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February 13, 2023

Jennifer Hawes
General Services Administration
1800 F Street
NW Washington, DC 20405

FAR Case 2021-015

Dear Ms. Hawes:

I write concerning the Federal Acquisition Regulation (FAR) Council's proposed rule titled "Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk."¹ As Ranking Member of the Senate Small Business Committee, I raise concerns with the proposed rule which will unquestionably increase regulatory and cost burdens on small businesses at a time when such entities are already combating skyrocketing inflation, supply chain disruptions, and unnecessary bureaucratic red tape when competing for federal contracts.

The proposed rule would mandate thousands of small businesses to 1) determine whether they fall under the categorizations established under the proposed rule of a "significant" or "major" contractor; 2) annually complete a greenhouse gas (GHG) inventory of their Scope 1 and Scope 2 emissions²; and 3) report these emissions through the government's System for Award Management (SAM). "Major" contractors are further required to 1) develop and submit an annual climate disclosure aligning with the recommendations of the Task Force on Climate-Related Financial Disclosure and which include Scope 3 emissions, and 2) set, disclose, and validate science-based targets to reduce their emissions in accordance with reductions necessary to meet the goals of the Paris Agreement to limit global warming. Importantly, once the requirements are in effect, all "significant" and "major" contractors will be presumed "nonresponsible" and thus may be denied the opportunity to compete for future contract awards unless they have complied with these disclosures or unless an exemption applies.

In addition to being confusing, contradictory, and misaligned with existing longstanding federal contracting standards, the proposed rule will disproportionately harm small businesses including and especially those small, disadvantaged businesses the Administration purports to

¹ Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (Nov. 14, 2022) (to be codified at 48 C.F.R. Pts. 1, 4, 9, 23 and 52).

² Scope 1 emissions are direct emissions to include sources owned and controlled by the company. Scope 2 emissions include those acquired for a company's own consumption (i.e., purchased electricity or other energy sources) but occur at other sources.

support, and will result in broader, deleterious impacts to the small business industrial base, affecting our national security posture and national economy. We summarize our concerns as follows:

I. By establishing new categories of businesses that do not comport with existing federal standards, the proposed rule is confusing and most likely undercounts the number of small businesses burdened, underestimating the total cost of compliance for small businesses.

This rule creates and designates new categories of businesses, those considered “significant” and “major” contractors. For the purposes of the rule, an offeror is considered a “significant” contractor if the offeror received \$7.5 million or more in federal contract obligations, not exceeding \$50 million, in the prior Federal fiscal year. An offeror is considered a “major” contractor if the offeror received more than \$50 million in federal contract obligations in the prior Federal fiscal year. Whether a contractor falls under one of these designations hinges on the term “federal contract obligation,” which is not a well-defined term. For instance, it is unclear whether the term refers to payments actually received by the contractor totaling these amounts, or if this refers to a contractor receiving contract awards valued at those amounts.

This novel categorization of businesses deviates from the longstanding U.S. Small Business Administration (SBA) small business size standard. Based on a firm’s North American Industry Classification System (NAICS) code, the SBA determines if a company is small or other than small based on either employee count or revenue, *not federal contract obligations*, averaged over a period of five years.³ To illustrate, an SBA-designated small business might have won a total of \$51 million in contract awards (federal contract *obligations*) this past fiscal year, yet could have made zero profit (zero *revenue*) as a result of skyrocketing inflation impacting original cost estimates. According to the proposed rule, this contractor would still be deemed a “major” contractor and thus subject to these new and onerous GHG disclosure requirements. As this illustration makes clear, utilizing federal contract obligations as the determining factor may result in a larger cohort of small businesses being subjected to Scope 1, 2, and 3 emissions declarations than the proposed rule suggests.

The total estimated cost to small businesses according to the proposed rule’s Regulatory Flexibility Analysis is \$103,054,261 in the initial year of implementation and \$62,514,193 in subsequent years.⁴ As the SBA Office of Advocacy stated in its comment letter,⁵ the proposed rule bases its cost estimates on a series of flawed assumptions. First, the rule generally relies on data gathered by the Security Exchange Commission in response to a request for information regarding costs associated with voluntary annual climate disclosures. This data may be

³ See Ijeoma S. Nwatu, *Does Your Small Business Qualify?*, U.S. SMALL BUSINESS ADMINISTRATION (Sept. 9, 2016), <https://www.sba.gov/blog/does-your-small-business-qualify>.

⁴ 87 Fed. Reg. 68312, 68325.

⁵ U.S. Small Business Administration Office of Advocacy, Comment Letter on FAR Case 2021-015, Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Feb. 10, 2023), <https://advocacy.sba.gov/2023/02/10/advocacy-encourages-far-council-to-reexamine-compliance-costs-and-explore-regulatory-alternatives-to-its-proposed-climate-disclosure-regulations/>.

inappropriately applied here, in regard to non-public, non-voluntary small businesses. Second, the rule assumes small businesses only require approximately half the resources of larger firms to comply. There is a clear lack of evidence in the proposed rule to support that broad assertion and commonsense reasoning can lead one to easily deduce that business size does not necessarily correlate with decreased compliance costs. Large businesses may already have existing resources they can leverage to comply with these new requirements, whereas many small businesses may not have the staff or infrastructure familiar with this type of reporting, and may be new to gathering the required information. Various factors drive the cost of compliance, ranging from a firm's industry to the number and types of assets it may hold, and establishing a small business's baseline cost as half that of a large business at the outset is refutable on its face.

The proposed rule also factors in only three costs for small businesses in its proposed total: the cost of regulatory familiarization, completing the annual SAM representations, and conducting the Scope 1 and 2 GHG inventory each year. There are likely a number of ancillary and related costs a small business must assume in order to become compliant with the proposed rule, which may not be reflected here. For example, this rigid mandate exposes contractors to costs pertaining to increased risk of potential legal liability (e.g., False Claims Act violations) for failing to accurately and completely report emissions data that may be challenging at best, impossible at worst, to identify and disclose accurately.

Finally, it should be noted that this rule is being proposed at a time when the vast majority of small businesses say they worry they lack the resources and guidance to comply with climate initiatives, according to first study of its kind from the UN-backed SME Climate Hub.⁶ According to this study, "two-thirds of small business owners worried they don't have the right skills and knowledge to tackle the climate crisis," with the top reasons cited by small businesses being a lack of skills and knowledge (64%), funding (48%), and time (40%). This means that even small businesses that wish to address climate issues simply do not have the resources to do so and will effectively be cut out of the federal contracting process simply due to a lack of resources and skills.

II. Having exemptions is the Administration's tacit agreement that the rule imposes a significant enough burden to warrant exemptions. The exemptions provided for in this proposed rule are arbitrary, unfair, and create inequality among small businesses.

The proposed rule outlines certain exempt entities. These include: An Alaska Native Corporation, a Community Development Corporation, an Indian tribe, a Native Hawaiian Organization, or a Tribally-owned concern; a higher education institution; a nonprofit research entity; a state or local government; or an entity deriving 80 percent or more of its annual revenue from Federal management and operating contracts subject to agency annual site sustainability reporting requirements.⁷ There is a glaring lack of justification from the proposed rule

⁶ SME Climate Hub, *New data reveals two-thirds of small businesses concerned over navigating climate action* (Feb. 23, 2022), <https://smeclimatehub.org/new-survey-reveals-small-business-barriers-climate-action/>.

⁷ The proposed rule also provides an additional exemption for certain major contractors. According to this exemption, if a major contractor is considered a small business for its primary NAICS code, or if it is a nonprofit

exempting these entities, but specifically in regards to small business contractors, the rule justifies the exception for Federally-recognized tribes or tribal or Native corporations as “in accordance with related Federal procurement policies and current commercial norms for sustainability reporting” with no further detail as to what these “related Federal procurement policies” and “current commercial norms” are. In fact, all small businesses are often exempt as a whole from certain federal regulations without exception – for example, while FAR 19.708(b) requires any contractor receiving a contract with a value greater than \$750,000 to have Small Business Subcontracting Plan, FAR 52.219-9⁸ exempts *all* small businesses from this requirement. Recall as well that the rule presupposes a small business as “nonresponsible”—and thus potentially unable to compete for federal contracts—unless they meet these GHG disclosure requirements or are exempted. By lacking sound justification for exempting one type of small business contractor over another, the FAR Council is unfairly and arbitrarily picking winners and losers. All non-exempt small businesses will be subject to mandatory increased compliance costs associated with the rule or face losing the ability to compete for awards putting them at significant disadvantage compared to the small business contractors described in the exemption, who are free of such burden.

While some entities including certain small businesses may fall under these specific exemptions, their “exemption” may be rendered moot under the Scope 3 emissions disclosure requirement for major contractors. Thus they may still be required to conduct Scope 1 and 2 GHG emissions disclosures, the same as any significant contractor. This is described in further detail below.

III. Scope III emissions are challenging to identify, track, and measure with a reliable degree of accuracy; all small businesses are likely to be impacted by a major contractor’s Scope 3 disclosure requirements, even those who may be exempted from the proposed rule.

The proposed rule requires major contractors, in addition to the same requirements as significant contractors, to also complete an annual climate disclosure which includes a GHG inventory of Scope 3 emissions. Scope 3 emissions, as defined by the Environmental Protection Agency (EPA) “are the result of activities from assets not owned or controlled by the reporting organization, but that the organization indirectly affects in its value chain... the scope 3 emissions for one organization are the scope 1 and 2 emissions of another organization.”⁹ Since Scope 3 emissions are, by definition, outside of the reporting entity’s ownership and control, major contractors will have to obtain GHG Scope 3 emissions information from its supply chain (i.e., subcontractors and suppliers). Since major contractors will be subject to Scope 3 emissions disclosures, they may require their subcontractors and suppliers to supply Scope 1 and 2 emissions information even if those parties may not otherwise be required to report under the

organization, it is not required to complete an annual climate disclosure or set science-based targets. In other words, such major contractors must only comply with the same Scope 1 and Scope 2 emissions disclosures as a significant contractor.

⁸ FAR 52.219-9 (“(a) This clause does not apply to small business concerns.”).

⁹ U.S. Environmental Protection Agency, *Scope 3 Inventory Guidance: Description of Scope 3 Emissions* (last updated Dec. 15, 2022), <https://www.epa.gov/climateleadership/scope-3-inventory-guidance>.

proposed rule (i.e. a small business with federal contract obligations under \$7.5M, or an Alaskan Native Corporation exempted entity). This imposition impacts all small businesses who may be downstream of a major contractor, even those who have no desire or intention to interact with the federal government in any direct or indirect capacity.

Additionally, the proposed rule offers little detail as to how a major contractor is supposed to obtain Scope 3 data. The rule states that, in 2021, “of the 13,000 companies reporting through CDP, 71 percent of companies reported their Scope 1 and 2 emissions, while only 20 percent reported emissions associated with products and goods they purchase (Scope 3).” The rule leaves out the likely reason why Scope 3 emissions reporting from these voluntary sources is low in comparison – because obtaining Scope 3 data is extremely challenging.¹⁰ The proposed rule offers minimal direction, merely stating that “Companies can calculate Scope 3 emissions using a hybrid approach of disclosed and modeled data that improves over time as data quality and supplier engagement improve.” As previously mentioned, a contractor exposes themselves to legal liabilities with every new requirement levied on them and failing to accurately capture, track, manage, and disclose such elusive data like Scope 3 emissions exposes small businesses to an unfair level of legal risk.

IV. Increased administrative and cost burdens will be placed disproportionately on small businesses, particularly the smallest entities and those considered small and disadvantaged. The Presidential announcement¹¹ underpinning this proposed rule contradicts another Presidential announcement¹² intended to assist underserved small business owners.

The proposed rule presupposes a contractor is nonresponsible, unless the contractor meets the GHG disclosure requirements as a significant or major contractor. Associated costs to meet this requirement are thus fixed, regardless of whether the small business is ultimately awarded a contract or not. These costs affect businesses disproportionately; a large contractor may be able to assume these fixed costs as part of their existing infrastructure while a small contractor, particularly one who is not currently collecting such information, will bear the brunt of the extra costs. As stated by the SBA’s Office of Advocacy, “the proposed rule imposes fixed costs that will fall disproportionately on small entities.”¹³ The proposed rule further makes no mention of such costs being reimbursable to the contractor. To this end, to offset these mandatory costs,

¹⁰ See R. Kaplan & K. Ramanna, *Accounting for Climate Change*, HARVARD BUSINESS REVIEW (Dec. 2021), <https://hbr.org/2021/11/accounting-for-climate-change> (“But the difficulty of tracking emissions from multiple suppliers and customers across multitier value chains makes it virtually impossible for a company to reliably estimate its Scope 3 numbers.”).

¹¹ See FACT SHEET: Biden-Harris Administration Proposes Plan to Protect Federal Supply Chain from Climate-Related Risks, THE WHITE HOUSE (Nov. 10, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/10/fact-sheet-biden-harris-administration-proposes-plan-to-protect-federal-supply-chain-from-climate-related-risks/>.

¹² See FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners, THE WHITE HOUSE (Dec. 2, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-biden-harris-administration-announces-reforms-to-increase-equity-and-level-the-playing-field-for-underserved-small-business-owners/>.

¹³ Advocacy Comments, *supra* note 5.

small businesses may pass these costs back on to the government by raising their bids, making them less competitive than an exempt business or those better positioned to assume the cost.

Furthermore, we agree with the SBA Office of Advocacy's statement that "the proposed rule appears to conflict with the December 2, 2021 presidential announcement on Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners."¹⁴ This announcement touts the President's intention to drive contracting opportunities to small disadvantaged businesses (SDBs) as a means to "create a more equitable economy."¹⁵ Unfortunately, as we have already established, small businesses are the entities that will be disproportionately harmed by the imposition of this proposed rule, particularly those who may have more difficulty obtaining access to capital like SDBs. The rule will almost certainly widen disparities between those who can afford to comply (i.e., large businesses) or are exempt, versus those who cannot afford comply (i.e., SDBs), rather than create a level playing field. In sum, it is likely that those businesses the President sought to elevate in its December 21, 2021 announcement will be most harmed, also by order of the President.

V. Diverting valuable resources – manpower, capital, time – away from a small business to meet onerous, bureaucratic compliance burdens will only serve to harm this already fragile and shrinking sector of our federal procurement ecosystem, exacerbating the decline of small businesses exiting the federal marketplace. This will have negative impacts on our national security, national economy, and will offset any "cost savings" touted in this proposed rule as we experience a loss of competition.

It is well established that small businesses are the economic engine of our nation. These entities total 99.9% of all U.S. businesses as well as 73% of companies in the defense industrial base.¹⁶ As the President acknowledged in his December 21, 2021, memorandum, "the number of new small business entrants to federal procurement decreased by 60 percent over the past decade" and this decline must be reversed. Notably missing from the President's December memorandum is any action pertaining to reducing the regulatory burden on small business, a problem so prevalent and onerous that it forms the legal basis for the existence of the SBA Office of Advocacy.¹⁷ In regards to the FAR Council's proposed rule, we agree with the Office

¹⁴ White House Increase Equity, *supra* note 12.

¹⁵ *Id.*

¹⁶ U.S. DEP'T OF DEFENSE, DOD RELEASES SMALL BUSINESS STRATEGY (Jan. 26, 2023), <https://www.defense.gov/News/Releases/Release/Article/3279279/dod-releases-small-business-strategy/>.

¹⁷ *See, e.g.*, Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 note ("It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration."); U.S. Small Business Administration Office of Advocacy, About (last visited Feb. 10, 2023), <https://advocacy.sba.gov/about/> ("Since 1980, Advocacy has worked with federal agencies to avoid excessive regulatory burdens on small businesses. Advocacy's role in rulemaking is based on the Regulatory Flexibility Act of 1980. This law requires agencies to consider alternative ways of reducing the economic impact of their regulations on small entities. Advocacy's efforts to have agencies comply with the Regulatory Flexibility Act have saved small businesses billions of dollars in regulatory costs.").

of Advocacy in their “concern[ed] that the proposed rule will further lower small business participation in the federal marketplace” and that “the proposed FAR amendments may not be the most effective or efficient way to achieve the goals [of this proposed rule].”¹⁸

Unlike large businesses, small businesses have limited resources—manpower, time, capital—and must act in a manner that ultimately drives the business towards profitability. We can reasonably anticipate small businesses viewing compliance with these new requirements as a significant diversion of company resources away from other essential aspects of one’s business (i.e., product development, managing supply chains, cost reduction, improving customer service). If a small business owner determines there is no business case for staying in or entering the federal marketplace due to the high regulatory burden, they will leave the federal marketplace altogether, leaving fewer vendors capable and willing to meet government’s needs. The less vendors in the federal marketplace, the less competition, ultimately leading to higher prices for taxpayers.

As the Department of Defense stated in its 2023 Small Business Strategy, “...small businesses create jobs, generate innovation, and are essential, daily contributors to national security and the defense mission.”¹⁹ I direct the FAR Council to review the letter sent on December 19, 2022 to Secretary of Defense Lloyd Austin in which I am a cosigner to better understand the deleterious impact of this rule on our national security posture.²⁰

VI. Conclusion

This proposed rule amounts to little more than additional cost and red tape for small contractors and will almost assuredly result in the loss of these valuable companies from the federal marketplace. This proposed rule rests on the hypothetical hope that such efforts might someday result in an unknown reduction of GHG emissions. As Ranking Member of the Senate Committee on Small Business and Entrepreneurship, I strongly urge the FAR Council to rescind this proposed rule in its entirety.

Sincerely,



Joni K. Ernst
Ranking Member
U.S. Senate Committee on Small Business &
Entrepreneurship

¹⁸ Advocacy Comments, *supra* note 5.

¹⁹ Dod Small Business Strategy, *supra* note 16.

²⁰ U.S. State Senator for North Dakota John Hoeven, Comment Letter on FAR Case 2021-015, Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Dec. 19, 2022), [https://www.hoeven.senate.gov/imo/media/doc/Hoeven-GOP-Conference-Final-DOD-GHG-Letter\[2\].pdf](https://www.hoeven.senate.gov/imo/media/doc/Hoeven-GOP-Conference-Final-DOD-GHG-Letter[2].pdf).