Institute for Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

February 13, 2023

To: Department of Defense, General Services Administration, and National Aeronautics and Space Administration

Re: Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (FAR-2021-0015-0001)

The Institute for Policy Integrity (Policy Integrity) at New York University School of Law respectfully submits the following comments to the Federal Acquisition Regulation Council (FAR Council) regarding its proposal to require that "certain Federal contractors disclose their greenhouse gas emissions and climate-related financial risk and set science-based targets to reduce their greenhouse gas emissions" (Proposed Rule).[1] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.[2]

We offer the following observations and recommendations:

- Requiring companywide (as opposed to product- or service-specific) risk disclosures is a pragmatic, readily implementable means of managing climate risk in the federal supply chain.
- The FAR Council should offer a more granular discussion of the rule's benefits. In particular, its final Regulatory Impact Analysis should distinguish between direct and ancillary benefits and should independently assess how each required disclosure can be expected to reduce federal agencies' exposure to climate risk.
- The FAR Council should be careful not to understate baseline levels of climate risk disclosure (and thus overstate the incremental compliance costs of this rule). In particular, the Council should consider the extent to which new policies from other regulators will increase risk disclosure among federal contractors even in the absence of this rule.
- The FAR Council should establish a system for periodically reviewing the reporting and verification regimes that contractors can use to comply with the Proposed Rule.

[1] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68,312, 68,312 (proposed Nov. 14, 2022).
[2] These comments do not purport to represent the views, if any, of New York University School of Law.

I. The Proposed Rule is preferable to alternative strategies for mitigating climate risk in the federal supply chain, such as incorporating climate-related metrics into individual contracting decisions.

Requiring significant contractors to provide companywide climate risk disclosures is an efficient means of managing climate risk in the federal supply chain. Alternative strategies, such as attempting to weigh the climate risk associated with particular products or services before granting contracts, can be effective only if potential contractors are able to supply specialized data about an individual product or service that can easily be compared to competitor data. Such declarations can be costly and time-consuming to prepare,[3] and the resulting benefits apply only to a particular competitive procurement process. By contrast, companywide disclosures will be relevant across all of that company's contracts with the federal government.

II. The FAR Council should provide a more granular assessment of the Proposed Rule's benefits.

While the Regulatory Impact Analysis (RIA) for the Proposed Rule already includes a substantial discussion of the policy's benefits, the FAR Council should consider providing a more granular assessment in the final analysis. In particular, the final RIA should distinguish direct benefits from ancillary benefits and should discuss the ways in which each disclosure required by the rule can be expected to aid mitigation of climate risk in the federal supply chain.

A. The FAR Council should distinguish direct benefits from ancillary benefits.

Under relevant caselaw, the FAR Council must show a "reasonably close nexus" between the requirements of the Proposed Rule and the Federal Property and Administrative Services Act's purpose of furthering "economy" and "efficiency" in federal procurement.[4] While the RIA's discussion of regulatory benefits is already sufficient to establish such a nexus, the FAR Council could make the connection even clearer in its final analysis by discussing the rule's direct benefits separately from its ancillary benefits (i.e., those "unrelated or secondary to the statutory purpose of the rulemaking"[5]). For example, reducing the probability that "critical services to the U.S. public" will be interrupted due to "disruptive climate and weather events"[6] is undoubtedly related to the economy and efficiency of federal procurement and thus a direct benefit. Contractors' "cost savings from emissions reduction activities,"[7] on the other hand, would likely be classified as an ancillary benefit, except to the extent that the savings are passed on to the government through lower prices for procured goods and services.

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[3] Tomohiro Tasaki et al., *International Survey of the Costs of Assessment for Environmental Product Declarations*, 61 PROCEDIA CIRP 727, 730 (2017).
[4] CONG. RSCH. SERV., R41866, PRESIDENTIAL AUTHORITY TO IMPOSE REQUIREMENTS ON FEDERAL CONTRACTORS 22 (July 18, 2012).
[5] OFF. MGMT. & BUDGET, CIRCULAR A-4 26 (2003)
[6] 87 Fed. Reg. at 68,319.
[7] *Id.*

B. The FAR Council should separately describe the benefits of each required disclosure.

The FAR Council explains why it is both efficient and consistent with federal law to incorporate existing, voluntary disclosure protocols and platforms into the Proposed Rule rather than developing a new disclosure framework entirely from scratch.[8] In its final analysis, the Council should consider supplementing this justification by independently discussing each component of a "[Task Force on Climate-Related Financial Disclosures]-aligned annual climate disclosure"[9] and explaining how that component can be expected to aid risk mitigation in the federal procurement context.

III. The FAR Council should be careful not to understate baseline levels of climate risk disclosure among contractors (and thus overstate the incremental costs of the Proposed Rule).

As explained in OMB's Circular A-4, the baseline for a regulatory impact analysis is the policymaker's "best assessment of the way the world would look absent the proposed action."[10] Making this assessment often requires looking beyond status quo conditions to account for "evolution of the market" and "changes in regulations promulgated by the agency or other government entities."[11] In its RIA, the FAR Council recognizes that a substantial percentage of major contractors already engage in some climate risk disclosure and will thus face lower incremental compliance costs from the Proposed Rule than firms with no disclosure experience.[12] But the Council does not account for the likelihood that this disclosing cohort would grow in future years even absent finalization of the Proposed Rule. Such an increase would be driven both by market forces (e.g., investor and consumer demand for disclosure) and by regulations from other agencies or governments (e.g., the Securities and Exchange Commission's soon-to-be-finalized climate risk disclosure requirements[13]). Accordingly, the Council is likely overestimating the incremental compliance burden of the Proposed Rule and should acknowledge as much in the final RIA.

IV. The FAR Council should establish a system for periodically reviewing the reporting and verification regimes that contractors can use to comply with the Proposed Rule.

As noted above, the Proposed Rule sensibly relies on existing, commonly used voluntary protocols and platforms for disclosing climate data and verifying emissions-reduction targets, including the Task Force on Climate-Related Financial Disclosures, CDP, and the Science Based

[8] *Id.* at 68,315.
[9] *Id.*
[10] CIRCULAR A-4*, supra* note 5, at 15.
[11] *Id.*
[12] 87 Fed. Reg. at 68,322.
[13] *Id.* at 68,312.

Targets Initiative (SBTi).[14] The FAR Council should establish a system for periodically reviewing these disclosure frameworks to ensure that they continue to solicit information that is useful for evaluating risks to the federal supply chain and that their methodologies align with best practices. Additionally, the FAR Council should periodically review the target-verification processes used by SBTi to ensure that the evaluation system remains rigorous and appropriate. These reviews could inform proposals for further amendments to the FAR, if warranted.

Respectfully,

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[14] *Id.* at. 68,315.