April 8, 2024

Submitted via email

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Office of Government-wide Policy
General Services Administration

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

Dear Ms. Brumfeld:

We write to offer further analysis underscoring the legal defensibility of the Federal Acquisition Regulation (FAR) Council's proposed rule, "Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk," FAR Case 2021–015 (Proposed Rule). Governing for Impact (GFI) is an organization dedicated to ensuring that the federal government operates more effectively for everyday working Americans.[1] This letter supplements the research and analysis in our organization's initial comment to the FAR Council's November 14, 2022 Proposed Rule.[2]

First, we highlight how the Proposed Rule is easily distinguishable from two recent Federal Procurement and Administrative Services Act (FPASA) orders that have faced setbacks in federal courts. Then, we apply a revised formulation of the Major Questions Doctrine (MQD) to demonstrate why criticisms of the Proposed Rule are unpersuasive. **In particular, we encourage the FAR Council to include in its Final Rule a discussion of how overlapping emissions disclosure regimes imposed by other governmental entities might reduce the incremental costs associated with the regulation, thereby reducing its economic significance and the likelihood that the MQD should apply**. Finally, we explain why and how the FAR Council should include a well-reasoned severability clause in its Final Rule to protect the core components of the regulation.

The Proposed Rule includes three primary components:

- Greenhouse gas (GHG) inventories: significant[3] and major[4] federal contractors are required to disclose their Scope 1 and Scope 2 emissions using a widely-used emissions accounting tool.[5] Major federal contractors are also required to inventory Scope 3 emissions.[6]

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[1] Governing for Impact, www.governingforimpact.org.
[2] Governing for Impact comment on FAR Case 2021-015; RIN 9000-AO32; Fed. Reg. Vol. 87, 68312 (Feb. 10, 2023), https://governingforimpact.org/wp-content/uploads/2023/02/Federal-Contractor-Climate-Disclosure.pdf.
[3] Significant contractors are those that received $7.5 million or more in federal awards in a federal fiscal year. Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68313 (Nov. 14, 2022).
[4] Major contractors are those that received $50 million or more in federal awards in a federal fiscal year. *Id.*
[5] "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 reporting company's own consumption but occur at sources owned or controlled by another entity." *Id.*
[6] Scope 3 emissions "are a consequence of the operations of the reporting entity but occur at sources other than those owned or controlled by the entity." *Id.* at 68314.

- Annual climate disclosure: major contractors are also required to prepare a public-facing disclosure of their emissions, as well as an explanation of the entity's climate risk assessment process and any risks identified.[7]
- Science-based targets: major contractors are required to develop science-based targets for emissions reductions and have those targets validated by a third party, the Science-Based Targets Initiative (SBTi).[8]

The FAR Council estimated that 5,766 significant and major contractors would be impacted by the Proposed Rule.[9]

A. The Proposed Rule is easily distinguishable from recently invalidated FPASA orders.

Since our initial comment, two recent invocations of FPASA have faced new setbacks in federal courts: one FPASA directive mandating that employees of federal contractors be vaccinated against Covid-19 and another requiring federal contractors to increase their minimum wage to $15 per hour.[10] As a threshold matter, we believe that the recent spate of adverse decisions in the FPASA context rely on a crabbed reading of the statute at odds with long-standing precedent. But we primarily write to emphasize a different point: even by the (flawed) logic of those decisions, a close reading reveals that the Proposed Rule should not succumb to similar challenges.

1. Vaccine mandate

The Biden Administration invoked the FPASA to require that federal contractors, with limited exemptions, ensure their employees' vaccination against Covid-19. Most federal appeals courts that considered the issue decided that the vaccine mandate was likely outside of the President's authority under the FPASA, with the Fifth Circuit making that finding explicitly on MQD grounds and the Eleventh and Sixth Circuits implicitly doing so.[11]

The FAR Council can distinguish the Proposed Rule from the invalidated vaccine mandate on several dimensions. The most obvious difference between the Proposed Rule and the vaccine mandate is that the former imposes obligations on federal contractor employers themselves rather than on their *employees*, which the Fifth and Sixth Circuit panels both characterized as novel and impermissible in ruling against the action.[12] Another problematic feature of the vaccine mandate, according to both appellate panels, was the fact that

[7] *Id.*
[8] *Id.*
[9] *Id.* at 68322.
[10] As the 5th Circuit explained in *Louisiana v. Biden*, 55 F.4th 1017, 1019 (5th Cir. 2022), 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; Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126, 67194 (Nov. 24, 2021).
[11] *See* Louisiana v. Biden, 55 F.4th 1017, 1029 (5th Cir. 2022); Georgia v. President of the United States, 46 F.4th 1283, 1295 (11th Cir. 2022); Kentucky v. Biden, 23 F.4th 585, 607 (6th Cir. 2022); *but see* Mayes v. Biden, 67 F.4th 921, 932 (9th Cir.), vacated as moot, 89 F.4th 1186 (9th Cir. 2023) (declining to apply the MQD).
[12] *Louisiana v. Biden*, 55 F.4th 1017, 1030 (5th Cir. 2022) (distinguishing the vaccine mandate from prior FPASA orders, which "govern the conduct of *employers*," and the vaccine mandate, which "purports to govern the conduct of *employees*.") (emphasis in original); *see also* Kentucky v. Biden, 23 F.4th 585, 605 (6th Cir. 2022) (rejecting the government's attempt to regulate actions performed by "the private employees of contractors" rather than the government itself, in part because the legislative history showed concern with government inefficiency caused by overbuying in certain sectors and not of the efficiency of the workers themselves).

vaccinations are irreversible — here, a future administration would be free to entirely revise the proposed climate emissions and risk accounting and disclosure standards (so long as the reversal complied with the Administrative Procedure Act).

The Proposed Rule is also drastically smaller in scope. The Proposed Rule only creates new obligations for roughly 6,000 federal contractors,[13] in contrast to the vaccine mandate that, the Sixth Circuit noted with alarm, would have required individual action by "*at least* one-fifth of the American workforce," or over 30 million people.[14]

Finally, the courts' concerns about the vaccine mandate's potential to upset the traditional balance of power between the federal and state governments do not apply to the Proposed Rule. The Sixth Circuit warned that the vaccine mandate would transfer a "traditional prerogative" of state and local governments – the police and public health powers – to the federal government.[15] In contrast, the Proposed Rule seeks to standardize climate emissions and risk reporting and disclosure, about which there is no long-standing tradition of state-level regulation.

2. *Minimum wage increase*

The Biden administration also issued a regulation in November 2021 increasing the minimum wage for over 300,000 federal contractor employees;[16] that rulemaking is the subject of ongoing litigation that focuses on the scope of FPASA authority as well as the MQD. Despite favorable district court rulings in Arizona and Colorado,[17] a court in the Southern District of Texas enjoined the rule's application in three southern states on the basis that the FPASA order was a major question that lacked clear authorization from Congress.[18] The cases are now on appeal in the Ninth and Fifth Circuits.[19]

There are several clear distinctions that the FAR Council could draw between the Proposed Rule and the minimum wage order. For one thing, as discussed below, the cost of the former is dramatically lower — $443 million annually compared to nearly $2 billion.[20] The Proposed Rule applies to fewer than 6,000 firms, whereas the Department of Labor estimated that the minimum wage order could have applied to anywhere between 80,000 and 507,000 firms.[21] And the Proposed Rule cannot be characterized as an attempt to circumvent Congress's refusal to impose a similar emissions disclosure itself, whereas the Texas district court admonished the President for issuing the minimum wage order after "he was unable to convince Congress to go along" with his efforts to amend the federal minimum wage for all workers.[22] To our knowledge, there has not been a failed attempt in Congress to impose a similar disclosure regime on federal contractors or a broader set of entities.

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[13] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68321-22 (Nov. 14, 2022).
[14] Kentucky v. Biden, 23 F.4th 585, 606 (6th Cir. 2022)(emphasis in original).
[15] *See id.* at 609 (complaining that the vaccine order "transfer[s] this traditional prerogative" of police and public health power to the federal government under the guise of economical and efficient contracting).
[16] Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126, 67194 (Nov. 24, 2021).
[17] Bradford v. U.S. Dep't of Lab., 582 F. Supp. 3d 819 (D. Colo. 2022); Arizona v. Walsh, No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6, 2023).
[18] Texas v. Biden, No. 6:22-CV-00004, 2023 WL 6281319 (S.D. Tex. Sept. 26, 2023).
[19] Daniel Wiessner, *US court questions Biden's power to adopt minimum wage for federal contractors*, (Feb. 6, 2024), https://www.reuters.com/legal/government/us-court-questions-bidens-power-adopt-minimum-wage-federal-contractors-2024-02-06/.
[20] *Compare* Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126, 67194 (Nov. 24, 2021) *with* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68322 (Nov. 14, 2022).
[21] Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126, 67197 (Nov. 24, 2021)
[22] Texas v. Biden, No. 6:22-CV-00004, 2023 WL 6281319, at *2 (S.D. Tex. Sept. 26, 2023).

Even by the terms of the Texas district court's cramped understanding of the FPASA,[23] the Proposed Rule should survive scrutiny. The court explained that the FPASA framework aims to "obtain full and open competition"[24] and "unambiguously limit[s]" the President's authority under the statute only to a "supervisory role of buying and selling goods,"[25] allowing agencies to "articulate *specific, output-related standards* to ensure that acquisitions have the features they want."[26] According to the court, the FPASA is a "relatively hands-off framework that enables agencies to determine for themselves the quantity and quality of items to procure on behalf of the federal government."[27] This understanding led the court to find that the FPASA does not enable the President to set "broad employment rules" like the $15 minimum wage hike.[28]

By contrast, the Proposed Rule aims to provide agencies with a standardized set of information from the government's contractors in order to help agencies evaluate the "features" and "quality of items" that they plan to purchase.[29] It does not wade into the internal personnel decisions of private companies, as did the minimum wage order. Nor does it require an across the board increase in labor costs. Instead, it imposes modest disclosure requirements on the government's largest contractors that provides agencies with a better understanding of how contracting with particular entities will affect the agency's own procurement-related efficiency goals. Without the information disclosed under the Proposed Rule's requirements, agencies are ill-equipped to, in the language of the Texas district court, "articulate *specific, output-related standards*" for their acquisitions because they are flying blind with respect to their purchases' climate-related externalities and risks. In order to set such standards, the agencies must have access to standardized information from contractors so they can make apples-to-apples comparisons between bidders, thereby promoting "full and open competition" in government contracting.[30]

B. The Major Questions Doctrine should not apply to the Proposed Rule, due in part to the existence of overlapping emissions disclosure regulatory regimes.

Some commenters have speculated that the Proposed Rule, if finalized, could be vulnerable to a legal challenge under the MQD.[31] Others have similarly characterized the Securities and Exchange Commission's (SEC) finalized climate disclosure rule — that is similar in design and scope as the Proposed Rule — as a major question.[32] Meanwhile, as explained above, the MQD has arisen in ongoing litigation concerning two

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[23] The court set forth a particularly crabbed reading of the FPASA and an incomplete formulation of the MQD that focused only on economic and political significance of an action. *Id.* at *11.
[24] *Id.* at *9.
[25] *Id.* at *7.
[26] *Id.* at *9. (internal quotations omitted; emphasis in original).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at *7.
[31] *See, e.g.,* Pacific Legal Foundation comment on FAR Case 2021-015 at 10-11, (Feb. 14, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0177; Heritage Foundation comment on FAR Case 2021-015 at 9-10, (Feb. 13, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0202; Job Creators Network Foundation comment on FAR Case 2021-015 at 6-8, (Feb. 13, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0196; 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).
[32] *See, e.g.,* Soyoung Ho, *SEC Scales Back Requirements in Final Climate Disclosure Rule*, Reuters (Mar. 7, 2024), https://tax.thomsonreuters.com/news/sec-scales-back-requirements-in-final-climate-disclosure-rule/ (quoting U.S. Chamber of Commerce Executive Vice President Tom Quaadman: "While it appears that some of the most onerous provisions of the initial proposed rule have been removed, this remains a **novel** and complicated rule that will likely have significant impact on businesses and their investors .. The Chamber will continue to use all the tools at our disposal,

other FPASA directives: the Administration's Covid-19 vaccine mandate and its minimum wage hike for federal contractors.[33]

Having closely studied the MQD in a number of rulemaking contexts,[34] we wrote in our prior comment that we did not believe that the FAR Council's Proposed Rule would implicate the doctrine.[35] To supplement the analysis we previously provided, in this section we consider the application of the MQD to the Proposed Rule using an updated formulation of the doctrine. We also consider the effect of overlapping regulatory regimes on the Proposed Rule's economic and political significance, a key factor in an MQD analysis. This research further supports our conclusion that the Proposed Rule, as written, should not implicate the MQD.

a. The Major Questions Doctrine

The MQD traces its lineage to a pair of cases at the turn of the millennium, but has taken on a more aggressive form in recent years—culminating in the Supreme Court's landmark decision in *West Virginia v. E.P.A.*[36]

According to *West Virginia*, the MQD operates by subjecting "certain extraordinary cases" to a more demanding legal standard, in which regulations must demonstrate "something more than a merely plausible textual basis" in a statute in order to avoid invalidation.[37] In *West Virginia*, the majority refers to this heightened legal bar as "clear congressional authority"—but whatever its name, it marks a break from the past several decades of judicial practice. Under the once-regnant *Chevron* Doctrine,[38] courts deferred to agency legal interpretations about ambiguous statutes so long as those interpretations were reasonable. In other words, demonstrating "a merely plausible textual basis" was once all that an agency needed to do in order to survive legal challenge; now, if a court deems a rule to be a "major question," that is no longer true.

Specifically, Chief Justice John Roberts, who authored the *West Virginia* majority opinion, articulated a two-step test for resolving MQD cases. First, a court will determine whether a given exercise of regulatory power poses a "major question"—a task accomplished by assessing "the history and breadth of the authority

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including litigation if necessary, to prevent government overreach and preserve a competitive capital market system.") (emphasis added).

[33] *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).

[34] *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).

[35] Governing for Impact comment on FAR Case 2021-015; RIN 9000-AO32; Fed. Reg. Vol. 87, 68312 (Feb. 10, 2023), https://governingforimpact.org/wp-content/uploads/2023/02/Federal-Contractor-Climate-Disclosure.pdf.

[36] *See MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *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 West Virginia. For a thorough review of the MQD up until *West Virginia*, *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) (working paper available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4300622).

[37] West Virginia at 2609.

[38] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The Supreme Court may limit or overturn Chevron in a case it will decide this term, Loper Bright Enterprises v. Raimondo. And even though *Chevron* formally remains good law, the Supreme Court has declined to invoke the doctrine for several years. *See* Thomas W. Merrill, "The Major Questions Doctrine: Right Diagnosis, Wrong Remedy," 3 (January 2023) (working paper available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4437332).

that [the agency] has asserted, and the economic and political significance of that assertion."[39] Columbia Law Professor Thomas Merrill has offered one of the clearest distillations of this doctrinal test. Per Merrill, the MQD applies to a particular agency action if the action: (i) marks "a deviation from its settled sphere of action (novel, unprecedented, unheralded)"; (ii) "has the effect of significantly changing the scope of the agency's authority (transformative, radical change, wholesale restructuring)"; and (iii) "is a big deal (sweeping and consequential, vast economic and political significance)."[40] Importantly, a rule must share *all* three of these features to qualify as a major question.

Second, and only if a court decides the first inquiry in the affirmative, an agency regulation will only survive if the government can point to "clear congressional authorization" for its interpretation.[41] With a single exception, every regulation that the Supreme Court has deemed to be a "major question" has also failed to meet the "clear congressional authority" standard (and so has been invalidated).[42] As a consequence, most MQD challenges hinge primarily on the first inquiry: whether the regulation at issue poses a "major question."

As we show below using Merrill's formulation, the Proposed Rule does not pose a major question, and therefore it is not necessary to reach the MQD's second, "clear congressional authorization" inquiry.

b. The Proposed Rule is not a "deviation from [the FAR Council's] settled sphere of action."

The Proposed Rule's inventory, disclosure, and other requirements are not unheralded or novel actions under the FPASA. As then-professor, and current OIRA Administrator, Richard L. Revesz suggested in a 2022 law review article, an effective way for agencies to rebut claims of novelty in the MQD context is to catalog its "regulatory antecedents," or prior regulations issued under the same statutory authority.[43] In our initial comment, we carefully documented prior FPASA rules to demonstrate how the Proposed Rule's features closely resemble its regulatory antecedents, especially those upheld in court. We continue to encourage the FAR Council to include a survey of prior FPASA invocations in a finalized rule, and would direct interested readers to our original comment for a fulsome analysis.[44] (The distinctions we draw above between the Proposed Rule and the vaccine mandate and minimum wage FPASA orders also help explain why the Proposed Rule fits within the FAR Council's "settled sphere of action.")

c. The Proposed Rule does not have "the effect of significantly changing the scope of the [FAR Council's] authority."

Nor is the Proposed Rule likely to qualify as transformative, given its modest scope. 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

[39] West Virginia at 2608 (internal citations omitted).
[40] Thomas W. Merrill, "The Major Questions Doctrine: Right Diagnosis, Wrong Remedy," 6 (January 2023) (working paper available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4437332).
[41] Which, as noted above, requires "something more than a merely plausible textual basis." *Id.* at 2609 (internal citations omitted).
[42] That exception came in *King v. Burwell*, 576 U.S. 473 (2015). Of the twenty-one lower court decisions to grapple with the doctrine since last June, only one upheld the agency action at issue under the second, "clear congressional authorization" step of the MQD inquiry. *See* Natasha Brunstein, "Taking Stock of West Virginia on its One-Year Anniversary," Yale J. Reg., https://www.yalejreg.com/nc/taking-stock-of-west-virginia-on-its-one-year-anniversary-by-natasha-brunstein/ (June 18, 2023).
[43] Richard L. Revesz & Max Sarinsky, "Regulatory Antecedents and the Major Questions Doctrine," (Nov. 29, 2022), (working paper available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4291030).
[44] Governing for Impact comment on FAR Case 2021-015; RIN 9000-AO32; Fed. Reg. Vol. 87, 68312 (Feb. 10, 2023), https://governingforimpact.org/wp-content/uploads/2023/02/Federal-Contractor-Climate-Disclosure.pdf

physician-assisted suicide that had been duly authorized by state law.[45] 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.[46] 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.[47] 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."[48] 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.[49] 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."[50] 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.[51]

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.[52] 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, who do business with the federal government voluntarily).[53] Nor, as the rules in *Gonzales* and *Burwell* did for their relevant agencies, does the

[45] 546 U.S. 243 (2006).
[46] *Id.* at 274.
[47] 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.
[48] 576 U.S. 473, 486 (2015).
[49] 141 S. Ct. 2485, 2489 (2021) (per curiam).
[50] *Id.* 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?" *Id.*
[51] *Id.*
[52] *See* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68313-68314 (Nov. 14, 2022).
[53] 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, 55 F.4th at 1038 (Graves, Jr., J., dissenting).

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.

d. The Proposed Rule is not economically or politically significant, and is made less so by overlapping regulatory regimes.

The proposal's requirements are not by any measure "sweeping and consequential"[54] or, as the *West Virginia* court put it, economically or politically significant. For one — and as we explain in more detail in our prior comment[55] — the Proposed Rule's estimated costs and scope do not rise to the level of the agency actions at issue in past MQD cases.

For example, in *UARG*, the Supreme Court struck down EPA regulations that would have increased the reach of one Clean Air Act program from 280 regulable entities to over 82,000, resulting in a 125-fold increase in administrative costs[56] and increased the cost of another program by nearly $150 billion over three years (more than $185 billion today, adjusting for inflation).[57] In *Burwell*, the regulation affected "billions of dollars in spending *each year* and … the price of health insurance for millions of people."[58] In *NFIB*, the invalidated Occupational Safety and Health Administration's vaccine-or-test mandate would have covered 84 million workers and cost firms nearly $3 billion in compliance over a single year.[59] In *West Virginia*, the new regulations would have imposed "billions of dollars in compliance costs," the closure of "dozens" of coal power plants, and the elimination of "tens of thousands of jobs."[60]

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.[61] The bulk of those aggregated costs arise from the obligations imposed on major contractors — less than 1,000 firms qualify for the designation[62] — 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)[63]; the FAR Council estimates those annual costs for the 30 percent of major contractors who do disclose emissions data at $208,000.[64] 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. 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.[65] In sum, measured against the baseline set by the MQD case law, the Proposed Rule cannot be properly understood as "economically significant."[66]

[54] West Virginia v. EPA, 597 U.S. 697, 721, 142 (2022).
[55] Governing for Impact comment on FAR Case 2021-015; RIN 9000-AO32; Fed. Reg. Vol. 87, 68312 (Feb. 10, 2023), https://governingforimpact.org/wp-content/uploads/2023/02/Federal-Contractor-Climate-Disclosure.pdf.
[56] UARG at 322.
[57] *Id.*
[58] Burwell at 485 (emphasis added).
[59] COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 FR 61402-01, (Nov. 5, 2021).
[60] West 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)).
[61] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68322 (Nov. 14, 2022).
[62] *Id.* at 68321.
[63] *Id.* at 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.
[64] *Id.*; *see also* RIA at 20–21, 40.
[65] *Id.* at 68322.
[66] Indeed, in a further sign that the Proposed Rule's breadth does not qualify as "unheralded," 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

Moreover, the costs in the Proposed Rule may even be overestimated, due to developments that post-date the publication of the Proposed Rule. Since the rule was published, the European Union,[67] the SEC,[68] and the State of California[69] have enacted or announced that they will enact policies that contain requirements for parties to inventory their emissions and, in some cases, set science-based targets similar to those required by the Proposed Rule. The emergence of these distinct emissions accounting and disclosure standards may well reduce the incremental implementation cost of the Proposed Rule's requirements because regulated entities may already be subject to similar or identical requirements.

Since the FAR Council issued the Proposed Rule, the European Union finalized its own climate emissions disclosure rules that are even broader than those in the Proposed Rule. Like the Proposed Rule, the EU's Corporate Sustainability Reporting Directive requires certain large companies to disclose Scope 1, 2, and, "where relevant," Scope 3 emissions;[70] disclose the results of climate risk assessments;[71] and provide sustainability targets.[72] The SEC issued its final climate disclosure rule in March 2023 that requires registered companies to disclose Scope 1 and 2 emissions and make other climate-related risk disclosures to the investing public.[73] And in late 2023, the State of California enacted two laws requiring public and private companies that do business in the state to disclose their greenhouse gas emissions (including Scope 1, 2, and 3) and climate-related financial risks.[74]

As the SEC noted in the preamble to its final rule,[75] duplicated requirements could reduce the additional burden that the Proposed Rule creates for regulated entities by decreasing, for example, their "incremental information gathering costs" to the extent that there is overlap in the pieces of information requested by each governmental entity. Additionally, one of the California laws permits companies to satisfy state disclosure requirements even if the disclosure offered to California is prepared in a manner required by a different law or regulation.[76] So even if the precise form of disclosures varied under the Proposed Rule, an entity subject to

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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).

[67] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464 (hereinafter "Corporate Sustainability Reporting Directive").

[68] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024).

[69] SB-261, Greenhouse gases: climate-related financial risk, (Oct. 7, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB261; SB-253, Climate Corporate Data Accountability Act (Oct. 7, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB253.

[70] Corporate Sustainability Reporting Directive at Article 29b(b)(2)(a)(i).

[71] Corporate Sustainability Reporting Directive at Article 29a(2)(a)(i).

[72] Corporate Sustainability Reporting Directive at Article 29a(2)(b).

[73] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21671 (Mar. 28, 2024).

[74] SB-261, Greenhouse gases: climate-related financial risk, (Oct. 7, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB261; SB-253, Climate Corporate Data Accountability Act (Oct. 7, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB253.

[75] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21858-59 (Mar. 28, 2024).

[76] *Id.* at 21887.

both regimes would not need to expend resources meeting two distinct standard processes. Taken together, such overlapping requirements on certain federal contractors could reduce the Proposed Rule's overall impact and therefore weigh against any finding of "majorness."

The FAR Council should consider incorporating a discussion and analysis of these regulatory synergies, as the SEC did in its final rule,[77] to further underscore its disclosure regulation's modest scope.

C. The Final Rule should incorporate a severability clause that explains how various components of the regulation could operate independently.

We believe that all aspects of the Proposed Rule as written are based on substantial and wholly adequate legal authorities. However, as noted above, recently some courts – especially district courts – have come to differing conclusions about the scope of the FPASA authority, some of which contradict long-standing precedent.[78]

Given this newly-fragmented legal landscape, and as we recommended in our initial comment,[79] we urge the FAR Council to incorporate an administrative severability clause into the finalized rule, as the the Administrative Conference of the United States recommends "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."[80]

The Supreme Court addressed the issue of administrative severability in *K-Mart Corp. v. Cartier*.[81] 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."[82] This test closely tracks that of severability in the legislative context,[83] and was perhaps more neatly articulated in a subsequent D.C. Circuit case that 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.[84] 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 affirmative answer to the two component questions of the severability test."[85] (Note also that nothing in the

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[77] *Id.* at 21835, 21886-88.
[78] *See supra* Section A.
[79] Governing for Impact comment on FAR Case 2021-015; RIN 9000-AO32; Fed. Reg. Vol. 87, 68312 (Feb. 10, 2023), https://governingforimpact.org/wp-content/uploads/2023/02/Federal-Contractor-Climate-Disclosure.pdf.
[80] "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; *see also* Adelaide Duckett & Donald L. R. Goodson, Administrative Severability, Institute for Policy Integrity, (Sept. 2023), https://policyintegrity.org/files/publications/Administrative_Severability_Issue_Brief_v2.pdf.
[81] 486 U.S. 281 (1988).
[82] K-Mart at 294.
[83] *See e.g.*, Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987).
[84] *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.
[85] 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*). Yet because the Supreme Court has never addressed the issue, ACUS nonetheless recommends that agencies incorporate severability provisions into appropriate regulations. ACUS recommendation at 2; see, 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);

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.")[86]

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."[87] 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."[88] 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 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.[89] In sum, the mere recitation of an administrative severability clause may not prove sufficient on its own; instead, agencies seeking to win the broadest judicial deference need to also explain *how* different components of a rule could function in the absence of potentially severable components.

To ensure that the FAR Council can implement as much of the regulatory scheme as possible as on-schedule as possible, it should follow the SEC's lead[90] and include a severability clause in the Final Rule and detailed severability discussion in the Final Rule's preamble.

There are several ways to divide the rule into severable, independently operational parts, and we suggested one in our initial comment.[91] To provide further examples, the Scope 1, 2, and 3 requirements can operate independently of any of the other components because they are self-contained calculations. Similarly, the climate risk disclosures for major contractors required by 23.XX03(b)(1) and defined in 23.XX02(2)(ii) could operate independently of Scope 1, 2, and 3 disclosures, because an entity's description of its "climate risk assessment process and any risks identified" could include numerous elements beyond just emissions inventories, like exposure to natural disasters and pollution. Of course, we offer these merely as examples; no doubt, other rationales exist to justify the independent operation of various components of the Proposed Rule in the event of a partial invalidation.

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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.

86 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).

87 ACUS recommendation at 4.

88 *Id.* at 2.

89 253 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).

90 The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21829 (Mar. 28, 2024).

91 Governing for Impact comment on FAR Case 2021-015; RIN 9000-AO32; Fed. Reg. Vol. 87, 68312 (Feb. 10, 2023), https://governingforimpact.org/wp-content/uploads/2023/02/Federal-Contractor-Climate-Disclosure.pdf.

In conclusion, we strongly support the FAR Council's efforts to implement the climate emissions and risk disclosure requirements. Our analysis underscores the proposal's legal soundness in the face of adverse FPASA case law and the MQD. It also suggests that the FAR Council should take into account overlapping regulatory regimes in its calculation of the incremental costs of the rule. Finally, we encourage the FAR Council to include a well-reasoned severability clause in the Final Rule. We appreciate the opportunity to share this information.

Sincerely,

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