GOVERNING FOR IMPACT

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Submitted via www.regulations.gov

Krystal Brumfeld
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Office of Government-wide Policy
General Services Administration

Re: Comment Regarding FAR Proposed Regulation, "Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk" — FAR Case 2021-015

Dear Ms. Brumfeld:

Governing for Impact ("GFI") submits this comment on the Federal Acquisition Regulatory Council's ("FAR Council") notice of proposed rulemaking, "Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk" ("the Proposed Rule").[1] GFI is an organization dedicated to ensuring that the federal government operates more effectively for everyday working Americans.[2]

We appreciate the opportunity to comment and we write in support of the Proposed Rule. Our comment makes three principal contributions:

1. it offers expanded legal justifications for the Proposed Rule, rooted in regulatory precedents under the Federal Property and Administrative Services Act ("FPASA");
2. it recommends that a Final Rule incorporate detailed information about regulatory antecedents in order to rebut suggestions that the Major Questions Doctrine applies[3]; and
3. it proposes incorporating a severability clause into the final rule.

[1] FAR Case 2021-015; RIN 9000-AO32; Fed Reg. Vol. 87, 68312 (November 14, 2022).
[2] Governing for Impact, www.governingforimpact.org.
[3] *See, e.g.,* Jonathon H. Adler, "Biden Administration to Require Federal Contractors to Report and Reduce Greenhouse Gas Emissions," Volokh Conspiracy, https://reason.com/volokh/2022/11/11/biden-administration-to-require-federal-contractors-to-report-and-reduce-greenhouse-gas-emissions/ (Nov. 11, 2022).

I. The Proposed Rule, if finalized, should include expanded legal justifications under the FPASA.

We strongly support the Proposed Rule's suite of climate obligations for significant and major federal contractors and believe that the Proposed Rule adequately explains how these obligations will further the FPASA's statutory goal of creating an economic and efficient federal contracting system.[4] We write to offer further context for some of the Proposed Rule's legal justifications, and to propose expanded justifications for the FAR Council's consideration.

a. The Proposed Rule falls well-within the FAR Council's authority under the FPASA, as demonstrated by judicial and regulatory precedent.

The Proposed Rule and E.O. 14030 fall well-within the president's authority under the FPASA.[5] The FPASA authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle," namely the FPASA's goal of promoting "economy" or "efficiency" in federal procurement.[6] The FPASA has been used by Administrations to regulate federal contracting in several ways. In the 1970s, courts held that the FPASA authorized the federal government to require that contractors abide by certain anti-discrimination policies.[7] In the 1970s and 2000s, the government invoked the FPASA to require federal contractors to comply with certain workplace standards, including wage and price standards,[8] regulations concerning project labor agreements,[9] and requirements that contractors provide employees notice of their rights to opt out of joining a union or paying mandatory dues outside of representational activities.[10] Under the FPASA, the federal government has promulgated rules requiring contractors to provide disclosures of known violations of federal criminal laws or of the civil False Claims Act,[11] creating business ethics awareness and compliance programs,[12] and mandating the use of the E-verify system to verify employment eligibility of workers.[13] And in 2011, the Obama administration cited the FPASA to mandate contractors' implement screening systems to prevent employee conflicts of interest.[14]

Federal courts have upheld the FPASA directives so long as the government offers good-faith arguments connecting the policy at issue to the statutory goals of economy and efficiency, even if they are attenuated. In *AFL-CIO v. Kahn*, the D.C. Circuit found that an executive order that required federal contracts, in a bid to slow inflation, to include clauses requiring compliance with wage and price standards was within the President's power under the FPASA; the court noted that the FPASA's goals of economy and efficiency are broad and found a "sufficiently close nexus" to the statute's goals because, if successful, the program could reduce government procurement prices in the future—even if in the short-run it might boost procurement costs.[15] The court emphasized

[4] P.L. 81-152, 63 Stat. 377 (June 30, 1949) (codified in scattered sections of Titles 40 and 41 of the United States Code).
[5] *Id.*
[6] 40 U.S.C.A. 121 (a) (West).
[7] *See, e.g., Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159 (3d Cir. 1971).
[8] *See, e.g., Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979).
[9] *See, e.g., Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002)
[10] *See, e.g., UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003)
[11] 48 C.F.R. § 52.203-13 (b)(3)(i).
[12] 48 CFR § 52.203-13 (c).
[13] 48 C.F.R. § 22.1802.
[14] 48 CFR § 52.203-16.
[15] 618 F.2d 784, 792.

"the importance to our ruling today of the nexus between the wage and price standards and likely savings to the Government[,]" noting that the decision "does not write a blank check for the President to fill in at his will."[16]

Courts have used *Kahn's* "reasonably close nexus" standard to compare an executive order's purpose with the FPASA's goals of economy and efficiency.[17] However, Courts have varied in their interpretations of what a valid nexus requires. For example, in *UAW-Labor Employment and Training Corp v. Chao*, the D.C. Circuit validated the "attenuated" nexus between FAPSA and an executive order that required all contracts in excess of $100,000 to include a provision obligating contractors to post notices informing employees of their rights not be required to join a union or pay fees, even if "one can with a straight face advance an argument claiming opposite effects or no effects at all."[18] And, in *Chamber of Commerce v. Napolitano* a federal district court upheld a requirement that contractors ascertain the immigration status of certain new hires using E-verify, finding that a reasonably close nexus exists so long as the "President's explanation for how an Executive Order promotes efficiency and economy [is] reasonable and rational."[19] In this case, the court found that President Bush's conclusion that the E-verify system would result in fewer immigration enforcement actions, fewer undocumented workers — and "therefore generally more efficient and dependable procurement sources" — was sufficient to meet the nexus requirement.[20] The court also held that "[t]here is no requirement …for the President to base his findings on evidence included in a record."[21]

While the case law suggests that an array of good-faith arguments can justify upholding a procurement directive under the FPASA, there are some limitations. Most notably, courts have invalidated FPASA directives that conflict with other statutes. In *Chrysler Corp. v. Brown*, the Court considered a challenge to an executive order requiring the public disclosure of information filed with the Office of Federal Contract Compliance Programs ("OFCCP") about contractors' compliance with their anti-discrimination and affirmative action requirements.[22] There, the Court determined that the information at issue fell under the purview of the Trade Secrets Act, 18 U.S.C. §1905, which generally forbids agencies from disclosing certain types of information, including "trade secrets[,]" unless "authorized by law."[23] The Court determined that the OFCCP regulations, even if promulgated under the FPASA, did not count as "authorized by law" for the purposes of the Trade Secrets Act, because nothing in the legislative history of the FPASA suggested that Congress intended to override the Trade Secrets Act preference for keeping sensitive business information confidential.[24] However, the Court did not hold in that case that the FPASA somehow prohibits requiring information disclosure in all cases, or that the regulations were invalid under the

[16] *Id.* at 793.
[17] For example, in *Liberty Mutual Insurance Co. v. Friedman* (1981), the Fourth Circuit struck down an EO as applied to insurance underwriters that required federal contractors to submit affirmative action plans. Doing so, the Court opined that the EO failed the "reasonably nexus" test because the cost of workers compensation policies and increase in cost of federal contractors that could be attributed to discrimination was "too attenuated." 639 F.2d 164, 169 (4th Cir. 1981).
[18] 325 F.3d 360, 366 (D.C. Cir. 2003).
[19] 648 F. Supp. 2d 726, 738 (D. Md.).
[20] *Id.*
[21] 648 F. Supp. 2d 726, 738 (D. Md. 2009)
[22] *See generally* 441 U.S. 281 (1979).
[23] 18 U.S.C.A. § 1905 (West).
[24] 441 U.S. 281, 305 (1979).

FPASA[25]—a point that Justice Marshall underscored in his concurrence.[26] Similarly, in *Chamber of Commerce of U.S. v. Reich*, the D.C. Circuit Court invalidated an executive order authorizing the Secretary of Labor to disqualify from federal contracts employers who hire replacement workers during lawful strikes because the National Labor Relations Act ("NLRA") preempted such a use of the FPASA.[27]

There remains some uncertainty about the extent to which FPASA directives can apply to subcontractors. In *Kahn*, for example, the court validated the wage rule under the FPASA even as applied to certain subcontractors.[28] But in another case, *Liberty Mutual Insurance Co. v. Friedman*, the Fourth Circuit invalidated an affirmative action requirement as applied to workers compensation insurance subcontractors, finding Liberty was "not itself a federal contractor and there [was], therefore, no direct connection to federal procurement."[29] Further, the court found "no suggestion that insurers have practiced deliberate exclusion of minority employees," and therefore the supposed increase in cost due to discrimination was "too attenuated."[30]

Most recently, a pair of circuit courts have concluded that the FPASA does not empower the government to require contractors' employees to undertake a medical procedure such as vaccination. In *Kentucky v. Biden*, the 6th Circuit found that the administration's COVID vaccine contractor requirement was not authorized under the FPASA because there was a "dearth of analogous historical examples" to impose a medical procedure in order to reduce absenteeism; other examples were "modest" and "work-anchored" measures with "an inbuilt limiting principle."[31] Similarly, the 5th Circuit upheld the injunction on the COVID vaccine contractor requirement and highlighted that unlike other uses of the FPASA, the mandate "purports to govern the conduct of *employees* – and more than their conduct, purports to govern their individual healthcare decisions."[32] By contrast, the court noted, previous uses of the FPASA had governed the conduct of employers.[33]

These judicial and regulatory precedents indicate that the FAR Council possesses the statutory authority to promulgate the Proposed Rule. The Proposed Rule does not conflict with another statutory scheme like the Trade Secrets Act or the NLRA. Nor does it attempt to directly regulate subcontractors. While the Proposed Rule does require the largest contractors to disclose relevant Scope 3 emissions, meaning emissions emitted by other firms in the supply chain, that requirement is well-within the FPASA's authority, and the required information can be developed without imposing new mandates on their subcontractors. Unlike *Liberty Mutual*, there exists ample evidence to suggest that measuring Scope 3 emissions is vital to assessing a company's climate-risk. One study found that the majority of emissions for most industries lie beyond their immediate suppliers; and

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[25] *Id.* at 309 n.40.

[26] *Id.* at 319. (Marshall, J., dissenting) ("Our conclusion that disclosure pursuant to the OFCCP regulations is not "authorized by law" for purposes of § 1905, however, does not mean *the regulations themselves* are 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right' for purposes of the Administrative Procedure Act"). As Marshall also notes, the OFCCP regulations at issue were arguably not promulgated in compliance with the APA, and so unlawful for additional reasons not relevant to this rulemaking. *Ibid.*

[27] 74 F.3d 1322 (D.C. Cir. 1996).

[28] The EO analyzed in *Kahn* included both contractors and "first-tier subcontractor whose contract exceeds $5 million." *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 786 (D.C. Cir. 1979).

[29] 639 F.2d 164, 171 (4th Cir. 1981)

[30] *Id.*

[31] 23 F. 4th 586, 607.

[32] *Louisiana, et. al. v Biden,* No. 2203319 (5th Cir. Dec. 19, 2022), *22.

[33] *Id.*

certain industries, like aerospace and defense, have over 80% of their emissions in suppliers further in their supply chain.[34] Finally, unlike the enjoined Covid-19 vaccine requirement for federal contractors, the Proposed Rule directs its obligations to contractor employers — rather than *employees* — and obviously does not concern medical procedures.

b. <u>The FAR Council should expand on why each of the Proposed Rule's obligations would allow the government to assess its own exposure to climate risk.</u>

The Proposed Rule details several benefits that it will confer, including greater climate disclosure transparency and possible cost savings. The benefits laid out in the Proposed Rule are sufficient to support the FAR Council's assertion that the Proposed Rule will promote economy and efficiency. However, we believe that providing more detail on the benefits that the Proposed Rule will have on the government's increased ability to assess and minimize its own climate related risk in federal contracting would strengthen the Rule; we write to suggest ways that the FAR Council might do so.

The Proposed Rule requires certain categories of federal contractors to variously disclose their greenhouse gas ("GHG") emissions and climate-related risks and to set science-based targets to reduce those emissions. The Rule has different requirements for "significant contractors," defined as receiving between $7.5 and $50 million in Federal contract obligations in the prior year, and "major contractors," defined as receiving over $50 million in obligations.[35] Significant and major contractors must both submit an annual GHG inventory of Scope 1 and Scope 2 emissions.[36] Along with Scope 1 & 2 inventories, major contractors must also include annual disclosures of Scope 3 emissions. In addition to publicly disclosing their GHG inventories, major contractors must use this information to assess their climate risks in consultation with the nonprofit Task Force on Climate-Related Financial Disclosures ("TCFD"). Importantly, major contractors must analyze both their transition (related to global transition to a lower-carbon economy) and physical (acute and chronic effects of climate change) risks. Finally, major contractors are required to develop science-based targets to reduce GHG emissions. The targets must be "... in line with reductions that the latest climate science deems necessary to meet the goals of the Paris Agreement…[.]" and must be validated by the Science Based Targets initiative ("SBTi").[37] The Rule also permits notable exceptions to these requirements, including certain exceptions for higher education institutions, nonprofits, and small businesses.[38]

The Proposed Rule lists five categories of benefits that help explain why its obligations will promote the FPASA's objective of a more economic and efficient procurement process. IPast precedent supports these justifications. For example, the Proposed Rule explains that one benefit of GHG inventory and climate risk disclosure requirements is that these data might offer firms insights into how they could reduce costs and maximize efficiencies, which in turn may translate into future

[34] *Thought you knew the Scope 3 issues in your supply chain? Think again.,* Accenture, https://www.accenture.com/content/dam/accenture/final/capabilities/strategy-and-consulting/supply-chain---operations/document/Accenture-Visibility-Into-Scope-3-Emissions-Supply-Chain-Report.pdf#zoom=40 , *8.
[35] 87 Fed. Reg. 68313, II.A.
[36] Scope 1 emissions include GHG emissions from sources that are owned or controlled by the reporting company. Scope 2 emissions include GHG emissions associated with the generation of electricity, heating and cooling, or steam, when these are purchased or acquired for the company's consumption but occur elsewhere.
[37] *Id.* at. 68314, II. B. 3.
[38] *Id.* at 68314, II.C. For example, small businesses that would qualify as "major contractors" need only meet the requirements applicable to "significant contractors."

savings on procurement contracts.[39] As described above, courts have upheld this kind of prospective benefit in cases like *Kahn*, *Chao* and *Napolitano*.[40]

Primarily, however, we write to encourage the FAR Council to expand its second category of benefits, "Understanding and Reduction of Supply Chain Vulnerabilities."[41] In the Proposed Rule, the FAR Council correctly argues that public disclosure of major contractors' exposure to the physical and financial risks of a changing climate and a transitioning economy will:

> "enable the Government to understand how and when the risks faced by major contractors (some of which are mission-critical) and their supply chains, including but not limited to increased likelihood of disruptive climate and weather events and material and energy cost fluctuations, may impact the agencies' own missions and activities."[42]

We believe it would be beneficial for the FAR Council to explain how the Proposed Rule's other obligations will also enable the government to better assess *its own exposure* to climate risks. By requiring certain contractors to divulge Scope 1, Scope 2 and/or Scope 3 GHG inventories, the government can gain valuable insight into contractors' reliance on carbon-dependent suppliers, and work to diminish the government's vulnerability to climate change. Carbon-dependent suppliers are exposed to both financial transition risks and the physical risks of climate change — including shifting energy generation patterns, natural disasters, and disruptions to the supply chain exacerbated by climate change. For example, a 2019 study found that 215 of the biggest global companies face almost $1 trillion in climate change risks and around $250 billion in losses due to stranded assets, including fossil fuel assets that may no longer offer economic returns because of market shifts.[43]

Another of the rule's major contractor requirements, producing science-based emissions reductions targets, will allow the government to reliably assess contractors' future ability to decrease their climate risks and actual adherence to their stated goals. It will also assist those contractors in identifying and minimizing climate-related vulnerabilities in their supply chain. SBTi reports that between 2015 and 2020, companies with approved reduction targets reduced combined Scope 1 and 2 emissions by 29%.[44]

The public nature of major contractors' various disclosure requirements will help the government ascertain and reduce its exposure to climate risk. Public disclosure of major contractors' Scope 1-3 GHG inventories will allow stakeholders, academics, advocates and other members of civil society to help the government map the extent of its risk exposure. Meanwhile, the requirement that major contractors publicly post their science-based emissions reductions targets and annual reports of progress toward those targets will provide a social enforcement mechanism, increasing the likelihood

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[39] *Id.* at. 68319. Indeed, in 2021, companies disclosing emissions through CPD independently reported a cost savings of $29 million in aggregate. FAR Case 2021-015: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk Regulatory Impact Analysis (November 15, 2022), *11.
[40] *See supra* notes 15, 18, 19.
[41] 87 Fed. Reg. 68319.
[42] *Id.*
[43] CDP, World's biggest companies face $1 trillion in climate change risks (June 4, 2019), https://www.cdp.net/en/articles/media/worlds-biggest-companies-face-1-trillion-in-climate-change-risks.
[44] Science-Based Targets Initiative, SBTi Annual Progress Report, 2021, https://sciencebasedtargets.org/resources/files/SBTiProgressReport2021.pdf, *27.

that major contractors meet those targets (as commenters have noted in similar contexts);[45] and if major contractors do reduce their emissions, then the government's actual exposure to climate risk will diminish too.

Furthering the government's understanding of its key contractors' — and therefore, its own — exposure to the physical and financial risks of climate change will enable the government to safeguard critical operations from the inevitable challenges to come. Without question, this will help promote "economy" and "efficiency" in federal contracting management.

II. The Proposed Rule, if finalized, should include detailed information about regulatory antecedents in order to rebut claims that the Major Questions Doctrine applies.

Some commentators have speculated that the Proposed Rule, if finalized, could be vulnerable to a legal challenge under the Major Questions Doctrine ("MQD").[46] Others have similarly characterized the Securities and Exchange Commission's proposed climate disclosure rule.[47] Meanwhile, the MQD has arisen in ongoing litigation concerning two other FPASA directives: the Administration's minimum wage hike and its Covid-19 vaccine mandate for federal contractors.[48]

Having closely studied the MQD for a recent white paper,[49] we do not believe that the FAR Council's final regulation will implicate the doctrine. (Indeed, at least one federal judge has questioned whether the MQD applies at all to FPASA directives.[50]) But to put the agencies on the firmest possible legal footing, we recommend that the FAR Council follow the advice of then-professor, and current OIRA Administrator, Richard L. Revesz to catalog the Proposed Rule's "regulatory antecedents" — in essence, analogous uses of the same rulemaking authority — in a Final Rule.[51]

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[45] *See e.g.*, Angie Basiouny, Knowledge at Wharton, The Benefits of the SEC's Climate Disclosure Rule (April 12, 2022), https://knowledge.wharton.upenn.edu/article/the-benefits-of-the-secs-climate-disclosure-rule/.

[46] *See, e.g.,* Jonathon H. Adler, "Biden Administration to Require Federal Contractors to Report and Reduce Greenhouse Gas Emissions," Volokh Conspiracy, https://reason.com/volokh/2022/11/11/biden-administration-to-require-federal-contractors-to-report-and-reduce-greenhouse-gas-emissions/ (Nov. 11, 2022).

[47] *See, e.g.,* Paul Atkins and Paul Ray, "The SEC's Climate Rule Won't Hold Up in Court," The Wall Street Journal, https://www.wsj.com/articles/the-sec-climate-rule-wont-hold-up-in-court-west-virginia-epa-agency-congress-11657659630 (July 12, 2022).

[48] *See* Reply in Support of the States' Motion for a Preliminary Injunction, *Arizona et al. v. Walsh et al.*, No. 2:22-cv-00213-JJT (D. Az. June 3, 2022); *see also Louisiana et al. v. Biden et al.*, No. 22-30019 (5th Cir. Dec. 19, 2022).

[49] *See* "The Major Questions Doctrine: Guidance for Policymakers," Governing for Impact, https://governingforimpact.org/wp-content/uploads/2022/11/MQD_Medium_templated_FINAL.pdf (November 2022); *see also* Will Dobbs-Allsopp, Rachael Klarman, & Reed Shaw, "Guidance for Regulators on the Major Questions Doctrine," The Regulatory Review, https://www.theregreview.org/2022/11/29/dobbs-allsopp-klarmn-shaw-guidance-for-regulators-on-the-major-questions-doctrine/ (Nov. 29, 2022).

[50] The legislative non-delegation concerns that partly animate the doctrine arguably do not arise when a statute accords authority to the president, as opposed to a subordinate executive agency. *See, e.g.,* Louisiana at 37 (Graves, Jr., dissenting) ("It is important to note that the major questions doctrine is only invoked when there are potential anti-delegation issues to agencies, and that is not the situation here"). At least for the purposes of this comment, however, we assume that the MQD does apply to rulemaking authority delegated specifically to the president.

[51] *See* Richard L. Revesz & Max Sarinsky, "Regulatory Antecedents and the Major Questions Doctrine," Inst. for Policy Integrity, https://policyintegrity.org/files/publications/SSRN-id4291030.pdf (Nov. 29, 2022). Our organization has made a similar point. *See* "The Major Questions Doctrine: Guidance for Policymakers" at 6–7.

In this section, we first provide a brief background on the MQD; next, we model how the FAR Council might catalog the Proposed Rule's regulatory antecedents; and finally, we offer our analysis as to why other characteristics of the Proposed Rule weigh against the MQD's application.

a. The Supreme Court recently laid out a two-part test for dealing with major questions cases.

The MQD, though a moniker that the Supreme Court adopted officially only last summer, traces its lineage to a pair of cases at the turn of the millennium.[52] Starting in 2021, however, the Supreme Court began deploying a more aggressive version of the doctrine, culminating in *West Virginia v. EPA*.[53] In that majority opinion, Chief Justice John Roberts articulated a two-step test for resolving "certain extraordinary cases" in which "both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there"—colloquially, these have come to be known as "major questions" cases.[54]

First, a court must assess whether a given exercise of regulatory power poses a major question. It does so by assessing "the history and breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion."[55] Put differently: skepticism is due, the Court suggested, when an agency (a) claims "to discover in a long-extant statute an unheralded power" that (b) represents "a transformative expansion in its regulatory authority."[56] Given that "the concept of regulatory novelty plays an important role" in these assessments, Revesz and his co-author Max Sarinsky argue that "agencies implementing … policies that could be vulnerable under the major questions doctrine have a strong incentive to identify relevant antecedents."[57]

Second, in the event a court determines that a given agency action does pose a major question, that action will only survive if the government can point to "clear congressional authorization" for its interpretation, which requires "something more than a merely plausible textual basis."[58] Because we conclude that the Proposed Rule does not pose a major question, this comment does not proceed to this step of the analysis.

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52 Primarily *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), but also *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994).
53 *See Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022); and *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022).
54 W. Virginia at 2609, quoting Utility Air Group v. EPA, 573 U.S. 302, 324 (2014).
55 *Id.* at 2608 (internal citations omitted).
56 *Id.* at 2610, quoting Utility Air Group v. EPA at 324 (internal citations omitted). Admittedly, whether this phrase constitutes a reformulation of the MQD Step One's core charge or a distinct and additional set of considerations for what effectively functions as a multi-factor test at MQD Step One, remains the subject of some debate. *See* Natasha Brunstein & Donald L. R. Goodson, "Unheralded and Transformative: The Test for Major Questions After *West Virginia*," 47 Wm. & Mary Env't L. & Pol'y Rev. (forthcoming 2023) at 3–4 (working paper available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4300622). Importantly, Justice Gorsuch's opinion, styled as a concurrence, and which seems to suggest that any one of several indicia — for example, an agency "claim[ing] the power to resolve a matter of great political significance" or "seek[ing] to intrude into an area that is the particular domain of state law" — would be sufficient to independently trigger MQD scrutiny, received the support of only one other justice, and so does not constitute binding precedent. *See* W. Virginia at 2620 (internal citations omitted).
57 Revesz and Sarinksy at 1–2.
58 W. Virginia at 2609 (internal citations omitted).

b. Cataloging the Proposed Rule's regulatory antecedents demonstrates that the proposal is neither "unheralded" nor "unprecedented."

The Proposed Rule, if finalized, will not pose a major question. For starters, far from being "unheralded," the Proposed Rule's invocation of the FPASA is firmly rooted in historical precedent—as a survey of the Proposed Rule's regulatory antecedents makes clear. Again, we write to encourage the FAR Council to include such a survey in any final rule.

The federal government has imposed significant conditions on its contractors since at least the Roosevelt administration.[59] Early procurement requirements, many of which concerned anti-discrimination provisions in military contracting, were issued under an array of statutes, as well as the president's constitutional Article II authority.[60] In the modern era, presidents have generally relied on the statutory authority provided by the FPASA to justify new procurement requirements. As described above, the FPASA authorizes the president to prescribe "policies and directives" aimed at ensuring "an economical and efficient" procurement system.[61]

Federal courts have upheld several different types of requirements on federal contractors under the FPASA. In *AFL-CIO v. Kahn*, the D.C. Circuit upheld a Carter administration policy requiring contractors who won contracts in excess of $5 million to certify their compliance with a set of highly prescriptive wage and price standards.[62] The policy required contractors — as well as "first-tier subcontractor[s]"[63] — to keep price increases for all products, not just those subject to a federal contract, below 0.5 percent of the company's "recent rate of average price increase"; and it restricted employee wages, again firm-wide, to no more than a seven percent annual increase.[64]

In *UAW-Labor Employment and Training Corp. v. Chao*, the D.C. Circuit upheld a directive requiring contractors to post a notice "at all of their facilities" informing employees of their rights not to "join a union or to pay mandatory dues for costs unrelated to representational activities."[65] And in *Chamber of Commerce v. Napolitano*, a federal district court in Maryland upheld a regulation, promulgated across two presidencies, requiring agency contractors to use E-Verify to ascertain whether new employees, including those who do not work directly on a federal contract, are authorized to work in the United States.[66]

More recent invocations of the FPASA provide additional context. The Obama administration exercised its FPASA authority to provide up to 7 days of paid sick leave to approximately 1.15 million employees who worked on or in connection with certain federal contracts.[67] Under the

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[59] Vanessa K. Burrows & Kate M. Manuel, "Presidential Authority to Impose Requirements on Federal Contractors," R41866 Cong. Res. Serv. 3 (June 2011), https://sgp.fas.org/crs/misc/R41866.pdf (explaining that "[p]residents from Franklin D. Roosevelt through Barack Obama have issued orders that seek to leverage the government's procurement spending to promote socio-economic policies").
[60] *Ibid.*
[61] *See* supra at 2.
[62] 618 F.2d 784 (1979).
[63] *Id.* at 786; *see also* 44 Fed. Reg. 1230 (1979).
[64] Kahn at 785-86.
[65] 325 F.3d 360, 362 (2003).
[66] 648 F.Supp.2d 726 (S.D. Md. 2009). The regulation also required employers to use E-Verify to ascertain the immigration status of *existing* employees who worked directly on a federal contract. *Id.* at 731.
[67] Establishing Paid Sick Leave for Federal Contractors, 80 Fed. Reg. 54697 (Sep. 7, 2015). The regulation was apparently never challenged in court. Louisiana at 17. *See also* "Fact Sheet: Final Rule to Implement Executive Order

Trump administration, the Department of Labor promulgated a rule expanding religious exemptions for contractors, which would permit contracting firms to evade long-standing non-discrimination protections.[68] The Biden administration issued a regulation in November 2021 increasing the minimum wage for over 300,000 federal contractors[69]; that rulemaking is the subject of ongoing litigation.[70] Finally, the Biden administration has also invoked the FPASA to require that federal contractors, with limited exemptions, ensure their employees' vaccination to Covid-19[71]; the Fifth Circuit recently affirmed an injunction against that rule on MQD grounds.[72]

Some important principles flow from these regulatory antecedents. On multiple occasions, courts have upheld FPASA directives prescribing firm-wide conduct that reaches beyond those specific products or services envisioned within the four corners of the federal contract. The Proposed Rule's firm-wide obligations, then, follow a well-trod regulatory path. Its required public disclosures find a precedent in the public notices mandated by the directive at issue in *UAW v. Chao*. The E-Verify requirement, also upheld in federal court, demonstrates that a president may invoke the FPASA, as the Proposed Rule does, to determine how contractors provide information to the federal government. And the directive upheld in *Kahn* is particularly instructive: the Proposed Rule's climate disclosure obligations are far less intrusive than the Carter administration's strict price and wage controls, which sought to micromanage a central pillar of contractors' business operations.

c. <u>Other characteristics of the Proposed Rule also weigh against the MQD's application.</u>

Given this regulatory precedent, invoking the FPASA to impose limited GHG emissions data, climate risk disclosure, and science-based targeting obligations on significant or major federal contractors cannot be considered an exercise of "unheralded power." But even if a court reached the contrary conclusion, the Proposed Rule would still not pose a major question because it does not effect a "transformative expansion in regulatory authority" or a "fundamental revision of the statute."[73]

13706, Establishing Paid Sick Leave for Federal Contractors," U.S. Dep't of Labor, Wage and Hour Div., https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/PaidLeaveFS.pdf.

[68] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79324 (Dec. 9, 2020). In November 2021, the Department of Labor issued a proposed rule, apparently not yet finalized, to rescind the 2020 rule. Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 86 Fed. Reg. 62115 (Nov. 9, 2021).

[69] Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126, 67194 (Nov. 24, 2021).

[70] *See supra* n.38.

[71] As the 5th Circuit explains in *Louisiana v. Biden*, some four documents collectively constitute the mandate: *see* Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50985 (published Sept. 14, 2021); COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors at 5 (Sept. 24, 2021), https://bit.ly/3jTHSHJ; 86 Fed. Reg. 53691-01 (Sept. 28, 2021); 7 Issuance of Agency Deviations to Implement Executive Order 14042 at 3 (Sept. 30, 2021), https://bit.ly/3bvdizB.

[72] *Louisiana et al. v. Biden et al.*, No. 22-30019 (5th Cir. Dec. 19, 2022). Note that even if that court's application of the MQD is correct in that context, the Proposed Rule is readily distinguishable from a vaccine mandate: for one, it targets employers, rather than employees—the latter being one of the reasons the 5th Circuit characterized the vaccine mandate as a major question, Louisiana at 20; nor does the Proposed Rule require individuals to inject themselves with an *irreversible* medical intervention. *Ibid.*

[73] W. Virginia at 2612.

i. The Proposed Rule does not represent a "transformative expansion in regulatory authority."

The MQD line of cases offers guidance about the kinds of agency action the Supreme Court has previously found to constitute a "transformative expansion in regulatory authority," or a "fundamental revision of the statute." For example, in *Gonzales v. Oregon*, the Supreme Court ruled against the Attorney General's attempt to criminalize physician-assisted suicide that had been duly authorized by state law.[74] In reaching its conclusion, the Court noted that the statute was co-administered by the Departments of Justice ("DOJ") and Health & Human Services, and therefore found it unlikely that Congress intended to delegate a medical determination to the less expert of the two agencies, DOJ.[75] In *Utility Air Regulatory Group v. EPA*, the Supreme Court nixed an Environmental Protection Agency ("EPA") rule that would have expanded the agency's regulatory authority over tens of thousands, and in some cases millions, of never before regulated small- and medium-sized sources of greenhouse gas emissions.[76] In *King v. Burwell*, the Supreme Court held that an Internal Revenue Service rule concerning implementation of the Affordable Care Act posed a major question, in part because "[i]t is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."[77] And in *Alabama Association of Realtors v. Dep't of Health & Human Services*, the Supreme Court invalidated a Covid-19 eviction moratorium by the Centers for Disease Control ("CDC") because the government had rested its authority to wield such "sweeping power" on a "wafer-thin reed" of a statutory provision.[78] Explaining that "[s]ince that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium," the Court characterized the government's articulation of its longstanding statutory authority as "expansive" and "unprecedented."[79] The Court also noted that the moratorium upset the traditional assumption that landlord-tenant relations fell under the purview of state, rather than federal law.[80]

The Proposed Rule stands in contrast to each of these precedents, and so cannot be characterized as a "transformative expansion" of the agencies' FPASA authority. It directly applies only to federal contractors of a certain size, and includes various exemptions.[81] Its proposed obligations do not seek to assert jurisdiction over a new class of regulated entities — as EPA's rule did in *UARG* or the CDC's eviction moratorium did in *Alabama Assoc.* — but rather apply to a limited set of actors who have always known that their taxpayer-funded contracts come with strings attached (and, of course,

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74 546 U.S. 243 (2006).
75 *Id.* at 274.
76 573 U.S. 302, 321–22 (2014) ("In the Tailoring Rule, EPA described the calamitous consequences of interpreting the Act in that way. Under the PSD program, annual permit applications would jump from about 800 to nearly 82,000; annual administrative costs would swell from $12 million to over $1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide. Tailoring Rule 31557. The picture under Title V was equally bleak: The number of sources required to have permits would jump from fewer than 15,000 to about 6.1 million; annual administrative costs would balloon from $62 million to $21 billion; and collectively the newly covered sources would face permitting costs of $147 billion"). EPA itself said that its primary rule, if not tempered by a subsequent tailoring regulation, would have rendered the statute "unrecognizable to the Congress" that adopted it. *Id.* at 312.
77 576 U.S. 473, 486 (2015).
78 141 S. Ct. 2485, 2489 (2021) (per curiam).
79 *Ibid.* The Court also wondered at the lack of a limiting principle: "Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work?" *Ibid.*
80 *Ibid.*
81 *See* supra at 5.

who do business with the federal government voluntarily).[82] Nor, as the rules in *Gonzales* and *Burwell* did for their relevant agencies, does the Proposed Rule stray from — and here it's clarifying to ditch the acronym — the *Federal Acquisition Regulatory* Council's core sphere of expertise: federal contracting management.

The Supreme Court has also suggested that an agency may be attempting to impermissibly expand its regulatory authority when it cites an "ancillary provision" of a statute "designed to function as a gap filler," and "rarely … used in the preceding decades," to justify its action.[83] For example, in the *West Virginia* decision invalidating the EPA's 2015 "Clean Power Plan," the Supreme Court characterized the provision of the Clean Air Act at issue as a "little-used backwater," for two primary reasons: (1) because that provision operated as a backstop to emissions not already covered by two of the statute's flagship programs, the National Ambient Air Quality Standards and Hazardous Air Pollutants programs; and (2) because EPA had only invoked the provision "a handful of times since the enactment of the statute in 1970."[84]

Here, the Proposed Rule once again strikes a different chord. Congress adopted the FPASA, as the D.C. Circuit has explained in its leading federal contracting case, in order to "centralize Government property management and *to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector*."[85] Given the prevalence of carbon emissions assessment and disclosure programs in the private sector (to say nothing of the myriad corporate emissions reduction commitments),[86] such "flexibility" surely must include the ability to assess the federal supply chain's exposure to the physical and financial risks of climate change and the resulting transition toward a green economy.[87] And far from a "little-used backwater," the FPASA provision at issue has been the source of authority for a host of contractor obligations imposed by presidents from both parties over several decades.[88]

ii. Even contested features of the still-emergent MQD test, including a rule's economic or political significance, suggest that the Proposed Rule does not pose a major question.

The extent to which a rule's economic or political significance should factor into a MQD analysis remains contested. While *West Virginia* and other recent MQD decisions at the Supreme Court have referenced those factors,[89] Natasha Brunstein and Donald L. R. Goodson have argued that *West*

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[82] Indeed, one reason the MQD may not apply at all to the Proposed Rule is that in exercising its authority to negotiate the terms of procurement per the FPASA, the federal government is acting not as a regulator, but as a *proprietor. See e.g.,* Kahn at 794 ("Further, any alleged mandatory character of the procurement program is belied by the principle that no one has a right to a Government contract. As the Supreme Court ruled in Perkins v. Lukens Steel Co., '(T)he Government enjoys the unrestricted power * * * to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.' Those wishing to do business with the Government must meet the Government's terms; others need not"); Louisiana at 37 (Graves, Jr., J., dissenting).
[83] W. Virginia at 2610.
[84] *Id.* at 2601–02.
[85] Kahn at 787 (emphasis added).
[86] One measure of the private sector's interest in developing carbon emissions data is that a notable portion of federal contractors already produce this information: according to the Proposed Rule, 31 percent of major contractors and 10 percent of significant contractors submit GHG emissions data to the System for Award Management (SAM). 87 FR 68313.
[87] *See* supra Part I.b.
[88] *See* supra Part II.b.
[89] *See* W. Virginia at 2608; NFIB at 664; and Alabama Assoc. at 2489.

Virginia's actual analysis of the Clean Power Plan neglected to "rest its analysis on some amorphous assertion of economic and political significance," as some legal commentators had urged the Court to do; as a result, Brunstein and Goodson suggest *West Virginia* has effectively de-emphasized such inquiries.[90] Regardless, it remains abundantly clear that, for example, a finding of "economic significance" is not *independently* sufficient, absent other suggestive factors, to trigger the doctrine's application. Though Justice Gorsuch arguably endorsed that "independent trigger" view in concurrence, he only received the support of one other justice, and so his framework does not serve as controlling precedent.[91]

But it's worth noting that even measured against Gorsuch's — again, non-controlling — standard, the Proposed Rule at issue here would not pose a major question. For one, the Proposed Rule's estimated costs and reach do not rise to the level of significance of agency actions in past MQD cases.

For example, one of the EPA regulations at issue in *UARG* would have radically transformed two Clean Air Act programs: that rule would have expanded the Prevention of Significant Deterioration program from 280 regulable entities to over 82,000, resulting in a 125-fold increase in administrative costs[92]; meanwhile, the rule's changes to the Title V permitting program would have cost regulated private entities — which would have increased under the rule from 15,000 to over 6 million — nearly $150 billion over three years (more than $185 billion today, adjusting for inflation).[93]

According to the *Burwell* Court, meanwhile, that case presented a major question because "billions of dollars in spending *each year* and … the price of health insurance for millions of people," hinged on the disputed provision's fate.[94] The Occupational Safety & Health Administration's Covid-19 vaccination or test mandate, struck down on MQD grounds in *National Federation of Independent Business v. Dep't of Labor, Occupational Safety and Health Administration* (2022), would have covered 84 million workers and cost firms nearly $3 billion in compliance over a single year.[95] And in *West Virginia*, the Supreme Court noted that EPA's estimates predicted "billions of dollars in compliance costs," the closure of "dozens" of coal power plants, and the elimination of "tens of thousands of jobs."[96] The Court also referenced a federal projection from the Energy Information Administration, which estimated "that the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040."[97]

By contrast, the Proposed Rule imposes costs that are orders of magnitude lower, and reaches a far narrower class of regulated firms, than the preceding regulations found subject to the MQD. In the Proposed Rule, the FAR Council estimates its obligations will apply to 5,766 contractor firms and cost, in aggregate, $605 million for the first year, and $443 million annually thereafter.[98] The bulk of

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[90] *See* Natasha Brunstein & Donald L. R. Goodson, "Unheralded and Transformative: The Test for Major Questions After *West Virginia*," 47 Wm. & Mary Env't L. & Pol'y Rev. (forthcoming 2023) at 37; *id. at* 3–4.
[91] *See* W. Virginia at 2620.
[92] UARG at 322.
[93] *Ibid.*
[94] Burwell at 485 (emphasis added).
[95] COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 FR 61402-01.
[96] W. Virginia at 2604 (citing EPA, "Regulatory Impact Analysis for the Clean Power Plan Final Rule," 3–22, 3–30, 3–33, 6–24, 6–25 (2015)).
[97] *Ibid.* (citing Dept. of Energy, Analysis of the Impacts of the Clean Power Plan 21, 63–64 (May 2015)).
[98] 87 FR 68321–22.

those aggregated costs arise from the obligations imposed on major contractors — less than 1,000 firms qualify for the designation[99] — which hold over $50 million in federal contracts: the Proposed Rule estimates it will cost the average major contractor that doesn't already disclose some emissions data approximately $415,000 per year to comply (after the initial year)[100]; the FAR Councils estimates those annual costs for the 30 percent of major contractors who do disclose emissions data at $208,000.[101] (Under the Proposed Rule's exemptions, small businesses that would otherwise qualify as "major contractors" need only comply with the obligations applicable to "significant contractors.")[102] To offer a sense of proportion, the Proposed Rule therefore estimates that the average major contractor with no history of disclosing emissions will face increased annual costs worth just 0.8 percent of the *minimum* value ($50 million) of their federal contract.

The average significant contractor, meanwhile, will face recurring costs of just $48,000 per year (again, after the initial year) to comply with the Proposed Rule's Scope 1 and 2 GHG emissions inventories.[103] (The FAR Council estimates that the average small business will face even lower average costs, less than $19,000 per year after the initial year.)[104] Aggregate costs for significant contractors complying with the Scope 1 and Scope 2 emissions inventories will total $101 million in the first year, and $79 million each year thereafter.[105] In sum, measured against the baseline set by the MQD case law, the Proposed Rule cannot be properly understood as "economically significant."[106]

Finally, even if some "political significance" threshold exists under the MQD, the Proposed Rule does not meet it. True, climate change has been the subject of intense political contestation in recent decades. But that level of generalized conflict does not by itself count toward a political significance finding under any reading of the doctrine. According to *West Virginia*, a more specific — though not necessarily sufficient — indication that an executive action holds political significance appears to be whether Congress has considered and rejected legislation that seeks to accomplish a similar end.[107] To our knowledge, Congress has voted down no analogous piece of legislation.

[99] RIA at 20.
[100] 87 FR 68322; *see also* "FAR Case 2021-015: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk Regulatory Impact Analysis" at 40, https://www.regulations.gov/document/FAR-2021-0015-0004.
[101] *Ibid.*; *see also* RIA at 20–21, 40.
[102] 87 FR 68315; RIA at 40.
[103] RIA at 40.
[104] *Ibid.*
[105] 87 FR 68322.
[106] Indeed, in a further sign that the Proposed Rule's breadth does not qualify as "unheralded," *see* discussion supra at Part II.b., the Proposed Rule's costs fall into the same neighborhood as the inflation-adjusted costs of recent FPASA directives. For example, regulators estimated the first year costs of the E-Verify directive to fall between $139 million and $145 million, adjusted for inflation. Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. 33374, 33377 (2008). The Obama administration's paid sick leave program for federal contractors was estimated to cost $125 million in 2016 dollars in its first year, or approximately $143 million today. "Establishing Paid Sick Leave for Federal Contractors," 81 FR 67598, 67687 (2016). And the Department of Labor estimated the Biden administration's minimum wage hike for contractors would transfer $1.5 billion from employers to workers in its first year. "Increasing the Minimum Wage for Federal Contractors," 86 FR 67126, 67209 (2021).
[107] W. Virginia at 2614.

III. The FAR Council should consider adding a severability clause to the final rule.

Despite their proliferation in congressional statutes, severability clauses remain a relatively under-utilized tool in administrative policymaking.[108] This runs contrary to 2018 guidance from the Administrative Conference of the United States ("ACUS"), which, after conducting a report on the subject,[109] recommended that agencies incorporate severability clauses "when an agency recognizes that some portions of its proposed rule are more likely to be challenged than others and that the remaining portions of the rule can and should function independently."[110] Given (in our view, incorrect) speculation that this and other proposed rules concerning climate disclosures lack an adequate statutory basis, as well as ongoing litigation concerning other federal contractor directives, it seems plausible that a finalized version of the Proposed Rule could face a legal challenge.[111] The Proposed Rule also contains multiple, distinct provisions that could plausibly function independently to confer the rule's stated benefits. For these reasons, and even though we believe the Proposed Rule stands on firm legal ground,[112] it might be prudent for the FAR Council to incorporate a severability provision into a final rule.

The Supreme Court addressed the issue of administrative severability in *K-Mart Corp. v. Cartier* .[113] In that case, the Court held an invalid subsection of a Customs Service regulation severable from the rest of the rule, because doing so did "not impair the function of the statute as a whole, and there is no indication that the regulation would not have been passed but for its inclusion."[114] This test closely tracks that of severability in the legislative context,[115] and was perhaps more neatly articulated in a subsequent D.C. Circuit case, which outlined a two-part analysis for administrative severability: essentially, whether (1) the agency intended for the invalidated provision's severability; and (2) the regulatory regime could function workably absent the invalidated provision.[116] (Note also that nothing in the Administrative Procedure Act ("APA") requires a reviewing court that identifies procedural or substantive defects to invalidate the *entire* rule: the APA defines "agency action" to include "a part of an agency rule.")[117]

As the scholars Charles W. Tyler and E. Donald Elliott explain in "Administrative Severability Clauses," the leading article on the topic, "a severability clause can be seen as the agency's

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108 Which is not to say that they are a novel innovation; the seminal academic article on the topic identified 59 examples of severability clauses in administrative rulemakings between 2000–2014. Charles W. Tyler & E. Donald Elliott, Administrative Severability Clauses, 124 YALE L.J. 2286, 2349–52 (2015), https://www.yalelawjournal.org/pdf/c.2286.Tyler-Elliott.2352_ou82b9gs.pdf.

109 Charles W. Taylor & E. Donald Elliott, "TAILORING THE SCOPE OF JUDICIAL REMEDIES IN ADMINISTRATIVE LAW," Administrative Conference of the United States (May 4, 2018), available at: https://www.acus.gov/sites/default/files/documents/tailoring-the-scope-of-judicial-remedies-in-administrative-law-final-report.pdf.

110 "Severability in Agency Rulemaking," Administrative Conference Recommendation 2018-2, 2 (adopted June 15, 2018), available at: https://www.acus.gov/sites/default/files/documents/recommendation-2018-2-severability%20in%20agency%20rulemaking.pdf.

111 *See* supra n.46–48.

112 *See* supra Parts I & II.

113 486 U.S. 281 (1988).

114 K-Mart at 294.

115 *See e.g.*, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

116 *See Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1455 (D.C. Cir. 1997); *see also* "Administrative Severability Clauses" at 2296–97.

117 5 U.S.C. §551(13); *see also* Charles Tyler, "Severability in Agency Rulemaking" The Regulatory Rev., https://www.theregreview.org/2018/10/31/tyler-severability-agency-rulemaking/ (Oct. 31, 2018).

affirmative answer to the two component questions of the severability test: the agency (1) intends for the remainder to stay in effect; and (2) believes that the remainder is workable."[118] Since *K-Mart*, lower courts have come to different conclusions about the extent to which they should defer to agency severability clauses (a distinct question from how courts should determine severability in the administrative context generally, answered in *K-Mart*).[119] Yet because the Supreme Court has never addressed the issue, ACUS nonetheless recommends that agencies incorporate severability provisions into appropriate regulations.[120] And as noted below, while the mere, rote inclusion of a severability clause may not always confer deference, agencies that both incorporate such a clause and also explain how a severed regulation could function in the absence of its removed provisions should fare better in court.

Including a severability provision in the text of a rule does not imply that an agency doubts a rule's lawfulness.[121] It merely acknowledges that a rule might receive a legal challenge and offers the agency's opinion about whether an adverse decision can be narrowly tailored via severability. By contrast, waiting until litigation to raise the prospect of severability poses risks. According to ACUS, "courts may be less likely to agree with the agency if the issue of severability comes up for the first time in litigation because of 'the fundamental principle that agency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel.'"[122] Another reason to include a severability clause in the text of the rule itself is that expert agency staff, rather than agency counsel, are best equipped to weigh the merits of severability.[123]

ACUS offers guidelines for agencies that wish to incorporate administrative severability clauses into appropriate regulations. In the event that "the agency intends that portions of the rule should continue in effect even if other portions are later held unlawful," ACUS suggests drafting rules so they are "divisible into independent portions."[124] It also recommends that "the agency addresses the rationale for severability in the statements of basis and purpose accompanying the final rule" and that "the agency explains how specific portions of the rule would operate independently."[125] This last recommendation stems from a D.C. Circuit case, *MD/DC/DE Broadcasters Ass'n v. F.C.C.* There, the court declined to defer to an administrative severability clause because, within the rulemaking

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118 "Administrative Severability Clauses" at 2297.

119 ACUS recommendation at n.5 ("*[s]ee, e.g.*, Consumer Fin. Prot. Bureau v. The Mortg. Law Grp., LLP, 182 F. Supp. 3d 890, 894–95 (W.D. Wis. 2016) (deferring to severability clause on issue of whether the agency intended for the remainder of the rule to stay in effect); High Country Conservation Advocates v. U.S. Forest Serv., No. 13-CV-01723-RBJ, 2014 WL 4470427, at *4 (D. Colo. Sept. 11, 2014) ('I conclude that the severability clause creates a presumption that the North Fork Exception is severable . . . .'); *cf.* Cmty. for Creative Non-Violence v. Turner, 893 F.2d 1387, 1394 (D.C. Cir. 1990) (quoting United States v. Jackson, 390 U.S. 570, 585 n.27 (1968)); New York SMSA Ltd. P'ship v. Town of Clarkstown, 603 F. Supp. 2d 715, 734 (S.D.N.Y. 2009), aff'd 612 F.3d 97 (2d Cir. 2010) (internal quotation marks omitted) ('[T]he presence of [a severability] clause is not dispositive.')"); "Administrative Severability Clauses," at 2317.

120 ACUS recommendation at 2.

121 *See* "Administrative Severability Clauses" at 2319.

122 ACUS recommendation at 3, quoting *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 867 (D.C. Cir. 2006) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989)). ACUS additionally notes that "[t]his is an application of the *Chenery* doctrine, which holds that a reviewing court may not affirm an agency decision on different grounds from those adopted by the agency. *See* SEC v. Chenery Corp., 318 U.S. 80, 92–94 (1943)." *Id.* at n.7. *See also MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 253 F.3d 732, 735 (D.C. Cir. 2001) (holding that the FCC, as a "collegial body," could not attest to its view on administrative severability through "counsel's filings," because the agency properly "speaks through its orders").

123 *See* "Administrative Severability Clauses" at 2320 (recounting *Davis County I* and *Davis County II*).

124 ACUS recommendation at 4.

125 *Id.* at 2.

record, the Federal Communications Commission had failed to explain how the surviving regulation could independently fulfill the agency's regulatory goals in the absence of the invalidated provision.[126]

Applying ACUS's recommendations here, the FAR Council could divide its Proposed Rule into at least three severable components: (1) the GHG inventories — covering Scope 1 and Scope 2 emissions — for significant contractors and certain small businesses; (2) the GHG inventory — covering Scope 1, Scope 2, and relevant Scope 3 emissions — and climate risk disclosures for certain major contractors; and (3) the science-based targets for certain major contractors.[127] Per ACUS, in a final rule, the FAR Council should be sure to independently justify each component under its statutory authority—as well as explain how each component could still fulfill the Council's statutory and policy goals in the event a court invalidated the remainder of the regulation. For example, and as noted above, each component of the Proposed Rule would enable the federal government to better assess its own exposure to the financial and physical risks of the climate transition, and therefore promote the statutory goals of economy and efficiency in federal contracting.[128]

As a final note, incorporating a severability clause into a final rule should not pose a "logical outgrowth" problem under the APA, which requires that a Notice of Proposed Rulemaking includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[129] To meet this requirement, agencies must at least "fairly apprise interested persons of the subjects and issues before the agency."[130] Here, that minimal showing has been met: because a severability clause is a technical, precautionary measure that makes no substantive changes to the policies at issue, commenters have been "fairly apprise[d]" of the "subjects and issues involved."[131]

IV. Conclusion

Amid the risks and opportunities that a changing climate and transitioning economy will pose in future years, the Proposed Rule holds the potential to improve the economy and efficiency of federal procurement. We applaud the FAR Council's efforts to date and appreciate the opportunity to comment.

Sincerely,

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[126] 253 F.3d 732, 733–36 (D.C. Cir. 2001). For a more recent example, *see also Nasdaq Stock Mkt. LLC v. Sec. & Exch. Comm'n*, 38 F.4th 1126, 1145 (D.C. Cir. 2022).
[127] Of course, the FAR Council could divide the rule even further—for example, by sorting the major contractor GHG inventories and the major contractor climate risk disclosure provisions into separate components.
[128] *See* supra Part I.b.
[129] 5 U.S.C. § 553(b).
[130] *See Prometheus Radio Project v. FCC*, 939 F.3d 567, 583 (3d Cir. 2019) (internal citations omitted).
[131] After all, the FAR Council could drop one or more of its proposed contractor obligations in a final rule without running afoul of the APA's "logical outgrowth" requirement; the greatest possible effect a severability clause might have on the rule is to achieve that same result, albeit after an adverse court decision rather than a notice and comment process.