COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6100

August 26, 2015

SUBMITTED VIA REGULATIONS.GOV

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

The Honorable Anne Rung
Administrator
Office of Federal Procurement Policy
Office of Management and Budget
1650 Pennsylvania Avenue, NW, Room 264
Washington, D.C. 20502

RE: Comments Regarding RIN 1290-ZA02 and RIN 9000-AM81

Dear Secretary Perez and Administrator Rung:

We submit the following comments on the U.S. Department of Labor's (DOL) proposed guidance[1] and the Federal Acquisition Regulatory Council's proposed rule,[2] published May 28, 2015, to implement Executive Order (EO) 13673, signed by the President on July 31, 2014.[3] The EO requires contractors and subcontractors to disclose potential violations of 14 federal labor laws and equivalent state laws and requires agencies to implement new processes before awarding federal contracts to employers with labor violations. If adopted, DOL's guidance and the Federal Acquisition Regulatory Council's proposed rule (collectively the "regulatory proposals") will bypass existing statutory authority and substantially disrupt the federal

[1] Guidance for Exec. Order 13673, "Fair Pay and Safe Workplaces," 80 Fed. Reg. 30,573 (May 28, 2015) [hereinafter proposed guidance].
[2] These changes are being implemented through proposed regulations by the Department of Defense, General Services Administration, and the National Aeronautics and Space Administration. Federal Acquisition Regulations; Fair Pay and Safe Workplaces; Proposed Rule, 80 Fed. Reg. 30,547 (May 28, 2015) [hereinafter proposed rule].
[3] Exec. Order 13673 of July 31, 2014, Fair Pay and Safe Workplaces, 79 Fed.Reg. 45,309 (Aug. 5, 2014) [hearinafter EO].

procurement process. They would circumvent the current suspension and debarment system used by agencies and impose significant administrative and financial burdens on employers. Further, they will not achieve the stated goal of improving labor law compliance. For these reasons, both the proposed guidance and rule should be withdrawn and the current exclusion processes vigorously enforced.

It is well-established in federal labor law and strongly supported in federal procurement practice that employers denying workers basic rights should not be awarded federal contracts funded with taxpayer dollars. Federal agencies have sufficient authority under the statutorily authorized Federal Acquisition Regulation (FAR) to penalize problematic contractors with suspension and debarment – exclusion practices which include the ability to deprive a bad actor the opportunity to receive, complete, or renew a federal contract.[4] Regrettably, DOL and the Federal Acquisition Regulatory Council (collectively the "agencies") failed to consider the burdens of implementing a new oversight system when issuing their regulatory proposals. These unnecessary and duplicative reporting requirements intentionally reward certain "preferred" contractors, while "blacklisting" others for mere allegations of labor law violations.

This is not the first time an administration has tried to reform the federal procurement system without Congressional input. In 2000, the Clinton administration proposed regulations to aggressively amend the "nonresponsibility" criteria used to disqualify a contractor from competing for a federal contract.[5] Had they been implemented, those regulations would have blacklisted federal contractors for not having a satisfactory record of integrity and business ethics based on compliance with various laws, including labor and employment laws, and they would have allowed contracting officers to deny contracts based on pending violations or allegations of violations of those laws. In 2001, the Bush administration revoked the regulation after reviewing over 1,800 comments from stakeholders and Congressional leaders.[6] It is unfortunate that this administration is attempting to recreate a flawed regulatory scheme that has been overwhelmingly rejected by procurement professionals and other stakeholders for more than a decade.

The House Committee on Education and the Workforce has jurisdiction over the relevant enforcement agencies under the EO, which include the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), the Office of Federal Contract Compliance Programs, and the Wage and Hour Division (WHD). Earlier this year, the Committee held a joint subcommittee hearing entitled "The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive

[4] *See* 48 C.F.R. §§9.407-1-9.407-5 (suspension) and 48 C.F.R. §§9.406-1-9.406-5 (debarment).
[5] First announced at an AFL-CIO convention by Vice President Gore in 2000, followed by several public comment periods and congressional hearings, President Clinton's administration published the final rule one day before President Bush took office, establishing an effective day of January 19, 2001. *See* Federal Acquisition Regulation: Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings; Final Rule, 65 Fed. Reg. 80,256, 80,264 (Dec. 20, 2000).
[6] The Bush administration did not enforce the final rule. Instead, the FAR Council published an interim final rule staying the December final rule for 270 days or until the proposed rule terminating the December rule was finalized. Federal Acquisition Regulation: Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings – Revocation; 66 Fed. Reg. 17,758 (April 3, 2001).

Fiat," which examined the projected draconian implementation of the EO.[7] We write to ensure the witnesses' statements and the hearing transcript (see attached) are included in the open docket. While the hearing occurred prior to the official publication of the regulatory proposals, many issues discussed by the witnesses are still pressing concerns for the Committee.

As in our correspondence of July 15, 2015, we strongly urge the guidance and rule be withdrawn.[8] In the interim, we provide comments explaining how the regulatory proposals:

1. Circumvent existing responsibility determination procedures and suspension and debarment exclusion penalties afforded to agencies;
2. Require reporting of "administrative merits determinations" that will result in employers losing contracts before such determinations are fully adjudicated;
3. Ignore the complexities of existing labor laws and regulations to impose unreasonable reporting requirements on employers; and,
4. Implement the newly-created position of labor compliance advisor (LCA) lacking objective expertise to unduly disrupt the federal procurement system.

1. The proposed guidance and rule circumvent existing responsibility determination procedures and suspension and debarment exclusion penalties afforded to agencies.

Government must protect the integrity of federal taxpayer dollars and should only award contracts to the most responsible, qualified bidder exhibiting the best value in service. To accomplish this, each agency executes a pre-award responsibility determination and maintains a post-award suspension and debarment program for employers contracting with the federal government pursuant to statutory authority.[9] The EO blatantly disregards the authority Congress vested in agencies to implement these practices and instead establishes an entirely new oversight system on which to base contract awards and denials. In doing so, the regulatory proposals fail to acknowledge federal agencies' existing power under the FAR and existing labor law statutes that ensure contractors preserve a satisfactory record of integrity and business ethics, which includes the FAR all-encompassing blanket provision allowing agencies to impose exclusions for labor law violations.

Before a contract is awarded to any employer, a pre-award responsibility determination occurs and is the initial investigation into the potential prime contractors' and subcontractors' ability to perform the contract. Under the FAR, to be eligible to receive a contract award, all prospective

---

[7] Hearing before the H. Education and the Workforce Subcomm. on Workforce Protections and Health, Employment, Labor, and Pensions, 114th Cong. (Feb. 26, 2015), *available at* http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=398427. [hereinafter joint subcommittee hearing].

[8] Letter from the Hon. John Kline, Chairman, H. Comm. on Education and the Workforce, the Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, and the Hon. Steve Chabot, Chairman, H. Comm. on Small Business, to the Honorable Secretary Perez, Secretary of the Dep't of Labor, and the Honorable Anne Rung, Administrator of the Office of Fed. Procurement Policy (July 15, 2015), *available at* http://edworkforce.house.gov/uploadedfiles/letter_to_secretary_perez_7-14-15.pdf.

[9] *See* KATE MANUEL, CONG. RESEARCH SERV., R40633, RESPONSIBILITY DETERMINATIONS UNDER THE FEDERAL ACQUISITION REGULATION (Jan. 4, 2013), *available at* http://fas.org/sgp/crs/misc/R40633.pdf; KATE MANUEL, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: A LEGAL OVERVIEW (Mar. 11, 2013), *available at* http://www.safgc.hq.af.mil/shared/media/document/AFD-120315-091.pdf.

[9] *See* n.4 for suspension and debarment.

contractors must satisfy general standards[10] and meet collateral requirements – such as compliance with federal equal employment opportunity requirements.[11] Contracting officers within individual agencies formulate responsibility determinations from information provided in a suite of web-based systems, including the Federal Awardee Performance Integrity Information System (FAPIIS). Officers use this information to determine whether the prospective contractor can fulfill the contract in a timely and satisfactory manner, while also ensuring the government deals only with socioeconomically sound employers. If a contractor fails to provide the FAPIIS information illustrating that all standards are met, the contracting officer deems them nonresponsible and will not award the contract to that employer.[12] The responsibility determination is therefore the first opportunity agencies have to deny a contract to employers with a record of labor law violations.

If a contract has already been awarded, agency exclusion officials can use the suspension and debarment system for contractors found to be lacking a satisfactory record of integrity and business ethics.[13] Suspension or debarment keeps a current contractor from (1) receiving new contracts or orders from agencies; (2) receiving new work under an existing contract; (3) serving as a subcontractor on certain contracts with agencies; or (4) serving as an individual surety for the duration of the debarment or suspension.[14] When imposed, suspensions and debarments are government-wide, affecting contractors' relationships with all agencies.[15] The FAR also allows agencies to impose suspensions or debarments for "any other cause so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor."[16] Thus, contractors can already be kept off current and future contracts for the same federal labor law violations as those listed in the EO.[17]

Additionally, an agency may enter into an administrative agreement in lieu of debarment, where a federal contractor who engages in questionable practices generally admits to wrongful conduct and agrees to remedial measures.[18] These measures could include restitution, separation of employees from management, implementation of compliance protocols, increased employee training, outside auditing, or increasing access to contractor records.[19] Under an administrative agreement, agencies reserve the right to impose additional sanctions, including debarment, if the contractor fails to execute the terms of the agreement or has additional violations.

---

[10] 48 C.F.R. §9.104-1(a)-(f). General standards include: (1) adequate financial resources; (2) the ability to comply with delivery or performance schedules; (3) a satisfactory performance record; (4) a satisfactory record of integrity or business ethics; (5) necessary organization and experience; and (6) necessary equipment and facilities.

[11] 48 C.F.R. §9.104-1(g). Contractors may also be required to meet specific specialized standards. (48 C.F.R. §9.104-2(a)).

[12] A contractors' civil, criminal, or administrative proceeding that led to conviction or finding of fault in relation to a government contract over the past five years is disqualifying. KATE MANUEL, CONG. RESEARCH SERV., R40633, RESPONSIBILITY DETERMINATIONS UNDER THE FEDERAL ACQUISITION REGULATION (Jan. 4, 2013), *available at* http://fas.org/sgp/crs/misc/R40633.pdf.

[13] *See* n.4 for suspension and debarment.

[14] KATE MANUEL, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: A LEGAL OVERVIEW (March 11, 2013), *available at* http://www.crs.gov/pdfloader/RL34753.

[15] See 48 C.F.R. §9.407-4 and 48 C.F.R. §9.406-4.

[16] 48 C.F.R. §9.406-2(c) (debarment) and 48 C.F.R. §9.407-2(c) (suspension).

[17] See n.28 for labor law statutes. 48 C.F.R. §§1-53. Agencies can also extend debarments, if necessary to protect the government's interests, as long as the extension is not based solely upon the facts in which the initial debarment was decided. 48 C.F.R. §9.406-4(b).

[18] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMO. NO. M-06-26, SUSPENSION AND DEBARMENT, ADMINISTRATIVE AGREEMENTS, AND COMPELLING REASON DETERMINATIONS (Aug. 31, 2006), *available at* http://m.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2006/m06-26.pdf

[19] K. MANUEL, CONG. RESEARCH SERV., RL34753 (March 11, 2013).

The responsibility determination, exclusion protocols, and administrative agreements each afford agencies the power and authority to deal with problematic contractors. Yet, during Fiscal Years (FY) 2012 and 2013, DOL registered no suspensions or debarments of federal contractors.[20] If agencies fail to do their due diligence in investigating employers and are not using the authority already vested in them to weed out unsuitable contractors, then the solution is to fix the current vetting system, not dramatically increase the burden for employers attempting to provide timely quality goods and services to the government.

2. <u>The proposed guidance and rule require reporting of "administrative merits determinations" resulting in employer's losing contracts before such determinations are fully adjudicated.</u>

One of the most concerning issues with the regulatory proposals is the overbroad definition of "violation," forcing employers to report *alleged* violations that have not been fully adjudicated when submitting an initial bid, which could result in the denial of a contract award. Reporting these so-called violations, deemed "administrative merits determinations," is fundamentally unfair and could result in *de facto* debarment of federal contractors, raising concerns that individuals will be deprived necessary due process protections.[21] Under the FAR, contractors are entitled to a hearing before being excluded from government contracts.[22] However, with the reporting of these non-final administrative merits determinations in the initial disclosures, contracting officers may exclude an employer from consideration of a contract award before the employer has the opportunity to fully ligate the merits of the allegation or document the results ("mitigating circumstances") of that litigation during the responsibility determination process.

Under the regulatory proposals, contractors must report administrative merits determinations during the initial bid before the responsibility determination process has commenced. Administrative merits determinations include events such as an OSHA citation, a NLRB complaint, or an EEOC reasonable cause determination. These cases may be appealed, settled, or overturned – and therefore are not a final disposition of the issue. However, the regulatory proposals require employers to report these determinations, which are documented in their record, for contracting officers to see before the matter has been fully adjudicated. Employers will then be required to provide extensive disclosures related to the allegations and challenges of those allegations. As a result of these requirements, the contracting officer may decide it is administratively advantageous to exclude the employer from consideration of a contract award

---

[20] Interagency Suspension and Debarment Committee, "Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities for FY2012 and FY2013," (March 2014), *available at* https://isdc.sites.usa.gov/files/2014/03/873-Report-Consol_FY12-and-FY13_color.pdf. *See also* U.S. GOV'T ACCOUNTABILITY OFFICE (GAO), GAO-14-513, FEDERAL CONTRACTS AND GRANTS; AGENCIES HAVE TAKEN STEPS TO IMPROVE SUSPENSION AND DEBARMENT PROGRAMS (May 2014), *available at* http://www.gao.gov/assets/670/663359.pdf.

[21] Now that contracting officers can bypass the regulatory procedural system for determining contract awards and exclusion penalties for problematic contractors, there is a significant concern about employers' rights regarding contract award denials. Joint Subcommittee Hearing, supra note 7, (written testimony by Stan Soloway, President of the Professional Services Council, and Willis Goldsmith, Jones Day, testifying on behalf of the U.S. Chamber of Commerce). *See also* 48 C.F.R. §9.406-3.

[22] The FAR states that contractors generally receive notice and an opportunity for a hearing before being debarred (48 C.F.R. §9.406-3(b)-(c)) but can be suspended without prior notice so long as they are "immediately advised" of the suspension and allowed to offer contrary information against suspension within 30 days of being advised (48 C.F.R. §9.407-3(b)-(c)).

despite the pending cases or complaints. Such dismissal without proper analysis of the circumstances could result in *de facto* debarment.

Required disclosure of administrative merits determinations prior to exhausting administrative and judicial remedies – even where the complaints lack merit – is evidence of the administration's bias against well-intentioned employers. For example, one large security guard employer charged with violating the *Fair Labor Standards Act's* (FLSA) overtime provisions was recently exonerated of those charges and won more than $800,000 in legal costs under the *Equal Access to Justice Act* as a result of bad faith actions by DOL – the very agency in charge of implementing the regulatory proposals.[23] In another case, a federal court found EEOC's discrimination allegations groundless and ordered EEOC to pay $751,941 in attorney and expert fees.[24] Litigation on these matters often lasts for years, which means the agencies' unmerited actions would be held against potential federal contractors, even if the employer is later exonerated. Reporting these allegations before a contract is awarded will place immense pressure on employers to settle with employees to ensure a clean record of compliance during the bidding process and throughout performance of the contract. Such settlements will more than likely increase the number of complaints filed and subsequent settlements paid.

As evidenced in the cases above, contractors could be vulnerable to coercive agency pressure to settle charges because of this particular reporting requirement. For instance, an agency could threaten to file a complaint or citation during settlement negotiations with employers – knowing it jeopardizes the employer's chances to receive a contract award – and use that leverage to force an employer to accept the agency's settlement agreement or otherwise be forced to report it on the next bid or during the required semiannual updates. One stakeholder has already reported to the Committee experiencing agency pressure first-hand during a settlement negotiation with the EEOC. Such cynical agency action is unacceptable and should not be condoned by the administration.

Labor unions could also use the reporting of administrative merits determinations to their advantage during contract negotiations. These regulatory proposals facilitate corporate campaigns to recognize unions by encouraging organized labor to threaten both non-unionized and unionized employers with the filing of frivolous charges to be reported by the employer during the bidding process. These charges could endanger the employer's chances to win a contract until union demands are appeased. Instead of making it easier for more well-meaning employers to earn federal contracts, the regulatory proposals give unions unprecedented influence at the bargaining table. For example, unions could threaten to file unfair labor practice complaints, albeit unmeritorious ones, in order to pressure a company into making labor concessions.

---

[23] *Gate Guard Services, L.P. v. Perez*, 2015 WL 4072105 (5th Cir. July 2, 2015). According to the opinion, "At nearly every turn, this [DOL] investigation and prosecution violated the department's internal procedures and ethical litigation practices. Even after the DOL discovered that its lead investigator conducted an investigation for which he was not trained, concluded Gate Guard was violating the [FLSA] based on just three interviews, destroyed evidence, ambushed a low-level employee for an interview without counsel, and demanded a grossly inflated multi-million dollar penalty, the government pressed on. In litigation, the government opposed routine case administration motions, refused to produce relevant information, and stone-walled the deposition of its lead investigator."

[24] *EEOC v. Peoplemark*, 732 F.3d 584 (6th Cir. 2013).

After an employer reports an administrative merits determination, the LCA and contracting officer will weigh these "violations" during the responsibility determination process according to overly-broad definitions outlined in the regulatory proposals for "serious, willful, repeated or pervasive." For example, a $5,000 fine for an FLSA violation would be categorized as "serious" under the regulatory proposals, an amount likely to be charged in nearly every penalty.[25] The agencies claim that employers reporting violations may submit evidence, such as an appeal, to be considered as "mitigating circumstances" or "remedial measures," which would lessen the weight placed on the violation. However, assessing such mitigating circumstances is left solely to the subjective evaluation of a contracting officer and an inexperienced LCA, both of whom would be directly involved in determining contract awards. This new assessment process is distinguished from the current suspension and debarment system in which the exclusion official – who is not a party to contract award decisions – is the official judging an employer's actions, a decision that objectively and systematically weighs all information, including mitigating circumstances, and affords necessary due process protections. In addition, even with the consideration of mitigating factors and remedial measures, employers are evaluated based on these alleged violations, even though they may be later cleared.

There is no precedent for the administration to consider and weigh such non-final adjudications against an employer during the bidding process before they are given an opportunity to report and debate the merits of the allegations. Rather, there is a strong probability employers will be pressured with threats of blacklisting, thanks to the mandatory disclosure of administrative merits determinations. As discussed in more detail below, contractors' reporting burdens are significantly increased with the improper consideration of administrative merits determinations, which runs contrary to the administration's stated goal of achieving higher levels of compliance with federal labor laws.

3. The proposed guidance and rule ignore the complexities of existing labor laws and regulations to impose unreasonable reporting requirements on employers.

With a reporting threshold that includes mere allegations of labor law violations to be considered by the LCAs and contracting officers, the regulatory proposals increase the number of employers affected by these requirements. Despite claims by the administration that law-abiding employers will simply need to "check a box" to comply with the regulatory proposals, the reality is that the proposals inflict a significant amount of new compliance burdens on employers and are administratively unworkable for both employers and federal agencies. Contractors will be forced to report violations for their own actions and for all their subcontractors, which for some prime contractors equates to thousands of employers.[26] As summarized by witnesses during the joint subcommittee hearing, the EO "fails on so many fronts that it can *never* be effectively implemented in its current form," and as a result, the "federal government will be either unable

[25] Proposed Guidance, Section III (May 28, 2015).
[26] The proposals are delaying the requirements for subcontractors to comply and are considering allowing subcontractors to report directly to DOL rather than to their prime contractors. Proposed Guidance, n.2 (May 28, 2015); Proposed Rule, Section IV (May 28, 2015).

to purchase essential goods and services or [be] forced to create a system that unfairly targets contractors for special attention."[27]

Contractors of all sizes have reported to the Committee how unfeasible the regulatory proposals are to implement and how they do not have systems in place to achieve compliance. Employers will need to develop costly databases and train personnel to maintain those systems, all at the expense of the government and taxpayers. By including non-final adjudications within the list of "violations," the amount of information to be reported vastly increases, as would the amount of time agencies will need to process such information before awarding a contract. Small business contractors will stop competing for federal contracts, which will result in significant job losses because of the additional compliance costs and agency delays in processing contracts. Even worse, the regulatory proposals ignore the fact that agencies are already collecting information regarding contractors' violations as discussed above, illustrating unnecessary duplication that will dissuade employers from competing for federal contracts.

Eventually, the list of federal labor laws will be expanded to include reporting of "violations" of hundreds of "equivalent" state labor laws.[28] Notwithstanding DOL's lack of jurisdiction over these state laws, such a requirement would be an insurmountable compliance request for employers. In fact, the administration could not even determine which state laws should be deemed equivalent when the regulatory proposals were initially issued. Instead, the list of equivalent state laws will be published "at a future date." Thus, employers trying to determine how to comply with the current regulatory proposals will need to change newly created reporting mechanisms in order to conform to the additional requirements when issued. Like everything else, this change will likely be significant and costly.

The regulatory proposals did not establish procedures for subcontractor reporting and instead consider allowing subcontractors to report directly to DOL.[29] How DOL will handle such reporting is a noteworthy concern, given the resources that will be needed to handle intake of this information, subsequently assess the material, and appropriately respond to each subcontractor, in addition to handling the multiple responsibilities associated with the new LCAs. Many subcontractors are small employers, which are disproportionally impacted by these regulatory proposals as their resources to investigate, track, and report the required information is limited. Such extensive reporting requirements under the strain of limited resources will undoubtedly lead to reporting mistakes which could prove devastating to subcontractor businesses because prime contractors will only utilize subcontractors with clean records. Moreover, the federal government has a statutorily mandated goal to award 23 percent of all prime federal contracts to

---

[27] Joint Subcomm. Hearing, supra note 7, (statements of Stan Soloway, President of the Professional Services Council and the Honorable Angela Styles, former administrator of the Office of Federal Procurement Policy).
[28] *See* Proposed Guidance at n.1. The 14 federal labor laws include: *Fair Labor Standards Act* (29 U.S.C §§201-219), *Occupational Safety and Health Act of 1970* (29 U.S.C. §§ 651-678), *Migrant and Seasonal Agricultural Worker Protection Act* (29 U.S.C. §§1801-1872), *National Labor Relations Act* (29 U.S.C. §§ 151-169), *Davis-Bacon Act* (40 U.S.C. §§ 3141-3148), *Service Contract Act* (41 U.S.C.A. §§6701-6707), Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), Section 503 of the *Rehabilitation Act of 1973* (29 U.S.C. §793), *Vietnam Era Veterans' Readjustment Assistance Act of 1974* (38 U.S.C. §§ 3696, 3698-3699, 4214, 4301-4306), *Family and Medical Leave Act* (29 U.S.C. §§ 2601-2654), Title VII of the *Civil Rights Act of 1964* (42 U.S.C.A. §§ 2000e-2000e-17), *Americans with Disabilities Act of 1990* (42 U.S.C. §§ 12101-12213), *Age Discrimination in Employment Act of 1967* (29 U.S.C. §§ 621-634), and Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).
[29] *See* n.26.

small businesses.[30] After failing for six years, in FY 2013 the federal government barely achieved this goal, awarding just 23.39 percent to small business contractors.[31] Given recent years' bombardment of federal regulations, small business contractors will be the least capable of meeting new requirements – regardless of whether they are reporting to DOL or their prime contractors – rendering such government-wide goals unattainable.

Furthermore, for large and small employers alike, compliance with complex labor policies is already a challenge further complicated by constant regulatory modifications and judicial rulings. Despite good faith attempts to comply, companies are often found in violation of labor laws. For instance, the rules enforcing the FLSA have proven to be a complex maze of regulations that have failed to keep pace with modern economic, societal, and technological developments. According to a 2013 Government Accountability Report (GAO), there has been a 514 percent increase in FLSA-related litigation over the last 25 years, demonstrating wage and hour lawsuits to be one of the fastest growing types of employment litigation.[32] DOL's recent release of the new overtime rules was a missed opportunity to update and simplify the law's burdensome and outdated regulatory structure.[33]

Testifying before the Workforce Protections Subcommittee earlier this year, the Honorable Tammy McCutchen, a former WHD administrator, noted the potentially troubling interplay between new overtime regulations and the EO.[34] She stated, "Revising the regulations for defining who is exempt and non-exempt for overtime compensation purposes will trigger many new enforcement actions as employers work to come into compliance. While these actions will create problems for any employer, coupled with the requirements for reporting of 'violations' under the proposed [Federal Acquisition Regulatory] Council regulations implementing President Obama's [EO], the impact could be potentially severe."

While the FLSA is one of 14 federal labor laws listed in the regulatory proposals, other laws are similarly complex posing major concerns for employers of all sizes. In order to comply with the regulatory proposals, employers must (1) interpret complicated federal and as yet undefined state labor laws; (2) create a new system to collect information related to the proposal; (3) gather similar information from all subcontractors; and (4) submit all information required by the regulatory proposals to be considered for a federal contract. As with most administrative actions, the regulatory proposals will therefore require employers to hire additional compliance officers or labor counsel in order to implement all of these steps, which increase costs tremendously for the employer and ultimately the government paying for the contract, with little or no impact to the quality of goods and services the government is acquiring.

---

[30] 15 U.S.C. §644(g)(1)(A)(i).
[31] Small Business Administration, FY2013 SCORECARD SUMMARY BY PRIME SPEND (Feb. 19, 2014), *available at* https://www.sba.gov/sites/default/files/files/FY13-Summary-Prime-Spend-Subk-Plan-Progress-2014-04-28.pdf. For FY2014, the government was again just above this 23 percent goal. *See* Small Business Administration, FY2014 SCORECARD SUMMARY BY PRIME SPEND (Apr. 20, 2015), *available at* https://www.sba.gov/sites/default/files/files/FY14_Scorecard_Summary_by_Prime_Spend_Subk_and_Plan_Progress_Scores_2015-05-04.pdf.
[32] U.S. GOV'T ACCOUNTABILITY OFFICE (GAO), GAO-14-69, FAIR LABOR STANDARDS ACT, THE DEPARTMENT OF LABOR SHOULD ADOPT A MORE SYSTEMATIC APPROACH TO DEVELOPING GUIDANCE (Dec. 2014), *available at* http://www.gao.gov/assets/660/659772.pdf.
[33] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule, 80 Fed. Reg. 38,515 (July 6, 2015).

After initial reporting is done and employers somehow manage to win contracts, they will be required to recertify their and their subcontractors' compliance to these laws every six months, further increasing the burdens imposed on them. Thus, the sheer volume of information to be reported by employers renders the regulatory proposals unfeasible and unworkable. Even worse, the avalanche of information expected to be assessed at the agency level has been considerably underestimated by the administration, which will be inundated to the point of halting federal procurement. Moreover, every time an equivalent state labor law is added to the list or a new federal law labor regulation is issued, an employer's federal contract is placed in jeopardy. Instead of creating more convoluted regulations through administrative fiat, efforts should be focused on clarifying existing regulatory requirements and providing better compliance guidance to employers.

4. The proposed guidance and rule implement newly-created labor compliance advisors that lack objective expertise and will substantially disrupt the federal procurement system.

Under the regulatory proposals, each agency must designate a senior official as a LCA to work with contracting officers in consultation with DOL to determine whether employers' actions reported rise to the level of a lack of integrity or business ethics. The advisor will assist with reviewing employers' disclosures in evaluating whether violations are "serious, repeated, willful, or pervasive," determining appropriate responses to address such violations (including remedial measures or compliance assistance) and ensuring agency-wide consistency. Advisors, like contracting officers, will also have the power to refer contractors' information to exclusion officials for suspension or debarment. These new LCAs therefore function as an extra layer of bureaucracy in an already inefficient procurement system. Unbelievably, there is no general requirement that LCAs be experts in the procurement process. It is recommended that advisors have "a general understanding of the Federal acquisition process . . . *but [it] is not required* [emphasis added]," according to an Agency Memorandum issued jointly by DOL and the Office of Management and Budget earlier this year.[35]

Even though procurement expertise is not required, the LCAs will supposedly help employers with recordkeeping, reporting, and best practices for attaining compliance prior to the responsibility determination being issued. Making matters worse, employers will also depend on LCAs for vital advice regarding specific labor law violations, even though they may lack expertise in the field of labor law regulation. For some smaller employers who lack a team of compliance personnel, an LCA's advice could make or break an employer's eligibility for a contract award. For prime contractors with hundreds of subcontractors, this advice will be crucial in determining whether or not the time and money expended to continue pursuit of a contract is a worthy endeavor. In addition, neither proposal explained what expertise the LCAs should maintain in order to be helpful to employers nor did they outline any objective procedures for LCAs to follow when making recommendations. For example, as described below, the LCAs will likely be overburdened with the responsibilities assigned of them under the regulatory

[35] OFFICE OF MGMT. & BUDGET, AND DEP'T OF LABOR, Memorandum for the Heads of Executive Departments and Agencies, M-15-07 (March 5, 2015), *available at* http://www.littler.com/files/Memo%20for%20Heads%20of%20Exec%20Depts%20and%20Agcs%20-%20Implementation%20of%20the%20Pr-c.pdf.

proposals and could very possibly rely on the decisions of other LCAs working with the same employers on other contracts. There are no mechanisms in place to protect against such abuse, which could again result in *de facto* debarment.

Additionally, the LCAs' recommendations regarding employers' compliance efforts will function to delay contracting officers' ability to issue responsibility determinations and award contracts. In written testimony submitted for the joint subcommittee hearing mentioned above, the Honorable Angela Styles, former administrator of the Office of Federal Procurement Policy, concluded that because of the EO, federal contracting could effectively "grind to a halt." To illustrate, her testimony described the possible effects on the Department of Defense (DOD). In FY2014, DOD executed 61,528 contract actions over $500,000. If DOD hired five LCAs who worked 40 hours per week for 50 weeks a year, they would be left with less than 10 minutes to review each prime contractor's actual and potential labor law violations, consult with relevant enforcement authorities (including contracting officers), answer compliance inquiries, and review contractors' recurring six month disclosures. Under such time constraints, the LCAs will not be able to effectively assist agencies in detecting problematic employers and will instead cause significant procurement slow-downs, greatly affecting small businesses that may only be able to work on one contract at a time. If contracts are not expeditiously awarded, each employer in the supply chain could be forced to lay-off employees.

It is evident the administration is going to use the LCAs as another mechanism to blacklist certain employers by tying the hands of current contracting officers with recommendations from the LCAs, instead of merely ensuring the government is contracting with upstanding employers. The administration cannot possibly believe inexperienced bureaucratic advisors will help employers achieve the goal of these proposals – an increase in compliance of federal labor laws.

Recent congressional appropriations action illustrates a lack of support for the regulatory proposals.

During this year's Floor consideration of four separate appropriations bills by the U.S. House of Representatives, an amendment was offered to prohibit the government from entering into a contract with any person who discloses, via FAPIIS, a civil, criminal, or administrative proceeding that resulted in a finding of fault and liability related to the FLSA.[36] Each amendment was rejected by a strong majority.[37] While the EO allows for mitigating circumstances to be considered and the amendments did not, in either case, punishing employers retroactively for non-final adjudications before a contract is awarded is unjust. Neither the failed appropriations amendments nor the EO will increase labor law compliance or further protect employees; instead, the outcome will be disruption to the contracting process and increased costs for American taxpayers.

[36] Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2016, H.R. 2029, 114th Cong. (2015) (Defeated 186 to 237); Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2016, H.R. 2577, 114th Cong. (2015) (Defeated 182 to 243); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016, H.R. 2578, 114th Cong. (2015) (Defeated 184 to 244); Department of Defense Appropriations Act, 2016, H.R. 2685, 114th Cong. (2015) (Defeated 187 to 242).
[37] *See* n. 36.

Conclusion

In promulgating these regulatory proposals, the agencies ignored current exclusion practices in the federal procurement system, the impact these new procedures will have on that system, and implementation concerns, including the unreasonable scope of the reporting requirements, heighted settlement pressures by agencies and organized labor, and the severely disruptive role of LCAs. Asking employers, especially small businesses, to comply with the myriad requirements put forth by the regulatory proposals will guarantee a reduction in the number of federal contractors, a slowdown in the delivery of goods and services provided by contractors, and substantial increases in the cost of overall procurement.

When questioned about the EO during a full committee hearing earlier this year, Secretary Perez testified, "the vast majority of contractors comply with the law."[38] If the administration truly believes this, then it should withdraw the proposed guidance and rule and ensure existing authority to exclude truly problematic contractors is fully enforced.

Sincerely,

JOHN KLINE
Chairman
Education and the Workforce Committee

TIM WALBERG
Chairman
Subcommittee on Workforce Protections

VIRGINIA FOXX
Member of Congress

PHIL ROE, M.D.
Member of Congress

BRETT GUTHRIE
Member of Congress

TODD ROKITA
Member of Congress

[38] *Reviewing the President's Fiscal Year 2016 Budget Proposal for the Department of Labor*, Hearing before the H. Education and the Workforce, 114th Cong. (March 18, 2015), available at http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=398533

LOU BARLETTA
Member of Congress

JOE HECK, D.O.
Member of Congress

LUKE MESSER
Member of Congress

BRADLEY BYRNE
Member of Congress

BUDDY CARTER
Member of Congress

MICHAEL D. BISHOP
Member of Congress

GLENN GROTHMAN
Member of Congress

RICK ALLEN
Member of Congress

cc: The Honorable Shaun Donovan, Director of the Office of Management and Budget