



February 10, 2023

VIA ELECTRONIC SUBMISSION

Re: Comments on FAR Case 2021-015, Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk

Dear Regulatory Secretariat:

On November 14, 2022, the Federal Acquisition Regulation (FAR) Council published a proposed rule that would require federal contractors that meet certain contract obligation thresholds to disclose greenhouse gas (GHG) emissions and climate-related financial risks and to set science-based targets to reduce emissions.¹ This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

Advocacy applauds the FAR Council's efforts to consider the costs of the proposed climate disclosure rule to small federal contractors. We support the decision to exempt small entities from the rule's most onerous requirements. Likewise, we support the rule's lowered reporting requirements for entities that fall below certain contract obligation thresholds.

Advocacy is concerned, however, that the proposed rule will discourage small contractors and subcontractors from participating in the federal procurement process. The compliance costs of the rule will fall disproportionately on small businesses and are likely to act as a barrier to small firms entering the marketplace. Moreover, Advocacy is not convinced that collecting emissions information from parties that have not been awarded contracts is the best way to measure the emissions intensity of federal operations. Advocacy encourages the FAR Council to explore additional regulatory alternatives to ease the burden of compliance on small entities.

¹ Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (November 14, 2022).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act,³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”⁶

B. Executive Order 14030

On May 20, 2021, President Biden issued Executive Order (E.O.) 14030, *Climate-Related Financial Risk*.⁷ E.O. 14030 sets forth the Administration's policy regarding the identification and incorporation of climate-related risk into government financial activities. One object of the E.O. is the accurate disclosure of climate-related financial risk metrics associated with federal procurement.⁸ To that purpose, section 5(b)(i) directs the FAR Council to consider regulatory amendments to “require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets[.]”⁹

C. The Proposed Rule

The Department of Defense, General Services Administration, and National Aeronautics and Space Administration are proposing to amend the FAR to implement section 5(b)(i) of E.O. 14030.¹⁰ Through its amendments, the FAR Council proposes to “establish a policy to ensure

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010, Pub. L. 111-240, §1601, 124 Stat. 2504 (2010).

⁵ *Id.*

⁶ *Id.*

⁷ Executive Order No. 14030, Climate-Related Financial Risk (May 20, 2021).

⁸ *See id.* at secs. 1, 5.

⁹ *Id.* at sec. 5(b)(1).

¹⁰ *See* 87 Fed. Reg. 68312 at 68312.

major Federal suppliers make the required disclosures and set targets to reduce their GHG emissions.”¹¹

The proposed rule would create a new FAR subpart at 23.XX, entitled “Public Disclosure of Climate Information.”¹² That section would (1) expand the representations at FAR 52.223-22, Public Disclosure of Climate Information-Representation, and FAR 52.212-3, Offeror Representations and Certifications-Commercial Products and Commercial Services and (2) establish a new responsibility standard in FAR subpart 9.1 for “major federal suppliers.”¹³

The FAR Council developed the new responsibility standard in line with a proposed rule on climate-related disclosures published by the Securities and Exchange Commission (SEC) in the *Federal Register* on April 11, 2022.¹⁴ Consistent with the SEC proposal, the responsibility standard would use the concept of “scopes” of GHG emissions to delineate those that are directly attributable and indirectly attributable to the contracting entity.¹⁵

- Scope 1 emissions include those from sources that are owned or controlled by the reporting company.¹⁶
- Scope 2 emissions include those associated with the generation of electricity, heating and cooling, or steam, when these are purchased or acquired for the reporting company’s own consumption but occur at sources owned or controlled by another entity.¹⁷
- Scope 3 emissions include those that “are a consequence of the operations of the reporting entity but occur at sources other than those owned or controlled by the entity.”¹⁸

The application of the new responsibility standard would depend on whether a federal supplier is considered either a “significant contractor” or “major contractor.”¹⁹ The proposed rule defines a “significant contractor” as one that received between \$7.5 million and \$50 million in federal contract obligations in the prior federal fiscal year as indicated in the System for Award Management (SAM) at <https://www.sam.gov>. A “major contractor” is one that received more than \$50 million in federal contract obligations in the prior federal fiscal year as indicated in SAM.²⁰

¹¹ *Id.*

¹² *Id.* at 68313.

¹³ *See id.* at 68313.

¹⁴ The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 F.R. 21334 (proposed April 11, 2022) (to be codified at 17 C.F.R. pts. 210.14-01, 210.14-02, 229.1500-229.1506, 239.11, 239.18, 239.25, 239.34, 249.210, 249.220f, 249.306, 249.308a, and 249.210). <https://www.federalregister.gov/documents/2022/04/11/2022-06342/the-enhancement-and-standardization-of-climate-related-disclosures-for-investors>.

¹⁵ 87 Fed. Reg. 68312 at 68313.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 68313-68314.

¹⁹ *Id.* at 68313.

²⁰ *Id.*

Under the new responsibility standard, significant contractors would be required to inventory and then disclose Scope 1 and Scope 2 emissions in SAM.²¹ Major contractors would have additional obligations to:

- Inventory and then disclose Scopes 1, 2, and 3 emissions in SAM.²²
- Publish an annual climate disclosure that includes its GHG inventory for Scope 1 through 3 emissions as well as a description of the entity’s climate risk assessment process and any risks identified. This disclosure would be submitted by completing certain portions of the CDP Climate Change Questionnaire and publishing the questionnaire on a “publicly accessible website.”²³
- Develop science-based targets to reduce GHG emissions and have the target validated by the Science Based Targets Initiative (SBTi).²⁴

The proposed rule would exempt certain major contractors from these additional requirements. Major contractors that are considered small businesses under the North American Industry Classification System (NAICS) codes and non-profit organizations would instead comply with the requirements for significant contractors.²⁵ Each contractor and prospective contractor that registers in SAM would be required to make an annual representation about its compliance with the proposed rule.²⁶ Starting one year after publication of the final rule, significant and major contractors will be required to complete a GHG inventory and disclose Scope 1 and Scope 2 emissions in SAM. Major contractors will need to complete the additional requirements of the rule starting two years after publication of the final rule.²⁷

The proposed rule includes an initial regulatory flexibility analysis (IRFA).²⁸ The IRFA estimates that approximately 74% of all entities registered in SAM are considered small under their primary NAICS code (364,290 out of 491,690 registered entities).²⁹ Award data for federal fiscal year 2021 indicates that 2,835 non-exempt entities that meet the definition of significant contractor are considered small. An additional 389 non-exempt small entities awarded contracts in fiscal year 2021 meet the definition of major contractor.³⁰ The IRFA indicates that the costs to small entities impacted by the proposed rule will include the cost of familiarizing themselves with the rule, completing the annual SAM representations, and conducting the annual Scope 1

²¹ *See id.* at 68313.

²² *See id.*

²³ *See id.* at 68314. CDP (formerly the Carbon Disclosure Project) is an international non-profit organization that runs a global environmental disclosure system. *See id.* at 68315.

²⁴ The proposed rule defines a science-based target as a “target for reducing GHG emissions that is in line with reductions that the latest climate science deems necessary to meet the goals of the Paris Agreement to limit global warming to well below 2°C above pre-industrial levels and pursue efforts to limit warming to 1.5 °C[.]” *Id.* at 68314. The Science Based Targets Initiative is a partnership between CDP, the United Nations Global Compact and World Resources Institute, and the World Wide Fund for Nature. *See id.* at 68315-68316.

²⁵ The proposed rule also outlines exceptions for certain other entities in Section II.C. *See id.* at 68314.

²⁶ *Id.* at 68316.

²⁷ *Id.*

²⁸ *Id.* at 68324.

²⁹ *Id.* at 68325.

³⁰ *Id.*

and 2 GHG inventory. The total estimated cost to small entities is \$103,054,261 (17% of the total estimated public cost) in the initial year of implementation and \$62,514,193 (14% of the total estimated public cost) in subsequent years.³¹

II. Advocacy's Concerns and Recommendations

A. The Rule Will Lower Small Business Participation in the Federal Marketplace

Advocacy generally supports the FAR Council's efforts to measure and disclose climate-related financial risk metrics such as GHG emissions. Nevertheless, 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.³² In that announcement, President Biden proposed "[i]ncreasing the number of new entrants to the Federal marketplace and reversing declines in the small business supplier base."³³ According to a report cited by the President, the number of new small business entrants to the federal procurement process decreased by 60 percent over the past decade.³⁴ As outlined below, Advocacy is concerned that the proposed rule will further lower small business participation in the federal marketplace.

The proposed rule imposes fixed costs that will fall disproportionately on small entities. Because the rule requires SAM registrants to make an annual representation about their compliance, a prospective contractor will have to meet the reporting requirements regardless of whether it ultimately is awarded a contract. Large contractors and those that exclusively work in the federal sphere may be able to build these costs into their operations. In contrast, a small contractor that does not work exclusively on federal contracts may not have the resources to comply.

Small firms will be expected to build compliance costs into their operations without assurance of reimbursement. Building the cost of compliance into bids may make a small contractor less competitive, as small contractors may not be able to spread compliance costs over as many contracts. A small contractor that has relatively few or smaller contracts may have less competitive bids due to the relatively larger costs of compliance with the proposed rule per contract. For these reasons, the rule is likely to act as a barrier to new small business entrants and may result in fewer small firms participating in federal contracting.

Advocacy is also concerned that the proposed rule may underestimate the cost burden to small businesses. The rule generally relies on data gathered by the SEC in response to a request for information about the costs associated with voluntary annual climate disclosures.³⁵ It is unclear whether use of that data is appropriate to estimate costs to non-public small businesses. The rule further assumes that small businesses will use approximately half of the resources as larger firms

³¹ *Id.*

³² Press Release, The White House, Statements and Releases, FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners, (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/>.

³³ *Id.*

³⁴ *Id.*

³⁵ *See* 87 Fed. Reg. 68312 at 68321.

to comply with the regulation.³⁶ The FAR Council has not supplied sufficient information to support that assumption across the affected industries. One of the companies providing annual climate disclosure consultation services “emphasizes that the cost is dependent on how much analysis is required, not necessarily the size of the company.”³⁷ There are several factors other than “number of employees, number of buildings, vehicle assets, etc.”³⁸ that may drive cost of compliance, including the specific industry and diversity of operations. These factors may or may not be correlated with business size. In addition, smaller entities also may not have staff familiar with this type of reporting and may not have gathered this information before.

Additionally, small business representatives have told Advocacy that the rule’s Scope 3 emissions reporting requirements will indirectly impact small federal subcontractors. These downstream parties would not otherwise be required to report under the proposed rule. To be selected for projects, however, they may be expected to supply Scope 1 and Scope 2 emissions information to federal contractors. Small subcontractors cannot be sure what information they will be expected to report to different federal contractors during and after the bidding process. This is particularly concerning because the proposed rule leverages third-party standards and systems such as the GHG Protocol Corporate Accounting and Reporting Standard, Task Force on Climate-related Financial Disclosures Recommendations, the CDP reporting system, and SBTi criteria.³⁹ These international reporting standards are subject to change without notice, thereby requiring additional time and resources to track and understand any updates to ensure compliance. Advocacy is concerned that the indirect impacts of the proposed rule may lower the rate at which small subcontractors bid on federal projects.

B. The Rule May Not Achieve the Purpose of E.O. 14030

The proposed rule would require prospective federal contractors to disclose climate-related financial risk metrics regardless of whether they receive a contract award. Contractors that work in the private sector in addition to federal projects would be required to report GHG emissions that are not attributable to government operations. These aspects of the regulation will impose a significant financial burden on contractors to gather data that will not further the FAR Council’s understanding of the climate risks associated with federal procurement. For these reasons, Advocacy believes the proposed FAR amendments may not be the most effective or efficient way to achieve the goals of E.O. 14030.

C. Advocacy’s Recommendations

Advocacy recommends that the FAR Council consider and analyze the following alternative approaches to this regulation to lower its impact on small businesses:

- The FAR Council should consider whether it would be more effective to require major federal suppliers to disclose GHG emissions and other climate-related financial risk

³⁶ *See id.* at 68322.

³⁷ FAR Case 2021-015: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk Regulatory Impact Analysis, 27 (Nov. 14, 2022), <https://www.regulations.gov/document/FAR-2021-0015-0004>.

³⁸ *Id.* at 30.

³⁹ *See* 87 Fed. Reg. 68312 at 68315-68316.

metrics on a contract basis. This would ensure that small contractors would not face compliance costs unless they are ultimately awarded a contract.

- The FAR Council should carefully reexamine costs of the proposed rule to all impacted small entities. Following this examination, the FAR Council should consider modifying the contract obligation thresholds associated with the terms “significant contractor” and “major contractor” to lower the burden on small entities.
- The FAR Council should consider exempting certain industries or federal activities from the reporting requirements where climate metrics can be easily determined based on average risk or GHG emissions intensity. Such activities might include office-based support and professional services.
- In the alternative, the FAR Council should consider allowing certain industries or federal activities to report climate metrics using average risk or GHG emissions intensity figures provided by the FAR Council.⁴⁰

III. Conclusion

Advocacy applauds the FAR Council’s efforts to assess the impact of the proposed regulation on small entities. As written, however, the proposed rule conflicts with the Administration’s goal to increase small business participation in the federal marketplace. Advocacy encourages the FAR Council to explore the above regulatory alternatives to ease the burden of compliance on small entities.

My office would be happy to assist in any way to ensure that the goal of the regulation is fulfilled with minimum negative economic impact on small businesses. If you have any questions or require additional information, please contact me. You may also contact Assistant Chief Counsel Meagan Singer at (202) 921-4843 or by email at meagan.singer@sba.gov, or Assistant Chief Counsel Dave Rostker at (202) 922-6091 or by email at david.rostker@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

⁴⁰ The Environmental Protection Agency has published supply chain GHG emission factors for U.S. industries and commodities. One way to determine which industries might be exempt from reporting and to create GHG emissions intensity figures would be to use these factors. See W. Ingwersen and M. Li, *Supply Chain Greenhouse Gas Emission Factors for US Industries and Commodities*, U.S. Environmental Protection Agency, EPA/600/R-20/001 (2020) https://cfpub.epa.gov/si/si_public_record_Report.cfm?dirEntryId=349324&Lab=CESER.

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