension or debarment is a business decision that considers the *totality* of the contractor's contributions and performance history and that should only be taken if it is *necessary* to exclude a contractor from federal contracting.

The Proposed Rule encourages COs to factor into their individual responsibility determinations the responsibility determinations reached by other agencies and other COs. Indeed, the Proposed Rule contemplates coordination by ALCAs and DoL to ensure COs reach "consistent" results. *See, e.g.*, 80 Fed. Reg. at 30550 (discussing DoL process to coordinate prior determinations to "avoid[] . . . inconsistent . . . evaluations"); *id.* at 30562 (noting that without ALCAs, it would not be "possible to achieve consistency across the Government in [COs'] consideration of contractors' labor compliance records"); *id.* at 30574 (noting DoL's role in ensuring "consistent decisions across the government"). DoL also plans to establish a special "structure" within the Department dedicated to consulting with ALCAs to, among other things, "help ensure . . . consistent decisions across the government." *Id.* at 30575 n.7. Thus, individual COs, under the instruction to reach "consistent" decisions with other COs, may repeatedly find a contractor non-responsible, effectively precluding that contractor from receiving new federal contracts, but without the due-process protections that are included in FAR subpart 9.4.

Unlike FAR subpart 9.4 and the increasing practice of SDOs, the Proposed Rule fails to provide contractors with adequate procedural protections when faced with a possible finding of non-responsibility. Under Proposed FAR Rule 22.2004-1, if the CO has initiated a responsibility determination, the CO will require an offeror that has disclosed labor-law violations to "provide information on mitigating circumstances and remedial measures such as labor compliance agreements." *See also* Proposed FAR Rule 22.2004-2(b) (CO will request specific information regarding reported violations, and the contractor will provide to the CO such information as it deems necessary to demonstrate its responsibility "*e.g.*, mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps take to achieve compliance with labor laws"). It is not clear whether a contractor can challenge, for example, the underlying validity of the "administrative merits determinations" that it has been required to disclose. The proposed FAR provision requires the CO to refer this information to the ALCA, but provides no standard of proof that the ALCA is to apply in making a recommendation. The Rule requires one of three recommendations: (1) that the contractor has a satisfactory record of business ethics and integrity; (2) that the contractor could be found to have a satisfactory record of business ethics and integrity if it enters into a labor compliance agreement; and (3) the contractor cannot be found to have a satisfactory record of ethics and business integrity, and the agency SDO should be so notified. After considering the ALCA's recommendation and considering the "nature of the labor violations," the number of violations, mitigating circumstances and remedial measures, the CO makes a responsibility determination. There is no notice to the contractor regarding the ALCA's recommendation or the CO's subsequent responsibility determination. Thus, a contractor will likely hear of a non-responsibility finding only *after* it has been determined to be non-responsible and not awarded the contract. The only current method of challenging such a determination is a bid protest, which is difficult and costly to pursue. Moreover, bid protest rules for the GAO limit consideration of affirmative responsibility determinations because such determinations are inherently discretionary. 4 C.F.R. § 21.5(c) ("Because the determination that a bidder or offeror is capable of performing a contract is largely committed to the contracting officer's discretion, GAO will generally not consider a protest challenging such a determination. The exceptions are protests that allege that definitive responsibility criteria in the solicitation were not met and those that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation."); *accord supra* Section III.E (discussing big protests of responsibility determinations)[24]

By contrast, more agency SDOs are using show cause notices and requests for information in lieu of immediate suspension or proposed debarment in recognition of fact that a contractor should be given a chance to respond to an SDO's concerns before exclusion is taken. *See, e.g.*, Interagency Suspension and Debarment Committee ("ISDC") Report to Congress for Fiscal Year 2014 at 5 (Mar. 31, 2015) ("'Show cause/pre-notice investigative letters' inform the

[24] Even if a contractor is given notice and an opportunity to be heard, which is ill-defined under the Proposed Rule, any such opportunity is unlikely to be meaningful because the rule requires COs to delve into substantive areas of law with which they are not even familiar, let alone expert. By depriving contractors of an opportunity to *meaningfully* rebut attacks on their integrity and ethics, the Proposed Rule fails to protect contractors' due-process rights. *Nat'l Ass'n of Psychiatric Treatment Ctrs. for Children v. Mendez*, 857 F. Supp. 85, 94-95 (D.D.C. 1994) ("Due process requires that a person be given notice and a meaningful opportunity to be heard.") (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

recipient that the agency debarment program is reviewing matters for potential SDO action, identify the assertion of misconduct, and give the recipient an opportunity to respond before formal SDO action." Report cites 161 show cause notices.); ISDC to Congress for Fiscal Years 2012-2103 at 6 (noting that the ISDC has accelerated efforts to assist agency SDOs with developing procedures to ensure due process, including providing the contractor with written notice of the cause for the suspension or debarment action in terms sufficient to put the contractor on notice of the factual conduct or transactional basis for the action, and to whom and how to contest the action, affording the contractor an opportunity to appear in person, in writing, or through a representative and present information in opposition to the action, affording the contractor the opportunity for an informal meeting with the SDO, and ensuring that the contractor receives a written final determination on the matter. Report cites 131 show cause notices for FY 2013.). Where facts material to the basis for the SDO's decision to take action are genuinely in dispute, an informal evidentiary proceeding is conducted, transcribed by a court reporter for the administrative record at which the respondent may appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents, and obtain a copy of the administrative record. Furthermore, under the FAR's suspension and debarment procedures, contractors are afforded an opportunity to present evidence regarding the cause for suspension or debarment as well as mitigating factors. In particular, in cases in which a proposed suspension is not based on an indictment, or in which a proposed debarment is not based on a conviction or final judgment, the FAR currently requires that the Government "[a]fford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents." *See* FAR 9.406-3(b)(2)(i); 9.407-3(b)(2)(i). The Proposed Rule does not afford any such opportunity.

Furthermore, the FAR currently provides that, in the absence of a conviction or civil judgment, the cause for debarment must be established by a "preponderance of the evidence," FAR 9.406-3(d)(3), while a suspension must be based on "adequate evidence" of a specified offense. FAR 9.407-2(a). By contrast, the Proposed Rule does not contain any evidentiary standard that the CO must meet before finding a contractor non-responsible. In fact, such a determination could be made on the basis of mere allegations. By granting COs discretion to deny contracts based on mere allegations, before a final administrative determination of liability, the Proposed Rule offends basic notions of due process. As a number of courts have recognized, a determination that a contractor lacks a record of business integrity involves a liberty interest recognized by the Fifth Amendment; therefore, agencies must afford contractors sufficient procedural due process before denying contracts based on an unsatisfactory record of integrity or ethics. *See Old Dominion Dairy Prods., Inc. v. Sec'y of Defense*, 631 F.2d 953 (D.C. Cir. 1980). As one court explained, "[t]he due process clauses of the fifth and fourteenth amendments require that a determination by governmental authority stigmatizing a person as so lacking in integrity that he is to be deprived of . . . the liberty to enjoy rights which he would otherwise enjoy must be preceded by written notice of the facts upon which the charge is based and a reasonable opportunity to submit facts in response." *ATL, Inc. v. United States*, 3 Cl. Ct. 259, 267 (1983) (citing *Perry v. Sindermann*, 408 U.S. 593, 601-03 (1972)).

In addition, the Proposed Rule effectively threatens to extend the period of suspension or debarment beyond what the FAR currently permits. Under the FAR, with few exceptions, a debarment should not exceed three years, including the period, if any, during which the contractor was suspended; suspensions should not exceed 18 months, absent the initiation of

legal proceedings against the contractor. FAR 9.406-4(a)(1); FAR 9.407-4(b). The FAR also allows the SDO to shorten the period of a debarment based on newly discovered evidence, reversal of a conviction or civil judgment, a change in ownership, elimination of the causes for debarment, or "[o]ther reasons the debarring official deems appropriate." FAR 9.406-4(c)(5). By allowing individual COs to deny contracts for the conduct that is already covered by the suspension and debarment rules, the Proposed Rule would allow individual COs to extend the effective period of debarment for more than three years. Moreover, whereas an SDO may decide to shorten or lift a suspension or debarment, and that decision would apply government-wide, a contractor that believes it has remediated its alleged labor-law violations would have to make its case to every CO at every agency.

In addition to usurping the role of SDOs to make responsibility determinations, the Guidance and Proposed Rule inappropriately compel contractors to enter into labor compliance agreements to avoid de facto debarment. Like administrative agreements, labor compliance agreements exist to satisfy the relevant government official (here, COs, based on written guidance of ALCAs) that a contractor has a satisfactory record of business integrity and ethics.[25] As discussed above, we believe the role of labor compliance agreements should be de-emphasized.

In summary, AIA is troubled by the foreseeable exclusion of contractors by multiple COs, without advance notice, as a result of alleged labor law violations, regardless of the need to exclude the contractor from federal contracting to protect the Government's interests. The Proposed Rule, as supplemented by the Guidance, does not provide the procedural protections of the current suspension and debarment rules, nor does it reflect the considered business decision that should precede a decision to exclude a contractor from the federal marketplace. The Proposed Rule and Guidance further improperly create an additional sanction in the form of labor compliance agreements which can be imposed in the absence of adjudicated facts regarding actual labor violations but will result in in DoL and contractors to entering into such agreements simply to make the responsibility determination process go more smoothly, not because there is a need for such an agreement to protect the Government or the contractor workforce.

Accordingly, AIA recommends that if the FAR Council and DoL proceed with further rulemaking, the FAR Council and DoL should revise the Proposed Rule to reflect these comments and resolicit comments from interested stakeholders. We recommend that, at a minimum, the FAR Council propose procedural processes for contractors to respond to potential findings of non-responsibility in advance of a determination, propose more rigorous decision-

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[25] The Proposed Rule further requires ALCAs to monitor contractors' progress towards or compliance with labor compliance agreements and to provide COs advice on the subject. Proposed FAR Rule 22.2004-3(b)(1)-(3). In addition, ALCAs can recommend that COs refer contractors during contract performance to DoL for "action, which may include a new or enhanced labor compliance agreement." Proposed FAR Rule 22.2004-3(b)(4)(ii). In rendering their responsibility determinations, COs are instructed to ensure, using DoL's Guidance, that the factors considered in their own evaluations include remedial measures "including the existence of and compliance with any labor compliance agreements, or whether the prospective contractor is still in good faith negotiating such an agreement." 80 Fed. Reg. at 30567. The Guidance also states that COs will be made aware of when "DOL has determined that a prospective or existing contractor or subcontractor with serious, willful, repeated and/or pervasive violations has not entered into a labor compliance agreement in a reasonable period or is not meeting the terms of such agreement." *Id.* at 30557. Thus, a contractor's unwillingness to accept a labor compliance agreement or its material breach of such an agreement allegedly indicates a lack of ethics and integrity.

making criteria, such as standards of proof, before a contractor is deemed not responsible, and de-emphasize the role of labor compliance agreements. We further recommend that the FAR Council and DoL consider protections or processes by which contractors can raise concerns or objections to de facto debarments so that repeated exclusions are addressed in a manner that recognizes contractor's due process rights.

D. The Proposed Rule Is Arbitrary and Capricious and Was Issued Without a Rational Basis.

In the Proposed Rule, the FAR Council has failed to articulate any rational basis for its decision to undertake the proposed changes. Under the APA, regulatory actions will be overturned if they are determined to be "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). In this case, the Proposed Rule is founded upon the faulty premise that its benefits outweigh its costs and otherwise "promote[s] economy and efficiency in procurement by awarding contracts to contractors that comply with labor laws." 80 Fed. Reg. at 30548. As discussed previously, the FAR Council has justified the Proposed Rule based on expected costs that are vastly underestimated or entirely unconsidered and benefits that are significantly overstated. Thus, the FAR Council has failed to demonstrate how the Proposed Rule "promote[s] economy and efficiency" consistent with the policy underlying the rule.

The Supreme Court has recently held that agencies cannot undertake rulemaking without evaluating the costs associated with the rule. In *Michigan v. EPA*, the Court found unreasonable the Environmental Protection Agency's ("EPA") decision to promulgate a regulation to regulate emissions of hazardous air pollutants from power plants without considering the costs associated with the regulation. *See* 135 S. Ct. 2699, 2712 (2015). Instead, the EPA considered only the benefits based on its interpretation of its mandate to regulate power plants when "appropriate and necessary." *See id.* at 2705. In reaching its decision, the Court stated that "[f]ederal administrative agencies are required to engage in 'reasoned decisionmaking.'" *Id.* at 2706 (citation omitted). Reasoned decision-making requires "the process by which [the agency] reaches [its] result [to] be logical and rational" and must "rest on a consideration of the relevant factors." *Id.* (citations and internal quotation marks omitted). While the Court's holding was limited to an agency's consideration of costs, logic and reason dictate that agencies must also consider the benefits before undertaking rulemaking.

Thus, because the FAR Council and DoL have severely underestimated likely costs and identified neither how nor to what extent any benefits might result, the Proposed Rule is irrational. Such regulatory abdication violates the fundamental tenet of administrative law that agencies must conduct rulemaking in a rational manner. This requires, at a minimum, that an agency promulgate regulations only when the new regulation will serve a beneficial purpose. In addition to, and consistent with, this tenet, FAR 1.102-2(b) directs that amendments to the FAR should be promulgated only when their benefits clearly exceed the costs of their development, implementation, administration, and enforcement. The FAR Council and DoL are far from satisfying these requirements when it comes to whether and how to implement EO 13673. The AIA members thus urge the Government to reconsider whether the Executive Order creates a compliance regime with negligible identifiable benefits to offset the certain substantial costs.

E. The Guidance Is a Legislative Rule Rather Than an Interpretive Rule and Must Be Issued Through Notice-and-Comment Rulemaking.

DoL has asserted that the Guidance is not subject to mandatory notice-and-comment rulemaking. *See* 80 Fed. Reg. at 30576 ("Agencies are not required to provide notice and an opportunity for public comment on guidance documents before they are adopted, as is generally required for formal legislative rulemaking and other regulatory action."). Instead, DoL asserts that it is publishing the Guidance for comment solely as a matter of discretion. *See id.* ("Consistent with its efforts to engage with interested parties regarding the Order, the Department, in its discretion, is soliciting public comment on this Guidance in the manner and before the date specified above.").

The Guidance is a legislative rule rather than an interpretive rule and, as such, must be subjected to notice-and-comment rulemaking. Section 4 of the APA requires notice-and-comment periods for "legislative rules." *See* 5 U.S.C. § 553. As the Supreme Court has recently reiterated, "[r]ules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'" *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (citation omitted). On the other hand, "interpretive rules" need not be issued through notice-and-comment rulemaking. 5 U.S.C. § 553(b)(A). "[T]he critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez*, 135 S. Ct. at 1204 (internal quotation omitted). That is not the case here.

The Guidance is not merely interpreting the FAR Council's legislative rule. Instead, the Guidance is an indivisible part the Proposed Rule. The Proposed Rule does not function without DoL's definitions of terms such as "administrative merits determination" and "willful" violations. Indeed, the Proposed Rule expressly refers readers to the Guidance for definitions. *See, e.g.*, 80 Fed. Reg. at 30565 (referring to the Guidance for the definition of "administrative merits determination"). Not only that, but the Guidance defines the terms "serious," "willful," "repeated," and "pervasive" for the labor laws even though, for the most part, those labor laws and their implementing regulations do not use those terms. Thus, the Guidance creates entirely new levels and types of violations, which means that DoL is not advising how it will interpret existing statutes and regulations, but is instead creating new definitions with the force and effect of law. This cannot stand.

The Supreme Court has disapproved of the approach taken by the FAR Council and DoL here. In *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, the Court stated that a regulation cannot "promulgate mush" and then concretize the ambiguities through less-formal interpretations:

> [T]here is, to be sure, an outer limit to that deference imposed by the Administrative Procedure Act. A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal "interpretations."

117 F.3d 579, 584 (D.C. Cir. 1997), *abrogated on other grounds by Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015). Yet that is exactly what the FAR Council and DoL have done,

thereby circumventing the notice-and-comment procedures of the APA. The Proposed Rule relies entirely on the Guidance for the actual substance of the regulation; it would be impossible to understand one without the other.

There are practical implications to DoL's improper cloaking of a legislative rule as guidance, too. Agencies may change interpretive rules, such as guidance, at any time without prior notice or opportunities to comment, even if the agency previously published the interpretive rule and considered comments on it. *See Perez*, 135 S. Ct. at 1207. Thus, as proposed, DoL can change any of its proposed definitions or terms at any time without warning. Yet the FAR Council proposes to embed DoL's guidance into FAR rules and clauses that will theoretically be incorporated into contracts. We are already concerned about the costs of implementing systems and processes to comply with EO 13673; our concerns are only amplified by the prospect that DoL can make any changes it wants to any part of the Guidance at any time, and thus upset the contractual expectations of both the agency and contractor and require substantial changes by covered contractors at a moment's notice.

VI. Conclusion

We agree with the public statements from the Administration, Secretary of Labor, and the Administrator of the Office of Procurement Policy that "the vast majority" of companies that do business with the Government comply with their labor-law obligations. Moreover, we note that DoD initiatives, such as Better Buying Power 3.0, are aimed at encouraging industry and new entrants to increase their investments in research and development and offer more innovative products so that the United States can maintain its technological superiority. We believe the Proposed Rule and Guidance disserve this objective and unduly and improperly penalize an entire industry for the transgressions of a few, isolated contractors.

For these reasons and those discussed above, we urge the FAR Council and DoL to consider the extraordinary burden and cost that will be imposed on industry and the Government and the correspondingly small likelihood of positive benefit to workers from the Proposed Rule and Guidance. We urge you to bring the comments received to the attention of the Administration so that it may consider revisions to EO 13673. We also request that the FAR Council and DoL re-issue revised proposed rules and guidance that take into account the comments submitted, and delay implementation of any rules or guidance until all stakeholders have had the opportunity to address them and implement any systems required to comply with them.

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APPENDIX
OVERVIEW OF EXISTING REMEDIAL SCHEMES OF THE LABOR LAWS COVERED BY EO 13673

This Appendix identifies which of the 14 labor laws listed in EO 13673 provide for debarment as well as the existing remedies created by each law. With the exception of Executive Order 13658, Establishing a Minimum Wage for Contractors (issued February 12, 2014), these remedial schemes have been in place for decades and have long been enforced by distinct agencies and courts applying varying substantive elements, burdens of proof, and defenses. Furthermore, none of the labor laws provide for the four-tier classification system embodied in the new severity standards envisioned by EO 13673. Of the 14 covered laws, only the OSH Act provides a statutory definition of a "serious violation," and that statutory standard varies significantly from the Guidance's proposed definition of a "serious" violation. Although case law interpreting some of the labor laws provides more guidance for determining what constitutes a "willful" violation, these standards vary by statute and whether or not the "willfulness" is being evaluated for substantive or statute of limitation purposes. There is no statutory definition in any of the labor laws for the newly proposed "pervasive" violation.

A. Six of the 14 Labor Laws Have Their Own Debarment Remedy.

Six of the labor laws already provide for debarment with their own well-developed procedural standards for enforcement. These six are discussed in greater detail below.

1. Vietnam Era Veterans' Readjustment Assistance Act of 1974 and the Rehabilitation Act of 1973

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"), as amended, 38 U.S.C. § 4212, prohibits discrimination against protected veterans and requires covered government contractors and subcontractors to take affirmative action to employ and advance in employment qualified protected veterans. 41 C.F.R. Part 60-300. Violations of VEVRAA may be a cause for debarment. 41 C.F.R. § 60-300.66 ("A contractor may be debarred from receiving future contracts for failure to comply with the provisions of the Act or this part subject to reinstatement pursuant to § 60-300.68. Debarment may be imposed for an indefinite period, or may be imposed for a fixed period of not less than six months but no more than three years."). As another example, Section 503 of the Rehabilitation Act of 1973 ("Section 503"), as amended, 29 U.S.C. § 793, prohibits discrimination against individuals with disabilities and requires covered government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. 41 C.F.R. Part 60-741.

These requirements are enforced by the Department of Labor's ("DoL") Office of Federal Contract Compliance Procedures ("OFCCP"), an independent Administrative Review Board, and the Secretary of Labor. In addition to traditional injunctive and make-whole relief for individuals, such as back pay and reinstatement, sanctions and penalties to correct any violations of the provisions of these statutes or regulations, or for failure to comply with these statutes or regulations, include withholding progress payments on federal contracts, termination of a contract in whole or in part, or debarment for an indefinite period, or for a fixed period of no less

than six months and no more than three years. 41 C.F.R. § 60-300.66; 40 C.F.R. § 60-741.66. *Significantly*, the regulations specifically provide that "an opportunity for a formal hearing shall be afforded to a contractor before the imposition of any sanction or penalty." 41 C.F.R. § 60-300.66(d); 41 C.F.R. § 60-741.66(d).

2. Executive Order 11246: Equal Employment Opportunity

Similarly, Executive Order 11246 prohibits federal contractors and federally assisted construction contractors and subcontractors, who do over $10,000 in government business in one year, from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. Executive Order 11246 also requires government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. As with VEVRAA and Section 503, remedies include back pay, reinstatement, and injunctive relief. Notably, only after a contractor participates in a full administrative hearing can sanctions be imposed, including cancellation, termination and suspension of the federal contracts, and/or debarment from further contracts. 41 C.F.R. § 60-1.26 and -1.27; 41 C.F.R. § 60-30.

3. Executive Order 13658: Minimum Wage for Federal Contractors

The more recent Executive Order 13658 establishes a minimum wage for covered federal contractors. In addition to responsibility for ensuring that the contract clause implementing the Executive Order's minimum wage requirement is included in any new contracts or solicitations for contracts covered by this executive order, contracting agencies are also responsible for withholding funds when a contractor or subcontractor fails to abide by the terms of the applicable contract clause, such as by failing to pay the required minimum wage, and for forwarding any complaints alleging a contractor's non-compliance with Executive Order 13658 to DoL's Wage and Hour Division ("WHD"). Complaints may be filed with the WHD by any person or entity that believes a violation of the executive order or its implementing regulations has occurred. The final rule contains a mechanism for WHD investigations and informal complaint resolution, as appropriate; it also specifies remedies and sanctions for violations of the executive order and its implementing regulations, including the payment of back wages and debarment. *See* 29 C.F.R. § 10.41-.44; 29 C.F.R. § 10.52. DoL's final rule also includes an administrative process, including administrative hearings, to resolve disputes of fact or law. Notably, the regulations implementing Executive Order 13658 specifically ensure that "neither an order for debarment of any contractor or its responsible officers from further government contracts nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors under this section shall be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge." 29 C.F.R. § 10.44(c).

4. The Service Contract Act and the Davis-Bacon Act

The Service Contract Act ("SCA"), 41 U.S.C. § 6701 et seq., sets a government-established floor on the hourly wages paid to a private contractor's employees performing a wide range of services at federal government facilities. The Davis-Bacon Act ("DBA"), 40 U.S.C. §§ 3141-3148, similarly regulates hourly wages paid to a federal contractor's mechanics and laborers

performing a wide range of construction work on the site of a federal "public works" project. These two laws have long been recognized as "parallel" federal prevailing wage statutes.

Congress provided a wide range of parallel civil remedies for SCA and DBA violations, and charged the Secretary of Labor with investigation and enforcement responsibilities. The remedies Congress prescribed include recovery of wage underpayments, contract payment withholding, contract cancellation, and suspension or debarment for three years from bidding on "every contract of the United States." 41 U.S.C. § 6705 (SCA); 40 U.S.C. § 3146 (DBA).

Debarment is presumed for SCA violators unless the Secretary of Labor recommends otherwise "because of unusual circumstances." Congress tightened the "unusual circumstances exemption" through a 1971 SCA amendment. At the time, Congressman O'Hara, a principal drafter of the SCA, observed:

> Restoration . . . [of wages and benefits] is not in and of itself a penalty. The penalty for violation is the suspension from the right to bid on Government contracts . . . . The authority [to relieve from blacklisting] was intended to be used in situations where . . . disbarment . . . would have been wholly disproportionate to the offense.

29 C.F.R. § 4.187 (quoting House Comm. on Education and Labor, Special Subcommittee on Labor Hearings on H.R. 6244 and H.R. 6245, 92d Cong., 1st Sess. 3 (1971)).

In accordance with Congress's proportionality directives, "blacklisting," which includes publication of the contractor's name to "all agencies of the Government," is permitted only after DoL follows its own set of debarment procedures and regulations. The DBA and SCA's implementing rules as well as the rules of practice for DBA and SCA administrative proceedings serve to safeguard contractors' due process rights. Consequently, the SCA and DBA debarment "penalty" is ordered only after an ALJ has made a formal finding of predicate DBA or SCA violations. *See, e.g.,* 29 C.F.R. § 5.12 (DBA). In addition, in marked contrast to the Guidance, the role of the CO is comparatively limited and constrained--more of a witness than a judge.

5. These Six Labor Laws Do Not Contain the FAR Regulation's Proposed Severity Standards.

Significantly, none of the six labor laws specifically applicable to federal contractors contain the severity standards—"serious, willful, repeated, or pervasive" —announced in EO 13673, the Guidance, and the Proposed Rule. Nonetheless, ALCAs, COs, and even contractors tasked with evaluating their subcontractors' compliance histories would have a duty to make a non-responsibility determination based on their view as to whether specific conduct fell within a specific severity standard not found in the underlying labor law.

For example, the DBA and the SCA do not contain any of the severity standards that COs and prime contractors are supposed to apply in evaluating, respectively, the severity of prime contractors' and subcontractors' DBA and SCA violations. At the same time, existing debarment rules, for example, already direct DoL enforcement officials (not procurement

officials at unrelated agencies) to take the severity of a federal contractor's SCA violations into account in making a debarment recommendation. *See* 29 C.F.R. § 4.188(a)(3)(i) (relief from debarment is not available for conduct of a "willful, deliberate, or of an aggravated nature").

In sum, well-developed procedures and standards already exist for debarment of federal contractors doing business with the federal government under these six laws. The supplemental debarment provisions erected by EO 13673 are arbitrary, unnecessary, and inconsistent with established law, and they do not provide adequate due process safeguards for federal contractors.

B. The Other Eight Labor Laws Purposefully Do Not Impose Contract Termination or Debarment Remedies.

The other eight labor laws listed in EO 13673 do not impose contract termination or debarment remedies for violations. Their remedial schemes are discussed in greater detail below.

1. Title VII and the ADA

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* covers both public and private employers and prohibits discrimination based on race, color, gender, national origin, and religion. The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.,* prohibits employment discrimination against individuals who are disabled but able to perform the substantial functions of the job. Both statutes are enforced by the EEOC and through a private right of action after exhaustion of administrative remedies. When enacting the ADA, Congress specifically made the procedures and remedies in Title VII applicable to Title I of the ADA. *See* 42 U.S.C. § 12117(a).

The remedies under these two statutes include:

- Back pay, front pay, and reinstatement. 42 U.S.C. § 2000e-5(g);

- Compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(a)(1);

- Punitive damages assessed against private sector employers who have acted with malice or with reckless indifference to the employee's federally protected rights. 42 U.S.C. § 1981a (b)(1); *Kolstad v American Dental Ass'n,* 527 U.S. 526 (1999);

- Other equitable relief. 42 U.S.C. § 2000e-5(g)(1). Should a trial court find the employer has intentionally discriminated, it may enjoin the defendant firm from engaging in such unlawful employment practice(s) and order affirmative action including reinstatement or hiring of employees with or without back pay. Declaratory relief is also available; and

- Attorneys' fees, 42 U.S.C. § 2000e-5(k), and prejudgment interest, within the discretion of the court, *Loeffler v Frank*, 486 U.S. 549, 557-58 (1988).

The prescribed caps for compensatory and punitive damages combined are:

- $50,000 for employers with 15-100 employees;
- $100,000 for employers with 101-200 employees;
- $200,000 for employers with 201-500 employees; and
- $300,000 for employers with more than 500 employees.

These caps do not apply to back pay.

2. Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 ("ADEA") protects applicants and employees 40 years of age and older from discrimination on the basis of age in hiring; promotion; discharge; compensation; or terms, conditions, or privileges of employment. 29 U.S.C. §§ 621-634. The statute is enforced by the EEOC or through a private right of action brought in court after filing a charge with the EEOC. 29 U.S.C. § 626(d). ADEA remedies include:

- Back pay. 29 U.S.C. § 626(b);
- Liquidated damages, defined as an additional amount equal to the back pay award, for willful violators. 29 U.S.C. § 626(b). The ADEA incorporates the definition of liquidated damages used in the FLSA, even though employees suing under the FLSA need not show that the violations were willful. *See* 29 U.S.C. § 216(b);
- Alternative relief, with is within the court's discretion to grant on a case-by-case basis due to Congress authorizing them to "grant such legal and equitable relief as may be appropriate . . . including . . . judgments compelling employment, reinstatement or promotion." *Id.*

Unlike Title VII, the ADEA does not provide for compensatory or punitive damages.

3. The Fair Labor Standards Act

The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments. Covered nonexempt workers are entitled to a minimum wage of not less than $7.25 per hour effective July 24, 2009. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.

WHD administers and enforces the FLSA with respect to private employment, state and local government employment, and federal employees of the Library of Congress, U.S. Postal Service, Postal Rate Commission, and Tennessee Valley Authority. The FLSA prescribes civil and criminal remedies, and also includes provisions for individual employees to file private

lawsuits. The 1989 amendments to the FLSA added a provision for civil monetary penalties ("CMP") for repeated or willful minimum wage or overtime violations.

- Enforcement through legal remedies

The FLSA allows DoL or an employee to recover back wages and an equal amount in liquidated damages for proven minimum wage and overtime violations. Generally, a two-year statute of limitations applies to the recovery of back wages and liquidated damages. A three-year statute of limitations applies in cases involving willful violations. Remedies may be pursued through administrative procedures, litigation, and/or criminal prosecution.

- Administrative procedures

DoL is authorized to supervise the payment of unpaid minimum wages and/or unpaid overtime compensation owed to any employee(s). In lieu of litigation, DoL may seek back wages and liquidated damages, through settlements with employers. CMPs may be assessed for child labor violations and for repeat and/or willful violations of the FLSA minimum wage or overtime requirements. Employers who willfully or repeatedly violate minimum wage or overtime pay requirements are subject to CMPs of up to $1,100 per violation.

- Litigation remedies

DoL may file suit on behalf of employees for back wages, an equal amount in liquidated damages, and civil money penalties where appropriate.

DoL may seek an injunction in federal district court to restrain violations of the law, including the unlawful withholding of proper minimum wage and overtime pay, failure to keep proper records, and retaliation against employees who file complaints and/or cooperate with the DoL. DoL may also seek an order for payment of CMPs from a DoL ALJ where appropriate.

An employee may file a private suit to recover back wages and an equal amount in liquidated damages, plus attorney's fees and court costs. In such a case, DoL will not seek the same back wages and liquidated damages on that employee's behalf.

- Criminal prosecution

Employers who have willfully violated the law may be subject to criminal penalties, including fines and imprisonment.

4. Family and Medical Leave Act of 1993

The Family and Medical Leave Act ("FMLA") entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons, qualifying exigencies arising out of a family members' covered active duty, and military caregiver responsibilities with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The law also prohibits interference with the exercise of these rights and retaliation.

The FMLA is also enforced by WHD and provides for administrative action and civil suits by the Secretary of Labor for damages or injunctive relief and also provides for a private right of action for damages and equitable relief. Damages include recovery of lost wages and benefits, actual monetary losses, liquidated damages of two times the actual damages unless the employer had reasonable grounds for not knowing it was violating the law, and attorneys' fees and costs. 29 U.S.C. § 2617. In enacting the FMLA, Congress specifically incorporated the investigative powers and recordkeeping obligations of the FLSA. 29 U.S.C. § 2616.

5. National Labor Relations Act

Congress empowered the National Labor Relations Board ("NLRB") to "prevent any person from engaging in an unfair labor practice." 29 U.S.C. § 160(a). The National Labor Relations Act ("NLRA") underscores that, with respect to unfair labor practice cases, the power to grant remedial relief rests exclusively with the NLRB. 29 U.S.C. § 160(a) ("[T]his power shall not be affected by any other means of adjustment or prevention that may be established by . . . law . . ."). In carrying out its remedial responsibilities, the NLRB, after finding that an unfair labor practice has been committed, is empowered to issue a cease and desist order and "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . ." 29 U.S.C. § 160(c).

Significantly, despite this broad conferral of power by Congress to order affirmative action, it has long been established that the NLRB "lacks authority to punish; its remedy must not be punitive in nature." *Phelps Dodge Corp. v. NLRB*, 379 U.S. 177 (1941); *see Consolidated Edison v. NLRB,* 305 U.S. 197, 219 (1938) ("[A]uthority to order affirmative action does not confer a punitive jurisdiction enabling the NLRB to inflict . . . any penalty it may choose . . . even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.").

Significantly, attempts to amend the NLRA to specifically give the NLRB the power to penalize employers for their proven unfair labor practice violations have failed to obtain consensus and have therefore been rejected by the Congress. This is the case even though the NLRB has been reversed by reviewing courts when it has attempted to fashion its own remedies to address perceived injustice. *Conair Corp. v. NLRB,* 721 F.2d 1355 (D.C. Cir. 1983) (rejecting NLRB's imposition of a unilateral, short-term bargaining order in response to "pervasive" section 8 violations that denied employees the right to organize and demonstrate majority status).

While the NLRA eschews DoL's proposed severity standards, the NLRB has developed remedies within the powers conferred by Congress to address, for example, a clear pattern or practice of proven unfair labor practices. The NLRB may fashion an order, for example, requiring the employer to cease and desist from violating the Act "in any other manner." *Miller Group*, 310 NLRB 1235 (1993) (posting justified beyond the facility where the where unfair labor practice occurred due to the employer's track record).

The NLRB thus implements remedial measures designed not to punish employers, as the Guidance seeks to do, but to recreate the relationships and restore the economic status quo that would have been had there been no unfair labor practice.

6. The Migrant and Seasonal Agricultural Worker Protection Act

The Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C. §§ 1801-1877, regulates employers and labor contractors who supply "migrant agricultural workers" for seasonal or temporary work away from their permanent residence. 29 U.S.C. § 1802(8). The law (and its predecessor) dates back to 1963 and is designed to protect migrant agricultural workers from economic exploitation. The MPSA includes requirements, for example, that employers and contractors register and certify that they are meeting regulatory standards relating to the employment, transportation, and housing of migrant agricultural workers. 29 U.S.C. § 1854.

The MSPA provides a criminal remedy for willful violations that includes imprisonment and/or fines. 29 U.S.C. § 1851. Upon conviction of any "subsequent violation" of the MSPA, the defendant may be fined up to $10,000 or imprisoned for up to three years. 29 U.S.C. § 1851. The MSPA also includes "administrative sanctions." These civil remedies include the assessment of a "money penalty" not to exceed $1,000 for each violation. 29 U.S.C. § 1853(1). Civil penalties are determined by taking into account the employer's "previous record" in terms of compliance.

While DoL is charged with enforcing the MSPA, the law also provides qualifying workers with a private right of action to sue in federal district court without having to exhaust administrative remedies. 29 U.S.C. § 1854. If the trial court finds an "intentional" violation of the MSPA, the court may award the migrant worker plaintiffs an amount equal to their actual damages or "statutory damages of up to $500 per plaintiff per violation." 29 U.S.C. § 1854(c)(1).

7. The Occupational Safety and Health Act of 1970

The Occupational Safety and Health ("OSH") Act of 1970 provides for far-reaching federal standards that regulate workplace safety and health. Employers must comply with two broad provisions under the OSH Act. First, the OSH Act requires the employer to keep its place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1). This requirement is often referred to as the general duty clause. Second, Section 654(a)(2) requires the employer to comply with specific standards promulgated pursuant to the OSH Act. 29 U.S.C. § 654(a)(2).

The Occupational Health and Safety Administration ("OSHA") is responsible for enforcing the OSH Act and the standards promulgated pursuant to the OSH Act (collectively, the "OSHA laws"). OSHA's enforcement powers include the authority to issue citations and assess "civil penalties" of up to $70,000 for violations of the OSHA laws. 29 U.S.C. § 666(a)-(c), (j).

In addition to the OSHA laws, 22 states have their own OSHA-approved State Plans applying to private sector employees. These state laws, which are administered by state safety and health regulators, are, by definition, identical to or more stringent than the OSHA laws.

If an employer wishes to contest a citation, it is entitled to a hearing before an ALJ at the Occupational Safety and Health Review Commission ("Review Commission"), an independent

federal agency. 29 U.S.C. § 661(j). A party that disputes the ALJ's determination is entitled to petition the Review Commission for discretionary review, and may thereafter seek judicial review of the Review Commission's "final order." 29 U.S.C. § 660(a).

In contrast to the other labor laws, the OSH Act itself includes some of the terminology used in the Guidance and violations are designated according to statutory standard. Notably, a violation of the OSHA laws may be characterized as "serious," "not serious," "willful," or "repeated." 29 U.S.C. § 666(a)-(c).

a. "Serious" and "Not Serious" Violations

The OSH Act authorizes OSHA to assess civil penalties up to $7,000 for each "serious" violation. 29 U.S.C. § 666(b). Unlike the other federal laws addressed in the Guidance, the OSH Act provides a statutory definition for what constitutes a "serious" violation. The law provides as follows:

> [A] serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or process which have been adopted or are in use in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 U.S.C. § 669(k). State Plans, by definition, must have adopted the same or a stricter "serious" violation definition.

In order to meet this statutory standard, OSHA must prove in an adversarial administrative proceeding that the employer that received the citation either knew or, with the exercise of reasonable care, could have known of the presence of the hazardous condition. OSHA need not show that there was a substantial probability that an accident would actually occur. *See, e.g.*, *Pressure Concrete Constr. Co*., 15 BNA OSHC 2011, 2018 (No. 90-2668, 1992); *Wal-Mart Stores Inc. v. Secretary of Labor*, 406 F.3d 731 (D.C. Cir. 2005).

b. "Willful" Violations

The OSH Act also authorizes OSHA to "assess a civil penalty of not more than $70,000" for each "willful" violation, 29 U.S.C. § 660(a); an amount ten times the maximum penalty for a "serious" (or a not "serious") violation. 29 U.S.C. § 660(b). However, the OSHA laws have never formally defined what constitutes a "willful" violation. Accordingly, the definition of a "willful" violation, for the purpose of workplace safety and health law, has only been developed through case law.

The Review Commission and federal courts have agreed that "[t]he hallmark of a willful violation is the employer's state of mind at the time of the violation — an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee

safety.'" *Kaspar Wire Works, Inc*., 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *see AJP Constr. Inc. v. Secretary*, 357 F.3d 70, 75 (D.C. Cir. 2004). Under the judicial definitions, a good faith reasonable belief by an employer that its conduct conformed to the law negates a finding of willfulness, and a difference in interpretation is not synonymous with willfulness. *See Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1510 (No. 97-1839, 2004); *A.E. Staley Manuf. Co. v. Secretary of Labor*, 295 F.3d 1341 (D.C. Cir. 2002).

c. "Repeated" Violations

The OSH Act also authorizes OSHA to assess a maximum civil penalty of $70,000 for "repeated" violations. However, as with "willful" violations, the OSHA laws do not define "repeat" violations. Notably, OSHA's own interpretative guidance confirms that "prior citations [issued pursuant to any of the 22 OSHA-approved State Plans] cannot be used as a basis for Federal OSHA repeated violations." OSHA Field Operations Manual at 4-32.

A violation may be characterized as "repeated" under the OSH Act if the employer has been cited previously for "the same or substantially similar" workplace conditions or hazards and the "citation *has become a final order of the Review Commission*." *Id.* (emphasis in original); *see also Cagle's Inc.*, 21 BNA OSHC 1738, 1745 (No. 98-0485, 2006). OSHA bears the burden of proving substantial similarity if the standard is broadly worded or if the standards are not the same. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807); *J.L. Foti Constr. Co. v. OSAHRC*, 10 BNA OSHC 1937 (No. 80-3806, 1982).

Significantly, under OSHA's current enforcement policy, OSHA takes into account only those citations under the OSHA laws that have become *final*--by virtue of not being contested, being settled, or having an adverse ALJ determination affirmed by the Review Commission—within the past five years. *See* OSHA Memorandum, Annual Review and Scheduled Modification to OSHA's Interim Administrative Penalty Policy dated March 27, 2012.

d. Review Process

If an employer contests a citation, initially an ALJ at the Review Commission will preside over an administrative hearing during which parties have the opportunity to present testimonial and documentary evidence. Following the hearing, the ALJ must issue a decision with his or her findings. 29 U.S.C. § 661(j). The Review Commission may, in its discretion, review the ALJ's decision *de novo*. *Id.* Notably, under the OSH Act, ALJs and the Review Commission have authority to review the citation, including the characterization and the penalties proposed by OSHA. Under the OSH Act, OSHA only has limited authority concerning the assessment of penalties. The Review Commission has the sole authority to determine penalties. 29 U.S.C. § 666(j). As such, the Review Commission serves as the final arbiter of penalties when a citation is contested. Their rulings characterizing the workplace conduct or conditions at issue will be upheld on appeal provided there is substantial supporting evidence. 29 U.S.C. § 660(a).

Since there is no time limit on how long the Commission may take to issue a decision, cases may sit for several years before a decision is issued. In *Dayton Tire v. Secretary of Labor,*

671 F.3d 1249 (D.C. Cir. 2012), the Review Commission took more than a decade to affirm an ALJ's willfulness determinations for 100 civil citations issued over conditions and practices at a single plant. The D.C. Circuit, however, ultimately vacated OSHA's decade-old "willful" characterization for most of these citations on the grounds that the agency's designation was not backed by substantial evidence.

The lengthy interval between OSHA's issuing multiple "willful" citations and the judicial determination vacating OSHA's characterization of the conduct at issue points to the importance of not using contested citations in making labor law responsibility determinations. 80 Fed. Reg. at 30585 (defining "willful" to include "willful" citations issued under the OSH Act or the OSHA-approved State Plan where "the designation has not been subsequently vacated").

While the OSH Act does not contain a suspension or debarment remedy, OSHA has implemented a program for at least a decade designed to bring heightened regulatory and public scrutiny to companies OSHA has characterized as "severe violators." Its current Severe Violator Enforcement Program ("SVEP") targets companies alleged to have a repeated or pervasive pattern of OSH Act violations. OSHA places companies in the SVEP before the underlying "violations" have been proven in an adversarial hearing before an ALJ. Companies are publicly identified as "severe violators" somewhat like the Comptroller General's circulation of a federal contractor debarment list, and may stay on the list for several years while they contest the underlying citations..

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