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Comments on Regulations and Guidance Implementing the “Fair Pay and Safe Workplaces” Executive Order

Dear Ms. Jones and Ms. Flowers:

Thank you for the opportunity to submit comments on the proposed rulemaking—FAR Case 2014-025—and guidance—ZRIN 1290-ZA02—to implement President Barack Obama’s “Fair Pay and Safe Workplaces” executive order, or EO 13673. CAPAF supports the regulations and guidance, which promise to help ensure that federal contractors respect their workers and comply with workplace laws before they receive federal contracts.

The federal government—which contracts out hundreds of billions of dollars’ worth of goods and services every year—must only contract with companies that have “a satisfactory record of performance, integrity, and business ethics.”¹ But the contracting system does not effectively review the responsibility records of companies before awarding contracts, nor does it adequately impose conditions on violators that encourage them to reform their practices. Instead, the federal government all too often awards contracts to workplace violators with no strings attached.

As a result, contractors that violate wage and workplace safety laws have little incentive to improve their practices. Even companies with the most egregious violations of workplace laws continue to receive federal contracts—the government awarded \$81 billion in federal contracts to these companies in fiscal year 2012 alone, according to a 2013 report from the Senate Committee on Health, Education, Labor, and Pensions.²

This not only harms workers—many of whom have been killed, injured, and short-changed tens of millions of dollars by law-breaking contractors—but also taxpayers. A 2013 report from the Center for American Progress Action Fund shows that contracting with companies that have egregious records of workplace violations also frequently results in poor contract performance.³

While this CAPAF analysis represents new evidence that companies who flout workplace laws also often show disregard for taxpayer value, this evaluation was not the first to find this link. Thirty years ago, the U.S. Department of Housing and Urban Development, or HUD, found a “direct correlation between labor law violations and poor quality construction” on HUD projects and discovered that these quality defects contributed to excessive maintenance costs.⁴

EO 13673 promises to protect workers, ensure taxpayers receive good value, and help law-abiding businesses compete on an even playing field by creating a fair and consistent process to review the responsibility records of federal contractors. The order is informed by best practices from state and local governments, private-sector companies, and—in limited instances—federal government agencies, which have both improved contract performance and protected workers.⁵

The draft regulations and guidance put forth by the Obama administration represent an important step toward ensuring that the federal government is able to achieve the intent of the order.

The Federal Acquisition Regulatory, or FAR, Council draft regulations detail a process whereby contractors and subcontractors will disclose workplace law violations. The government will use this information to assess contractors’ past violations and, when necessary, help contractors and subcontractors come into compliance with workplace laws and prevent future violations. In order to ensure that contracting officers and supporting staff and agencies have the tools they need to interpret contractors’ records, the U.S. Department of Labor guidance focuses on defining labor violations; how to determine whether a labor violation is reportable; and how to analyze the severity of labor violations.

CAPAF applauds the FAR Council and the Department of Labor for offering robust draft language and strongly supports its implementation in order to help create a robust and efficient responsibility review process. Below, CAPAF offers specific recommendations on how the FAR Council and the department can strengthen the final regulations and guidance even further. CAPAF also urges the Obama administration to move swiftly to issue guidance and regulations by the end of the year in order to ensure that companies report on violations of equivalent state laws.

Strengthen remedies to ensure that contractors come into compliance

EO 13673 establishes a review process to help companies with significant workplace law violations clean up their acts. Such companies may enter into new federal contracts after reaching a labor compliance agreement, or LCA, with the Department of Labor. Yet, the draft regulations do not provide sufficient guidance on what will be included in an LCA in order to ensure that the agreements change company behavior. Nor do the regula-

tions provide strong enough remedies to ensure that companies enter into and comply with these agreements. Without strong remedies, contractors with labor law violations may have insufficient incentives to clean up their acts.

First, the draft regulations should include more specific guidance on what will be included in an LCA in order to ensure future compliance with workplace laws. Currently, the draft regulations specify that the LCAs will address “appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or other related matters.”⁶ In addition to remedies for workplace law violations, LCAs should be required to include plans to safeguard against future violations—including enhanced reporting requirements—as well as notice and protections for workers. Taking these steps will help to ensure that workers feel empowered to report violations without employer retaliation and have access to neutral and balanced processes to address any complaints. Contractors and subcontractors should also be required to provide information and training to employees and management officials.

Other types of agreements between agencies and contractors—such as the Office of Federal Contract Compliance Programs’ conciliation agreements and contracting-agency administrative agreements—can include these sorts of measures to ensure future compliance.⁷

Second, in order to ensure that companies comply with the requirements of an LCA, the final regulations should make it clear that the LCAs operate as mandatory contract clauses. Doing so will ensure that the agreements are enforceable regardless of whether the contracting agency remembers to include a clause⁸ and will clarify the executive order’s requirement that contracting officers continue to monitor compliance throughout the life of the contract. This change is consistent with other provisions in the draft regulations—such as compliance representation and subcontractor responsibility determination requirements—which already operate as mandatory contract clauses.

Third, CAPAF supports the FAR Council’s alternative supplemental language, which would add consideration of a contractor’s compliance with workplace laws into the evaluation of a contractor’s performance. The language would make sure that refusal by a contractor or one of its subcontractors to enter into an LCA or failure to comply with the terms of an LCA would be factored into the company’s performance evaluation.

Bolstering these remedies will help ensure that the executive order is able to change contractors’ behavior.

Create a process for stakeholder input

The responsibility review system will depend on honest and accurate disclosure by federal contractors in order to function properly. Yet, without appropriate checks on contractor reporting, companies with violations will not have sufficient incentives to provide accurate information. For this reason, the final regulations must create a process for the submission and review of relevant information from stakeholder groups.

The executive order supports stakeholder involvement by allowing labor law compliance information to come from both company reporting and “other sources.” For example, Section 2 (b)(ii) states:

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.⁹

Yet, the draft regulations provide no guidance on how third parties would report these violations or how and when contracting officers would be required to consider them. Similarly, there is no process for third parties to report violations of LCAs, as well as the forced arbitration or paycheck transparency provisions.

The responsibility review process will only function properly if there is a thorough process for reviewing third-party information.

The final regulations should specify that “other sources” include individual workers, unions, community groups, and other worker advocates. They should allow third parties to report violations of labor laws or LCAs, as well as misrepresentations regarding mitigation efforts both while bidders are being reviewed and over the performance of a contract.

Agency labor compliance advisors should be the primary point of contact for third parties and should be required to consider and respond to all credible evidence presented by other sources. Just as with any other disclosure, the compliance advisors would work with the Department of Labor when necessary to investigate allegations. Agency labor compliance advisors should also be instructed to reach out to third parties who may have information relevant to a responsibility determination. Moreover, findings of violations uncovered by third-party reporting should result in the same consequences for contracting companies as if a contracting officer had directly discovered them. When these violations are found, they should trigger an investigation into whether a company misrepresented their record.

Improve disclosure to the government and to the public

The draft regulations and guidance significantly improve responsibility reporting requirements and public disclosure. Yet, as currently written, the regulations would permit a contractor to avoid reporting on its full record of labor law violations. Moreover, limitations on public disclosure would prevent other stakeholders from verifying that company disclosures are accurate, which may lead to abuse by contractors with violations.

The final regulations should strengthen disclosures to the government and the public in order to ensure that companies report on their entire legal record and that stakeholders are able to report incomplete or inaccurate reporting.

First, the final regulations should more clearly define the term “contractor” or “offeror” so that it includes all of a company’s operating entities and affiliates. This will help ensure that contractors report on their entire compliance record. Companies often conduct their public contracting work through a legally separate entity, such as a subsidiary, partnership, or a joint venture. Because the executive order is concerned with business ethics and responsibility, the final guidance and regulations should focus on the entity’s ownership and control rather than the corporate form it chooses to use for its bid.

Currently, the Department of Labor’s draft guidance makes it clear that repeated violations may be considered on a “company-wide basis,” and existing FAR regulations governing responsibility reviews state that “the contracting officer shall consider the affiliate’s past performance and integrity when they may adversely affect the prospective contractor’s responsibility.”¹⁰ However, the draft regulations do not specifically require bidders to report on labor violations across their entire corporate entity.

Without clarification in the final regulations governing what information shall be disclosed to the government, contractors could essentially evade the executive order’s intent of ensuring that the government contracts with responsible sources who comply with labor laws.

Second, the final regulations and guidance should also ensure contractors disclose to the government their full record of workplace law compliance—both on federal contracts and in the private sector. Yet, as written, the draft regulations create a significant loophole. The regulations require contractors to disclose violations of workplace laws that result in an administrative merits determination, arbitral award or decision, or civil judgment—regardless of whether they occurred on a federal contract or within the private sector.

However, criminal violations of workplace law are not addressed in the draft regulations, and existing acquisition regulations require contractors to only report on criminal workplace law violations if they occurred while performing a federal contract.¹¹ This would potentially exclude some of the most serious violations of workplace laws.

While the executive order does not specifically address criminal violations of workplace law, the Federal Acquisition Regulation already requires disclosure of other types of criminal violations regardless of whether they occurred during the performance of a federal contract.¹² 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.

Third, the government can ensure that companies provide the full account of their past violations by enumerating specific actions that the contracting officer may take when a company misrepresents the details of their past violations. The draft regulations provide that a contracting officer may terminate a contract when it is later determined that an offeror “knowingly rendered an erroneous representation” as to whether it had any reportable workplace law violations.¹³ However, there are no similar consequences for contractors that purposely omit information on the extent of their past violations.

Fourth, the regulations should require the public disclosure of a contractor’s entire record of workplace law violations, as well as any efforts to ensure future compliance. As drafted, the regulations do not require the public disclosure of a contractor’s documents showing that it has taken remedial actions after a workplace law violation. Currently, the regulations are also silent on whether administrative merits determinations, arbitral awards, LCAs, or civil judgments will be publicly disclosed.

In order to ensure that stakeholders can verify compliance, the final regulations should require public disclosure of all workplace law violations, as well as the existence and content of any LCAs. Moreover, documents submitted by bidders or contractors to demonstrate mitigation efforts should be made available to the public when requested, and the Department of Labor should regularly publish lists of companies where there are ongoing responsibility investigations, as well as the names of contractors that have not entered into an LCA in a timely manner or are not meeting the terms of an existing agreement.

Other types of agreements between agencies and contractors to rectify existing problems and ensure future compliance are currently made public. For example, administrative agreements are posted on the Federal Awardee Performance and Integrity Information System.¹⁴

Uphold a thorough review process of subcontracting companies

A significant portion of federal procurement spending flows through prime contractors to subcontractors. While these companies are doing the work of the government, they do not have a direct business relationship with the government.

For the executive order to function as intended, prime contractors must have sufficient incentive to hire responsible subcontractors that obey workplace laws. Without strong standards, law-breaking companies that make little effort to clean up their acts could continue to receive lucrative subcontracts.

The draft regulations contemplate two options for reviewing subcontractors: The first proposal holds prime contractors primarily responsible for reviewing any reported labor law violations, while an alternative proposal would require the Department of Labor to lead the review process.

In order to uphold a thorough review process while maintaining strong incentives for prime contractors to hire responsible contractors, the final regulations should create a process for prime contractors and the Department of Labor to partner in the responsibility determination process.

Prime contractors—with the power to exert pressure on subcontractor compliance—should make the ultimate decision on whether a subcontractor is responsible but must be required to consult with the Department of Labor if any prospective subcontractor discloses workplace law violations. In order to ensure that proper vetting occurs, prime contractors should also require subcontractors to provide all relevant information about any workplace law violations under oath to the Department of Labor.

Under this framework, prime contractors choosing to rely on the guidance of the Department of Labor would generally be provided a safe harbor and protected from being held responsible for any false information provided by subcontracting companies. Conversely, if a prime contractor disregards the advice of Department of Labor by hiring a subcontractor that has not come into compliance, it would assume the risk of being held responsible for the subcontractor's labor law violations during the period of contract performance and, consequently, face actions as if it had committed the violations itself. In addition, the subcontractor's violations would be factored into the prime contractor's future responsibility reviews and performance evaluations.

The Department of Labor should have up to 30 days to evaluate contractors with reported violations. Moreover, in order to alleviate the burden on the department's investigators and promote an efficient contracting process, subcontractors with labor law violations should be permitted to request a Department of Labor assessment prior to bidding on a subcontract and potentially enter into a LCA at that time.

The draft regulations contemplate such a process, stating that:

... contractors and subcontractors will be able to engage with DOL and enforcement agencies early in the process when contractors or subcontractors know that they have violations that may require remediation, so that the results of those engagements can be used by contracting officers to help determine responsibility, and used by contractors to help determine responsibility of subcontractors, without having these steps unnecessarily disrupt the procurement process.

However, the final regulations should make it clear that access to this process will be available to contractors and subcontractors at all tiers and include, if necessary, negotiation of an LCA. Also, the final regulations should clarify that prime contractors could accept these Department of Labor reviews as an indication that a prospective subcontractor is presently responsible as long as there has been no subsequent violations.

Finally, the phase in of the requirements on subcontractors should occur one year after the regulations are finalized. This will give prime contractors ample time to understand and incorporate the system.

Ensure that Department of Labor guidance captures all major violations of workplace laws

The Department of Labor guidance to assist federal agencies in the implementation of EO 13673 provides definitions that will allow the contracting agency and contracting officers to analyze the severity of labor violations.

CAPAF applauds the Department of Labor for offering detailed and robust draft language aimed at capturing all major violations. The current definitions of serious, repeated, willful, and pervasive violations are very strong. In order to ensure that no major violations fall through the cracks, CAPAF recommends that the Department of Labor strengthen the guidance even further in the ways detailed below.

First, the Department of Labor should strengthen the definition of “serious” violations by including all workplace law violations that cause or contribute to the death and life-threatening injury of a worker; clarifying that the proposed dollar threshold for fines and penalties is cumulative across provisions violated and workers affected; and stipulating 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.

Second, 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.

Third, the definition of “repeated” violations should be strengthened by clarifying that violations involving gender discrimination—including “sex,” “pregnancy,” “sexual orientation,” or “gender identity”—could be considered “substantially similar” and therefore repeated.¹⁵

The draft regulations already require that a violation will be considered substantially similar if it involves “the same or an overlapping protected status” even if they do not involve the same employment practices or arise under different statuses.¹⁶ However, the final definition would more accurately reflect the nature of bias if it allowed “sex,” “pregnancy,” “sexual orientation,” and “gender identity” to be considered overlapping statuses, since they may arise out of essentially the same gender bias.

Finally, CAPAF applauds the Department of Labor for including violations involving the termination of a worker for exercising a right protected under the covered laws as a violation of “particular gravity” that should be given greater weight. When a worker is fired for exercising their protected rights, it creates a chilling effect that deters others from exercising their own rights. The final guidance should also include “constructive discharge” in this category, since the effects on the workplace are often the same regardless of whether a worker is fired or an employer creates a work environment so hostile that the employee is essentially pushed out of their job.

Ensure that a contractor’s entire workforce is protected from forced arbitration requirements

EO 13673 limits the use of forced arbitration for employees of federal contractors in the case of civil rights claims and claims related to sexual assault or abuse. This limitation protects employees from discrimination and ensures that they retain access to the courts.

Arbitration can be a valid and effective method of dispute resolution when both parties voluntarily agree to arbitrate, but when an employer uses it to limit the legal rights of an unrepresented employee in a nonnegotiable contract, it becomes an abusive practice. Empirical studies find that workers compelled to arbitrate are less likely to win their case and win far less in damages than workers who are able to bring their cases to court.¹⁷

The final regulations should be strengthened to ensure that unrepresented workers employed by federal contractors are able to bring these cases to court if they so choose.

The final regulations should make clear that the prohibition on forced arbitration applies to a contractor’s entire unrepresented workforce—regardless of whether or not they work directly on the federal contract. For example, President Lyndon Johnson’s executive order 11246—which established requirements for nondiscriminatory practices in hiring and employment on the part of government contractors—applies to a federal contractor’s entire workforce.¹⁸

Also, if a contractor retains forced arbitration provisions for employment disputes other than those specifically prohibited by the executive order, the contractor should be barred from enforcing those remaining forced arbitration provisions in the event a dispute arises out of same set of facts under statutes both covered and not covered by forced arbitration.

Finally, the draft regulations provide that existing contractors will be permitted to keep their forced arbitration clauses unless changes are permitted or the contract is renegotiated or replaced. The final regulations should define those terms and require bidders to report on the continued use of forced arbitration provisions in order to provide some context for the contractor's disclosures.

Ensure that paycheck transparency requirements give workers meaningful information

The Department of Labor's guidance on paycheck transparency is critical to meeting the executive order's goal of ensuring fair pay and allowing workers and employers to efficiently resolve any errors in pay. In order to ensure that workers are given the information they need to review their status as an employee and understand whether they received the pay they earned, the final guidance should be strengthened in four ways.

First, the guidance should make clear that the terms used in the executive order paycheck transparency provision have the same meaning as they do under the Fair Labor Standards Act, or FLSA. Currently, neither the order nor the guidance includes definitions for these terms.

Second, the final guidance should require that employers provide information to workers both on their total pay and their regular rate of pay so that they may assess whether they have been paid correctly under the applicable laws. As proposed, for every pay period, the rule and guidance require a document listing an individual worker's hours, overtime hours, pay, and all additions to or deductions from pay—yet not their pay rate. Since employers are already required to keep this information under the FLSA, it is not a burden for them to disclose this information to their workers.

Third, the Department of Labor should ensure that the guidance upholds a strong transparency requirement for all workers by only recognizing state laws as "substantially similar" if they require wage statements to include the essential elements of overtime hours or overtime earnings, total hours, gross pay, rate of pay, and any specific additions or deductions.

Finally, the guidance should ensure that the written notice that informs workers of their status as independent contractors must also explain that they will not be entitled to overtime or the other protections of the FLSA.

Conclusion

CAPAF applauds the FAR Council and the Department of Labor for offering thorough draft regulations and guidance and strongly supports their implementation in order to help create a robust and efficient responsibility review process. The draft regulations and guidance represent an important step toward ensuring that the federal procurement process upholds strong responsibility standards that protect workers, ensure taxpayers receive good value, and help law-abiding businesses compete on an even playing field.

Sincerely,

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Endnotes

- 1 Acquisition.gov, "Federal Acquisition Regulation Section 9.1: Responsible Prospective Contractors," available at <https://www.acquisition.gov/?q=browsefar> (last accessed August 2015).
- 2 U.S. Senate Health, Education, Labor, and Pensions Committee, "Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk" (2013), available at <http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf>.
- 3 Karla Walter and David Madland, "At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers" (Washington: Center for American Progress, 2013), available at <https://www.americanprogressaction.org/issues/labor/report/2013/12/11/80799/at-our-expense/>.
- 4 Office of Inspector General, *Audit Report on Monitoring and Enforcing Labor Standards* (U.S. Department of Housing and Urban Development, 1983).
- 5 Karla Walter and David Madland, "Executive Order Protects Workers and Supports Law-Abiding Contractors," Center for American Progress Action Fund, July 31, 2014, available at <https://www.americanprogressaction.org/issues/labor/news/2014/07/31/94923/executive-order-protects-workers-and-supports-law-abiding-contractors/>.
- 6 U.S. Department of Defense, General Services Administration, and NASA, "Federal Acquisition Regulations: Fair Pay and Safe Workplaces," *Federal Register* 80 (102) (2015): 30548–30572, available at <http://www.regulations.gov/#!documentDetail;D=FAR-2014-0025-0001>.
- 7 For example, see Terra Universal Inc. and the U.S. Department of the Air Force, "Administrative Agreement" (2013), available at <http://www.safgc.hq.af.mil/shared/media/document/AFD-131125-070.pdf>; Office of Federal Contract Compliance Programs, *Federal Contract Compliance Manual* (U.S. Department of Labor, 2014), available at http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf.
- 8 *G.L. Christian and Associates v. United States*, 312 F.2d 418 (Cl. Ct. 1963).
- 9 The White House, "Executive Order—Fair Pay and Safe Workplaces," July 31, 2014, available at <https://www.whitehouse.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>.
- 10 Acquisition.gov, "Federal Acquisition Regulation Section 9.104-3: Application of Standards," available at <https://www.acquisition.gov/?q=browsefar> (last accessed August 2015).
- 11 Acquisition.gov, "Federal Acquisition Regulation Section 52.209-7: Information Regarding Responsibility Matters," <https://www.acquisition.gov/?q=browsefar> (last accessed August 2015). Offerors must report on criminal proceedings in connection with the award or performance of a federal contract or grant that resulted in a conviction through the Federal Awardee Performance and Integrity Information System.
- 12 Acquisition.gov, "Federal Acquisition Regulation Section 52.209-5: Certification Regarding Responsibility Matters," available at <https://www.acquisition.gov/?q=browsefar> (last accessed August 2015). Offerors must certify whether they have been criminally or civilly charged or convicted of "commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property."
- 13 U.S. Department of Defense, General Services Administration, and NASA, "Federal Acquisition Regulations."
- 14 Federal Awardee Performance and Integrity Information System, "Data Reports: Government Entered," available at <https://www.fapiis.gov> (last accessed August 2015). Moreover, the U.S. Department of Labor makes public consent decrees between the Office of Federal Contract Compliance Programs and companies in order to resolve discrimination within a company and prevent future problems. Consent decrees between the Office of Federal Contract Compliance Programs and companies are made public through the U.S. Department of Labor's Office of Administrative Law Judges.
- 15 U.S. Department of Labor, "Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces,'" *Federal Register* 89 (102) (2015): 30574–30604, available at <http://www.regulations.gov/#!documentDetail;D=DOL-2015-0002-0001>.
- 16 *Ibid.*
- 17 Mark D. Gough, "The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation," *Berkeley Journal of Employment & Labor Law* 1 (35) (2015): 91–112, available at <http://scholarship.law.berkeley.edu/bjell/vol35/iss1/6/>; Alexander J.S. Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes," *Journal of Empirical Legal Studies* 1 (8) (2011): 1–23; available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1586&context=articles>.
- 18 EEOC.gov, "Executive Order No. 11246," available at <http://www.eeoc.gov/eeoc/history/35th/thelaw/eo-11246.html> (last accessed August 2015).