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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHEAST TEXAS, *et al*,	§	
Plaintiffs	§	NO. 16-CV-00425
vs.	§	
ANNE RUNG, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, et al.	§	
Defendants.		

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT THEREOF, WITH REQUEST FOR EXPEDITED BRIEFING SCHEDULE AND HEARING

Plaintiffs Associated Builders and Contractors of Southeast Texas, *et al*, hereby move on an emergency basis for a temporary restraining order and preliminary injunction against Defendants pursuant to Federal Rule of Civil Procedure 65, to prevent Defendants from implementing or enforcing Executive Order 13673 issued by the President on July 31, 2014. *See* Ex. 1, 79 Fed. Reg. 45309 (Aug. 5, 2014), as amended, 80 Fed. Reg, 58807 (Aug. 26, 2016) ("the Executive Order"). Plaintiffs specifically seek to enjoin the final rule promulgated by the Federal Acquisition Regulatory ("FAR") Council. *See* Ex. 2, 81 Fed. Reg. 58562 (Aug. 25, 2016) ("FAR Rule"). Plaintiffs also seek to enjoin the United States Department of Labor's ("DOL's") guidance regarding the FAR Rule, incorporated by reference therein. *See* Ex. 3, 81 Fed. Reg. 58654 (Aug. 25, 2016). The foregoing Rule and Guidance are scheduled to go into

effect on **October 25, 2016**, absent preliminary injunctive relief, causing irreparable harm to Plaintiffs' government contractor members.

As further explained in Plaintiffs' Brief in support of and made part of this Motion, as well as Plaintiffs' previously filed Complaint [ECF 1], the unprecedented Executive Order, FAR Rule, and DOL Guidance exceed the authority of the President, FAR Council, and DOL, violate and are preempted by numerous acts of Congress, infringe Plaintiffs' First Amendment and Due Process rights under the Constitution, and are arbitrary and capricious and not in accordance with applicable law. This Court is therefore authorized to enjoin the foregoing orders and actions pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, and related statutes.

As further demonstrated below, and in comments made part of the Administrative Record as well as the attached Affidavits, the standards for temporary restraining order and/or preliminary injunction are met here. Plaintiffs are likely to succeed on the merits; Plaintiffs will suffer irreparable harm in the absence of an injunction preserving the status quo; the balance of harms favors the Plaintiffs; and an injunction that preserves the status quo of many decades pending a final ruling on the merits is in the public interest.

Because of the October 25, 2016 effective date of the FAR Rule, which the FAR Council has arbitrarily failed and refused to delay in response to reasonable requests from the regulated business community, an expedited briefing schedule and hearing are requested. A proposed order is also attached.

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I. BRIEF IN SUPPORT OF MOTION - INTRODUCTION

Under the guise of increasing efficiency and cost savings in federal contracting, the Executive Order, FAR Rule, and DOL Guidance impose new regulatory burdens on government contractors that exceed and contradict Congress's carefully balanced labor and employment law statutory scheme. Specifically, the Executive Order, FAR Rule, and DOL Guidance compel prospective and existing contractors to publicly disclose and declare whether they have been found to have violated any of fourteen federal labor or employment laws, even though such "violations" have not been finally adjudicated by any court and even if the claimed violations are still being contested or have been settled without a hearing, and without any judicially approved finding of an actual violation of any law.

The potential consequences of such compelled speech are severe. The public disclosures in and of themselves will cause irreparable harm to the reputation of Plaintiffs' members immediately upon their filing, while serving no permissible government interest and indeed conflicting with Congressional intent underlying the labor laws. The disclosures extend far beyond any information previously deemed relevant to government contractors' responsibility to perform government work. Nevertheless, the Executive Order, FAR Rule, and DOL Guidance will now require federal contracting officers for the first time to determine whether the alleged violations of fourteen different labor and employment laws should disqualify contractors from being awarded or continuing to perform government contracts. As further described below, a burdensome new regulatory regime is being created to implement this misguided policy, which again exceeds the Executive's authority and violates the Due Process rights of government contractors, at considerable cost and with no benefits to taxpayers.

II. STATEMENT OF FACTS

A. Executive Order 13673

On July 31, 2014 President Barack Obama issued Executive Order 13673. As subsequently amended, the Executive Order purports to "increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws." 79 Fed. Reg. 45309.

The Executive Order requires that "[f]or procurement contracts for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds $500,000, each agency shall ensure that provisions in solicitations require that the offeror represent, … whether there has been any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor, rendered against the offeror within the preceding 3-year period for violations of any of the following labor laws and Executive Orders (labor laws)": (1) the Fair Labor Standards Act; (2) the Occupational Safety and Health Act of 1970; (3) the Migrant and Seasonal Agricultural Worker Protection Act; (4) the National Labor Relations Act; (5) the Davis-Bacon Act; (6) the Service Contract Act; (7) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity); (8) Section 503 of the Rehabilitation Act of 1973; (9) the Vietnam Era Veterans' Readjustment Assistance Act of 1974; (10) the Family and Medical Leave Act; (11) Title VII of the Civil Rights Act of 1964; (12) the Americans with Disabilities Act of 1990; (13) the Age Discrimination in Employment Act of 1967; (14) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors); and (15) "equivalent State laws, as defined in guidance issued by the Department of Labor." 79 Fed. Reg. 45309.

Pursuant to the Executive Order, contracting officers are required to consider the information provided by the offeror in determining "whether an offeror is a responsible source

that has a satisfactory record of integrity and business ethics, after reviewing the guidelines set forth by the Department of Labor and consistent with any final rules issued by the Federal Acquisition Regulatory (FAR) Council," notwithstanding the fact that the "violations" that require reporting may not be final decisions or determinations, are not confined to performance of past government contracts, and/or have not been preceded by a hearing or been made subject to judicial review. *Id.*[1]

The Executive Order imposes similar requirements on subcontractors for any subcontract where the estimated value exceeds $500,000. The Executive Order further requires the FAR Council to "propose such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out [the Executive Order], and shall issue final regulations in a timely fashion after considering all public comments, as appropriate." *Id.*[2] The Executive Order further requires DOL to issue guidance to assist agencies in determining whether the disclosed determinations were issued for "serious, repeated, willful, or pervasive violations" of the fourteen labor laws. *Id*. Many of the laws themselves do not recognize such terminology with regard to violations of their provisions.

The Executive Order also provides that contractors and subcontractors who enter into contracts for non-commercial items over $1 million agree not to enter into any mandatory pre-

[1] Prior to the issuance of the Executive Order, federal agency contracting officers generally made "responsibility determinations" relating to integrity and business ethics solely as to serious crimes or acts of fraud or similarly serious civil matters involving offerors. *See, e.g.,* CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation*, at 6 (Jan. 4, 2013). As conceded in the preamble to the new FAR Rule, the government previously recognized that "contracting officers generally lack the expertise and tools to assess the severity of labor law violations brought to their attention and therefore cannot easily determine if a contractor's actions show a lack of integrity and business ethics." 81 Fed. Reg. at 58564.

[2] The FAR Council is a federal agency charged with assisting in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government, in accordance with the Office of Federal Procurement Policy ("OFPP") Act, 41 U.S.C § 1301, *et seq.* Defendants in this case are the agency representatives of the statutorily designated members of the FAR Council, chaired by the Administrator of the Office of Federal Procurement Policy.

dispute arbitration agreement with their employees or independent contractors on any matter arising under Title VII of the Civil Rights Act, as well as any tort related to or arising out of sexual assault or harassment.

The Executive Order also requires that all covered contractors inform their employees in each paycheck of their number of hours worked, overtime calculations (for non-exempt employees), rates of pay, gross pay and additions or deductions from pay, and whether they have been classified as independent contractors.

B. The FAR Rule and DOL Guidance Implementing The Executive Order.

On August 25, 2016, following public comment on a proposed rule, including strong opposition from Plaintiffs and many other groups representing government contractors, the FAR Council published the final FAR Rule that is being challenged in Plaintiffs' Complaint, setting an effective date of October 25, 2016. 81 Fed. Reg. 58562. That same day, DOL published its Guidance further implementing the Executive Order. 81 Fed. Reg. 58654.

As called for by the Executive Order, but in violation of the Constitution and other applicable law, the FAR Rule and DOL Guidance require federal contractors and subcontractors for the first time to disclose any "violations" of the federal labor laws set forth in the Executive Order prior to any procurement for federal government contracts/subcontracts exceeding $500,000, in addition to requiring updated disclosures of labor law violations every six months while performing covered government contracts.[3] The FAR Rule and DOL Guidance make clear that the required disclosures include non-final administrative merits determinations, regardless of the severity of the alleged violation, or whether a government contract was involved, and

[3] The FAR Rule requires the violations to be disclosed by contractors, on the government's public website, the Federal Awardee Performance and Integrity Information System (FAPIIS). 81 Fed. Reg. 58565.

regardless of whether a hearing has been held or an enforceable decision issued. 81 Fed. Reg. 58668.

Specifically, for any alleged violation of the National Labor Relations Act, DOL's Guidance states that covered contractors must publicly disclose, *inter alia*, any complaint against them issued by the General Counsel of the National Labor Relations Board (NLRB), even if said complaint has not yet been adjudicated before an Administrative Law Judge or the Board itself, and even if no court has yet enforced any order of the Board as to the complaint. 81 Fed. Reg. 58668. The General Counsel of the NLRB issues more than 1200 such unfair labor practice complaints each year, many of which are ultimately dismissed as lacking in merit, in whole or in part, by an Administrative Law Judge or by the NLRB. Even those complaints ultimately found to have merit by the NLRB are frequently denied enforcement by courts of appeals. *See* www.nlrb.go/news-outreach/graphs-data/charges-and-complaints/.

For alleged violations of the Fair Labor Standards Act, Davis-Bacon Act, Service Contract, FMLA, or Executive Order 13658, covered contractors must publicly disclose, *inter alia*, non-final determinations by DOL's Wage Hour Division, including WH-56 "Summary of Unpaid Wages" or any Wage Hour Division letter, notice or other document assessing civil monetary penalties, even if such forms or documents have not yet been adjudicated before an Administrative Law Judge or Administrative Review Board, and even if no court has yet enforced any WH order. 81 Fed. Reg. 58666. DOL initiates more than 11,000 of these Wage Hour "cases" against employers each year. *See* www.dol.gov/whd/statistics/statstables.htm. A substantial percentage of them are ultimately dismissed or settled without any finding of merit. 81 Fed. Reg. 58666.

For alleged violations of the Occupational Safety and Health Act, covered contractors must report citations, which are non-final determinations by OSHA, *inter alia*, even though they have not been adjudicated before an Administrative Law Judge or OSHA Review Commission, and even if no court has yet enforced any such determination: an order of reference filed with an administrative law judge. 81 Fed. Reg. 58667. OSHA issues many thousands of citations against employers each year, 75 percent of which are identified by the agency as "serious" violations. *See* www.osha.gov/oshstats/. It is very common, however, for such citations to be reclassified to "other than serious" by OSHA after they are contested.

For alleged violations of laws enforced by the Office of Federal Contract Compliance Programs (OFCCP), DOL's Guidance states *inter alia* that covered contractors must publicly disclose such non-final determinations as a show cause notice for failure to comply with the requirements of Executive Order 11246, Section 503 of the Rehabilitation Act, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974. 81 Fed. Reg. 58667.

For alleged violations of discrimination laws enforced by the Equal Employment Opportunity Commission (EEOC), DOL's Guidance states that covered contractors must disclose any non-final letter of determination that reasonable cause exists to believe that an unlawful employment practice (including retaliation) has occurred or is occurring. 81 Fed. Reg. 58665. The EEOC issues more than 3000 reasonable cause notices each year, but litigates fewer than 150 such cases per year, and a significant percentage of such cases are ultimately found to lack merit. *See* www.eeoc.gov.

The FAR Rule further requires each contracting agency's contracting officers to determine whether companies' reported violations of the identified labor laws render such

offerors "non-responsible" based on "lack of integrity and business ethics." The FAR Rule, like the Executive Order, requires each contracting agency to designate an agency labor compliance advisor to assist contracting officers in determining whether a company's actions rise to the level of a lack of integrity or business ethics. The Rule also requires each contractor/subcontractor who is forced to report violations of labor laws to demonstrate "mitigating" efforts and/or enter into remedial agreements or else be subject to a potential finding of non-responsibility for contract award, suspension, debarment, contract termination, or nonrenewal.

The DOL's Guidance further defines the terms ''serious,'' ''repeated,'' 'willful,'' and ''pervasive'' for all of the above referenced labor law violations, but does so in a manner that creates a different set of criteria than those appearing in the statutes themselves. 81 Fed. Reg. 58723-24.

Absent injunctive relief by this Court, the stated effective date of the FAR Rule is October 25, 2016. For the first six months following the implementation of the Rule, October 25, 2016 to April 24, 2017, prime contractors (including a number of Plaintiffs' members) will be compelled to make disclosures on solicitations (and resulting contracts) with an estimated value of $50 million or more. Starting on April 25, 2017, the prime contractor disclosure requirements will apply to all solicitations (and resulting contracts) with an estimated value of merely $500,000 or more. Starting on October 25, 2017, subcontractor disclosures are required for any solicitation (or resulting contract) valued at $500,000 or more.[4]

[4] According to published reports, the necessary electronic portal on which government contractors are supposed to file their newly required disclosures is not yet available for use. *See* Clark, *Contractors Group Files Suit Against 'Fair Pay and Safe Workplaces,'* posted at www.govexec.com/contracting/2016/10/. For this and other reasons, numerous government contractor associations have asked the FAR Council to delay the effective date of the new Rule. *Id*. The FAR Council has so far not agreed to any delay in the opening phase of the Rule's requirements, which remains Oct. 25, 2016.

III. LEGAL STANDARD FOR GRANTING A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION.

The standards for securing a temporary restraining order or preliminary injunction are substantively the same. Plaintiffs must demonstrate (1) a substantial likelihood of success on the merits of their case; (2) a substantial threat of irreparable injury; (3) that the threatened injury outweighs any damage that the injunctive order might cause the Defendants; and (4) that the order will not be adverse to the public interest. *Women's Med. Ctr. v. Bell,* 248 F .3d 411, 418-20, n.15 (5th Cir. 2001); *Dallas Cowboys Cheerleaders v. Scoreboard Posters, Inc.,* 600 F.2d 1184, 1187 (5th Cir. 1979); *Barton v. Huerta,* 2014 WL 4088582, at *I (N.D. Tex. 2014), *affd,* 613 F.App'x 426 (5th Cir. 2015). To preserve the status quo, federal courts in this Circuit have regularly enjoined federal agencies from implementing and enforcing new regulations pending litigation challenging them. *See, e.g., Texas v. U.S.,* 787 F.3d 733 (5th Cir. 2015) (enjoining executive order inconsistent with immigration statutes)*; Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080 (11th Cir. 2013) (affirming preliminary injunction of new DOL rule during pendency of the action); *Nat'l Fed'n of Ind. Bus. v. Perez,* Case No. 5:16-cv-00066-C (N.D. Tex. June 27, 2016), appeal pending (5th Cir.) (preliminarily enjoining DOL's "persuader" rule as violative of Congressional intent under the LMRDA). Here, all four factors strongly support granting injunctive relief, as will be shown in the remainder of this brief.

IV. STANDING AND RIPENESS

Plaintiffs have standing to bring this action, and it is ripe for review. As set forth in attached affidavits, Plaintiffs are Texas and/or national trade associations whose members regularly bid on and are awarded government contracts exceeding the threshold amounts covered by the Executive Order and the new FAR Rule. Many of the Plaintiff associations' members will be irreparably harmed by the Executive Order and the FAR Rule in their exercise of First

Amendment and Due Process rights as bidders and awardees of government contracts exceeding the threshold amounts covered thereby. *See* Ex. 4, Affidavit of ABC Vice President Ben Brubeck; Ex. 5, Affidavit of NASCO Executive Director Stephen Amitay; s*ee* additional ABC and NASCO comments submitted to the OFPP at Exs. 6-7; *See* also numerous comments opposing the Rule and Guidance at www.regulations.gov.

The association Plaintiffs have standing to bring this action on behalf of their members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3) neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members. *See* Brubeck and Amitay Affidavits.

As further explained below, Plaintiffs' government contractor members will be immediately and irreparably harmed if the Rule is allowed to go into effect. They will be compelled to disclose so-called "violations" of the fourteen labor laws incorporated under the FAR Rule, even where such violations have not yet been finally adjudicated or have been settled without a hearing or final decision by a court. Such disclosures will be immediately required for all bidders on covered government contracts, which include Plaintiffs' members. Thus, the infringement of the First Amendment rights of Plaintiffs' employer members will occur immediately after October 25, 2016 for all solicitations of $50 million or more, and after April 25, 2017 for all solicitations merely $500,000 or more. The Executive Order, FAR Rule, and DOL Guidance are therefore ripe for review. *See Texas v. Dept. of Interior*, 497 F.3d 491 (5th Cir. 2007) (finding challenge to final administrative regulations ripe for review).

V. ARGUMENT

A. Plaintiffs Have A Substantial Likelihood Of Success On The Merits.

In their Complaint, Plaintiffs challenge the Executive Order, FAR Rule, and DOL Guidance on multiple independent grounds, each of which on its own is enough to render these government actions void and unenforceable.[5] Each of these grounds is discussed below.

1. The Executive Order, FAR Rule, and DOL Guidance Violate the First Amendment.

As explained above, any bidder on a solicitation occurring after the new FAR Rule goes into effect will suffer an infringement of their First Amendment rights in the form of "compelled speech." This is so because the Executive Order, FAR Rule, and DOL Guidance impose an immediate, public disclosure requirement that obligates federal contractors and their subcontractors for the first time to publicly disclose any "violations" of the fourteen federal labor laws occurring since October 25, 2015, regardless of whether such alleged violations occurred while performing government contracts, and regardless of whether such violations have been finally adjudicated after a hearing or settled without a hearing, or even occurred at all.

It is well settled that the First Amendment protects not only the right to speak but also the right not to. For this reason, government compulsion of speech has been repeatedly been found to violate the Constitution. *See Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 797 (1988) (overturning law requiring fundraisers to disclose retained revenues to potential donors); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W.Va. State Bd. of Educ. v.*

[5] The unlawful Executive Order is subject to judicial scrutiny because it is being enforced by Executive Branch officials, *i.e.*, the Defendants. The FAR Council, a federal agency operating within the Executive Branch, has implemented the President's unlawful Executive Order by issuing the new FAR Rule. The DOL, a federal agency also operating within the Executive Branch, has implemented the President's unlawful Executive Order by issuing the Guidance incorporated by reference in the new Rule. Therefore, the Executive Order may be challenged by Plaintiffs. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (permitting a challenge to the constitutionality of an executive order based on the DOL's implementation of a rule enforcing the unconstitutional executive order).

Barnette, 319 U.S. 624 (1943); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S. 47, 61 (2006). *See also Texas State Troopers Ass'n v. Morales*, 10 F. Supp.2d 628 (N.D. Tx. 1998) ("[T]he First Amendment requires that the State not dictate the content of speech absent necessity, and then, only by means precisely tailored.").

Under the DOL Guidance, the FAR Rule will require contractors/subcontractors to report that they have violated one or more labor laws and to publicly identify the "labor law violated" along with the case number and agency that has allegedly so found. FAR Rule 22.2004-2, 81 Fed. Reg. 58641. Far from being narrowly tailored, the disclosure requirement forces contractors to disclose an unprecedented list of court actions, arbitrations, and "administrative merits determinations," even where there has been no final adjudication of any violation at all, and regardless of the severity of the violation. 81 Fed. Reg. at 58664. As noted above at pp. 5-7, thousands of "administrative merits determinations" are issued against employers of all types each year, many of which are later dismissed or settled and most of which are issued without benefit of a hearing or review by any court. The arbitration decisions and civil determinations, including preliminary injunctions, that will have to be reported under the FAR Rule are likewise not final and are subject to appeal. The Executive Order's unprecedented requirement, as implemented by the FAR Rule and DOL Guidance, thus compels contractors to engage in public speech on matters of considerable controversy adversely affecting their public reputations, and thereby infringing on contractors' rights under the First Amendment.

In *National Association of Manufacturers v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), on rehearing, 800 F.3d 518 (D.C. Cir. 2015), rehearing *en banc* denied, 2015 U.S. App. LEXIS 19539 (D.C. Cir. Nov. 9, 2015), the D.C. Circuit held that a similarly compelled public reporting requirement violated the First Amendment. There, an SEC rule required private businesses to

disclose their use of "conflict minerals" (minerals obtained from war zones). The court found that using such minerals, and disclosure of such use, was "controversial" in nature. The court therefore required that the government bear a heavy burden to prove that forcing businesses to speak publicly about such activities in the form of public reports was narrowly tailored to support a compelling government interest. Rejecting the government's claim that similar reports were "standard," the appeals court found that the government failed to meet its burden because the claim that the compelled reports would achieve the purported government interest was based on speculation. 800 F.3d. at 530. The appeals court further took issue with the government's attempt to force companies to "stigmatize" themselves by filing the required reports, stating: "Requiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so." *Id*.

The Executive Order, FAR Rule, and DOL Guidance share the same constitutional defect as the conflict minerals rule in *NAM v. SEC,* only more so. The Order, Rule, and Guidance compel government contractors to "publicly condemn" themselves by stating that they have violated one or more labor or employment laws. The reports must be filed with regard to merely *alleged* violations, which the contractor may be vigorously contesting or has instead chosen to settle without an admission of guilt, and therefore without a hearing or final adjudication. The disclosures are much broader than required to achieve the Executive Order's stated interest of disclosing matters demonstrating lack of integrity and business ethics. By DOL's own admission, many of the reported violations will not be used to make that determination. 81 Fed. Reg. 58664.

It must also be noted that the FAR Council and DOL have failed to support the basic premise of the Executive Order and the new Rule, namely that public disclosure of non-

adjudicated determinations of labor law violations on private projects correlates in any way to poor performance on government contracts. The studies cited by the FAR Council for this premise, 81 Fed. Reg. at 58564, did not examine the universe of administrative merits determinations, regardless of severity. Whatever attenuated relationship they claimed to show between labor law compliance and performance, none of the studies purported to show a relationship between *non-adjudicated allegations* of labor law violations and performance. Instead, the various studies cited in the Rule's preamble rely on the most severe findings of labor violations by agencies and courts, the vast majority of which are based on final, adjudicated decisions, not mere complaints or allegations. In any event, the Executive Order, the FAR Rule, and DOL have expanded their brief far beyond any claimed impact on government procurement and instead rely entirely on speculation in claiming that the burdensome new disclosures of non-final determinations demonstrate any likelihood of poor performance on government contracts.

Finally, it is settled in this circuit that government contractors are entitled to the same First Amendment protections as other citizens, and the government's procurement role does not entitle it to compel speech as the price of maintaining eligibility to perform government contracts. *See O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996) (First Amendment applied to government contractor's right to placement on list of contractors eligible for awards); *see also Board of County Commissioners v Umbehr,* 518 U.S. 668, 685 (1996); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech."). *See also Oscar Renda Contracting, Inc., v. City of Lubbock, Tex*., 463 F.3d 378 (5th Cir. 2006) (applying these holdings to bidders for new contracts). It must be observed that the Executive Order, FAR Rule, and DOL Guidance require reports of

violations to be filed by existing government contractors as well as those who have "commercial relationships" with the government, in addition to new bidders. 80 Fed. Reg. at 30553.

For all of the foregoing reasons, the Executive Order, the FAR Rule, and the DOL Guidance, must be found to violate the First Amendment and must be preliminarily enjoined to prevent irreparable harm to Plaintiffs' members from the compelled speech that is in no way narrowly tailored to achieve any compelling government interest.

2. The Executive Order, FAR Rule and DOL Guidance Violate the Due Process Rights Of Government Contractors and Offerors

Courts have long held that contractors and offerors are entitled to due process before being disqualified from performing government contracts. *See Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953 (D.C. Cir. 1980), applying the due process clause of the Fifth Amendment. As the court there held, government contractors and bidders have a "liberty" interest in the right to be "free from stigmatizing governmental defamation having an immediate and tangible effect on its ability to do business." *Id*. The FAR Rule violates the due process rights of Plaintiffs' government contractor members by compelling them to report and defend against non-final agency allegations of labor law violations without being entitled to a hearing at which to contest such allegations.

As a matter of Constitutional due process, under every one of the statutes incorporated by reference in the Executive Order, FAR Rule, and DOL Guidance, any employer faced with an administrative merits determination has a right to a hearing before an Administrative Law Judge, appeal to the head(s) of the agency involved, and judicial review before enforcement of any such determination takes place. See, e.g., *Brennan v. Winters Battery Mfg. Co*., 531 F.2d 317, 324-25 (6th Cir. 1975). The FAR Rule disregards government contractors' due process rights, however, by directing contracting officers to consider as potentially disqualifying any violations that have

been found by an administrative agency (or court), including those determinations that have not yet been contested in a hearing or judicially reviewed.

Reporting by "other sources" creates related due process concerns. Based on "similar information obtained through other sources," the DOL's Guidance permits contracting officers to take remedial measures up to and including contract termination and referral to the agency's suspending and debarring official. 81 Fed. Reg. at 58718. This allows a contractor to be punished as a consequence of an unknown source's allegation of a labor law violation. The masked source could be a labor union seeking to organize the contractor, filing baseless labor law claims in the hopes that a complaint will be issued that forces the contractor to file a public notice of "violation." Congress could not have envisioned this faceless "other source" reporting requirement in any of its 14 labor law schemes, and the Constitution's due process clause certainly forecloses it. For this reason as well, the Executive Order, FAR Rule, and DOL Guidance must be vacated.

3. The Executive Order, FAR Rule, and DOL Guidance, Separately and Together, Significantly Exceed The President's, FAR Council's, And DOL's Authority And Are Otherwise Preempted By Federal Labor Laws.

As explained above, the public disclosure and disqualification requirements now being imposed on federal contractors and subcontractors are nowhere found in or authorized by the statute on which the Executive Order, FAR Rule, and DOL Guidance relies, the Federal Property and Administrative Services Act (FPASA), 40 U.S.C. 101 and 121. During the course of many decades, neither Congress, nor the FAR Council, nor the DOL has deemed it necessary, practicable or appropriate for government contracting officers to make responsibility determinations based on alleged violations of private sector labor and employment laws. Instead, in those instances where Congress has decided to permit the suspension or debarment of

government contractors, it has done so expressly in a select category of labor laws that directly apply to government contracts, and even then only after final adjudications of alleged violations by the DOL, subject to judicial review, with full protection of contractors' due process rights.

It is well settled that "when Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken." *Texas v. Department of Interior*, 497 F.3d at 502, citing *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."). As the Fifth Circuit has further held: "[A]dministrative agencies and the courts are 'bound, not only by the ultimate purposes Congress has selected but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.'" *Quoting MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 231, n.4 (1994). *See also Middlesex Cnty Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 20-21 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under [other federal laws]." *See, e.g., Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81, 91 (2002) (overturning DOL's exercise of generally delegated rulemaking authority, where the agency "exercise[d] its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law").

In the present case, the Executive Order, FAR Rule, and DOL Guidance unlawfully arrogate to contracting agencies the authority to require contractors to publicly disclose mere allegations of labor law violations, and then to disqualify or coerce contractors based on their alleged violations of such laws. By these actions, the Executive Branch has departed from

Congress's explicit instructions dictating how violations of the labor law statutes are supposed to be addressed.

The Supreme Court overturned a very similar government action in *Wisconsin Dept. of Ind. v. Gould,* 475 U.S. 282, 286 (1986). There a state attempted by law to disqualify government contractors who had been found by judicially enforced orders to have violated the NLRA on multiple occasions over a five-year period. The Supreme Court held that the NLRA foreclosed both "regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [NLRA]." *Id.*[6] As has occurred here, the government defendant in *Gould* defended its disqualification policy by asserting that the agency was merely exercising its spending power as a market participant and that the government could choose with whom it would contract without violating the NLRA's provisions. Rejecting that defense, the Supreme Court held in *Gould* that the government's attempt to disqualify otherwise eligible contractors from performing work for the government was entitled to no exemption from NLRA preemption under the "market participant" doctrine. Instead, the Court found the government's actions were "regulatory" in nature because they disqualified companies from contracting with the government on the basis of conduct unrelated to any work they were doing for the government. *Id.* at 287-288. The holding in *Gould* has been applied equally to the Executive Branch of the federal government. *See Chamber of Commerce v. Reich*, 74 F.3d at 1344 (applying NLRA preemption to federal executive order "encroaching on NLRA's regulatory territory."). These cases require that the Executive Order, FAR Rule, and DOL Guidance be vacated.

[6] The facts of *Gould* actually presented a closer case than is present here because the state only disqualified contractors who were found by "judicially enforced orders" to have violated the NLRA. The current Executive Order and FAR Rule are much more egregious in their violation of federal labor laws, because they allow disqualification of government contractors without waiting for judicial review and enforcement of final agency action.

For similar reasons, none of the other labor laws of general applicability (such as the FLSA, OSHA, and the anti-discrimination laws) referenced in the Executive Order and FAR Rule can be used by the government to disqualify contractors from performing government services. Each of these laws contain "unusually elaborate enforcement provisions." *Kendall v. City of Chesapeake*, 174 F.3d 437, 433 (4th Cir. 1999). None of them include any provision authorizing the federal government to disqualify contractors from performing federal work in response to alleged violations of those labor laws.

The Executive Order, FAR Rule, and DOL Guidance are even more directly in conflict with those labor laws that already specify debarment procedures, after full hearings and final adjudications, for contractors who violate the requirements specifically directed at government contracting, *i.e.*, the DBA, SCA, Rehabilitation Act, VEVRAA, EO 11246, and EO 13658. It cannot be true that Congress gave explicit instructions to suspend or debar government contractors who violate these government-specific labor laws, only after a full hearing and final decision, but intended to leave the door open to government agencies to disqualify contractors from individual contract awards without any of these procedural protections. The DOL Guidance does not offer any support for its overbroad claims in this regard. 81 Fed. Reg. 58658-59.

4. The New Rule And Guidance Are Arbitrary And Capricious And Entitled To No Deference.

The APA, 5 U.S.C. § 706(2)(A), directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."

As explained above, the challenged Rule and Guidance are preempted or contradicted by longstanding labor laws. The FAR Council and the DOL have also failed to give an adequate

explanation for imposing the drastic new requirements set forth in the Rule and Guidance. *See Encino Motorcars*, 2016 U.S. LEXIS 3924, 84 U.S.L.W. 4424 (giving no deference to agencies that change course without taking cognizance of "reliance interests" of the regulated community; and where the policy reversal results in "unexplained inconsistencies.").

The Rule and Guidance do not adequately take into consideration the costs the Rule will impose on contractors and subcontractors, and the entire procurement process. Thus, under FAR Rule and DOL Guidance, complaints issued by a NLRB Regional Director must be reported, even though the allegations in them are based solely on investigatory findings without judicial or quasi-judicial safeguards. Similarly, EEOC determination letters that are issued at the nascent stages of the administrative process must be reported even though they are subject to reversal months or years down the road. These and other non-final findings by a single agency official do not constitute reportable "violations" under any reasonable definition and should not be considered at all in contracting decisions. Furthermore, to contest even decisions by full agency boards, an employer must generally exhaust the administrative process through the agency before challenging the agency action in federal court. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987).

The Fifth Circuit's recent decision in *Gate Guard Services v. Perez*, 792 F.3d 554 (5th Cir. 2015), is instructive. Five years after the DOL investigated Gate Guard for supposedly violating the FLSA, the court awarded the company attorneys' fees as a result of DOL's frivolous and "oppressive" conduct investigating and litigating the matter. *Id*. at 562). The court found among other misconduct that the DOL deliberately shredded investigation notes, employed an investigator unqualified to undertake the investigation, surprised an employee at the facility when it was known company attorneys would not be present, inflated the damages

calculation by about $4 million, and continued litigating the case "despite overwhelming contradictory evidence." *Id*. at 562-63.

Absent injunctive relief, Plaintiffs' members will be required to report pending "violations" like those in *Gate Guard*, even though years later they may be vindicated—such as by demonstrating to a court that the government's case wholly lacked merit. *See also, e.g., Heartland Plymouth Court MI, LLC v. NLRB,* No. 15-1034, 2016 U.S. App. LEXIS 17688 (D.C. Cir. Sept. 30, 2016) (awarding attorneys fees to employer victim of "oppressive" and "bad faith" administrative determination of the NLRB after years of litigation stemming from an unjustified complaint); *S. New England Tel. Co. v. NLRB*, 793 F.3d 93, 97 (D.C. Cir. 2015) (vacating NLRB decision years later, citing "[c]ommon sense" in resolving the dispute); *EEOC v. Propak Logistics, Inc.*, 884 F. Supp. 2d 433, 441 (W.D.N.C. 2012), *appeal dismissed*, Case No. 12-2249 (4th Cir. Feb. 22, 2013) (finding that the doctrine of laches barred an EEOC lawsuit initiated 7 years after the filing of the underlying EEOC charge), 746 F.3d 145 (4th Cir. 2014) (ordering the EEOC to pay attorney's fees).

These examples of enforcement agency conduct that has later been rejected by the courts illustrate the fallacy and danger of the Guidance's definition of "violation." It remains true that, under the Executive Order and Far Rule, a court's vindication of a contractor's position may well come too late. The damage to a contractor's business and reputation stemming from a reportable "violation" later reversed cannot be undone.

5. The Executive Order, Rule and Guidance Force Massive And Unnecessary Costs On Contractors, Government Agencies, And Taxpayers.

The Rule and Guidance impose significant additional costs and expenses on Plaintiffs and their members, as contractors will incur substantial cost in "looking back" at their "violations" for a period of three years before a contract is offered, which then must be updated every six

months. These new costs will require many Plaintiffs' members to charge higher prices, which may put them at a competitive disadvantage for government bids. Even worse, once contractors have disclosed the violations they will be required to spend additional monies explaining why the allegations are not true (in two forums) and/or identifying any mitigating circumstances that exist.

In response to a recent survey conducted by Plaintiff ABC, more than half the respondents said the FAR Rule's onerous requirements, including reporting alleged violations that firms are still contesting, will force them to abandon the pursuit of federal contracts. 91 percent of respondents said the Rule will impose a significant or extreme burden on their firms. As further detailed in the comments filed by Plaintiff NASCO, NASCO's own survey of its membership established that very few members currently are able to track the information now being sought by the FAR Rule, and that the resources needed to do so will be tremendous. Expenditures will rise for in-house and outside legal counsel, expensive information technology systems, and expanded human resource personnel, negatively affecting the cost, availability, quality, and delivery of these vital protective services.

Unions have already used the new FAR Rule and Guidance as a bargaining chip against NASCO members, by threatening to file questionable unfair labor practice charges with the NLRB if the employer refuses to accede to its demands. The threat of a charge carries more weight than before because if the charges mature into a complaint issued by a NLRB Regional Director, the employer will risk losing the contract. About 87% of NASCO survey respondents have collective bargaining agreements with labor organizations; several have dozens of such agreements. All survey respondents are concerned that the rule if finalized would be used to strong-arm them in negotiations.

6. The Paycheck "Transparency" Requirement Is Unlawful and Arbitrary

The challenged Rule also requires for the first time that contractors provide a document informing individuals of their independent contractor status, in addition to a wage statement that requires burdensome information to be provided regarding wage rates, benefits, and exempt status In addition, DOL's Guidance acknowledges that the determination of independent contractor status under each particular law is governed by that law's definition of "employee", thereby leaving employers uncertain as to what definition should be used. *See* 81 Fed. Reg. at 58713. The burdens imposed by these new requirements do not increase the economy or efficiency of procurement, are not authorized by statute, and are arbitrary and capricious. They should be set aside.

7. The Executive Order and The FAR Council Rule Violate The Federal Arbitration Act.

The Executive Order and the Rule provides that contractors and subcontractors who enter into contracts for non-commercial items over $1 million must agree not to enter into any mandatory pre-dispute arbitration agreement with their employees or independent contractors on any matter arising under Title VII of the Civil Rights Act, as well as any tort related to or arising out of sexual assault or harassment.

The Federal Arbitration Act ("FAA") provides that "[a] written provision in any…contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The FAA "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312, n. 3 (2013). The Court emphasized in *CompuCredit* that this requirement applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." 132 S. Ct. at 669 (citations omitted). The Court stressed that a "congressional command" must be found in an unambiguous statement in the statute, and cannot be gleaned from ambiguous statutory language. *Id*. at 670-73.

By prohibiting the arbitration of certain claims arising under Title VII of the Civil Rights Act, as well as any tort related to or arising out of sexual assault or harassment, in the absence of any congressional command that would override the requirement that arbitration agreements be enforced in accordance with their terms, the Executive Order and the Rule violate the FAA.

B. Plaintiffs Meet The Remaining Three Criteria For A Preliminary Injunction.

1. Plaintiffs Will Suffer Irreparable Harm Unless The New Rules Are Enjoined.

An employer who fails to comply with the Executive Order, as implemented by the FAR Rule and DOL Guidance, is subject to disqualification from government contracts. Once the FAR Rule goes into effect, Plaintiffs' government contractor members' only means of avoiding losing such potential work will be to disclose alleged violations even if the alleged violations have not been fully adjudicated and resolved. Based on the Administrative Record evidence discussed above and the attached declarations, such compelled speech infringes the First Amendment rights of bidders and contractors. Ex.'s 4 and 5, Affidavits of Ben Brubeck and Stephen Amitay; Ex.'s 6 and 7, Supplemental Comments filed by ABC and NASCO.

Once First Amendment rights have been chilled, there is no effective remedy, and it is well established in the Fifth Circuit that infringement of First Amendment rights, "standing alone," constitutes irreparable harm. *See Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535 (5th Cir. 2013) ("We have repeatedly held, … that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Accord, *Opulent Life Church v. City of Holly Springs Miss*., 697 F.3d 279, 295 (5th Cir. 2012) The Executive Order and FAR Rule present an imminent and non-speculative threat to Plaintiffs' members' First Amendment rights by virtue of the fact that their public reports of alleged violations may be used by their competitors and enemies to gain competitive advantage over Plaintiffs and their members. First Amendment violations of the sort imposed by the New Rules have been found to constitute irreparable harm justifying preliminary injunctive relief. *See also Nat'l Solid Waste Mgmt. Ass'n v. City of Dallas*, 903 F. Supp. 2d 446, 470 (N.D. Tex. 2012) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable [harm] is necessary."). The same principles apply to the Fifth Amendment violations of due process outlined above, which similarly deprive Plaintiffs' members of their liberty reputational interests and again constitute irreparable harm.

2. The President, FAR Council, And The DOL Will Not Be Harmed By A Preliminary Injunction.

An order for injunctive relief in the present case will simply preserve the status quo and temporarily retain the same rules and guidelines in effect for government contractor selection that have been in place for decades. There is no evidence that employees or the general public will be harmed as a result of this relief. Thus, there is no harm in requiring federal agencies to continue to follow their existing practices for selecting contractors until this matter can be

concluded. In this regard, mere delay of government enforcement does not constitute sufficient harm to deny injunctive relief. *See Texas v. United States*, 809 F.3d at 186.

3. The Public Interest Will Be Furthered By Injunctive Relief.

Injunctive relief is necessary to protect the public interest. Public policy demands that governmental agencies be enjoined from acting in a manner contrary to the law. *See, e.g., Texas v. United States,* 809 F.3d at 186. Beyond that, it is in the public interest to ensure the delivery of economical and quality services from government contractors to federal government agencies, which will be harmed by the arbitrary and unnecessary burdens imposed by the Executive Order, FAR Rule, and DOL Guidance.

VI. CONCLUSION – SCOPE OF PRAYED FOR RELIEF

For the reasons stated in their Complaint and in this Brief, Plaintiffs pray that the status quo be preserved and that Defendants be preliminary enjoined from implementing and enforcing the Executive Order, FAR Rule, and DOL Guidance in all jurisdictions where Plaintiffs' members and the U.S. government do business, *i.e.*, nationwide. *See Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015); *see also Texas v. U.S.*, 787 F.3d 733 (5th Cir. 2015) (authorizing nationwide injunctions against unlawful federal regulations and/or executive orders). Plaintiffs pray for all other relief, in law or in equity, to which they are justly entitled.

Dated October 13, 2016

Respectfully submitted,

/s/G. Mark Jodon

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CERTIFICATE OF CONFERENCE

I hereby certify that I have complied with the meet and confer requirement in Local Rule CV-7(h). Plaintiffs' attorney conferred with counsel for Defendants via email and telephone regarding the Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Request for oral Argument And Expedited Consideration. Counsel for Defendants stated that the Defendants opposed the requested injunction. The discussions conclusively ended in an impasse, leaving an open issue for the court to resolve. LR CV-7(i).

/s/G. Mark Jodon
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Emergency Motion for Temporary Restraining Order and Preliminary Injunction has been served by electronic mail on the following, this 13th day of October, 2016:

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Federal Register
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Presidential Documents

Title 3—

The President

Executive Order 13673 of July 31, 2014

Fair Pay and Safe Workplaces

By the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 121, and in order to promote economy and efficiency in procurement by contracting with responsible sources who comply with labor laws, it is hereby ordered as follows:

Section 1. *Policy.* This order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws. Labor laws are designed to promote safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. Helping executive departments and agencies (agencies) to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance.

Sec. 2. *Compliance with Labor Laws.* (a) Pre-award Actions. (i) For procurement contracts for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds $500,000, each agency shall ensure that provisions in solicitations require that the offeror represent, to the best of the offeror's knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor, rendered against the offeror within the preceding 3-year period for violations of any of the following labor laws and Executive Orders (labor laws):

(A) the Fair Labor Standards Act;

(B) the Occupational Safety and Health Act of 1970;

(C) the Migrant and Seasonal Agricultural Worker Protection Act;

(D) the National Labor Relations Act;

(E) 40 U.S.C. chapter 31, subchapter IV, also known as the Davis-Bacon Act;

(F) 41 U.S.C. chapter 67, also known as the Service Contract Act;

(G) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);

(H) section 503 of the Rehabilitation Act of 1973;

(I) 38 U.S.C. 3696, 3698, 3699, 4214, 4301–4306, also known as the Vietnam Era Veterans' Readjustment Assistance Act of 1974;

(J) the Family and Medical Leave Act;

(K) title VII of the Civil Rights Act of 1964;

(L) the Americans with Disabilities Act of 1990;

(M) the Age Discrimination in Employment Act of 1967;

(N) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors); or

(O) equivalent State laws, as defined in guidance issued by the Department of Labor.

(ii) A contracting officer, prior to making an award, shall, as part of the responsibility determination, provide an offeror with a disclosure pursuant to section 2(a)(i) of this order an opportunity to disclose any steps taken to correct the violations of or improve compliance with the labor laws listed in paragraph (i) of this subsection, including any agreements entered into with an enforcement agency. The agency's Labor Compliance Advisor, as defined in section 3 of this order, in consultation with relevant enforcement agencies, shall advise the contracting officer whether agreements are in place or are otherwise needed to address appropriate remedial measures, compliance assistance, steps to resolve issues to avoid further violations, or other related matters.

(iii) In consultation with the agency's Labor Compliance Advisor, contracting officers shall consider the information provided pursuant to paragraphs (i) and (ii) of this subsection in determining whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics, after reviewing the guidelines set forth by the Department of Labor and consistent with any final rules issued by the Federal Acquisition Regulatory (FAR) Council pursuant to section 4 of this order.

(iv) For any subcontract where the estimated value of the supplies acquired and services required exceeds $500,000 and that is not for commercially available off-the-shelf items, a contracting officer shall require that, at the time of execution of the contract, a contractor represents to the contracting agency that the contractor:

(A) will require each subcontractor to disclose any administrative merits determination, arbitral award or decision, or civil judgment rendered against the subcontractor within the preceding 3-year period for violations of any of the requirements of the labor laws listed in paragraph (i) of this subsection, and update the information every 6 months; and

(B) before awarding a subcontract, will consider the information submitted by the subcontractor pursuant to subparagraph (A) of this paragraph in determining whether a subcontractor is a responsible source that has a satisfactory record of integrity and business ethics, except for subcontracts that are awarded or become effective within 5 days of contract execution, in which case the information may be reviewed within 30 days of subcontract award.

(v) A contracting officer shall require that a contractor incorporate into subcontracts covered by paragraph (iv) of this subsection a requirement that the subcontractor disclose to the contractor any administrative merits determination, arbitral award or decision, or civil judgment rendered against the subcontractor within the preceding 3-year period for violations of any of the requirements of the labor laws listed in paragraph (i) of this subsection.

(vi) A contracting officer, Labor Compliance Advisor, and the Department of Labor (or other relevant enforcement agency) shall be available, as appropriate, for consultation with a contractor to assist in evaluating the information on labor compliance submitted by a subcontractor pursuant to paragraph (v) of this subsection.

(vii) As appropriate, contracting officers in consultation with the Labor Compliance Advisor shall refer matters related to information provided pursuant to paragraphs (i) and (iv) of this subsection to the agency suspending and debarring official in accordance with agency procedures.

(b) Post-award Actions. (i) During the performance of the contract, each agency shall require that every 6 months contractors subject to this order update the information provided pursuant to subsection (a)(i) of this section and obtain the information required pursuant to subsection (a)(v) of this section for covered subcontracts.

(ii) If information regarding violations of labor laws is brought to the attention of a contracting officer pursuant to paragraph (i) of this subsection, or similar information is obtained through other sources, a contracting officer shall consider whether action is necessary in consultation with the agency's Labor Compliance Advisor. Such action may include agreements requiring appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations, as well as remedies such as decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official.

(iii) A contracting officer shall require that if information regarding violations of labor laws by a contractor's subcontractor is brought to the attention of the contractor pursuant to subsections (a)(iv), (v) or (b)(i) of this section or similar information is obtained through other sources, then the contractor shall consider whether action is necessary. A contracting officer, Labor Compliance Advisor, and the Department of Labor shall be available for consultation with a contractor regarding appropriate steps it should consider. Such action may include appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations.

(iv) The Department of Labor shall, as appropriate, inform contracting agencies of its investigations of contractors and subcontractors on current Federal contracts so that the agency can help the contractor determine the best means to address any issues, including compliance assistance and resolving issues to avoid or prevent violations.

(v) As appropriate, contracting officers in consultation with the Labor Compliance Advisor shall send information provided pursuant to paragraphs (i)–(iii) of this subsection to the agency suspending and debarring official in accordance with agency procedures.

Sec. 3. *Labor Compliance Advisors.* Each agency shall designate a senior agency official to be a Labor Compliance Advisor, who shall:

(a) meet quarterly with the Deputy Secretary, Deputy Administrator, or equivalent agency official with regard to matters covered by this order;

(b) work with the acquisition workforce, agency officials, and agency contractors to promote greater awareness and understanding of labor law requirements, including recordkeeping, reporting, and notice requirements, as well as best practices for obtaining compliance with these requirements;

(c) coordinate assistance for agency contractors seeking help in addressing and preventing labor violations;

(d) in consultation with the Department of Labor or other relevant enforcement agencies, and pursuant to section 4(b)(ii) of this order as necessary, provide assistance to contracting officers regarding appropriate actions to be taken in response to violations identified prior to or after contracts are awarded, and address complaints in a timely manner, by:

(i) providing assistance to contracting officers and other agency officials in reviewing the information provided pursuant to sections 2(a)(i), (ii), and (v) and 2(b)(i), (ii), and (iii) of this order, or other information indicating a violation of a labor law, so as to assess the serious, repeated, willful, or pervasive nature of any violation and evaluate steps contractors have taken to correct violations or improve compliance with relevant requirements;

(ii) helping agency officials determine the appropriate response to address violations of the requirements of the labor laws listed in section 2(a)(i) of this order or other information indicating such a labor violation (particularly serious, repeated, willful, or pervasive violations), including agreements requiring appropriate remedial measures, decisions not to award a contract or exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official;

(iii) providing assistance to appropriate agency officials in receiving and responding to, or making referrals of, complaints alleging violations by

agency contractors and subcontractors of the requirements of the labor laws listed in section 2(a)(i) of this order; and

(iv) supporting contracting officers, suspending and debarring officials, and other agency officials in the coordination of actions taken pursuant to this subsection to ensure agency-wide consistency, to the extent practicable;

(e) as appropriate, send information to agency suspending and debarring officials in accordance with agency procedures;

(f) consult with the agency's Chief Acquisition Officer and Senior Procurement Executive, and the Department of Labor as necessary, in the development of regulations, policies, and guidance addressing labor law compliance by contractors and subcontractors;

(g) make recommendations to the agency to strengthen agency management of contractor compliance with labor laws;

(h) publicly report, on an annual basis, a summary of agency actions taken to promote greater labor compliance, including the agency's response pursuant to this order to serious, repeated, willful, or pervasive violations of the requirements of the labor laws listed in section 2(a)(i) of this order; and

(i) participate in the interagency meetings regularly convened by the Secretary of Labor pursuant to section 4(b)(iv) of this order.

Sec. 4. *Ensuring Government-wide Consistency.* In order to facilitate Government-wide consistency in implementing the requirements of this order:

(a) to the extent permitted by law, the FAR Council shall, in consultation with the Department of Labor, the Office of Management and Budget, relevant enforcement agencies, and contracting agencies, propose to amend the Federal Acquisition Regulation to identify considerations for determining whether serious, repeated, willful, or pervasive violations of the labor laws listed in section 2(a)(i) of this order demonstrate a lack of integrity or business ethics. Such considerations shall apply to the integrity and business ethics determinations made by both contracting officers and contractors pursuant to this order. In addition, such proposed regulations shall:

(i) provide that, subject to the determination of the agency, in most cases a single violation of law may not necessarily give rise to a determination of lack of responsibility, depending on the nature of the violation;

(ii) ensure appropriate consideration is given to any remedial measures or mitigating factors, including any agreements by contractors or other corrective action taken to address violations; and

(iii) ensure that contracting officers and Labor Compliance Advisors send information, as appropriate, to the agency suspending and debarring official, in accordance with agency procedures.

(b) the Secretary of Labor shall:

(i) develop guidance, in consultation with the agencies responsible for enforcing the requirements of the labor laws listed in section 2(a)(i) of this order, to assist agencies in determining whether administrative merits determinations, arbitral awards or decisions, or civil judgments were issued for serious, repeated, willful, or pervasive violations of these requirements for purposes of implementation of any final rule issued by the FAR Council pursuant to this order. Such guidance shall:

(A) where available, incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful; and

(B) where no statutory standards exist, develop standards that take into account:

(1) for determining whether a violation is ''serious'' in nature, the number of employees affected, the degree of risk posed or actual harm done by the violation to the health, safety, or well-being of a worker, the amount of damages incurred or fines or penalties assessed with

regard to the violation, and other considerations as the Secretary finds appropriate;

(2) for determining whether a violation is ''repeated'' in nature, whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years;

(3) for determining whether a violation is ''willful'' in nature, whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by the requirements of the labor laws listed in section 2(a)(i) of this order; and

(4) for determining whether a violation is ''pervasive'' in nature, the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity;

(ii) develop processes:

(A) for Labor Compliance Advisors to consult with the Department of Labor in carrying out their responsibilities under section 3(d) of this order;

(B) by which contracting officers and Labor Compliance Advisors may give appropriate consideration to determinations and agreements made by the Department of Labor and other agencies; and

(C) by which contractors may enter into agreements with the Department of Labor or other enforcement agency prior to being considered for contracts.

(iii) review data collection requirements and processes, and work with the Director of the Office of Management and Budget, the Administrator for General Services, and other agency heads to improve those processes and existing data collection systems, as necessary, to reduce the burden on contractors and increase the amount of information available to agencies;

(iv) regularly convene interagency meetings of Labor Compliance Advisors to share and promote best practices for improving labor law compliance; and

(v) designate an appropriate contact for agencies seeking to consult with the Department of Labor pursuant to this order;

(c) the Director of the Office of Management and Budget shall:

(i) work with the Administrator of General Services to include in the Federal Awardee Performance and Integrity Information System information provided by contractors pursuant to sections 2(a)(i) and (ii) and 2(b)(i) of this order, and data on the resolution of any issues related to such information; and

(ii) designate an appropriate contact for agencies seeking to consult with the Office of Management and Budget pursuant to this order;

(d) the Administrator of General Services, in consultation with other relevant agencies, shall develop a single Web site for Federal contractors to use for all Federal contract reporting requirements related to this order, as well as any other Federal contract reporting requirements to the extent practicable;

(e) in developing the guidance pursuant to subsection (b) of this section and proposing to amend the Federal Acquisition Regulation pursuant to subsection (a) of this section, the Secretary of Labor and the FAR Council, respectively, shall minimize, to the extent practicable, the burden of complying with this order for Federal contractors and subcontractors and in particular small entities, including small businesses, as defined in section 3 of the Small Business Act (15 U.S.C. 632), and small nonprofit organizations; and

(f) agencies shall provide the Administrator of General Services with the necessary data to develop the Web site described in subsection (d) of this section.

Sec. 5. *Paycheck Transparency.* (a) Agencies shall ensure that, for contracts subject to section 2 of this order, provisions in solicitations and clauses in contracts shall provide that, in each pay period, contractors provide all individuals performing work under the contract for whom they are required to maintain wage records under the Fair Labor Standards Act; 40 U.S.C. chapter 31, subchapter IV (also known as the Davis-Bacon Act); 41 U.S.C. chapter 67 (also known as the Service Contract Act); or equivalent State laws, with a document with information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay. Agencies shall also require that contractors incorporate this same requirement into subcontracts covered by section 2 of this order. The document provided to individuals exempt from the overtime compensation requirements of the Fair Labor Standards Act need not include a record of hours worked if the contractor informs the individuals of their overtime exempt status. These requirements shall be deemed to be fulfilled if the contractor is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required by this subsection.

(b) If the contractor is treating an individual performing work under a contract or subcontract subject to subsection (a) of this section as an independent contractor, and not an employee, the contractor must provide a document informing the individual of this status.

Sec. 6. *Complaint and Dispute Transparency.* (a) Agencies shall ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds $1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise. Agencies shall also require that contractors incorporate this same requirement into subcontracts where the estimated value of the supplies acquired and services required exceeds $1 million.

(b) Subsection (a) of this section shall not apply to contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items.

(c) A contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall not apply with respect to:

(i) employees who are covered by any type of collective bargaining agreement negotiated between the contractor and a labor organization representing them; or

(ii) employees or independent contractors who entered into a valid contract to arbitrate prior to the contractor or subcontractor bidding on a contract covered by this order, except that a contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall apply if the contractor or subcontractor is permitted to change the terms of the contract with the employee or independent contractor, or when the contract is renegotiated or replaced.

Sec. 7. *Implementing Regulations.* In addition to proposing to amend the Federal Acquisition Regulation as required by section 4(a) of this order, the FAR Council shall propose such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order, including sections 5 and 6, and shall issue final regulations in a timely fashion after considering all public comments, as appropriate.

Sec. 8. *Severability.* If any provision of this order, or applying such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

Sec. 9. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an agency or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 10. *Effective Date.* This order shall become effective immediately and shall apply to all solicitations for contracts as set forth in any final rule issued by the FAR Council under sections 4(a) and 7 of this order.

THE WHITE HOUSE,
July 31, 2014.

[FR Doc. 2014–18561
Filed 8–4–14; 8:45 am]
Billing code 3295–F4

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2015–0051, Sequence No. 4]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–90; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of a final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005–90. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov.*

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to the FAR case. Please cite FAC 2005–90 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755.

RULE LISTED IN FAC 2005–90

Subject	FAR case	Analyst
Fair Pay and Safe Workplaces.	2014–025	Delgado.

SUPPLEMENTARY INFORMATION: Summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to the specific item number and subject set forth in the document following this item summary. FAC 2005–90 amends the FAR as specified below:

Fair Pay and Safe Workplaces (FAR Case 2014–025)

DoD, GSA, and NASA are issuing a final rule amending the FAR to implement Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces, amended by E.O. 13683, to correct a statutory citation, and further amended by an E.O. signed today to modify the handling of subcontractor disclosures and clarify the requirements for public disclosure of documents. E.O. 13673 is designed to improve contractor compliance with labor laws and increase efficiency and cost savings in Federal contracting. As E.O. 13673 explains, ensuring compliance with labor laws drives economy and efficiency by promoting ''safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government.'' The E.O. was signed July 31, 2014. The Department of Labor is simultaneously issuing final Guidance to assist Federal agencies in implementation of the E.O. in conjunction with the FAR final rule.

The E.O. requires that prospective and existing contractors on covered contracts disclose decisions regarding violations of certain labor laws, and that contracting officers, in consultation with agency labor compliance advisors (ALCAs), a new position created by the E.O., consider the decisions, (including any mitigating factors and remedial measures), as part of the contracting officer's decision to award or extend a contract. In addition, the E.O. creates new paycheck transparency protections, among other things, to ensure that workers on covered contracts are given the necessary information each pay period to verify the accuracy of what they are paid. Finally, the E.O. limits the use of predispute arbitration clauses in employment agreements on covered Federal contracts. Phase-ins: (1) From October 25, 2016 through April 24, 2017, the prime contractor disclosure requirements will apply to solicitations with an estimated value of $50 million or more, and resultant contracts; after April 24, 2017, the requirements apply to solicitations estimated to exceed $500,000, and resultant contracts. (2) The requirements apply to subcontractors starting October 25, 2017. (3) The decision disclosure period covers labor law decisions rendered against the offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the offer, whichever period is shorter. (4) The paycheck transparency clause applies to solicitations starting January 1, 2017. There is significant impact on small entities imposed by the FAR rule.

Dated: August 10, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Federal Acquisition Circular (FAC) 2005–90 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–90 is effective August 25, 2016 except for FAR Case 2014–025, which is effective October 25, 2016.

Dated: August 11, 2016.

Claire M. Grady,

Director, Defense Procurement and Acquisition Policy

Dated: August 12, 2016.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: August 10, 2016.

William G. Roets,

Acting Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration.

[FR Doc. 2016–19675 Filed 8–24–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 9, 17, 22, 42, and 52

[FAC 2005–90; FAR Case 2014–025; Docket No. 2014–0025, Sequence No. 1]

RIN 9000–AM81

Federal Acquisition Regulation; Fair Pay and Safe Workplaces

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 13673, Fair Pay and Safe Workplaces, which is designed to increase efficiency and cost savings in Federal contracting by improving contractor compliance with labor laws. The Department of Labor is simultaneously issuing final Guidance to assist Federal agencies in

implementation of the Executive Order in conjunction with the FAR final rule.

DATES: *Effective* October 25, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–90, FAR Case 2014–025.

SUPPLEMENTARY INFORMATION:

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II. Overview

A. Background

This final rule implements Executive Order 13673, Fair Pay and Safe Workplaces, dated July 31, 2014 (79 FR 45309, August 5, 2014), amended by Executive Order 13683, (December 11, 2014) (79 FR 75041, December 16, 2014) to correct a statutory citation, and further amended by an Executive Order to modify the handling of subcontractor disclosures and clarify the requirements for public disclosure of documents.

A FAR proposed rule was published on May 28, 2015 (80 FR 30548) to implement Executive Order 13683 (hereinafter designated as the ''E.O.''). Public comments were due July 27, 2015. The Department of Labor (DOL) also published its proposed Guidance on May 28, 2015 (80 FR 30574).

A first extension of the period for public comments on the FAR rule, to August 11, 2015, was published on July 14, 2015. A second extension, to August 26, 2015, was published on August 5, 2015. There were 927 respondents that made comments on the FAR proposed rule. Including mass mailings, about 12,600 responses were received on the FAR proposed rule. Respondent organizations typically submitted their responses to both DOL and FAR dockets. DOL, DoD, GSA, and NASA worked together and closely coordinated review and disposition of the comments.

The purpose of E.O. 13673 is to improve contractor compliance with labor laws in order to increase economy and efficiency in Federal contracting. As section 1 of E.O. 13673 explains, ensuring compliance with labor laws drives economy and efficiency by promoting ''safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government.''

It is a longstanding tenet of Federal Government contracting that economy and efficiency is driven, in part, by contracting only with responsible contractors that abide by the law, including labor laws. However, as explained in the preamble to the proposed rule, many labor violations that are serious, repeated, willful, and/or pervasive are not being considered in procurement decisions, in large part because contracting officers are not aware of them. Even if information regarding labor law decisions is made available, contracting officers generally lack the expertise and tools to assess the severity of the labor law violations brought to their attention and therefore cannot easily determine if a contractor's actions show a lack of integrity and business ethics. See 80 FR 30548–49 (May 28, 2015).

While the vast majority of Federal contractors abide by labor laws, a number of studies suggest a significant percentage of the most egregious labor law violations identified in recent years have involved companies that received Federal contracts. In the mid-1990s, the Government Accountability Office (GAO) (then known as the General Accounting Office) issued two reports finding that Federal contracts worth more than 60 billion dollars had been awarded to companies that had violated the National Labor Relations Act (NLRA) and the Occupational Safety and Health Act (the OSH Act). See U.S. General Accounting Office, GAO/HEHS–96–8, Worker Protection: Federal Contractors and Violations of Labor Law, Report to Senator Paul Simon (1995), available at *http://www.gao.gov/assets/230/221816.pdf*; U.S. General Accounting Office, GAO/HEHS–96–157, Occupational Safety and Health: Violations of Safety and Health Regulations by Federal Contractors, Report to Congressional Requesters (1996), available at *http://www.gao.gov/assets/230/223113.pdf*. The GAO stated that contracting agencies already had the authority to consider these violations when awarding Federal contracts under the existing regulations, but were not doing so because they lacked adequate information about contractors' noncompliance. See U.S. General Accounting Office, GAO/T–HEHS–98–212, Federal Contractors: Historical Perspective on Noncompliance With Labor and Worker Safety Laws, Statement of Cornelia Blanchette before the Subcommittee on Oversight and Investigations, Committee on Education and the Workforce, House of Representatives, 2 (July 14, 1998), available at *http://www.gao.gov/assets/110/107539.pdf*.

More than ten years later, the GAO again found a similar pattern. As discussed in the preamble to the proposed rule, the GAO found that almost two-thirds of the 50 largest wage-and-hour violations and almost 40 percent of the 50 largest workplace health-and-safety penalties issued between FY 2005 and FY 2009 were made against companies that went on to receive new Government contracts. See U.S. Government Accountability Office, GAO–10–1033, FEDERAL CONTRACTING: Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors, Report to Congressional Requesters (2010), available at *http://www.gao.gov/new.items/d101033.pdf*. A 2013 report by the Senate Health, Education, Labor, and Pensions (HELP) Committee corroborated these findings. See Majority Staff of Senate Committee on Health, Education, Labor, and Pensions, Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk, 1 (2013) (hereinafter HELP Committee Report), available at *http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf*.

Equally important, a number of studies suggest a strong relationship between labor law compliance and performance. One study conducted by the Center for American Progress (''At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers,'' dated December 2013, *https://www.americanprogressaction.org/issues/labor/report/2013/12/11/80799/at-our-expense/*) found that one quarter of the 28 companies with the top workplace violations that received Federal contracts between FY 2005 and FY 2009 had significant performance problems. As cited in the preliminary regulatory impact analysis (RIA), a report by the U.S. Department of Housing and Urban Development's Office of Inspector General, Internal Audit—Monitoring and Enforcement of Labor Standards, January 16, 1985, found a ''direct relationship between labor standards violations and construction deficiencies'' on the Department of Housing and Urban Development (HUD) projects and revealed that poor quality work contributed to excessive maintenance costs. Similarly, a Fiscal Policy Institute report, which analyzed a random sample of 30 New York City construction contractors, concluded that a contractor with labor law violations is more than five times as likely to receive a low performance rating than a contractor with no labor law violations. See Adler Moshe, ''Prequalification of Contractors: The Importance of Responsible Contracting on Public Works Projects,'' Fiscal Policy Institute, May 2003. In addition, in the ''Background'' section of the Preamble to its final Guidance, DOL cites to a number of studies describing how strengthening contractor labor-law compliance policies ''can improve the

quality of competition by encouraging bids from more responsible contractors that might otherwise abstain from bidding out of concern about being able to compete with less scrupulous corner-cutting companies.''

E.O. 13673 is designed to address the longstanding deficiencies highlighted in the GAO reports and thereby to increase economy and efficiency in Federal procurement by providing, to Federal contracting officers, additional relevant information and guidance with which to consider that information. To achieve this goal, the E.O. requires that prospective and existing contractors on covered contracts disclose decisions regarding violations of certain labor laws, and that contracting officers, in consultation with agency labor compliance advisors (ALCAs), a new position created by the E.O., consider the decisions, (including any mitigating factors and remedial measures), as part of the contracting officer's decision to award or extend a contract. See sections 2 and 3 of the E.O. In addition, the E.O. creates new paycheck transparency protections, among other things, to ensure that workers on covered contracts are given the necessary information each pay period to verify the accuracy of what they are paid. See section 5 of the E.O. Finally, the E.O. limits the use of predispute arbitration clauses in employment agreements on covered Federal contracts. See section 6 of the E.O.

B. The Proposed FAR Rule

On May 28, 2015, DoD, GSA, and NASA published a proposed rule at 80 FR 30548, to implement E.O. 13673. The proposed rule delineated, through policy statements, solicitation provisions, and contract clauses, how, when, and to whom disclosures are to be made and the responsibilities of contracting officers and contractors in addressing labor law violations. Specifically, a new FAR subpart 22.20 was proposed to provide direction to contracting officers on how they are to obtain disclosures from contractors on labor law decisions concerning their labor law violations; how to consider disclosures when making responsibility determinations, and decisions whether to exercise options; and how to work with ALCAs, who will advise contracting officers in assessing labor law violations, mitigating factors, and remedial measures. New solicitation provisions and contract clauses were proposed in FAR part 52 to incorporate into contracts whose estimated value exceeds $500,000, and into subcontracts over this value, other than subcontracts for commercially available off-the-shelf (COTS) items. Conforming changes were proposed to FAR subpart 9.1 to address the consideration of labor law violation information in the Federal Awardee Performance and Integrity Information System (FAPIIS) during a responsibility determination, to FAR 17.207 to address consideration of labor law decisions, mitigating factors, and remedial measures prior to the exercise of an option, and to FAR subpart 22.1 to address the appointment and duties of ALCAs.

Simultaneously, DOL issued proposed Guidance entitled ''Guidance for Executive Order 13673, Fair Pay and Safe Workplaces'' that was designed to work hand-in-hand with the FAR rule. DOL's proposed Guidance provided proposed definitions and Guidance regarding labor law decisions; how to determine whether a labor law decision is reportable; what information about labor law decisions must be disclosed; how to analyze the severity of labor law violations; and the role of ALCAs, DOL, and other enforcement agencies in addressing labor law violations. The proposed Guidance defined the term labor compliance agreement as an agreement between a contractor and an enforcement agency, and it identified the existence of such an agreement as an important mitigating factor when an ALCA assesses the contractor's labor law violations. DOL's proposed Guidance at section IV also included discussion of the E.O.'s provisions related to paycheck transparency. These requirements include satisfaction by complying with substantially similar State laws, information to be included on required wage statements, FLSA exempt-status notices, and independent contractor notifications. The proposed FAR rule incorporated DOL's Guidance, including DOL's proposed interpretations of the E.O's reference to serious, repeated, willful, pervasive and other key terms; and, as already discussed, the proposed FAR rule addressed when and how contracting officers are to consider this Guidance.

In addition to the new requirements to improve labor compliance, the proposed FAR rule required contracting agencies to ensure that certain workers on covered Federal contracts receive a wage statement document that contains information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions taken from pay. The proposed rule also instructed contractors to inform individuals in writing if the individual is being treated as an independent contractor and not an employee. Finally, the proposed rule required that contractors and subcontractors entering into contracts and subcontracts for non-commercial items over $1 million agree not to enter into any mandatory predispute arbitration agreement with their employees or independent contractors on any matter arising under Title VII of the Civil Rights Act of 1964, as well as any tort related to or arising out of sexual assault or harassment.

For additional background, refer to the preamble for the proposed rule.

III. Discussion and Analysis of Public Comments

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the disposition of public comments in the development of the final rule. A discussion of the comments and of the changes made to the rule as a result of those comments is provided below.

A. Summary of Significant Issues

1. Summary of Significant Changes to the Proposed Rule

DoD, GSA, and NASA seek to ensure that this FAR rulemaking, like any other, results in regulatory changes that are clear, manageable, and effective. To this end, in soliciting public comment on the proposed rule, DoD, GSA, and NASA highlighted a number of issues whose shape in the final rule will play a particularly important role in the effective implementation of the E.O. These issues included: (i) How the new requirements might be phased in to give affected parties time to acclimate themselves to their new responsibilities, (ii) how disclosure requirements are best shaped to achieve a balance between transparency and a reasonable environment for contractors to work with enforcement agencies, (iii) how to avoid challenges contractors may face in evaluating labor law violations disclosed by their subcontractors, and (iv) how to craft remedies that create accountability for compliance while providing reasonable time and opportunity for contractors and subcontractors to take action. See 80 FR 30555 to 30557.

Based on the extensive and detailed public comments received in response to the proposed rule (discussed in greater detail below) and additional deliberations, DoD, GSA, and NASA have agreed on the following key actions to minimize burden for contractors and subcontractors, small and large, which include a number of changes to the proposed rule, as follows:

a. *Phase-in.* The final rule provides a measured phase-in process for the

disclosure of labor law decisions to recognize that contractors and subcontractors were not previously required to track and report labor law decisions and to provide the time affected parties may need to familiarize themselves with the rule, set up internal protocols, and create or modify internal databases to track labor law decisions in a more readily retrievable manner.

Accordingly, when the rule first takes effect, the disclosure reporting period will be limited to one year and gradually increase to three years by October 25, 2018. Moreover, no disclosures will be required from prospective prime contractors during the first six months that the rule is effective (from October 25, 2016 through April 24, 2017), except from prospective contractors bidding on solicitations issued on or after October 25, 2016 for contracts valued at $50 million or more. Because of the time typically required for contractors to prepare proposals, the Government to evaluate the proposals, and the Government to select a prospective contractor for major acquisitions of this size, such entities should have adequate time to perform the more limited disclosure representation set forth in the rule.

Subcontractor disclosure is also phased in, and subcontractors will not be required to begin making disclosures until one year after the rule becomes effective. More specifically, subcontractors will be required to report labor law decisions in accordance with this rule if they are seeking to perform covered work for prospective contractors under Federal contracts awarded pursuant to solicitations issued on or after October 25, 2017.

DOL and other enforcement agencies are actively working to upgrade their tracking systems so that the need for contractor disclosures of labor law decisions may be reduced over time. DoD, GSA, NASA, and the Office of Management and Budget (OMB) intend to work closely with DOL, as part of the renewal process required under the Paperwork Reduction Act (PRA), to review progress made on system upgrades and evaluate the feasibility of phasing out disclosure requirements set forth in this rule.

Nothing in the phase-in relaxes the ongoing and long-standing requirement for agencies to do business only with contractors who are responsible sources and abide by the law, including labor laws. Accordingly, if an agency has information indicating that a prospective prime contractor has been found within the last three years to have labor law violations that warrant heightened attention in accordance with DOL's Guidance (*i.e.,* serious, repeated, willful, and/or pervasive violations), the contractor should be prepared to be asked about the violations and expect to be given an opportunity to address any remediation steps it has taken to address the violations. For this reason, entities seeking to do business with the Government are strongly encouraged to work with DOL in their early engagement preassessment process to obtain compliance assistance if they identify covered labor law decisions involving violations that they believe may be serious, repeated, willful, and/or pervasive. This assistance is available to entities irrespective of whether they are responding to an active solicitation. Working with DOL prior to competing for Government work is not required by this rule, but will allow the entity to focus its attention on developing the best possible offer when the opportunity arises to respond to a solicitation.

b. *Subcontracting.* To minimize burden on, and overall risk to, prime contractors and to create a manageable and executable process for both prime contractors and subcontractors, the final rule requires subcontractors to disclose details regarding their labor law violations (the decisions, mitigating factors and remedial measures) directly to DOL for review and assessment instead of to the prime contractor. The subcontractor then makes a statement to the prime contractor regarding DOL's response to its disclosure. The prime contractor will then consider any response from DOL in evaluating the integrity and business ethics of subcontractors. See FAR 22.2004–1(b), 22.2004–4, and 52.222–59(c) and (d) of the final rule. This approach was detailed in the preamble to the proposed rule (at 80 FR 30555 to 30557) as an alternative to the regulatory text addressing this matter. It has now been adopted after careful consideration of concerns raised by numerous respondents which would have required contractors to obtain from subcontractors with whom they have contracts exceeding $500,000 other than COTS items, the same labor compliance information that they must themselves disclose.

Respondents stated that these subcontractor disclosures would be costly, burdensome, and difficult for prime contractors to assess. They explained that contractors do not have sufficient expertise and capacity to assess subcontractor labor law violation disclosures and indicated that subcontractors working for multiple prime contractors may receive inconsistent assessments. They further explained that these disclosures would add to systems costs, both to track and properly protect the information, and could strain business relationships as companies may be reluctant to share information that they may believe is proprietary or otherwise harmful to their competitive interests.

Under the final rule, subcontractors will be required to provide information about their labor law violations to the prime only when the subcontractor is not in agreement with, or has concerns with, DOL's assessment (see FAR 52.222–59(c)(4)(ii)(C)(3)). DoD, GSA, and NASA believe that the flowdown processes set forth in the final rule should minimize the challenges identified with the proposed rule, including the need for prime contractors to obtain additional resources and expertise to track and assess subcontractor labor law violation disclosures. Equally important, DOL's review and assessment of subcontractor labor law decision information, mitigating factors, and remedial measures should help to promote consistent assessments of labor law violations and the need for further action. The E.O. has been amended to adopt this process in lieu of disclosure to the prime contractor to ensure that processes are as manageable and minimally burdensome as possible.

c. *Public Disclosure of Labor Law Decision Information.* The final rule, like the proposed rule, requires prospective prime contractors to publicly disclose certain basic information about covered violations—namely, the law violated, the case identification number, the date of the decision finding a violation, and the name of the body that made the decision. The final rule reiterates that the requirement to provide information on the existence of covered violations applies not only to civil judgments and administrative merits determinations, but also arbitral awards, including awards that are not final or still subject to court review. This is consistent with section 2(a)(i) of the E.O., which specifically requires the disclosure of arbitral awards or decisions without exception. DoD, GSA, and NASA refer readers to the Preamble of DOL's final Guidance, which explains that confidentiality provisions generally have exceptions for disclosures required by law. Moreover, there is nothing particularly sensitive about the four pieces of basic information that contractors must publicly disclose about each violation—the labor law that was violated, the case number, the date of the award or decision, and the name of arbitrator. See FAR 22.2004–2(b)(1)(i). Parties routinely disclose more

information about an arbitral award when they file a court action seeking to have the award vacated, confirmed, or modified.

That said, the final rule does not compel public disclosure of additional documents the prospective contractor deems necessary to demonstrate its responsibility, such as documents demonstrating mitigating factors, remedial measures, and other steps taken to achieve compliance with labor laws. The rule states this information will not be made public unless the Contractor determines that it wants this information to be made public (see FAR 22.2004–2(b)(1)(ii)).

d. *Contract Remedies.* Consistent with the E.O.'s goal of bringing contractors into compliance the final rule adopts additional language regarding use of remedies, with the intent of reinforcing the availability and consideration of remedies, such as documenting noncompliance in past performance or negotiating a labor compliance agreement, prior to the consideration of more severe remedies (*e.g.,* terminating a contract, notifying the suspending and debarring officials).

Of particular note, the final rule enumerates the ALCA's responsibility to encourage prospective contractors and contractors that have labor law violations that may be serious, repeated, willful, and/or pervasive to work with DOL or other relevant enforcement agencies to discuss and address the violations as soon as practicable. See FAR 22.2004–1(c)(1). Early engagement with DOL through the preassessment process can give entities with violations an opportunity to understand and address concerns, as appropriate, before bidding on work so that they may focus their attention on developing the best possible offer during competition. The Office of Federal Procurement Policy (OFPP) is working with DOL, members of the FAR Council (DoD, GSA, NASA, and OFPP) and other acquisition executives, the Small Business Administration (SBA), and the SBA Office of Advocacy to highlight language in DOL's Guidance that explains how entities may avail themselves of assistance at DOL (*i.e.,* Section VI Preassessment) and, more generally, the best ways to promote understanding and early engagement whenever it makes sense.

The rule also amends the policies addressing the assessment of past performance when the contract includes the clause at 52.222–59, to recognize consideration of a contractor's relevant labor law violation information, *e.g.,* timely implementation of remedial measures, and compliance with those remedial measures (including related labor compliance agreements), and the extent to which the prime contractor addressed labor law decisions of its subcontractors. See FAR 42.1502(j). The rule calls on agencies to seek input from ALCAs for these purposes when assessing the contractor's performance. See 42.1503(a)(1)(i). Further, the rule requires contracting officers to consider compliance with labor laws when past performance is an evaluation factor (see FAR 22.2004–2(a)). This language was shaped by public comment received in response to language in the preamble of the proposed rule addressing the consideration of compliance with labor laws in evaluating contractor performance. See 80 FR 30557. DoD, GSA, and NASA note that the Councils opened FAR Case 2015–027, Past Performance Evaluation Requirements, to separately develop regulatory guidance around the consideration of contractor compliance issues more generally.

In addition, the final rule addresses the use of labor compliance agreements. The rule clarifies how the timeframe for developing a labor compliance agreement, which involves parties outside the contracting agency, is intended to interact with the acquisition process. It also speaks to basic obligations between the contractor and the contracting officer where the need for a labor compliance agreement has been identified by the ALCA. Labor compliance agreements are bilateral. Parties to the agreement (*i.e.,* a contractor or subcontractor and the enforcement agency) will need time to negotiate an appropriate agreement—time which ordinarily will go beyond that which a contracting agency would typically give to completing a responsibility determination. The contracting officer notifies the contractor if a labor compliance agreement is warranted, and states the name of the enforcement agency. Unless the contracting officer requires the labor compliance agreement to be entered into before award, the contractor is then required to state an intent to negotiate a labor compliance agreement, or explain why not.

Where a contracting officer has premised a responsibility determination (or exercise of an option postaward) on the prospective contractor's present or future commitment to a labor compliance agreement, the prospective contractor (or existing contractor) must take certain steps; the failure to do so will be taken into account and could have postaward consequences with respect to the instant contract or future contracts.

The rule promotes economy and efficiency by ensuring that the most severe labor law violations that have not yet been adequately remedied (serious, repeated, willful, and/or pervasive violations) are dealt with in a timely manner. Labor compliance agreements are designed to address these severe labor law violations. As section 1 of the E.O. states, ''[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable and satisfactory delivery of goods and services to the Federal Government.'' The rule provides a mechanism to allow for the time needed to negotiate an agreement reasonable to both sides. This approach should avoid situations where instant contract actions are unnecessarily delayed or prospective contractors passed over in favor of other offerors before having had reasonable time to work with the enforcement agency to address their problems, while also making sure that the contractor is taking reasonable steps after award to negotiate an appropriate agreement.

Nothing in the rule seeks to limit a contractor's ability to choose how it will remediate labor law violations or to negotiate settlement agreements. To the contrary, the rule and DOL Guidance fully anticipate that contractors will often take action on their own, or enter into settlement agreements, to remediate their labor law violations. For this reason, the rule, as well as DOL's Guidance, emphasize that contracting officers must carefully consider these actions in deciding if a contractor is a responsible source.

It is only in a limited number of situations—where the severity of labor law violations warrants heightened attention and remediation efforts taken to date are inadequate—that a contractor should expect to be advised of the need to enter into a labor compliance agreement. The agreement may address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, measures to ensure improved future compliance, and other related matters. Except for unusual circumstances where the ALCA recommends and the contracting officer agrees that the prospective contractor must enter into a labor compliance agreement before award, prospective contractors and existing contractors will be given a reasonable opportunity to negotiate an appropriate agreement. If an entity, at its own choosing, does not take action, through a labor compliance agreement or otherwise, it will be incumbent on the agency to determine

the appropriate action in light of the noncompliance. A nonresponsibility determination or exclusion action would be considered where previous attempts to secure adequate remediation by the contractor have been unsuccessful and it is necessary to protect the Government's interest. With respect to the latter, consistent with long-standing policy and practice, an entity would be given an opportunity to be heard before an agency suspension and debarment official debars the contractor in order to protect the Government's interest.

e. *Regulatory impact.* See the summary of the RIA at Section IV below.

2. Summary of Changes by Provision

The following summary highlights changes made from the proposed to final rule by section:

FAR 22.2002 Definitions

- Added within the definition of ''enforcement agency'' the agencies associated with each labor law.
- Deleted the definition of ''labor violation'' and substituted the definition of ''labor law decision''.
- Clarified the definition of ''pervasive violations''.

FAR 22.2004–1 General

- In paragraph (b) added language on subcontractors disclosing to DOL.
- Added paragraph (c) on duties of the Agency Labor Compliance Advisor (ALCA), such as providing input to the individual responsible for past performance so that the input can be considered during source selection, and making a notation in FAPIIS of the existence of a labor compliance agreement.

FAR 22.2004–2 Preaward Assessment of an Offeror's Labor Law Violations

- In paragraph (a) included contracting officer consideration of compliance with labor laws when past performance is an evaluation factor.
- Added language in paragraph (b)(1)(ii) directing that disclosures of mitigating factors and remedial measures will be made in SAM, and will not be made public unless the contractor determines that it wants this information to be made public.
- Added language in paragraph (b)(3) on the recommendations that the ALCA will make to the contracting officer.
- Clarified language in paragraph (b)(4) that identifies what the ALCA analysis shall contain.
- Added a requirement in (b)(5)(ii) for the contracting officer to document the contract file and explain how the ALCA's written analysis was considered.
- Added language in paragraph (b)(6) that disclosure of a labor law decision does not automatically render the prospective contractor nonresponsible.
- Added procedures in (b)(7) for notifying the prospective contractor if a labor compliance agreement is warranted.
- Added paragraph (c) that the contracting officer may rely on the offeror's representation, unless the contracting officer has reason to question it.

FAR 22.2004–3 Postaward Assessment of a Prime Contractor's Labor Law Violations

- Added language in paragraph (a)(2) to clarify the semiannual update requirement and minimize the disclosure burden.
- Retained wording making the ALCA responsible for monitoring SAM and FAPIIS and identifying updated information that needs to be brought to the contracting officer's attention for consideration.
- Made various conforming changes to align preaward and postaward sections, including that disclosures to the contracting officer of mitigating information in SAM will not be publicly disclosed unless the contractor determines that it wants this information to be made public.

FAR 22.2007 Solicitation Provisions (Two) and Contract Clauses (Three)

- Added date and threshold phase-in language for the FAR 52.222–59 clause. It is inserted in solicitations with an estimated value of $50 million or more, issued from October 25, through April 24, 2017, and resultant contracts, and is inserted in solicitations that are estimated to exceed $500,000 issued after April 24, 2017. (The FAR 52.222–57 and 52.222–58 provisions are not used unless this clause is used.)
- Added date phase-in language for the FAR 52.222–58 clause, which covers subcontractor disclosures. It is inserted in solicitations issued on or after October 25, 2017.

FAR Part 42

- Added text at FAR subpart 42.15 to require consideration of labor law compliance during past performance evaluations.
- Added a new paragraph 42.1503(h)(5) consolidating references to agencies entering information into FAPIIS.

FAR 52.212–3

- Conformed the definitions to changes made in FAR 22.2002, and conformed the rest of the representation to changes made in FAR 52.222–57.

FAR 52.222–57

- Added a paragraph (a)(2) on joint ventures.
- Added date and threshold phase-in language in paragraph (b).
- Added phase-in language for the decision disclosure period in paragraph (c): ''rendered against the offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter''.
- Added a new paragraph (f) that the representation whether there are labor law decisions rendered against the offeror will be in FAPIIS

FAR 52.222–58

- Added phase-in language for the decision disclosure period.
- Added paragraph (b)(2) about nonliability for subcontractor misrepresentations, similar to the language at FAR 52.222–59(f).

FAR 52.222–59

- Conformed the definitions to changes made in FAR 22.2002.
- Added language in paragraph (b) to conform to FAR 22.2004–3 on the semiannual update.
- Moved the discussion at former (b)(4) on contract remedies to only be at FAR 22.2004–3(b)(4).
- Revised paragraph (c) to implement the alternative from the proposed rule where the subcontractor discloses to DOL. A description of the steps followed include—
  - ○ Subcontractors make a representation regarding labor law decisions;
  - ○ If the representation was affirmative, disclosures will be made to DOL; the subcontractor will provide information to the contractor regarding DOL's assessment;
  - ○ If the subcontractor disagrees with DOL's assessment, it will inform the prime contractor and provide rationale; if the subcontractor is found responsible, the prime contractor must provide an explanation to the contracting officer; and
  - ○ A similar process is followed for subcontractor updates during contract performance (see paragraph (d)).
- Added a statement in paragraph (c)(2) that disclosure of a labor law decision(s) does not automatically render the prospective subcontractor nonresponsible; the contractor shall consider the prospective subcontractor for award notwithstanding disclosure of a labor law decision. Added language that the contractor should encourage

prospective subcontractors to contact DOL for a preassessment of their record of labor law compliance.

• Added a new paragraph (f) that a contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements.

FAR 52.222–60

• Expanded the required elements of the wage statement, FLSA exempt-status notices, and independent contractor notices.

3. Additional Issues

a. Legal entity.

DoD, GSA, and NASA emphasize that the scope of representations and disclosures required by the final rule follows existing general principles and practices. Specifically, the requirement to represent and disclose applies to the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract. The legal entity that is the offeror does not include a parent corporation, a subsidiary corporation, or other affiliates (see definition of affiliates in FAR 2.101). A corporate division is part of the corporation. Consistent with current FAR practice, representation and disclosures do not apply to a parent corporation, subsidiary corporation, or other affiliates, unless a specific FAR provision (*e.g.,* FAR 52.209–5) requires that additional information. Therefore, if XYZ Corporation is the legal entity whose name appears on the bid/offer, covered labor law decisions concerning labor law violations by XYZ Corporation at any location where that legal entity operates would need to be disclosed. The fact that XYZ Corporation is a subsidiary of XXX Corporation and the immediate parent of YYY Corporation does not change the scope of the required disclosure. Only XYZ Corporation's violations must be disclosed. (See also Section III.B.3.e. below).

b. Other Equivalent State Laws

Consistent with the proposed rule, the final rule limits the scope of initial implementation to decisions concerning violations of the Federal labor laws enumerated in the E.O. and violations of State Plans approved by the Occupational Safety and Health Administration (OSHA). Disclosure and consideration of decisions concerning other equivalent State law violations will not go into effect until DOL and the FAR Council seek public comment on additional Guidance and rulemaking. As a result, the number of labor law decisions that contractors and subcontractors will need to disclose for the immediate future will be significantly reduced and these entities will have additional opportunity to engage with the Federal Government on the best and least burdensome approaches for meeting those requirements before such additional requirements take effect.

B. Analysis of Public Comments

1. Challenges to Legality and Authority of the Executive Order and Implementing Regulatory Action

a. Administrative Procedure Act (APA)

Comment: Several respondents stated that the costs associated with the proposed rule (which the respondents stated are largely unquantified in the proposed rule and which the public had insufficient time to quantify during its public comment period) so greatly outweigh the benefits (which the respondents stated there is insufficient evidence to support) that there is a great decrease in economy and efficiency, and the rulemaking is not a rational exercise of Government power. They asserted that under the APA, an agency action that is ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'' will be held unlawful and set aside. See 5 U.S.C. 706(2)(A).

Response: It is a longstanding tenet of Government contracting that economy and efficiency is driven, in part, by dealing only with responsible contractors that abide by the law, including labor laws. As section 1 of E.O. 13673 explains, compliance with labor law drives economy and efficiency by promoting ''safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government.''

Many labor law violations that are serious, repeated, willful, and/or pervasive are not considered in awarding contracts, in large part because contracting officers are not aware of them. Even if information regarding labor law violations is made available, contracting officers generally lack the expertise and tools to assess the severity of the labor law violations brought to their attention and therefore cannot easily determine if a contractor's actions show a lack of integrity and business ethics. The FAR rule, in concert with DOL's Guidance, is designed to close these gaps so that the intended benefits of labor laws and the economy and efficiency they promote in Federal procurement can be more effectively realized. The Councils acknowledge that many of these benefits are difficult to expressly quantify, but point out that E.O. 13563, Improving Regulation and Regulatory Review, provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Respondents assert that the costs that would be imposed by the proposed rule greatly outweigh the benefits and, on this basis, conclude that the rule is arbitrary. The Councils refer respondents to the RIA which was developed, in close consultation with DOL, to evaluate the effect of the rule. As the RIA explains, the Government, consistent with E.O. 13563, has made a reasoned determination that the benefits justify the costs, as the regulation has been tailored to impose the least burden, consistent with achieving the objectives of the Fair Pay and Safe Workplaces E.O.

Of particular note, the final rule, as required by the express provisions of the E.O., limits costs by building processes within the existing Federal acquisition system with which contractors are familiar. The final rule limits the E.O.'s labor law decision disclosure requirements to contracts and subcontracts over $500,000, and excludes flowdown for contracts of COTS items—limitations which will result in excluding the majority of transactions performed by small businesses.

The final rule makes a number of important additional refinements that will work to contain costs and create a compliance process that is manageable and fair. These refinements were made after considering public comments on the proposed rule—including comments addressing specific issues that the Councils highlighted to enable further tailoring of the rule so that it imposes the least burden possible. For example:

• The final rule adopts an alternative proposal outlined in the proposed rule preamble that directs disclosure of subcontractor labor law decision information directly to DOL, rather than to the prime contractor, in order to minimize the burden and business challenges for both prime contractors and subcontractors that might arise through direct disclosure of a subcontractor's violations to the prime.

• The final rule adopts a measured phase-in process for the disclosure of labor law decisions. When the rule first takes effect, the disclosure period will be limited to one year and no disclosure will be required during the first six months, except for contractors bidding on contracts valued at $50 million or more. Subcontractors will not begin making disclosures until one year after the rule becomes effective. These steps will enable affected parties to acclimate themselves to the new processes and develop internal protocols, as necessary, without having to undertake costly measures within tight timeframes to meet compliance requirements.

• The final rule limits the scope of initial implementation to decisions concerning violations of the Federal labor laws enumerated in the E.O. and OSHA-approved State Plans. Disclosure and consideration of decisions concerning other equivalent State law violations will not go into effect until DOL and the FAR Council seek public comment on additional Guidance and rulemaking. As a result, the number of labor law decisions that contractors and subcontractors will need to report for the immediate future will be significantly reduced and these entities will have additional opportunity to engage with the Federal Government on the best and least burdensome approaches for meeting those requirements before such additional requirements take effect.

For a more comprehensive discussion on benefits and costs, see the RIA. For discussions of the publication requirements of the APA see below at Section III.B.2.a.i., at Length of Phase-in Period, and at Section III.B.13.a.

Comment: Some respondents asserted that the rule is imprecise regarding the way in which contractor labor law violations are to be assessed. The respondents stated that this imprecision invites inconsistent application across agencies, and arbitrary actions by the Government.

Response: Consistent with well-established contracting principles and practices, the rule requires that determinations regarding a prospective contractor's responsibility be made by the particular contracting officer responsible for the procurement, on a case-by-case basis. This approach helps to ensure that actions are taken in proper context. While contracting officers may reach different conclusions, steps have been taken in the context of this rulemaking that will help to promote consistency in the assessment of labor law violation information by ALCAs and the resultant advisory input to contracting officers and promote greater certainty for contractors. In particular, ALCAs will coordinate with DOL and share their independent analyses for consideration by other ALCAs. This collaboration should help to avoid inconsistent advice being provided to the contractor from different agencies. DOL has developed Guidance to assist ALCAs in meeting their requirements under the E.O. and to further enhance both inter-agency and intra-agency understanding of the process and uniformity in implementation practices. (See also discussion at Section III.B.6.a. below.)

Comment: Respondents asserted that the regulation requires State law enforcement agencies to dictate whether remediation is properly taking place. According to these respondents, this placement of power in the hands of a State for a Federal procurement is at odds with Federalism principles and improperly places contractor responsibility—a Federal determination—in the hands of a State agency, whose workplace laws may conflict with their Federal counterparts. They concluded that the rulemaking is ''contrary to constitutional right, power, privilege, or immunity'' and must be held unlawful and set aside. See 5 U.S.C. 706(2)(B).

Response: The only State enforcement agencies engaged under the rule are the State enforcement agencies for the OSHA-approved State Plans. Under the proposed and final rules, contracting officers, not enforcement agencies, are solely empowered to make responsibility determinations. Contracting officers have broad discretion in making responsibility determinations, and in determining the amount of information needed to make that determination, including whether conduct is being remediated. See *Impresa Construzioni Geom. Domenico Garufi* v. *U.S.,* 238 F.3d 1324, 1334–35 (Fed. Cir. 2001). Contractors are already required to report numerous types of improper conduct, including conduct that in some cases violated State laws, and contracting officers must use this information in determining whether a contractor is a responsible source. See FAR 52.209–5(a)(1)(i)(B)–(D). While contracting officers and ALCAs will carefully consider information about remediation from Federal or State enforcement agencies, a contracting officer's responsibility determination is independent of the finding of an enforcement agency—whether Federal or State—regarding whether the labor law violation has been sufficiently remediated.

Comment: Respondents contended that the FAR Council and DOL, through their regulation and Guidance respectively, are effectively amending Federal labor and employment law by creating a new enforcement scheme, with different classes of violations (*e.g.,* ''serious,'' ''repeated,'' ''willful,''), and with new punitive sanctions that contravene Congressional intent. They believed this action is ''in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,'' and must be held unlawful and set aside. See 5 U.S.C. 706(2)(C). They stated that agency action is pre-empted by established statutory schemes. Respondents cited the Davis-Bacon Act and the Service Contract Act, where Congress explicitly made suspension and debarment an available remedy, and did not make this remedy available under any of the other labor laws cited in the rule. They note that labor compliance agreements are not required or authorized for labor law violations.

Response: Neither the FAR Council's rule nor DOL's Guidance amend any Federal labor and employment laws. Instead, the rule will require contractors and subcontractors to disclose decisions concerning certain violations of some of those laws so that those decisions, if any, can be taken into account to determine whether the contractor or subcontractor has a satisfactory record of integrity and business ethics. Determining whether a contractor is a responsible source is a long-standing tenet of Federal contracting and a prerequisite to receiving a contract award. See 41 U.S.C. 3702(b), 41 U.S.C. 3703(c), and FAR subpart 9.1. Contracting officers already may consider violations of the labor laws and other laws when making responsibility determinations. Indeed, it is the very nature of the existing FAR responsibility determination to assess conduct that may be remediable or punishable under other statutes. The E.O.'s direction to require a prospective contractor to disclose certain labor law decisions so that the contracting officers can more effectively determine if that source is responsible falls well within the established legal bounds of presidential directives regarding procurement policy.

The Federal Property and Administrative Services Act (FPASA) (also known as the Procurement Act), was codified into positive law in titles 40 and 41 of the United States Code. 40 U.S.C. 101 and 121 authorize the President to craft and implement procurement policies that further the statutory goals of that Act of promoting ''economy'' and ''efficiency'' in Federal procurement. The Office of Federal Procurement Policy Act (41 U.S.C. 1101)

also has the goal of promoting ''economy'' and ''efficiency'' in Federal Procurement.

By asking contractors to disclose past labor law decisions the Government is better able to determine if the contractor is likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. See, *e.g., UAW-Labor Employment & Training Corp.* v. *Chao,* 325 F.3d 360, 366 (D.C. Cir. 2003) (affirming authority of the President under the Procurement Act to require Federal contractors, as a condition of contracting, to post notices informing workers of certain labor law rights).

Moreover, contractors are already required to report numerous types of conduct—including fraud, anti-competitive conduct, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, and receiving stolen property—that is unlawful and separately punishable under existing Federal and State laws. See FAR 52.209–5(a)(1)(i)(B)–(C). Thus, contractors and subcontractors are not being punished twice (or in any manner inconsistent with Congressional intent) for any labor law decisions that they report; instead, the reported decisions, along with other reported information, will be part of the existing responsibility determination process.

Neither the FAR Council's rule nor DOL's Guidance expand or change the availability of suspension or debarment as a statutory remedy under the labor laws. Under the existing FAR subpart 9.4, agencies are given the administrative discretion to exercise suspension and debarment to protect the Government from harm in doing business with contractors that are not responsible sources—without regard for whether other statutes specify suspension or debarment as a consequence. The rule and Guidance require contractors and subcontractors to disclose certain labor law decisions so that those decisions, if any, can be taken into account as part of responsibility determinations. The rule has been constructed to help contractors come into compliance with labor laws, and consideration of suspension and debarment is only considered when previous attempts to secure adequate remediation by the contractor have been unsuccessful and it is necessary to protect the Government's interest. The rule provides for contracting officers to take into consideration a number of mechanisms that contractors may use to come into compliance, including labor compliance agreements, that derive from labor enforcement agencies' inherent authority to implement labor laws and to work with covered parties to meet their obligations under these laws.

b. Due Process and Procedural Considerations

Comment: Respondents stated that the FAR Council has improperly promulgated labor standards under 41 U.S.C. 1707, by incorporating Guidance from DOL.

Response: The FAR rule does not promulgate new labor standards, nor does it interpret labor laws or standards. Rather, the FAR rule adopts DOL's interpretation of labor law provided in DOL's Guidance, which interprets the labor terms in the E.O. The FAR rule explains when contracting officers are to consider such guidance and, more importantly, how and when contracting officers are to interact with ALCAs who will be principally responsible for using the Guidance, along with officials from DOL and enforcement agencies, to assess covered contractor violations and provide advice to contracting officers.

Comment: One respondent stated that the rule would require the contractor to report violations that arose outside of the performance of a Government contract. The respondent stated that additional consideration of these matters has no nexus with traditional contractor responsibility determinations that relate to whether a contractor is responsible for the particular procurement and the performance of a Government contract.

Response: In issuing E.O. 13673, the President explained the broad nexus that exists between general compliance with labor laws and economy and efficiency:

Labor laws are designed to promote safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. Helping executive departments and agencies to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance.

As explained in the preamble to the proposed FAR rule and the preliminary RIA, a growing body of research supports the conclusion that a relationship exists between labor law violations and performance problems. This includes reports by the GAO, the Senate HELP Committee, and HUD's Inspector General; a Fiscal Policy Institute report; and reports by the Center for American Progress.

Under longstanding tenets reflected in FAR subpart 9.1 contracting officers have long had the discretion to consider violations of law, whether related to Federal contracts or not, for insights into how a contractor is likely to perform during a future Government contract. Evidence of a prospective contractor's past violations of labor laws is a basis to inquire into that contractor's potential for satisfactory labor law compliance; furthermore, how the prospective contractor has handled past violations is indicative of how it will handle future violations. Whether or not a labor law violation arose in connection with or outside of the performance of a Government contract, the contracting officer should consider the impact of that violation and the potential that future noncompliance will have in terms of the agency resources that will be required to monitor the contractor's workplace practices during contract performance.

Comment: Respondents stated that longstanding Federal procurement statutes and regulations focus contracting officers on final adjudications in determining if a contractor is in compliance with the law, as evidenced by the type of information that Congress requires for inclusion in FAPIIS. In addition, respondents noted that in the final rule implementing FAPIIS (FAR Case 2008–027, 75 FR 14059), the Councils recognized that if information regarding yet-to-be-concluded proceedings were allowed, negative perceptions could unfairly influence contracting officers to find a contractor nonresponsible, even in situations that later end with the contractor being exonerated.

These respondents pointed out that this focus helps to avoid unnecessary complexities and potential unfairness that may arise from the systematic consideration of decisions that are subject to adjudication but have not been fully adjudicated, in particular, administrative merits determinations. Such determinations may not have been approved or supported by an adjudicative body, and in some cases, are only based on an agency's reasonable cause to believe that an unlawful practice has occurred or is occurring. Respondents believed this deviation from well-established practice undermines substantive due process because, among other things, a contractor may be unable to fully

explain itself during a responsibility determination if the basis of a determination is being litigated, as it would potentially require disclosure of privileged information, evidence, litigation strategy and other sensitive information to the contracting officer. Also, a contractor could find itself being denied work even though the determination might be later overturned by a court. These respondents concluded that this type of unfairness could be avoided if the rule were revised to exclude disclosure and consideration of administrative merits determinations.

Response: The Councils reaffirm their commitment, voiced in FAR Case 2008–027, to avoid the potential perception that contracting officers might be unfairly influenced by nonfinal decisions. We note that the structure of the E.O., this final rule, and particularly the DOL Guidance provide necessary steps for considering nonfinal information. Specifically, the DOL Guidance (1) informs contractors of the fact that the information being nonfinal is a mitigating factor, and (2) explains that ALCAs consider that the decision is nonfinal as a mitigating factor. Additionally, contractors have the opportunity to make mitigating factors public (see FAR 52.222–57(d)(1)(iii), its commercial item equivalent at 52.212–3(s)(3)(i)(C), and 52.222–59(b)(3)).

The Councils refer respondents to DOL's Guidance, which addresses matters relating to the violations that must be disclosed and considered. In particular, attention is directed to DOL's Preamble and the discussion of administrative merits determinations, which states, in pertinent part:

The Department believes that the due process and related critiques of the proposed definition of administrative merits determination are unwarranted. The Order delegates to the Department the authority to define the term. See Order, § 2(a)(i). The proposed definition is consistent with the Order and the authority delegated. The Department limited the definition to a finite number of findings, notices, and documents—and only those issued ''following an investigation by the relevant enforcement agency.'' 80 FR 30574, 30579.

* * * * *

The definition of administrative merits determination simply delineates the scope of contractors' disclosure obligations—the first stage in the Order's process. Not all disclosed violations are relevant to a recommendation regarding a contractor's integrity and business ethics. Only those that are serious, repeated, willful, or pervasive will be considered as part of the weighing step and will factor into the ALCA's written analysis and advice. Moreover, when disclosing Labor Laws violations, a contractor has the opportunity to submit all relevant information it deems necessary to demonstrate responsibility, including mitigating circumstances and steps taken to achieve compliance with Labor Laws. FAR 22.2004–2(b)(1)(ii). As the Guidance provides, the information that the contractor is challenging or appealing an adverse administrative merits determination will be carefully considered. The Guidance also states that Labor Law violations that have not resulted in final determinations, judgments, awards, or decisions should be given lesser weight. The Department believes that contractors' opportunity to provide all relevant information—including mitigating circumstances—and the guidance's explicit recognition that nonfinal administrative merits determinations should be given lesser weight resolve any due process concerns raised by the commenters.

With respect to the specific concern that a contractor could find itself being denied work even though the determination might be later overturned by a court, DOL has noted in the Preamble to its final Guidance that a very low percentage of administrative merits determinations are later overturned or vacated. For example, only about two percent of all OSHA citations are later vacated. In other words, the likelihood that a contractor could find itself being denied work even though the determination is later overturned by a court is very low.

See also discussions below in Section III.B.13.b. on DOL Guidance Content Pertaining to Disclosure Requirements; Defining Violations: Administrative Merits Determinations, Arbitral Awards, and Civil Judgments.

Comment: Respondents asserted that the regulation effectively authorizes a *de facto* debarment of contractors by creating a system where a contractor may be found nonresponsible based on the advice of an ALCA or otherwise denied work for not agreeing to enter into a labor compliance agreement when such action is recommended by the ALCA. They further contended that the rule may produce disparate, conflicting, and redundant decisions by Federal contracting officers on the issue of contractor responsibility. Such decisions run the substantial risk of violating constitutional protections of due process that have been consistently applied to combat *de facto* suspension or debarment of contractors.

Response: Evidence of a prospective contractor's past violations of labor laws is a basis to inquire into that contractor's potential for satisfactory labor law compliance; furthermore, how the prospective contractor has handled past violations is appropriately considered as being indicative of how it will handle future violations. Under longstanding tenets reflected in FAR subpart 9.1, contracting officers have the discretion to consider violations of law, whether related to Federal contracts or not, for insights into how a contractor is likely to perform during a future Government contract. These long-standing tenets also hold that determinations regarding a prospective contractor's responsibility shall be made by the particular contracting officer responsible for the procurement. Requiring that decisions be made on a case-by-case basis helps to ensure that actions are taken in proper context.

While this approach may result in different decisions by different contracting officers, steps have been taken in the context of this rulemaking that will help to promote consistency in the assessment of labor law violations and relevant labor law violation information by ALCAs and the resultant advisory input to contracting officers and will result in greater certainty for contractors. In particular, ALCAs will coordinate with DOL and share their independent analyses for consideration by other ALCAs. This collaboration should help to avoid inconsistent advice being provided to the contractor from different agencies. The ALCA's recommendation to the contracting officer is advisory, and not conclusive on the subject of responsibility. The rule does not supplant or modify suspension and debarment processes, which, consistent with current regulations, is considered in certain extreme cases when previous attempts to secure adequate contractor remediation has been unsuccessful, or otherwise to protect the Government from harm.

Comment: Respondents suggested that the rule relies on a construct that certain violations must be addressed through a contractor compliance plan. They remarked that this violates basic labor management law, because it prevents contractors from exercising choice of resolution, and hinders the right to negotiate mutually beneficial settlements between parties. The respondents further noted that through this process, DOL would have undue leverage in their enforcement of labor law violations unrelated to the scope of the responsibility determination process.

Response: The purpose of the E.O., regulation, and Guidance is to improve contractor compliance with labor laws through processes that are reasonable and manageable. Neither the rule nor the Guidance seeks to limit a contractor's ability to choose how it will remediate labor law violations or to negotiate settlement agreements. To the contrary, the rule and Guidance fully anticipate that contractors will often take action on their own, including entering into settlement agreements, to remediate their labor law violations. For this reason, the rule and Guidance both emphasize that contracting officers must carefully consider these actions in deciding if a contractor is a responsible source.

In deciding if additional action is required, the E.O. seeks to avoid unnecessary action by instructing agencies to focus on only those violations that require heightened attention because of the severity of the violations. In addition to helping ALCAs identify those serious, repeated, willful, and/or pervasive violations that warrant heightened attention, DOL's implementing Guidance makes distinctions in the weight to be given to the different types of opinions addressing a contractor's violations. DOL's Guidance provides that violations that have not resulted in a final judgment, determination, or order are to be given less weight in the ALCA's analysis, and therefore also in the contracting officer's consideration during the responsibility determination. In this way, DOL explicitly recognizes that a contractor may still be contesting the findings of an administrative merits determination. And, as already discussed, ALCAs and contracting officers must consider very carefully this information as well as any other information that the contractor calls to their attention. There are no automatic triggers in the rule that compel a contracting officer to make a nonresponsibility determination, even in light of an ALCA's recommendation to do so, or to prevent a contracting officer from exercising an option; nor is there evidence that labor law enforcement actions will be abused to pressure contractors into forfeiting their rights in order to obtain favorable responsibility determinations. In short, it is only in a limited number of situations—where agencies have concluded that contractors have not taken sufficient steps to remediate past violations and prevent future noncompliance—that a contractor should expect to be advised of the need to enter into a labor compliance agreement. Except for unusual circumstances where the ALCA recommends and the contracting officer agrees that the prospective contractor (*i.e.,* those that have been tentatively selected to receive an award and are undergoing a responsibility determination) must enter into a labor compliance agreement before award, the prospective contractor and existing contractors will be given a reasonable opportunity to negotiate an appropriate labor compliance agreement. Such agreements will accomplish the objective of mutually beneficial settlements between enforcement agencies and employers. Put another way, the labor compliance agreement is one additional tool of many, designed to help prevent situations from deteriorating to the point where exclusion becomes necessary. Thus, if an entity, at its own choosing, does not take action, through a labor compliance agreement or otherwise, it will be incumbent on the agency to determine the appropriate action in light of the noncompliance. A nonresponsibility determination or exclusion action would generally be considered only where previous attempts to secure adequate remediation by the contractor have been unsuccessful or otherwise it is necessary to protect the Government's interest. With respect to the latter, consistent with long-standing policy and practice, an entity would be given an opportunity to be heard before an agency suspension and debarment official debars the contractor in order to protect the Government's interest.

c. False Claims Act

Comment: Several respondents stated that the proposed rule requires the contractor to report a broad range of information including final court decisions and administrative merits determinations, over a three year period during which there was no previous requirement to track. As these violations are now reportable, the respondents contended that the rule creates a significant risk of litigation under the False Claims Act, as (1) contractors may not have had the systems necessary to catalogue that information when the violation occurred, and (2) it may take significant time to develop systems which are capable of tracking information in the manner required by the rule.

Response: As a general matter, the rule requires only that an offeror represent ''to the best of [its] knowledge and belief'' that there either has or has not been an ''administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the offeror''. While knowingly misrepresenting the existence of a determination, decision, or judgment may result in adverse action against the contractor, an inadvertent omission would not result in the same action.

In addition, in response to public feedback explaining the challenges that some contractors may face in getting systems in place (coupled with the fact that tracking was not required when past violations occurred), the final rule provides for a phase-in of the disclosure process, initially limited to a 1-year disclosure period. Specifically, disclosure will be required no earlier than for decisions rendered on October 25, 2015 and cover to the date of the offer, or for the three years preceding the date of the offer, whichever period is shorter. During the six month period after the rule becomes effective, disclosures also will be limited to offerors and prospective contractors on contracts valued at $50 million or more; subcontractor reporting will not begin until one year after the rule's initial effective date. These phase-in mechanisms are intended to give contractors the time they need to evaluate and address their systems needs and avoid placing a covered contractor in a situation where it finds itself unable to collect and report the requisite information.

d. Other Issues

Comment: Several respondents raised concerns about the relationship between labor compliance agreements and litigation-specific settlements for violations. One respondent, in particular, stated that labor compliance agreements could overlap with and contradict provisions of settlement agreements that are already in place or administrative agreements reached as part of suspension and debarment proceedings.

Response: Labor compliance agreements, settlement agreements, and administrative agreements have similar objectives in addressing labor law violations and remedial actions; however, they differ in their specific purposes. Settlement agreements are entered into with an enforcement agency to settle a particular case. Administrative agreements that are entered into with suspending and debarring officials may address a number of types of concerns (one of which may be labor law compliance) and are entered into to address present responsibility. Labor compliance agreements may be warranted when the ALCA identifies a pattern of conduct or policies that could be addressed through

preventative action. Where this is the case, the contractor's history of labor law violations demonstrates a risk to the contracting agency of violations during contract performance, but these risks might be mitigated through the implementation of appropriate compliance measures. For a discussion of the relationship between settlement agreements, labor compliance agreements, and administrative agreements resolving suspension and debarment actions the Councils refer respondents to the DOL Guidance which addresses the purpose and use of labor compliance agreements. In particular, attention is directed to DOL's Preamble and the discussion of administrative merits determinations, which states, in pertinent part:

The Department believes that concerns about labor compliance agreements conflicting with existing settlements are unwarranted. Contractors are encouraged to disclose information about existing settlements as a potential mitigating factor in the weighing process. In determining whether a labor compliance agreement is necessary, the ALCA will consider any preexisting settlement agreement—and recommend a labor compliance agreement only where the existing settlement does not include measures to prevent future violations.

In addition, the Department notes that a labor compliance agreement is an agreement between a contractor and an enforcement agency. Enforcement agencies will know if they previously entered into agreements with the contractor and can assure that any labor compliance agreement does not conflict with prior agreements.

Comment: Several respondents stated that the final rule should not compel disclosure to the Government of the existence or the content of confidential arbitral proceedings that are subject to a nondisclosure agreement. In addition, even if information is shared with the Government, such information should not be disclosed to the public.

Response: The E.O. specifically requires the disclosure of arbitral awards or decisions without exception, and confidentiality provisions in non-disclosure agreements generally have exceptions for disclosures required by law. Further, the final rule requires contractors to publicly disclose only four limited pieces of information: The labor law that was violated, the case number, the date of the award or decision, and the name of the arbitrator. See FAR 22.2004–2(b)(1)(i). There is nothing particularly sensitive about this information, as evidenced by the fact that parties routinely disclose this information and more when they file court actions seeking to vacate, confirm, or modify an arbitral award. While this information may not be sensitive, disclosing it to the government as part of the contracting process furthers the E.O.'s goal of ensuring that the government works with contractors that have track records of complying with labor laws.

Comment: Several respondents commented that the proposed rule offered no explanation, or an inadequate explanation, for how a limitation on arbitration agreements would promote economy and efficiency in Federal procurement. Some of these respondents expressed the view that the proposed rule would in fact work against the stated aims of the E.O. One respondent also stated that the limitation had no connection with the Federal procurement process and should be deleted in its entirety.

Response: The Procurement Act grants the President broad authority to prescribe policies and directives that the President considers necessary to carry out the statutory purposes of ensuring economical and efficient government procurement. The limitation on arbitration agreements is a reasonable and rational exercise of that authority.

In particular, the limitation on arbitration agreements will help bring to light sexual harassment and other Title VII violations, ultimately reducing their prevalence. Allowing parties access to the courts for alleged violations of the law provides employees with the opportunity to file individual, group, or class lawsuits that can raise awareness of and redress such violations. These developments will make it easier for agencies to identify and work with contractors with track records of compliance, consistent with the overall goals of the E.O. In addition, lawsuits, and the attendant publicity they can generate, can also deter other contractors from committing similar infractions. Prohibiting pre-dispute arbitration may also increase employee perceptions of fairness in workplace dispute mechanisms, thereby improving employee morale and productivity.

Finally, DoD, the Federal government's largest contracting agency, is currently subject to a nearly identical (and more restrictive) limitation on mandatory arbitration. The rule would extend similar restrictions to all contractors, helping make regulations more consistent across agencies and thus reducing barriers to operating with the federal government. That, in turn, helps to enhance competition among suppliers, and competition is a well-established mechanism for achieving cost savings. These gains in economy and efficiency would come with limited burdens for contractors, as many are already doing business with DoD, and are thus already subject to these restrictions. Further, nothing in the E.O. or final rule prohibits employers or workers from choosing voluntarily to arbitrate a dispute—the E.O. and rule simply prevent an employer from unilaterally controlling the means of dispute resolution before any disputes arise.

Comment: Respondents commented that the exception for arbitrations conducted pursuant to collective bargaining agreements improperly penalized contractors without collective bargaining agreements and recommended the exception be removed.

Response: Unlike mandatory arbitration clauses in employment contracts with individual employees, dispute resolution procedures set forth in a collective bargaining agreement are jointly agreed upon by employers and employees. These dispute resolution procedures are therefore more likely to be perceived as fair, and thus unlikely to undermine employee morale and productivity. Collective bargaining agreements also tend to feature protections for workers coming forward with grievances, which increase the likelihood that sexual harassment and Title VII violations will be brought to light and hence enable agencies to identify and work with contractors with records of compliance. The rationales that generally support banning mandatory arbitration of covered claims thus do not apply in the context of a collective bargaining agreement negotiated between the contractor and a labor organization representing the contractor's employees.

Comment: Respondents recommended that contractors who retain forced arbitration provisions for employment disputes other than those specifically prohibited by the regulation should be barred from enforcing those remaining forced arbitration provisions in the event disputes arise out of the same set of facts.

Response: To be consistent with DoD's existing regulations and the requirements of the E.O., this rule does not apply the limitation on mandatory pre-dispute arbitration to aspects of an agreement unrelated to the covered areas. Establishing consistent rules across government agencies helps to enhance competition among suppliers, which is a well-established mechanism for achieving cost savings for the Federal government.

Comment: Several respondents commented that the proposed rule's coverage on arbitration is invalid and unenforceable because it conflicts with Federal statute, U.S. Supreme Court precedent, current regulation, or should otherwise only be accomplished through Congressional legislation. Respondents provided the following in support of their comments: *Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 U.S. 20, 25 (1991) (the Federal Arbitration Act reflects a ''liberal federal policy favoring arbitration agreements'') *AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333, 339 (2011) (''The FAA (Federal Arbitration Act) was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.'') *CompuCredit* v. *Greenwood,* 565 U.S. 95 (2012), and similar rulings, which uphold the enforceability of arbitration agreements pursuant to the Federal Arbitration Act.

Response: The Federal Arbitration Act provides for the validity and enforceability of arbitration agreements. The final rule, consistent with the proposed rule, does not alter the validity or enforceability of such agreements; indeed, the E.O. makes clear that it does not disturb existing pre-dispute arbitration agreements unless those agreements are renegotiated or replaced in a process that allows changes to the terms to the contract. Therefore, the final rule does not conflict with the Federal Arbitration Act.

The government does, however, generally have the authority to decide which companies it will contract with and what terms such contracts will contain. The final rule accordingly provides that contracting agencies in their capacity as contracting parties shall not, with some exceptions, enter into contracts with contractors who utilize certain types of mandatory arbitration agreements with their employees. Contractors remain free to require employees to enter into mandatory pre-dispute arbitration agreements of claims that do not arise under Title VII or torts relating to sexual assault or harassment, and may further seek to arbitrate covered disputes when they arise.

Comment: Respondents argued that failure to include the cost of reporting equivalent State labor law violations circumvents the intent of the Congressional Review Act (CRA), the Small Business Regulatory Enforcement Fairness Act (SBREFA) as part of the Regulatory Flexibility Act (RFA), and E.O. 12866. Respondents indicated that when the cost of a proposed rule is estimated to have a cost impact of more than $100 million on the economy, each of these Federal laws require the agency proposing the rule to undertake additional regulatory review steps.

Response: The proposed and final FAR rules do not address the cost of reporting violations related to equivalent State laws (other than OSHA-approved State Plans) because the rule and DOL's Guidance do not implement those requirements of E.O. 13673. In response to what the Councils and DOL learned from public comments and public outreach sessions regarding the best way to create a fair, reasonable, and implementable process, the FAR rule and DOL Guidance will phase in parts of the E.O. over time. As part of the phase-in plan, contractors will not be required to disclose labor law decisions related to equivalent State laws immediately (other than for OSHA-approved State Plans), which will significantly reduce the number of labor law decisions that a contractor or subcontractor will need to report. Separate Guidance and an additional rulemaking will be pursued at a future date to identify equivalent State laws, and such requirements will be subject to public notice and comment before they take effect. The notice of proposed rulemaking accompanying this subsequent action will address the cost of disclosing labor law decisions concerning violations of equivalent State labor laws and address applicable requirements of the CRA, SBREFA, RFA, and E.O. 12866.

2. Various Alternatives to the Proposed Rule

a. Alternatives That Were Presented in the Proposed Rule

Introductory Summary: The proposed rule asked for consideration of, and comment on, alternatives to three aspects of the rule: (i) Phase-in of subcontractor disclosure requirements, (ii) subcontractor disclosures and contractor assessments, (iii) contractor and subcontractor remedies. The Councils reviewed and considered public comments in development of the final rule and have implemented revisions as follows:

Phase-in (of Disclosure Requirements). In addition to comments received on subcontractor phase-in, a number of concerns, comments, and additional phase-in options were offered with regard to the ability of prime contractors to comply with the rule immediately on the effective date. In order to best enable compliance with the rule, the Councils have implemented the following phase-in periods for representations and disclosures (see FAR 22.2007, 52.222–57 and its commercial items equivalent at 52.212–3, 52.222–58, 52.222–59):

- Prime Contractor Representations and Disclosures
  - For the first 6 months after the rule's effective date (October 25, through April 24, 2017), representations and disclosures are required for solicitations expected to result in contracts valued at $50 million or more.
  - After the first 6 months (after April 24, 2017), representations and disclosures are required for solicitations expected to result in contracts valued at greater than $500,000.
- Subcontractor Representations and Disclosures

Beginning 12 months after the rule's effective date (October 25, 2017), representations and disclosures are required for solicitations expected to result in subcontracts valued at greater than $500,000 other than COTS.

- Labor Law Decision Preaward Disclosure Period—Prime and Subcontractor

Whenever preaward disclosures are required they must cover decisions rendered during the time period beginning October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.

Subcontractor Disclosures and Contractor Assessments. The proposed rule offered alternative language for subcontractor disclosures and contractor assessments of labor law violation information; the final rule adopts this alternative approach. In the final rule, at FAR 52.222–58 and 52.222–59(c) and (d), subcontractors disclose details regarding decisions concerning their labor law violations (and mitigating factors and remedial measures) directly to DOL for review and assessment instead of to the prime contractor. The applicability to subcontracts remains unchanged in the final rule, *i.e.,* $500,000 threshold for other than COTS.

Contractor and Subcontractor Remedies. The proposed rule offered supplemental language regarding remedial measures in order to achieve the dual goals of providing reasonable time for remedial action and accountability for unjustified inaction (FAR 22.2004–5, Consideration of Compliance with Labor Laws in Evaluation of Contractor Performance, at 80 FR 30557). The final rule instead includes language for contracting officers to consider a contractor's compliance with labor laws (including adherence to labor compliance agreements) in their evaluation of past

performance (FAR 42.1502(j)). It also provides for contracting officers to consider whether labor compliance agreements have been timely entered into and complied with, at FAR 22.2004–2(b)(4); 22.2004–3(b)(3).

i. Phase-in (of Disclosure Requirements)

• Phase-In of Subcontractor Review

Comment: Several respondents recommended phase-in of the subcontractor disclosure requirement. The proposals included (1) allowing 12–18 months for phase-in, (2) delaying or phasing-in subcontractor review requirements, and (3) limiting reporting on violations to only those that arise after the effective date of the proposed rule.

Response: As stated in the summary above, the Councils agree that phase-in of subcontractor disclosures would benefit both the public and the Government and have updated the rule to provide for a phase-in period.

• Phase-In of Subcontractor Disclosures by Subcontracting Tiers

Comment: Respondents recommended that the subcontractor disclosure requirement be phased in by subcontractor tiers. Respondents recommended: (1) Applying the rule initially to prime contractors and then, after a phase-in period, expanding application only to first-tier subcontractors, and (2) creating a phase-in schedule to add one year for first-tier subcontracts, one more year for second-tier subcontracts, and one more year for lower-tier subcontracts.

Response: As stated in the summary above, the Councils have decided to apply a phase-in period to all subcontractor disclosures. This will allow sufficient time for systems and processes to be in place to implement the rule's requirements at the subcontractor level.

• Phase-In for Small Businesses

Comment: The SBA Office of Advocacy and other respondents recommended (in addition to the phase-in for subcontractors), that the Councils consider providing a phase-in period for small business prime contractors. The SBA Office of Advocacy recommended that this phase-in period be long enough to allow small businesses, who are current contractors or offerors interested in contracting with the Government, to absorb the costs of the rule. Another respondent indicated that a phased approach to implementation is appropriate for small businesses, to afford them sufficient time to develop systems and modify contractual terms, and one respondent recommended that the rule exempt small businesses entirely. However, another respondent cautioned the Councils that, while considering the burden on small businesses, the Councils should avoid inadvertently providing an unfair competitive advantage when small businesses participate in unrestricted procurements.

Response: As stated in the introductory summary above, the burden for all businesses, including small businesses, under the rule will be greatly reduced by phased-in application of the rule regarding disclosures by prime contractors and subcontractors.

Comment: A respondent recommended the phase-in apply to all subcontractors and not make distinctions among subcontractor tiers. The respondent proposed two distinct one-year phase-in periods for subcontractor disclosure and for update requirements and provided suggested FAR text changes.

Response: The Councils concur that a phase-in of application to subcontractors will allow an opportunity for contractors and subcontractors to become acclimated to the tracking, reporting, and reviewing requirements of this rule.

• Phase-In for Other-Than-Small Businesses

Comment: Several respondents recommended a phase-in or delayed effective date for prime contractors with the most recommended timing for a phase-in being one year. The recommendations included: (1) A significant period for phase-in to develop mechanisms for reporting, collecting, and evaluating information; (2) limiting initial application to prime contractors, specifically those subject to full Cost Accounting Standards compliance requirements; (3) an initial phase-in period for contracts valued over $10,000,000; phase-in for both prime contractors and subcontractors; and a phased approach over at least 5 years.

Response: The Councils have revised the rule to phase in application of the rule to prime contractors and subcontractors as described in the summary above.

• Length of Phase-In Period

Comment: Respondents made various recommendations for phase-in of the three year period for disclosures: That it be reduced to six to twelve months; that it begin four years after the rule's effective date; that it be increased to five years consistent with the FAPIIS reporting requirement and to enable contracting officers to conduct more thorough responsibility determinations; that it be a year at a time, *e.g.,* a year after the effective date, contractors report a year of violations; two years out, they report two years; and three years out, they report 3 years of violations.

Response: The Councils have implemented revisions in the final rule consistent with the disclosure reporting described in the above summary.

Comment: Respondents expressed concern with implementation phasing. A respondent noted that Section 10 of the E.O. indicated it will apply to solicitations as set forth in the FAR final rule, and that the E.O. Fact sheet stated that the E.O. will be ''implemented on new contracts in stages, on a prioritized basis, during 2016.'' The respondent was concerned that the proposed rule is silent on the timing of implementation. The respondent stated that this omission is significant as the effective date and implementation strategy will have substantive implications for contractors. The respondent contended that by failing to address this issue, contractors have been deprived of the opportunity to comment on this critical point as required by the APA.

Response: The statutory publication requirement for FAR rules is found at 41 U.S.C. 1707. The APA publication section at 5 U.S.C. 553 does not apply to FAR procurement regulations. The proposed rule met the requirements of 41 U.S.C. 1707 by requesting public comment on alternatives for implementation phase-in. See paragraph A of Section IV of the proposed FAR rule preamble and paragraph 6 of the Initial Regulatory Flexibility Analysis.

Comment: One respondent suggested a lengthy phased implementation and enforcement approach, along the following lines: (1) During the first two years after the effective date of the final rule, contracting agencies and DOL would establish ALCA functions by staffing and training employees to implement the rule, and contractors would begin to establish compliance and reporting protocols and mechanisms, and train their employees, (2) During the third and fourth year the final rule should apply to new solicitations and contracts valued over $20,000,000, and $10,000,000 respectively, but only to prime contracts, and (3) During later years the threshold would be reduced and apply to subcontracts.

Response: The Councils have revised the rule to reflect a phasing as described in the summary above.

ii. Subcontractor Disclosures and Contractor Assessments

Comment: A respondent took exception to the requirement for primes to ''certify'' that suppliers and subcontractors are complying with the relevant labor laws and to collect this information every six months.

Response: There is no requirement for contractors to certify that their subcontractors or suppliers are complying with relevant labor laws. The requirement is for contractors to consider labor law violations when conducting determinations of subcontractor responsibility.

Comment: One respondent recommended that DOL be tasked with evaluating subcontractors' history of violations and assessing the need for a labor compliance agreement, rather than having the prime contractors carry out that function. The respondent stated that the process of evaluating compliance history and weighing the frequency and gravity of violations should be treated as an inherently governmental function.

Response: The Councils have adopted the alternative offered in the proposed rule to have DOL assess subcontractor violations. The contractor is still ultimately responsible for evaluating the subcontractor's compliance with labor laws as an element of responsibility. Determining subcontractor responsibility is not an inherently governmental function, and reflects existing policy at FAR 9.104–4(a). There is no transfer of enforcement of the labor laws as a result of the rule; the rule provides for information regarding compliance with labor laws to be considered during subcontractor responsibility determinations and during subcontract performance.

Comment: Many respondents objected to the role of contractors collecting subcontractor violation information as prescribed in the proposed rule. Several of those respondents expressed some level of support for the alternative presented. Other respondents expressed concerns that: (1) The rules for contractors are not the same or similar to the practice that contracting officers follow; (2) proposed subcontractors do not report directly to the Government; (3) the subcontractor should make a representation back to the contractor regarding any DOL response; (4) contractors should review their subcontractors' compliance on a continual or ongoing basis; (5) if the alternative is implemented, DOL would not be able to respond quickly enough; (6) if the Government were to make a recommended responsibility determination for a proposed subcontractor that the contractor making the responsibility determination might come to a different conclusion; and (7) DOL might issue inconsistent recommendations regarding different proposed subcontracts with one company.

Response: As described in the summary above, the Councils are implementing the final rule with the alternative whereby the contractor would direct the subcontractor to disclose its labor law decisions (and mitigating factors and remedial measures) to DOL, which will resolve many of the concerns expressed regarding application of the rule to subcontractors. See the full discussion of comments and responses on the subcontractor disclosure alternative below at Section III.B.5.

iii. Contractor and Subcontractor Remedies

Comment: A number of respondents recommended that the rule enumerate specific remedies or punitive measures that are available for misrepresentations and failures to disclose relevant information.

Response: FAR representations, including those in this rulemaking, are made to the best of the offeror's knowledge and belief. However, inaccurate or incomplete representations related to this rule, like other representations in the FAR, could constitute a false statement. The rule provides that the representation is a material representation of fact upon which reliance was placed when making award; if it is later determined that the offeror knowingly rendered an erroneous representation, in addition to other remedies available to the Government, the contracting officer may terminate the contract. In addition, there are existing civil and criminal penalties for making false statements to the Government that are applicable to representations and to other information not provided as part of a representation, for example, information disclosed about labor law violations.

Comment: Two respondents recommended that the representations required of contractors and subcontractors be under oath.

Response: The Councils do not agree that the representations by contractors and subcontractors should be made under oath as it is inconsistent with how FAR representations are made. Also see prior response regarding the impact of making a representation.

Comment: Respondents recommended that the remedies specified in the regulation for misrepresentations at the ''check the box'' representation stage also apply to the contractor or subcontractor's preaward and postaward labor law violation disclosures.

Response: There are existing civil and criminal penalties for making false statements to the Government, which would be applicable to representations and to other information not provided as part of a representation, for example, information disclosed about labor law violations. With respect to subcontracts, the rule does not discuss the penalties applicable to the prime contractor—subcontractor relationship in this FAR implementation. This is in accord with general FAR practice. Prime contractors have discretion to establish subcontract terms and conditions applicable to their subcontracts. Therefore, the Councils do not consider a change to be necessary.

Comment: A respondent recommended that the penalties for misrepresentation should apply to subcontractor disclosures and be explicitly communicated to the subcontractor by the prime or higher-tier subcontractor, or the contracting officer through the solicitation.

Response: The rule does not discuss penalties for misrepresentation by subcontractors in the provision at FAR 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673). However, contractors and subcontractors may draft terms and conditions for their subcontracts that include coverage of misrepresentation penalties.

Comment: A respondent recommended that the prime contractor should have a rebuttable presumption that it was not responsible for a subcontractor's false disclosure.

Response: The Councils agree that the prime is not responsible for all subcontractor misrepresentations or false statements and have revised the FAR provision at FAR 52.222–58(b) and clause at 52.222–59(f) to read that ''A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements.''

Comment: A respondent recommended that a mechanism be provided for giving the subcontractor recourse for an erroneous negative determination by the prime contractor of the subcontractor's responsibility.

Response: Consistent with FAR 9.104–4(a), the prime contractor is generally responsible for determining the responsibility of its prospective subcontractors. Prime contractors must

exercise due diligence when evaluating and selecting among prospective subcontractors. This is existing policy and implementation of the E.O. does not change this construct. The prime contractor is ultimately responsible for deciding with whom to subcontract and how to manage the subcontractor relationship. Implementing the alternative in the final rule provides DOL's subject matter expertise to the review of subcontractor labor law decisions (and mitigating factors and remedial measures) and allows for prime contractor consultation with DOL. The Councils find the existing policies sufficient and decline to establish the new mechanism requested.

Comment: A respondent recommended that the contracting officer should document a contractor's violation of a labor compliance agreement, or its refusal to enter into one, in its past performance evaluation.

Response: As described in the summary above, the final rule has been revised to include labor law compliance (including adherence to labor compliance agreements) in information considered by contracting officers in past performance evaluations (see FAR 42.1502(j)).

Comment: A respondent recommended that the rule more closely align with the contractor performance information process which provides at FAR subpart 42.15 for notice to a contractor, an opportunity for comment, and a review at a level above the contracting officer to address disagreements.

Response: The contractor performance information process provides that agency evaluations of contractor performance, including both negative and positive evaluations, shall be provided to the contractor as soon as practicable after completion of the evaluation. As described in the summary above, the final rule has been revised to include labor law compliance (including adherence to labor compliance agreements) in information considered by contracting officers in past performance evaluations (see FAR 42.1502(j)).

Comment: Respondents stated that there could be an increase in Contract Disputes Act appeals. Respondents suggested that reporting of violations could trigger adverse performance evaluations or lead to decisions not to exercise options based on responsibility determinations. Respondents noted that the FAR provides specific processes for responding to and appealing performance evaluations. In addition, where a contracting officer determines that a contractor is not responsible, such that the contract should be terminated for default or options not exercised, there may be grounds to bring claims under the contract, based on claims that the contracting officer acted arbitrarily and capriciously; there is also a right to appeal any final contracting officer decision on these grounds under the Contract Disputes Act.

Response: The Councils note that the traditional use of options under FAR part 17 involves the exercise of the option being within the discretion of the contracting officer. The intent of the E.O. is to have contractors put their efforts in improving their record of labor law violations, rather than in litigating.

Comment: A respondent recommended that FAR 22.2004–3(b)(3) be strengthened to specify that an ALCA may consider whether the contractor has entered into a collectively bargained labor compliance agreement and whether the contractor has failed to comply with an existing labor compliance agreement as an aggravating factor.

Response: The ALCA, pursuant to FAR 22.2004–3(b)(1), is required to verify, consulting with DOL as needed, whether the contractor is making progress toward, or has entered into, the labor compliance agreement. In addition, the ALCA, in developing its assessment using DOL Guidance, will consider whether a labor compliance agreement already in place is being adhered to. Specifying whether the labor compliance agreement is collectively bargained is not required by the E.O.

Comment: Respondents proposed strengthening the remedies at FAR 22.2004–3(b)(4) to provide for the suspension of payments under a contract until the labor law violation is remedied and/or an enhanced labor compliance agreement is implemented.

Response: The respondents' recommendation for suspension of payments for labor law violations is not provided for in the E.O., and under current FAR practice, contractors are entitled to be paid for work performed.

Comment: A respondent recommended that FAR 22.2004–3(b) should be amended to provide that contracting officers and ALCAs must consider all reportable labor law violations of a prime contractor's subcontractors that were committed during the period of contract performance, for those subcontractors that have not been cleared or precleared by DOL. The respondent proposed an alternative process as a remedy to address the violations of subcontractors for whom DOL had not completed an assessment prior to subcontract award. The respondent proposed that ALCAs and contracting officers, in addition to the prime, should review all subcontractor labor law violations committed during the performance period and the prime should face the same remedial action from the contracting officer as if the prime had committed the violation.

Response: We note that it appears that an underlying assumption to the respondent's comment is that the prime's decision to award or continue the subcontract was inappropriate, and that the prime was not diligently considering the labor law violations. In fact, it may have been the appropriate decision to award or continue the subcontract depending on the totality of the circumstances related to (1) the labor law violation(s), and (2) the circumstances of the particular procurement.

Comment: A respondent recommended that the FAR should require DOL to inform prime contractors directly when DOL conducts an investigation of a subcontractor and provide specific information about the subcontractor's need for and compliance with a labor compliance agreement to the contracting officer and the prime.

Response: The E.O. does not provide that DOL must notify prime contractors directly when DOL conducts an investigation of a prospective subcontractor or provide copies of an established labor compliance agreement to the contracting officer and the prime. However, a contracting officer may request a copy of a labor compliance agreement from DOL or an enforcement agency, and the contracting officer is entitled to receive it. In addition, if prime contractors decide to enter into or continue subcontracts with a subcontractor that DOL has advised needs a labor compliance agreement and the subcontractor is in disagreement with DOL, the prime contractor must inform the contracting officer (see FAR 52.222–59(c)(5) and (d)(4)). Also, the FAR text amended at 52.222–58(b)(2) and 52.222–59(f) states that ''A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements.''

Comment: A respondent recommended that the FAR should require a prime contractor to consult with DOL if a subcontractor discloses labor law violations to the prime during contract performance. The respondent indicated that, if the subcontractor does not receive an updated clearance from DOL and the prime continues to retain

the subcontractor, the prime should face the same action by the contracting officer as if the prime had committed the violation.

Response: The processes for subcontractor disclosures to DOL at FAR 52.222–59(c) and (d) are mandatory; however, the opportunity for a prime contractor to consult with DOL or an enforcement agency at FAR 52.222–59(e) is at the prime's discretion. The prime is responsible for evaluating any information it has, including labor compliance information received from DOL, when determining subcontractor responsibility. FAR 9.104–4(a) does provide that determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility. The final rule is consistent with this policy. If prime contractors decide to enter into or continue subcontracts with subcontractors that DOL has advised need a labor compliance agreement and the subcontractor is in disagreement with DOL, the prime contractor must inform the contracting officer (see FAR 52.222–59(c)(5) and (d)(4)).

Comment: A respondent commented that an approach where DOL rather than the prime contractors would make the subcontractor responsibility determination would be equally problematic since the Government would, in effect, determine the subcontractor with whom prime contractors can do business. The respondent suggested that if DOL finds a subcontractor nonresponsible and the subcontractor's work was necessary to the prime contractor's supply chain, then the prime contractor may be forced to go out of business or not do business with the Government.

Response: The rule requires prospective subcontractors to submit labor law violation information to DOL, and requires DOL to develop an assessment. The DOL assessment assists prime contractors as they determine prospective subcontractor responsibility. Consistent with current practices under FAR 9.104–4(a), prime contractors determine subcontractor responsibility; the Government does not.

Comment: A respondent indicated that there could be conflicts of interest for DOL advisors when DOL analyzes a labor law decision issued by another part of DOL. This could also be problematic when State laws are implemented. The respondent recommended that the ALCA should be the moderator to avoid these conflicts of interest and the ALCAs should weigh in on recommendations with regards to State law violations.

Response: The structure of the subcontractor responsibility process does not create a conflict of interest, in and of itself. DOL Guidance clarifies that labor law decision information forthcoming from an enforcement component of DOL will be assessed objectively. Administrative decision makers enjoy a presumption of honesty and integrity. See *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).

Comment: Another respondent suggested that DOL issue subcontractors a certificate of competency for labor law violations, so that prime contractors can be assured that any issues have been reviewed by the most trained and appropriate subject matter experts.

Response: DOL has the most trained and appropriate subject matter experts and will provide an assessment of a subcontractor's labor law violations. There is no need for the requested certificate of competency. The subcontractor is responsible for communicating the results of the DOL assessment to the prime. The prime may rely on this information in reaching a conclusion as to a subcontractor's responsibility. In addition, DOL encourages companies to work with DOL and other enforcement agencies to remedy potential problems independent of the procurement process so companies can give their full attention to the procurement process when a solicitation of interest is issued (See DOL Guidance Section VI, Preassessment).

Comment: One respondent agreed with the FAR Council's proposed Supplemental Alternative which required that a contractor's compliance with a labor compliance agreement be factored into the evaluation of a contractor's performance. The respondent indicated this does not go far enough, and should provide that contracting officers and ALCAs must consider such compliance and factor it into both the contractor's future responsibility reviews and its past performance evaluations. In addition, the respondent stated that the contracting officer should not be permitted to credit whether the prospective contractor is still in good faith negotiating such an agreement as a mitigating factor under FAR 22.2004–3(b)(2) or (3)(v) unless such delay is directly attributed to specific Government action or inaction. The respondent stated that this standard would otherwise provide a disincentive for employers to promptly enter into a labor compliance agreement.

Response: The FAR currently provides a contracting officer with broad discretion in determining the suitability of the prime contractor. In addition, language has been added to the final rule, as described in the summary of this section, to include consideration of labor law violations in past performance evaluations (see FAR 42.1502(j)).

Comment: Respondents objected to the requirement that contractors must disclose labor law decision information every six months during the life of the contract for the Government to evaluate whether contract performance under an existing contract should continue, and contended that this would be akin to a determination of nonresponsibility. They asserted that current FAR requirements do not provide that the Government will automatically terminate an existing contract when there has been a violation, even where the violation has led to a debarment or suspension of the contractor. Indeed, Government contacts generally continue. Respondents noted that a process that disrupts a contract that is being properly and timely performed would hinder the Government's ability to carry out its mission. They suggested that the approach embodied in the proposed rule marks a significant shift in how the Government procurement process operates, and that such a fundamental shift is neither required nor justified to implement the E.O. and may lead to legal action.

Response: FAR 52.222–59(b) requires the contractor to update disclosed labor law decision information. An update of the contractor's information does not automatically result in a decision by the contracting officer to terminate the contract. Rather, the updated information is considered by the contracting officer in making contract decisions such as whether contract remedies are warranted or whether to exercise an option (see FAR 22.2004–3(b)(4)). This is consistent with current practice and no change to the rule is warranted.

b. Alternatives for Implementation of Disclosures That Were Not Presented in the Proposed Rule

Comment: A respondent suggested using existing disclosure and reporting requirements in the FAR to satisfy requirements under the E.O.

Response: The existing FAR does not require disclosure and reporting requirements for the fourteen labor laws and equivalent State laws in the E.O. The E.O. addresses more than just disclosure and reporting requirements; for clarity, the Councils have

determined to implement the E.O. through a separate subpart in the FAR, consistent with how the Councils have implemented other statutes and E.O.s of this scale.

Comment: A respondent recommended limiting the rule's disclosure and reporting requirements for subcontracts only to first-tier subcontracts, as defined at FAR 52.204–10, in order to avoid application to a contractor's supplier agreements with vendors. This change would exempt long term arrangements for materials or supplies that benefit multiple contracts and/or related costs that are normally applied to a contractor's general and administrative expenses or indirect costs.

Response: The Councils decline to limit applicability of disclosure and reporting requirements to only first-tier subcontracts, as that term is defined in FAR 52.204–10. In addition, the Councils decline to exclude long-term supplier agreements. The E.O. provides no exclusion for lower-tier subcontracts, for non-COTS items, or for supplier agreements. However, the exemption for COTS items, and the $500,000 and above threshold, should minimize the number of supplier agreements with small businesses that are covered by the E.O.

Comment: A respondent stated that contractors should be required to obtain a responsibility recommendation from DOL concerning subcontractors prior to making a subcontractor responsibility determination.

Response: DOL, as an enforcement agency, does not perform responsibility determinations or make recommendations on the responsibility determination. DOL makes assessments of labor law violations to inform the contractor's consideration of such information when the contractor is making its subcontractor responsibility determinations (FAR 52.222–59(c)(4)(ii)). The final rule, like the proposed rule, provides at FAR 52.222–59(e) that the prime contractor may consult with DOL for advice, as appropriate, regarding assessment of subcontractor labor law violation information.

Comment: A respondent requested that the Councils establish new affirmative prequalification procedures, or affirmative job-to-job certification standards, for bidders and subcontractors on contracts valued at more than $500,000, that will require offerors to attest that they do not have any of the labor law violations specified by the E.O. in order to qualify to bid or participate on a project. The respondent commented that the disclosure provisions will not effectively remove contractors with substantial histories of labor law violations from the Federal procurement process.

Response: The Councils view the proposed disclosure provisions as sufficiently rigorous. Having a labor law violation is not an automatic bar from doing business with the Government. The information disclosed will be assessed in accordance with the requirements of this rule and the contracting officer is responsible for making a determination of responsibility before awarding a contract.

Comment: A respondent expressed concern about subcontractor monitoring by higher-tier contractors and recommended that contractors be required to submit all disclosure information received from potential subcontractors to the contracting officer, who, in consultation with the ALCA, should assess the subcontractor's responsibility as part of the assessment of the prime. Otherwise, the respondent stated, there would be almost no Government oversight of subcontractors' compliance with labor laws.

Response: The final rule has been revised to require subcontractors at all tiers to disclose labor law decisions to DOL, so that contractors can obtain the advice of DOL on labor law decisions (and mitigating factors and remedial measures) in formulating subcontractor responsibility decisions. The Councils do not support requiring the submission of all labor law violations regarding subcontractors to the contracting officer, as the prime contractor is responsible for determining subcontractor responsibility (see FAR 9.104–4(a)).

Comment: A respondent recommended that the 3-year reporting period be changed to a less-burdensome, rolling 12-month period under which contractors would be required to report only labor law violations occurring within the preceding 12 months which are serious, repeated, willful and pervasive.

Response: As stated in the summary, the reporting period for disclosing decisions relating to violations of labor laws is being phased in; the period begins on October 25, 2015 and runs to the date of the offer, or for three years preceding the offer, whichever period is shorter.

Comment: A respondent recommended a ''fast-track'' approach for low risk violations that would not activate the E.O.'s remedial process and would permit contracting officer discretion to proceed with a responsibility determination for matters that properly fit into the low risk categories. This approach could involve consulting the ALCA, but without the remedial process being activated.

Response: Violations must undergo the analysis process to determine whether they are low-risk. The process in the final rule requires the ALCA to assess the labor law violations; the contracting officer considers the ALCA's analysis. No revisions are necessary.

Comment: Respondents expressed concerns about the proposed rule being applied retroactively to existing contracts. One respondent recommended that the rule prohibit retroactive application of the rule through modification of existing contracts, including multiple year IDIQ contracts with less than 3 years remaining, and prohibit contracting officers from making option exercise contingent on agreement to adopt new clauses.

Response: The rule will not apply to existing contract options for contracts which do not contain the FAR 52.222–59 clause. As discussed in the summary, the Councils have implemented a phase-in of contract and subcontract disclosure requirements. Neither the E.O. nor the final rule provides for retroactive application of the disclosure requirements to existing contracts. Companies will be brought into the labor law decision disclosure process with their first new contract issued after this rule is effective. There is no need for the Councils to make the rule applicable to contracts awarded before the rule, nor is it necessary to risk voiding the Government's right to exercise a unilateral option by attempting to add these clauses to an existing contract. No changes to the final rule are necessary. The Councils note that companies with a basic disregard for labor laws, without a satisfactory record of integrity and business ethics, may be found nonresponsible, whether or not the disclosure process is in effect.

c. Recommendations for Use of Existing Data or Employing Existing Remedies

Comment: A respondent, echoing the view of many of respondents, suggested using existing reporting and disclosure systems and processes instead of creating new ones. The respondent commented that the proposed rule is unnecessary to meet the Government's stated objectives of economy and efficiency in procurement because the Government has procedures already in place to ensure that it contracts only with responsible parties, which include the consideration of labor law violations. The respondent stated that the proposed reporting and disclosure

requirements will duplicate information already in the Government's possession thus placing a reporting burden on contractors that outweighs the benefits. Several respondents suggested that Federal agencies use existing, adequate suspension and debarment processes to root out bad firms rather than create a new and burdensome regulatory scheme for that purpose.

Response: DOL's existing systems were established in the past for a different purpose and do not satisfy the current needs of the Government in meeting the objectives of the E.O. As explained in the Preamble to DOL's Guidance, DOL and other enforcement agencies are actively working to upgrade their current tracking systems for use by the Government in compiling and maintaining enforcement data and contractor-disclosed data for purposes of implementation of the E.O. Enforcement agency databases do not and will not collect labor law decision data on arbitral awards or decisions or civil judgments in private litigation. Thus, disclosure of labor law decisions contemplated under the E.O. will necessarily include some level of disclosure by contractors. Like all information collections, the collections established to meet the requirements of this final rule will be reviewed periodically and revised accordingly when Government systems are better able to meet the terms of the E.O. See the RIA for discussion on costs and benefits of the rule. Also see Section III.B.1. of this publication and DOL Preamble Section V, paragraph D(1), which discusses the explanation for the E.O. meeting the stated objectives of increasing economy and efficiency.

Comment: A number of respondents objected to the proposed disclosure and reporting requirements as unnecessary because DOL and other agencies already have the authority to take action against violators and track violators. These respondents commented that the proposed rule would shift the burden and expense traditionally borne by the Government to Federal contractors and subcontractors, and asserted that private and public resources should not be spent filing the proposed reports when the Government already has sufficient data on whether offerors have labor law violations. A respondent commented: (1) The protections sought by the proposed rule already exist in statutes and regulations that contain civil and/or criminal penalties for contractors who violate the labor laws and prevent egregious violators from receiving contracts, referencing the FLSA, the OSH Act, Title VII of the Civil Rights Act of 1964, and the debarment authority of labor laws such as the Service Contract Act (SCA) and the Davis-Bacon Act (DBA); (2) the Councils could dispense with the proposed contractor reporting system and instead improve the Government's information collection and dissemination mechanisms and processes because the agencies which enforce the labor laws listed in the E.O. already possess the information that contractors would be required to report and the current process will work more efficiently at a fraction of the cost of the proposed rule; and (3) contracting agencies can gather information about a contractor's Federal labor law compliance history by visiting DOL's Web site and the federal courts' public access docketing viewer (commonly referred to as ''PACER'').

Response: The response to the prior comment addresses the limits of utilizing the existing enforcement agency system capabilities versus requiring contractor disclosure. See also the discussion of economy and efficiency and authority challenges at Section III.B.1. of this publication.

Comment: Several respondents indicated that the Government has FAPIIS for compiling contractor data for purposes of informed responsibility determinations based on a contractor's satisfactory record of integrity and business ethics, which includes provisions allowing agencies to impose exclusions for labor law violations. Respondents noted that it is a robust system for determining whether to award contracts to entities, including the discretion not to award a contract if the entity has an unsatisfactory labor record. Respondents pointed out that the rule should focus on modifications and improvements to those Federal systems, rather than impose a reporting requirement on Federal contractors.

Response: The E.O. provides a mechanism, implemented in this final rule, for contracting officers and contractors to gain access to labor law decision information of offerors and prospective subcontractors, including mitigating factors and remedial information, so that it may be considered when making responsibility determinations of offerors and subcontractors. This information is not otherwise available.

Comment: A respondent stated the proposed rule confuses contracting officers' authority to make determinations of responsibility with Governmentwide exclusion determinations made by suspension and debarment officials, causing duplication of roles and inconsistent treatment under labor laws. The respondent stated that by giving contracting officers tasks that belong to suspension and debarment officials, the proposed rule is inconsistent, incompatible, and duplicative of existing systems, and undermines the fairness and due process protections established within the suspension and debarment process.

Response: A contracting officer finding of nonresponsibility relates to the contractor's capability of performing a particular procurement. In contrast, the suspension and debarment process is based upon the conclusion that a contractor is so lacking in integrity or business ethics such that no contract award is in the Government's interest. The Councils do not consider a change to be necessary.

Comment: Many respondents commented that the existing, proven suspension and debarment system should be used in response to contractors who have serious, repeated, willful, and/or pervasive labor law violations instead of creating an overly burdensome and costly additional process. Respondents stated: (1) It is fairer to allow a negative Federal contracting determination only according to the established due process-protected procedures found in the suspension and debarment process; and (2) Federal labor law and Federal procurement practices already strongly support not awarding Federal contracts to employers who deny workers basic rights and Federal agencies have sufficient authority with suspension and debarment-exclusion practices.

Response: While the Councils agree that suspension and debarment is an appropriate remedy in certain instances when labor law violations occur, it may not be the appropriate vehicle to be used in most instances of contractor labor law violations. A contractor may be able to enter into a labor compliance agreement or otherwise remedy its labor law violations, and still be eligible for future awards.

The final rule also provides that when a contractor discloses labor law decisions, when being considered for contract award, it has the opportunity to provide remedial measures and mitigating factors for Government consideration.

The final rule also provides that the ALCA or the contracting officer may notify agency suspending and debarring officials.

d. Alternatives Suggested for the Threshold for Dollar Coverage for Prime Contracts

The disclosure of labor law decisions by prime contractors applies to prime contracts over $500,000; see FAR 22.2007(a) and (c) and 52.212–3(s). For

paycheck transparency, the application is also to prime contracts over $500,000; see FAR 22.2007(d). For arbitration, the application for prime contracts is over $1,000,000 for other than commercial items; see FAR 22.2007(e).

Comment: Some respondents stated that the $500,000 applicability threshold is too low and will slow down the contracting process for both the Government and prime contractors, have a disparate impact on small business, and should be modified. In contrast, other respondents believed the individual contract threshold of $500,000 is too high. One wanted more contracts covered to highlight the importance of safety issues. Another respondent cautioned that contractors with significant labor law violations but no single contract or subcontract over the $500,000 threshold will be exempted from the intent of the E.O.

Response: The $500,000 threshold is explicitly stated in the E.O. Lowering the threshold would further increase the burden on the public. Raising the threshold would eliminate a significant number of prospective contractors and subcontractors from application of the E.O.

Comment: Respondents commented on the applicability of the rule to task and delivery orders and Federal Supply Schedules (FSS), Governmentwide Acquisition Contracts (GWACs), and Multi-agency Contracts (MACs). One suggested that the rule clarify that it does not apply to the award of task orders and delivery orders. Another asked whether the required notices in FAR 52.222–59(c) and (d) would go to the agency with the contract, or the agency that issued the order.

Response: While the value of expected task and delivery orders may be relevant for the ''estimated value'' of a base contract for the purpose of reaching the relevant dollar threshold (*e.g.*, $500,000), the issuing of an individual task or delivery order does not independently trigger any of the E.O.'s requirements. Requirements of the solicitation provision FAR 52.222–57 will apply to solicitations for new base contracts, including indefinite-delivery contracts, FSS, GWACs, and MACs. Representations and disclosures required at the time of determination of responsibility will occur prior to the base contract awards. Representations and disclosures required at the time of determination of responsibility are not required again when a task or delivery order is awarded against an indefinite-delivery base contract. Existing base contracts that do not contain the FAR subpart 22.20 requirements are not subject to the disclosure requirements of this rule; this includes those existing base contracts that pre-date the effective date of the disclosure requirements, but which may have subsequent task and delivery orders issued after the effective date of the disclosure requirements. This practice is standard for application of clauses in the FAR. If the FAR were to specify this practice in one part or subpart, it would create an ambiguity on overall applicability. Therefore, no clarification is needed to the rule. The disclosures required by FAR 52.222–59(c)(5) and (d)(4) are made to the contracting officer for the base contract. Existing contractors gradually will be brought under the rule's requirements as new contracts are awarded.

e. Threshold for Subcontracts

The disclosure of labor law decisions by subcontractors applies to subcontracts over $500,000 for other than COTS items; see FAR 52.222–58 and 52.222–59(g). For paycheck transparency, the application is also to subcontracts over $500,000 for other than COTS; see FAR 52.222–60(f). For arbitration, the application is to subcontracts over $1,000,000 for other than commercial items; see FAR 52.222–61.

Comment: Some respondents stated that subcontracts for commercial items and COTS should not be exempt from the labor law decision disclosure requirements of the rule, because COTS and commercial item subcontractors are just as prone to labor law violations, and that this exemption will weaken the rule. On the other hand, some respondents believed that subcontracts for commercial items should be exempt in the same manner subcontracts for COTS items are.

Response: The E.O. limited the subcontractor disclosure exemption to COTS in order to balance the objectives of the E.O. with minimizing the burden it places on contractors. The Councils agree that this approach is an appropriate balance and no change is made to the rule.

Comment: One respondent objected to the COTS exemption for subcontracts under paycheck transparency (FAR 52.222–60) and the commercial item exemption for arbitration (FAR 52.222–61).

Response: The E.O. restricted the subcontractor disclosure exemption to COTS in order to balance the objectives of the E.O. with minimizing the burden it places on contractors. The Councils agree that this approach is an appropriate balance and no change is made to the rule.

Comment: Some respondents stated that applicability of the rule to subcontractors should not be delayed.

Response: Providing a phase-in period for subcontractors will allow both prime contractors and Government personnel to understand the new requirements, develop processes, and focus resources needed for execution. Therefore the Councils have adopted a one year phased implementation approach (see introductory summary in Section III.B.2.a. above), whereby initial implementation applies to prime contractors, later followed by subcontractors.

Comment: Several respondents, including the SBA Office of Advocacy, were concerned about the effects that applicability of the rule may have on small businesses. They suggested applicability to subcontracts be minimized, for example, by raising the threshold from $500,000 to $1,000,000, and indexing it to inflation.

Response: The E.O. considered impacts to small businesses and by design has taken steps to minimize the burden on small businesses, by exempting the majority of Federal contract awards to small businesses, namely, contracts valued under $500,000 and subcontracts for COTS items. Therefore, no change is being made to the rule.

41 U.S.C. 1908 provides for inflation indexing; however, that statute does not provide for increasing E.O. thresholds.

f. Applicability to Prime Contracts for Commercial Items

For prime contractors the disclosure of labor law decisions and coverage of paycheck transparency do not exclude contracts for commercial items or COTS. For arbitration, the application for prime contracts excludes contracts for commercial items. See prescriptions at FAR 22.2007, and see 52.212–3.

Comment: Respondents expressed opposition to the rule, claiming that the exemption for COTS subcontracts should be extended to COTS prime contracts. In the respondents' view, applying the rule to prime contractors may drive commercial companies out of the Federal marketplace, particularly nontraditional, innovative suppliers. Some respondents would expand the exemption to all contracts for commercial items.

Others expressed the view that the final rule should not contain an exemption for COTS or for commercial item contracts. In their view, the quality of responsibility determinations should not depend on the type of item being purchased.

Response: The E.O. considered impacts to contractors and subcontractors who provide commercial items and COTS. The E.O. limited the COTS exemption to subcontractor disclosure, in order to minimize the burden it places on subcontractors, while still meeting the objectives of the E.O. The E.O.'s approach is an appropriate balance in applying the exception for COTS to subcontractors and not to prime contractors.

Comment: A respondent pointed out that the Federal Acquisition Streamlining Act of 1984 (FASA) was designed to make Federal contracts for commercial items more consistent with their commercial counterparts in order to encourage the commercial entities to enter the Federal marketplace and the Government to purchase more commercial items. Citing section 8002 of FASA, the respondent pointed out that ''contracts for the acquisition of commercial items must include only those clauses that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or that are determined to be consistent with customary commercial practice to the maximum extent practicable.'' Noting that the FAR contains similar requirements, the respondent inferred that the E.O. is inconsistent with statute to the extent it ''deters commercial item contractors from participating in the Government market.''

Response: The E.O.'s goal is to contract with responsible parties who have a satisfactory record of integrity and business ethics; this is consistent with commercial practices. While there are aspects of the rule that fall outside customary commercial practices (*e.g.*, disclosures of labor law violations), its provisions and clauses fall within FAR 12.301(a)(1) as ''[r]equired to implement provisions of law or executive orders applicable to the acquisition of commercial items.'' The E.O. was intended to cover commercial item contracts; it specifically exempted COTS subcontracts but not commercial item contracts. As a result, the Councils find the inclusion of the provisions and clauses consistent with law, regulation, and the E.O.

g. Miscellaneous Public Comments Concerning Alternatives

Comment: Some respondents wanted to retain the disclosure requirement for labor law violations occurring on nonGovernment work. Other respondents wanted coverage limited to work under Government contracts or to business units that do business with the Government. Their rationale for coverage limited to Government contracts was that if the reported labor law violations relate to performance under a Government contract, these matters may be properly addressed under applicable FAR subpart 42.15, Past performance information; there is no need to impose redundant reporting obligations. Additionally, if the reported labor law violations do not relate to past performance under a Government contract, they reasoned that such information would not necessarily be relevant to a contractor's or subcontractor's ability to successfully perform a specific Government contract, and consideration should instead be determined in accordance with the established suspension and debarment procedures set out in FAR subpart 9.4.

Response: The rule covers the legal entity's full record, including private sector work. The particular information that a contracting officer may need to make a responsibility determination will be specific to the circumstances of a given contract. Rather than predetermine what information a contracting officer must use, the rule provides the information that will allow a contracting officer to make a considered responsibility determination.

Violations of the labor laws listed in Section 2 of the E.O., particularly in instances where the violations are serious, repeated, willful, and/or pervasive, may specifically affect whether a contractor has a satisfactory record of integrity and business ethics, and may also negatively impact a contractor's ability to meet other standards established in FAR 9.104–1. There is a direct nexus between labor law violations and whether a contractor has a ''satisfactory record of integrity and business ethics'' as required by FAR 9.104–1(d). See, *e.g.*, Gen. Painting Co., B–219449, Nov. 8, 1985, 85–2 CPD ¶ 530.

This nexus is explicitly cited in the E.O. at Section 2(a)(iii): ''In consultation with the agency's Labor Compliance Advisor, contracting officers shall consider the information provided . . . in determining whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics. . . .'' Further, as stated in Section 1 of the E.O., the President has concluded that ''[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. Helping executive departments and agencies . . . to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance.''

Satisfactory record of performance and ability to comply with the required delivery or performance schedule are expressly included among the list of standards in FAR 9.104–1, which a prospective contractor shall meet to be determined responsible.

The E.O. provides that, in making a responsibility determination prior to award, the contracting officer should consider all reported labor law violations in determining whether a prospective contractor is a responsible source that has a satisfactory record of integrity and business ethics. This consideration should not be limited only to reported violations that have occurred during the performance of prior Federal Government contracts, but should also include violations that have occurred outside the performance of Federal Government contracts. Consideration of all reported labor law violations, whether related to Federal contracts or not, provides insight into how the prospective contractor will perform during a future Government contract. Evidence of a prospective contractor's past labor law decisions concerning labor law violations is a basis to inquire into that contractor's potential for satisfactory labor law compliance; furthermore, how the prospective contractor has handled past violations is indicative of how it will handle future violations. When a prospective contractor has a record of noncompliance with labor laws, the contracting officer should consider the impact that likely future noncompliance will have in terms of the agency resources that will be required to monitor the contractor's workplace practices. Also see discussion in Section III.B.1.b. above.

Comment: Several respondents recommended that the rule provide an exemption or other mechanism for a prime contractor to enter into a contract with a subcontractor, notwithstanding its labor law violation history, in the case of contingency, urgency, compelling need, or an agency-directed subcontract.

Response: The rule requires contractors to consider a prospective subcontractor's labor law decision information as part of its responsibility determination, but it does not preclude a contractor proceeding with a determination in the case of contingency, urgency, or compelling need, even if the subcontractor has labor

law violations. The FAR text at 52.222–59(c)(2), (c)(5) and (c)(6) has been revised to reflect how some of these circumstances may be handled.

Comment: A respondent recommended creation of an exemption, for urgent needs, to the rule's requirement for contracting officers to consult with labor compliance advisors.

Response: There is no need for an exemption for urgent needs because under the existing rule text, the contracting officer can set the timeframe for an ALCA's response and absent a response can move forward with a responsibility determination (see FAR 22.2004–2(b)(2) and (b)(5)(iii)).

Comment: Respondents commented that the reporting requirement for initial and subsequent semiannual reporting conflicts with information restrictions associated with classified contracts. They recommended that the rule be revised to accommodate classified contracts, and that public comments be requested on this issue. The recommendation was to protect information relating to classified contracts, and classified information. Respondents pointed out that sometimes the identity of the contracting agency and the contractor are classified, and that the issue can arise at prime and subcontract levels.

Response: The rule does not compel the disclosure of classified information.

3. Requirements for Disclosures of Labor Law Decisions

Introductory Summary: The Councils received a number of comments related to disclosures associated with the proposed rule. Particular comments related to scope of information provided, potential liability, need for disclosure, public availability of information, semiannual updates, and reporting entity, among others.

The Councils recognize the E.O. and final rule contain a range of new requirements for contractors, subcontractors, and the Government. As such, the Councils have been mindful in attempting to minimize impacts while meeting the objectives of the E.O.

In response to the comments, the Councils have:

- Clarified in the final rule at FAR 52.222–59(b) that the semiannual update does not have to be accomplished on a contract-by-contract basis.
- Clarified in the final rule at FAR 52.222–57(a)(2) that if the offeror is a joint venture that is not itself a separate legal entity, each concern participating in the joint venture must separately comply with the representation and disclosure requirements.

a. General Comments

Comment: A respondent expressed general support for contractor disclosures of labor law violations, stating that the contractor is in the best position to furnish complete and accurate records about its labor law violations.

Response: Noted.

Comment: A respondent recommended that a list of companies (both contractors and subcontractors) that have been precleared or cleared in prior responsibility determinations and the dates of those clearances be made publicly available. The respondent further recommended that a list of companies under ongoing responsibility investigations should be made publicly available and promptly updated so that worker representatives and advocates, community groups, and other relevant interested parties may provide input. The respondent indicated that such publication would assist contractors in choosing precleared subcontractors, enhancing the efficiency and speed of the subcontracting approval process.

Response: The E.O. and the FAR implementation require public disclosure of labor law decision information in FAPIIS (*i.e.*, labor law violated, case number, date rendered, name of the body that made the determination or decision). For each contract or subcontract award, a responsibility determination is fact-specific and the assessment of integrity and business ethics is but one factor that is taken into consideration. A previous finding of responsibility does not indicate present responsibility for the particular procurement. As such, the Councils decline to adopt a requirement to establish a precleared or cleared process for contractors previously found responsible on other contracts and make such information publicly available. Nevertheless, in accordance with DOL's Guidance, contractors do have the ability to address their labor law compliance with DOL, in advance of any particular procurement, to enhance the efficiency of the procurement process (see DOL Guidance Section VI, Preassessment).

Comment: Respondents made recommendations to increase transparency when prospective contractors were undergoing responsibility determinations and investigations so that interested parties could provide input. For example, respondents recommended that unions or a contractor's employees be permitted to report labor law violations directly to a contracting agency. To facilitate such reporting, the respondents suggested that a prospective contractor be required to notify unions and its employees at a prospective contract performance location of the opportunity to report violations and of whistleblower protections. Respondents further recommended that a list of companies where there are ongoing responsibility investigations be made publicly available and promptly updated so that worker representatives and advocates, community groups, and other relevant interested parties may provide input.

Response: Sources having knowledge of labor law violation information are encouraged to provide it to DOL and the enforcement agencies in a timely manner and not wait for agency procurement actions. The Councils decline to make such information public as doing so is outside the scope of the E.O.

Comment: Respondents recommended changing the scope of required disclosures. Some recommended expanding the disclosures to include information such as remedies and number of workers affected. One recommended including violations older than three years. Others recommended that disclosure not be required for nonfinal, nonmaterial, or technical violations, for violations arising on nonGovernment projects, or for citations that might be settled or withdrawn.

Response: Expanding the disclosures to require the submission of additional information would create an increased burden on contractors. Moreover, contracting officers have an existing duty under the FAR to obtain such additional information as may be necessary to be satisfied that a contractor has a satisfactory record of integrity and business ethics (see FAR 9.104–1(d)), and contractors must provide the labor law decision documents to contracting officers upon request (see FAR 22.2004–2(b)(2)(iii), 52.222–57(d)(1)(ii), 52.222–59(b)(2)).

Comment: A respondent recommended creating a safe harbor framework to permit contractors and subcontractors found not to be responsible back into the marketplace.

Response: Responsibility determinations are conducted on a contract-by-contract basis. A finding of nonresponsibility on a specific contract does not remove the contractor from the marketplace or bar a contractor from bidding on or receiving future contracts. Furthermore, the labor law violation information that informs the assessment of integrity and business ethics is but one factor that is taken into consideration in making a responsibility determination.

Comment: A respondent recommended that copies of administrative merits determinations, civil judgments, and descriptions of violations be available publicly.

Response: The final rule, consistent with the proposed rule, compels public disclosure of certain basic information, *i.e.*, whether offerors do or do not have labor law decisions rendered against them concerning violations of covered laws, and, for prospective contractors being assessed for responsibility, certain basic information about the violation. The FAR implementation requires that the basic information be input in SAM and be publicly disclosed in FAPIIS. See FAR 52.222–57(d). Other contractor information submitted to the Government under this rule is not automatically available, and release is covered in FAR 9.105–3, FAR part 24, and agency policies issued pursuant to the Freedom of Information Act (FOIA). A contractor which submits mitigating factors and remedial measure or other explanatory information into SAM may determine whether the contractor wants this information to be made public. See FAR 22.2004–2(b)(1)(ii) and 52.222–57(d)(1)(iii).

Comment: Respondents voiced concerns about keeping representations current given a long solicitation lead time. For example, a respondent observed that contractors would need to update representations right up to the award date, which could be several months after the offer date. Another respondent commented that contractors will need to update the reporting system at the System for Award Management (SAM) so that the agencies have the most current information available, which is especially important if there is a long gap between offer and award.

Response: The offeror must notify the contracting officer of an update to its representation (see FAR 52.222–57(e)) if the offeror learns that its representation is no longer accurate. This means that if an offeror represented at FAR 52.222–57(c) that no labor law decisions were rendered against it, and since the time of the offer the offeror now does have a labor law decision rendered against it, the contractor must notify the contracting officer. The reverse is also true: If for example, an offeror made an initial representation that it has a labor law decision to disclose, and since the time of the offer that labor law decision has been vacated by the enforcement agency or a court, the contractor must notify the contracting officer. In the process of making a responsibility determination, the contracting officer may obtain additional information from a contractor in accordance with FAR 9.105.

Comment: Respondents were concerned that the rule would reduce or increase contractors' incentive to settle labor citations, *e.g.*, in order to attain a favorable responsibility determination.

Response: The objective of the E.O. is to increase the focus on compliance with labor laws. Studies cited in the proposed rule link compliance with labor laws to favorable performance. Therefore, it is assumed that such consideration may alter certain aspects of contractor behavior. With regard to attaining a favorable responsibility determination: The assessment of integrity and business ethics is fact-specific and labor law compliance is but one factor that is taken into consideration in making a contractor or subcontractor responsibility determination.

Comment: One respondent recommended that subcontractors be permitted to file disclosures of labor law violations directly with the Government through SAM.

Response: SAM registers contractors intending to do business with the Federal Government, not their subcontractors. In consideration of public comments, the Councils have revised the final rule at FAR 52.222–59(c) and (d) to incorporate the alternative presented in the proposed rule, whereby subcontractors provide their labor law decision disclosures to DOL, in lieu of to the prime contractor (see DOL Guidance Section V).

b. Semiannual Updates

Comment: Several respondents recommended that the required labor law violation disclosure update reporting be consolidated on an annual or semiannual basis, based on a date chosen by the contractor and subcontractor. There was concern that contractors holding many covered contracts and subcontracts will find themselves gathering information and submitting information on a near-constant basis.

Response: There is no requirement for the information in SAM to be updated separately on a contract-by-contract basis. The Councils agree that the term ''semiannual'' as used in the proposed rule was subject to different interpretations. In the final rule, the Councils clarify that contractors have flexibility in establishing the date for the semiannual update; they may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date to achieve compliance with this requirement. In either case, the contractor must continue to update it semiannually. Registrations in SAM are required to be current, accurate, and complete (see FAR 52.204–13). If the SAM registration date is less than six months old, this will be evidence to the Government that the required representation and disclosure information is updated and the requirement is met.

Comment: A respondent recommended that the proposed rule require the reporting of the following additional information about administrative merits determinations, arbitral awards, or civil judgments in the postaward semiannual disclosure updates, in SAM and directly to the contracting officer: (a) Labor law violated; (b) docket number; (c) name of the adjudicating body; (d) short factual description of the violation; (e) remedies imposed including monetary amount; (f) number of workers affected; (g) current status of the case; (h) copy of the determination, arbitral award, or civil judgment; (i) copy of any applicable labor compliance agreement or remediation agreement; (j) any notice from DOL advising that the subcontractor either has not entered into a labor compliance agreement within a reasonable period of time or is not meeting the terms of an existing agreement.

The respondent indicated that requiring the contractor to provide such information and documentation directly to the contracting officer would enable the ALCA to more efficiently and expeditiously assess the contractor's labor law compliance and to recommend appropriate action to the contracting officer.

Response: The scope of the required disclosure is delineated in the E.O. The E.O. required DOL to define the terms ''administrative merits determination'', ''civil judgment'', and ''arbitral award or decision''. The definitions of these terms further delineate the scope of required disclosure and the FAR rule adopts these definitions. Expanding the disclosures to allow for the submission of additional information is outside of the E.O. and DOL Guidance, creates an increased burden on contractors, and will additionally complicate the review process.

c. Burden of Disclosing Labor Law Decisions

Comment: Several respondents commented that the proposed rule adds unnecessary regulatory burdens and risks that serve as a disincentive for companies considering entry into the Federal market or may cause companies to leave the Federal market entirely.

Response: The Federal procurement process works more efficiently and effectively when contractors and subcontractors comply with applicable laws, including labor laws. The Councils recognize that implementation of the E.O. does have associated disclosure requirements, but the final rule is designed to meet the E.O. objective of promoting compliance with labor laws while minimizing burden where possible.

Comment: Respondents, including the SBA Office of Advocacy, expressed concern that the disclosure process, the frequency of disclosures, and review process is very burdensome and costly for all. They suggested that the burden could weigh more heavily on the small business community. One respondent stated that the onerous reporting requirements run counter to the Administration's commitment to reduce burden in commercial items acquisitions and recommended that the Government streamline the reporting process by exempting commercial items.

Response: The E.O. does not exempt small businesses or commercial items, which are significant components of the Federal marketplace. However, to minimize burden, the E.O. disclosure requirements are limited to contracts over $500,000 and subcontracts over $500,000 other than COTS items. This disclosure threshold excludes the vast majority of transactions, many of which are set aside and performed by small business. Also see the discussion of phase-in at section III.B.2.a. above.

Additionally, the Councils have adopted the alternative approach whereby subcontractors provide their labor law decision information (and mitigating factors and remedial measures) to DOL and revised FAR 52.222–59(c) and (d) to incorporate this alternative. This approach will further reduce prime contractor burden. The final rule has been revised to delete reporting language that specified updates ''throughout the life of the contract.'' Likewise, to minimize the impact of the rule, the Councils clarify that contractors have flexibility in establishing the date for the semiannual update; they may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date to achieve compliance with this requirement. In either case, the contractor must continue to update the disclosures semiannually.

The revised language should provide contractors with more flexibility for compliance with the semiannual requirement.

Comment: A respondent expressed concern that if the rule is tailored to mostly exempt small businesses, higher tiered contractors will have to absorb all risk related to labor law violations by small business suppliers.

Response: The E.O. disclosure requirements are limited to contracts and subcontracts over $500,000. This threshold minimizes the impact and burden by exempting contracts and subcontracts under $500,000, but the risk level of subcontracting with suppliers with labor law violations does not change. Under current practice, higher-tiered subcontractors must subcontract with responsible firms and set the terms and conditions of their subcontracts.

Comment: Respondents stated that contractors will have to make significant investments to deal with the complexity of complying with disclosures. In addition to understanding the various statutes and executive orders, contractors will need to master the definitions and terminology outlined in the FAR and the DOL Guidance. The respondents surmised that contractors will expand their compliance departments and much of the expense will get passed on to the Government.

Response: The Government and contractors will have to establish disclosure procedures, processes, practices, and tracking mechanisms commensurate with their size and organizational structure. However, this information is necessary to provide a clear and accurate picture of past labor law violations to comply with the E.O. requirements.

Comment: Respondents commented that the complexity of the proposed rule and new requirements will burden Federal contracting agencies that will have to create a new bureaucracy of advisors to counsel contracting officers, contractors, and subcontractors on the intricacies of the new rules. Respondents noted that each time a contractor reports labor law violations, contracting officers will be required to make determinations.

Response: The rule will impose additional requirements on the Government. These efforts are necessary to meet the policy objectives of the E.O. and to help inform procurement decisions made by the contracting officer before contract award and during contract performance, and enhance the Government's ability to contract with those having a record of integrity and business ethics. DOL will create processes that facilitate coordination between ALCAs and DOL, which will minimize the burden for agencies by avoiding redundant and inconsistent analysis.

Comment: Many respondents commented that the proposed rule and DOL Guidance will create onerous data collection and reporting requirements. They expressed that most companies do not have systems in place that routinely track whether there have been any administrative merits determinations, arbitration decisions, or civil judgments against them. In addition, most companies would not track such actions because they may not be final and are reversible. These respondents remarked that in order to comply, contractors would need to create new databases and collection mechanisms, develop new internal policies and procedures, and hire and train new personnel to ensure compliance with the proposed requirements.

Response: The Councils recognize that the rule creates reporting requirements for which contractors and subcontractors may need to establish systems, processes, and procedures, including for primes to manage their subcontractors' compliance with the rule's requirements. Each contractor and subcontractor will determine the size and complexity of the processes, procedures, and tracking and/or collection mechanisms necessary to meet its obligations under the rule.

Comment: Respondents stated that reporting potentially nonfinal administrative merits determinations, arbitration decisions, or civil judgments under the proposed FAR rule bears no traditional nexus between labor law violations and traditional notions of responsibility which are for a particular procurement and performance of a Government contract. They suggested that narrowing the reporting requirement to labor law violations that bear the most relevance would reduce the burden for contractors and the Government.

Response: The E.O. falls well within the established legal bounds of presidential directives regarding procurement policy. The Procurement Act authorizes the President to craft and implement procurement policies that further the statutory goals of that Act and of the Office of Federal Procurement Policy Act (41 U.S.C. 1101) of promoting ''economy'' and ''efficiency'' in Federal procurement. By asking contractors to disclose past labor law decisions the Government is better able to determine if the contractor is likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. See,

e.g., UAW-Labor Employment & Training Corp. v. *Chao,* 325 F.3d 360, 366 (D.C. Cir. 2003) (affirming authority of the President under the Procurement Act to require Federal contractors, as a condition of contracting, to post notices informing workers of certain labor law rights). In issuing E.O. 13673, the President explained the broad nexus that exists between general compliance with labor laws and economy and efficiency:

Labor laws are designed to promote safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. Helping executive departments and agencies to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance.

As explained in the preamble to the proposed FAR rule and the preliminary RIA, a number of studies over the years support the conclusion that there is a relationship between labor law violations and performance problems. These include reports by the GAO, the Senate HELP Committee, HUD's Inspector General, the Fiscal Policy Institute, and the Center for American Progress.

See also the discussion at Section III.B.1. above.

Comment: A respondent commented that the two-step reporting approach does not reduce burdens. In this two-step approach, the first step comprises a ''yes/no'' representation as to whether a contractor has any covered labor law violations, and the second step requires disclosure of the details of any violation(s).

Response: The two-step process is designed to reduce the preaward burden by only requiring basic labor law decision information to be reported by those for whom a responsibility determination has been initiated, rather than by all prospective contractors that answered affirmatively in the initial representation.

Comment: Respondents were concerned that contractors are required to disclose labor law violations for the past three years and represent accurately, when they had no notice of how past labor law violations might be used in the procurement process and had no reason to track these violations.

Response: The Council recognizes the burden that could be associated with immediate implementation of a three-year reporting period absent appropriate mechanisms to retrieve the information, and therefore is phasing in the reporting periods. In order to best enable compliance with the rule, the Councils have implemented a number of phase-ins for labor law decision disclosure requirements, which are discussed in Section III.B.2.a. above.

Comment: A respondent was concerned that contractor reporting of labor law violation information should be directly tied to a procurement consideration point (contract award, option exercise) rather than set at semiannual intervals. The respondent suggested that information not tied to procurement consideration point serves no useful purpose.

Response: The E.O. contemplated the contracting officer having information throughout the life of the contract, not at a specific procurement consideration point. The final rule, consistent with the proposed rule, requires disclosure of labor law decisions prior to a finding of responsibility for a contract award, and within six months from the last SAM update during performance. The purpose of the recurring update is to enable the contracting officer to determine whether any action is necessary in light of any updates to disclosures or any new decisions disclosed.

Comment: A respondent expressed concern that because the proposed rule required that contractors report on all tiers of their supply chains, the requirement to submit representations of violations with each bid or proposal would require the prime contractor to start very early to accumulate the information needed to make such a representation, or risk that the contractor would be unable to prepare and submit a bid or proposal because it has been unable to obtain information needed for its representation in a timely manner. Further, if and when a contracting officer initiates a responsibility determination and requests mitigating information, the contractor (and its subcontractors) would need time to respond.

Response: The E.O. applies to subcontractors at any tier, with subcontracts valued at greater than $500,000, except COTS acquisitions. Prime contractors are to exercise diligence in selecting responsible subcontractors. In an effort to minimize disruption to the procurement process, DOL will be available to consult with contractors and subcontractors to assist them in fulfilling their obligations under the E.O. DOL will be available to contractors and subcontractors for preassessment consultations on whether any of their labor law violations are potentially problematic, as well as on ways to remedy any problems.

As a matter of clarification, representations are made to the best of the offeror's knowledge and belief at the time of an offer. Prime and subcontractor representations are separate and distinct. Prime contractors represent their own labor law decisions rendered against them (see FAR 52.222–57 and 52.222–59(c)(3)). Subcontractor representations of whether they have had or have not had labor law decisions rendered against them are separately made under the FAR 52.222–58 provision to prime contractors and the Councils have clarified this language at FAR 52.222–58, paragraph (b). If the prospective subcontractor responded affirmatively in its representation, and a responsibility determination has been initiated by the prime contractor, the prospective subcontractor will be directed by the prime contractor to disclose its labor law violation information to DOL.

Likewise, prime contractors provide subcontractors an opportunity to provide remediating and mitigating information to DOL that the subcontractor deems necessary to demonstrate its responsibility.

Comment: Respondents expressed concern that risks of an adverse responsibility determination are borne by the prime contractor, who will be forced to pursue, compile, and update information throughout its supply chain in order to effectively manage risk associated with ongoing labor compliance reporting.

Response: As stated in FAR 9.104–4(a), prime contractors are responsible for determining the responsibility of their prospective subcontractors. This final rule does not change the responsibility paradigm. In the final rule, the Councils adopted the alternative approach to disclosure whereby prospective subcontractors submit labor law violation information directly to DOL rather than the prime contractor. This alternative approach reduces burden on the prime contractor; it also provides access to DOL's expertise which may reduce overall risk.

Comment: Respondents expressed concern that the proposed reporting is unnecessarily duplicative and disrupts well-established, legally protected enforcement mechanisms and highly effective settlement processes. As an example, one respondent stated that OSHA maintains databases of inspections and citations that contain

inspection case detail for approximately 100,000 OSHA inspections conducted annually. Additionally, accident investigation information is provided, including textual descriptions of the accident, and details regarding the injuries that may have occurred. Respondents suggested that DOL should report on and aggregate existing enforcement data, rather than imposing this requirement on contractors. Alternatively, DOL should fund its own data collection effort and allow industry to input data into that DOL portal.

Response: This rule does not intend to disrupt existing settlement processes in place by DOL or other enforcement agencies. Whenever possible, the Government seeks to use and leverage existing databases, sources, and systems. As explained in Section III.B.2.c., the existing systems of DOL and other enforcement agencies do not satisfy the current needs of the Government in meeting the objectives of the E.O. DOL and other enforcement agencies are actively working to upgrade these systems for use by the Government in compiling and maintaining administrative merits determination enforcement data and contractor-disclosed data for purposes of implementation of the E.O. Enforcement agency databases do not and will not collect labor law violation data on civil judgments, arbitral awards or decisions. Thus, disclosure of labor law violations contemplated under the E.O. will necessarily include some level of disclosure by contractors. Therefore, contractors and subcontractors are best positioned to provide labor law violation information.

Comment: Respondents stated that the proposed rule shifts a significant proportion of the burden of monitoring and enforcing labor, workplace safety, and anti-discrimination compliance across multiple jurisdictions from the Government agencies responsible for ensuring such compliance, namely the DOL and State labor departments, to contracting agencies and contractors.

Response: Neither the E.O. nor the FAR implementation shifts enforcement responsibility away from enforcement agencies. The rule emphasizes the consideration of labor law violation information as part of the contracting officer's and prime contractor's responsibility determination process.

d. Risk of Improper Exclusion

Comment: Respondents, including the SBA Office of Advocacy, surmised that the proposed regulation will have adverse impacts particularly on small subcontractors; many prime contractors will simply avoid contracting with a company that has a violation, rather than wait for the outcome of a responsibility determination. A respondent raised a concern that a contracting officer faced with choosing between an offeror with a ''clean record,'' or an offeror with some alleged labor law violations, would likely find it easier to select the offeror that does not require a labor law assessment.

Response: The objective of the E.O. is for prime contractors to contract with responsible parties, not to disregard subcontractors with labor law violations. To further this objective, the E.O. seeks to help contractors—especially those with serious, repeated, willful, and/or pervasive violations—come into compliance with labor laws, not to deny contracts. Companies with labor law violations will be offered the opportunity to receive early guidance on whether those violations are potentially problematic and how to remedy any problems. Very minor labor law violations do not meet the threshold of serious, willful, and/or pervasive, and in most cases a single violation of law may not necessarily give rise to a determination of nonresponsibility, depending on the nature of the violation (see E.O. Section 4(i) and DOL Guidance).

The final rule has been revised at FAR 22.2004–2(b)(6) to clarify that ''disclosure of labor law decisions does not automatically render the prospective contractor nonresponsible'' and ''the contracting officer shall consider the offeror for contract award notwithstanding disclosure of one or more labor law decision(s).'' (Similar language is added at FAR 52.222–59(c)(2) regarding subcontractor decisions.) Contracting officers consider the totality of circumstances in a particular procurement when making responsibility determinations and contract award decisions. In doing so, contracting officers have an obligation to possess or obtain sufficient information to be satisfied that a prospective contractor has met specific standards of responsibility. Documents and reports supporting a determination of responsibility or nonresponsibility must be included in the contract file (see FAR 9.105–2(b)). As explained in Section VI of DOL's Guidance, prospective contractors are encouraged to contact DOL for a preassessment of labor law violation information.

Comment: Respondents raised a variety of concerns regarding a potential *de facto* debarment. A respondent stated that the rule would increase contractors' incentive to bring protests, as a nonresponsibility determination would in essence be a *de facto* debarment. Another concern was contracting officers using one another's nonresponsibility determinations without conducting an independent assessment. A related concern was that the due process protections of FAR subpart 9.4 would be unavailable. A respondent suggested that guidance is necessary regarding types of conduct leading to denial of contracts.

Response: The rule does not supplant or modify suspension and debarment processes, which, consistent with current regulations, are considered in certain extreme cases when previous attempts to secure adequate contractor remediation have been unsuccessful, or otherwise to protect the Government from harm. Evidence of a prospective contractor's past violations of labor laws is a basis to inquire into that contractor's potential for satisfactory labor law compliance; furthermore, how the prospective contractor has handled past violations is appropriately considered as being indicative of how it will handle future violations. Under longstanding tenets reflected in FAR subpart 9.1, contracting officers have the discretion to consider violations of law, whether related to Federal contracts or not, for insights into how a contractor is likely to perform during a future Government contract. These long-standing tenets also hold that determinations regarding a prospective contractor's responsibility shall be made by the particular contracting officer responsible for the procurement. Requiring that decisions be made on a case-by-case basis helps to ensure that actions are taken in proper context. While this approach may result in different decisions by different contracting officers, steps have been taken in the context of this rulemaking that will help to promote consistency in assessments of labor law violation information by ALCAs and the resultant advisory input to the contracting officers and will result in greater certainty for contractors. In particular, ALCAs will coordinate with DOL and share their independent analyses for consideration by other ALCAs. This collaboration should help to avoid inconsistent advice being provided to the contractor from different agencies.

Comment: Respondents identified the due process procedures in the FAR regarding suspension and debarment and noted that suspension and debarment is a business decision and not for enforcement or punishment.

Response: The Councils agree. Suspension and debarment is a discretionary action, for a finite period of time, to protect the Government's interest, which is available for specific

causes and is invoked in accordance with procedures in FAR subpart 9.4. The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment (FAR 9.402(b)).

Comment: A respondent commented that, if Congress had intended for Federal contracting remedies, such as suspension and debarment, to apply to violations of all 14 laws cited in E.O. 13673, Congress would have specifically identified this; instead, only two of the statutes in the E.O.—the Davis-Bacon Act and the Service Contract Act—identify that the suspension and debarment remedy should be available for violations.

Response: Neither the FAR Council's rule nor DOL's Guidance expand or change the availability of suspension or debarment as a statutory remedy under the FAR or under the labor laws cited in the E.O. Under existing FAR subpart 9.4, agencies are given the administrative discretion to exercise suspension and debarment to protect the Government from harm in doing business with contractors that are not responsible sources. The rule requires only that contractors and subcontractors disclose certain labor law decisions (and mitigating factors and remedial measures) so that this information can be taken into account as part of responsibility determinations and for award decisions. The rule has been constructed to help contractors come into compliance with labor laws, and consideration of suspension and debarment is only considered when previous attempts to secure adequate contractor remediation have been unsuccessful and to protect the Government's interest. The rule provides for a number of mechanisms to help contractors come into compliance, including labor compliance agreements, that derive from labor enforcement agencies' inherent authority to implement labor laws and to work with covered parties to meet their obligations under these laws. (See also Section III.B.1. above.)

e. Request for Clarification on Scope of the Reporting Entity

Comment: Respondents, including the SBA Office of Advocacy, were unclear whether the representation of labor law violation history is required for the legal entity signing the offer alone, or if they must also represent for related entities, such as parents, subsidiaries, and affiliates. Respondents further questioned whether the subcontractor representation requirement would encompass supplier agreements or arrangements.

Some respondents recommended expanding what is reported under the representation to include the parent, subsidiaries, and affiliates of the contractor. Respondents considered this especially important where an entity exists less than three years and noted that some contractors might use subsidiaries and affiliates to evade reporting requirements. One respondent further recommended the reporting entity be expanded to also encompass partnerships and joint ventures. Alternatively, a respondent indicated that a contractor should be at least required to identify its affiliates (parent corporations, subsidiaries) in its disclosures.

Other respondents stated that reporting should be limited to the entity performing the contract and recommended against expanding the representation and certification requirement. One respondent was concerned such an expanded requirement would serve to discourage participation and have a negative impact on the number of contractors participating in Federal procurement. Another respondent expressed concern that such an expansion might lead to an unmanageable volume of disclosures. Others, including the SBA Office of Advocacy, were concerned with the associated increase in costs and impact on mid or small-sized businesses.

Response: The scope of prime contractor and subcontractor representations and disclosures follows general principles and practices of the FAR that are the same for other provisions requiring representations and disclosures. The requirement to represent and disclose applies to the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract. The Councils decline to expand the scope of the representation and disclosure requirement beyond that required in the E.O. and existing FAR practices. See the more detailed discussion of ''legal entity'' in Section III.A.3.a. above.

As is the current FAR practice, FAR rules are applied (unless specifically instructed otherwise) to solicitations from the effective date of the rule and are not applied retroactively to pre-existing contracts or subcontracts.

The representation and disclosure requirements of this FAR rule apply prospectively to subcontracts containing the provision at FAR 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), and the clause 52.222–59 Compliance with Labor Laws (Executive Order 13673). Regarding applicability to supplier agreements or arrangements, neither the E.O. nor the FAR rule contains an exception for supplier arrangements or agreements. However, the exemption for COTS items, and the $500,000 and above threshold, should minimize the number of supplier agreements with small businesses that are covered by the E.O.

Comment: Respondents asked for clarification on representation and disclosure requirements for companies in a joint venture or other teaming arrangement, and stated that it is unclear how companies acting jointly as a prime contractor should assess each other or how each would be assessed—separately or jointly. One respondent recommended the reporting entity encompass partnerships and joint ventures.

Response: The final rule has been revised to include a clarification in the provision at FAR 52.222–57 that if the offeror is a joint venture that is not itself a separate legal entity, each concern participating in the joint venture must separately comply with the representation and disclosure requirements. A joint venture that is a separate legal entity will be treated as a separate legal entity. A teaming arrangement that is a prime contractor with subcontractor will represent and disclose separately as a prime contractor and as a subcontractor. Labor law decisions that are represented and disclosed will be considered for the concern that made the disclosure.

4. Labor Law Decision Disclosures as Relates to Prime Contractors

Introductory Summary: The FAR Council received considerable comments addressing disclosure of labor law decisions. There was general support of a process by which contractors and subcontractors may consult with DOL and other enforcement agencies to receive early guidance on whether labor law violations are potentially problematic, and to receive assistance and an opportunity to remedy problems prior to a particular procurement. Some respondents said that public access to contractor disclosures will foster increased compliance with labor laws, while other respondents expressed concern about public access and safeguarding of information disclosed by contractors. The FAR Council received comments on the type of documents and information that should be disclosed by contractors; comments for and against reporting by third parties of labor law violations; and comments

with respect to contractor reliance on representations, information, and documents submitted by subcontractors.

a. General Comments

Comment: Respondents requested that the rule clarify that contractors, prior to particular procurements, have access to a ''preclearance'' process for consulting with DOL concerning their labor law violation history, and that contracting officers could accept DOL's recommendations in making a responsibility determination.

Response: The availability of DOL for consultation, prior to a contractor responding to a solicitation, is not addressed in the FAR text, which generally focuses on requirements invoked by clauses and provisions in solicitations. However, DOL's Guidance (Section VI Preassessment) includes information about the process by which contractors and subcontractors can consult with DOL and other enforcement agencies for assistance. Specifically, contractors and subcontractors are encouraged to receive early guidance on whether violations are potentially problematic, as well as avail themselves of the opportunity to remedy any problems. DOL's assessment, even if made prior to a particular procurement, is available to contracting officers through ALCAs for consideration during responsibility determination.

b. Public Display of Disclosed Information

Comment: Several respondents provided inputs on the benefits and drawbacks of public display of disclosed information. Some respondents recommended that the Government should make the disclosed information publicly available. One respondent indicated that public availability would foster increased compliance with labor laws, as well as increase third-party awareness. On the other hand, some respondents contended that public disclosure of information provided at the prime or subcontractor level could harm the contractor's business and reputation, lead to more protests, and inadvertently expose confidential, sensitive, and classified information. Respondents stated that if information must be made publicly available, it should be limited to final determinations.

Response: At the prime contract level, the final rule requires the public disclosure of prospective contractors' representation whether they have labor law decisions concerning violations of covered labor laws rendered against them within the last three years (phased-in, see Section III.B. 2.a. above) and, for prospective contractors being assessed for responsibility, certain basic information about the violation (*i.e.,* the law violated, docket number, date, name of the body that made the determination or decision). Disclosure of the representation and of the basic information about the labor law decisions will be made publicly available in FAPIIS. The rule does not provide for public disclosure of remedial and mitigating information the prospective contractor deems necessary to demonstrate its responsibility, unless the contractor determines that it wants the information to be made public. See FAR 22.2004–2(b)(1)(ii) and 52.222–57(d)(1)(iii). Concerning the decisions themselves, the rule limits publicly disclosed information to specified data elements in order for the Government to obtain copies of the decision documents; the rule does not require disclosure to the public of the decision documents themselves. These decision documents will be available for ALCAs and will not reside in SAM or FAPIIS.

Comment: Respondents believed that the Government should provide for protections to safeguard personal, corporate, and confidential information; information relating to classified contracts or subcontracts; personally identifiable and business proprietary information; and information disclosed by contractors during the bidding process and during the life of the contract. One respondent in particular recommended that the FAR Council draft guidelines for internal handling of contractor-provided information and provide appropriate protections from disclosure under FOIA.

Response: Executive agencies each have procedures in place for the handling and safeguarding of sensitive but unclassified information; additional procedures are not necessary.

All public requests for information will be handled under FAR part 24, Protection of Privacy and Freedom of Information, as usual. The data elements at FAR 52.222–57 (d)(1)(iii) (*e.g.,* mitigating factors) will be included in SAM and available to contracting officers and the registrant, but will not be publicly disclosed in FAPIIS unless the Contractor determines that it wants this information to be public. The rule does not alter the current FAR procedures for classified contracts (see FAR subpart 4.4).

Comment: Respondents believed that the Government should provide a means for the contractor that provided the information to redact confidential business information before it appears on SAM or FAPIIS.

Response: The rule does not provide for confidential business information to be included on SAM or FAPIIS. The basic information disclosed about the decision (*e.g.,* the labor law violated, the case number) is not confidential business information and will appear in FAPIIS. The contractor may redact any mitigating information provided at the discretion of the contractor into the SAM database or directly to the contracting officer. The contracting officer may inquire if the contracting officer needs to know the redacted information.

Comment: One respondent requested that the prime contractor be made to safeguard the subcontractor's information in the same manner as the Government is responsible for handling the prime contractor's information.

Response: The laws that govern the protection of information shared by the prime contractor with the Government (*e.g.,* FOIA) do not apply to protection of information shared between contractors, such as a subcontractor sharing its information with the prime contractor. However, as a matter of good business practice, many private parties negotiate protections. This is a matter between the parties.

Comment: Respondents discussed concerns that as a result of the rule, FOIA-related legal proceedings would increase, which would delay the procurement process and significantly adversely impact the efficiency of Government contracting. Reasons cited for the respondents' concerns included: Increased exposure of contractor-proprietary or competition-sensitive data, increased FOIA requests, and ''reverse FOIA appeals'' whereby contractors seek to protect contractor-proprietary or competition-sensitive information. The respondents cautioned that responding to FOIA requests will require considerable Government administrative time and personnel to retrieve relevant information, review and issue decisions, and litigate appeals at the agency level or in Federal court.

Response: The rule requires limited information about labor law decisions to be disclosed to the Government by contractors; however, the general rules for Government disclosure to the public are not changed as a result of the rule. The Councils acknowledge that handling FOIA requests can absorb Government time. However, FOIA requests are handled independently of procurements and do not typically delay procurements.

c. Violation Documents

Comment: Respondents stated that the proposed rule should require that more

than just ''basic information'' about violations be made publicly available in the FAPIIS database. Respondents advocated for the public availability of the actual labor law violation documents, contractor-provided mitigation or remedial information (including settlement agreements and labor compliance agreements), the ALCA's analysis, and the contracting officer's resultant determination.

Response: The rule requires offerors to provide basic information on labor law decisions (such as the law violated, case number, date rendered, and name of the body that made the determination or decision). Disclosure of this basic information about the labor law decisions will be made publicly available in FAPIIS. If a labor compliance agreement is entered into by a contractor, this information will be entered by the Government into FAPIIS.

Comment: Respondents identified pros and cons of allowing labor law violation reporting by third parties, such as employees, their representatives, fair contracting compliance organizations, labor-management cooperation committees, community groups, labor organizations, worker centers, and other worker rights organizations.

Some respondents advocated for allowing reporting of relevant information by third parties if they have information that contractors may not have properly disclosed relevant information. A respondent asserted that worker rights organizations may have experience with employers' compliance records. This information might include grievances, compliance with monitoring arrangements, or compliance with a labor compliance agreement. Some respondents advocated for third-party access to Government information on contractor responsibility. Another proposed that ALCAs and contracting officers should affirmatively reach out to worker organizations.

On the other hand, some respondents were concerned about the negative implications of third-party reporting. A chief concern was that a labor union seeking to organize the contractor might have an incentive to report meritless labor law allegations in order to exert pressure on contractors. Another concern was that the third parties may report ''violations'' that are being resolved, are not yet fully adjudicated, or lack merit altogether.

Response: Paragraph (b) of Section 2 of the E.O. provides that information may be obtained from other sources during performance of a contract. Specifically, E.O. Section 2(b)(ii) and (iii) provide that, during contract performance, contracting officers, in consultation with ALCAs, shall consider information obtained from contractor disclosures or relevant information from other sources related to required labor law violation disclosures.

The Councils have revised the rule at FAR 22.2004–3, Postaward assessment of a prime contractor's labor law violations, at paragraph (b)(1), to address ALCA consideration of relevant information from other sources. The Councils have not expanded access to nonpublic Government information nor created a requirement for affirmative outreach to obtain information.

With regard to respondents' concerns about meritless allegations from third parties, ALCAs will not recommend any action regarding alleged violations unless a labor law decision, as defined in FAR 22.2002, has been rendered against the contractor.

Comment: In order for the ALCA to have sufficient time to consult with third-party groups, a respondent recommended that the ALCA be given more time to conduct his or her assessment of labor law violations.

Response: The ALCA assesses violation information that is related to labor law decisions, including information that originates with third-party groups, in assessing a contractor's record of labor law compliance. The three business day timeframe in the final rule at FAR 22.2004–2(b)(2) pertains to preaward review of labor law violation information and was established to minimize negative impacts to procurement timelines. FAR 22.2004–2(b)(2) also provides that a contracting officer can determine another time period. The ALCA does not consult with third-party groups about labor compliance records related to specific ongoing procurements, due to Procurement Integrity Act restrictions (see 41 U.S.C. chapter 21). The E.O. also provides for information from other sources during contract performance. The FAR implementation of this postaward requirement does not prescribe the time available for the ALCA's postaward review. Also, in conducting subsequent assessments, the ALCA will consider such information.

d. Use of DOL Database

Comment: A respondent stated that DOL should use its existing databases and systems to capture labor law compliance information, in order to protect contractor business information and minimize the duplicative cost and process of collecting data from numerous contractors.

Response: The Councils agree on the importance of leveraging existing databases and systems where possible. Enforcement agency databases do not and will not collect labor law violation data on civil judgments, or on arbitral awards or decisions. Thus, disclosure of labor law decisions contemplated under the E.O. will necessarily include some level of disclosure by contractors. At this time, existing data systems do not include all of the information required by the E.O. DOL is working to ensure that its databases provide the information necessary to implement the E.O. regarding administrative merits determinations.

e. Remedial and Mitigating Information

Comment: Respondents stated that the Government should provide a safe harbor framework. One respondent recommended that contractors and higher-tiered subcontractors can safely rely on representations, information, and documents provided by prospective and actual subcontractors, without the need to independently verify information. Another respondent recommended that civil liability protection for contractors be provided if a subcontractor litigates the responsibility decision.

Response: The rule provides a safe harbor with respect to reliance on the FAR 52.222–58 and 52.222–59(c)(3) representations. The representation is provided to the best of the subcontractor's knowledge and belief at the time of submission. In support of the subcontractor responsibility decision and consideration of updates during contract performance, information and documents may be provided to the contractor. The contractor may rely on those representations, information, and documents. The contractor is responsible for reviewing the information and documents in making reasoned decisions. The final rule has been revised to state that ''A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements''. FAR 52.222–58(b)(2) and 52.222–59(f).

With respect to indemnification from civil liability, consistent with current procurement practices the rule does not provide such protections.

Comment: One respondent recommended that the public Web site where contractors are required to submit basic information about labor law violations should be updated to reflect subsequent decisions in the contractor's favor.

Response: At the FAR 52.222–59 clause, the contractor is required to update basic information semiannually in SAM. The rule does not restrict

contractors from providing updated information more frequently, whether the update is favorable or unfavorable.

Comment: Respondents approved of the DOL-stated intention to allow contractors and subcontractors the opportunity to seek the DOL's guidance on whether any of their violations of labor laws are potentially problematic, as well as the opportunity to remedy any problems, and urged DOL to formalize this as a ''preclearance'' process. They suggested that such a process for subcontractors would greatly benefit the prime contractors by creating a ''safe harbor,'' guaranteeing that any ''precleared'' subcontractors they hire would have no outstanding unremedied labor law violations. One respondent encouraged DOL to issue a proposed process for notice and comment on how this process will work, and how contractors may access it.

Response: The FAR rule only addresses implementation at the initiation of the procurement process. However, the DOL Guidance (at Section VI Preassessment) encourages early consultation with DOL, prior to being considered for a contract or subcontract opportunity, to address appropriate remediation and obtain DOL guidance and assessments.

Comment: Respondents recommended that the regulations clarify that the prime contractor's representation regarding compliance with labor laws is required after it wins a contract competitively, not in its initial offer.

Response: Representations are required when offerors submit either a bid or proposal in response to a solicitation. This practice allows the contracting officer to consider labor law violation information when determining contractor responsibility, which is done before award. No clarification to the FAR text is required.

Comment: A respondent recommended that prime contractors that disregarded DOL advice should be responsible for the subcontractor violation as if the prime contractor had committed the violation.

Response: The rule does not change remedies for false information submitted to the Government. The rule is not intended to remove the prime contractor's discretion in reviewing responsibility of their subcontractors, nor to provide a penalty for exercising business discretion. Prime contractors continue to be responsible for awarding contracts to subcontractors with a record of satisfactory integrity and business ethics; they are also responsible for the performance of their subcontractors once award is made.

5. Labor Law Decision Disclosures as Relates to Subcontractors

Introductory Summary: To minimize burden on, and overall risk to, prime contractors and to create a manageable and executable process for both prime contractors and subcontractors, the proposed rule offered alternative language for subcontractor disclosures and contractor assessments of labor law violation information. After considering public comments, the final rule adopts this alternative approach. In the final rule, at FAR 22.2004–1(b), 22.2004–4, and 52.222–59(c) and (d), subcontractors disclose details regarding labor law decisions rendered against them (including mitigating factors and remedial measures) directly to DOL for review and assessment instead of to the prime contractor. The next set of comments focuses on the alternative approach for subcontractor disclosures and contractor assessments.

a. General Comments

Comment: Respondents commented that subcontractor disclosures and prime contractor assessments of those disclosures would impose costly, burdensome, and difficult requirements for prime contractors to manage. Respondents further expressed concern that contractors do not have sufficient expertise, staff, and time to assess and track subcontractor labor law violation disclosures and responsibility determinations for subcontractors and their supply chain. Respondents recommended that DOL be tasked with evaluating subcontractors' history of violations and assessing the need for a labor compliance agreement.

Respondents expressed concern that multiple prime contractors may provide inconsistent assessments of a single subcontractor. Another expressed concern that the proposed rule did not provide guidance on the roles and responsibilities of the ALCA, DOL, and the contracting officer regarding a subcontractor's responsibility determination during the preaward assessment process.

A respondent expressed concern that contractors may demand additional remediation measures from subcontractors in order to ensure they are found responsible by the contracting agency.

Response: As stated in the summary, the Councils have adopted the alternative approach. The final rule has been revised at FAR 52.222–59(c) and (d) to incorporate this alternative whereby subcontractors provide their labor law decision information to DOL.

DOL's review and assessment of subcontractor labor law decision information (and mitigating factors and remedial measures) will promote consistent assessments as to whether labor law violations are of a serious, repeated, willful, and/or pervasive nature, and whether labor compliance agreements are warranted. It will also limit the likelihood that different contractors would provide inconsistent assessments on a single contractor. The alternative process will also minimize the effort required by prime contractors to obtain additional resources and expertise to assess and track subcontractor labor law decision disclosures. ALCAs are not involved in the assessment of subcontractor labor law violation information. Prime contractors will continue to make subcontractor responsibility determinations in accordance with FAR 9.104–4(a). In making such responsibility determinations, prime contractors will consider labor law compliance as an indicator of integrity and business ethics. Subcontractors will also be afforded an opportunity to provide information to DOL on mitigating factors and remedial measures, such as subcontractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws.

Comment: A respondent raised concerns that DOL is not required to provide its assessment of labor law violation information within any particular time frame. The respondent postulated that, as a result, the process implemented in the alternative (FAR 52.222–59(c) and (d)) for subcontractors to disclose directly to DOL may result in weekly or monthly delays awaiting DOL's assessment. The respondent indicated that this is not consistent with the time frames for most procurements and would be disruptive to contractors' ability to depend on subcontractor availability and to rationally plan their proposals or bids. On the other hand, the respondent cautioned that permitting prime contractors to make a separate responsibility determination if DOL has failed to respond to the subcontractor's submission within three days leaves the prime contractor at substantial risk if DOL eventually provides an adverse assessment. The respondent concluded that the alternative process would be likely to place undue pressure on subcontractors to come to terms with DOL on labor compliance agreements that, if negotiated without the immediacy of a pending procurement, would likely come out very differently.

Response: As stated in the summary, the Councils have adopted the

alternative approach whereby subcontractors provide their labor law violation information to DOL. The final rule has been revised at FAR 52.222–59 (c) and (d) to incorporate this alternative. Paragraph (c)(6) of the clause indicates that the contractor may proceed with making a responsibility determination using available information and business judgment, for appropriate circumstances, when DOL does not provide advice to the subcontractor within three business days.

To maintain the time frames for most procurements, prospective subcontractors with labor law violations are encouraged to consult early with DOL, prior to being considered for a subcontract opportunity, to: Address appropriate remediation, obtain DOL Guidance and assessment, mitigate the risk of DOL providing an adverse assessment and reduce delays and disruption of potential subcontract awards (see DOL Guidance Section VI, Preassessment).

Comment: A respondent recommended the Councils give contractors a choice about whether to use the language in the proposed rule, or the alternative approach, for paragraphs (c), Subcontractor responsibility, and (d), Subcontractor updates, of FAR 52.222–59 in their contracts with subcontractors.

Response: In consideration of public comments, the Councils have revised the final rule at FAR 52.222–59(c) and (d) to incorporate the alternative presented in the proposed rule, whereby subcontractors provide their labor law decision disclosures to DOL. This approach is mandatory for contractors. By implementing the procedures in the alternative language, the final rule will minimize contractor costs and procedural steps required for compliance. Implementing two processes as suggested by the respondent, and allowing contractors to choose which process to utilize, would be administratively unmanageable for subcontractors and the Government; therefore, the Councils decline to accept the suggestion.

b. Definition of Covered Subcontractors

Comment: A respondent expressed concern that it was too costly and burdensome to enforce the requirements of the proposed rule, which apply to all subcontractors at any tier with subcontracts estimated to exceed $500,000, except for contracts for COTS items. The respondent recommended the final rule cover only first tier subcontractors. However, another respondent recommended that subcontractors at all tiers, regardless of dollar value, be subject to the proposed rule.

Response: Section 2(a)(iv) of the E.O. applies this requirement to any subcontract where the estimated value of supplies and services required exceeds $500,000 except for contracts for COTS items. Limiting applicability to first tier subcontractors or removing the dollar threshold alters the E.O. requirements. The final rule, similar to the proposed rule, implements the E.O. requirements.

Comment: A respondent expressed concern that the proposed rule would incentivize contractors to refuse to subcontract with companies with very minor violations, which would disrupt longstanding business relationships and even drive small and middle-tier subcontractors out of business.

Response: The E.O. and rule seek to help contractors come into compliance with labor laws, not to deny contracts or subcontracts. Companies with labor law violations are encouraged to consult early with DOL on whether those violations are potentially problematic and how to remedy any problems. Very minor labor law violations do not meet the threshold of serious, repeated, willful, and/or pervasive (see DOL Guidance). The final rule has been revised at FAR 52.222–59(c)(2) to state that ''Disclosure of labor law decision(s) does not automatically render the prospective subcontractor offeror nonresponsible. The Contractor shall consider the prospective subcontractor for award notwithstanding disclosure of one or more labor law decision(s).''

Comment: Respondents asserted that the rule would encourage contractors to seek to avoid Buy American restrictions and purchase from foreign subcontractors who have no employees performing work within the United States, and therefore have no United States labor law violations. One respondent stated that the efforts to block noncompliant U.S. companies from participating in the Federal contractor process should not be allowed to provide an incentive for the use of non-U.S. workers, thus violating the goals of the Buy American requirements.

Response: The Councils acknowledge the concern. However, the statues and the E.O. are clear. As stated in Sec. 9(b) of the E.O., the requirement of this E.O. shall be implemented consistent with applicable law. As such, the implementing FAR rule does not affect the applicability of existing Buy American Act and trade agreement requirements with regards to foreign acquisitions and subcontractors, and does not alleviate contractors' compliance with these laws. For contracts performed outside the United States, a company that had no employees in the United States would have employees subject to the laws of another country, and that country would enforce its own labor laws on the company, not United States laws. Labor law violations that rise to the level of Trafficking in Persons would be covered by FAR subpart 22.17.

Comment: A respondent commented that the proposed inclusion of subcontractor disclosure will require public disclosure of proprietary information (the identity of subcontractors the contractor would be using to perform the contract) which is protected from disclosure by FOIA. On the other hand, another respondent commented that DOL's assessment of the subcontractor should be transparent, rigorous, and public.

Response: As stated in the summary, the Councils have adopted the alternative approach. The final rule has been revised at FAR 52.222–59(c) and (d) to incorporate the alternative whereby subcontractors provide their labor law violation information to DOL. The subcontractor's semiannual updates of this information will also be provided to DOL and DOL will assess this information in accordance with the DOL Guidance. The E.O. and rule do not compel public disclosure of subcontractors' identity, labor law violation information, nor DOL's assessment of that information.

Comment: A respondent expressed concern that the proposed DOL Guidance defined a ''covered subcontract'' as ''any contract awarded to a subcontractor that would be a covered procurement contract except for contracts for commercially available off-the-shelf items.'' The respondent stated this definition is overly broad and is inconsistent with the definition of subcontract in FAR part 44, Subcontracting Policies and Procedures, which does not exclude COTS items.

Response: The DOL Guidance is not inconsistent with the definitions of ''subcontract'' and ''subcontractor'' in FAR part 44. Unlike FAR part 44, the DOL Guidance does not specifically define these terms. Rather, it defines the term ''covered subcontract''—meaning a subcontract that is covered by the E.O. It describes how it uses the term ''subcontractor,'' for ease of reference both to subcontractors to subcontractors and prospective subcontractors. Neither of these uses of the terms are inconsistent with FAR part 44. The definition of ''covered subcontract'' in DOL Guidance is consistent with Sec.

2(a)(iv) of the E.O. which limits applicability to prime contracts and any subcontracts exceeding $500,000, except for acquisitions for COTS items. Prime contractors will determine applicability by following the requirement as it is outlined in FAR 52.222–59(c)(1).

Comment: A respondent recommended requiring contractors to consult with, and obtain a recommendation from, DOL regarding the review and assessment of subcontractor disclosed information, rather than letting the prime decide whether to consult DOL.

Response: As stated in the summary, the Councils adopted the alternative approach presented in the proposed rule and have revised the final rule at FAR 52.222–59(c) whereby subcontractors provide their labor law decision disclosures to DOL. DOL will review and assess the labor law violations and advise the subcontractor who will make a representation and statement to the prime contractor pursuant to FAR 52.222–59(c)(4). In the implemented alternative, the prime does not elect whether the subcontractor discloses to the prime or DOL; instead, the subcontractor discloses to DOL.

Comment: A respondent recommended ensuring the process for evaluating labor law violation information of subcontractors be as transparent and rigorous as it is for primes' labor law violation information. The respondent recommended requiring DOL to publicize that it is conducting a review of labor law violation information; requiring subcontractor disclosed information to be publicly accessible to the same extent as prime disclosed information; requiring subcontractors to provide the same information that primes must provide on labor law violations; providing for 10 business days for DOL to perform an assessment; and requiring the prime contractor to disclose to the contracting officer all of the documentation underlying its responsibility determination of the subcontractor.

Response: The E.O. and the rule compels public disclosure of basic labor law decision information of the contractor (*e.g.,* the law violated, case number, date, name of the body that made the decision), but not the subcontractor. In implementing the E.O., the Councils seek to balance the importance of transparency with efficiency, recognizing the potentially sensitive nature of relevant labor law violation information, and do not agree with expanding on the E.O.'s disclosure requirements. Therefore, no revision to the rule is made.

c. Authority for Final Determination of Subcontractor Responsibility

Comment: Respondents made comments on who should have the authority to make final determinations of subcontractor responsibility. Some respondents recommended the Councils amend the final rule to make contracting officers responsible for evaluating subcontractor responsibility in regard to labor law violations. One respondent recommended that contractors alone should make the final determination regarding subcontractor responsibility. Another respondent recommended the Councils amend the final rule to prohibit DOL from giving advice on subcontractor responsibility because DOL does not have the same amount of experience and expertise as contracting officers.

Response: The final rule, consistent with the proposed rule, builds on prime contractors' existing obligation to determine the responsibility of their subcontractors and does not change who has the authority to determine subcontractor responsibility in accordance with FAR 9.104–4(a). DOL will be responsible for analyzing subcontractor labor law violation information and providing an assessment which subcontractors can provide to primes for use in determining subcontractor responsibility, but DOL does not conduct a responsibility determination.

d. Governmental Planning

Comment: A respondent expressed concerns regarding prime contractor liability to an actual or prospective subcontractor, for either denying a subcontract award or discontinuing a subcontract because the prime found the actual or prospective subcontractor nonresponsible based on the subcontractor's labor law violations.

Response: Contractors will continue to make subcontractor responsibility determinations in accordance with FAR 9.104–4(a). The final rule does not change the legal consequences of a prime contractor's nonresponsibility determination of its actual or prospective subcontractors. Likewise, the rule does not alter the discretion a contractor has in making appropriate decisions regarding whether to discontinue a subcontract.

Comment: A respondent commented that giving primes a six-month cycle for review of thousands of subcontractors is not executable on a timely basis, even if only a small number of subcontractors report decisions concerning violations of the E.O.'s covered labor laws.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. This change shifts subcontractor disclosure assessment from the prime contractor to DOL (see FAR 52.222–59(c) on the procedures). The prime contractor's responsibility is to consider DOL's analysis and determine whether to take action with their subcontractor.

Comment: A respondent stated the proposed rule lacks procedures for subcontractors to challenge prime contractors' responsibility determinations.

Response: Neither the current FAR nor the rule includes procedures for subcontractors to challenge prime contractors' responsibility determinations (see FAR 9.104–4(a)). The prime contractor's responsibility determination of their prospective subcontractors, including review of labor law compliance history, remains a matter between the two parties.

Comment: Respondents remarked that the proposed rule creates the possibility of conflicting determinations between DOL and the ALCA, as well as between the contracting officers and various prime contractors, regarding subcontractors' labor law compliance history.

Response: The DOL Guidance includes a consistent approach for ALCAs and DOL to use when considering labor law violation information. However, each responsibility determination, made by a contracting officer or prime contractor, is independent and fact-specific, and therefore responsibility determinations may differ.

e. Subcontractor Disclosures (Possession and Retention of Subcontractor Information)

Comment: Several respondents raised concerns about prime contractors possessing and retaining subcontractor information. The SBA Office of Advocacy asked how prime contractors would be required to handle subcontractors' proprietary information. Other respondents recommended greater protection for subcontractor's confidential and proprietary information, including restrictions on handling and distribution. Some respondents cited increased risks of third-party liability, breach of contract, bid protests, and other litigation. One respondent commented that supplying information to the primes would violate legal privileges.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor

disclosures. This approach seeks to minimize the need for prime contractors to retain subcontractor labor law violation information. Notwithstanding, the rule does not address current practices for primes and subcontractors regarding the handling and distribution of subcontractor information including proprietary or confidential information that subcontractors might provide in support of a subcontractor responsibility determination. Subcontractors may assert to their primes what information they consider proprietary or confidential, by marking it for restrictions on disclosure and use of data.

Comment: Respondents commented that the rule inappropriately attempts to shift responsibility for labor law enforcement to prime contractors.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. Subcontractors provide their labor law violation information to DOL, not to prime contractors. Prime contractors will review the subcontractor representation and DOL's analysis provided by the subcontractor in order to assess integrity and business ethics and make a responsibility determination. The rule does not impinge on or shift responsibility for enforcement of labor laws to prime contractors. Only the enforcement agencies have statutory or other (*e.g.,* E.O.) prescribed jurisdictional authority to administer and enforce labor laws. The rule simply provides prime contractors with relevant information to consider in making appropriate determinations and subcontract decisions.

Comment: One respondent remarked that large projects would require a prime to certify compliance of hundreds of subcontractors, and that would be impractical or impossible.

Response: The rule does not require prime contractors to certify the compliance of subcontractors with labor laws. Prime contractors may rely on representations of subcontractors and DOL assessments. With regard to the respondent's concern over a large number of subcontractors, DOL will be available to consult with both contractors and subcontractors, providing early guidance before bidding on a particular subcontract opportunity, to address appropriate remediation, and obtain DOL guidance and assessments (See DOL Guidance Section VI Preassessment).

Comment: One respondent recommended that proposals be required to include a list of subcontractors who will perform work under the contract, to bolster effective checks and balances and reduce ''bid shopping.''

Response: Bid shopping is the practice of a construction contractor divulging to interested subcontractors the lowest bids the contractor received from other subcontractors, in order for the contractor to secure a lower bid. The Councils are aware of this practice but decline to address it in the rule as the E.O. does not address bid shopping. However, the Councils note that FAR Case 2014–003, Small Business Subcontracting Improvements, will go into effect November 1, 2016. It was published on July 14, 2016 (81 FR 45833). It adds a new requirement to the content of subcontracting plans at FAR 19.704(a)(12) and 52.219–9(d)(12), that the offeror will make assurances that the offeror will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that the offeror used in preparing the bid or proposal, in the same or greater scope, amount, and quality used in preparing and submitting the bid or proposal; the case also describes what is meant by ''used in preparing.''

Comment: One respondent recommended establishing a single reporting portal for all contractors, both prime and subcontractor, through SAM to aggregate the data and avoid the added expense of creating new databases and interfaces. The respondent stated that having one portal for primes and subcontractors makes sense because many subcontractors sell products to prime or higher tier contractors and also sell directly to the Government.

Response: The E.O. does not contemplate a single Web site for prime contractor and subcontractor disclosures. In Section 4, the E.O. requires establishment of a single database that Federal contractors could use for all Federal contract reporting requirements related to it, and that certain information about disclosed labor law decisions would be included in FAPIIS. The FAR implementation requires that certain basic labor law decision information that contractors enter into SAM will be publicly displayed in FAPIIS. There is no requirement for subcontractor information to be included in SAM or FAPIIS, except for trafficking in persons violation information which is posted to the record of the prime contractor (see FAR 9.104–6(b)(5)). If a subcontractor separately serves as a prime contractor on another Government contract, at that time they will be required to report their information in SAM.

f. Potential for Conflicts When Subcontractors Also Perform as Prime Contractors

Comment: Respondents commented that subcontractors and prime contractors are often competitors in subsequent procurements. One concern was that subcontractor disclosures would lead to increased bid protests because competitors may be a subcontractor on one opportunity and a prime on a future one. One respondent suggested that the subcontractors should be required to disclose violations directly to DOL rather than to prime contractors to address this concern. Another was concerned that having knowledge of a future competitor's labor law violation information would provide an unfair competitive advantage.

Response: The Councils appreciate the concerns of the respondents with respect to the disclosure of information to a potential future competitor. This concern is mitigated by the adoption in the final rule of the alternative approach to subcontractor disclosure whereby subcontractor disclosures are provided to and assessed by DOL instead of by the prime contractor. In the final rule, only under limited circumstances would subcontractors disclose information to a prime contractor (such as when the subcontractor disagrees with DOL advice). See FAR 52.222–59(c)(4)(ii)(C)(*3*).

g. Not Workable Approach for Prime Contractors To Assess Subcontractors' Disclosures

Comment: Respondents discussed the complexities of DOL's Guidance for assessing an entity's reported labor law violations. Two respondents specifically asserted that DOL's Guidance for assessing how an entity's reported labor law violations bear on its integrity and business ethics is detailed and complicated. One respondent asserted that DOL's Guidance does not identify how a prime should consider subcontractor reports and, with a lack of actual standards, one prime may reach one determination while another reached a different conclusion by considering the circumstances at a different level of granularity.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The final rule is revised at FAR 52.222–59(c) and (d) to implement the alternative approach in the proposed rule for contractors determining the

responsibility of their subcontractors, where the contractor directs the subcontractor to consult with DOL on its violations and remedial actions. Under this approach, subcontractors disclose labor law violation details to DOL instead of to the prime contractor. The DOL Guidance provides a consistent approach to consideration of the nature of violations to determine if they are serious, repeated, willful, and/or pervasive under the E.O. The DOL Guidance offers DOL's availability to consult with both contractors and subcontractors that have labor law violations. DOL's assessments of subcontractors, as well as its availability for consultations, are designed to improve consistency of assessments.

Comment: Respondents asserted that subcontractor reporting requirements are unworkable. A respondent specifically claimed that many subcontractors already agree to report to the prime offenses such as OSHA citations, but much of the time the subcontractors fail to actually report. One respondent specifically asserted that because primes are required to obtain from covered subcontractors, at every tier, the same information about Federal and State labor law violations that they must disclose about themselves, the proposed regulation will put contractors at risk of making good-faith representations regarding their subcontractors that could, despite the contractors' due diligence, turn out to be inaccurate or incomplete.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The E.O. and final rule establish a requirement for prime contractors to require subcontractors to disclose to DOL specified labor law decisions. Under the rule, prime contractors do not make a representation about their subcontractors' disclosures to the Government. Per FAR 9.104–4(a), prime contractors make a determination of subcontractor responsibility by virtue of awarding a subcontract.

Comment: Respondents asserted that reviewing subcontractor labor law violations and reporting requirements will be burdensome, costly, and onerous for the Government and primes to administer and creates unintended consequences for contractor/subcontractor relationships. One respondent specifically asserted that the reporting requirements would create a massive amount of reports to contracting officers and other Government officials charged with evaluating contractor labor law compliance. Respondents specifically asserted the proposed rule imposes detailed obligations for reporting on subcontractors at every tier, and that the Government would need to resolve disagreements between primes and their subcontractors, which would add another dimension to the burden placed on the Government's contract professionals.

Response: The E.O. includes disclosure requirements for contractors and subcontractors, to provide information regarding compliance with labor laws, and for Government review, assessment, and management of the information. As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. This will minimize the burden and address complexities involved with subcontractors reporting to primes. Neither the E.O. nor the rule provides for the Government to resolve differences between primes and subcontractors. Prime contractors have discretion in determining subcontractor responsibility and in deciding whether actions are needed during subcontract performance.

Comment: One respondent asserted that basic data regarding an employer's workforce, such as the location where work is performed, the number of employees working in an establishment or in a job group, how a workforce is organized, and the like, are often considered proprietary or confidential by contractors. The respondent stated that for this reason contractors often object when requests are filed with agencies under FOIA for these or similar types of information and the Government has generally respected such objections. This respondent recommended the FAR Council ensure that contractors are not required to disclose such information to the public or to their competitors.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. This change shifts subcontractor disclosure assessment from the prime contractor to DOL (see FAR 52.222–59(c) and (d)).

Prime contractors and their prospective subcontractors may agree on their own to impose restrictions on the handling of subcontractor information, but the rule does not impose any restrictions. The FAR implementation only compels public disclosure of basic information regarding the prime contractor's labor law decision(s) specifically prescribed in the E.O and does not compel public disclosure of subcontractor information. The rule does not alter or change the requirements of FOIA.

Comment: Respondents suggested that in certain industries, *e.g.,* construction, where a preponderance of work on Federal contracts is performed by subcontractors, the process in the rule for disclosure and assessment of subcontractor labor law violations is neither sufficiently robust nor transparent to achieve the desired objectives of the E.O.

Response: The E.O., through the requirement to flow down to subcontractors at all tiers, recognized that subcontractors and the work performed by subcontractors is significant to Federal procurement. The requirements of the E.O. are sufficient for all industries, including those where a preponderance of work is performed by subcontractors.

Comment: Respondents asserted the proposed model whereby primes consult with DOL to determine subcontractor or supplier responsibility creates an enormous risk for primes and is cost prohibitive for all parties, including many small and nontraditional companies wishing to act as either prime or subcontractor. A respondent claimed that because the risks of an adverse responsibility determination are borne by the prime, the prime would be forced to pursue and compile information and would need sufficient experience, training, or background to determine whether violations are serious, repeated, willful and/or pervasive; and the ability to assess mitigating factors. A respondent contended that contractors would also need to update that information on a regular basis in order to effectively manage risk associated with labor law compliance throughout their supply chain.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. Contractors currently are responsible for taking necessary steps to subcontract with responsible parties and perform adequate subcontract management. The E.O. and its implementation in the final rule make it possible for contractors to conduct a more thorough review of the subcontractor's responsibility because they will now have information and analysis they did not previously have with regard to labor law violations.

While the adoption of the alternative through which subcontractors disclose violations to DOL will mitigate the degree to which contractors may need to do assessments, there clearly is a need

for contractor employees who are responsible for subcontract awards and management to have sufficient familiarity with the DOL Guidance and their responsibilities under the rule.

Comment: Respondents supported the E.O. and asserted that there is no incentive for primes to perform the comprehensive assessment outlined in E.O. because primes want to hire subcontractors expeditiously and with as little interference as possible. They contended that unless a subcontractor runs into problems while working on the project, there appears to be no penalty for a prime contractor to deem a putative subcontractor ''responsible'' after performing a cursory review of its labor law violations.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The prime contractor's responsibility is to consider DOL's analysis and determine whether to find a subcontractor responsible and whether to take any action regarding the subcontractor. As the final rule minimizes burdens to prime contractors, it should increase prime contractors' ability to fully comply with the requirements of the rule.

Comment: A respondent asserted that neither the proposed rule nor the DOL Guidance establish processes for prime contractors to confirm subcontractors' compliance with the requirements of the rule.

Response: The representation requirement at FAR 52.222–58(b), which flows down to subcontractors at all tiers (see FAR 52.222–59(c) and (g)), will help prime contractors obtain subcontractor compliance. However, as they do with all subcontract requirements, prime contractors will establish processes that they deem necessary for them to validate and maintain subcontractor compliance.

Comment: One respondent asserted that to make compliance efforts even more difficult, the proposed rule requires prime contractors to collect labor law compliance information from subcontractors every six months. This respondent stated that the Government should bear the burden of collecting the information directly, rather than relying on prime contractors to perform this function.

Response: The E.O. requires prime contractors to receive updated subcontractor disclosures so the prime contractors can continue to consider the information and determine whether action is necessary during subcontract performance. As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. This alternative applies to disclosures both before and after subcontract award.

h. Suggestions To Assess Subcontractor Disclosures During Preaward of the Prime Contractor

Comment: One respondent recommended that DOL and ALCAs assess disclosures, and contracting officers make responsibility determinations, for both prime contractors and subcontractors before awarding the prime contract. The respondent asserted that preaward (versus postaward) determinations at all subcontractor tiers will minimize the impact of ineligibility decisions later in the project, due in part to consistent application of DOL Guidance standards throughout the tiers, which in turn will reduce project delay, cost overruns, claims, and disputes.

This respondent also asserted that consolidated agency review of all covered firms at all contracting tiers at the start of the process would bring uniform False Claims Act discipline to the certification process.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. Contractors may encourage potential subcontractors and those within their supply chain to consult with DOL in advance of a specific subcontract opportunity, to address labor law violations. (See DOL Guidance Section VI Preassessment). However, the Councils decline to accept the suggestion to require that all subcontract assessments be accomplished during prime contract preaward. Often circumstances exist whereby contractors identify a need for subcontracts during contract performance, as opposed to before contract award. Therefore, the rule provides language to account for these circumstances in the Compliance with Labor Laws (Executive Order 13673) clause at FAR 52.222–59(c)(2).

Comment: A respondent recommended that contractors submit all subcontractor labor law violation information to the contracting officer, and not just violations relating to a labor compliance agreement. The respondent further suggested that the contracting officer should use the information to evaluate the prime contractor's performance.

Response: A subcontractor's regard for compliance with labor laws may be an indicator of integrity and business ethics. Subcontractors are required to submit labor law decision information to DOL; subcontractor labor law decision information does not automatically go to the contracting officer. The final rule has been revised to require contracting officers to consider the extent to which the prime contractor addressed labor law decisions rendered against its subcontractors, when preparing past performance evaluations (see FAR 42.1502(j)).

i. Suggestion for the Government To Assess Subcontractor Responsibility

Comment: One respondent recommended creating a preclearance program to facilitate Government reviews of subcontractor responsibility and to streamline this process.

Response: Prospective contractors and subcontractors with labor law violations are encouraged to consult early with DOL, in accordance with the DOL Guidance (at Section VI, Preassessment) to obtain guidance, request assessments, and address appropriate remediation. These opportunities for early engagement are available to prospective contractors and subcontractors prior to and not tied to any specific contract or subcontract opportunity. The Councils do not accept the suggestion for the Government to perform or review subcontractor responsibility. Contractors are responsible for making subcontractor responsibility determinations. The Government determines subcontractor responsibility only in those rare instances when it is critical to the Government's interest or the particular agency's mission to do so. See 9.104–4(b).

Comment: Respondents advocated that the Government not only assess a subcontractor's labor law violation history, but also directly conduct subcontractor responsibility determinations. Respondents noted that the language at FAR 9.104–4(a) does not require the contractor to conduct a responsibility determination of its subcontractor and at FAR 9.104–4(b) allows the Government to do so.

Response: Contractors are responsible for making subcontractor responsibility determinations. The Government determines subcontractor responsibility only in those rare instances when it is critical to the Government's interest or the particular agency's mission to do so (see FAR 9.104–4(b)). In this case, the E.O. does not direct changes to how subcontractor responsibility will be conducted by the prime contractor, it simply provides a means by which prime contractors will receive relevant information to consider. The Councils find the processes established in this rule enable prime contractors to

effectively assess subcontractor labor law violation information, in consultation with DOL.

Comment: A respondent acknowledged DOL's role is to advise and provide technical assistance on compliance issues, which is consistent with their enforcement agency role. The respondent recommended that DOL not make responsibility determinations for subcontractors, as DOL does not have the same level of experience and expertise in these matters as ALCAs and contracting officers.

Response: The Councils concur that DOL's knowledge and technical expertise support its role to provide assistance in analyzing and assessing labor law compliance. Under the rule, DOL and ALCAs provide advisory assessments that inform responsibility determinations made by others. Contracting officers alone make responsibility determinations on prime contractors; contractors make the responsibility determinations for subcontractors.

Comment: In cases where DOL has determined that the subcontractor has not entered into a labor compliance agreement within a reasonable period or has not complied with the terms of such an agreement, a respondent recommended that the contractor should provide the contracting officer with a heightened explanation of the contractor's need to proceed with an award to the subcontractor and should provide information demonstrating the additional remedial measures that the subcontractor took before subcontract award.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The final rule adopts the alternative language at FAR 52.222–59(c)(5) and (d)(4), which requires that the prime contractor provide the contracting officer with the name of the subcontractor and the basis for the contractor's decision for proceeding with the subcontract (*e.g.,* relevancy to the requirement, urgent and compelling circumstances, preventing delays in contract performance, or when only one supplier is available to meet the requirement).

Comment: A respondent cited concerns that smaller subcontractors may seek advice from the contractor's legal counsel regarding the subcontractor's labor law violation history, creating potential ethical issues for the contractor's legal counsel, whose legal responsibility does not extend to the subcontractor.

Response: DOL's Guidance encourages prospective contractors and subcontractors with labor law violations to consult early with DOL, to obtain guidance, request assessments, and address appropriate remediation. As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The concern that the respondent describes is not unique to the E.O.; a prime contractor's legal counsel will always need to consider possible ethical issues when providing advice to a subcontractor. However, in the application of the E.O., this concern is addressed, in part, by the Councils' adoption of the alternative subcontractor disclosure approach in the FAR rule, whereby prime contractors direct their subcontractors to provide their labor law violation information to DOL and DOL assesses the violations. In addition, DOL's Guidance encourages prospective contractors and subcontractors with labor law violations to consult early with DOL, to obtain guidance, request assessments, and address appropriate remediation. DOL's advice may reduce a subcontractor's need to seek legal advice from outside counsel.

j. Miscellaneous Comments About Subcontractor Disclosures

Comment: One respondent recommended the process of evaluating subcontractors' labor law compliance history be done by DOL as an inherently governmental function.

Response: In accordance with FAR 9.104–4(a), contractors make subcontractor responsibility determinations. Assessment of information considered in subcontract responsibility is not inherently governmental. There is no transfer of enforcement of the labor laws as a result of the rule; the rule provides information regarding compliance with labor laws to be considered during subcontract responsibility determinations and during subcontract performance.

Comment: Respondents recommended that prime contractors be required to consult with DOL if any prospective subcontractor discloses workplace law violations.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The final rule has been revised at FAR 52.222–59(c) and (d) to incorporate this alternative whereby subcontractors provide their labor law violation information to DOL. Based on the subcontractor's submission, DOL provides its assessment to the subcontractor, who provides this information to the prime. Consultation with DOL is available to prime contractors, but is not required.

Comment: Respondents inquired about the DOL consultation timeframe, and one respondent suggested that DOL have 30 days to assess subcontractor violations. Respondents suggested DOL should be open to performing ''preclearance'' assessments before a subcontractor bids on a subcontract to expedite matters when an actual procurement is underway.

Response: If a subcontractor requests DOL's assessment to support a specific subcontracting opportunity and does not receive DOL's response within 3 business days, and DOL did not previously advise the subcontractor that it needed to enter into a labor compliance agreement, the prime contractor may proceed with making a subcontractor responsibility determination without DOL's input, using available information and business judgment (see FAR 52.222–59(c)(6)). The rule does not specify a time limit for DOL to conduct its assessment. Subcontractors do not need to wait until responding to a specific opportunity in order to request DOL's review of their labor law violation history. DOL will be available to consult with contractors and subcontractors to assist them in fulfilling their obligations under the E.O. (See DOL Guidance Section VI, Preassessment).

Comment: One respondent commented that 3 business days is not a reasonable or appropriate amount of time for DOL to make an accurate and complete determination. The respondent indicated that any period shorter than 3 business days will not allow the Government to properly assess contractors with track records of compliance. The respondent pointed out that the DHS joint rulemaking on the labor certification process for H–2B temporary workers allows DOL Certifying Officers 7 business days to examine, assess, and respond to an employer's Application for Temporary Employment Certification.

Response: Allowing more than 3 business days for response from DOL could, in some circumstances, cause delays to subcontract awards and delivery of needed goods and services. Most offerors submit offers on multiple solicitations and DOL will have an opportunity to do a thorough and complete assessment of a subcontractor's labor law violations.

Comment: One respondent recommended that a prime contractor be required to submit to DOL its

communications with subcontractors with regard to the subcontractor's reporting requirements and consequences for labor law violations.

Response: The E.O. and rule do not require a prime contractor to submit to DOL its communications with subcontractors regarding the subcontractor's reporting requirements and consequences for labor law violations. As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. Based on the subcontractor's submission, DOL provides its assessment to the subcontractor, who provides this information to the prime contractor. This direct communication between DOL and the prospective subcontractor provides for a dialogue on the consequences for labor law violations.

Comment: One respondent asked what would happen on an instant acquisition if DOL provides its advice subsequent to the prime contractor's responsibility determination and the two are inconsistent.

Response: Under FAR 52.222–59(c)(6), if DOL does not provide its advice with respect to the subcontractor's labor law decisions within 3 business days, the prime contractor is authorized to proceed with its determination of subcontractor responsibility. If the advice from DOL is received prior to subcontract award, the Government would expect the prime to assess the impact of that information on its subcontract award decision, consistent with prudent business practice. If the advice from DOL is received subsequent to subcontract award, the contractor should consider the information in a manner similar to information received for semiannual update purposes at FAR 52.222–59(d) and determine if any action is appropriate or warranted.

Comment: One respondent asked how long each contractor would have to retain subcontractors' information, and whether a contractor would be required to disclose information under Federal and State public information statutes.

Response: The rule does not affect existing records retention or public disclosure statutes or policies under Federal and State public information statutes (*e.g.,* FAR subpart 4.7, Contractor records retention).

Comment: One respondent recommended that prime contractors be responsible for making contracting officers aware that DOL has determined that a prospective or existing subcontractor has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of the agreement. The respondent further recommended that subcontractors be required to disclose DOL's concerns to the prime contractor and DOL be required to directly inform the prime contractor.

Response: The FAR rule requires the subcontractor to make the prime contractor aware of DOL assessments and this process preserves the prime-subcontractor contractual relationship. The requirements in the revised final rule, appearing in FAR 52.222–59(c)(5) and (d)(4), for the prime contractor to notify the contracting officer are sufficient.

6. ALCA Role and Assessments

Introductory Summary: The agency labor compliance advisor (ALCA) is defined at FAR 22.2002 as ''the senior official designated in accordance with Executive Order 13673. ALCAs are listed at *www.dol.gov/fairpayandsafeworkplaces.*'' The ALCA is a senior agency official who serves as the primary official responsible for the agency's implementation of Executive Order 13673, Fair Pay and Safe Workplaces. ALCAs will play a key new role in agencies, promoting awareness of and respect for the importance of labor law compliance through their interactions with senior agency officials, contracting officers, and contractors, while also meeting regularly with DOL and ALCAs from other executive departments and agencies to formulate effective and consistent practices Governmentwide.

In the procurement process ALCAs will provide support to contracting officers as technical advisors lending expertise in the subject area of labor law compliance. ALCAs provide analysis and advice, including a recommendation, to the contracting officer regarding disclosed labor law violations (including mitigating factors and remedial measures) for the consideration of contracting officers when conducting responsibility determinations and during contract performance. The ALCA's analysis includes an assessment of whether the disclosed violations are of a serious, repeated, willful, and/or pervasive nature; consideration of mitigating factors; and whether the contractor has taken steps to adequately remedy the violation(s). The ALCA's advice to the contracting officer may address whether a labor compliance agreement is warranted given the totality of circumstances, and the status of prior advice that a labor compliance agreement was warranted.

ALCA tasks are addressed in FAR 22.2004–1(c), 22.2004–2(b), and 22.2004–3(b).

Nothing in the phase-in relaxes the ongoing and long-standing requirement for agencies to do business only with contractors who are responsible sources and abide by the law, including labor laws. Accordingly, if information about a labor law decision is brought to the attention of the ALCA indicating that a prospective prime contractor has been found within the last three years to have labor law violations that warrant heightened attention in accordance with DOL's Guidance (*i.e.,* serious, repeated, willful, and/or pervasive violations), the contracting officer, upon receipt of the information from the ALCA, shall provide the contractor with an opportunity to review the information and address any remediation steps it has taken. Based on this input, which shall be provided to the ALCA, the ALCA may recommend measures to the contracting officer to further remediate the matter, including seeking the prospective contractor's commitment to negotiate a labor compliance agreement or other remedial measures with the enforcement agency, which the contracting officer must then consider. If the violations showed a basic disregard for labor law, or the contractor refused to comply with the recommended remediation measures, the ALCA's recommendation might advise the contracting officer that the prospective contractor has an unsatisfactory record of labor law compliance which may contribute to a contracting officer's determination of nonresponsibility. For this reason, entities seeking to do business with the Government are strongly encouraged to work with DOL in their early engagement preassessment process to obtain compliance assistance if they identify covered labor law decisions involving violations that they believe may be serious, repeated, willful, and/or pervasive. This assistance is available to entities irrespective of whether they are responding to an active solicitation. Working with DOL prior to competing for Government work is not required by this rule, but will allow the entity to focus its attention on developing the best possible offer when the opportunity arises to respond to a solicitation.

a. Achieving Consistency in Applying Standards

Comment: Respondents speculated that ALCAs would perform their duties with unclear standards and ambiguous criteria.

Response: The E.O. expressly requires the creation of processes to ensure

Governmentwide consistency in its implementation. The DOL Guidance was developed to provide specific guidelines for ALCAs, contractors, and contracting officers. In addition, ALCAs will work closely with DOL during more complicated assessments. This level of coordination will ensure that ALCAs receive expert guidance and instruction.

Comment: Respondents expressed concern that ALCAs at different agencies, when reviewing the same information regarding a contractor's labor law violations, would come to inconsistent conclusions as to whether a violation is of a serious, repeated, willful, or pervasive nature and whether actions, such as termination of a contract, are warranted. Similarly, respondents expressed concern that contracting officers across various agencies will make inconsistent decisions regarding responsibility and appropriate remedies.

Response: The DOL Guidance provides specific guidelines for weighing and considering violations (see DOL Guidance Section III.B.), which will foster consistency. Likewise, DOL is available to provide advice and assistance, and ALCA coordination across agencies will occur, as appropriate. The final rule, consistent with the proposed rule, does not require the ALCA to advise the contracting officer regarding which postaward contractual remedies to take, such as contract termination. The Government is employing measures to achieve consistency in ALCA analysis of labor law violation information, but contracting officer responsibility determinations and postaward decisions are intended to be arrived at independently. There is no change to existing requirements for contracting officers to make independent determinations on contractor responsibility (see FAR subpart 9.1). The ALCA provides contracting officers with analysis and advice, in addition to a specific recommendation, which does not disturb the contracting officer's independent authority in determining responsibility. Contracting officers consider assessments provided by ALCAs consistently with advice provided by other subject matter experts. Contracting officer responsibility determinations and procurement decisions are made in the context of the specific requirements of each procurement; lockstep consistency in such determinations and decisions is not expected, appropriate, or required. (See also Section III.B.1. above).

b. Public Disclosure of Information

Comment: Respondent requested that ALCAs' annual reports contain, as separate elements, the number of contractors and subcontractors reporting labor law violations, the names of contractors entering into labor compliance agreements, the names of contractors failing to comply with their labor compliance agreements, and the number of violations that have been cured as a result of remedial actions.

Response: The FAR implementation does not cover the E.O. Section 3, Labor Compliance Advisors, in its entirety; the FAR implementation is limited to ALCA duties necessary for contracting officer execution of procurement actions. Thus, the FAR does not cover the specifics of the ALCA's annual report described in E.O. Section 3(h).

Comment: Respondent recommended that the final Guidance and regulation specify that a public database publish ALCA recommendations regarding responsibility, contracting officer final responsibility determinations and any labor compliance agreements referenced as part of the contracting officer's determination.

Response: The additional information requested by the respondent is not required by the E.O. In addition, as part of the responsibility determination, the contracting officer considers the ALCA's assessment of a contractor's labor compliance history. Per FAR 9.105–3, information accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government (this does not apply to information publicly available in FAPIIS). The existence of a labor compliance agreement entered into by the prime contractor will be public information. See FAR 22.2004–1(c)(6).

c. Sharing Information Between ALCA and Contracting Officer

Comment: A respondent recommended that ALCAs be required to ''pass on'' to the contracting officer additional information that the contractor may have submitted demonstrating a commitment to compliance.

Response: The final rule has been revised to require that information to demonstrate responsibility and commitment to compliance (including mitigating factors and remedial measures such as contractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws) is provided in SAM (FAR 22.2004–2(b)(1)(ii), 22.2004–3(b)(2)). The ALCA, in providing analysis and advice to the contracting officer, provides such supporting information that the ALCA finds to be relevant, which may include discussion of mitigating factors and remedial measures.

Comment: A respondent noted concerns that Congress may not fund the President's fiscal year 2016 budget request for an office of labor compliance within DOL that would be staffed by 15 Federal employees at a cost of $2.6 million.

Response: DOL and the FAR Council are committed to fulfilling their duties under the E.O.

d. Respective Roles of Contracting Officers and ALCAs in Making Responsibility Determinations

Comment: Respondents expressed concern that ALCAs and DOL, rather than contracting officers, would decide which contractors are deemed responsible to receive contract awards.

Response: Contracting officers determine the responsibility of prime contractors. DOL is available to the ALCA for coordination and assistance, and the ALCA provides analysis and advice for use by the contracting officer. Neither DOL nor the ALCA make responsibility determinations. The FAR provides for advisory input by technical subject matter experts to assist contracting officers. For example, see FAR 1.602–2(c) which requires contracting officers to request and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate.

Comment: Respondent speculated that contracting officers will inevitably receive pressure from ALCAs, and that ALCA inputs may drive contracting decisions.

Response: According to FAR 1.602–1(b), no contract shall be entered into unless the contracting officer ensures all requirements of law, executive orders, regulations, and all other applicable procedures have been met. As advisors to the contracting officer, ALCAs provide an assessment of labor law violation information, including mitigating factors and remedial information, for the contracting officer's consideration during the responsibility determination process. ALCAs, like other technical expert advisors to the contracting officer, may provide inputs that are persuasive; however, the ultimate determination of responsibility is the contracting officer's.

Comment: Respondents recommended that contracting officers be required to document reasons for not

complying with ALCA recommendations, and that agencies be required to track compliance and publicly report the results on a regular basis.

Response: The final rule has been revised at FAR 22.2004–2(b)(5)(ii) and 22.2004–3(b)(4) to require contracting officers to place the ALCA's written analysis into the file and explain how it was considered. Preaward procurement-specific information is protected from release outside the Government per FAR 9.105–3, as it relates to the responsibility of a prospective contractor. Separately, the E.O. at Section 3(h) requires agencies to publicly report agency actions in response to serious, repeated, willful, and/or pervasive violations, which agencies will implement in a manner suitable to protecting procurement-specific information, *e.g.,* on a cumulative basis.

Comment: Respondent suggested that contracting officers not complying with ALCA recommendations of nonresponsibility be required to seek and obtain concurrence and approval from the senior agency procurement official.

Response: ALCAs are advisors to the contracting officer. As part of the ALCA analysis and advice, ALCAs make a recommendation about whether the prospective contractor's record supports a finding by the contracting officer of a satisfactory record of integrity and business ethics (see FAR 22.2004–2(b)(3)). ALCAs provide analysis and advice on one aspect of responsibility: Integrity and business ethics regarding labor law violations. Contracting officers consider the information provided by advisors such as ALCAs, as well as advice from other experts. The FAR generally does not require higher-level review and approval of a contracting officer's responsibility determination.

Comment: Respondents alleged that ALCA determinations violate contractor due process rights.

Response: According to FAR 1.602–1(b), no contract shall be entered into unless the contracting officer ensures all requirements of law, executive orders, regulations, and all other applicable procedures have been met. ALCAs provide input to be considered during the contracting officer's responsibility determination process; however, ALCAs are advisors to contracting officers and do not make responsibility determinations. The assessments of ALCAs do not violate prospective contractors' due process rights, because ALCAs are advisors to the contracting officer in the well-established responsibility determination process. Neither the E.O. nor the final rule affects contractors' rights to administrative hearings. (See also Section III.B.1. above.)

Comment: Respondents alleged that ALCA determinations have the potential to result in *de facto* debarments. Specifically, respondents alleged there is a danger that one ALCA determination and a subsequent contracting officer decision, finding a contractor nonresponsible, would be improperly copied across the Government on multiple contract actions.

Response: ALCAs provide analysis and advice to contracting officers about one aspect of offeror responsibility; it is the contracting officer who makes the final responsibility determination. In addition, as required by FAR 9.105–2(b)(2)(i), contracting officers must publish in FAPIIS nonresponsibility determinations on acquisitions above the simplified acquisition threshold. If the contracting officer finds nonresponsibility determinations previously submitted in FAPIIS under FAR 9.105–2 because the contractor does not have a satisfactory record of integrity and business ethics, FAR 9.104–6(c) requires the contracting officer to notify the agency official responsible for initiating suspension and debarment action if the information appears appropriate for consideration. This FAR requirement for suspension and debarment notification is intended to prevent *de facto* debarments. There is no evidence that nonresponsibility determinations have been improperly ''copied'' across the Government on multiple contract actions. (See also Section III.B.1. above.)

Comment: Respondents raised concerns that the potential of an ALCA making a nonresponsibility recommendation would lead to coercive efforts against potential contractors to enter into labor compliance agreements.

Response: ALCA assessments are provided to the contracting officer, who considers a range of information on various aspects of responsibility. An ALCA's analysis may indicate to the contracting officer that a labor compliance agreement is warranted. A contracting officer will notify the contractor that the ALCA has advised that a labor compliance agreement is warranted. See FAR 22.2004–2(b)(7) and 22.2004–3(b)(4)(i)(B)(*1*). There is no evidence to suggest that ALCAs or contracting officers would act inappropriately in executing their respective duties and responsibilities.

Comment: Respondent recommended procuring agencies engage in a dialogue between offerors and ALCAs prior to award, suggesting that a great deal of transparency between the Government and individual contractors is necessary.

Response: The rule provides for exchange of information in FAR 22.2004–2(b)(1)(ii) and 52.222–57(d)(1)(iii), where each prospective contractor has an opportunity to provide additional information to the contracting officer it deems necessary to demonstrate its responsibility, *e.g.,* mitigating factors, remedial measures, etc. The ALCAs are advisors to contracting officers, and as such, ALCA dialogue with potential offerors is not available to the public. Additionally, the DOL Guidance provides transparency in the form of early engagement preassessment opportunities for prospective contractors.

Comment: Respondents were concerned that the role of the ALCA is not consistent with, or usurps, the duties of contracting officers and debarring officials.

Response: ALCAs are advisors to contracting officers in the field of labor law; their provision of analysis and advice is consistent with the advisory role of other specialists consulted by contracting officers (FAR 1.602–2(c)), and with the role of the contracting officer in making final decisions in contracting matters. In addition, the ALCA functions and duties are separate and distinct from the suspension and debarment process.

e. Number of Appointed ALCAs, ALCA Expertise, and ALCA Advice/Analysis Turn-Around Time Insufficient

Comment: Respondents raised concern over the language at Section 3 of the E.O., which reads in part ''[e]ach agency shall designate a senior agency official to be an [ALCA].'' Respondents were concerned that each agency would have only one ALCA available to assist contracting officers in analyzing and responding to labor law violations, and as a result, ALCAs at certain agencies with a high volume of contract work would cause delays in the procurement process.

Response: The E.O. requires each agency to designate a senior agency official to serve as the agency's labor compliance advisor, and it would be beyond the authority of this rule to require agencies to appoint more than one ALCA. However, agencies have discretion to develop an appropriate support structure to allow for successful implementation of the ALCA's responsibilities. For example, an agency has one General Counsel, one Chief Financial Officer, one Chief Acquisition Officer, and one Chief Information Officer, but each has support staff. In

response to the concern about delays in the procurement process, if an ALCA does not reply in a timely manner, the contracting officer has the discretion to make a responsibility determination using available information and business judgment (see FAR 22.2004–2(b)(5)(iii)).

Comment: Respondents, including the SBA Office of Advocacy, raised concerns that three business days were insufficient time for an ALCA to provide written advice and recommendations to contracting officers during the preaward assessment of an offeror's labor law violations.

Response: As stated at FAR 22.2004–2(b)(2)(i), contracting officers shall request that ALCAs provide written analysis and advice ''within three business days of the request, or another time period determined by the contracting officer.'' The time period for an ALCA to provide written advice to a contracting officer is adjustable according to contracting officer requirements; however, the standard timeframe is three business days. If an ALCA response is not timely, the contracting officer has the discretion to make a responsibility determination using available information and business judgment (see FAR 22.2004–2(b)(5)(iii)). Additionally, contractors and subcontractors are encouraged to avail themselves of the preassessment process to consult with DOL in advance of a particular procurement opportunity, which will facilitate processes during procurements (see DOL Guidance Section VI Preassessment).

Comment: Respondents raised concerns about the lack of guidance regarding training, knowledge and expertise required for an individual to be qualified for appointment as an ALCA. Respondents recommended that ALCAs have training in labor law and the role of labor organizations in order to assist them in understanding and evaluating the various labor laws identified in FAR 22.2002 of the rule.

Response: The Government has issued internal guidance to agencies identifying ALCA's appropriate qualifications and expertise. See OMB Memorandum M–15–08, March 6, 2015, Implementation of the President's Executive Order on Fair Pay and Safe Workplaces. Agencies will consider the knowledge, training, and expertise of individuals they appoint to fulfill ALCA duties as they do for all other positions, as well as relevant factors, including an individual's demonstrated knowledge and expertise in Federal labor laws and regulations enumerated in the E.O. Agencies are responsible for ensuring that ALCAs have sufficient training to perform their duties. In addition, the Government plans to develop internal policies and operating procedures for ALCAs.

7. Labor Compliance Agreements

Introductory Summary: Discussion of labor compliance agreements in the DOL and FAR Preambles and coverage in the final DOL Guidance and FAR rule have been reviewed for consistency. Discussion of public comments and responses submitted on the topic of labor compliance agreements is found in the DOL Preamble Section by Section Analysis at Section III. Preaward assessment and advice, C. Advice regarding a contractor's record of Labor Law compliance; coverage of labor compliance agreements in the DOL Guidance is also in Section III. Preaward assessment and advice, C. Advice regarding a contractor's record of Labor Law compliance.

Labor compliance agreements are defined at FAR 22.2002 as ''an agreement entered into between a contractor or subcontractor and an enforcement agency to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters.'' The ALCA reviews disclosed labor law violation information (including mitigating factors and remedial measures) and, using DOL Guidance, provides analysis and advice for the contracting officer to consider when assessing the prospective contractor's present responsibility (FAR 22.2004–2(b)(3) and (4)) and when determining if remedial action is required during contract performance (FAR 22.2004–3(b)(3)). If an ALCA includes in its analysis a notification to the contracting officer that a labor compliance agreement is warranted, the contracting officer will provide written notice to the prospective contractor. For preaward assessments, the contracting officer's notice will state that the ALCA has determined a labor compliance agreement is warranted, identify the name of the enforcement agency, and either require the labor compliance agreement to be entered into before award, or require the prospective contractor to provide a written response to the contracting officer regarding the prospective contractor's intent (see FAR 22.2004–2(b)(7)). For postaward assessments, the contracting officer will follow similar procedures in issuing a written notification that a labor compliance agreement is necessary (see FAR 22.2004–3(b)(4).

The Government's objective is to maximize efficiency by negotiating a single labor compliance agreement whenever possible. Occasionally, a single labor compliance agreement may not be feasible. The Government anticipates having a single point of contact within each enforcement agency for coordinating labor compliance agreements involving more than one enforcement agency.

a. Requirements for Labor Compliance Agreements

Comment: Respondents expressed differing views on whether a labor compliance agreement should be required as a prerequisite for a contract award and to continue contract performance. One view was that a labor compliance agreement is unnecessary because it is not clearly linked to a specific labor problem. Another requested the rule require all contractors and subcontractors who violate labor laws during their contract performance period to enter into a labor compliance agreement. Several respondents proposed that labor compliance agreements be incorporated into contracts as mandatory contract clauses.

Response: A labor compliance agreement is not necessarily a prerequisite for a responsibility determination, award, or continued performance at either the contract or subcontract level. An assessment providing that a labor compliance agreement is warranted for a prospective contractor is but one data point that a contracting officer will consider in determining responsibility and may or may not have bearing on an award decision. Contracting officers have discretion and may find responsibility or nonresponsibility in the absence of a labor compliance agreement as each responsibility determination is fact specific. An ALCA assessment providing that a labor compliance agreement is warranted for a performing contractor will result in the contracting officer taking appropriate action, which will include providing written notification to the contractor that a labor compliance agreement is necessary or exercising a contract remedy (see FAR 22.2004–3(b)(4)).

Comment: Respondents requested that the rule explicitly state when a labor compliance agreement will be required.

Response: When labor law violations are of a serious, repeated, willful, and/or pervasive nature, the ALCA may recommend to the contracting officer that a labor compliance agreement is warranted, after taking a holistic view of the totality of circumstances including consideration of mitigating factors and remedial measures. The contracting officer will notify the offeror in writing

if negotiation of a labor compliance agreement is warranted.

b. Negotiating Labor Compliance Agreements

Comment: Respondent opposed the negotiation of labor compliance agreements with multiple labor and employment agencies across the Government, due to the expected inefficiency of having several parties involved in the negotiation process.

Response: As stated in the introduction to this section, the Government's goal is maximizing efficiency and negotiating a single labor compliance agreement where feasible.

Comment: Respondent expressed concern that there was no assurance of fairness in the labor compliance agreement process because the proposed rule and Guidance fail to include any recourse for a contractor to challenge the fairness of the labor compliance agreement negotiation process.

Response: The FAR rule provides opportunities both preaward and postaward for contractors to provide relevant information to the contracting officer. Such relevant information could include information on difficulties in negotiating with enforcement agencies. Similar opportunities are provided for subcontractors to provide information to DOL. Labor compliance agreements, however, are negotiated with enforcement agencies, not procurement agencies, and therefore specific processes for entering into labor compliance agreements are not covered in the FAR rule.

Comment: A respondent objected to the expectation in the proposed rule and DOL Guidance that contractors would execute labor compliance agreements to demonstrate efforts to mitigate labor law violations.

Response: The objective of the E.O. is to enhance economy and efficiency by improving compliance with labor laws. There are many methods and mechanisms available to contractors to improve their compliance with labor laws. Labor compliance agreements are one such mechanism that is made available for those contractors whose labor law violation information (including mitigating factors and remedial information) is such that a contracting officer may find them nonresponsible absent some affirmative action to address concerns identified by the ALCA analysis. If other remedial measures have been employed such that, when considering the totality of the circumstances, the ALCA does not find further actions are warranted, the analysis and advice to the contracting officer will reflect this.

c. Settlement Agreements and Administrative Agreements

Comment: Respondent expressed concern that labor compliance agreements are ill-defined in the regulation and seem to be viewed by the Government as a cure-all for all alleged labor law violations.

Response: Labor compliance agreements are one way a contractor can demonstrate that it has taken steps to resolve issues to increase compliance with the labor laws. Neither the rule nor the DOL Guidance anticipates that labor compliance agreements will be seen as a cure-all or warranted in every situation. As delineated in the DOL Guidance, labor compliance agreements will be considered in circumstances where labor law violations are classified as serious, repeated, willful, and/or pervasive and have not been outweighed by mitigating factors.

Comment: A respondent expressed concern that labor compliance agreements will duplicate settlement agreements to resolve labor litigation or administrative agreements executed to resolve suspension and debarment matters.

Response: Labor compliance agreements, settlement agreements, and administrative agreements have similar objectives in addressing labor law violations and remedial actions; however, they differ in their specific purposes. Remediation efforts for individual cases, such as settlement agreements, are entered into to address specific violations. Administrative agreements, although they may address broader concerns, resolve issues concerning present responsibility during suspension and debarment proceedings. The objective is that labor compliance agreements will not duplicate or conflict with existing settlement agreements or administrative agreements. In determining whether a labor compliance agreement is necessary, the ALCA will consider information about mitigating factors provided by the contractor. If the contractor provides information about preexisting settlement or administrative agreements in the mitigating information, the ALCA will necessarily consider them. After conducting a holistic review of the totality of relevant information, the ALCA will advise that a labor compliance agreement may be warranted notwithstanding any prior agreements. DOL similarly will take a holistic view of the totality of relevant information when considering whether a labor compliance agreement is warranted in the case of a subcontractor. (See also Section III.B.1.d. above.)

d. Third Party Input

Comment: Respondents requested the regulation create a process for third parties such as unions, worker centers, advocates and subcontractors to have input in the following areas regarding labor compliance agreements:

- Reporting labor law violations to the contracting officer,
- Providing input into the terms of labor compliance agreements, and
- Providing information on contractor compliance with labor compliance agreements.

Response: Under current procurement practices, interested third parties may report relevant information, including labor law violations, to the contracting officer and to the appropriate enforcement agency. Consistent with these current practices, third parties may provide relevant information regarding compliance or noncompliance with labor compliance agreements to the contracting officer, ALCA, and to the appropriate enforcement agency. Enforcement agencies will follow internal policies and procedures as they negotiate and enter into labor compliance agreements with contractors. However, to increase awareness that current practices will apply to issues of labor law compliance, the final rule has been revised at FAR 22.2004–3(b)(1) to indicate that at the postaward stage ALCAs will consider labor law decision information received from sources other than SAM or FAPIIS.

e. Consideration of Labor Compliance Agreements in Past Performance Evaluations

Comment: Respondents requested that the rule clarify that when a contractor violated a labor compliance agreement or refused to enter into one, the contracting officer should document this in a past performance evaluation. Another respondent opposed doing so as being excessive since the contracting officer has existing tools available to address noncompliance with a labor compliance agreement.

Response: Although the Councils did not adopt the alternative supplemental FAR language (22.2004–5 Consideration of Compliance with Labor Laws in Evaluation of Contractor Performance) presented for consideration in the proposed rule preamble, the Councils sought to achieve a balance between providing reasonable opportunities for contractors to initiate and implement remedial measures and taking appropriate action when remediation is not adequate or timely. In order that compliance with labor laws is considered during source selection

when past performance is an evaluation factor, the final rule has been revised to include language at FAR 42.1502(j) requiring that past performance evaluations shall include an assessment of contractor's labor violation information when the contract includes the clause at 52.222–59. FAR 22.2004–1(c)(2) describes the ALCA's role in providing input to the individual responsible for preparing and documenting past performance in Contractor Performance Assessment Reporting System.

f. Public Disclosure of Labor Compliance Agreements and Relevant Labor Law Violation Information

Comment: Respondents made recommendations for public disclosure of certain information and suggested the establishment of a user-friendly public database for implementation of Section 2 of the E.O. The types of information suggested included:

- All workplace law violations;
- Labor compliance agreements;
- Mitigating factors and remedial measures;
- DOL and ALCA recommendations, including their underlying reasoning; and,
- Lists of companies undergoing labor law violation assessments and those not meeting the terms of their labor compliance agreements.

Response: The E.O. did not prescribe that the specific information respondents identified be made public or included in a public database. However, the final rule provides language at FAR 22.2004–2 and 22.2004–3 for public disclosure of certain relevant labor law decision information.

Under FAR 22.2004–2(b), 52.212–3(s) and 52.222–57, prospective contractors are required to represent whether the prospective contractor has labor law decisions rendered during the disclosure period. This representation will be public information in FAPIIS. See FAR 52.212–3(s)(5) and 52.222–57(f).

If the contracting officer initiates a responsibility determination, the prospective contractor discloses in SAM certain information for each labor law decision. This information will be publicly available in FAPIIS. See FAR 52.212–3(s)(3) and 52.222–57(d). Also in SAM, contractors will provide additional information they deem necessary to demonstrate responsibility, including mitigating factors and remedial measures, which may include labor compliance agreements. This information will not be made public unless the contractor determines that it wants this information to be made public. See FAR 52.212–3(s)(3) and 52.222–57(d). A similar process is outlined in FAR 22.2004–3 and 52.222–59 for postaward updates of labor law decision information, if there are new labor law decisions or updates to previously disclosed labor law decisions. The existence of a labor compliance agreement will be public in FAPIIS. See FAR 22.2004–1(c)(c)(6). These processes are designed to strike a balance between ensuring the Government has access to the information necessary to make an informed analysis of a contractor's labor law violation information and informed procurement decisions and recognizing the potentially sensitive nature of relevant labor law violation information.

Comment: One respondent recommended that DOL should regularly publish lists of companies undergoing responsibility investigations, as well as the names of contractors that have not entered into a labor compliance agreement in a timely manner or are not meeting the terms of an existing agreement.

Response: The E.O. does not direct DOL to publicly publish information suggested by the respondent; however, such information will be available to ALCAs in performing their assessments of offerors and contractors. While recognizing the value of transparency, the Councils have concluded that it is also appropriate to protect sensitive information and have limited the public exposure of information.

g. Labor Compliance Agreement—Suggested Improvements, Including Protections Against Retaliation

Comment: Many respondents offered suggestions to improve the labor compliance agreement process, including:

- A labor compliance agreement should contain provisions protecting employees against retaliation when they lodge complaints under a labor compliance agreement.
- Contractor employees should participate in developing a labor compliance agreement and process.
- Labor compliance agreement enforcement should be centralized in DOL, and any labor compliance agreement should be entered into between the DOL and/or Occupational Safety and Health Review Commission and the contractor.
- A labor compliance agreement should not modify or supplant the terms of existing remediation agreements.
- Specific guidance should exist on what should be included in a labor compliance agreement, to include a list of specific elements.
- Additional guidance should be provided to ensure future compliance with workplace laws, including plans for enhanced reporting, notice, and protection for workers to safeguard against future violations.

Response: E.O. 13673 does not provide for protection, beyond the existing anti-retaliation protection included in statutes such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the statutes regarding whistleblower protections for contractor employees (see FAR subpart 3.9). Therefore, the rule does not create additional protections. Complaints related to labor compliance agreements will be addressed in accordance with the policies and procedures of the relevant enforcement agency. The enforcement agencies, which will be party to the labor compliance agreements, will negotiate the terms of each labor compliance agreement on a case-by-case basis, taking into consideration the totality of the circumstances.

- A labor compliance agreement is negotiated between contractors and enforcement agencies, and E.O. 13673 does not provide for input from third parties into their negotiation.
- As stated in the introduction to this section, the Government's goal is to negotiate a single labor compliance agreement where feasible and to appoint a single contact within each enforcement agency for coordination. Each enforcement agency has a unique jurisdiction, and E.O. 13673 does not alter these jurisdictions or shift jurisdictional authority to DOL for labor compliance agreements.
- When an enforcement agency negotiates a labor compliance agreement with a contractor, it will have access to existing remediation agreements. The Government does not anticipate duplicate or conflicting terms among agreements. (Also see Section III.B.1.d. above.)
- Enforcement agencies enter into labor compliance agreements with the contractor; therefore, it is not appropriate to prescribe the content of such agreements in the FAR. Enforcement agencies will determine the agreement contents on a case-by-case basis, taking into consideration the totality of the circumstances.
- The FAR rule implements the E.O. by ensuring that the specific requirements of the E.O. that apply to procurement actions have been implemented in the final rule. These requirements will serve to improve future compliance. For example,

contracting officers will give contractors the opportunity to disclose ''mitigating factors and remedial measures such as Offeror actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws'' (FAR 52.222–57(d)(1)(iii)). Another example is that ALCAs advise contracting officers at FAR 22.2004–2(b)(3) on whether the contractor's record of labor law compliance warrants a labor compliance agreement. By definition, a labor compliance agreement is designed to increase compliance with labor laws (see FAR 22.2002).

Also, as discussed in its Preamble, through its work with enforcement agencies, DOL will provide assistance in analyzing whether remediation efforts are sufficient to bring contractors into compliance with labor laws and whether implemented programs or processes will improve future compliance.

h. Weight Given to Labor Compliance Agreements in Responsibility Determinations

Comment: A respondent proposed that a contractor's refusal to enter into a labor compliance agreement, or its failure to comply with a labor compliance agreement, be deemed an aggravating factor in a contracting officer's responsibility determination.

Response: Efforts to negotiate and enter into a labor compliance agreement, and adherence to a labor compliance agreement, are addressed in ALCA assessments and are likewise considered in a contracting officer's review of a contractor's record of integrity and business ethics, as part of the responsibility determination. Responsibility determinations are fact specific, and contracting officers, after reviewing and considering the totality of relevant information to the particular procurement, exercise discretion in determining present responsibility (see FAR subpart 9.1). This is a longstanding tenet of procurement practice in the FAR.

i. Concern Regarding Improper Discussions

Comment: A respondent expressed concern that discussions with a contracting officer regarding a labor compliance agreement could constitute improper interaction with offerors and violate the rules in FAR part 15 on holding discussions. The active solicitation and receipt of information and the follow-up discussions regarding the remediation of violations and the terms upon which a contractor will be deemed presently responsible pose significant risks of exceeding the prescribed review of a contractor's record to determine present responsibility for a particular procurement and may also exceed the limited clarification of offers permitted prior to establishment of a competitive range. Only once a competitive range is established can the Government engage in discussions with offerors.

Response: The rule makes it clear at FAR 22.2004–2 that when a contracting officer receives information about an offeror's labor law violations, and the remediation of those violations, this is done to determine ''whether a prospective contractor is a responsible source that has a satisfactory record of integrity and business ethics.'' This is typically done just prior to an award decision, which is after, not during, a contracting officer's evaluation of offers. This does not disturb the competition for a contract. Information needed to make a responsibility determination may be obtained by the contracting officer in accordance with FAR 9.105–1. Discussions under FAR part 15 are distinct from communications with offerors pursuant to responsibility determinations.

The contractor is encouraged to work with DOL on improving the contractor's labor law compliance. This can be before the contractor makes an offer on a solicitation.

j. Process for Enforcement of Labor Compliance Agreements

Comment: A respondent recommended that guidance be provided for penalties to be administered when a labor compliance agreement is violated.

Response: The FAR rule at 22.2004–3(b) provides for the ALCA assessment to address whether the contractor is meeting the terms of a labor compliance agreement. This information is provided to the contracting officer for consideration in making procurement-related decisions, including where the contractor should be referred to the agency suspending and debarring official (see the third example in 22.2004–2(b)(3)(vi)). Procurement agencies are not parties to labor compliance agreements and therefore do not enforce their terms.

k. Pressure or Leverage To Negotiate a Labor Compliance Agreement

Comment: Respondents raised concerns that: The Government will use a labor compliance agreement to improperly expand its remedial authority beyond those statutorily authorized by Congress, contracting officers and ALCAs do not have enforcement authority, and a labor compliance agreement will become an extra-legal mechanism for exacting remedies from contractors that could not otherwise be imposed.

Response: The E.O. does not disrupt or alter existing remedies provided under any of the 14 covered labor laws. Instead, the E.O. and FAR implementation give prospective contractors an additional means, labor compliance agreements, to demonstrate remediation of labor law violations and efforts to prevent future labor law violations. Labor compliance agreements are entered into with enforcement agencies that have jurisdictional authority for the particular labor law(s) violated and so no expansion or extra-legal authority will be undertaken. (See also Section III.B.1. above.)

l. False or Without Merit Allegations/Citations

Comment: Respondents expressed concern that the rule forces contractors into entering into a labor compliance agreement regardless of the merits of the allegations, because the definition of an administrative merits determination presumes all accusations equate to violations. Respondents also raised a concern that third parties could force a contractor into a labor compliance agreement by creating unfounded complaints to undermine the responsibility determination process.

Response: An accusation or claim by a party does not meet the definition of a labor law decision. A labor law decision is not an allegation; instead, only civil judgments, arbitral awards or decisions, and administrative merits determinations are labor law decisions. The terms are discussed in detail in Section II.B. of the DOL Guidance.

m. Interference With Due Process

Comment: Respondents expressed concern that the proposed rule provides virtually no due process protections, stating that every labor law identified in the E.O. has its own enforcement regime. Each provides for varying levels of due process for contractors before they can be forced to pay a fine, or comply with long term injunctive relief.

Response: The final rule, consistent with the proposed rule, does not eliminate any due process protections afforded to parties under the 14 covered labor laws. As explained in discussion of the legal issues in the above section III.B.1. and in the DOL Preamble, Section V., Discussion of general comments, paragraph D.3., neither the E.O., FAR rule, nor the DOL Guidance

diminishes existing procedural safeguards already afforded to prospective contractors during the preaward responsibility determination or to contractors after they have been awarded a contract. Moreover, the E.O. does not violate due process because contractors receive notice that the responsibility determination is being made and are offered a predecisional opportunity to be heard by submission of any relevant information—including mitigating factors related to any labor law decision. Nothing in the E.O. diminishes contractors' postdecisional opportunity to be heard through existing administrative processes and the Federal courts. Likewise, the E.O. does not diminish or interfere with due process procedures available with the enforcement agencies that have jurisdictional authority for each of the 14 listed labor laws.

8. Paycheck Transparency

Introductory Summary: Section 5 of the E.O. requires contractors to provide wage statements to individuals working for them, overtime exemption notices to employees exempt from the overtime compensation requirements of the Fair Labor Standards Act (FLSA) for whom the contractor does not want to include hours-worked information on those employees' wage statements, and documentation to individual workers treated as independent contractors notifying them of their status as independent contractors. Section 5 of the E.O. is implemented by FAR 22.2005 and clause 52.222–60 Paycheck Transparency (Executive Order 13673).

The purpose is to increase transparency in compensation information and employment status, which will enhance workers' awareness of their rights, promote greater employer compliance with labor laws, and thereby increase economy and efficiency in Government contracting.

Section 5 of the E.O. requires contractors to provide, on contracts that exceed $500,000, a wage statement document (*e.g.*, a pay stub) in every pay period to all individuals performing work under the contract, for whom contractors are required to maintain wage records under the FLSA, the Wage Rate Requirements (Construction) statute (also known as the Davis-Bacon Act or DBA, see FAR 1.110), or the Service Contract Labor Standards statute (also known as the Service Contract Act or SCA). The content of the wage statement is covered at FAR 52.222–60 and must include the total hours worked in the pay period, the number of those hours that were overtime hours, the rate of pay, the gross pay, and itemized additions made to or deductions taken from gross pay. However, for employees who are exempt from the overtime compensation requirements of the FLSA, contractors do not need to provide information in that employee's wage statement about hours worked, if the contractor has provided written notice of the employee's overtime exemption status.

The E.O. requires that the wage statement also be provided to individuals performing work under the contract for whom contractors are required to maintain wage records under State laws equivalent to the FLSA, DBA, or SCA. Section 2(a)(i)(O) of the E.O. requires DOL to identify those equivalent State laws.

DOL plans to identify these State laws in a second Guidance to be published in the **Federal Register** at a later date (see Section III.B.12 below).

The E.O. also requires contractors to provide a document to all individuals performing work under the contract as independent contractors informing them of that status. The clause at FAR 52.222–60 requires that the document must be provided anew for each Government contract, at the time the independent contractor relationship with the individual is established, or prior to the time the individual begins to perform work on the Government contract.

The E.O. also states the E.O.'s wage statement requirement is ''deemed to be fulfilled if the contractor is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required by this subsection.'' The DOL determination of Substantially Similar Wage Payment States may be found at *www.dol.gov/fairpayandsafeworkplaces*. Where a significant portion of the workforce is not fluent in English, the clause requires a contractor to provide its required notices in English and the language with which the significant portion of the workforce is fluent. The clause allows notices to be provided to workers electronically under certain circumstances.

The clause flows down to subcontractors with subcontracts over $500,000, other than subcontracts which are for COTS items.

Department of Labor Guidance—Section VII of the DOL Guidance addresses paycheck transparency. The DOL Guidance assists agencies in interpreting the paycheck transparency provisions of the E.O. and the FAR rule. Like the FAR Council, DOL also received public comments regarding these provisions. DOL analyzed public comments, and made recommendations which the FAR Council is adopting in the final rule version of the clause. The DOL analysis is summarized here. For more detail on the reconciliation of the comments see the DOL Preamble published today accompanying the DOL Guidance.

a. Wage Statement Provision

DOL and the FAR Council received many comments regarding the different aspects of the proposed wage statement requirements. Employee advocates generally supported the Order's wage statement provisions. Employer organizations, on the other hand, commented that the wage statement provisions are overly burdensome and in addition made several specific suggestions and objections.

In order to implement the purposes of the Order's wage-statement requirement, the final FAR rule has interpreted the term ''pay'' to mean both gross pay and rate of pay. See FAR 52.222–60(b). The final rule has clarified that any additions made to or deductions taken from gross pay must be itemized or identified in the wage statement. See FAR 52.222–60(b). The FAR final rule, therefore, provides that wage statements required under the E.O. must contain the following information: (1) Hours worked, (2) overtime hours, (3) rate of pay, (4) gross pay, and (5) an itemization of each addition to or deduction from gross pay. Nothing prohibits the contractor from including more information in the wage statement (*e.g.*, exempt-status notification, overtime pay rate).

i. Rate of Pay

Comment: Several respondents suggested that contractors should be required to include in the wage statement: (a) The worker's rate of pay, (b) hours and earnings at the basic rate, and (c) hours and earnings at the overtime rate. In their view, these would allow ''a worker to fully understand the basis for his or her net pay.'' They argued that the term ''pay'' in the E.O. should be defined to include both the worker's regular rate of pay and the total amount of pay for the pay period. ''[E]mployers are already required to keep [the rate of pay] information under the FLSA, it is not a burden for them to disclose this information to their workers.'' Other respondents also noted that several states already require rate of pay information in wage statements, ''demonstrating the reasonableness of this requirement.'' Another respondent suggested that the wage statement should include the ''overtime rate of pay and hours calculated,'' reasoning that the ''rate of pay alone is not sufficient

for a worker to calculate his or her overtime hours . . . .'' Respondents also suggested that the Guidance ''should make clear that the terms used in the paycheck transparency provisions have the same meaning as they do under the FLSA.''

Response: The FAR Council and DOL agree with the respondents that the wage statements required under the E.O.'s paycheck transparency provisions should include the rate of pay information. The E.O. states that the wage statement must contain the worker's ''pay.'' As the respondents noted, the term ''pay'' can and should be defined to include both ''gross pay'' and ''rate of pay.'' DOL indicates that a worker's rate of pay is a crucial piece of information that should appear in the wage statement, because a worker's knowledge of his or her rate of pay enables the worker to more easily determine whether all wages due have been paid. Inclusion of rate of pay in wage statements will reduce the time an employer spends resolving pay disputes because workers will have available the information on which their pay was determined, and be able to identify any problems at an earlier date. Thus, including the rate of pay in the wage statement will help to implement the purposes of the E.O.'s wage statement provision by providing workers with information about how their pay is calculated, enabling workers to raise any concerns about their pay early on, and encouraging employers to proactively resolve such concerns. All parties have an interest in ensuring that workers receive their full pay when it is earned—including contractors who benefit from fair competition, employee satisfaction, and limiting liability for damages resulting from unpaid wages. Also, in most cases, contractors compute gross pay by multiplying the regular hours worked by the worker's rate of pay and, in overtime workweeks, by also multiplying the overtime hours worked by time and one half of the rate of pay. As contractors cannot compute the worker's earnings without the rate of pay information, workers similarly cannot easily determine how their earnings are computed without inclusion of the rate of pay information in the wage statement.

Moreover, the relevant laws already require that the employer keep a record of the rate of pay. As one employee advocacy organization pointed out, the employer must maintain a record of a nonexempt employee's rate of pay under the FLSA. See 29 CFR 516.2(a)(6)(i). A requirement to keep rate of pay information also applies to SCA-covered contracts, see 29 CFR 4.6(g)(1)(ii), and to DBA-covered contracts, see 29 CFR 5.5(a)(3)(i). In general, for DBA and SCA, the basic hourly rate listed in the wage determination is considered the rate of pay that is to be included in the wage statement. Under the FLSA, rate of pay is determined by dividing the employee's total remuneration (except statutory exclusions) by total hours worked in the workweek. See 29 CFR 778.109.

In addition, DOL has identified 15 States that require the worker's rate of pay to be included in wage statements. Contractors located in one of these 15 States should already be compliant with the requirement to include the rate of pay in the wage statement. Therefore, including this information in the wage statement helps the worker to understand the gross pay received and how it was calculated, in order to realize the purposes of the E.O. with limited burden to contractors.

DOL indicates that it is not essential for the overtime rate of pay to be included in the wage statement. For example, in order to check the accuracy of the wages paid in weeks when overtime hours are worked, a worker can generally perform the necessary calculations. The inclusion of the overtime rate of pay in the wage statement would slightly simplify the calculation for the worker. In most situations, once the worker knows his or her rate of pay, the worker can readily determine what the overtime pay rate should be by simply multiplying the rate of pay by time and one half (by a factor of 1.5).

In addition, the FLSA, SCA, and DBA regulations do not require contractors to keep a record of the overtime pay rate in their payroll records. Similarly, with some exceptions, State laws generally do not require that the overtime rate of pay be included in wage statements. Therefore, requiring the overtime rate of pay in the wage statement would be a new burden on contractors and, as already discussed, having the overtime pay-rate information in the wage statement does not significantly improve the worker's ability to determine whether the correct wages were paid.

With regard to the comment that the Guidance should make clear that the terms used in the E.O.'s paycheck transparency provision should be given the same meaning as in the FLSA, DOL agrees with this comment to the extent the FLSA provides relevant meaning and context to the terms in the E.O.'s paycheck transparency provisions. DOL has cited to the FLSA regulations where applicable.

ii. Itemizing Additions Made to and Deductions Taken From Wages

Comment: Employee advocates urged DOL to require contractors to itemize additions made to and deductions taken from wages in the wage statement.

Response: The Councils and DOL agree with respondents that the additions made to and deductions taken from gross pay should be itemized in the wage statement. Section 5(a) of the E.O. provides that the wage statement should, among other items, include ''any additions made to or deductions made from pay.'' The E.O., therefore, already contemplates that any and all additions or deductions be separately noted in the wage statement; in other words, the wage statement must itemize or identify each addition or deduction, and not merely provide a lump sum for the total additions and deductions. Accordingly, the FAR final rule and the final Guidance clarify that additions and deductions must be itemized.

Neither DOL nor the Councils received comments specifically objecting to the itemization of additions or deductions.

With regard to suggestions by employee advocates that the wage statements should identify the name and address of each fringe benefit fund, and the plan sponsor and administrator of each fringe benefit plan, DOL believes, and the Councils agree, that listing such information in the wage statement would be duplicative.

Comment: One respondent requested that the hourly fringe-benefit rate be listed in the wage statement.

Response: DOL concludes, and the Councils agree, that it is not essential to include the hourly fringe-benefit rate in the wage statement.

The amount of the fringe benefit required by the DBA or SCA is typically expressed as an hourly rate in the wage determinations issued by DOL. The contractor may pay this amount as a contribution to a fringe benefit fund or plan, or in ''cash'' as an addition to the worker's wages. Section 5(a) of the E.O. requires any additions made to gross pay be listed in the wage statement. DOL stated that fringe-benefit amounts paid by the contractor into a fund or plan (*e.g.*, health insurance or retirement plan) on behalf of the worker should not be considered additions to the worker's gross pay for purposes of the Order. Such fringe-benefit contributions are excludable from the regular rate for purposes of computing overtime pay under the FLSA and are not taxable. Fringe-benefit contributions paid by the contractor on behalf of the worker thus do not need to be included

in the wage statement, as such information has no bearing on determining whether the worker received the correct cash wages as reported in the wage statement.

The wage determination issued under the DBA and SCA that is applicable to the contract must be posted by the contractor at the site of work in a prominent and accessible place where it can be easily seen by the workers. See 29 CFR 5.5(a)(1)(i), 4.6(e). Workers therefore have access to fringe benefit rate information, further negating the necessity to include the fringe benefit rate amount in the wage statement.

On the other hand, when the contractor elects to meet its fringe benefit obligation under the DBA or SCA by paying all or part of the stated hourly amount in ''cash'' to the worker, the payments are subject to tax withholdings, and the wage statement should list the fringe benefit amounts paid as an addition to the worker's pay. Such amounts are part of gross pay.

iii. Weekly Accounting of Overtime Hours Worked

Comment: Industry respondents objected to the proposed requirement that if the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), then the hours worked and overtime hours contained in the wage statement must be broken down to correspond to the period for which overtime is actually calculated and paid (which will almost always be weekly). See 80 FR 30571 (FAR proposed rule); 80 FR 30591 (DOL proposed Guidance). Several employer representatives stated that contractors generally issue wage statements on a bi-weekly basis, and do not separately provide the number of hours worked (regular and overtime hours) for the first and second workweeks of the bi-weekly pay period. These respondents stated that requiring a weekly accounting of regular hours worked (*i.e.*, hours worked up to 40 hours) and overtime hours worked in the wage statement would be costly to implement and unnecessary.

Response: As DOL discussed in the proposed Guidance, transparency in the relationships between employers and their workers is critical to workers' understanding of their legal rights and to the speedy resolution of workplace disputes. See 80 FR 30591. The calculation of overtime pay on a workweek-by-workweek basis as required by the FLSA has been a bedrock principle of labor protections since 1938. See 29 U.S.C. 207(a). A wage statement that is provided bi-weekly or semi-monthly that does not separately state the hours worked during the first workweek from those worked during the second workweek of the pay period fails to provide workers with sufficient information about their pay to be able to determine if they are being paid correctly. For example, a worker who receives a wage statement showing 80 hours worked during a bi-weekly pay period and all hours paid at the regular (straight-time) rate may, in fact, have worked 43 hours the first week and 37 hours the second week. In this case, to comply with the FLSA, the employer should have paid the worker at time and one half of the worker's regular rate of pay for the three hours worked after 40 hours in the first workweek. Without documentation of the weekly hours, it would be difficult for this worker to determine whether overtime pay is due.

The FLSA already requires that employers calculate overtime pay after 40 hours worked per week; and the implementing regulations under the FLSA, DBA, and SCA require employers to maintain payroll records for at least three years. Under the FLSA regulations at 29 CFR 516.2(a)(7), for instance, the employer must maintain a record of each nonexempt employee's total hours worked per week. A requirement to keep rate of pay information also applies to SCA-covered contracts, see 29 CFR 4.6(g)(1)(iii), and to DBA-covered contracts, see 29 CFR 5.5(a)(3)(i). Moreover, workers covered under DBA must be paid on a weekly basis requiring a workweek-by-workweek accounting of overtime hours worked. See 29 CFR 5.5(a)(1)(i). Therefore, as noted in this DOL analysis, including hours worked information in the wage statement derived on a workweek basis will not be overly burdensome, and the FAR Council final rule retains this requirement.

iv. Substantially Similar State Laws

The E.O. provides that the wage-statement requirements ''shall be deemed to be fulfilled'' where a contractor ''is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required'' by the E.O. See E.O. Section 5(a). If a contractor provides a worker in one of these ''substantially similar'' States with a wage statement that complies with the requirements of that State, the contractor would satisfy the E.O.'s wage-statement requirements. In the proposed Guidance, the DOL stated that two requirements do not have to be exactly the same to be ''substantially similar''; they must, however, share ''essential elements in common.'' 80 FR 30587 (quoting *Alameda Mall, L.P.* v. *Shoe Show, Inc.*, 649 F.3d 389, 392 (5th Cir. 2011)). The proposed Guidance offered two options for determining whether State requirements are substantially similar to the E.O.'s requirements.

The first proposed option identified as substantially similar those States that require wage statements to have the essential elements of overtime hours or earnings, total hours, gross pay, and any additions made to or deductions taken from gross pay. As the proposed Guidance noted, when overtime hours or earnings are disclosed in a wage statement, workers can identify from the face of the document whether they have been paid for overtime hours.

The second proposed option would have allowed wage statements to omit overtime hours or earnings, as long as the wage statements included ''rate of pay,'' in addition to the essential elements of total hours, gross pay, and any additions made to or deductions taken from gross pay. The intent of this option was to allow greater flexibility while still requiring wage statements to provide enough information for a worker to calculate whether he or she has been paid in full. DOL noted that one drawback of this option was that failure to pay overtime would not be as easily detected when compared with the first option. The worker would have to complete a more difficult calculation to identify an error in pay.

DOL requested comments regarding the two options and stated that it could also consider other combinations of essential elements or other ways to determine whether State or local requirements are substantially similar. See 80 FR 30592.

Comment: Numerous employee advocates and members of Congress strongly supported the first option. These respondents observed that employers and workers benefit when workers can easily understand their pay by reviewing their wage statement. They noted that wage statements also provide an objective record of compensated hours, which helps employers to more easily meet their burden of demonstrating wages paid for hours worked. A comment by members of Congress favored the first option because ''[d]isclosing whether workers have been paid at the overtime rate is critical to enabling workers to discern whether they have been paid fairly.'' Other respondents further recommended that the first option be adopted with the modification that the rate of pay information should also be included as an essential element.

The employee advocates found the second option (which would have allowed wage statements to omit overtime hours or earnings, as long as the wage statements include the rate of pay) to lack transparency. On the other hand, employer representatives recommended that the second option be adopted. They explained that the second option would result in more substantially similar states and localities than would the first option—thereby reducing compliance burdens and providing greater flexibility to contractors. They also stated the second option is more in line with employers' practices and is less burdensome than the first option.

Response: DOL analyzed the public comments in the Preamble to its final Guidance, and adopted the first option for determining whether wage statement requirements under State law are substantially similar. The list of Substantially Similar Wage Payment States, now adopted in the final Guidance is: (1) Alaska, (2) California, (3) Connecticut, (4) the District of Columbia, (5) Hawaii, (6) New York, and (7) Oregon. These States and the District of Columbia require wage statements to include the essential elements of hours worked, overtime hours, gross pay, and any itemized additions made to and deductions taken from gross pay.

Comment: A respondent requested clarification regarding whether complying with a State requirement (*e.g.*, the California State requirement) means that the contractor has met the E.O.'s requirement for all employees or just employees in that State.

Response: DOL notes that as long as the contractor complies with the wage-statement requirements of any of the Substantially Similar Wage Payment States, the contractor will be in compliance with the final rule. For example, if a contractor has workers in California and Nevada, the contractor may provide workers in both States with wage statements that adhere to California State law to comply with the FAR Council final rule. (California is among the States included in the list of Substantially Similar Wage Payment States, while Nevada requires minimal information in the wage statement provided to workers.) Thus, the contractor would be in compliance with the final rule if it adopts the wage-statement requirements of any particular State or locality in the list of Substantially Similar Wage Payment States in which the contractor has workers, and applies this model for its workers elsewhere.

v. Request To Delay Effective Date

Comment: One employer advocate suggested that DOL and the FAR Council allow Federal contractors time to comply with the wage-statement provisions. The respondent noted that, in the short term, contractors will have to devise manual wage statements to comply with the E.O. until automated systems are able to generate compliant wage statements. Citing DOL's Home Care rule regarding the application of the FLSA to domestic service (78 FR 60454, Oct. 1, 2013), which had an effective date 15 months after the publication of the final rule, the respondent recommended that contractors be provided at least 12 to 15 months within which to comply with the wage-statement requirements.

Response: The Councils have revised the proposed rule to implement a phased implementation for paycheck transparency provisions, in order to permit time for prime contractors and subcontractors to determine and effect changes necessary to their payroll systems to comply with the rule. Beginning January 1, 2017, the 52.222–60 clause will be inserted in solicitations if the estimate value exceeds $500,000, and in resultant contracts. See FAR 22.2007(d).

b. Fair Labor Standards Act (FLSA) Exempt-Status Notification

According to the E.O., the wage statement provided to workers who are exempt from the overtime pay provisions of the FLSA ''need not include a record of hours worked if the contractor informs the individuals of their exempt status.'' See E.O. Section 5(a). Because such workers do not have to be paid overtime under the FLSA, hours worked information need not be included in the wage statement. See 80 FR 30592. DOL suggested in its proposed Guidance that in order to exclude the hours-worked information in the wage statement, the contractor would have to provide a written notice to the worker stating that the worker is exempt from the FLSA's overtime pay requirements; oral notice would not be sufficient. *Id.* The proposed FAR rule noted that if the contractor regularly provides documents to workers electronically, the document informing the worker of his or her exempt status may also be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor. See 80 FR 30561. The proposals suggested that if a significant portion of the contractor's workforce is not fluent in English, the document provided notifying the worker of exempt status must also be in the language(s) other than English in which the significant portion of the workforce is fluent. See 80 FR 30592.

The FAR Council and DOL received comments regarding the following issues related to the FLSA exempt-status notice: Type and frequency of the notice, differing interpretations by the courts regarding exemptions under the FLSA, and phased-in implementation.

i. Type and Frequency of the Notice

Comment: One labor union commented that the contractor should be excused from recording the overtime hours worked in the wage statement only if the worker is correctly classified as exempt from the FLSA's overtime pay requirements. The respondent also recommended that workers should be informed of their exempt status on each wage statement. An employer-advocate requested clarification on whether the exempt-status notice should be provided once (*e.g.,* in a written offer of employment) or on a recurring basis (*e.g.,* on each wage statement).

Response: With regard to the labor union's comment on the importance of correctly determining the exempt status of a worker under the FLSA, the FAR Council and DOL agree that employers should correctly classify their workers. An employer who claims an exemption from the FLSA is responsible for ensuring that the exemption applies. See *Donovan* v. *Nekton, Inc.,* 703 F.2d 1148, 1151 (9th Cir. 1983). However, the fact that an employer provides the exempt-status notice to a worker does not mean that the worker is necessarily classified correctly. DOL will not consider the notice provided by the contractor to the worker as determinative of or even relevant to whether the worker is exempt or not under the FLSA. Accordingly the FAR Council has provided in the final rule that a contractor may not in its exempt-status notice to a worker indicate or suggest that DOL or the courts agree with the contractor's determination that the worker is exempt.

With regard to the type of notice to be provided to the worker and how often it should be provided, after carefully reviewing the comments, DOL believes, and the FAR Council agrees, that it is sufficient to provide notice to workers one time before the worker performs any work under a covered contract, or in the worker's first wage statement under the contract. If during performance of the contract, the contractor determines that the worker's status has changed from nonexempt to exempt, it must provide notice to the worker prior to providing

a wage statement to the worker without hours worked information or in the first wage statement after the change. The notice must be in writing; oral notice is not sufficient. The notice can be a stand-alone document or be included in the offer letter, employment contract, position description, or wage statement provided to the worker. See FAR 52.222–60(b).

DOL does not believe that it is necessary, and the FAR Council agrees that it is not necessary, to require a contractor to include the exempt-status information on each wage statement. While it is permissible to provide notice on each wage statement, it also is permissible to provide the notice one time before any work on the covered contract is performed. If the contractor does the latter, there is no need to provide notice in the first wage statement.

ii. Differing Interpretations by the Courts of an Exemption Under the FLSA

Comment: One respondent stated that it would not be prudent to require employers to report on the exempt or nonexempt status of workers where there is disagreement among the courts on who is and who is not exempt under the FLSA.

Response: Some court decisions regarding the exemption status of certain workers under the FLSA may not be fully consistent. However, this is not a persuasive reason to relieve contractors from providing the exempt-status notice to employees. Regardless of any inconsistency in court decisions, contractors already must make decisions about whether to classify their employees as exempt or nonexempt under the FLSA in order to determine whether to pay them overtime. Such determinations are based on the facts of each particular situation, the statute, relevant regulations, guidance from DOL, and advice from counsel. In addition, in making these determinations, contractors already must consider any inconsistent court decisions.

The E.O. does not change this status quo. Under the E.O., the contractor retains the authority and responsibility to determine whether to claim an exemption under the FLSA. All that is required under the E.O. is notice to the workers of the status that the employer has already determined. Such notice is only required if the employer wishes to provide workers with a wage statement that does not contain the worker's hours worked.

iii. Request To Delay Implementation of the Exempt-Status Notice

Comment: One industry association suggested that implementation of the exempt-status notice be postponed until DOL has finalized its proposal to update the regulations defining the ''white collar'' exemptions under section 13(a)(1) of the FLSA. See 80 FR 38515 (July 6, 2015); *http://www.dol.gov/whd/overtime/NPRM2015/*. The white-collar exemptions define the executive, administrative, and professional employees who are exempt from the FLSA's minimum wage and overtime pay protections. See 29 CFR part 541.

Response: DOL has finalized its rulemaking to update the FLSA's white-collar exemptions. (See 81 FR 32391, May 23, 2016.) In any event, the FAR Council's concurrence to phased implementation for the wage statement requirement will result in delayed implementation of the paycheck transparency clause at FAR 52.222–60.

c. Independent Contractor Notice

Section 5(b) of the E.O. states that if a contractor treats an individual performing work under a covered contract as an independent contractor, then the contractor must provide ''a document informing the individual of this [independent contractor] status.'' Contracting agencies must require that contractors incorporate this same requirement into covered subcontracts. See FAR 52.222–60(d) and (f).

The proposed FAR rule provided that the notice informing the individual of the independent contractor status must be provided before any work is performed under the contract. See 80 FR 30572. As DOL noted in the proposed Guidance, the notice must be in writing and provided separately from any agreement entered into between the contractor and the independent contractor. See 80 FR 30593.

The proposed Guidance further stated that the provision of the notice to a worker informing the worker that he or she is an independent contractor does not mean that the worker is correctly classified as an independent contractor under the applicable laws. See 80 FR 30593. The determination of whether a worker is an independent contractor under a particular law remains governed by that law's definition of ''employee'' and its standards for determining for its purposes which workers are independent contractors and not employees. *Id.*

DOL received comments from several unions and other employee advocates that were supportive of the E.O.'s independent contractor notice provisions. In contrast, several industry advocates commented that several aspects of the independent contractor notice requirement need to be clarified.

i. Clarifying the Information in the Notice

Comment: DOL received comments requesting clarification of the information that should be included in the independent contractor notice. Several employee advocates recommended that the document also notify the worker that, as an independent contractor, he or she is not entitled to overtime pay under the FLSA, is not covered by worker's compensation or unemployment insurance, and is responsible for the payment of relevant employment taxes.

One employee advocate recommended that the notice include a statement notifying the worker that the contractor's designation of a worker as an independent contractor does not mean that the worker is correctly classified as an independent contractor under the applicable law. Several respondents suggested that the notice also include information regarding which agency to contact if the worker has questions about being designated as an independent contractor or needs other types of assistance. One labor union also recommended that DOL establish a toll-free hotline that provides more information on misclassification of employees as independent contractors or tools to challenge the independent contractor classification.

One industry respondent suggested that the FAR Council or DOL publish a model independent contractor notice with recommended language. Another industry respondent requested more detailed guidance on what the independent contractor notice should include.

Response: Section 5(b) of the E.O. requires that the worker be informed in writing by the contractor if the worker is classified as an independent contractor and not an employee. Thus, the final FAR rule clarifies that the notice must be in writing and provided separately from any independent contractor agreement entered into between the contractor and the individual. See FAR 52.222–60(d)(1).

The E.O., however, does not require the provision of the additional information suggested by respondents. DOL believes, and the FAR Council agrees, that notifying the worker of his or her status as an independent contractor satisfies the Order's requirement. Providing such notice enables workers to evaluate their status as independent contractors and raise

any concerns. The objective is to minimize disruptions to contract performance and resolve pay issues early and efficiently. If the worker has questions or concerns regarding the particular determination, then he or she can raise such questions with the contractor and/or contact the appropriate Government agency for more information or assistance.

With regard to comments about contractors correctly classifying individuals as independent contractors, similar to the prior discussion regarding the FLSA exempt-status notification, providing the notice does not mean that the worker is correctly classified as an independent contractor. DOL will not consider the notice when determining whether a worker is an independent contractor or employee under the laws that it enforces. Accordingly, a contractor may not in its notice indicate or suggest that enforcement agencies or the courts agree with the contractor's determination that the worker is an independent contractor.

With regard to comments recommending that DOL establish a hotline that provides information on issues involving misclassification of employees as independent contractors, the relevant agencies within DOL already have toll-free helplines that workers and contractors can access to obtain this type of information and for general assistance. Members of the public, for example, can call the Wage and Hour Division's toll-free helpline at 1–866–4US–WAGE (487–9243), the Occupational Safety and Health Administration at 1–800–321–OSHA (6742), and the Office of Federal Contract Compliance Programs at 1–800–397–6251. The National Labor Relations Board can be reached at 1–866–667–NLRB (667–6572), and the Equal Employment Opportunity Commission at 1–800–669–4000. Moreover, the enforcement agencies' respective Web sites contain helpful information regarding employee misclassification.

With regard to comments requesting a sample independent contractor notice, DOL does not believe that it is necessary to create a template notice. DOL expects that any notice would explicitly inform the worker that the contractor had made a decision to classify the worker as an independent contractor.

ii. Independent Contractor Determination

Comment: Several industry members suggested that DOL clarify which statute should provide the basis for determining independent-contractor status for purposes of the E.O.'s requirement. These respondents noted that the proposed Guidance stated that the determination of whether a worker is an independent contractor or employee under a particular law remains governed by that law's definition of ''employee.'' 80 FR 30593. The respondents stated that they are uncertain as to what definition should be used in determining whether a worker is an employee or independent contractor.

Response: DOL and the FAR Council do not find it necessary or appropriate to pick one specific definition of ''employee'' for the E.O.'s independent-contractor notice requirement. Employers already make a determination of whether a worker is an employee (or an independent contractor) whenever they hire a worker. The E.O. does not affect this responsibility; it only requires the contractor to provide the worker with notice of the determination that the contractor has made. If the contractor has determined that the worker is an independent contractor, then the employer must provide the notice.

iii. Frequency of the Independent Contractor Notice

Comment: The FAR Council and DOL received comments regarding the number of times an individual who is classified as an independent contractor and engaged to perform work on several covered contracts should receive notice of his or her independent contractor status. Two industry respondents, for example, noted that an independent contractor who provides services on multiple covered contracts on an intermittent basis could receive dozens of identical notices, resulting in redundancy and inefficiencies. Other industry respondents believed that providing multiple notices for the same work performed on different covered contracts is burdensome and unnecessary. Two industry respondents suggested that an independent contractor agreement between the relevant parties should satisfy the E.O.'s independent contractor notice requirement.

Response: The final FAR rule provides that the notice informing the individual of his or her independent contractor status must be provided at the time an individual is engaged as an independent contractor or before the individual performs any work under the contract. See FAR 52.222–60(d)(1). The final FAR rule also clarifies that contractors must provide the independent-contractor notice to the worker for each covered contract on which the individual is engaged to perform work as an independent contractor. See FAR 52.222–60(d). The Guidance reflects this clarification. DOL agrees that there may be circumstances where a worker who performs work on more than one covered contract would receive more than one independent contractor notice. DOL, however, believes that because the determination of independent contractor status is based on the circumstances of each particular case, it is reasonable to require that the notice be provided on a contract-by-contract basis even where the worker is engaged to perform the same type of work. It is certainly possible that the facts may change on any of the covered contracts such that the work performed requires a different status determination.

iv. Workers Employed by Staffing Agencies

Comment: The FAR Council and DOL received several comments regarding contractors that use temporary workers employed by staffing agencies and whether those contractors must provide such workers with a document notifying them that they are independent contractors. One respondent believed that in such cases, ''temporary workers are neither independent contractors nor employees of the contractor.'' Several industry respondents suggested that the final Guidance clarify that contractors would not be required to provide notice of independent contractor status to temporary workers who are employees of a staffing agency or similar entity, but not of the contractor. Some of these respondents also recommended that the independent contractor status notice be given only to those workers to whom the contractor provides an IRS Form 1099.

Response: In situations where contractors use temporary workers employed by staffing agencies to perform work on Federal contracts, the contract with the staffing agency may be a covered subcontract under the E.O. Section 5 of the E.O. requires that the independent contractor status notice requirement be incorporated into subcontracts of $500,000 or more. See E.O. Section 5(a). If the contract with the staffing agency is a covered subcontract, and the staffing agency treats the workers as employees, then no notices would be required. If the contract with the staffing agency is a covered subcontract, and the staffing agency treats the workers as independent contractors, then the staffing agency (not the contractor) is required to provide the workers with notice of their independent contractor status. (When using a staffing agency, a

contractor should consider whether it jointly employs the workers under applicable labor laws. DOL recently issued Guidance under the FLSA and Migrant and Seasonal Agricultural Worker Protection Act for determining joint employment.)

The FAR Council and DOL disagree with comments suggesting that the contractor should provide independent-contractor notices only to those workers to whom the contractor already provides an IRS Form 1099. Employers use a Form 1099–MISC to report, among other items, ''payments made in the course of a trade or business to a person who is not an employee or to an unincorporated business.'' The E.O. does not limit the requirement to provide the independent contractor notice to workers who receive a Form 1099–MISC. To the extent the contractor has classified an individual as an independent contractor for Federal employment tax purposes and provides the individual a Form 1099–MISC, the contractor must provide the individual with the independent-contractor status notice. The universe of workers who should receive an independent contractor notice should not be limited only to those workers to whom the contractor already provides a Form 1099.

d. Requirements That Apply to All Three Documents (Wage Statement, FLSA Exempt-Status Notice, Independent Contractor Notice)

The FAR Council's proposed regulations would have required that if a significant portion of the contractor's workforce is not fluent in English, the document notifying a worker of the contractor's determination that the worker is an independent contractor, and the wage statements to be provided to the worker, must also be in the language(s) other than English in which the significant portion of the workforce is fluent. The proposed regulations were unclear with regard to whether required documents could be provided electronically. See 80 FR 30572. The final rule has been revised at FAR 52.222–60(e) to clarify that all documents required must be provided in English and the language(s) in which significant portions of the workforce is fluent, and that all documents may be provided electronically under certain circumstances.

i. Translation Requirements

Comment: The FAR Council and DOL received comments requesting clarification regarding what would constitute a ''significant portion'' of the workforce sufficient to trigger the translation requirement. One industry respondent stated that the final Guidance should set a specific threshold. Another stated that the translation requirement is unnecessary and should be removed. One labor union recommended that the term ''significant portion'' of the workforce be defined as 10 percent or more of the workforce under the covered contract.

One industry respondent posited a situation where there are various foreign languages spoken in the workplace, and requested clarification regarding whether the contractor would be required to provide the wage statement and the independent contractor notice to workers in every language that is spoken by workers not fluent in English. The respondent suggested that the wage statement translation requirement be revised to state: ''Where a significant portion of the workforce is not fluent in English but is fluent in another language, the contractor shall provide the wage statement in English and in each other language in which a significant portion of the workforce is fluent.''

With regard to translating the independent contractor notice, the respondent recommended that this requirement apply only when the company is aware that the worker is not fluent in English. Another industry respondent also stated that it would not be sensible to require contractors to provide notice in Spanish to an independent contractor who speaks only English simply because a significant portion of the contractor's workforce is fluent in Spanish. A respondent further advocated that contractors should be allowed to include in each wage statement and independent contractor notice a Web site address where the translations are posted, instead of including the complete translation in each wage statement or independent contractor notice for each worker.

Response: For reasons noted by DOL, the FAR Council does not believe that it is necessary to set a specific threshold defining what would constitute a ''significant portion'' of the workforce sufficient to trigger the final FAR rule's translation requirement. As DOL notes, this requirement is similar to regulatory requirements implementing two of the labor laws, the Family and Medical Leave Act and the Migrant and Seasonal Agricultural Worker Protection Act. The term ''significant portion'' has not been defined under these regulations, and the lack of a definition or bright-line test has not prevented employers from complying with the requirement. For these reasons, the term is not defined in the final Guidance.

The FAR Council and DOL agree with the suggestion about workplaces where multiple languages are spoken. Where a significant portion of the workforce is not fluent in English, DOL finds that the contractor should provide notices to workers in each language in which the significant portion of the workforce is fluent. However, the FAR Council and DOL do not agree with the suggestion that it would be sufficient in all cases to provide a Web site address where the translated notice would be posted. Where workers are not fluent in English, providing a link to a Web site for the translation would be ineffective at providing the required notice.

ii. Electronic Wage Statements

Comment: With regard to providing wage statements electronically, one respondent agreed that providing wage statements electronically should be an option. One labor union advocated that workers should be allowed to access wage statements using the contractor's computer network during work hours. According to the union, merely providing workers with the Web site address to access their wage statements on their own would be insufficient as such an arrangement would require the worker to purchase internet connection to access the information. Another respondent suggested that the contractor should be allowed to provide wage statements electronically only with written permission from the worker and if written instructions on how to access the wage statements are provided to the worker.

Response: The FAR Council finds, and DOL agrees, that contractors should have the option of providing wage statements either by paper-format (*e.g.,* paystubs), or electronically if the contractor regularly provides documents electronically and if the worker can access the document through a computer, device, system, or network provided or made available by the contractor. (The final FAR rule states that the FLSA exempt-status notice and the independent contractor notice also may be provided electronically on these terms.) As DOL stated in the Preamble to its final Guidance, merely providing workers with a Web site address would be insufficient; the contractor must provide the worker with internet or intranet access for purposes of viewing this information. The FAR Council and DOL, however, find that it is not necessary to require contractors to allow workers such access during work hours. The FAR Council and DOL assume that workers will, in most cases, access wage

statements (or other employer-provided documents, such as leave statements or tax forms) using the contractor's network or system during the workday—including during the worker's rest breaks or meal periods. It is not necessary to specifically prescribe a requirement regarding the time period during which a wage statement can be accessed. We also find that it is not necessary to require that workers give consent before receiving the wage statement electronically, or to require that workers be given written instructions on how to access the wage statement using the contractor's computer, device, system, or network. As the DOL proposed Guidance noted, the employer must already be regularly providing documents to workers electronically in order to provide wage statements in the same manner. See 80 FR 30592. Contractors that already provide documents electronically presumably also provide general instructions regarding accessing personnel records on their intranet Web pages; therefore, additional written instructions specific to accessing the worker's wage statement using the contractor's computer, device, network, or system are not necessary. Similarly, requiring a written consent by the worker is not necessary, because the workers for such employers should already be familiar with the process for receiving documents electronically.

9. Arbitration of Contractor Employee Claims

Introductory Summary: The FAR Council received various comments concerning the clause FAR 52.222–61, Arbitration of Contractor Employee Claims (Executive Order 13673), which is required by Section 6 of the E.O. The clause provides that contractors agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment, shall only be made with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions. The clause applies to contracts and subcontracts if the estimated value exceeds $1,000,000, other than those for commercial items.

Comment: Several respondents commented that the proposed rule is invalid and unenforceable because it conflicts with Federal statute, U.S. Supreme Court precedent, current regulation, or should otherwise only be accomplished through Congressional legislation. Respondents provided the following in support of their comments: *Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 U.S. 20, 25 (1991) (the FAA reflects a ''liberal federal policy favoring arbitration agreements.'' *AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333, 339 (2011) (''The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.'') U.S. Supreme Court's decision in *CompuCredit* v. *Greenwood,* 565 U.S. 95 (2012), and similar rulings upholding the enforceability of arbitration agreements pursuant to the Federal Arbitration Act.

Response: As explained above in Section III.B.1.d., the final rule does not conflict with the Federal Arbitration Act or regulations or judicial decisions interpreting that Act.

Comment: Several respondents commented that the proposed rule offered no explanation, or an inadequate explanation, for how a limitation on arbitration agreements would promote economy and efficiency in Federal procurement. Some of these respondents expressed the view that the proposed rule would in fact work against the stated aims of the E.O. One respondent also stated that the limitation had no connection with the Federal procurement process and should be deleted in its entirety.

Response: As explained above in Section III.B.1.d, the limitation on arbitration agreements is a reasonable and rational exercise of the President's authority, under the Procurement Act, to prescribe policies and directives that the President considers necessary to carry out the statutory purposes of ensuring economical and efficient government procurement.

Comment: Respondents commented that the exception for arbitrations conducted pursuant to collective bargaining agreements improperly penalized contractors without collective bargaining agreements and recommended the exception be removed.

Response: As explained above in Section III.B.1.d, the exception does not penalize contractors without collective bargaining agreements and will remain in the final rule.

Comment: Respondents recommended that contractors who retain forced arbitration provisions for employment disputes other than those specifically prohibited by the regulation should be barred from enforcing those remaining forced arbitration provisions in the event disputes arise out of the same set of facts.

Response: As explained above in Section III.B.1.d., to be consistent with DoD's existing regulations and the requirements of the Executive Order, this rule does not apply the limitation on mandatory pre-dispute arbitration to aspects of an agreement unrelated to the covered areas.

Comment: Several respondents expressed support of the limitations on arbitration agreements as a worthwhile protection for employees. Some respondents commented that the authority for this E.O. is sound. One respondent expressed that society benefits from an open legal process, which exposes civil rights violations and perpetrators of sexual assault instead of hiding them from view. Forced arbitration, on the other hand, restricts the public's ability to obtain such information and keeps abusive practices hidden. One respondent found that there is a distinct link between the E.O. and economy and efficiency. Limiting forced arbitration is a fundamental component of decreasing systemic discrimination by Government contractors because forced arbitration allows employers to avoid accountability for violating Federal anti-discrimination laws. Respondents asserted that, with less discrimination in Government contracting, efficiency will increase. The Federal Arbitration Act (FAA), as originally drafted and passed in 1925, neither envisioned, nor intended forcing individual employees into secret, private arbitration forums thereby depriving them of their constitutional right to trial by jury. Nor was it intended to apply in scenarios where individuals with little to no bargaining power must sign away their rights as a condition of securing employment. Rather, the FAA was intended to apply only in cases involving commercial disputes between two businesses with relatively equal bargaining power. Respondents provided the following in support of their comments: Margaret L. Moses, *Arbitration Law: Who's in Charge?,* 40 Seton Hall L. Rev. 147, 147 (2010) (''The Federal Arbitration Act (FAA) that Congress adopted in 1925 bears little resemblance to the Act as the Supreme Court of the United States has construed it. The original Act was intended to provide Federal courts with procedural law that would permit the enforcement of arbitration agreements between merchants in diversity cases.''). Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use,* Nev. L.J. 385,392 (2007) (FAA ''was intended to apply to disputes between commercial entities of generally similar bargaining power.''). Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights,* Yale

Law Journal, Vol. 124, p. 2808–2943 (2015), available at *http://ssrn.com/abstract=2601132*.

Response: As explained above in Section III.B.1.d, the FAR Council agrees that the limitation on arbitration agreements does not conflict with the Federal Arbitration Act, and is a reasonable and rational exercise of the President's authority, under the Procurement Act, to prescribe policies and directives that the President considers necessary to carry out the statutory purposes of ensuring economical and efficient government procurement.

Comment: Respondents commented that the proposed rule was unworkably vague because it failed to clarify whether the prohibition on certain arbitration agreements applies solely to employees working under a covered contract, or applies to all employees of the firm generally, regardless of whether they were working under the contract. Several respondents recommended the final rule specify that the limitations on arbitration agreements apply to all employees, or all unrepresented employees, not just those working on the Federal contract.

Response: The clause requires the contractor to agree not to enter into the specified arbitration agreements. The clause does not provide an exception for employees not working under the contract. Thus, the clause applies to all contractor employees and independent contractors.

Comment: A respondent recommended clarification of the exceptions to the limitation on arbitration and particularly recommended definitions for ''permitted,'' ''renegotiated,'' and ''replaced'' as clarifications.

Response: The Councils decline to revise the clause because it is implementing the language of Section 6.c.ii. of the E.O. There are three terms that the respondent requested be clarified, which appear in paragraph (b)(2) of the Arbitration of Contractor Employee Claims (Executive Order 13673) clause at FAR 52.222–61. The word ''permitted'' means that the contractor is able to modify the employment contract. The words ''renegotiated'' or ''replaced'' refer to a modified or new employment contract.

Comment: Respondents recommended revising the proposed rule to require contractors to report on use of forced arbitration not prohibited by the regulation.

Response: The Councils decline to add a reporting requirement as the E.O. did not contain a reporting requirement, and adding a reporting requirement would increase the burden on contractors.

Comment: One respondent stated that there is no process for third parties to report contractor violations of the arbitration provisions of the E.O.

Response: Existing procurement practices allow for other sources, including third parties, to inform the contracting officer that the contractor is not meeting the terms of its contract, which would include clause violations.

Comment: Respondents recommended that the final rule expand the arbitration limitations to cover claims arising out of discrimination against the disabled. Likewise, other respondents suggested expansion to cover claims under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, or its implementing regulations at 41 CFR part 60–300, under the Uniformed Services Employment and Reemployment Rights Act of 1994. Others suggested expansion to the full list of 14 labor laws and E.O.s covered under Section 2 of the E.O.

Response: In accordance with the E.O., the clause applies to Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex and national origin, and to any tort related to or arising out of sexual assault or harassment. The Councils decline to extend the clause coverage.

Comment: A respondent recommended the dollar threshold that triggers the predispute arbitration agreement requirement be lowered to $500,000.

Response: The E.O. clearly states the prohibition on arbitration applies to contracts above $1,000,000. The Councils decline to change the dollar threshold.

Comment: One respondent recommended revising the proposed rule to require contractors and subcontractors to notify employees and independent contractors that employers cannot force them to enter into a predispute arbitration agreement for disputes arising out of Title VII or torts related to sexual assault or harassment, and that compulsory predispute arbitration agreements violate the Federal contract.

Response: The Councils decline to insert a requirement for notification to employees and independent contractors as the E.O. does not require such a notice.

Comment: Several respondents recommended that the final rule adopt the interpretation given to the term ''contractor'' by DoD under the Franken Amendment, section 8116 of the Department of Defense Appropriations Act for Fiscal Year 2010, Public Law 111–118, that the term ''contractor'' is narrowly applied only to the entity that has the contract. Unless a parent or subsidiary corporation is a party to the contract, it is not affected.

Response: The final rule does not expand ''contractor'' to include parents and subsidiaries. Consistent with the standard interpretation of contractor as used in the FAR and the Defense Federal Acquisition Regulation Supplement (DFARS), it is limited to the entity awarded the contract. (Also see Section III.B.3.e. above).

Comment: Another respondent recommended the final rule specify that the arbitration limitations do not apply to commercial items or COTS items.

Response: As required by the E.O., the clause prescription at FAR 22.2007(f) specifies an exception for commercial items. The policies that apply to commercial items also apply to COTS (see FAR 12.103), therefore COTS are likewise excepted from the arbitration clause.

Comment: A respondent provided an additional argument in support of the limitation on arbitration. Forced arbitration clauses are also used to limit the ability of employees to bring class claims. Further, an employee might be too afraid to pursue a civil rights or sexual assault related claim on her own. However, class actions allow employees who have suffered a common harm to hold their employer accountable no matter the disparity in resources. Indeed, class claims are powerful tools that deter bad behaviors and allow employees to rectify employer wrongs. Eliminating forced arbitration clauses will protect employees' ability to bring class claims and therefore safeguard important employee rights.

Response: The Councils appreciate the respondent's comment.

10. Information Systems

a. The Government Should Have a Public Data Base of All Labor Law Violations

Comment: Several respondents recommended a searchable, public Web site containing labor law violation information accessible to contracting officers and prime contractors for their use in making labor law compliance determinations, and increasing public involvement. A respondent suggested that a public data base is the most effective means to improve transparency and capture contractor misrepresentations or ongoing violations, and would increase incentives to comply with labor laws. A respondent provided examples of

existing Federal Web sites that allow the public and enforcement agencies to benefit from mutual access to information.

Response: Although a public data base containing information on entities and their labor law violations would enhance transparency, creation of such a system to implement the E.O. is beyond the purview of the FAR Council (see Section 4 of the E.O.).

b. Data Base for Subcontractor Disclosures

Introductory Summary

As stated in section III.B.5, the final rule requires subcontractors to disclose details regarding labor law decisions directly to DOL for review and assessment. Such disclosures will be provided to DOL through the DOL Web site at *www.dol.gov/fairpayandsafeworkplaces* (see FAR 52.222–59 (c)). At the time of rule publication, this subcontractor disclosure DOL Web site is under development; it will be functional 60 days prior to the initiation of subcontractor disclosures.

Comment: Respondents including the SBA Office of Advocacy, stated the rule lacks a system to track subcontractor labor law violations. One respondent recommended establishing a single reporting portal for all subcontractors through SAM, as many subcontractors are also prime contractors. The respondent believed it would greatly reduce the significant reporting burden if the Government provided a common, public place for subcontractor disclosures. The existing SAM system is utilized in the contracting process, and could aggregate the data and avoid the added expense of creating new data bases and interfaces.

Response: The E.O. requires that prime contractors report certain information about the labor law decisions rendered against them. The FAR implementation requires that the information is input in SAM and will be publicly disclosed in FAPIIS. There is no requirement for public disclosure of subcontractor violations. The process for subcontractor disclosures is streamlined in the alternative implemented in the final rule. Rather than providing their disclosures to each prime contractor, subcontractors will instead provide disclosures to a single site within DOL (see FAR 52.222–59(c)(3)(iv)).

c. Posting Names of Prospective Contractors Undergoing a Responsibility Determination and Contractor Mitigating Information

Comment: One respondent stated contracting officers should regularly post the names of prospective contractors undergoing a responsibility determination in a publicly available place so that interested parties can know that a prospective contractor is undergoing review.

Response: The FAR implementation of this E.O. does not alter existing processes for conducting the responsibility determination. The names of contractors undergoing a responsibility determination are Source Selection Information and cannot be disclosed.

Comment: One respondent recommended the final rule require the public disclosure of documents the contractor submits to demonstrate its responsibility, namely those describing mitigating circumstances, remedial measures, and other steps taken to achieve compliance with labor laws. These additional disclosures would greatly benefit the public without imposing an undue burden on the Government.

Response: The E.O. does not require, and the FAR implementation does not contemplate, public disclosure of documents submitted by the contractor to demonstrate its responsibility, unless the contractor determines that it wants this information to be made public. See FAR 22.1004–2(b)(1)(ii).

d. Method To Protect Sensitive Information Needed

Comment: One respondent stated the proposed rule requires disclosure of sensitive corporate information to prime contractors and does not adequately establish protocols to protect the required information. The respondent noted the rule requires the collection by prime contractors of labor law compliance data from subcontractors. The respondent believed the proposed rule should provide guidance to subcontractors supplying the information to redact or otherwise protect sensitive information from risk of exposure.

Response: Contractors and subcontractors exchange sensitive corporate information and have associated protocols to protect the information. In addition, the amount of sensitive information exchanged should be minimized under the final rule, which revised the clause at FAR 52.222–59(c) and (d) to require prime contractors to direct that subcontractor information shall be submitted to DOL, and not to the prime contractor.

e. Information in System for Award Management (SAM) and Federal Awardee Performance and Integrity Information System (FAPIIS)

Comment: One respondent cited the policy at FAR 22.2004–3(a) includes ''whether'' there have been labor law violations pursuant to the clause at FAR 52.222–59(b). Both SAM representations and certifications and the SAM reporting module will include information on ''whether'' there have been any reportable violations of labor laws. However, the respondent asserted that these two parts of SAM often would be subject to different three-year timeframes thereby creating potential confusion and ambiguity.

Response: The proposed rule's reference to a separate SAM reporting module is removed in the final rule. All information is disclosed into SAM. Contractors must ensure information in SAM is accurate, current, and complete each time data is input or updated in SAM.

Comment: One respondent stated that the proposed rule provided no mechanism for posting a contractor's vindication of a labor law violation previously disclosed in SAM. The respondent is concerned that contractors would be forever harmed by the required reporting of incomplete, nonfinal information, without an effective remedy.

Response: Contractors are encouraged to maintain an accurate and complete SAM registration and may update their information in SAM any time the information changes.

Comment: One respondent stated the proposed rule does not clarify whether companies must submit labor law violation information to FAPIIS pursuant to each contract or whether a company may update the information once every six months to cover the reporting requirements for all of their contracts.

Response: The companies do not submit this semiannual update information to FAPIIS but to SAM. The final rule has been revised to clarify that contractors have flexibility in establishing the date for the semiannual update; they may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date to achieve compliance with this requirement. In either case, the contractor must continue to update it semiannually. Registrations in SAM are required to be current, accurate, and complete (see FAR 52.204–13). If the SAM registration

date is less than six months old, this will be evidence to the Government that the required representation and disclosure information is updated and the requirement is met. The revised language should provide contractors with more flexibility for compliance with the semiannual requirement.

Comment: One respondent stated the final rule should require that more labor law violation data be made publicly available on the FAPIIS database. The respondent recommended adding the following to the public disclosure requirement: (1) The address(es) of the worksite where the violation took place; and (2) the amount(s) of any penalties or fines assessed and any back wages due as a result of the violation.

Response: The FAR rule implements the E.O. by requiring the minimum information necessary; requiring any additional information would unnecessarily increase the burden on the public.

Comment: Respondents expressed concern that the development of the centralized electronic database for reporting of labor law compliance information has not been completed.

Response: The next release of Government changes to SAM, scheduled for October 28, 2016, will collect the following data fields for each labor law decision required by FAR 52.212–3(s)(3)(a) and FAR 52.222–59(b)(1)(i), based on the information the Entity provides when directed to report the details in SAM by a contracting officer:

- The labor law violated;
- The case number, inspection number, charge number, docket number, or other unique identification number;
- The date rendered; and
- The name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision;

Similarly, FAPIIS will be prepared to publicly display such information, if appropriate.

Comment: One respondent observed that the proposed rule imposes requirements that are more onerous than those imposed by FAPIIS. Specifically, FAPIIS provides the contractor with a mechanism to object to the public posting of information that is subject to FOIA protections from disclosure. The respondent noted FAPIIS reporting also permits the contractor to provide its comments along with the reported violation, so that the reported matter is viewed in context.

Response: The Councils note that the final rule has been revised so that contractors provide mitigating factors in SAM for the contracting officer's consideration; this information will not be made public unless the contractor determines that it wants this information to be made public.

Comment: One respondent stated that FAPIIS was established to create a ''one-stop'' resource for contracting officers reviewing the background of prime contract offerors. In implementing FAPIIS, the FAR Council identified existing sources of information that would not require the creation of additional information submissions. If no existing source was found, preference was given to obtaining information from Government sources rather than contractors. The respondent stated that FAPIIS applies only to reporting covered proceedings in connection with the award to or performance by the offeror of a Federal contract or grant and this limits the scope of FAPIIS reporting to matters that have a nexus to a contractor's contracting relationship with the Federal Government.

Response: In order to maximize efficiency by leveraging an existing and known system, the E.O. identified FAPIIS for the display of labor law decision disclosures. The FAPIIS statute does not require that proceedings involve award or performance of a Federal contract or grant (see for example paragraph (c)(8) of 41 U.S.C. 2313 on blocked persons lists).

f. Contractor Performance Assessment Reporting System (CPARS)

Comment: A respondent was concerned that the alternative proposed rule language at FAR 22.2004–5 is overly broad and past performance reports should require a clear connection between the labor law performance issue and the contract action being reported in CPARS. Any discussion in the past performance report should have arisen directly under the contractor's performance of the contract action being reported in CPARS, or at a minimum the labor law performance issue should be connected to a substantially similar labor law issue that was considered during the initial responsibility determination for the contract action subject to CPARS reporting. The respondent believed that labor compliance agreements having no connection to the contract action being reported in CPARS should be excluded from the contractor's performance report.

Response: Contracting officers address regulatory compliance, including compliance with labor laws, as appropriate. The Councils have not incorporated the alternative supplemental FAR language at FAR 22.2004–5. However, the final rule has been revised to include a contractor's relevant labor law compliance and the extent to which the prime contractor addressed labor law violations by its subcontractors in preparation of past performance evaluations (see FAR 42.1502(j)).

g. Chief Acquisition Officer Council's National Dialogue on Information Technology

Comment: One respondent expressed concern that the proposed rule required a single Web site for all Federal contract reporting requirements and commented on the reference in the proposed rule to the National Dialogue, which is an interagency campaign to solicit feedback on how to reduce burdens and streamline the procurement process. The respondent noted the National Dialogue Web site contained no information related to implementation of E.O. 13673. The respondent requested that the FAR Council re-open the public comment period after sufficient information has been made available on the Web site to allow for meaningful input.

Response: The reference to the National Dialogue in the preamble was to inform the public and encourage participation in the National Dialogue and Pilot to reduce reporting compliance costs for Federal contractors and grantees. The proposed rule advised that such comments would not be considered public comments for purposes of this rulemaking.

h. Difficulty for Contractors To Develop Their Own Information Technology System

Comment: One respondent stated that contractors do not currently have centralized systems in place to capture information required by the proposed rule and DOL Guidance. The respondent commented that existing systems do not have the reliability needed to make representations as prime contractors or subcontractors, or assess reports from subcontractors. The respondent stated that it is not feasible to develop information technology solutions to comply until the requirements are known. Additionally, the respondent stated that contractors cannot implement solutions until the scope of the State law requirement is clear. The respondent indicated that the challenge facing the Government is similar: Neither contracting agencies nor DOL can develop reliable guidance or internal processes with undefined requirements.

Response: The Councils recognize that developing information systems is challenging for contractors, especially large contractors with multiple

locations. Although the rule does not contain an explicit requirement for contractors to establish independent IT systems, the Councils recognize that many contractors and subcontractors will elect to create or modify administrative and information management systems to manage and comply with the rule's requirements. See also discussion at Section III.B.1.c. above.

11. Small Business Concerns

Introductory Summary: To the extent practicable, the E.O. and implementing FAR rule minimize the compliance burden for Federal contractors and subcontractors and in particular small businesses by: (1) Limiting disclosure requirements, for the first six months to contracts for $50 million or more, and subsequently to contracts over $500,000, and subcontracts over $500,000 excluding COTS items, which excludes the vast majority of transactions performed by small businesses; (2) limiting initial disclosure from offerors to a representation of whether the offeror has any covered labor law decisions and generally requiring more detailed disclosures only from the apparent awardee; (3) only requiring postaward updates semiannually; (4) creating certainty for contractors by having ALCAs coordinate through DOL to promote consistent responses across Government agencies regarding assessments of disclosed labor law violations; (5) phasing in disclosure requirements for subcontractor flowdown so that contractors and subcontractors have an opportunity to become acclimated to new processes; (6) establishing the alternative subcontractor disclosure approach that directs the prime contractor to have their subcontractor disclose labor law decisions and mitigating information to DOL; and (7) emphasizing in the final rule that labor law decisions do not automatically render the offeror nonresponsible (see FAR 22.2004–2(b)(6) and an equivalent statement at FAR 52.222–59(c)(2) for assessment of subcontractors). In addition, DOL encourages companies to work with DOL and other enforcement agencies to remedy potential problems independent of the procurement process so companies can give their full attention to the procurement process when a solicitation of interest is issued (See DOL Guidance Section VI, Preassessment). Language is added at FAR 52.222–59(c)(2) that the prime contractor should encourage prospective subcontractors to contact DOL for a preassessment of their record of labor law compliance.

The RIA includes estimates of all costs associated with the rulemaking and an assessment and (to the extent feasible) a quantification and monetization of benefits and costs anticipated to result from the proposed action and from alternative regulatory actions. The Regulatory Flexibility Act (RFA) requires Federal agencies to consider the impact of regulations on small entities in developing regulations. If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared.

Comment: Respondents, including the SBA Office of Advocacy, asked for clarification of three aspects of applying FAR subpart 19.6, Certificates of Competency and Determinations of Responsibility, under the final rule. Specifically, they asked whether: (1) A Certificate of Competency (COC) would apply if a contracting officer determines an apparent successful small business lacks responsibility due to a labor law violation, (2) under a COC the contracting agency's ALCA or an ALCA at the SBA would make the final determination of whether a small business is responsible, and (3) a system for COC could be set up for small business subcontractors.

Response: The E.O. and FAR rule do not make any changes to the SBA COC program or require a new COC system to be established for small subcontractors. Contracting officers are required to refer small businesses that are found nonresponsible to the SBA (see FAR 9.103(b) and 19.601(c)), and the final rule reiterates that nonresponsibility determinations must be referred to SBA (see FAR 22.2004–2(b)(5)(iv)). The SBA certifies responsibility for small businesses under the SBA COC program, applying existing processes and procedures for COCs. Consistent with existing FAR 9.104–4(a), prime contractors make responsibility determinations for their prospective subcontractors. The COC program does not apply to determination of subcontractor responsibility. The ALCA is not involved in making the responsibility determination.

Comment: Respondents, including the SBA Office of Advocacy, raised a number of concerns that the rule would drive out small businesses, including specialized information technology firms, from Government procurement. A number of the concerns related to cost implications including additional compliance costs and delays in processing contracts, lack of resources to compile and/or assess reports of labor law violations and unwillingness to take on the risk of making a false statement to the Government, lack of profitability due to the cost burden (a particular concern of the SBA Office of Advocacy), and no existing systems for small businesses to track their own labor law violations or those of subcontractors. The SBA Office of Advocacy recommended a phase-in period for small businesses.

Response: Federal contractors will undertake the necessary due diligence to fully comply with the requirements of the E.O. and the final rule. Steps were taken to minimize the impact on small businesses as described in the introductory summary to this section III.B.11. With regard to the risk of making a false statement, see the discussion above at Section III.B.1.c. With regard to the risk of false statements by subcontractors, FAR 52.222–58(b)(2) and 52.222–59(f) are revised to read that ''A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements.''

Comment: Respondents, including the SBA Office of Advocacy, expressed concern that the Initial Regulatory Flexibility Analysis (IRFA) of the proposed rule is flawed in a number of ways and is in violation of the Regulatory Flexibility Act. The flaws described by the respondents included:

- Presumption that the $500,000 applicability threshold will minimize impact to small businesses, given that long-term supplier agreements with small businesses are likely to exceed this threshold;
- Reliance on different metrics to determine the percentage of entities with labor law violations (respondent suggested using firms versus entities);
- Failure to compare the compliance burden on the typical small business in relevant terms to the burden on other affected businesses; and
- Reliance on Federal Procurement Data System (FPDS) data to determine the proportion of small versus large subcontractors.

Response: The Councils have considered concerns raised by respondents regarding IRFA concerns and provide the following in response:

- The E.O. provides no exclusion for supplier agreements. Supplier agreements are used between a company and its supplier, are typically for products, and range in contract value. However, the exemption for COTS items, and the $500,000 and above threshold, should minimize the number

of supplier agreements with small businesses that are covered by the E.O.

• The FAR Council worked closely with DOL in developing the final RIA for this rule. In response to public comments, DOL reexamined the methodology used to develop the estimated percentage of likely violators and has revised the estimate for all entities from 4.05 percent to 9.67 percent. For a detailed discussion of the estimating methodology, please see the final RIA. The Final Regulatory Flexibility Analysis (FRFA) has been prepared using the 9.67 percent estimate developed for the RIA.

• The FAR Council, working closely with DOL, developed the regulatory compliance burden estimates used in the analyses prepared for this final rulemaking. In response to public comments, relative size structure and complexity of small and other than small businesses has been considered and taken into account in developing the burden estimates. The Government does not collect data that easily translates into such a stratification of business size and complexity, however, where it was feasible and lent greater realism to the estimates, it has been considered, *e.g.,* estimates of tracking system costs. For a more detailed discussion of how relative business size and complexity have been considered, see the final RIA.

• The Government's procurement data source is FPDS, and this data system is used in preparing estimates for procurement regulatory actions. For each procurement, FPDS contains a data field that indicates whether the procurement is awarded to a small business or an other than small business. As the Government has no other comparable data source for business size of subcontractors, the approximate percentage of small versus large businesses represented in FPDS was applied, as an estimating methodology, in developing the estimated population of subcontractors.

Comment: Respondents stated the Government failed to articulate in the IRFA a rational basis for its decision to promulgate the rule, in violation of the Regulatory Flexibility Act. Specifically, respondents contended that the Government merely regurgitated the substance of E.O. 13673, made a conclusory statement that the rule would reinforce protections for workers, and made a conclusory statement that the rule would ensure the Government contracted with companies with a satisfactory record of business ethics.

Response: The FAR Council examined a number of options and combinations of options to meet the requirements of the E.O., achieve the objectives of the E.O., and minimize burden on industry, especially small businesses. The introductory summary to this section III.B.11. describes the results of this examination of options, which include implementing the alternative for subcontractor labor law decision disclosures to DOL instead of to the prime contractor. This alternative approach is expected to reduce the compliance burden of this regulatory action for primes and subcontractors and will benefit small businesses, particularly small business prime contractors. The FRFA contains discussion of the examination and consideration of these options.

Although it is not possible to guarantee the Government only contracts with companies with integrity and business ethics, the E.O. and the rule are expected to greatly increase the Government's ability to contract with companies that regularly comply with labor laws, as the rule and DOL Guidance provide a structural foundation and assistance to companies that do business with the Government to continually improve their compliance with labor laws.

Comment: Respondents stated the Government failed to identify in the IRFA any significant alternatives to the rule that accomplished the rule's stated objectives while minimizing any significant economic impact on small entities, in violation of the Regulatory Flexibility Act. For example, the respondents indicated that Government did not analyze the recordkeeping or ongoing compliance costs that will be imposed on small businesses. In addition, Federal dollars would be better spent improving existing processes rather than requiring contractors to collect data and self-report.

Response: In the proposed rule the FAR Council recognized that the rule would impose recordkeeping and ongoing compliance costs. The FAR Council requested input from the public regarding what types of recordkeeping systems it might employ to develop and maintain compliance, and what costs might be incurred to initialize and maintain such systems. The final rule analyses (RIA, PRA Supporting Statement, and FRFA) have been developed to include estimates for such costs. The Government remains committed to ongoing efforts to improve its ability to retrieve data from the various enforcement agencies. As these abilities are developed and improved, the Government will continue to consider the most efficient means to meet the requirements and objective of the E.O. and minimize compliance burden on industry, especially small businesses.

Comment: One respondent stated the Government failed to identify in the IRFA any relevant Federal rules which may duplicate, overlap, or conflict with the rule, in violation of the Regulatory Flexibility Act. In particular, the respondent asserted that the rule conflicts with suspension and debarment procedures because Congress determined the suspension and debarment remedy should be available for only two of the statutes identified in E.O. 13673: The Davis-Bacon Act and the Service Contract Act. The respondent also asserted that each of the 14 labor laws already have complex enforcement mechanisms and remedial schemes, and only some of those allow for the denial of a Federal contract as a result of a violation.

Response: The Councils do not find that the rule conflicts with existing procedures for suspension and debarment. The rule creates procedures associated with the award of individual contracts. Suspension and debarment applies to contracts across all Federal agencies. Suspension and debarment procedures and labor law enforcement procedures are independent of one another. Companies who have violated labor laws respond to the enforcing agency or body that found the violation. Suspension and debarment actions are taken by Suspending and Debarring Officials to protect the Government's interest when a company's record of integrity and business ethics indicates cause for concern. The actions of an enforcement agency when it issues an administrative merits determination for a labor law violation, and the procurement system's use of the suspension and debarment process, are independent of each other. For additional discussion see Section III.B.1 of this preamble.

Comment: Respondents expressed concern that small businesses (especially Service-Disabled Veteran-Owned, Women-owned and HUBzone small businesses) would not have the resources to collect and assess information on the labor law violations of large contractors, including Fortune 500 companies, that serve as their subcontractors.

Response: The Councils acknowledge that small business prime contractors may have larger firms as subcontractors, and the assessment of the labor law violations of a large firm may be especially difficult for the small prime contractor. The Councils have revised the final rule at FAR 52.222–59(c) to incorporate the alternative presented in

the proposed rule, whereby subcontractors provide their labor law decision disclosures (including mitigating factors and remedial measures) to DOL (see introductory summary to Section III.B.5). DOL will assess the violations and advise the subcontractor who will make a representation and statement to the prime contractor pursuant to FAR 52.222–59(c)(4)(ii). A great deal of the burden to prime contractors, including small business prime contractors, thus has been reduced. If DOL does not provide a timely response, the final rule provides that the prime contractor may proceed with making a responsibility determination using available information and business judgment, including whether, given the circumstances, it can await DOL analysis, see FAR 52.222–59(c)(6).

Comment: Respondents expressed concerns that the DOL Guidance was devoid of any instructions on how the size of a contractor could impact an analysis of whether a business had ''pervasive'' violations and therefore could be applied inequitably against small businesses. In addition, a respondent expressed concern that there was no definition in the DOL Guidance of what constituted a small, medium, or large contractor.

Response: Contractor size standards are the purview of the SBA and are specific to the procurement's assigned North American Industry Classification System (NAICS) code. However, in response to these comments in its Preamble to the final Guidance, DOL explains that it declines to eliminate the company-size factor because the E.O. explicitly requires the Department to ''take into account . . . the aggregate number of violations of requirements in relation to the size of the entity.'' See E.O. Section 4(b)(i)(B)(4). DOL notes that the size of the employer will be one factor among many assessed when considering whether violations are pervasive. Likewise, DOL declines to establish specific criteria for how company size will affect the determination of pervasive violations. Violations vary significantly, making the imposition of bright-line rules for company size inadvisable. However, the final DOL Guidance in Appendix D provides examples that note in most of the examples the number of employees for the contractor. The examples illustrate circumstances under which violations may be classified as pervasive.

Comment: One respondent stated the Government violated the Regulatory Flexibility Act by failing to identify or consider in the IRFA the burden of compliance faced by small entities such as small towns, small nonprofit organizations, and small school systems.

Response: To the extent that small towns, nonprofit organizations, and school systems are engaged in Federal procurement contracts, award information to these entities is reported in FPDS. The FRFA addresses the impact on small entities such as small towns, small nonprofit organizations, and small school systems.

Comment: A respondent expressed concern about small businesses' ability to monitor subcontractor compliance near the threshold value of $500,000, and suggested raising the threshold to $3 million for small business prime contractors.

Response: The E.O. set the $500,000 applicability threshold in order to minimize impact on small business and to be consistent with current procurement practices, including the then-existing FAPIIS reporting threshold ($500,000 when the E.O. was signed). The threshold in the FAR rule will remain at $500,000.

Comment: Respondents, including the SBA Office of Advocacy, expressed concerns that prime contractors will avoid contracting with a small business that has a labor law violation, rather than wait for the outcome of a responsibility determination, and that it would be difficult and costly to find new subcontractors.

Response: The existence of a single labor law decision is not cause for disqualification; however, if a subcontractor is found to be nonresponsible, then it is appropriate to select a more suitable source. All businesses with labor law violations, including small business subcontractors, are encouraged to remediate violations and consult early with DOL. In addition, the Councils have revised the final rule to implement the alternative approach provided in the proposed rule, whereby subcontractor labor law information (including decisions, mitigating factors, and remedial measures) is submitted to DOL and DOL assesses the violations (FAR 52.222–59(c)). (See introductory summary to Section III.B.5.) This revised implementation is designed to, among other things, lessen the concerns of prime contractors so that they will continue subcontracting with small businesses.

The final rule has been revised at FAR 22.2004–2(b)(6) to clarify that for prime contractors ''[d]isclosure of labor law decision(s) does not automatically render the offeror nonresponsible'' and ''[t]he contracting officer shall consider the offeror for contract award notwithstanding disclosure of one or more labor law decision(s).'' Similar language is added at FAR 52.222–59(c)(2) regarding subcontractor violations.

Comment: The SBA Office of Advocacy stated the proposed regulation underestimated the rule's ''quantifiable cost'' to the public, and recommended that the Council and DOL provide more clarity as to the actual cost of compliance for small entities acting as prime contractors and as subcontractors. As an example, the respondent said the Government's calculation did not reflect additional time and cost to review phase two of the DOL Guidance and the revised FAR rule, nor did it include any costs for review of current State labor laws.

Response: In preparing the analyses (RIA, PRA Supporting Statement, FRFA) for the final rule, DOL and the FAR Council considered public comments and have adjusted the estimates of quantifiable costs of compliance with the regulation, including the costs for regulatory review and familiarization. DOL and the FAR Council have also paid particular attention to, and where appropriate have noted more clearly, the estimates of costs of compliance for small entities acting as prime contractors and as subcontractors. The proposed and final FAR rules do not address the cost of reporting violations related to equivalent State laws (other than OSHA-approved State Plans) because the rule and DOL's Guidance do not implement those requirements of E.O. 13673. (See also the discussion above at Section III.B.1.d.)

Comment: The SBA Office of Advocacy recommended that the IRFA be amended to reflect the costs that are cited in the RIA. The Office of Advocacy suggested that to further support the importance of this cost data, once such data are made more readily available, the Council should extend the public comment period for 30 days.

Response: The RIA includes estimates of all costs associated with the rulemaking and an assessment and (to the extent feasible) a quantification and monetization of benefits and costs anticipated to result from the proposed action and from alternative regulatory actions. The Regulatory Flexibility Act (RFA) requires Federal agencies to consider the impact of regulations on small entities in developing regulations. If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared. A summary of the proposed RIA and IRFA were published with the proposed rule and full

documents were available for review by the general public. The public comment period deadline was extended twice from the original closing date of July 27, 2015, to August 11, 2015, and again to August 26, 2015, to provide additional time for interested parties to review and provide comments on the FAR case including the RIA and IRFA. Those comments have been reviewed and considered in the development of the final RIA and FRFA.

Comment: A respondent suggested exempting small businesses to lessen burden.

Response: The objective of the E.O. is to increase the ability of the Government to award contracts to contractors that are compliant with labor laws and as such does not exempt small businesses. However, the E.O. and the FAR rule were designed to minimize the burden associated with the required disclosure for Federal contractors and subcontractors, especially small businesses.

Comment: A respondent suggested the Government allow small business to submit their filings to one central database in order to lessen the burden on small businesses.

Response: In regard to prime contractors (including small businesses), the initial representations are completed in SAM. If, at responsibility determination, disclosures are required, they will likewise be made in SAM. For subcontractors (including small business subcontractors), the Councils have revised paragraphs (c) and (d) of the FAR clause 52.222–59, Compliance With Labor Laws (Executive Order 13673), in the final rule to implement the alternative presented in the proposed rule for subcontract labor law violations to be disclosed to DOL. (See the introductory summary to Section III.B.5.) This eliminates the requirement for subcontractors to disclose to each of their contractors, reducing the compliance burden for small businesses whether in the capacity of primes or subcontractors.

Comment: A respondent suggested that the IRFA's discussion of alternatives to subcontractor reporting overstates the obligation of the prime contractor to make a subcontractor responsibility determination.

Response: Consistent with existing procurement practice and FAR 9.104–4(a), prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors.

12. State Laws

a. OSHA-Approved State Plans

The E.O. directs DOL to define the State laws that are equivalent to the 14 identified Federal labor laws and executive orders. See E.O. Section 2(a)(i)(O). The proposed DOL Guidance stated that OSHA-approved State Plans are equivalent State laws for purposes of the E.O.'s disclosure requirements because the OSH Act permits certain States to administer OSHA-approved State occupational safety-and-health plans in lieu of Federal enforcement of the OSH Act. See 80 FR 30574, 30579.

Comment: Several respondents addressed the inclusion of OSHA-approved State Plans as equivalent State laws. One respondent agreed that State Plans are equivalent to the OSH Act, as the State Plans function in lieu of the OSH Act in those States, and a second respondent called it ''essential'' to the E.O.'s purpose that both the OSH Act and ''its State law equivalents'' be included.

In contrast, another respondent argued that the State Plans are not equivalent State laws. The respondent noted that, under Section 18 of the OSH Act, the State Plans must be ''at least as effective'' as OSHA's program, and therefore may be more protective than OSHA's requirements.

Response: DOL responds to these comments in its Preamble to the final DOL Guidance. See DOL Preamble Section-by-Section Analysis, II.B., coverage of ''OSHA State Plans''. DOL did not modify this aspect of the Guidance. The Councils agree with DOL. Equivalent State laws do not need to be identical to Federal laws, and failing to include the OSHA-approved State Plans would lead to a gap in coverage. The OSHA-approved State Plans can be found at *www.osha.gov/dcsp/osp/approved_state_plans.html.*

b. Phased Implementation of Equivalent State Laws

The proposed Guidance provided that DOL will identify additional equivalent State laws in a second Guidance to be published in the **Federal Register** at a later date.

Comment: Several respondents expressed concern that the Guidance is incomplete without identification of all equivalent State laws. A number of them argued that without the second Guidance employers are unable to estimate the costs associated with implementing the E.O., including the disclosure requirements. One respondent asserted that by failing to identify equivalent State laws, the proposed Guidance ignored the costs of tracking and disclosing violations of potentially hundreds of additional laws and the potential costs of entering into labor compliance agreements with respect to those additional laws. Some industry respondents called for a delay of the implementation of the E.O.'s requirements until guidance identifying the equivalent State laws is issued. Another respondent requested that the second Guidance not be issued at all because the requirement will be ''unworkable.'' Others encouraged DOL to issue the second Guidance ''swiftly'' before the end of 2015.

Response: DOL responds to these comments in its Preamble to the final DOL Guidance. See DOL Preamble Section VIII. Effective date and phase-in of requirements, coverage of ''Phased implementation of equivalent state laws''. DOL did not modify this aspect of the Guidance. The Councils agree with DOL. DOL plans to identify the equivalent State laws in a second Guidance published in the **Federal Register** at a later date.

That second Guidance will be subject to notice and comment, and the FAR Council will engage in an accompanying rulemaking that will include the costs of disclosing labor law decisions concerning violations of equivalent State laws, and address applicable requirements of the CRA, SBREFA, RFA, and E.O. 12866. Delaying implementation of all of the E.O.'s requirements until DOL completes the second Guidance will not serve to promote the E.O.'s goal of improving the Federal contracting process and would have negative consequences on the economy and efficiency of Federal contracting by allowing contractors who have unsatisfactory records of compliance with the 14 Federal labor laws identified in the Order, and OSHA-approved State Plans, to secure new contracts in the interim. The proposed and final FAR rules do not address the cost of reporting violations related to equivalent State laws (other than OSHA-approved State Plans) because the rule and DOL's Guidance do not implement those requirements of E.O. 13673. (See also the discussion at Section III.B.1.d.)

13. DOL Guidance Content Pertaining to Disclosure Requirements

Introductory Summary: The Councils received various responses concerning matters addressed by DOL Guidance and applied in the proposed rule. The E.O., Section 2, provides, in relevant part, that DOL Guidance will define ''administrative merits determination, arbitral award or decision, or civil judgment . . . rendered . . . for violations of any of the [listed] labor

laws and Executive Orders (labor laws).'' The E.O., Section 4(b), states, in relevant part, that DOL ''shall (i) develop guidance . . . to assist agencies in determining whether administrative merits determinations, arbitral awards or decisions, or civil judgments were issued for serious, repeated, willful, or pervasive violations of these requirements for purposes of implementation of any final rule issued by the FAR Council pursuant to this order.'' DOL analyzed public comments, and developed definitions which the FAR Council is adopting in its final rule. The DOL Guidance was initially published concurrent with this FAR rule and significant revisions to the Guidance will be published for public comment. DOL's analysis is referred to below; for more detail see the DOL Preamble published today accompanying the DOL Guidance.

a. General Comments

Comment: Respondents, including the SBA Office of Advocacy, contested the proposed rule's incorporation by reference of the DOL Guidance. Some respondents asserted that because the DOL Guidance is explicitly incorporated in the FAR, it is a *de facto* regulatory provision that must be subject to notice-and-comment rulemaking. Other respondents said that any future changes to the DOL Guidance must also be subject to notice-and-comment rulemaking. One respondent said the current approach, which incorporates the DOL Guidance into the FAR, is a violation of the APA. One respondent requested the withdrawal of the DOL Guidance.

Response: The Councils disagree that references in the rule to DOL's Guidance, such as for purposes of determining whether a labor law violation is serious, repeated, willful and/or pervasive, conflict with the APA, 5 U.S.C. 553(b). The E.O. charges DOL with developing guidance on, among other things, the definitions of those specific terms. The rule accordingly relies on those definitions. Moreover, whether or not required, DOL satisfied the APA by publishing the proposed Guidance in the **Federal Register** and soliciting and then considering comments before issuing the final Guidance. The FAR 22.2002 definition of ''DOL Guidance'' includes an acknowledgement that significant revisions will be published for public comment in the **Federal Register**.

Comment: One respondent requested that DOL provide a ''preclearance'' process for contractors who have no labor law violations, or have remedied any reportable labor law violations. The respondent also requested the names of precleared contractors be made publicly available.

Response: DOL has provided a preassessment process for prospective prime contractors and subcontractors, covered in the DOL Guidance at Section VI. However, the FAR does not cover a preassessment process because it takes place prior to the procurement process. Concerning covered subcontractors, the final rule has been modified to clarify that contractors shall direct their prospective subcontractors to submit labor law violation information (including mitigating factors and remedial measures) to DOL. (See introductory summary to Section III.B.5.) Contractors will consider DOL analysis and advice as they make responsibility determinations on their prospective subcontractors. See FAR 22.2004–1(b), 52.222–58, and 52.222–59(c) and (d).

Comment: One respondent commented that if the Government chooses to apply the E.O. to subcontractors, the definition of ''subcontract'' and ''subcontractor'' should be modified. It stated that the proposed DOL Guidance definitions were inconsistent with the FAR part 44 provisions on subcontracting, which narrowly define a ''subcontract'' and ''subcontractor.''

Response: The DOL Guidance is not inconsistent with the definitions of ''subcontract'' and ''subcontractor'' in FAR part 44. Unlike FAR part 44, the DOL Guidance does not specifically define these terms. Rather, it defines the term ''covered subcontract''—meaning a subcontract that is covered by the E.O. It describes how it uses the term ''subcontractor,'' for ease of reference both to subcontractors and prospective subcontractors. Neither of these uses of the terms are inconsistent with FAR part 44. The definition of ''covered subcontract'' in the DOL Guidance is consistent with sections 2(a)(i) and (iv) of the E.O. which limit applicability to prime contracts exceeding $500,000, and any subcontracts exceeding $500,000 except for acquisitions for COTS items. Prime contractors will determine applicability by following the requirement as it is outlined in FAR 52.222–59(c)(1). Consistent with the E.O., the DOL Guidance explains, among other things, that references to ''contractors'' and ''subcontractors'' include both individuals and organizations, and both offerors on and holders of contracts (see DOL Guidance, Section V, Subcontractor responsibility).

Comment: One respondent requested that a definition of ''compliant with labor laws'' be added, and that the phrase be defined as compliance with current business ethics standards.

Response: The Councils decline to add a definition of ''compliant with labor laws'' to mean compliance with current business ethics standards. While clearly compatible, the two terms are distinct and not always coextensive.

Comment: A respondent expressed concerns that DOL's Guidance permits contracting officers to take remedial measures up to and including contract termination and referral to the agency's suspending and debarring officials. They contended that the new proposals play directly into the hands of malicious third parties that seek to put unfair pressure on employers, because mere allegations of labor law violations could result in disqualification of targeted Government contractors.

Response: Contracting officers have a number of contract remedies available to them that are preexisting in the FAR. The final rule, consistent with the proposed rule, includes mention of a number of these available remedies, and also addresses the availability of a labor compliance agreement as a remedy. The DOL Guidance mentions the remedies that are addressed in the FAR. The DOL Guidance does not create or permit actions available to contracting officers. The E.O. contemplates that information regarding labor law violations will be ''obtained through other sources.'' During the postaward period, ALCAs are required to consider any information received from sources other than the Federal databases into which disclosures are made. See FAR 22.2004–3(b)(1). ALCAs will be available to receive such information from other sources. ALCAs will not recommend any action regarding alleged violations unless a labor law decision, as defined in FAR 22.2002, has been rendered against the contractor.

Comment: A respondent recommended that the rule provide that agreeing to legally enforceable protection for workers who come forward with information regarding violations is a strong mitigating factor in determining a contractor's ethics and responsibility. The respondent asserted that the best tool for ensuring that future violations do not occur are informed workers who are not afraid to step forward when a violation occurs.

Response: Although protections for workers are not addressed in the FAR rule, DOL does include consideration of such information as a mitigating factor in the Guidance at Section III.B.1., Mitigating factors that weigh in favor of a satisfactory record of Labor Law compliance, at paragraph d, which is also found in Appendix E, Assessing

Violations of the Labor Laws. The E.O. does not authorize the Councils to create an anti-retaliation mechanism for adverse actions taken against workers or others who provide information to contracting officers, ALCAs, or others. The Councils note, however, that Federal law provides whistleblower protections to employees who report fraud or other violations of the law related to Federal contracts. See, *e.g.,* FAR subpart 3.9, Whistleblower Protections for Contractor Employees.

b. Defining Violations: Administrative Merits Determinations, Arbitral Awards, and Civil Judgments

Comment: Two respondents said that administrative merits determinations by Government agencies are not and cannot be labeled as labor law violations, as proposed by FAR subpart 22.20.

Response: The E.O. requires the disclosure and weighing of administrative merits determinations, arbitral awards or decisions, and civil judgments, as defined in Guidance issued by DOL, for violations of the specified labor laws (see E.O. Section 2(a)(i)). This can include determinations, awards, decisions, and judgments subject to appeal. Challenges to the express contents of the E.O. are outside the purview of this rulemaking. (See also the discussion at Section III.B.1.b.)

Comment: One respondent requested that the regulation limit the scope of reportable labor law violations to facilities currently in use and owned by the contractor at the time of a bid, and to employees currently working under Federal contract.

Response: The Councils decline to limit disclosure requirements to facilities currently in use and owned by the contractor at the time of a bid and to employees currently working under Federal contract. Such limitations on the scope of disclosure would be inconsistent with and largely undermine the effectiveness of the E.O.

Comment: One respondent requested that the regulation clarify whether a matter qualifies as a labor law violation if it is settled or resolved in a manner that results in the elimination of the violation.

Response: While not negating the existence of an administrative merits determination, arbitral award or decision, or civil judgment (as defined in the DOL Guidance), evidence submitted of remedial measures taken to resolve or settle a labor law violation shall be considered by a contracting officer in making a responsibility determination. A private settlement, however, that occurs without a determination of a labor law violation is not a civil judgment under the E.O. In addition, as the DOL Guidance explains, a labor law decision that is reversed or vacated in its entirety need not be disclosed. (See Section II.B.4. of the Guidance.)

Comment: Respondents commented that FAR subpart 22.20 should require contractors to report only fully adjudicated labor law violations. Specifically, the respondents challenged the definition of labor law violation as including administrative merits determinations asserting that administrative merits determinations are not final, are frequently overturned in court, are not issued pursuant to proceedings that provide due process protections to contractors, and are often issued based on novel, untested theories that seek to expand or overturn existing law.

Response: The E.O. mandates the disclosure of administrative merits determinations of labor law violations. Furthermore, the Councils disagree that requiring disclosure of administrative merits determinations will interfere with due process. Existing procedural safeguards available to prospective contractors during the preaward responsibility determination, or to contractors during postaward performance, remain intact. Among other things, contractors receive notice that the responsibility determination is being made and are offered a predecisional opportunity to be heard by submission of any relevant information, including mitigating factors related to any labor law decision. Also, no limit is placed on contractors' postdecisional opportunity to be heard through existing administrative processes and the Federal courts. (See also the discussion at Section III.B.1.b.)

Comment: One respondent commented that, as with the definition of administrative merits determination, the definitions of civil judgment and arbitral award or decision are, in some instances, based on preliminary determinations or mere allegations. By requiring contractors to report such preliminary findings, the respondent contended that the DOL Guidance short-circuits due process and gives undue weight to preliminary determinations. The respondent suggested revising the definitions of ''civil judgment'' and ''arbitral award or decision'' to limit them to judgments made on the basis of a complete record, including contractor response, a decision in writing, and a finding of fault.

Response: The Councils do not agree that the definitions for civil judgment and arbitral award or decision undermine due process or are based on allegations alone and need to be limited. For purposes of the E.O., a labor law violation may exist, even if the determination is not final, or, in the case of preliminary injunctions, if there is a court order that enjoins or restrains a labor law violation.

Comment: The SBA Office of Advocacy asked on behalf of small businesses whether the rule allows for due process and stated that the implication of the rule is that a disclosure of a violation, such as administrative merits determinations, before final adjudication may result in the denial of a contract.

Response: Requiring disclosure of administrative merits determinations will not interfere with due process. Existing procedural safeguards available to prospective contractors during the preaward responsibility determination, or to contractors during postaward performance, remain intact. Among other things, contractors receive notice that the responsibility determination is being made and are offered a predecisional opportunity to be heard by submission of any relevant information, including mitigating factors related to any labor law decision. Also, no limit is placed on contractors' postdecisional opportunity to be heard through existing administrative processes and the Federal courts. (See also discussion at Section III.B.1.b.)

Comment: Respondent commented that every labor law identified in the E.O. provides due process for contractors before they can be forced to pay a fine, or comply with long term injunctive relief. However, the respondent indicated that the proposed FAR rule and proposed DOL Guidance provide virtually no due process protections. According to the respondent, basing responsibility determinations on preliminary agency findings undermines the accuracy of responsibility determinations and increases the chance that contracts will be denied due to mistakes, incompetency, and bias with little possibility of check, balance, or correction by an objective arbiter. While permitting contractors the opportunity to explain reportable incidents is a critically important component, respondent asserts that it provides little comfort to contractors who still have comparatively little real guidance about the types of conduct that will lead to the denial of Federal contracts or *de facto* debarment.

Response: Employers who receive administrative findings of labor law violations have the right to due process, including various levels of adjudication

and review before administrative and judicial tribunals, depending on the labor law involved in the violation. For clarity, DOL has modified its Guidance to include an additional discussion of the three steps in the assessment and advice process: Classifying of violations, weighing of the violations and mitigating factors, and providing advice. This discussion provides extensive information about the factors that weigh in favor of a satisfactory record of labor law compliance, and those factors that weigh against. It also now contains a separate and more extensive explanation of labor compliance agreements, which are another tool that may be used to assist contractors in coming into compliance (See DOL Guidance, Section III.B. and III.C.).

Comment: One respondent commented that nonfinal violations can be later overturned, which makes the reporting unfair. The respondent asserted that the process of agency adjudication and judicial appeal often results in the initial administrative decision being overturned—yet the rule and Guidance unfairly sweep these decisions within its reach, risking loss of contracts before the employer is ultimately vindicated.

Response: The E.O., Section 2(a)(i), requires the disclosure and weighing of administrative merits determinations, arbitral awards or decisions, or civil judgments, as defined in Guidance issued by DOL, for violations of the specified labor laws and E.O.s. As the DOL Guidance explains, this can include determinations, awards, decisions, and judgments subject to appeal. The DOL Guidance explains that contractors' opportunity to provide all relevant information—including mitigating circumstances—coupled with the explicit recognition that nonfinal administrative merits determinations should be given lesser weight, addresses due process concerns. A contractor's avenues to seek due process under the statutes or E.O.s violated remain undiminished and undisturbed by the E.O. and this rule. Finally, the aim of the rule is to increase efficiency by increasing contractor compliance with the specified labor laws, not to deny contracts. Federal agencies have a duty to protect the integrity of the procurement process by contracting with responsible sources that are compliant with the terms and conditions of their contracts including labor laws.

In addition, as the DOL Guidance explains, a labor law decision that is reversed or vacated in its entirety need not be disclosed. (See Section II.B.4. of the Guidance.)

Comment: Respondent expressed concerns that the proposed rule will disqualify contractors from performing Government work because of unadjudicated agency decisions or judicial allegations.

Response: As explained in DOL's Preamble, nonfinal administrative merits determinations are not mere allegations. These determinations are made only after the agency has conducted an investigation or inspection and has concluded, based on evidentiary findings, that a violation has occurred. (See the section-by-section analysis in the Preamble to DOL Guidance at Section II.B.1.) Furthermore, the definition of administrative merits determination (see DOL Guidance Section II.B.1) is used to identify the extent of a contractor's obligation to disclose violations. Not all disclosed violations are relevant to a recommendation regarding a contractor's integrity and business ethics. Only those that are found to be serious, repeated, willful, and/or pervasive will be subsequently considered as part of the weighing step and will factor into the ALCA's written analysis and advice. Moreover, when disclosing labor law violations, a contractor has the opportunity to submit all relevant information it deems necessary to demonstrate responsibility, including mitigating factors and remedial measures such as steps taken to achieve compliance with labor laws. See FAR 22.2004–2(b)(1)(ii). The DOL Guidance provides that information that the contractor is challenging or appealing an adverse administrative merits determination will be carefully considered.

Comment: Respondents favored full disclosure of potential violations for the consideration of contracting officers. Another respondent requested that contractors not be required to disclose allegations of unlawful conduct made by employees or their representatives.

Response: The E.O. expressly provides as a threshold for disclosure an administrative merits determination, civil judgment, or arbitral award or decision of a labor law violation. For this reason, the Councils decline to add a disclosure requirement of a potential violation. An allegation alone does not mandate disclosure under the E.O. However, an allegation may lead to a determination, or the enjoining or restraining, of a labor law violation by an administrative merits determination, civil judgment, or arbitral award or decision that would need to be disclosed.

Comment: Respondents opposed the requirement that confidential arbitral awards or decisions should be reported, as this would violate State laws that enforce the terms of any confidentiality agreements contained in the arbitration award and expose contractors to suit for breach of a confidentiality provision.

Response: The E.O., Section 2(a)(i), specifically requires the disclosure of arbitral awards or decisions without exception, and confidentiality provisions in non-disclosure agreements generally have exceptions for disclosures required by law. Further, the final rule requires contractors to publicly disclose only four limited pieces of information: The labor law that was violated, the case number, the date of the award or decision, and the name of the arbitrator(s). See FAR 22.2004–2(b)(1)(i). There is nothing particularly sensitive about this information, as evidenced by the fact that parties routinely disclose this information and more when they file court actions seeking to vacate, confirm, or modify an arbitral award. While this information may not be sensitive, disclosing it to the government as part of the contracting process furthers the Executive Order's goal of ensuring that the government works with contractors that have track records of complying with labor laws.

Comment: One respondent commented that disclosure requirements should apply to private settlements in which the lawsuit is dismissed without any judgment being entered because legal actions against companies often settle without a formal judgment by a court or tribunal. The respondent suggested that the final rule should require the disclosure of labor law violation cases that were settled without a final judgment, and contracting officers should be required to assess such cases as part of the responsibility determination.

Response: Disclosure is required for civil judgments that are not final, or are subject to appeal, provided the court determined that there was a labor law violation, or enjoined or restrained a labor law violation. If a private settlement results in a lawsuit dismissed by the court without any judgment being entered of a labor law violation or without any enjoining or restraining of a labor law violation, it does not meet the definition of ''civil judgment''.

Comment: One respondent opposed the requirement that contractors report civil judgments that are not final, such as preliminary injunctions and temporary restraining orders.

Response: In defining ''civil judgment'' for the implementation of the E.O., DOL affirms that disclosure is required for court judgments and orders

that are not final, or are subject to appeal, provided the court determined that there was a labor law violation, or enjoined or restrained a labor law violation. A preliminary injunction qualifies as a civil judgment if the court order or judgment enjoins or restrains a labor law violation. Temporary restraining orders, however, are not civil judgments for the purposes of the Order, and need not be disclosed. They are distinct from preliminary injunctions under the Federal Rules of Civil Procedure and can, in certain circumstances, be issued without notice to the adverse party. (See DOL Preamble, section-by-section analysis, Section II.B.2, Defining ''civil judgment'' and DOL Guidance Section II.B.2.)

Comment: A number of respondents requested that various violations be exempted from the disclosure requirement or that others that are not reportable be required to be disclosed.

One respondent requested that contractors not be required to disclose OSHA violations that do not occur on the premises of the contractor; two respondents requested that contractors not be required to report violations caused by the Government; two respondents requested that contractors not be required to disclose administrative merits determinations issued by a Regional Director of the National Labor Relations Board; one respondent requested that contractors be required to report violations of foreign laws similar to the 14 statutes and executive orders listed in FAR subpart 22.20; one respondent requested that contractors be required to report all health and safety violations found by any Government agency; and one respondent requested that contractors be required to disclose labor law violations that occurred only while the contractor was performing a Government contract.

Response: The E.O. required DOL to provide Guidance that includes definitions of ''administrative merits determination'', ''arbitral award or decision'', and ''civil judgment''. DOL proposed definitions, analyzed public comments, and has retained the essence of the proposed definitions, but has made some minor revisions. Discussion of the revisions can be found in Section II.B. of the section-by-section analysis in the Preamble to the Guidance, and the final definitions can be found in Section II.B. of the Guidance. Regarding the request that contractors not be required to report violations caused by the Government, if a violation was caused by the Government, the contractor may present this as a mitigating factor. See Section III.B.1.f. of the Guidance.

Comment: One respondent requested that contractors not be required to disclose any violation caused by a contractor acting in good faith to vindicate its rights.

Response: Disclosure of administrative merits determinations, arbitral awards or decisions, and civil judgments, as defined in Guidance issued by DOL, for violations of the specified labor laws and orders is required even if the violation occurred despite the contractor acting in good faith to vindicate its rights. As the DOL Guidance explains, however, evidence of ''good faith and reasonable grounds'' is a mitigating factor that weighs in favor of a recommendation that a contractor has a satisfactory record of labor law compliance. In addition, as the DOL Guidance explains, a labor law decision that is reversed or vacated in its entirety need not be disclosed. (See Section II.B.4. of the Guidance.)

Comment: Respondents requested that contractors be required to disclose allegations of retaliation.

Response: An allegation of retaliation standing alone does not mandate disclosure under the E.O. Disclosure is triggered if an allegation of retaliation, results in a determination, or enjoining, of a labor law violation by administrative merits determination, civil judgment, or arbitral award or decision. Also, as the DOL Guidance explains, evidence of retaliation related to a labor law violation weighs in favor of a serious violation classification.

Comment: Some respondents observed that criminal violations of workplace law are not addressed in the draft regulations, and that existing acquisition regulations require contractors to only report on criminal workplace law violations if they occurred while performing a Federal contract. According to them, this would potentially exclude some of the most serious violations of workplace laws.

The respondent indicated that while the E.O. does not specifically address criminal violations of workplace law, the FAR already requires disclosure of other types of criminal violations regardless of whether they occurred during the performance of a Federal contract. The respondent suggested that the final regulations should require contractors to report on criminal violations occurring on private contracts or, at the very least, allow contracting officers and compliance advisors to review this sort of information when conducting a review of a company that has disclosed other legal violations.

Response: DOL has declined to adopt this, and the Councils agree.

Comment: One respondent suggested that civil judgments and arbitral awards or decisions should concern conduct that occurred or ceased within the prior three years so that consideration is given only to reasonably current conduct and also requested that contractors be required to report only those administrative merits determinations made within the past three years.

Response: The representation required of an offeror is to represent to the best of the offeror's knowledge and belief whether there has been ''an administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the Offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter''. (See FAR 52.222–57(c).) ''Rendered'' refers to the date of the decision, not the date of the underlying conduct. Revisions have been made in the FAR text, including the representations, to make this clear. To facilitate initial implementation of the E.O., the final rule, and DOL Guidance, the Councils have modified provisions to require disclosures for the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.

Comment: Respondent requested that contractors be required to disclose labor law violations that occurred only while the contractor was performing a Government contract.

Response: The Councils decline to excuse from disclosure labor law violations that occur on nonGovernmental contracts. The E.O. provides no exclusion of violations that occur while performing nongovernmental work. (See discussion at Section III.B.1.b. above.)

c. Defining the Nature of Violations

i. Serious, Repeated, Willful, and/or Pervasive Violations

Comment: Respondents stated that one or more of the definitions of ''serious,'' ''repeated,'' ''willful,'' and ''pervasive'' in the DOL Guidance are extra-legal for various reasons, including that they are not found in a statute and are vague.

Response: E.O. section 4(b)(i) directs DOL to develop guidance to assist agencies in classifying labor law violations as serious, repeated, willful, or pervasive. The definitions are specific, thoroughly explained in DOL Guidance, and are based on concrete, factual information. (See DOL Guidance,

Section III.A, Preaward assessment and advice—Classifying Labor Law violations; DOL Preamble, Section III.A, Preaward assessment and advice—Classifying Labor Law violations; also see the Appendices to the DOL Guidance.)

Comment: A number of respondents commented on the definitions of ''serious,'' ''repeated,'' ''willful,'' and ''pervasive''.

Some respondents said the proposed definitions of ''serious,'' ''repeated,'' ''willful,'' and ''pervasive'' found in proposed FAR subpart 22.20 are overbroad because they will result in virtually all labor and employment agency findings at whatever stage to be viewed as serious, repeated, willful, and/or pervasive. As a result, the respondents said the proposed definitions will overburden contractor responsibility determinations with irrelevant information, and will eliminate any cost savings contemplated by the Government.

Other respondents said the vagueness of the proposed definitions of ''serious,'' ''repeated,'' ''willful,'' and ''pervasive'' found in FAR subpart 22.20 will lead to inconsistent, arbitrary, capricious and nontransparent results across the Government.

Response: The Councils do not agree that the definitions are overbroad or too vague. Rather, as defined in FAR subpart 22.20 and section III of the DOL Guidance, the criteria set forth for determining whether violations are serious, repeated, willful, and/or pervasive are fair, appropriate, and administrable. Many of the definitions provided in FAR subpart 22.20 and in section III of the DOL Guidance set out clear criteria that leave little room for ambiguity. However, in some instances, DOL has modified the criteria for increased clarity (see DOL Guidance, Section III.A., Preaward assessment and advice; DOL Guidance, Section III.A.1, Preaward assessment and advice—Classifying Labor Law violations; see also the Appendices to the DOL Guidance). DOL and ALCAs have or will develop the expertise necessary to classify and weigh the violations.

Comment: One respondent indicated that the DOL Guidance's definition of ''administrative merits determination,'' combined with its definitions of ''serious'', ''repeated'', ''willful'', and ''pervasive,'' will result in an agency always finding that there is a serious, repeated, willful, and/or pervasive violation, or some combination thereof. According to the respondent, this will lead to excessive and inconsistent ALCA assessments, as well as excessive costs for both Government agencies and contractors, because the definitions do not distinguish bad actors from the rest of the contractor community. For example, the respondent noted that because OSH Act violations are serious violations under the E.O. if the underlying citation was designated as serious by OSHA, a substantial majority of all OSHA citations would be classified as ''serious violations.'' The respondent also criticized the DOL Guidance's classification of a violation as serious if it affects 25 percent of the workforce because, in the respondent's view, the 25 percent threshold is too low and lacks a reasonable minimum for smaller sites, and the term ''worksite'' should be more clearly defined such as in the Worker Adjustment and Retraining Notification (WARN) Act. Finally, the respondent indicated that it would be inefficient and costly for contractors to have to negotiate labor compliance agreements with multiple enforcement agencies.

Response: The rationale for requiring nonfinal administrative merits determinations to be reported has been explained in Section III.B.1.b. of this Preamble. Regarding the classification of violations under the E.O., the DOL Guidance's specific definitions of each of the terms ''serious,'' ''repeated,'' ''willful,'' and ''pervasive'' make it clear that not all violations will meet these criteria. Moreover, even if a violation is classified as serious, repeated, willful, and/or pervasive, the ALCA will also consider any additional information that the contractor has provided, including mitigating circumstances and remedial measures.

Regarding the examples cited by the respondent, as to OSH Act violations, the DOL Guidance explicitly incorporated the OSH Act's definition of a serious violation to comply with Section 4(b)(i)(A) of the E.O., which requires incorporation of existing statutory standards for assessing whether a violation is serious, repeated, or willful. As to the 25 percent threshold, under the final DOL Guidance, this criterion has been narrowed so it applies only if there are at least 10 affected workers, thus avoiding triggering the 25 percent threshold when only a few workers are affected. Additionally, as explained below in Section III.B.13.c.ii., the definition of ''worksite'' in the DOL Guidance is already similar to the definition of ''single site of employment'' under WARN Act regulations.

Regarding the respondent's concerns about consistency, ALCAs will work closely with DOL during more complicated determinations, and DOL will be able to assist ALCAs in comparing a contractor's record with records that have in other cases resulted in advice that a labor compliance agreement is warranted, or that notification of the Suspending and Debarring Official is appropriate. Through its work with enforcement agencies, DOL also will provide assistance in analyzing whether remediation efforts are sufficient to bring contractors into compliance with labor laws and whether contractors have implemented programs or processes that will ensure future compliance in the course of performance of federal contracts. This level of coordination will ensure that ALCAs (and through them, contracting officers) receive guidance and structure.

Finally, the Councils anticipate that labor compliance agreements will be warranted in relatively infrequent circumstances. As such, the respondent's concerns about contractors having to negotiate numerous labor compliance agreements with multiple agencies will not likely be realized.

ii. Serious Violations

Comment: One respondent recommended revising the definition to remove any form of injunctive relief as a ''serious violation.''

Response: The Councils and DOL agree with the respondent, and DOL has modified the definition of ''serious'' in the Guidance accordingly. In the final Guidance, DOL removes injunctive relief from the list of criteria used to classify violations as serious, given that injunctions may include violations that do not necessarily bear on a contractor's integrity and business ethics. DOL has, however, added injunctive relief to the weighing section of its Guidance. Both preliminary and permanent injunctions imposed by courts are rare and require a showing of compelling circumstances, including irreparable harm to workers and a threat to the public interest. Thus, DOL determined that the imposition of injunctive relief for a serious, repeated, willful, and/or pervasive violation should give that violation additional weight against a finding that the contractor is responsible.

Comment: Respondents requested the definition of ''serious'' include any violation resulting in death, serious bodily injury, or assault.

Response: The Councils agree with DOL that a violation of any labor law should be serious when the violation causes or contributes to the death or serious injury of a worker. DOL has adopted this change in its final Guidance. The Councils agree with DOL that an assault would not necessarily

render a violation serious; no change is made to the DOL final Guidance to that effect.

Comment: One respondent requested the definition of ''serious,'' when based on a fine or other monetary penalty, be based on the final adjudicated value of the fine, and not the original assessment. According to one respondent, monetary penalties or back-wage assessments may be reduced for a variety of reasons, such as an employer demonstrating that it did not commit all or any of the alleged violations, or that the agency's calculations were erroneous. Additionally, the respondent stated that characterizing the reduced amount, which the agency agrees to and accepts, as a mitigating factor is not factually or legally sound. Respondent recommended that the final, reduced amount paid should be the only amount reported and considered because the original assessment is a flawed indication of the seriousness of the violation and cannot reasonably be used to measure the gravity of the violation or the contractor's integrity and business ethics.

Response: The E.O. explicitly instructs that ''the amount of damages incurred or fines or penalties assessed with regard to the violation'' be taken into account. Section 4(b)(i)(B)(1). The final DOL Guidance states that the thresholds are measured by the amount ''due'' instead of, as proposed, by the amount the enforcement agency ''assessed.'' This means that if an enforcement agency consents to accept a reduced amount of either back wages or penalties for a violation, it is that lesser amount that will be used to determine seriousness. The Councils agree with DOL's determination that the ''reduced amount'' will be considered when determining whether a violation is serious. However, reliance on a lesser amount will not apply if an employer files for bankruptcy and cannot pay the full amount, or simply refuses to pay such that the full penalty is never collected. In such cases, the original assessed amount is the amount due, and therefore should be used when evaluating seriousness. (See DOL Preamble, section-by-section analysis, Section III.A.1.b.ii, Preaward assessment and advice-Fines, penalties, and back wages.) Finally, the Councils note that the respondent's concern about ''reporting'' the initial amount is unfounded; the disclosure provision in FAR 22.2004–2(b)(1)(i)(A)–(D) does not require contractors to disclose the amount of back wages assessed.

Comment: A respondent requested that the definition of ''serious'' include not only violations affecting 25 percent or more of the workforce at the site of the violation, but also any violations affecting 25 workers or more. Another respondent recommended that the ''25 percent'' threshold be lower to accurately reflect the impact that a serious violation may have on a workforce. By requiring that a full quarter of the workforce at any given worksite be affected by a violation in order for it to be considered ''serious,'' these respondents stated that the threshold would fail to capture many serious violations that affect a smaller number of employees.

Response: As noted in the final DOL Guidance, DOL has declined to lower the threshold of affected workers from 25 percent. While any threshold will necessarily include some violations and exclude others, DOL believes that 25 percent is an appropriate benchmark for determining whether a violation affects a sufficient number of workers to be considered serious and thus warranting further review. DOL also has declined to add a threshold based on an absolute minimum number of workers; as DOL indicates, such a threshold would disproportionately affect larger employers. However, as to the 25 percent threshold, under the final DOL Guidance, this criterion has been narrowed so it applies only if there are at least 10 affected workers, thus avoiding triggering the 25 percent threshold when only a few workers are affected.

While recognizing the concerns of employee advocates that certain violations may fall short of the threshold, DOL notes that these violations may meet other criteria for seriousness.

Comment: One respondent requested that the definition of ''serious'' include any litigation involving ''systemic'' labor law violations.

Response: DOL determined not to expand the criterion of ''systemic discrimination'' to include other ''systemic'' labor law violations. ''Systemic discrimination'' has a well-established meaning under anti-discrimination laws and many widespread violations unrelated to discrimination will likely be classified as serious under other criteria in the DOL final Guidance. (See DOL Preamble, section-by-section analysis, Section III.A.1.b.vii, Preaward assessment and advice-Pattern or practice of discrimination or systemic discrimination.)

Comment: One respondent recommended revising the DOL Guidance with respect to findings that would ''support'' a conclusion that a contractor ''interfered'' with an agency's investigation for the purpose of determining whether a violation is serious under the E.O. The respondent asserted that: (1) The Guidance does not explain what it means by ''support'' such a finding; and (2) the Guidance would deprive contractors of rights to challenge scope of the agency's investigation.

Response: DOL has removed the language indicating that the findings in a labor law decision must ''support a conclusion'' that a contractor engaged in certain activities. In its place, DOL has clarified that the relevant criteria for classifying a violation as serious, repeated, willful, and/or pervasive must be readily ascertainable from factual findings or legal conclusions of the labor law decision itself. This means that ALCAs should not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. It also means that a contractor will not be deemed to have interfered with an investigation based on a minimal or arguable showing. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they should rely only on the information contained in the labor law decisions themselves to determine whether violations are serious, repeated, willful, and/or pervasive.

Additionally, the term ''interference,'' when used to determine whether a violation is serious, has been narrowed in the final DOL Guidance to include a more limited set of circumstances. While DOL views interference with investigations as serious because such behavior severely hinders enforcement agencies' ability to conduct investigations and correct violations of law, DOL also recognizes that employers may have good-faith disputes with agencies about the scope or propriety of a request for documents or access to the worksite, and has accordingly narrowed the definition of ''interference''. The Councils agree with DOL's determinations on these issues.

Comment: A respondent proposed that the definition of ''serious'' violations should: (1) Include all workplace law violations that cause or contribute to the death and life-threatening injury of a worker; (2) clarify that the proposed dollar threshold for fines and penalties is cumulative across provisions violated and workers affected; and (3) stipulate that the 25 percent affected-worker threshold may be applied either to a single site of a company or on a cumulative basis across all of a company's worksites.

Response: As noted in the final DOL Guidance, DOL adopted the respondent's three suggestions with regard to the definition of serious violations.

Comment: One respondent suggested that the term ''worksite'' in the definition of ''serious'' was ambiguous when compared with the regulatory definition under the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. 2101–09. See 20 CFR 639.1–10.

Response: As noted in the DOL preamble, the definition of ''worksite'' in the proposed Guidance, which is largely unchanged in the final Guidance, is already similar to the definition of ''single site of employment'' under WARN Act regulations. Both definitions provide that: (1) A worksite can be a single building or a group of buildings in one campus or office park, but that separate buildings that are not in close proximity are separate worksites; and (2) for workers who do not have a fixed worksite, their worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. See 80 FR 30583, 20 CFR 639.3(i). These similarities support the conclusion that the definition of worksite in the DOL Guidance is appropriate.

Comment: One respondent recommended that DOL provide a more exhaustive definition of ''serious'' violations by:

1. Reducing the percentage of a workforce a violation must affect to trigger the serious designation;
2. Adding an alternative back wages threshold for wage and hour violations; and
3. Specifying that the designation applies to any labor law violation that causes or contributes to death or serious injury, or involves physical assault; and clarifying that a violation need not arise from a class action to support a determination of engagement in a pattern or practice of discrimination or systemic discrimination.

Response: DOL, in its final Guidance, declined to lower the threshold of affected workers from 25 percent. While any threshold will necessarily include some violations and exclude others, DOL believes that 25 percent is an appropriate benchmark for determining whether a violation affects a sufficient number of workers to be considered serious and thus warranting further review. Additionally, DOL declined to lower the back-wage threshold from $10,000 because it believes that this amount is appropriate.

DOL has clarified in the final Guidance that the $10,000 threshold is cumulative; *i.e.,* it can be satisfied by summing the back wages due to all affected employees. DOL believes that this will appropriately capture wage-and-hour violations that warrant additional scrutiny. Additionally, DOL, in its final Guidance, modified the definition of serious violations such that a violation of any labor law is serious when the violation causes or contributes to the death or serious injury of a worker. DOL has not, however, changed the Guidance to require that any case involving physical assault is a serious violation given that this term may include minor workplace altercations or interactions. Finally, DOL has clarified in the final Guidance that systemic discrimination is not limited to class actions.

iii. Repeated Violations

Comment: Some respondents requested that the definition of ''repeated'' include any violation of a law that happens five or more times in a three-year period.

Response: DOL made a determination not to adopt this suggestion. As DOL's final Guidance indicates, this suggestion is inconsistent with the E.O.'s specific direction that a determination of a repeated violation be based on ''the same or a substantially similar requirement.'' However, DOL notes in its final Guidance that multiple violations that are not substantially similar to each other may be properly considered in an assessment of whether such violations constitute pervasive violations.

Comment: One respondent proposed that the definition of ''repeated violation,'' which is in the new FAR 22.2002 and 52.222–59(a), include ''the same or'' between the existing ''one or more additional labor violations of'' and ''substantially similar requirements.''

The respondent rationalized that the phrase ''the same or'' is included in the DOL Guidance and would improve the brief definition of ''repeated violation'' being proposed for the FAR.

Response: The definition of ''repeated violation'' at FAR 22.2002 is revised to reflect the terminology ''the same or a substantially similar.''

iv. Willful Violations

Comment: A respondent proposed that the definition of a ''willful'' violation should be strengthened by allowing the reckless disregard or plain indifference standard of willfulness to apply to violations of all of the covered workplace laws—not just those for which no alternative statutory standard exists.

Response: As explained in DOL's final Guidance, DOL has declined to adopt this suggestion. The purpose of listing specific standards for the five laws that already incorporate a concept of willfulness is to further the efficient implementation of the E.O. The DOL Guidance states that for labor laws with an existing willfulness framework, violations are only willful under the E.O. if the relevant labor law decision explicitly includes such a finding. This reflects DOL's reasoning that it is inappropriate for ALCAs to second-guess the decision that a violation was willful, when an existing willfulness framework exists.

v. Pervasive Violations

Comment: One respondent expressed concern that the definition of ''pervasive'' lacked sufficient clarity. The respondent indicated that DOL has only identified a vague category of factors to measure/define ''pervasive'' which leave the contracting officers with no guidance or standards and thus leave it in the contracting officers' discretion to determine what is ''pervasive.''

Response: In DOL's view, the definition of pervasive violations must be a flexible one. Notwithstanding the utility of the definitions of serious, repeated, and willful violations, violations falling within these classifications may still vary significantly in their gravity, impact, and scope. Thus, in DOL's view, it would not be reasonable to require a finding of ''pervasive'' violations based on a set number or combination of these violations. Similarly, DOL declined to adopt rigid criteria that would mandate, for example, that any company of a certain size with at least a certain designated number of serious, repeated, or willful violations would be deemed to have pervasive violations. The Councils agree with these determinations.

d. Considering Mitigating Factors in Weighing Violations

Comment: One respondent commented that a contractor who has implemented a health and safety program must have in place more than just a ''paper program'' to be considered as having taken steps to mitigate past violations. The respondent requested that the definition of ''mitigate'' include the implementation of an effective compliance program and added that the contractor must have corrected the identified violations. The respondent also suggested that any contractor with

repeat or pervasive violations should not be considered to have implemented a sufficient program.

Response: The Councils decline to adopt the suggested changes and DOL's final Guidance does not include any substantive changes to its discussion of mitigating factors. Concerns about ''paper'' compliance programs will be addressed through careful consideration of the totality of the circumstances—which may include the adequacy of a compliance program put forth as a mitigating factor. The Councils also decline to add a restriction that a contractor with repeated or pervasive OSHA violations may never be considered to have implemented a sufficient program or that such a program is required for mitigation. (See DOL Preamble, section-by-section analysis, Section III.B.1., Preaward assessment and advice—Mitigating factors that weigh in favor of a satisfactory record of Labor Law compliance.)

Comment: A respondent expressed concerns that DOL's limitation of remediation to those cases where any affected workers are made whole has generated some confusion, as in many cases, employers will choose to settle alleged violations even though the settlement does not pay affected workers with the full amount of back pay and other relief originally sought by the agency. Additionally, the respondent suggested that the proposed Guidance places special emphasis on remediation measures that go beyond the scope of the applicable law, such as enhanced settlement agreements that address remediation on an enterprise-wide level. Respondent recommended that in settlement cases involving alleged violations, affected workers are made whole even if they do not get full amount of back pay and other relief originally sought by the agency. Additionally, the respondent asserted that the provisions should not require that remediation efforts exceed the law's requirement in order to receive ''full credit'' for remediation.

Response: ALCAs are required to weigh, and contracting officers are required to consider, contractors' mitigating and remedial information in assessing contractors' disclosed labor law violations. ALCAs will not second-guess the remediation that has already been negotiated by enforcement agencies during a settlement agreement. A contractor's future-oriented measures that go beyond the minimum specifically required under the labor laws—whether voluntarily, through a settlement with an enforcement agency, or through a labor compliance agreement negotiated at the suggestion of an ALCA, are considered and contribute to a favorable finding regarding a contractor's record of labor law compliance. (See the DOL Guidance, section III.B.1.a. Mitigating factors that weigh in favor of a satisfactory record of Labor Law compliance, Remedial measures). This approach is consistent with the E.O.'s underlying goal of encouraging contractors to comply with labor laws while performing on Federal contracts.

Comment: A respondent recommended the following be included in the category of mitigating factors related to safety and health programs or grievance procedures that is in the proposed Guidance: (1) Participation in OSHA Voluntary Protection Programs, as the program encourages employee involvement and continuous improvement, similar to those industry consensus standards cited in the proposal; and (2) the final Guidance include reference to the International Organization for Standardization (ISO) 45001, which is a voluntary consensus standard for occupational health and safety management systems that is currently under development.

Response: ALCAs and contracting officers will take additional information about safety-and-health programs into consideration as part of their review of the totality of the circumstances. Employers who participate in such programs or have adopted safety and health management systems pursuant to recognized consensus standards are encouraged to include this information when they have an opportunity to provide relevant information, including regarding mitigating factors.

Comment: A respondent recommended more emphasis on safety and health programs, including ensuring the contractor enforces its own program, especially if a contractor wants to use a safety and health program as a mitigating factor. The respondent attached a copy of an OSHA Advisory Committee on Construction Safety and Health checklist for contracting officers to evaluate a program.

Response: The Councils thank the respondent for this information.

14. General and Miscellaneous Comments

a. Out of Scope of Proposed Rule

Comment: One respondent indicated that Government employees carrying out the mandates of these regulations should receive conspicuous notice of whistleblower protection as contracting officers, ALCAs (who are housed in contracting agencies), and other DOL personnel may face retaliation for failing to approve contracts even when serious labor law violations exist. Another respondent said employees of contractors and subcontractors and Government officials should be notified of the prohibition against retaliation and they should have effective remedies should retaliation occur.

Response: The E.O. does not provide for additional notifications of protection for whistleblowers. Whistleblower protection for contractor employees is already covered at FAR subpart 3.9. Whistleblower protection for Government employees is not covered in the FAR. The Councils note that contracting officers are given warrants; they are required to pay close attention to the requirements of law and are expected to be less susceptible to pressure than other Government employees. In addition, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (known as the No Fear Act) requires that agencies provide annual notice to Federal employees, former Federal employees, and applicants for Federal employment of the rights and protections available under Federal antidiscrimination and whistleblower protection laws. Thus, no change to the final rule is warranted.

Comment: One respondent indicated that the Occupational Safety and Health (OSH) Act does not apply where another Federal agency has prescribed or enforced occupational safety and health standards. Under the authority of the 2002 National Defense Authorization Act's amendments to the Atomic Energy Act (AEA), 42 U.S.C. 2282c, Congress directed the Department of Energy to promulgate and enforce occupational safety and health standards for contractors working on Federally-owned nuclear facilities and laboratories operated by private employers. The E.O. does not expressly list the AEA among the statutes. However, scores of contractors and subcontractors regularly perform construction and large-scale maintenance work on Department of Energy worksites, under the AEA. The rule should cover the AEA.

Response: This is beyond the scope of the rule. The E.O.'s specific coverage did not include the AEA.

Comment: One respondent urged the FAR Council, for procurements that involve work with hazardous chemicals and/or hazardous work practices, add provisions to FAR 9.104–1 to require contracting officers to review the content of prospective contractors' safety and health programs before making a determination of responsibility. Best practices developed

and published by industry in consensus standards and advocacy documents should be adopted by the FAR Council and placed in the final rule to aid contracting officers in evaluating prospective contractors' safety and health programs, especially when hazardous chemicals or hazardous work practices are involved.

Response: This is beyond the scope of the rule. The E.O.'s specific coverage concerns labor law violations and not the preventative measures envisioned by the respondent. However, contracting officers have the authority and ability to investigate and affirm the responsibility of contractors whose performance might involve hazardous chemicals and/or hazardous work practices.

Comment: One respondent indicated that the rule does not adequately address current DoD practices regarding business ethics. With respect to DoD contracts, this framework failed to acknowledge that the contractor purchasing system requirements already have clear requirements for the procurement of subcontract and supplier resources by DoD contractors.

Response: This comment is specific to DoD, and beyond the scope of the FAR rule which is a Governmentwide rule.

b. Extension Request

Comment: A number of respondents requested an extension beyond the initial 60 days. Some recommended that the FAR Council and DOL publish revised proposed rules in response to comments from affected persons, and delay implementation of any final rule until all affected persons have a meaningful opportunity to weigh in on all of the issues raised by the proposed rule and DOL Guidance.

Response: Two extensions were granted. The first extended the comment due date from July 27, 2015, to August 11, 2015 (80 FR 40968, July 14, 2015). The second extended the comment period from August 11, 2015, to August 26, 2015 (80 FR 46531, August 5, 2015).

Comment: One respondent opposed an extension because the respondent stated the President did not have the authority to issue the regulations.

Response: The President properly exercised his authority under 40 U.S.C. 121 and issued the E.O. directing the FAR Council to issue this regulation.

c. Miscellaneous

Comment: One respondent asserted that 41 U.S.C. 2313(g), part of the statute authorizing the FAPIIS database, should be used as the authority for the FAR rule, and that only some parts of the FAPIIS database need be publicly available.

Response: By statute, information in the FAPIIS database must be publicly available, except for past performance information. (41 U.S.C. 2313 Note).

Comment: A respondent stated that labor law enforcement is not a function the Federal Government should directly or indirectly transfer to its prime contractors through the acquisition process, especially since law enforcement is an inherently governmental function.

Response: As detailed in Section III.B.5 of this preamble, the Councils have adopted the alternative offered in the proposed rule for subcontractor disclosures whereby DOL assesses subcontractor violations. The contractor is still ultimately responsible for evaluating the subcontractor's compliance with labor laws as an element of responsibility. Determining subcontractor responsibility is not an inherently governmental function. There is no transfer of enforcement of the labor laws as a result of the rule; the rule provides information regarding compliance with labor laws to be considered during subcontract responsibility determinations and during subcontract performance.

Comment: A respondent theorized that a subcontractor could structure its bid to be under the $500,000 threshold, forcing the contractor to staff a project with several low-cost subcontractors instead of one that could most efficiently perform the work.

Response: Subcontractors are not forbidden from doing this. But for this to happen, multiple subcontractors would have to keep their bids under $500,000. Another subcontractor with an excellent labor law decision record might decide to bid over $500,000 and win more or all of the work. The intent of the E.O. is not to stifle competition, but to improve economy and efficiency by assuring that the Government contracts with responsible sources that will comply with labor laws; a subcontractor would be better off discussing its labor law decisions with DOL to try to improve its position. The Councils note that the E.O. exempts COTS subcontracts from the labor law decision disclosures (see FAR 52.222–58(b)).

Comment: A respondent recommended that contractor costs for implementing the E.O. should be specifically addressed as being allowable and allocable in the final rule.

Response: FAR cases do not normally revise FAR part 31 Cost Principles when new FAR coverage is added by the case. No revisions to the final rule are required.

Comment: The SBA Office of Advocacy commented that small businesses are concerned about how this rule impacts mergers, acquisitions and teaming agreements. Another respondent pointed out that during the due diligence phase of the merger/acquisition, companies would have to go back through at least three years of labor records in order to ensure that they are not purchasing a company with any violations, or alleged violations, which could impact the company formed as a conclusion of that deal. The respondent presumed that companies would steer clear of merging with or acquiring any company with violations on their record that could come back to haunt them in the future, potentially missing out on valuable innovation and development coming from companies with previous labor law violations and hindering deals that would otherwise result in positive developments for all parties involved. Another respondent warned that companies may seek to disavow prior labor law violation liability that could impact their present responsibility per this rule by spinning off companies whose sole purpose is to own the violations.

Response: Whichever legal entity is signing the contract is the one which discloses its own labor law decisions. The State law on corporations, not the FAR, will govern whether the legal entity signing the contract is the entity which owns a particular labor law violation.

The legal entity that is the offeror does not include a parent corporation, a subsidiary corporation, or other affiliates (see definition of affiliates in FAR 2.101). A corporate division is part of the corporation. Consistent with current FAR practice, representation and disclosures do not apply to a parent corporation, subsidiary corporation, or other affiliates, unless a specific FAR provision (*e.g.,* FAR 52.209–5) requires that additional information. Therefore, if XYZ Corporation is the legal entity whose name appears on the bid/offer, covered labor law decisions concerning labor law violations by XYZ Corporation at any location where that legal entity operates would need to be disclosed. The fact that XYZ Corporation is a subsidiary of XXX Corporation and the immediate parent of YYY Corporation does not change the scope of the required disclosure. Only XYZ Corporation's violations must be disclosed.

However, the Councils also note that the FAR does sometimes consider affiliates of an entity. Affiliates are defined in FAR 2.101(b) as associated business concerns or individuals if,

directly or indirectly, (1) Either one controls or can control the other; or (2) A third party controls or can control both. Affiliates are considered, for example under small business size rules, under debarment and suspension, and sometimes under contracting officer responsibility considerations. See FAR 9.104–3(c), 9.406–3(b), and subpart 19.1. A final rule under FAR Case 2013–020, Information on Corporate Contractor Performance and Integrity, was published on March 7, 2016 (81 FR 11988); it implemented section 852 of the NDAA for FY 2013, giving more information for a contracting officer to consider about an immediate owner, predecessor, or subsidiary.

Comment: Two respondents alleged that current staffing at the GAO is insufficient to manage the expected increase in the number of protests as a result of adverse or delayed responsibility determinations under this rule. Insufficient GAO resources would mean additional delays since a bid protest at the GAO automatically stays the performance of a contract.

Response: Staffing at GAO, an agency in the legislative branch, is beyond the scope of the FAR rule, which covers executive branch agencies.

Comment: A respondent theorized that there would be increased bid protests alleging favoritism, *e.g.,* that a protester was passed over for a bid in place of an entity the protester believes has a similar record of labor law violations.

Response: ''Being passed over for contract award'' describes a source selection evaluation. The labor law violation assessment is a matter of responsibility, which occurs separate from the evaluation.

Comment: A respondent stated that the rule expands the grounds for a sustainable protest, including for reasons of *de facto* debarment resulting from a nonresponsibility determination, use of a competitor's alleged noncompliance for a competitive advantage, and many other potential scenarios.

Response: One finding of nonresponsibility is not a *de facto* debarment, but multiple findings of nonresponsibility based on the same facts may constitute an improper *de facto* debarment. Contracting officers will work with ALCAs, and when appropriate, notify their agency suspending and debarring officials, using the procedures at FAR subpart 9.4 as the proper means of excluding a firm from Government contracting. Both ALCAs and the suspending and debarring officials will coordinate actions within an agency and across the Government, as a further protection. The contracting officer and the ALCA will each be exercising their own independent judgment in each case. The Councils do not see that the rule will expand the grounds for protests. The ALCA will be documenting his/her analysis and advice, and the contracting officer will be documenting how the ALCA analysis was considered. (See also discussion at Section III.B.1.b. above.)

Comment: A respondent warned that a death spiral could occur for a contractor after a nonresponsibility determination from a single labor law ''violation'' in a single transactional process, and so bid protests could increase as a matter of company survival.

Response: The E.O. states that, in most cases, a single violation will not lead to a finding of nonresponsibility.

The intent of the E.O. is to improve efficiency by assuring contractors' compliance with labor laws while performing Federal contracts, not to decrease competition or increase bid protests. The DOL Guidance at section III.B.2.c. lists four examples of violations of particular gravity:

> Violations related to the death of an employee; violations involving a termination of employment for exercising a right protected under the Labor Laws; violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite; and violations where the amount of back wages, penalties, and other damages awarded is greater than $100,000.

Even a violation of particular gravity is not an automatic bar; the ALCA and contracting officer will consider mitigating factors and remedial measures (see FAR 22.2004–2(b)).

Comment: Respondents alleged that the rule will open the way to many more bid protests. Even if a competitor would otherwise have no basis to challenge an award, publicly available information would provide them with a road map to protest. Information regarding any reported violation would be made available in FAPIIS. An unsuccessful offeror could raise as a challenge to the procurement decision the agency's failure to properly consider the responsibility of that awardee in light of the violation. Although the record of the ALCA and contracting officer's consideration of the matter would, in many instances, lead to the denial of this protest ground, this resolution could not be accomplished without completion of the full protest adjudication process—100 days at GAO and potentially longer if brought at the Court of Federal Claims.

Response: It is undetermined whether and how much of an increase in bid protests will occur as a direct result of this rule. A long-standing tenet of Federal procurement is that the responsibility determination is solely the contracting officer's duty and discretion. When reviewing a bid protest based on responsibility grounds, GAO gives great deference to a contracting officer's decision. Although some disclosed information associated with this rule will be made publicly available in FAPIIS, potential protesters will not have insight into how the ALCA assessed, and the contracting officer considered the labor law violation information, nor into how a contractor's record of labor law compliance factored into the contracting officer's overall responsibility determination, which considers the totality of circumstances for the particular procurement.

Comment: Respondents noted that bid protests may result in long delays in the procurement process, and that protests at GAO may result in automatic stays.

Response: While bid protests can cause delays in the procurement process, the Government considers them valuable in preserving fairness, integrity, and ethics in the procurement process.

Comment: Respondents noted that small businesses can appeal nonresponsibility determinations at SBA. The contracting officer can only refer one matter at a time for a single acquisition to the SBA. Thus, if multiple small businesses are being considered for an award and such questions are raised, the SBA would be required to consider each of these matters in turn. In the interim, no award could issue for a period of at least 15 business days following receipt of a referral.

Response: The Councils acknowledge that the Certificate of Competency process can add time to the procurement process.

Comment: A respondent alleged that the rule would have broad impact on the construction industry, as few construction contracts are below the $500,000 threshold. The respondent indicated that the procedures will be an encumbrance on the procurement process, especially since violations on nonGovernment contracts are to be disclosed.

Response: The Councils acknowledge that the E.O. was intended to have a broad scope. The final rule disclosures will have a phase-in threshold for solicitations and contracts of $50 million for October 25, 2016, through April 24, 2017, dropping to $500,000 thereafter.

Comment: A respondent stated that the responsibility process, already expanded by many other new preaward compliance checks aimed at tax delinquency, human trafficking, and counterfeit parts, just to name a few, will become its own distinct procurement process aimed at enforcing laws not related to contract performance, rather than a last due diligence step as prescribed by FAR part 9.

Response: The responsibility process requires the contractor have a satisfactory record of integrity and business ethics. See 9.104–1(d). The E.O. properly instructs contracting officers to consider whether a contractor's labor law compliance may affect its record of integrity and business ethics.

d. General Support for the Rule

Comment: Many respondents expressed some support for the proposed rule. Among the numerous reasons cited were that: Federal contractors that commit labor law violations harm their workers and cost taxpayers money; the American people deserve to be assured that their Federal tax dollars are not being used to subsidize violations of the employment rights of workers, and that high-road employers are not placed at a competitive disadvantage; the E.O. and the proposed rules are critical to closing gaps in the Federal Government's system for ensuring that contractors that do business with the Federal Government abide by labor laws; and the fact that the proposed regulation and DOL's Guidance offer putative contractors compliance assistance shows that this is not a punitive ''blackballing'' system, but rather one aimed at proactively assisting contractors in improving and maintaining compliant labor policies and practices.

Response: The Councils appreciate the support for the rule and E.O.

e. General Opposition to the Rule

Comment: Many respondents expressed some opposition to the proposed rule. Some recommended withdrawal of the proposed rule. Among the comments and reasons cited were:

—The E.O., the proposed rule, and DOL Guidance fail to demonstrate an actual need for this new rule and process. The proposed rule acknowledges that ''the vast majority of Federal contractors play by the rules.'' As a result, the proposed rule and Guidance are a solution in search of a problem;

—The FAR Council has not adequately assessed the impacts or seriously examined the potential for unintended consequences and other harmful effects of this rule on the Government mission, the vendor community, and the Federal marketplace and costs to the taxpayer directly resulting from compliance with the new rule. The FAR Council should withdraw the proposed rule until it concludes that the benefits of the intended regulation justify the costs. Further study and analysis is needed to demonstrate that the E.O.'s goals are attainable, and whether they might be achieved through less-costly modifications to existing regulatory regimes;

—The E.O., FAR rule, and DOL Guidance violate statutes and/or the Constitution.

—The E.O. improperly usurps existing enforcement regimes at the expense of due process. The existing suspension and debarment structure, and the FAPIIS clauses, are sufficient to address the matter of unscrupulous contractors. The Office of Federal Contractor Compliance Programs already reviews contractors' compliance with affirmative action employment practices.

—The implementation of the rule as it relates to safety and health violations would add no constructive value to existing law and structures.

Response: Noted. Many of these comments are described in more detail elsewhere in this Preamble (see Section III.B.1.) and in the DOL Preamble. The Councils are implementing the E.O.

IV. Executive Orders 12866 and 13563

A. Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is a major rule under 5 U.S.C. 804.

B. A Regulatory Impact Analysis (RIA) that includes a detailed discussion and explanation about the assumptions and methodology used to estimate the cost of this regulatory action is available at *https://www.regulations.gov/*. A summary of the RIA follows.

The RIA was developed as a joint product by DoD, GSA, and NASA along with DOL in its capacity as the lead program agency for implementing this Executive Order. Many of the estimates and much of the supporting analysis were developed in cooperation with DOL and rely to a significant extent on input provided by DOL. The RIA contains comprehensive discussion of the many public comments received and was revised as a result of careful consideration of public comment to better reflect estimates of burden and cost associated with this regulatory approach. The final RIA was adjusted in the following areas following careful consideration of public comments—(1) stratification of the contractor and subcontractor population when estimating costs for key compliance areas (*e.g.,* reporting and disclosure, semiannual updates) to reflect the size of contractors most impacted by this rule, (2) increase of burden hours for familiarization with the regulation, (3) adjustment to the labor burden hours for compliance, (4) inclusion of tracking mechanism costs (*e.g.,* software upgrades to include this compliance functionality), and (5) recognition of contractor and subcontractor overhead associated with this rule. Quantified cost estimates are presented where feasible and presented in a qualitative manner when not feasible. The analysis covers 10 years to ensure it captures the key benefits and costs of this regulatory action and considers the phase in periods of the disclosure and paycheck transparency requirements.

The RIA presents a subject-by-subject analysis of the benefits and costs of the final rule, followed by a summary of these benefits and costs, including the total benefits and costs over the 10-year period of analysis. The subject-by-subject analysis sections of the RIA provide comprehensive and detailed discussion of the estimating methodologies used.

Number of Prime Contract Awards and Unique Contractors

In estimating the number of contract awards over $500,000 subject to the rule, three years of FPDS data, from FY2012 to FY2014, was utilized to arrive at an estimate of 26,757 prime contract awards per fiscal year. The estimating methodology for prime contractors and subcontractors was revised. The most significant revision in methodology was in aligning the population of affected contractors with the legal entity making the offer, which is the scope of the reporting burden. The

final rule uses Tax Identification Numbers (TIN), rather than the DUNS number, to identify unique prime contractors that will be impacted by this rule. The unique subcontractor population was determined using a methodology that assumes the subcontractor population is a factor of the unique prime contractor population. Again taking an average over the three fiscal years, the agencies estimate that there are on average 13,866 unique contractors who receive awards valued at or over $500,000 each fiscal year.

Number of Subcontract Awards and Unique Subcontractors

The unique subcontractor population was determined using a methodology that assumes the subcontractor population is a factor of the unique prime contractor population. Specifically, that each unique prime contractor has three subcontractors with awards valued at or over $500,000 (across all tiers) with further adjustments, for example, for duplication of subcontractors who also perform as prime contractors. The number of unique subcontractors subject to the rule is estimated at 10,317. It was assumed that, on average, subcontractors receive four awards valued at or above $500,000 each year for an average 41,268 subcontract awards subject to the rule.

Adjusting the Annual Number of Unique Contractors and Subcontractors for Repeat Recipients of Awards

The analysis identifies, for years 2 through 10, what share of affected contractors and subcontractors would likely receive an award for the first time under the new requirements. This was done in order to eliminate double counting certain burdens, such as regulatory familiarization costs.

Hourly Compensation Rates

For Federal employees, the agencies are using the mid-range of the GS–13, GS–14, and GS–15 wage rates from the GS salary table adjusted for the locality pay area of Washington-Baltimore-Northern Virginia. For private sector employees, a source which more closely reflects private sector compensation is used: Median wage rates from the Bureau of Labor Statistics' Occupational Employment Statistics (OES) program. The agencies adjusted these wage rates using a loaded wage factor to reflect total compensation, which includes health insurance and retirement benefits. The loaded wage factor for private sector employees is 1.44, and the loaded wage factor for federal employees is 1.63. (See RIA Exhibit 2: Calculation of Hourly Compensation Rates).

The final RIA contains a lengthy qualitative discussion that considers inclusion of overhead and how overhead has been treated in a number of recent regulatory actions. The RIA, in footnote 21, applies a 17% overhead rate, which is a rate utilized by EPA in recent rules, as example to demonstrate the affect overhead might have on the estimate for this regulatory action.

Time To Review the Final Rule

The RIA recognizes that eight hours would not be sufficient for a large contractor to review and understand the rule. The agencies also recognize that some large and small employers without in-house labor law expertise would need participation and advice from a labor attorney, as stated in the public comments. Therefore, the estimate for the amount of time it will take employers to become familiar with the rule has been revised accordingly. Based in part on FPDS data, the signatory agencies and DOL estimate that 55 percent of federal contractors are small businesses that would need 8 hours by a general manager and 4 hours by a labor attorney, while 45 percent of federal contractors that are not small businesses would need 14 hours by a general manager and 8 hours by a labor attorney.

Costs of the Disclosure Requirements

Cost Methodology

To determine the impact of the disclosure requirements the following steps were taken:

1. Estimate the population of affected contractors and subcontractors.
2. Estimate the number of initial responses disclosing information related to labor law violations, and supporting documentation.
3. Estimate the number of hours and the associated costs of completing those responses.
4. Estimate the number of workers who would receive status notices, along with the number of hours and the associated costs of completing the recurring status notices.
5. Estimate the cost of producing and disseminating required wage statements.
6. Consider the potential cost of increased litigation due to the E.O.'s provision prohibiting certain contractors from requiring their workers to sign mandatory-arbitration agreements.

The estimated representation costs include the time and effort it will take federal contractors and subcontractors to search for relevant documents, review and approve the release of the information, and disclose the information. The estimates assume that not all efforts (*e.g.,* retrieving and keeping records) are attributed solely to the purpose of complying with the disclosure requirements of the Order; only those actions that are not customary to normal business operations are attributed to this estimate.

Population of Contractors and Subcontractors With Labor and Employment Violations

The estimating methodology for the percent of likely violators has been revised to use a randomly selected statistically representative sample of 400 Federal contractors with at least one award over $500,000 from FY 2013 FPDS. The estimated percent of Federal contractors and subcontractors that will have labor law decisions subject to disclosure has been revised from 4.05 percent in the proposed RIA to 9.67 percent in the final RIA.

Cost of Contractor and Subcontractor Representation Regarding Compliance With Labor Laws

The amount of time required for personnel to research files containing compliance and litigation history information, determine whether to report that it has or has not had a covered violation at the initial representation stage, and to identify any additional information that may be submitted if in fact it has a covered violation will vary depending on the complexity of any given case. In some instances, where the violation history of a particular case is more elaborate, compiling supporting documentation to demonstrate mitigating factors may require significant resources and time. In other cases, where one violation or a few violations are reported or where there is little to no supporting information to show mitigating factors, this step could take virtually no time. The estimate assumes 25 hours are required for the first time a contractor or subcontractor conducts a full reporting period response and 4 hours for subsequent responses.

Cost of Contractor Review of Subcontractor Information

The analysis expects that prime contractors will incur costs for reviewing the information submitted by prospective subcontractors. Where a prospective subcontractor responded that it has a covered violation and DOL requests additional information, DOL will review materials submitted by the subcontractor and notify the contractor of DOL's recommendation. An

estimated 80 percent of prospective subcontractors with violations will agree with DOL's recommendation, so it is estimated that prime contractors will only expend about 30 minutes to review DOL's recommendation. For the other 20 percent of prospective subcontractors with violations, if a prospective subcontractor does not agree with DOL's recommendation and requests review by a prime contractor or if DOL has not completed its review within three days, then the prime contractor will expend an estimated 31.0 hours to consider the information submitted by a prospective subcontractor. Therefore, the weighted average time for prime contractors to review information submitted by prospective subcontractors with violations is estimated to be 6.6 hours (= 80% × 0.5 hours + 20% × 31.0 hours).

Cost of Semiannual Updates Regarding Compliance With Labor Laws

In determining whether updated information needs to be provided, the estimate recognizes that identifying information at this stage would be part of an established process and is for a greatly reduced timeframe (*i.e.,* six months or less versus 36 months for the initial representation), therefore 4 hours is estimated for a management level employee. It is estimated that the task of input and transmission of the updated information identified will take a legal support worker 2 hours.

Lastly, contractors may need or want to review and analyze the updated information submitted by subcontractors to determine whether any additional action is warranted. The estimate considers that 80 percent of subcontractors with violations will agree with DOL's recommendation, so prime contractors will only expend about 30 minutes to review DOL's recommendation. For the other 20 percent of subcontractors with violations, if a subcontractor does not agree with DOL's recommendation and requests review by a prime contractor or if DOL has not completed its review within three days, then the prime contractor will expend an estimated 3.6 hours to consider the updated information submitted by a subcontractor. The 3.6 hour estimate is derived from the estimated 2 hours that is used in the Government Costs section to estimate contracting agency evaluations of prospective contractor information, with an upward adjustment to account for added reporting when contractors decide to continue the subcontracts of subcontractors after having been informed that the subcontractor has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of the agreement. Therefore, the estimated time for a manager to review the updated information provided by a subcontractor is 1.12 hours (= 80% × 0.5 hour + 20% × 3.6 hours).

Cost of Developing and Maintaining a System for Tracking Violations

The final rule acknowledges that some contractors may choose to utilize tracking mechanisms in order to more easily: (1) Identify labor violations; (2) determine which violations are reportable; (3) disclose information to the contracting officer when a responsibility determination is being made; (4) provide to the contracting officer additional information to demonstrate responsibility; and (5) provide required semi-annual updates. A tracking system could be a mechanism such as software, added functionality to an existing system, or establishing a new system. Regardless of whether a contractor has had labor violations or is likely to have any in the future the analysis recognizes that prudent contractors and subcontractors may establish a tracking mechanism with the appropriate depth and breadth that, in their business judgment, is necessary to demonstrate compliance.

Startup Costs

The analysis stratifies contractors by organizational complexity level relative to company size small, medium, large, and the top one percent of federal contractors. FPDS categorizes businesses as either ''small'' or ''other than small.'' As already discussed, analysis estimates that 55 percent of Federal contractors are small businesses. Within the ''other than small'' category, there are varying organizational sizes and complexities, therefore, for purposes of this estimate, the agencies have attributed 35 percent of other than small businesses in FPDS to medium organizations, and 10 percent to large businesses, further breaking out the top one percent representing the very largest businesses. Subcontractors were not stratified by organizational complexity because Federal procurement data do not include information about subcontractor size; therefore, the total subcontractor estimate remains 10,317.

Illustrative estimates of system development costs for contractors within the four complexity categories are presented. The cost estimates reflect the tasks associated with identifying the requirements for a tracking system, developing the system, giving access to the system, and providing training on the system.

Maintenance Costs

Once tracking systems are in place, ongoing maintenance costs may accrue. To account for these maintenance costs, the analysis considered a range from 10 percent to 20 percent of the initial cost of establishing the tracking system. The estimate of annual maintenance costs is based on the size of the organization, with smaller contractors incurring higher costs as a percentage of their initial system costs. The annual maintenance costs are estimated as follows: 20 percent of startup costs for small contractors; 15 percent of startup costs for medium-sized contractors; 10 percent of startup costs for large contractors; 10 percent of startup costs for the very largest contractors; and 15 percent of startup costs for subcontractors.

Sensitivity Analysis

The cost estimates for tracking systems are the function of primarily two assumptions: (1) The type of system each firm size category will need to develop, and (2) the average cost to develop a given tracking system. A sensitivity analysis presents what the estimated total tracking system costs would be if these two assumptions were altered (see RIA Exhibits 6 and 7).

Government Costs

The analysis includes estimates for five categories of costs to the federal government directly related to the implementation of the Order: (1) New staff at DOL; (2) new Agency Labor Compliance Advisors (ALCAs) at other federal agencies; (3) contracting agency evaluation costs; (4) information technology costs to support implementation of the Order; and (5) government personnel training costs.

Costs of the Paycheck Transparency Provision

Cost Methodology

The final rule's paycheck transparency clause contain a requirement for contractors and subcontractors to provide two documents to workers on such contracts for whom they are required to maintain wage records under the FLSA, the DBA, the SCA, or equivalent state laws. First, contractors and subcontractors will provide a notice to each worker whom they treat as an independent contractor informing the worker of his/her independent contractor status. Second, contractors and subcontractors will provide a wage statement to each worker in each pay period. The wage

statement need not contain a record of hours worked if the contractor or subcontractor has informed the worker that he/she is exempt from the FLSA's overtime requirements, so contractors and subcontractors may elect to provide additional notices to their exempt employees informing them of their FLSA exempt status. The analysis of costs for the paycheck transparency requirements include estimates for—

- Number of Independent Contractor Status Notices.
- Number of FLSA Status Notices.
- Total Number of Status Notices.
- Cost of Implementation of Status Notices.
- Cost of Status Notices in Year One.
- Cost of Recurring Status Notices.
- Generation and Distribution of Wage Statements.

Total Quantifiable Costs

Exhibit 8, which is reproduced below, presents a summary of the first-year, second-year, and annualized quantifiable costs final rule disclosure and paycheck transparency requirements to contractors and subcontractors, as well as the estimated government costs. Exhibit 8 includes both the first-year and second-year impacts because the Final Rule's requirement for contractors and subcontractors to report labor law violations will be phased in over three years.

EXHIBIT 8—SUMMARY OF QUANTIFIABLE COSTS

	Entity affected	Monetized year 1 costs	Monetized year 2 costs	Annualized costs	
				3% Discounting	7% Discounting
Time to Review the Order	Contractors and Subcontractors.	$126,918,776	$76,912,778	$57,154,219	$59,743,450
Offeror Initial Representation	Contractors	25,046,077	63,945,154	59,460,088	59,187,405
	Subcontractors	0	86,105,338	70,900,398	69,982,912
Offeror Additional Information	Contractors	17,921	130,666	233,556	226,447
	Subcontractors	0	201,529	357,073	345,577
Contractor Review of Subcontractor Information.	Contractors	0	1,268,066	2,352,118	2,275,288
Update Determination	Contractors	0	2,026,028	6,237,564	5,905,436
	Subcontractors	0	0	4,145,008	3,867,284
Providing Additional Information	Contractors	0	8,146	25,105	23,768
	Subcontractors	0	0	16,684	15,566
Contractor Considers Subcontractors' Updated Information.	Contractors	0	0	18,705	17,452
Tracking System Costs	Contractors and Subcontractors.	291,052,560	172,493,936	187,486,027	189,038,901
Status Notice Implementation	Contractors and Subcontractors.	1,569,801	0	178,669	208,883
Issuing First and Recurring Status Notices.	Contractors and Subcontractors.	2,388,669	1,283,828	1,409,577	1,430,842
Update of Payroll Systems	Contractors and Subcontractors.	5,079,547	3,078,206	2,287,428	2,391,054
Wage Statement Distribution	Contractors and Subcontractors.	6,279,598	6,279,598	6,279,598	6,279,598
Total Employer Costs		458,352,949	413,733,272	398,541,816	400,939,861
Government Costs		15,772,150	10,129,299	10,944,157	11,091,474
Total Costs (Employer + Government).		474,075,099	423,862,572	409,535,973	412,031,335

Note: Totals may not sum due to rounding.

See RIA Exhibit 9, Summary of Monetized Costs, for a summary of the cost analysis of the final rule. The monetized costs displayed are the yearly summations of the calculations already described.

Cost of Complaint and Dispute Transparency Provision

The final rule contains a clause that prohibits contractors and subcontractors with Federal contracts exceeding $1 million from requiring employees to arbitrate certain discrimination and harassment claims. Specifically, the Order provides that the decision to arbitrate claims under Title VII of the Civil Rights Act of 1964 and sexual harassment or sexual assault tort claims may only be made with the voluntary consent of the employee or independent contractor after such a dispute arises. The analysis presents a discussion of the impacts of this prohibition in terms of a presumption that as a result of this provision more workers will seek to litigate such claims in court as opposed to raising them through arbitration. A quantified analysis was not feasible as the agencies were unable to obtain empirical data that would allow them to quantify the provision's overall cost because the potential increase in the number of claimants that would elect to go to trial as a result of this prohibition is unknown.

Benefits, Transfer Impacts, and Accompanying Costs of Disclosing Labor Law Violations

In the final analysis, as in the proposed analysis, there were insufficient data to accurately quantify the benefits presented. The agencies invited respondents to provide data that would allow for more thorough benefit estimations, however no data were received that could be used to quantify the benefits of the final rule. The agencies have extensively discussed the benefits and showed relevant peer-reviewed studies and other published reports that often quantitatively demonstrate that fair pay and safe workplaces would lead to improved contractor performance, fewer injuries

and fatalities, reduced employment discrimination, less absenteeism, and higher productivity at work. Extensive discussion is presented on the following—

- Improved Contractor Performance
- Safer Workplaces
- Reduced Employment Discrimination
- Fairer Wages
- Enforcement Cost Savings and Transfer Impacts for the Government, Contractors, and Society
- Transfer Impacts of the Paycheck Transparency Provision
- Non-Quantified Impacts of the Paycheck Transparency Provision
- Benefits and Transfer Impacts of Complaint and Dispute Transparency Provision

Discussion of Regulatory Alternatives

The E.O. and the Final Rule are designed to reduce the likelihood that taxpayers will be subject to poor performance on Federal contracts and preventing taxpayer dollars from rewarding corporations that break the law. A series of alternative regulatory approaches were examined including—

1. Require contracting officers to consider prospective contractors' labor compliance without the assistance of ALCAs, and without disclosure by contractors of their labor law decisions. This alternative was rejected because the E.O. provided for contractor disclosure and for ALCAs to assist contracting officers because these tools are deemed necessary for contracting officers to effectively consider a prospective contractor's labor compliance. Without timely disclosures or the support and expert advice of ALCAs, it is unrealistic to expect a consistent approach to the assessment of labor violation information provided to contracting officers for their consideration during responsibility determinations and during contract performance.

2. Remove the requirement that prospective contractors disclose their labor violations while leaving the rest of the final rule implementation of the E.O. intact. This could be an attractive alternative if a contracting agency's ALCA had access to a database that would provide all of a prospective contractor's labor law decisions as required by the E.O. and implementing regulation. However even if a current system had efficient access to all enforcement agency information, *e.g.* administrative merits determinations, and all publicly available information, it would still not have access to all labor law decisions required by the E.O. and implementing regulation, *e.g.,* privately conducted arbitration decisions and all civil judgments. OMB, GSA, and other Federal agencies are working on systems that will improve the availability of relevant data in the longer term, however for implementation of the final rule, this alternative has been rejected.

3. Require all contractors for which a responsibility determination is undertaken to provide the following nine categories of information regarding their labor violations:

a. The labor law that was violated;

b. The case number, inspection number, charge number, docket number, or other unique identification number;

c. The date that the determination, judgment, award, or decision was rendered;

d. The name of the court, arbitrator(s), agency, board, or commission that rendered it;

e. The name of the case, arbitration, or proceeding, if applicable;

f. The street address of the worksite where the violation took place (or if the violation took place in multiple worksites, then the address of each worksite);

g. Whether the proceeding was ongoing or closed;

h. Whether there was a settlement, compliance, or remediation agreement related to the violation; and

i. The amount(s) of any penalties or fines assessed and any back wages due as a result of the violation.

This approach would make the process of considering labor violations more efficient from the perspective of contracting agencies because more information would immediately be available to ALCAs and contracting officers without the necessity of gathering it. However, it was rejected in favor of a narrowed list of four data elements of information in order to reduce the burden on contractors while still providing the minimally necessary information to achieve the desired regulatory outcome.

4. Another alternative would be to have all prospective contractors bidding on contracts valued at greater than $500,000—not just those for which a contracting officer undertakes a responsibility determination—disclose the information. This alternative was rejected because it would increase the burden on contractors and it was determined that the approach taken in the final rule of a more narrowly tailored requirement would retain the rule's effectiveness relative to the objectives of the E.O. while minimizing the burden on contractors.

5. With regard to the Order's and Final Rule's provisions regarding subcontractors, one alternative would be to simply exempt subcontractors from any obligations under the Order and focus only on prime contractors' records of labor compliance. This alternative would eliminate any burden on subcontractors. It would also reduce the burden on contractors associated with evaluating their prospective subcontractors' labor compliance histories. This alternative was rejected because contractors are already required to evaluate their prospective subcontractors' integrity and business ethics, when determining subcontractor responsibility and disregarding subcontractors' labor compliance in making that determination would undermine the core objective of the E.O.

6. Similarly, the Order's requirements could be limited to first-tier subcontractors. This alternative was rejected because similar to the previous alternative, this alternative would also undermine the core goals of the E.O., given that a significant portion of the work on Federal contracts is performed by subcontractors below the first tier.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows—

The final regulatory flexibility analysis contains six discrete types of information, consistent with 5 U.S.C. 604. The FRFA coverage of these elements is summarized below.

1. Rule objectives. The FRFA summarizes E.O. 13673's requirement for the FAR Council to develop Fair Pay and Safe Workplace regulations, identifies the objective of promoting economy and efficient in procurement by awarding contracts to contractors that comply with labor laws; and provides an overview of the final rule's main requirements.

2. Significant IRFA issues raised by the public. The FRFA identifies six issues that the public raised as shortcomings with the IRFA—

- The Government did not articulate a rational basis for the rule promulgation,
- The Government did not sufficiently explore alternatives to the rule,
- The rule conflicts with suspension and debarment procedures,
- The applicability threshold will not help minimize impact to small businesses,
- The compliance burden on small businesses was not addressed in relevant terms, and
- The data source for subcontractors was problematic.

The FRFA includes the Government's assessment of each issue and identifies an associated disposition.

3. Disposition of comments from the Chief Counsel for Advocacy of the Small Business Administration (SBA). The FRFA identifies 14 comments raised by the Chief Counsel for Advocacy of the Small Business Administration. Specifically, the Chief Counsel for Advocacy of the SBA's comments reflected concerns about DOL Guidance, the proposed FAR rule, and the associated burden estimate, including: (1) Calculation of small business entities, (2) increased costs of compliance, (3) burdens of the disclosure process, (4) impact on small business subcontractors, (5) handling by primes of subcontractor proprietary information, (6) insufficient processing time for ALCAs to assess information, (7) inability to track subcontractor law violations, (8) lack of clarity on the rule's impact to the Certificate of Competency process, (9) underestimate of affected entities, (10) underestimate of public cost, (11) non-inclusion of all RIA costs in the IRFA, (12) lack of using the rulemaking process to publish the DOL Guidance, (13) lack of due process in disclosing a violation before final adjudication, and (14) negative impact on mergers, acquisitions, and teaming agreements. The FRFA includes the Government's assessment of each issue and identifies an associated disposition.

4. Impact to small entities. The FRFA estimates that 17,943 small businesses (7,626 prime contractors and 10,317 subcontractors) will be impacted by the rule's requirements, noting that this rule will impact all small entities who propose as contractors or subcontractors on solicitations and resultant contracts estimated to exceed $500,000. The number of impacted small entities is derived by estimating a total of 24,183 impacted contractors (13,866 prime contractors and 10,317 subcontractors), then deducing the number of impacted small businesses (7,626 prime contractors and 10,317 subcontractors). The RIA section A, Contractor and Subcontractor Populations, provides detailed information.

5. Estimated compliance requirements. The FRFA reviews the reporting and disclosure requirements of two FAR provisions, 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673) and 52.222–58, Subcontractor Responsibility Regarding Compliance with Labor Laws (Executive Order 13673). It also reviews the compliance requirements of associated clauses. The FRFA includes an Exhibit from the RIA that outlines overall employer costs of $458,352,949, in year one, which account for 12 compliance activities (review the E.O., make an initial representation, provide additional information, review subcontractor information, update the determination, provide Additional Information, consider subcontractors' updated Information, establish a tracking system, implement a status notice, issue status notices, update payroll systems, and distribute wage statements). The FRFA notes that Exhibit 8 is a summary of overall costs; not those specific to small businesses.

6. Steps to minimize impact on small entities. The FRFA indicates that the Councils have taken several actions to minimize burden for contractors and subcontractors, small and large, in response to the public comments and those of SBA's Office of Advocacy. Among the steps taken are:

- The disclosure reporting period is phased in to provide the time affected parties may need to familiarize themselves with the rule, set up internal protocols, and create or modify internal databases.
- Subcontractor disclosure of labor law decisions (the decisions, mitigating factors and remedial measures) is made directly to DOL for review and assessment instead of to the prime contractor.
- Public disclosure is limited to four basic pieces of labor law decision information; the final rule does not compel public disclosure of additional documents demonstrating mitigating factors, remedial measures, and other compliance steps.
- The availability and consideration of existing remedies, such as documenting noncompliance in past performance, over more severe remedies (*e.g.,* termination) is emphasized; and early engagement with DOL is encouraged.

The FRFA also identifies other significant alternatives to the rule that were considered, which affect the impact on small entities, and why each was rejected.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000–0195, titled: Fair Pay and Safe Workplaces. The PRA supporting statement is summarized as follows—

The PRA supporting statement provides a description of the requirements of the rule that contain information collection requirements and indicates that they are contained in two solicitation provisions and two contract clauses.

- Provision 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673) (which is repeated at paragraph(s) of 52.212–3 Offeror Representations and Certifications—Commercial Items).
- Provision 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673).
- Clause 52.222–59, Compliance with Labor Laws (Executive Order 13673).
- Clause 52.222–60, Paycheck Transparency (Executive Order 13673).

The PRA supporting statement contains a discussion of the public comments submitted to the proposed rule information collection analysis and supporting statement. Respondents submitted public comments on various aspects of the estimates in the proposed rule PRA supporting statement and were critical of estimating methods used and expressed that many cost elements were missing from the estimates or were (sometimes significantly) underestimated. The cost elements addressed in the public comments with respect to the PRA included: (1) Regulatory familiarization, (2) recordkeeping, and (3) burden hours.

The public comments were carefully considered in developing the estimates for the final rule supporting statement. The supporting statement estimates were prepared in coordination with, and relied heavily on, the final Regulatory Impact Analysis (RIA). The RIA is a joint FAR Council and DOL product with substantial analysis provided by DOL in its capacity as a program agency and advisor to the FAR Council on labor matters.

As a result of the consideration of public comments adjustments were made to reflect the following (note that the table numbers cited in this summary correlate to the table numbers appearing in the PRA supporting statement)—

(1) Regulatory familiarization—Larger and more complex organizational structures will require more hours and the time of an attorney is warranted. Therefore the estimate for regulatory review and familiarization has been significantly increased in the final rule. See Table 7 for initial costs and Table 5 for annual regulatory review costs that

will be incurred for new entrants in subsequent years.

(2) Recordkeeping—Contractors and subcontractors may establish new internal control systems or modify existing systems in order to track and report labor law decisions and related information and to manage and track subcontractor compliance with the disclosure requirements. Estimates have been included for initial startup and annual maintenance costs for tracking mechanisms. The estimates took into consideration that for those contractors with the least complicated organizational structures, a commercial software program may suffice, for others revising existing systems or building additional functionality and capability into existing systems may suffice, and yet for others development of a web-based compliance system may be necessary. The estimates considered a stratification of contractors by organizational complexity. See Table 8 for nonrecurring initial start-up costs and Table 4 for recurring annual maintenance costs.

(3) Burden hours—The comments on the calculations of burden hours reflected concerns with the estimates of (i) Population of affected contractors; (ii) percentage of those contractors estimated to be violators; (iii) omission of overhead in the estimates of labor burden; and (iv) underestimating the hours needed to accomplish required tasks.

(i) Population of affected contractors—The estimating methodology for prime contractors and subcontractors was revised. The most significant revision in methodology was in aligning the population of affected contractors with the legal entity making the offer, which is the scope of the reporting burden. The final rule uses Tax Identification Numbers (TIN), rather than the DUNS number, to identify unique prime contractors that will be impacted by this rule. The unique subcontractor population was determined using a methodology that assumes the subcontractor population is a factor of the unique prime contractor population.

(ii) Percentage of contractors estimated to be violators—

The estimating methodology has been revised to use a randomly selected statistically representative sample of 400 Federal contractors with at least one award over $500,000 from FY 2013 FPDS. A detailed description of the methodology can be found in the RIA, section D.2. Population of Contractors and Subcontractors with Labor and Employment Violations. The estimated percent of Federal contractors and subcontractors that will have labor law decisions subject to disclosure has been revised from 4.05 percent in the proposed RIA to 9.67 percent in the final RIA. A detailed description of the methodology is found in the RIA, section A. Contractor and Subcontractor Populations.

(iii) Overhead as a component of labor burden—While overhead impacts exist, they are difficult to effectively quantify for this regulatory action. The final RIA contains a lengthy discussion that considers inclusion of overhead and how overhead has been included in a number of recent regulatory actions, see section B. Hourly Compensation Rates. The RIA, in footnote 21, applies a 17% overhead rate, which is the rate utilized by EPA in a recent rule, as example to demonstrate the affect overhead might have on the estimate for this final rule.

(iv) Burden hours—The tasks necessary to comply with the representation and disclosure requirements of the rule were carefully considered, and estimates have been adjusted as shown in Table 1 and summarized in Table 3 (Table 3 is reproduced below). With regard to the labor burden hours for specific representation and disclosure tasks, the estimates generally did not increase in recognition of the inclusion of costs for contractors and subcontractors to modify or develop tracking system mechanisms. Inherent in the development of such systems are internal controls and protocols and processes which will greatly streamline the information retrieval process. The majority of the labor violation disclosure effort is at the initial representation and as such the greatest number of hours is allotted to the initial response. A detailed breakdown, including explanatory footnotes, of estimated burden hours can be found in Table 1, Reporting Estimate. It should be noted that estimates for burden hours considered that the time needed for a simple disclosure and for a complex disclosure vary; and that across the universe of disclosures, a greater proportion are simple, *i.e.,* for single or non-complex labor law violations. Annualized cost estimates for this supporting statement have been prepared assuming the full implementation of the rule, *i.e.,* upon completion of all phase-in periods. The RIA and PRA supporting statement are not intended to match each other as they are representative of different analyses and timeframes.

TABLE 3—SUMMARY OF TABLE 1 ANNUAL ESTIMATED COST TO THE PUBLIC OF REPORTING BURDEN*

Number of respondents	24,183
Responses per respondent	17.3
Total annual responses	417,808
Hours per response	5.19
Total hours	2,166,815
Rate per hour (average)	$61.43
Total annual cost to public	$133,109,793

*Totals may not sum due to rounding.

A number of other tables in the supporting statement estimate cost elements including—annual recurring costs to include maintenance of tracking mechanism costs and costs incurred by new entrants (see Tables 4 and 5); and nonrecurring costs to include regulatory review and familiarization (see Table 7) and contractor business systems (see Table 8). The summary of total costs to the public is captured in Tables 10a and 10b, reproduced below.

TABLE 10a—SUMMARY OF TOTAL COSTS TO THE PUBLIC

[First year of full implementation]

Cost element	Cost
Table 3. Annual Reporting(Recurring)	$133,109,793
Table 9. Initial Start Up (Nonrecurring)	321,534,290
Total Initial Public Costs	454,644,083

TABLE 10b—SUMMARY OF TOTAL COSTS TO THE PUBLIC

[Subsequent years]

Cost element	Cost
Table 3. Annual Reporting (Recurring)	$133,109,793
Table 6. Other Recurring Costs	126,931,469
Total Annual Subsequent Public Costs	260,041,262

List of Subjects in 48 CFR Parts 1, 4, 9, 17, 22, 42, and 52

Government procurement.

Dated: August 10, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 4, 9, 17, 22, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 9, 17, 22, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 in the table following the introductory text, by adding in numerical sequence, FAR segments ''52.222–57'', ''52.222–58'', 52.222–59'', and 52.222–60'' and their corresponding OMB Control Number ''9000–0195''.

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.1202 by redesignating paragraphs (a)(21) through (31) as paragraphs (a)(22) through (32), respectively; and adding a new paragraph (a)(21) to read as follows:

4.1202 Solicitation provision and contract clause.

(a) * * *

(21) 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673).

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 4. Amend section 9.104–4 by redesignating paragraph (b) as paragraph (c); and adding a new paragraph (b) to read as follows:

9.104–4 Subcontractor responsibility.

* * * * *

(b) For Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces, requirements pertaining to labor law violations, see subpart 22.20.

* * * * *

■ 5. Amend section 9.104–5 by redesignating paragraph (d) as paragraph (e); and adding a new paragraph (d) to read as follows:

9.104–5 Representation and certifications regarding responsibility matters.

* * * * *

(d) When an offeror provides an affirmative response to the provision at 52.222–57(c)(2), Representation Regarding Compliance with Labor Laws (Executive Order 13673), or its commercial item equivalent at 52.212–3(s)(2)(ii), the contracting officer shall follow the procedures in subpart 22.20.

* * * * *

■ 6. Amend section 9.104–6 by revising paragraph (b)(4) and adding paragraph (b)(6) to read as follows:

9.104–6 Federal Awardee Performance and Integrity Information System.

* * * * *

(b) * * *

(4) Since FAPIIS may contain information on any of the offeror's previous contracts and information covering a five-year period, some of that information may not be relevant to a determination of present responsibility, *e.g.,* a prior administrative action such as debarment or suspension that has expired or otherwise been resolved, or information relating to contracts for completely different products or services. Information in FAPIIS submitted pursuant to the following provision and clause is applicable above $500,000, and may be considered if the information is relevant to a procurement below $500,000: 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673), its commercial item equivalent at 52.212–3(s), and 52.222–59, Compliance with Labor Laws (Executive Order 13673).

* * * * *

(6) When considering information in FAPIIS previously submitted in response to the provision and clause listed at paragraph (b)(4) of this section the contracting officer—

(i) Shall follow the procedures in 22.2004–2, if the procurement is expected to exceed $500,000; or

(ii) May elect to follow the procedures in 22.2004–2, if the procurement is not expected to exceed $500,000.

* * * * *

■ 7. Amend section 9.105–1 by adding paragraph (b)(4) to read as follows:

9.105–1 Obtaining information.

* * * * *

(b) * * *

(4) When an offeror provides an affirmative response to the provision at 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673) at paragraph (c)(2), or its commercial item equivalent at 52.212–3(s)(2)(ii), the contracting officer shall follow the procedures in 22.2004–2.

* * * * *

9.105–3 [Amended]

■ 8. Amend section 9.105–3 by removing from paragraph (a) ''provided in subpart 24.2'' and adding ''provided in 9.105–2(b)(2)(iii) and subpart 24.2'' in its place.

PART 17—SPECIAL CONTRACTING METHODS

■ 9. Amend section 17.207 by—

■ a. Removing from paragraph (c)(6) ''considered; and'' and adding ''considered;'' in its place;

■ b. Removing from paragraph (c)(7) ''satisfactory ratings.'' and adding ''satisfactory ratings; and'' in its place; and

■ c. Adding paragraph (c)(8).

The addition reads as follows:

17.207 Exercise of options.

* * * * *

(c) * * *

(8) The contractor's labor law decisions, mitigating factors, remedial measures, and the agency labor compliance advisor's analysis and advice have been considered in accordance with subpart 22.20, if the contract contains the clause 52.222–59, Compliance with Labor Laws (Executive Order 13673).

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 10. Amend section 22.000 by—

■ a. Removing from paragraph (a) ''Deals with'' and adding ''Prescribes'' in its places;

■ b. Revising paragraph (b); and

■ c. Removing from paragraph (c) ''labor law.'' and adding ''labor law and Executive order.'' in its place.

The revision reads as follows:

22.000 Scope of part.

* * * * *

(b) Prescribes contracting policy and procedures to implement each pertinent labor law and Executive order; and

* * * * *

■ 11. Amend section 22.102–2 by revising the section heading and paragraph (c)(1) and adding paragraph (c)(3) to read as follows:

22.102–2 Administration and enforcement.

* * * * *

(c)(1) The U.S. Department of Labor (DOL) is responsible for the administration and enforcement of the Occupational Safety and Health Act. DOL's Wage and Hour Division is responsible for administration and enforcement of numerous wage and hour statutes including—

(i) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (see subpart 22.4);

(ii) 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards (see subpart 22.3);

(iii) The Copeland Act (18 U.S.C. 874 and 40 U.S.C. 3145) (see 22.403–2);

(iv) 41 U.S.C. chapter 65, Contracts for Materials, Supplies, Articles, and Equipment Exceeding $15,000 (see subpart 22.6); and

(v) 41 U.S.C. chapter 67, Service Contract Labor Standards (see subpart 22.10).

* * * * *

(3) DOL's administration and enforcement authorities under the statutes and under the Executive orders implemented in this part do not limit the authority of contracting officers to administer and enforce the terms and conditions of agency contracts. However, DOL has regulatory authority to require contracting agencies to change contract terms to include missing contract clauses or wage determinations that are required by the FAR, or to withhold contract amounts (see, *e.g.,* 22.1015, 22.1022).

■ 12. Add section 22.104 to read as follows:

22.104 Agency labor advisors.

(a) *Appointment of agency labor advisors.* Agencies may designate or appoint labor advisors, according to agency procedures.

(b) *Duties.* Agency labor advisors are generally responsible for the following duties:

(1) Interfacing with DOL, agency labor compliance advisors (ALCAs) (as defined at 22.2002), outside agencies, contractors, and other parties in matters concerning interpretation, guidance, and enforcement of labor statutes, Executive orders, and implementing regulations applicable to agency contracts.

(2) Providing advice and guidance to the contracting agency regarding application of labor statutes, Executive orders, and implementing regulations in agency contracts.

(3) Serving as labor subject matter experts on all issues specific to part 22 and its prescribed contract clauses and provisions.

(c) Agency labor advisors are listed at *www.wdol.gov/ala.aspx.*

(d) For information about ALCAs, who provide support regarding Executive Order 13673, Fair Pay and Safe Workplaces, see subpart 22.20.

■ 13. Add subpart 22.20 to read as follows:

Subpart 22.20—Fair Pay and Safe Workplaces

Sec.
22.2000 Scope of subpart.
22.2001 Reserved.
22.2002 Definitions.
22.2003 Policy.
22.2004 Compliance with labor laws.
22.2004–1 General.
22.2004–2 Preaward assessment of an offeror's labor law violations.
22.2004–3 Postaward assessment of a prime contractor's labor law violations.
22.2004–4 Contractor preaward and postaward assessment of a subcontractor's labor law violations.
22.2005 Paycheck transparency.
22.2006 Arbitration of contractor employee claims.
22.2007 Solicitation provisions and contract clauses.

Subpart 22.20—Fair Pay and Safe Workplaces

22.2000 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces, dated July 31, 2014.

22.2001 [Reserved].

22.2002 Definitions.

As used in this subpart—

Administrative merits determination means certain notices or findings of labor law violations issued by an enforcement agency following an investigation. An administrative merits determination may be final or be subject to appeal or further review. To determine whether a particular notice or finding is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Agency labor compliance advisor (ALCA) means the senior official designated in accordance with E.O. 13673. ALCAs are listed at *www.dol.gov/fairpayandsafeworkplaces.*

Arbitral award or decision means an arbitrator or arbitral panel determination that a labor law violation occurred, or that enjoined or restrained a violation of labor law. It includes an award or decision that is not final or is subject to being confirmed, modified, or vacated by a court, and includes an award or decision resulting from private or confidential proceedings. To determine whether a particular award or decision is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Civil judgment means any judgment or order entered by any Federal or State court in which the court determined that a labor law violation occurred, or enjoined or restrained a violation of labor law. It includes a judgment or order that is not final or is subject to appeal. To determine whether a particular judgment or order is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

DOL Guidance means the Department of Labor (DOL) Guidance entitled: ''Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces'.'' The DOL Guidance, dated August 25, 2016, can be obtained from *www.dol.gov/fairpayandsafeworkplaces.*

Enforcement agency means any agency granted authority to enforce the Federal labor laws. It includes the enforcement components of DOL (Wage and Hour Division, Office of Federal Contract Compliance Programs, and Occupational Safety and Health Administration), the Equal Employment Opportunity Commission, the Occupational Safety and Health Review Commission, and the National Labor Relations Board. It also means a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. It does not include other Federal agencies which, in their capacity as contracting agencies, conduct investigations of potential labor law violations. The enforcement agencies associated with each labor law under E.O. 13673 are—

(1) Department of Labor Wage and Hour Division (WHD) for—

(i) The Fair Labor Standards Act;

(ii) The Migrant and Seasonal Agricultural Worker Protection Act;

(iii) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act;

(iv) 41 U.S.C. chapter 67, formerly known as the Service Contract Act;

(v) The Family and Medical Leave Act; and

(vi) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors);

(2) Department of Labor Occupational Safety and Health Administration (OSHA) for—

(i) The Occupational Safety and Health Act of 1970; and

(ii) OSHA-approved State Plans;

(3) Department of Labor Office of Federal Contract Compliance Programs (OFCCP) for—

(i) Section 503 of the Rehabilitation Act of 1973;

(ii) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974; and

(iii) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity);

(4) National Labor Relations Board (NLRB) for the National Labor Relations Act; and

(5) Equal Employment Opportunity Commission (EEOC) for—

(i) Title VII of the Civil Rights Act of 1964;

(ii) The Americans with Disabilities Act of 1990;

(iii) The Age Discrimination in Employment Act of 1967; and

(iv) Section 6(d) of the Fair Labor Standards Act (Equal Pay Act).

Labor compliance agreement means an agreement entered into between a contractor or subcontractor and an enforcement agency to address appropriate remedial measures,

compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters.

Labor laws means the following labor laws and E.O.s:

(1) The Fair Labor Standards Act.

(2) The Occupational Safety and Health Act (OSHA) of 1970.

(3) The Migrant and Seasonal Agricultural Worker Protection Act.

(4) The National Labor Relations Act.

(5) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act.

(6) 41 U.S.C. chapter 67, formerly known as the Service Contract Act.

(7) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity).

(8) Section 503 of the Rehabilitation Act of 1973.

(9) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

(10) The Family and Medical Leave Act.

(11) Title VII of the Civil Rights Act of 1964.

(12) The Americans with Disabilities Act of 1990.

(13) The Age Discrimination in Employment Act of 1967.

(14) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

(15) Equivalent State laws as defined in the DOL Guidance. (The only equivalent State laws implemented in the FAR are OSHA-approved State Plans, which can be found at *www.osha.gov/dcsp/osp/approved_state_plans.html.*)

Labor law decision means an administrative merits determination, arbitral award or decision, or civil judgment, which resulted from a violation of one or more of the laws listed in the definition of ''labor laws''.

Pervasive violations, in the context of E.O. 13673, Fair Pay and Safe Workplaces, means labor law violations that bear on the assessment of a contractor's integrity and business ethics because they reflect a basic disregard by the contractor for the labor laws, as demonstrated by a pattern of serious and/or willful violations, continuing violations, or numerous violations. To determine whether violations are pervasive it is necessary to consult the DOL Guidance section III.A.4. and associated Appendix D.

Repeated violation, in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because the contractor had one or more additional labor law violations of the same or a substantially similar requirement within the prior 3 years. To determine whether a particular violation(s) is repeated it is necessary to consult the DOL Guidance section III.A.2. and associated Appendix B.

Serious violation, in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because of the number of employees affected; the degree of risk imposed, or actual harm done by the violation; the amount of damages incurred or fines or penalties assessed; and/or other similar criteria. To determine whether a particular violation(s) is serious it is necessary to consult the DOL Guidance section III.A.1. and associated Appendix A.

Willful violation, in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because the contractor acted with knowledge of, reckless disregard for, or plain indifference to the matter of whether its conduct was prohibited by one or more requirements of labor laws. To determine whether a particular violation(s) is willful it is necessary to consult the DOL Guidance section III.A.3. and associated Appendix C.

22.2003 Policy.

It is the policy of the Federal Government to promote economy and efficiency in procurement by awarding contracts to contractors that promote safe, healthy, fair, and effective workplaces through compliance with labor laws, and by promoting opportunities for contractors to do the same when awarding subcontracts. Contractors and subcontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services. This policy is supported by E.O. 13673, Fair Pay and Safe Workplaces.

22.2004 Compliance with labor laws.

22.2004–1 General.

(a) *Contracts.* An offeror on a solicitation estimated to exceed $500,000 must represent whether, in the past three years, any labor law decision(s), as defined at 22.2002, was rendered against it. If an offeror represents that a decision(s) was rendered against it, and if the contracting officer has initiated a responsibility determination, the contracting officer will require the offeror to submit information on the labor law decision(s) and afford the offeror an opportunity to provide such additional information as the prospective contractor deems necessary to demonstrate its responsibility including mitigating factors and remedial measures such as contractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. The contractor must update the information semiannually in the System for Award Management (SAM). For further information, including about phase-ins, see the provisions and clauses prescribed at 22.2007(a) and (c).

(b) *Subcontracts.* Contractors are required to direct their prospective subcontractors to submit labor law decision information to DOL. Prospective subcontractors will also be afforded an opportunity to provide information to DOL on mitigating factors and remedial measures, such as subcontractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Contractors will consider DOL analysis and advice as they make responsibility determinations on their prospective subcontractors for subcontracts at any tier estimated to exceed $500,000, except for subcontracts for commercially available off-the-shelf items. Subcontractors must update the information semiannually. For further information, including about phase-ins, see the provision and clauses prescribed at 22.2007(b) and (c).

(c) *ALCA assistance.* The ALCA is responsible for accomplishing the specified objectives of the E.O., which include a number of overarching management functions. In addition, the ALCA provides support to the procurement process by—

(1) Encouraging prospective contractors and subcontractors that have labor law violations that may be serious, repeated, willful, and/or pervasive to work with enforcement agencies to discuss and address the labor law violations as soon as practicable;

(2) Providing input to the individual responsible for preparing and documenting past performance evaluations in Contractor Performance Assessment Reporting System (CPARS) (see 42.1502(j) and 42.1503) so that labor compliance may be considered during source selection;

(3) Providing written analysis and advice to the contracting officer for consideration in the responsibility determination and during contract performance (see 22.2004–2(b) and

22.2004–3(b)). The analysis requires obtaining labor law decision documents and, using DOL Guidance, assessing the labor law violations and information on mitigating factors and remedial measures, such as contractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws;

(4) Notifying, if appropriate, the agency suspending and debarring official, in accordance with agency procedures (see 9.406–3(a) and 9.407–3(a)), or advising that the contracting officer provide such notification;

(5) Monitoring SAM and FAPIIS for new and updated contractor disclosures of labor law decision information; and

(6) Making a notation in FAPIIS when the ALCA learns that a contractor has entered into a labor compliance agreement.

22.2004–2 Preaward assessment of an offeror's labor law violations.

(a) *General.* Before awarding a contract in excess of $500,000, the contracting officer shall—

(1) Consider relevant past performance information regarding compliance with labor laws when past performance is an evaluation factor; and

(2) Consider information concerning labor law violations when determining whether a prospective contractor is responsible and has a satisfactory record of integrity and business ethics.

(b) *Assessment of labor law violation information during responsibility determination.* When the contracting officer initiates a responsibility determination (see subpart 9.1) and a prospective contractor has provided an affirmative response to the representation at paragraph (c)(2) of the provision at 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673), or its equivalent for commercial items at 52.212–3(s)(2)(ii)—

(1) The contracting officer shall request that the prospective contractor—

(i) Disclose in SAM at *www.sam.gov* for each labor law decision, the following information, which will be publicly available in FAPIIS:

(A) The labor law violated.

(B) The case number, inspection number, charge number, docket number, or other unique identification number.

(C) The date rendered.

(D) The name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision;

(ii) Provide such additional information, in SAM, as the prospective contractor deems necessary to demonstrate its responsibility, including mitigating factors and remedial measures such as actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Prospective contractors may provide explanatory text and upload documents in SAM. This information will not be made public unless the contractor determines that it wants the information to be made public; and

(iii) Provide the information in paragraphs (b)(1)(i) and (ii) of this section to the contracting officer if the prospective contractor meets an exception to SAM registration (see 4.1102(a));

(2) The contracting officer shall—

(i) Request that the ALCA provide written analysis and advice, as described in paragraph (b)(3) of this section, within three business days of the request, or another time period determined by the contracting officer;

(ii) Furnish to the ALCA all relevant information provided to the contracting officer by the prospective contractor; and

(iii) Request that the ALCA obtain copies of the administrative merits determination(s), arbitral award(s) or decision(s), or civil judgment(s), as necessary to support the ALCA's analysis and advice, and for each analysis that indicates an unsatisfactory record of labor law compliance. (The ALCA will notify the contracting officer if the ALCA is unable to obtain any of the necessary document(s); the contracting officer shall request that the prospective contractor provide the necessary documentation).

(3) The ALCA's advice to the contracting officer will include one of the following recommendations about the prospective contractor's record of labor law compliance in order to inform the contracting officer's assessment of the prospective contractor's integrity and business ethics. The prospective contractor's record of labor law compliance, including mitigating factors and remedial measures—

(i) Supports a finding, by the contracting officer, of a satisfactory record of integrity and business ethics;

(ii) Supports a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, but the prospective contractor needs to commit, after award, to negotiating a labor compliance agreement or another acceptable remedial action;

(iii) Could support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, only if the prospective contractor commits, prior to award, to negotiating a labor compliance agreement or another acceptable remedial action;

(iv) Could support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, only if the prospective contractor enters, prior to award, into a labor compliance agreement; or

(v) Does not support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, and the agency suspending and debarring official should be notified in accordance with agency procedures;

(4) The ALCA will provide written analysis and advice, using the DOL Guidance, to support the recommendation made in paragraph (b)(3) of this section and for the contracting officer to consider in determining the prospective contractor's responsibility. The analysis and advice shall include the following information:

(i) Whether any labor law violations should be considered serious, repeated, willful, and/or pervasive.

(ii) The number and nature of labor law violations (depending on the nature of the labor law violation, in most cases, a single labor law violation may not necessarily give rise to a determination of lack of responsibility).

(iii) Whether there are any mitigating factors.

(iv) Whether the prospective contractor has initiated and implemented, in a timely manner—

(A) Its own remedial measures; and

(B) Other remedial measures entered into through agreement with or as a result of the actions or orders of an enforcement agency, court, or arbitrator.

(v) If the ALCA recommends pursuant to paragraphs (b)(3)(iii) or (iv) of this section that the prospective contractor commit to negotiate, or agree to enter into, a labor compliance agreement prior to award, the rationale for such timing (*e.g.*, (1) the prospective contractor has failed to take action or provide adequate justification for not negotiating when previously notified of the need for a labor compliance agreement, or (2) the labor violation history demonstrates an unsatisfactory record of integrity and business ethics unless an immediate commitment is made to negotiate a labor compliance agreement).

(vi) If the ALCA's recommendation is that the prospective contractor's record of labor law compliance does not support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, the rationale for the recommendation (*e.g.*, a labor compliance agreement cannot be reasonably expected to improve future compliance; the prospective contractor has shown a basic disregard for labor

law including by failing to enter into a labor compliance agreement after having been given reasonable time to do so; or the prospective contractor has breached an existing labor compliance agreement).

(vii) Whether the ALCA supports notification to the suspending and debarring official and whether the ALCA intends to make such notification.

(viii) If the ALCA recommends a labor compliance agreement pursuant to paragraphs (b)(3)(ii), (iii), or (iv) of this section, the name of the enforcement agency or agencies that would execute such agreement(s) with the prospective contractor.

(ix) Any such additional information that the ALCA finds to be relevant;

(5) The contracting officer shall—

(i) Consider the analysis and advice from the ALCA, if provided in a timely manner, in determining prospective contractors' responsibility;

(ii) Place the ALCA's written analysis, if provided, in the contract file with an explanation of how it was considered in the responsibility determination;

(iii) Proceed with making a responsibility determination if a timely written analysis is not received from an ALCA, using available information and business judgment; and

(iv) Comply with 9.103(b) when making a determination that a prospective small business contractor is nonresponsible and refer to the Small Business Administration for a Certificate of Competency;

(6) Disclosure of labor law decision(s) does not automatically render the prospective contractor nonresponsible. The contracting officer shall consider the offeror for contract award notwithstanding disclosure of one or more labor law decision(s), unless the contracting officer determines, after considering the analysis and advice from the ALCA on each of the factors described in paragraph (b)(4) of this section, and any other information considered by the contracting officer in performing related responsibility duties under 9.104–5 and 9.104–6, that the offeror does not have a satisfactory record of integrity and business ethics (*e.g.*, the ALCA's analysis of disclosed or otherwise known violations and lack of or insufficient remediation indicates a basic disregard for labor law).

(7) If the ALCA's assessment indicates a labor compliance agreement is warranted, the contracting officer shall provide written notification, prior to award, to the prospective contractor that states that the prospective contractor's disclosures have been analyzed by the ALCA using DOL's Guidance, that the ALCA has determined that a labor compliance agreement is warranted, and that identifies the name of the enforcement agency or agencies with whom the prospective contractor should confer regarding the negotiation of such agreement or other such action as agreed upon between the contractor and the enforcement agency or agencies.

(i) If the ALCA's recommendation is that the prospective contractor needs to commit, after award, to negotiating a labor compliance agreement or another acceptable remedial action (paragraph (b)(3)(ii) of this section), the notification shall indicate that—

(A) The prospective contractor is to provide a written response to the contracting officer and that the response is not required prior to contract award. The response is due in a time specified by the contracting officer. (The contracting officer shall specify a response time that the contracting officer determines is reasonable for the circumstances.);

(B) The contractor's response will be considered by the contracting officer in determining if application of a postaward contract remedy is appropriate. The prospective contractor's commitment to negotiate in a reasonable period of time will be assessed by the ALCA during contract performance (see 22.2004–3(b));

(C) The response shall either—

(*1*) Confirm the prospective contractor's intent to negotiate, in good faith within a reasonable period of time, a labor compliance agreement, or take other remedial action agreed upon between the contractor and the enforcement agency or agencies identified by the contracting officer, or

(*2*) Explain why the prospective contractor does not intend to negotiate a labor compliance agreement, or take other remedial action agreed upon between the contractor and the enforcement agency or agencies identified by the contracting officer; and

(D) The prospective contractor's failure to enter into a labor compliance agreement or take other remedial action agreed upon between the contractor and the enforcement agency or agencies within six months of contract award, absent explanation that the contracting officer considers to be adequate to justify the lack of agreement—

(*1*) Will be considered prior to the exercise of a contract option;

(*2*) May result in the application of a contract remedy; and

(*3*) Will be considered in any subsequent responsibility determination where the labor law decision on the unremediated violation falls within the disclosure period for that solicitation;

(ii) If the ALCA's recommendation is that the prospective contractor commit, prior to award, to negotiating a labor compliance agreement or another acceptable remedial action (paragraph (b)(3)(iii) of this section), use the procedures in paragraph (b)(7)(i) but substitute the following paragraphs (b)(7)(ii)(A) and (B) for paragraphs (b)(7)(i)(A) and (B):

(A) The prospective contractor is to provide a written response to the contracting officer and that the response is required prior to contract award. The response is due in a time specified by the contracting officer. (The contracting officer shall specify a response time that the contracting officer determines is reasonable for the circumstances.);

(B) The contractor's response will be considered by the contracting officer in determining responsibility.

(iii) If the ALCA's recommendation is that the prospective contractor enter, prior to award, into a labor compliance agreement (paragraph (b)(3)(iv) of this section), the notification shall state that the prospective contractor shall enter into a labor compliance agreement before contract award;

(8) The contracting officer shall notify the ALCA—

(i) Of the date notice was provided to the prospective contractor; and

(ii) If the prospective contractor fails to respond by the stated deadline or indicates that it does not intend to negotiate a labor compliance agreement; and

(9) If the prospective contractor enters into a labor compliance agreement, the entry shall be noted in FAPIIS by the ALCA.

(c)(1) The contracting officer may rely on an offeror's negative response to the representation at paragraph (c)(1) of the provision at 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673), or its equivalent for commercial items at 52.212–3(s)(2)(i) unless the contracting officer has reason to question the representation (*e.g.*, the ALCA has brought covered labor law decisions to the attention of the contracting officer).

(2) If the contracting officer has reason to question the representation, the contracting officer shall provide the prospective contractor an opportunity to correct its representation or provide the contracting officer an explanation as to why the negative representation is correct.

22.2004–3 Postaward assessment of a prime contractor's labor law violations.

(a) *Contractor duty to update.* (1) If there are new labor law decisions or updates to previously disclosed labor

law decisions, the contractor is required to disclose this information in SAM at *www.sam.gov*, semiannually, pursuant to the clause at 52.222–59, Compliance with Labor Laws (Executive Order 13673).

(2) The contractor has flexibility in establishing the date for the semiannual update. The contractor may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date. In either case, the contractor must continue to update its disclosures semiannually.

(3) Registrations in SAM are required to be maintained current, accurate, and complete (see 52.204–13, System for Award Management Maintenance). If the SAM registration date is less than six months old, this will be evidence that the required representation and disclosure information is updated and the requirement is met.

(b) *Assessment of labor law violation information during contract performance.* (1) The ALCA monitors SAM and FAPIIS for new and updated labor law decision information pursuant to paragraph (a) of this section. If the ALCA is unable to obtain any needed relevant documents, the ALCA may request that the contracting officer obtain the documents from the contractor and provide them to the ALCA. If the contractor had previously agreed to enter into a labor compliance agreement, the ALCA verifies, consulting with DOL as needed, whether the contractor is making progress toward, or has entered into and is complying with a labor compliance agreement. The ALCA also considers labor law decision information received from sources other than SAM and FAPIIS. If this information indicates that further consideration or action may be warranted, the ALCA notifies the contracting officer in accordance with agency procedures.

(2) If the contracting officer was notified pursuant to paragraph (b)(1) of this section, the contracting officer shall request the contractor submit in SAM any additional information the contractor may wish to provide for the contracting officer's consideration, *e.g.*, remedial measures and mitigating factors or explanations for delays in entering into or for not complying with a labor compliance agreement. Contractors may provide explanatory text and upload documents in SAM. This information will not be made public unless the contractor determines that it wants the information to be made public.

(3) The ALCA will provide written analysis and advice, using the DOL Guidance, for the contracting officer to consider in determining whether a contract remedy is warranted. The analysis and advice shall include the following information:

(i) Whether any labor law violations should be considered serious, repeated, willful, and/or pervasive.

(ii) The number and nature of labor law violations (depending on the nature of the labor law violation, in most cases, a single labor law violation may not necessarily warrant action).

(iii) Whether there are any mitigating factors.

(iv) Whether the contractor has initiated and implemented, in a timely manner—

(A) Its own remedial measures; and/or

(B) Other remedial measures entered into through agreement with, or as a result of, the actions or orders of an enforcement agency, court, or arbitrator.

(v) Whether a labor compliance agreement or other remedial measure is—

(A) Warranted and the enforcement agency or agencies that would execute such agreement with the contractor;

(B) Under negotiation between the contractor and the enforcement agency;

(C) Established, and whether it is being adhered to; or

(D) Not being negotiated or has not been established, even though the contractor was notified that one had been recommended, and the contractor's rationale for not doing so.

(vi) Whether the absence of a labor compliance agreement or other remedial measure, or noncompliance with a labor compliance agreement, demonstrates a pattern of conduct or practice that reflects disregard for the recommendation of an enforcement agency.

(vii) Whether the labor law violation(s) merit consideration by the agency suspending and debarring official and whether the ALCA will make such a referral.

(viii) Any such additional information that the ALCA finds to be relevant.

(4) The contracting officer shall—

(i) Determine appropriate action, using the analysis and advice from the ALCA. Appropriate action may include—

(A) Continue the contract and take no remedial action; or

(B) Exercise a contract remedy, which may include one or more of the following:

(*1*)(*i*) Provide written notification to the contractor that a labor compliance agreement is warranted, using the procedures in 22.2004–2(b)(7) introductory paragraph and (b)(7)(i), appropriately modifying the content of the notification to the particular postaward circumstances (*e.g.*, change the time in paragraph 2004–2(b)(7)(i)(D) to ''within six months of the notice''); and

(*ii*) Notify the ALCA of the date the notice was provided to the contractor; and notify the ALCA if the contractor fails to respond by the stated deadline or indicates that it does not intend to negotiate a labor compliance agreement.

(*2*) Elect not to exercise an option (see 17.207(c)(8)).

(*3*) Terminate the contract in accordance with the procedures set forth in part 49 or 12.403.

(*4*) In accordance with agency procedures (see 9.406–3(a) and 9.407–3(a)), notify the agency suspending and debarring official if the labor law violation(s) merit consideration; and

(ii) Place any ALCA written analysis in the contract file with an explanation of how it was considered.

(5) If the contractor enters into a labor compliance agreement, the entry shall be noted in FAPIIS by the ALCA.

22.2004–4 Contractor preaward and postaward assessment of a subcontractor's labor law violations.

(a) The provision at 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), and the clause at 52.222–59, Compliance with Labor Laws (Executive Order 13673), have requirements for preaward subcontractor labor law decision disclosures and semiannual postaward updates during subcontract performance, and assessments thereof. This requirement applies to subcontracts at any tier estimated to exceed $500,000, other than for commercially available off-the-shelf items.

(b) If the contractor notifies the contracting officer of a determination and rationale for proceeding with subcontract award under 52.222–59(c)(5), the contracting officer should inform the ALCA.

22.2005 Paycheck transparency.

E.O. 13673 requires contractors and subcontractors to provide, on contracts that exceed $500,000, and subcontracts that exceed $500,000 other than for commercially available off-the-shelf items—

(a) A wage statement document (*e.g.*, a pay stub) in every pay period to all individuals performing work under the contract or subcontract, for which the contractor or subcontractor is required to maintain wage records under the Fair Labor Standards Act (FLSA), Wage Rate

Requirements (Construction) statute, or Service Contract Labor Standards statute. The clause at 52.222–60 Paycheck Transparency (Executive Order 13673) requires certain content to be provided in the wage statement; and

(b) A notice document to all individuals performing work under the contract or subcontract who are treated as independent contractors informing them of that status (see 52.222–60). The notice document must be provided either—

(1) At the time the independent contractor relationship with the individual is established; or

(2) Prior to the time that the individual begins to perform work on that Government contract or subcontract.

22.2006 Arbitration of contractor employee claims.

E.O. 13673 requires contractors, on contracts exceeding $1,000,000, to agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, be made only with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions. This flows down to subcontracts exceeding $1,000,000 other than for the acquisition of commercial items.

22.2007 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673), in solicitations that contain the clause at 52.222–59.

(b) For solicitations issued on or after October 25, 2017, the contracting officer shall insert the provision at 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), in solicitations that contain the clause at 52.222–59.

(c) The contracting officer shall insert the clause at 52.222–59, Compliance with Labor Laws (Executive Order 13673)—

(1) In solicitations with an estimated value of $50 million or more, issued from October 25, 2016 through April 24, 2017, and resultant contracts; and

(2) In solicitations that are estimated to exceed $500,000 issued after April 24, 2017 and resultant contracts.

(d) The contracting officer shall, beginning on January 1, 2017 insert the clause at 52.222–60, Paycheck Transparency (Executive Order 13673), in solicitations if the estimated value exceeds $500,000 and resultant contracts.

(e) The contracting officer shall insert the clause at 52.222–61, Arbitration of Contractor Employee Claims (Executive Order 13673), in solicitations if the estimated value exceeds $1,000,000, other than those for commercial items, and resultant contracts.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 14. Amend section 42.1502 by adding paragraph (j) to read as follows:

42.1502 Policy.

* * * * *

(j) Past performance evaluations shall include an assessment of contractor's labor violation information when the contract includes the clause at 52.222–59, Compliance with Labor Laws (Executive Order 13673). Using information available to a contracting officer, past performance evaluations shall consider—

(1) A contractor's relevant labor law violation information, *e.g.*, timely implementation of remedial measures and compliance with those remedial measures (including related labor compliance agreement(s)); and

(2) The extent to which the prime contractor addressed labor law violations by its subcontractors.

■ 15. Amend section 42.1503 by—

■ a. Removing from paragraph (a)(1)(i) ''management office and,'' and adding ''management office, agency labor compliance advisor (ALCA) office (see subpart 22.20), and,'' in its place;

■ b. Removing from paragraph (a)(1)(ii) ''service, and'' and adding ''service, ALCA, and'' in its place; and

■ c. Adding paragraph (h)(5).

The addition reads as follows:

42.1503 Procedures.

* * * * *

(h) * * *

(5) *References to entries by the Government into FAPIIS that are not performance information.* For other entries into FAPIIS by the contracting officer see 9.105–2(b)(2) for documentation of a nonresponsibility determination. See 22.2004–1(c)(6) for documentation by the ALCA of a labor compliance agreement. See 9.406–3(f)(1) and 9.407–3(e) for entry by a suspending or debarring official of information regarding an administrative agreement.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 16. Amend section 52.204–8 by—

■ a. Revising the date of the provision;

■ b. Redesignating paragraphs (c)(1)(xv) through (xxii) as paragraphs (c)(1)(xvi) through (xxiii), respectively; and

■ c. Adding a new paragraph (c)(1)(xv).

The revision and addition read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (OCT 2016)

* * * * *

(c)(1) * * *

(xv) 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673). This provision applies to solicitations expected to exceed $50 million which are issued from October 25, 2016 through April 24, 2017, and solicitations expected to exceed $500,000, which are issued after April 24, 2017.

* * * * *

■ 17. Amend section 52.212–3 by—

■ a. Revising the date of the provision;

■ b. Removing from the introductory text ''(c) through (r)'' and adding ''(c) through (s)'' in its place;

■ c. Adding to paragraph (a), in alphabetical order, the definitions ''Administrative merits determination'', ''Arbitral award or decision'', ''Civil judgment'', ''DOL Guidance'', ''Enforcement agency'', ''Labor compliance agreement'', ''Labor laws'' and ''Labor law decision'';

■ d. Removing from paragraph (b)(2) ''(c) through (r)'' and adding ''(c) through (s)'' in its place; and

■ e. Adding paragraph (s).

The revision and additions read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (OCT 2016)

* * * * *

(a) * * *

Administrative merits determination means certain notices or findings of labor law violations issued by an enforcement agency following an investigation. An administrative merits determination may be final or be subject to appeal or further review. To determine whether a particular notice or finding is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Arbitral award or decision means an arbitrator or arbitral panel determination that a labor law violation

occurred, or that enjoined or restrained a violation of labor law. It includes an award or decision that is not final or is subject to being confirmed, modified, or vacated by a court, and includes an award or decision resulting from private or confidential proceedings. To determine whether a particular award or decision is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Civil judgment means—

(1) In paragraph (h) of this provision: A judgment or finding of a civil offense by any court of competent jurisdiction.

(2) In paragraph (s) of this provision: Any judgment or order entered by any Federal or State court in which the court determined that a labor law violation occurred, or enjoined or restrained a violation of labor law. It includes a judgment or order that is not final or is subject to appeal. To determine whether a particular judgment or order is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

DOL Guidance means the Department of Labor (DOL) Guidance entitled: ''Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces' ''. The DOL Guidance, dated August 25, 2016, can be obtained from *www.dol.gov/fairpayandsafeworkplaces*.

* * * * *

Enforcement agency means any agency granted authority to enforce the Federal labor laws. It includes the enforcement components of DOL (Wage and Hour Division, Office of Federal Contract Compliance Programs, and Occupational Safety and Health Administration), the Equal Employment Opportunity Commission, the Occupational Safety and Health Review Commission, and the National Labor Relations Board. It also means a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. It does not include other Federal agencies which, in their capacity as contracting agencies, conduct investigations of potential labor law violations. The enforcement agencies associated with each labor law under E.O. 13673 are—

(1) Department of Labor Wage and Hour Division (WHD) for—

(i) The Fair Labor Standards Act;

(ii) The Migrant and Seasonal Agricultural Worker Protection Act;

(iii) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act;

(iv) 41 U.S.C. chapter 67, formerly known as the Service Contract Act;

(v) The Family and Medical Leave Act; and

(vi) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors);

(2) Department of Labor Occupational Safety and Health Administration (OSHA) for—

(i) The Occupational Safety and Health Act of 1970; and

(ii) OSHA-approved State Plans;

(3) Department of Labor Office of Federal Contract Compliance Programs (OFCCP) for—

(i) Section 503 of the Rehabilitation Act of 1973;

(ii) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974; and

(iii) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity);

(4) National Labor Relations Board (NLRB) for the National Labor Relations Act; and

(5) Equal Employment Opportunity Commission (EEOC) for—

(i) Title VII of the Civil Rights Act of 1964;

(ii) The Americans with Disabilities Act of 1990;

(iii) The Age Discrimination in Employment Act of 1967; and

(iv) Section 6(d) of the Fair Labor Standards Act (Equal Pay Act).

* * * * *

Labor compliance agreement means an agreement entered into between a contractor or subcontractor and an enforcement agency to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters.

Labor laws means the following labor laws and E.O.s:

(1) The Fair Labor Standards Act.

(2) The Occupational Safety and Health Act (OSHA) of 1970.

(3) The Migrant and Seasonal Agricultural Worker Protection Act.

(4) The National Labor Relations Act.

(5) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act.

(6) 41 U.S.C. chapter 67, formerly known as the Service Contract Act.

(7) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity).

(8) Section 503 of the Rehabilitation Act of 1973.

(9) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

(10) The Family and Medical Leave Act.

(11) Title VII of the Civil Rights Act of 1964.

(12) The Americans with Disabilities Act of 1990.

(13) The Age Discrimination in Employment Act of 1967.

(14) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

(15) Equivalent State laws as defined in the DOL Guidance. (The only equivalent State laws implemented in the FAR are OSHA-approved State Plans, which can be found at *www.osha.gov/dcsp/osp/approved_state_plans.html*).

Labor law decision means an administrative merits determination, arbitral award or decision, or civil judgment, which resulted from a violation of one or more of the laws listed in the definition of ''labor laws''.

* * * * *

(s) *Representation regarding compliance with labor laws (Executive Order 13673).* If the offeror is a joint venture that is not itself a separate legal entity, each concern participating in the joint venture shall separately comply with the requirements of this provision.

(1)(i) For solicitations issued on or after October 25, 2016 through April 24, 2017: The Offeror [ ] does [ ] does not anticipate submitting an offer with an estimated contract value of greater than $50 million.

(ii) For solicitations issued after April 24, 2017: The Offeror [ ] does [ ] does not anticipate submitting an offer with an estimated contract value of greater than $500,000.

(2) If the Offeror checked ''does'' in paragraph (s)(1)(i) or (ii) of this provision, the Offeror represents to the best of the Offeror's knowledge and belief [*Offeror to check appropriate block*]:

[ ](i) There has been no administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the offeror (see definitions in paragraph (a) of this section) during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter; or

[ ](ii) There has been an administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the Offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.

(3)(i) If the box at paragraph (s)(2)(ii) of this provision is checked and the

Contracting Officer has initiated a responsibility determination and has requested additional information, the Offeror shall provide—

(A) The following information for each disclosed labor law decision in the System for Award Management (SAM) at *www.sam.gov*, unless the information is already current, accurate, and complete in SAM. This information will be publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS):

(*1*) The labor law violated.

(*2*) The case number, inspection number, charge number, docket number, or other unique identification number.

(*3*) The date rendered.

(*4*) The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision;

(B) The administrative merits determination, arbitral award or decision, or civil judgment document, to the Contracting Officer, if the Contracting Officer requires it;

(C) In SAM, such additional information as the Offeror deems necessary to demonstrate its responsibility, including mitigating factors and remedial measures such as offeror actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Offerors may provide explanatory text and upload documents. This information will not be made public unless the contractor determines that it wants the information to be made public; and

(D) The information in paragraphs (s)(3)(i)(A) and (s)(3)(i)(C) of this provision to the Contracting Officer, if the Offeror meets an exception to SAM registration (see FAR 4.1102(a)).

(ii)(A) The Contracting Officer will consider all information provided under (s)(3)(i) of this provision as part of making a responsibility determination.

(B) A representation that any labor law decision(s) were rendered against the Offeror will not necessarily result in withholding of an award under this solicitation. Failure of the Offeror to furnish a representation or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(C) The representation in paragraph (s)(2) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous representation, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation in accordance with the procedures set forth in FAR 12.403.

(4) The Offeror shall provide immediate written notice to the Contracting Officer if at any time prior to contract award the Offeror learns that its representation at paragraph (s)(2) of this provision is no longer accurate.

(5) The representation in paragraph (s)(2) of this provision will be public information in the Federal Awardee Performance and Integrity Information System (FAPIIS).

* * * * *

■ 18. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (b)(35) through (58) as paragraphs (b)(37) through ((60), respectively;

■ c. Adding new paragraphs (b)(35) and (36);

■ d. Redesignating paragraphs (e)(1)(xvi) through (xviii) as paragraphs (e)1)(xviii) through (xx), respectively;

■ e. Adding new paragraphs (e)(1)(xvi) and (xvii); and

■ f. Amending Alternate II by—

■ 1. Revising the date of the Alternate;

■ 2. Redesignating paragraphs (e)(1)(ii)(O) and (P) as paragraphs (e)(1)(ii)(Q) and (R); and

■ 3. Adding new paragraphs (e)(1)(ii)(O) and (P).

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (OCT 2016)

* * * * *

(b) * * *

__(1) * * *

__(35) 52.222–59, Compliance with Labor Laws (Executive Order 13673) (OCT 2016). (Applies at $50 million for solicitations and resultant contracts issued from October 25, 2016 through April 24, 2017; applies at $500,000 for solicitations and resultant contracts issued after April 24, 2017).

__(36) 52.222–60, Paycheck Transparency (Executive Order 13673) (OCT 2016).

* * * * *

(e)(1) * * *

(xvi) 52.222–59, Compliance with Labor Laws (Executive Order 13673) (OCT 2016) (Applies at $50 million for solicitations and resultant contracts issued from October 25, 2016 through April 24, 2017; applies at $500,000 for solicitations and resultant contracts issued after April 24, 2017).

(xvii) 52.222–60, Paycheck Transparency (Executive Order 13673) (OCT 2016)).

* * * * *

Alternate II (OCT 2016). * * *

(e)(1) * * *

(ii) * * *

(O) 52.222–59, Compliance with Labor Laws (Executive Order 13673) (OCT 2016).

(P) 52.222–60, Paycheck Transparency (Executive Order 13673) (OCT 2016).

* * * * *

■ 19. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(viii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (OCT 2016)

(a) * * *

(2) * * *

(viii) 52.244–6, Subcontracts for Commercial Items (OCT 2016).

* * * * *

■ 20. Add section 52.222–57 to read as follows:

52.222–57 Representation Regarding Compliance with Labor Laws (Executive Order 13673).

As prescribed in 22.2007(a), insert the following provision:

Representation Regarding Compliance With Labor Laws (Executive Order 13673) (OCT 2016)

(a)(1) *Definitions.*

Administrative merits determination, arbitral award or *decision, civil judgment*, *DOL Guidance, enforcement agency*, *labor compliance agreement, labor laws*, and *labor law decision* as used in this provision have the meaning given in the clause in this solicitation entitled 52.222–59, Compliance with Labor Laws (Executive Order 13673).

(2) *Joint ventures.* If the offeror is a joint venture that is not itself a separate legal entity, each concern participating in the joint venture shall separately comply with the requirements of this provision.

(b)(1) For solicitations issued on or after October 25, 2016 through April 24, 2017: The Offeror [ ] does [ ] does not anticipate submitting an offer with an estimated contract value of greater than $50 million.

(2) For solicitations issued after April 24, 2017: The Offeror [ ] does [ ] does not anticipate submitting an offer with an estimated contract value of greater than $500,000.

(c) If the Offeror checked ''does'' in paragraph (b)(1) or (2) of this provision, the Offeror represents to the best of the Offeror's knowledge and belief [*Offeror to check appropriate block*]:

[ ](1) There has been no administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the Offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter; or

[ ](2) There has been an administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the Offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.

(d)(1) If the box at paragraph (c)(2) of this provision is checked and the Contracting Officer has initiated a responsibility determination and has requested additional information, the Offeror shall provide—

(i) For each disclosed labor law decision in the System for Award Management (SAM) at *www.sam.gov*, the following, unless the information is already current, accurate, and complete in SAM. This information will be publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS):

(A) The labor law violated.

(B) The case number, inspection number, charge number, docket number, or other unique identification number.

(C) The date rendered.

(D) The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision;

(ii) The administrative merits determination, arbitral award or decision, or civil judgment document to the Contracting Officer, if the Contracting Officer requires it;

(iii) In SAM, such additional information as the Offeror deems necessary to demonstrate its responsibility, including mitigating factors and remedial measures such as Offeror actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Offerors may provide explanatory text and upload documents. This information will not be made public unless the contractor determines that it wants the information to be made public; and

(iv) The information in paragraphs (d)(1)(i) and (d)(1)(iii) of this provision to the Contracting Officer, if the Offeror meets an exception to SAM registration (see 4.1102(a)).

(2)(i) The Contracting Officer will consider all information provided under (d)(1) of this provision as part of making a responsibility determination.

(ii) A representation that any labor law decisions were rendered against the Offeror will not necessarily result in withholding of an award under this solicitation. Failure of the Offeror to furnish a representation or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(iii) The representation in paragraph (c) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous representation, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation in accordance with the procedures set forth in part 49.

(e) The Offeror shall provide immediate written notice to the Contracting Officer if at any time prior to contract award the Offeror learns that its representation at paragraph (c) of this provision is no longer accurate.

(f) The representation in paragraph (c) of this provision will be public information in the Federal Awardee Performance and Integrity Information System (FAPIIS).

(End of provision)

■ 21. Add section 52.222–58 to read as follows:

52.222–58 Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673).

As prescribed in 22.2007(b), insert the following provision:

Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673) (OCT 2016)

(a) *Definitions.*

Administrative merits determination, arbitral award or decision, *civil judgment*, *DOL Guidance*, *enforcement agency*, *labor compliance agreement*, *labor laws*, and *labor law decision* as used in this provision have the meaning given in the clause in this solicitation entitled 52.222–59, Compliance with Labor Laws (Executive Order 13673).

(b) *Subcontractor representation.* (1) The requirements of this provision apply to all prospective subcontractors at any tier submitting an offer for subcontracts where the estimated subcontract value exceeds $500,000 for other than commercially available off-the-shelf items. The Offeror shall require these prospective subcontractors to represent, to the Offeror, to the best of the subcontractor's knowledge and belief, whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments for any labor law violation(s) rendered against the prospective subcontractor during the period beginning October 25, 2015 to the date of the offer, or for three years preceding the offer, whichever period is shorter.

(2) A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements.

(c) *Subcontractor responsibility determination.* If the prospective subcontractor responded affirmatively to paragraph (b) of this provision and the Offeror initiates a responsibility determination, the Offeror shall follow the procedures in paragraph (c) of 52.222–59, Compliance with Labor Laws (Executive Order 13673).

(End of provision)

■ 59. Add section 52.222–59 to read as follows:

52.222–59 Compliance with Labor Laws (Executive Order 13673).

As prescribed in 22.2007(c), insert the following clause:

Compliance With Labor Laws (Executive Order 13673) (OCT 2016)

(a) *Definitions.* As used in this clause—

Administrative merits determination means certain notices or findings of labor law violations issued by an enforcement agency following an investigation. An administrative merits determination may be final or be subject to appeal or further review. To determine whether a particular notice or finding is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Agency labor compliance advisor (ALCA) means the senior official designated in accordance with E.O. 13673. ALCAs are listed at *www.dol.gov/fairpayandsafeworkplaces*.

Arbitral award or decision means an arbitrator or arbitral panel determination that a labor law violation occurred, or that enjoined or restrained a violation of labor law. It includes an award or decision that is not final or is subject to being confirmed, modified, or vacated by a court, and includes an award or decision resulting from private or confidential proceedings. To determine whether a particular award or

decision is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Civil judgment means any judgment or order entered by any Federal or State court in which the court determined that a labor law violation occurred, or enjoined or restrained a violation of labor law. It includes a judgment or order that is not final or is subject to appeal. To determine whether a particular judgment or order is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

DOL Guidance means the Department of Labor (DOL) Guidance entitled: ''Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces' ''. The DOL Guidance, dated August 25, 2016, can be obtained from *www.dol.gov/fairpayandsafeworkplaces*.

Enforcement agency means any agency granted authority to enforce the Federal labor laws. It includes the enforcement components of DOL (Wage and Hour Division, Office of Federal Contract Compliance Programs, and Occupational Safety and Health Administration), the Equal Employment Opportunity Commission, the Occupational Safety and Health Review Commission, and the National Labor Relations Board. It also means a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. It does not include other Federal agencies which, in their capacity as contracting agencies, conduct investigations of potential labor law violations. The enforcement agencies associated with each labor law under E.O. 13673 are—

(1) Department of Labor Wage and Hour Division (WHD) for—

(i) The Fair Labor Standards Act;

(ii) The Migrant and Seasonal Agricultural Worker Protection Act;

(iii) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act;

(iv) 41 U.S.C. chapter 67, formerly known as the Service Contract Act;

(v) The Family and Medical Leave Act; and

(vi) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors);

(2) Department of Labor Occupational Safety and Health Administration (OSHA) for—

(i) The Occupational Safety and Health Act of 1970; and

(ii) OSHA-approved State Plans;

(3) Department of Labor Office of Federal Contract Compliance Programs (OFCCP) for—

(i) Section 503 of the Rehabilitation Act of 1973;

(ii) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974; and

(iii) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity);

(4) National Labor Relations Board (NLRB) for the National Labor Relations Act; and

(5) Equal Employment Opportunity Commission (EEOC) for—

(i) Title VII of the Civil Rights Act of 1964;

(ii) The Americans with Disabilities Act of 1990;

(iii) The Age Discrimination in Employment Act of 1967; and

(iv) Section 6(d) of the Fair Labor Standards Act (Equal Pay Act).

Labor compliance agreement means an agreement entered into between a contractor or subcontractor and an enforcement agency to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters.

Labor laws means the following labor laws and E.O.s:

(1) The Fair Labor Standards Act.

(2) The Occupational Safety and Health Act (OSHA) of 1970.

(3) The Migrant and Seasonal Agricultural Worker Protection Act.

(4) The National Labor Relations Act.

(5) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act.

(6) 41 U.S.C. chapter 67, formerly known as the Service Contract Act.

(7) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity).

(8) Section 503 of the Rehabilitation Act of 1973.

(9) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

(10) The Family and Medical Leave Act.

(11) Title VII of the Civil Rights Act of 1964.

(12) The Americans with Disabilities Act of 1990.

(13) The Age Discrimination in Employment Act of 1967.

(14) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

(15) Equivalent State laws as defined in the DOL Guidance. (The only equivalent State laws implemented in the FAR are OSHA-approved State Plans, which can be found at *www.osha.gov/dcsp/osp/approved_state_plans.html*.)

Labor law decision means an administrative merits determination, arbitral award or decision, or civil judgment, which resulted from a violation of one or more of the laws listed in the definition of ''labor laws''.

Pervasive violations in the context of E.O. 13673, Fair Pay and Safe Workplaces, means labor law violations that bear on the assessment of a contractor's integrity and business ethics because they reflect a basic disregard by the contractor for the labor laws, as demonstrated by a pattern of serious and/or willful violations, continuing violations, or numerous violations. To determine whether violations are pervasive it is necessary to consult the DOL Guidance section III.A.4. and associated Appendix D.

Repeated violation in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because the contractor had one or more additional labor law violations of the same or a substantially similar requirement within the prior 3 years. To determine whether a particular violation(s) is repeated it is necessary to consult the DOL Guidance section III.A.2. and associated Appendix B.

Serious violation in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because of the number of employees affected; the degree of risk imposed, or actual harm done by the violation; the amount of damages incurred or fines or penalties assessed; and/or other similar criteria. To determine whether a particular violation(s) is serious it is necessary to consult the DOL Guidance section III.A.1. and associated Appendix A.

Willful violation in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because the contractor acted with knowledge of, reckless disregard for, or plain indifference to the matter of whether its conduct was prohibited by one or more requirements of labor laws. To determine whether a particular violation(s) is willful it is necessary to consult the DOL Guidance section III.A.3. and associated Appendix C.

(b) *Prime contractor updates.* Contractors are required to disclose new labor law decisions and/or updates to previously disclosed labor law decisions in SAM at *www.sam.gov*, semiannually. The Contractor has flexibility in establishing the date for the semiannual

update. (The contractor may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date. In either case, the contractor must continue to update its disclosures semiannually.) Registrations in SAM are required to be maintained current, accurate, and complete (see 52.204–13, System for Award Management Maintenance). If the SAM registration date is less than six months old, this will be evidence that the required representation and disclosure information is updated and the requirement is met. The Contractor shall provide—

(1) The following in SAM for each disclosed labor law decision. This information will be publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS):

(i) The labor law violated.

(ii) The case number, inspection number, charge number, docket number, or other unique identification number.

(iii) The date rendered.

(iv) The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision;

(2) The administrative merits determination, arbitral award or decision, or civil judgment document to the Contracting Officer, if the Contracting Officer requires it;

(3) In SAM, such additional information as the Contractor deems necessary, including mitigating factors and remedial measures such as contractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Contractors may provide explanatory text and upload documents. This information will not be made public unless the Contractor determines that it wants the information to be made public; and

(4) The information in paragraphs (b)(1) and (b)(3) to the Contracting Officer, if the Contractor meets an exception to SAM registration (see 4.1102(a)).

(c) *Subcontractor responsibility.* (1) This paragraph (c) applies—

(i) To subcontracts with an estimated value that exceeds $500,000 for other than commercially available off-the-shelf items; and

(ii) When the provision 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), is in the contract and the prospective subcontractor responded affirmatively to paragraph (b) of that provision, and the Contractor initiates a responsibility determination.

(2) The Contractor shall consider subcontractor labor law violation information when assessing whether a prospective subcontractor has a satisfactory record of integrity and business ethics with regard to compliance with labor laws, when determining subcontractor responsibility. Disclosure of labor law decision(s) does not automatically render the prospective subcontractor nonresponsible. The Contractor shall consider the prospective subcontractor for subcontract award notwithstanding disclosure of one or more labor law decision(s). The Contractor should encourage prospective subcontractors to contact DOL for a preassessment of their record of labor law compliance (see DOL Guidance Section VI, Preassessment). The Contractor shall complete the assessment—

(i) For subcontracts awarded within five days of the prime contract award or that become effective within five days of the prime contract award, no later than 30 days after subcontract award; or

(ii) For all other subcontracts, prior to subcontract award. However, in urgent circumstances, the assessment shall be completed within 30 days of subcontract award.

(3)(i) The Contractor shall require a prospective subcontractor to represent to the best of the subcontractor's knowledge and belief whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments, for any labor law violation(s) rendered against the subcontractor during the period beginning on October 25, 2015 to the date of the subcontractor's offer, or for three years preceding the date of the subcontractor's offer, whichever period is shorter.

(ii) When determining subcontractor responsibility, the Contractor shall require the prospective subcontractor to disclose to DOL, in accordance with paragraph (c)(3)(iv) of this clause, for each covered labor law decision, the following information:

(A) The labor law violated.

(B) The case number, inspection number, charge number, docket number, or other unique identification number.

(C) The date rendered.

(D) The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision.

(iii) The Contractor shall inform the prospective subcontractor that the prospective subcontractor may provide information to DOL, in accordance with paragraph (c)(3)(iv) of this clause, on mitigating factors and remedial measures, such as subcontractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws.

(iv) The Contractor shall require subcontractors to provide information required by paragraph (c)(3)(ii) and discussed in paragraph (c)(3)(iii) of this clause to DOL through the DOL Web site at *www.dol.gov/fairpayandsafeworkplaces*.

(4) The Contractor, in determining subcontractor responsibility, may find that the prospective subcontractor has a satisfactory record of integrity and business ethics with regard to compliance with labor laws if—

(i) The prospective subcontractor provides a negative response to the Contractor in its representation made pursuant to paragraph (c)(3)(i) of this clause; or

(ii) The prospective subcontractor—

(A) Provides a positive response to the Contractor in its representation made pursuant to paragraph (3)(i);

(B) Represents, to the Contractor, to the best of the subcontractor's knowledge and belief that it has disclosed to DOL any administrative merits determinations, arbitral awards or decisions, or civil judgments for any labor law violation(s) rendered against the subcontractor during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter; and

(C) Provides the following information concerning DOL review and assessment of subcontractor-disclosed information—

(*1*) The subcontractor has been advised by DOL that it has no serious, repeated, willful, and/or pervasive labor law violations;

(*2*) The subcontractor has been advised by DOL that it has serious, repeated, willful, and/or pervasive labor law violations; and

(*i*) DOL has advised that a labor compliance agreement is not warranted because, for example, the subcontractor has initiated and implemented its own remedial measures;

(*ii*) The subcontractor has entered into a labor compliance agreement(s) with an enforcement agency and states that it has not been notified by DOL that it is not complying with its agreement; or

(*iii*) The subcontractor has agreed to enter into a labor compliance agreement or is considering a labor compliance agreement(s) with an enforcement agency to address all disclosed labor law violations that DOL has determined to be serious, willful, repeated, and/or

pervasive labor law violations and has not been notified by DOL that it has not entered into an agreement in a reasonable period; or

(*3*) The subcontractor disagrees with DOL's advice (*e.g.,* that a proposed labor compliance agreement is warranted), or with DOL's notification that it has not entered into a labor compliance agreement in a reasonable period or is not complying with the agreement, and the subcontractor has provided the Contractor with—

(*i*) Information about all the disclosed labor law violations that have been determined by DOL to be serious, repeated, willful, and/or pervasive;

(*ii*) Such additional information that the subcontractor deems necessary to demonstrate its responsibility, including mitigating factors, remedial measures such as subcontractor actions taken to address the labor law violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws;

(*iii*) A description of DOL's advice or a description of an enforcement agency's proposed labor compliance agreement; and

(*iv*) An explanation of the basis for the subcontractor's disagreement with DOL.

(5) If the Contractor determines that the subcontractor has a satisfactory record of integrity and business ethics based on the information provided pursuant to paragraph (c)(4)(ii)(C)(*3*), or the Contractor determines that due to a compelling reason the contractor must proceed with subcontract award, the Contractor shall notify the Contracting Officer of the decision and provide the following information in writing:

(i) The name of the subcontractor.

(ii) The basis for the decision, *e.g.,* relevancy to the requirement, urgent and compelling circumstances, to prevent delays during contract performance, or when only one supplier is available to meet the requirement.

(6) If DOL does not provide advice to the subcontractor within three business days of the subcontractor's disclosure of labor law decision information pursuant to paragraph (c)(3)(ii) and DOL did not previously advise the subcontractor that it needed to enter into a labor compliance agreement to address labor law violations, the Contractor may proceed with making a responsibility determination using available information and business judgment.

(d) *Subcontractor updates.* (1) The Contractor shall require subcontractors to determine, semiannually, whether labor law decision disclosures provided to DOL pursuant to paragraph (c)(3)(ii) of this clause are current, accurate, and complete. If the information is current, accurate, and complete, no action is required. If the information is not current, accurate, and complete, subcontractors must provide revised information to DOL, in accordance with paragraph (c)(3)(iv) of this clause, and make a new representation and provide information to the Contractor pursuant to paragraph (c)(4)(ii) of this clause to reflect any advice provided by DOL or other actions taken by the subcontractor.

(2) The Contractor shall further require the subcontractor to disclose during the course of performance of the subcontract any notification by DOL, within 5 business days of such notification, that it has not entered into a labor compliance agreement in a reasonable period or is not complying with a labor compliance agreement, and shall allow the subcontractor to provide an explanation and supporting information for the delay or non-compliance.

(3) The Contractor shall consider, in a timely manner, information obtained from subcontractors pursuant to paragraphs (d)(1) and (2) of this clause, and determine whether action is necessary.

(4) If the Contractor has been informed by the subcontractor of DOL's assessment that the subcontractor has not demonstrated compliance with labor laws, and the Contractor decides to continue the subcontract, the Contractor shall notify the Contracting Officer of its decision to continue the subcontract and provide the following information in writing:

(i) The name of the subcontractor; and

(ii) The basis for the decision, *e.g.,* relevancy to the requirement, urgent and compelling circumstances, to prevent delays during contract performance, or when only one supplier is available to meet the requirement.

(e) *Consultation with DOL and other enforcement agencies.* The Contractor may consult with DOL and enforcement agency representatives, using DOL Guidance at *www.dol.gov/fairpayandsafeworkplaces*, for advice and assistance regarding assessment of subcontractor labor law violation(s), including whether new or enhanced labor compliance agreements are warranted. Only DOL and enforcement agency representatives are available to consult with Contractors regarding subcontractor information. Contracting Officers or Agency Labor Compliance Advisors may assist with identifying the appropriate DOL and enforcement agency representatives.

(f) *Protections for subcontractor misrepresentations.* A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements.

(g) *Subcontractor flowdown.* If the Government's solicitation included the provision at 52.222–58, the Contractor shall include the substance of paragraphs (a), (c), (d), (e), (f) and (g) of this clause, in subcontracts with an estimated value exceeding $500,000, at all tiers, for other than commercially available off-the-shelf items.

(End of clause)

■ 23. Add section 52.222–60 to read as follows:

52.222–60 Paycheck Transparency (Executive Order 13673).

As prescribed in 22.2007(d), insert the following clause:

Paycheck Transparency (Executive Order 13673) (OCT 2016)

(a) *Wage statement.* In each pay period, the Contractor shall provide a wage statement document (*e.g.* a pay stub) to all individuals performing work under the contract subject to the wage records requirements of any of the following statutes:

(1) The Fair Labor Standards Act.

(2) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (formerly known as the Davis Bacon Act).

(3) 41 U.S.C. chapter 67, Service Contract Labor Standards (formerly known as the Service Contract Act of 1965).

(b) *Content of wage statement.* (1) The wage statement shall be issued every pay period and contain—

(i) The total number of hours worked in the pay period;

(ii) The number of those hours that were overtime hours;

(iii) The rate of pay (*e.g.,* hourly rate, piece rate);

(iv) The gross pay; and

(v) Any additions made to or deductions taken from gross pay. These shall be itemized. The itemization shall identify and list each one separately, as well as the specific amount added or deducted for each.

(2) If the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), the hours worked and overtime hours contained in the wage statement shall be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid.

(3) The wage statement provided to an individual exempt from the overtime compensation requirements of the Fair Labor Standards Act (FLSA) need not

include a record of hours worked, if the Contractor informs the individual in writing of his or her overtime exempt status. The notice may not indicate or suggest that DOL or the courts agree with the Contractor's determination that the individual is exempt. The notice must be given either before the individual begins work on the contract, or in the first wage statement under the contract. Notice given before the work begins can be a stand-alone document, or can be in an offer letter, employment contract, or position description. If during performance of the contract, the Contractor determines that the individual's status has changed from non-exempt to exempt from overtime, it must provide the notice to the individual before providing a wage statement without hours worked information or in the first wage statement after the change.

(c) *Substantially similar laws.* A Contractor satisfies this wage statement requirement by complying with the wage statement requirement of any State or locality (in which the Contractor has employees) that has been determined by the United States Secretary of Labor to be substantially similar to the wage statement requirement in this clause. The determination of substantially similar wage payment states may be found at *www.dol.gov/fairpayandsafeworkplaces*.

(d) *Independent contractor.* (1) If the Contractor is treating an individual performing work under the contract as an independent contractor (*e.g.,* an individual who is in business for him or herself or is self-employed) and not as an employee, the Contractor shall provide a written document to the individual informing the individual of this status. The document may not indicate or suggest that the enforcement agencies or the courts agree with the Contractor's determination that the worker is an independent contractor. The Contractor shall provide the document to the individual either at the time an independent contractor relationship is established with the individual or prior to the time the individual begins to perform work on the contract. The document must be provided for this contract, even if the worker was notified of independent contractor status on other contracts. The document must be separate from any independent contractor agreement between the Contractor and the individual. If the Contractor determines that a worker's status while performing work on the contract changes from employee to independent contractor, then the Contractor shall provide the worker with notice of independent contractor status before the worker performs any work under the contract as an independent contractor.

(2) The fact that the Contractor does not make social security, Medicare, or income tax withholding deductions from the individual's pay and that an individual receives at year end an IRS Form 1099-Misc is not evidence that the Contractor has correctly classified the individual as an independent contractor under the labor laws.

(e) *Notices*—(1) *Language.* Where a significant portion of the workforce is not fluent in English, the Contractor shall provide the wage statement required in paragraph (a) of this clause, the overtime exempt status notice described in paragraph (b)(3) of this clause, and the independent contractor notification required in paragraph (d) of this clause in English and the language(s) with which the significant portion(s) of the workforce is fluent.

(2) *Electronic notice.* If the Contractor regularly provides documents to its workers by electronic means, the Contractor may provide to workers electronically the written documents and notices required by this clause. Workers must be able to access the document through a computer, device, system or network provided or made available by the Contractor.

(f) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (f), in all subcontracts that exceed $500,000, at all tiers, for other than commercially available off-the-shelf items.

(End of clause)

■ 24. Add section 52.222–61 to read as follows:

52.222–61 Arbitration of Contractor Employee Claims (Executive Order 13673).

As prescribed in 22.2007(e), insert the following clause:

Arbitration of Contractor Employee Claims (Executive Order 13673) (OCT 2016)

(a) The Contractor hereby agrees that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment, shall only be made with the voluntary consent of employees or independent contractors after such disputes arise.

(b) This does not apply to—

(1) Employees covered by a collective bargaining agreement negotiated between the Contractor and a labor organization representing the employees; or

(2) Employees or independent contractors who entered into a valid contract to arbitrate prior to the Contractor bidding on a contract containing this clause, implementing Executive Order 13673. This exception does not apply:

(i) If the contractor is permitted to change the terms of the contract with the employee or independent contractor; or

(ii) When the contract with the employee or independent contractor is renegotiated or replaced.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts that exceed $1,000,000. This paragraph does not apply to subcontracts for commercial items.

(End of clause)

■ 25. Amend section 52.244–6 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (c)(1)(xiii) through (xv) as paragraphs (c)(1)(xv) through (xvii), respectively; and

■ c. Adding new paragraphs (c)(1)(xiii) and (xiv).

The revision and additions read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (OCT 2016)

* * * * *

(c)(1) * * *

(xiii) 52.222–59, Compliance with Labor Laws (Executive Order 13673) (OCT 2016), if the estimated subcontract value exceeds $500,000, and is for other than commercially available off-the-shelf items.

(xiv) 52.222–60, Paycheck Transparency (Executive Order 13673) (OCT 2016), if the estimated subcontract value exceeds $500,000, and is for other than commercially available off-the-shelf items.

* * * * *

[FR Doc. 2016–19676 Filed 8–24–16; 8:45 am]

BILLING CODE 6820–EP–P

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHEAST TEXAS, *et al*,	§	
Plaintiffs	§	NO. 16-CV-00425
vs.	§	
ANNE RUNG, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, *et al*.	§	
Defendants.		

AFFIDAVIT

I, Ben Brubeck, being duly sworn, hereby state the following based on personal knowledge:

1. I am the Vice President of Regulatory, Labor and State Affairs of Associated Builders and Contractors, Inc. ("ABC"), one of the Plaintiffs in the pending case known as *Associated Builders and Contractors of Southeast Texas v. Rung*, Case No. 16-cv-00425.
2. ABC represents nearly 21,000 member contractors and related firms both in Texas and throughout the country, who share the philosophy that work in the construction industry should be awarded and performed on the basis of merit, without regard to labor affiliation. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work

in the industrial and commercial sectors. ABC of Southeast Texas ("ABCSETX") is a chapter of ABC whose headquarters and principal place of business is located in Nederland, Jefferson County, Texas.

3. ABCSETX and ABC as a whole represent many businesses that regularly bid on and are awarded government contracts exceeding the threshold amounts covered by the Executive Order, FAR Rule, and DOL Guidance. According to recent data posted on the official government website www.usaspending.gov, ABC members were awarded and successfully performed more than half of all construction contracts awarded by the U.S. government exceeding $25 million from FY2009 to FY2015, with a total value of work performed exceeding $39.8 billion dollars.

4. Many ABC members are performing and regularly bid on new solicitations for government construction projects of $500,000 or more and many ABC members also are performing and regularly bid on new solicitations of $50 million or more. These ABC members desire and intend to bid on solicitations that are expected to be issued by the U.S. government contracting agencies after October 25, 2016, which is the effective date of the new FAR Rule published at 81 Fed. Reg. 58562, implementing Executive Order 13673 (entitled "Fair Pay and Safe Workplaces").

5. However, as a result of the Executive Order and the new FAR Rule, absent injunctive relief, ABC's government contractor members will be compelled as a condition of bidding on and performing federal government contracts to publicly disclose any violations of a list of 14 labor laws that they are alleged to have committed, as defined in the Executive Order, the new FAR Rule, and new Guidance issued by the Department of Labor, published at 81 Fed. Reg. 58654. The newly required public

disclosures include "administrative merits determinations," which are not final adjudications and typically are mere allegations of violations by administrative agencies as to which no hearing has been held or which may have been settled with no admission of any liability.

6. By being compelled to make the public disclosures of alleged labor law violations called for by the Executive Order, the FAR Rule, and the DOL Guidance, ABC's government contractor members will be required to stigmatize themselves publicly as labor law violators, even with regard to those allegations that they are contesting before a labor agency or in the courts, and even with regard to those allegations that they have settled without any hearing. Such compelled speech infringes the First Amendment rights of ABC's government contractor members causing irreparable harm.

7. As trade associations representing federal government contractors in Texas and around the country, ABCSETX and ABC each have standing to bring this action on behalf of their members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' government contractor members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3) neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

8. ABC's government contractor members would otherwise have standing to sue in their own right because they will suffer imminent harm under the Executive Order, FAR Rule, and DOL Guidance. Specifically, they will be unable to bid on or continue to

perform government contracts unless they comply with the unlawful compelled speech requirements of the Executive Order, FAR Rule, and DOL Guidance, thereby being forced to publicly stigmatize themselves as labor law "violators" as a condition of bidding on and performing government contracts, in violation of the First Amendment.

9. The First Amendment violation will irreparably harm ABC's members immediately by virtue of the public disclosure requirement, regardless of whether they are ultimately disqualified by government contracting officers as a result of the alleged "violations" that are publicly disclosed. They will also be exposed to reputational harm and exploitation by competitors and antagonistic labor organizations who have already announced their intent to monitor the government website in order to further publicize any violations that government contractors are compelled to report.

10. In a recent survey of ABC's membership, 51 percent of respondents said the FAR Rule's onerous requirements, including reporting alleged violations that firms are still contesting, will force them to abandon the pursuit of federal contracts. 91 percent of respondents said the Rule will impose a significant or extreme burden on their firms.

11. The interests at stake are germane to ABC's principles, which include the mission of advocating on behalf of our members and the principles of full and open competition for construction work based on merit, for the betterment of the construction industry as a whole and the taxpayers who ultimately pay for government construction projects.

12. The claims asserted and relief requested by ABC in this lawsuit do not require participation of our members because ABC's Complaint is a facial challenge to the

Executive Order, FAR Rule, and DOL Guidance based upon their unlawful departure from the statutory authority delegated by Congress under the Procurement Act and the 14 different labor laws at issue and violations of the Constitution, including the First Amendment and Fifth Amendment (Due Process). The Complaint is entirely based on principles of law and the Administrative Record and thus requires no individual employer participation.

I have read the foregoing statement and swear under penalties of perjury that it is true.

Ben Brubeck

10/12/16

Ben Brubeck

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHEAST TEXAS, *et al*,	§	
Plaintiffs	§	NO. 16-CV-00425
vs.	§	
ANNE RUNG, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, et al.	§	
Defendants.		

AFFIDAVIT

I, Stephen Amitay, being duly sworn, hereby state the following based on personal knowledge:

1. I am the Executive Director of the National Association of Security Companies ("NASCO"), one of the Plaintiffs in the pending case known as Associated *Builders and Contractors of Southeast Texas v. Rung*, Case No. 16-cv-00425.

2. NASCO is the nation's largest contract security trade association, whose member companies employ more than 400,000 of the nation's most highly trained security officers servicing every business sector. Founded in 1972, NASCO strives to increase awareness and understanding among policy-makers, consumers, the media and the general public of the important role of private security in safeguarding persons and property. At the same time, NASCO is the leading advocate for raising standards for the licensing of private security firms and the registration, screening, and training of security officers, and has

collaborated with legislators and officials at every level of government to implement higher standards for companies and officers.

3. NASCO members provide security officers and other security related services to numerous federal agencies for the protection of a wide range of federal facilities and assets and the employees and visitors in those facilities. A significant number of NASCO members are performing and regularly bid on new solicitations for government security services contracts above $500,000, and a significant number of NASCO members also are performing and regularly bid on new solicitations above $50 million dollars. These NASCO members desire and intend to bid on solicitations that are expected to be issued by the U.S. government contracting agencies after October 25, 2016, which is the effective date of the new FAR Rule published at 81 Fed. Reg. 58562, implementing Executive Order 13673 (entitled "Fair Wage and Safe Workplaces").

4. However, as a result of the Executive Order and the new FAR Rule, absent injunctive relief, NASCO's government contractor members will be compelled as a condition of bidding on and performing federal government contracts to publicly disclose any violations of a list of fourteen labor laws that they are alleged to have committed, as defined in the Executive Order, the new FAR Rule, and new Guidance issued by the Department of Labor, published at 81 Fed. Reg. 58654. The newly required public disclosures include any "administrative merits determinations" which are not final adjudications and are typically merely allegations of violations by administrative agencies as to which no hearing has been held or which may have been settled with no admission of any liability.

5. By being compelled to make the public disclosures of alleged labor law violations called for by the Executive Order, the FAR Rule, and the DOL Guidance, NASCO's government contractor members will be required to stigmatize themselves publicly as labor law violators, even as to those allegations that they are contesting before a labor agency or in the courts, and even as to those allegations that they have settled without any hearing. Such compelled speech infringes the First Amendment rights of NASCO's government contractor members causing irreparable harm.

6. As a trade association representing security companies who perform federal government contract in Texas and around the country, NASCO has standing to bring this action on behalf of its members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' government contractor members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3) neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

7. NASCO's government contractor members would otherwise have standing to sue in their own right because they will suffer imminent harm under the Executive Order, FAR Rule, and DOL Guidance. Specifically, they will be unable to bid on or continue to perform government contracts unless they comply with the unlawful compelled speech requirements of the Executive Order, FAR Rule, and DOL Guidance, thereby being forced to publicly declare themselves to be labor law "violators" as a condition of bidding on and performing government contracts, in violation of the First Amendment.

8. The First Amendment violation will immediately and irreparably harm NASCO's members by virtue of the public disclosure requirement, regardless of whether they are ultimately disqualified by government contracting officers as a result of the alleged "violations" that are publicly disclosed. NASCO's members will also be exposed to reputational harm and exploitation by competitors and antagonistic labor organizations who have already announced their intent to monitor the government website in order to further publicize any violations that government contractors are compelled to report.

9. The interests at stake are germane to NASCO's principles, which include the goal of increased recognition of the important role of private security in safeguarding government persons and property. NASCO also seeks greater collaboration with every level of government to implement higher security standards at a time when the security threats faced by government agencies are greater than ever before.

10. The claims asserted and relief requested by NASCO in this lawsuit do not require participation of our members because NASCO's Complaint is a facial challenge to the Executive Order, FAR Rule, and DOL Guidance based upon their unlawful departure from the statutory authority delegated by Congress under the Procurement Act and the fourteen different labor laws at issue and violations of the Constitution, including the First Amendment and Fifth Amendment (Due Process). The Complaint is entirely based on principles of law and the Administrative Record and thus requires no individual employer participation.

I have read the foregoing statement and swear under penalties of perjury that it is true.

Stephen Amitay

Stephen Amitay

October 11, 2016

Date

June 15, 2016

VIA HAND DELIVERY

Hon. Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
1650 Pennsylvania Ave., N.W.
Washington, D.C. 20503

Re: FAR Case 2014-025, Supplemental Comments on the Proposed Federal Acquisition Regulation; Federal Pay and Safe Workplaces (RIN 9000-AM81); Supplemental Comments on the Proposed Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" (ZRIN 1290-ZA02)

Dear Mr. Shelanski:

In connection with our meeting in your office on this date attended by representatives of the Federal Acquisition Regulatory (FAR) Council and the Department of Labor, Associated Builders and Contractors, Inc. (ABC) submits the following supplemental comments in response to the above-referenced Notice of Proposed Rulemaking (NPRM or Proposed Rule), published in the Federal Register on May 28, 2015 by the FAR Council, and to the Department of Labor's Notice of Proposed Guidance (NPG or Proposed Guidance) published the same day.

As you know, the NPRM/NPG seeks to implement Executive Order 13673 ("Fair Pay and Safe Workplaces"), by amending 48 CFR parts 1, 4, 9, 17, 22, and 52. ABC previously filed comments opposing all of the proposed amendments as unlawful, impracticable and extremely burdensome to taxpayers and to government contractors, particularly small businesses in the construction industry.

The purpose of these supplemental comments is not to repeat what ABC and other interested parties have already stated for the record[1], but to focus on legal developments since those comments were filed. The comments provide additional grounds for stopping the Proposed Rule, or anything like it, from being issued as a Final Rule.

In particular, we wish to bring to your attention recent case law raising serious First Amendment concerns about the Proposed Rule's attempt to compel employers to publicly declare themselves to be labor law "violators." Finally, we present new information concerning

[1] ABC incorporates comments filed to the docket on August 26, 2015, into this letter by reference. Comments located at Docket ID FAR-2014-0025-0749 and Docket ID DOL-2015-0002-0085.

the burdensome impact of the Propose Rule on small businesses and the procurement process itself.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. -ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar.

Many ABC members currently perform federal government contracts exceeding the threshold for coverage by the NPRM/NPG. Indeed, a recent review of federal government construction contracts listed at USASpending.gov indicated that ABC members performed almost 56 percent of all federal government prime construction contracts exceeding $25 million from FY2009-FY2015.[2]

ABC's Supplemental Comments

1. Under Recent Case Law, The Proposed Rule's Compulsion Of Speech By Government Contractors Violates The First Amendment.

As previously noted, the Executive Order and the Proposed Rule impose an immediate reporting requirement that obligates federal contractors and their subcontractors for the first time to disclose any "violations" of 14 federal labor laws and an unspecified number of additional state laws occurring in the three years prior to any covered procurement for government contracts/subcontracts. As interpreted by the Department of Labor, this will require contractors/subcontractors to include among their disclosed violations an unprecedented list of court actions, arbitrations, and "administrative merits determinations," even where there has been no final adjudication of any violation at all. Not only does this new requirement conflict with many of the federal labor laws themselves in a manner invoking principles of preemption, but the Proposed Rule also infringes on contractors' rights under the First Amendment, because the Rule would coerce speech on the part of the contractors.

In *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), rehearing *en*

[2] http://www.thetruthaboutplas.com. As reported on January 28, 2016, ABC members performed 626 federal construction contracts exceeding $25 million from FY2009-FY2015, with a total value of almost $40 billion.

banc denied, 2015 U.S. App. LEXIS 19539 (D.C. Cir. Nov. 9, 2015), the D.C. Circuit held that an SEC rule requiring private businesses to disclose their use of "conflict minerals" (minerals obtained from war zones) violated the First Amendment. The appeals court distinguished its previous holding in *American Meat Institute v. U.S. Department of Agriculture ("AMI")*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), which had applied a more relaxed standard of review to governmentally compelled disclosures that are "purely factual and uncontroversial information about a service being offered." 800 F.3d at 527. With regard to compelled disclosure of "controversial" information, the D.C. Circuit in the *NAM v. SEC* case held that the government bears a heavy burden to prove that such disclosures are narrowly tailored to support a compelling government interest. As the appeals court stated: "Requiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so." *Id.* at 530.

The Rule now being considered by Office of Information and Regulatory Affairs (OIRA) shares the same constitutional defect as the conflict minerals rule in *NAM v. SEC*. Here too, the Proposed Rule compels government contractors to "publicly condemn" themselves by stating that they have violated one or more labor or employment laws. Such a disclosure cannot be characterized as "factual and noncontroversial," particularly where the disclosures are not limited to matters that have received final adjudications in the courts. As previously noted in ABC's comments, the Proposed Rule defines "administrative merits determinations" as including many *claimed* violations that may turn out not to be violations at all.[3] The Proposed Rule nevertheless requires government contractors to declare themselves to have violated the laws in question even while they are contesting whether any violations have in fact occurred. Such compelled disclosures, under the holding of *NAM v. SEC*, plainly violate the First Amendment. *See also Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 797 (1988); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (all cases cited in *NAM v. SEC* for the principle that "freedom of speech prohibits the government from telling people what they must say.").

First Amendment violations of the sort imposed by the Proposed Rule have been found to constitute irreparable harm justifying preliminary injunctive relief. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).[4] In order to avoid the government spending resources in litigation, OIRA

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[3] As noted in its original comments, a survey of ABC's membership found that more than 12 percent of the respondents had been falsely accused of violating one of the 14 labor laws. This is consistent with statistics derived from published data of the NLRB, EEOC and the Department of Labor whose initiating complaints, cause determinations, and charging letters are now being put forward by the NPRM/NPG as potential grounds for disqualification from government contracts. See Docket ID FAR-2014-0025-0749, page 8.

[4] The chilling effect of the Proposed Rule's compelled disclosures was discussed in ABC's previous comments, which noted that ABC member contractors are predominately nonunion employers who are regularly targeted by construction trades unions for so-called "corporate" or "comprehensive" campaigns. These campaigns consist in large part of union efforts to destroy a targeted company's reputation by filing

should direct that the compelled disclosure requirements of the Proposed Rule be withdrawn.

2. Recent Surveys Indicate The Proposed Rule Will Harm Small Businesses And Reduce The Government's Procurement Choices

ABC has surveyed its membership in order to assess the impact of the Proposed Rule on federal contractors. More than 57 percent of the survey respondents believe that the proposals, if finalized as proposed, will compel them to abandon the pursuit of federal contracts. 94 percent of respondents believe the NPRM/NPG would make them less likely to pursue federal contracts. Finally, 99 percent of the respondents believe the new proposals will make the federal contracting process less efficient and 98 percent believe the proposals will make federal contracting more expensive."[5]

To put this into perspective, from FY2009-FY2015, ABC member prime contractors won 56 percent of large-scale federal contracts. In other words, 626 prime contracts valued at roughly $40 billion (63.65 percent of total value) were won by ABC members. With the loss of these qualified and experienced prime contractors expected to result from the proposal, the federal government would experience increased costs, reduced competition and lower quality construction projects.

These findings directly contradict the NPRM/NPG claim that the Rule will promote "economy and efficiency in procurement." To the contrary, the new proposals can only impose new burdens on contractors, Contracting Officers, Agency Labor Compliance Advisors, the federal acquisition workforce and entire federal procurement process. Compliance with these proposals will require time-consuming and highly subjective analyses of complex and specialized legal concepts that appear in each of the 14 federal laws subject to the NPRM/NPG for a period of three years before a contract is offered and every six months during a new contract.

Private and public resources should not be spent to require contractors to file public reports in this manner when the federal government already has sufficient data on whether offerors have violated federal labor laws. The pre-award review as proposed will result in uncertainty for both contractors and the government, and will delay the procurement process. The NPRM does not explain how Contracting Officers or contractors will be able to navigate the labyrinth of requirements in a timely manner without unduly delaying the procurement process.

Conclusion

For each of the reasons set forth above, and in its attached original comments, ABC urges OIRA to direct that the Rule be withdrawn or at least held in abeyance. The FAR Council and DOL should withdraw or substantially revise their unlawful and unwise proposals. Thank you for

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numerous unsubstantiated charges of labor law violations. The proposals play directly into the hands of malicious third parties who seek to put unfair pressure on employers, because mere allegations of labor law violations could result in disqualification of targeted government contractors under the NPRM/NPG.

[5] Source: Findings of July 2015 Survey of ABC membership on proposed Blacklisting rule.

meeting with ABC's representatives and allowing us to submit these additional comments on this matter.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHEAST TEXAS, *et al*,	§	
Plaintiffs	§	NO. 16-CV-00425
vs.	§	
ANNE RUNG, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, *et al*.	§	
Defendants.		

ORDER GRANTING PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Pending before the Court is Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction Having considered the Motion, Defendants' Opposition, and Plaintiffs' Reply, and supporting evidence submitted by both sides, the Court grants the requested injunction and preliminarily enjoins implementation of Executive Order 13673, as implemented by the FAR Rule published at 81 Fed. Reg. 58562 (Aug. 25, 2016); and the United States Department of Labor's ("DOL's") guidance regarding the FAR Rule, incorporated by reference therein, 81 Fed. Reg. 58654 (Aug. 25, 2016). Due to the time sensitive nature of these proceedings, this Order will stay the effective date of the FAR Rule and DOL Guidance, with a more detailed written decision explaining the Court's reasoning to follow.

At this stage, Plaintiffs' have satisfied all prerequisites for a preliminary injunction. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009); Fed. R. Civ. P. 65(d). Plaintiffs have demonstrated a likelihood of success on the merits; they have shown irreparable harm due to infringement of their First Amendment and Fifth Amendment rights; the balance of harms favors Plaintiffs; and the public interest supports issuance of an injunction to maintain the status quo of many decades pending a final decision on the merits. This Court has authority to enjoin the implementation of Executive Order 13673 on a nationwide basis and finds that it is appropriate to do so in this case. *See Texas v. U.S.*, 809 F.3d 134, 188 (5th Cir. 2015).