# A BAR TOO HIGH: CONCERNS WITH CEQ'S PROPOSED REGULATORY HURDLE FOR FEDERAL CONTRACTING

## HEARING

BEFORE THE

SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

OF THE

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

OF THE

HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

SEPTEMBER 20, 2023

**Serial No. 118–25**

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# C O N T E N T S

**September 20, 2023**

# A BAR TOO HIGH: CONCERNS WITH CEQ'S PROPOSED REGULATORY HURDLE FOR FEDERAL CONTRACTING

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**WEDNESDAY, SEPTEMBER 20, 2023**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT,
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY,
*Washington, D.C.*

The Subcommittee met, pursuant to notice, at 10 a.m., in room 2318, Rayburn House Office Building, Hon. Jay Obernolte [Chairman of the Subcommittee] presiding.


**COMMITTEE ON SCIENCE, SPACE, and TECHNOLOGY**

**HEARING CHARTER**

**"A Bar Too High:**
***Concerns with CEQ's Proposed Regulatory Hurdle for Federal Contracting"***

**Wednesday*, September 20, 2023***
***10:00 a.m.***
***2318 Rayburn House Office Building***

**Purpose:**

On Wednesday, September 20, 2023, the Investigations and Oversight subcommittee will hold a hearing to examine the Administration's recently proposed regulation titled "Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk." The proposed regulation would require that federal contractors disclose their greenhouse gas emissions (GHG) to a foreign entity and set science-based targets to reduce their GHG emissions. The hearing will examine the practical, financial, and national security implications of this proposed regulation as well as the proposed rule's constitutionality.

The Committee also plans to discuss the Administration's responsiveness to Congressional oversight into the process used for drafting this proposed rule. The hearing will also discuss these matters as it specifically relates to the selection of Science Based Target Initiative (SBTi), a private, foreign based company, as the single source vendor for all federal contractors.

**Witnesses:**

- Ms. Brenda Mallory, Chair, Council on Environmental Quality (CEQ) (invited)
- Ms. Christine J. Harada, Chair, Federal Acquisition Regulation Council (FAR) (invited)
- Mr. Eric Fanning, President and Chief Executive Officer, Aerospace Industries Association
- Mr. Chad Whiteman, Vice President, U.S. Chamber of Commerce
- Mr. Steven Rothstein, Managing Director, Ceres Accelerator for Sustainable Capital Markets
- Ms. Victoria Killion, Legislative Attorney, Congressional Research Service

**Overarching Questions:**

- What impact will the proposed rule have on federal contractors?
- Will compliance with science-based target-setting impose an unnecessary burden on contractors?
- What are the national security implications of allowing a foreign-based company to validate science-based targets for U.S. contractors?
- What legal questions are implicated by this proposed rule and the no-bid selection of a single source vendor?

**Background:**

On May 20, 2021, President Biden issued Executive Order 14030 (E.O. 14030), Climate-Related Financial Risk.[1] E.O. 14030 seeks to require major federal suppliers to, "publicly disclose greenhouse gas emissions and climate-related financial risks."[2] On November 14, 2022, the Federal Acquisition Regulation Council (FAR Council) in coordination with the Council on Environmental Quality (CEQ) published a notice of proposed rulemaking (NPRM) to amend the Federal Acquisition Regulations to implement E.O. 14030.[3] If implemented, the proposed rule would separate major federal suppliers into two categories: significant contractors and major contractors. The proposed rule loosely defines a significant contractor as a contractor that received between $7.5 million and $50 million in federal funds during the prior fiscal year.[4] A major contractor is defined as a contractor that received more than $50 million in fiscal funds during the prior fiscal year.[5] The rule would require both significant and major contractors to disclose Scope 1 and Scope 2 GHG emissions, while requiring major contractors to disclose Scope 3 GHG emissions and set science-based reduction targets.

*EPA Guidance*. The Environmental Protection Agency published guidance that explained scopes of emissions that companies must disclose.[6] Scope 1 GHG emissions include emissions from sources that are owned or controlled by the contractor or company submitting the disclosure. Scope 2 covers emissions associated with generating electricity, such as the heating and cooling of manufacturing or office space. Scope 3 covers GHG emissions as a consequence of operating a business, but which occur at facilities that are controlled by others. Only major contractors are required to disclose Scope 3 emissions.

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[1] 3 Exec. Order No. 14,030, 86 Red. Reg. 27967 (May 20, 2021), https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.
[2] *Id.*
[3] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Red. Reg. 218 (proposed on Nov. 14, 2022) (to be codified 48 C.F.R pt. 1,4,9,23,52), https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial [hereinafter *FAR: Climate-Related Financial Risk*].
[4] *Id.*
[5] *Id.*
[6] Environmental Protection Agency, *GHG Inventory Development Process and Guidance*, agency guidance, December 6, 2022, https://www.epa.gov/climateleadership/ghg-inventory-development-process-and-guidance; *see* EPA, *Scope 1 and Scope 2 Inventory Guidance*, EPA Center for Corporate Climate Leadership, August 21, 2023, https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance; see also EPA, *Scope 3 Inventory Guidance*, EPA Center for Corporate Climate Leadership, August 3, 2023, https://www.epa.gov/climateleadership/scope-3-inventory-guidance.

*NPRM Requirements*. Under this proposed rule, major contractors would also be required to set science-based targets to reduce GHG emissions and have those targets validated by an outside private entity known as the Science Based Target Initiative (SBTi). As the name suggests, science-based targets are attempts to set targets, based on scientific data to reduce the GHG emissions by a certain amount in a certain period of time. For example, Company A may set a target of reducing their GHG emissions by 25 percent by the year 2030.

This proposed regulation leans heavily on private industry for implementation by delegating important governmental authorities to the private sector. For example, significant and major contractors must report GHG emissions by using CDP's (formerly Carbon Disclosure Project) Climate Change Questionnaire. Major contractors are then required to set GHG reduction targets and pay SBTi to validate those targets.

The proposed rule would impact over 670 U.S. contractors and steer at least $1.2 million in yearly fees to SBTi.[7]

*Science Based Target Initiative*. SBTi was formed in 2015 as a collaborative initiative between the CDP, the World Resources Institute (WRI), the World Wide Fund for Nature (WWF), and the United Nations Global Compact following the Paris Climate Agreement.[8] The We Mean Business Coalition later joined the initiative, while the U.N. Global Compact currently serves as a permanent observer.[9] SBTi's purpose is to develop standardized guidance, criteria, and tools for entities to voluntarily use when establishing their emissions baseline, then set reduction targets.[10] All of this is done, however, for a fee.[11] In 2022, SBTi received approximately 35 percent of its funding from its validation services, with the rest of their funding coming in the form of donations from philanthropic groups and businesses.[12] Despite operating since 2015, SBTi did not officially exist as a corporation until June 26, 2023, when it incorporated in London, UK, nearly eight years after its launch and months after the publication of the proposed rule and the initiation of the Committee's oversight efforts.

Both CEQ Chair Mallory, and FAR Council Chair Christine Harada were invited to attend this hearing, but did not confirm their attendance.

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[7] *Id.*
[8] Letter from Karen Elizabeth Christian, Counsel, Akin Gump Strauss Hauer & Feld LLP, on behalf of Sci. Based Targets Initiative, to Frank Lucas, Chairman, H. Comm. Sci., Space, and Tech. (Aug. 9, 2023) (on file with Committee).
[9] Letter from Karen Elizabeth Christian, Counsel, Akin Gump Strauss Hauer & Feld LLP, on behalf of Sci. Based Targets Initiative, to Frank Lucas, Chairman, H. Comm. Sci., Space, and Tech. (Aug. 9, 2023) (on file with Committee).
[10] *Id.*
[11] *Id.*
[12] Science Based Target Initiatives, *How are We Funded*, https://sciencebasedtargets.org/about-us/funders (last visited Sept. 15, 2023).

Chairman OBERNOLTE. Good morning, everyone. The hour of 10 o'clock having arrived, I will convene this hearing of the Science, Space, and Technology Subcommittee on Investigations and Oversight. Without objection, the Chair is authorized to declare a recess of the Committee at any time. Hearing none, so ordered.

I will begin by recognizing myself for five minutes for an opening statement.

I'd like to thank all of our witnesses and our Committee Members and Ranking Member Foushee for participating in our hearing today. I'd like to begin by requesting unanimous consent that the Subcommittee's investigative portfolio be submitted for the record. Hearing none, so ordered.

Today's hearing will focus on a proposed regulation by the Federal Acquisition Regulatory (FAR) Council that would require Federal contractors to disclose greenhouse gas (GHG) emissions and set reduction targets. The rule would further require that a London-based company validate those targets. To be clear, today's hearing is not about climate change or whether or not companies should reduce their greenhouse gas emissions. In fact, many companies have voluntarily chosen to reduce emissions and are verifying those reductions in a variety of ways already. Instead, today's hearing concerns government overreach and questionable processes that result in the Administration picking winners and losers in the marketplace.

Regardless of political affiliation, every Member of this institution should be concerned by regulatory policies that usurp Congress' legislative authority. And every Member of Congress should be concerned with any regulatory action that arbitrarily selects one company to do business with the Federal Government without a meritorious selection process. The government should not be in the business of picking winners and losers when it comes to Federal contracting.

However, unfortunately, that is exactly the case in this instance. This Administration published a proposed rule in November which decreed that all major Federal contractors will be required to set greenhouse gas emission reduction targets and then hire a specified private foreign company to validate those targets. The company anointed by the Administration to perform this task is called the Science Based Targets initiative or SBTi.

According to the information that this Committee has gathered, SBTi did not go through a competitive selection process before being chosen for this role. Documents provided by the OMB (Office of Management and Budget) indicate that representatives from SBTi met with the Council on Environmental Quality (CEQ) to discuss this proposed regulation only twice. There was no other email traffic, no formal vetting or application. It appears SBTi did not even have to submit a single piece of paper explaining why they were the company best suited for this job.

The choice of SBTi is not only concerning this Committee and the proposed rule, but because of the rule's poor drafting, it raises multiple practical financial and national security issues. For instance, ceding the authority to approve the emissions targets of Federal contractors to a foreign entity means that we have no way to verify that SBTi's processes are based in sound science. In fact, both Con-

gress and the Federal Government have very little oversight of the decisions being made here.

In addition, companies specializing in oil and gas production may not even have the ability to submit proposals that meet SBTi's science-based targets, which could have a severe impact on our Nation's mission readiness in industries such as space and national defense. Our hope is that this hearing will surface these issues and help our Members consider these concerns as we move forward.

The Investigations and Oversight Subcommittee has investigated this issue since February of this year. It reviewed many documents, sent multiple letters, and met with numerous individuals, including representatives from government agencies and stakeholders in order to get to this point. The council has invited Chair Mallory of CEQ and the head of the FAR Council to join us today to answer our remaining questions regarding how this proposed rule came into being, questions only they can answer. Unfortunately, they have declined to be here this morning.

Therefore, the witnesses at this hearing are experts who are here to help Congress understand the legal, practical, financial, and national security concerns associated with this proposed regulation. It's my hope that your testimonies today will cover four main issue areas: first, the constitutionality of this proposed regulation; second, the practical impacts that the proposed regulation would have, specifically as it pertains to industry and national security; third, the issues regarding the delegation of a quasi-government regulatory authority to SBTi and the conflict-of-interest concerns inherent in having a single entity act as both standard setter and validator; fourth, and finally, the impossibility of either the executive or the legislative branches to conduct meaningful oversight of SBTi, a foreign entity which answers to neither.

I look forward to a robust discussion on these topics. I'd like to thank everyone for your willingness to be here and to have a dialog on this important topic.

[The prepared statement of Chairman Obernolte follows:]

Today's hearing will focus on a proposed regulation by the Federal Acquisition Regulatory (FAR) Council that would require federal contractors to disclose greenhouse gas (GHG) emissions and set reduction targets. Further, the rule would require that a London-based company validate those targets.

Today's hearing is not about climate change or whether companies should or should not reduce their greenhouse emissions. In fact, many companies have voluntarily chosen to reduce emissions and are verifying those reductions in a variety of ways. Today's hearing is about government overreach and questionable processes that result in the Administration picking winners and losers.

Regardless of political affiliation, every member of this institution should be bothered by regulatory policies that usurp Congress' legislative authority.

And every member of Congress should be concerned with any regulatory action that arbitrarily selects one company to do business with the federal government without a meritorious selection process. The federal government should not be in the business of picking winners and losers.

However, that is exactly the case in this instance. This Administration published a proposed rule in November, which declared that all major contractors would have to set greenhouse gas emission reduction targets, and then hire a specific private foreign-based company to validate those targets. The company anointed by the Administration to perform this task is called the Science Based Target Initiative or SBTi.

From what this Committee has gathered, SBTi did not go through a competitive selection process before being chosen. According to documents provided by OMB, representatives from SBTi met with the Council on Environmental Quality (CEQ) to discuss this proposed regulation TWICE. There was no other email traffic, no for-

mal vetting or application, and it appears SBTi did not even have to submit a single piece of paper explaining why they were the best for the job.

The choice of SBTi is not the only concern this Committee has with this proposed rule. Because of its poor drafting, it has multiple practical, financial, and national security issues.

For instance, ceding this authority to a foreign entity means that we cannot verify that SBTI's processes are based in sound science. We will have very little oversight of the decisions being made.

What's more, companies specializing in oil and gas may not even be able to submit proposals to meet SBTi's science-based targets and that could have a severe impact on our mission readiness in industries like space and national defense.

Our hope is that this hearing will highlight these issues and help our members consider these concerns as we move forward.

The Investigations and Oversight Subcommittee has investigated this issue since February of this year. It reviewed many documents, sent multiple letters, and met with quite a few individuals, including representatives from government agencies and stakeholders, in order to get to this point.

The Committee invited Chair Mallory of CEQ and the head of the FAR Council to join us today to answer our remaining questions regarding how this proposed rule came into being--questions only they can answer.

Unfortunately, they are not here today.

Therefore, today's witnesses are experts who are here to help Congress understand the legal, practical, financial, and national security concerns associated with this proposed regulation.

We hope your testimonies today will generally cover four main issues. First, the Constitutionality of this proposed regulation.

Second, the practical impacts that the proposed regulation would have, specifically as it pertains to industry and national security.

Third, the issues regarding the delegation of a quasi-government regulatory authority to SBTi and the conflict of interest concerns inherent in having a single entity act as both standard setter and validator.

Fourth and finally, the inability of both the executive and legislative branches to conduct oversight of SBTi. Specifically, into the standards and scientific methods implemented by SBTi when they provide these services. I look forward to robust discussion.

Thank you all for your willingness to be here.

Chairman OBERNOLTE. I now recognize Ranking Member Foushee for her opening statement.

Mrs. FOUSHEE. Thank you, Chairman Obernolte, and thank you to our witnesses for joining us here today to discuss this proposed rulemaking.

As we on the Science Committee know, science-based information is crucial in Federal decisionmaking. The Federal Government has the responsibility of ensuring that taxpayer money is properly stewarded and improves the lives of all Americans and the functioning of our government. Procurement policy is a significant part of this responsibility. The Federal Government outlays enormous sums to contractors. Therefore, agencies should gather as much information as possible before selecting companies to receive massive contracts.

When it comes to ensuring science-based decisionmaking in this space, I can think of no more important issue than combating climate change. The proposed rule we're here to discuss has not yet been finalized. The Administration is working through public comments, and today, we have an opportunity for a productive conversation about how to ensure this rule can best achieve its important goals.

In its current form, this rule would offer an unprecedented level of transparency into the greenhouse gas emissions and mitigation strategies of Federal contractors who the government entrusts with hundreds of billions of taxpayer dollars. In the private sector, it is

well-accepted that a company's exposure to climate risk and its contribution to climate change has a direct impact on its bottom line. Shareholders demand to know that they're investing in companies who understand this reality and are working to reduce these risks. Financial institutions increasingly consider their susceptibility to climate-related disasters when making business decisions. Agencies and the Americans who fund them deserve that same level of transparency and forethought.

I applaud the Biden Administration for taking this step to modernize the Federal procurement process. This rulemaking, if finalized, would give agencies the opportunity to make contracting decisions that incorporate an understanding of vulnerability to climate-related risks. This would be a large improvement across the government, but it is especially critical when it comes to ensuring our defense preparedness. Our national security depends on a clear-eyed assessment of the risks posed to our country. The Department of Defense (DOD) has committed to incorporating climate risks into its strategies. If finalized, this rule will give them crucial information to deliver on that promise.

I won't to exaggerate the impact of this rule. The FAR Council has chosen to limit its reach to a small subset of contractors. The full suite of requirements would apply only to companies with over $50 million in contract obligations. Just 1.2 percent of prospective contractors would have any additional reporting requirements at all. And for small businesses and certain nonprofit entities, exemptions are provided to help alleviate the burden of compliance, and agencies can provide waivers for mission-essential purposes.

Despite this relatively limited scope, it truly is a significant step forward in promoting contractor transparency for their greenhouse gas emissions. I believe this is also an excellent springboard for further action. I look forward to hearing from our panel about how this rulemaking can be improved before finalization and how we can further bolster our Federal infrastructure against the risk of catastrophic climate change.

Thank you, Chairman Obernolte. I yield back.

[The prepared statement of Mrs. Foushee follows:]

Thank you, Chairman Obernolte. And thank you to our witnesses for joining us here today to discuss this proposed rulemaking. As we on the Science Committee know, science-based information is crucial in Federal decision making. The Federal government has the responsibility of ensuring that taxpayer money is properly stewarded and improves the lives of all Americans and the functioning of our government. Procurement policy is a significant part of this responsibility. The Federal government outlays enormous sums to contractors. Therefore, agencies should gather as much information as possible before selecting companies to receive massive contracts.

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In its current form, this rule would offer an unprecedented level of transparency into the greenhouse gas emissions and mitigation strategies of Federal contractors, who the government entrusts with hundreds of billions of taxpayer dollars. In the private sector, it is well accepted that a company's exposure to climate risk—and its contribution to climate change—has a direct impact on its bottom line. Shareholders demand to know that they're investing in companies who understand this reality and are working to reduce these risks.

Financial institutions increasingly consider their susceptibility to climate-related disasters when making business decisions. Agencies, and the Americans who fund them, deserve that same level of transparency and forethought. I applaud the Biden Administration for taking this step to modernize the Federal procurement process. This rulemaking, if finalized, would give agencies the opportunity to make contracting decisions that incorporate an understanding of vulnerability to climate-related risk.

This would be a large improvement across the government, but it is especially critical when it comes to ensuring our defense preparedness. Our national security depends on a clear-eyed assessment of the risks posed to our country. The Department of Defense has committed to incorporating climate risk into its strategies. If finalized, this rule will give them crucial information to deliver on that promise. I won't exaggerate the impact of this rule. The FAR Council has chosen to limit its reach to a small subset of contractors.

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Thank you, Chairman Obernolte, I yield back.

Chairman OBERNOLTE. The gentlewoman yields back.

[The prepared statement of Ms. Lofgren follows:]

The climate crisis is one of the most profound challenges facing humanity. We are witnessing the devastating consequences of climate change every day, in ways large and small, and we are only beginning to grasp the enormity of the impact that it will have on our society. If we want to avoid the worst-case scenarios that loom ahead of us, we have no choice but to deploy every tool in our arsenal to reduce greenhouse gas emissions as much as we can, as fast as we can. And as the world's largest economy, the United States has a unique responsibility—and opportunity—to lead this effort.

Under the Biden Administration, the U.S. government has been leading by example in the fight against climate change. President Biden has overseen an unprecedented mobilization of federal resources to reduce the federal government's own emissions and strengthen the federal government's climate resilience. That effort has been wide-ranging—spanning from federal risk planning and infrastructure vulnerabilities to federal supply chains and emission sources. I wholeheartedly support the administration's emphasis on this issue, which is long overdue.

Federal procurement is another critical way in which the federal government can use its authority and influence to be a force for good in the climate fight. The federal government is an enormous purchaser of goods and services—indeed, the largest single purchaser in the world. In 2021 alone, federal procurement stood at $630 billion. Federal procurement decisions can alter economic incentives across entire sectors and send unmistakable market signals that the private sector is hard-pressed to ignore. But until now, the federal government has overlooked the greenhouse gas emissions of its contracting sector and failed to consider how its contractors can work towards reducing those emissions. This neglect increases the potential costs of climate change across the federal supply chain and exposes taxpayers to unnecessary risks.

The rulemaking at the center of today's hearing, Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, is a first step to address greenhouse gas emissions from the federal procurement sector. Simply put, the rule seeks to shed light on the emissions of the largest federal contractors and prod them to set science-based targets for reducing those emissions.

I applaud the goals of this rulemaking. It operates by the simple principle that more information leads to better decisions and more effective oversight of taxpayer dollars. More data is always better. Greater transparency is always better. And the federal government, as the customer for its own goods and services, has the right to demand more of its contractors in order to properly safeguard public resources.

There have been criticisms of the proposed rule, and I'm sure we'll hear more about those at today's hearing. I want to note that this proposed rule has not been

finalized. The public comment period has closed, and I have no doubt that the administration will seriously consider all such comments to improve the rule before finalization.

The existential threat posed by climate change demands that we do everything within our power to confront it. Federal procurement is no exception. The federal contracting sector must be prepared to step up, disclose its greenhouse gas emissions in a transparent fashion, and start to think about how to reduce those emissions in line with America's broader emission reduction goals. This rulemaking is a step in the right direction, and I hope that today's hearing allows for a productive conversation about how best to improve the transparency of federal procurement emissions.

I yield back.

Chairman OBERNOLTE. We'll move next to our witness panel. Our first witness is Eric Fanning, President and CEO (Chief Executive Officer) of AIA (Aerospace Industries Association). Mr. Fanning, you are recognized for five minutes.

**TESTIMONY OF MR. ERIC FANNING,**
**PRESIDENT AND CHIEF EXECUTIVE OFFICER,**
**AEROSPACE INDUSTRIES ASSOCIATION**

Mr. FANNING. Thank you, Chairman Obernolte and Ranking Member Foushee. Thank you for inviting me to discuss the serious challenges posed by this proposed rule.

First, let me begin by emphasizing our industry's deep commitment to sustainability. U.S. aviation manufacturers pledge to achieve net zero carbon emissions by 2050. Today, manufacturers are building more efficient planes and more sustainable propulsion. They are also minimizing the impact of the manufacturing process and advancing the use of sustainable aviation fuels.

Our companies are working daily to reduce their environmental footprint, not just because it's the right thing to do, but because the market and our customers demand it. We strive to work closely with the Federal Government to achieve these goals, including supporting appropriate disclosure of climate-related information, including GHG and climate-related financial risks, in accordance with the Executive order on climate-related financial risk.

But the proposed FAR greenhouse gas emissions rule, while well-intended, is not executable for the American aerospace and defense (A&D) industry. Under this proposal, Federal contractors would be required to disclose emissions and set emission reduction targets based on the standards set by the Science Based Targets initiative, or SBTi, an international nongovernmental entity. This is applicable to direct and indirect emissions or scope 1 and scope 2 emissions, which can be challenging enough.

However, the greatest challenge comes from disclosing scope 3 emissions, the emissions created by suppliers and end users, including the emissions generated by aircraft when the airlines or the military fly them. For A&D companies, especially small businesses, accurately assessing scope 3 emissions is a complex, long-range problem that they do not have the capacity or capability to execute.

Furthermore, SBTi does not have sector-based guidance for all industries, including the A&D industry. As such, SBTi may establish aggressive timelines and rigid standards that don't factor in our unique circumstances. For instance, the equipment we produce have much longer service lives than most consumer products. Any

science-based target must take this into account, and it's not clear the rule or SBTi would do so.

Congress should be particularly concerned about the national security implications of the rule. If the Pentagon provides a total estimate of emissions, will the military then be bound to operate within those parameters regardless of the threats we encounter? Will disclosing this information publicly provide sensitive information, including data about next-generation platforms and use scenarios to our adversaries?

What is even more concerning from a security perspective is that this rule opens the door for foreign influence over U.S. Government procurement. SBTi is led by foreign nationals and has no accountability to the U.S. Government. The proposed rule taps into other international NGOs (non-governmental organizations) to solicit information regarding companies' environmental impacts and targets. If a contractor does not provide this information, or if SBTi does not approve their targets, then the contractor would be ruled ineligible for Federal contracts. In other words, it gives a nongovernmental international body the authority to determine which American companies can and can't do business with the U.S. Government, including our military, all without regard to cost, schedule, and capability of what that company may offer.

This rule also places unusually burdensome requirements on small- and mid-sized companies that are part of the supply chain at a time when the Pentagon and the defense community are concerned about the shrinking size of the defense industrial base. Companies, especially these small and mid-sized companies, increasingly cannot afford the costs of doing business with the U.S. Government. This rule would become yet another market barrier that could turn companies in the defense industrial base to commercial work instead. A diverse defense industrial base is critical to our military meeting its growing mission set, and this rule would jeopardize that, even as a land war continues in Europe and the threat of conflict in the Indo-Pacific grows.

The American A&D industry shares our government's goal of reducing carbon emissions. The proposed rule would place enormous if even executable burdens on industry, set up a regulatory-like process without the normal transparency and oversight we have come to expect in the United States, and put our national security at risk by making public highly sensitive military data.

Thank you again for having me, and I look forward to your questions.

[The prepared statement of Mr. Fanning follows:]

**The Honorable Eric Fanning**
**President and Chief Executive Officer**
**Aerospace Industries Association**

"A Bar Too High: Concerns with CEQ's Proposed Regulatory Hurdle for Federal Contracting"
House Science, Space, and Technology Subcommittee on Investigations and Oversight
Wednesday, September 20, 2023

**Introduction**

Chairman Obernolte, Ranking Member Foushee, and members of the committee, thank you for inviting me to appear today. My name is Eric Fanning, and I serve as the President and CEO of the Aerospace Industries Association (AIA). For over 100 years, AIA has advocated for America's aerospace and defense (A&D) companies and the more than 2.2 million men and women who are the backbone of our industry. AIA serves as a bipartisan convener, bringing people together to find consensus on important topics, like effective federal investments and adaptation of policies empowering our defense industrial base (DIB) and country for the 21st century and beyond.

AIA applauds this committee for its ongoing leadership in listening to A&D industry leaders and its willingness to act on new and innovative approaches that will support and strengthen our industry and our nation's security.

Today, AIA represents more than 320 A&D companies ranging from family-run businesses to multinational corporations, operating up and down the supply chain. Our membership includes aircraft and engine manufacturers and companies that design and build cutting-edge military and dual-use technology second to none. Our members have a worldwide reputation for global technological leadership, and the A&D industry represents a dynamic workforce composed of many types of workers.

Our industry is not only integral to national security, but also a significant driver of the American economy. Despite the inflationary pressure and ongoing supply chain disruptions, the industry's workforce generated $951 billion in sales in 2022, a 6.7 percent increase from the prior year.

Even when facing challenges, the 2022 A&D workforce stood at more than 2.2 million strong. The industry supports jobs representing almost 1.5 percent of the nation's total employment base. Nearly 58 percent of employment comes from the shared A&D supply chain and an extensive network of suppliers composed of thousands of small and medium-sized businesses located every state in the United States.

**Background**

The A&D industry has been very focused on promoting climate resiliency and greenhouse gas (GHG) reductions. Our member companies continue to demonstrate their ability to shrink their carbon footprint, while still supporting the missions and objectives of their customers. The industry has publicly committed to wholesale efforts to reduce emissions; for example, in October 2021, AIA announced the commitment by U.S. commercial aviation manufacturers to achieving Net Zero carbon emissions by 2050, and in April

2022, AIA published "Horizon 2050: A Flight Plan for the Future of Sustainable Aviation," which describes the technologies and policies needed to achieve this goal. To achieve these goals, our member companies are investing in and developing new technologies and rethinking existing engineering to make their products more environmentally sound and reduce carbon emissions. This includes increasing the use of alternate materials, such as composites, to build more efficient planes; finding innovative methods of propulsion, including electric, hybrid, or hydrogen; using less energy and creating less waste during the manufacturing process; and exploring sustainable aviation fuels (SAF) as an alternative to traditional fossil fuels.

Just last week, the International Coordinating Council of Aerospace Industries Associations (ICCAIA), of which AIA is a member, released a commitment to ensuring all aircraft are SAF-compatible by 2030. Our commitment is evident in the outcomes; one example of this is that each new generation of Boeing commercial aircraft is 15-25 percent more sustainable than the generation before. AIA also supports appropriate disclosure of climate-related information, including GHG and climate-related financial risks, in accordance with the Executive Order on Climate-Related Financial Risk (EO 14030). We take these steps not just because we know it's the right thing to do, but also because it's what the market and our customers demand.

However, the proposed Federal Acquisition Regulatory (FAR) GHG emissions rule, while well-intended, will impact our national security and economic prosperity, especially for America's small businesses that partner with the federal government. These overly burdensome requirements would in fact hinder our progress to a net-zero carbon emissions goal by 2050. The cumulative impact of this proposal along with other similar federal requirements being considered by the Securities and Exchange Commission is not executable for the American aerospace and defense industry.

**Executability of the proposed rule**

The foundation of AIA's concerns with the proposed rule is the practicability of implementation. For the aerospace and defense industry — with its myriad uses, including critical national security applications, along with long lifecycles and complex supply chains — it is practically impossible. Specifically, this proposed rule would require Major and Significant Contractors to collect and publish GHG emissions data from Scope 1 and 2 inventories. It would also require Major Contractors to complete the CDP Climate Change questionnaire, collect and publish GHG emissions data for "relevant" Scope 3 emissions, and develop GHG emissions reduction performance metrics approved by SBTi before they can be eligible for new federal contracts.

By way of definition, Scope 1 emissions are the direct GHG emissions from sources owned, operated, or controlled by a company; in the case of the A&D industry, for an original equipment manufacturer (OEM), this includes emissions from energy used to produce an aircraft in its own facilities, for instance. Scope 2 are indirect emissions from energy usage, including purchased electricity, steam, heat, and cooling. Scope 3 encompasses all other indirect emissions created up and down the supply chain; for the A&D industry, this would be the largest proportion, including emissions used to manufacture parts and tools and transport them and emissions generated by aircraft when airlines or the military fly them. Accurately estimating Scope 3 emissions is beyond the ability of almost any company due to the extensive range and complexity of "upstream" and "downstream" emissions. These data requirements would be especially difficult to meet for small businesses.

The workload estimates in the proposed rule do not fully anticipate the burden of data collection and compliance-related activities required to set goals and measure Scope 3 emissions throughout the supply chain. Collecting this required data, especially Scope 3 emissions as required, would be extremely difficult for members of the A&D industry as our products are used domestically and internationally and our materials and parts are sourced domestically and internationally. American businesses cannot force international suppliers to comply with these burdensome requirements. The ultimate effect is that it will limit the diversity and resilience of the global supply chain, even as we already struggle with supply chain disruptions and delays. The challenges get even more onerous for military applications, where such data is sensitive and not likely to be provided by the Department of Defense.

Under this proposal, companies must set targets to reduce their emissions based on standards set by Science-Based Targets initiative (SBTi), an international coalition of non-governmental entities. To start, SBTi has not yet developed the methodology for evaluating Scope 3 emissions, has not been tested, and was not designed to do this at-scale. On September 13, 2023, SBTi announced a complete organizational overhaul, meaning we do not have fidelity on what its governance will look like, even as we propose handing them the reins of setting and policing emissions standards.

Furthermore, SBTi does not have sector-based guidance for all industries, including our A&D industry. As such, SBTi may establish aggressive timelines and rigid standards that are not appropriately tailored for the A&D industry, and American contractors would be forced to set and adhere science-based targets based on these unrealistic standards. A unique aspect of the A&D industry that makes developing and certifying a science-based target for GHG reductions difficult is its extensive material lifespan. Aircraft (both military and civilian), military platforms, and space vehicles have much longer service lives than most normal consumer products (in some cases, more than 30 years). Development of any science-based target for the A&D community must take this long lifecycle into account when developing policies intended to make major changes to aircraft and space fleets, and it's not clear that would be the case for this rule.

From the national security perspective, the rule leaves many unanswered questions about how industry is supposed to work with its end user — specifically, the Pentagon — to ascertain the Scope 3 emissions. If the Pentagon provides a total estimate, will the military then be bound to operate within those parameters, regardless of the threats we encounter? Delegating oversight functions to an entity supported by foreign governments, including China, raises serious concerns about the impact the Rule would have on procurement for national security. Will disclosing this information provide sensitive information, including new generation platforms, to our adversaries?

In addition, submitting the necessary information and gaining approval of the science-based target by SBTi will be more complex and time-consuming than described in the rule, and there would also be significant translation, transformation, and reorganization challenges in attempting to fulfill these two different requirements. On the back end, the means by which SBTi is to review contractors' target submittals and complete proper evaluations in a timely manner are uncertain and not well defined; the ability of SBTi to work with companies to complete timely assessments on nearly 1,000 new targets within two years is highly suspect, given that many companies already using this service have found the process is lengthy and SBTi personnel are slow to respond. The A&D industry is already a long lead-

time industry, and this could further delay delivery to the customer, including the U.S. military, and these lags would certainly drive costs up even more.

The federal contracting process, especially within the Department of Defense (DoD), is already complex with hundreds of vendor compliance requirements. Many companies simply cannot withstand the additional costs, including both financial and human resources, required to adhere to this proposed rule.

The costs and time spent simply trying to adhere to the reporting requirements of this rule ultimately means companies – from the largest original equipment manufacturers (OEMs) to the smallest suppliers – have fewer resources to dedicate toward efforts that will have a meaningful impact on reducing carbon emissions and making the aviation industry more sustainable.

**Foreign influence on government procurement and the U.S. A&D industry**

Beyond the practicability of this rule, our other primary concern is that the proposal would insert non-governmental international entities into the federal contracting process, potentially to determine who can and cannot do business with the U.S. government. SBTi is led by foreign nationals and has no accountability to the U.S. government; it is an organization designed to create transparency while having no transparency of its own. We think it unwise for the U.S. government to divest its authority to control what requirements are set for U.S. industry or when they should be changed — abdicating its global leadership in aviation innovation at the same time. This proposed rule would allow third-party, pay-to-use, non-governmental organizations (NGOs) to set and approve key standards in the federal contracting process without any requirement that the priorities of these NGOs remain aligned with those of the United States government. As SBTi sets these standards, there will be no opportunity for public comment, as is required in U.S. rulemaking.

The proposed rule taps into another international non-governmental nonprofit, the CDP, to solicit information regarding companies' environmental impacts and targets. Right now, some AIA member companies use the CDP's climate change questionnaire on a voluntary basis. They have noted that this questionnaire frequently changes to include new climate-related concepts and increasingly nuanced questions that only bestow credit if the respondent provides progressively detailed explanations and responses. The proposed rule moves questionnaire from voluntary use to a requirement. It then vests the SBTi with regulatory authority to apply those evolving standards to approve or deny Major Contractors' proposed emissions targets and to dive into the details of federal contractors' emissions data in the process. These questions are aligned with the Task Force on Climate-Related Financial Disclosures (TCFD), which was created and is run by the Financial Stability Board, yet another international body, which also lacks treaty basis and formal power. The outcome would be if a contractor does not complete the TCFD-aligned CDP questions and submit the questionnaire to CDP, or if SBTi does not approve the target submission, then SBTi would designate that contractor as "non-responsible" and ineligible to receive federal contracts.

In other words, this policy would open the door to foreign influence over American national security strategies and decisions. For over 100 years, the men and women of the U.S. A&D industry have worked tirelessly to support America's national security and equip the warfighter. It is unthinkable that this proposal would outsource governance to an international body, allowing foreign influence over who is qualified to build military equipment to protect our country. AIA believes that the U.S. government

must be involved in developing streamlined and simplified climate questionnaire and setting national policy on science-based GHG emission targets by sector. Requiring oversight in this area would save contractors time and reduce overall costs through predictable and stable questionnaires and GHG targets.

**Implications for Small Business**

The financial burden placed on small businesses within the proposed FAR rule is very likely underestimated and must be studied further. Large A&D manufacturers who now consistently report publicly on their emissions profile did not build that capacity overnight. Emissions accounting takes time, resources, manpower, and commitment to identify the data inputs, understand how to convert those inputs to emissions, and develop the necessary processes to establish an inventory. The government cannot expect the same of a small or medium-sized manufacturer that operates in a niche market on slim margins, with an ever-expanding regulatory burden and increasing customer expectations.

In addition, many of the mid-tier suppliers in our industry provide opportunities for small businesses to access federal work – the same small businesses that would bear this new compliance burden if the proposed rule were flowed down from major federal contractors.

In any scenario, implementing this rule would come at a significant cost to the federal government and its supply chain. That cost may become a market barrier for many small and medium-sized business already operating on thin profit margins may shift their businesses towards a strictly commercial focus, and the end result would be fewer companies participating in the already shrinking defense industrial base. The absence of new entrants and small businesses, our military can no longer access the full range of innovative solutions to meet the growing, geographically diverse, and evolving mission set positioned against a backdrop of competition with China, a war in Ukraine, and the possibility of conflict in Taiwan, as well as a range of other threats. The government must recognize that the Scope 3 ambition of this rule would clearly compromise other economically and socially significant contracting priorities.

**Conclusion**

AIA is dedicated to reducing carbon emissions in both commercial and military applications, keeping commercial aviation safe and economically viable, and improving the efficiency, affordability, and performance of the capabilities we provide to our armed forces. We are similarly committed to being a close partner with the government toward these ends as well. While we are actively working to reduce GHG emissions and increase climate resiliency, AIA strongly objects to this proposed rule in its current form. We urge that any further relevant rulemaking be suspended immediately.

In closing and on behalf of AIA and our members, I thank you for your time and consideration of these matters. As always, AIA is available to address any questions or concerns the Committee has now and in the future.

The Honorable Eric Fanning
President and Chief Executive Officer
Aerospace Industries Association

Eric Fanning is President and Chief Executive Officer (CEO) of the Aerospace Industries Association (AIA), the leading advocacy organization for the aerospace and defense industry with more than 320 companies in its membership – ranging from multinational prime contractors to family-owned small businesses. As AIA's leader, Fanning develops the association's strategic priorities and works with member company CEOs to advocate for policies and investment that keep our country strong and competitive, bolster our capacity to innovate, and spur our economic growth.

Mr. Fanning brings nearly 30 years of public and private sector experience to his role at AIA. He joined the association after serving as the 22nd Secretary of the Army, where he provided civilian leadership and oversight of our nation's largest military service. He is the only person to have held senior appointments in all three military departments and the Office of the Secretary of Defense, previously serving as Chief of Staff to the Secretary of Defense, Acting Secretary of the Air Force and Under Secretary of the Air Force, and Deputy Under Secretary of the Navy/Deputy Chief Management Officer. In these roles, he helped spearhead budgets, personnel planning, and weapons systems and equipment acquisition.

Prior to his roles at the Pentagon and AIA, Fanning worked on the staff of the House Armed Services Committee and as Senior Vice President of Strategic Development for Business Executives for National Security. He was also the Deputy Director of the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism and was associate director of political affairs at the White House.

Fanning has been appointed to a number of bipartisan and nonpartisan boards and commissions. This includes the NASA Advisory Council and National Space Council Users' Advisory Group. He also serves as the Chair of the United States Air Force Academy Board of Visitors and as a member of the congressionally mandated Commission on Planning, Programming, Budget and Execution Reform. He currently chairs the International Coordinating Council of Aerospace Industries Associations (ICCAIA), and also serves as a member of the Center for a New American Security (CNAS) Board of Advisors, the Council of Manufacturing Associations Board of Advisers, the National Medal of Honor Museum Advisory Board, and the Economic Club of Washington, DC.

Fanning holds a bachelor's degree in history from Dartmouth College. His awards include the Department of Defense's Medal for Distinguished Public Service (twice awarded), the Department of the Army's Decoration for Distinguished Civilian Service, the Department of the Navy's Distinguished Public Service Award (twice awarded), and the Department of the Air Force's Distinguished Public Service Award and Decoration for Exceptional Civilian Service.

Chairman OBERNOLTE. Thank you, Mr. Fanning.

Our second witness is Chad Whiteman, Vice President of the U.S. Chamber of Commerce. Mr. Whiteman, you're recognized for five minutes.

**TESTIMONY OF MR. CHAD WHITEMAN,**
**VICE PRESIDENT, U.S. CHAMBER OF COMMERCE**

Mr. WHITEMAN. Thank you. Chairman Obernolte, Ranking Member Foushee, and Members of the Committee—Subcommittee, I'm Chad Whiteman, Vice President of Environment and Regulatory Affairs for the Global Energy Institute at the U.S. Chamber of Commerce. Thank you for the opportunity to present the U.S. Chamber's views here to the Subcommittee on the FAR's climate disclosure rulemaking.

Chamber members include Federal contractors large and small that provide products and services across diverse industries such as aerospace and defense, telecommunications, information technology, engineering services, food and hospitality, pharmaceuticals, healthcare, energy, and many more. American companies are already playing a crucial role in developing innovations and approaches to reduce greenhouse gas emissions while also spurring the evolution of climate disclosures. Companies are also increasingly reporting more information to the public about their efforts to reduce their greenhouse gases. Many have also made forward-looking statements and commitments to reduce their emissions over time.

While the private sector is making significant progress, regulatory decisions must always be informed by a careful analysis of the available alternatives, outcomes, and cost-benefit tradeoffs to ensure that optimal policies are implemented. Such regulatory decisions also must be made within the bounds of agencies' legal authorities.

We're concerned that the proposed rule fails to strike the right balance and is an inappropriate and inefficient means of mitigating the potential effects of global climate change. The proposed rule would impose immense costs on government contractors of all sizes, costs that would be passed on to the government and ultimately to taxpayers. This would undermine rather than advance the goal of economic and efficient system of contracting that underpins the *Federal Property and Administrative Services Act.*

Detailed disclosure of climate risk assessment processes and risks, inventorying and disclosing scope 1, 2, and 3 greenhouse gas emissions, and developing and implementing science-based emissions reduction targets would require thousands of employee hours and saddle contractors with billions of dollars in compliance costs. The government's acquisition costs would rise as a consequence, and some contractors and companies in the supply chain would likely drop out of the market entirely, weakening the competitive forces that keep prices down.

The council's pursuit of goals beyond economic and efficient contracting exceeds its legal authority. While the council can promulgate specific output-based related standards to help ensure that the government acquires the goods and services it needs at appropriate prices, the council lacks the statutory authority to use government

contracts as a vehicle for furthering other policies like addressing climate change, even if well-intended.

The proposal raises significant issues under the Constitution, as it would force contractors to associate with and likely follow the speech guidelines of certain private organizations whom the council would deputize to do most of the standard setting and verification. This unusual arrangement would violate contractors' First Amendment rights and would transgress longstanding legal limitations on delegating legislative and rulemaking authority to private entities.

The proposed rule would violate the *Administrative Procedures Act* in several respects. Most significantly, the council's cost-benefit analysis is flawed and vastly underestimates the costs. For example, the council alludes to benefits from potential greenhouse gas emissions reductions but fails to acknowledge or quantify the costs required to achieve such reductions. The actual cost of the council's proposal would exceed their estimate of $1 billion for the first year and $3 billion over 10 years. The benefits side of the ledger fares no better. The council also fails to grapple with the duplicative and even conflicting requirements of the Securities and Exchange Commission (SEC) is simultaneously proposing to impose on public companies.

Other aspects of the proposal are equally troubling. The council fails to account for the disproportionate burden that the proposal imposes on small businesses, both directly as Federal contractors and indirectly as suppliers of major contractors. The role would outsource most of the standard setting to private entities that the Federal Government does not control, regulate, or monitor. It would undermine national security interests. It would set compliance deadlines that are impossible to meet. It would require contractors to set science-based targets, even if they do not have a viable means of meeting the targets in the short timeframe allowed, and it would do all of this without the council having adequately considered numerous less-restrictive alternatives. These and other flaws counsel in favor of abandoning the proposal, as we explained further in our detailed written comments submitted to the council earlier this year.

Thank you for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Mr. Whiteman follows:]

U.S. Chamber of Commerce

[redacted]

HEARING BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
INVESTIGATION AND OVERSIGHT SUBCOMMITTEE

September 20, 2023

Written Testimony of Chad S. Whiteman
Vice President, Environment and Regulatory Affairs, Global Energy Institute
U.S. Chamber of Commerce

Chairman Lucas, Ranking Member Lofgren, and members of the Subcommittee. I am Chad Whiteman, Vice President, Environment and Regulatory Affairs for the Global Energy Institute at the U.S. Chamber of Commerce. Thank you for the opportunity to testify at today's hearing.

The U.S. Chamber of Commerce appreciates the opportunity to offer its views to the Subcommittee concerning the Federal Acquisition Regulatory Council's proposal ("Proposed Rule") to require significant and major contractors to make climate-related disclosures and to require major contractors to set targets to reduce greenhouse gas ("GHG") emissions. Under the proposal, satisfying these requirements would be a condition of eligibility for federal government contracts.

The Chamber's members range from the small businesses and local chambers of commerce that line the Main Streets of America to leading trade associations and Fortune 500 companies, to growing startups in emerging and fast-growing industries that are shaping our future. Chamber members include federal contractors large and small, that provide products and services across diverse industries such as aerospace and defense, telecommunications, information technology, engineering services, food and hospitality, pharmaceuticals, biotechnology, healthcare, energy, and many more.

We work with our members and other stakeholders to promote practices, policies, and technology innovations across industry and government to address the climate challenge. Our particular focus has been on facilitating the development, deployment and commercialization of technologies needed to meet our energy demands while accelerating the transition to a cleaner economy. It is vital that citizens, governments, and businesses work together to reduce the risks associated with climate change and ensure a sustainable and prosperous future. American companies are already playing a crucial role in developing innovations and approaches to reduce GHG emissions while also spurring the evolution of climate disclosures. Companies are also

increasingly reporting more information to the public about their efforts to reduce their GHG emissions. Many have also made forward-looking statements and commitments to reduce their emissions over time. These commitments have helped drive progress to address climate change over the last decade.

While the private sector is making significant progress, regulatory decisions must always be informed by a careful analysis of the available alternatives, outcomes, and cost-benefit tradeoffs to ensure that optimal policies are implemented. Such regulatory decisions also must be made within the bounds of agencies' legal authorities. We are concerned that the Proposed Rule fails to strike the right balance. While the Federal Acquisition Regulatory Council ("Council") seeks to further the worthwhile end of mitigating the potential effects of global climate change, the Proposed Rule itself is an inappropriate and inefficient means of doing so, for several reasons.

First, the Proposed Rule would impose immense costs on government contractors of all sizes, costs that would be passed on to the government and ultimately to taxpayers. This would undermine rather than advance the goal of an economic and efficient system of contracting that underpins the Federal Property and Administrative Services Act. Detailed disclosure of climate-risk assessment processes and risks, inventorying and disclosing scope 1, 2, and 3 GHG emissions, developing and implementing science-based emissions-reduction targets, and paying fees to the private entities to whom the Council requires many of the disclosures be submitted, among other things, would require thousands of employee hours and saddle contractors with billions of dollars in added implementation and compliance costs. The government's acquisition costs would rise as a consequence, and some contractors, and companies in the supply chain, would likely drop out of the market entirely, weakening the competitive forces that keep prices down. Although the Council suggests that the proposed disclosures may lead to a reduction in GHG emissions, the Proposed Rule provides no evidence for that suggestion. Even if it did, the Council provides no "reasoned determination that the benefits of the intended regulation justify its costs."[1]

Second, the Council's pursuit of goals beyond economic and efficient contracting exceeds its legal authority. While the Council can promulgate specific, output-related standards to help ensure that the government acquires the goods and services it needs at appropriate prices, the Council lacks the statutory authority to use government contracts as a vehicle for furthering other policy goals like addressing climate change, even if well intended. The Council's attempt to do that here not only exceeds the Council's statutory authorization, but also raises significant issues under the Constitution. Among other things, the Proposed Rule would force contractors to associate with, and likely follow, the speech guidelines of certain private organizations whom the Council would deputize to do most of the standard setting and verification. This unusual arrangement would violate contractors' First Amendment rights and would

[1] Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993).

transgress longstanding legal limitations on delegating legislative and rulemaking authority to private entities.

Third, the Proposed Rule would violate the Administrative Procedure Act in several respects. Most significantly, the Council's cost-benefit analysis is flawed and vastly underestimates the costs. It misreads or overlooks estimates, relies on stale data, ignores millions of dollars of costs altogether, and inconsistently and inaccurately frames the costs that it does consider. For example, the Council alludes to benefits from potential GHG reductions, but fails to acknowledge or quantify the costs required to achieve such reductions. The actual costs of the Council's proposal would exceed their estimate of $1 billion per year. The benefits side of the ledger fares no better. The cost savings the Council cites are speculative and unlikely to materialize. The Council also fails to grapple with the duplicative, and even conflicting, requirements the Securities and Exchange Commission (SEC) is simultaneously proposing to impose on public companies.

Other aspects of the proposal are equally troubling. The Council fails to account for the disproportionate burden that the Proposed Rule would impose on small businesses, both directly as federal contractors and indirectly as suppliers of major contractors. The rule would outsource most of the standard setting to private entities that the federal government does not control, regulate, or monitor. It would require contractors, at significant cost, to collect and analyze data to fill out detailed mandatory filings. It would undermine national-security interests. It would set compliance deadlines that are impossible to meet. It would require contractors to set science-based targets, even if they do not have a viable means of meeting the targets in the short timeframe allowed, and it would do all of this without the Council having adequately considered numerous less restrictive ways of pursuing the Council's interests.

These and other flaws counsel in favor of abandoning the proposal, as we explained in further detail in the written comments that we submitted to the Council on February 13, 2023.[2] Thank you for the opportunity to testify, and I look froward to your questions.

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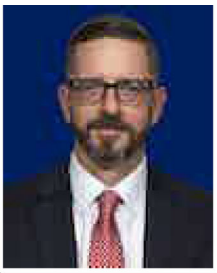
[2] *See* https://www.uschamber.com/small-business/u-s-chamber-of-commerce-comments-on-federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial-risk.



Vice President, Environment and Regulatory Affairs, U.S. Chamber of Commerce

Chad S. Whiteman is vice president for environment and regulatory affairs at the U.S. Chamber of Commerce's Global Energy Institute. Whiteman has more than two decades of experience working on energy and environmental policy, including developing and implementing Clean Air Act policies at the U.S. Environmental Protection Agency as well as leading executive branch review of top Administration regulatory policies for the White House.

Whiteman is a Clean Air Act expert and is responsible for developing the Institute's clean air policies and strategies as they relate to Congress and the executive branch.

Before joining the Chamber, Whiteman was deputy chief of the Natural Resources and Environment Branch in the White House Office of Information and Regulatory Affairs. There, he provided expert input on the prioritization of agency regulatory and deregulatory actions for White House officials across multiple administrations. He was the executive branch lead for the review of regulatory policy priorities across various statutes impacting onshore and offshore oil and gas production, vehicle fuel economy, biofuels, power plant and industrial emissions, energy efficiency standards for residential appliances and commercial equipment, refrigerant manufacturing, and other sectors.

Earlier in his career, Whiteman was deputy director of the Institute of Clean Air Companies, the U.S. air pollution control technology association promoting the industry to create and maintain vibrant markets for its products and services. He managed the policy committees establishing the outreach priorities for each committee with industry executives on emerging federal and state regulatory policies.

At EPA, Whiteman developed and implemented parts of several power plant market-based cap-and-trade programs, including the Acid Rain Program, the NOx Budget Trading Program, the Clean Air Interstate Rule, and the Clean Air Mercury Rule. He was also the lead analyst for a multiagency effort to quantify the potential air quality impacts of increased nuclear generation as one of the initiatives under President George W. Bush's National Energy Policy.

Whiteman has an M.S. in environmental engineering and a B.S. in civil engineering both from West Virginia University.

Chairman OBERNOLTE. Thank you very much, Mr. Whiteman.

Our third witness is Steven Rothstein, Managing Director of the Ceres Accelerator for Sustainable Capital Markets. Mr. Rothstein, you're recognized for five minutes.

**TESTIMONY OF MR. STEVEN M. ROTHSTEIN, MANAGING DIRECTOR, CERES ACCELERATOR FOR SUSTAINABLE CAPITAL MARKETS**

Mr. ROTHSTEIN. Thank you, Mr. Chair, Madam Ranking Member, Members of the Committee. Again, Steven Rothstein, Managing Director of the Ceres Accelerator. Thank you for the invitation to be here.

Ceres is a nonprofit organization, working with investors and companies to transform the economy and build a just and sustainable future. I'd like to briefly highlight five key points in the rule that we're talking about.

No. 1, the rule will strengthen the ability of agencies to deliver on their mission while reducing burden to taxpayers. This rule will make the United States stronger. The Federal Government spends over $630 billion a year on ranging from food to cement to steel and so much more. It would allow the Federal Government for the first time to really understand the common business practice of measuring and managing climate risk associated with that. According to a recent Deloitte survey of 2000 C-suite executives, 97 percent of those executives say the climate will cause business interruptions in the next few years. PwC did an annual survey of CEOs. Three quarters of those CEOs say that in the next year, the supply chain could be disrupted because of climate risk.

No. 2, by focusing on the Federal supply chain, the rule addresses a major source of the climate risk. We've all known about the brutal climate events that are happening, but to put it in context, NOAA (National Oceanic and Atmospheric Administration) highlighted that in the 1980's, we had one major a billion dollars or more climate event every four months, every four months in the 1980's. In 2010 it was every three weeks. This year, it's every two weeks. That is costing State and Federal taxpayers today hundreds of billions of dollars to prepare and repair for those. So those costs are happening now. The—one of the fortunate things about the proposed rule is that they only focus on the largest suppliers to ease the burden. And as was said earlier, there is only 1.3 percent of the Federal suppliers that represent 86 percent of the emission. So that's a way to ensure that. This is not just the United States. Eighteen countries have come together and say that they need to reduce emissions not just for emission but to reduce business risk. Eighteen countries plus the United States established the Net-Zero Government Alliance. Canada's done something similar and so many other countries.

No. 3, climate risk disclosure is now mainstream among major companies, including many large Federal contractors. In fact, 71 percent, 71 percent of Fortune 500 companies are already disclosing their greenhouse gas emissions. They've done that even without requirements because it makes good business sense. Major Federal contractors like General Dynamics, Honeywell, IBM, Johnson Controls, and so many more are disclosing their emission re-

duction targets. Why are they doing this? Because they know it makes sense, and their investors want it. If you look at the rule, the comments that were submitted to the SEC, over 95 percent of investors representing over $50 trillion of assets have said they need this information because it is a business risk.

No. 4, this proposed rule has received support broader than, to be honest, I would have thought. We did an analysis of the elements, and looking at the core elements of the rule, not every detail, but it got 19,000 individual supporters and 68 organizational supporters who generally support, including the Council of Defense and Space Industries, BP America, Baker Hughes, Global Electronics, National Workforce and Technology Council, National Contract Management Association, and groups like Taxpayers for Common Sense and Sustainable Purchasing Council.

No. 5, the proposed rule properly leverages standards that were developed by the private sector, but we do recommend changes from what the FAR Council proposed. Among the steps the proposed rule takes to minimize burdens is to leverage the private sector standards. Leveraging those standards is exactly what Congress sought when it enacted the *National Technology Transfer and Advancement Act* in 1996, but we think to clarify the rule and add flexibility Ceres recommends the FAR Council not delegate but set minimum Federal standards for science-based targets and allow major contractors to achieve those standards with a widely market-accepted, market-based methodology. That can be SBTi, if there is another one, let them talk about that, too. We also recommend that there should be a third-party process to validate using the same process.

In summary, this approach adheres to what we recommend as guiding principle, leveraging the important work that private sector leaders have already undertaken and adhering to best science.

Thank you for the opportunity. I welcome your questions.

[The prepared statement of Mr. Rothstein follows:]

Ceres
Sustainability is the bottom line.

**"Reducing Climate Risks in Federal Supply Chains While Revitalizing the Economy"**

**Testimony of Steven M. Rothstein**
**Managing Director, Ceres Accelerator for Sustainable Capital Markets**

**Before the House Committee on Science, Space and Technology, Subcommittee on Investigations and Oversight**

**Wednesday, September 20, 2023**

Thank you Chair Obernolte, Ranking Member Foushee and members of the Subcommittee for the invitation to testify today. My name is Steven M. Rothstein. I serve as the Managing Director of the Ceres Accelerator for Sustainable Capital Markets. Ceres is a nonprofit organization working with investors and companies to transform the economy to build a just and sustainable future through equitable market-based and policy solutions.

I am grateful for the opportunity to share Ceres' views on addressing climate risk and resilience in federal supply chains with the Subcommittee.

The focus of this hearing is a proposal to address climate risks and opportunities by the FAR Council, a Congressionally-authorized policy making entity composed of the Department of Defense (DOD), NASA and the General Service Administration (GSA) and coordinated by the Office of Federal Procurement Policy. Released for public comment in November 2022 and awaiting finalization, the Federal Supplier Climate Risks and Resilience Proposed Rule is a critically important initiative. In February 2023, Ceres filed comments expressing strong support for the proposal and offering recommendations for improvement. We ask that these comments, as well as our March 2023 supplemental comments that provided an analysis of the comment file, be considered part of the hearing record.

Today I will emphasize six key points about the proposed rule:

1. The rule will strengthen the ability of agencies to deliver on their missions while reducing burdens on taxpayers
2. By focusing on federal supply chains, the rule addresses a major source of climate risk
3. Climate risk disclosure is now mainstream among major companies, including large federal contractors

4. The proposed rule does not dictate the outcomes of any particular contracting decision
5. The proposed rule has received broad support, including from the private sector
6. The proposed rule properly leverages standards that were developed by the private sector and are based on science, although Ceres recommends some changes

1. The rule will strengthen the ability of agencies to deliver on their missions while reducing burdens on taxpayers.

This proposal will make the United States stronger in many ways. The federal government spends over $630 billion a year on procuring products and services ranging from food and fuel to steel and cement to cars and helicopters. Currently there is no focused federal effort to understand and manage the climate risk in these supply chains. As explained in many comments on the proposal, ending this blindfolded approach to procurement would significantly decrease the burden of climate change on taxpayers. With focused attention to climate risk, the federal government can better identify opportunities for building resilience and saving money for taxpapers. For example, by reducing its overall energy use through cost-effective efficiency measures and increasing its use of renewable energy, the federal government has already saved billions for taxpayers, helped revitalize the economy and strengthened national security.

In recent years, a global consensus has emerged among investors, banks and other participants in capital markets: climate risk is financial risk. Clear, consistent and comparable reporting from companies on how they are managing climate risk is essential both for assessing the prospects of individual businesses and ensuring well-functioning capital markets.

Large companies are increasingly paying attention to climate risk in their supply chains. In a January 2023 survey of 2,000 C-level executives by Deloitte and market research firm KS&R, 97 percent of respondents stated that they expect climate change to impact company strategy and operations in the next three years. In PwC's January 2023 Annual Global CEO Survey, 76 percent of CEOs surveyed said they anticipate that climate risk would impact their supply chains in the next 12 months; 16 percent said they anticipate a "large" or "very large" impact. Focusing on these supply chain risks is simply part of their fiduciary duty to provide the best value for their investors and other stakeholders.



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2. By focusing on federal supply chains, the rule addresses a major source of climate risk.

In the past year, our country has experienced one brutal climate-related disaster after another from Hawaii, California, Texas, Florida, Vermont and beyond. According to NOAA, this is part of a dangerous trend. On average there was a billion-dollar weather and climate disaster every four months in our country in the 1980s. By the 2010s, there was one every three weeks. This year we have experienced one every two weeks.

This is costing hundreds of billions of dollars for state and federal taxpayers to rebuild and strengthen resiliency in the face of these extreme climate and weather events. Governments must address the emissions that are increasing the risks and costs.

Reducing the climate risks that are increasing due to the government's operational emissions can *only* be achieved with the full participation of its major contractors. As the GSA has found, the vast majority of the government's emissions come from its supply chains (so-called Scope 3 emissions). Fortunately, emissions reductions from just a small number of large contractors can accomplish a lot. According to the FAR Council, the proposed rule, with its applicability limited to contractors with $7.5 million of contract awards in the most recent fiscal year, or roughly 1.3% of all federal suppliers, would cover about 86 percent of supply chain greenhouse gas emissions.

Concerned about the growing financial, environmental and national security risks of greenhouse gas emissions, national governments around the world are now committing to reducing emissions in their supply chains. In November 2022, 18 countries joined with the U.S. in launching a Net-Zero Government Initiative, pledging to achieve net-zero emissions from national government operations by no later than 2050 and to develop a roadmap for achieving this outcome by the 2023 UNFCCC Conference of the Parties. In February 2023, Canada's Treasury Board promulgated a Standard on the Disclosure of Greenhouse Gas Emissions and the Setting of Reduction Targets requiring major federal contractors to disclose their greenhouse gas emissions and set emissions reduction targets either through participation in Canada's Net-Zero Challenge or another approved internationally recognized and functionally equivalent standard or initiative.

3. Climate risk disclosure is now mainstream among major companies, including large federal contractors



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A growing number of major companies around the world are recognizing the benefits of disclosing their climate risk assessments and mitigation strategies and voluntarily undertaking significant disclosures. For example, 71 percent of Fortune 500 companies are already disclosing their greenhouse gas emissions. These and other climate risk disclosures are driven in significant part by the expectations of their investors: over 95% of the investors that submitted comments to the Securities & Exchange Commission are urging action to ensure consistent climate disclosure to reduce financial risk.

Among the companies that have embraced climate risk disclosure are large federal contractors. The GSA's Federal Contractor Climate Action Scorecard shows that many of the federal government's largest contractors are already disclosing greenhouse gas emissions, climate risk assessments and emissions reductions targets. For example, on emissions reduction targets, General Dynamics, Honeywell, IBM and Johnson Controls are disclosing their commitments.

The numbers of contractors disclosing actions on climate risk will increase dramatically in the coming years as regulators around the world put in place new disclosure standards. Such standards have already been enacted by the European Union through its Corporate Sustainability Disclosure Directive and will soon be enacted by hundreds of other national governments now that the International Sustainability Standards Board has finalized its climate risk disclosure requirements and those requirements have won the approval of the International Organization of Securities Commissions. As of the time of this writing, two landmark California climate disclosure laws have passed the legislature and the Governor recently announced his intention to sign them, with the support of 30 major companies including Apple, Microsoft and many others. State insurance regulators now require over 80% of insurers to submit public climate disclosure reports.

The FAR Council's proposal is completely in line with what is now mainstream thinking in both the private and public sectors.

4. The proposed rule does not dictate the outcomes of any particular contracting decision

It is important to note that the proposed rule does *not* dictate the outcomes of any particular contracting decision; it is designed solely to provide information for strategy development. Thus any claims that it would interfere with agencies' ability to deliver on their missions are unsupported.



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To the contrary, consistent with the objectives of the Procurement Act, the proposed rule would improve delivery of government services. Thanks to the proposed rule, strategic decisions about agency procurement policies and practices will be informed by essential information on risks and opportunities facing the federal government. Once required disclosures are submitted, DOD and other agencies will finally be able to properly assess the supply chain risks that threaten their programs and can develop strategies for reducing these risks. For example, if any of DOD's fuel suppliers have failed to plan for the transportation bottlenecks that are now regularly arising along key supply routes due to extreme weather, the proposed rule will ensure DOD has this information at its disposal as it updates its procurement strategies.

5. The proposed rule has received broad support, including from the private sector

In March 2023, we filed supplemental comments with an analysis of the public comments. While many supporters of the proposed rule including Ceres offered constructive suggestions for improvement, this analysis shows that the proposed rule enjoys broad support, with nearly 19,000 individual supporters and 68 organizational supporters, including private sector leaders such as **The Council of Defense and Space Industries Association**, **BP America**, **Baker Hughes**, **Global Electronics Council**, **Energy Workforce and Technology Council** and **National Contract Management Association** and nonprofit leaders such as **Taxpayers for Common Sense** and **Sustainable Purchasing Leadership Council** support the key elements of the proposed rule.

6. The proposed rule properly leverages standards that were developed by the private sector and are based on science, although changes are recommended.

The FAR Council takes three critical steps in its proposed rule to minimize burdens on the contracting community: limiting the rule's applicability to only the largest contractors; offering a suite of waivers, exceptions and exemtions; and leveraging private standards that are in widespread use across the private sector.

Leveraging private standards is what Congress sought to promote when it enacted the National Technology Transfer and Advancement Act in 1996. How best to leverage private standards was left to agency discretion to a significant extent and a robust discussion on this topic is welcome and appreciated.

In the proposed rule, the FAR Council calls for major contractors to use SBTI's standards in establishing science-based emissions reduction targets and to secure SBTi's validation that those targets are indeed science-based. Ceres has recommended



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that that the FAR Council instead set a minimum federal standard[1] and allow major contractors to enlist help in achieving the standard from SBTi or any other organization with a widely-accepted, science-based methodology. With respect to proposed rule's requirement that major contractors obtain third-party validation of targets, we similarly recommend that the FAR Council allow validation to be secured from SBTI or any other assurance provider that uses a widely-accepted, science-based framework.

By requiring third-party assurance of a science-based methodology for setting targets, the FAR Council would be following a well-established federal strategy for ensuring effective contractor oversight. An example is the U.S. Department of Defense's Cybersecurity Maturity Model Certification (CMMC) program, which uses third-party assessments in implementing cybersecurity requirements for federal contractors.[2]

The best approaches adhere to two guiding principles: respect for science and leveraging the important work that private sector leaders have already undertaken in partnership with civil society.

We know from experience that SBTI and the other groups mentioned in the proposed rule are committed to these principles. We look forward to working closely with these private standard setters, other civil society groups, the contracting community and policy makers to implement these principles in advancing a new era of procurement rules designed to effectively address climate risk.

Thank you again for this opportunity. I welcome your questions.



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Steven M. Rothstein is the founding Managing Director of the Ceres Accelerator for Sustainable Capital Markets. Ceres Accelerator aims to transform the practices and policies that govern capital markets in order to accelerate reduction of the worst financial impacts of the climate crisis and other sustainability threats. Steven's 40 years of experience will be critical to explore the most effective strategies for the Accelerator to focus on and move capital markets towards climate sustainability.

Steven has had a successful career starting, managing and growing several non-profit, social change and government organizations. After college he was one of the founding team of Citizens Energy Corporation, the world's only non-profit oil company. This enterprise, and its related organizations, grew to provide tens of millions of service for low income and needy individuals through oil, natural gas, electricity, energy conservation, pharmaceuticals and renewable energy. After several years, Steven went on to manage a Massachusetts $300 million human service state agency's programs and facilities for people with intellectual disabilities. He then started and ran Environmental Futures, a management and market consulting company serving a wide range of enterprises in the US and internationally seeking to grow their environmental work. He also ran the New England market for Constellation's entry and expansion into this market as a successful electricity broker. His career also includes running the world renowned, Perkins School for the Blind, as well as Citizen Schools and the John F. Kennedy Library Foundation.

He has worked at local, state, federal and international levels of government. Steven served on many non-profit and government boards. He has spoken and written extensively and worked with partners in the corporate, non-profit, government and philanthropy sectors.

Steven has a BA with Honors in Political Science from Williams College and an MBA from Northeastern University's D'Amore - McKim School of Management. He also studied at Duke University's, Institute of Public Policy. He and his wife, Susan, live in Somerville. They have two grown sons. He is currently on the Brady Campaign for Gun Safety Board and the Mass Civic Learning Coalition's Steering Committee.

Chairman OBERNOLTE. Thank you, Mr. Rothstein.

Our final witness is Victoria Killion, Legislative Attorney for the Congressional Research Services (CRS). Ms. Killion, you're recognized for five minutes.

**TESTIMONY OF MS. VICTORIA KILLION,**
**LEGISLATIVE ATTORNEY,**
**CONGRESSIONAL RESEARCH SERVICE**

Ms. KILLION. Thank you. Chairman Obernolte, Ranking Member Foushee, and Members of the Subcommittee, my name is Victoria Killion, and I'm a Legislative Attorney at the Congressional Research Service, or as you know us, CRS. Thank you for the opportunity to testify before you today about legal considerations relevant to the proposed rule. My testimony today will focus mainly on two legal areas, the major questions doctrine and the private nondelegation doctrine. If these topics sound vaguely familiar but terribly academic, I completely understand. My objective today is to help explain what these doctrines are, how courts have applied them, and how they might affect the current rulemaking.

Both doctrines stem from constitutional principles designed to safeguard Congress' legislative power and are starting to become more prevalent in judicial opinions. The major questions doctrine is about how courts decide whether Congress has authorized an agency to take a particular action. Typically, courts examine the statutory text to see if it provides explicit or implicit authority for a particular agency rulemaking. But there's another consideration as well. The Supreme Court has ruled that when a regulation presents a question of, quote, "vast economic and political significance" that exceeds the history and breadth of agencies' past assertions of authority, there must be, quote, "clear congressional authorization" for that action. Essentially, the doctrine creates a higher bar for an agency to show that its regulation falls within the scope of its statutory authority.

If the proposed rule were to be finalized as written and challenged in court, a reviewing court might examine the anticipated effects of the rule on various industries in the economy, the compliance costs for Federal contractors, and how the promulgating agencies have exercised their authority in the past. If, in the court's view, the rule raised a major question, then the court would likely ask whether a Federal statute clearly authorized its requirements. In the proposed rule, the agencies cited Federal procurement statutes and executive orders as authorities for the regulation. Accordingly, one question that a reviewing court might consider is whether Federal procurement laws clearly authorize the rule's requirements.

Turning to the second legal question, private nondelegation, this doctrine provides that Congress may not delegate its legislative authority to unappointed private entities, and likewise, Federal agencies generally can't assign their regulatory authority, which comes from Congress, to private entities. Courts have ruled that private organizations can assist Federal agencies with implementing Federal law so long as they function subordinately to a Federal agency, and the government has authority and surveillance over their activities.

One aspect of the rule that could implicate the private nondelegation doctrine is the requirement that major contractors bidding on a new contract have their emissions targets validated by SBTi. As we said, that is a private entity. If a prospective contractor subject to that requirement does not obtain validation, the proposed rule would create a presumption that the contractor is not responsible and thus ineligible for the contract. So in evaluating any private nondelegation argument, a reviewing court might consider the nature of SBTi's role. Is it regulatory or does—or would SBTi perform a ministerial or advisory function and whether a Federal agency adequately supervises its activities?

The major questions doctrine and the private nondelegation doctrine are evolving legal areas, and CRS looks forward to helping the Subcommittee navigate these legal questions.

Thank you for inviting me to testify. I'm honored to be here today, and I look forward to your questions.

[The prepared statement of Ms. Killion follows:]

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TESTIMONY

Statement of

**Victoria L. Killion**
Legislative Attorney

Before

Committee on Science, Space, and Technology
Subcommittee on Investigations and Oversight
U.S. House of Representatives

Hearing on

# "A Bar Too High: Concerns with CEQ's Proposed Regulatory Hurdle for Federal Contracting"

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CRS TESTIMONY
Prepared for Congress

# Executive Summary

Chairman Obernolte, Ranking Member Foushee, and Members of the Subcommittee:

My name is Victoria Killion, and I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for the opportunity to testify on potential legal issues concerning the proposed rule, *Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk*.[1] This testimony will focus mainly on two legal considerations: (1) the major questions doctrine; and (2) the private nondelegation doctrine.

If finalized as written, the proposed rule would require "significant" and "major" contractors seeking additional contracts with the U.S. government to make annual, public disclosures regarding their greenhouse gas emissions. It would also require major contractors to set targets for reducing emissions and obtain validation of those targets from a private entity.[2] Failure to comply with these rules could result in a determination of "nonresponsibility" by the contracting officer and loss of the contracting opportunity.[3]

An assessment of the rule's validity potentially could involve application of the major questions doctrine. The doctrine provides that when an agency seeks to regulate "a significant portion of the American economy,"[4] or the agency's assertion of regulatory authority has "vast 'economic and political significance,'"[5] its rule must be based on a clear grant of statutory authority. Notwithstanding the President's broad authority to prescribe policies for carrying out the procurement laws,[6] recent cases involving a federal vaccination requirement suggest that the major questions doctrine, if applicable, could impose a heightened threshold for a court to identify "clear congressional authorization" for some contractor requirements.[7]

The proposed rule could also implicate the private nondelegation doctrine, which generally prohibits the government from delegating regulatory power to a private entity.[8] The resolution of this question could depend on whether a reviewing court considers the private entities' role in this rule as regulatory or instead merely in aid of a federal agency's functions, and whether the federal agency exercises sufficient supervisory authority over the private entity.[9]

CRS remains available to the Committee to provide research and analysis of these issues or other questions related to the current rulemaking through testimony, briefings, and confidential memoranda.

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

[2] *Id.* at 68328.

[3] *Id.* at 68329.

[4] West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022).

[5] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

[6] *E.g.*, AFL-CIO v. Kahn, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc).

[7] *E.g.*, Louisiana v. Biden, 55 F.4th 1017, 1033 (5th Cir. 2022).

[8] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[9] Oklahoma v. United States, 62 F.4th 221, 230 (6th Cir. 2023).

# Introduction

Chairman Obernolte, Ranking Member Foushee, and Members of the Subcommittee:

My name is Victoria Killion, and I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for the opportunity to testify on potential legal issues concerning the proposed rule, *Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk*.[10] This testimony will focus mainly on two legal considerations: (1) the major questions doctrine; and (2) the private nondelegation doctrine. Because of their complexity and constitutional underpinnings, both doctrines present challenging issues for Congress and the agencies that implement federal law. Additionally, recent Supreme Court and federal appellate decisions have spurred major developments in these legal doctrines, which federal courts, legislators, and agencies are working to synthesize and understand. This testimony will provide a foundation for evaluating these legal considerations as they may relate to the proposed rule and other agency regulations. CRS is available to assist further in analyzing these issues.

# Executive Orders

In a series of executive orders, President Biden directed federal agencies to take certain actions to "reduce greenhouse gas emissions," including through amendments to the Federal Acquisition Regulation (FAR),[11] the primary rules governing federal contracts for supplies and services.[12] An executive order issued in January 2021 directed the Chair of the Council on Environmental Quality to "consider additional administrative steps and guidance to assist the Federal Acquisition Regulatory Council [(FAR Council)] in developing regulatory amendments to promote increased contractor attention on reduced carbon emission and Federal sustainability."[13] In May 2021, the President issued Executive Order 14030 (EO 14030), directing the FAR Council, "in consultation with the Chair of the Council on Environmental Quality and the heads of other agencies as appropriate" to "consider amending" the FAR to "require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets."[14] Then, in December 2021, the President directed the General Services Administration (GSA) Administrator to "track disclosure of greenhouse gas emissions, emissions reduction targets, climate risk, and other sustainability-related actions by major Federal suppliers, based on information and data collected through supplier disclosure" requirements of EO 14030.[15] On the same day, the Office of Management and Budget (OMB) published a memorandum recommending that the FAR Council "leverage existing third-party standards and systems" in "the development of regulatory amendments to promote contractor attention on reduced carbon emissions and Federal sustainability."[16]

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[10] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (proposed Nov. 14, 2022) (to be codified at 48 C.F.R pts. 1, 4, 9, 23, 52) [hereinafter Proposed Rule].

[11] Federal Acquisition Regulation, ACQUISITION.GOV, https://www.acquisition.gov/browse/index/far (last visited Sept. 15, 2023).

[12] Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01765.pdf; *see generally Federal Acquisition Regulation (FAR)*, U.S. GENERAL SERVICES ADMINISTRATION (GSA), https://www.gsa.gov/policy-regulations/regulations/federal-acquisition-regulation (last visited Sept. 15, 2023).

[13] Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021), https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad.

[14] Exec. Order No. 14,030, 86 Fed. Reg. 27967 (May 25, 2021), https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.

[15] Exec. Order No. 14,057, 86 Fed. Reg. 70935 (Dec. 13, 2021), https://www.federalregister.gov/documents/2021/12/13/2021-27114/catalyzing-clean-energy-industries-and-jobs-through-federal-sustainability.

[16] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMO NO. M-22-06, CATALYZING CLEAN ENERGY INDUSTRIES AND JOBS THROUGH FEDERAL SUSTAINABILITY (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-06.pdf.

# The Proposed Rule

On November 14, 2022, GSA, along with the Department of Defense (DoD) and the National Aeronautics and Space Administration (NASA),[17] issued a proposed rule to implement EO 14030.[18] The comment period for the rule closed on February 13, 2023.[19] The agencies received over 38,000 comments, 261 of which were posted publicly on *Regulations.gov*.[20]

The proposed rule would amend the FAR to create new qualification standards for "significant" and "major" contractors. The proposal defines "significant contractor" as "an offeror who received $7.5 million or more, but not exceeding $50 million, in total Federal contract obligations (as defined in OMB Circular A–11) in the prior Federal fiscal year as indicated in the System for Award Management (SAM)."[21] "Major contractor" is defined as "an offeror who received more than $50 million in total Federal contract obligations" in the prior federal fiscal year as indicated in SAM.[22]

## Disclosure and Target Validation Requirements

The FAR currently requires offerors that are registered in SAM and that received $7.5 million or more in federal contract awards in the previous fiscal year to "[r]epresent whether they publicly disclose greenhouse gas emissions" and "a quantitative greenhouse gas emissions reduction goal," and to "[p]rovide the website for any such disclosures."[23] If finalized as written, the proposed rule would remove this requirement and create a new subpart of the FAR for "Public Disclosure of Climate Information."[24] The new subpart would require significant and major contractors seeking additional contracts to make annual, public disclosures regarding their Scope 1 and Scope 2 greenhouse gas emissions, starting one year after publication of the final rule.[25] Specifically, the prospective contractors would need to complete a "greenhouse gas inventory" of their annual Scope 1 and 2 emissions and report the total of those annual emissions in the SAM.[26] Among other requirements, the greenhouse gas inventory would have to be

[17] These three agencies "jointly issue the FAR." *Federal Acquisition Regulation*, GSA, https://www.gsa.gov/policy-regulations/regulations/federal-acquisition-regulation (last visited Sept. 15, 2023).

[18] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (proposed Nov. 14, 2022).

[19] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 78910 (proposed Dec. 23, 2022) (extension of comment period), https://www.federalregister.gov/documents/2022/12/23/2022-27884/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial.

[20] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (FAR Case 2021-015), REGULATIONS.GOV, https://www.regulations.gov/docket/FAR-2021-0015 (rulemaking docket).

[21] Proposed Rule, 87 Fed. Reg. at 68329. *See also* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A–11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2023), https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf; SAM.GOV, https://sam.gov/content/home (last visited Sept. 15, 2023).

[22] Proposed Rule, 87 Fed. Reg. at 68329.

[23] 48 C.F.R. § 23.802(d).

[24] Proposed Rule, 87 Fed. Reg. at 68328 (proposed amendments to 48 C.F.R. § 23.802 and proposed new subpart 23.XX). The proposed rule would also remove a related section requiring contracting officers to insert provisions about these representations in certain contracts. *Id.* (proposed amendments to 48 C.F.R. § 23.804).

[25] *Id.* at 68329. The proposed rule defines "Scope 1 emissions" as "direct greenhouse gas emissions from sources that are owned or controlled by the reporting entity," and "Scope 2 emissions" as "indirect greenhouse gas emissions associated with the generation of electricity, heating and cooling, or steam, when these are purchased or acquired for the reporting entity's own consumption but occur at sources owned or controlled by another entity." *Id.*

[26] *Id.* at 68329.

"conducted in accordance with the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard."[27]

The proposed rule would impose additional requirements on major contractors. These requirements would incorporate the standards and processes of three organizations that are not part of the federal government.[28] The first organization is CDP, "a not-for-profit charity that runs the global disclosure system for investors, companies, cities, states and regions to manage their environmental impacts."[29] CDP operates an online disclosure platform, through which companies can submit responses to CDP's annual Climate Change Questionnaire.[30] The second organization is the Task Force on Climate-related Financial Disclosures (TCFD), a group of 31 members "representing both preparers and users of financial disclosures."[31] TCFD was convened in 2015 by the Financial Stability Board, "an international body that monitors and makes recommendations about the global financial system."[32] In 2017, TCFD published "recommendations to improve and increase reporting of climate-related financial information."[33] The third organization is the Science Based Targets initiative (SBTi), "a partnership between CDP, the United Nations Global Compact, World Resources Institute (WRI) and the World Wide Fund for Nature (WWF)."[34] SBTi has a framework for companies to "commit to set a science-based target," "develop" that target, and have that target "validated" by SBTi.[35]

Under the proposed rule, major contractors would need to submit an "annual climate disclosure"[36] by "completing those portions of the CDP Climate Change Questionnaire that align with the TCFD recommendations as identified by CDP" and making that disclosure "available on a publicly accessible

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[27] *Id.* at 68328 (proposed § 23.XX02).

[28] *Id.* at 68329 (proposed § 23.XX03(b)(1)).

[29] *About Us*, CDP, https://www.cdp.net/en/info/about-us (last visited Sept. 15, 2023).

[30] Proposed Rule, 87 Fed. Reg. at 68315; *see also Guidance for Companies*, CDP, https://www.cdp.net/en/guidance/guidance-for-companies (last visited Sept. 15, 2023).

[31] *About: Task Force Members*, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (TCFD), https://www.fsb-tcfd.org/about/ (last visited Sept. 16, 2023).

[32] *About the FSB*, FINANCIAL STABILITY BOARD (FSB), https://www.fsb.org/about/#mandate (last updated Nov. 16, 2020); TCFD, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES: 2022 STATUS REPORT 2 (2022), https://assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf.

[33] Proposed Rule, 87 Fed. Reg. at 68315; TCFD, RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (2017), https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf.

[34] *Who We Are*, SCIENCE BASED TARGETS INITIATIVE (SBTI), https://sciencebasedtargets.org/about-us (last visited Sept. 15, 2023).

[35] Proposed Rule, 87 Fed. Reg. at 68316; *see also How Can Companies Set a Science-Based Target?*, SBTI, https://sciencebasedtargets.org/how-it-works (last visited Sept. 16, 2023).

[36] Proposed Rule, 87 Fed. Reg. at 68329. The proposed rule defines "annual climate disclosure" as:

> [A]n entity's set of disclosures that—(1) Aligns with—(i) The 2017 Recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD) (see https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf), which cover governance, strategy, risk management, and metrics and targets (see figure 4 of the 2017 recommendations for an outline of disclosures); and (ii) The 2021 TCFD Annex: Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures, which includes updates to reflect the evolution of disclosure practices, approaches, and user needs (see https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFDImplementing_Guidance.pdf); and (2) Includes—(i) A greenhouse gas inventory of its Scope 1, Scope 2, and relevant Scope 3 emissions; and (ii) Descriptions of the entity's climate risk assessment process and any risks identified.

*Id.* at 68328 (proposed § 23.XX02).

website."[37] Among other things, the annual climate disclosure would have to include a major contractor's Scope 3 emissions, in addition to its Scope 1 and 2 emissions.[38]

The proposed rule would also require major contractors to develop a "science-based target," have that target "validated" by SBTi, and publish the validated target on a publicly accessible website.[39] The proposed rule defines "science-based target" as:

> [A] target for reducing greenhouse gas emissions that is in line with reductions that the latest climate science deems necessary to meet the goals of the Paris Agreement to limit global warming to well below 2°C above pre-industrial levels and pursue efforts to limit warming to 1.5°C (see SBTi frequently asked questions at https://sciencebasedtargets.org/faqs#what-are-science-based-targets). For information on the latest climate science see 2018 Intergovernmental Panel on Climate Change (IPCC) Special Report on 1.5°C at https://www.ipcc.ch/sr15/.[40]

Five groups of entities would be automatically exempt from the proposed disclosure and validation requirements: (1) an "Alaska Native Corporation, a Community Development Corporation, an Indian tribe, a Native Hawaiian Organization, or a Tribally owned concern, as those terms are defined at 13 CFR 124.3"; (2) a "higher education institution (defined as institutions of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001)"; (3) a "nonprofit research entity"; (4) a state or local government; and (5) an "entity deriving 80 percent or more of its annual revenue from management and operating contracts (see subpart 17.6) that are subject to agency annual site sustainability reporting requirements."[41] Additionally, the requirements specific to major contractors would not apply to a nonprofit organization or an entity listed as a small business for purposes of its primary code in the North American Industry Classification System.[42]

## Consequence of Noncompliance

From a legal perspective, the main consequence of noncompliance with these requirements is potential ineligibility to receive a federal contract or sell goods or services to the federal government. The FAR provides that "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only."[43] A prospective contractor must "affirmatively demonstrate its responsibility" to the contracting officer reviewing its bid.[44] The contracting officer must evaluate seven criteria to determine whether the prospective contractor is responsible, including whether the company is "otherwise qualified and eligible to receive an award under applicable laws and regulations."[45] The proposed rule would explicitly include its disclosure and validation requirements as an example of potentially applicable regulations.[46] If a significant or major contractor did not comply with the disclosure and validation

[37] *Id.* at 68329 (proposed § 23.XX03(b)(1)).

[38] *Id.* at 68328 (proposed § 23.XX02). The proposed rule defines "Scope 3 emissions" as "greenhouse gas emissions, other than those that are Scope 2 emissions, that are a consequence of the operations of the reporting entity but occur at sources other than those owned or controlled by the entity." *Id.* at 68329 (proposed § 23.XX02).

[39] *Id.* at 68329 (proposed § 23.XX03(b)(2)). Major contractors could rely on targets validated by SBTi within the previous 5 calendar years. *Id.*

[40] *Id.* at 68329 (proposed § 23.XX02).

[41] *Id.* at 68329 (proposed § 23.XX04(a)).

[42] *Id.* at 68329 (proposed § 23.XX04(b)).

[43] 48 C.F.R. § 9.103(a).

[44] *Id.* § 9.103(c).

[45] *Id.* § 9.104-1(g).

[46] Proposed Rule, 87 Fed. Reg. at 68327 (proposed amendment to 48 C.F.R. § 9.104-1).

requirements (as applicable), the proposed rule would require the contracting officer to "presume" that the contractor is nonresponsible unless the contracting officer makes certain determinations.[47]

The presumption of nonresponsibility would not apply to entities that are exempt from registering in SAM at the time of submitting an offer or quote.[48] Additionally, the proposed rule would permit the senior procurement executive of the contracting federal agency to grant waivers to non-exempt entities in certain circumstances. One type of waiver would dispense with the procedures to determine compliance with the reporting and validation requirements for "[f]acilities, business units, or other defined units for national security purposes" or "[e]mergencies, national security, or other mission essential purposes."[49] Alternatively, the senior procurement executive could provide a waiver of up to one year "to enable a significant or major contractor to come into compliance with" the reporting and validation requirements.[50]

# Legal Considerations

As previously indicated, the agencies undertaking the rulemaking published hundreds of comments in favor of and in opposition to the proposed rule. These comments reflect a wide range of legal and policy issues. This testimony focuses on two legal questions that may arise if the agencies were to finalize the proposed rule in this form. The first is the major questions doctrine, and the second is the private nondelegation doctrine.

## Major Questions Doctrine

Federal agencies derive their authority to regulate from Congress; in other words, from federal statutes.[51] If an agency exceeds its statutory authority through a given regulation, the Administrative Procedure Act authorizes a court to "hold unlawful and set aside" that regulation.[52]

Some statutory authorizations are explicit and specific; in other laws, Congress states an agency's authority in broad or general terms. In interpreting a statute that delegates authority to an agency, the Supreme Court generally begins—and often ends—with the statutory text.[53] In recent years, however, the Court has applied and elaborated on what some courts have called a "background rule"[54] of statutory construction or "extra-statutory limitation[]"[55] known as the major questions doctrine. Under this doctrine, when an agency seeks to regulate "a significant portion of the American economy,"[56] or its assertion of regulatory authority has "vast 'economic and political significance,'"[57] its rule must be based on a clear grant of statutory authority.[58] The Supreme Court has not drawn a line between "major" and

[47] *Id.* at 68327 (proposed amendment to 48 C.F.R. § 9.104-3).

[48] *Id.* at 68330 (proposed § 23.XX06(a)) (exempting "offerors and quoters" excepted from registration under 48 C.F.R. § 4.1102(a)).

[49] *Id.* at 68330 (proposed § 23.XX06(b)(1)).

[50] An agency would have to make waivers of this type publicly available on its website. *Id.* at 68330 (proposed § 23.XX06(b)(2)).

[51] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 665 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

[52] 5 U.S.C. § 706(2)(C).

[53] *See* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 553 (2014) (stating that the Court's "analysis begins and ends with the text" of the statutory provision at issue because the text was "patently clear").

[54] N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 296 (4th Cir. 2023).

[55] Louisiana v. Biden, 55 F.4th 1017, 1028 (5th Cir. 2022).

[56] West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022).

[57] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

[58] CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022).

"minor" questions for purposes of this doctrine or specified which legislative acts could constitute clear congressional authorization. Although the Court has twice applied the major questions doctrine in cases involving requirements related to greenhouse gas emissions, those cases involved the Environmental Protection Agency's authority and did not involve requirements for federal contractors.[59]

Some commenters have argued that the proposed rulemaking implicates the major questions doctrine and exceeds the agencies' statutory authority.[60] This section examines the statutes and executive orders that the agencies cited in support of the proposed rule as well as the cases that might inform a court's analysis of whether the rule involves a major question.

## Procurement Authorities

The agencies issuing the proposed rule cite three statutes, four executive orders, and one OMB memorandum as authorities for promulgating the proposed changes to the FAR. The three statutory references—40 U.S.C. § 121(c), 10 U.S.C. chapter 137, and 51 U.S.C. § 20113—are listed in the current authority citations for Parts 1, 4, 9, 23, and 52 of Title 48 of the FAR (i.e., the parts that the proposed rule would amend).[61] The agencies did not propose any changes to these authority citations for purposes of the proposed rule.[62]

Section 121(c) of Title 40 provides that the GSA Administrator "may prescribe regulations to carry out this subtitle," referring to the Federal Property and Administrative Services laws in 40 U.S.C. §§ 101 to 1315 as well as Title III of the Federal Property and Administrative Services Act of 1949 (Procurement Act) concerning procurement procedure.[63] These provisions do not appear to specifically address contractor reporting of or targets to reduce greenhouse gas emissions.[64]

The second citation, invoking 10 U.S.C. chapter 137, refers to a chapter of the *U.S. Code* that Congress has repealed, though many of its provisions were transferred to other sections of the *U.S. Code*. Among the transferred sections are provisions directing the Secretary of Defense to promulgate regulations governing certain aspects of the procurement process.[65] The provisions transferred from chapter 137 do not appear to specifically address contractor reporting of or targets to reduce greenhouse gas emissions.[66]

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[59] *West Virginia*, 142 S. Ct. at 2587; *Util. Air Regulatory Grp.*, 573 U.S. at 302.

[60] *See, e.g.*, Crowley Maritime Corporation, Comment on Proposed Rule on Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Feb. 13, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0135 (comment ID FAR-2021-0015-0135). Chamber of Com. of the U.S., Comment on Proposed Rule on Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Feb. 14, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0254.

[61] *E.g.*, 48 C.F.R. Part 9—Contractor Qualifications (authority citation).

[62] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68327 (proposed Nov. 14, 2022).

[63] Pub. L. No. 107-217, § 111, 116 Stat. 1062, 1065 (2002) (codifying title 40 of the *U.S. Code*); Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, title III, 63 Stat. 377, 393 (codified as amended in scattered sections of title 41, *U.S. Code*). Section 121(c) also states that the GSA Administrator "shall prescribe regulations that the Administrator considers necessary to carry out the Administrator's functions under this subtitle." 40 U.S.C. § 121(c)(2).

[64] Based on a search of subtitle I of title 40 and title 41 of the *U.S. Code* in *Lexis Advance* for the terms "greenhouse," "climate," "emissions," and "net zero."

[65] *See, e.g.*, 10 U.S.C. §§ 3501(b)(1)–(2)(A) (directing the Secretary of Defense to "prescribe acquisition regulations" to "promote the use of multiyear contracting"); *id.* § 3069 (directing the Secretary of Defense to "prescribe regulations" to administer a section concerning the acquisition of "end items"); *id.* § 4507(a) (directing the Secretary of Defense to "prescribe regulations to ensure, to the maximum extent practicable, that professional and technical services are acquired on the basis of the task to be performed rather than on the basis of the number of hours of services provided").

[66] 10 U.S.C. ch. 137 (repealed and listing renumbered and transferred provisions), https://uscode.house.gov/view.xhtml?req=(title:10%20chapter:137%20edition:prelim)%20OR%20(granuleid:USC-prelim-title10-chapter137)&f=treesort&num=0&edition=prelim.

Section 20113 of Title 51 authorizes NASA to "make, promulgate, issue, rescind, and amend rules and regulations governing the manner of its operations and the exercise of the powers vested in it by law."[67] Those powers include the authority to acquire certain real and personal property and to enter into such contracts with governmental and private entities "as may be necessary in the conduct of its work and on such terms as it may deem appropriate."[68]

Although not specifically cited in the proposed rule, two provisions of Title 51 authorize the NASA Administrator to take certain steps to address greenhouse gas emissions. Section 40112 directs the NASA Administrator to "establish an initiative to research, develop, and demonstrate new technologies and concepts . . . to reduce greenhouse gas emissions from aviation, including carbon dioxide, nitrogen oxides, other greenhouse gases, water vapor, black carbon and sulfate aerosols, and increased cloudiness due to contrail formation."[69] Objectives of the initiative include "a reduction of greenhouse gas emissions from new aircraft by at least 50 percent, as compared to the highest-performing aircraft technologies in service as of December 31, 2021," and "net-zero greenhouse gas emissions from aircraft by 2050."[70] Section 40702 similarly directs the Administrator to "establish an initiative involving the Administration, universities, industry, and other research organizations as appropriate, of research, development, and demonstration, in a relevant environment, of technologies to enable the following commercial aircraft performance characteristics: . . . [s]ignificant reductions in greenhouse gas emissions compared to aircraft in commercial services as of October 15, 2008."[71]

As authority for the reporting and target validation requirements specifically in the proposed rule, the agencies cited the executive orders and OMB memorandum discussed at the outset of this testimony.[72] As previously indicated, one of the executive orders, EO 14030, directed the FAR Council "in consultation with the Chair of the Council on Environmental Quality and the heads of other agencies as appropriate" to "consider amending" the FAR to "require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets."[73] This executive order was based on "the authority vested in [the President] by the Constitution and the laws of the United States of America."[74]

While EO 14030 does not indicate which particular statutes authorize the directives regarding the FAR amendments, the statute that authorizes the GSA Administrator to promulgate regulations to carry out the procurement laws also authorizes the President, in subsection (a), to "prescribe policies and directives that the President considers necessary to carry out this subtitle" and that are "consistent with this subtitle."[75] In the past, the executive branch has exercised this authority to impose conditions on federal contractors, which courts have largely upheld until recent years. In 1979, the U.S. Court of Appeals for the D.C. Circuit[76] observed that until that point "the most prominent use of the President's authority" under the predecessor Procurement Act was "a series of anti-discrimination requirements for Government

[67] 51 U.S.C. § 20113(a).

[68] *Id.* § 20113(c), (e).

[69] *Id.* § 40112(b).

[70] *Id.* § 40112(c)(A), (C).

[71] *Id.* § 40702.

[72] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68328 (proposed Nov. 14, 2022) (proposed § 23.XX01).

[73] Exec. Order No. 14,030, 86 Fed. Reg. 27967 (May 25, 2021), https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.

[74] *Id.*

[75] 40 U.S.C. § 121(a).

[76] For purposes of brevity, references to a particular circuit in the body of this testimony (e.g., the D.C. Circuit, the Second Circuit) refer to the U.S. Court of Appeals for that particular circuit.

contractors."[77] Although the "early anti-discrimination orders were issued under the President's war powers and special wartime legislation," an appellate court later upheld the orders as "a proper exercise of presidential authority" under the Procurement Act and "the 'declaration of policy' in the Defense Production Act of 1950."[78] In its 1979 decision in *AFL-CIO v. Kahn*, the D.C. Circuit ruled that the President had the authority to deny "Government contracts above $5 million to companies that fail or refuse to comply with . . . voluntary wage and price standards."[79] The court rejected the district court's conclusion that this limitation on federal contracts conflicted with another federal statute that, in the district court's view, prohibited certain "mandatory economic controls."[80] The D.C. Circuit reasoned that "any alleged mandatory character of the procurement program is belied by the principle that no one has a right to a Government contract."[81] The court quoted the Supreme Court's statement in a 1940 decision that "the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."[82]

The Fifth Circuit has observed that while "[t]he Supreme Court has had little occasion to review presidential authority" under 40 U.S.C. § 121(a) (formerly, the Procurement Act), since *Kahn* "courts have generally landed on a 'lenient' standard under which the President must demonstrate a 'sufficiently close nexus' between the requirements of the executive order and 'the values of 'economy' and 'efficiency.'"[83] For example, in 2003, the D.C. Circuit upheld an executive order requiring businesses with government contracts over $100,000 to post notices at all of their facilities to inform employees of certain rights under federal labor law and to require their subcontractors to do the same.[84] The order stated that "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced. The availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts."[85] The D.C. Circuit reasoned that although that "link may seem attenuated" and potentially "increase procurement costs" (at least in "the short run"), there was "enough of a nexus" to uphold the requirement.[86] In 2009, a federal district court in Maryland held that the Procurement Act authorized an executive order and FAR amendment requiring federal contractors to use a specific electronic system to verify employment eligibility of certain employees.[87]

These cases predated the Supreme Court's major questions decisions from the last few terms so it is unclear if the Court, presented with similar facts, would reach the same conclusion about the President's

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[77] AFL-CIO v. Kahn, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc); *see also* Kentucky v. Biden, 57 F.4th 545, 549 (6th Cir. 2023) (stating that the "Presidents' earliest invocations" of the statute "matched its relatively modest scope").

[78] *Kahn*, 618 F.2d at 790 (citing Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3d Cir. 1964)).

[79] *Id.* at 785.

[80] *Id.* at 794.

[81] *Id.*

[82] Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940).

[83] Louisiana v. Biden, 55 F.4th 1017, 1026 (5th Cir. 2022) (quoting UAW-Labor Emp't & Training Corp. v. Chao, 325 F.3d 360, 367 (D.C. Cir. 2003), and *Kahn*, 618 F.2d at 792). *But cf.* Kentucky v. Biden, 57 F.4th 545, 552 (6th Cir. 2023) (concluding that the "operative language in § 121(a) empowers the President to issue directives necessary to effectuate the Property Act's substantive provisions, not its statement of purpose").

[84] *Chao*, 325 F.3d at 362.

[85] *Id.* at 366 (quoting Exec. Order No. 13,201, 66 Fed. Reg. 11221 (Feb. 22, 2001)).

[86] *Id.* at 366–67.

[87] Chamber of Com. of the U.S. v. Napolitano, 648 F. Supp. 2d 726, 738 (D. Md. 2009). Like the D.C. Circuit in *Kahn*, the court was asked to decide whether a separate federal statute, which generally prohibited the government from requiring private participation in the e-verification system, prohibited the government from requiring contractors to use the system. The court concluded that it did not, reasoning that although the order and final rule "require government contracts to contain a clause regarding use of [the specific e-verification system], potential government contractors have the option not to contract with the government." *Id.* at 736.

procurement authority. As the next section explains, while there are many open questions regarding the major questions doctrine, it is possible that the doctrine may modify the application of the "close nexus" standard in the context of sufficiently significant assertions of agency authority.

## Major Questions Considerations

In addition to the cases discussed above, a court reviewing the authority for the proposed rule might consider a series of appellate decisions concluding that the President likely did not have sufficient authority to require federal contractors to impose COVID-19 vaccination requirements on their workforces.[88] The courts in those cases decided that the President's order involved a major question because, in the words of the Fifth Circuit, it was "neither a straightforward nor predictable example of procurement regulations authorized by Congress to promote 'economy and efficiency.'"[89] In reviewing an order preliminarily enjoining the vaccination requirement, the Fifth Circuit recognized the breadth of the President's statutory authority under 40 U.S.C. § 121(a) and the "close nexus" test.[90] The court reasoned, however, that under the major questions doctrine, the order likely exceeded the President's "proprietary authority in federal contracting or employing" because it reached employees who were not working on a "federal job site" or on projects covered by a federal contract.[91] In another decision involving the same contractor requirement, the Eleventh Circuit declined to apply the "close nexus" test, holding that in light of the major questions doctrine, "[a]gencies' bare authority to set contract specifications and terms is not enough to show that when Congress passed the Procurement Act it contemplated the general power to mandate vaccination."[92] The court reasoned that "[o]ther statutes setting out procurement rules show that when Congress wants to further a particular economic or social policy among federal contractors through the procurement process—beyond full and open competition—it enacts explicit legislation."[93] As examples, the court cited statutes "prevent[ing] the government from contracting with any company that has criminally violated air pollution standards," and "legislation to respond to significant supply-chain risks" that "allow[ed] federal agencies to refuse to contract with firms that fail to meet certain cybersecurity qualifications."[94] Similarly, the Sixth Circuit concluded in another case addressing the contractor vaccine requirement that it was unlikely Congress authorized this "sweeping" authority based on "a 70-year-old procurement statute."[95]

A court considering whether to apply the major questions doctrine to the proposed FAR rule (if finalized) might first ask whether the proposed rule implicates a question of "vast economic and political significance."[96] According to the preamble of the proposed rule, because the federal government is "the world's single largest purchaser of goods and services," decisions about "[p]ublic procurement can shift markets, drive innovation, and be a catalyst for adoption of new norms and global standards."[97] The agencies posited that requiring major contractors to "set, disclose, and maintain validation of such ambitious climate targets can thus be an effective tool for addressing the Federal Government's Scope 3

[88] Kentucky v. Biden, 57 F.4th 545, 555 (6th Cir. 2023); Louisiana v. Biden, 55 F.4th 1017, 1033 (5th Cir. 2022); Georgia v. President of the United States, 46 F.4th 1283, 1301 (11th Cir. 2022).

[89] *Louisiana*, 55 F.4th at 1029.

[90] *Id.* at 1028 (reasoning that "[t]he statute introduces no serious limit on the President's authority and, in fact, places discernment explicitly in the President's hands").

[91] *Id.* at 1032.

[92] *Georgia*, 46 F.4th at 1301.

[93] *Id.* at 1297.

[94] *Id.*

[95] Kentucky v. Biden, 57 F.4th 545, 548 (6th Cir. 2023).

[96] Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 665 (2022).

[97] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68318 (proposed Nov. 14, 2022).

emissions and associated risks of climate change to the national economy."[98] While the line between major and minor questions has not been clearly drawn, some courts might view these statements as indicators that the rule would essentially "regulate 'a significant portion of the American economy'" or allow the agencies responsible for procurement processes to exercise a "policy judgment" about how best to "substantially restructure the American energy market."[99] On the other hand, some elements of the rule could be cited by a court in deciding that the rule is not sufficiently significant to invoke the major questions doctrine. For example, many of the statements in the preamble suggest that certain economic effects "may" occur or are contingent upon additional, voluntary actions by the regulated contractors.[100] Additionally, the proposed rule is potentially distinguishable from the COVID-19 vaccine requirement because it would apply only to significant and major contractors and would not affect the health decisions of their "individual employees."[101]

If a reviewing court were to conclude that the proposed rule presents a major question, then it would likely ask whether GSA, DoD, and NASA have "clear congressional authorization" to impose the requirements in the proposed rule.[102] As discussed in the previous section, the three statutory sections cited as authorities for the proposed FAR amendments do not explicitly address contractor reporting or targets related to greenhouse gas emissions. Two of the cited statutory provisions give GSA and NASA broad, general authority to promulgate regulations to carry out the duties and functions in their authorizing statutes.[103] At least one federal appellate court has suggested that this type of "catchall delegation language" may be "insufficient to delegate major questions."[104] As to the more specific directive for NASA to develop an "initiative" to research ways to reduce greenhouse gas emissions from aircraft,[105] it is unclear whether this provision would authorize the reporting and target validation requirements in the proposed rule.

By citing to the executive orders, the agencies also appear to rely on the President's authority under 40 U.S.C. § 121(a). If a reviewing court were to follow the reasoning of the Fifth, Sixth, and Eleventh Circuits, it could find that the proposed rule has some of the same breadth issues as the challenged COVID-19 vaccination requirement, because the rule would require certain federal contractors to set emissions targets that affect their operations broadly, not just those linked to the equipment or materials used to fulfill the federal contract.[106] Based on this conclusion, a court could conclude that the proposed rule's qualification standards exceed the "project-specific restrictions contemplated by the [Procurement] Act."[107] It is possible, on the other hand, that a court could distinguish the vaccine cases as involving individual health decisions that reflected a more significant departure from Presidents' past exercises of

[98] *Id.* at 68320.

[99] West Virginia v. EPA, 142 S. Ct. 2587, 2610–12 (2022).

[100] *See, e.g.*, Proposed Rule, 87 Fed. Reg. at 68319 (stating ways in which companies "may be prompted" to act).

[101] *Cf.* Louisiana v. Biden, 55 F.4th 1017, 1033 (5th Cir. 2022) (emphasis removed).

[102] *West Virginia*, 142 S. Ct. at 2609 (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[103] *See* 40 U.S.C. § 121(c) ("The [GSA] Administrator may prescribe regulations to carry out this subtitle."); 51 U.S.C. § 20113 ("In the performance of its functions, [NASA] is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of its operations and the exercise of the powers vested in it by law.").

[104] *See* West Virginia v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1147 (11th Cir. 2023) (analyzing a provision that allowed the agency head to "issue such regulations as may be necessary or appropriate to carry out [the Act]").

[105] 51 U.S.C. § 40112(b).

[106] *See* Georgia v. President of the United States, 46 F.4th 1283, 1296 (11th Cir. 2022) ("To be sure, contract terms sometimes lead to changes in contractors' internal operations. But agencies procuring property or services may 'include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.'" (quoting 40 U.S.C. § 3306(a)(2)(B))).

[107] *Id.*

proprietary authority under the Procurement Act, particularly if a court concludes that the reasoning of *Kahn* is applicable.[108]

## Private Nondelegation Doctrine

Article I of the Constitution vests "[a]ll legislative Powers" granted by the Constitution in Congress.[109] Through its "nondelegation doctrine," the Supreme Court has interpreted the Constitution as limiting Congress's authority to delegate "legislative power" to the other branches of government.[110] Under the related "private nondelegation doctrine," the Court has also limited delegations of federal authority to private entities.[111] In a foundational case on private nondelegation, *Carter v. Carter Coal Co.*, the Supreme Court in 1936 invalidated a federal statute that authorized the largest coal producers and a majority of the coal miners in a given region to impose maximum hour and minimum wage standards on all other miners and producers in that region.[112] The Court considered this arrangement "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[113]

Delegations to private entities are not entirely forbidden, however.[114] After Congress amended the statute at issue in *Carter Coal*, the Supreme Court upheld the revised law against a nondelegation challenge.[115] Under the revised law, private boards of coal producers acted as "an aid" to a federal agency with regulatory authority over the bituminous coal industry.[116] Although the statute authorized the boards to propose certain minimum prices, those prices were subject to "prescribed statutory standards" and the agency could approve, disapprove, or modify those prices.[117] The Court ruled that Congress had not unconstitutionally delegated its legislative authority to private industry because the private boards functioned "subordinately" to the federal agency, which had "authority and surveillance" over their activities.[118] In other words, the Court has drawn a distinction between authorizing private entities to assist the government, subject to its control and supervision, and authorizing private entities to engage in government functions or render a final decision on a policy matter without agency oversight.

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[108] AFL-CIO v. Kahn, 618 F.2d 784, 789–90 (D.C. Cir. 1979) (en banc) (reasoning that "several Executive actions taken explicitly or implicitly" under the predecessor to 40 U.S.C. § 121(a) "have also imposed additional considerations on the procurement process" beyond economy and efficiency).

[109] U.S. CONST. art. I, § 1.

[110] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . .") (first and second alterations in original) (quoting Loving v. United States, 531 U.S. 457, 472 (2001)).

[111] *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (holding that delegation to trade and industrial associations of the power to develop codes of "fair competition" for the poultry industry would be "unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress," invalidating broad Presidential authority to revise and approve industry proposed codes); Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 884 (5th Cir. 2022) (using the term "private non-delegation doctrine").

[112] *Carter Coal*, 298 U.S. at 310–12.

[113] *Id.* at 311.

[114] *See* CRS Report R44965, *Privatization and the Constitution: Selected Legal Issues*, by Linda Tsang and Jared P. Cole (2017).

[115] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).

[116] *Id.* at 387–88.

[117] *Id.* at 388.

[118] *Id.* at 399; *see also* Currin v. Wallace, 306 U.S. 1, 15–16 (1939) (upholding a law that authorized the Secretary of Agriculture to issue a regulation respecting the tobacco market, but only if two-thirds of the growers in that market voted for the Secretary to do so).

Judicial decisions involving the Horseracing Integrity and Safety Act (HISA) illustrate this distinction. HISA originally delegated "unsupervised" authority to a private entity that had the power to regulate anti-doping, medication, and racetrack safety programs for horseracing nationwide.[119] The statute required the Federal Trade Commission (FTC) to approve the private entity's regulations if the agency found that the regulations were consistent with HISA.[120] The FTC could not modify the substance of the regulations or disapprove them based on policy differences.[121] The FTC also could not propose regulations of its own except in cases of emergency.[122] In 2022, the Fifth Circuit held that this version of HISA violated the private nondelegation doctrine.[123] The Fifth Circuit determined that the FTC's authority to review was too limited to serve as independent oversight.[124] Congress then amended HISA by providing the FTC the authority to "abrogate, add to, and modify" regulations submitted to it by the private entity and to propose its own regulations.[125] The Sixth Circuit subsequently determined that HISA as amended created "true oversight authority" and no longer violated the private nondelegation doctrine.[126]

The proposed rule's requirements for major contractors could raise a private nondelegation question in two respects. First, the proposed rule would require major contractors to submit an annual climate disclosure "by completing those portions of the CDP Climate Change Questionnaire that align with the TCFD recommendations as identified by CDP."[127] It is not uncommon for agencies to incorporate third-party standards by reference.[128] Additionally, at least one federal statute encourages agencies to use private-sector standards in some circumstances.[129] A reviewing court might distinguish, however, between incorporating third-party standards by reference and allowing a private party to set the standards that other regulated entities must follow.[130] It is unclear whether the agencies are proposing to incorporate a certain version of the CDP Climate Change Questionnaire as of a fixed date (similar to the TCFD recommendations).[131] The CDP Climate Change Questionnaire might be updated on an annual basis.[132] Additionally, under the proposed rule, CDP would decide which portions of its questionnaire "align with

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[119] Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 882, 890 (5th Cir. 2022).

[120] *Id.* at 884.

[121] *Id.* at 884–86.

[122] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 1204(e), 134 Stat. 3258 (2020) (prior to 2022 amendment).

[123] *Black*, 53 F.4th at 890.

[124] *Id.* at 884–86.

[125] 15 U.S.C. § 3053(e).

[126] Oklahoma v. United States, 62 F.4th 221, 230 (6th Cir. 2023). On remand from the Fifth Circuit and after Congress amended HISA, the district court in that case also concluded that HISA did not violate the private nondelegation doctrine. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, No. 21-CV-071-H, 2023 WL 3293298, at *7 (N.D. Tex. May 4, 2023), *appeal docketed*, No. 23-10520 (5th Cir. May 19, 2023).

[127] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68329 (proposed Nov. 14, 2022).

[128] Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., No. 22-7063, 2023 U.S. App. LEXIS 24037, at *4 (D.C. Cir. Sep. 12, 2023).

[129] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (1996).

[130] *See* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 883 (5th Cir. 2022) (reasoning that HISA delegated regulatory authority to a private entity because, among other reasons, it "broadly instruct[ed]" the private entity to "create a program that includes '[a] uniform set of training and safety standards and protocols consistent with the humane treatment of covered horses,' § 3056(b)(2), while leaving the policy details up to the [private entity]").

[131] *See* 1 C.F.R. § 51.1(f) (providing that for purposes of publication in the *Federal Register*, "[i]ncorporation by reference of a publication is limited to the edition of the publication that is approved" and "[f]uture amendments or revisions of the publication are not included"). The proposed rule specifies the 2017 TCFD recommendations with a 2021 annex providing guidance on their implementation. *See* Proposed Rule, 87 Fed. Reg. at 68328 (proposed § 23.XX02) (defining "annual climate disclosure").

[132] *See* Proposed Rule, 87 Fed. Reg. at 68315 (explaining that "[e]ach year CDP issues the proposed updates to the questionnaire, which are opened for public consultation in the fall," and finalized and available "early in the new year").

the TCFD recommendations," a determination that does not appear to be subject to agency supervision or revision under the proposed framework.[133]

Second, some commenters have suggested that the proposed rule violates nondelegation principles because it would require federal contractors—private entities—to obtain validation of their science-based targets from SBTi—another private entity—to certify compliance with qualification standards under the FAR.[134] While it is not entirely clear from the proposed rule, it appears that SBTi would conduct validation of proposed targets according to its own processes and applying its own and other third-party standards.[135] A court reviewing this framework (if finalized) would likely ask whether the rule delegates governmental authority to SBTi and the nature of that authority—in other words, does the proposed rule delegate regulatory power to SBTi or does it merely authorize SBTi to assist a federal contracting officer in making a contracting determination?[136]

On the one hand, the contracting process and the role allocated to SBTi under the proposed rule might indicate that SBTi would not be exercising regulatory authority. As discussed in the major questions section, some courts have concluded that federal contractors are not "required" to comply with contract provisions because they "have the option not to contract with the government."[137] Additionally, unlike the private entity at issue in the original HISA statute, SBTi would not be creating rules directly governing the conduct of regulated entities. Instead, it would be evaluating whether companies seeking government contracts created a target—effectively, a goal—that aligns with certain standards.[138] This target is one of several factors considered by a contracting officer in determining whether a prospective contractor is eligible to receive a federal contract.[139] A lack of SBTi validation results in a presumption of nonresponsibility for prospective contractors. The presumption can be overcome if the contracting officer makes three findings: (1) the "noncompliance resulted from circumstances properly beyond the prospective contractor's control"; (2) the prospective contractor's "documentation" sufficiently "demonstrates substantial efforts taken to comply" with the rule such as performing "one or more of the actions" that the proposed rule would require; and (3) the "prospective contractor has made a public commitment to comply as soon as possible (within 1 calendar year) on a publicly accessible website."[140]

A reviewing court could conclude, based on this process, that SBTi primarily provides expert assistance to a contracting officer in making a preliminary determination—akin to a recommendation—on whether a

[133] *Id.* at 68329 (proposed § 23.XX03(b)(1)).

[134] *E.g.*, Cargo Airline Assoc., Comment on Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Fed. 13, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0152 (comment ID FAR-2021-0015-0152).

[135] The proposed rule requires a "science-based target" to be "in line with reductions that the latest climate science deems necessary to meet the goals of the Paris Agreement to limit global warming to well below 2°C above pre-industrial levels and pursue efforts to limit warming to 1.5°C." Proposed Rule, 87 Fed. Reg. 68312, 68329 (proposed Nov. 14, 2022). The proposed rule then cites two documents: (1) SBTi's Frequently Asked Questions page; and (2) the 2018 Intergovernmental Panel on Climate Change's Special Report on 1.5°C. *Id.*

[136] Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 872 (5th Cir. 2022) ("A cardinal constitutional principle is that federal power can be wielded only by the federal government.").

[137] Chamber of Commerce of the United States v. Napolitano, 648 F. Supp. 2d 726, 736 (D. Md. 2009).

[138] In *Texas v. Rettig*, the Fifth Circuit rejected a nondelegation challenge to a rule requiring certain state Medicaid contracts to be certified as actuarially sound by a qualified actuary. 987 F.3d 518, 524–25, 533 (5th Cir. 2021). The Supreme Court denied certiorari, and three Justices wrote a statement suggesting that the rule might have violated the private nondelegation doctrine. Texas v. Commissioner, 142 S. Ct. 1308, 1309 (2022) (Alito, J., statement respecting the denial of certiorari).

[139] *Cf. Rettig*, 987 F.3d at 533 (reasoning that "certification is a small part of the approval process" for the contracts at issue).

[140] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68327 (proposed Nov. 14, 2022) (proposed § 9.104(e)(1)).

prospective contractor has met a qualification standard that is technical in nature.[141] SBTi's role in this contracting process, a court might determine, is more similar to other instances in which courts have approved assistance provided by private entities to agencies, which hold the final decisionmaking authority.[142] Like the amended version of HISA upheld by the Sixth Circuit, for instance, the proposed rule does not bind the agency to a private entity's determination.[143] The promulgating agencies considered and rejected "making noncompliance a go/no-go decision for award" and opted instead to "allow[] contracting officers some flexibility to determine what actions a noncompliant contractor has taken to comply."[144]

On the other hand, a reviewing court might conclude that under the proposed rule, SBTi would exercise inadequately supervised regulatory power in violation of the private nondelegation doctrine. A court might find that because SBTi's validation decision is needed to avoid a presumption of ineligibility for a contract award, the proposed rule effectively authorizes this private entity to set the relevant regulatory standards. A court reaching this conclusion might find support in a statement issued by three Supreme Court Justices in a 2022 case, *Texas v. Commissioner*, that the Court declined to review.[145] The statement argued that the role of a private entity in establishing certain standards for certifying state payment plans under Medicaid raised "an important separation-of-powers question."[146] The Justices observed that "[w]hat was essentially a legislative determination—the actuarial standards that a State must meet in order to participate in Medicaid—was made not by Congress or even by the Executive Branch but by a private group," and that "this was no inconsequential matter" because it "has cost the States hundreds of millions of dollars."[147] Additionally, at least one commenter has argued that SBTi could be a competitor to

[141] *Rettig*, 987 F.3d at 531 (reasoning that "an agency does not improperly subdelegate its authority when it 'reasonabl[y] condition[s]' federal approval on an outside party's determination of some issue; such conditions only amount to legitimate requests for input").

[142] For example, in a decision issued earlier this year, the Sixth Circuit upheld the role of a private entity in assisting the Federal Communications Commission (FCC) with administering a certain government fund. The court found it significant that the agency had not granted the private entity "any authority to make actual decisions or establish or define standards." Consumers' Rsch. v. FCC, 67 F.4th 773, 796 (6th Cir. 2023). The Fifth Circuit has agreed to hear a similar challenge *en banc*. Consumers' Rsch. v. FCC, 72 F.4th 107, 108 (5th Cir. 2023) (per curiam).

[143] Proposed Rule, 87 Fed. Reg. at 68324.

[144] *Id.* Additionally, a contractor can obtain a waiver from the senior procurement officer under certain circumstances. Those situations are limited, however, to circumstances involving "[e]mergencies, national security, or other mission essential purposes." *Id.* at 68330 (proposed § 23.XX06(b)(1)). Another type of waiver allows the agency to delay the compliance period for up to one year. *Id.* at 68330 (proposed § 23.XX06(b)(2)).

[145] Texas v. Commissioner, 142 S. Ct. 1308, 1309 (2022) (Alito, J., statement respecting the denial of certiorari).

[146] *Id.*

[147] *Id.*

some of the companies that it would validate,[148] which, if demonstrated, could implicate the due process concerns raised by the Supreme Court in *Carter Coal*.[149]

Some other regulatory schemes authorize third-party testing or certification pursuant to federal standards. For example, manufacturers of certain children's products must submit product samples to a "third party conformity assessment body" accredited by the Consumer Product Safety Commission (CPSC), a government agency, "to be tested for compliance with" applicable CPSC rules, and obtain a certificate of compliance.[150] Congress has also allowed the FCC to "authorize the use of private organizations for testing and certifying the compliance of devices or home electronic equipment and systems with regulations promulgated under this section."[151] In both of these examples, private entities conducting the testing must adhere to rules and procedures specified by Congress or promulgated by the federal agency.[152] However, as signaled by the Justices' statement in *Texas*, some judges may be inclined to scrutinize such schemes more closely. One potentially novel question presented by the proposed rule is whether and under what circumstances a presumption in favor of a private party's testing or certification determination might erode an agency's decisionmaking authority enough to create a private nondelegation concern.

In finalizing the proposed rule, the agencies could potentially mitigate the prospect of a court finding a private nondelegation violation by creating additional mechanisms for the agencies to exercise oversight of SBTi's validation function. Congress also has the option to amend federal law to task a federal agency with the validation decision or to specify limitations on SBTi's role. Other options for Congress include enacting a law that prohibits the agencies from requiring contractor validation of emissions targets altogether or prohibiting validation by private entities.

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[148] Crowley Maritime Corporation, Comment on Proposed Rule on Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Feb. 13, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0135 (comment ID FAR-2021-0015-0135) (stating that SBTi's "board of directors includes multiple corporations that rotate on a regular basis," and suggesting that "[m]any if not most of the companies associated with SBTi likely have federal contracts or are affiliated with federal contractors").

[149] *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (holding that a law giving one person "the power to regulate the business of another, and especially of a competitor," is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment").

[150] 15 U.S.C. § 2063(a)(2).

[151] 47 U.S.C. § 302a(c).

[152] *See* 15 U.S.C. § 2063(d) (setting out "[a]dditional regulations for third party testing"); 47 C.F.R. §§ 2.960–964 (regulations concerning the accreditation of and requirements for Telecommunication Certification Bodies).

Biography for Victoria L. Killion, Legislative Attorney, Congressional Research Service
September 14, 2023

Victoria L. Killion is a Legislative Attorney for the American Law Division of the Congressional Research Service (CRS). Victoria's portfolio for CRS includes a variety of constitutional and administrative law issues, as well as questions of statutory interpretation. In particular, her work for Congress focuses on questions involving separation-of-powers principles and free-speech issues. Prior to joining CRS in 2017, Victoria was an associate at the law firm of Arnold & Porter LLP, in Washington, D.C., where she advised clients on litigation, internal investigations, and compliance matters.

Victoria graduated with a Bachelor of Arts degree in Political Science from the Pennsylvania State University Schreyer Honors College. She graduated *magna cum laude* from Temple University Beasley School of Law in 2010, after which she clerked for the Honorable Paul S. Diamond of the U.S. District Court for the Eastern District of Pennsylvania. Victoria is a member of the District of Columbia and the Pennsylvania Bars.

Chairman OBERNOLTE. Thank you very much, Ms. Killion.

I will now recognize myself for five minutes for questions.

And I want to just point out the fact that we can—reasonable minds can disagree about the wisdom of implementing a rule like this, and I know a lot of the testimony that we heard this morning was arguments back and forth about whether or not this rule is a good thing. But in my opinion, that's not why we're here. We're here discussing whether or not the Administration has the legal authority to impose that rule, absent clear authorization from Congress. And I think everyone in this institution should be concerned about that. Because if it's not your Administration today, it might be your Administration tomorrow. We should all be worried about the legislative authority of Congress being usurped by the executive branch.

I also am very concerned about the fact that this decisionmaking authority was delegated apparently to a foreign company with no competitive process involved in its selection. To me, that raises some serious legal and national security issues, and I think that, regardless of what your thoughts are on the wisdom of the rule, everyone ought to be concerned about that.

Ms. Killion, I enjoyed your testimony about the legalities involved here. I wanted to ask you about the major questions doctrine. You had testified that some of the difficulties when an Administration takes actions that don't have clear authorization from Congress, but I'd like your opinion, in this case, does the DOD, the GSA (General Services Administration), or NASA (National Aeronautics and Space Administration) have a clear grant of authority to require businesses to disclose and reduce their greenhouse gas emissions?

Ms. KILLION. Thank you for that question, Chairman Obernolte. So under the major questions doctrine, the first consideration would be whether this presents a major question. So your question gets to the second part of the doctrine. If there is a major question, would there be clear congressional authorization? Now, unfortunately, the major questions doctrine is in a state of flux right now, and it is still evolving, so we don't know exactly the parameters of what constitutes clear congressional authorization. How specific does the law have to be? Can the court look at things other than the text of the statute?

When it comes to the authorities cited here, the agencies cite three statutes, four Executive orders and an OMB memorandum as authority for the rule, so there's a lot to unpack, and I'm happy to take specific questions on those.

Chairman OBERNOLTE. All right. So is there specific authorization language for those agencies to require the disclosure of greenhouse gas emissions from companies who are involved in procurement?

Ms. KILLION. Unfortunately, Chairman, that is not something that CRS can answer because of the open questions with the major questions doctrine.

Chairman OBERNOLTE. OK, well, I mean, it seems to me like this is just a factual question about the regulations that have actually been passed—I'm sorry, the legislation that's actually been passed

by Congress because in combing through them, we can't find any authorization for these agencies to take this action.

Ms. KILLION. So what I can say is the statutes that I've reviewed, which are the ones that the agency is relying on in the authority citations in this proposed rule, do not appear to specifically use the words in this regulation. That said, we don't know whether—how much specificity is required under the Supreme Court's major questions doctrine. So it is a question, I think, of an open legal issue about how to apply that doctrine.

Chairman OBERNOLTE. Sure. I know other agencies have been going through this as well in the courts, the EPA (Environmental Protection Agency) in particular.

Ms. KILLION. Yes.

Chairman OBERNOLTE. All right. Mr. Whiteman, I wanted to ask about scope 3 emissions because you brought that up in your testimony. And having been in business for 30 years myself, I was asking myself how on earth I would comply with the requirement to disclose scope 3 emissions, which, as you said, are not emissions that a procuring company would create but instead emissions that the suppliers to that company and the end users of that company's products would create. Can you talk a little bit more about that? I mean, for example, what would happen in the case where a supplier refused to disclose its own emissions to someone who was bidding on a Federal procurement contract?

Mr. WHITEMAN. It's a really good question, and it's an important point to bring up. Scope 3 emissions are quite challenging to estimate, and I think in this rulemaking what is even more concerning is if you're able to identify the scope 3 emissions, then you have to go out and actually reduce your emissions. You set the targets, and then you have to actually reduce them. So you have to not only reduce them at your company level, but you have to get your suppliers all through the supply chain to make commitments to do the same. And I think that's one of the unaccounted-for impacts of the rulemaking. It doesn't just affect the 6,000 or so estimated contractors. It affects a much broader number, all the way down through the supply chain. And the council didn't adequately analyze that.

Chairman OBERNOLTE. All right. Thank you very much. I can see I'm out of time. Maybe—hopefully, we'll have time for another round of questions.

I now yield to the Ranking Member, Mrs. Foushee, for five minutes for questions.

Mrs. FOUSHEE. Thank you, Mr. Chairman.

Mr. Rothstein, this rule will provide unprecedented insight into the climate risks contained without the Federal procurement sector. As you said in your testimony, the Federal Government is the world's largest purchaser of products and services. Therefore, the government has a weight of responsibility to ensure American taxpayer money is stewarded responsibly. How will the proposed rule, if finalized, help the government make informed decisions to protect taxpayer dollars from climate-related risks? And further, are agencies required to take any action based on the information disclosed to them pursuant to this rule if finalized?

I would like to ask unanimous consent to enter Ceres' public comment into the record.

Chairman OBERNOLTE. Without objection.

Mrs. FOUSHEE. In those comments and in your testimony, you mentioned the enormous amount of money the Federal Government spends as the world's largest purchaser of goods and services. That's an incredible opportunity to move the ball forward on crucial priorities like climate change. Can you please elaborate on how this rule and thoughtful procurement policy in general can move the market at large?

Mr. ROTHSTEIN. Thank you very much. I'm going to date myself, but I—in the 1980's, I worked on a project looking at the Federal Government exploring the idea of recycled paper, and that moved the marketplace at the time. Clearly, climate change is an enormous risk right now, but it's really a financial risk. If you look at it, as I say, we are spending hundreds of billions of dollars. NOAA projected that last year, our country—just looking at the storms—a billion dollars and above is $160 billion in direct costs. That doesn't count healthcare costs and other costs for our country.

So the first question is, what are the costs today? The costs are enormous, and they're growing exponentially. The one thing that the scientists have taught us over the last decade is, if anything, their estimates have been underreported in terms of what those costs have been. So—and there isn't any other issue that we wouldn't want a business leader or government official to have good information about, so we think this is critical.

The second question you asked about in terms of what would be requirements, it's—that's really up to the senior people. There is no requirement for a procurement officer to take certain action except for just kind of filling out the box, and it's up to the senior people in the agency to make a determination, as it should be. And we would want someone—for example, if the Department of Defense is relying on contractors that are using, let's say, the Panama Canal or Mississippi River and there's droughts and those ships are delayed, that can affect national defense. In fact, the Defense Department has stated that one of the national issues from a security perspective is climate. So we think this would help taxpayers reduce climate risk, reduce healthcare costs, as well as improve national security without putting burdens. And just to highlight, this is only for the largest, largest of suppliers. One-point-three percent have to disclose, but in terms of their emission reductions, that's less than one percent. So it's a small handful of the Federal suppliers.

Mrs. FOUSHEE. Some criticism of this rule has alleged that requiring information on climate risks from prospective contractors will undermine the government's ability to make national defense the priority. What is your response to that?

Mr. ROTHSTEIN. First, just the opposite. Again, if you look back at what the Department of Defense has said, that having more information is important. It's also that there are thousands of companies that will have to release this anyway under European rules. There's a new law that was just passed in California that includes scope 1, scope 2, scope 3. That's not just California companies, but it's companies operating across the country, both public and private so that this information is out there. And again, 92 percent of Fortune 500 companies today publicly release some climate information. They do that because they understand that they want it, their

investors want it, their employees want it. It makes companies more secure and our government more secure.

Mrs. FOUSHEE. Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman OBERNOLTE. The gentlewoman yields back.

We'll go down to Congressman McCormick. Sir, you're recognized for five minutes for your questions.

Mr. MCCORMICK. Thank you, Mr. Chair. By the way, Mr. Chair, I appreciate you talking about the legal authority between the executive and the legislative branches and who gets to delegate what authority there is to begin with. That's what's really concerning with me. As a matter of fact, in the last couple of years what we've seen is the legislative branch being overrun by the executive branch, being able to tell us where we invest our IRA (individual retirement account) savings, where the DOD gets to advertise, whether we have some modifications on our weapons. I think it's interesting when we talk about this, I realized that there's an alarming overreach by the executive branch that's unchecked and unconstitutional. Matter of fact, I would—I'd say that maybe the new moniker should be King Joe based on the way he's acting without any authorization from the balanced government system that we designed by our Constitution.

For those of you who want to talk science, I heard what you guys had to say. Somebody was talking about global warming. Let's talk the science for a second. I'm a scientist, M.D., MBA. I've done some classes, probably just like you guys. One of the things that I don't understand when it comes to carbon emissions—because that's what we're talking about, right? We're not producing methane. Now, animals are other—and land waste and stuff like that.

We're going to talk about carbon emissions. What is the atmosphere made of primarily? Overwhelmingly, nitrogen, right? Then oxygen. And what's the percentage of carbon dioxide in the atmosphere? Anybody want to answer that? Nobody wants to answer that? Scientifically, we—it's an easy question, five minutes on Google, 78 percent nitrogen, 21 percent oxygen. Carbon dioxide is .04 percent. Of that, what percentage comes from manmade of that .04? Anybody want to answer that? Google will tell you it's around 11 percent. So 11 percent of .04 percent is produced by manmade, but that's what we're focused all of our attention on. That's what's caused global warming, that retention by that .04 percent of the carbon emissions that we are 11 percent of is what we're debating here, the hundreds of billions of dollars we want to put in to prevent that, and that's going to prevent global warming and cooling? Because we're talking about environmental change, which can be either. And over the millennium—I just recently watched them say that it's the hottest month in 100,000 years. Based on what scientific evidence? What reporting did we have around the world 100,000 years ago? I didn't see that Egyptian hieroglyphic. Did you? No answers? When I ask scientists all the time, no answers on how we are producing this climate change.

I'm not saying there's not climate change. I'm not saying there's not scientific things we can do to keep a clean environment. I'm the son of a forest ranger. I believe in a clean environment. I will be the first one to pick up trash in the street when I walk by it. But

let's not get carried away and limit our ability to get things done, to keep our global leadership instead of globalism.

Mr. Fanning, you made a great point. A foreign entity who gets to tell the United States what's going on based on an Executive order, would you consider that globalism?

Mr. FANNING. I don't know that I would try to label it globalism or something else. I'm just concerned that it puts other nations in the decision process in what our Pentagon should buy to defend the country.

Mr. MCCORMICK. I couldn't agree with you more. As matter of fact, if you're going to be King Joe, I don't know why you'd put the power back in somebody else's opinion.

Now you talk about, Mr. Rothstein, other people in the world having the same criteria. When we put ourselves on par with everybody else, are we putting ourselves in jeopardy of actually being reined in by other countries?

Mr. ROTHSTEIN. Congressman, first, thank you for your public service and for your question. We're not on par. We're the greatest country in the world.

Mr. MCCORMICK. Amen. We agree on that.

Mr. ROTHSTEIN. And I believe it's actually patriotic to think about our taxpayers, to think about our national defense, to think about our climate, which scientists agree across the board that——

Mr. MCCORMICK. OK. Let me interrupt you there, please. Scientists agree across the board. I debate that science because I read scientists from both sides, just like I do on economic policy. Not everybody believes in modern monetary theory. Not all scientists believe that we are the cause of global warming. Now we like to pretend like that's the case, and the President—sorry, King Joe likes to say that we have scientists and universal agreement. That's simply not true.

I'm out of time, but I want to make a point that we have silenced people who dissent from King Joe, and I think that's a big problem today, and we need to address that first. Thank you. With that, I yield.

Chairman OBERNOLTE. The gentleman yields back.

We'll hear next from Mr. Casten. Congressman, you are recognized for five minutes.

Mr. CASTEN. Thank you. And I am really troubled that we are debating science on the Science Committee. I was a molecular biology major. I would no more claim to be a doctor than a doctor should claim to be a climate scientist. Do better. Fifty percent of all the $CO_2$ we have ever emitted as a species is since I graduated from college in 1993, and we're going to sit here denying? My God.

Let's move on to some more serious conversations. Mr. Rothstein, if I understand right that a lot of companies are voluntarily reporting their climate disclosures, and there is no consistent standard that they currently use to do that, correct?

Mr. ROTHSTEIN. Correct.

Mr. CASTEN. Yes. OK. Mr. Whiteman, a number of my Republican colleagues are talking about putting a carbon border adjustment tax in order to protect U.S. steel manufacturing because U.S. steel has less carbon impact than Chinese steel. Do you agree that U.S. steel is cleaner than Chinese steel?

Mr. WHITEMAN. I'm not sure I know enough to opine on that, but——

Mr. CASTEN. Well, let me give another question. The U.S. gas industry often says that we should increase U.S. gas exports because it's cleaner than the fuels we displace around the world. Do you agree with those—that statement?

Mr. WHITEMAN. Industry has been—is some of the cleanest industry in the world here in the United States——

Mr. CASTEN. OK. How do you possibly know that if we don't have consistent climate reporting? That's my point, right? Like we can talk a good game, but everybody's reporting wildly different things because we don't have consistent standards.

Mr. Rothstein, is a U.S. multinational that does business in Europe subject to European climate disclosure rules?

Mr. ROTHSTEIN. Yes, thousands of them.

Mr. CASTEN. OK. Does anybody on the panel think that it is in the interest of the United States not to lead? Now, I ask that question because I was in Madrid at the climate conference after the prior President pulled us out of the Paris Climate Accord. We were the only country in the world that had decided not to be a part of that treaty. And I got pulled aside by some of our European colleagues who said can you please take this back to your country and let them know that we have direct experience here in Europe that really bad things happen when the United States chooses not to lead?

The question sitting before us here is not some completely fabricated major questions doctrine. And let's be really clear. This is not something with any robust legal precedent. This is a question of do we think that we in the legislative branch are going to completely cede our authority to the judicial branch to decide what we meant? If anybody on the other side of the street has a question about what Congress meant, they should give us a call and we can tell them, but all of us know it is insane for us to specify every little detail we want in a proposal. We give the executive branch legal authority to expand on these things, and if we're not going to push back, we are basically saying that this article 1 branch is less worthy of our coequal powers than the judicial branch is, the unelected judicial branch, I might add.

So to sit here and say do we think that the U.S. Government has the legal authority to lead? Do we think that the U.S. Government has the legal authority to collect data necessary to make decisions? Do we believe that the U.S. Government has the legal authority to actually follow the laws of physics and assume that they are immutable, even if you couldn't get a vote on the floor today, that agrees that the laws of thermodynamics are entirely nonnegotiable? And we're going to argue that that's because of a major questions doctrine? That is insanity.

With due respect to my friends on the other side of the aisle, what the hell are we talking about here? Get the data. Disclose the data. There's $8.4 trillion of investors who want to invest in ESG (environmental, social, and governance) funds, who want clear disclosure rules. There's massive amounts of capital that are flowing into cleaner energy, giving us access to cheaper energy. If we want

to win the future, if we want to own the technologies, my God, get the hell out of the way.

I yield back.

Chairman OBERNOLTE. OK. The gentleman yields back.

We'll hear next from Congresswoman Tenney. Congresswoman, you are recognized for five minutes for your questions.

Ms. TENNEY. Thank you, Chairman and Ranking Member Foushee, for holding this hearing. And thank you to the witnesses for being here.

Mr. Chairman, I ask for unanimous consent to insert into the record Science Based Targets—SBTi's articles of incorporation, a document from "We Mean Business" in quotes stating that we are—they are a project of the New Venture Fund and the "who we are" page from New Venture Fund, which states that they're managed by Arabella Advisors.

Chairman OBERNOLTE. Without objection, so ordered.

Ms. TENNEY. Thank you, Mr. Chairman.

While my colleagues have focused on many highly concerning aspects of the Biden Administration's proposed rulemaking requiring companies to contract with SBTi, I want to focus on the motivation for this decision. Why is the Biden Administration forcing companies to use only SBTi as opposed to any other climate group? The answer is surprisingly simple. This is a left-wing dark money patronage scheme. Let's put aside the fact that SBTi is registered in the United Kingdom and was only formed on June 26th, 2023, eight months after this proposed rule was issued.

SBTi's certificate of incorporation as a private limited company states that their largest owner is the We Mean Business Coalition, Inc., which is under the Arabella Advisors umbrella. Who is the We Mean Business Coalition? According to documents from We Mean Business, they are simply a project of the New Venture Fund, again, going back to Arabella Advisors. And according to the website, it is solely wholly owned by Arabella Advisors.

And for those unfamiliar with who Arabella Advisors is, InfluenceWatch describes them as—and I quote—"a philanthropic consulting company that guides the strategy, advocacy, impact investing, and management for high-dollar, left-leaning nonprofits and individuals," close quote. The financial supporters and donors of Arabella Advisors and its subsidiaries include George Soros, the Bill and Melinda Gates Foundation, Michael Bloomberg, and the American Federation of Teachers just to name a few, although we don't know who the rest are because it's a dark money fund.

Simply put, Arabella Advisors uses the New Venture Fund, along with the Windward Fund, the Sixteen Thirty Fund, the Hopewell Fund, and the North Fund to funnel money to Democrats and left-wing causes. Through these funds, Arabella Advisors finances other ventures such as the Demand Justice Initiative, the Demand Progress Education Fund, Fix the Court, Redistricting Reform Project, and the Climate and Clean Energy Equity Fund. These radical groups advocate for everything from expanding the Supreme Court, partisan gerrymandering, defunding our military, abortion on demand, and much more. How does this—deep this web of dark money go? Ceres, which Mr. Steven Rothstein, one of the witnesses here represents, received $3.3 million from the New

Venture Fund and is an original founder and part of the We Mean Business Coalition, which owns SBTi.

This hearing is not about the existence of dark money. It's about the Biden Administration's new, unconstitutional proposed rule forcing companies to contract with a subsidiary of Biden's donors left-wing money group. The forced contracting will undoubtedly provide substantial profits for SBTi, creating new capital which can be moved through this dark money web to fund left-wing priorities and other left-wing politicians.

This is a network of corruption which undermines the trust that the taxpayers put in us, and while I appreciate the witnesses for being here, the only one who can ultimately give us answers we need is the Council on Environmental Quality Chair Brenda Mallory. While I understand that this Committee invited Chair Mallory to testify, she unfortunately declined, which is simply unacceptable. The American people deserve the answers, and I urge this Committee to subpoena Chair Mallory for another hearing on this matter. We must get to the bottom of this.

I do have one question with the little bit of time that I have left. I'd like to direct this to Ms. Killion. As I laid out the direct link between SBTi and Arabella Advisors, which means SBTi can be used to line the pockets of Democratic donors and left-wing dark money groups, under this precedent, if this rule were to become finalized, under the precedent established by this Administration with this rule, you wouldn't object to a Republican Administration amending a proposed rule to mandate that validation services be provided by companies primarily tied to the GOP donors, would you?

Ms. KILLION. Thank you so much, Congresswoman, for that question. I want to make sure I understood your question and what—it is as to the issue of delegating authority to SBTi?

Ms. TENNEY. Well, let me ask, would you—if this were the Republicans asking for a proposed rule to use a dark money donor to the Republican side, would you approve of that rule?

Ms. KILLION. Well, I think as an attorney for the Congressional Research——

Ms. TENNEY. Yes—was that a yes, you would approve of it?

Ms. KILLION. Oh, I didn't say yes or no. I think that's the information that I can't verify.

Ms. TENNEY. Well, if you're an attorney——

Ms. KILLION. It's outside of my——

Ms. TENNEY [continuing]. I'm an attorney as well. Can you just give me your opinion on it as an attorney? Would this be something that would be good for the taxpayers to use a dark money——

Ms. KILLION. Well, here's the——

Ms. TENNEY [continuing]. Subgroup to fund——

Ms. KILLION. Here's what I can say——

Ms. TENNEY [continuing]. Organizations——

Ms. KILLION [continuing]. Because I want to be careful——

Ms. TENNEY. Yes.

Ms. KILLION [continuing]. Because I don't have any of the information that you're talking about. I wasn't prepared on that for this testimony. But here's what I can say about the legal aspect of that. One of the considerations in the private nondelegation doctrine is

a question of whether the government is delegating regulatory authority to a competitor in industry. There have been——

Ms. TENNEY. Well, let me stop you on that because I'm going to reclaim my time. I'm out of time. Do you think it's fair that we allow that to happen, that we only have one entity that the government goes to, to confirm these contracts and not a choice?

Ms. KILLION. That is a policy question that I can't opine on as an attorney for CRS.

Ms. TENNEY. I'm afraid my time has expired. Thank you very much. Appreciate it.

Chairman OBERNOLTE. The gentlewoman yields back.

We'll hear next from Congressman Babin. Sir, you're recognized for five minutes.

Mr. BABIN. Thank you very much, and thank you, witnesses for being here, appreciate it. Ranking Member Foushee and Mr. Chairman, thank you.

I have a series of questions for you, Mr. Whiteman, if you don't mind, on this rule. I want to ask, how is this rule different from the SEC's climate disclosure rule?

Mr. WHITEMAN. Well, the SEC's climate disclosure rule was set up to protect investors, whereas this rulemaking is set up to disclose emissions and ultimately to try to reduce those emissions. So it's a much different scheme. One is about public disclosure, and this one is—the FAR rule is about public disclosure by going further and actually requiring emissions reductions.

Mr. BABIN. OK. Is there any concern in the business community of having to comply with several different greenhouse gas reporting standards and, as an example, SEC, FAR, and EPA?

Mr. WHITEMAN. That's a really good question, and I think there are a lot of concerns with that. One, there's concern of the cost of redundant conflicting reporting requirements. I think there are issues with the public trying to understand which are the actual valid real emissions or emissions reductions. And this eventually flows into issues of litigation where companies could be sued under false claims acts for actually saying they're going to reduce their emissions, but a third party is accusing them of not actually doing what they said. If you have three different standards, it makes it much more difficult for companies to show, OK, here's actually what my emissions are, and what I said I've done is actually true.

Mr. BABIN. Got you. Are the compliance deadlines that are set within this rule in your opinion reasonable and achievable?

Mr. WHITEMAN. I don't think they are. For the first part—do you want me to elaborate? The first part——

Mr. BABIN. Yes, sir.

Mr. WHITEMAN [continuing]. Of the disclosure part is disclosing scope 1 and scope 2 emissions. They're required to be done within one year of finalizing the rulemaking. The problem is you have to account for 12 continuous months of emissions reporting to actually be able to report that. So literally day one that the rulemaking is finalized, you would actually have to start recording your emissions and—or registering them, which is an impossible task, not knowing what is actually in the final rulemaking.

Mr. BABIN. OK. Thank you. And then a question for Mr. Fanning if you don't mind. Certain businesses such as those in space and

aviation require extensive use of fossil fuels. What are some of the challenges that those businesses will face in setting emission reduction targets and then having to comply with them?

Mr. FANNING. I think the issue for aerospace and defense, sort of riffing on what my seatmate here had to say, is not knowing what the requirements are going to be, not understanding what this organization SBTi is thinking in terms of aerospace and defense, is thinking in terms of sector guidance, is thinking in terms of how they're going to define what it is they want you to report and how to set these goals and then how to achieve these goals. Most of the companies in aerospace and defense are already trying to do that right now because of market demand. And in fact, all of the major companies in aerospace and defense is defined by the rule $50 million or more in government contracts are disclosing some financial climate risk already.

For us, the bigger issue with this rule is scope 3. It does sweep up the industrial base, the supply chain. The big defense companies have thousands of companies in their supply chain, and so it would go far beyond the number of companies defined in the analysis of the rule and require us to understand how the end user is going to use the product, which is most of what falls into scope 3 when you're in an industry that's building things that are meant to last for 30 years.

Mr. BABIN. OK. One more I would ask Mr. Whiteman again. What is the business community's perspective on the use of these private entities to develop, revise, and enforce the provisions of the rule? I mean, I know where you're going with it, but just for the record.

Mr. WHITEMAN. There's a lot of concerns. I think one of the main concerns is that these third parties could change the standards at any time. They could do it outside of the notice and comment process, which is established under the *Administrative Procedures Act,* which allows the opportunity for the public to take a look at the proposal, evaluate it, and provide comment and requires the regulatory agency to then respond to those comments. So there's accountability. There's transparency issues that are built in there. And that's not built into this regulation if you're relying upon third parties.

Mr. BABIN. Absolutely. Thank you very much, and I'm out of time so I yield back.

Chairman OBERNOLTE. The gentleman yields back.

We'll hear next from Congressman Miller. Sir, you are recognized for five minutes for your questions.

Mr. MILLER. Thank you to the Chair, and thank you to the Ranking Member and all the witnesses who are with us here today. Thank you for your time and patience.

Mr. Whiteman, my first question is for you. Do you think this rule will reduce the participation of small businesses and diversity in Federal contracting and inhibit innovation?

Mr. WHITEMAN. I think it will. I think because of the costs, I think because of the complexity of the rulemaking, the timing of compliance, I think it's just going to put downward pressure on the participation of small businesses, who proportionally are going to

have much higher costs than bigger businesses to comply with something like this rulemaking.

Mr. MILLER. And—thank you for that answer.

And second question for you, Mr. Whiteman. Are there any outside factors that you believe may make it more difficult for companies to comply with these standards?

Mr. WHITEMAN. Yes, certainly outside factors, I think there are many factors that make it difficult for folks to comply. Certainly, the third-party standards make it challenging. Again, getting back to what I said to Representative Babin, if you're looking at third parties changing the standards constantly, how are you going to know what your standards are going to be in the future? I think there's a lot of litigation potential under the *False Claims Act* and not knowing where these public policies are going to go. Some of the changes recently at the SBTi have been significant, reducing the period of time to set targets just due to outside global policy reports that are driving their target setting.

Mr. MILLER. Thank you for that answer.

Mr. Rothstein, my next question is for you. Do you see any conflict of interest with SBTi being incorporated in a foreign country and being able to set costly regulatory standards that may favor foreign investors or nations, some of whom may not be friendly? And I believe we've seen some of that.

Mr. ROTHSTEIN. First, thank you again for your public service, Congressman, appreciate it.

Ceres believes that the FAR Council should adopt their own rule. They should look at what's in the private sector, including SBTi, but not delegated specifically to SBTi, but it's important to use market-based and science-based approach, and if there's something else out there, look at that, too.

Mr. MILLER. Thank you. How can companies—and this is for you as well, sir. How can companies meaningfully engage in the standard-setting process if third parties can set or revise standards without going through a public notice and comment process that is normally required for Federal regulations?

Mr. ROTHSTEIN. Again, we believe that the FAR Council should set regulations, utilize the best practices, as the act I talked about earlier from 1996 is looked for, and just to highlight that this would only be covering for the largest companies, and then for them, their largest on the supply chain. So we talked about scope 3 earlier. It is not every company in the supply chain. It's really the largest ones that have the most material impact. The others can be used for averages, that there are thousands of companies around the world using this now, and so it's—they found that it is a practical way to work.

Mr. MILLER. OK. Mr. Chairman, this is all the questions that I have, and I yield back. Thank you.

Chairman OBERNOLTE. The gentleman yields back.

We'll hear next from Congressman Kean. Sir, you're recognized for five minutes.

Mr. KEAN. Thank you, Mr. Chairman.

Either Mr. Fanning or Mr. Whiteman, there is clear evidence that Russia has in the past funneled millions of dollars through nongovernmental organizations to influence U.S. energy markets.

Are there concerns among your membership that SBTi is susceptible to such influence from Russia or other countries or other entities?

Mr. WHITEMAN. I can take that question. Thank you. I think there is some concern there in that SBTi does take funding from outside parties. And certainly, with the United States exporting larger volumes of LNG (liquefied natural gas) to Europe to support our allies, you could see that certain countries, Russia, may have an incentive to influence that process to impose higher costs on the oil and gas industry here in the United States to create a competitive advantage.

Mr. KEAN. Ms. Killion, given this requirement—the requirement of a clear grant of statutory authority and vast economic and political significance under the major questions doctrine, does the collaboration with CEQ change the authority of DOD, GSA, and NASA are required to maintain in order to promulgate this regulation?

Ms. KILLION. Thank you for that question, Congressman Kean. My understanding of CEQ's role here is that—and this is just based on the Executive orders detailing CEQ's involvement here. So Executive Order 14030, for example, requires consultation with the Chair of the Council on Environmental Quality. So in a consultative role, I don't think that CEQ's involvement would affect the authority for the rule which is not promulgated by CEQ. The rule is promulgated by the FAR Council, the DOD, GSA, and NASA.

Mr. KEAN. Mr. Fanning, do your members have concerns as it pertains both meeting the scope 3 requirements outlined in the proposal, as well as safeguarding sensitive information against foreign actors?

Mr. FANNING. Thank you. Yes, we do. The difference in this rule from what's taken place already is the addition of the scope 3 reporting requirements. For an industry like aerospace and defense, again, that builds platforms that last decades and has a global supply chain and a global market, being able to get accurate information to aggregate to roll into that report seems unexecutable. But when you add in the national security component because if you're talking about Federal contractors in aerospace and defense, the Department of Defense is the biggest customer, we're not even sure they would offer that information, nor would we want them to for national security reasons because part of the rule, if you read through all of it and carry it out, is that this information is meant then to be transparent and shared publicly, so all of our adversaries would have access to it as well.

Mr. KEAN. Thank you. Thank you, Mr. Chairman. I yield back.

Chairman OBERNOLTE. The gentleman yields back. That concludes our questioning.

I want to thank all of our witnesses for being here and for your valuable testimony today and all of our Members for their questions. It's been an interesting and very emotional topic, and I hope we have a further discussion on this. The record will remain open for 10 days for additional comments and written questions from our Members.

This hearing is adjourned.

[Whereupon, at 11:06 a.m., the Subcommittee was adjourned.]

# Appendix I

## Answers to Post-Hearing Questions

ANSWERS TO POST-HEARING QUESTIONS

*Responses by Mr. Eric Fanning*

**U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY**

**A Bar Too High: Concerns with CEQ's Proposed Regulatory Hurdle for Federal Contracting**

Mr. Eric Fanning, President and Chief Executive Officer, Aerospace Industries Association

Questions submitted by Chairman Jay Obernolte, Committee on Science, Space, and Technology

1. Which companies do you think will be most significantly impacted and most likely to leave the government contracting space?

   **AIA Response:** This rule would most significantly impact small and mid-sized companies. That cost may become a market barrier for many small and medium-sized businesses that are already operating on thin profit margins. The Department of Defense (DOD) needs the innovative solutions and efficient processes that our vibrant commercial sector develops. These new requirements would provide incentives for many companies to shift their businesses towards a strictly commercial focus, with the end result of fewer companies participating in the already shrinking defense industrial base. With the absence of new entrants and small businesses, our military can no longer access the full range of innovative solutions to meet the growing threats to our national security around the globe against a backdrop of competition with China, a war in Ukraine, and the possibility of conflict in Taiwan.

2. What concerns, if any, do your members have regarding the disclosure of propriety information to SBTi? Are there concerns regarding information leaks of proprietary information? How would such a leak affect a government contractor?

   **AIA Response:** Our members have serious concerns that under the proposed rule, a contractor would be required to disclose all emissions information, including proprietary and even militarily sensitive information, to an international entity such as SBTi. The divestment of U.S. government authority under the proposed rule fails to ensure proper protections for American contractors' sensitive business information; it opens the door for our national security adversaries and economic competitors to gain access to the proprietary and sensitive information and attempt to reverse engineer valuable U.S. aviation and defense equipment. Lastly, it must be noted that for the defense industrial base, our customer, the DOD, would already have all the emissions data, plus much more, they need from a contractor. Thus, this proposed rule is an unnecessary additional step in the contracting process as the contractor would share the same data with SBTi just to have SBTi return the data back to the DOD.

   a. Is there anything in law or the proposed rule that protects proprietary information that would be disclosed to SBTi?

      **AIA Response:** It is not clear under the rule how and if SBTi would protect proprietary information disclosed from a contractor. Furthermore, with the divestment of U.S. government authority, there is no legal recourse for American contractors if their sensitive business information is improperly accessed. This is a significant risk to the intellectual property developed by American companies.

3. In 2020, Amazon voluntarily committed to setting emission reduction targets and to having those targets validated by SBTi. However, just last month, SBTi revoked Amazon's validation after they failed to meet certain submission deadlines. Amazon accused SBTi of changing their methodologies and requirements for submission making it difficult for them to submit data in a "meaningful and accurate way."

    a. How are companies supposed to meet SBTi's submission guidelines and methodologies if SBTi can change them seemingly on the fly and without notice?

    **AIA Response:** A sudden change in methodologies or submissions guidelines would be extremely difficult to execute for any company. For the aerospace and defense industry, unanticipated and immediate new requirements would cause service disruptions, production delays, and an increased cost to the American taxpayer.

    b. How does this impact a company's ability to plan if it has to abruptly account for changes in SBTi's methodologies and submission requirements?

    **AIA Response:** SBTi's ability and track record of abruptly changing their methodologies and submission requirements with no input or feedback process will make it nearly impossible for any company to adequately plan or adjust to the new changes. Manufacturing and the production of cutting-edge military systems and equipment cannot be changed on the whims of an international entity. It takes years of planning, financing, and ultimately contracting with the DOD to produce a new system.

    c. How much of a financial burden would an abrupt change by SBTi in methodologies or submission requirements impose on U.S. companies that must comply?

    **AIA Response:** The costs to a U.S. company to account and comply with an abrupt change by SBTi could be catastrophic to the future viability of the company. SBTi's authority under the proposed rule could bring production of some vital military systems and equipment to a halt. Further troubling is that foreign influence could play a role in targeting specific companies that are developing military equipment currently in use to protect not only the United States but also our trusted allies and partners.

    d. If a U.S. company does not agree with SBTi's change in methodology or submission requirements, is there any recourse available, for example, an appeals process?

    **AIA Response:** Under the proposed rule, contractors are offered an opportunity to resubmit, but there is no formal third-party appeals process if an SBTi expert reviewer does not validate a submission — putting far too much control in the hands of a single, foreign-run body with minimal accountability and transparency.

    e. The proposed rule currently details a resubmission process and limited waiver ability for when a company does not receive validation. Would these methods for non-validation inquiries be sufficient remedies?

    **AIA Response:** No, the proposed rule does not provide sufficient remedies in the case of a company not receiving a validation. As is the norm with any federal contracting, there

needs to be a formal appeals process when two parties cannot come to an agreement on the terms. In federal contracting, both administrative and judicial remedies are generally available.

4. SBTi's business model is set up so that they are both the standard setter and validator for greenhouse gas emission reductions. This creates a strong conflict of interest. Mr. Bill Baue, who previously served on SBTi's technical advisory board, sent a letter to the Committee. In that letter he asserts, "SBTi structures itself on a double helix of intertwining conflicts of interest." And "SBTi has embedded multiple conflicts of interest into the DNA of its role as a standard setter." Mr. Baue has been raising these concerns for years, and it was only after this Committee raised the same concerns that SBTi even attempted to address these conflicts of interest. Do these conflicts concern your members?

   **AIA Response:** Yes, our members are deeply concerned about the conflicts of interest with the current SBTi business model and the proposed rule delegating all authority to SBTi. As the witnesses testified, the U.S. government should adopt its own guidelines, utilize best practices, and find market-based approaches from multiple sources.

5. According to Mr. Baue, who previously served on SBTi's technical advisory board, SBTi "leverages its position as standard setter to illegitimately monopolize the validation role, prioritizing its own private interest in revenue generation over the public interest of an open marketplace." This Administration's decision to arbitrarily select SBTi as standard setter and validator for the entire federal government transforms SBTi's into a government sanctioned monopoly. What are some of the concerns with this type of unchecked power?

   **AIA Response:** Our primary concern, and one that we have already seen play out, is that SBTi can change its standards and then the requirements to meet the threshold to do business with the U.S. government under the proposed rule. There is no formal appeal process and SBTi could pick winners and losers without regard to our national security needs.

   a. Are your members concerned with how this Administration is essentially sanctioning SBTi's monopoly over science-based targets? Is this stifling competition in this area?

      **AIA Response:** Yes, our members are concerned about how the proposed rule gives SBTi ultimate authority over emissions standards and inserts an international entity into the U.S. federal contracting process. This will stifle competition in this area, and it is why any federal regulation should maintain U.S. authority, utilize best practices, and find market-based approaches from multiple sources.

6. Have your member organizations attempted to meet with SBTi, and does SBTi have a physical location where they operate from?

   **AIA Response:** AIA's members have made multiple attempts, with no success, to meet with SBTi representatives. Our members would stress the need for SBTi to create sector-based guidance for all industries, including the aerospace and defense (A&D) industry, which does not obviously exist at present. Any science-based target must consider that the A&D industry produces equipment with much longer service lives than most consumer products. It is not clear the proposed rule or SBTi would take factors like this into proper consideration.

7. Could you describe national security concerns regarding information that might not be classified but possibly sensitive? Could providing information like emissions over a period of years telegraph information to foreign surveillance agencies?

   **AIA Response:** From the national security perspective, the proposed rule leaves many unanswered questions about how industry is supposed to work with its end user — specifically, the Pentagon. Delegating oversight functions to an entity supported by foreign governments, including China, raises serious concerns about the impact the rule would have on research, development, and procurement for national security. AIA is very concerned that disclosing emissions information that would be published on public databases, as called for in the proposed rule, could very well telegraph sensitive information to foreign surveillance agencies.

Questions submitted by Representative Tom Kean Jr, Committee on Science, Space, and Technology

1. SBTI's business model is set up so that they are both the standard setter and validator for greenhouse gas emission reductions. This creates a strong conflict of interest. Mr. Bill Baue, who previously served on SBTi's technical advisory board sent a letter to the committee regarding today's hearing. In that letter he asserts, "SBTi structures itself on a double helix of intertwining conflicts of interest." And, "SBTi has embedded multiple conflicts of interest into the DNA of its role as a standard setter" Mr. Baue, has been raising these concerns for years, and it was only after this Committee raised the same concerns that SBTi even attempted to address these conflicts of interest. Do these conflicts concern your members?

   **AIA Response:** Yes, our members are deeply concerned about the conflicts of interest with the current SBTi business model and the proposed rule delegating all authority to SBTi. As the witnesses testified, the U.S. government should adopt its own guidelines, utilize best practices, and find market-based approaches from multiple sources.

*Responses by Mr. Chad Whiteman*

**U.S. HOUSE OF REPRESENTATIVES**
**COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY**

**A Bar Too High:**
**Concerns with CEQ's Proposed Regulatory Hurdle for Federal Contracting**

Mr. Chad Whiteman, Vice President, U.S. Chamber of Commerce

Questions submitted by Chairman Jay Obernolte, Committee on Science, Space, and Technology

**1. Which companies or industries do you think will be most significantly impacted and most likely to leave the government contracting space?**

A broad swath of Chamber members would be impacted by the rule, including federal contractors large and small, that provide products and services across industries such as aerospace and defense, telecommunications, information technology, engineering services, food and hospitality, pharmaceuticals, biotechnology, healthcare, energy, and many more. With two-thirds of the federal government's more than $600 billion in contract obligations allocated to the Department of Defense, the Proposed Rule[1] would create significant problems for defense contractors and subcontractors. The vast majority of the products supplied through these contracts have national security implications. In 2020, for example, the top five defense services and products included aircraft, combat ships, guided missiles, gas turbine and jet engines, and drugs and biologicals.[2]

**2. What concerns, if any, do your members have regarding the disclosure of proprietary information to SBTi? Are there concerns regarding information leaks of proprietary information? How would such a leak affect a government contractor?**

Disclosure of confidential business information would be damaging, as it would provide information to competitors for example about bid pricing, enable duplication of intellectual property, and would in certain cases threaten national security. As the SBTi would not be bound by the same requirements imposed on federal agencies to protect confidential business information, mandating disclosure to this entity raises serious concerns. The government has protections in place that prohibit the disclosure of various forms of intellectual property, including trade secrets, processes, operations, and styles of work. The government also has established procedures that agencies must follow for the storage, access, and disclosure of collected information. It is uncertain whether these government protections and due process would be available through a private, third party such as the SBTi.

As stated in our public comments on the proposed rule, the Federal Acquisition Regulatory Council ("Council") has not explained why public disclosure is necessary here. Any interest the government has in making informed contracting decisions could be achieved by requiring prospective contractors to submit the required information to the government alone, as opposed to a third party such as the SBTi.

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[1] FAR Case 2021-015, Proposed Rule, Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk; 87 Fed. Reg. 68312-68334 (November 14, 2022)

[2] GAO, A Snapshot of Government-Wide Contracting for FY 2021, https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboard.

**a. Is there anything in law or the proposed rule that protects proprietary information that would be disclosed to SBTi?**

We are not aware of any provisions in the Proposed Rule that would protect proprietary information submitted to a third party such as the SBTi, nor do we believe that the Proposed Rule suggests that existing law would provide such protections. SBTi currently maintains in its corporate manual that it "safeguards the confidentiality of all information provided by companies to assess targets." It appears that a failure by the SBTi to comply with the commitment embodied in that statement, or with other commitments made to protect submitters' confidentiality, may amount to actionable or sanctionable conduct under various legal theories.

**3. In 2020, Amazon voluntarily committed to setting emission reduction targets and have those targets validated by SBTi. However, just last month, SBTi revoked Amazon's validation after they failed to meet certain submission deadlines. Amazon accused SBTi of changing their methodologies and requirements for submission making it difficult for them to submit data in a "meaningful and accurate way."**

**a. How are companies supposed to meet SBTi's submission guidelines and methodologies if SBTi can change them seemingly on the fly and without notice?**

It will be challenging, costly, and potentially impossible for contractors to comply if the third parties such as SBTi and CPD were to change the submission guidelines and methodologies with little or no public notice. As noted in our comments, CDP and SBTi are constantly changing their standards. Some of the changes have been significant; for example, SBTi shortened the maximum number of years permitted to meet emissions reduction targets from 15 years to 10 years. SBTi and CPD made those changes without following any procedure akin to the Administrative Procedure Act's notice-and-comment requirements, and they would be able to continue that practice if the Proposed Rule were finalized as proposed.

**b. How does this impact a company's ability to plan if it has to abruptly account for changes in SBTi's methodologies and submission requirements?**

Because the private entities are not subject to the legal and procedural requirements with which federal agencies must comply, they will be able to change their requirements and recommendations—and therefore the eligibility requirements for federal contracts—without any opportunity for the affected industry to participate in a notice-and-comment process. Abrupt changes in requirements would make compliance increasingly costly, reduce the number of companies that would participate in federal contracting, and potentially preclude the government from receiving certain products and services.

**c. How much of a financial burden could an abrupt change by SBTi in methodologies or submission requirements impose on U.S. companies that must comply?**

The Council has neither explained how it would monitor third party changes to submission guidelines and methodologies to ensure they conform to the Council's goals, nor factored such foreseeable future changes into the estimated compliance costs in the regulatory impact analysis. The Council has failed to adequately consider the costs of the requirements that the Proposed Rule would impose. In one example, the Council only accounts for the costs to collect and process Scope 1 and 2 emissions information without assessing the costs of the more substantive step of actually calculating those emissions. It is why the costs of just that part of the requirements are likely as much as 50 times higher

than those estimated by the Council's regulatory impact analysis. Such costs would be imposed each time a third party were to change the requirements.

**d. If a U.S. company does not agree with SBTi's change in methodology or submission requirements, is there any recourse available, for example, an appeals process?**

It is unclear whether there would be any appeals process or recourse available if a company were not to agree with SBTi's changes in methodology or submission requirements. However, the consequences of not meeting the third party's submission and methodology requirements could be noncompliance that would render the contractor deemed not "responsible" or eligible to bid on federal government contractors.

**e. The proposed rule currently details a resubmission process and limited waiver ability for when a company does not receive validation. Would these methods for non-validation inquiries be sufficient remedies?**

The waiver provisions found in the proposed rule would be of limited use as they could be inconsistently applied across different contracts. Senior procurement executives for each agency are given the discretion to decide, based on their judgment, whether a waiver or exemption of the requirements should be granted. Due to the number of procurement executives across federal agencies, this would lead to inconsistent implementation.

The waivers would also be granted for just one year, which is not a sufficient amount of time. For certain sectors like defense, products are typically designed over long-time horizons and in many cases are designed based on government specifications and are subject to various national security considerations. Due to these factors, companies will have a limited ability to change products within the one-year waiver period as laid out in the Proposed Rule. Only through a blanket exemption for national security procurements could the Proposed Rule avoid placing debilitating burdens on the security and self-defense of the United States and its allies.

**4. SBTi's business model is set up so that they are both the standard setter and validator for greenhouse gas emission reductions. This creates a strong conflict of interest. Mr. Bill Baue, who previously served on SBTi's technical advisory board, sent a letter to the Committee regarding our hearing. In that letter he asserts, "SBTi structures itself on a double helix of intertwining conflicts of interest." And "SBTi has embedded multiple conflicts of interest into the DNA of its role as a standard setter." Mr. Baue has been raising these concerns for years, and it was only after this Committee raised the same concerns that SBTi even attempted to address these conflicts of interest. Do these conflicts concern your members?**

Yes. Both the SBTi and CDP are international, non-profit organizations directed by a board of trustees and board of directors (many of whom are non-U.S. citizens) and influenced by its advisors. They also receive funding support from a wide range of sources such as philanthropic grants, service-based memberships, sponsorship, and partnerships. This presents a major challenge for companies, in particular (but not solely) companies in the defense industry, as it imposes foreign influence over proposed FAR requirements and poses significant risks to national security and the sovereignty of United States.

The Proposed Rule also raises First Amendment and non-delegation problems, which further counsel against adoption. The First Amendment "prohibits the government from telling people what they must

say" or with whom they must associate. The Proposed Rule would violate these rights by forcing companies to engage in costly speech on a matter that is the subject of much political debate, to publicly associate with the political messages of a private organization, and to subject themselves to that organization's speech "guidelines." The Proposed Rule would explicitly disqualify from government procurement major contractors who decline to make "available on a publicly accessible website" certain statements regarding climate change, including by completing the CDP Climate Change Questionnaire.

In addition, as the Supreme Court has long recognized, federal lawmakers cannot delegate regulatory authority to a private entity.

**5. According to Mr. Baue, who previously served on SBTi's technical advisory board, SBTi "leverages its position as standard setter to illegitimately monopolize the validation role, prioritizing its own private interest in revenue generation over the public interest of an open marketplace." This Administration's decision to arbitrarily select SBTi as standard setter and validator for the entire federal government transforms SBTi's into a government sanctioned monopoly. What are some of the concerns with this type of unchecked power?**

**a. Are your members concerned with how this Administration is essentially sanctioning SBTi's monopoly over science-based targets? Is this stifling competition in this area?**

As a general matter, we are concerned that the Proposed Rule would weaken the competitive forces in government contracting that help keep prices down. The government's acquisition costs would rise as a consequence as some contractors and companies in the supply chain would likely drop out of the market entirely. This "works against the [Procurement] Act's oft-repeated priority of achieving 'full and open competition' in the procurement process,"[3] and would lead to higher contract prices. In addition, as noted above, the delegation of regulatory authority to a private entity is not legally permissible, and the practical and legal concerns with doing so are heightened when the entity essentially functions as the sole regulator in an area and may have a financial interest in maintaining that role.

**6. Have your member organizations attempted to meet with SBTi, and does SBTi have a physical location where they operate from?**

As a general matter, the Chamber is not aware of the breadth or specifics of its member companies' meetings, including any such meetings with SBTi, but is generally aware that some such meetings have occurred. The Chamber does not have a specific understanding of the physical location or locations from which SBTi operates.

**7. Could you describe the national security concerns regarding information that might not be classified but possibly sensitive? Could providing information like emissions over a period of years telegraph sensitive information to foreign surveillance agencies?**

The Council's proposed requirements for emissions reporting, in particular for scope 3 emissions, for the defense contracting industry would pose a serious risk to national security. For example, as two former Chairmen of the Joint Chiefs of Staff have noted, the United States military is "the single largest consumer of fuel in the United States, if not the world. It uses fuel to power tanks, helicopters, and fighter jets, run surveillance, electrify barracks, heat military installations and enable numerous other

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[3] *Georgia v. President of United States*, 46 F.4th 1283, 1296 (11th Cir. 2022) (quoting 40 U.S.C. § 101).
See infra pp. 17-21.

operations. Fuel is necessary to the United States military in times of war and in times of peace to make sure the military is ready for war, for peacekeeping missions, to deter future threats and to prevent terrorism."[4] Requiring defense contractors to report the use of fuel would provide sensitive information to the public about our military's range and capabilities.

[4] *Amici Curiae* Brief of General (Retired) Richard B. Myers and Admiral (Retired) Michael G. Mullen, in Sup-port of Defendants-Appellants 21, City & County of Honolulu v. Sunoco LP, Nos. 21-15313, 21-15318 (9th Cir. July 26, 2021), ECF No. 49.

Questions submitted by Representative Tom Kean Jr, Committee on Science, Space, and Technology

**1. SBTI's business model is set up so that they are both the standard setter and validator for greenhouse gas emission reductions. This creates a strong conflict of interest. Mr. Bill Baue, who previously served on SBTi's technical advisory board sent a letter to the committee regarding today's hearing. In that letter he asserts, "SBTi structures itself on a double helix of intertwining conflicts of interest." And, "SBTi has embedded multiple conflicts of interest into the DNA of its role as a standard setter>" Mr. Baue, has been raising these concerns for years, and it was only after this Committee raised the same concerns that SBTi even attempted to address these conflicts of interest. Do these conflicts concern your members?**

Yes. Both the SBTi and CDP are international, non-profit organizations directed by a board of trustees and board of directors (many of whom are non-U.S. citizens) and influenced by its advisors. They also receive funding support from a wide range of sources such as philanthropic grants, service-based memberships, sponsorship and partnerships. This presents a major challenge for the companies, in particular the defense industry, as it imposes foreign influence over proposed FAR requirements and poses significant risks to national security and the sovereignty of the United States.

The Proposed Rule also raises First Amendment and non-delegation problems, which further counsel against adoption. The First Amendment "prohibits the government from telling people what they must say" or with whom they must associate. The Proposed Rule would violate these rights by forcing companies to engage in costly speech on a matter that is the subject of much political debate, to publicly associate with the political messages of a private organization, and to subject themselves to that organization's speech "guidelines." The Proposed Rule would explicitly disqualify from government procurement major contractors who decline to make "available on a publicly accessible website" certain statements regarding climate change, including by completing the CDP Climate Change Questionnaire.

In addition, as the Supreme Court has long recognized, federal lawmakers cannot delegate regulatory authority to a private entity.

*Responses by Mr. Steven M. Rothstein*

**U.S. HOUSE OF REPRESENTATIVES**
**COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY**

**A Bar Too High:**
**Concerns with CEQ's Proposed Regulatory Hurdle for Federal Contracting**

Mr. Steven M. Rothstein, Managing Director, Ceres Accelerator for Sustainable Capital Market

Questions submitted by Ranking Member Valerie Foushee, Committee on Science, Space, and Technology

Mr. Rothstein, at the hearing, a Member made this statement:
"How does this deep this web of dark money go? Ceres, which Mr. Steven Rothstein, one of the witnesses here, represents, received $3.3 million from the New Venture Fund, and is an original founder and part of the We Mean Business Coalition, which owns SBTi."

1. Do you have any response to this statement's assertions and characterizations?

**Response to Ranking Member Foushee**

**Thank you for inviting me to testify at the September 20, 2023, hearing regarding the FAR Council's proposal to require climate risk disclosures by the federal government's largest contractors. While seeking technical amendments regarding the proposed rule, Ceres strongly supports this proposed rule as an essential part of the federal government's efforts to measure, manage and reduce climate-related risks to taxpayers and delivery on agency missions, including the Department of Defense's protection of national security.**

**I am writing to respond to inaccurate assertions about Ceres made at the hearing. It was stated that Ceres is a founder and "owner" of the We Mean Business Coalition and that the We Mean Business Coalition in turn "owns" the Science-Based Target Initiative.**

**Ceres is an independent US public charity organized and operating as a not-for-profit 501(c)(3) organization. Ceres is a founding member of We Mean Business, a separate not-for-profit 501(c)(3) organization. We Mean Business does not own or control SBTi.**

**Ceres has no role in the governance of the Science Based Targets Initiative. We would appreciate your making this letter part of the hearing record.**

**U.S. HOUSE OF REPRESENTATIVES**
**COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY**

**A Bar Too High:**
**Concerns with CEQ's Proposed Regulatory Hurdle for Federal Contracting**

Mr. Steven M. Rothstein, Managing Director, Ceres Accelerator for Sustainable Capital Market

Questions submitted by Representative Tom Kean Jr, Committee on Science, Space, and Technology

SBTI's business model is set up so that they are both the standard setter and validator for greenhouse gas emission reductions. This creates a strong conflict of interest. Mr. Bill Baue, who previously served on SBTi's technical advisory board sent a letter to the committee regarding today's hearing. In that letter he asserts, "SBTi structures itself on a double helix of intertwining conflicts of interest." And, "SBTi has embedded multiple conflicts of interest into the DNA of its role as a standard setter>" Mr. Baue, has been raising these concerns for years, and it was only after this Committee raised the same concerns that SBTi even attempted to address these conflicts of interest.

1. Do you share Mr. Baue's, concerns that SBTI's conflicts of interest are hurting the science and leading to inferior target setting methods?

**Response to Representative Tom Kean Jr,**

**Do you share Mr. Baue's concerns that SBTI's conflicts of interest are hurting the science and leading to inferior target setting methods?**

**As stated in its testimony, Ceres believes that SBTI is a science-based and market-accepted organization. Its target-setting methodology was built with the support and input of diverse stakeholders over many years. Like all science-based systems, this methodology requires constant evaluation and updates, and we support this ongoing work. At the same time, we support the FAR Council's establishment of a federal standard for target-setting, with contractors encouraged to work with SBTI and other science-based, market-accepted organizations in meeting this standard.**

*Responses by Ms. Victoria Killion*


**MEMORANDUM** October 17, 2023

**To:** House Committee on Science, Space, and Technology, Subcommittee on Investigations and Oversight
Attention: Chairman Jay Obernolte

**From:** Victoria L. Killion, Legislative Attorney, vkillion@crs.loc.gov, 7-9496

**Subject:** **Responses to Questions for the Record**

Chairman Obernolte, Ranking Member Foushee, and Members of the Subcommittee:

Please find enclosed responses to your October 3, 2023 letter containing questions for the record submitted by Members of the Committee following the September 20, 2023 hearing titled "A Bar Too High: Concerns with CEQ's Proposed Regulatory Hurdle to Federal Contracting." Thank you for the opportunity to respond to these questions. CRS remains available to assist the Committee on this and other matters through testimony, confidential briefings, and written memoranda.

# Questions Submitted by Chairman Jay Obernolte

## Question 1

*1. In your written testimony, you highlighted the Major Questions Doctrine, which says that when an agency seeks to regulate a significant portion of the American economy or the agency's assertion of regulatory authority has "vast economic and political significance" its rule must be based on a clear grant of authority.*

*a. Does DoD, GSA, or NASA have a clear grant of statutory authority to require businesses to disclose and reduce their greenhouse emissions? Could you cite to the specific language in statute that grants these agencies the power to regulate business emissions?*

Whether DoD, GSA, or NASA would have sufficient statutory authority would depend on the meaning of "clear congressional authorization" as used in the Supreme Court's major questions cases.[1] The major questions doctrine has only recently started to gain prominence as a distinct

[1] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014)).

doctrinal limit on agency authority.[2] The Supreme Court's decisions thus far are heavily context-dependent and offer few general principles for lower courts to apply.[3] It is thus difficult to predict how a future court would decide a case involving a purported major question.[4] The Supreme Court has described the requisite "clear congressional authorization" as entailing "something more than a merely plausible textual basis for the agency action," but the Court has not elucidated the degree of clarity or specificity required.[5]

There are at least two open legal questions regarding the meaning and scope of "clear congressional authorization" that could affect the analysis.

First, the Supreme Court has not decided whether, under a major questions analysis, statutory authority to promulgate regulations to "carry out" an act[6] could constitute "clear congressional authorization" to adopt a requirement that might effectuate the purposes of that act. In *Gonzales v. Oregon*, the Court suggested that in many cases, an agency's authority "is clear because the statute gives an agency broad power to enforce all provisions of the statute."[7] However, that case involved a statute that gave the Attorney General "limited [rulemaking] powers, to be exercised in specific ways."[8] Thus, the Court did not (and could not) decide whether the Attorney General's rule—which the Court found to implicate a major question[9]—fell within a "broad" grant of "authority to promulgate rules," because there was no such provision.[10]

At least one federal appellate court has suggested that "generic language" authorizing an agency to carry out a statute might be "insufficient to delegate major questions" based on the Supreme Court's decision in *King v. Burwell*.[11] Although the statutory section at issue in *King* contained a general delegation provision,[12] that provision was not the focus of the Court's analysis.[13] Instead, the Court parsed the specific language of other provisions before turning to the "broader

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[2] *See id.* (remarking that the major questions doctrine "refers to an identifiable body of law" in response to the dissent's criticism that the Court "announc[ed] the arrival" of a new doctrine).

[3] *See* CRS Report R44954, *Chevron Deference: A Primer*, by Benjamin M. Barczewski (2023) (stating that "the Court has not articulated a precise standard for determining when an agency interpretation raises a question so significant that a court should not defer, nor has it explained why this consideration is relevant in some cases but not others").

[4] *See id.* (discussing how the Court has "gradually stopped applying the *Chevron* [deference] framework while at the same time invoking the major questions doctrine more frequently[,] . . . creating some uncertainty as to the relationship between the two doctrines").

[5] *West Virginia*, 142 S. Ct. at 2609.

[6] The "authority citation" for the parts of the FAR that the proposed rule would amend cites, *inter alia*, 40 U.S.C. § 121(c), which authorizes the GSA Administrator to "prescribe regulations to carry out this subtitle." 40 U.S.C. § 121(c)(1); Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68327 (proposed Nov. 14, 2022).

[7] 546 U.S. 243, 258 (2006).

[8] *Id.* at 259.

[9] *See id.* at 275 (describing the "importance of the issue" underlying the regulation and reasoning that the Attorney General's assertion of authority would "effect a radical shift of authority from the States to the Federal Government").

[10] *Id.* at 259.

[11] West Virginia v. Dep't of the Treasury, 59 F.4th 1124, 1147 (11th Cir. 2023), *reh'g en banc denied*, No. 22-10168, 2023 U.S. App. LEXIS 24484, at *4 (11th Cir. Sep. 14, 2023).

[12] *Id.* (quoting 26 U.S.C. § 36B(h)).

[13] King v. Burwell, 576 U.S. 473, 484–86, 492 (2015).

structure of the Act."[14] Thus, *King v. Burwell* may have limited utility for analyzing a general delegation of authority to carry out the purposes of an act.

Second, the Supreme Court has not decided whether the executive branch's statutory authority under the Procurement Act[15]—which lower courts have sometimes interpreted broadly[16]—would be deemed to have the same broad sweep under a major questions analysis. Under the D.C. Circuit's standard, for example, the government ordinarily needs only to show that there is a "sufficiently close nexus" between the procurement requirement at issue and the "values of 'economy' and 'efficiency'" that form the "touchstone" of the Procurement Act.[17] At least two federal circuit courts have reasoned that, under a major questions analysis, the government must show more than a "close nexus" between the requirement at issue and the values of economy and efficiency.[18] In those cases, the courts found that the Procurement Act lacked a "clear statement by Congress" authorizing a vaccination requirement for federal contractors.[19] One of the courts observed that Congress "could have drafted vaccination-related laws or even made clear its intent regarding the President's proprietary authority in federal contracting or employing"—though the court did not explain what language would have made Congress's intent clear for purposes of the disputed vaccination requirement.[20]

As to whether there is specific statutory language authorizing the regulation of business emissions, CRS has not identified statutory provisions[21] within the authority citations for the proposed FAR amendments that explicitly authorize DoD, GSA, or NASA to categorically regulate the greenhouse gas emissions of businesses or federal contractors.[22] There are two provisions in Title 51 of the *U.S. Code* that authorize the NASA Administrator to take certain steps to address greenhouse gas emissions from aviation and certain aircraft. Section 40112

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[14] *Id.* at 486–92.

[15] For purposes of these responses, the Procurement Act refers to the Federal Property and Administrative Services Act of 1949, which is now codified in scattered sections of Title 40 and Title 41 of the *U.S. Code*. UAW-Labor Emp't & Training Corp. v. Chao, 325 F.3d 360, 362 (D.C. Cir. 2003).

[16] *See* Louisiana v. Biden, 55 F.4th 1017, 1026 (5th Cir. 2022) ("[W]hile there is no direct, binding authority on the scope of presidential authority under the Procurement Act, courts have generally landed on a 'lenient' standard, under which the President must demonstrate a 'sufficiently close nexus' between the requirements of the executive order and 'the values of "economy" and "efficiency."'" (quoting *Chao*, 325 F.3d at 367 and AFL-CIO v. Kahn, 618 F.2d 784, 792 (D.C. Cir. 1979) (en banc))).

[17] *Kahn*, 618 F.2d at 792–93.

[18] *See Louisiana*, 55 F.4th at 1029, 1031–32 (reasoning that the major questions doctrine is an "extra-statutory limitation" on the president's typically broad procurement authority); Georgia v. President of the United States, 46 F.4th 1283, 1295 (11th Cir. 2022) (explaining that the court's analysis was informed by the major questions doctrine). *Cf.* Kentucky v. Biden, 57 F.4th 545, 552 (6th Cir. 2023) (reasoning that the president's authority under the Procurement Act is limited to effectuating the act's "substantive provisions, not its statement of purpose" and considering major questions cases as further support).

[19] *Louisiana*, 55 F.4th at 1031; *see also Georgia*, 46 F.4th at 1297 (concluding that "no statutory provision contemplates the power to implement an across-the-board vaccination mandate").

[20] *Louisiana*, 55 F.4th at 1032.

[21] The promulgating agencies also cite executive orders as authority for the final rule. *See* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68328 (proposed Nov. 14, 2022) (proposed § 23.XX01) (citing four executive orders and an Office of Management and Budget memorandum as authority for the reporting and target validation requirements).

[22] This statement is based on a review of the transferred provisions from 10 U.S.C. chapter 137, and the following searches in the *Lexis Advance* database: (1) for provisions related to 40 U.S.C. § 121(c), a search of subtitle I of Title 40 and Title 41 of the *U.S. Code* for the terms "carbon," "climate," "emissions," "greenhouse," and "net zero"; and (2) for provisions related to 51 U.S.C. § 20113, a search of Title 51 of the *U.S. Code* for the terms "carbon," "climate," "emissions," "greenhouse," and "net zero."

directs the NASA Administrator to "establish an initiative to research, develop, and demonstrate new technologies and concepts . . . to reduce greenhouse gas emissions from aviation, including carbon dioxide, nitrogen oxides, other greenhouse gases, water vapor, black carbon and sulfate aerosols, and increased cloudiness due to contrail formation."[23] Objectives of the initiative include "a reduction of greenhouse gas emissions from new aircraft by at least 50 percent, as compared to the highest-performing aircraft technologies in service as of December 31, 2021," and "net-zero greenhouse gas emissions from aircraft by 2050."[24] Section 40702 directs the NASA Administrator to "establish an initiative involving the Administration, universities, industry, and other research organizations as appropriate, of research, development, and demonstration, in a relevant environment, of technologies to enable the following commercial aircraft performance characteristics: . . . [s]ignificant reductions in greenhouse gas emissions compared to aircraft in commercial services as of October 15, 2008."[25]

*b. Based on recent court decisions, could you describe how this proposed rule might potentially violate the Major Questions Doctrine?*

The proposed rule, if enacted as written, potentially could be found to exceed the agencies' authority under the major questions doctrine if a court were to decide that: (1) the promulgating agencies' assertion of authority involves a question of "vast economic and political significance" or otherwise constitutes a major question in the court's view; and (2) there is no "clear congressional authorization" for the rule.[26] For example, a court might decide that requiring major contractors to set greenhouse gas emissions targets involves a major question because the Supreme Court has twice invoked the doctrine in cases involving EPA regulations related to greenhouse gas emissions, most recently in 2022.[27] Alternatively, a court might distinguish the EPA cases based on the scope or anticipated effects of the regulations at issue in those cases.[28] For instance, whereas the rule in *Utility Air Regulatory Group v. EPA* would have subjected "the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide" to a costly permitting process,[29] the proposed FAR rule might require fewer than a thousand major contractors to report annual climate disclosures and establish science-based targets.[30] Still, it is possible that a court might consider those effects to be significant

[23] 51 U.S.C. § 40112(b)(1).

[24] *Id.* § 40112(b)(3)(A), (C).

[25] *Id.* § 40702.

[26] Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014) (internal quotation marks omitted).

[27] West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022); *Util. Air Regulatory Grp.*, 573 U.S. at 324. *But cf.* Massachusetts v. EPA, 549 U.S. 497, 513 (2007) (rejecting EPA's argument, based on a major questions case, that EPA lacked authority to regulate greenhouse gas emissions under its authority to regulate "air pollutants").

[28] A court might also use the final regulatory impact analysis to decide whether the rule's costs to the government are of the same scale as recent major questions cases. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2362, 2365, 2369, 2372, 2374 (2023) (repeatedly referencing agency estimates that the challenged policy would "release 43 million borrowers from their obligations to repay $430 billion in student loans").

[29] *Util. Air Regulatory Grp.*, 573 U.S. at 324.

[30] *See* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68322 (proposed Nov. 14, 2022) ("Approximately 671 of the 964 major contractors that are other than small businesses currently represent that they do not publicly disclose information about their emissions or reduction goals."). *But cf.* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (concluding that the CDC's eviction moratorium involved a major question because, *inter alia*, "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls

(continued...)

enough to warrant major questions treatment.[31] It is also possible that a court could find that some aspects of the rule, such as the reporting requirements, do not raise a major question while other aspects, such as the target-setting and validation requirements, do raise a major question.

As to statutory authorization, a court relying on the contractor vaccination cases discussed in response to Question 1.a might require an "explicit" grant of authority to require contractors to report their emissions or validate emissions targets.[32] A different court might conclude, however, that the final rule is consistent with past exercises of executive authority under the Procurement Act.[33] As discussed in response to Question 1.a, the question of what constitutes "clear congressional authorization" is not well settled.

## Question 2

*2. If our investigation determined that CEQ was the sole author of this proposed rule with the mere consultation of the FAR Council, would CEQ be acting outside of their statutory authority as a policy advisor to the President on environmental issues?*

Because the legal standards that would apply to this question have been developed in the context of judicial review, CRS will consider how a reviewing court might consider this issue in a challenge to the FAR Council's final rulemaking under the Administrative Procedure Act (APA). A discussion of CEQ's statutory authority independent of the question of APA review is included in response to Question 3.

As a threshold matter, it is unclear that there would be any legal grounds to sue CEQ for exceeding its statutory authority under the circumstances described in this question. Even if CEQ, a division of the Executive Office of the President,[34] were considered an "agency" within

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within the moratorium"). A court could potentially distinguish *West Virginia v. EPA* on the basis that EPA's rule would have "substantially restructure[d] the American energy market" by requiring power plants to reduce their emissions in a certain way, *West Virginia*, 142 S. Ct. at 2605, 2610, whereas the proposed rule, a court could conclude, would use reporting and target-setting to lay the groundwork for emissions reduction for "contractors who choose to address [greenhouse gas] emissions." Proposed Rule, 87 Fed. Reg. at 68319.

[31] *See* Texas v. Biden, No. 6:22-CV-00004, 2023 WL 6281319, at *12 (S.D. Tex. Sept. 26, 2023) (rejecting the defendants' argument that the case did not implicate the major questions doctrine because the rule at issue did "not sweep as broadly as the federal contractor vaccine mandate" and "only affects the wages of certain employees of federal contractors and subcontractors").

[32] *See, e.g.*, Georgia v. President of the United States, 46 F.4th 1283, 1297 (11th Cir. 2022) ("Other statutes setting out procurement rules show that when Congress wants to further a particular economic or social policy among federal contractors through the procurement process—beyond full and open competition—it enacts explicit legislation.").

[33] *See* AFL-CIO v. Kahn, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc) (upholding a procurement policy that denied "Government contracts above $5 million to companies that fail or refuse to comply with . . . voluntary wage and price standards"); UAW-Labor Emp't & Training Corp. v. Chao, 325 F.3d 360, 367 (D.C. Cir. 2003) (upholding an executive order requiring businesses with government contracts over $100,000 to post notices at all of their facilities to inform employees of certain rights under federal labor law and to require their subcontractors to do the same).

[34] *Council on Environmental Quality*, THE WHITE HOUSE, https://www.whitehouse.gov/ceq/ (last visited Oct. 16, 2023).

the meaning of the APA for purposes of this question,[35] submitting a regulatory proposal to the FAR Council would not likely qualify as "final agency action" for purposes of APA review.[36]

An APA challenge to a final version of the proposed rule might be premised instead on the promulgating agencies' compliance with the APA.[37] Under the APA, a court can "hold unlawful and set aside" a rule that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations," among other grounds.[38]

Assuming for purposes of this response that CEQ drafted the text of the proposed rule, it is not clear that such involvement alone would violate the APA.[39] The proposed rule was promulgated by DoD, GSA, and NASA.[40] Designees of the heads of these agencies and the Administrator for Federal Procurement Policy make up the FAR Council.[41] Executive Order 14030 (EO 14030) directed the FAR Council to "consider amending" the FAR to "require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets."[42] EO 14030 further directed the FAR Council to consider these changes "in consultation with the Chair of [CEQ] and the heads of other agencies as appropriate."[43] Thus, the President directed the FAR Council to consult with CEQ in considering the amendments that are the core features of the proposed rule. Additionally, in the National Environmental Policy Act (NEPA), which established CEQ, Congress directed "all agencies of the Federal Government" to "identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . ., which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."[44]

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[35] *See* Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) (holding that the President is not an "agency" within the meaning of the APA); Wild Virginia v. Council on Env't Quality, 544 F. Supp. 3d 620, 632 (W.D. Va. 2021) (explaining that in an APA challenge to a rule promulgated by CEQ, the parties did "not dispute that the 2020 Rule is a final agency action"), *aff'd*, 56 F.4th 281 (4th Cir. 2022).

[36] 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.").

[37] *See, e.g.*, Nat'l Fed'n of the Blind v. U.S. Abilityone Comm'n, 421 F. Supp. 3d 102, 135 (D. Md. 2019) (adjudicating a plaintiff's claim that the agency violated the APA by offering "no rationale for its selection" of a certain nonprofit entity to assist in administering a federal contracting program).

[38] 5 U.S.C. § 706(2)(A), (C).

[39] For example, in *Sierra Club v. Costle*, the D.C. Circuit rejected a procedural challenge under the Clean Air Act to a series of EPA meetings with White House staff and agency officials, one of which involved CEQ. 657 F.2d 298, 387, 446 (D.C. Cir. 1981). The court "recognize[d] the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy," stating that the president and "his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered." *Id.* at 405. The court reasoned that "unless expressly forbidden by Congress, such intra-executive contacts may take place, both during and after the public comment period" and that the only issue presented was "whether they must be noted and summarized in the docket." *Id.*

[40] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (proposed Nov. 14, 2022).

[41] 41 U.S.C. § 1302(b); Fed. Acquisition Reg. Council, *FAR Council Members*, ACQUISITION.GOV, https://www.acquisition.gov/far-council-members (last visited Oct. 6, 2023).

[42] Exec. Order No. 14,030, 86 Fed. Reg. 27967 (May 25, 2021), https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.

[43] *Id.*

[44] 42 U.S.C. § 4332(2)(B).

A plaintiff challenging the rule might argue that sole authorship of a rule exceeds "consultation" as that term is commonly understood.[45] Assuming, *arguendo*, that a court agreed, a plaintiff might still need to show that the agency acted contrary to law (i.e., in violation of the Constitution or a federal statute or regulation) or acted in an arbitrary or capricious manner to prevail on an APA claim.[46]

Relevant to the first consideration, the FAR states that "subject to" the joint authority of DoD, GSA, and NASA, "revisions to the FAR will be prepared and issued through the coordinated action of two councils, the Defense Acquisition Regulations Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council).[47] The FAR provides that "[v]iews of agencies and nongovernmental parties or organizations will be considered in formulating acquisition policies and procedures."[48] Additionally, the FAR states that "[c]onsideration shall also be given to unsolicited recommendations for revisions that have been submitted in writing with sufficient data and rationale to permit their evaluation."[49] A plaintiff bringing an APA claim under the scenario outlined in Question 2 potentially could argue that CEQ, not the DAR and CAA Councils, "prepared" the rule, in violation of the FAR.[50] Resolution of this claim could depend on the DAR and CAA Councils' precise involvement, because the FAR does not appear to bar consideration of a proposal from another agency.[51]

Review under the arbitrary-or-capricious standard is typically deferential to the agency.[52] A court may find that an agency action is arbitrary or capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[53] In evaluating the agency record, a court may not "substitute its judgment for that of the agency."[54] It is not clear that an agency's use of a proposal submitted by CEQ, standing alone, would make the agency's action arbitrary or capricious.[55]

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[45] *See Consultation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/consultation (last visited Oct. 16, 2023) ("the act of consulting or conferring"); *Consult*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/consult#h1 (last visited Oct. 16, 2023) (to "ask the advice or opinion of" or "deliberate together").

[46] 5 U.S.C. § 706(2).

[47] 48 C.F.R. § 1.201-1(a); *see also id.* § 1.201-1(d) ("Responsibility for processing revisions to the FAR is apportioned by the two councils so that each council has cognizance over specified parts or subparts.").

[48] 48 C.F.R. § 1.501-2(a).

[49] *Id.* § 1.502.

[50] 48 C.F.R. § 1.201-1(a).

[51] CRS has not identified any reported cases interpreting 48 C.F.R. § 1.201-1 in the context of another agency's participation in drafting a proposed rule.

[52] *See* FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential . . . ."); Ohio Valley Env't Coal. v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009) ("Review under this [arbitrary-and-capricious] standard is highly deferential, with a presumption in favor of finding the agency action valid.").

[53] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[54] *Id.*

[55] *Cf.* Pac. Choice Seafood Co. v. Ross, 976 F.3d 932, 939 (9th Cir. 2020) (upholding the agency's authority to base its regulations on findings from advisory bodies comprised of industry participants).

For legal questions regarding the scope of CEQ's authority or NEPA, please contact CRS Legislative Attorney Kristen Hite.

a. *Would the FAR Council be abusing their authority by issuing an environmental regulation requirement rather than a procurement rule for federal contractors?*

Whether a particular rule is characterized as an environmental regulation or a procurement rule would not be dispositive of an agency's authority to issue that rule. Instead, a reviewing court would need to examine the particulars of the rule or challenged agency action to determine whether it falls within the agency's assertion of regulatory authority. Please see the response to Question 1.a for a discussion of whether the proposed rule, if finalized, could exceed the promulgating agencies' statutory authority.

## Question 3

*3. CEQ was established under the National Environmental Policy Act (NEPA) as a policy advisor to the President. 42 U.S.C. chapter 55 section 4344 details the specific responsibilities and duties of the Council. Under the plain meaning of this statute, does CEQ have a "clear grant of statutory authority" to assist in the promulgation of regulation that sets further parameters on procurement processes?*

a. *Could you point to the specific language in this statute that would provide CEQ this authority?*

This response addresses Questions 3 and 3.a together.

As discussed in response to Question 2, a challenge to the proposed rule (if finalized) would likely concern the statutory authority of the promulgating agencies (DoD, GSA, and NASA). In an APA challenge to an agency regulation, it is not clear that a court would take into account whether a different agency had adequate statutory authority to participate in the rulemaking process.

Considering the question independently of judicial review under the APA, there are reasonable arguments that CEQ's participation, standing alone, does not exceed CEQ's statutory authority.

CEQ is a division of the Executive Office of the President.[56] Through the National Environmental Policy Act (NEPA), Congress directed CEQ to:

> review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto.[57]

[56] 42 U.S.C. § 4342.

[57] *Id.* § 4344(3).

In title I of NEPA, Congress declared a continuing policy "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[58]

CEQ's participation in a FAR rulemaking might be considered within its statutory duty to "review and appraise the various programs and activities of the Federal Government."[59] Procurement is likely a "program" or "activity" of the federal government.[60] The phrase "review and appraise" does not equate to regulatory authority for CEQ *itself* to promulgate amendments to the FAR—authority which federal law reserves to DoD, GSA, and NASA, acting jointly.[61] NEPA does, however, direct CEQ to perform its review-and-appraisal function in light of the statute's broad policy goals, which include the use of "all practicable means and measures, including financial and technical assistance, in a manner calculated to . . . create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[62] Additionally, the statute requires "all agencies of the Federal Government" to "assist" CEQ and to "identify and develop methods and procedures, in consultation with [CEQ] . . . , which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."[63] Advising the FAR Council with respect to the procurement laws could potentially constitute permissible technical assistance in view of the interagency collaboration required by NEPA.[64]

## Question 4

*4. If this rule raises Major Questions Doctrine concerns as you stated it could in your statements, are GSA, DoD, and NASA operating beyond their "clear congressional authorizations," by imposing requirements to set targets and acquire validation for GHG emissions or would this type of regulation require project-specific authorities as contemplated by the Procurement Act?*

As indicated in response to Question 1.a, the meaning and scope of "clear congressional authorization" in the Supreme Court's major questions cases is unsettled.[65] A court relying on the

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[58] *Id.* § 4331(a).

[59] *Id.* § 4344(3).

[60] *See* GSA, *Purchasing Programs*, U.S. GENERAL SERVICES ADMINISTRATION, https://www.gsa.gov/buy-through-us/purchasing-programs (last visited Oct. 12, 2023); GSA, *About Us: Background*, U.S. GENERAL SERVICES ADMINISTRATION, https://www.gsa.gov/about-us/mission-and-background/background (last visited Oct. 12, 2023) (discussing the "federal government activities" that GSA "manage[s] and support[s]").

[61] 41 U.S.C. § 1303(a)(1).

[62] *Id.* § 4331(a).

[63] *Id.* § 4332(2)(B), (L).

[64] *See* Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301, 1310 (1974) (Douglas, J., Circuit Justice) (granting a stay pending appeal in the Court of Appeals) (explaining that "NEPA requires all federal agencies both to consult with the CEQ to insure that environmental factors are adequately considered and to assist the CEQ," and that CEQ "members must be qualified 'to appraise programs and activities of the Federal Government in the light of the policy' set forth" in NEPA).

[65] *See generally* CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022).

contractor vaccination cases discussed in response to Question 1.a could conclude that the Procurement Act does not contain a sufficiently "explicit" grant of authority for the promulgating agencies to require contractors to set and validate emissions targets.[66] For example, in considering whether there was explicit authority for a federal contractor vaccination mandate, the Eleventh Circuit identified contrasting federal statutes requiring "contractors for services to pay their employees the federal minimum wage"; prohibiting the government from "contracting with any company that has criminally violated air pollution standards"; or allowing the government "to refuse to contract with firms that fail to meet certain cybersecurity qualifications."[67] The Supreme Court has not ruled on whether GSA's authority under the Procurement Act is limited to project-specific requirements or how the major questions doctrine might affect this analysis. In the past, lower courts have upheld requirements that certain contractors comply with specified wage and price standards[68] and provide notice to workers of certain rights under federal labor law,[69] which were based on the President's and GSA's general authority under the Procurement Act (now found at 40 U.S.C. § 120(a) and (c)). The executive branch has also used its authority under the Procurement Act to adopt "a series of anti-discrimination requirements for Government contractors."[70]

## Question 5

*5. As you are aware, Article I of the Constitution vests all legislative powers in Congress. The Nondelegation Doctrine limits Congress's authority to delegate legislative power to the other branches of government and has further limited delegations of federal authority to private entities through the related "private nondelegation doctrine." While the court has not deemed it entirely forbidden, it has strictly limited its application. Under this application by the courts, would the Executive Branch have the authority to delegate validation and standards development authority to a private entity?*

*a. What are the strict limitations on this type of delegation of authority?*

This response addresses Questions 5 and 5.a together. For context, CRS understands this question to allude to the role that the proposed regulation would assign to SBTi to validate contractors' science-based targets.

Under limited available case law, whether the executive branch could lawfully delegate validation and standards development authority to a private entity depends on at least two factors: (1) whether those activities are regulatory in nature; and (2) whether, in performing them, the private entity would be subordinate to and adequately supervised by a federal agency.[71] Agency supervision and the due process considerations discussed in response to Question 6

[66] *E.g.*, Georgia v. President of the United States, 46 F.4th 1283, 1297 (11th Cir. 2022).

[67] *Id.* at 1297.

[68] AFL-CIO v. Kahn, 618 F.2d 784, 793 (D.C. Cir. 1979) (en banc).

[69] *Chao*, 325 F.3d at 366–67.

[70] *Kahn*, 618 F.2d at 790.

[71] *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 387–88, 399 (1940).

appear to be the main limits on a delegation of governmental authority to a private entity under the private nondelegation doctrine.[72]

The proposed rule concerns a unique context—federal contracting—that raises questions about the proper application of these general principles. Some courts have concluded that federal contractors are not "required" to comply with contract provisions because they "have the option not to contract with the government."[73]

Additionally, unlike in some cases involving improper delegation of regulatory authority, SBTi would not be creating rules directly governing the conduct of regulated entities.[74] Instead, it would be evaluating whether companies seeking government contracts created a target—effectively, a goal—that aligns with the proposed rule's definition of "science-based target."[75] In *Texas v. Rettig*, the Fifth Circuit rejected a private nondelegation challenge to a rule requiring certain state Medicaid contracts to be certified as actuarially sound by a qualified actuary.[76] The appellate court reasoned that "an agency does not improperly subdelegate its authority when it 'reasonabl[y] condition[s]' federal approval on an outside party's determination of some issue."[77] Similar to *Rettig*, SBTi validation is one of several factors considered by a contracting officer in determining whether a prospective contractor is eligible to receive a federal contract.[78] These considerations may prompt a court to conclude that SBTi merely assists a federal officer in making an award determination regarding a discrete technical issue.

On the other hand, SBTi's validation decision would be based on its own internal processes and methodologies. Because that decision is needed to avoid a presumption of ineligibility for a contract award,[79] a court might conclude that the proposed rule effectively authorizes this private entity to set the relevant regulatory standards. A court reaching this conclusion might find support in a statement issued by three Supreme Court Justices when the Court denied certiorari in *Rettig*.[80] The statement asserted that "[w]hat was essentially a legislative determination—the actuarial standards that a State must meet in order to participate in Medicaid—was made not by Congress or even by the Executive Branch but by a private group," and that "this was no inconsequential matter" because it "has cost the States hundreds of millions of dollars."[81] If a court were to apply this line of reasoning, it might conclude that under the proposed rule, SBTi

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[72] *See id.*

[73] Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726, 736 (D. Md. 2009).

[74] *Cf.* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 882 (5th Cir. 2022) (holding that Congress unconstitutionally "empowered" a private entity to "make 'myriad' rules for the horseracing industry").

[75] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935) ("The Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.").

[76] 987 F.3d 518, 524–25, 533 (5th Cir. 2021), *cert. denied sub nom.* Texas v. Commissioner of Internal Revenue, 142 S. Ct. 1308 (2022).

[77] *Id.* at 531 (quoting United States Telecom Ass'n v. FCC, 359 F.3d 554, 566 (D.C. Cir. 2004)).

[78] *Cf. Rettig*, 987 F.3d at 533 (reasoning that "certification is a small part of the approval process" for the contracts at issue).

[79] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68327 (proposed Nov. 14, 2022) (proposed § 9.104-3(e)(1)).

[80] Texas v. Commissioner of Internal Revenue, 142 S. Ct. 1308, 1309 (2022) (Alito, J., statement respecting denial of certiorari).

[81] *Id.*

would exercise inadequately supervised regulatory power in violation of the private nondelegation doctrine.

## Question 6

*6. Concerns have been raised that, if this rule is finalized, SBTi could be a competitor with the companies it would be required to validate. If it is a competitor as well as a validator, would this implicate due process concerns raised by the Supreme Court in other cases?*

CRS lacks sufficient facts to determine whether SBTi could be a competitor with the federal contractors whose targets it would validate. Assuming SBTi could be a competitor, that factor could raise due process concerns under private nondelegation cases—at least insofar as validation is considered regulatory in nature.[82] In *Carter v. Carter Coal Co.*, the Supreme Court opined that "one person may not be intrusted with the power to regulate the business of another, and especially of a competitor."[83] A law that "attempts to confer such power," the Court reasoned, "undertakes an intolerable and unconstitutional interference with personal liberty and private property."[84] Cases in this area have drawn a distinction between, for example, permissible "assistance" of private entities "in matters of a more or less technical nature, as in designating the standard height of drawbars" and effectively empowering "trade or industrial associations or groups" to "enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries."[85] The latter type of delegation, the Supreme Court has explained, "is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[86] The D.C. Circuit stated that "the Due Process Clause effectively guarantees the regulatory power of the federal government will be wielded by 'presumptively disinterested' and 'duly appointed' actors who, in exercising that awesome power, are beholden to no constituency but the public good."[87]

## Question 7

*7. If this rule were to be finalized, would there be any other due process concerns that could be raised?*

If the proposed rule were to be finalized as written, a major contractor subject to it might argue that the rule does not provide adequate process for contractors to object to delays or to appeal denials of target validation by SBTi that would render them presumptively ineligible for a new contract. In general, due process requires notice and an opportunity to be heard.[88]

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[82] *See supra*, response to Question 5.

[83] 298 U.S. 238, 311 (1936).

[84] *Id.*

[85] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

[86] *Id.*

[87] Ass'n of Am. R.R. v. Dep't of Transp., 821 F.3d 19, 39 (D.C. Cir. 2016).

[88] *E.g.*, Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976).

To bring a procedural due process claim, a prospective contractor must first show that it has a constitutionally protected property interest in the contract at issue.[89] This is a context- and jurisdiction-dependent inquiry that considers "whether a law or government policy created an 'entitlement'—a reasonable expectation that a government-provided benefit would continue."[90]

Assuming that a contractor can establish such a property interest, an additional question is whether the proposed rule provides adequate recourse for contractors who cannot obtain validation from SBTi. In general, "the specific procedures needed to satisfy due process vary depending on the circumstances."[91] In the civil context, courts typically apply "a balancing test that evaluates the government's chosen procedure in light of the private interest affected, the risk of erroneous deprivation of that interest under the chosen procedure, and the government interest at stake."[92]

The proposed rule provides at least the following processes for contractors unable to obtain SBTi validation. First, the proposed rule provides a contractor with an opportunity to overcome the presumption of ineligibility by presenting information demonstrating: (1) that the "noncompliance resulted from circumstances properly beyond the . . . contractor's control"; (2) that the contractor's "documentation" sufficiently "demonstrates substantial efforts taken to comply" with the rule, such as performing "one or more of the actions" that the proposed rule would require; and (3) that the contractor "has made a public commitment to comply as soon as possible (within 1 calendar year) on a publicly accessible website."[93] Second, the proposed rule permits a contractor to seek a waiver from the senior procurement executive of the contracting federal agency, who is authorized to grant waivers to non-exempt entities in certain circumstances. One type of waiver would dispense with the procedures to determine compliance with the reporting and validation requirements for "[f]acilities, business units, or other defined units for national security purposes" or "[e]mergencies, national security, or other mission essential purposes."[94] Alternatively, the senior procurement executive could provide a waiver of up to one year "to enable a significant or major contractor to come into compliance with" the reporting and validation requirements.[95] To the extent a court considers whether the proposed rule provides adequate process, these additional procedures may adequately mitigate any potential risk of erroneous deprivation of a protected interest (assuming such an interest is at issue).

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[89] *See* Ho v. City of Boynton Beach, No. 22-11542, 2023 U.S. App. LEXIS 4984, at *6 (11th Cir. Mar. 1, 2023) (per curiam) (explaining that a "procedural due process claim requires a showing of: (1) a constitutionally protected liberty or property interest, (2) state action, and (3) constitutionally inadequate process").

[90] *Overview of Procedural Due Process*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-1/ALDE_00013747/ (last visited Oct. 13, 2023) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)); *e.g.*, John Gil Constr., Inc. v. Riverso, 7 F. App'x 134, 135 (2d Cir. 2001) (affirming the district court's decision that a prospective contractor had no "entitlement to prequalified-bidder status or to the award of [school construction] contracts").

[91] *Overview of Procedural Due Process*, *supra* note 90.

[92] *Id.* (citing *Eldridge*, 424 U.S. at 335).

[93] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68327 (proposed Nov. 14, 2022) (proposed § 9.104(e)(1)).

[94] *Id.* at 68330 (proposed § 23.XX06(b)(1)).

[95] An agency would have to make waivers of this type publicly available on its website. *Id.* at 68330 (proposed § 23.XX06(b)(2)).

## Question 8

*8. The Court has previously drawn distinctions between authorizing private entities to assist the government, subject to its control and supervision and authorizing private entities to engage in government functions or render a final decision on a policy matter without agency oversight.*

a. *By requiring major contractors to submit annual climate disclosures through the completion of the "CDP Climate Change Questionnaire" that align with the recommendations identified by CDP, does the proposed rule simply incorporate a third-party standard or allow the private party to set the standard?*

Because the agencies have asked for feedback on how to identify which portions of the CDP Climate Change Questionnaire covered contractors must complete, CRS does not have enough information to answer this question. For example, it is currently unknown whether the agencies are proposing to incorporate a certain version of the CDP Climate Change Questionnaire as of a fixed date[96] or how they might otherwise incorporate any third-party standard by reference.[97] The agencies have specifically asked for public feedback on "whether any specificity beyond 'those portions of the CDP Climate Change Questionnaire that align with the TCFD as identified by CDP (*https://www.cdp.net/en/guidance/how-cdp-isaligned-to-the-tcfd*)' is necessary."[98] Accordingly, further clarification of CDP's role may be forthcoming. CRS is available to provide further legal analysis of this question based on any changes in a final rule.

b. *If this qualifies as setting the standard, would this violate the private nondelegation doctrine, under the current precedent?*

If CDP, a private entity, were to set the standard for which types of information major contractors seeking a government contract would be required to publicly report, then CDP's involvement could be viewed as regulatory in nature and thus raise a private nondelegation question.[99] Whether such involvement would violate the private nondelegation doctrine would depend on whether the agency, under the final rule, would have adequate supervision over CDP's standard-setting, such that CDP would "function subordinately to the supervising agency"[100] in a role that could be considered "perform[ing] ministerial and fact-gathering functions."[101]

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[96] *See* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68315 (proposed Nov. 14, 2022) (explaining that "[e]ach year CDP issues the proposed updates to the questionnaire, which are opened for public consultation in the fall," and finalized and available "early in the new year").

[97] *See* 1 C.F.R. § 51.1(f) (providing that for purposes of publication in the *Federal Register*, "[i]ncorporation by reference of a publication is limited to the edition of the publication that is approved" and "[f]uture amendments or revisions of the publication are not included").

[98] Proposed Rule, 87 Fed. Reg. at 68317.

[99] *Cf.* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 882 (5th Cir. 2022) (describing the private entity's "sweeping" rulemaking power to establish "anti-doping, medication, and racetrack safety programs" for the horseracing industry).

[100] *Id.* at 881.

[101] Consumers' Rsch. v. FCC, 67 F.4th 773, 796 (6th Cir. 2023).

Congress's enactment and subsequent amendment of the Horseracing Integrity and Safety Act (HISA) may be instructive. HISA originally delegated "unsupervised" authority to a private entity that had the power to regulate anti-doping, medication, and racetrack safety programs for horseracing nationwide.[102] The statute required the Federal Trade Commission (FTC) to approve the private entity's regulations if the agency found that the regulations were consistent with HISA.[103] The FTC could not modify the substance of the regulations or disapprove them based on policy differences.[104] The FTC also could not propose regulations of its own except in cases of emergency.[105] In 2022, the Fifth Circuit held that this version of HISA violated the private nondelegation doctrine.[106] The Fifth Circuit determined that the FTC's authority to review was too limited to serve as independent oversight.[107] Congress then amended HISA by providing the FTC the authority to "abrogate, add to, and modify" regulations submitted to it by the private entity and to propose its own regulations.[108] The Sixth Circuit subsequently determined that HISA as amended created "true oversight authority" and no longer violated the private nondelegation doctrine.[109]

*c. If this is merely incorporation of third-party standards, how would the outcome differ?*

Incorporation of third-party standards by reference appears to be a common and accepted practice for federal agencies. The U.S. Court of Appeals for the D.C. Circuit recently opined:

> Federal agencies may incorporate privately developed standards into law by referencing them in agency rulemaking. Incorporation by reference (IBR) in a published rule allows agencies to satisfy the requirement to publish rules in the Federal Register without reproducing the standards themselves. 5 U.S.C. § 552(a)(1). The Code of Federal Regulations contains more than 27,000 incorporations of privately developed standards by reference.[110]

Accordingly, incorporation of a private entity's standards by reference is unlikely to pose the same private nondelegation concerns as delegating inadequately supervised regulatory authority to a private entity.[111] Other legal requirements might still apply to incorporation by reference in a federal rule.[112]

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[102] Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 882, 890 (5th Cir. 2022).

[103] *Id.* at 884.

[104] *Id.* at 884–86.

[105] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 1204(e), 134 Stat. 3258 (2020) (prior to 2022 amendment).

[106] *Black*, 53 F.4th at 890.

[107] *Id.* at 884–86.

[108] 15 U.S.C. § 3053(e).

[109] Oklahoma v. United States, 62 F.4th 221, 230 (6th Cir. 2023). On remand from the Fifth Circuit and after Congress amended HISA, the district court in that case also concluded that HISA did not violate the private nondelegation doctrine. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, No. 21-CV-071-H, 2023 WL 3293298, at *7 (N.D. Tex. May 4, 2023), *appeal docketed*, No. 23-10520 (5th Cir. May 19, 2023).

[110] Am. Soc'y for Testing & Materials v. Pub.Resource.Org, Inc., No. 22-7063, 2023 U.S. App. LEXIS 24037, at *4 (D.C. Cir. Sep. 12, 2023) (citing *Standards Incorporated by Reference Database*, Nat'l Inst. of Safety & Tech., https://sibr.nist.gov [perma.cc/W4BN-HLZG] (last visited Aug. 30, 2023)).

[111] *See supra*, response to Question 5.

[112] *See, e.g.*, 15 U.S.C. § 272 note (stating that subject to certain exceptions, "all Federal agencies and departments shall use

(continued...)

## Question 9

*9. By requiring federal contractors to obtain validation of their science-based targets from SBTi to certify compliance with qualification standards under the FAR, does the proposed rule violate the private nondelegation doctrine, or merely authorize SBTi to assist a federal contracting officer in making a contracting determination?*

Because the certification requirement stems from the rule itself and not SBTi,[113] the requirement is unlikely to violate the private nondelegation doctrine. Certification requirements are common in federal contracting.[114] Whether SBTi's role in the validation process that would form the basis for the certification may implicate nondelegation principles is discussed in response to Question 5.

## Question 10

*10. The proposed rule currently requires potential contractors to disclose the validation of their science-based targets. It also requires contracting companies that have received validation to abide by the SBTi guidance on public communications. The proposed rule would effectively force companies to associate with and engage in speech that they may not necessarily agree with. Can federal agencies compel private speech or association?*[115]

In general, the First Amendment applies to laws that restrict or compel expression, whether through speech or association.[116] The Free Speech Clause "also prohibit[s] the government from imposing unconstitutional conditions that chill or deter speech."[117] This second principle means that the government may violate the Constitution if it conditions a government benefit on relinquishment of a First Amendment right.[118] Accordingly, if a federal agency were to compel the speech or association of a private entity through a regulation, that regulation, or application or enforcement thereof, would likely implicate the First Amendment.[119]

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technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments"); 1 C.F.R. §§ 51.1–51.11 (prescribing rules for incorporation by reference in the *Federal Register*).

[113] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68332 (proposed Nov. 14, 2022)

[114] *E.g.*, 48 C.F.R. §§ 4.1202, 33.207, 52.204-8.

[115] This response is based on the quoted text of the proposed rule. While the proposed rule would require certain potential contractors to disclose the validation of their science-based targets, it does not appear to require companies with validated targets to abide by SBTi guidance on public communications.

[116] U.S. CONST. amend. I. *See generally Overview of Compelled Speech*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-12-1/ALDE_00000769/; *Overview of Freedom of Association*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-8-1/ALDE_00013139/ (last visited Oct. 10, 2023).

[117] Ark. Times LP v. Waldrip, 37 F.4th 1386, 1391 (8th Cir. 2022).

[118] In *Perry v. Sindermann*, the Supreme Court explained that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." This, in turn, the Court reasoned, "would allow the government to 'produce a result which [it] could not command directly.'" 408 U.S. 593, 597 (1972) (quoting Speiser v. Randall, 357 U.S.C. 513, 526 (1958)).

[119] *See* CRS In Focus IF12388, *First Amendment Limitations on Disclosure Requirements*, by Valerie C. Brannon et al. (2023) (discussing the basic principles of compelled speech); *Overview of Freedom of Association*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-8-1/ALDE_00013139/ (last visited Oct. 10, 2023).

Not all compelled speech automatically violates the First Amendment, however. Instead, the Supreme Court has applied different levels of scrutiny depending on the type of speech or association required and the specific context in which the claim arises.[120] Additionally, different legal standards might apply if the challenger is a government contractor, as discussed in more detail in response to Question 10.a. Courts have upheld some compelled-speech or disclosure requirements and rejected others as inconsistent with the Free Speech Clause.[121]

*a. In your professional opinion, do these requirements violate aspects of the first amendment?*

The proposed regulatory text would require major contractors to "develop[] a science-based target," have that target "validated by" SBTi, and make the validated target "available on a publicly accessible website."[122] The last requirement—to make the target available on a publicly accessible website[123] (the publication requirement)—could implicate the First Amendment because it would require a private entity (a major contractor) to publish certain information—potentially including information that the contractor would not normally publish of its own volition.[124]

Ordinarily, a law requiring companies to publish certain information would be subject to First Amendment scrutiny insofar as it requires companies to make statements that they would not otherwise make or provide access to information that they would not otherwise provide.[125] In such circumstances, a reviewing court might require the government to satisfy strict scrutiny if it concludes that the law implicates protected, noncommercial speech.[126] A lower standard of scrutiny could apply if a court decides that the published information concerns only commercial

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[120] *See generally* CRS In Focus IF12388, *First Amendment Limitations on Disclosure Requirements*, by Valerie C. Brannon et al. (2023).

[121] *Compare* Associated Builders & Contractors of Se. Tex. v. Rung, No. 1:16-CV-425, 2016 U.S. Dist. LEXIS 155232, at *27, 30, 32 (E.D. Tex. Oct. 24, 2016) (preliminarily enjoining certain public disclosure requirements for prospective federal contractors after finding that the requirements were not "narrowly tailored"), *with* SEC v. Gallagher, No. 21-CV-8739, 2023 WL 6276688, at *16 (S.D.N.Y. Sept. 26, 2023) (explaining that "[s]trictly speaking, the application of the securities laws" to the defendant was "a content-based regulation of his speech, as it would require him to disclose material facts but not other information," but observing that the "Supreme Court has recognized that the government may regulate 'the exchange of information about securities' 'without offending the First Amendment'" (quoting Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 456 (1978)).

[122] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68329 (proposed Nov. 14, 2022) (proposed § 23.XX03(b)(2)).

[123] The proposed regulatory text would allow for publication on any publicly accessible website. As discussed in response to Question 11, any additional requirements related to publication on SBTi's website could involve other First Amendment considerations.

[124] CRS In Focus IF12388, *First Amendment Limitations on Disclosure Requirements*, by Valerie C. Brannon et al. (2023). Whether the requirement to *develop* a science-based target would also implicate the First Amendment depends on whether setting a target for reduction of greenhouse gas emissions involves "unexpressive commercial conduct" or "protected expressive conduct." Ark. Times LP v. Waldrip, 37 F.4th 1386, 1391 (8th Cir. 2022).

[125] *See generally Content-Based and Compelled Speech*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-3-6/ALDE_00013700/ (last visited Oct. 9, 2023).

[126] *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) (explaining that laws that "compel[] individuals to speak a particular message . . . 'alte[r] the content of [their] speech,'" and thus are presumptively unconstitutional (quoting Riley v. Nat'l Federation of the Blind, 487 U.S. 781, 795 (1988))).

speech; that is, speech made "solely" in "the economic interests of the speaker and its audience."[127] These traditional levels of scrutiny might apply in a First Amendment challenge to the proposed rule (if finalized), depending on the jurisdiction where the challenge is brought.[128]

In the context of government contracting, however, the Supreme Court has not settled on a specific test, and lower courts have applied a variety of legal standards.[129] In evaluating a federal contractor's claim for First Amendment retaliation, where the government allegedly terminated the contract because of the contractor's speech, the Supreme Court in *Board of County Commissioners v. Umbehr* applied a balancing test based on case law involving public employees, considering both the contractor's interest in commenting on matters of public concern and the government's interest in effectively carrying out its functions.[130] One court applied the *Umbehr* test in a case involving a federal policy prohibiting federal contractors from promoting certain "divisive concepts" in workplace trainings—in other words, in the context of a speech restriction.[131] It is unclear whether a court would take the same approach in a case involving compelled speech.[132] Additionally, a 1995 Supreme Court case suggests that a heightened standard of scrutiny might apply when analyzing a law that has the potential to burden "a massive number of potential speakers" as opposed to a "disciplinary action[] taken in response to a government employee's speech."[133]

If a court were to apply the *Umbehr* test, it might ask first whether the rule under consideration would force a prospective contractor to speak as a citizen on "a matter of public concern."[134] Publication of a science-based target could involve a matter of public concern outside the scope of the contractual relationship if viewed as a public statement regarding a company's commitment to reducing greenhouse gas emissions, particularly because the target itself does not appear to be limited to emissions associated with a government contract.[135] At the second step of the analysis, a court would likely balance the government's interests against the prospective

[127] Cent. Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980); *e.g.*, Briggs & Stratton Corp. v. Balridge, 728 F.2d 915, 918 (7th Cir. 1984). *See generally* CRS Report R45700, *Assessing Commercial Disclosure Requirements under the First Amendment*, by Valerie C. Brannon (2019).

[128] *See* NRA of Am. v. City of Los Angeles, 441 F. Supp. 3d 915, 925 (C.D. Cal. 2019) (applying strict scrutiny to an ordinance that "require[d] 'a prospective contractor of the City to disclose all contracts with or sponsorship of the National Rifle Association'"); Associated Builders & Contractors of Se. Tex. v. Rung, No. 1:16-CV-425, 2016 U.S. Dist. LEXIS 155232, at *32 (E.D. Tex. Oct. 24, 2016) ("[I]t 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.").

[129] *See* O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 721 (1996) (eschewing a "rigid rule" to govern the First Amendment rights of federal contractors).

[130] Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 673, 675–76 (1996) (citing Pickering v. Bd. of Ed., 391 U.S. 563 (1968)).

[131] Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 528, 540 (N.D. Cal. 2020).

[132] *Cf.* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2473 (2018) (questioning the application of *Pickering* in a case involving compelled subsidization in the form of public employee union agency fees).

[133] *See* United States v. Nat'l Treasury Emps. Union (NTEU), 513 U.S. 454, 457, 466–68 (1995) (reasoning that the government has a "greater" burden to justify "a law that broadly prohibits federal employees from accepting any compensation for making speeches or writing articles").

[134] *Umbehr*, 518 U.S. at 685.

[135] *Cf. Santa Cruz Lesbian & Gay Cmty. Ctr.*, 508 F. Supp. 3d at 541 ("On its face, this restriction on the contractor's training of its own employees applies regardless of whether the federal contract has anything to do with diversity training . . . and is untethered to the use of the federal funds. Moreover, the restricted speech, addressing issues of racism and discrimination, goes to matters of public concern.").

contractors' free speech interests.[136] In the case described above involving "divisive concepts" in workplace trainings, the trial court concluded that the contractors' First Amendment rights likely outweighed the government's interests in "controlling the scope of diversity training," because the restriction reached the contractors' speech "on matters that potentially have nothing to do with the federal contract."[137] In the proposed rule, the government has asserted a broader interest in, among other things, "conduct[ing] prudent fiscal management of all major Federal suppliers."[138] The Supreme Court has stated that "operational efficiency is undoubtedly a vital governmental interest."[139] A court might have to decide whether the publication requirement is a "reasonable response" to that interest, and if not, whether the government has asserted some other interest that would justify any restriction on contractors' speech.[140]

While *Umbehr* provides one potential framework for evaluating free-speech challenges to conditions on federal contracts, at least one federal court has applied legal standards derived from cases involving funding conditions that affect the speech of grantees.[141] Like grantees who generally are not entitled to a federal benefit, prospective contractors generally do not have a right to a federal contract.[142] Nevertheless, the government may not condition a benefit on relinquishment of a First Amendment right.[143] To evaluate whether the publication requirement comports with this principle, a court might ask whether the requirement falls within the scope of the government program or instead forces private entities to adopt a message with which they disagree "outside the contours of the program itself."[144] The Supreme Court has recognized that this line "is hardly clear"[145] but has highlighted factors such as whether the condition affects only the funded project, leaving the funding recipient "unfettered in its other activities,"[146] or forces funding recipients to "adopt—as their own—the Government's view on an issue of public concern."[147] Alternatively, a court might ask whether any burden on speech created by the condition is "incidental" to a regulation of nonexpressive conduct.[148]

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[136] *Id.* at 541.

[137] *Id.* at 542.

[138] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (proposed Nov. 14, 2022).

[139] *NTEU*, 513 U.S. at 473.

[140] *Id.*

[141] Nat'l Ass'n of Manufacturers v. Perez, 103 F. Supp. 3d 7, 17 (D.D.C. 2015) (reasoning that the choice to "host government speech as a condition of receipt of a federal contract" is "no different than the one presented" in *Rumsfeld v. FAIR* to "either accommodate a military recruiter or forgo federal funds" (citing 547 U.S. 47, 63 (2006))).

[142] AFL-CIO v. Kahn, 618 F.2d 784, 794 (D.C. Cir. 1979) ("[A]ny alleged mandatory character of the procurement program is belied by the principle that no one has a right to a Government contract."); *cf.* Agency for Int'l Dev. (USAID) v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013) ("As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights.").

[143] Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.").

[144] *USAID*, 570 U.S. at 214–15.

[145] *Id.* at 215.

[146] *Id.* at 217 (quoting Rust v. Sullivan, 500 U.S. 173, 196 (1991)).

[147] *Id.* at 218.

[148] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR), 547 U.S. 47, 63 (2006).

Because the distinction between permissible programmatic requirements and impermissible leveraging of federal funding to control private speech is "not always self-evident,"[149] courts could reach different conclusions applying the same case law. For example, a court might determine that the rule would require a company to say something about its goals for reducing greenhouse gas emissions, and not just emissions linked to a federal contract. A court might reason that the message conveyed by the target would be dictated, not by the company's own priorities, but by federal law through the definition of "science-based target" and SBTi's validation requirements. A prospective contractor that attempts to distance itself from its published target could create confusion for consumers, investors, and procurement officials.[150] In these circumstances, a court might conclude that requiring major contractors to publish science-based targets is a condition that "by its very nature affects" their speech "outside the scope" of the contractual relationship.[151]

On the other hand, a court might conclude that the publication requirement does not offend the First Amendment. A court could potentially reach this conclusion if it defined the relevant program as the federal procurement program, rather than a particular contract, and if it reasoned that the publication requirement is "designed to ensure that the limits of the federal program are observed" in order to meet the government's procurement-related goals.[152] Alternatively, if a court decided that the requirement to develop a science-based target regulates contractors' nonexpressive conduct, it might conclude that the publication requirement imposes only an incidental burden on speech rather than compelling speech in violation of the First Amendment.[153]

## Question 11

*11. Compelled speech under the First Amendment has been considered when the government forces an individual or entity to say or associate with something they do not want to. However, there has been debate over the extent to which government regulations are considered compelled speech. Does the publication of company names on the SBTi website constitute compelled speech given the strict policing that SBTi intends to conduct regarding public communications by validated companies?*

The proposed rule would require major contractors to publish their targets on "a publicly accessible website."[154] The preamble to the proposed rule states that "[c]ompanies can commit to

[149] *USAID*, 570 U.S. at 217.

[150] *Id.* at 219 (explaining that although grantees could express views counter to the government's policy through their affiliates, they could do so "only at the price of evident hypocrisy").

[151] *Id.*

[152] Rust v. Sullivan, 500 U.S. 173, 193 (1991). *See* Proposed Rule, 87 Fed. Reg. at 68318–319 (describing the "discrete categories of benefits" that the government expects from the regulation).

[153] *FAIR*, 547 U.S. at 62.

[154] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68329 (proposed Nov. 14, 2022) (proposed § 23.XX03(b)(2)).

set a science-based target by submitting a letter to SBTi and will be recognized as 'committed' on the SBTi website."[155]

CRS cannot fully evaluate these provisions due to uncertainties in how they would be implemented. It is not clear that the proposed rule, if finalized, would require contractors to publish their targets on any particular public website. Although the preamble states that companies "will be recognized as 'committed' on the SBTi website," it is not clear whether the proposed rule would require contractors to first "commit" to establishing a target before seeking validation or otherwise require SBTi to publish contractors' names on its website. In the absence of state action, the publication of contractors' names would not raise a First Amendment issue.[156]

If, however, the rule were to require publication of contractors' names on SBTi's website or otherwise meet the state action requirement,[157] it could implicate the First Amendment rights of both SBTi and the affected contractors.[158] In addition to the free-speech considerations discussed in response to Question 10, contractors might argue that the rule compels their association with SBTi (and vice versa).[159] Resolution of this question might depend on whether publication of a prospective contractor's name on SBTi's website suggests that the business is affiliated with SBTi or aligned with SBTi's goals in a way that alters either SBTi's or the business's own message.[160]

## Question 12

*12. According to several sources, SBTi is funded and supported by the We Mean Business Coalition, which itself was launched by the Arabella Advisors network, a group that directed over $200 million to Democratic campaigns in 2020.*

*a. What are the legal concerns if Congress discovers in the future that the reason SBTi was selected as the sole source provider of validation services was due to their connection to the Arabella Advisor's network?*

CRS has not independently verified SBTi's funding sources. The FAR contains conflict-of-interest rules for contracts with for-profit or nonprofit organizations;[161] however, CRS would

[155] Proposed Rule, 87 Fed. Reg. at 68318.

[156] *See* CRS Report R45650, *Free Speech and the Regulation of Social Media Content*, by Valerie C. Brannon (2019) (discussing the First Amendment's state action requirement).

[157] *See* CRS Legal Sidebar LSB10742, *Online Content Moderation and Government Coercion*, by Valerie C. Brannon and Whitney K. Novak (2022).

[158] *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2312 (2023).

[159] *Overview of Freedom of Association*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-8-1/ALDE_00013139/ (last visited Oct. 10, 2023).

[160] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 575 (1995) ("[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

[161] 48 C.F.R. §§ 9.500–9.508.

need additional information to analyze whether these rules would apply to the choice of SBTi as the validating entity.[162]

With respect to an agency's choice to utilize the standards or services of a private entity more broadly, agencies may incorporate third-party standards by reference if consistent with their statutory authority.[163] If, however, an agency assigns unsupervised regulatory power to a private entity, that rule could violate the private nondelegation doctrine, as discussed in response to Question 5. Additionally, as discussed in response to Question 6, if the private entity performing a regulatory function is a competitor to the companies that it would regulate, that rule could raise due process concerns.

A regulated entity might also have a statutory basis to challenge an agency's decision to adopt the standards of or enlist the services of a third party. For example, under the Administrative Procedure Act, a regulated entity can challenge an agency action as "arbitrary and capricious," among other grounds.[164] Under this typically "deferential" form of review,[165] a court decides "whether the [agency] examined 'the relevant data' and articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made.'"[166] If a court decides that the agency's action fell outside "the bounds of reasoned decisionmaking,"[167] it must "set aside" the action.[168]

*b. If this rule is finalized, under the precedent established by this Administration, could a future administration alter the rule, striking SBTi and inserting validation service tied to their donors?*

Longstanding Supreme Court precedent provides that an administrative agency may change its position, including by amending a regulation, subject to the APA's requirement of a "reasoned explanation."[169] If this rule were to be finalized as written, a future Administration could amend

[162] From the proposed rule, it appears that the promulgating agencies designated SBTi as the validating entity but may not have a contractual relationship with SBTi. If the agencies were to enter into a contract or cooperative agreement with SBTi, they could be subject to legal requirements that might not apply outside of those contexts. *See* Grigsby Brandford & Co. v. United States, 869 F. Supp. 984, 997–98 (D.D.C. 1994) (holding that the FAR did not apply to an agency's selection of a "designated bonding authority" for a program because the FAR applies "only to procurements and acquisitions," and the agency's selection merely "conferred status upon a private entity").

[163] Am. Soc'y for Testing & Materials v. Pub.Resource.Org, Inc., No. 22-7063, 2023 U.S. App. LEXIS 24037, at *4 (D.C. Cir. Sep. 12, 2023) ("Federal agencies may incorporate privately developed standards into law by referencing them in agency rulemaking.").

[164] Dep't of Commerce v. New York, 139 S. Ct. 2551, 2569 (2019); *see also* 5 U.S.C. § 706(2)(A) (directing a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be— . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[165] A less deferential standard may apply in a challenge to an agency's application of debarment procedures. *See* Friedler v. Gen. Servs. Admin., 271 F. Supp. 3d 40, 53 (D.D.C. 2017) ("Although the APA's arbitrary and capricious standard is ordinarily '[h]ighly deferential' and 'presumes the validity of agency action[,]' it is well established that only minimal deference is due to GSA's interpretation of the FAR when a court undertakes to determine whether the agency followed that regulation's procedural requirements prior to imposing a debarment." (quoting AT&T Corp. v. FCC, 220 F.3d 607, 616 (D.C. Cir. 2000))).

[166] *Dep't of Commerce*, 139 S. Ct. at 2569 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U. S. 29, 43 (1983))).

[167] *Id.* (quoting Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc., 462 U.S. 87, 105 (1983)).

[168] 5 U.S.C. § 706(2).

[169] *See, e.g.*, F.C.C. v. Fox Television Stations, Inc., 566 U.S. 502, 514–16 (2009).

the rule to modify the validation requirements, including by substituting one or more entities for SBTi through which major contractors could obtain validation of their science-based targets. Such amendments could be subject to the rulemaking procedures in 41 U.S.C. § 1707.[170] As with any final version of the proposed rule, any future amendments would be subject to the principles discussed above in response to Question 12.a.

## Question 13

*13. According to OpenSecrets, the Arabella Advisors network steered over $3.2 million to the Center for American Progress Fund. At least 66 individuals who worked for the Center for American Progress have gone on to work in the Biden Administration, so much so, that they were dubbed the "administration in waiting." At least one individual that worked at the Center for American Progress is now at a high-level position at CEQ. Does Congress have the ability to investigate if CEQ and OMB arbitrarily selected SBTi due to its connections with the Arabella Advisors network [and the Center for American Progress Fund]?*

Congress may investigate the reasons for SBTi's inclusion in the proposed rule so long as Congress's investigation serves a "valid legislative purpose."[171] In general, Congress's legal authority to conduct oversight of the executive branch is "broad," and its power to "conduct investigations is inherent in the legislative process."[172] In *Barenblatt v. United States*, the Supreme Court wrote that Congress's "power of inquiry" is as "penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[173] At the same time, the Court has held that Congress's investigation must serve a "valid legislative purpose,"[174] meaning that "it must be related to, and in furtherance of, a legitimate task of the Congress."[175] For example, Congress may conduct "probes into departments of the Federal Government to expose corruption, inefficiency or waste" but may not investigate agency officials "solely for the personal aggrandizement of the investigators or to 'punish' those investigated."[176] Congress may also conduct "inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[177] Pursuant to these legal standards, Congress would likely have the authority to investigate the choice of SBTi to validate contractors' science-based targets, as part of Congress's authority to ensure that DoD, GSA, and NASA (the promulgating agencies) issued the proposed rule consistent with their statutory delegations of authority and in compliance with the APA.

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[170] *See infra*, response to Question 17.

[171] Barenblatt v. United States, 360 U.S. 109, 127 (1959); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) ("[W]e have held that each House has power 'to secure needed information' in order to legislate." (quoting McGrain v. Daugherty, 273 U.S. 135, 161 (1927))).

[172] Watkins v. United States, 354 U.S. 178, 187 (1957); *see generally* CRS In Focus IF10015, *Congressional Oversight and Investigations*, by Todd Garvey, Mark J. Oleszek, and Ben Wilhelm (2022); CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Ben Wilhelm, Todd Garvey, and Christopher M. Davis (2022).

[173] *Barenblatt*, 360 U.S. at 111.

[174] *Id.* at 127.

[175] *Watkins*, 354 U.S. at 187.

[176] *Id.*

[177] *Id.*

For more information on the scope of Congress's oversight authority, please contact CRS Legislative Attorney Todd Garvey.

## Question 14

*14. As a London based company, with no incorporation in the U.S., is SBTi subject to any of the U.S. anti-trust laws?*

In general, "the federal antitrust laws apply to foreign conduct that has a substantial and intended effect in the United States."[178] The Department of Justice and the Federal Trade Commission have jointly issued guidelines explaining their enforcement policies with respect to such conduct.[179] CRS has not independently verified the incorporation or business registration status of SBTi.

For more information on U.S. antitrust laws, please contact CRS Legislative Attorneys Peter Benson and Jay Sykes.

## Question 15

*15. As a London based company, does SBTi operate under U.S. laws? Does the U.S. government have the legal ability to conduct oversight of SBTi?*

As a general matter, companies that engage in conduct connected to the United States may be subject to a range of domestic federal and state laws.[180] However, this is a fact-dependent inquiry that will turn on both the scope of the potentially applicable law and the nature of the company's conduct.[181] CRS has not independently verified the incorporation or business registration status of SBTi or SBTi's contacts with the United States.

To the extent that SBTi is subject to U.S. laws, then the executive branch may investigate violations of those laws pursuant to its enforcement authority.[182] Congress has the legal authority

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[178] DOJ & FTC, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 17 (2017), https://www.justice.gov/media/1067656/dl?inline=; *see also id.* at 4 ("Cases involving foreign commerce or foreign conduct can involve almost any provision of the federal antitrust laws."); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (explaining that it is "well established" that the Sherman Antitrust Act "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States").

[179] ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION, *supra* note 178.

[180] *See, e.g.*, 26 U.S.C. § 882 (tax on income of foreign corporations connected with United States business); *Hartford Fire Ins. Co.*, 509 U.S. at 796 (antitrust laws); Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 845, 863–66 (2d Cir. 2021) (Justice Against Sponsors of Terrorism Act); C.W. Downer & Co. v. Bioriginal Food & Sci. Corp., 771 F.3d 59, 65–71 (1st Cir. 2014) (breach-of-contract claim); Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613–15 (8th Cir. 1994) (product liability); United States v. Inco Bank & Tr. Corp., 845 F.2d 919, 919–21 (11th Cir. 1988) (per curiam) (conspiracy to launder money).

[181] *Compare* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 261–73 (2010) (Securities Exchange Act does not provide cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchange), *with* Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 69 (2d Cir. 2012) (Securities Exchange Act can provide a cause of action for misconduct related to sales between foreign buyers and sellers if the parties incur irrevocable liability to carry out the securities transaction within the United States or title to the securities is passed within the United States).

[182] *See, e.g.*, *Justice Department Announces Eight Indictments Against China-Based Chemical Manufacturing Companies and*

(continued...)

to seek information from or about SBTi—as it can with any private individual or organization—so long as its inquiries serve a valid legislative purpose, as discussed in response to Question 13.

## Question 16

*16. As a private London-based company does SBTi need to consult with any legal authority or go through any type of formal process, akin to the Administrative Procedures Act, to change its methodologies or submission requirements?*

Regardless of where SBTi is based, SBTi's internal decisions are not subject to the procedural requirements of the Administrative Procedure Act (APA). The APA specifies "the procedures agencies usually must follow when they promulgate rules, adjudicate cases, or take other actions."[183] As a private organization, SBTi is not an "agency" within the meaning of the APA.[184] The promulgating agencies could also impose substantive or procedural constraints on SBTi's validation process if they choose to do so in the final rule.

Questions regarding the laws of other countries may be directed to the Law Library of Congress.

## Question 17

*17. If this validation service was being performed by a federal agency, would that agency have to go through some form of legal process to change its methodologies or submission requirements?*

The answer to this question may depend on the form in which the agency seeks to make the hypothetical changes because different statutory requirements could apply to different types of proposals. For example, if the agency were to seek to change its methodologies or submission requirements through a "procurement policy, regulation, procedure, or form," or an amendment thereto, it might have to comply with the procedural requirements for the publication of proposed regulations in 41 U.S.C. § 1707.[185] In general, that statute requires publication of certain procurement-related proposals in the *Federal Register* and a public comment period of at least 30 days.[186] Certain rules are also subject to additional statutory requirements imposing procedures for regulatory review.[187]

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*Employees*, OFFICE OF PUBLIC AFFAIRS: U.S. DEPARTMENT OF JUSTICE (Oct. 3, 2023), https://www.justice.gov/opa/video/justice-department-announces-eight-indictments-against-china-based-chemical-manufacturing; *NXP Semiconductors N.V., In the Matter of*, FEDERAL TRADE COMMISSION (Jan. 29, 2016), https://www.ftc.gov/legal-library/browse/cases-proceedings/151-0090-nxp-semiconductors-nv-matter (announcing a proposed consent order with a Netherlands-based company).

[183] *See generally* CRS In Focus IF12386, Defining Final Agency Action for APA and CRA Review, by Valerie C. Brannon (2023).

[184] *See* 5 U.S.C. § 551(1) (defining agency, with certain exceptions, to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency").

[185] These requirements are similar to the informal rulemaking procedures in the APA, which generally apply to rules affecting individual rights and obligations, Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979), "except to the extent that there is involved . . . a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2); CRS In Focus IF10003, *An Overview of Federal Regulations and the Rulemaking Process*, by Maeve P. Carey (2021).

[186] 41 U.S.C. § 1707(b).

[187] *See, e.g.*, CRS In Focus IF10023, *The Congressional Review Act (CRA): A Brief Overview*, by Maeve P. Carey and Christopher M. Davis (2023); CRS In Focus IF11837, *The Paperwork Reduction Act and Federal Collections of Information: A*

(continued...)

*a. What recourse would there be for companies that believe the changes are arbitrary or capricious?*

A company that is aggrieved by a "final agency action," including the types of action discussed in the response to Question 17, typically may bring a claim in federal court alleging that the agency's action violated the APA.[188] Among other reasons, a plaintiff can bring an APA claim on the ground that the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[189] An agency's "rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," can all qualify as an "agency action" for purposes of judicial review under the APA.[190] Accordingly, if a federal agency were to change its requirements for validation through a final rule, the APA may authorize judicial review of that action.[191] Whether a denial of validation to a particular entity would qualify as a final agency action would depend on whether it "mark[s] the 'consummation' of the agency's decisionmaking process" (i.e., it is not "tentative" or "interlocutory") and if "legal consequences will flow" from that denial.[192]

Bid protests (i.e., written objections to solicitations or award decisions) are limited to three forums—the contracting agency, GAO, and the Court of Federal Claims[193]—and "the legal processes applicable to and remedies available under the forums vary considerably."[194] Protests filed in the U.S. Court of Federal Claims are reviewed under the APA's standards.[195]

*b. Does the process outlined by the APA better protect the interests of stakeholders as a compared to that of a completely private foreign based company?*

Whether the APA "better protect[s] the interests of stakeholders" than a private entity's process is a policy judgment. CRS policy analysts are available to assist the Committee with identifying policy considerations relevant to each approach and factors that might affect the interests of different stakeholders.

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*Brief Overview*, by Maeve P. Carey (2023); CRS In Focus IF11900, *The Regulatory Flexibility Act: An Overview*, by Maeve P. Carey (2021).

[188] 5 U.S.C. § 704; CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole (2016).

[189] 5 U.S.C. § 706.

[190] 5 U.S.C. § 551(13).

[191] *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2383–84 (2020) (explaining that final rules must "articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made," to "allow[] courts to assess whether the agency has promulgated an arbitrary and capricious rule by 'entirely fail[ing] to consider an important aspect of the problem [or] offer[ing] an explanation for its decision that runs counter to the evidence before [it]'" (internal quotation marks and citations omitted)).

[192] Bennett v. Spear, 520 U.S. 154, 178 (1997) (citation omitted).

[193] *E.g.*, 31 U.S.C. §§ 3551–3557.

[194] CRS Report R45080, *Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments*, by David H. Carpenter (2018)

[195] *See* 28 U.S.C. § 1491(b)(4) ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.").

## Question 18

*18. There are instances in which the government awards a contract to a contractor because they are the only organization capable of delivering a service or a product. This could be because of a patent or other legal issue, but it can also be because of a contractor's unique one-of-a-kind ability or research. How does the proposed rule account for these types of contracts?*

The proposed rule does not specify solicitation requirements for future contracts based on a contractor's expertise; nor does it specify whether the government would enter into a contract with the private entities discussed in the proposed rule (e.g., SBTi, CDP). To the extent this question is asking whether particular, unique potential contractors might have the ability to comply with the proposed rule, the proposed rule would permit the senior procurement executive of the contracting federal agency to grant waivers to prospective contractors in certain circumstances. For instance, one type of waiver would dispense with the procedures to determine compliance with the reporting and validation requirements for "[f]acilities, business units, or other defined units for national security purposes" or "[e]mergencies, national security, or other mission essential purposes."[196]

To the extent this question is asking about the reasons stated for the selection of SBTi or other private standards such as the CDP Climate Change Questionnaire, the preamble to the proposed rule observes the following:

- "The GHG Protocol Corporate Accounting and Reporting Standard . . . is the most widely used accounting tool to track corporate GHG emissions."[197]
- "Governments around the world are asking companies to provide consistent and decision-useful information to market participants in line with TCFD recommendations . . . ."[198]
- "CDP's disclosure platform provides the mechanism for reporting climate-related financial risks in line with the TCFD recommendations as well as reporting annual progress towards science-based targets."[199]
- "Targets not receiving validation [from SBTi] are provided with detailed feedback from expert reviewers . . . ."[200]
- "By aligning with global standards such as the TCFD recommendations and SBTi target-setting methodologies, as well as the leading centralized data platform CDP (which implements and is aligned with TCFD), this rule will reinforce existing industry trends toward standardization around these systems, which are already used by large numbers of U.S. companies because they are required in order to meet the demands of other entities, such as non-Federal customers and investors."[201]

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[196] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68330 (proposed Nov. 14, 2022) (proposed § 23.XX06(b)(1)). Alternatively, the senior procurement executive could provide a waiver of up to one year "to enable a significant or major contractor to come into compliance with" the reporting and validation requirements. *Id.* (proposed § 23.XX06(b)(2)).

[197] *Id.* at 68315.

[198] *Id.*

[199] *Id.*

[200] *Id.* at 68318.

[201] *Id.* at 68320.

# Question Submitted by Representative Tom Kean, Jr., Committee on Science, Space, and Technology

## Question 1

*1. As a London Based company, does SBTi operate under U.S. laws? Does the U.S. Government have the legal ability to conduct oversight of SBTi?*

Please see the response to Question 15 from Chairman Obernolte.

# Appendix II

## Additional Material for the Record

SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT, INVESTIGATIVE PORTFOLIO

FRANK D. LUCAS, Oklahoma
CHAIRMAN

ZOE LOFGREN, California
RANKING MEMBER

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House of Representatives
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March 10, 2023

Mathew C. Blum
Chair
Federal Acquisition Regulatory Council
Office of Management and Budget
725 17th St., NW
Washington, DC 20503

Dear Acting Administrator Blum:

Under a recently proposed rule by the National Aeronautics and Space Administration (NASA), the Department of Defense, and the General Services Administration, all major government contractors will have to disclose their greenhouse gas emissions and develop emission reduction targets that must be validated and approved by an international non-governmental organization known as the Science Based Target Initiative (SBTi).[1] The Science Committee has grave concerns that these requirements would have detrimental consequences for our national security and mission readiness. Additionally, the decision to outsource the responsibility for validating emission reductions to an international organization—particularly one with a history of problematic actions, potentially in conflict with U.S. interests—is disturbing.

It's unclear why government agencies are unable to independently validate emission reduction targets for their own contractors and would instead delegate such responsibilities to an international entity outside of our government's supervision and whose loyalties and mission do not align with those of the United States. The Federal Acquisition Regulatory Council (FAR) must explain its reasoning for inserting this requirement into the proposed rule and for arbitrarily selecting SBTi to both set emission reduction targets and validate compliance with those same targets.

[1] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Red. Reg. 218 (proposed on Nov. 14, 2022) (to be codified 48 C.F.R pt. 1,4,9,23,52). *available at* https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial

Under the proposed rule, all federal contractors would have to disclose their greenhouse gas emissions, and major contractors, which the regulation defines as businesses with contracts valued at over $50 million, would be required to set "science-based reduction targets."[2] If finalized, this proposed rule would implement President Biden's executive order on Climate Related Financial Risk which seeks to require that major suppliers "publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets."[3] President Biden's executive order does not require, nor does he have the authority to require, reduction target validation by a private international non-governmental organization. It appears the FAR has gone far beyond the scope of the President's executive order by outsourcing their work to SBTi as the standard setter for greenhouse gas emissions and requiring that all major contractors use their validation services.[4]

SBTi was established in 2015 as a collaboration between the Carbon Disclosure Project, World Wide Fund for Nature, United Nations Global Compact, and World Resource Institute.[5] It aims to reduce greenhouse emissions by encouraging the private sector to set emission reduction targets which SBTi then validates **for a fee**. In 2022, SBTi received approximately 35% of its funding from its validation services, with the rest of their funding coming in the form of donations from philanthropic groups and businesses.[6] Some of SBTi's biggest doners include Amazon, Bezos Earth Fund, and Ikea Foundation among others.[7]

SBTi has recently come under scrutiny due to potential conflicts of interest, a lack of transparency, and has even been accused of manipulating their metrics to make it appear as though certain companies were doing more to reduce greenhouse gas emissions than what was happening.[8] For example, the New Climate Institute recently analyzed the greenhouse gas emissions disclosures of 18 companies which had received a good approval score from SBTi.[9] They published their findings in a report which stated that "for the majority of the 18 companies assessed in this report with an SBTi approved 1.5°C (or 2°C) compatible target, we would consider that rating either **contentious or inaccurate**, due to various subtle details and loopholes that significantly undermine the companies' plans [emphasis added]."[10] Among the companies that were flagged by the New Climate Institute for receiving a misleading or erroneous rating by SBTi was IKEA, the buyer-assembled furniture store. This is notable because the IKEA Foundation – which is the parent company of IKEA – donated $18 million to SBTi.[11] While there is no evidence of wrongdoing, it is clear the potential of strong conflicts of interests exists, especially for those companies who both donate to SBTi and seek their services.

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[2] *Id.*
[3] Exec. Order No. 14,030, 86 Red. Reg. 27967 (May 20, 2021), *available at* https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.
[4] *Id.*
[5] Science Based Targets, https://sciencebasedtargets.org/resources/files/Head-of-Standards.pdf.
[6] Science Based Targets, How We Are Funded, https://sciencebasedtargets.org/about-us/funders.
[7] *Id.*
[8] Joe Lo, *Science Based Targets initiative accused of providing a 'platform for greenwashing'*, Climate Home News (Jun. 6, 2022), *available at* https://www.climatechangenews.com/2022/02/06/science-based-targets-initiative-accused-providing-platform-greenwashing/#:~:text=The%20Science%2DBased%20Targets%20initiative,or%202C%20of%20global%20warming.
[9] Thomas Day et al, *Corporate Climate Responsibility Monitor 2022*, New Climate Institute (Feb. 2022) *available at* https://newclimate.org/sites/default/files/2022/02/CorporateClimateResponsibilityMonitor2022.pdf.
[10] *Id.* at pg. 6.
[11] Science Based Targets, SBTi Secures $37M USD to Scale-up Exponential Growth, https://sciencebasedtargets.org/news/sbti-secures-37m-usd-to-scale-up-exponential-growth.

The New Climate Institute is not SBTi's only critic. Bill Baue, one of the founders of SBTi, has recently criticized SBTi for the inherent conflict of interest in combining the role of standard setter while also being paid to vet companies' climate plans.[12] According to a news article, Mr. Baue is quoted as saying "Science-Based Targets is not a science-based approach… I believe in this instance that SBTi… [is] putting their own interest above the interests of the public."[13]

Designating SBTi or any other international non-governmental organization as the sole arbiter of compliance with emission reduction targets presents clear national security concerns and will hurt the government's mission readiness.[14] Alarmingly, the federal government is not actively reviewing SBTi's processes and methodologies to ensure sound scientific practices are being followed. The federal government is also failing to monitor SBTi to ensure foreign actors are not influencing the group to harm the U.S. or other countries. There is strong evidence that foreign actors are engaging in this type of misinformation.[15] For example, there is evidence Russia funneled millions of dollars through non-government organizations to influence U.S. energy markets.[16] According to the former Secretary General of NATO, "Russia, as part of their sophisticated information and disinformation operations, engaged actively with so-called nongovernmental organizations - environmental organizations working against shale gas – to maintain dependence on imported Russian gas."[17]

As an international organization, SBTi's goals do not align with those of the United States. For example, SBTi currently does not allow oil and gas companies to submit proposals for science-based targets.[18] This would imply that if this proposed regulation is enacted, companies specializing in oil and gas may not even be able to submit a proposal and, as a result, would no longer be able to do business with the government unless a waiver was granted. This would severely hurt our national security and mission readiness since a large part of our government, specifically our military, still depends on fossil fuels including jet fuel and rocket fuel for which there is no current electrical alternative.[19]

The FAR and the other departments involved must explain their reasoning for inserting this requirement into the proposed rule despite the various national security concerns, conflicts of interest, and questions over the accuracy of SBTi's methods. To better understand the FAR's reasoning, please answer the following questions by no later than March 22, 2023:

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[12] Ed Ballard, *Group That Vets Corporate Climate Plans Aims to Strengthen Its Own Governance*, Wall Street Journal (Feb. 23, 2022), *available at* https://www.wsj.com/articles/group-that-vets-corporate-climate-plans-aims-to-strengthen-its-own-governance-11645638638.

[13] Joe Lo, *Science Based Targets initiative accused of providing a 'platform for greenwashing'*, Climate Home News (Jun. 6, 2022), *available at* https://www.climatechangenews.com/2022/02/06/science-based-targets-initiative-accused-providing-platform-greenwashing/#:~:text=The%20Science%2DBased%20Targets%20initiative,or%202C%20of%20global%20warming.

[14] Wayne Winegarden, *Neither The Department Of Defense Nor NASA Should Be Setting U.S. Climate Policy,* Forbes (Jan. 30, 2023), available at https://www.forbes.com/sites/waynewinegarden/2023/01/30/neither-the-department-of-defense-nor-nasa-should-be-setting-us-climate-policy/?sh=7a0db3a02f14

[15] Letter from Lamar Smith, Chairman, House Committee on Science, Space, and Technology, and Randy Weber, Chairman, Subcommittee on Energy, to Steven Mnuchin, Secretary, Department of Treasury (Jun.29, 2017) (on file with Committee).

[16] *Id.*

[17] *Id.*

[18] Science Based Targets, Oil and Gas, https://sciencebasedtargets.org/sectors/oil-and-gas.

[19] Wayne Winegarden, *Neither The Department Of Defense Nor NASA Should Be Setting U.S. Climate Policy,* Forbes (Jan. 30, 2023), available at https://www.forbes.com/sites/waynewinegarden/2023/01/30/neither-the-department-of-defense-nor-nasa-should-be-setting-us-climate-policy/?sh=7a0db3a02f14.

1. Please describe the selection process that resulted in SBTi being selected as the sole provider of target setting and validation services?

    a. Since the FAR is requiring American companies to pay for SBTi's services, does the FAR consider SBTi to be a government contractor? If not, why not?

    b. Was SBTi subject to the open bidding process as required by the FAR? If not, why not?

    c. What other federal agencies or nongovernmental organizations besides SBTi were considered?

2. Was the FAR aware of the conflicts of interest central to SBTi's business model such as being responsible for both setting emission reduction standards and validating such standards; charging clients a fee for their validation services; and, accepting donations from foundations linked to companies it is validating such as Amazon, Ikea, etc.?

    a. If yes, then how does the FAR reconcile these conflicts of interests?

    b. If not, why not?

3. Was the FAR aware of the claims made by the New Climate Institute or others that highlight serious errors or inconsistencies with SBTi's metrics and methods for validating emission reduction targets?

    a. If yes, how did the FAR conclude that SBTi would be reliable?

    b. Has the FAR independently verified the accuracy of SBTi's metrics and methods? If so, how?

    c. Does the FAR believe that the New Climate Institute's report was false? If so, why?

4. Did the FAR have any communications with SBTi prior to or after the promulgation of this rule? Please provide the Committee with all communications between FAR members, employees, or agents thereof and SBTi employees or agents thereof. Please provide all communications between NASA employees or agents thereof and SBTi employees or agents thereof.

5. If this rule is ultimately adopted, how does the FAR plan to address the national security concerns associated with having a foreign entity set emissions standards for U.S. contractors and then validate those same standards?

6. How does the FAR plan to counter Russian environmental disinformation as it relates to SBTi?

Mr. Blum
March 10, 2023

Should you have any questions or concerns please contact Dario Camcho of the Committee's Majority staff at [redacted]. Thank you for your time and consideration regarding this important matter.

Sincerely,

Frank Lucas
Chairman
House Committee on
Science, Space, and Technology

Jay Obernolte
Chairman
House Committee on
Science, Space, and Technology
Subcommittee on Investigations
and Oversight

Brian Babin
Chairman
House Committee on
Science, Space, and Technology
Subcommittee on Sapce and Aeronautics

Max Miller
Chairman
House Committee on
Science, Space, and Technology
Subcommittee on Enviroment

Cc:
Karla S. Jackson
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FRANK D. LUCAS, Oklahoma
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March 10, 2023

Brenda Mallory
Chair
Council on Environmental Quality
The White House
1600 Pennsylvania Ave NW
Washington, D.C. 20500

Dear Chair Mallory:

Under a recently proposed rule by the National Aeronautics and Space Administration (NASA), the Department of Defense, and the General Services Administration, all major government contractors will have to disclose their greenhouse gas emissions and develop emission reduction targets that must be validated and approved by an international non-governmental organization known as the Science Based Target Initiative (SBTi).[1] The Science Committee has grave concerns that these requirements would have detrimental consequences for our national security and mission readiness. Additionally, the decision to outsource the responsibility for validating emission reductions to an international organization—particularly one with a history of problematic actions, potentially in conflict with U.S. interests—is disturbing.

It's unclear why government agencies are unable to independently validate emission reduction targets for their own contractors and would instead delegate such responsibilities to an international entity outside of our government's supervision and whose loyalties and mission do not align with those of the United States. The Council on Environmental Quality (CEQ) must explain its reasoning for inserting this requirement into the proposed rule and for arbitrarily selecting SBTi to both set emission reduction targets and validate compliance with those same targets.

[1] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Red. Reg. 218 (proposed on Nov. 14, 2022) (to be codified 48 C.F.R pt. 1,4,9,23,52). *available at* https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial

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SBTi was established in 2015 as a collaboration between the Carbon Disclosure Project, World Wide Fund for Nature, United Nations Global Compact, and World Resource Institute.[5] It aims to reduce greenhouse emissions by encouraging the private sector to set emission reduction targets which SBTi then validates **for a fee**. In 2022, SBTi received approximately 35% of its funding from its validation services, with the rest of their funding coming in the form of donations from philanthropic groups and businesses.[6] Some of SBTi's biggest doners include Amazon, Bezos Earth Fund, and Ikea Foundation among others.[7]

SBTi has recently come under scrutiny due to potential conflicts of interest, a lack of transparency, and has even been accused of manipulating their metrics to make it appear as though certain companies were doing more to reduce greenhouse gas emissions than what was happening.[8] For example, the New Climate Institute recently analyzed the greenhouse gas emissions disclosures of 18 companies which had received a good approval score from SBTi.[9] They published their findings in a report which stated that "for the majority of the 18 companies assessed in this report with an SBTi approved 1.5°C (or 2°C) compatible target, we would consider that rating either **contentious or inaccurate**, due to various subtle details and loopholes that significantly undermine the companies' plans [emphasis added]."[10] Among the companies that were flagged by the New Climate Institute for receiving a misleading or erroneous rating by SBTi was IKEA, the buyer-assembled furniture store. This is notable because the IKEA Foundation – which is the parent company of IKEA – donated $18 million to SBTi.[11] While there is no evidence of wrongdoing, it is clear the potential of strong conflicts of interests exists, especially for those companies who both donate to SBTi and seek their services.

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[2] *Id.*
[3] Exec. Order No. 14,030, 86 Red. Reg. 27967 (May 20, 2021), *available at* https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.
[4] *Id.*
[5] Science Based Targets, https://sciencebasedtargets.org/resources/files/Head-of-Standards.pdf.
[6] Science Based Targets, How We Are Funded, https://sciencebasedtargets.org/about-us/funders.
[7] *Id.*
[8] Joe Lo, *Science Based Targets initiative accused of providing a 'platform for greenwashing'*, Climate Home News (Jun. 6, 2022), *available at* https://www.climatechangenews.com/2022/02/06/science-based-targets-initiative-accused-providing-platform-greenwashing/#:~:text=The%20Science%2DBased%20Targets%20initiative,or%202C%20of%20global%20warming.
[9] Thomas Day et al, *Corporate Climate Responsibility Monitor 2022*, New Climate Institute (Feb. 2022) *available at* https://newclimate.org/sites/default/files/2022/02/CorporateClimateResponsibilityMonitor2022.pdf.
[10] *Id.* at pg. 6.
[11] Science Based Targets, SBTi Secures $37M USD to Scale-up Exponential Growth, https://sciencebasedtargets.org/news/sbti-secures-37m-usd-to-scale-up-exponential-growth.

The New Climate Institute is not SBTi's only critic. Bill Baue, one of the founders of SBTi, has recently criticized SBTi for the inherent conflict of interest in combining the role of standard setter while also being paid to vet companies' climate plans.[12] According to a news article, Mr. Baue is quoted as saying "Science-Based Targets is not a science-based approach… I believe in this instance that SBTi… [is] putting their own interest above the interests of the public."[13]

Designating SBTi or any other international non-governmental organization as the sole arbiter of compliance with emission reduction targets presents clear national security concerns and will hurt the government's mission readiness.[14] Alarmingly, the federal government is not actively reviewing SBTi's processes and methodologies to ensure sound scientific practices are being followed. The federal government is also failing to monitor SBTi to ensure foreign actors are not influencing the group to harm the U.S. or other countries. There is strong evidence that foreign actors are engaging in this type of misinformation.[15] For example, there is evidence Russia funneled millions of dollars through non-government organizations to influence U.S. energy markets.[16] According to the former Secretary General of NATO, "Russia, as part of their sophisticated information and disinformation operations, engaged actively with so-called nongovernmental organizations - environmental organizations working against shale gas – to maintain dependence on imported Russian gas."[17]

As an international organization, SBTi's goals do not align with those of the United States. For example, SBTi currently does not allow oil and gas companies to submit proposals for science-based targets.[18] This would imply that if this proposed regulation is enacted, companies specializing in oil and gas may not even be able to submit a proposal and, as a result, would no longer be able to do business with the government unless a waiver was granted. This would severely hurt our national security and mission readiness since a large part of our government, specifically our military, still depends on fossil fuels including jet fuel and rocket fuel for which there is no current electrical alternative.[19]

The CEQ and the other departments involved must explain their reasoning for inserting this requirement into the proposed rule despite the various national security concerns, conflicts of interest, and questions over the accuracy of SBTi's methods. To better understand the CEQ's reasoning, please answer the following questions by no later than March 22, 2023:

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[12] Ed Ballard, *Group That Vets Corporate Climate Plans Aims to Strengthen Its Own Governance*, Wall Street Journal (Feb. 23, 2022), *available at* https://www.wsj.com/articles/group-that-vets-corporate-climate-plans-aims-to-strengthen-its-own-governance-11645638638.

[13] Joe Lo, *Science Based Targets initiative accused of providing a 'platform for greenwashing'*, Climate Home News (Jun. 6, 2022), *available at* https://www.climatechangenews.com/2022/02/06/science-based-targets-initiative-accused-providing-platform-greenwashing/#:~:text=The%20Science%2DBased%20Targets%20initiative,or%202C%20of%20global%20warming.

[14] Wayne Winegarden, *Neither The Department Of Defense Nor NASA Should Be Setting U.S. Climate Policy,* Forbes (Jan. 30, 2023), available at https://www.forbes.com/sites/waynewinegarden/2023/01/30/neither-the-department-of-defense-nor-nasa-should-be-setting-us-climate-policy/?sh=7a0db3a02f14

[15] Letter from Lamar Smith, Chairman, House Committee on Science, Space, and Technology, and Randy Weber, Chairman, Subcommittee on Energy, to Steven Mnuchin, Secretary, Department of Treasury (Jun.29, 2017) (on file with Committee).

[16] *Id.*

[17] *Id.*

[18] Science Based Targets, Oil and Gas, https://sciencebasedtargets.org/sectors/oil-and-gas.

[19] Wayne Winegarden, *Neither The Department Of Defense Nor NASA Should Be Setting U.S. Climate Policy,* Forbes (Jan. 30, 2023), available at https://www.forbes.com/sites/waynewinegarden/2023/01/30/neither-the-department-of-defense-nor-nasa-should-be-setting-us-climate-policy/?sh=7a0db3a02f14.

1. Please describe the selection process that resulted in SBTi being selected as the sole provider of target setting and validation services?

    a. Since the CEQ is requiring American companies to pay for SBTi's services, does the CEQ consider SBTi to be a government contractor? If not, why not?

    b. Was SBTi subject to the open bidding process as required by federal regulation? If not, why not?

    c. What other federal agencies or nongovernmental organizations besides SBTi were considered?

2. Was the CEQ aware of the conflicts of interest central to SBTi's business model such as being responsible for both setting emission reduction standards and validating such standards; charging clients a fee for their validation services; and, accepting donations from foundations linked to companies it is validating such as Amazon, Ikea, etc.?

    a. If yes, then how does the CEQ reconcile these conflicts of interests?

    b. If not, why not?

3. Was the CEQ aware of the claims made by the New Climate Institute or others that highlight serious errors or inconsistencies with SBTi's metrics and methods for validating emission reduction targets?

    a. If yes, how did the CEQ conclude that SBTi would be reliable?

    b. Has the CEQ independently verified the accuracy of SBTi's metrics and methods? If so, how?

    c. Does the CEQ believe that the New Climate Institute's report was false? If so, why?

4. Did the CEQ have any communications with SBTi prior to or after the promulgation of this rule? Please provide the Committee with all communications between CEQ members, employees, or agents thereof and SBTi employees or agents thereof.

5. If this rule is ultimately adopted, how does the CEQ plan to address the national security concerns associated with having a foreign entity set emissions standards for U.S. contractors and then validate those same standards?

6. How does the CEQ plan to counter Russian environmental disinformation as it relates to SBTi?

Chair Mallory
March 10, 2023

Should you have any questions or concerns please contact Dario Camcho of the Committee's Majority staff at [redacted]. Thank you for your time and consideration regarding this important matter.

Sincerely,

Frank Lucas
Chairman
House Committee on
Science, Space, and Technology

Jay Obernolte
Chairman
House Committee on
Science, Space, and Technology
Subcommittee on Investigations
and Oversight

Brian Babin
Chairman
House Committee on
Science, Space, and Technology
Subcommittee on Space and Aeronautics

Max Miller
Chairman
House Committee on
Science, Space, and Technology
Subcommittee on Environment

Cc:
Karla S. Jackson
Assistant Administrator for Procurement
National Aeronautics and Space Administration
300 E Street SW,
Washington, DC 20546

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LEGISLATIVE AFFAIRS

April 27, 2023

The Honorable Jay Obernolte
Chairman
Subcommittee on Investigations and Oversight
Committee on Science, Space, and Technology
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter responds to your March 10, 2023, correspondence to the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ) regarding the proposed rulemaking issued by the Federal Acquisition Regulatory (FAR) Council on disclosure of greenhouse gas emissions and climate-related financial risk. Your letter raised concerns regarding the role of the Science Based Target Initiative (SBTi) in the proposed rule. Identical responses will be sent to each of the cosigners of your letter.

The Office of Federal Procurement Policy has shared your letter with the members of the FAR Council so that your comments may be taken under consideration as the FAR Council evaluates the public comment and makes revisions, as appropriate, before publishing a final rule.

If you or your staff have any further questions, please contact OMB's Office of Legislative Affairs at OMBLegislativeAffairs@omb.eop.gov.

Sincerely,

Wintta M. Woldemariam
Associate Director
Office of Legislative Affairs

CC:
Ms. Karla S. Jackson
Assistant Administrator for Procurement
National Aeronautics and Space Administration

aia-aerospace.org

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INDUSTRIES
ASSOCIATION

May 2, 2023

Shalanda Young
Director
Office of Management and Budget
Washington, DC 20503

Dear Director Young,

On behalf of the Aerospace Industries Association (AIA), which represents many of the nation's most innovative and integral aerospace and defense (A&D) companies ranging from family-run businesses to multinational corporations, I write today with concerns about a Federal Acquisition Regulatory (FAR) Council proposal[1] to require certain federal contractors to disclose greenhouse gas (GHG) emissions throughout their complex supply chains. While our industry shares the goal of addressing climate change and has already made a number of meaningful commitments to reduce environmental impacts, this punitive proposal would impose significant costs on businesses as they work to meet onerous, impractical requirements; open the door to foreign influence on government procurement and the U.S. A&D industry; and inflict a disproportionate burden on small businesses.

By requiring companies to calculate and disclose "Scope 3" emissions, compliance with this proposal would be enormously challenging, if not impossible, for many companies throughout the shared A&D supply chain. So-called Scope 3 emissions are emissions associated with the suppliers and customers throughout a company's value chain. Attempting to calculate these emissions would require companies to set up new, costly, complex data collection systems—for data that is largely outside of their control and provided by entities who are likely unable to accurately calculate their own emissions information. This would be particularly difficult for members of the A&D industry, as our products are used nationally and internationally and tend to have much longer service lives than most consumer products. Because of the sensitivity of military use data and the difficulty of predicting a platform's service life, meeting the proposal's requirements would be especially impractical for companies doing business with the Pentagon.

Additionally, the proposal would insert non-governmental international entities into the federal contracting process. Under this proposal, companies must set targets to reduce their emissions based on standards set by Science-Based Targets initiative (SBTi), an international coalition of non-governmental entities with foreign national leadership and no accountability to the U.S. government. For over 100 years, the men and women of the U.S. A&D industry have worked tirelessly to support America's national security and equip the warfighter. It is unthinkable that

[1] FAR Case 2021-015, https://www.regulations.gov/document/FAR-2021-0015-0001

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this proposal would outsource governance to an international body, opening the door to foreign influence on who is qualified to build military equipment for the protection of our country.

Underlying the many problems with this proposal is the disproportionate burden that would fall on small businesses. At a time when small businesses acutely feel the pressure of inflation and continue to reel from pandemic disruptions, this proposal would saddle contractors with steep implementation and compliance costs and add to the already overwhelming administrative burdens that deter small businesses from working with the government—particularly with the Department of Defense. Over the last decade, small business participation in the defense industrial base (DIB) has already shrunk by more than 40 percent; this proposal has the potential to shrink that rate even further. The absence of small businesses and the innovative, evolving capabilities they bring to the table has a real and direct impact on our national security and ability to deter war. Simply put, the government cannot afford to lose more small business participation in the DIB, and small businesses cannot afford this proposal.

We appreciate the FAR Council's role in this process and have formally submitted comments further detailing our concerns to them.[2] Because the chair of the Council sits under the Office of Management and Budget (OMB) and due to OMB's critical role in the review, implementation, and oversight of the Administration's regulatory agenda, we bring our concerns to you directly and urge you to block this proposal entirely. I welcome the opportunity to speak with you and the FAR Council to discuss these concerns and related issues.

Sincerely,

Remy Nathan
Senior Vice President of Policy
Aerospace Industries Association

CC: FAR Council

Mathew C. Blum
Acting Administrator
Office of Federal Procurement Policy
Office of Management and Budget
Washington, DC 20503

[2] https://www.aia-aerospace.org/wp-content/uploads/AIA-Comments-FAR-2021-015-Climate-Risk-GHG-2-13-23-Final.pdf

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FRANK D. LUCAS, Oklahoma
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RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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May 5, 2020

Bill Nelson
Administrator
National Aeronautics and Space Administration
300 E. Street SW
Washington, DC 20546

Dear Administrator Nelson:

Under a recently proposed rule by the National Aeronautics and Space Administration (NASA), the Department of Defense, and the General Services Administration, all major government contractors will have to disclose their greenhouse gas emissions and develop emission reduction targets that must be validated and approved by an international non-governmental organization known as the Science Based Target Initiative (SBTi).[1] The Science Committee has grave concerns that these requirements would have detrimental consequences for our national security and mission readiness. Additionally, the decision to outsource the responsibility for validating emission reductions to an international organization—particularly one with a history of problematic actions, potentially in conflict with U.S. interests—is disturbing.

Under the proposed rule, all federal contractors would have to disclose their greenhouse gas emissions, and major contractors, which the regulation defines as businesses with contracts valued at over $50 million, would be required to set "science-based reduction targets."[2] If finalized, this proposed rule would implement President Biden's executive order on Climate Related Financial Risk which seeks to require that major suppliers "publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets."[3] President

[1] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Red. Reg. 218 (proposed on Nov. 14, 2022) (to be codified 48 C.F.R pt. 1,4,9,23,52), https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial.
[2] *Id.*
[3] Exec. Order No. 14,030, 86 Red. Reg. 27967 (May 20, 2021), *available at* https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.

Biden's executive order does not require, nor does he have the authority to require, reduction target validation by a private international non-governmental organization. It appears the CEQ has gone far beyond the scope of the President's executive order by outsourcing their work to SBTi as the standard setter for greenhouse gas emissions and requiring that all major contractors use their validation services.[4]

SBTi was established in 2015 as a collaboration between the Carbon Disclosure Project, World Wide Fund for Nature, United Nations Global Compact, and World Resource Institute.[5] It aims to reduce greenhouse emissions by encouraging the private sector to set emission reduction targets which SBTi then validates **for a fee**. In 2022, SBTi received approximately 35% of its funding from its validation services, with the rest of their funding coming in the form of donations from philanthropic groups and businesses.[6] Some of SBTi's biggest doners include Amazon, Bezos Earth Fund, and Ikea Foundation among others.[7]

SBTi has recently come under scrutiny due to potential conflicts of interest, a lack of transparency, and has even been accused of manipulating their metrics to make it appear as though certain companies were doing more to reduce greenhouse gas emissions than what was happening.[8] For example, the New Climate Institute recently analyzed the greenhouse gas emissions disclosures of 18 companies which had received a good approval score from SBTi.[9] They published their findings in a report which stated that "for the majority of the 18 companies assessed in this report with an SBTi approved 1.5°C (or 2°C) compatible target, we would consider that rating either **contentious or inaccurate**, due to various subtle details and loopholes that significantly undermine the companies' plans [emphasis added]."[10] Among the companies that were flagged by the New Climate Institute for receiving a misleading or erroneous rating by SBTi was IKEA, the buyer-assembled furniture store. This is notable because the IKEA Foundation – which is the parent company of IKEA – donated $18 million to SBTi.[11] While there is no evidence of wrongdoing, it is clear the potential of strong conflicts of interests exists, especially for those companies who both donate to SBTi and seek their services.

The New Climate Institute is not SBTi's only critic. Bill Baue, one of the founders of SBTi, has recently criticized SBTi for the inherent conflict of interest in combining the role of standard setter while also being paid to vet companies' climate plans.[12] According to a news article, Mr.

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[4] *Id*.
[5] Science Based Targets, https://sciencebasedtargets.org/resources/files/Head-of-Standards.pdf.
[6] Science Based Targets, How We Are Funded, https://sciencebasedtargets.org/about-us/funders.
[7] *Id*.
[8] Joe Lo, *Science Based Targets initiative accused of providing a 'platform for greenwashing'*, Climate Home News (Jun. 6, 2022), *available at* https://www.climatechangenews.com/2022/02/06/science-based-targets-initiative-accused-providing-platform-greenwashing/#:~:text=The%20Science%2DBased%20Targets%20initiative,or%202C%20of%20global%20warming.
[9] Thomas Day et al, *Corporate Climate Responsibility Monitor 2022*, New Climate Institute (Feb. 2022) *available at* https://newclimate.org/sites/default/files/2022/02/CorporateClimateResponsibilityMonitor2022.pdf.
[10] *Id*. at pg. 6.
[11] Science Based Targets, SBTi Secures $37M USD to Scale-up Exponential Growth, https://sciencebasedtargets.org/news/sbti-secures-37m-usd-to-scale-up-exponential-growth.
[12] Ed Ballard, *Group That Vets Corporate Climate Plans Aims to Strengthen Its Own Governance*, Wall Street Journal (Feb. 23, 2022), *available at* https://www.wsj.com/articles/group-that-vets-corporate-climate-plans-aims-to-strengthen-its-own-governance-11645638638.

Baue is quoted as saying "Science-Based Targets is not a science-based approach… I believe in this instance that SBTi… [is] putting their own interest above the interests of the public."[13]

Designating SBTi or any other international non-governmental organization as the sole arbiter of compliance with emission reduction targets presents clear national security concerns and will hurt the government's mission readiness.[14] Alarmingly, the federal government is not actively reviewing SBTi's processes and methodologies to ensure sound scientific practices are being followed. The federal government is also failing to monitor SBTi to ensure foreign actors are not influencing the group to harm the U.S. or other countries. There is strong evidence that foreign actors are engaging in this type of misinformation.[15] For example, there is evidence Russia funneled millions of dollars through non-government organizations to influence U.S. energy markets.[16] According to the former Secretary General of NATO, "Russia, as part of their sophisticated information and disinformation operations, engaged actively with so-called nongovernmental organizations - environmental organizations working against shale gas – to maintain dependence on imported Russian gas."[17]

As an international organization, SBTi's goals do not align with those of the United States. For example, SBTi currently does not allow oil and gas companies to submit proposals for science-based targets.[18] This would imply that if this proposed regulation is enacted, companies specializing in oil and gas may not even be able to submit a proposal and, as a result, would no longer be able to do business with the government unless a waiver was granted. This would severely hurt our national security and mission readiness since a large part of our government, specifically our military, still depends on fossil fuels including jet fuel and rocket fuel for which there is no current electrical alternative.[19]

NASA and the other departments involved must explain their reasoning for inserting this requirement into the proposed rule despite the various national security concerns, conflicts of interest, and questions over the accuracy of SBTi's methods. To better understand NASA's reasoning, please answer the following questions by no later than May 19, 2023:

1. Did NASA have any communications with SBTi prior to or after the promulgation of this proposed rule? Please provide the Committee with all communications between NASA employees, or agents thereof and SBTi employees or agents thereof.

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[13] Joe Lo, *Science Based Targets initiative accused of providing a 'platform for greenwashing'*, Climate Home News (Jun. 6, 2022), *available at* https://www.climatechangenews.com/2022/02/06/science-based-targets-initiative-accused-providing-platform-greenwashing/#:~:text=The%20Science%2DBased%20Targets%20initiative,or%202C%20of%20global%20warming.
[14] Wayne Winegarden, *Neither The Department Of Defense Nor NASA Should Be Setting U.S. Climate Policy,* Forbes (Jan. 30, 2023), available at https://www.forbes.com/sites/waynewinegarden/2023/01/30/neither-the-department-of-defense-nor-nasa-should-be-setting-us-climate-policy/?sh=7a0db3a02f14
[15] Letter from Lamar Smith, Chairman, House Committee on Science, Space, and Technology, and Randy Weber, Chairman, Subcommittee on Energy, to Steven Mnuchin, Secretary, Department of Treasury (Jun.29, 2017) (on file with Committee).
[16] *Id.*
[17] *Id.*
[18] Science Based Targets, Oil and Gas, https://sciencebasedtargets.org/sectors/oil-and-gas.
[19] Wayne Winegarden, *Neither The Department Of Defense Nor NASA Should Be Setting U.S. Climate Policy,* Forbes (Jan. 30, 2023), available at https://www.forbes.com/sites/waynewinegarden/2023/01/30/neither-the-department-of-defense-nor-nasa-should-be-setting-us-climate-policy/?sh=7a0db3a02f14.

2. Was NASA involved in the selection or vetting process that resulted in SBTi being selected as the sole provider of target setting and validation services?

3. Please provide all internal NASA communications as well as all communications between NASA and any other government agency regarding the proposed rule.

4. If the answer to question 2 is yes, then please answer the following questions:

    a. Please describe the selection process that resulted in SBTi being selected as the sole provider of target setting and validation services?

        i. Since NASA is requiring American companies to pay for SBTi's services, does NASA consider SBTi to be a government contractor? If not, why not?

        ii. Was SBTi subject to the open bidding process as required by Federal Acquisition Regulations? If not, why not?

        iii. What other federal agencies or nongovernmental organizations besides SBTi were considered?

    b. Was NASA aware of the conflicts of interest central to SBTi's business model such as being responsible for both setting emission reduction standards and validating such standards; charging clients a fee for their validation services; and, accepting donations from foundations linked to companies it is validating such as Amazon, Ikea, etc.?

        i. If yes, then how does NASA reconcile these conflicts of interests? If not, why not?

    c. Was NASA aware of the claims made by the New Climate Institute or others that highlight serious errors or inconsistencies with SBTi's metrics and methods for validating emission reduction targets? If yes, how did NASA conclude that SBTi would be reliable?

    d. Has NASA independently verified the accuracy of SBTi's metrics and methods? If so, when and how?

    e. Does NASA believe that the New Climate Institute's report was false? If so, why? How did NASA come to this determination and what methods were used?

f. If this proposed rule is ultimately adopted, how does NASA plan to address the national security concerns associated with having a foreign entity set emissions standards for U.S. contractors and then validate those same standards?

   i. How will NASA's mission be affected?

   ii. What steps is NASA currently taking to diminish these concerns?

g. How does NASA plan to counter Russian environmental disinformation as it relates to SBTi?

Should you have any questions please contact Dario Camacho of the Committee's Majority staff at [redacted]. Thank you for your time and consideration regarding this important matter.

Sincerely,

Frank Lucas
Chairman
House Committee on Science,
Space, and Technology

cc: Zoe Lofgren, Ranking Member, House Committee on Science, Space, and Technology

National Aeronautics and Space Administration

**Mary W. Jackson NASA Headquarters**
Washington, DC 20546-0001

June 14, 2023

Reply to Attn of: OLIA/2023-00151:CD:dac

The Honorable Frank D. Lucas
Chairwoman
Committee on Science, Space, and Technology
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Lucas:

Thank you for your May 5, 2023, letter regarding the FAR Council's proposed rule, "Federal Acquisition Regulation (FAR): Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk," and for your extension of the original May 19, 2023, deadline it contained.

The FAR Council was established by the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. §1302(a)) and is chaired by the Administrator of OFPP, with NASA, the Department of Defense, and the General Services Administration (GSA) as member agencies of the Council (41 U.S.C. §1302(b)(1)). The FAR Council was established to assist in the direction and coordination of Government-wide procurement policy (e.g., Office of Management and Budget memoranda) and regulatory activities (e.g., E.O.s, laws, standards, etc.,) in the Federal Government. As such, the Council manages, coordinates, controls, and monitors the maintenance and issuance of changes made to the FAR.

While NASA is a member of the FAR Council, we are unable to answer inquiries on behalf of the Council and its activities. The questions contained in your May 5, 2023, letter would be most appropriately directed to FAR Council chair.

We appreciate your continued support of NASA.

Sincerely,

Alicia Brown

Alicia Brown
Associate Administrator
for Legislative and Intergovernmental Affairs

cc: Zoe Lofgren, Ranking Member, House Committee on Science, Space, and Technology

FRANK D. LUCAS, Oklahoma
CHAIRMAN

ZOE LOFGREN, California
RANKING MEMBER

Congress of the United States
House of Representatives
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July 12, 2023

Luiz Amaral
Chief Executive Officer
Science Based Target Initiative

Dear Mr. Amaral:

Under a recently proposed regulation by the Federal Acquisition Council, all major U.S. contractors would be required to set emission reduction targets as determined by your organization and then retain the services of your organization – for a fee – to vet those targets.[1] Failure to meet the standards set by your organization would, absent a waiver from the federal government, disqualify major contractors from conducting further business with the United States. However, several news articles have recently highlighted potential conflicts of interest inherent with the proposed rule when combined with SBTi's business model. This is in addition to other serious criticism that has been leveled against SBTi, including allegations made by one of your founders and former partners. The Committee on Science, Space, and Technology has also learned that SBTi officials met with White House officials **only once** prior to SBTi's selection as the sole source provider of emission reduction targets and vetting services. While SBTi *may* be perfectly qualified to perform these tasks, the apparent lack of a proper deliberative vetting process by the Administration is both astonishing and reckless. We write to you today to seek answers to questions we believe the Administration failed to ask.

SBTi was established in 2015 as a collaboration between the Carbon Disclosure Project, World Wide Fund for Nature, United Nations Global Compact, and World Resource Institute.[2] It aims to reduce greenhouse emissions by encouraging the private sector to set emission reduction targets which SBTi then validates **for a fee**.[3] In 2022, SBTi received approximately 35% of its funding from its validation services, with the rest of their funding coming in the form of donations

[1] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Red. Reg. 218 (proposed on Nov. 14, 2022) (to be codified 48 C.F.R pt. 1,4,9,23,52). *available at* https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial.
[2] Science Based Targets, Head-of-Standards.pdf (sciencebasedtargets.org).
[3] Science Based Targets, How We Are Funded, https://sciencebasedtargets.org/about-us/funders.

from philanthropic groups and businesses.[4] Some of SBTi's biggest doners include Amazon, Bezos Earth Fund, and Ikea Foundation among others.[5]

SBTi has recently come under scrutiny due to potential conflicts of interest, a lack of transparency, and has even been accused of manipulating their metrics to make it appear as though certain companies were doing more to reduce greenhouse gas emissions than what was actually happening.[6] For example, the New Climate Institute recently analyzed the greenhouse gas emissions disclosures of 18 companies which received a good approval score from SBTi.[7] They published their findings in a report which stated that "for the majority of the 18 companies assessed in this report with an SBTi approved 1.5°C (or 2°C) compatible target, we would consider that rating either **contentious or inaccurate**, due to various subtle details and loopholes that significantly undermine the companies' plans [emphasis added]."[8] Among the companies that were flagged by the New Climate Institute for receiving a misleading or erroneous rating by SBTi was IKEA, the buyer-assembled furniture store. This is notable because the IKEA Foundation – which is the parent company of IKEA – donated $18 million to SBTi.[9] While there is no evidence of wrongdoing, it is clear the potential of strong conflicts of interests exists, especially for those companies who both donate to SBTi and seek their services.

The New Climate Institute is not SBTi's only critic. Bill Baue, one of the founders of SBTi, recently criticized SBTi for the inherent conflict of interest in combining the role of standard setter while also being paid to vet companies' climate plans.[10] According to a news article, Mr. Baue is quoted as saying "Science-Based Targets is not a science-based approach… I believe in this instance that SBTi… [is] putting their own interest above the interests of the public."[11]

These allegations raise serious concerns about SBTi's ability to properly and impartially perform the government tasks that the Administration seeks to assign to it. To better understand and assist Congress in determining the degree of intervention necessary and potentially overturn this proposed regulation (if finalized) please answer the following questions and provide the following documents by no later than July 26, 2023.

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[4] *Id.*
[5] *Id.*
[6] Joe Lo, *Science Based Targets initiative accused of providing a 'platform for greenwashing'*, Climate Home News (Jun. 6, 2022); https://www.climatechangenews.com/2022/02/06/science-based-targets-initiative-accused-providing-platform-greenwashing/#:%7E:text=The%20Science%2DBased%20Targets%20initiative,or%202C%20of%20global%20warming.
[7] Thomas Day et al, *Corporate Climate Responsibility Monitor 2022*, New Climate Institute (Feb. 2022) *available at* https://newclimate.org/sites/default/files/2022/02/CorporateClimateResponsibilityMonitor2022.pdf.
[8] *Id.* at pg. 6
[9] Science Based Targets, SBTi Secures $37M USD to Scale-up Exponential Growth, https://sciencebasedtargets.org/news/sbti-secures-37m-usd-to-scale-up-exponential-growth.
[10] Ed Ballard, *Group That Vets Corporate Climate Plans Aims to Strengthen Its Own Governance*, Wall Street Journal (Feb. 23, 2022); https://www.wsj.com/articles/group-that-vets-corporate-climate-plans-aims-to-strengthen-its-own-governance-11645638638.
[11] Joe Lo, *Science Based Targets initiative accused of providing a 'platform for greenwashing'*, Climate Home News (Jun. 6, 2022); https://www.climatechangenews.com/2022/02/06/science-based-targets-initiative-accused-providing-platform-greenwashing/#:~:text=The%20Science%2DBased%20Targets%20initiative,or%202C%20of%20global%20warming.

1. Has SBTi received funding from a foreign government (defined as any government outside of the U.S.), or an entity controlled by a foreign government? If so, please list the foreign governments that have contributed to SBTi.

2. How many foreign nationals (non-US citizens) does SBTi employ? Please list the different nationalities employed at SBTi?

3. SBTi often receives donations from entities linked to businesses whom it also provides emission targets and vetting for. How does SBTi prevent conflicts of interests associated with these transactions? Will SBTi consider refusing any donations from entities linked to companies it is also providing vetting services for?

4. How does SBTi respond to the allegations leveled by the New Climate Institute, including allegations that several of the companies assessed had "contentious or inaccurate" ratings?

5. Does SBTi believe there is a conflict of interest in both setting emissions targets and charging clients to vet those targets? If not, why not?

6. How many current SBTi employees have previously worked for the U.S. government?

7. How many former employees of SBTi currently work for the U.S. government?

    a. How many work for the current Administration?

8. How was SBTi approached to take on this role?

9. Did SBTi formally apply to take on this role?

10. What documents did SBTi provide to the U.S. government as part of this proposed rule? Please provide copies of all such documents to the Committee.

11. Does SBTi believe that their inclusion in the proposed rule was done through a competitive process? If so, how? If not, why does SBTi believe it was chosen to take on this role?

12. SBTi's website claims that it is "conducting in-depth assessments of corporate emissions reduction targets to ensure they align with the latest climate science." Will targets set by SBTi for U.S. government contractors change while they are trying to meet them based on the timeliness of new climate science? If so, how can these companies effectively plan? If not, how are they being held to the latest standards?

13. Please provide all communications (emails, documents, etc.) between SBTi and the United States government.

Should you have any questions or concerns please contact Dario Camacho of the Committee's Majority staff at [redacted]. Thank you for your time and consideration regarding this important matter.

Sincerely,

Frank Lucas
Chairman
Committee on Science, Space, and Technology

cc: Ranking Member Lofgren

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August 9, 2023

The Honorable Frank Lucas
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Lucas:

On behalf of Science Based Target Initiative ("SBTi" or the "Initiative"), we are writing in response to your letter of July 12, 2023 ("Letter"), seeking certain documents and information relating to the Initiative and a proposal to amend the Federal Acquisition Regulation ("FAR"), entitled "Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk" issued on November 14, 2022. SBTi appreciates the importance of your inquiry and the extension of time allowed by your staff to provide this response.

This response will provide an overview of SBTi, including the services the Initiative has provided to companies, NGOs, and other interested entities; how it performs its work; its funding; and a description of the changes the organization is currently making to its structure to advance in its development and impact. The response will address the concerns raised in your Letter in a manner which is consistent with SBTi's obligations as an organization newly incorporated in the UK on June 26, 2023.

***Overview of SBTi***

In 2015, multiple governments committed to the Paris Agreement. The primary goal of this agreement was to address the threat of climate change by limiting global temperature rise during this century to below 2 degrees Celsius above pre-industrial levels and to pursue efforts to further limit the temperature increase to 1.5 degrees Celsius. According to the Intergovernmental Panel

on Climate Change ("IPCC")[1], to meet these objectives, greenhouse gas ("GHG") emissions must be cut in half by 2030 and drop to net zero by 2050.

SBTi was formed that same year as a voluntary, collaborative initiative between four non-profit organizations, the CDP (previously known as Carbon Disclosure Project), the World Resources Institute ("WRI"), the World Wide Fund for Nature ("WWF"), and the United Nations Global Compact, to assist companies in their efforts to curb GHG emissions to prevent the worst effects of climate change, taking into account findings and guidance from the Intergovernmental Panel on Climate Change ("IPCC") and other relevant bodies and conventions in this field. The We Mean Business Coalition later joined the Initiative. Currently, the U.N. Global Compact serves as a permanent observer.

The purpose of the Initiative is to develop standardized guidance, criteria, and tools for entities to use when voluntarily establishing a baseline of their current GHG emissions, then setting science-based emission reductions targets along identifiable pathways. SBTi develops these resources (guidance, criteria and tools) through collaboration with academics, businesses, civil society groups, and other interested parties, including advisory and expert groups. Experts are then asked to review and provide feedback on these drafted work products, which are then posted for public consultation. Inputs from public consultation are then reviewed and the drafts are adjusted, taking into account the consultation feedback, before going through an approval process. Examples of public consultation can be found here: https://sciencebasedtargets.org/news/the-sbti-launches-six-week-public-consultation-on-beyond-value-chain-mitigation and https://sciencebasedtargets.org/news/the-sbti-launches-three-draft-financial-sector-resources-for-public-consultation. Once approved, they are made available publicly. As an example, you can find the most recent version of the criteria for target-setting, effective April 2023, here: SBTi-criteria.pdf (sciencebasedtargets.org).

Once a company establishes a target or targets that meet(s) SBTi's criteria, that company may elect to submit its emissions target(s) to SBTi for validation. For information on SBTi's target validation protocol please see here: https://sciencebasedtargets.org/resources/files/Target-Validation-Protocol.pdf and for the SBTi target validation process please see here: https://sciencebasedtargets.org/contact/participating-in-the-sbti-or-setting-a-target/the-target-validation-process.

[1] *See* Remarks by the IPCC Chair during the Press Conference presenting the Working Group III contribution to the Sixth Assessment Report, April 4, 2022, available at https://www.ipcc.ch/2022/04/04/ipcc-remarks-wgiii-ar6-press-conference/.

The validation service offered by SBTi is separate from the work of the technical hub, which generates the standardized guidance, criteria and tools; additionally, the teams developing standardized guidance, criteria and tools are separate from the teams undertaking the validation. Information received from a company for conformity assessments by the validation department goes through three layers of evaluations, with the final validation determination decided by an internal validation committee. All companies submitting SBTi targets must comply with SBTi requirements in order for their targets to be validated. The validation team has an internal conflict of interest policy, and each target analyst will be vetted in line with this policy before they evaluate an operator's targets. In addition, SBTi maintains a conflict of interest policy, which was updated in December 2022 and can be found here: Conflict of Interest Policy - Science Based Targets.

As a result of its growth, standing, and relevance, SBTi continues to evolve and is further formalizing its process and procedures. For example, in 2022 SBTi put out a call for experts to join its Technical Council, which has delegated authority from SBTi's board to approve and review SBTi's standard setting normative documents, including assessing and resolving complaints regarding the way standards are set and objections to aspects of the standards, which any person or organization is able to submit. The Technical Council held its first meeting in June 2023, at which it reviewed its governance documents, among them conflict of interest and conflict of loyalty policies and principles for the Code of Conduct.

Approximately 110 professionals currently support the Initiative to perform this important work. These individuals are highly qualified and experienced in relevant fields such as science, engineering, business, economics, accounting, and environmental studies, among others. In addition, these individuals have professional experience, including in the private, academic, and civil society sectors, performing climate and sustainability-related work. Some of these professionals work with corporate and civil society engagement through the impact workstream; others on developing guidance, criteria and tools through the technical hub; client services and conformity assessment through the validation services; and others through the operations, compliance and human resources work streams. Given that SBTi develops methodologies for use by companies across the economy with operations around the world, the persons working with the Initiative are based in various locations around the world.

SBTi has three different sources of funding to support its work. First, SBTi receives funding from philanthropic donors to fund its core operations and to advance SBTi's goals. SBTi also receives project-specific or restricted funding, which typically is used for the development of technical guidance for GHG emissions reduction in particular areas of industry or commerce. Finally, like

other certification or verification organizations or bodies[2], SBTi charges fees for the validation services it provides in undertaking conformity assessments to its requirements. The fees are set at a level that allows SBTi, acting through the non-profit partner organizations, to recover its costs while also ensuring that the initiative can continue to provide quality services and fund its work outputs. The fees that SBTi charges for its validation services are publicly listed here (SBTi-Target-Validation-Service-Offerings.pdf (sciencebasedtargets.org) and a fee exemption is available for certain types of companies. Further, SBTi publicly discloses its funders; a list of our past and current funders is available here https://sciencebasedtargets.org/about-us/funders. To date, SBTi has not obtained and/or received direct grant funding from any governments.

Finally, with regard to the statements that were excerpted in the Letter from the New Climate Institute and its Carbon Market Watch Corporate Climate Responsibility Monitor ("CCRM"), SBTi issued public responses to the CCRM in 2022 and 2023. Those responses are available here: The SBTi welcomes stronger scrutiny on corporate climate targets - Science Based Targets and The SBTi Technical Response: Corporate Climate Responsibility Monitor 2023 Report - Science Based Targets. The technical assessment included in the 2023 response explains the differences between the CCRM and SBTi methodologies and clarifies certain information contained in the CCRM relating to SBTi's standards and validation process.

***Proposal to Amend the Federal Acquisition Regulations***

SBTi is a voluntary, collaborative initiative that supports companies and financial institutions in their pursuit of climate mitigation ambition. Over the last two years, SBTi has participated in meetings and responded to civil society, companies, and government officials around the world about its policies, procedures, and processes for establishing standardized guidance, criteria, and tools and performing validation assessments on companies' ambitions to reduce GHG emissions.

With respect to the proposed rule, "Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk," as an outside party, SBTi believes that the relevant executive branch agencies are best positioned to answer questions regarding their process for drafting proposed regulation. SBTi understands that the current rulemaking is ongoing and recognizes that it is the responsibility of the U.S. government to determine the methods, standards, validation, and processes that will be

[2] Examples of certification or verification organizations that charge fees for validation services are available here: Rainforest Alliance (https://www.rainforest-alliance.org/business/certification/how-much-does-rainforest-alliance-certification-cost/), Fairtrade FLOCERT (https://www.flocert.net/upcoming-change-to-our-certification-fee/), Global Gap (https://www.globalgap.org/.content/.galleries/documents/220929_GG_fee_table_v7_0_Sep22_en.pdf), and ISO certification (https://www.iso-certification.us/iso-9001-certification-cost.html), among others.

Akin



required. As a voluntary initiative, SBTi recognizes and welcomes the importance of other players in this ecosystem to promote the advancement of corporate climate action.

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As stated above, SBTi appreciates the extension of time provided to submit this response. On behalf of SBTi, we hope the information presented in this response helps to clarify how SBTi develops standardized guidance, criteria and other tools for setting science-based emissions reduction targets and performs validation services.

With respect to this response, production of this information is not intended to constitute a waiver of the attorney-client, attorney work product, or any other applicable rights or privileges in this or any other forum. SBTi expressly reserves its rights in this regard. Information and data provided today may contain confidential, sensitive, or proprietary information. Accordingly, SBTi respectfully requests that such information be kept confidential by you and your staff. Notwithstanding our request that such information be kept confidential, we would ask that your staff provide us with reasonable notice and an opportunity to be heard before you disclose any such information or data to any third parties.

Please do not hesitate to contact us with any questions.

Sincerely,

Karen Elizabeth Christian
Raphael A. Prober

Counsel for SBTi

Cc: The Honorable Zoe Lofgren
Ranking Member
House Committee on Science, Space, and Technology

FRANK D. LUCAS, Oklahoma
CHAIRMAN

ZOE LOFGREN, California
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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August 16, 2023

The Honorable Shalanda Young
Director
Office of Management and Budget
725 17th Street NW
Washington D.C. 20503

Dear Director Young:

The House Science, Space, and Technology Committee (Committee) has been investigating the process of selecting an international organization, the Science Based Target Initiative (SBTi), as the sole arbitrator of emission reduction targets for federal contractors. After several letters sent by the Committee with no answers provided, we seek further explanation into the selection of SBTi by the Council on Environmental Quality (CEQ) and the Federal Regulatory Council (FAR), justification of the seemingly nefarious financial activities of SBTi, and legal analysis explaining the unconstitutional outsourcing of Congressional authority to an international non-governmental organization.

On May 20, 2021, President Biden issued Executive Order 14030 (E.O. 14030), Climate-Related Financial Risk.[1] E.O. 14030 seeks to require major federal suppliers to, "publicly disclose greenhouse gas emissions and climate-related financial risks."[2] On November 14, 2022, the FAR published the proposed rule, implementing the E.O. adding the requirement that "major federal suppliers [also] set science-based reduction targets" and defined "major federal suppliers" as businesses with contracts with the federal government valued over $50 million.[3] Within the rule, FAR council outsourced the standards and validation work to SBTi, effectively making a foreign non-governmental organization the sole source provider of these services. President Biden's E.O. 14030 does not require these standard setting and validation services, nor does it have the authority

[1] 3 Exec. Order No. 14,030, 86 Red. Reg. 27967 (May 20, 2021), https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.
[2] *Id.*
[3] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Red. Reg. 218 (proposed on Nov. 14, 2022) (to be codified 48 C.F.R pt. 1,4,9,23,52), https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial [hereinafter *FAR: Climate-Related Financial Risk*].

to issue this requirement. Additionally, the Executive branch does not have constitutional authority to delegate administrative and legislative authority to a foreign entity, or any entity for that matter, without Congressional approval.[4] For these reasons and more, the Committee is investigating the decision by Administration officials to propose outsourcing this primary government function and the selection of SBTi.

On March 9, 2023, the Committee sent oversight letters to CEQ and FAR.[5] Additionally on May 5, 2023, the Committee sent a letter to the National Aeronautics and Space Administration (NASA).[6] Each of these letters questioned the selection process conducted by the agencies.[7] The rule would impact over 670 U.S. contractors and steer at least $1.2 million in yearly fees to SBTi.[8] On April 27, 2023, the Office of Management and Budget (OMB) responded on behalf of CEQ and FAR, but refused to provide any answers to the our questions or the documents we requested.[9] Instead, OMB claimed they would include the letter as a "comment" in the official review of the proposed rule because doing otherwise would interfere with the notice and comment process.[10] This is a patently false statement.[11] By preventing CEQ, NASA, and FAR from responding to what would otherwise be a routine Congressional oversight request, OMB is actively obstructing the Committee's oversight functions under the guise of administrative process.

Furthermore, on June 22, 2023, the House Committee on Natural Resources held a full committee hearing with Brenda Mallory, Chair of CEQ.[12] During the hearing, Chair Mallory repeatedly refused to answer questions regarding the selection of SBTi, questions that for the most part were included in the Committee's letters.[13] Specifically, Chair Mallory refused to answer why

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[4] Myers, Administratrix v. United States, 272 U.S. 52, 129 (1926) (stating that the power to establish offices, determination of functions and jurisdiction, relevant qualifications and fixing the term falls to Congress); *see also* Henry B. Hogue, CONG. RSCH. SERV., R42852, PRESIDENTIAL REORGANIZATIONAL AUTHORITY: HISTORY, RECENT INITIATIVE, AND OPTIONS FOR CONGRESS 1-3, 33-34, 49 (2021), https://sgp.fas.org/crs/misc/R42852.pdf (describing how the Executive must ask for authorization from Congress to reorganize or delegate administrative or legislative without Congressional authorization).

[5] Letter from Frank Lucas, Chairman, H. Comm. on Sci., Space, and Tech., to Mathew C. Blum, Chair, Fed. Acquisition Regul. Council (Mar. 10, 2023), https://republicans-science.house.gov/_cache/files/5/0/5010748d-ea2a-435c-b63f-2603c9d15418/AFBCC3D9063875ADC02C39DF847F1675.2023-03-10-letter-to-far-on-proposed-emissions-rule.pdf; Letter from Frank Lucas, Chairman, H. Comm. on Sci., Space, and Tech., to Brenda Mallory, Chair, Council on Env't Quality (Mar. 10, 2023), https://republicans-science.house.gov/_cache/files/2/b/2b20da8d-c61b-434b-8940-a75e2f3ff72f/6320CE269D227135EB2B0DBEFB53E7C9.2023-03-10-letter-to-ceq-on-far-council-proposed-emissions-rule.pdf; Letter from Frank Lucas, Chairman, H. Comm. on Sci., Space, and Tech., to Bill Nelson, Administrator, Nat'l Aeronautics and Space Admin. (May 5, 2023), https://republicans-science.house.gov/_cache/files/8/5/857cb644-04ce-48e3-90bf-6c2246279ff4/CABB4B69C9A700A3D76A8B3A92FD436D.2023-05-05-fl-to-nasa-sbti-.pdf [hereinafter *NASA Letter*].

[6] *NASA Letter*, *supra* note 5.

[7] *FAR: Climate-Related Financial Risk*, *supra* note 3.

[8] *Id.*

[9] Letter from Wintta M. Woldemariam, Associate Director, Off. of Legis. Aff., Off. of Mgmt. and Budget, to Jay Obernolte, Chairman, Subcomm. on Investigations and Oversight, H. Comm. on Sci., Space, and Tech. (Apr. 27, 2023) https://republicans-science.house.gov/_cache/files/7/e/7ee2d58b-94bc-41b3-a4f6-76edbb8ea1d0/6EEE19899F0E2A329D3E66D9394C1A5E.chairmanobernolteresponse-4.27.pdf.

[10] *Id.*

[11] 5 U.S.C. § 553 (1966); *see also* ADMIN. CONF. OF THE U. S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2020-1: RULES ON RULEMAKING, (adopted Dec. 16, 2020), https://www.acus.gov/sites/default/files/documents/Recommendation%202020-1%2C%20Rules%20on%20Rulemakings.pdf (stating that the purpose of the rules on rulemaking promote accountability and transparency).

[12] *Examining the Council on Environmental Quality Fiscal Year 2024 Budget Request and Related Policy Matters Before the H. Comm. on Natural Resources*, 118th Cong. (2023) [hereinafter *CEQ Budget*] (statements of Brenda Mallory, Chair, Council on Environmental Quality).

[13] *Id.*

the Biden Administration chose an international organization for this task; refused to answer whether there was a competitive bidding process; refused to answer how the Biden Administration plans to ensure SBTi will not be influenced by foreign governments or organizations; refused to answer why the Biden Administration did not select a U.S. based organization; refused to answer concerns over the accuracy of SBTi's emissions assessments; and refused to answer whether she was aware that one of SBTi's founders accused SBTi of having conflicts of interest and putting its own interests over the interests of the public.[14] Chair Mallory did admit she did not know whether other agencies or organizations were considered before awarding SBTi the role of sole arbitrator of emission reduction targets for federal contractors, which, in itself, is an issue for alarm.[15]

The selection of SBTi, OMB's obstruction of the Committee's constitutional oversight function, and Chair Mallory's refusal to provide answers is even more alarming, given information brought to light in a recent news article. The article highlighted that SBTi did not "officially exist" until June 26, 2023, nearly eight years after its launch and many months after the publication of the proposed rule.[16] While SBTi filed its official incorporation in the United Kingdom, it appears that it is currently not registered in the United States.[17] According to these incorporation documents filed in London, SBTi is funded and managed by We Mean Business, an organization closely linked to the New Venture Fund, a known Democratic "dark money" group that does not disclose its donors.[18] SBTi's connection to groups that routinely fund Democratic causes and campaigns exacerbates concerns that they were arbitrarily selected to perform this task and that this Administration is potentially directing millions of dollars in business revenue to an organization that is closely tied to its donors. Congress needs to know immediately if this Administration has been attempting to improperly use the rule-making process to funnel money to anonymous partisan corporate entities.

SBTi also has come under recent scrutiny due to potential conflicts of interest and a lack of transparency.[19] SBTi has been accused of manipulating their metrics to favorably portray certain companies as more successful in greenhouse gas emissions reduction than the companies actually were.[20] For example, the New Climate Institute recently analyzed the greenhouse gas emissions disclosures of companies that received a good approval score from SBTi.[21] The New Climate Institute published their findings in a report, stating that "for the majority of the companies assessed…with an SBTi approved 1.5°C (or 2°C) compatible target, we would consider that rating either **contentious or inaccurate**…."[22] Among the companies flagged by the New Climate

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[14] *CEQ Budget*, *supra* note 12.
[15] *Id.*
[16] Alana Goodman, *Biden Proposal Would Give Foreign Climate Group Veto Power Over U.S. Military Contracts*, THE WASHINGTON FREE BEACON (Jul. 13, 2023), https://freebeacon.com/biden-administration/biden-proposal-would-give-foreign-climate-group-veto-power-over-u-s-military-contracts/ [hereinafter *Proposed Climate Group Gives Veto Power*].
[17] *Certification of Incorporation of a Private Limited Company: Science Based Targets Initiative LTD*, COMPANIES HOUSE U.K. (Jun. 26. 2023), https://find-and-update.company-information.service.gov.uk/company/14960097/filing-history.
[18] *Id.*; *see also Proposed Climate Group Gives Veto Power*, *supra* note 16.
[19] Joe Lo, *Science Based Targets initiative accused of providing a 'platform for greenwashing'*, CLIMATE HOME NEWS (Jun. 6, 2022), https://www.climatechangenews.com/2022/02/06/science-based-targets-initiative-accused-providing-platform-greenwashing/#:%7E:text=The%20Science%2DBased%20Targets%20initiative,or%202C%20of%20global%20warming.
[20] Thomas Day, et al, *Corporate Climate Responsibility Monitor 2022*, NEW CLIMATE INSTITUTE (2022), https://newclimate.org/sites/default/files/2022/02/CorporateClimateResponsibilityMonitor2022.pdf.
[21] *Id.*
[22] *Id.*

Institute for receiving an erroneous rating by SBTi was IKEA, the buyer-assembled furniture store. This is notable because the IKEA Foundation, which is the sister company of IKEA, publicly stated that they donated $18 million to SBTi.[23] IKEA's dual role as both a donor and recipient of SBTi's validation service is one example of rampant conflicts of interests. Needless to say, the Committee is deeply concerned with mandating major federal contractors to use a validation service provided by a foreign company accused of engaging in a "pay-for-play" with favored companies.

The lack of transparency within SBTi recently surfaced, again, when one of the founders of SBTi, Mr. Bill Baue, alleged that he was removed from SBTi's technology advisory committee after raising concerns regarding SBTi's scientific methodology.[24] Moreover, in a recent interview, Mr. Baue raised concerns that under the Administration's proposed rule, SBTi would be "operating in a quasi-regulator stance…and yet it doesn't have the kind of checks and balances or transparency for such an organization…."[25] This unprecedented transfer of authority creates unclear and nebulous issues including a lack of oversight and accountability mechanisms, clear national security concerns, and degradation of the government's mission readiness.

From a scientific and national security perspective, the unconstitutional outsourcing of Congressional authority to SBTi limits the federal government from actively reviewing the processes and methodologies to ensure sound scientific practices are being followed. Additionally, the federal government would be inhibited from ensuring foreign actors are not influencing the group to harm the U.S. or our allies. Indeed, there is strong evidence that foreign actors are engaging in misinformation with regard to climate change and foreign non-governmental organizations.[26] For example, there is evidence Russia funneled millions of dollars through non-government organizations to influence U.S. energy markets.[27] According to the former Secretary General of NATO, "Russia, as part of their sophisticated information and disinformation operations, engaged actively with so-called nongovernmental organizations - environmental organizations working against shale gas – to maintain dependence on imported Russian gas."[28] Without a clear oversight process, the United States will have no way of knowing whether or not SBTi's emissions metrics are being manipulated to disfavor American companies, making it harder for us to acquire goods and materials that are critical to our national security.[29]

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[23] Press release, Science Based Targets Initiative, SBTi Secures $37M USD to Scale-up Exponential Growth (Nov. 3, 2021), https://sciencebasedtargets.org/news/sbti-secures-37m-usd-to-scale-up-exponential-growth.

[24] Bill Baue, *Formal Complaint: Science Based Targets Conflicts of Interest*, MEDIUM (Feb. 15, 2021), https://bbaue.medium.com/formal-complaint-science-based-targets-conflicts-of-interest-f8199407ac10#_ftnref3, *see also* Bill Baue, LINKEDIN (Feb. 15, 2021), https://www.linkedin.com/posts/billbaue_formal-complaint-science-based-targets-conflicts-activity-6767120667797143552-33wv?utm_source=share&utm_medium=member_desktop.

[25] *Proposed Climate Group Gives Veto Power*, *supra* note 16.

[26] Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, and Tech., and Randy Weber, Chairman, Subcomm. on Energy, to Steven Mnuchin, Secretary, Dep't of Treas. (Jun. 29, 2017) https://republicans-science.house.gov/_cache/files/7/a/7ab01fca-7258-4b35-9580-11500c67ec76/C13408FE3E3819EA58ABE2155B1E86D9.06-29-2017-cls-weber---mnuchin.pdf.

[27] *Id.*

[28] *Id.*

[29] *See generally*, Letter from Frank Lucas, Chairman, H. Comm. Sci., Space, and Tech., to Luiz Amaral, Chief Executive Officer, Sci. Based Target Initiative (Jul. 12, 2023) (on file with Committee); *see also* Letter from Karen Elizabeth Christian, Counsel, Akin Gump Strauss Hauer & Feld LLP, on behalf of Sci. Based Targets Initiative, to Frank Lucas, Chairman, H. Comm. Sci., Space, and Tech. (Aug. 9, 2023) (on file with Committee) (highlighting that as a UK Company, SBTi has limited legal obligations when responding to U.S. government oversight, but may cooperate on a voluntarily basis).

The Committee has a duty to investigate the processes used by CEQ, NASA, and FAR in the selection of SBTi as the sole source provider of emission targets and emission validation services. Given the myriad of issues raised in this letter—such as the seemingly nefarious financial activities, the unconstitutional outsourcing of Congressional authority, conflicts of interest, lack of transparency, and threats to national security—the Committee once again seeks answers on awarding SBTi this role. Hence, the Committee reiterates the request for OMB to provide a response to its letter, to be delivered by August 30th.

Failure to comply may result in the use of all available tools at Congress' disposal. Should you have any questions please contact Dario Camacho or Victoria Lombardo of the Committee staff at [redacted]. Thank you for your time and consideration regarding this matter.

Sincerely,

Frank D. Lucas
Chairman
House Committee on Science,
Space, and Technology

cc: Zoe Lofgren, Ranking Member, Committee on Science, Space, and Technology
Brenda Mallory, Chair, Council on Environmental Quality
Mathew C. Blum, Chair, Federal Acquisition Regulatory Council
Bill Nelson, Administrator, National Aeronautics and Space Administration

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LEGISLATIVE AFFAIRS

September 6, 2023

The Honorable Frank Lucas
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing on behalf of the Office of Management and Budget (OMB) to provide further information in response to your March 10 and August 16, 2023 letters to OMB regarding a Federal Acquisition Regulatory Council (FAR Council) proposed rulemaking on the disclosure of greenhouse gas emissions and climate-related financial risk.[1] As discussed during OMB's continued engagements with Committee staff, including conversations on May 4, May 26, June 15, June 21, and August 14, 2023, we appreciate the Committee's interest in this topic, and we have previously provided information responsive to the Committee's requests. We are producing additional responsive information today. As this document production demonstrates, OMB remains committed to accommodating the Committee's legitimate needs for information while appropriately meeting our obligations to protect the public's interest in the integrity of the rulemaking process and Executive Branch confidentiality interests.

In furtherance of that commitment, our respective staffs have maintained a consistent and productive dialogue. The Committee's March 10 letter sought information relating to a proposed rule issued by the National Aeronautics and Space Administration (NASA), the Department of Defense (DoD), and the General Services Administration (GSA)—the agency members of the FAR Council. In particular, the Committee's letter sought information relating to the selection process that led to the Science Based Targets Initiative's (SBTi) contemplated role in the proposed rule; the FAR Council's awareness of different issues pertaining to SBTi and plans to address those issues, such as alleged conflicts of interests and alleged errors or consistencies with SBTi's metrics and methods; and the FAR Council's plans to address certain national security concerns and counter alleged Russian environmental disinformation.

[1] OMB's initial response to the Committee on April 27, 2023 was on behalf of both OMB and the Council on Environmental Quality (CEQ). The information provided in connection with this letter is only on behalf of OMB.

Consistent with OMB's position during ongoing discussions with Committee staff, OMB has significant concerns with the Committee's requests as they concern topics that are currently under review and deliberation by the FAR Council agencies as they work to prepare a final rule. The FAR Council agencies invited the public to provide comments on the proposed rule and are currently reviewing comments, some of which concern SBTi, from over 38,000 sources. The FAR Council agencies are taking under consideration this vast and broad-ranging input from Congress and other stakeholders in the development of the final rule.

It is important to OMB to maintain the integrity of rulemakings, including by ensuring the transparency, openness, and evenhandedness that the established process provides. The established rulemaking process provides opportunity for the public to participate with comments on a proposed rule, requires agencies to deliberate on the record before them including serious consideration of these comments, and, once agencies reach a final decision, requires agencies to answer questions like those the Committee has raised by responding to public comments and explaining the agencies' reasoning for their decisions in a final rule. Answering the types of questions that the Committee has posed outside this established process threatens to short-circuit the agencies' deliberation and, worse, could inaccurately suggest to the public that the outcome of the rulemaking is preordained or subject to influences beyond the rulemaking record. For these reasons, in our initial letter response from April 27, we explained that OMB's Office of Federal Procurement Policy had shared your March 10 letter with members of the FAR Council so that your comments could be taken under consideration before the agencies publish a final rule. Our response to your March 10 letter was consistent with OMB's practice of viewing congressional letters and requests for information relating to proposed rules during the rulemaking process as comment letters.

At the same time, and since this initial April 27 response, OMB has continued to work in good faith to respond to your requests, in a manner that has sought to accommodate the Committee's legitimate legislative needs while also maintaining the integrity of the rulemaking process and Executive Branch confidentiality interests.

In your March 10 letter and during subsequent conversations with Committee staff, you have asked whether the FAR Council[2] had any communications with SBTi, including its employees or agents, prior to or after the promulgation of this rule.[3] Committee staff has indicated to OMB that this request is the highest priority to the Committee.

In an effort to be responsive and to accommodate the Committee's interests, during a phone conversation with Committee staff on June 21, and as memorialized in an email later that day, OMB provided the Committee information about the single meeting that it was aware of at the time that in any way related to the issues under consideration in the proposed rule prior to or after the promulgation of the proposed rule and that involved a participant affiliated with SBTi. Specifically, and as discussed with Committee staff during the June 21 call, on March 15, 2021,

[2] OMB can only speak to those communications to which it participated in directly or those that it has custody and control over—namely, communications involving OMB personnel. Therefore, the information that OMB is providing in connection with this letter and in response to the Committee's request is on behalf of OMB alone.
[3] As previously noted, this proposed rule has not yet been finalized.

OMB participated in a Zoom meeting with representatives from CEQ, GSA, the Department of Energy, the Environmental Protection Agency, DoD, and an individual from CDP. OMB believes that this meeting may be responsive to the Committee's request because according to the Science Based Targets website, SBTi is a partnership among various organizations, including CDP.[4] In connection with this letter and in response to the Committee's request, OMB is producing to the Committee the calendar invitation associated with this March 2021 meeting, as well as an email that was sent during this Zoom meeting, which OMB also previously discussed with Committee staff during the June 21 call. *See* OMB-SST01-000000001-07.

Since our conversation with Committee staff on June 21, OMB has conducted a comprehensive search and identified three additional documents within OMB's custody that it believes may be responsive to the Committee's request. The first is a calendar invitation for a Zoom meeting on November 8, 2021 involving representatives from CEQ, the White House, and OMB, as well as an individual from CDP. The second and third additional documents are calendar invitations for a Zoom meeting on November 10, 2022 involving representatives from CEQ, the White House, and OMB, as well as a large number of outside organizations, including individuals from CDP, We Mean Business Coalition, and World Resources Institute (WRI).[5] In connection with this letter and in response to the Committee's request, OMB is similarly producing these documents to the Committee. *See* OMB-SST01-000000008-13. In total, OMB is producing to the Committee in response to its request four calendar invitations and one email. *See* OMB-SST01-000000001-13. Following a search, OMB is currently unaware of any other communications that it had with SBTi that would be responsive to the Committee's request.

OMB is producing this information to further accommodate the Committee, and as a further demonstration of our good faith and willingness to work with the Committee. By providing this extraordinary accommodation, OMB has endeavored to avoid unnecessary escalation and work with the Committee in the accommodation process in good faith, while also meeting our obligations in the rulemaking process and protecting the public interest in the integrity of the ongoing rulemaking process. This information is provided as a voluntary and good-faith accommodation of the Committee's particular interests in these fact-specific circumstances; any future requests related to ongoing rulemakings will also be considered under those specific facts and circumstances and in light of the public interest in the integrity of the rulemaking process, as well as Executive Branch confidentiality interests. Additionally, these documents may contain sensitive information exempt from the disclosure provisions of the Freedom of Information Act (5 U.S.C. § 552). OMB respectfully requests that these documents be shared only within the Committee; that the documents not be disclosed outside the Committee; and that appropriate steps be taken to safeguard the documents from unauthorized disclosure.

[4] *See* https://sciencebasedtargets.org/about-us.

[5] According to the Science Based Targets website, the World Resources Institute is also a part of the partnership that constitutes SBTi. Additionally, this website indicates that "[t]he SBTi call to action is one of the We Mean Business Coalition commitments." *See* https://sciencebasedtargets.org/about-us.

If you have any further questions, please contact the Office of Legislative Affairs at OMBLegislativeAffairs@omb.eop.gov.

Sincerely,

Wintta M. Woldemariam
Associate Director
Office of Legislative Affairs

aia-aerospace.org

February 13, 2023

Ms. Jennifer Hawes
Procurement Analyst
Regulatory Secretariat Division
Government Services Administration
1800 F St NW
Washington, DC 20405

**Subject:** AIA Comments – FAR Case 2021-015 "Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risks," Proposed Rule dated 14 November 2022

Dear Ms. Hawes,

The Aerospace Industries Association (AIA)[1] welcomes the opportunity to respond to the proposed rule by the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) to modify the Federal Acquisition Regulation (FAR) to establish requirements to have certain Federal contractors disclose their greenhouse gas (GHG) emissions, climate-related financial risks and set science-based targets to reduce their greenhouse gas emissions.

The aerospace and defense (A&D) industry has been very focused on promoting climate resiliency and GHG reductions. Our member companies continue to demonstrate their ability to shrink their carbon footprint, while still supporting the missions and objectives of their customers. We have published national goals on carbon emissions reductions: for example, in October 2021 AIA announced the commitment by U.S. commercial aviation manufacturers to achieving Net Zero carbon emissions by 2050, and in April 2022 AIA published "Horizon 2050: A Flight Plan for the Future of Sustainable Aviation" that describes the technologies and policies needed to achieve this goal. AIA also supports appropriate disclosure of climate-related information, including GHG and climate-related financial risks, in accordance with the Executive Order on Climate-Related Financial Risk (EO 14030).

We are dedicated to reducing carbon emissions in both commercial and military applications; to keeping commercial aviation safe and economically viable; and to improving the efficiency, affordability, and performance of the capabilities we provide to our armed forces. While we are actively working to reduce GHG emissions and increase climate resiliency, AIA strongly objects to this proposed rule in its current form. We urge that any further relevant rulemaking be suspended, unless and until the concerns detailed below are resolved.

[1] Founded in 1919, the Aerospace Industries Association (AIA) is the premier trade association advocating on behalf of over 300 aerospace and defense (A&D) companies for policies and investments that keep our country strong, bolster our capacity to innovate and spur economic growth. AIA's members represent the United States of America's leading manufacturers and suppliers of aircraft and aircraft engines, helicopters, unmanned aerial systems, missiles, and space systems.

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**Subject:** FAR Case 2021-015: "Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk"

**Summary**

AIA's concerns fall into the following four major categories, summarized here and detailed in the following pages:

Foreign influence on government procurement and the U.S. A&D industry

The rule would insert an international, non-profit, third-party, pay-to-use NGO (CDP Global) into the federal contracting process. It would allow the Science Based Targets Initiative (SBTi) to change the applicable standards governing emissions targets without any notice, comment, or input from U.S. Government (and government contractors), and vest SBTi with regulatory authority to apply those evolving standards and approve/deny Major Contractors' proposed emissions targets. As a result, international bodies that are not accountable to the U.S. government would influence who is qualified to build military equipment for the protection of the United States.

Compliance burden - impact on program cost, schedule, and performance

We believe that this rule would add significant time, cost, and complexity to federal contracting. Estimating Scope 3 emissions would require companies to calculate GHG emissions from 'upstream' activities (i.e., those associated with the production of goods and services by their suppliers), and from 'downstream' activities (i.e., those associated with the use of their products by their customers). This would require companies to establish large-scale, time- and resource-intensive data acquisition mechanisms, which would be enormously challenging for large companies, and likely unachievable for mid- and small-sized companies. Further military use data is sensitive (and thus unlikely to be provided by DOD), and it is difficult to accurately predict a platform's service life, and the types of missions for which it will be used; any data produced would likely be incomplete and misaligned with DoD's focus on readiness and operational effectiveness. Furthermore, these requirements would add to the already-overwhelming compliance burden that today deters small business and commercially focused firms from doing business with DoD. Finally, because applying this rule to contracts would be the responsibility of the defense acquisition workforce (DAWF) with no specialized training, decisions would be subject to the contracting officers' individual, subjective views of what is 'acceptable.'

Challenges with current emissions estimation methodologies

The rule would require companies to calculate Scope 3 emissions based on data that is mostly outside of their control, and would be provided by entities likely unable to accurately calculate their own emissions information. This would render any aggregate estimates inaccurate, perhaps by orders of magnitude, undermining any value they might have in setting policy or making acquisition and investment decisions.

Alignment with Securities and Exchange Commission (SEC) disclosure requirements

A proposed SEC rule ("The Enhancement and Standardization of Climate-Related Disclosures for Investors") would require a company to disclose its GHG goals if it has set them, but it does not compel that goals be set. This proposed FAR rule would require Major Contractors to set a science-based target for GHG reductions, thus raising the prospect of



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having FAR-based requirements that are inconsistent with previously established voluntary goals disclosed through the SEC process, and/or creating different compliance standards for publicly traded and privately held companies.

**Detailed Comments**

1. **Foreign Influence on government procurement and the US A&D Industry**

SBTi is a partnership between CDP, the United Nations Global Compact, World Resources Institute (WRI) and the World Wildlife Fund for Nature (WWF). The proposed requirement to have third party, non-governmental entities determine what climate-related risks must be disclosed, set the criteria for what constitutes an acceptable science-based GHG reduction target, and have sole authority to validate and approve companies' targets raises profound concerns for our members.

Our primary concern is the authority that the proposed rule would grant to non-governmental international entities with foreign national personnel in leadership or advisory roles over approval of U.S. federal contractors. We think it unwise for the U.S. government to divest its authority to control what requirements are set or when they should be changed. This proposed rule would allow third-party, pay-to-use, non-governmental bodies to set and approve key standards in the federal contracting process without any requirement that the priorities of these NGOs remain aligned with those of the United States government.

Requiring contractors to set a SBT validated by SBTi is further problematic because it may establish aggressive timelines and rigid standards that are not appropriately tailored for the A&D industry. While the CDP's questionnaire is used by some of our member companies on a voluntary basis, it frequently changes to include new climate-related concepts and include increasingly nuanced questions that only earn credit if the respondent provides progressively detailed explanations and responses. The proposed rule moves CDP from voluntary use to a requirement; it vests the SBTi with regulatory authority to apply those evolving standards to approve or deny Major Contractors' proposed emissions targets, and to dive into the details of federal contractor's emissions data in the process. The outcome would be if a contractor does not complete the TCFD-aligned CDP questions and submit the questionnaire to CDP, or if SBTi does not approve the target submission, then that contractor would be designated as "non responsible" and ineligible to receive federal contracts.

Beyond the question of foreign control, there are several practical challenges regarding climate risk disclosures and the setting of science-based GHG targets:

- The climate related risks disclosures that would be required by the proposal are not entirely clear. The rule simply refers to the TCFD recommendations, and states that contractors need to fill out all the questions in the CDP climate questionnaire that CDP deems as "TCFD-aligned." This cross-referencing hides the actual nature and scope of the disclosure requirements, hindering effective public notice and comment.



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CDP maintains a mapping document that identifies the current list of such questions -- currently 28 questions – but most of those questions contain numerous sub-queries that also need to be completed. Many of the questions are not directly applicable to the government's potential supply chain risks from climate change, and some lack established methodologies such as calculating the financial impacts of physical and transitional climate risks. Both TCFD and CDP can at any time change their requirements, as evidenced by actual practice, and this would directly affect the disclosure requirements needed to do business with the federal government.

- The proposal requires Major contractors to set science-based targets for reducing GHG emissions in accordance with specific and stringent requirements developed and maintained by SBTi, a private entity. These criteria include such impactful parameters as the required annual average reductions of Scopes 1, 2, and 3 emissions, the maximum time horizon of the targets, what baseline year can be used, and what portion of Scope 3 emissions needs to be included in the goal. SBTi has historically changed its criteria periodically and sometimes significantly, such as requiring Scope 3 targets to align with a "*well below* 2 degrees Celsius (C)" reduction pathway instead of the prior requirement of "2 degrees C," which has significant technical and financial ramifications. SBTi is free to update its criteria and make them more stringent, without providing the notice and comment protections that federal agency rulemaking affords.
- The means by which SBTi is to review contractors' target submittals and complete proper evaluations in a timely manner is uncertain and not well defined**.** Under the proposed rule, all Major Contractors would be required to set a science-based target and have the target validated by SBTi within two years of publication of a final rule. To achieve this, a company would need to work with the SBTi organization to get their company-specific targets submitted and approved. The ability of SBTi to complete timely assessments on nearly 1,000 new targets within two years is highly suspect, given that many companies already using this service have found the process is lengthy and SBTi personnel are slow to respond. The likely failure of SBTi to support the requisite validation timeline would have a significant negative impact on the entire U.S. federal contracting process.

There is a unique additional aspect for the A&D industry that makes development and certification of a science-based target for GHG reductions difficult. Aircraft (both military and civilian), military platforms, and space vehicles have much longer service lives than most normal consumer products (in some cases, more than 30 years). Development of any science-based target for the A&D community must take this long lifecycle into account when developing policy intended to make major changes to aircraft and space fleets.

AIA believes that the government must be involved in the development of a streamlined and simplified climate questionnaire as well as setting national policy on science based GHG emission targets by sector. Requiring oversight in this area would be an additional cost to the



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government but would save contractors (and ultimately to government) time and reduce overall costs through predictable and stable questionnaires and GHG targets.

Recommendations: We propose the following recommendations regarding the reporting of climate risk assessments and science-based targets:

- The specific climate-related disclosure elements should be explicitly identified, and the elements narrowed to those directly impacting supplier risks. These disclosure elements should be reported either in the SAM system, or through public disclosures such as websites and sustainability reports, and not require the completion of specific questions in the CDP Climate questionnaire; this would effectively remove TCFD and CDP from the federal government contracting process.
- Instead of the requirement to use SBTi's criteria to set a science-based target, the FAR Council should develop a companion rule to set the exact criteria for the targets and develop a procedure for self-certifications or oversight by DCMA (if a company has a sustainability report). This would encourage Major Contractors to assist the government (through the rule-making process) by setting credible and manageable science-based targets for GHG emissions that are linked to U.S. government strategic goals.
- Future science-based target requirements should be limited to Scope 1 and 2 emissions, which companies are able to quantify, manage, and reduce. Each Major Contractor should be required to set their own targets for reductions of their Scope 1 and 2 emissions in accordance with the FAR Council's identified criteria to meet the government's long-term goal for GHG reduction; these targets should be published on the company's website, or self-certification reported in SAM or adjudicated by DCMA (rather than requiring SBTi validation).

**2. Compliance Burden – Impact on Program Cost, Schedule, and Performance**

The federal contracting process – especially within DoD – is already a complex system with hundreds of compliance requirements for vendors. The addition of new GHG reporting requirements would likely result in increased costs and delay delivery of capability to our military forces. Specifically, this proposed rule would require Major and Significant Contractors (approximately 5,766 companies as listed in the proposed rule) to collect and publish GHG emissions data from Scope 1 and 2 inventories, and would require Major Contractors (approximately 964 companies) also to complete the CDP Climate Change questionnaire, collect and publish GHG emissions data for "relevant" Scope 3 emissions, and develop GHG emissions reduction performance metrics approved by SBTi before they can be eligible for new federal contracts. The workload estimates included in the preamble to the proposal likely do not fully anticipate the burden of data collection and compliance-related activities required to set goals and measure Scope 3 emissions throughout the supply chain.

**Subject:** FAR Case 2021-015: "Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk"

Burden on Contractors

The proposed changes to the FAR would be extensive and affect nearly every federal contractor. These changes would increase both the complexity and cost of submitting proposals:

- Accurately estimating Scope 3 emissions is beyond the ability of almost any company due to the extensive range and complexity of "upstream" and "downstream" emissions. These data requirements would be especially difficult to meet for small businesses.
- Submitting the CDP climate questionnaire and gaining approval of the science-based target by SBTi will be more complex and time-consuming than described in the rule, and there would also be significant translation, transformation, and reorganization challenges in attempting to fulfill these two different requirements. The collection of data for the CDP climate questionnaire and SBTi, especially Scope 3 emissions as required, would be extremely difficult for members of the A&D industry as our products are used nationally and internationally, and in military applications where such data is sensitive and not likely to be available.

Burden on Federal Contracting Officers

The assertion in the proposed rule that contracting personnel would "need no additional training" underestimates the complexity of emissions estimation, climate change and mitigation science, and climate-related business risk evaluation. There are new studies, data sets, and assertions on the severity of climate change being published daily. The proposed rule would require contracting officers and acquisition specialists to understand GHG emissions, science-based targets, and climate change issues as they assess contracts. Government contracting officers and evaluators do not have the time or resources to maintain the knowledge required to keep up with the best available science to guide decisions. Without sufficient training or knowledge of climate science, contracting personnel would be required to rely on their own knowledge which could vary widely among individuals and add further risk to contracting processes.

Along with training risk, the proposed rule would likely add considerable time and expense as the contracting officer seeks to determine if a contractor is non-responsible and therefore ineligible for government contracts. To make this determination, contracting officers would be required to review additional submissions from the contractor to determine if:

- Non-compliance resulted from circumstances properly beyond the prospective contractor's control;
- the prospective contractor has provided sufficient documentation that demonstrates substantial efforts to comply; and
- the prospective contractor has made a public commitment to comply as soon as possible on a publicly accessible website (within one year).



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This cascade of submissions would take time to review and process at each stage, with contracting officers' wide discretion leading to additional review and challenges, resulting in more delays in the federal contracting process.

As such, there is a clear need for a well-defined and continuous science-based training for acquisition officials in climate change to substantiate their decisions regarding A&D industry contract submission and proposals. At minimum, acquisition and contracting staff must have an effective understanding of the technical requirements to develop a GHG emissions inventory along with the documentation needed to complete the CDP Climate Change questionnaire and develop a science-based target to be approved by SBTi. If acquisition and contracting staff do not understand these procedures, they cannot be tasked with determining the accuracy of submissions or evaluating the need for a waiver of requirements.

Finally, the presumption of 'non responsibility' for seemingly non-compliant contract offerors represents an unwarranted and novel distortion of the longstanding concept of presuming responsibility until determined otherwise. This change allows a contracting officer to exclude potential contractors based on their personal understanding of climate change science during their review of contracting submissions. While there has always been judgment and discretion in the contracting approval process, adding climate change issues (which are politically divisive) to the contracting process could lead to incidents where a contracting officer's personal opinions about climate change and mitigation science and climate-related business risk evaluation, could drive awards to, or away from specific companies. Because contracting officers would receive no additional training, they would have to rely on their own views as they review technical submissions and evaluate them, both in reviewing contracts and in the appeals process. The outcome could be that contractors would be presumed to be "non responsible" if contracting officers do not understand the technical information within either the contract submissions, or the appeals information, or both.

Recommendation: Any climate change-related submissions should be limited to Scope 1 and 2 and included as reporting data fields in SAM, along with a self-certification section. Adding fields and a self-certification block to SAM would decrease the time for data entry for contractors, remove the subjectivity with third party, non-governmental entities reviewing submissions, and use a standard process that is familiar to contracting officers. Contractors who publish sustainability reports could present them annually to their cognizant DCMA rather than being required to report them publicly in SAM.

3. **Challenges with current emissions estimation methodologies**

Over the past decade, the A&D industry has been focused on developing Scope 1 and 2 emissions inventories and expanding our ability to effectively conduct Scope 3 data gathering and analysis. We have engaged third parties in verifying the quality of Scope 1 and Scope 2 data calculations and are actively setting aggressive targets to reduce these operational emissions. Publicly reporting Scope 1 and Scope 2 GHG emission inventories, through annual sustainability reports or other public disclosure forums, has become common practice. However, due to its complexity and the need for coordination along a company's



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entire value chain, comprehensive Scope 3 reporting is far less common. While several categories of Scope 3 emissions can be calculated from data sources under a company's control (e.g., employee commuting and business travel), these often only represent a small percentage of an A&D company's Scope 3 footprint. Several of the Scope 3 categories are complex to calculate and are dependent upon the availability of data that would need to be provided by entities that are outside a company's operational control and may not be equipped to accurately calculate their own emissions. It is likely that most A&D industry Scope 3 emissions are generated either in the upstream category of "purchased goods and services," or in the downstream category of "use of sold products;" both types are extremely difficult for the A&D industry to accurately measure (as described below).

Purchased Goods and Services

The A&D industry manufactures highly complex products containing thousands of sophisticated sub-assemblies, components, and parts that have been produced by an extensive network of foreign and domestic suppliers. Many of the subcomponents, assemblies and individual parts being supplied to the upper tiers of the industry are produced by small and medium-sized businesses that do not have the knowledge, time, or experience needed to execute complex emissions calculations for their businesses.

Further, a Major Contractor's ability to report Scope 3 emissions to the federal government could hinge significantly on the Major Contractor's ability to estimate its upstream Scope 3 emissions, or on its ability to reach deep into its supply chain and gain access to emissions data from many, if not all, of its suppliers, irrespective of that supplier's size, nationality or level of awareness of the topic. Calculating actual supplier emissions is the most accurate approach but would require enormous amounts of time and resources for manufacturers of complex and sophisticated A&D products. The burden of calculating this data and meeting these requirements from prime contractors may likely drive many small businesses to leave the DIB.

Any Major contractor generally interacts with thousands of suppliers each year; many of those suppliers produce highly intricate assemblies and subassemblies that require inputs from hundreds of suppliers; and each of those suppliers have hundreds of suppliers themselves. In these complex supply chains, even the simplest information or data request becomes progressively difficult to define and identify at each level. The task becomes exponentially more complex when a supplier is being asked to report a quantitative value (i.e., the emissions from a given purchased good) that can only be calculated using a system of equations that could include thousands of inputs, each of which is an independently determined variable from an independent sub-supplier with an associated varying degree of accuracy.

In order to achieve this level of detail, a Major Contractor would need to set up and execute a large-scale, time- and resource-intensive data acquisition exercise that even then would yield



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a potentially highly unreliable estimate. Conversely, Major Contractors could employ less invasive methodologies for estimating the emissions of their purchased goods and services; while easier, this use of broad assumptions and more generic sets of variables could result in less accurate, less comparable and thus less useful data.

Downstream Use of Sold Products

Reporting on the downstream use and disposal of sold products is also particularly challenging for the A&D community due to the nature of the products it sells to the federal government. While much of the federal government currently is calculating its associated Scope 1 and Scope 2 emissions, it has not yet begun to publish product use data, which is critical to the A&D industry's ability to calculate product-related downstream Scope 3 emissions. In addition, while some members of the A&D community that also support civil aviation may have publicly available information regarding emissions from the use of their products, that is not the case for many of the A&D products sold to the federal government; their role in military and other national security operations would obviously limit the information our federal customers believe is appropriate to share. For example, use data of certain weapons systems is not publicly available information for completely legitimate reasons; without this information, contractors can neither accurately report their Scope 3 emissions nor establish valid science-based targets.

Another challenging aspect of product in-use accounting for the A&D industry would be how to appropriately allocate Scope 3 emissions among the Major Contractors that may have contributed to a product's delivery. While the company responsible for the product delivery to the government (i.e., the "prime contractor") may be assigned responsibility for the direct in-use emissions of the product (e.g., the fuel consumed by the product as a whole), other Major Contractors supporting the prime contractor would be responsible for calculating the direct product in-use emissions for the component or sub-assembly that they provide, which would in turn consume electricity/energy while in use. In order for all participants to comply, component manufacturers would also require the product in-use data for the product as a whole as well as the use case information for the assembly or component that was contributed. If the federal government and its A&D contractors cannot precisely allocate Scope 3 emissions for a product, then there is greater likelihood that reporting by the Major Contractor would be repetitive, incomplete, or otherwise inaccurate.

For the government to require Scope 3 emissions information from Major Contractors, it must provide the time necessary to set up well-designed and effective means of collecting this data for these material categories of indirect emissions. If the government is unable to provide appropriate time and resources to support this task, then Major Contractors may be forced to employ untested estimation methodologies to "check the box." This approach could yield results that may be off by orders of magnitude, and thus do little to provide usable information to the federal contracting process, and in fact distort the efforts of policymakers and contracting officers to rationally address this issue.



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The information and arguments presented above illustrate how difficult it would be for Major Contractors within the A&D community to collect and report accurate Scope 3 emissions inventories within the next 3-5 years. While we are confident that companies can demonstrate reasonable progress towards Scope 3 reporting, the speed at which that is accomplished depends entirely on how quickly data outside our control is provided and validated. AIA therefore recommends that the federal government delay (or provide a waiver for the A&D industry and defense contractors) the Scope 3 reporting requirement until data and consensus methodologies for the relevant categories are available, established, and validated.

Implications for Small Business

The financial burden placed on small businesses within the proposed FAR rule is very likely underestimated and must be studied further. Large A&D manufacturers who now consistently report publicly on their emissions profile did not build that capacity overnight. Emissions accounting takes time, resources, and commitment to identify the data inputs, to understand how to convert those inputs to emissions, and to develop the necessary processes to establish an inventory. While large manufacturers may have resources that are readily available to quickly tackle the challenge of emissions accounting, the same cannot be expected of a small or medium-sized manufacturer that operates in a niche market on slim margins, with an ever-expanding regulatory burden and increasing customer expectations. In addition, many of the mid-tier suppliers in our industry provide opportunities for small businesses to access federal work – the same small businesses that would bear this new compliance burden if the proposed rule were flowed down from major federal contractors. While we recognize that small and medium-sized business are not the target of this proposed rule, the federal government must consider how its implementation would reverberate through the supply chain as suppliers purportedly exempt it based on their size are held to its requirements by covered contractors trying to comply with the rule.

In any scenario, implementation of this rule would come at a significant cost both to the federal government and to its supply chain, and that cost may become a market barrier for many of the small and medium-sized business that are operating on thin profit margins. The government must recognize that the Scope 3 ambition of this rule would clearly compromise other economically and socially significant contracting priorities.

Recommendations: We propose the following recommendations regarding the collection of GHG emissions from Significant and Major Contractors within the A&D industry:

- Revise the requirement to collect and report all "relevant" Scope 3 emissions to require only "material" Scope 3 emissions and remove the requirement to collect and report on the downstream use and disposal of products. This would reduce the

compliance burden, while capturing the most significant emission categories that are within the control of contractors.

- Establish an option for collection and reporting on Scope 1 and 2 emissions inventories from "Major and Significant" contractors within the System for Award Management (SAM).
- Delay the publication of this rule until the government provides an analysis of the financial impact of proposed requirements on the small businesses in the defense sector.
- Provide a permanent exemption from emissions reporting for Scope 3, Categories 11 (Use of Sold Products) and 12 (End-of-life treatment of sold products) emissions from military products due to national security concerns.

4. **Alignment with Securities and Exchange Commission (SEC) disclosure requirements**
The SEC has not yet issued a final rule on "The Enhancement and Standardization of Climate-Related Disclosures for Investors." Proposed Section 229.1506 (Targets and goals) in the SEC rule would require a company to disclose significant information about any targets or goals related to the reduction of GHG emissions, including Scope 3 emissions, if the company has set such goals. While the proposed SEC rule does not compel a company to set and disclose a GHG emissions reduction goal, this proposed FAR rule does; and a 'science-based target' for GHG reductions could be different than an existing GHG emission reduction goal required to be reported by the company to the SEC. We believe it is not appropriate to use this rule to indirectly, and perhaps inadvertently, expand the scope of the SEC Rule.

   Recommendation: Remove the FAR requirement to set a science-based target, and align this rule's requirements with the pending SEC rule.

**Standardization of Terms and References**

In addition to the four categories of substantive comments above, we urge that terms used in any future rulemaking effort be clarified and standardized; for example:

- "Relevant Scope 3 Emissions" versus "relevant categories of Scope 3 emissions."
- "Major federal suppliers" and "Major Federal Contractors"
- "Significant" and "Major Contractors" have not been used previously in contracting language and could be confused with Small and Large Business designations.
- "Immediate owner" or "Highest-level owner"

It is also unclear at what level within a company the rule applies. Different terms are used in the proposal such as supplier, offeror, company, contractor, entity, etc. AIA recommends that the rule be explicit on where within a company this requirement applies and where such



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disclosure would take place. Similarly, it is not clear if the highest level of the parent company must report for all business units or if each business unit must also report. Data may be double-counted if the parent company and associated business units must report separately. AIA recommends that reporting be captured at the highest level of the company.

Recommendations: We propose the following recommendations to clarify and standardize terms within the regulatory language:

- Standardize all terms with existing FAR nomenclature; where there are terms used interchangeably, use only one. Clarify new terms and ensure the "Definitions" section is updated completely. Standardize reporting instructions and clarify the level within a company where GHG reporting occurs.
- Ensure alignment of the proposed changes to the FAR with any requirements that might be part of the recently proposed SEC and the final version. The government should standardize and align procedures to ensure companies do not have to disclose two different sets of data for two different federal agencies.

**Conclusion**

The proposed rule would likely hinder competition in the marketplace and reduce the government's ability to contract with technically preferred services or solutions as it would disqualify contractors for failing to comply with disclosure and/or target-setting requirements in the specified timeframe. At this time, the A&D industry continues to struggle with the effects of the COVID-19 pandemic and large global supply chain challenges. Levying these additional compliance regimes on the A&D industry could further compromise the U.S. Government's ability to access innovative, cost-effective solutions to meet national aerospace and defense needs.

AIA believes it is critical that any amendments to the FAR provide real tools to combat climate-related risk to the government's procurement needs while minimizing the economic impact on companies and their supply chains. Supply chain resiliency is more important than ever, making it essential to avoid putting an unbearable burden on the thousands of small businesses that make up the critical supply chains for many A&D companies' most important programs. It is also important that new rules refrain from penalizing companies for delivering on the very requirements mandated by their federal customers, such as programs calling for specific materials and fuels that may lead to higher Scope 3 emissions in the short term but overall lower GHG emissions in the long term. The need to combat climate-related risk will unavoidably lead to some level of corporate burden, but it is the responsibility of the U.S. Government to prevent an unnecessary burden on the federal supply base's capability to meet the government's needs.

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**Subject:** FAR Case 2021-015: "Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk"

Thank you for your consideration. Please direct any questions to Mark Sudol, AIA's Director of Environmental Policy [redacted] and Lorenzo Williams, Senior Director for Acquisition Policy [redacted]

Sincerely,

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**Subject:** FAR Case 2021-015: "Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk"

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News / Sustainability

# Amazon's approach to setting Science-Based Targets

1 min August 3, 2023

Written by Amazon Staff

At Amazon, we remain committed to our ambitious plan to reach net-zero carbon—and our goals are driven by science. We measure our carbon emissions in order to understand and reduce them—and we'll continue to be transparent and share our progress in our annual Sustainability Report, which also includes details on how we measure carbon.

In 2020, Amazon committed to setting voluntary targets with the Science Based Target initiative (SBTi). Since then, SBTi's requirements for submission changed, and new methodologies have begun to be developed. Amazon is among hundreds of organizations that received an extension on their original deadline to submit due to these ongoing changes.

We have continued to work with SBTi throughout this time to determine appropriate submission guidelines and methodologies for complex businesses like Amazon, however it remains difficult for us to submit in a meaningful and accurate way. We will continue to work with SBTi to establish a path forward for submission, and we believe there's a role to play for organizations like theirs. We're also not pulling back or slowing down—in tandem to this ongoing work v ЭTi, we'll also seek to set science-based targets with other organizations and credible third-party validators.

And, as we've done from the beginning, we'll also continue to work with leaders on our teams and in the climate space to make target-setting tools and standards more available, adaptable, and actionable across multiple industries.

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14 September 2023

Representative Frank D Lucas, Chair
Representative Zoe Lofgren, Ranking Member
US House of Representatives Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chair Lucas and Ranking Member Lofgren,

I write to submit this *nonpartisan* Letter to the House Committee on Science, Space, and Technology in the context of its Investigation and Hearing regarding the Science Based Targets initiative (SBTi). I write as an *original instigator* of SBTi, having initiated engagement in 2012, and having served on SBTi's Technical Advisory Group (TAG) since inception in 2015 until 2020.

I preface this Letter clearly declaring that I ***fully support*** the *general goal* of the Federal Acquisition Regulation on Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk: "to require major Federal suppliers to publicly disclose greenhouse gas (GHG) emissions and climate-related financial risk and to set science-based reduction targets."[1]

In fact, I believe that this Regulation ***should go further***, as it is framed on a logical inconsistency: it *rightly* asks these suppliers to 1) disclose their GHG emissions, and 2) set future-oriented science based targets (SBTs), but it ignores the vital space between these two activities – namely, **disclosing annual *performance* against these targets**.

Indeed, if the US is to meet its Nationally Determined Contribution (NDC)[2] – which it is lagging on achieving,[3] and which is further deemed *insufficient,*[4] particularly in the context of the UNFCCC's release of the first Global Stocktake that calls for "systemic transformation" such as

[1] *Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk*. 14 November 2022. https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gasemissions-and-climate-related-financial

[2] The United States of America. *Nationally Determined Contribution -- Reducing Greenhouse Gases in the United States: A 2030 Emissions Target.* 21 April 2021. https://unfccc.int/sites/default/files/NDC/2022-06/United%20States%20NDC%20April%2021%202021%20Final.pdf

[3] Stacey Davis. *The U.S. is behind on its climate commitments. Here's how the Biden administration can close the gap*. Clean Air Task Force. 21 April 2023. https://www.catf.us/2023/04/the-u-s-is-behind-on-its-climate-commitments-heres-how-the-biden-administration-can-close-the-gap/

[4] Climate Action Tracker. *USA*. 16 August 2022. https://climateactiontracker.org/countries/usa/

"phasing out all unabated fossil fuels"[5] – it needs *all company activity* within its borders to fulfill proportionate shares of the collective burden. This *requires* not merely emissions disclosure and target setting, as the Regulation calls for, but also: science-based ***performance assessment***.[6]

With this perspective established, I turn to this Hearing's specific line of investigation, which appropriately scrutinizes not the *general goal* of the Regulation, but rather its implementation details. Specifically, the Regulation stipulates a joint role for SBTi – namely, as a *de facto standard setter*,[7] and concurrently, as a *validator* of targets set according to its standard. This joint role cuts to the core of my *critical* engagement with SBTi for the past 5 years, since 2018.[8]

In a nutshell, **SBTi structures itself on a double helix of intertwining conflicts of interest.**

Specifically, SBTi's structure is not only predicated on an *overarching* conflict of interest – serving as both standard-setter *and* validator – but also, each of these discrete elements (standard-setter and validator) is further embedded with its own discrete conflicts of interest: **conflicts of interest *within* conflicts of interest,** if you will, genetically imprinted.

By "conflict of interest," I do not limit myself to its strict pecuniary sense,[9] but rather, I invoke its broadest sense: that **SBTi prioritizes *other,* private interests (including its own interests) *above* the public interest** (which it *ostensibly* serves first and foremost, as a not-for-profit).

I now turn to laying out the case, and the evidence for each of these charges, in sequence. While the Press Releases and Letters from the Committee Chair[10] focus primarily on the

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[5] United Nations Framework Convention on Climate Change. *Technical dialogue of the first global stocktake: Synthesis report by the co-facilitators on the technical dialogue*. 8 September 2023. https://unfccc.int/sites/default/files/resource/sb2023_09_adv.pdf

[6] The Regulation rightly observes that "the SEC proposed rule did not include a requirement for SEC registrants to set science-based targets" – nor, for that matter, does the SEC's proposed rule call for performance assessment against these science-based targets, so it, too, is insufficient. Op cit *Federal Acquisition Regulation.*

[7] Alberto Carrillo Pineda. *Let's limit warming to 1.5°C: Our new 2021-2025 strategy.* Science Based targets initiative. 15 July 2021. https://sciencebasedtargets.org/blog/our-ambitious-new-strategy

[8] Bill Baue. *An Inquiry Invitation: Is the Science Based Targets initiative Science Based? A Comprehensive Compilation of a Multi-year Quest for Answers*. A Living Document. r3.0 Common Good Resource. 15 February 2023. https://www.r3-0.org/wp-content/uploads/2023/03/Is-the-Science-Based-Targets-initiative-Science-Based.pdf

[9] SBTi has attempted, unsuccessfully, to circumvent the definition of "conflict of interest" in ways that preclude its culpability. SBTi Steering Committee. *Response to Formal Complaint by Bill Baue to SBTi Executive Board*. 23 February 2021. https://docs.google.com/document/d/1lghs3qxsZKNZB53kZlfmgoiyjf7uFJdNLPtC2xk4N4M/edit#bookmark=kix.6q2imi8leaki
Bill Baue. *Memorandum on SBTi Steering Committee Response Letter to the Formal Complaint*. 24 March 2021. https://docs.google.com/document/d/1lghs3qxsZKNZB53kZlfmgoiyjf7uFJdNLPtC2xk4N4M/edit#bookmark=id.e4aca9hms9ia

[10] House Science, Space, and Technology Committee. *Lucas Criticizes Administration's Decision to Outsource Emission Requirements to Controversial International Entity*. Press Release. 17 August 2023. https://science.house.gov/press-releases?ID=87906E43-8072-4FAD-927E-5104F1A3451D

*validator* conflict of interest, I will focus first on the standard setting conflicts of interest, as the validation role flows from the standard setting role. I will lay out the case as follows:

- **Conflict of Interest 1: Standard Setter *and* Validator**
- **Conflict of Interest 2: Standard Setter *and* Method Creator (with 4 sub-items)**
- **Conflict of Interest 3: Sole Validator**

**Conflict of Interest 1: Standard Setter *and* Validator**

SBTi admits the fact that serving as both standard setter *and* validator represents a clear conflict of interests; SBTi Co-Founder, Cynthia Cummis of the World Resources Institute (WRI), and former SBTi Steering Committee member Alexander Farsan of WWF, clearly acknowledge this in the April 2019 TAG meeting:[11]

> **Bill Baue** (55:06) Ok. **I have voiced in the past concern that the fee and validation by the standards setter does step into tricky territory: when you're setting the standard *and* assuring it, that can be perceived as a red flag.** I understand why you're doing that, but I just encourage…
>
> **Cynthia Cummis** (55:34) **Yeah, yeah. I understand that. Yeah. Yeah.**
>
> **Alexander Farsan** (55:39) I think it's really an interim solution, while we get ready to [inaudible] it out. I think we basically weigh the risk of outsourcing it prematurely against **the very valid point that this isn't best practice to have these functions sitting so closely together**.[12] [emphasis added]

It is noteworthy that Ms Cummis interrupted me before I had the opportunity to finish my sentence, *explicitly* identifying this "*red flag*" as a *conflict of interests*, though it was clear from the context that this was the issue at hand.

It is also noteworthy that SBTi has *yet to outsource* validation, over 4 years later – even as it sets up an artificial division between its standard setting and validation arms in an act with performative significance only:[13] apparently, it prefers a *perpetual* "interim solution".

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House Science, Space, and Technology Committee. *Science Committee Chairs Call for Answers on FAR Council Proposed Emissions Rule*. Press Release. 14 March 2023. https://science.house.gov/press-releases?ID=79ABA539-9C70-4703-BCF2-96BACF2BA013

[11] Science Based Targets initiative. *TAG [Technical Advisory Group] Consultation Call*. April 2019. 2 April 2019. https://wwf.zoom.us/recording/play/eZw6WSR8MP0g7OcNX2gmrhA40LHtV1aHb0_S8kEYv8Ocl2XsEzMd_HECwLi8WZ9t?continueMode=true

[12] See the *Appendix* of this Letter for a more complete transcript of this exchange.

[13] Science Based Targets initiative. *Corporate climate action gets a boost with upgrade to target validation and standard setting*. Press release. 13 September 2023. https://sciencebasedtargets.org/news/corporate-climate-action-gets-a-boost-with-upgrade-to-target-validation-and-standard-setting

*Why is serving as the standard setter and validator an **inherent** conflict of interest?*

Ms Cummis provides a key element for answering this question: "we're charging a fee for the target validation, so that enables us to ramp up our capacity."[14] Fellow SBTi Co-Founder Alberto Carillo Pineda made the same point on growing its validation staff to *The Financial Times (FT)* two years later (in 2021) – "we have a model that allows us to grow the team as the number of companies joining grows"[15] – which became the center of a subsequent *FT* article in 2022 that applied a much more critical lens on this admission.[16]

Generally speaking: a SBT standard setter serves the *public interest* by establishing the most scientifically robust standard possible; and a SBT validator serves the *public interest* by only validating sufficiently robust targets against this most robust standard.

Then we have the case of SBTi: a SBT standard setter that *also* serves as a SBT validator *with a business model tied to validation growth* (according to two Co-Founders quoted above), whose *private interest* thus diverges from the *public interest*, as it seeks to "keep the customer satisfied" (in the words of Simon & Garfunkel).[17]

*Private interest* considerations pressure the standard setting arm to make the standard *less* scientifically robust to increase the number of successful validations, leading to more validation submissions, in a positive feedback loop.

It matters not that target setters pay regardless of validation outcome: the joint standard / validator business model fails if successful validations fall below the critical mass necessary to maintain market confidence, which creates unavoidable temptation to dilute the standard.

**Conflict of Interest 2: Standard Setter *and* Method Creator**

And: this is *precisely* what happened.

In early 2018 – after 3 years of serving the *public interest* as a provider of broad guidance on SBT setting methods (both independent methods created long before SBTi's founding, and methods SBTi created itself) – SBTi *abruptly* shifted to serving its *private interest* by recommending *its own* methods *exclusively*, barring the use of the pre-existing independent methods. SBTi did not so much as mention this most consequential technical decision to its Technical Advisory Group (which demonstrates that the TAG served as a "fig leaf," as one former TAG member stated privately upon departing the group), nor did it follow the standard practice of standard setters of running a Public Consultation. SBTi just *radically* shifted its

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[14] See the *Appendix* of this Letter for a more complete transcript of this exchange.
[15] Pilita Clark. Science Based Targets climate campaign starts to bear fruit. *The Financial Times*. 26 May 2021. https://www.ft.com/content/308c08a6-3e4f-43a6-81d4-cfc0625eb9fa
[16] Camilla Hodgson. Climate targets oversight group under scrutiny over its own governance. *The Financial Times.* 2 February 2022. https://www.ft.com/content/75527cce-9748-4aec-b6e6-7c7828460d2a
[17] Simon & Garfunkel. Keep the Customer Satisfied. *Bridge Over Troubled Water*. 1970. https://en.wikipedia.org/wiki/Keep_the_Customer_Satisfied_(song)

approach, *out of nowhere*, for reasons that remain unclear (even to scientists – as revealed in more depth below).

It is *common sense* to be skeptical of a supposedly neutral arbiter that exclusively recommends its own products; it is *naïve* to fail to recognize this bald conflict of interests.

Further confounding this development is the fact that the criteria SBTi set for qualifying methods applied not only to its own methods – the Absolute Contraction Approach (ACA) and Sectoral Decarbonization Approach (SDA) – but also to one of the methods that it disqualified: the Center for Sustainable Organizations (CSO) Context-Based Carbon Metric (the first ever SBT method, inaugurated at Ben & Jerry's in 2006.)[18]

I submitted a *Formal Complaint* over this illogic (and the underlying conflict of interest) on 15 February 2021 that SBTi neglected to adjudicate for *two-and-a-half years* (the *Complaint* is only now being adjudicated).[19] Nobel Laureate Elinor Ostrom identified a set of 8 "core design principles" for "governing a commons"[20] (such as the earth's climate regulatory system) that includes "fast and fair conflict resolution": clearly, SBTi fails on this front, prioritizing its own interests over the public's in delaying resolution for an inordinate lag.

I had been seeking resolution through private engagement for the past 3 years (since 2018), and went public with this *Formal Complaint* when my concerns were scientifically validated by the publication of the first-ever comprehensive peer-reviewed scientific study of *all* SBT methods.[21] The study assessed "emissions imbalance," or the degree to which application of the methods transgresses balancing the carbon budget. Quoting the authors' own words:

> "The SBTi currently recommends ACA and SDA over the other methods (SBTi 2020c). As mentioned (section 1), **the reasoning behind this recommendation is not entirely clear**, but emission imbalance appears to play a role. However, **our results indicate that concerns over emission imbalance should favour the CSO and SDA methods**, rather than ACA and SDA."

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[18] Bill Baue. *Memorandum on SBTi Steering Committee Response Letter to the Formal Complaint*. 24 March 2021.
https://docs.google.com/document/d/1lghs3qxsZKNZB53kZlfmgoiyjf7uFJdNLPtC2xk4N4M/edit#bookmark=id.e4aca9hms9ia
Ben & Jerry's. Global Warming Social Footprint. *2006 Social & Environmental Assessment Report*. 2006.
https://www.benjerry.com/about-us/sear-reports/2006-sear-report#globwarmsocfootprint

[19] Bill Baue. *Formal Complaint: Request to Address Concerns over Science Based Targets Governance*. 15 February 2021.
https://docs.google.com/document/d/1lghs3qxsZKNZB53kZlfmgoiyjf7uFJdNLPtC2xk4N4M/edit#bookmark=id.g6ydcgk1fbt

[20] Elinor Ostrom. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge University Press. 1990.

[21] Anders Bjørn, Shannon Lloyd, and Damon Matthews. From the Paris Agreement to corporate climate commitments: evaluation of seven methods for setting 'science-based' emission targets. *Environmental Research Letters*. Volume 16, Number 5. 22 April 2021. https://doi.org/10.1088/1748-9326/abe57b
SBTi staff had earlier published an incomprehensive study of SBT methods that strangely omitted the CSO method, without explanation – which raises its own conflicts of interest questions.

> "The **CSO method**, followed by the SDA method, **has the overall lowest emission imbalance across all scenarios**." [emphasis added]

The fact that independent scientists cannot clearly understand the reasoning behind SBTi's recommendations is damning. Even more damning is their finding that the method that best fulfills SBTi's emissions balance criterion is the *very* method SBTi bars: CSO.

The very conducting of this research unveiled yet another conflict of interest: the research design called for using *actual* data on company performance, but SBTi's refusal to share this data precluded such research, so the study had to revert to representative archetypes.

Why did SBTi hide this information? As revealed in a subsequent news article, SBTi signs non-disclosure agreements (NDAs) with target-setting companies: "Asked if SBTi had rejected any climate targets as inadequate, a spokesperson said that they could not answer this question because of non-disclosure agreements."[22]

Let me repeat this so it can sink in: a *de facto* standard with the term "science" in its name obstructed the enactment of the scientific method (*replication through transparent data to verify results*) by prioritizing the private interest of a NDA between itself and its clients *over* the public interest of transparent scientific inquiry.

The study's lead author Anders Bjørn and colleagues have more recently published a peer-reviewed study focused exclusively on SBTi's obstruction of the transparency that is "necessary to assess justice implications, evaluate the sufficiency of aggregate emission reductions, and hold companies accountable for actions on their targets."[23]

Bjørn and colleagues have also identified a further conflict of interest around SBTi allowing clients (companies) to apply renewable energy credits (RECs) to their decarbonization claims instead of applying "only real emission reductions as progress towards meeting their science-based targets"[24] – clearly, the former serves private interests while the latter serves the public interest.

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[22] Joe Lo. Science Based Targets initiative accused of providing a 'platform for greenwashing'. *Climate Home News*. 2 June 2022. https://www.climatechangenews.com/2022/02/06/science-based-targets-initiative-accused-providing-platform-greenwashing/

[23] Anders Bjørn, H. Damon Matthews, et al. Increased transparency is needed for corporate science-based targets to be effective. *Nature Climate Change*. Volume 13. August 2023. https://doi.org/10.1038/s41558-023-01727-z

[24] Anders Bjørn, Shannon M. Lloyd et al. Renewable energy certificates threaten the integrity of corporate science-based targets. *Nature Climate Change*. Volume 12. 9 June 2022. https://doi.org/10.1038/s41558-022-01379-5

Finally, a second comprehensive peer reviewed scientific assessment of SBT methods[25] found that only one fulfilled *all* of the proposed criteria: CSO. Specifically, CSO was the sole existing SBT method that enables integration of historic responsibility for emissions — a core tenet of the Paris Agreement — into target setting. Given that the United States is the "world's largest historical emitter,"[26] applying SBT methods that integrate historic responsibility is the *only* way to enact climate justice[27] – yet SBTi's methods lack this crucial functionality. SBTi's private interest thus conflicts with the public interest of climate justice.

To summarize, SBTi has embedded *multiple* conflicts of interest into the DNA of its role as a standard setter:

- **Conflict of Interest 2a:** SBTi prioritizes its own SBT-setting methods over independent SBT-setting methods, despite the fact that the two extant comprehensive scientific studies find SBTi's methods *inferior.*
- **Conflict of Interest 2b**: SBTi prioritizes its own and its clients' confidentiality over and above the public interest of enacting the scientific method with transparent data.
- **Conflict of Interest 2c**: SBTi prioritizes its own and its clients' preference for RECs over the public interest of "only real emission reductions" applying in SBTs.
- **Conflict of Interest 2d**: SBTi prioritizes its own methods, which do not integrate historic emissions, over methods that integrate them to enact climate justice

**Conflict of Interest 3: Sole Validator**

Now, after addressing this laundry list of instances where SBTi prioritizes private interests (including its own) over the public interest, it is now time to consider the question of SBTi as the sole validator of SBTs. As demonstrated above, SBTi long ago acknowledged the *inherent* conflict of interest in serving as standard setter *and* validator – an *overarching* conflict of interest that triggers a cascade of further conflicts of interest.

Specifically, SBTi leverages its position as standard setter to *illegitimately monopolize* the validation role, prioritizing its own private interest in revenue generation *over* the public interest of an open marketplace. Essentially, SBTi uses its privileged position as the *de facto* standard setter to *enclose* a commons (validation of science based targets), instead of leaving this commons open for broad engagement by any and all validators, who have the right to engage on equal terms, without the standard setter illegitimately leveraging its position for advantage.

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[25] Saphira Rekker, M. C. Ives, et al. Measuring corporate Paris Compliance using a strict science-based approach. *Nature Communications*. Volume 13, Article Number 4441. 10 August 2022. https://doi.org/10.1038/s41467-022-31143-4

[26] Climate Action Tracker *op cit*

[27] Simon Evans. Analysis: Which countries are historically responsible for climate change? *Carbon Brief*. 5 October 2021. https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change/

SBTi's announcement[28] yesterday (13 September) of its decoupling of its standard setting from its validation does *absolutely nothing* to resolve this conflict of interest, as SBTi remains the *exclusive* validator, earning this privilege not on merit, but *only* on its standard-setter role. This Committee's concerns remain utterly unresolved by this announcement – which raises concerns about SBTi's prioritization of performative perception over substantive responsiveness.

Indeed, it is further concerning that the response from SBTI CEO Luiz Amaral to the Committee's Letter of 12 July 2023[29] remains intransparent now, a full two months later. My understanding is that the SBTi response will be made available with redactions, which raises the question: why does a not-for-profit entity that ostensibly serves the public interest need to hide information from the public it ostensibly serves?

**Remediation Options**

Having clearly laid out the myriad structural dysfunctions with SBTi, this Committee faces the question: can these deeply entrenched problems be remediated?

SBTi would like us to believe so. But SBTi's announcement makes it clear that, of its own accord, it will only enact cosmetic changes that leave structural flaws intact. SBTi seems constitutionally incapable of advancing the public interest over private interests (including its own and its clients – that latter now being well represented at the Board level with 2 corporate CEOs as Trustees, including the Chair, yet no representation by stakeholders most impacted by climate breakdown, and amazingly, no climate scientists…) SBTi has clearly inculcated a culture of conflicts, so it is unrealistic to expect this DNA to be genetically altered by superficial tweaks.

I believe it is the Committee's responsibility to *require* changes that *actually* resolve the problems, at their core, if the Regulation is to achieve its purpose. I therefore propose some options for the Committee to consider, dealing first with the standards side of the SBTi house, then its validation side, before scoping back to the Regulation itself.

**Standards Remediation**

The simplest remediation is for **SBTi to remove its barring the use of the CSO method**, and to explicitly allow use of this method that the two extant comprehensive scientific studies of SBT methods finds the strongest, and which enables the integration of historic responsibility If SBTi does not do so voluntarily, the US government could regulate this stipulation.

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[28] Science Based Targets initiative. *Corporate climate action gets a boost with upgrade to target validation and standard setting*. Press release. 13 September 2023.
https://sciencebasedtargets.org/news/corporate-climate-action-gets-a-boost-with-upgrade-to-target-validation-and-standard-setting

[29] Frank Lucas, Chair, US House of Representatives Committee on Science, Space, and Technology. *Letter to SBTi CEO Luiz Amaral*. 12 July 2023.
https://republicans-science.house.gov/_cache/files/1/b/1b998f8d-5543-4f86-b5cf-1bc81c95e668/8101142B8EAFE7E018000FAE441F9656.2023-07-12-fl-to-sbti-emission-reduction-targets-.pdf

If SBTi claims that its research identified significant problems with the CSO method, then **the Committee can require SBTi to disclose the data and analysis it applied to make this claim**. I have been asking SBTi for said data and analysis for more than 5 years now, and SBTi has refused to disclose it.

This points to a related remediation: **require transparent disclosure of the data, analysis, and method used in company SBTs**, so that they can be independently replicated and verified, applying the scientific method.

Rounding this out further, **SBTi should allow the use of *any and all* SBT methods that are scientifically robust and valid** – both independent methods and methods created by SBTi. (And if the SBTi methods are found to be insufficiently robust and/or valid, SBTi should bar the use of its own methods – or fix the methods to resolve the concerns.) Accordingly, SBTi should set baseline criteria for robust valid SBT methods. This function could also be played by a government entity instead.

**Validation Remediation**

SBTi's very recent separation of its standard setting function from its validation function is *utterly insufficient*, given that this leaves intact the motivating concern of this Committee: namely, SBTi's illegitimate monopolization of the validation marketplace. Accordingly, the Committee could seek the requirement of **SBTi open sourcing its validation criteria so that independent validators can validate SBTs in an open, competitive marketplace**.

**Regulation Remediation**

As noted at the outset, the Regulation regulates two ends of the equation – emissions disclosure and target setting – leaving a huge gap in the middle, where attention *should* be focused. Specifically, a necessary remediation is for the Regulation to expand its scope to include **assessment of performance against targets**.

**Regulatory Authority**

Some of this remediation may require implementation by government bodies, such as the Environmental Protection Agency (EPA). The Regulation may therefore need to include authorization and budgeting to support the necessary infrastructure for this implementation.

**Risk Insulation**

Given the recent historical precedent of a Presidential Administration gutting regulatory agencies (such as the EPA) in ways that undermine the implementation of important Regulations, I urge this Committee as a whole (the Minority and Majority) to insulate against the risk of reenactment of such undermining of the *necessary* regulatory apparatus of the state. After all, regulation is a natural phenomenon – for example, our bodies self-regulate

to maintain healthy temperatures for sustaining our lives, just as earth systems self-regulate to maintain dynamic temperature balance conducive to planetary life overall. It only follows that this Committee has a civic and ethical responsibility to protect the regulatory functions of the US government, such that it supports the thriving of life.

Thank you very much for your attention and your hard work to advance and uphold scientific integrity for the common good.

Sincerely,

Bill Baue
Senior Director, r3.0 (Redesign for Resilience & Regeneration)
Original Instigator, Science Based Targets initiative

**Appendix**

**SBTi Technical Advisory Group (TAG) Consultation Call. 2 April 2019.**[30]

(Timestamps provided in parentheses after the speaker's name. The transcript is edited to correct auto-transcribe mistakes. Emphasis is added.)

> **Bill Baue** (54:06) Is the validation opening up to third party validation or assurance, or is this going to be handled in-house by SBTi.
>
> **Cynthia Cummis** (54:20) Yeah Bill that's still our intention eventually, but we still -- our plan is to work on developing a SBT standard, and then once we have that in place, **we can outsource this target validation process and have third party verifiers do that** but we don't feel like we're ready to outsource that process until we have a standard in place that verifiers can follow.
>
> **Bill Baue** (54:50) Gotcha. And you're confident that the pipeline, you'd be able to manage that and not be overwhelmed internally.
>
> **Cynthia Cummis** (54:58) We yeah we do now because **we're charging a fee for the target validation so that enables us to ramp up our capacity.**
>
> **Bill Baue** (55:06) Ok. **I have voiced in the past concern that the fee and validation by the standards setter does step into tricky territory: when you're setting the standard and assuring it, that can be perceived as a red flag.** I understand why you're doing that, but I just encourage…
>
> **Cynthia Cummis** (55:34) **Yeah, yeah. I understand that. Yeah. Yeah.**
>
> **Alexander Farsan** (55:39) I think it's really an interim solution, while we get ready to [inaudible] it out. I think we basically weigh the risk of outsourcing it prematurely against **the very valid point that this isn't best practice to have these functions sitting so closely together.**
>
> **Cynthia Cummis** (56:02) Yep. And the criteria have been evolving so quickly that we're still getting our hands around what we think is best practice. So it's been somewhat premature to develop a standard at this point, I think we're getting closer to being ready for that. We've just had trouble fundraising for that activity. So that's why I haven't gotten underway yet.

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[30] Science Based Targets initiative. *TAG [Technical Advisory Group] Consultation Call*. April 2019. 2 April 2019.
https://wwf.zoom.us/recording/play/eZw6WSR8MP0q7OcNX2gmrhA40LHtV1aHb0_S8kEYv8Ocl2XsEzMd_HECwLi8WZ9t?continueMode=true

REPORT

# Russia's Quiet War Against European Fracking

Environmentalists trying to block shale gas exploration across Europe are unknowingly helping Putin maintain his energy leverage over the continent.

By **Keith Johnson**



JUNE 20, 2014, 7:08 PM

Russia is trying to maintain its energy stranglehold over Europe by backing movements across the continent to demonize fracking, the head of NATO alleged. It is part of Russia's broader use of soft power and covert means to complement its more overt efforts to reassert influence in Europe and keep countries there from developing alternatives to an energy addiction worth $100 million a day to Moscow.

"I have met allies who can report that Russia, as part of their sophisticated information and disinformation operations, engage actively with so-called non-government organizations — environmental organizations working against shale gas — obviously to maintain European dependence on imported Russian gas," NATO chief Anders Fogh Rasmussen said after a Chatham House speech this week.

NATO officials said Rasmussen's remarks were meant to underscore NATO's growing unease with Europe's energy security situation. "Clearly, it is in the interest of all NATO allies to be able to have adequate energy supplies. We share a concern by some allies that Russia could try to obstruct possible projects on shale gas exploration in Europe in order to maintain Europe's reliance on Russian gas," a

:he practice,
al cocktail at

high pressure to break apart shale formations deep underground, also generates plenty of environmental opposition. Critics say fracking can poison underground stores of drinking water.

In Europe, that opposition is particularly fierce, both because environmental groups have more political power than in the United States and because higher population densities magnify the possible damaging effects of the drilling practice. Some countries have banned fracking outright; others,

including France and Germany, have imposed onerous regulations that effectively make the practice illegal, though they are reconsidering fracking in light of the standoff with Russia over Ukraine.

Russian energy firms and officials, as well as Kremlin-controlled media, have lambasted fracking on environmental grounds for years. Top Gazprom officials and even Russian President Vladimir Putin have attacked the technology, which, if adopted, could ease Europe's dependence on Russian gas.

But one thing has for years puzzled energy experts: Well-organized and well-funded environmental opposition to fracking in Europe sprang up suddenly in countries such as Bulgaria and Ukraine, which had shown little prior concern for the environment but which are heavily dependent on Russia for energy supplies. Similar movements have also targeted Europe's plans to build pipelines that would offer an alternative to reliance on Moscow.

"It's very concrete; it relates to both opposition to shale and also trying to block any alternative pipelines with environmental challenges," said Brenda Shaffer, an energy expert at Georgetown University. "There is a lot of evidence here; countries like Bulgaria, Romania, Ukraine being at the vanguard of the environmental movement is enough for it to be conspicuous," she said.

Bulgaria's anti-shale movement is particularly telling. The country initially embraced fracking as a way to develop its own energy resources and reduce reliance on Russia, even signing an exploration deal with Chevron in 2011. But then came an eruption of seemingly grassroots environmental protests and a televised blitz against fracking. In early 2012, the government reversed course and banned the practice.

y of
tal groups

In Ukraine, for example, anti-fracking movements became more organized and better funded just as the government worked to finalize shale gas deals with Western energy firms, officials there say. In Lithuania, "exactly the same thing is happening," said a government official, who described the mushrooming of anti-shale billboards and websites there as "an integrated, strategic communications campaign." As in Bulgaria, the well-funded groups organized screenings of *Gasland* to galvanize opposition to fracking.

"All of a sudden, in societies that never did grassroots organization very well, you saw all these NGOs well-funded, popping up, and causing well-organized protests," said Mihaela Carstei, an energy and environment analyst at the Atlantic Council.

To be sure, much of Europe's anti-fracking movement is motivated by genuine environmental concerns, just as in the United States; much of that opposition was catalyzed by the controversial 2010 anti-shale documentary *Gasland*. There are fears about fracking's effect on groundwater and the link between fracking and increased seismic activity. France, for instance, banned fracking before Bulgaria. And despite the Ukraine crisis and the rumblings of pro-fracking sentiment from some senior government officials, which could open the door to France rethinking the ban, fracking is still off the table there for now. Environmental groups such as Greenpeace scoff at the NATO chief's allegations, saying that they oppose fracking for sound environmental reasons. What's more, there's little love lost between Greenpeace and Russia, because Moscow detained dozens of the group's green activists last year.

"I wouldn't underestimate the role that Russia plays in shale gas in Europe, but I wouldn't overestimate it, either," said Andreas Goldthau, an energy expert at Harvard University's Belfer Center who has extensively researched shale gas policies in Europe. "Overall, particularly in Bulgaria and Romania, the causes of shale's problems are varied; it's not only the Russians coming in and trying to start protests."

Ultimately, Russia's efforts to derail Europe's alternative pipeline projects, more than its possible support for anti-fracking groups, represent a more immediate threat to Europe's efforts to diversify its energy supplies, Shaffer said.

"These rival projects are even more of a threat than fracking because shale gas will take a long time to develop, but these projects will soon bring gas to Europe; they are practical and concrete," she said.

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**Keith Johnson** is a deputy news editor at *Foreign Policy*. Twitter: @KEJ_FP

Boards, Policy & Regulation | Sustainable Markets | Boards | Climate Change | ESG Investors

# Group judging corporate climate claims overhauls itself after criticism

By Tommy Wilkes and Ross Kerber

September 13, 2023 3:47 PM EDT - Updated 2 days ago

[1/2] FILE PHOTO-Enel CEO Francesco Starace speaks during the Reuters NEXT Newsmaker event in New York City, New York, U.S., December 1, 2022. REUTERS/Brendan McDermid/File Photo Acquire Licensing Rights

Summary

- SBTi to separate validation from standard setting
- Group has faced concerns about conflicts of interest, capacity
- More firms announcing net zero plans amid greenwashing worries

LONDON/BOSTON, Sept 13 (Reuters) - The group that has become the go-to judge of corporate climate targets globally is separating itself into two and overhauling its governance in a bid to address conflict of interest concerns and speed up the time it takes to assess company plans.

Businesses, often under pressure from shareholders, have been rushing to commit to reducing their carbon emissions, typically to zero on a net basis by 2050, with interim targets for cutting emissions from now until 2030.

For these plans to have credibility amid accusations that many firms are greenwashing, scientists, investors and climate groups say companies need external validation of their emission reduction plans.

The Science Based Targets initiative (SBTi) has emerged as a key group setting standards for targets and deciding whether companies' plans are good enough, raising concerns about its ability to make assessments as independently and robustly as possible and whether it can cope with a backlog of approvals.

Under plans unveiled on Wednesday, SBTi has incorporated a new company in the UK to "safeguard impartiality." The fee-charging part validating corporate targets will be managed by a subsidiary while standard setting will sit within the new company.

The SBTi has also appointed a chair of its board of trustees, naming Francesco Starace, a partner at EQT Infrastructure and ex-CEO of Italian energy giant ENEL, and two independent trustees.

"The SBTi plays an important role in encouraging ambitious corporate climate action, which relies on credible target validation and robust standard setting," Starace said.

The group said it plans to grow its validation capacity amid soaring demand - last year saw an 87% jump in the number of firms setting climate targets.

SBTi's standard-setting processes will be redrawn, and the group will publish standard-setting procedures following the appointment of an independent body to approve SBTi standards.

Established by several climate groups including the World Wide Fund for Nature and the United Nations Global Compact, the SBTi charges companies a fee for validating their targets. Its funders include the Bezos Earth Fund, IKEA Foundation and Bloomberg Philanthropies.

The group has also faced criticism about the transparency of its methods.

Bill Baue, a vocal critic and sustainability activist who was a technical adviser to the initiative until 2020, told Reuters that the separation would not tackle the "deeper problem" of SBTi effectively monopolising the validation process.

He also said that it was a mistake to only appoint trustees who represent SBTi's client base while neglecting those living in areas hit hard by climate change.

But James Parker, head of sustainability at carbon accounting software platform Minimum, said the appointment of the new trustees -- including Ivan Duque, a former president of Colombia -- matches a current demand for stronger corporate targets.

Separating the validation and standard-setting parts of the organization should also help the organization's impartiality, Parker said.

Reporting by Tommy Reggiori Wilkes in London and Ross Kerber in Boston; Editing by Alex Richardson, Elaine Hardcastle and Mark Porter

Our Standards: The Thomson Reuters Trust Principles.



America now in prolonged state of political violence
03:55

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04:14


Images of July

Sustainability ›

## TikTok fined 345 million euros over handling of children's data in Europe

Technology · September 15, 2023 · 8:13 AM EDT

TikTok has been fined 345 million euros ($370 million) for breaching privacy laws regarding the processing of children's personal data in the European Union, its lead regulator in the bloc said on Friday.

Sustainable Finance & Reporting
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9:17 AM EDT

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expertise, and industry defining technology.

experience on desktop, web and mobile.

from worldwide sources and experts.

relationships and human networks.

U.S. Chamber of Commerce

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February 13, 2023

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*Via* https://www.regulations.gov

**Re: FAR Case 2021-015**
**Proposed Rule, Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk; 87 Fed. Reg. 68312-68334 (November 14, 2022)**

Dear Ms. Field, Mr. Tenaglia, Mr. Koses, and Ms. Jackson:

The U.S. Chamber of Commerce appreciates the opportunity to comment on the Federal Acquisition Regulatory Council's proposal ("Proposed Rule") to require significant and major contractors to make climate-related disclosures and to require major contractors to set targets to reduce greenhouse gas ("GHG") emissions. Under the proposal, satisfying these requirements would be a condition of eligibility for federal government contracts.

The Chamber represents a broad spectrum of businesses, including federal contractors large and small, that provide products and services across industries such as aerospace and defense, telecommunications, information technology, engineering services, food and hospitality, pharmaceuticals, biotechnology, healthcare, energy, and many more. We continue to actively collaborate with our members and other stakeholders to promote practices, policies, and technology innovations across industry and

government that address our shared climate challenges, particularly to reduce greenhouse gas emissions at the pace of innovation.

It is vital that citizens, governments, and businesses work together to reduce the risks associated with climate change and ensure that America is on the path to a sustainable and prosperous future. American companies are already playing a crucial role in developing innovations and approaches to reduce GHG emissions and spurring evolution of climate disclosures. Companies are also increasingly reporting more information to the public about their efforts to reduce their GHG emissions. Many have also made forward-looking statements and commitments to reduce their emissions over time. These commitments have helped drive progress to address climate change over the last decade. While industry is making significant progress, regulatory decisions must always be informed by a careful analysis of the available alternatives, outcomes, and cost-benefit tradeoffs to ensure that optimal policies are implemented. Such regulatory decisions also must be made within the bounds of agencies' legal authorities. We are concerned that the Proposed Rule fails to strike the right balance.

While the Federal Acquisition Regulatory Council ("Council") seeks to further the worthwhile end of mitigating the potential effects of global climate change, the Proposed Rule itself is an inappropriate and inefficient means of doing so, for several reasons.

*First*, the Proposed Rule would impose immense costs on government contractors of all sizes, costs that would be passed on to the government and ultimately to taxpayers. This would undermine rather than advance the goal of an economic and efficient system of contracting that underpins the Federal Property and Administrative Services Act ("Procurement Act"). Detailed disclosure of climate-risk assessment processes and risks, inventorying and disclosing scope 1, 2, and 3 GHG emissions, developing and implementing "science-based" emissions-reduction targets, and paying fees to the private entities to whom the Council requires many of the disclosures be submitted, among other things, would require thousands of employee hours and saddle contractors with billions of dollars in added implementation and compliance costs. The government's acquisition costs would rise as a consequence, and some contractors, and companies in the supply chain, would likely drop out of the market entirely, weakening the competitive forces that keep prices down. The Council substantiates no offsetting benefits to speak of. Although the Council suggests that the proposed disclosures "may" lead to a reduction in GHG emissions, the Proposed Rule provides no evidence that that would actually happen. Even if it did, the Council provides no "reasoned determination that the benefits of the intended regulation justify its costs."[1]

*Second*, the Council's pursuit of goals beyond economic and efficient contracting exceeds its legal authority. While the Council can promulgate specific, output-

[1] Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993).

related standards to help ensure that the government acquires the goods and services it needs at appropriate prices, the Council has no authority to use government contracts as a vehicle for furthering climate policies. The Council's attempt to do that here not only exceeds the Council's statutory authorization, but also raises significant issues under the Constitution. The Proposed Rule would compel contractors to speak on matters of significant public debate, and would force contractors to associate with, and likely follow, the speech "guidelines" of certain private climate organizations whom the Council would deputize to do most of the standard setting and verification. This unusual arrangement would violate contractors' First Amendment rights and would transgress longstanding legal limitations on delegating legislative and rulemaking authority to private entities.

*Third*, and finally, the Proposed Rule violates the Administrative Procedure Act ("APA") in several respects. Most significantly, the Council's cost-benefit analysis is deeply flawed. The Council vastly underestimates the costs. It misreads or overlooks estimates, relies on stale data, ignores millions of dollars of costs altogether, and inconsistently and inaccurately frames the costs that it does consider. For example, the Council alludes to benefits from potential GHG reductions, but fails to acknowledge or quantify the costs required to create such reductions. As documented below, the actual costs of the Council's proposal will *exceed $1 billion per year*.[2] The benefits side of the ledger fares no better. The cost savings the Council cites are speculative and unlikely to materialize. The Council also fails to grapple with (or adequately acknowledge) the duplicative, and even conflicting, requirements the Securities and Exchange Commission (SEC) is simultaneously proposing to impose on public companies.

Other aspects of the proposal are equally flawed. The Council fails to account for the disproportionate burden that the Proposed Rule would impose on small businesses, both directly as federal contractors and indirectly as suppliers of major contractors. The rule would outsource most of the standard setting to private entities that the federal government does not control, regulate, or monitor. It would require contractors, at significant cost, to collect and analyze data to fill out detailed mandatory filings. It would undermine national-security interests. It would set compliance deadlines that are impossible to meet. It would require contractors to set science-based targets, even if they do not have a viable plan to meet the targets in the short timeframe allowed, and it would do all of this without the Council having adequately considered numerous less restrictive ways of pursuing the Council's interests.

These and other flaws counsel in favor of abandoning the proposal and starting again. The Chamber would welcome the opportunity to work with the Council on identifying a constructive path forward.

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[2] *See infra* Part III.A.1.

## I. The Proposed Rule is immensely costly and is contrary to the Procurement Act's goals of an economic and efficient system of government contracting.

The Proposed Rule would saddle government contractors with *billions* of dollars in costs,[3] exclude firms that are fully capable of meeting the government's procurement needs from the procurement process and *increase* procurement costs to the Government. This is "worlds away" from what the procurement laws, in particular the federal Procurement Act, are "all about—creating an 'economical and efficient system' for federal contracting."[4]

### A. The Proposed Rule is exceptionally burdensome.

As discussed in greater detail below,[5] the Proposed Rule would impose significant burdens on government contractors, who would be required to divert thousands of employee hours from productive activities—the efficient provision of property and services to the government—to compiling and disclosing information related to climate change.[6] This would be an enormously costly distraction. By the Council's own estimate, the Proposed Rule would require nearly 6,000 contractors to implement systems and policies for inventorying and publicly disclosing scope 1 and scope 2 GHG emissions.[7] These disclosures alone would add hundreds of thousands of dollars to annual total compliance costs for each contractor,[8] resulting in nearly $1 billion in total costs in the first year of implementation alone.[9]

For many firms, those costs would just be the start. For so-called "major" contractors—contractors that receive more than $50 million in government contracts[10]—the Proposed Rule would also require an annual "climate disclosure."[11] In conjunction with the private reporting standards the proposal incorporates, that disclosure would encompass 11 "key climate-related financial disclosures," including: governance systems; processes for identifying, assessing, and managing risks; identification of climate risks and their financial impacts and required expenditures; climate-related scenario analysis; how climate-related risks and opportunities are influencing business strategy and financial planning; disclosure of targets and goals; scope 1, 2, and "relevant" scope

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[3] *See, e.g.*, Proposed Rule, 87 Fed. Reg. 68,312, 68,324 (Nov. 14, 2022) (conceding more than $3 billion in added costs over the next 10 years); *infra* Part III.A.1 (documenting more than $1 billion in costs *per year*).
[4] *Georgia v. President of United States*, 46 F.4th 1283, 1296 (11th Cir. 2022) (quoting 40 U.S.C. § 101).
[5] *See infra* pp. 17-21.
[6] *See, e.g.*, RIA 37-38 tbls. 9-10.
[7] *See* Proposed Rule, 87 Fed. Reg. at 68,321.
[8] *See* RIA 22-29, 33-36 & tbls. 6-7.
[9] *See infra* pp. 17-21.
[10] Proposed Rule, 87 Fed. Reg. at 68,313.
[11] *Id.*

3 GHG emissions; and progress towards targets.[12] Major contractors would have to submit this disclosure by filling out the questionnaire of a private entity—CDP—and by paying CDP thousands of dollars in fees.[13] The Proposed Rule would further require major contractors to develop "science-based targets" for reducing GHG emissions in accordance with specific and stringent requirements developed and maintained by a private entity, the Science Based Targets initiative ("SBTi") (which is not subject to the legal and political constraints that apply to federal administrative agencies)[14] and to have those targets "validated" by the same entity. All in all, these additional requirements would tack millions of dollars onto each "major" contractor's total annual compliance spending.

Scope 3 disclosure alone would be a massively burdensome undertaking and very well may be impossible for contractors to accomplish. Scope 3 emissions, also known as value-chain emissions, are GHG emissions occurring both upstream and downstream of a contractor's operations. Calculation methods for scope 3 categories are immature, highly variable, use many assumptions and estimates, and continue to evolve. Many scope 3 categories, moreover, lack accessible and reliable source data, resulting in emissions calculations that are based on unvalidated assumptions and often use gross estimates, thereby significantly reducing their meaning and value. To track such emissions on a level concomitant with the liability that would attach to the public disclosure of this information, contractors would need to seek to amend their contracts with customers, suppliers (including many small businesses), and other third parties to require the sharing of climate-related data—a process that could impact thousands of contracts, require "tens of thousands of hours" of a contractor's employee time, and place an enormous burden on the small businesses that supply major contractors.[15] Because the Proposed Rule does not address third-party compliance, contractors will struggle to obtain emissions information from sub-contractors and other third parties (including, in some instances, foreign governments), who may resist any attempt to contractually require their cooperation in the absence of a prime-contract obligation.[16]

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[12] CDP, *CDP Technical Note on the TCFD* 9-23, https://cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/001/429/original/CDP-TCFD-technical-note.pdf?1512736184.

[13] Proposed Rule, 87 Fed. Reg. at 68,314 (requiring a major contractor to "submit[] its annual climate disclosure by completing those portions of the CDP Climate Change Questionnaire that align with the TCFD as identified by CDP"); CDP, *Admin Fee FAQ*, https://www.cdp.net/en/info/admin-fee-faq.

[14] Proposed Rule, 87 Fed. Reg. at 68,314.

[15] ConocoPhillips Comments 14 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

[16] At least some contractors would therefore reasonably expect to be in a position to submit only incomplete scope 3 emissions data. Any final rule must include a safe harbor for cases in which it is impracticable, unduly burdensome, or unreasonably costly to obtain and submit complete scope 3 data.

This information-gathering process alone would cost millions of dollars, and that is just the first step. On an annual basis, to properly inventory scope 3 emissions, a contractor would need to: retain outside consultants; dedicate at least one full-time employee in the supply-chain department to track emissions related to goods purchased; task a full-time environmental specialist to interpret GHG-disclosure guidance for the business and develop tools for data management; enlist the IT department for data acquisition and management; develop local environmental teams to inventory local scope 3 emissions; update lifetime emissions of its products and services; and dedicate a steering committee to review progress and review reports.[17] This would be an enormous burden, as documented by commenters in an ongoing rulemaking of the SEC, but is not accounted for at all in the Council's estimates.

The science-based-targets requirement will compound that burden immensely. Contractors would need to develop targets for reducing scope 1, scope 2, and two-thirds of scope 3 GHG emissions to a level that is "consistent with the level of decarbonization required to keep global temperature increase to 1.5°C."[18] These targets must meet the SBTi's detailed criteria for what constitutes a "science-based" target, including the portion of scope 3 emissions that need to be addressed by a contractor's targets, the duration of the target period, and the annual reductions to be achieved for each "scope." Setting these targets would require contractors—with the assistance of retained consultants and experts—to complete approximately 50 pages of written questions (posed by the private entity SBTi) and to perform numerous complex calculations.[19] Some of the questions are multi-part, such as one question that asks—when a scope 3 target must be set—for the submitter to calculate scope 3 emissions across 15 different categories over at least one calendar year.[20] The SBTi also charges a validation fee starting at $9,500 for large companies and $1,000 for small and medium businesses.

Setting a science-based target is just the start—*meeting* it would require major contractors to incur additional costs, costs that are not accounted for in the Proposed Rule. The proposal anticipates that major contractors would undertake good-faith efforts to meet the targets and "monitor progress on reaching the target[s]."[21] This would require major contractors to develop decarbonization strategies, implement emission-reduction measures, and spend capital to drive progress towards the targets. Achieving reductions in scope 3 emissions would be particularly onerous since those emissions are not under the control of the contractor, and therefore the contractor has much less

[17] Williams Companies Comments 14 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

[18] SBTi Criteria and Recommendations § V.I (Oct. 2021), https://sciencebasedtargets.org/resources/files/SBTi-criteria.pdf.

[19] SBTi Near-Term Target Submission Form and Guidance (Dec. 2021).

[20] *Id.*

[21] Proposed Rule, 87 Fed. Reg. at 68,318.

ability, if any, to reduce them. These, too, are weighty burdens for which the Council must fully and carefully account in promulgating the Proposed Rule.

### B. The costs of the Proposed Rule would undermine efficient government contracting.

The massive burden imposed by the Proposed Rule would undermine, rather than further, the Procurement Act's goals of economic and efficient contracting. To begin, contractors would "pass on" much of the "regulatory" costs to the federal government (and, ultimately, to taxpayers) through higher contract bids.[22] This would make the procurement system *less* economical and efficient, as the government would end up paying more—to offset contractors' increased compliance costs—for the same property and services. By the Council's own (mistaken)[23] estimate, contractors would be saddled with hundreds of millions of dollars of added costs every year[24]—costs that would ultimately be baked into the prices the government pays for property and services.

Economy and efficiency would also suffer because of a reduced pool of potential contractors. Under federal regulations, government "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only."[25] The Proposed Rule would significantly shrink that pool of eligible contractors, as any noncompliance with the proposal could render a contractor not "responsible."[26] Some contractors would voluntarily drop out of the market rather than make climate-related certifications that could later be second-guessed in False Claims Act lawsuits that can be costly even when they are baseless. This culling of eligible providers would degrade economy and efficiency in two ways.

*First*, by "exclud[ing] contractors who are otherwise capable of meeting an agency's needs,"[27] the Proposed Rule would decrease competition. This "works against the [Procurement] Act's oft-repeated priority of achieving 'full and open competition' in the procurement process,"[28] and would lead to higher contract prices.

*Second*, and relatedly, a decrease in eligible contractors would decrease the procurement options available to the government. As federal law recognizes, a "variety of

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[22] *Acadia Motors, Inc. v. Ford Motor Co.*, 44 F.3d 1050, 1056 (1st Cir. 1995); *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979) (noting that pollution-control regulations imposed without regard to cost of compliance could lead to the "doubling or tripling [of] the cost of motor vehicles to purchasers").

[23] *See infra* pp. 17-21.

[24] *See* RIA 41.

[25] 48 C.F.R. § 9.103(a).

[26] *See* RIA 45.

[27] *Georgia*, 46 F.4th at 1297.

[28] *Id.*

products or services" can perform similar "functions."[29] Typically, the government benefits from this optionality, as it can choose the product or service that is *most* suitable to its particular needs. The Proposed Rule, however, would take many of these options away, leaving the government with fewer choices and potentially less efficient products and services.

### C. There are no offsetting benefits to the vast costs that the Proposed Rule would impose.

The Chamber believes that American businesses can and must play a vital role in creating innovative solutions and reducing GHG emissions to protect our planet. We've outlined a comprehensive approach to climate solutions[30] and are fully engaged in international dialogue. However, the most effective solutions are those achieved through collaboration between government and businesses, not by unilateral regulation, in this case under the Procurement Act, which is designed to create "an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services."[31] The Council does not identify any offsetting gain in economy or efficiency in government contracting that would flow from the Proposed Rule to offset its tremendous costs.

The Council suggests that "[c]ompanies who are required to publicly disclose their GHG emissions and climate risks *may* be prompted to thoroughly investigate their operations and supply chains, which *may*, in turn, reveal opportunities to realize efficiencies,"[32] but that is "sheer speculation."[33] Aside from observing that "increased public transparency and accountability *may* prompt suppliers to take action following a 'what gets measured gets managed' mantra,"[34] the Council offers no evidence to suggest that contractors would actually curtail their emissions beyond reductions that would otherwise occur. The Council, to be sure, speculates that emissions reductions would lead to cost savings,[35] but that assertion undermines the rationale for the Council's proposal. The Procurement Act is entirely premised on the understanding that "full and open competition" leads to better quality and lower price.[36] Accordingly, if reducing emissions creates cost savings, competitive and market pressures are likely to have *already* driven contractors to take steps to realize those savings, rendering additional regulation unnecessary at best and overtly burdensome at worst. This is an important part of the analysis that the Council completely ignores. It cannot reasonably claim that the Proposed Rule would reduce contractors' own costs without first explaining why the

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[29] 41 U.S.C. § 3306(a)(1).
[30] https://www.uschamber.com/climate-change/our-approach-to-climate-change.
[31] 40 U.S.C. § 101.
[32] Proposed Rule, 87 Fed. Reg. at 68,319 (emphases added).
[33] *Sorenson Commc'ns, Inc. v. FCC*, 755 F.3d 702, 708-09 (D.C. Cir. 2014).
[34] Proposed Rule, 87 Fed. Reg. at 68,318 (emphasis added).
[35] *Id.* at 68,319.
[36] 41 U.S.C. § 3306(a)(1).

competitive procurement process—together with contractors' competition for private sector customers—has not already incentivized companies to take the proposed measures.

The Council also asserts that the Proposed Rule would somehow mitigate "supply chain vulnerabilities,"[37] but, again, the Council lacks any evidence to support that assertion. The Council observes that, in 2012, "Superstorm Sandy caused widespread damage to logistics and transportation networks throughout the Northeast, leading to major fuel shortages for agencies to overcome while providing critical Federal services."[38] Yet the Council does not explain how knowledge of the precise level of GHG emissions from thousands of contractors—along with hundreds of millions of dollars of other company-by-company disclosures—would have eliminated or reduced the harms that Hurricane Sandy inflicted on the supply chain. Indeed, the Council does not identify any step that anyone—government or contractor—would have taken in light of an annual climate disclosure that would have better "prepared[]" it for a destructive hurricane.[39] To the extent the Council suggests that the Proposed Rule would make hurricanes less likely or severe—by mitigating climate change—that suggestion is equally devoid of evidentiary support. Even if the rule *were* to prompt contractors to meaningfully reduce their GHG emissions (beyond the work that companies are *already* doing to address climate change), climate change is a *global* phenomenon. As the Council itself asserts, "[i]n the absence of more significant *global mitigation efforts*, climate change is projected to impose substantial damages on the U.S. economy, human health, and the environment."[40] The Council presents no evidence that the Proposed Rule would make any discernable difference in global emissions, and thus to global climate change.

## II. The Proposed Rule exceeds the Council's legal authority.

The Council's pursuit of other goals—beyond efficiency in government contracting—exceeds the Council's statutory authority and raises significant constitutional issues.

### A. The Council does not have statutory authorization to set climate standards.

The goal of the Proposed Rule is clear: "The objective of this rule is to implement the E.O. [14030]," which "target[s] ... a net-zero emissions economy by no later than 2050."[41] The Council emphasizes that "public and standardized disclosure" is "[t]he

[37] RIA 11.
[38] *Id.* at 12.
[39] *Id.*
[40] Proposed Rule, 87 Fed. Reg. at 68,319.
[41] *Id.* at 68,234-35.

foundation to properly analyze and mitigate climate risks" and "promot[e] environmental justice."[42] And "[m]itigating the effects of climate change by reducing emissions can provide important economic, ecological, and social benefits."[43] These may be commendable goals, but they have nothing to do with efficient government contracting, and the Council, therefore, has no authority to pursue them. Other matters, such as reductions in GHG emissions, are reserved to other agencies, such as the EPA.[44]

Congress has never authorized the Council to require contractors to address climate change as a condition of all procurement contracts. As the Eleventh Circuit recently explained in striking down a similar attempt to leverage the government's procurement authority to pursue other objectives—there, COVID-19 vaccination—the statutory procurement scheme "establishes a framework through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want."[45] That is the extent of the federal government's contracting authority. As noted, the Procurement Act seeks to create "an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services."[46] In line with that purpose, federal law generally requires agencies, in seeking goods and services providers, to use "competitive procedures" to "obtain full and open competition."[47] As part of those procedures, an acquiring agency must "specify its needs" and "develop specifications" that allow contractors to competitively bid "with due regard to the nature of the property or services to be acquired."[48] Once bids are submitted, an agency must award the contract "based solely on the factors specified in the solicitation."[49] These procedures may be "dry," the Eleventh Circuit has explained, but "they show what the Procurement Act is all about—creating an 'economical and efficient system' for federal contracting," a system where the federal government can obtain the specific products and services it needs at low cost.[50] That is, to paraphrase the Eleventh Circuit, "worlds

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[42] *Id.* at 68,312.
[43] *Id.* at 68,319.
[44] *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007) ("the Clean Air Act authorizes EPA to regulate greenhouse gas emissions [that] contribute to climate change").
[45] *Georgia*, 46 F.4th at 1295; *see also Louisiana v. Biden*, 55 F.4th 1017, 1026 n.25 (5th Cir. 2022) (recognizing the "compelling case" made by the Eleventh Circuit in *Georgia*). The Sixth Circuit recently reached the same conclusion, holding that the government's power to create an "'economical and efficient system' of procurement [] is internally focused, speaking to government efficiency, not contractor efficiency." *Kentucky v. Biden*, 57 F.4th 545, 553 (6th Cir. 2023). It explained that "the plain text of the Procurement Act does not confer the authority to promulgate a rule ... that simply makes contractors more efficient" but only rules that make "the government's *system of entering into contracts* for ... goods and services ... more efficient." *Id.* at 553-54 (emphasis added).
[46] 40 U.S.C. § 101.
[47] 41 U.S.C. § 3301(a).
[48] *Id.* § 3306(a)(1).
[49] *Id.* § 3701(a).
[50] *Georgia*, 46 F.4th at 1296.

away" from conferring a general authority on every agency to insert a term in every contract establishing climate-change standards.

What the procurement laws' text and structure demonstrate, the major questions doctrine confirms. The major questions doctrine is a "common sense" principle of statutory interpretation that teaches that Congress does not delegate to agencies highly consequential powers—including the power to resolve "major questions"—in "modest words, vague terms, or subtle devices."[51] To the contrary, when Congress "wishes to assign to an agency decisions of vast economic and political significance," Congress "speak[s] clearly."[52]

This is a major questions case. In arguing that the procurement laws empower the Council to "shift markets," "be a catalyst for adoption of new norms and global standards," "provide insights into the entire U.S. economy," and "achieve the target of a net-zero emissions U.S. economy by no later than 2050,"[53] the Council is claiming to have "'discovered in [ ] long-extant statute[s] an unheralded power' representing a 'transformative expansion in its regulatory authority.'"[54] The Council was established to assist in the direction and coordination of government-wide procurement practices in accordance with the Office of Federal Procurement Policy Act. Accordingly, the Council's authority has traditionally been understood to be limited to implementing the Procurement Act's framework "through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want."[55] The rule as proposed here would turn this regime on its head. Instead of setting standards that would apply given "the specific needs in a given project,"[56] the Council has asserted the authority to set baseline climate standards for all federal contractors, in pursuit of goals related to global climate change. There are many reasons to be "skeptic[al]" of such sweeping regulatory authority.[57]

The sheer magnitude of the economic consequences of the Proposed Rule provides further reason for concern. As the Supreme Court has emphasized, Congress does not lightly confer on an agency the authority to regulate a "significant portion of the American economy"[58] or to require "billions of dollars in spending" by private entities.[59] However, that is the exact authority that is claimed in the Proposed Rule. By the

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[51] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).
[52] *Id.* at 2605 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).
[53] RIA 2, 10.
[54] *West Virginia*, 142 S. Ct. at 2610 (cleaned up) (quoting *Util. Air*, 573 U.S. at 324).
[55] *Georgia*, 46 F.4th at 1295.
[56] *Id.* at 1297.
[57] *West Virginia*, 142 S. Ct. at 2609 (quoting *Util. Air*, 573 U.S. at 324).
[58] *Id.* at 2608 (quoting *Util. Air*, 573 U.S. at 324).
[59] *King v. Burwell*, 576 U.S. 473, 485 (2015); *accord West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

Council's own estimate, the Proposed Rule would hit federal contractors with more than $3 billion in added costs over the next 10 years.[60]

The "political significance" of the Proposed Rule is cause for additional skepticism.[61] If Congress intended to empower the Council to resolve the proper handling of climate-related issues—issues of "'earnest and profound debate' across the country"—it would have provided clear congressional authorization to that effect.[62]

Yet, Congress did not do so. The Council claims to have located this authority in three statutory provisions of the Procurement Act and related laws, 40 U.S.C. § 121(c), 10 U.S.C. chapter 137, and 51 U.S.C. § 20113, but none of these are apposite. The various provisions of Chapter 137 of Title 10 have been repealed and transferred. None of the transferred provisions come close to authorizing an agency to require climate-related disclosures as part of the government's procurement process. Section 121(c) and section 20113 are similarly unavailing. Section 121(c) permits GSA to "prescribe regulations to carry out this subtitle," and section 20113 similarly permits NASA to issue rules "governing the manner of its operations and the exercise of the powers vested in it by law." These generic grants of authority are not the type of "clear[]" congressional authorization that one would expect for the type of "highly consequential" authority asserted here[63]—the authority to condition all government contracts on pursuit of a global climate policy unmoored from the specific products or services the government seeks to acquire. Indeed, when "Congress *wants* to further" such a "policy among federal contractors through the procurement process—beyond full and open competition—it enacts *explicit* legislation."[64] Congress, for example, has passed specific statutes requiring "contractors for services to pay their employees the federal minimum wage,"[65] prohibiting the government from "contracting with any company that has criminally violated air pollution standards,"[66] and permitting agencies to "refuse to contract with firms that fail to meet certain cybersecurity qualifications."[67] Congress has taken no such steps with regard to climate change.

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[60] Proposed Rule, 87 Fed. Reg. at 68,324.
[61] *West Virginia*, 142 S. Ct. at 2605 (quoting *Util. Air*, 573 U.S. at 324); *accord id.* at 2620 (Gorsuch, J., concurring) (quoting *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022)).
[62] *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *accord West Virginia*, 142 S. Ct. at 2614; *id.* at 2620 (Gorsuch, J., concurring).
[63] *Georgia*, 46 F.4th at 1296.
[64] *Id.* at 1297 (emphases added).
[65] *Id.* (citing 41 U.S.C. § 6704).
[66] *Id.* (citing 42 U.S.C. §§ 7413(c), 7606).
[67] *Id.* (citing 41 U.S.C. § 4713).

The Executive Order that the Council cites[68] cannot, of course, supply the legal authority that Congress withheld;[69] instead, it further confirms that the Proposed Rule would effect what the Chief Justice has characterized as a "workaround" to circumvent Congress.[70] As the Chief Justice observed during oral argument,

> [A]s more and more mandates, [from] more and more agencies come into place, it's a little hard to accept the idea that this is particularized to this thing, that it's an OSHA regulation, that it's a CMS regulation, that it's a *federal contractor regulation*. It seems to me ... that the government is trying to work across the waterfront and it's just going agency by agency. ... I don't know that we should try to find ... [w]hat specific thing ... to say ... we're doing this because this is a *federal contractor*[.] *It seems to me that the more and more mandates that pop up in different agencies, ... I wonder if it's not fair for us to look at the ... general exercise of power by the federal government and then ask[,] why doesn't Congress have a say in this[?]*"[71]

As the Chief Justice suggested, if—to quote the Executive Order—the Executive Branch wants to "act to mitigate [climate-related financial risk] and its drivers, while ... spurring the creation of well-paying jobs and achiev[ing] [its] target of a net-zero emissions economy by no later than 2050,"[72] then it needs to obtain authorization to do so from Congress.

### B. The Proposed Rule would violate the Constitution.

The Proposed Rule also raises First Amendment and non-delegation problems, which further counsel against adoption.

#### 1. The Proposed Rule would infringe First Amendment rights.

The First Amendment "prohibits the government from telling people what they must say"[73] or with whom they must associate.[74] The Proposed Rule would violate these rights by forcing companies to engage in costly speech on a matter that is the subject of much political debate, to publicly associate with the political messages of a private organization, and to subject themselves to that organization's speech "guidelines." That

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[68] Proposed Rule, 87 Fed. Reg. at 68,312 (citing Exec. Order No. 14,030, 86 Fed. Reg. 27,967, 27,967 (May 20, 2021)).

[69] 86 Fed. Reg. at 27,970 ("Nothing in this order shall be construed to impair or otherwise affect ... the authority granted by law to an executive department or agency, or the head thereof ... .").

[70] Tr. of Oral Argument 79:14-81:12, *NFIB v. Dep't of Lab.*, No. 21A244 (U.S. Jan. 7, 2022).

[71] *Id.* (emphases added).

[72] Exec. Order No. 14040, 86 Fed. Reg. at 27,967.

[73] *Rumsfeld v. F. for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006).

[74] *Janus v. Am. Fed'n of State Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

the proposal arises in the contractor setting does not insulate it from First Amendment scrutiny; while the government has discretion in choosing its contracting partners, it may not reject a bid based on the contractor's exercise of its First Amendment rights.[75] Yet, that is exactly what the Proposed Rule would do.

Here, the Proposed Rule would explicitly disqualify from government procurement major contractors who decline to make "available on a publicly accessible website" certain statements regarding climate change,[76] including by completing the CDP Climate Change Questionnaire. This is a direct infringement on contractors' First Amendment rights.[77] Addressing climate change is an important issue that is the subject of robust political debate, including not only the specific consequences of climate change but also the responsibilities that corporations have to address it. By requiring contractors to annually "describe[] the entity's climate risk assessment process and any risks identified,"[78] and publicly commit to a science-based target even if they do not have technological or cost-effective means to achieve it, the Proposed Rule would force contractors into the middle of this debate, compelling them to discuss, at significant cost, issues that are often highly complex and fraught with uncertainty and controversy. The government's interests "*as contractor*" in no way justify this compulsion.[79]

The speech compulsion at issue here also raises heightened First Amendment concerns because the compelled speech would be used to "stigmatize" companies and attempt to "shape their behavior."[80] In *National Association of Manufacturers v. SEC*, for example, the SEC promulgated a rule requiring public companies to disclose whether certain "conflict minerals" used in their products originated in countries affected by the conflict in the Democratic Republic of the Congo by stating whether or not their products were "DRC conflict free."[81] The Commission had argued that the "conflict free" disclosure requirement survived First Amendment scrutiny because it served a legitimate interest—it might cause companies to "boycott mineral suppliers having any connection to this region of Africa," which would "decrease the revenue of armed groups in the DRC and their loss of revenue [would] end or at least diminish the humanitarian crisis there."[82]

The D.C. Circuit, however, disagreed. It dismissed the Commission's logical chain as "entirely unproven and rest[ing] on pure speculation."[83] It held that the

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[75] *See, e.g.*, *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378, 385 (5th Cir. 2006).
[76] Proposed Rule, 87 Fed. Reg. at 68,314.
[77] The Proposed Rule goes further than the proposed SEC rule, as the Proposed Rule would require public disclosures from public and private companies alike.
[78] Proposed Rule, 87 Fed. Reg. at 68,314.
[79] *Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 678 (1996).
[80] *Nat'l Ass'n of Mfrs. & U.S. Chamber of Com. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015).
[81] *Id.* at 545-47.
[82] *Id.* at 525.
[83] *Id.* at 525-26.

Commission's attempt to leverage a disclosure regime to "stigmatize" companies to "shape [their] behavior" made the speech compulsion even "more constitutionally offensive."[84] The same logic applies here. The Council describes a disclosure regime whose benefits are, at best, highly speculative. It openly states that one of the principal benefits of the regime is "increased public transparency *and accountability*," *i.e.*, public pressure and stigma.[85] It must be expected that some parties will use contractors' disclosures about emissions and their plans to address them as a basis to criticize the contractors or to call for increased regulation or other concerted action, whether by regulators or by the contractors themselves.[86] The conflict-free disclosure requirement failed in nearly identical circumstances, and this proposal faces a similar fate.

The Proposed Rule raises other First Amendment concerns as well. As discussed, the proposal would require contractors to submit "science-based" targets to a private organization, SBTi, for validation. Once a contractor's targets are validated, SBTi "publish[es] [the targets] on [its Companies taking action page] and ... partner websites."[87] That, in effect, forces contractors to associate with SBTi and its messages. While some contractors may wish to associate with SBTi's particular messages—for example, its message that "climate science sends a clear warning that we must dramatically curb temperature rise to avoid the catastrophic impacts of climate change"—others may prefer to "eschew association" with SBTi and its causes,[88] or simply prefer not to directly or publicly engage in this policy debate. The Council cites no reason why all major contractors should be forced to associate with a particular private action organization.

Potentially even more problematic, the Proposed Rule appears to subject contractors to SBTi's "communications guidance." SBTi is the only authority, under the Proposed Rule, that could validate (or renew validation of) a company's targets. SBTi makes clear that companies "*must* follow [SBTi's] guidance" about public communications.[89] Companies, for example, "may not claim to be net-zero in scopes 1 and 2 only,

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[84] *Id.* at 530.

[85] Proposed Rule, 87 Fed. Reg. at 68,318 (emphasis added).

[86] *See* Western Energy Alliance Comments 4-6 (June 15, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022-20131418-301593.pdf); *see also, e.g.*, Basit Mahmood, *There are 100 Companies Responsible for Climate Change, Activist Says*, Newsweek (Sept. 8, 2020), https://www.newsweek.com/climate-change-xr-extinction-rebellion-fossil-fuels-climategreenhouse-gasses-emissions-1530084; Alastair Marsh & Danielle Bochove, *Dear Bank CEO, You are Cordially Invited to Defund this Pipeline*, Bloomberg (July 1, 2021), https://www.bloomberg.com/news/articles/2021-07-01/how-climate-activists-pressure-banks-to-defund-the-oil-industry; Andrew Edgecliffe-Johnson, *Activists Target Public Relations Groups for Greenwashing Fossil Fuels*, Financial Times (Jan. 11, 2022), https://www.ft.com/content/f90562d6-6673-457a-901e-257eb4578d98.

[87] SBTi, *Set a Target*, https://sciencebasedtargets.org/step-by-step-process (last visited Feb. 13, 2023).

[88] *Janus*, 138 S. Ct. at 2463.

[89] SBTi, *FAQs*, https://sciencebasedtargets.org/faqs (Question: "Can we include the SBTi in our communications materials?") (last visited Feb. 13, 2023) (emphasis added).

or scope 3 only."[90] They may not "include any additional details that are not approved by SBTi when communicating [about] [their] target language." They may not talk about "carbon neutrality," unless their claim has been "validated by the SBTi." They may not even "[s]uggest that offsets ... will be counted by [the company] to achieve [its own] near-term science-based targets."[91] SBTi admits that, practically speaking, it "cannot police all communications about science-based targets all the time," but it pledges to try. When SBTi "see[s] a company ... [allegedly] mispresenting their science-based target(s) or commitment(s) in their external communications, [SBTi] will make contact" and demand a "correction."[92] Making such demands is permissible for a private organization that exercises no governmental power, but the Council does not explain how the government, consistent with the First Amendment, could subject companies to such detailed policing of their speech.

### 2. The Proposed Rule raises significant non-delegation problems.

The Proposed Rule's reliance on private entities to develop, revise, and enforce its provisions raises other constitutional issues. As the Supreme Court has long recognized, delegation of governmental authority to private entities is "delegation in its most obnoxious form";[93] "[f]ederal lawmakers cannot delegate regulatory authority to a private entity."[94]

Yet, the Proposed Rule would do exactly that. In contrast to the SEC's proposed disclosure requirements, which are "modeled in part" on recommendations of the Task Force on Climate-Related Financial Disclosure (TCFD), and "draw[] upon" the GHG Protocol,[95] the Proposed Rule would outsource to private climate organizations the authority to determine the content of the disclosures required for significant and major contractors to be eligible for government contracts. In conducting an inventory of their GHG emissions, for example, contractors would be required to "follow the GHG Protocol Corporate Accounting and Reporting Standard,"[96] a standard created by two private entities, the World Resources Institute and the World Business Council for Sustainable Development.[97] Major contractors would further be required to make an annual climate

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[90] SBTi, *SBTi Communications Guide for Companies and Financial Institutions Taking Action* 12, https://docs.google.com/document/d/1wAce1et-yyML_y_a-NyUVyr9oPep9hC5jo8ikCbiHrY/edit (last visited Feb. 13, 2023).
[91] *Id.* at 2.
[92] *FAQs*, SBTi, *supra* note 89.
[93] *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).
[94] *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015); *Ass'n of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring) ("there is not even a fig leaf of constitutional justification" for delegations of regulatory authority to "private entities").
[95] 87 Fed. Reg. at 21,345.
[96] 87 Fed. Reg. at 68,313.
[97] Greenhouse Gas Protocol, *About Us*, https://ghgprotocol.org/about-us.

disclosure that "align[s] with ... recommendations" of the TCFD,[98] a private entity created by the private Financial Stability Board,[99] and whose recommendations have expanded over time and are the subject of annual Status Reports that include additional insights and which may lead to future changes.[100] Because these private entities are not subject to the procedural requirements with which federal agencies must comply, they will be able to change their requirements and recommendations—and therefore the eligibility requirements for federal contracts—without any opportunity for the affected industry to participate in a notice-and-comment process.

Major contractors, moreover, would make these TCFD-recommended disclosures, not by submitting them to the government, but by "completing those portions of the CDP Climate Change Questionnaire that align with the TCFD as identified by CDP,"[101] a "not-for-profit charity."[102] CDP can and does change the "TCFD-aligned" questions in its Questionnaire.[103] Finally, major contractors would be required to set emissions-reduction targets that meet the detailed science-based requirements established by the SBTi, a private "partnership between CDP, the United Nations Global Compact (UNGC), the World Resources Institute (WRI), and the World Wide Fund for Nature (WWF, also known as the World Wildlife Fund)."[104] Once set, the targets must be submitted to, and validated by, the SBTi. This is a private delegation (including to foreign-influenced entities) several times over.

The Constitution does not permit the government to jettison its authority in this way. As the Fifth Circuit recently put it, "[b]y delegating unsupervised government power to a private entity, [the government] violates the private non-delegation doctrine."[105] A number of Justices of the Supreme Court recently expressed the same concern about a rule of the Department of Health and Human Services that required State Medicaid plans to be certified as "actuarially sound" by "actuaries who meet the qualifications of the American Academy of Actuaries and follow the practice standards established by the Actuarial Standards Board, which is a private entity."[106] Although the

[98] 87 Fed. Reg. at 68,313.
[99] TCFD, *About*, https://www.fsb-tcfd.org/about/.
[100] TCFD, *Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures* (June 2017), https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf; TCFD, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures* (Oct. 2021), https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf; TCFD, *Publications*, https://www.fsb-tcfd.org/publications/ (showing Status Reports for 2018, 2019, 2020, 2021, and 2022).
[101] 87 Fed. Reg. at 68,314.
[102] CDP, *Who We Are*, https://www.cdp.net/en/info/about-us.
[103] *See* CDP, *How CDP Is Aligned to the TCFD*, https://www.cdp.net/en/guidance/how-cdp-is-aligned-to-the-tcfd.
[104] 87 Fed. Reg. at 68,314-15.
[105] *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 890 (5th Cir. 2022).
[106] *Texas v. Commissioner*, 142 S. Ct. 1308, 1308 (2022) (Alito, J., joined by Thomas and Gorsuch, JJ., respecting the denial of certiorari).

Court denied certiorari, Justice Alito, joined by Justices Thomas and Gorsuch, explained that HHS had unconstitutionally delegated regulatory authority to a private actuarial group: "What was essentially a legislative determination—the actuarial standards that a State must meet in order to participate in Medicaid—was made not by Congress or even by the Executive Branch but by a private group."[107] The Proposed Rule suffers from the same infirmity. It has given a group of private entities unrestrained discretion to determine the climate disclosures that other private entities must make to participate in the federal procurement process.

The private delegation contemplated by the proposal raises significant due-process problems as well. Due process does not permit a "self-interested actor" to wield regulatory power over other private parties.[108] Yet that is exactly what the Proposed Rule would allow. CDP and SBTi are private organizations with their own private missions. There is no constitutional basis to give them regulatory power over other private organizations.

## III. The Proposed Rule is arbitrary and capricious for a multitude of reasons.

Besides being contrary to the goals of the Procurement Act and otherwise unlawful, the Proposed Rule is arbitrary and capricious in several ways.

### A. The Council's cost-benefit analysis is deeply flawed.

Given the importance of economy and efficiency in the procurement process, the Council has an obligation to determine "as best it can" the economic implications of the Proposed Rule.[109] Here, the Council's cost-benefit analysis is fundamentally flawed.

#### 1. The Council underestimates the costs.

The Council has failed to adequately consider the costs of the requirements that the Proposed Rule would impose. For inventorying scope 1 and scope 2 emissions, for example, the Council estimates that each contractor would incur initial internal compliance costs of only $6,608 and annual ongoing compliance costs of only $5,003.[110] Yet, there is no support for those estimates. The Council's analysis is based entirely on an "Impact Assessment" of a rule in the United Kingdom that has little relevance to the Council's proposal.[111] Since 2018, "all quoted UK companies" have been required "to

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[107] *Id.* at 1309.

[108] *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 821 F.3d 19, 23 (D.C. Cir. 2016); *see also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) (warning of the "potential for private interest to influence the discharge of public duty").

[109] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

[110] *See* RIA 35.

[111] *See id.* at 34.

report on scope 1 and 2 emissions."[112] The cited impact assessment simply estimates that a parent corporation would devote about one hour for "Chief Executive and Senior Officials," 14 hours for "Corporate Managers," and 70 hours for "Administrative Professionals" to collect and process climate-related information from subsidiaries.[113] The impact assessment does not estimate the costs of actually calculating scope 1 and scope 2 emissions, but only of collecting and processing information that is already available—it has little relevance here. Far more relevant are comments from the related SEC rulemaking that directly estimate the cost of inventorying scope 1 and scope 2 emissions. The Society for Corporate Governance, for example, reports an estimate of "$300,000 annually in staff time for ... [s]cope 1 data collection and reporting" alone.[114] That estimate is *more than 50 times* the Council's, and is in line with other estimates that the Council cites but fails to factor into its analysis.[115]

The Council's external-cost estimates are also far off the mark. The Council, for example, estimates that a non-small business would retain a consultant for 409 hours to help prepare an initial inventory of scope 1 and scope 2 emissions.[116] Yet, the Council pegs the consultant's hourly rate at only $140 per hour.[117] There is no basis for that estimate. The Council repeatedly adopts other estimates made by the SEC in its related rulemaking,[118] but abandons the Commission's estimate of $400 for the hourly cost of outside experts. The Council states that "a $140 hourly rate is used in lieu of a $400 hourly rate since [its] rule does not contemplate a need for auditors,"[119] but the Commission's $400 estimate is not limited to auditors.[120] The Council is relying on stale data. Throughout its analysis, the Council repeatedly cites comments submitted in response to the SEC's "Request for Information" issued in March 2021.[121] The SEC began receiving a new round of comments in April 2022, a full year later, when it issued its proposed rule. Since then, the Commission in other rules has adjusted "for inflation"

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[112] UK Department for Business, Energy & Industrial Strategy, *Mandating Climate-Related Financial Disclosures by Publicly Quoted Companies, Large Private Companies and Limited Liability Partnerships (LLPs)* 17 (Jan. 10, 2021).
[113] *See id.* at 30.
[114] Society for Corporate Governance Comments 91 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).
[115] *See* RIA 24 (noting estimate of $372,000 in internal costs for scope 1 and scope 2 reporting, along with other climate-related data reporting); *id.* at 26 (noting estimate of $174,000 for internal costs for sustainability report with scope 1 and scope 2 disclosures).
[116] *See* RIA 35.
[117] *Id.* at 34.
[118] *See, e.g.*, *id.* at 30, 34, 37.
[119] *Id.* at 30.
[120] *See The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21,334, 21,458 (Apr. 11, 2022).
[121] *See, e.g.*, RIA 22, 28, 30, 36, 37.

its standard estimate for the hourly rate of outside consultants.[122] That estimate is now $600[123]—*more than four times the Council's*.

Using more realistic estimates substantially increases the predicted costs of the Proposed Rule. For the 1,578 non-small business contractors, for example, the Council estimates initial scope 1 and 2 compliance costs of about $100 million (1,578 contractors x $63,868/contractor).[124] Adjusting for the rate for consultants and a more accurate measure of internal costs, that number should really be $860 million (1,578 contractors x ($300,000 internal costs + (409 consultant hours x $600/hour))). Of course, that does not account for the other flaws in the scope 1 and 2 estimates described above, or account for the costs to small businesses, which would be hundreds of millions of dollars in additional costs.

The Council also underestimates the costs of inventorying scope 3 emissions and making annual climate disclosures. To estimate the relevant costs, the Council simply averages the internal and external costs reported by certain commenters in response to the SEC's Request for Information in March 2021.[125] Yet, the responses to the SEC's RFI generally reported costs of *voluntary* disclosures. In voluntary disclosures, companies typically omit information that they determine not to be meaningful.[126] The proposed *mandatory* disclosures would be significantly more burdensome. Take just one of the Council's datapoints: the Williams Companies.[127] The Council relies on a Williams report of $445,800 for annual climate disclosures.[128] However, the Council cites a June 2021 comment discussing Williams' then-current voluntary reporting. Williams subsequently submitted a June 2022 comment explaining that if it were required to report scope 3 emissions (which is not included in its voluntary reporting), that would add "more than $1 million" to its compliance costs[129]—more than tripling the Council's flawed estimate. Rather than costing less than $309 million in the initial year of

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[122] *Listing Standards for Recovery of Erroneously Awarded Compensation*, 87 Fed. Reg. 73,076, 73,133 n.549 (Nov. 28, 2022).
[123] *Id.*
[124] *See* RIA 35.
[125] *See id.* at 36.
[126] *See, e.g.*, American Chemistry Council Comments 21-23 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm) (explaining that the SEC's proposal "adopts a false equivalence" between voluntary disclosures, where companies freely choose from among "an incredibly diverse set of frameworks and metrics that meet the unique needs of [their] different sectors or audience[s]" and a mandatory "one-size-fits-all standard" that doesn't take into account the "sheer diversity of different operational contexts" or "a company's unique climate risk profile").
[127] *See* RIA 36.
[128] *See id.*
[129] Williams Companies Comments 14 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

compliance,[130] then, the scope 3 inventory alone would cost contractors more than $670 million in the first year (more than $1 million x 671 major contractors). Furthermore, even the Council's underestimated "internal personnel costs" and "external consultant" costs[131] fail to account for the minimum $2,950 fee that companies must pay CDP simply to file their annual climate disclosure.[132]

Even more flawed is the Council's estimate of the cost to develop science-based emissions-reductions targets. The Council's estimate consists in its entirety of the $9,500 fee that SBTi charges to validate targets every five years.[133] Yet, the Council inexplicably ignores the costs of developing those targets before they are presented to SBTi (not to mention any further costs that may arise if SBTi does not validate them as submitted). SBTi reports that target development takes 24 *months*;[134] it requires answering about 50 pages of often complex, technical questions and following hundreds of pages of technical guidance concerning scenario analyses and modeling.[135] The Council nonetheless assumes that it would cost *nothing* to develop an emissions-reductions target and gather the information necessary to complete the process. That assumption is obviously wrong. If it costs companies more than $1 million to simply calculate their scope 3 emissions,[136] it would cost multiples of that amount to analyze all of the emissions and to model and plan for significant reductions.

The Council's failure to consider the costs of *implementing* the targets is even more problematic. SBTi requires companies to revalidate their targets every five years, and "is currently undergoing a process to track company progress against targets."[137] The Council cannot reasonably require contractors to commit to implementing certain climate targets—claiming benefits from those reductions—but then ignore the costs that contractors would incur in attempting to meet the targets. Those massive costs, which include developing decarbonization strategies and funding emission-reduction measures for both scope 1 and 2 emissions, as well as a large percentage of scope 3

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[130] *See* RIA 38.
[131] Proposed Rule, 87 Fed. Reg. at 68,322.
[132] CDP, *Admin Fee FAQ*, https://www.cdp.net/en/info/admin-fee-faq.
[133] *See* RIA 37.
[134] *FAQs*, SBTi, *supra* note 89.
[135] *Supra* pp. 5-6; *see* SBTi, *SBTi Near-Term Target Submission Form and Guidance* (Dec. 2021), *available at* https://sciencebasedtargets.org/step-by-step-process#submit; SBTi, *SBTi Corporate Manual* (Dec. 2021), https://sciencebasedtargets.org/resources/files/SBTi-Corporate-Manual.pdf; SBTi, *Target Validation Protocol* (Apr. 2020), https://sciencebasedtargets.org/resources/legacy/2019/04/target-validation-protocol.pdf; SBTi, *SBTi Criteria and Recommendations* (Oct. 2021), https://sciencebasedtargets.org/resources/files/SBTi-criteria.pdf; SBTi, *How-To Guide for Setting Near-Term Targets* (Dec. 2021), https://sciencebasedtargets.org/resources/files/SBTi-How-To-Guide.pdf; *see also* SBTi, *Cement Science Based Target Setting Guidance* (Sept. 2022), https://sciencebasedtargets.org/resources/files/SBTi-Cement-Guidance.pdf (example of sector-specific guidance).
[136] *Supra* pp. 4-5.
[137] *FAQs*, SBTi, *supra* note 89.

value-chain emissions—over which the contractor has limited control—must be factored into the Council's analysis.

For example, to achieve their targets, Tesco switched to 100% renewable electricity in the UK and Ireland and invested £8 million in onsite generation in Asia;[138] Pfizer constructed a wind turbine;[139] and Norwegian packing company Elopak replaced all HVAC gas valves and installed a new print line.[140] Especially high implementation costs are likely to arise from two scope 3 categories in particular—"Use of Sold Products" for energy intensive products, and "Purchased Goods and Services" (supplier emissions)—due to the cost associated with redesigning products and driving reductions in the supply chain to meet near-term and long-term targets. Many companies would likely need to establish "engagement" targets with their suppliers or customers—this means getting suppliers or customers to set their *own* science-based targets, thereby significantly expanding the number of entities setting science-based targets and imposing additional costs on suppliers and customers (many of whom are small businesses). These are significant costs—millions of dollars for each contractor—that the Council simply ignores.

In fact, it may not even be possible for some contractors to meet the reduction targets that the Council would require them to set. For example, businesses in the energy sector would have to have their proposed GHG-reducing investments approved by state public utility commissions, whose primary goal is not to mitigate the effects of global climate change but to ensure that energy remains affordable and reliable for consumers.[141] No good can come from forcing a company to publicly commit to emissions-reduction targets that are impossible to meet.

The Council fails to consider other costs as well, including the burdens that the Proposed Rule would impose on non-contractors. Because scope 3 reporting necessarily requires coordination with upstream and downstream third parties, the Proposed Rule would require contractors to demand that suppliers, sub-contractors, end users

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[138] *Case Study – Tesco*, SBTi, https://sciencebasedtargets.org/companies-taking-action/case-studies/tesco.

[139] *Case Study – Pfizer*, SBTi, https://sciencebasedtargets.org/companies-taking-action/case-studies/pfizer.

[140] *Net-Zero Case Study – Elopak*, SBTi, https://sciencebasedtargets.org/companies-taking-action/case-studies/case-study-elopak.

[141] Jake Duncan & Dr. Robert Klee, *Transforming Utility Regulation to Achieve Climate Goals*, Institute for Market Transformation (June 23, 2020), https://www.imt.org/news/transforming-utility-regulation-to-achieve-climate-goals/ ("[U]tilities are increasingly being asked to invest heavily in renewable energy, energy efficiency, storage, and new technologies so that jurisdictions can meet climate goals. This puts utilities in a bit of a bind. Not only does it go against the traditional utility business model that has been around for 100 years but even if a utility wants to change the way it operates, it can be hard to get regulatory approval," from state utility commissions, which "have historically had a narrow focus on affordability, safety, and reliability.").

(including the federal government), and others collect and provide information about their own GHG emissions, imposing a burden on those other entities that likely is commensurate with the scope 1 and 2 burdens on contractors. Many entities up- and downstream from major contractors are likely to be small businesses that do not have the resources to provide such information to the requesting contractor. The Proposed Rule would likewise impose burdens on third parties that would be affected by contractors' implementation of emissions-reductions targets. For example, in some circumstances—where a contractor sets scope 3 GHG emissions goals that require reducing product usage—the government itself may be restricted in its ability to use a procured product, or to buy a new one. The Council must expect, moreover, that all or most of these costs will ultimately be passed on to the customer imposing them: the procuring government agency.

Finally, the Council fails to consider the costs arising from the interaction between its Proposed Rule and the SEC's proposed climate-disclosure rule. The SEC has downplayed the costs of its own proposal by suggesting that certain disclosure requirements are triggered only if a company sets emissions-reductions targets.[142] But, here, the Proposed Rule would *require* certain contractors to set emissions-reductions targets, which for public companies would trigger the full suite of proposed SEC disclosure requirements—along with the litigation risks that come with them. These, again, are massive additional costs that the Council must include in its assessment.

**2. The Council overestimates the benefits that it claims would result from the Proposed Rule.**

The Council errs on both sides of the ledger; just as its cost estimates are too low, its benefits estimates are too high.

The Council wrongly assumes that requiring contractors to make climate-related disclosures would "provid[e] economic and other benefits to the contractors themselves," such as "improving employee morale," improving "brand reputation," and boosting a company's competitive advantage.[143] This assumption is flawed on numerous levels. First, the Council mistakenly extrapolates from *voluntary* disclosures.[144] Companies that chose to voluntarily disclose climate-related information may do so in part because their labor and product markets make it in their self-interest to do so. There is no reason to assume that the asserted benefits would materialize for companies that are *required* to make such disclosures. Indeed, if it were in their self-interest to do so, those companies would presumably *already* be voluntarily disclosing such information. The Council, second, suggests that the Proposed Rule would increase a contractor's competitive advantage over companies that do not make climate-related

[142] *See, e.g.*, 87 Fed. Reg. at 21,345, 21,347.
[143] 87 Fed. Reg. at 68,320.
[144] *Id.*

disclosures[145]—but that makes no sense, because *all* significant and major contractors would be required to make the same disclosures.

The Council also does not explain how the Proposed Rule would meaningfully reduce *aggregate global* emissions, the actual driver of climate change. More fundamentally, adoption of the rule may not be based on "benefits" that fall outside the purposes for which the Council is authorized to adopt a rule in the first place. The Council is authorized to act for the limited purpose of promoting efficiency and economy in procurement; in assessing the reasonableness and appropriateness of its action, and of the costs it is imposing, the Council may weigh in the balance only those benefits that it is authorized to pursue (and which it has the expertise to assess). Put differently, an objective that is *ultra vires* counsels *against* agency action; it may not be counted as a benefit that justifies agency action.

The Council suggests that "[t]o the extent" there is "alignment" between its proposal and the SEC's climate-disclosure proposal, contractors "will benefit from greater standardization of climate-related disclosures."[146] The problem, though, is that the two proposed rules are not aligned, and this misalignment would only add to the compliance burden companies are facing.[147] For instance, the SEC proposal would require companies to disclose scope 3 emissions "if material," whereas the Council's proposal would require the disclosure of "relevant" scope 3 emissions. (The Council does not define "relevant.") The SEC, moreover, would require scope 1 and scope 2 disclosures based on the organizations included in a company's consolidated financial statements, whereas the Proposed Rule would require disclosures based on the organizational boundaries set by the GHG Protocol.[148] Far from "benefit[ing]" contractors, this overlap would force contractors to prepare two *separate* emissions reports and disclosures.[149] This is the opposite of "efficient."[150]

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[145] *See* RIA 13.

[146] RIA 15.

[147] This violates the Council's duty to "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations." Exec. Order No. 13,563, § (1)(b)(2), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

[148] *Compare* Proposed Rule, 87 Fed. Reg. at 68,318 ("[A] significant and major contractor ... must follow the GHG Protocol Corporate Accounting and Reporting Standard ... to complete a GHG inventory of the [s]cope 1 and [s]cope 2 emissions."), *with* 87 Fed. Reg. at 21,384 ("A company following the GHG Protocol would base its organizational boundaries on either an equity share approach or a control approach. Our [the SEC's] proposed approach, however, would require a registrant to set the organizational boundaries for its GHG emissions disclosure using the same scope of entities, operations, assets, and other holdings within its business organization as those included in, and based upon the same set of accounting principles applicable to, its consolidated financial statements.").

[149] The divergent reporting proposed by the SEC and the Council could also confuse investors and further undermine the SEC's goal of "enhancing investor protection." 87 Fed. Reg. at 21,429.

[150] 40 U.S.C. § 101.

The uses to which the Council suggests the government would put the proposed climate disclosures are too vague and uncertain to justify the imposition of billions of dollars of costs on government contractors. This does not accord with the Council's duties under the Paperwork Reduction Act, which requires it to certify that the proposed collection of information "is necessary for the proper performance of the functions of the agency, including that the information has practical utility."[151] "Practical utility means the *actual*, not merely the *theoretical or potential*, usefulness to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects ... in a useful and timely fashion."[152] Yet, the Council has not shown that the information that it would require major and significant contractors to disclose is actually—as opposed to potentially—useful, or that the government would even be able to process the information in a useful and timely fashion.

The Council claims that the government will use the required disclosures "to inform development of policies and programs to reduce climate risks and GHG emissions associated with Federal procurement activities, and to incentivize and enable technologies critical to achieving a national economy and industrial sector that are resilient to the physical and transition risks of climate change and net zero emissions by 2050."[153] Also, it says, "GSA will provide periodic recommendations on further actions to reduce supply chain emissions, based on information and data collected through supplier disclosures pursuant to this FAR rule and other publicly available information."[154] Even if the Council had the authority to compel disclosures to help the government develop strategies to reduce greenhouse gas emissions—which it does not—the government's surmise that compelling these disclosures might, in some undetermined way and degree, "inform" the government's policymaking on the issues of climate change and GHG emissions does not justify such a costly rule, nor demonstrate its practical utility. It is not reasonable to impose billions of dollars of costs on government contractors because the government might potentially find some of the information they produce relevant to climate policymaking at some unknown future date.

Evidence from the SEC rulemaking undercuts the notion that the required disclosures would provide useful information. For example, as numerous commenters explained, "the reality is that [scope 3] methodologies continue to be under development and, in its current state, [s]cope 3 GHG data is of limited reliability."[155] There is simply

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[151] 44 U.S.C. § 3506(c)(3)(A); *see* 5 C.F.R. § 1320(d)(1)(iii) ("To obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that the proposed collection of information ... [h]as practical utility.").

[152] 5 C.F.R. § 1320.3(*l*).

[153] 87 Fed. Reg. at 68,323, 68,326.

[154] *Id.*

[155] Comments of T. Rowe Price 4 (June 16, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

"no uniform methodology or approach" to calculating scope 3 emissions, and thus, it would be "highly unlikely that Scope 3 GHG disclosures [would] provide comparable, useful, material, climate-related information."[156] Scope 3 emissions are duplicative of the scope 1 and scope 2 emissions reported by other companies, thus imposing a burden that would not offer helpful information. Moreover, companies often serve both government and private-sector contracts, but GHG disclosures are generally company-wide. Suppose, for instance, that two contractors each operate a facility that produces products to fill a $51 million government contract, but the second contractor *also* operates other facilities that serve $5 billion in private-sector contracts. The second contractor would report much higher GHG emissions, but the vast majority of those emissions would be due to its nongovernment work. The Council does not explain how knowing contractors' total GHG emissions would provide any useful information or otherwise help the government in awarding a contract.

The Council also has not shown that the government has the capacity to review and respond to the mountains of data that the Proposed Rule would require contractors to provide to the government. The proposal estimates that it would cost the government $47,000 a year just to *obtain* major contractors' annual climate disclosures from CDP,[157] and projects an implausibly low $200,000 for analyzing the data once received. Yet, it does not identify who would conduct this analysis—$200,000 would not cover the annual compensation of two federal employees with requisite expertise—nor does it identify offices in the contracting agencies that have this type of specialized knowledge. Assuming this data is even provided to individual contracting agencies, it seems doubtful that anyone at the Department of Education, for example, or Veterans' Affairs, has the capability to review and analyze the reams of data that their contractors would submit. The proposal makes no account at all for the costs to the government of actually acting upon the data once obtained and analyzed. At a time when government agencies regularly assert that they have insufficient budget and staff to discharge the responsibilities assigned by Congress, it is highly doubtful they could make any meaningful

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[156] *Id.*; *see also* Comments of Investment Adviser Association 15 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm) ("We believe it is premature at this point to require disclosure of Scope 3 GHG emissions due to data gaps and the absence of agreed-upon measurement methodologies."); Comments of the Investment Company Institute 15 (June 16, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm) ("A large majority of our members believe that the Commission should not require companies to report Scope 3 emissions at this time, because of significant data gaps and the absence of agreed-upon methodologies to measure Scope 3 emissions. These deficiencies seriously undermine the ability of most companies to report consistent, comparable, and verifiably reliable data.").

[157] Proposed Rule, 87 Fed. Reg. at 68,323.

inroads in actually using this costly and voluminous data.[158] Simply, the Council cannot impose billions of dollars of costs on government contractors without demonstrating, as required by the Paperwork Reduction Act, that the government has the capacity to analyze the required disclosures and put the information to actual productive use.

Finally, to the extent that the Council believes that the rule would instead yield benefits by requiring contractors to collect and consider the information for themselves, that goal could be achieved by less drastic and less costly alternatives, including the option of requiring companies to maintain internal records of their climate-related information, rather than by requiring them to make costly and unnecessary disclosures.

### B. The Proposed Rule would disproportionately harm small businesses.

The Proposed Rule would have serious adverse effects on small businesses, exacerbating a disturbing trend in which "the number of small businesses doing business with the federal government has plummeted over the past decade."[159]

The Council simply assumes that the costs on small businesses would be half those of large businesses because small businesses have fewer employees, buildings, vehicles, and the like, so the "level of effort" required would be less.[160] That is wrong. As the Office of Advocacy of the U.S. Small Business Administration explained in connection with the SEC proposal, small businesses would need to "allocate larger shares of their technological, financial, and staff resources" to come into compliance with climate rules than larger firms.[161] Many small businesses have less developed climate-

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[158] The Council also does not address the problem under the Anti-Deficiency Act of agencies paying staff to conduct climate-related activities for which Congress has not provided appropriations. *See* 31 U.S.C. § 1341.

[159] Sarah Treuhaft et al., *Fewer and Fewer Small Businesses Are Getting Federal Contracts*, National Equity Atlas (Sept. 28, 2021), https://nationalequityatlas.org/federalcontracts?_sm_au_=iHVZZ5NcvTsM2FvFFcVTvKQkcK8MG; *see* Steven Koprince, *Number of Small Businesses Awarded Federal Government Contracts Has Dropped 12.7% in Four Years*, SmallGovCon (Aug. 19, 2021), https://smallgovcon.com/reports/number-of-small-businesses-awarded-federal-government-contracts-has-dropped-12-7-in-four-years/?_sm_au_=iHVZZ5NcvTsM2FvFFcVTvKQkcK8MG (noting that in FY 2020 the number of small businesses awarded government contracts dropped 12.7% over the past four years and that the number of small businesses awarded prime contracts dropped 32% between FY 2009 and FY 2018). Just last month, the Department of Defense reported that small business participation in the defense industrial base has declined by over 40 percent in the past decade, in part due to regulatory burdens. U.S. Dep't of Defense, *Small Business Strategy* 5 (Jan. 2023), https://media.defense.gov/2023/Jan/26/2003150429/-1/-1/0/SMALL-BUSINESS-STRATEGY.PDF.

[160] RIA 30.

[161] Small Business Administration Advocate Comments 5 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm); *see* U.S. Chamber of Commerce Foundation, *The Regulatory Impact on Small Businesses: Complex. Cumbersome. Costly.* 5, https://www.uschamberfoundation.org/smallbizregs/assets/files/Small_Business_Regulation_Study.pdf (Mar. 2017) (explaining that

disclosure programs than their larger peers. "Representatives from the biotechnology, plastics, and equipment manufacturing industries," for example, have reported to the Office of Advocacy "that small businesses in their industries have not traditionally tracked GHG emissions or other climate-related metrics," and would thus need to build out reporting programs from scratch.[162] This would be a massive undertaking that the Council must factor into its analysis.

Small businesses would also be affected indirectly if "major contractors" were required to comply with the scope 3 and science-based targets provisions of the Proposed Rule. As noted, major contractors would need to gather scope 3 supplier-emissions data from all of their subcontractors, many of whom are small businesses. Similarly, as part of the science-based target-setting requirement, many major contractors would likely be led to adopt the "engagement target" option specified by SBTi. Under this approach, discussed above, contractors would press suppliers and customers to set their own science-based targets, thereby proliferating the number of entities that must incur the costs to achieve stringent science-based targets.

The Council's failure to adequately consider impacts on small business is particularly problematic here for at least two reasons. First, because "[t]he COVID-19 pandemic has dramatically impacted American small businesses, ... efforts to reduce the regulatory burden on small entities [is] more important than usual."[163] Second, the benefit from imposing the Proposed Rule on small businesses is, at best, minuscule. "An individual small business has a relatively small carbon footprint," and "[t]aking climate action is not easy for small businesses," which "often lack the resources needed to invest in their journey to net zero."[164] There is simply no reason to impose these massive costs on "the lifeblood of the U.S. economy."[165]

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"[t]he complexity of the federal ... regulatory system[] creates disproportional cost burdens on small businesses" and citing report commissioned by SBA Office of Advocacy for proposition that "small firms bear a regulatory cost 36% higher than the cost of regulatory compliance carried by larger firms, measured in dollar cost per employee"); Nicole V. Crain & W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," https://dair.nps.edu/bitstream/123456789/3664/1/SEC809-MKT-10-0055.pdf (Sep. 2010) (report commissioned by SBA Office of Advocacy).

[162] Small Business Administration Advocate Comments 5 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

[163] Office of Advocacy, *Small Businesses Benefit from Reduced Regulatory Burden in FY 2021* (Apr. 5, 2022), https://advocacy.sba.gov/2022/04/05/small-businesses-benefit-from-reduced-regulatory-burden-in-fy-2021/.

[164] Maria Mendiluce, Johan Falk, & Kristian Rönn, *How Big Businesses Can Help Their Suppliers Cut Emissions*, Harvard Business Review (Apr. 8, 2022), https://hbr.org/2022/04/how-big-businesses-can-help-their-suppliers-cut-emissions.

[165] Office of Advocacy, *Small Businesses Generate 44 Percent of U.S. Economic Activity*, U.S. Small Business Administration (Jan. 30, 2019), https://advocacy.sba.gov/2019/01/30/small-businesses-generate-

### C. The Proposed Rule would undermine national security interests.

The Council also fails to evaluate the impacts of the Proposed Rule on military readiness and national security. Two-thirds of the federal government's more than $600 billion dollars in contract obligations are allocated to the Department of Defense. The vast majority of the products supplied through these contracts have national security implications. In 2020, for example, the top five defense services and products included aircraft, combat ships, guided missiles, gas turbine and jet engines, and drugs and biologicals.[166] The importance of military contracting is even more pronounced now, given the substantial military aid that the United States is currently providing in the conflict in Ukraine. Yet the Proposed Rule would create significant problems that would be specific to defense contractors. Military and defense products' "use phase" GHG emissions (Category 11) are nearly impossible to accurately calculate, given how sensitive this information is for national security reasons. Defense products, moreover, are designed to government specifications and subject to various national security considerations that severely limit contractors' ability to comply with scope 3 disclosure requirements or to implement product emission reductions to achieve science-based targets.[167]

Additionally, to the extent the Council's proposed rule is designed to reduce scope 3 emissions in the defense contracting industry, that would pose a serious risk to national security. For example, as two former Chairmen of the Joint Chiefs of Staff have noted, the United States military is "the single largest consumer of fuel in the United States, if not the world. It uses fuel to power tanks, helicopters and fighter jets, run surveillance, electrify barracks, heat military installations and enable numerous other operations. Fuel is necessary to the United States military in times of war and in times of peace to make sure the military is ready for war, for peacekeeping missions, to deter future threats and to prevent terrorism."[168] While the former Chairmen recognized that "it is important to continue to look for 'greener' ways to fuel the military," they emphasized that the military cannot "go it alone and unilaterally strip itself of higher-performing fossil fuels" because that "would weaken our armed forces while strengthening those of other countries."[169] In other words, the military cannot safely reduce reliance

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44-percent-of-u-s-economic-activity/; Martin Rowinski, *How Small Businesses Drive the American Economy*, Forbes (Mar. 25, 2022), https://www.forbes.com/sites/forbesbusinesscouncil/2022/03/25/how-small-businesses-drive-the-american-economy/?sh=575521824169.

[166] GAO, *A Snapshot of Government-Wide Contracting For FY 2021*, https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboard.

[167] Adding new disclosure requirements that impact legacy procurements for products that have been delivered for many years or even decades to the federal government could disadvantage existing prime contractors and their respective supply chains.

[168] *Amici Curiae* Brief of General (Retired) Richard B. Myers and Admiral (Retired) Michael G. Mullen, in Support of Defendants-Appellants 21, *City & County of Honolulu v. Sunoco LP*, Nos. 21-15313, 21-15318 (9th Cir. July 26, 2021), ECF No. 49.

[169] *Id.* at 22.

on fossil fuels through unilateral government contracting decisions; "reduction in fossil fuel use can be accomplished only through comprehensive international, multi-lateral negotiations and treaties."[170] The Council must not impose requirements on defense contractors that could compromise national security and defense objectives.

The Proposed Rule would, to be sure, allow individual contractors to request exemptions from certain of the proposal's requirements, but there is no provision for these exemptions to be granted on an industry-wide basis, and in any event exemptions have just a one-year duration. That is not sufficient. Only through a blanket exemption for national security procurements could the Proposed Rule avoid placing debilitating burdens on the security and self-defense of the United States and its allies.

### D. The Proposed Rule is impermissibly tethered to the decision-making of private organizations.

The Council also does "not act rationally when it blindly tethers its decisionmaking to that of" a number of private entities, "because such faith in another [entity's] decisionmaking fails to account for the very real possibility that the other [entity] [will] act[] improperly or irrationally."[171] Here, the Proposed Rule would require contractors' GHG inventories to "follow the GHG Protocol Corporate Accounting and Reporting Standard," require annual climate disclosures to "align[] with recommendations of the TCFD" and be submitted through the "CDP Climate Change Questionnaire," and require emissions-reduction targets to be set according to the criteria established by the SBTi, and be validated by SBTi.[172] Yet, the Council has entirely failed to articulate its *own* independent reasons for why the various standards it has adopted wholesale from those private organizations are appropriate. None of these organizations, for example, have been formed or administered to improve procurement in particular, or even to incorporate climate considerations into procurement. The standards of these organizations, moreover, were designed to operate as *voluntary* disclosure standards (CDP and SBTi) and recommendations (TCFD) to generate industry best practices toward climate change; the standards were *never* crafted for use in mandatory compliance programs. The Council therefore has no reason to posit that these standards are suited to the Council's objectives.

Consider the science-based emissions targets. The Proposed Rule would require *all* major contractors to validate such targets with SBTi. However, SBTi states that emissions reductions for certain industries are too "complex" for it to validate targets

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[170] *Id.*

[171] *Foster v. Mabus*, 895 F. Supp. 2d 135, 148 (D.D.C. 2012); *see also, e.g., Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1413 (D.C. Cir. 1985) ("DOE may not rely without further explanation on an unelaborated order from another agency.").

[172] 87 Fed. Reg. at 68,313-14.

from those industries at this time.[173] For fossil fuels, for example, SBTi "has engaged a consultant to facilitate a panel of independent external experts to complete an independent review of the draft oil and gas methods and guidance,"[174] but SBTi has yet to establish targets in the "fossil fuel sector."[175] This also applies to automakers (who already are subject to regulation of GHG emissions by standards set by the EPA and the State of California)[176] and a multitude of other sectors. Aluminum, aviation original equipment manufacturing,[177] chemicals, construction, healthcare, steel, and transportation, to name a few, all lack the SBTi sector guidance[178] that is needed to address the unique abatement challenges in these industries. (While SBTi offers generic guidance for some (but not all)[179] companies that do not have sector-specific guidance, that generic guidance does not take into account the unique emissions-reductions challenges facing specific industries.)[180] The Council does not explain why the SBTi framework is a good fit for companies in the many, major sectors of the U.S. economy for which the SBTi itself has not identified a satisfactory approach. To the extent the Council is relying on forthcoming SBTi industry-specific guidance, the Council does not—and cannot—explain how it found guidance that does not yet exist to be reasonable and appropriate.

Additionally, in sharp contrast to other standards commonly referred to in FAR orders and rules,[181] such as SAE, RTRA, ISO, and ASTM standards, the SBTi standards are not consensus-based. They represent the views of a single nongovernmental organization and have received little input from significant industry sectors, such as the aerospace and defense industry, which receive the largest share of federal government contracts. Accordingly, the SBTi standards, while voluntarily adopted by some

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[173] SBTi, *FAQs*, *supra* note 89 (Question: "What is the SBTi's policy on fossil fuel companies?").
[174] *Id.*
[175] *Id.*
[176] *Id.* (Question: "What is the SBTi's policy regarding automakers?").
[177] SBTi has released guidance for the "Aviation Sector," but this guidance applies to "airlines and users of aviation services"—not aviation equipment manufacturers. SBTi, *Science-Based Target Setting for the Aviation Sector* 4 (Aug. 2021), https://sciencebasedtargets.org/resources/files/SBTi_AviationGuidanceAug2021.pdf.
[178] *See* SBTi, *Sector Guidance*, https://sciencebasedtargets.org/sectors.
[179] *See, e.g.*, SBTi, *FAQs*, https://sciencebasedtargets.org/faqs#what-is-the-sbtis-policy-on-fossil-fuel-companies (Question: "What is the SBTi's policy on fossil fuel companies?") (stating, "Due to the developing status of our method, in addition to the existing SBTi policy to pause the validation of fossil fuel sector targets, we are also pausing commitments from these companies," and describing "[c]ompanies that cannot commit to the SBTi until the oil and gas method is finalized").
[180] SBTi, *How-to Guide for Setting Near-Term Targets* (Dec. 2021), https://sciencebasedtargets.org/resources/files/SBTi-How-To-Guide.pdf.
[181] *See, e.g.*, FAR Part 11.101(b); *see also* Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-119, Revised, https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf.

companies and organizations, have not been subjected to the same level of scientific rigor or scrutiny as other standards. Indeed, some standards, such as those for the energy industry, may prove *impossible* to achieve for companies that do not obtain necessary approvals from state public utility commissions.[182] For these and other basic reasons, the Council must reconsider its use of SBTi.[183]

The Council's surrender of its authority to private organizations creates other problems. CDP and SBTi are constantly changing their standards.[184] Some of the changes have been significant; for example, SBTi shortened the maximum number of years of the target from 15 years to 10 years.[185] Those changes are made without following the APA's notice-and-comment requirements. Moreover, the Council has neither explained how it would monitor such changes to ensure they conform to the Council's goals, nor factored such foreseeable future changes into its regulatory cost-benefit analysis.

Finally, the Council does not show that due diligence has been performed on the private organizations to which the Proposed Rule would outsource most of the standard setting in this rulemaking. For example, the Council does not analyze whether SBTi even has the resources to handle the thousands of additional submissions it would receive under the Proposed Rule.[186] In addition, the Council does not examine SBTi's or any of the other private organizations' control, membership, or funding, and performs no analysis of the organizations' goals. Some of those organizations have connections

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[182] *See supra* p. 20; Jake Duncan & Dr. Robert Klee, *Transforming Utility Regulation to Achieve Climate Goals*, Institute for Market Transformation (June 23, 2020), https://www.imt.org/news/transforming-utility-regulation-to-achieve-climate-goals/.

[183] SBTi also arbitrarily excludes certain carbon-reduction strategies from consideration in assessment of a company's progress towards its targets. *See, e.g.*, SBTi, *SBTi Criteria and Recommendations* 7 n.6 (Oct. 2021), https://sciencebasedtargets.org/resources/files/SBTi-criteria.pdf (GHG "removals that are not directly associated with bioenergy feedstock production are not accepted to count as progress towards SBTs or to net emissions in a company's GHG inventory.").

[184] The GHG Protocol is also currently soliciting comments to inform updates of the Protocol. Greenhouse Gas Protocol, *Survey on Need for GHG Protocol Corporate Standards and Guidance Updates*, https://ghgprotocol.org/survey-need-ghg-protocol-corporate-standards-and-guidance-updates.

[185] *Compare* SBTi, *SBTi Criteria and Recommendations* 16 (Apr. 2021), https://sciencebasedtargets.org/resources/files/SBTi-criteria-legacy.pdf, *with* SBTi, *SBTi Criteria and Recommendations* (Oct. 2021), https://sciencebasedtargets.org/resources/?tab=develop#resource.

[186] According to the System for Award Management ("SAM") data summarized in the preamble to the Proposed Rule, there are 964 entities that meet the definition of "major" contractor and are not registered as "small" for their primary NAICS code. SBTi reported in a December 2022 presentation that there are 1,982 companies, including both U.S. and foreign companies, with validated SBTs, including approximately 700 organizations that have used the streamlined target validation route exclusive to small and medium-sized enterprises. Regardless of how many major federal contractors already have SBTi-validated targets, this potential influx of new organizations will place an immense workload on SBTi. Already, the regular SBTi process itself typically exceeds two years. For these and other reasons, the two years the proposal allows for SBTi validation is plainly infeasible.

or funding relationships with foreign governments or foreign nationals, some of whose interests are not aligned with the United States'.[187] The Council does not, and cannot, explain how it furthers the public interest to give such organizations standard-setting authority over U.S. defense contractors and other critical industries and suppliers.

### E. The proposed implementation timeline is infeasible.

The Proposed Rule's compliance deadlines are also unreasonable. As proposed, the rule appears to require contractors to begin taking actions *on the very day* a final rule is promulgated. Within one year of publication, significant and major contractors must have completed a GHG inventory and must have disclosed their total scope 1 and 2 emissions;[188] the inventory "must represent emissions during a continuous period of 12 months."[189] This could mean that significant and major contractors who do not currently collect scope 1 and scope 2 emissions data would need to begin collecting that data—at the very latest—on the day the final rule is published. Similarly, major contractors must have their emissions-reduction targets validated by SBTi within two years of the final rule's publication.[190] SBTi anticipates a 24-month development period for reductions targets. To have those targets validated, SBTi requires companies to submit GHG emissions data (including scope 3) for one or two years, depending on the base year. Further, if the rule were adopted as proposed, SBTi would receive thousands of new submissions—a flood of requests that would create a substantial backlog and delay in SBTi's review process. Complying with the proposed requirements is thus not immediately possible. The Proposed Rule fails to allow the initial start-up time necessary to comply with the proposed requirements—a start-up time that the Council's own cost projections acknowledge will be unavoidable.

### F. The Council fails to adequately consider reasonable, less-restrictive alternatives.

The Council has an obligation under the Administrative Procedure Act to consider reasonable, less restrictive alternatives. There are, however, a number of

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[187] For example, the GHG Protocol is funded by several foreign governments and organizations, including the China Business Council for Sustainable Development; the Dutch Ministry of Foreign Affairs; the German government's International Climate Initiative; and the United Kingdom's Foreign & Commonwealth Office and its Department for Environment, Food and Rural Affairs. Greenhouse Gas Protocol, *Funders*, https://ghgprotocol.org/funders. Several of CDP's funders are foreign organizations, such as the Chinese Zijin Mining Group Co., the Gruppo Ferrovie dello Stato, Italy's state-owned railway, and the National Bank of Kuwait, Ltd. CDP, *How We Are Funded*, https://www.cdp.net/en/info/finance. And one of SBTi's three "core" funders is the Dutch IKEA Foundation. Science Based Targets, *How We Are Funded*, https://sciencebasedtargets.org/about-us/funders.

[188] 87 Fed. Reg. at 68,316.

[189] *Id.* at 68,313.

[190] *Id.* at 68,316.

alternatives that the Council has failed to adequately consider. A few examples are presented here.

*First*, the Council could require contractors, in lieu of GHG disclosures, to disclose well-known, easily observable characteristics, such as industry membership, company size, sales growth, earnings growth, the value of plant, property, and equipment, and capital expenditures.[191] Contractors typically have this type of information more readily available. Studies have shown that 90% of variation in GHG emissions can be inferred from it.[192] The Council states that "modeled" emissions are not "accura[te]" enough,[193] but the Council does not even attempt to explain why 90% predictive power would not be sufficient for its legitimate purposes. Nor does the Council explain why an extra few percentage points in the accuracy of a GHG emissions estimate would be worth the billions of dollars of costs the Proposed Rule would impose. To be sure, this alternative would not address the legal problems noted above, but it would at least mitigate some of the practical burdens for companies.

*Second*, the Council could require climate-related disclosures on a less-than-annual basis, for example, every five years. As Professor Daniel J. Taylor of the University of Pennsylvania's Wharton School demonstrated in his comment on the SEC's climate-disclosure rule, "GHG emissions are extremely highly correlated over time (e.g., autocorrelation of 0.977)," meaning that, "on average, next year's GHG emissions will be almost the same as this year."[194] Climate-related risks are also unlikely to change from year to year. In these circumstances, little benefit can arise from requiring every contractor to disclose GHG emissions and climate-related risks every year. Such frequent and broad disclosures provide little marginal value, and the Council could eliminate hundreds of millions of dollars in compliance costs from the proposal by just adopting a longer interval between reports. As with the first alternative, this alternative would not ameliorate the many legal problems with the proposal, but would at least mitigate some of the proposal's compliance burdens.

*Third*, the Council could require nonpublic disclosure to only the contracting agency. Although such a rule would still suffer significant flaws (including legal defects), it would at least avoid some of the First Amendment issues detailed above and would

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[191] Although much of this information, particularly for public companies, is not likely to be confidential if presented in "top-level" format, appropriate protection for confidential business information would need to be provided. The Council could then aggregate the information submitted without compromising confidentiality for individual companies.

[192] Daniel J. Taylor Study 7 (June 16, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

[193] Proposed Rule, 87 Fed. Reg. at 68,326.

[194] Daniel J. Taylor Study 7 (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

alleviate concerns about confidential business information.[195] The Council has not explained why *public* disclosure is necessary here; any interest the government has in making informed contracting decisions could be achieved by requiring prospective contractors to submit the required information to the government alone.

*Fourth,* the Council could broaden the exemptions that it has proposed. At the very least, the Council should exempt "significant" contractors, 64% of whom it acknowledges are small businesses.[196] By limiting the rule to major contractors, the Council would still capture the majority of scope 1 and scope 2 emissions but would significantly alleviate the burden on small business. The Proposed Rule already contains a number of significant exemptions.[197] Many of the exempted organizations have large, important government contracts.[198] If those contracts can be adequately evaluated without the detailed climate disclosures that the Proposed Rule contemplates, so can others, such as regulated utilities and military contractors.[199]

*Fifth*, instead of delegating authority to private parties to create the standards and provide the platforms for their implementation, the Council could unambiguously spell out what specific climate-related risk disclosures it wants from contractors in a rulemaking. The Council has not itself enumerated the specific climate-related disclosures it would require but instead directs major contractors to "complet[e] those portions of the CDP Climate Change Questionnaire that align with the TCFD *as identified by CDP*."[200] Similarly, the Council could unambiguously spell out in a rulemaking the specific criteria for science-based targets, instead of requiring major contractors to follow SBTi's changing standards and CDP's changing questionnaires. Although such a rule would still exceed the Council's legal authority and suffer from many of the defects detailed above, the independent rulemaking approach would at least avoid some of the issues associated with the Council's reliance on constantly changing standards created

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[195] *Supra* pp. 12-15.

[196] *See* RIA 20.

[197] *See* Proposed Rule, 87 Fed. Reg. at 68,314 (noting exemptions for Community Development Corporations, as well as for Alaska Native Corporations, Indian tribes, Native Hawaiian Organizations, and Tribally owned concerns).

[198] *See, e.g.*, Senate Comm. on Homeland Sec. & Governmental Affairs, Subcomm. on Contracting Oversight, *New Information About Contracting Preferences for Alaska Native Corporations (Part I)* 2, https://www.hsgac.senate.gov/imo/media/doc/SubcommitteMajorityStaffAnalysisofPubliclyAvailableANCData62309.pdf ("Between 2000 and 2008, contract awards to Alaska Native Corporations increased by $4.6 billion, from $508.4 million to $5.2 billion. ... The Department of Defense is by far the largest user of ANC contracts. In total, the Department of Defense spent $16.9 billion on contracts with ANCs from 2000 to 2008 ... .").

[199] Jake Duncan & Dr. Robert Klee, *Transforming Utility Regulation to Achieve Climate Goals*, Institute for Market Transformation (June 23, 2020), https://www.imt.org/news/transforming-utility-regulation-to-achieve-climate-goals/.

[200] Proposed Rule, 87 Fed. Reg. at 68,314 (emphasis added).

by private organizations. An independent rulemaking would also allow the Council to provide the type of clarity and compliance guidance that is currently lacking.[201]

*Sixth*, if the Council requires climate-related risk disclosures and GHG-emissions disclosures (it should not), the Council should at least grant companies the flexibility to report the risk disclosures and GHG emissions in different ways—for example, through existing public disclosure channels such as company websites and sustainability reports—rather than requiring disclosure exclusively via the CDP. Alternatively, the Council could let companies subject to EPA's GHG Reporting Rules provide a hyperlink to where the company's information appears on EPA's website. This would help reduce costs and still provide the government the information it claims it needs.

*Seventh,* the Council could limit the science-based target requirement to scopes 1 and 2, rather than including scope 3 emissions. Scope 3 emissions are duplicative of other companies' scope 1 and 2 emissions, and federal contractors have much less ability to reduce those emissions. In addition, many scope 3 emissions are gross estimates due to the lack of available and reliable data sources, making it difficult to measure reductions that are needed to meet the SBTi target requirements.

*Finally*, the Council could withdraw the Proposed Rule and work to harmonize a new proposal with any requirements adopted by the SEC and with the requirements of the EPA's Greenhouse Gas Reporting Program. Although the Chamber has significant concerns with both the Council's and the SEC's proposals, including the lack of statutory authority for the proposals, there is no reason the federal government should have more than one, single standard for reporting GHG emissions and climate-related risks. The Council should not rush ahead now, potentially saddling contractors with three separate climate-disclosure frameworks.[202]

### G. The Council must either withdraw the Proposed Rule or re-propose a new rule for public comment.

To satisfy its rulemaking responsibilities under the APA, the Council will need to address the important matters discussed above that were not accounted for in the Proposed Rule, including various categories of costs that the proposal simply overlooked. The APA requires, additionally, that the Council make this new data and analysis available for public comment before adopting a final rule. This new data and analysis would

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[201] The current proposal lacks sufficient detail to help companies comply. For example, the Proposed Rule does not define what disclosures are "relevant" for scope 3 purposes. A comparison of the Proposed Rule to other climate-related rules confirms the less-developed nature of the Council's proposal. The Council's proposal is just 23 pages in the Federal Register; in contrast, EPA's Clean Power Plan for power plant GHG emissions is 304 pages and EPA's methane rules for the oil and gas sector are 146 and 154 pages. 80 Fed. Reg. 64,662 (Oct. 23, 2015) (Clean Power Plan); 86 Fed. Reg. 63,110 (Nov. 15, 2021) (methane standards); 87 Fed. Reg. 74,702 (Dec. 6, 2022) (supplemental methane standards).

[202] *See supra* p. 22.

address the potential impacts and justifications for many crucial aspects of the Proposed Rule, and "the most critical factual material that is used to support [an agency's] position," including "the technical studies and data upon which the agency relies," must have "been made public in the proceeding and exposed to refutation."[203] That is, the Council is foreclosed from "extensive reliance upon extra-record materials in arriving at its cost estimates" concerning the Proposed Rule, unless it provides "further opportunity for comment" on those materials and the Council's analysis of them.[204] Plainly, in light of the discussion in this comment letter alone, a wealth of new data and considerations must be evaluated before a final rule here can be adopted. To properly weigh that information, the Council must reopen the comment period to satisfy the requirements of 5 U.S.C. § 553(c).

Given the concerns expressed above, the Council should abandon this flawed rule entirely. However, if the Council elects to re-propose the rule, the Council must revise its assessment of the rule's justification, and of its costs and benefits, to focus on the benefits that the rule would have for the economy and efficiency of the procurement process, and the Council must weigh *those* benefits against the rule's costs. As explained above, any rule of this kind must be predicated on the benefits that Congress authorized the Council to pursue, not *ultra vires* objectives. This would require a thorough reassessment of the Proposed Rule's justification, resulting in a very different approach that must be presented in a new round of notice and comment.

* * *

The Chamber remains committed to working with the government to address the threat of global climate change.[205] Unfortunately, the Proposed Rule is not the proper way to proceed.

Sincerely,

Martin J. Durbin
President, Global Energy Institute,
and Senior Vice President, Policy
U.S. Chamber of Commerce

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[203] *Chamber of Com. of U.S. v. SEC*, 443 F.3d 890, 899-900 (D.C. Cir. 2006).
[204] *Id.* at 901.
[205] *See, e.g.*, Coalition Letter on the Ratification of the Kigali Amendment to the Montreal Protocol (Sep. 20, 2022), https://www.uschamber.com/environment/coalition-letter-on-the-ratification-of-the-kigali-amendment-to-the-montreal-protocol.

REPORT SUBMITTED BY REPRESENTATIVE VALERIE FOUSHEE

Ceres Accelerator for Sustainable Capital Markets

February 9, 2023

*Via* www.regulations.gov
Jennifer Hawes
General Services Administration
Regulatory Secretariat Division
1800 F Street, NW
Washington, DC 20405

**Re: Proposed Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk**

Dear Ms. Hawes:

I write on behalf of Ceres in support of the proposed Federal Supplier Climate Risk and Resilience Rule ("Proposed Rule") (FAR Case 2021-015, 87 Fed. Reg. 68312). In the attached comment, we explain why finalization of this rule will be critical to reducing the federal government's climate-related financial risk and capitalizing on climate-related economic opportunities. We also provide our recommendations for potential improvement.

The Proposed Rule reflects an enormous amount of work by the Federal Acquisition Regulation Council and its staff, and we commend this effort.

Please feel free to reach out to me (srothstein@ceres.org) or John Kostyack (john@kostyackstrategies.com) if you have any questions or would like to discuss our recommendations.

Thank you for your consideration.

Sincerely,

Steven M. Rothstein

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California Office: 369 Pine Street, Suite 620, San Francisco, CA 94104

Ceres Accelerator for Sustainable Capital Markets

**Ceres Comments on Proposed Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk**
**[FAR Case 2021-015]**
**February 9, 2023**

# I. Summary of Recommendations

Ceres appreciates this opportunity to provide comments on the proposed Federal Supplier Climate Risk and Resilience Rule put forward by the Federal Acquisition Regulatory Council (FAR Council).[1] We write to express our enthusiastic support for the Proposed Rule. As explained below, its disclosure provisions will provide critical information needed by the federal government in designing programs and strategies to reduce climate-related financial risk in its supply chain and to capitalize on climate-related economic opportunities. Its emissions reduction target requirements will ensure that the nation's largest contractors are committed to partnering with the government in reducing its climate risk.

We offer suggestions below for strengthening and clarification of the Proposed Rule and ensuring effective implementation. There are many thoughtful and important elements of the proposal, and we appreciate the White House's leadership on this vital issue. Recognizing these elements, we hope the FAR Council will consider these additional points:

- Borrowing from the excellent work of the four nonprofit entities identified in the Proposed Rule, establish federal standards for calculating GHG emissions, assessing climate-related financial risks and opportunities, and establishing science-based targets;[2]
- Require that large contractors use the methodologies of these entities or other widely accepted, science-based methodologies for meeting federal standards;[3]
- Limit the use of "mission-essential" waivers and improve transparency around the use of all waivers;

[1] See 87 Fed. Reg. 68312 (Nov. 14, 2022). With a membership consisting of the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of General Services, the FAR Council manages, coordinates, controls and monitors the maintenance and issuance of changes in the Federal Acquisition Regulations. See 41 USC 1302.

[2] If the FAR Council elects not to establish federal standards, we propose that it clarify that updates to private standards enacted following the effective date of the Proposed Rule are inapplicable and that it commits to regular updates to its rules to reflect such updates.

[3] We recognize the term "standards" has various meanings depending on whether it is used in a regulatory context. To avoid confusion, we recommend that the FAR Council use "standards" solely in reference to its regulatory requirements and that any private sector guidance offered to a contractor for purposes of meeting one or more of the Proposed Rule's standards is not a standard, but a "methodology."

- Prevent businesses with large impacts on the government's climate risk from taking advantage of regulatory relief aimed at small businesses; and
- Strongly encourage disclosure by the largest contractors of any voluntary efforts to address the needs of historically disadvantaged communities and fossil fuel-dependent communities.

We suggest strengthening of rule implementation with issuance of guidance by the Council on Environmental Quality on how the rule will be integrated with other procurement policies and practices as well as non-procurement spending; establishment of a Center for Management of Supply Chain Climate Risk; and rigorous program oversight and evaluation.

We respond in Sections IV and VII, respectively, to two questions on which the FAR Council requested comment: "The necessity of this collection of information for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility," and "Ways to enhance the quality, utility, and clarity of the information to be collected."

Ceres is a nonprofit organization working with the most influential capital market leaders to solve the world's greatest sustainability challenges. Our Investor Network, composed of investors with a combined total of $60 trillion in assets under management, focuses on ramping up sustainable investments in clean energy, clean technology innovation, and global food and water systems. Our Company Network drives business leaders to action to stabilize the climate, protect water and natural resources, and build a just and inclusive economy. Our Policy Network, with numerous corporate members, plays a critical role in passing some of the most ambitious climate laws in the country.

The Ceres Accelerator for Sustainable Capital Markets is a center within Ceres that aims to transform the practices and policies that govern capital markets in order to reduce the worst financial impacts of the climate crisis. It spurs action on climate change as a systemic financial risk—driving the large-scale behavior and systems change needed to achieve a net zero emissions economy. Through Ambition 2030 and other key programs, Ceres works to reduce emissions from six of the largest sectors in the economy – steel, utilities, oil and gas, transportation, banking, and food and agriculture.

We appreciate the leadership of the FAR Council and other federal officials in preparing this Proposed Rule.

# II. Background

As the world's largest purchaser of products and services, with $630 billion in procurements in 2021, the federal government has enormous amounts of greenhouse gas (GHG) emissions embodied in its supply chain. These GHG emissions, along with its suppliers' exposure to extreme weather and other climate change impacts, leaves the government highly vulnerable to climate-related financial risks. The government has an obligation to protect taxpayers and promote economical and efficient procurement by identifying these climate change risks as well as opportunities to mitigate them. The collection of climate-related information facilitated by this Proposed Rule will make possible critically needed updates to contracting strategies and programs aimed at reducing climate risk.

The climate risk assessments and disclosures required by this rule will greatly reduce the costs and difficulties faced by federal agencies seeking to assess and manage climate risk in the federal supply chain. The standardized format called for in the Proposed Rule, along with the Proposed Rule's requirements that disclosures be posted on a public website and that the location of that website be shared with the federal government, will greatly facilitate the government's risk reduction work as well as such work by contractors, state and local agencies and other stakeholders.

In addition to requiring climate risk assessments and disclosures, the Proposed Rule calls for establishment and disclosure of validated science-based emissions reductions targets by the nation's largest contractors. These targets, along with the required assessments of progress toward targets, will likewise serve to facilitate the government's and stakeholders' efforts to reduce climate-related financial risk.

Together, the emissions calculations, risk assessments, targets and disclosures in the Proposed Rule will achieve the FAR Council's stated objectives of saving money for taxpayers and promoting economical and efficient procurement. They also will achieve the ancillary benefits of incentivizing climate-related technological innovation, creating jobs in sustainable businesses, strengthening the economy and national security, and protecting the environment and public health. Achievement of these benefits ultimately will benefit taxpayers through a strengthened revenue base and reduced procurement costs.

Increasing the resilience of the federal supply chain to climate-related financial risks is an urgent national priority. The October 2021 Intergovernmental Panel on Climate Change (IPCC) report on the physical science basis of climate change states: "Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in carbon dioxide ($CO_2$) and other greenhouse gas emissions occur in the coming decade. . . . Human-induced climate change is already affecting many weather and climate extremes in every region across the globe. Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has strengthened (over time)."

In its annual report on billion-dollar weather and climate disasters affecting the U.S., the National Oceanic and Atmospheric Association (NOAA) determined that the U.S. has experienced 338 disasters since 1980 where overall damages or costs reached or exceeded $1 billion, for a total of $2.295 trillion in costs. Such disasters are becoming more frequent in the U.S. as global temperatures increase. Last year NOAA found that the annual average for the most recent five years (2017-21) is 17.8 events, far greater than the 1980-21 annual average of 7.7 events. Earlier this year, NOAA announced that this trend was continuing: in 2022, the U.S. experienced 18 disasters with damages or costs reaching or exceeding $1 billion. The harmful impacts are being felt widely across the country: according to researchers at Rebuild by Design, in the years between 2011 and 2021, 90 percent of U.S. counties experienced a climate disaster, with some experiencing as many as 12 such disasters during that time.

Failing to heed the science highlighting growing climate risks to the federal supply chain increases the costs for products and services, increases bottlenecks and other disruptions and otherwise exposes taxpayers to serious harm. As noted by Steve Ellis of Taxpayers for Common Sense at a December 2022 Ceres webinar discussing the Proposed Rule, the growing costs to the federal government of responding to extreme weather and other climate-related disasters are the equivalent of a new tax; procurement policies that reduce climate risks are needed to reduce that tax burden.

In May 2021 President Biden issued Executive Order 14030, calling for the FAR Council to consider requiring major federal suppliers to (1) publicly disclose GHG emissions and climate-related financial risk and (2) set science-based reduction targets. It also called for agencies to consider GHG emissions and climate risk in their procurement decisions. This Executive Order properly recognizes the critical role of federal procurement policy in increasing the visibility of climate risks in the federal supply chain and promoting efficient management of those risks.

In an October 2021 Advanced Notice of Proposed Rulemaking on FAR Case No. 2021-016, the FAR Council invited comments on how agencies could consider GHG emissions and climate risk in their procurement decisions. In January 2022 comments, Ceres expressed its view that "the most important step that the FAR Council can take to reduce climate-related financial risk, is to require all federal suppliers to disclose and publish their GHG emissions and their science-based net-zero plans to reduce emissions on a pathway aligned with the internationally agreed target of 1.5°C." The FAR Council is now taking this critical step with respect to large contractors as part of FAR Case No. 2021-15.

Updating procurement regulations to require that contractors estimate GHG emissions, assess climate risks and establish science-based emissions reduction targets will lead to important progress toward the government's objectives of reducing global GHG emissions in alignment with Paris Agreement targets. This Proposed Rule also will increase the resilience of federal supply chains to risks from the transition to a low-carbon economy and the physical impacts of climate change. As discussed in Section IV, it also will provide much-needed protection for taxpayers.

Tracking and managing emissions and other climate-related risks builds supply chain resilience and reduces costs for both suppliers and the federal government. For instance, since setting its own climate goals, the federal government reports that it has reduced its building and vehicle energy use by at least 32 percent since 2008 and saved taxpayers at least $11.8 billion annually.

A more systematic approach to identifying and addressing climate risks has the potential to reduce emissions and save taxpayers even more. Most of the FAR's climate-related policies are aimed at specific emissions sources or commercial and industrial processes, and not at the full range of climate risks that contractors face. See, e.g., FAR 23.703 (requiring agencies to "[i]mplement cost-effective contracting preference programs promoting energy-efficiency, water conservation, and the acquisition of environmentally preferable products and services"); FAR 23.802 (establishing federal policy giving "preference to the procurement of acceptable alternative chemicals, products, and manufacturing processes that reduce overall risks to human health and the environment."); FAR 23.804 (requiring tracking and reporting of hydrofluorocarbons with high global warming potential by suppliers of air conditioners, refrigerators and other products).

In 2016, the FAR Council promulgated FAR 52.223-22, its only rule to date addressing GHG emissions from federal suppliers operating across the entire U.S. economy. Entitled “Public Disclosure of Greenhouse Gas Emissions and Reduction Goals-Representation" (2016 FAR Rule), this rule requires all entities with $7.5M or more of federal contract obligations in the prior fiscal year to make representations in response to two prompts:

1. Whether the contractor makes available on a publicly accessible website the results of a GHG emissions inventory, performed in accordance with the GHG Protocol Corporate Standard or a similar accounting standard; and
2. Whether the contractor makes available on a publicly available website a target to reduce absolute GHG emissions or GHG emissions intensity by a specific quantity or percentage.

If either of the questions is answered affirmatively, the contractor must identify the website on which the emissions inventory and/or target are disclosed. The representation is optional for those entities with less than $7.5M of Federal contract awards in the previous fiscal year.

The 2016 FAR Rule received support from most of those who responded to the FAR Council proposal. The shipping firm UPS was among the proposal’s supporters, stating that “federal agencies should have no less freedom [than private sector buyers] to pose [climate risk] questions to their vendors, and to choose to look elsewhere for a vendor who refuses to answer the questions.” Further, “[t]he best opportunity for sustainability is a world where sustainability becomes a matter of corporate competitive advantage.”

This approach to climate risk disclosure – essentially making climate risk assessment and target-setting by suppliers optional – was generally seen as a positive first step at the time. However, largely because of the purely voluntary nature of disclosure, the federal government did not meet its need for decision-useful information about climate-related financial risk in its supply chain. There is scant evidence that the 2016 FAR Rule has driven supplier climate risk assessments or meaningful reductions in climate risk.

Based on information collected from CDP and other sources, for the past several years the General Services Administration (GSA) has published and regularly updated a Federal Contractor Climate Action Scorecard. The website currently provides summary metrics on all contracts obligated in FY21, excluding small businesses, government entities, nonprofits, and some Department of Energy site operators. It is perhaps the

best window into whether the 2016 FAR Rule has produced needed assessments of the federal government's climate risk from its supply chain and meaningful commitments to emissions reductions.

The GSA scorecard shows that a large number of federal procurement dollars are not covered by such disclosures. Contractors representing 60 percent of dollars spent by the federal government have publicly disclosed their GHG emissions, and contractors representing 20 percent of dollars spent have set or committed to setting targets through the Science-Based Targets Initiative (SBTi), the largest initiative defining and promoting best practice in emissions reductions and net-zero targets in line with climate science. Contractors representing another 47 percent of dollars spent had set emissions reduction targets without ensuring that they were science-based.

The statistics in the most recent status report of the Task Force on Climate-Related Financial Disclosures (TCFD), examining disclosures from a wide array of companies from around the world, also highlight the limits of voluntary disclosure of climate risk assessments: while 80% of companies disclosed in line with at least one of the TCFD-recommended disclosures for fiscal year 2021, only 43% disclosed in line with at least five. These levels of disclosure fall short of the TCFD's 11 recommended disclosures.[4]

Considering these incomplete disclosures of climate risk assessments and science-based emissions reduction targets, the FAR Council is wisely proposing to move beyond the 2016 FAR Rule's optional approach in favor of a more comprehensive, mandatory approach.

The growth of the government's climate-related financial risk due to increased government spending makes this a matter of great urgency. The government's annual contracting budget has nearly tripled in the past two decades, from $235 billion in fiscal year 2001 to $637 billion in fiscal year 2021. The GHG emissions associated with this increased spending have not been tracked, so it is difficult to estimate precisely the increase in federal supplier emissions that has taken place during this time. However, given the absence of a comprehensive emissions reduction strategy, one can presume that emissions increases from products and services provided by contractors have been quite substantial. As the TCFD, the SEC and many others have demonstrated, an

[4] As explained in a February 2023 Ceres submission to the SEC regarding its proposed climate risk disclosure rule, recent increases in corporate reporting in alignment with TCFD's recommendations represents important progress because, among other things, the overall costs of compliance with a disclosure rule based on the TCFD framework decline as adoption of this framework increases.

increase of GHG emissions is a key indicator of growing climate-related financial risk. The FAR Council's thoughtful proposal will achieve meaningful and measurable reductions in emissions and climate risks by facilitating analysis of climate-related information and modernization of federal contracting strategies and programs.

Like the 2016 FAR Rule, the Proposed Rule does not impose specific emissions reductions or resilience-building requirements. However, by requiring GHG emissions disclosures by significant contractors and major contractors, as well as climate risk assessments and science-based emissions reduction targets by certain major contractors, the Proposed Rule provides a critical foundation for the federal government to measure, manage and reduce climate risks and costs in the federal supply chain.

The federal government should follow the lead of the many large corporate buyers that are rapidly increasing their demand for decision-useful climate risk information from their supply chains. The rapid growth of the Sustainable Procurement Leadership Council, which today has more than 180 members with over $300 billion in collective purchasing power just ten years after its founding, and the participation of over 280 companies in CDP's Supply Chain membership, highlights the urgency of this work. A January 2023 survey of 2,000 C-level executives by Deloitte and market research firm KS&R also shows the urgent need for action: 97 percent stated that they expect climate change to impact company strategy and operations in the next three years. Similarly, in PwC's January 2023 Annual Global CEO Survey, 76 percent of CEOs surveyed said they anticipate that climate risk would impact their supply chains in the next 12 months; 16 percent said they anticipate a "large" or "very large" impact.

# III. Overview of Key Provisions

## Three Tiers of Requirements

The Proposed Rule creates three tiers of requirements, with significant differences in responsibilities assigned to contractors based on the size of their federal contracts and other attributes.

## Tier 1 (Requirements for All SAM Registrants)

The first tier of requirements applies to all entities registered in the System for Award Management (SAM) as interested in pursuing federal contracts. These entities must simply complete a representation regarding whether they meet the definition of a significant or major contractor. Significant contractors are defined as those with $7.5M to $50M of federal contract obligations in the prior fiscal year; major contractors are those with more than $50M of such obligations. According to the FAR Council, 491,690 entities are currently registered in SAM; an estimated 5,766 (1.17%) would answer affirmatively the question of whether they are significant or major contractors. Thus, almost 99 percent of registered contractors would have no responsibilities aside from a simple representation that they are not significant or major contractors.

## Tier 2 (Requirements for Certain Significant Contractors and Major Contractors)

The second tier of requirements applies to: (1) registered significant contractors not excused altogether from disclosure of climate information by the exceptions provisions; and (2) registered major contractors not excused altogether, or from more rigorous disclosure requirements, by the exceptions provisions. (The exceptions provisions are further discussed below.) In this tier of requirements, the Proposed Rule calls for inventorying Scope 1 and 2 emissions using the accounting standard established by the nonprofit GHG Protocol.[5] This inventory must have been performed within the current or previous fiscal year and must be disclosed through the government's SAM website. We refer to contractors subject only to these requirements as "Tier 2 contractors."

## Tier 3 (Requirements for Certain Major Contractors)

[5] Scope 1 emissions are defined in the Proposed Rule as "direct greenhouse gas emissions from sources that are owned or controlled by the reporting entity," and Scope 2 emissions are defined as "indirect greenhouse gas emissions associated with the generation of electricity." However, the Proposed Rule also calls for use of the GHG Protocol, which defines Scope 2 emissions more broadly as "emissions from the generation of acquired and consumed electricity, steam, heat, or cooling." Because the Proposed Rule refers to these emissions sources collectively as "electricity," we presume that the FAR Council intended to align with this broader definition.

The third tier of responsibilities applies to registered major contractors that are not excepted due to their status as Small Business Association-designated small businesses or nonprofits. In addition to inventorying and disclosing Scope 1 and 2 emissions, these contractors must:

(1) Inventory "relevant" Scope 3 emissions;[6]
(2) Disclose GHG emissions and climate risk information recommended for disclosure by the TCFD;
(3) Develop and disclose science-based emission-reduction targets;[7] and
(4) Have the targets validated by the nonprofit Science-Based Targets Initiative (SBTi).

The required disclosure must be performed annually by completing portions of the nonprofit CDP's Climate Change Questionnaire that, as identified by CDP, align with the TCFD's recommendations. The required target validation must be obtained within the previous five calendar years. Both the CDP Questionnaire responses and SBTi-validated targets must be made available on a publicly accessible website, which the FAR Council defines as one "that the general public can discover using commonly used search engines and read without cost."

We refer to contractors subject to these requirements as "Tier 3 contractors."

Using data on FY 2021 contract obligations, the FAR Council states that roughly 964 entities (major contractors not designated as small businesses) would be subject to the rule's Tier 3 requirements, while approximately 4,802 entities would be subject only to the Tier 2 requirements.[8] Stated differently, based on the FAR Council's analysis of FY2021 data, roughly 17 percent of all significant and major contractors would be Tier 3 contractors, while 83 percent would be Tier 2 contractors. Tier 3 contractors would

[6] Scope 3 emissions are defined in the Proposed Rule as greenhouse gas emissions, other than those that are Scope 2 emissions, that are a consequence of the operations of the reporting entity but occur at sources other than those owned or controlled by the entity.

[7] A science-based target is defined as "a target for reducing greenhouse gas emissions that is in line with reductions that the latest climate science deems necessary to meet the goals of the Paris Agreement to limit global warming to well below 2°C above pre-industrial levels and pursue efforts to limit warming to 1.5°C."

[8] The FAR Council does not provide an estimate of the number of major contractors that would be excused from Tier 3 responsibilities due to nonprofit status.

represent a mere 0.28% of SAM-registered contractors; Tier 2 contractors would represent 0.98% of SAM-registered contractors.

## Responsibility Determinations Based on Contractor Representations

The FAR Council proposes to use the FAR's responsibility provision, under which only contractors deemed by contracting officers to be responsible are eligible for contract awards, as its enforcement tool.[9] Its Proposed Rule calls for contracting officers to assess the climate-related representations made by contractors as part of their determination of whether they are responsible and therefore eligible.

## Waivers

Under two proposed new waiver provisions and a proposal to preserve an existing waiver rule, loss of eligibility for federal business due to non-compliance would not be automatic.

First, the contracting officer may only "presume" that the prospective contractor is Non responsible if it fails to comply with required representations or if the contracting officer has reason to doubt the veracity of the representations. If the contracting officer finds that the contractor is making a good faith effort to comply, the agency's senior procurement executive may provide a waiver for up to one year to allow the contractor to bring itself into compliance.

Second, the senior procurement executive of an agency is empowered to waive the rule's requirements for facilities, business units, or other defined units "for national security purposes" or emergencies or other mission essential purposes. The rule does not define "national security," "emergencies" or "mission essential."[10] Nor does it require

[9] Under section 9.103 of the FAR, it is federal policy that "No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility."

[10] FAR 23.105 offers complete exemptions from the FAR's environmental rules for certain activities upon a finding by an agency head that an activity constitutes an "emergency response" or that an exemption is "in the interest of national security." However, this existing regulation also does not provide a definition of these terms.

that a record of these types of waivers be made accessible to the public on the agency's website.

Finally, small businesses (which, according to the FAR Council, represent 56% of the 5,766 entities covered by Tiers 2 and 3 of the rule) also benefit from waiver authority given to the Small Business Administration under the existing FAR.[11]

## Contractors Excused from Tier 2 and Tier 3 Requirements

In the "exceptions" section of the Proposed Rule, five contractor types (tribal entities, higher education institutions, nonprofit research entities, state and local governments, and certain entities with management and operating (M&O) contracts) are excused from the rule's Tier 2 and Tier 3 requirements even if their total contract obligations in the previous year exceeded the rule's threshold of $7.5 million or more.

## Contractors Excused from Tier 3 Requirements

Another key provision in the "exceptions" section of the Proposed Rule is the treatment of small businesses and nonprofit organizations. The FAR Council proposes to limit their obligations to Scope 1 and 2 emissions disclosures (Tier 2), even if they are major contractors and otherwise would be subject to Tier 3 requirements.

Small businesses are defined as contractors with primary NAICS codes that, due to revenue or workforce size, put them in the small business category. An SBA guide allows companies with NAICS codes to determine if they qualify as small businesses; the determination is made based on either average annual receipts or average number of employees over a specified period of time. As discussed in Section VII below, we recommend modifying this approach to Tier 3 requirements to avoid excusing entities with high climate risk and sufficient financial resources.

## Exemptions

The Proposed Rule would exempt acquisitions listed at FAR 4.1102(a), the regulation excusing contractors from the usual requirement that they be registered in the SAM at

[11] Upon making a determination of nonresponsibility with regard to emissions disclosures by a small business entity, the contracting officer must refer the matter to the Small Business Administration, which then must decide whether to issue a Certificate of Competency. FAR subpart 19.6 empowers the SBA to override the contracting officer and declare the small business eligible for a contract award.

the time an offer is submitted. The FAR Council explains that this is necessary for reasons of enforceability: enforcement "is accomplished via review of a significant or major contractor's representations in SAM."

Contracts exempted from SAM registration under this regulation include those involving sensitive matters such as classified contracts, those awarded by deployed contracting officers in the course of military operations, and those awarded by contracting officers located outside the U.S. for support of diplomatic or developmental operations.

### Deadlines

The Proposed Rule has two key deadlines for contractors. The first applies to all Tier 2 and Tier 3 contractors. Starting one year after publication of a final rule, a significant or major contractor must have completed a GHG inventory and disclosed the total annual Scope 1 and Scope 2 emissions from its most recent inventory in SAM.

The second of the two key deadlines arrives in the following year. All of the Tier 3 requirements - completing a GHG inventory that covers relevant Scope 3 emissions, completing and disclosing responses to the annual CDP Questionnaire, and developing and disclosing an SBTi-validated science-based target – must be completed two years after publication of a final rule.

## IV. The Proposed Rule Will Provide Enormous Taxpayer and Societal Benefits

The Proposed Rule will deliver a wide array of benefits to the public without creating undue burdens for contractors – all the while helping the federal government, U.S. taxpayers and contractors reduce their climate-related financial risks and costs.

By focusing on Tier 2 and Tier 3 contractors, the FAR Council sensibly would apply the key emissions calculation, risk assessment, target-setting and disclosure requirements to entities receiving the most annual Federal contract obligations. This will elicit needed information from those with "the most responsibility for the management of GHG

emissions and climate risks impacting the Federal Government's supply chains."[12] According to the Proposed Rule, "[t]he major contractor requirements would address 64 percent of Federal Government spend and approximately 69 percent of supply chain GHG impacts.... Collectively, this rule will cover 86 percent of annual spend and about 86 percent of supply chain GHG impacts."

By using the responsibility determination of contracting officers as its enforcement mechanism, the Proposed Rule creates a simple way for contractors to demonstrate compliance and for contracting officers to ensure compliance. The representations that would be required to secure a responsibility determination are straightforward: the contractor need only indicate if it is a significant or major contractor and, if so, whether it has taken the procedural steps required under Tier 2 or Tier 3 of the rule, as applicable.[13] Through its waiver provisions, the Proposed Rule gives contracting officers and other federal officials flexibility to reduce these compliance measures. The Proposed Rule further reduces compliance costs by providing for the use of widely adopted private methodologies for emissions calculations, climate risk assessments and target-setting, as further discussed in Section V.

The FAR Council's Proposed Rule to assess and manage federal suppliers' climate risk exposure is consistent with approaches already in widespread use by large customers in the private sector. An August 2022 Federal Reserve Board research paper examined how physical climate risks affect firms' financial performance and operational risk management in global supply chains. According to the Fed researchers, weather shocks at supplier locations were already reducing the operating performance of suppliers and customers. Further, customers were responding to perceived changes in suppliers' climate-risk exposure: when realized shocks exceeded expectations, customers were 6 to 11 percent more likely to terminate existing supplier-relationships.

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[12] As discussed in Section VII, Ceres has concerns that roughly one-third of those entities with the largest federal contracts – those designated as small businesses by the Small Business Administration despite having over $50M in contract obligations the previous fiscal year – would be excused from Tier 3 responsibilities despite their high climate risk and sufficient financial resources.

[13] Although the contractor must review procedural compliance, the Scopes 1 and 2 emissions data disclosed by Tier 2 and 3 contractors through the SAM website and additional disclosures made by Tier 3 contractors on a public website are not reviewed by the contracting officer as part of its responsibility determination. As discussed in Section VIII, because the responsibility determination does not rest on the accuracy or completeness of responses to these inquiries, the Council on Environmental Quality must closely monitor implementation of the rule with an eye toward assessing the adequacy of these disclosures.

Customers subsequently chose new suppliers with lower expected climate-risk exposure.

According to a February 2022 survey by Just Capital, the public overwhelmingly wants information on climate risk and believes the federal government has an important role to play in eliciting it.

As explained below, the proposed measures to assess and manage climate will help protect taxpayers while strengthening our economy and national security and protecting the environment and public health.

## The Proposed Rule Will Protect Taxpayers from Climate-Related Financial Risks and Improve Delivery of the Government's Products and Services

Climate change poses significant challenges and opportunities in virtually every economic sector in the U.S. As we witnessed during the past few years with the Covid-19 pandemic, unaddressed corporate vulnerabilities can significantly harm our lives and livelihoods. The discontinuance of operations and closures of companies reveal the fragility of national and global supply chains and the importance of a proactive approach to supply chain risks.

Climate risks to the federal government and the overall economy fall into two categories. Transition risk is the risk that companies will not be adequately prepared to participate in the transition to a low-carbon economy currently underway. Physical risk is the risk that companies will not be adequately prepared for new weather extremes and other physical impacts of climate change.

At the core of the Proposed Rule is the TCFD's disclosure framework. The use of this framework reflects a recognition by the FAR Council that once the federal government's largest contractors disclose their approaches to transition risk and physical risk as recommended by the TCFD, federal agencies and contractors will have more of the information they need to address these risks and related opportunities. This information will be invaluable to agencies in their acquisition planning, solicitation design and source selection processes.

The TCFD's recommended disclosures have four core elements: governance, strategy, risk management and metrics/targets. Within each of these elements, the TCFD recommends disclosures about the climate-related risks and opportunities that the company sees, as well as the processes followed to identify and assess those risks and opportunities and the targets and metrics used by the company to evaluate progress in addressing them.

As discussed below, an efficient and effective federal procurement system – one that protects the financial interests of taxpayers while delivering essential services - can be achieved only if suppliers' handling of climate risks is assessed and managed. Unfortunately, as discussed in Section II above, many large U.S. contractors do not currently disclose sufficient information about the risks that climate change poses to their assets and operations and have not made commitments to reduce GHG emissions in alignment with Paris Agreement targets. For large federal suppliers, disclosures of emissions, climate risk assessments and target setting are frequently incomplete or delivered in formats that are not decision-useful. The Proposed Rule would help rectify this problem.

## The Proposed Rule Will Help Agencies and Contractors Prepare for the Transition to a Low-Carbon Economy

These disclosures made pursuant to the Proposed Rule – particularly those relating to Scope 1, 2 and 3 GHG emissions, science-based targets and transition plan implementation - will be critical to the government's ability to measure, manage and reduce risks arising from the transition to a low carbon economy, such as rapid changes to policy and technology and shifting attitudes of customers and the workforce. They will facilitate invaluable collaboration between agencies and suppliers, and among suppliers, that seek to address these challenges.

The disclosure will also help companies evaluate and leverage tremendous economic opportunities arising from the transition to a decarbonized economy. For years, many companies have recognized the growing market advantages of delivering zero-carbon technologies and other climate change solutions. By developing and implementing effective transition plans, they have seized the opportunities created by the accelerating shift to a low-carbon economy to meet customer demand, grow their profits and ensure their long-term sustainability. This information produced by the Proposed Rule's required disclosures will help agencies identify these forward-looking companies in

designing their procurement programs and strategies and help suppliers highlight their efforts to provide solutions.

Virtually every day, more evidence emerges of the significant economic opportunities arising from the transition. For example, In June 2022, McKinsey estimated that the net-zero-by-2050 goal will provide investment opportunities amounting to $9.2 trillion per year from 2023 to 2050. In December 2022, the International Energy Agency (IEA) issued its annual 5-year projection of growth in global renewable energy capacity, anticipating almost 30 percent higher growth than in its 2021 forecast, the “largest ever upward revision of IEA’s renewable power forecast,” with solar PV capacity by itself exceeding natural gas by 2026 and coal by 2027. According to the IEA, "fossil fuel supply disruptions have underlined the energy security benefits of domestically generated renewable electricity, leading many countries to strengthen policies supporting renewables."

Meanwhile, Credit Suisse has pointed to the Inflation Reduction Act (IRA) as one of the key drivers of the accelerated transition away from carbon-intensive energy sources, concluding that the IRA “will have a profound effect across industries in the next decade and beyond” and could ultimately shape the direction of the American economy. Ceres also has noted the transformative potential impact of the Inflation Reduction Act.

Changes over the past year in a key sector of the economy – surface transportation – highlight the historic nature of the risks and opportunities associated with this transition. Responding to the IRA’s electric vehicle (EV) and battery incentives, as well as EV mandates from China, California and other major markets, automakers have recently announced dramatic updates to sales and production targets, such as commitments by Volvo (100% EV sales by 2030), Ford (50% EV sales by 2030), and BMW (50% EV sales by 2030). In January 2023, BP lowered its projection of oil demand from its 2022 projection, citing the IRA’s incentives along with Russia’s invasion of Ukraine. It now anticipates that fossil fuels’ share of total primary energy sources will fall from 80 percent in 2019 to between 55 and 20 percent by 2050.

Dramatic changes in the manufacturing sector similarly highlight risks for companies failing to prepare for the transition and opportunities for forward-looking companies. In its January 2023 Energy Tech Perspectives report, the IEA forecasts that the market for mass-manufactured clean technologies will triple by 2030 under existing national policies and pledges.

It is in the interest of federal taxpayers, and in fact, every U.S. resident, that the federal government and its suppliers have increased visibility into transition risks and opportunities in the federal supply chain. Greater transparency enables federal agencies and suppliers to work together to achieve efficiencies and cost-savings in contracts. It also enables agencies to identify problems with suppliers that could impact their ability to meet contract timelines and obligations. This risk is especially acute considering the federal government's reliance in many instances on multi-year contracts, the use of which the FAR strongly encourages to reduce costs and broaden the competitive base of suppliers.

The FAR Council's Proposed Rule contains three core provisions, based on TCFD recommendations, that directly confront the buildup of transition risk in the federal supply chain.

First, as noted above, the Proposed Rule requires Tier 2 contractors to annually disclose Scopes 1 and 2 emissions and Tier 3 contractors to disclose Scopes 1 and 2 and relevant Scope 3 emissions.

Second, as also noted above, the Proposed Rule requires Tier 3 contractors to establish and annually disclose validated science-based emissions reduction targets.

Third, the Proposed Rule effectively requires that Tier 3 contractors disclose their plans for achieving science-based targets (commonly known as climate transition plans) *and detail their* progress in implementing those plans. This is because Tier 3 contractors must complete and disclose the portions of the CDP Questionnaire aligned with TCFD recommendations, and the TCFD recommends these disclosures.[14]

Obtaining consistent and reliable disclosures about contractors' science-based targets, and progress toward those targets, will be critical to the federal government's success in reducing climate risk in its supply chain. Net Zero Tracker analyzed in a June 2022 report the net-zero emissions goals set by 1,181 companies and found that 65 percent showed a "troubling lack of clarity on essentials." In another June 2022 report, SBTi

[14] A CDP technical note identifies key TCFD-recommended questions, including a request to "describe the targets used by the organization to manage climate related risks and opportunities and performance against targets." The technical note also includes a host of TCFD-recommended questions about the organization's Scope 1, 2 and 3 emissions. As discussed in Section VII, Ceres recommends that the federal government directly require disclosures of this information rather than indirectly by calling for a CDP Questionnaire.

found that only 46% of companies setting science-based targets were disclosing progress toward those targets. In a March 2022 report, CDP found that of the 13,100 organizations disclosing environmental data, only 135 met its criteria for a credible climate transition plan – the key document for setting the metrics against which progress toward targets is evaluated. In an October 2022 report, Ceres, CDP and partner organizations provided detailed recommendations on how companies can improve the credibility and usability of these transition plans. A May 2022 Ceres report offers suggestions on how such plans could be improved in the food sector.

With its mandate for emissions disclosures by Tier 2 and Tier 3 contractors and for science-based targets and reports on progress toward those targets by Tier 3 contractors, the Proposed Rule will enable agencies to compare disclosures among contractors and to work with contractors to improve disclosure quality. Over time, the information that agencies and contractors develop will be a central part of their strategy development as they work to reduce costly transition risk and ensure timely delivery of critical products and services.

## The Proposed Rule Will Reduce Supply Chain Vulnerabilities to Climate Change's Physical Impacts

The Proposed Rule's requirement for Tier 3 contractors to respond to TCFD-recommended questions also ensures that the federal government receives critically needed information about the preparedness of those major contractors to address the physical impacts of climate change. The TCFD defines the risks of physical impacts as including both acute risks (event-driven) and chronic risks (those due to longer-term shifts in climate patterns). Thus, for example, the chronic risks of megadroughts and their impacts on transportation of essential commodities on major waterways would be a fundamental component of any climate risk disclosure by a contractor dependent on such waterways for its shipments.

Through its reliance on the TCFD framework, the Proposed Rule requires a host of disclosures about a Tier 3 contractor's assessment of, and response to, these threats to its operations and its finances. Disclosures of this information by Tier 3 contractors will enable federal agencies and contractors to better assess and manage these risks, reducing their costs and enhancing their ability to deliver critical products and services. By facilitating the sharing of lessons among the largest contractors, the government will

improve its own resilience to climate impacts as well as resilience across the economy.

A January 2020 McKinsey study highlights the broad scientific consensus that both the public and private sectors are unprepared for physical climate change impacts. According to McKinsey, "the pace and scale of adaptation are likely to need to significantly increase to manage rising levels of physical climate risk. Adaptation is likely to entail rising costs and tough choices that may include whether to invest in hardening or relocate people and assets."

Federal agencies have recently engaged in a concerted effort to develop and implement climate adaptation and resilience plans. However, substantial knowledge gaps are inhibiting the government's ability to ensure that facilities, operations, and investments are resilient to climate impacts.[15]

The Proposed Rule would provide a wealth of information about the vulnerabilities of the federal supply chain to climate change impacts. These disclosures will inform a new generation of agency adaptation plans with concrete procurement actions to reduce these vulnerabilities.

## The Proposed Rule Will Reduce Systemic Risks to Federal Financial Stability and the National Economy

The Financial Stability Oversight Council (FSOC) 2022 Annual Report emphasizes climate change as an emerging and increasing threat to U.S. financial stability. The Proposed Rule's disclosure and target-setting requirements also help to reduce systemic risks that jeopardize federal finances and program delivery. The broad failure of federal suppliers and other businesses to align their operations with Paris-aligned emissions reduction targets poses significant risks to the overall economy, in turn threatening government operations.

As explained in the October 2021 report of the state-commissioned California Climate-Related Risk Disclosure Advisory Group, under the leadership of Stanford University's

[15] In many ways, the government is playing catch-up after years of neglect. In a 2015 report on climate risks to critical supply chains, the General Accounting Office focused on the lack of preparedness of the federal government. It analyzed adaptation plans of 24 federal agencies and found that only 12 included information on agency-specific risks. Only four agencies identified agency-specific actions to manage climate risks to their supply chains.

Alicia Seiger, the government is “a long-term owner and insurer of last resort of a wide variety of infrastructure.” This is especially true of the federal government, which in recent years has repeatedly served as the financial backstop for numerous communities suffering climate-related damages due to worsening tropical storms, flooding, drought, and wildfires. The Advisory Group’s recommended solution to this challenge is mandatory contractor disclosures, through which the government can obtain “critical information to understand and manage these risks.”

The federal government also serves as the ultimate backstop for companies in the financial sector facing potential failures, like it did in 2008. Without significant steps to address transition risk through greater emissions disclosure and rapid emissions reductions by companies across the economy, many experts fear a financial crisis at or beyond the scale of the Global Financial Crisis of 2008, spurred by a sudden and widespread deflation in asset values at carbon-intensive businesses. As highlighted in a September 2022 Ceres report, this hidden risk is distributed across major financial institutions.

In October 2021, the Financial Stability Oversight Council released a major report finding that climate change is an emerging and increasing threat to financial stability. The report identifies threats to the basic functioning of our financial system and economy from both transition risk and physical risk and emphasizes the importance of corporate disclosure of climate risk information, including information on GHG emissions. With its emphasis on disclosure by the federal government’s largest contractors, the Proposed Rule will make an important contribution to reduction of this systemic risk.

## The Proposed Rule Will Reduce the Impact of Price Volatility and Inflation on Procurement

One of the key benefits of the Proposed Rule is that it will help the federal government with addressing price volatility and inflation. By prompting suppliers to identify emissions reductions strategies and providing both agencies and suppliers with information about climate-related economic opportunities from transitioning to a low-carbon economy, the rule will reduce the harms that price volatility and inflation cause to efficient and economical federal procurement.

Mark Zandi, Moody's chief economist, is among the many experts who have noted the role of fossil fuel dependence in driving price volatility and inflation. According to Zandi, "Invariably, it's the high cost of oil and fossil fuels in general that drive big fluctuations and overall inflation.... Every recession since World War II has been preceded by a jump in oil prices." Reducing reliance on fossil fuels "will significantly reduce its grip on inflation in the broader economy."

According to a November 2022 study by Weber et al., supply shocks in just eight "systemically significant" sectors, including "Petroleum and coal products" and "Oil and gas extraction," are the primary drivers of price instability. A December 2022 Bloomberg analysis of reductions in Russian oil and gas supplies following the Ukraine invasion bears this out – it concludes that this supply shock has already imposed $1 trillion in costs on European energy consumers, with significant additional costs expected in the coming years.

A December 2022 study by Positive Money highlights another linkage between fossil fuels and inflation: climate-driven weather disasters erode infrastructure and supply chains, impact food production, and reduce worker productivity. Prices increase as the scale and frequency of extreme weather increase.

As President Biden has highlighted, recent spikes in fossil fuel prices linked to the Russian invasion of Ukraine have resulted in financial gains for shareholders and executives, not investments in innovative technologies that would reduce costs for consumers or taxpayers. In fact, executives have repeatedly signaled a desire to capitalize on Ukraine-related foreign demand growth to increase those costs. For example, Tellurian Chairman Charif Souki recently expressed the view that if U.S. LNG exports are expanded, domestic and international gas prices will converge in the latter half of this decade. In this scenario, U.S. consumers with fossil gas in their supply chains (such as the federal government) could be subject to dramatic cost increases.

A September 2022 study by Way et al. demonstrates how transitioning from a fossil-based energy system to a low-carbon energy system by 2050 would likely result in overall net savings of many trillions of dollars—even without accounting for climate damages or co-benefits of climate policy. Thanks to learning curves, clean energy sources will offer steady decreases in prices in the coming decades.

A key inflation-fighting feature of the Proposed Rule is that disclosures will enable agencies and suppliers to identify ways to deliver on energy efficiency. As the Green

Purchasing Guide of the National Association of State Procurement Officials explains, sustainable purchasing has become an integral part of public procurement in recent years in significant part because of the cost savings of energy-efficient products and services.

With the benefit of the GHG emissions and climate risk disclosures provided under the Proposed Rule, federal agencies will be able to identify expanded opportunities to build partnerships with contractors that help facilitate the transition away from costly fuel sources and toward renewable energy sources and energy efficiency.

## The Proposed Rule Will Simplify Review of Contractors' Climate Risk Profiles

In today's largely voluntary disclosure regime, large customers, investors and other stakeholders struggle with the wide array of formats and locations of climate risk disclosures. In a January 2022 report, the Conference Board found that more than half of S&P 500 companies disclose climate risks in annual reports and 71% disclose GHG emissions in their annual reports, sustainability reports, or company websites. However, not enough of these reports are prepared in a format that is decision-useful for the federal government.

The disclosures required by the Proposed Rule will significantly increase the efficiency of federal review of contractors' climate risk profiles by aligning federal disclosure requirements with existing global standards and methodologies already used by a large number of companies. The standardized format called for in the Proposed Rule, along with the Proposed Rule's requirements that disclosures be posted on a public website and that the location of that website be shared with the federal government, will greatly facilitate federal risk reduction work as well as the risk reduction efforts of state and local governments, investors, and other entities.

As the largest customer in the world, the federal government has a legitimate need for its potential contractors to facilitate its risk reduction work by providing disclosures about climate risks in a decision-useful format.

## The Proposed Rule Will Help Taxpayers by Strengthening the Economy and National Security and Protecting the Environment and Public Health

In addition to facilitating more effective and efficient procurement, the government's efforts to reduce its climate risk will have sizable payoffs for the economy, national security, the environment, and public health. Advancing these objectives has the combined benefit of producing taxpayer savings and improving overall quality of life.

*Strengthening the economy*

Numerous analysts have recognized that firms delivering solutions to the massive challenges posed by climate change have bright prospects in today's economy. For example, a January 2022 Deloitte study found that the U.S. economy could gain $3 trillion if it rapidly decarbonizes over the next 50 years. According to Deloitte, "this once-in-a-generation transformation could add nearly 1 million more jobs to the US economy by 2070."

The Proposed Rule will increase the federal government's and suppliers' visibility into opportunities to partner on climate solutions and economic revitalization. Tracking and managing emissions could spur significant private-sector transformations. For example, the supplier disclosures provided under this rule, once combined with product disclosures provided pursuant to the Administration's "Buy Clean" policies, could provide information to help scale the technologies needed to decarbonize key sectors such as steel, concrete, aluminum, and chemicals. We discuss in Section VI our recommendations for integrating the disclosures required under this rule with Buy Clean disclosures and other product-level and project-level climate disclosures.

According to a June 2022 analysis of supply chain risk management by the Gartner consulting firm, leading companies see climate change as both a near- and long-term threat *and* an opportunity for differentiation to achieve competitive advantage. With the disclosure required by the Proposed Rule, federal agencies and suppliers will have much greater visibility into these opportunities. Partnering with federal agencies, firms with well-reasoned strategies for reducing climate risk and seizing climate-related opportunities will accelerate U.S. economic revitalization. As noted earlier, these opportunities continue to grow as a result of policies such as the Inflation Reduction Act and the Bipartisan Infrastructure Law.

*Strengthening national security*

The federal government has long recognized climate change as a threat to national security for reasons ranging from sea level rise impacts on defense installations to increased resource scarcity, regional conflicts, political instability, and mass migrations. In January 2021, the Defense Department announced a series of actions to make climate change a priority focus area, including climate risk assessments and actions to reduce the department's carbon footprint and spur the development of climate-friendly technologies at scale. In October 2021, the Department released a detailed climate risk assessment, identifying a wide variety of national security risks posed by climate change – including climate change's impacts to supply chains.[16]

Notably, defense procurements represent a majority of the U.S. procurement budget. Many of the nation's largest contractors help determine the resilience of the vast supply chains of defense agencies. The proposed rule will help build this resilience, and thereby reduce national security risks, by driving suppliers to track and more effectively manage climate risk.

*Protecting the environment and public health*

Climate change's large-scale ongoing damage to the environment and public health, and the prospects for even more significant damage in the coming decades, has been well-documented by the IPCC and other leading authorities. This damage shows up in substantial increases in the environmental and health protection and restoration costs of federal agencies as well in those of state, local, tribal and private entities. For example, according to a May 2021 NRDC report, fossil-fuel generated air pollution and climate change impose $820 billion in health costs on U.S. communities *each year*—a burden that falls heaviest on historically disadvantaged communities. With its proposed climate risk assessment and target-setting provisions, the FAR Council will enable federal agencies, suppliers, and other partners to identify cost-saving solutions to climate-related environmental and health problems.

[16] To ensure continued high-quality risk assessments, we recommend that the federal government limit the use of the national security waivers offered by the Proposed Rule. In Section VII, we recommend ensuring that any such waivers are publicly disclosed and that the use of waivers is regularly assessed during program evaluations.

# V. With its Reliance on Widely Accepted Private Standard-Setters, the Proposed Rule Will Simplify Disclosures and Target-Setting

In crafting the Proposed Rule, the FAR Council was faced with a decision on how best to leverage third-party standards and methodologies already in widespread use in the marketplace. In this section, we explain why we largely support the FAR Council's reliance on GHG Protocol, TCFD, and SBTi standards and methodologies and the widely used CDP disclosure approach. In Section VII, we explain how the FAR Council could strengthen its proposal by putting in place federal standards for GHG emissions calculations, climate risk assessments, target-setting and disclosures and by encouraging use of these methodologies and those of other qualified entities in meeting those standards.

The FAR Council's reliance on the nonprofit entities identified in the Proposed Rule greatly simplifies compliance with the rule by contractors as well as the use of required disclosures by federal agencies and stakeholders. The costs and burdens of collection, analysis and disclosure will be minimized by leveraging standardized approaches already in widespread use in the U.S. and around the world.

Like other large companies around the world, numerous contractors that would be covered by the Proposed Rule are very likely already using, or will soon be using, the GHG Protocol's methodology for calculating emissions, the TCFD's recommendations for assessment of climate-related financial risks and opportunities, SBTi's approach to target-setting and CDP's platform for disclosure.

- In comments filed in response to the FAR Council's October 2021 Advanced Notice of Proposed Rulemaking FAR Case 2021-016, numerous trade associations and major companies, including the Council of Defense and Space Industry Associations (at 8), Professional Services Council (at 5-6), Aerospace Industries Association (at 2), Boeing (at 2-3), HP (at 3), and Microsoft (at 5), expressed support for leveraging the existing frameworks of the leading private climate risk disclosure organizations.

- More than 90 percent of Fortune 500 companies reporting through CDP use the GHG Protocol. Corporate contributors to its methodologies range from 3M Corporation to Chevron to PriceWaterhouseCooper.

- Over 3,400 companies and institutional investors in 95 jurisdictions have publicly endorsed the TCFD recommendations, and over 120 regulators and governments around the world are TCFD supporters.
- Over 11,000 individuals and entities filed comments in response to the U.S. Securities and Exchange Commission's (SEC's) March 2022 proposed climate risk disclosure rule, with comments from investors and corporations showing "strong support" for use of the TCFD framework.
- In 2021, 400 companies (80%) from the S&P 500 index, worth over US$28.2 trillion in market capitalization, responded to CDP's climate change questionnaire, the vast majority of which disclosed against at least 80% of the TCFD-tagged questions in the CDP climate change questionnaire.
- The proposed climate disclosure standard developed by the International Sustainability Standards Board (ISSB) is aligned with the TCFD. Countries around the world are expected to adopt the ISSB standard, in whole or in part, in the next two years.[17]
- Beginning in 2022, TCFD-recommended disclosures became mandatory in the United Kingdom (UK) under the UK's Company Regulations and Limited Liability Partnership Regulations for over 1,300 UK-listed companies and private firms. The disclosure requirements specifically apply to contractors of the UK government.
- In the US, the National Association of Insurance Commissioners (NAIC) voted to require new climate disclosures based on the TCFD for insurers that operate in 15 states. These filings will reflect over 200 companies or close to 80% of the insurance market by size and will significantly add to TCFD adoption in the U.S.
- Comments filed on the March 2022 climate risk disclosure proposal issued by the SEC also provide useful data on the marketplace's embrace of these standard setters. Ceres analyzed 320 institutional investors' comments on the SEC's proposal and determined that 100% of these investors support the SEC's proposed use of the TCFD framework, 99% support its proposed use of GHG Protocol for Scope 1-2 disclosures, 97% support its proposed use of GHG Protocol for Scope 3 disclosures, and 95% support disclosure of emissions reduction targets.
- At the end of 2021, 2,253 companies across 70 countries and 15 industries, representing more than one third ($38 trillion USD) of global market

[17] The International Financial Reporting Standards (IFRS) Foundation is leading the development of the ISSB standard; 144 jurisdictions currently require the use of the accounting standards that the IFRS put in place.

capitalization, had approved emissions reductions targets or commitments with the SBTi.

- A wide array of industry-specific guidance and tools have been built using the GHG Protocol as their foundation. For example, the Partnership for Carbon Accounting Financials (PCAF), created by the financial services industry to establish a standard for Scope 3 emissions disclosures by financial institutions, uses the GHG Protocol. In addition to supporting this standard, PCAF explicitly advocates for assessing climate-related risks in line with the TCFD, setting science-based targets using SBTi and reporting to stakeholders through CDP.
- Tara Schmidt, Head of Climate and Sustainability Strategy, Sustainability & ESG Finance at Lloyds Bank and Bank of Scotland, recently referred to the TCFD as a "game changer." According to Schmidt, "[e]xternal frameworks like the TCFD and science-based targets giv[e] everyone an opportunity to 'compare and contrast to best-in-class and [find] opportunities that [climate change] could potentially present."
- Leading companies such as Mars, HP, Unilever, Ford, JLL and Walmart are already relying on the GHG Protocol and SBTi to measure, manage and reduce their Scope 3 emissions. According to Kate Monahan of Trillium Asset Management, this work is critical for prioritizing emissions reduction opportunities in the packaged food industry, where Scope 3 emissions represent more than 90 percent of companies' total emissions on average.

A key benefit to reporting companies from the FAR Council's use of widely respected private methodologies is that, because their adoption by companies and other reporting entities is so rapidly increasing, learning will likewise increase at a rapid pace, driving significant reductions in costs to both contractors and agencies and other users of contractor disclosures. A June 2022 white paper from the World Resources Institute and Concordia University on Scope 3 measurement highlights how the rate of learning about this complex area of climate risk assessment is accelerating now that the number of Scope 3 practitioners has scaled. This learning - including how to make reasonable estimates where high-quality source data are unavailable - will continue to accelerate as emissions disclosures using the GHG Protocol are increasingly mandated by financial regulators, large customers, investors, and others.

# VI. The Proposed Rule is Well Within the FAR Council's Authority under Federal Procurement Law

Requiring the largest federal contractors to publicly disclose their GHG emissions, climate-related financial risks and opportunities, and science-based targets is squarely within the executive's authority to set procurement policy.

The history of federal procurement law and policy shows that the federal government has wide latitude to determine those with whom it will deal and to fix contract terms. Over seventy years ago, Congress assigned the President a central role in managing the federal contracting system. The Federal Property and Administrative Services Act of 1949 ("Procurement Act") provides that "[t]he President may prescribe policies and directives that the President considers necessary to carry out" the Act's objective of "an economical and efficient" federal procurement system.[18]

Courts largely have upheld procurement policies established by the executive branch to promote the Act's economy and efficiency purposes. For example, the D.C. Circuit Court of Appeals has recognized that the Procurement Act "grants the President particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole."[19]

The Proposed Rule has a close nexus to economical and efficient procurement and is well within the executive's broad authority. Importantly, the Proposed Rule does not impose any new or unique change to the procurement process, but rather sets out a needed update to the requirements of the 2016 FAR Rule, as described below. The Proposed Rule will result in significant benefits to taxpayers and the national economy by helping identify vulnerabilities in federal supply chains and cost-saving mitigation opportunities, facilitating valuable collaboration with and among contractors, and increasing efficiencies in corporate disclosure processes and industries. Moreover, as discussed above, the Proposed Rule would achieve those benefits by harnessing established global standards and methodologies already used by many U.S. companies—including many of the largest federal contractors—thereby reducing compliance costs.

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[18] 40 U.S.C. § 101.

[19] *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir.) (*en banc*), *cert. denied*, 443 U.S. 915 (1979).

The Proposed Rule is also in line with extensive past practice. Since the adoption of the Procurement Act, Presidents have regularly exercised their authority to direct government procurement. Contracting requirements that drive innovation and cost-savings through greater efficiencies in contractor operations are commonplace. Past procurement policies have included measures prohibiting certain civilian contractors from engaging in employment discrimination, requiring contractors to inform employees of certain labor rights, requiring contractors to use an electronic system to verify employee work authorization, and requiring contractors to provide paid sick leave. Like these procurement policies, the Proposed Rule will result in verifiable economic and efficiency benefits for the federal government and contractors that flow through federal contracts.

# VII. Ceres' Recommendations to the FAR Council for Strengthening and Clarifying the Proposed Rule

## 1. Close key disclosure gaps

### a. Establish minimum standards for disclosures of GHG emissions, climate-related financial risks and opportunities and science-based targets

As discussed in Section V, the Proposed Rule's reliance on GHG Protocol, TCFD, SBTi and CDP is beneficial. Contractors, agencies, and stakeholders all benefit from the standardization, broad stakeholder participation and continuous learning and improvement that is central to the four entities' approaches. These benefits can best be achieved with the addition of clear federal standards describing what must be disclosed.

The Proposed Rule defers significantly to the four nonprofit entities to provide clarity on what Tier 2 and Tier 3 contractors must disclose. For example, the Proposed Rule does not describe with specificity the climate risks and opportunities that Tier 3 contractors must disclose. Instead, the Proposed Rule tells contractors to complete "those portions of the CDP Climate Change Questionnaire that align with the TCFD recommendations as identified by CDP." Moreover, departing from the approach of the 2016 FAR Rule, which as noted above calls for use of "the GHG Protocol Corporate Standard *or a similar accounting standard"* (emphasis added), the Proposed Rule requires reliance on the current standards and methodologies of the four nonprofit entities. This approach

poses the risk that the methodologies established by these entities at the time of the rulemaking will become outdated, with the Proposed Rule also becoming outdated and out of sync with science and best practices.

Ceres recommends that the FAR Council close these gaps by establishing minimum standards, described below. This would provide greater clarity and certainty to contractors, agencies and stakeholders, while still leveraging the benefits of the carefully developed methodologies offered by the four nonprofit entities.

Ceres also recommends that contractors be provided with the ability to select among available methodologies for calculating emissions, assessing climate risks, and establishing and validating science-based targets, so long as these methodologies meet minimum thresholds of widespread acceptance and scientific integrity and are fully disclosed. Contractors should be required to briefly summarize the methodologies employed in their annual climate disclosures.

We anticipate that the vast majority of Tier 2 and 3 contractors will elect to use the methodologies of the four nonprofits identified in the Proposed Rule to take advantage of their standardization, broad stakeholder engagement and continuous learning and improvements. However, although the GHG Protocol, TCFD, and SBTi are likely to serve for the foreseeable future as the leaders on emissions calculations, climate risk assessment and target setting, respectively, and CDP will also likely continue serving as the leading climate disclosure platform, the FAR Council should highlight their industry-leading methodologies while also allowing the use of similarly rigorous methodologies and disclosure platforms. By allowing this flexibility, the FAR Council will empower contractors to decide which science-based methodologies best fit their needs and objectives and will help ensure that its Proposed Rule remains consistent with the latest science-based approaches in widespread use in the marketplace.

Adopting this flexible approach to implementing federal standards would be consistent with the 2016 FAR Rule, in which contractors are instructed to indicate in their SAM website representations whether they have performed a GHG emissions inventory "in accordance with the GHG Protocol Corporate Standard *or a similar accounting standard*" (emphasis added).

We recommend that the FAR Council strike the following balance between setting minimum federal standards and relying on methodologies developed by third-party entities:

*Calculations and Disclosures of Scope 1 and Scope 2 GHG Emissions*

As noted above, the FAR Council already provides a clear standard in its Proposed Rule governing the emissions disclosures required by both Tier 2 and Tier 3 contractors. This standard is found in section 23.XX03(a) of the Proposed Rule, which calls for Tier 2 and Tier 3 contractors to annually estimate Scope 1 and Scope 2 emissions using the definitions of these emissions at proposed section 23.XX02. Proposed section 23.XX03(a) also makes clear that Tier 2 and Tier 3 contractors must annually disclose these emissions on the SAM website. We recommend providing greater flexibility to contractors regarding the calculation methodology: rather than limiting contractors to the GHG Protocol, the FAR Council should require contractors to use "the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard or another widely-accepted, science-based methodology" in calculating these emissions.

*Calculations and Disclosures of Scope 3 GHG Emissions*

As noted in Section II, a key element of the FAR Council's Proposed Rule is the requirement that Tier 3 contractors inventory and disclose Scope 3 emissions.

The Proposed Rule's definition of "annual climate disclosure" specifies that this disclosure must include disclose "relevant" Scope 3 emissions. The Proposed Rule also suggests that relevant Scope 3 emissions will be included in the CDP Questionnaire: it requires [20]"those portions of the CDP Climate Change Questionnaire that align with the TCFD recommendations as identified by CDP."[21]

We recommend that the FAR Council provide greater clarity by expressly requiring that Tier 3 contractors calculate relevant Scope 3 emissions and disclose them annually along with Scope 1 and 2 emissions. These emissions disclosures should be made in SAM as well as on a publicly accessible website.

As we propose with regard to Scope 1 and Scope 2 emissions calculations, we suggest that the Proposed Rule require contractors to use "the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard or another widely-accepted, science-based methodology" in calculating Scope 3 emissions. In addition, the definition of

[20] See, e.g., Proposed Rule at 68316: explaining that a delayed starting date for Tier 3 requirements is needed to provide "additional time to complete a GHG inventory that covers relevant Scope 3 emissions."

[21] The TCFD recommends "appropriate" Scope 3 GHG emissions disclosures.

Scope 3 emissions in proposed section 23.XX02 should be expanded to define what constitutes "relevant" Scope 3 emissions. We hope the FAR Council considers adding the following two elements to its definition of relevancy.

First, the FAR Council should add to its standard the test for relevant Scope 3 emissions used in the GHG Protocol Corporate Standard. It states that Scope 3 emissions categories may be relevant for any of the following reasons:

- They are large (or believed to be large) relative to the company's Scope 1 and Scope 2 emissions
- They contribute to the company's GHG risk exposure
- They are deemed critical by key stakeholders (e.g., feedback from customers, suppliers, investors, or civil society); or
- There are potential emissions reductions that could be undertaken or influenced by the company.

Second, the FAR Council should consider the bright-line test provided by SBTi for evaluating the first of these four factors: "if scope 3 emissions represent more than 40% of a company's overall emissions, [the company must] set a target to cover this impact."

Finally, after incorporating into the rule the GHG Protocol's 15 categories of Scope 3 emissions, the FAR Council should consider requiring that Tier 3 contractors disclose whether any of these categories were excluded from its Scope 3 emissions calculations and, if so, that they provide a rationale. This is industry best practice, currently required by both the GHG Protocol and CDP.

*Assessments and Disclosures of Climate-Related Financial Risks and Opportunities*

Ceres strongly supports the FAR Council's proposal to require annual disclosures of Tier 3 contractors' climate-related financial risks and opportunities in alignment with TCFD recommendations. However, rather than directing Tier 3 contractors to complete those portions of the CDP Questionnaire that align with the TCFD "as identified by CDP," the FAR Council should identify in its rule the relevant questions that must be addressed. Using the January 2022 CDP Technical Note on the TCFD (at 11) and February 2022 CDP Technical Note: Reporting on Transition Plans (at 8), which were in turn derived from the June 2017 Recommendations of the Task Force on Climate-Related Financial Disclosures and the October 2021 guidance Implementing the

Recommendations of the Task Force on Climate-Related Disclosures (Implementation Annex), we propose the following questions be considered for inclusion in the rule and that required responses be included in the annual climate disclosure placed on a public website:

*Governance*

1. *Describe the board's oversight of climate-related risks and opportunities*
2. *Describe management's role in assessing and managing climate-related risks and opportunities*
3. *Describe the board-level oversight on the climate transition plan and defined governance mechanisms to ensure delivery of the plan's targets*

*Strategy*

1. *Describe the climate-related risks and opportunities the organization has identified over the short, medium, and long term*
2. *Describe the impact of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning*
3. *Describe the resilience of the organization's strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario*
4. *Outline time-bound financial planning details of the transition plan, such as capital expenditure, operating expenditure, and revenue*
5. *Identify time-bound actions in the transition plan to decarbonize business operations and the value chain, with time-bound Key Performance Indicators*
6. *Describe how policy engagement aligns with the organization's climate ambitions and strategy*

*Risk Management*

1. *Describe the organization's processes for identifying and assessing climate-related risks and opportunities*
2. *Describe the organization's processes for managing climate-related risks*
3. *Identify how processes for identifying, assessing, and managing climate-related risks are integrated into the organization's overall risk management*

*Metrics and Targets*

1. *Disclose the metrics used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process*
2. *Disclose Scope 1, Scope 2 and, if appropriate, Scope 3 greenhouse gas (GHG) emissions, and the related risks*
3. *Describe the targets used by the organization to manage climate-related risks and opportunities and performance against targets*

We recommend that the FAR Council revise its definition of an annual climate disclosure to include responses to these questions rather than responses to a CDP questionnaire. In responding to these questions, Tier 3 contractors should be required to use recommendations provided by TCFD or any other entity with a widely accepted, science-based framework for assessing climate-related risks and opportunities. Finally, the FAR Council should preserve its requirements that the annual climate disclosure be published on a publicly accessible website and that the location of this disclosure be included in the representations on the SAM website.

*Establishment, Validation and Disclosures of Science-Based Targets*

Proposed section 23.XX03 of the Proposed Rule provides a clear standard regarding emissions reductions targets: Tier 3 contractors must develop a target that is science-based, they must secure validation that the target is science-based from SBTi, and they must make the validated target available on a publicly-accessible website. Moreover, the definition of a science-based target at proposed section 23.XX02 is also clear: a target for reducing GHG emissions is science-based if it is "in line with reductions that the latest climate science deems necessary to meet the goals of the Paris Agreement to limit global warming to well below 2°C above pre-industrial levels and pursue efforts to limit warming to 1.5°C."

As explained in Section IV, these requirements will be enormously helpful to the federal government in its broader initiative to reduce climate risk to taxpayers and the delivery of essential government services. We recommend only one modification to this standard: the FAR Council should replace the requirement that Tier 3 contractors secure validation of targets from SBTi with a requirement that they secure validation from "the Science-Based Targets Initiative or any other assurance provider that uses a widely-accepted, science-based framework for ensuring consistency of an emissions reduction target with the section 23.XX02 definition of a target that is science-based."

This would be consistent with the approach we recommend with respect to GHG emissions and climate-related financial risks and opportunities: the federal government

would establish the standard but would give Tier 3 contractors the flexibility to choose a widely accepted and science-based methodology for achieving the standard. The FAR Council would ensure that the emissions reduction target is credible by requiring third-party assurance.

By requiring third-party assurance of a science-based methodology for setting targets, the FAR Council would be following a well-established federal strategy for ensuring effective contractor oversight. An example is the U.S. Department of Defense's approach to its Cybersecurity Maturity Model Certification (CMMC) program, which implements cybersecurity requirements for federal contractors. Under section 252.204-7021 of the Defense Federal Acquisition Regulation Supplement, certain contractors must obtain a CMMC certificate from an accredited CMMC Third- Party Assessment Organization and maintain it at the appropriate level for the duration of the contract.

### b. Limit use of "mission-essential" waivers and improve transparency of waiver decisions

Ceres supports the targeted use of waivers to avoid unjust results or when an urgent situation requires that procurements move forward despite a supplier's lack of compliance. Thus, we have no objection to the one-year waiver that the Proposed Rule offers to contractors making an effort at compliance and we do not object in concept to the proposed waiver for national security and emergency reasons. However, the Proposed Rule provision that senior procurement executives be authorized to waive compliance with the rule for any procurement that is "mission essential" is too open-ended. The FAR Council should craft a narrow definition of "mission essential" to focus on achieving the stated purposes of the Proposed Rule. This will be essential to avoid confusion among senior procurement executives and contractors and to avoid potential abuse.

The FAR Council does not explain its objectives for the proposed "mission-essential" waiver, thus making it difficult for commenters to offer suggestions on how this objective could be achieved without producing unintended negative impacts. However, we suggest that the FAR Council clarify that it would *not* be legitimate to issue a waiver based on a Tier 3 contractor's claimed inability to perform the rule's requirements. Such a claim would not be credible considering that such a contractor, by definition, would have received federal contract awards exceeding $50M in the previous fiscal year and thus would have the needed resources to complete this important work. We recommend

that the FAR Council substantially reduce agency discretion to offer waivers for mission-essential purposes, especially such waivers for Tier 3 contractors - the contractors most likely to pose the most significant risk to the federal government.

The early years of implementation of the waiver provisions should offer many lessons about how they can be properly tailored so that the climate risk reduction objectives are not undercut. To facilitate evaluation of these decisions by program managers and the public, the rule should consider requiring that waivers for emergency, national security and mission-essential reasons be explained in writing and that the explanations be provided on a publicly accessible website. This is the sensible approach that the FAR Council proposes for the one-year waiver. Applying this approach for other waivers likewise makes good sense.

The FAR Council also could issue a policy statement on the importance of avoiding excessive use of waivers and the importance of senior procurement executives ensuring, to the greatest degree possible, that contractors with sizable carbon footprints and potentially vulnerable infrastructure disclose their climate risks and strategies for addressing them.

### c. Prevent contractors that are contributing substantially to the government's climate risk from taking advantage of regulatory relief aimed at small businesses

We recommend that the FAR Council remove its provision excusing contractors from Tier 3 requirements, despite having more than $50M of contract volume in the previous fiscal year, simply because they meet the Small Business Administration's technical definition of a small business.

Under federal regulations, a company is treated as a small business by the Small Business Administration (SBA) if, based on a three-year lookback, it has either low average annual receipts or a low average number of employees. The thresholds depend on the North American Industry Classification System (NAICS) code under which it is classified.

If a business is in a category in which average annual receipts is the determining factor, the largest average receipts that a business could earn and still qualify as a small business under the SBA's definition would $41.5M. Thus, there is no reason to excuse a

major contractor (i.e., one with over $50M in contract obligations the previous fiscal year) from Tier 3 duties under the small business exception based on its average receipts. The FAR Council effectively addresses concerns about overburdening contractors with insufficient financial resources by limiting Tier 3 duties to those with over $50M in contract obligations the previous fiscal year.

Major contractors that fall within one of the SBA's small business categories that use the "average number of employees" tests likewise should not be excused from Tier 3 duties. If regulatory relief were extended to this subset of SBA-designated small businesses, contractors engaged in "Fossil Fuel Electric Power Generation" (designated as small businesses if the average number of employees is less than 750) and "Petroleum Refineries" (designated as small businesses if the average number of employees is less than 1500) could be excused from Tier 3 duties. The FAR Council would be undercutting the Proposed Rule's purposes if it were to provide regulatory relief to major contractors in the face of the likely high climate risks and obvious financial resources of entities such as these.

According to the FAR Council, 389 major contractors (approximately one-third of major contractors) would have their obligations reduced from Tier 3 to Tier 2 under the proposed small business exception. Unless there are extenuating circumstances (which have not been articulated in the Proposed Rule), Tier 3 requirements should apply to all of these contractors. Their annual contract obligations of $50M or more in the prior fiscal year is a strong indicator of significant climate risk to the federal government, as well as the financial resources to carry out climate risk assessments and target-setting.

### d. Require a simplified disclosure of any efforts to address impacts to historically disadvantaged and fossil fuel-dependent communities

As the Biden Administration has recognized, any efforts to reduce GHG emissions and build climate resiliency must address redlining and other historical inequities. These inequities persist today in communities typically inhabited by low-income and/or Black, Indigenous and People of Color (BIPOC) residents and that are overburdened by pollution and underinvestment. In its Federal Sustainability Plan, the Administration calls for agencies to "consider incorporating the goals of the Justice40 Initiative into operational planning and decision making regarding Federal facilities, fleets, and operations. Specifically, they will consider how certain Federal investments might be

made toward the goal that 40 percent of the overall benefits flow to disadvantaged communities."

To effectuate this strategy, we encourage the FAR Council to put in place an easy-to-implement mechanism for Tier 3 contractors to voluntarily disclose any actions they are taking to address climate-related injustices. We recommend that the Proposed Rule be amended to call for a representation on the SAM website by Tier 3 contractors on whether their annual climate disclosure voluntarily discusses any current or planned actions taken to address challenges faced by historically disadvantaged communities. It might be helpful to offer the Administration's Climate & Economic Justice Screening Tool (including any updates to this tool) to assist contractors in identifying these communities.

We also recommend that the Proposed Rule be amended to call for a representation by Tier 3 contractors on whether their annual climate disclosure voluntarily discusses any current or planned actions taken with respect to a "just transition" for fossil fuel-dependent communities. Numerous communities and workers that have long been dependent on carbon-intensive businesses are at risk of getting left behind by the energy transition and are often faced with polluted water supplies and other unfunded environmental cleanup burdens. The federal government has an interest in facilitating their transition to the new clean energy economy. An October 2022 report by Ceres and partners on transition plans provides useful information that could assist the FAR Council in formulating a definition of just transition for these communities. Leading sustainability standard setters such as the Global Reporting Initiative, the Workforce Disclosure Initiative and Sustainability Assurance Standards Board have likewise provided disclosure metrics relevant to the just transition. The federal government should consider providing information distilled from these and other reports as guidance to contractors.

We recognize that the TCFD does not currently call for disclosure information on actions to assist historically disadvantaged or fossil fuel-dependent communities. Given the absence of any history of disclosure of these matters pursuant to the TCFD framework or related standards, it would be premature for the FAR Council to mandate specific disclosures about such actions or to tie eligibility for federal contracts to such disclosures. However, the rule should require representations from Tier 3 contractors on whether they have *voluntarily* discussed in their annual disclosures any current or planned actions to address challenges faced by these communities.

Although such voluntary disclosures would not affect the responsibility determination that decides eligibility for federal contracts, they would nonetheless begin to provide the federal government with valuable information on two important climate risk factors. Gathering information about contractors' actions and commitments regarding historically disadvantaged and fossil fuel-dependent communities would greatly advance the federal government's and the nation's interests in identifying opportunities to address these climate-related risks and opportunities.

### 2. Clarify applicability of updates to standards

If the FAR Council elects not to adopt our recommendation in Section VII.A.1 that it adopt its own standards, it should address how it intends to treat updates to those private standards that take place after the Proposed Rule has been promulgated as a final rule.

The Proposed Rule is clear that contractors must (depending on their contract volume and other factors) use the GHG Protocol to calculate emissions, make TCFD-recommended disclosures of climate risks and opportunities using the CDP Questionnaire and set science-based targets validated by SBTi. However, it is ambiguous when it comes to the updates that these private entities regularly enact. The FAR Council should clarify that only the standards in place on the effective date of the final rule apply.

With respect to any updates enacted by the private entities after the effective date of the final rule, the FAR Council should commit to regular updates of the Proposed Rule's definitions (through a notice-and-comment rulemaking) to achieve alignment.

## VIII. Ceres' Recommendations to the Council on Environmental Quality for Strengthening Implementation

Implementation of the Proposed Rule would be greatly strengthened through actions taken outside of the FAR. We recommend the following actions by the Council of Environmental Quality (CEQ), and especially its Office of the Federal Chief

Sustainability Officer, to maximize the effectiveness of the Proposed Rule in achieving its climate risk reduction objectives.

## 1. Maximize impact of disclosures on spending decisions

### a. Issue guidance on how disclosures will be used in modernizing procurement programs and strategies

When engaging in acquisition planning, bid solicitations, source selection and post-award contract management, program managers and contracting officers must evaluate information on a wide range of topics beyond the potential contractors' company-wide handling of climate risk. CEQ should issue guidance, separate from this rulemaking, on how the company-level disclosures required by this rule will be used in conjunction with other information collection to modernize and strengthen procurement programs and strategies.[22]

Of particular importance will be guidance on what climate risk information will likely be required beyond company-level disclosures. For example, in many procurements, the federal government will have a strong interest in evaluating potential contractors' capabilities to address the risks of extreme weather and other climate change impacts to delivery of the product or service that is the focus of the procurement ("project-level" climate risk disclosures). In some procurements the government may have an interest in promoting decarbonization of particular industry sectors and will be seeking "product-level" disclosures of embodied carbon and related climate information. The latter type of disclosure includes facility-specific Environmental Product Declarations (EPDs), a key feature of the Administration's Buy Clean initiative to accelerate decarbonization of the steel, concrete, cement, flat glass, and other industrial sectors.

Addressing all of the information that a contracting officer will need is outside the scope of the Proposed Rule. However, CEQ should issue guidance on how all levels of specificity of climate information will be integrated into contracting decisions. Such

[22] The FAR Council also should provide an update on FAR Case No. 2021-016. In its October 2021 Advanced Notice of Proposed Rulemaking, the FAR Council indicated that a rule would be forthcoming under this case that would integrate considerations of the social cost of GHG emissions in procurement decisions and that, where appropriate and feasible, would give preference to bids and proposals from suppliers with a lower social cost of GHG emissions. A report is due on this case on February 22, 2023.

guidance will be essential for contractors and other stakeholders seeking to engage effectively with the government in its efforts to reduce supply chain climate change risk.

### b. Issue guidance on how disclosures will inform decisions on grants, loans, and other non-procurement spending

Disclosures of climate risk assessments and science-based targets resulting from this Proposed Rule will have benefits to many stakeholders beyond federal procurement agencies and officials. In particular, federal agencies and officials engaged in non-procurement spending would benefit from the information and insights about climate risk in the federal supply chain. CEQ should therefore consider issuing guidance to federal agencies on how they can seize the opportunity to leverage the standards and disclosures required by the Proposed Rule in areas of federal spending outside of the procurement, such as grants and loans. For example, federal and state agencies receiving funding under the IRA for grants and loans to decarbonize key industrial sectors would benefit enormously from the standardized disclosures flowing from this rulemaking.

The Biden Administration has already issued guidance on how programs authorized by the IRA will help the nation achieve its goal of net-zero federal procurement while building the market for low-carbon construction materials and other advanced technologies. It also has begun work on integrating procurements and grant spending through its Buy Clean initiative, where the U.S. Department of Transportation (DOT) is working with the states to ensure that the $120 billion in infrastructure funds appropriated in FY2022 are distributed with an eye toward reducing embodied carbon in industrial materials. Working with DOT and other agencies, CEQ should now issue guidance on how the standards and disclosures resulting from the Proposed Rule will accelerate integration of climate risk considerations into all areas of federal spending.

### c. Establish a Center for Management of Supply Chain Climate Risk to accelerate learning

The Biden Administration has embarked upon an array of exciting initiatives aimed at measuring, managing and reducing climate risk in the federal supply chain. To ensure the effectiveness of these initiatives, and outside the technical scope of this Proposed Rule, Ceres urges the CEQ to consider creating a hub that accelerates learning in the

public and private sectors. We recommend establishment of a *Center for Management of Supply Chain Risk* at either the General Services Administration's Federal Acquisition Institute or the Department of Treasury's Office of Financial Research. The center would adopt many of the features of Defense Acquisition University, providing information, tools and training, but its primary mission would be reducing climate risk through federal procurement policies and best practices. Its secondary mission would be seizing climate-related economic opportunities through procurement.

Most procurement officials and contracting officers in the federal government are trained in procurement, not climate risk, and so the Center would serve as an invaluable forum for them to learn how best to integrate climate change considerations into procurement. Numerous stakeholders would benefit as well, ranging from contractors and subcontractors to state and local procurement officers to private standard-setters and NGO and university researchers and advocates.

The Center should be designed to encourage participation by those in private sector companies that have been innovating on reducing climate risk. Potential partners could include the Sustainable Purchasing Leadership Council which, as noted earlier, works closely with large corporate customers on developing best practices for achieving sustainability goals through supply chain innovations. The Center should collaborate with other federal entities focused on climate accounting, such as the Federal LCA Commons, the interagency community of practice for Life Cycle Assessment (LCA) research methods. The Center also should tap into the supply chain risk management expertise of those working outside of the climate risk arena, such as of the Director of National Intelligence's National Counterintelligence and Security Center and Department of Homeland Security's Cybersecurity Infrastructure and Security Agency

The Center should prioritize training and technical assistance for small- and medium-sized enterprises, so that the federal government can expand and diversify its supplier base and develop climate risk reduction approaches that are tailored for this critically important segment of the economy.

Finally, the Center should prioritize learning about the Proposed Rule, both in its early stages prior to implementation and as lessons are learned during implementation. It should make accessible all disclosures made pursuant to the Proposed Rule (i.e., the representations and emissions disclosures made on the SAM website and the more detailed disclosures made by Tier 3 contractors on public websites) as well as climate risk disclosures made by federal contractors that were excused from rule compliance

due to pre-existing disclosure obligations (such as M&O contractors). Summaries and evaluations of these disclosures and the Proposed Rule's overall performance (discussed below) should be prominently featured on the Center's website.

It should be noted that company climate disclosures required under the 2016 climate disclosure regulation are not currently reviewable by the public, and no summaries or evaluations of that regulation's effectiveness appear to have been published.[23] Existing databases of federal procurements such as the Federal Procurement Data System (FPDS) website are poorly designed for analyzing the effectiveness of this or any other procurement policy. The Center will provide a critical public service by demonstrating how to present procurement data in a format useful to analysts and that encourages public engagement. Based on public input on its summaries and evaluations, the Center could make recommendations to the FAR Council on how to strengthen climate risk disclosures for the benefit of contracting officials, contractors, and stakeholders.

Ceres has supported other organizations in the implementation of TCFD-related climate risk reports. For example, we have produced ten hours of training materials for insurance companies seeking to address climate risk. We would be pleased to explore offering similar support for the Center's important work.

## 2. Conduct rigorous program oversight and evaluations and solicit public comment on needed improvements

We recommend that CEQ put in place a framework to ensure that robust oversight of program implementation is carried out, accompanied by regular program evaluations that incorporate public input. A key focus should be ensuring that the rule is resulting in accurate climate risk information. Regular evaluations should be performed regarding the accuracy and completeness of contractors' representations and GHG inventories reported on the SAM website as well as the Tier 3 contractors' disclosures on public websites.

Under the Proposed Rule, the FAR Council has no imposed responsibilities on CDP or SBTi for ensuring the accuracy and completeness of disclosures made to them, and no third-party attestations are required to ensure the reliability of emissions inventories.

[23] The FAR Council briefly discusses disclosures made pursuant to this rule in its Proposed Rule but does not analyze the rule's effectiveness.

Moreover, because the representations required by the Proposed Rule would not serve as the basis of contracting decisions, the False Claims Act is unlikely to serve as an enforcement tool. This is a reasonable approach for the early phase of the program when a significant number of contractors will be using the approaches of the four private standard-setters in a comprehensive way for the first time. However, leading experts on corporate climate disclosure have expressed serious concerns about the prevalence of greenwashing and related forms of deception. In a November 2022 report, the UN High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities stated that "[I]f greenwash premised upon low-quality net zero pledges is not addressed, it will undermine the efforts of genuine leaders, creating both confusion, cynicism and a failure to deliver urgent climate action. Which is why, ultimately, regulations will be required to establish a level playing field and ensure that ambition is always matched by action."

With careful oversight of implementation and rigorous program evaluations, the federal government will ensure that the ambition reflected in contractors' science-based targets for emissions reductions, and reflected in the Proposed Rule's overarching disclosure framework, is matched by action.

newventurefund

WHO WE ARE HOW WE WORK

SAMPLE PROJECTS NEWS AND STORIES

# Who We Are

The New Venture Fund works with change leaders who share our purpose of creating positive impact

## in our communities, our country, and our world.

We were founded in 2006 in response to demand from leading philanthropists for an efficient, cost-effective, and time-saving platform to launch and operate public interest projects.

Our team of creative problem-solvers provides strategic advice and operational support to a range of donor-supported projects in conservation, education, youth development, global health, public policy, global development, disaster recovery, and the arts.

From 2013-2018,
we partnered with more than

**8,000**

**DONORS**

More than half of the 50 largest US grant-making foundations have funded projects hosted at the New Venture Fund, including eight of the top 10.

We are a 501(c)(3) public charity overseen by an independent board of directors with extensive experience in philanthropy and nonprofit management. To increase our own efficiency and effectiveness, NVF employs a team from Arabella Advisors to manage many of our day-to-day operations. Arabella is a leading philanthropy services firm that provides expert support to a wide range of foundations, impact

From 2013-2018, we made more than

**4,900**

**SUBGRANTS**

investors, individual philanthropists, and nonprofit organizations.

"New Venture Fund staff members are **extraordinary thinkers** and display **impeccable professionalism**."

— NVF PROJECT PARTNER



New Venture Fund
202-595-1061
info@newventurefund.org

For media inquiries:
communications@newventurefund.org

News and Stories

**FILE COPY**

# CERTIFICATE OF INCORPORATION OF A PRIVATE LIMITED COMPANY

Company Number **14960097**

The Registrar of Companies for England and Wales, hereby certifies that

**SCIENCE BASED TARGETS INITIATIVE LTD**

is this day incorporated under the Companies Act 2006 as a private company, that the company is limited by guarantee, and the situation of its registered office is in England and Wales

Given at Companies House, Cardiff, on **26th June 2023**

*N14960097N*

Companies House

THE OFFICIAL SEAL OF THE REGISTRAR OF COMPANIES

The above information was communicated by electronic means and authenticated by the Registrar of Companies under section 1115 of the Companies Act 2006

Companies House

# IN01 (ef)

**Application to register a company**

*Received for filing in Electronic Format on the:* **23/06/2023** *XC6AJNSA*

| | |
|---|---|
| *Company Name in full:* | **SCIENCE BASED TARGETS INITIATIVE LTD** |
| *Company Type:* | **Private company limited by guarantee** |
| *Situation of Registered Office:* | **England and Wales** |
| *Proposed Registered Office Address:* | **FIRST FLOOR, 10 QUEEN STREET PLACE<br>LONDON<br>ENGLAND EC4R 1BE** |
| *Sic Codes:* | **96090** |

## *Proposed Officers*

*Company Director 1*

| | |
|---|---|
| *Type:* | **Person** |
| *Full Forename(s):* | **MR ANIRUDDHA** |
| *Surname:* | **DASGUPTA** |
| *Former Names:* | |
| *Service Address:* | **10 G ST NE #800**<br>**WASHINGTON**<br>**UNITED STATES DC20 002** |
| *Country/State Usually Resident:* | **UNITED STATES** |

*Date of Birth:* ****/06/1964** *Nationality:* **INDIAN**
*Occupation:* **PRESIDENT AND CEO**

*The subscribers confirm that the person named has consented to act as a director.*

*Company Director 2*

| | |
|---|---|
| *Type:* | **Person** |
| *Full Forename(s):* | **MS MARIA** |
| *Surname:* | **MENDILUCE VILLANUEVA** |
| *Former Names:* | |
| *Service Address:* | **389 7TH STREET, BROOKLYN<br>NEW YORK<br>UNITED STATES NY11 215** |
| *Country/State Usually Resident:* | **SWITZERLAND** |

*Date of Birth:* ****/02/1974** *Nationality:* **SPANISH**
*Occupation:* **CHIEF EXECUTIVE OFFICER**

*The subscribers confirm that the person named has consented to act as a director.*

*Company Director 3*

| | |
|---|---|
| *Type:* | **Person** |
| *Full Forename(s):* | **MS NICOLETTE** |
| *Surname:* | **BARTLETT** |
| *Former Names:* | |
| *Service Address:* | **4TH FLOOR, 60 GREAT TOWER STREET<br>LONDON<br>ENGLAND EC3R 5AZ** |
| *Country/State Usually Resident:* | **ENGLAND** |

*Date of Birth:* ****/02/1975** *Nationality:* **SOUTH AFRICAN,BRITISH**
*Occupation:* **CHIEF IMPACT OFFICER**

*The subscribers confirm that the person named has consented to act as a director.*

*Company Director 4*

| | |
|---|---|
| *Type:* | **Person** |
| *Full Forename(s):* | **MR MANUEL** |
| *Surname:* | **PULGAR-VIDAL** |
| *Former Names:* | |
| *Service Address:* | **28 RUE MAUVERNEY<br>GLAND<br>SWITZERLAND 1196** |
| *Country/State Usually Resident:* | **PERU** |

*Date of Birth:* ****/05/1962** *Nationality:* **PERUVIAN**
*Occupation:* **CLIMATE & ENERGY GLOBAL PRACTICE LEADER**

*The subscribers confirm that the person named has consented to act as a director.*

## *Persons with Significant Control (PSC)*

**Statement of no PSC**

**The company knows or has reason to believe that there will be no registerable Person with Significant Control or Relevant Legal Entity (RLE) in relation to the company**

## *Statement of Guarantee*

I confirm that if the company is wound up while I am a member, or within one year after I cease to be a member, I will contribute to the assets of the company by such amount as may be required for:
- payments of debts and liabilities of the company contracted before I cease to be a member;
- payments of costs, charges and expenses of winding up, and;
- adjustment of the rights of the contributors among ourselves, not exceeding the specified amount below.

| | |
|---|---|
| *Name:* | **WE MEAN BUSINESS COALITION INC.** |
| *Address* | **389 7TH STREET, BROOKLYN**<br>**NEW YORK**<br>**UNITED STATES**<br>**NY11 215** |
| *Amount Guaranteed* | **1** |
| *Name:* | **CDP WORLDWIDE** |
| *Address* | **4TH FLOOR, 60 GREAT TOWER STREET**<br>**LONDON**<br>**ENGLAND**<br>**EC3R 5AZ** |
| *Amount Guaranteed* | **1** |
| *Name:* | **WORLD RESOURCES INSTITUTE** |
| *Address* | **10 G ST NE #800**<br>**WASHINGTON**<br>**UNITED STATES**<br>**DC20 002** |
| *Amount Guaranteed* | **1** |
| *Name:* | **WWF- WORLD WIDE FUND FOR NATURE (FORMERLY WORLD WILDLIFE FUND)** |
| *Address* | **28 RUE MAUVERNEY**<br>**GLAND**<br>**SWITZERLAND**<br>**1196** |
| *Amount Guaranteed* | **1** |

## *Statement of Compliance*

*I confirm the requirements of the Companies Act 2006 as to registration have been complied with.*

| | |
|---|---|
| *Name:* | **WE MEAN BUSINESS COALITION INC.** |
| *Authenticated* | **YES** |
| *Name:* | **CDP WORLDWIDE** |
| *Authenticated* | **YES** |
| *Name:* | **WORLD RESOURCES INSTITUTE** |
| *Authenticated* | **YES** |
| *Name:* | **WWF- WORLD WIDE FUND FOR NATURE (FORMERLY WORLD WILDLIFE FUND)** |
| *Authenticated* | **YES** |

## *Authorisation*

*Authoriser Designation:* **subscriber** *Authenticated* **YES**

**End of Electronically filed document for Company Number:** **14960097**

# COMPANY NOT HAVING A SHARE CAPITAL

## Memorandum of Association of

## SCIENCE BASED TARGETS INITIATIVE LTD

Each subscriber to this memorandum of association wishes to form a company under the Companies Act 2006 and agrees to become a member of the company.

| Name of each subscriber | Authentication |
|---|---|
| WE MEAN BUSINESS COALITION INC. | Authenticated Electronically |
| CDP WORLDWIDE | Authenticated Electronically |
| WORLD RESOURCES INSTITUTE | Authenticated Electronically |
| WWF- WORLD WIDE FUND FOR NATURE (FORMERLY WORLD WILDLIFE FUND) | Authenticated Electronically |

Dated: 23/06/2023

**The Companies Act 2006**

**Company Limited by Guarantee without Share Capital**

# Articles of Association

**of**

# Science Based Targets initiative

**Company Number:**

Bates Wells

10 Queen Street Place, London EC4R 1BE
bateswells.co.uk

**The Companies Act 2006**

**Company Limited by Guarantee without Share Capital**

**Index to Articles of Association of Science Based Targets initiative**

## CONTENTS

## The Companies Act 2006

## Company Limited by Guarantee without Share Capital

## Articles of Association of Science Based Targets initiative

### PART I - CHARITABLE STATUS AND CAPACITY

### PURPOSES AND POWERS

1. **Purposes**

The Charity exists to further the charitable purposes of:

1.1 promoting for the public benefit the conservation, protection and improvement of the physical and natural environment; and

1.2 advancing education for the public benefit in the subject of climate change and making the useful results of research in this subject available to the public;

in particular, but not exclusively, by developing standards, guidance, tools and resources to enable the assessment of ambition and performance of products, entities, and financial portfolios against greenhouse gas emission limits informed by science.

2. **Powers**

The Charity has power to do anything which helps to promote its Purposes for the public benefit. For the avoidance of doubt (and without limit) it may:

***Promote best practice in greenhouse gas emissions reduction***

2.1 develop standards, guidance, tools and resources to enable the assessment of ambition and performance of products, entities, and financial portfolios against greenhouse gas ("**GHG**") emission limits informed by science (hereby referred to as "**climate alignment**");

2.2 independently assess and validate conformance against standards;

2.3 undertake research, information gathering, peer-learning, capacity building and delivering education in relation to aligning economic activity to science-based GHG emission limits;

2.4 provide technical advice to organisations aiming to align to science-based GHG emission limits;

2.5 provide support and activities which develop skills, capacities and capabilities to enable greater understanding of climate change risks and mitigation against such risks;

2.6 provide grants and funding for initiatives focussed on climate alignment, including contribution to scientific research;

2.7 contribute to the sound administration of climate science and climate alignment initiatives;

2.8 comment on climate science and its regulation and implementation;

2.9 promote public support for climate alignment in the private sector;

***Manage its finances***

2.10 raise funds;

2.11 borrow money (including, without limit, for the purposes of investment or raising funds);

2.12 accept or disclaim gifts (of money and/or other property);

2.13 lend money and give credit to, take security for such loans or credit, and guarantee or give security for the performance of contracts by, any person or company;

2.14 invest money not immediately required for its Purposes in or upon any investments, securities, or property;

2.15 set aside funds for particular reasons, or as reserves;

2.16 open and operate bank accounts and other facilities for banking and draw, accept, endorse, issue or execute promissory notes, bills of exchange, cheques and other instruments;

2.17 give guarantees or other security for the repayment of money borrowed, for a grant, or for the discharge of an obligation (but only in accordance with the restrictions in the Charities Act 2011);

2.18 pay out of the funds of the Charity the costs of forming and registering the Charity;

***Manage its property affairs***

2.19 dispose of, or deal with, all or any of its property (but only in accordance with the restrictions in the Charities Act 2011);

2.20 acquire or rent property of any kind and any rights or privileges in and over property and construct, maintain, alter and equip any buildings or facilities;

2.21 arrange for investments or other property of the Charity to be held in the name of a nominee or nominees (and pay any reasonable fee for this);

2.22 impose (revocable or irrevocable) restrictions on the use of any property of the Charity, including (without limitation) by creating permanent endowment;

2.23 incorporate and acquire subsidiary companies;

2.24 insure the property of the Charity against any foreseeable risk and take out other insurance policies as are considered necessary by the Trustees to protect the Charity;

***Work with other organisations***

2.25 establish and support (or aid in the establishment and support of) any other organisations, execute charitable trusts and subscribe, lend or guarantee money or property for charitable purposes;

2.26 become a member, associate or affiliate of or act as trustee or appoint trustees of any other organisation (including without limit any charitable trust, including a charitable trust of permanent endowment property held for any of the charitable purposes included in the Charity's Purposes);

2.27 co-operate with charities, voluntary bodies, statutory authorities and other bodies and exchange information and advice with them;

2.28 amalgamate or merge with or acquire or undertake all or any of the property, liabilities and engagements of any body;

***Manage its day-to-day operations***

2.29 subject to Article 3 (Limitation on private benefit):

2.29.1 engage and remunerate staff and advisers;

2.29.2 make reasonable provision for the payment of pensions and other benefits to or on behalf of employees and their spouses and dependants; and

2.29.3 enter into compromise and settlement arrangements with them;

2.30 alone or with other organisations, seek to influence public opinion and make representations to and seek to influence governmental and other bodies and institutions regarding the reform, development and implementation of appropriate policies, legislation and regulations provided that all such activities shall be confined to those which an English and Welsh charity may properly undertake;

2.31 promote, encourage, carry out or commission research, surveys, studies or other work, make the useful results available;

2.32 organise and assist in the provision of conferences, courses of instruction, exhibitions, lectures and other educational activities; and

2.33 provide indemnity insurance for:

2.33.1 the Trustees, in accordance with, and subject to the conditions in, section 189 of the Charities Act 2011; and

2.33.2 officers who are not Trustees, subject to such conditions as the Trustees shall determine.

**LIMITATION ON PRIVATE BENEFIT**

3. **Limitation on private benefit**

***The general rule***

3.1 The Charity's income and property may only be applied to promote its Purposes.

3.2 In light of the Charity's charitable status:

3.2.1 no part of its income or property may be paid or transferred to any of the Charity's members, whether directly or indirectly, by way of dividend, bonus or otherwise by way of profit; and

3.2.2 no Trustee, or person Connected to them, may:

(a) sell goods, services or any interest in land to the Charity;

(b) be employed by, or receive any remuneration from, the Charity;

(c) buy any goods or services from the Charity on terms preferential to those applicable to members of the public; or

(d) receive any other financial benefit from the Charity (that is, a benefit, direct or indirect, which is either money or has a monetary value);

except as set out in Article 3.3.

***Exceptions to the general rule***

3.3 Article 3.2 does not prohibit:

3.3.1 an Authorised Benefit;

3.3.2 a benefit to a person in their capacity as a beneficiary of the Charity;

3.3.3 a grant being paid to a member provided that the member must be obliged to use any such grant to further the Charity's Purposes (and not for any other purpose);

3.3.4 the payment of reasonable expenses properly incurred by a Trustee or Connected person when acting on behalf of the Charity (including without limitation expenses falling within the scope of Article 2.18); or

3.3.5 any other payment, benefit or action which is authorised by the court or the Charity Commission (or where the Charity Commission has confirmed that its authority is not required).

***Authorised Benefits***

3.4 The following are Authorised Benefits:

3.4.1 A member, Trustee or Connected person may receive:

(a) reasonable and proper remuneration for any goods or services supplied to the Charity (so long as, once this Article 3.4.1(a) has been relied upon, only a minority of Trustees will be receiving (or will be Connected to a person who is receiving) remuneration from the Charity that is authorised by this Article 3.4.1(a));

(b) reasonable and proper rent for premises let to the Charity; and/or

(c) a reasonable and proper rate of interest on money lent to the Charity.

3.4.2 Additionally:

(a) the Charity may pay reasonable and proper premiums in respect of indemnity insurance, as permitted under Article 2.33; and

(b) a Trustee or other officer of the Charity may receive payment under an indemnity from the Charity in accordance with the indemnity provisions set out at Article 5.

***Application to Subsidiary Companies***

3.5 In Articles 3.3 and 3.4, a reference to the Charity should be interpreted as including any Subsidiary Company of the Charity (in which case, cross-references in Article 3.4.2 to particular Articles should instead be interpreted as referring to the equivalent articles (if any) in governing document of that Subsidiary Company). For the avoidance of doubt, the effect of this Article 3.5 is that only a minority of Trustees may receive (or may be Connected to a person who is receiving) remuneration from the Charity or any Subsidiary Company by virtue of Article 3.4.1(a) at any time, meaning that any relevant remuneration paid by a Subsidiary Company to a Trustee (or Connected person) must be taken into account when determining how many Trustees fall within the scope of Article 3.4.1(a) at any time.

***Authorised Benefits: additional terms***

3.6 Where a benefit is to be received from the Charity (rather than a Subsidiary Company), Article 3.4.1(a):

3.6.1 does not permit a Trustee to be employed by the Charity (but, for the avoidance of doubt, a Connected person can be employed by the Charity); and

3.6.2 does not permit a Trustee to be paid for acting as a charity trustee.

3.7 Article 16 (Conflicts) applies where benefits are to be received under this Article.

3.8 If the Charity is registered with the Office of the Scottish Charity Regulator, the additional requirements under section 67 of the Charities and Trustee Investment (Scotland) Act 2005 must be complied with.

**LIMITATION OF LIABILITY AND INDEMNITY**

4. **Liability of members**

The liability of members is limited. Each member agrees, if the Charity is wound up while they are a member (or within one year after they cease to be a member), to pay up to £1 towards:

4.1 payment of the Charity's debts and liabilities contracted before they ceased to be a member;

4.2 payment of the costs, charges and expenses of winding up; and

4.3 adjustment of the rights of the contributors among themselves.

5. **Indemnity**

Without prejudice to any indemnity to which a Trustee may otherwise be entitled:

5.1 every Trustee of the Charity shall be indemnified out of the assets of the Charity in relation to any liability incurred by them in that capacity but only to the extent permitted by the Companies Acts; and

5.2 every other officer of the Charity may be indemnified out of the assets of the Charity in relation to any liability incurred by them in that capacity, but only to the extent permitted by the Companies Acts.

**WINDING UP**

6. **Winding up**

6.1 At any time before, and in expectation of, the winding up or dissolution of the Charity, the members or, subject to any resolution of the members, the Trustees, may resolve that any net assets of the Charity after all its debts and liabilities have been paid, or provision made for them, shall on the winding up or dissolution of the Charity be applied or transferred in any of the following ways:

6.1.1 directly in furtherance of one or more of the Purposes of the Charity; or

6.1.2 to any institution or institutions to be used for charitable purposes which fall within the Purposes of the Charity.

6.2 For avoidance of doubt, the net assets of the Charity may only be paid to one or more of the members of the Charity at any time before, and in expectation of, the winding up or dissolution of the Charity, if such payment or distribution is made in accordance with Article 6.1.1 or 6.1.2.

6.3 If no resolution is passed in accordance with Article 6.1 the net assets of the Charity shall be applied for such purposes regarded as charitable under the law of every part of the United Kingdom as are directed by the Charity Commission.

**PART II – TRUSTEES**

**THE ROLE OF THE TRUSTEES**

7. **Management of the Charity's business**

7.1 Unless the Articles provide otherwise, the Trustees are responsible for managing the Charity's business. When doing so, they may exercise all the powers of the Charity.

7.2 The members may pass a special resolution requiring the Trustees to take (or refrain from taking) specified action: but this does not invalidate anything which the Trustees did before the resolution was passed.

8. **Ability to delegate**

8.1 Unless the Articles provide otherwise, the Trustees may delegate:

8.1.1 any of their powers or functions to any committee; and

8.1.2 the implementation of their decisions, or the day-to-day management of the Charity's affairs, to any person or committee.

8.2 The Trustees may delegate by such means; to such an extent; in relation to such matters or territories; and on such terms and conditions as they think appropriate. They may allow those

to whom a responsibility has been delegated to delegate further; and may change or terminate the delegation arrangements at any time.

***Appointing a Chief Executive Officer***

8.3 The Trustees shall appoint a Chief Executive Officer ("**CEO**") of the Charity in accordance with such recruitment process as the Trustees determine is appropriate. The CEO shall normally attend Trustees' meetings at the invitation of the Trustees, but for the avoidance of doubt shall not be a Trustee and shall have no automatic right to attend Trustees' meetings. The Trustees shall provide the CEO with a written job description and confirm the extent of the CEO's delegated authority pursuant to Article 8.1 and 8.2.

***Delegating to a committee***

8.4 When delegating to a committee, the Trustees must confirm:

8.4.1 the composition of that committee (although they may permit the committee to co-opt its own additional members, up to a specified number);

8.4.2 how the committee will report regularly to the Trustees; and

8.4.3 any other regulations relating to the functioning of the committee.

8.5 No committee shall knowingly incur expenditure or liability on behalf of the Charity except where authorised by the Trustees or in accordance with a budget which has been approved by the Trustees.

***Appointment of Nominations Committee***

8.6 The Trustees shall establish a Nominations Committee which shall include at least one Trustee and have the functions, composition and governance as set out in these Articles and under terms of reference adopted by the Trustees ("**Nominations Committee Terms of Reference**").

***Delegating investment management***

8.7 The Trustees may delegate the management of investments to a Financial Expert or Financial Experts provided that:

8.7.1 the investment policy is set down in writing for the Financial Expert or Financial Experts by the Trustees;

8.7.2 timely reports of all transactions are provided to the Trustees;

8.7.3 the performance of the investments is reviewed regularly with the Trustees;

8.7.4 the Trustees are entitled to cancel the delegation arrangement at any time;

8.7.5 the investment policy and the delegation arrangements are reviewed regularly;

8.7.6 all payments due to the Financial Expert or Financial Experts are on a scale or at a level which is agreed in advance; and

8.7.7 the Financial Expert or Financial Experts must not do anything outside the powers of the Trustees.

***Appointing agents***

8.8 The Trustees may (by power of attorney or otherwise) appoint any person to be the agent of the Charity for such purposes and on such conditions as they decide.

9. **Chair and Deputy Chair**

9.1 Subject to Article 9.2, the Trustees may appoint from among their number a Chair and Deputy Chair of the Trustees for such term of office as they think appropriate and may at any time remove a person so appointed from office.

9.2 Once the Nominations Committee is established, the Trustees shall consider its recommendations whenever making decisions to appoint a Chair or Deputy Chair.

10. **Technical Council**

10.1 The Trustees shall establish a Technical Council and shall agree the terms of reference ("**Technical Council Terms of Reference**") setting out the appointment process, membership eligibility criteria, technical decision-making functions, reporting requirements and any other operational arrangements applying to the Technical Council.

10.2 Each member shall have the right to propose one candidate for consideration, but the decision about whether such candidates meet the qualifying criteria shall be made in accordance with the Technical Council Terms of Reference.

10.3 The chair of the Technical Council shall be appointed by the Trustees. The Trustees may invite the chair of the Technical Council to attend the Trustees' meetings, as appropriate, but for the avoidance of doubt the chair of the Technical Council shall not be a Trustee and shall have no automatic right to attend Trustees' meetings.

11. **Rules**

11.1 The Trustees may from time to time make, repeal or alter such rules as they think fit as to the management of the Charity and its affairs, including (without limitation) the conduct of meetings (including any arrangements for Remote Attendance); codes of conduct for members or trustees; the payment of subscriptions; and the duties of officers and employees of the Charity. The rules shall be binding on all members of the Charity to the extent they regulate the relationship between the Charity and its members. No rule shall be inconsistent with the Companies Acts, the Articles or any rule of law.

**HOW TRUSTEES MAKE DECISIONS**

12. **The Trustees must take decisions collectively**

Any decision of the Trustees must be either:

12.1 a decision of a majority of the Trustees present and voting at a quorate Trustees' meeting (subject to the casting vote described in Article 14.6); or

12.2 a decision without a meeting taken in accordance with Article 15.

13. **Calling a Trustees' meeting**

13.1 The Chair, Deputy Chair or any two Trustees may call a Trustees' meeting or instruct the Secretary (if any) to do so.

13.2 A Trustees' meeting must be called by at least four Clear Days' notice unless all the Trustees agree otherwise, or urgent circumstances require shorter notice. The person scheduling the meeting must try to ensure, subject to the urgency of any matter to be discussed at the meeting, that as many Trustees as practicable are likely to be available to participate.

13.3 Notice of Trustees' meetings must be given to each Trustee and the Permanent UN Advisor by such means as the Trustees decide. Such notice must ordinarily be in writing and specify:

13.3.1 the day and time of the meeting;

13.3.2 the place where all the Trustees may physically attend the meeting (if there is to be such a place);

13.3.3 the general nature of the business to be considered at the meeting; and

13.3.4 if it is anticipated that Trustees participating in the meeting will not be in the same physical place, how it is proposed that they should communicate with each other during the meeting.

14. **Procedure for Trustees' meetings**

***Quorum***

14.1 The Trustees cannot conduct any business at a Trustees' meeting unless a quorum is participating. However, if the total number of Trustees for the time being is less than the minimum number of Trustees under Article 18, the Trustees may still act to appoint further Trustees, or call a general meeting to enable the members to do so.

14.2 The quorum shall be 50% of the total number of Trustees in office. In the event that all Representatives Trustees are conflicted on a matter and are unable to vote, the quorum requirement shall be a majority of the non-conflicted Trustees in office.

***Virtual / hybrid meetings are acceptable***

14.3 Meetings do not need to take place in one physical place. Trustees participate in (and form part of the quorum in relation to) a Trustees' meeting, or part of a Trustees' meeting, when they can contemporaneously communicate with each other by any means. If all the Trustees participating in a meeting are not in the same place, they may decide that the meeting is to be treated as taking place wherever any of them is.

***Chair and casting vote***

14.4 The Chair (if any) shall preside as chair of each Trustees' meeting unless they are absent from the meeting in which case the Deputy Chair shall preside as chair.

14.5 If both the Chair and Deputy Chair are absent from a Trustees' meeting, the Trustees in attendance may nominate one of their number to preside as chair.

14.6 If the numbers of votes for and against a proposal at a Trustees' meeting are equal, and the chair of the meeting is eligible to vote on the proposal, they will have a casting vote in addition to any other vote they may have.

15. **Decisions without a meeting**

15.1 A decision is taken in accordance with this Article 15 when the majority of the Trustees indicate by any means that they share a common view on a matter, provided that:

15.1.1 the Chair or Secretary (if any) or any other person authorised by the Trustees to put the proposed decision to the Trustees (the "**Facilitator**") has taken reasonable steps to notify all Trustees and the Permanent UN Advisor of the proposed decision; and

15.1.2 a majority of the Trustees have indicated to the Facilitator that they approve the proposed decision.

15.2 Following receipt of responses from a majority of the Trustees, the Facilitator must communicate to all of the Trustees (by any means) whether the decision has been formally approved by the Trustees in accordance with Article 15.1.

16. **Conflicts**

***Declaration of interests***

16.1 A Trustee must declare the nature and extent of:

16.1.1 any direct or indirect interest which they have in a proposed transaction or arrangement with the Charity; and

16.1.2 any duty, or any direct or indirect interest, which they have which conflicts or may conflict with the interests of the Charity or their duties to the Charity.

***Involvement in decision-making***

16.2 A Trustee's entitlement to participate in decision-making in relation to a matter depends on whether:

16.2.1 their situation could reasonably be regarded as likely to give rise to a conflict of interest or duties in respect of the Charity (a "**Potential Conflict Situation**"); or

16.2.2 their situation could not be reasonably regarded as likely to give rise to a conflict of interest or duty in respect of the Charity (a "**No Conflict Situation**").

16.3 Any uncertainty about whether a situation is a Potential Conflict Situation or a No Conflict Situation in relation to a matter shall be decided by a majority decision of the other Trustees taking part in the relevant decision.

16.4 A Trustee in a No Conflict Situation can participate in the decision-making process, be counted in the quorum and vote in relation to the relevant matter.

16.5 A Trustee in a Potential Conflict Situation can participate in the decision-making process, be counted in the quorum and vote in relation to the relevant matter, unless:

16.5.1 a majority of the other Trustees taking part in the relevant decision decide otherwise; or

16.5.2 the decision could result in the Trustee or any person who is Connected with them receiving a benefit. The following benefits are not counted for the purposes of this Article:

(a) any benefit received by any person in their capacity as a beneficiary of the Charity (see Article 3.3.2) which is available generally to the beneficiaries of the Charity;

(b) the payment of premiums in respect of indemnity insurance (see Article 3.4.2(a));

(c) payment under the indemnity in Article 5;

(d) reimbursement of expenses (see Article 3.3.4); or

(e) any benefit authorised by the court or the Charity Commission under Article 3.3.5, so long as any conditions accompanying that authorisation are complied with;

in which case Article 16.6 applies to the decision.

16.6 If this Article 16.6 applies, the relevant Trustee must:

16.6.1 take part in the relevant decision-making process only to such extent as in the view of the other Trustees is necessary to inform the debate;

16.6.2 not be counted in the quorum for that part of the process; and

16.6.3 have no vote on the matter.

***Continuing duties to the Charity***

16.7 Where a Trustee or person Connected with them has a conflict of interest or conflict of duties and the Trustee has complied with their obligations under these Articles in respect of that conflict:

16.7.1 the Trustee shall not be in breach of their duties to the Charity by withholding confidential information from the Charity if to disclose it would result in a breach of any other duty or obligation of confidence owed by them; and

16.7.2 the Trustee shall not be accountable to the Charity for any benefit expressly permitted under these Articles which they or any person Connected with them derives from any matter or from any office, employment or position.

17. **Validity of Trustee actions**

All acts done by a person acting as a Trustee shall be valid, notwithstanding that it is afterwards discovered that there was a defect in their appointment, or that they were disqualified from holding office or had vacated office, or that they were not entitled to vote on the matter in question.

**APPOINTMENT AND RETIREMENT, ETC. OF TRUSTEES**

18. **Number of Trustees**

The Charity shall seek to ensure that there are always at least three Trustees and ordinarily no more than 11 Trustees in post, unless the Trustees determine a higher number is appropriate on the recommendation of the Nominations Committee and resolve to increase the limit.

19. **Appointment and retirement of Trustees**

***First Trustees***

19.1 The first Trustees shall be the people notified to the Registrar of Companies as the initial directors of the Charity.

***Composition and appointment of Trustees***

19.2 The board of Trustees shall at all times be comprised of the Representative Trustees and such additional Trustees as are appointed in accordance with Article 19.3 up to the maximum specified in Article 18.

19.3 Trustees shall be appointed to the board of Trustees (provided that they would not otherwise be disqualified from acting under Articles 19.7 or 20):

19.3.1 by a Founding Member as a Representative Trustee, subject to Article 19.4.1; or

19.3.2 by a decision of the Trustees, following nomination by the Nominations Committee in accordance with the process in Article 19.6.

***Representative Trustees***

19.4 For Representative Trustees:

19.4.1 Each Founding Member shall have the right to appoint one Representative Trustee under Article 19.3.1 by giving written notice to the Charity, but such appointment is subject to board approval and shall not take effect unless and until that appointment is confirmed by a decision of the Trustees; and

19.4.2 Representative Trustees remain in office until their Founding Member removes them by giving notice under Article 20.4, or they resign or are otherwise removed or disqualified from office under Article 20, in which case the Founding Member shall be entitled to make a replacement appointment under Article 19.3.1

***Trustees appointed following the nominations process***

19.5 For each Trustee appointed by the Trustees under Article 19.3.2:

19.5.1 their term of office will run until the next board meeting following the third anniversary of their appointment and will expire at the conclusion of that meeting;

19.5.2 they will be eligible to be re-appointed by the Trustees if the Nominations Committee recommends this, provided that they have not reached the term limits in Article 19.5.3; and

19.5.3 if they have served for consecutive terms totalling nine years, the Trustee must take a break from office and are not eligible for re-appointment until twelve months has passed, unless the Trustees acting on the recommendation of the Nominations Committee resolve otherwise due to exceptional circumstances.

***Nominations process***

19.6 The Trustees shall delegate responsibility for identifying individuals for appointment as Trustees to the Nominations Committee who shall put forward candidates for appointment in accordance with the Nominations Committee Terms of Reference (adopted under Article 8.6).

***Minimum age***

19.7 No one may be appointed as a Trustee unless they have reached the age of 18 years.

20. **Disqualification and removal of Trustees**

A Trustee ceases to hold office if:

20.1 they cease to be a director, or become prohibited from being a director or charity trustee, by law;

20.2 the Trustees reasonably believe that the Trustee has become physically or mentally incapable of managing their own affairs and they resolve to remove the Trustee from office;

20.3 they notify the Charity in writing that they are resigning from office, and any period of time specified in such notice has passed (but only if at least three Trustees will remain in office when such resignation has taken effect);

20.4 they are a Representative Trustee and the Founding Member which appointed them gives notice to the Charity that they are to be removed from office (in which case the Founding Member shall be entitled to make a replacement appointment under Article 19.3.1);

20.5 they fail to attend three consecutive meetings of the Trustees and the Trustees resolve that they be removed for this reason;

20.6 at a general meeting of the Charity, a resolution is passed that the Trustee be removed from office, provided the meeting has invited their views and considered the matter in the light of such views; or

20.7 in the case of a Trustee who is not a Representative Trustee, at a meeting of the Trustees at which at least half of the Trustees are present, a resolution is passed that the Trustee is removed from office. Such a resolution shall not be passed unless the affected Trustee has been given at least 14 Clear Days' notice that the resolution is to be proposed, specifying the circumstances underlying the proposal, and has been afforded a reasonable opportunity of either (at their option) being heard by or making written representations to the Trustees. For the avoidance of doubt, a Representative Trustee may not be removed under this Article.

21. **Honorary Representative Roles**

The Trustees may appoint and remove any individual(s) to honorary representative roles such as (but not limited to) patron(s) or honorary president or honorary ambassador of the Charity

on such terms as they shall think fit. Such individual(s) shall have the right to be given notice of, to attend and speak (but not vote) at any general meeting of the Charity and shall also have the right to receive accounts of the Charity when available to members.

## PART III – MEMBERS

### BECOMING AND CEASING TO BE A MEMBER

22. **Becoming a member**

22.1 The first members of the Charity are the subscribers to its Memorandum of Association and shall be referred to as the Founding Members.

22.2 After this, the members may admit additional members by a unanimous decision.

22.3 Except for the Founding Members, no organisation may become a member of the Charity unless:

22.3.1 it has applied for membership; and

22.3.2 the members have approved the application by unanimous vote.

22.4 The members may from time to time prescribe criteria for membership.

22.5 The members may in their absolute discretion decline to accept any person as a member (whether or not they meet any criteria prescribed under Article 22.4), and do not need to give reasons for this.

***Authorised representatives of corporate members***

22.6 If a corporate body is a member, it may authorise one or more individuals to exercise its rights as a member. Evidence of the representative's appointment must be provided in any such form as the Trustees reasonably require. This individual or individuals may exercise (on behalf of the corporate member) the same powers as the corporate member could exercise if it were an individual member.

23. **Ending membership**

23.1 Membership is not transferable.

23.2 A person shall cease to be a member if:

23.2.1 that person gives at least seven days' written notice to the Charity via an authorised representative that it intends to withdraw from membership, and that period of notice has elapsed;

23.2.2 the members (excluding the member who is proposed to be removed) unanimously decide that a member should be removed from its membership; or

23.2.3 the member goes into liquidation other than for the purpose of a solvent reconstruction or amalgamation, has an administrator or a receiver or an administrative receiver appointed over all or any part of its assets, or has an order made or a resolution passed for its winding up.

24. **Associate members**

24.1 The Trustees may establish one or more categories of associate membership. Associate members are not members of the Charity for the purposes of the Articles or the Companies Acts but may have such rights and obligations (and may be liable for any such subscriptions) as the Trustees decide from time to time. The Trustees may admit and remove any associate members in accordance with any regulations that they make.

25. **Permanent UN Advisor**

25.1 The UN Global Compact shall have the right to appoint a UN Global Compact staff person to serve as a Permanent UN Advisor who shall be given notice of and have the right to attend and speak (but not vote) at any Trustees' meeting, committee meeting, or general meeting of the Charity and shall also have the right to receive accounts of the Charity upon request. The Permanent UN Advisor shall confine themself to providing technical comment which is not of a policy nature with respect to any of the activities or business of the Charity.

25.2 The Permanent UN Advisor may be appointed by the UN Global Compact giving written notice to the Charity, and the UN Global Compact may at any time remove its Permanent UN Advisor and make a replacement appointment by giving written notice to the Charity.

25.3 The UN Global Compact may nominate the Permanent UN Advisor for appointment by the Trustees to an honorary role under Article 21. The conferral of an honorary role or title is intended to reflect the significant commitment and role played by the UN Global Compact in supporting the Charity. For the avoidance of doubt neither the Permanent UN Advisor nor any individual appointed to any honorary role shall be a Trustee or member of the Charity.

25.4 The UN Global Compact's participation and/or entry into any document concerning the establishment of the Charity, and the exercise by the Permanent UN Advisor of the rights set out in these Articles are not to be interpreted as a waiver of all or part of the privileges and immunities applying to the UN Global Compact as recognised under English law or international treaties recognised by English law.

25.5 Accordingly, any persons acting on behalf of any of the UN Global Compact in relation to matters concerning the Charity shall continue to benefit from all the privileges and immunities applicable to the UN Global Compact in England and Wales.

**ORGANISATION OF GENERAL MEETINGS**

26. **Annual general meetings and general meetings**

26.1 It is anticipated that in most circumstances, formal members' decisions under these Articles and for the purposes of company law will be made by written resolution of the members under Article 27. If this is not possible or practical, and/or if the Trustees wish to convene an annual general meeting or other general meeting of members, and/or a member exercises their rights under company law to require the Trustees to call a general meeting, then a general meeting shall be convened by the Trustees in accordance with company law and the provisions in Schedule 2.

27. **Written resolutions**

***General***

27.1 Subject to this Article 27, a written resolution agreed by:

27.1.1 members representing a simple majority; or

27.1.2 (in the case of a special resolution) members representing not less than 75%;

of the total voting rights of eligible members shall be effective, save that:

27.1.3 for a decision to admit a new member of the Charity under Article 22.2, a written resolution must be passed by all members, and

27.1.4 for a decision to remove a member of a Charity under Article 23.2.2, a written resolution must be passed by all members excluding the member who is proposed to be removed.

27.2 On a written resolution each member entitled to vote on the proposal shall have one vote.

27.3 A written resolution must state that it was proposed as a special resolution in order to be a special resolution under the Companies Acts.

***Circulation***

27.4 A copy of the proposed written resolution must be sent to every eligible member together with a statement informing the member how to signify their agreement and the date by which the resolution must be passed if it is not to lapse.

27.5 In relation to a resolution proposed as a written resolution of the Charity the eligible members are the members who would have been entitled to vote on the resolution on the Circulation Date of the resolution.

27.6 The required majority of eligible members must signify their agreement to the written resolution within the period of 28 days beginning with the Circulation Date.

27.7 Communications in relation to written resolutions must be sent to the Charity's auditors in accordance with the Companies Acts.

***Signifying agreement***

27.8 A member signifies their agreement to a proposed written resolution when the Charity receives from them (or from someone acting on their behalf) an authenticated document:

27.8.1 identifying the resolution to which it relates; and

27.8.2 indicating the member's agreement to the resolution.

27.9 For the purposes of Article 27.8:

27.9.1 a document sent or supplied in hard copy form is sufficiently authenticated if it is signed by the person sending or supplying it; and

27.9.2 a document sent or supplied in electronic form is sufficiently authenticated if:

(a) the identity of the sender is confirmed in a manner specified by the Charity; or

(b) where no such manner has been specified by the Charity, if the communication contains or is accompanied by a statement of the identity of the sender and the Charity has no reason to doubt the truth of that statement.

27.10 If the Charity gives an electronic address in any document containing or accompanying a written resolution, it will be deemed to have agreed that any document or information relating to that resolution may be sent by electronic means to that address (subject to any conditions or limitations specified in the document).

**PART IV - ADMINISTRATIVE ARRANGEMENTS AND MISCELLANEOUS**

28. **Communications by the Charity**

***General rule***

28.1 The Charity may send or supply any documents, notices, information or other material to members or Trustees in the manner indicated in the first column below. They will be deemed received at the time specified in the second column below. This Article is subject to Article 28.2.

| **Method** | **Deemed delivery** |
|---|---|
| (a) By hand. | The day it was delivered. |
| (b) By post, in a prepaid envelope addressed to the recipient. | 48 hours after posting, excluding any part of a day that is a Saturday, Sunday or Public Holiday. |
| (c) By electronic means. | The day it was sent. |
| (d) By making it available on a website. | The day it was made available or (if later) the day the recipient was notified (or is deemed notified) that it was so available. |
| (e) By other means authorised by the Articles and the Companies Acts. | In accordance with any provisions in the relevant Article or the Companies Acts. |

***Exceptions***

28.2 The following exceptions apply:

28.2.1 where the Companies Act 2006 requires it, the requirements in that Act for the Charity to gain a person's consent (or deemed consent) must be complied with before method (c), (d) or (as applicable) (e) is used (or before relevant material is sent in electronic form by other means);

28.2.2 insofar as the communication falls within the scope of the Companies Act 2006, the Charity must have gained the Trustee's prior agreement for the deemed delivery provisions listed above (rather than those prescribed by the Companies Act 2006) to take effect. A Trustee may agree with the Charity that notices or documents concerning Trustee decision-making can be sent to them in a particular way (whether or not listed above); and that they may be deemed delivered sooner than would otherwise be the case under this Article;

28.2.3 a member present by proxy or authorised representative at a meeting of the Charity shall be deemed to have received notice of the meeting and the purposes for which it was called;

28.2.4 a member who does not register a postal address within the United Kingdom with the Charity shall not be entitled to receive any notice from the Charity by methods (a) or (b) but shall be entitled to receive any notice by methods (c), (d) or (e) (subject to Article 28.2.1 above); and

28.2.5 where any document or material has been sent or supplied by the Charity by electronic means and the Charity receives notice that the message is undeliverable:

(a) if the material has been sent to a member or Trustee and is notice of a general meeting of the Charity, the Charity is under no obligation to send a hard copy of the material to their postal address as shown in the Charity's register of members or Trustees, but may in its discretion choose to do so;

(b) in all other cases, the Charity shall send a hard copy of the material to the member's postal address (within the United Kingdom) as shown in the Charity's register of members (if any), or in the case of a recipient who is not a member, to the last known postal address for that person within the United Kingdom (if any); and

(c) the date of service or delivery of the material shall be the date on which the original electronic communication was sent, notwithstanding the subsequent sending of hard copies.

29. **Secretary**

A Secretary may be appointed by the Trustees on such terms as they see fit and may be removed by them. If there is no Secretary, the Trustees may make appropriate alternative arrangements.

30. **Irregularities**

The proceedings at any meeting or on the taking of any poll or the passing of a written resolution or the making of any decision shall not be invalidated by reason of any accidental informality or irregularity (including any accidental omission to give or any non-receipt of notice) or any want of qualification in any of the persons present or voting or by reason of any business being considered which is not specified in the notice.

31. **Minutes**

31.1 The Trustees must ensure minutes are made:

31.1.1 of all appointments of officers made by the Trustees;

31.1.2 of all resolutions of the Charity and of the Trustees (including, without limitation, decisions of the Trustees made without a meeting); and

31.1.3 of all proceedings at meetings of the Charity and of the Trustees, and of committees of Trustees, including the names of the Trustees present at each such meeting;

and any such minute, if purported to be signed (or in the case of minutes of Trustees' meetings signed or authenticated) by the chair of the meeting at which the proceedings were had, or by the chair of the next succeeding meeting, shall, as against any member or Trustee of the Charity, be sufficient evidence of the proceedings.

32. **Records and accounts**

32.1 The Trustees shall comply with the requirements of the Companies Acts and of the Charities Act 2011 as to maintaining a members' register, keeping financial records, the audit or

examination of accounts and the preparation and transmission to the Registrar of Companies and the Charity Commission of:

32.1.1 annual reports;

32.1.2 annual statements of account; and

32.1.3 annual returns or confirmation statements.

32.2 Except as provided by law or authorised by the Trustees or an ordinary resolution of the Charity, no person is entitled to inspect any of the Charity's accounting or other records or documents merely by virtue of being a member.

33. **Interpretation**

These Articles should be read and interpreted in accordance with Schedule 1.

34. **Exclusion of model articles**

The relevant model articles for a company limited by guarantee are expressly excluded.

**Schedule 1 - Interpretation – Defined Terms**

1. In the Articles, unless the context requires otherwise, the following terms shall have the following meanings:

| | Term | Meaning |
|---|---|---|
| 1.1 | **"Articles"** | the Charity's articles of association; |
| 1.2 | **"CDP"** | means CDP Worldwide, a charitable company limited by guarantee incorporated in England and Wales with company number 05013650 and charity registration number 1122330, whose principal address is at 4th Floor, 60 Great Tower Street, London EC3R 5AZ; |
| 1.3 | **"Chair"** | has the meaning given in Article 9; |
| 1.4 | **"Charity"** | Science Based Targets initiative; |
| 1.5 | **"Clear Days"** | in relation to the period of a notice, that period excluding the day when the notice is given or deemed to be given and the day for which it is given or on which it is to take effect; |
| 1.6 | **"Companies Acts"** | the Companies Acts (as defined in Section 2 of the Companies Act 2006), in so far as they apply to the Charity; |
| 1.7 | **"Connected"** | means in respect of a Trustee:<br>(a) the Trustee's parent, child, sibling, grandparent or grandchild;<br>(b) the spouse or civil partner of the Trustee or another person described in paragraph (a);<br>(c) a person carrying on business in partnership with the Trustee, or a person described in paragraph (a) or (b);<br>(d) an institution controlled by the Trustee and/or one or more person(s) described in paragraph (a), (b) or (c); or<br>(e) a body corporate in which the Trustee and/or one or more person(s) described in paragraph (a), (b) or (c) have a substantial interest.<br>Sections 350 – 352 of the Charities Act 2011 apply for the purposes of interpreting the terms used in this definition; |
| 1.8 | **"electronic form" and "electronic means"** | have the meanings respectively given to them in Section 1168 of the Companies Act 2006; |

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| 1.9 | **"Financial Expert"** | an individual, company or firm who, or which, is authorised to give investment advice under the Financial Services and Markets Act 2000; |
| 1.10 | **"Founding Members"** | The first subscribers to the Memorandum of Association which are CDP, The World Resources Institute, The World Wide Fund for Nature, and We Mean Business Coalition; |
| 1.11 | **"hard copy" and "hard copy form"** | have the meanings respectively given to them in the Companies Act 2006; |
| 1.12 | **"Nominations Committee"** | A committee established by the Trustees in accordance with Article 8.6; |
| 1.13 | **"Permanent UN Advisor"** | The representative of the UN Global Compact appointed under Article 25, as notified to the Charity from time to time; |
| 1.14 | **"Purposes"** | means the charitable objects (or purposes) of the Charity; |
| 1.15 | **"Proxy Notice"** | has the meaning given in Article 11; |
| 1.16 | **"Public Holiday"** | means Christmas Day, Good Friday and any day that is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom where the company is registered; |
| 1.17 | **"Remote Attendance"** | means remote attendance at a general meeting by such means as are approved by the Trustees in accordance with Article 4.5; |
| 1.18 | **"Representative Trustees"** | Trustees appointed to the board of Trustees by the Founding Members under Article 19.3.1; |
| 1.19 | **"Secretary"** | the secretary of the Charity (if any); |
| 1.20 | **"Subsidiary Company"** | any company in which the Charity holds more than 50% of the shares, controls more than 50% of the voting rights attached to the shares or has the right to appoint a majority of the board of the company; |
| 1.21 | **"Trustee"** | a director of the Charity, and includes any person occupying the position of director, by whatever name called; |
| 1.22 | **"UN Global Compact"** | the United Nations Global Compact (or its respective successor body within the United Nations). The UN Global Compact is a special initiative of the UN Secretary-General based on commitments by businesses to implement universal sustainability |

| | | |
|---|---|---|
| | | principles and to take steps to support UN goals. The Board of the UN Global Compact, appointed and chaired by the UN Secretary-General, is the main governance body of the initiative and makes recommendations to the Global Compact Office. The Global Compact Office works on the basis of a mandate from the UN General Assembly to advance United Nations values and responsible business practices within the United Nations system and among the global business community (A/RES/68/234); |
| 1.23 | **"We Mean Business Coalition"** | means We Mean Business Coalition Inc, a US non-profit, 501(c)(3) tax exempt organisation, with company name We Mean Business Coalition Inc, whose principal address is at 1178 Broadway 3rd Floor, #325 New York, NY 10001; |
| 1.24 | **"The World Wide Fund for Nature"** | means WWF-World Wide Fund for Nature (formerly World Wildlife Fund) a Swiss foundation, No. CH-CHE-107.971.916, with its registered address at Rue Mauverney 28, 1196 Gland, Switzerland; and |
| 1.25 | **"The World Resources Institute"** | means a US non-profit, 501(c)(3) tax-exempt organisation incorporated in the State of Delaware with FEIN 52-1257057 whose principal address is at 10 G Street, NE, Suite 800 Washington, DC 20002 USA. |

2. Unless the context requires, references to "writing" and "document" should be interpreted (without limitation) as allowing for the transmission of information in electronic form. A reference to a "document" includes summons, notice, order or other legal process.

3. Subject to paragraph 4 of this Schedule, any reference in the Articles to an enactment includes a reference to that enactment as re-enacted or amended from time to time and to any subordinate legislation made under it.

4. Unless the context otherwise requires, words or expressions contained in the Articles which are not defined in paragraph 1 above bear the same meaning as in the Companies Act 2006 as in force on the date when the Articles became binding on the Charity.

**Schedule 2 – General Meetings of the Charity**

1. **Annual general meetings**

1.1 The Charity may (but is under no obligation to) hold an annual general meeting within 18 months of incorporation and afterwards once in every calendar year and not more than 15 months shall pass between one annual general meeting and the next.

1.2 Any annual general meeting shall be held in accordance with such arrangements as are made by the Trustees.

2. **General meetings**

2.1 The Trustees may call a general meeting at any time.

2.2 The Trustees must call a general meeting if required to do so by the members under the Companies Acts.

3. **Notice of general meetings**

***Length of notice***

3.1 All general meetings must be called by either:

3.1.1 at least 14 Clear Days' notice; or

3.1.2 shorter notice if it is so agreed by a majority in number of the members having a right to attend and vote at that meeting. Any such majority must together represent at least 90% of the total voting rights at that meeting of all the members.

***Contents of notice***

3.2 A notice calling a general meeting must specify the following information, insofar as required by the Companies Acts:

3.2.1 the day, time and place of the meeting; and

3.2.2 the general nature of the business to be transacted.

3.3 If a special resolution is to be proposed, the notice must include the full text of the proposed resolution and specify that it is proposed as a special resolution.

3.4 In every notice calling a meeting of the Charity there must appear with reasonable prominence a statement informing the member of their rights to appoint another person as their proxy at a meeting of the Charity.

3.5 If the Charity gives an electronic address in a notice calling a meeting, it will be deemed to have agreed that any document or information relating to proceedings at the meeting may be sent by Electronic Means to that address (subject to any conditions or limitations specified in the notice).

***Service of notice***

3.6 Notice of general meetings must be given to every member, to the Permanent UN Advisor, to the Trustees and to the auditors of the Charity.

4. **Attendance and speaking at general meetings**

4.1 A person is able to exercise the right to speak at a general meeting when that person is in a position to communicate to all those attending the meeting, during the meeting, any information or opinions which that person has on the business of the meeting.

4.2 A person is able to exercise the right to vote at a general meeting when:

4.2.1 that person is able to vote on any resolutions put to the vote at the meeting; and

4.2.2 that person's vote can be taken into account in determining whether or not such resolutions are passed at the same time as the votes of all the other persons attending the meeting.

4.3 In determining attendance at a general meeting, it is irrelevant whether any two or more members attending it are in the same physical location as each other.

4.4 Two or more persons who are not in the same physical location as each other attend a general meeting if their circumstances are such that if they have (or were to have) rights to speak and vote at that meeting, they are (or would be) able to exercise them.

4.5 The Trustees may make such lawful arrangements as they see fit in respect of physical attendance and/or Remote Attendance at a general meeting. The entitlement of any person to attend and participate in a general meeting shall be subject to such arrangements.

4.6 When the Trustees have made arrangements to facilitate Remote Attendance:

4.6.1 the provisions of the Articles shall be treated as modified to permit such arrangements and in particular:

(a) a person attending a general meeting by Remote Attendance shall be treated as being present and/or present in person at the meeting for the purposes of the Articles, including without limitation the provisions of the Articles relating to the quorum for the meeting and rights to vote at the meeting, unless the Articles expressly provide to the contrary; and

(b) references in these Articles to the place of a general meeting shall be treated as references to the place specified as such in the notice of general meeting;

4.6.2 the Trustees must ensure that the notice of the meeting includes details of the arrangements for Remote Attendance, and any relevant restrictions, in addition to any other information required by the Companies Acts;

4.6.3 the arrangements must specify:

(a) how those attending by Remote Attendance may communicate with the meeting, for example by using an electronic platform to communicate with the chair and/or others attending the meeting in writing;

(b) how those attending by Remote Attendance may vote;

4.6.4 Insofar as not disapplied by any arrangements made under Article 4.5:

(a) the arrangements for Remote Attendance may be changed or withdrawn in advance of the meeting by the Trustees, who must give the members as much notice as practicable of the change;

(b) in the event of technical failure or other technical issues during the meeting (including, for example, difficulties in establishing whether the meeting is quorate) the chair of the meeting may adjust or withdraw the arrangements for Remote Attendance and/or adjourn the meeting if in their view this is necessary or expedient for the efficient conduct of the meeting; and

(c) under no circumstances shall the inability of one or more persons (being entitled to do so) to access, or continue to access, the technology being used for Remote Attendance at the meeting (despite adequate technology being made available by the Charity) affect the validity of the meeting or any business conducted at the meeting, provided a quorum is present at the meeting.

5. **Quorum for general meetings**

5.1 No business (other than the appointment of the chair of the meeting) may be transacted at a general meeting unless a quorum is present.

5.2 The quorum shall be 50% of the total membership (represented by authorised representative or by proxy) on the condition that at least two individuals must be in attendance.

5.3 If both a member's authorised representative and its proxy are present at a general meeting, only the authorised representative shall be counted towards the quorum and entitled to vote.

5.4 If a quorum is not present within half an hour from the time appointed for the meeting; (or such longer time as is decided by the chair of the meeting) or a quorum ceases to be present during the meeting:

5.4.1 where the meeting has been called by requisition of the members under the Companies Acts, it shall be dissolved; or

5.4.2 otherwise, the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such day (within 14 days of the original meeting), time and place (and with such arrangements for Remote Attendance (if any)) as the Trustees may decide, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting those present and entitled to vote shall be a quorum.

6. **Chairing general meetings**

6.1 The Chair (if any), or in their absence the Deputy Chair, shall preside as chair of every general meeting.

6.2 If neither the Chair nor Deputy Chair is present within fifteen minutes after the time appointed for holding the meeting and willing to act, the Trustees present shall elect one of their number

to chair the meeting and, if there is only one Trustee present and willing to act, they shall be chair of the meeting.

6.3 Failing this, the members present by authorised representative or by proxy, and entitled to vote, must choose one of the authorised representatives to be chair of the meeting.

7. **Attendance and speaking by Trustees, Permanent UN Advisor and non-members**

7.1 Trustees may attend and speak at general meetings, whether or not they are the authorised representative or a proxy for a member.

7.2 The Permanent UN Advisor may also attend and speak at general meetings.

7.3 The chair of the meeting may permit other persons who are not members of the Charity (or otherwise entitled to exercise the rights of members in relation to general meetings) to attend and speak at a general meeting.

8. **Adjournment**

8.1 The chair of the meeting may adjourn a general meeting at which a quorum is present:

8.1.1 with the consent of the meeting;

8.1.2 in the event of technical failure under Article 4.6.4(b); or

8.1.3 if it appears to the chair that adjournment is necessary to protect the safety of any person attending the meeting or to ensure the business of the meeting is conducted in an orderly manner.

8.2 The chair of the meeting must adjourn a general meeting if directed to do so by the meeting.

8.3 When adjourning a general meeting, the chair of the meeting must:

8.3.1 either specify the time and place to which it is adjourned or state that it is to continue at a time and place to be fixed by the Trustees; and

8.3.2 have regard to any directions as to the time and place of any adjournment which have been given by the meeting.

8.4 If the meeting is to continue more than 14 days after it was adjourned, the Charity must give at least 7 Clear Days' notice of it:

8.4.1 to the same persons to whom notice of the Charity's general meetings is required to be given; and

8.4.2 containing the same information which such notice is required to contain.

8.5 No business may be transacted at an adjourned general meeting which could not properly have been transacted at the meeting if the adjournment had not taken place.

9. **Voting at general meetings**

9.1 A resolution put to the vote at a general meeting must be decided on a show of hands unless a poll is duly demanded in accordance with the Articles.

***Voting rights***

9.2 Where a vote is carried out by a show of hands, the following persons have one vote each:

9.2.1 each authorised representative of a corporate member present and entitle to vote; and

9.2.2 (subject to Article 12.3) each proxy present who has been duly appointed by one or more persons entitled to vote on the resolution,

provided that if a person attending the meeting falls within two or more of the above categories, they are not entitled to cast more than one vote but shall instead have a maximum of one vote.

9.3 On a vote on a resolution which is carried out by a poll, the following persons entitled to vote have one vote each:

9.3.1 every member present by proxy (subject to Article 12.3); and

9.3.2 every authorised representative of a corporate member present (subject to Article 9.8).

9.4 On a vote on a resolution at a meeting which is carried out by a poll, if more than one authorised representative of a corporate member purports to vote on behalf of the same corporate member:

9.4.1 if they purport to vote in the same way, they will be treated as having cast one vote between them; and

9.4.2 if they purport to vote in different ways they are treated as not having voted.

9.5 In the case of an equality of votes, whether on a show of hands or on a poll, the chair of the meeting shall not be entitled to a casting vote in addition to any other vote they may have.

9.6 For the avoidance of doubt, the Permanent UN Advisor shall not be entitled to vote and a member shall not be entitled to vote on any resolution proposed to remove them as a member under Article 23.2.2.

***Saving provisions***

9.7 No objection may be raised to the qualification of any person voting at a general meeting except at the meeting or adjourned meeting at which the vote objected to is tendered, and every vote not disallowed at the meeting is valid. Any such objection must be referred to the chair of the meeting whose decision is final.

9.8 On a vote on a resolution at a meeting on a show of hands, unless a poll is duly demanded, a declaration by the chair of the meeting that the resolution:

9.8.1 has or has not been passed; or

9.8.2 passed with a particular majority,

is conclusive evidence of that fact without proof of the number or proportion of the votes recorded in favour of or against the resolution. An entry in respect of such a declaration in minutes of the meeting recorded in accordance with Article 31 is also conclusive evidence of that fact without such proof.

10. **Poll voting: further provisions**

***Process for demanding a poll***

10.1 A poll on a resolution may be demanded:

10.1.1 in advance of the general meeting where it is to be put to the vote; or

10.1.2 at a general meeting, either before a show of hands on that resolution or immediately after the result of a show of hands on that resolution is declared.

10.2 A poll may be demanded by:

10.2.1 the chair of the meeting;

10.2.2 the Trustees;

10.2.3 two or more persons having the right to vote on the resolution;

10.2.4 any person who holds two or more votes; or

10.2.5 a person or persons representing not less than one tenth of the total voting rights of all the members having the right to vote on the resolution.

10.3 A demand for a poll may be withdrawn, if the poll has not yet been taken, and with the consent of the chair of the meeting.

***Procedure on a poll***

10.4 Subject to the Articles, polls at general meetings must be taken when, where and in such manner as the chair of the meeting directs.

10.5 The chair of the meeting may appoint scrutineers (who need not be members) and decide how and when the result of the poll is to be declared.

10.6 The result of a poll shall be the decision of the meeting in respect of the resolution on which the poll was demanded.

10.7 A poll to elect a chair of the meeting, or concerning the adjournment of the meeting, must be taken immediately. Other polls must be taken within 30 days of their being demanded. If a poll is demanded the meeting may continue to deal with any other business that may be conducted at the meeting.

10.8 No notice need be given of a poll not taken immediately if the time and place at which it is to be taken are announced at the meeting at which it is demanded.

10.9 In any other case, at least 7 days' notice must be given specifying the time and place at which the poll is to be taken.

11. **Proxies**

***Power to appoint***

11.1 A member is entitled to appoint another person as its proxy to exercise all or any of their rights to attend and speak and vote at a meeting of the Charity. A proxy must vote in accordance with any instructions given by the member by whom the proxy is appointed.

***Manner of appointment***

11.2 Proxies may only validly be appointed by a notice in writing (a "**Proxy Notice**") which:

11.2.1 states the name and address of the member appointing the proxy;

11.2.2 identifies the person appointed to be that member's proxy and the general meeting in relation to which that person is appointed;

11.2.3 is signed by or on behalf of the member appointing the proxy, or is authenticated in such manner as the Trustees may decide; and

11.2.4 is delivered to the Charity in accordance with the Articles and any instructions included with the notice of the general meeting to which they relate.

11.3 The Charity may require Proxy Notices to be delivered in a particular form and may specify different forms for different purposes.

11.4 Proxy Notices may specify how the proxy appointed under them is to vote (or that the proxy is to abstain from voting) on one or more resolutions.

11.5 Unless a Proxy Notice indicates otherwise, it must be treated as:

11.5.1 allowing the person appointed under it as a proxy discretion as to how to vote on any ancillary or procedural resolutions put to the meeting; and

11.5.2 appointing that person as a proxy in relation to any adjournment or postponement of the general meeting to which it relates as well as the meeting itself.

12. **Delivery of Proxy Notices**

12.1 A Proxy Notice may be delivered (including by electronic means) in accordance with any instructions included with the notice of general meeting to which it relates. It must be received by the Charity in accordance with the following timing requirements:

| | | |
|---|---|---|
| (a) | Where the proxy appointment relates to a poll, which is not to be taken at the meeting, but is to be taken 48 hours or less after it was demanded. | The Proxy Notice must be:<br>1. delivered in accordance with paragraph (c) below; or<br>2. given to the chair, Secretary or any Trustee at the meeting (including an adjourned or |

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| | | postponed meeting) at which the poll was demanded. |
| (b) | Where the proxy appointment relates to a poll, which is to be taken more than 48 hours after it was demanded. | The Proxy Notice must be received 24 hours before the time appointed for taking the poll. |
| (c) | In all other circumstances. | The Proxy Notice must be received 48 hours before the meeting, adjourned meeting or postponed meeting to which it relates. |

12.2 Saturdays, Sundays, and Public Holidays are not counted when calculating the 48-hour and 24-hour periods referred to in this paragraph 12.

12.3 A person who is entitled to attend, speak or vote (either on a show of hands or on a poll) at a general meeting remains so entitled in respect of that meeting or any adjournment of it, even though a valid Proxy Notice has been delivered to the Charity by or on behalf of that person.

12.4 The appointment of a proxy may be revoked by delivering to the Charity a notice in writing given by or on behalf of the person by whom or on whose behalf the Proxy Notice was given. It must be delivered before the start of the meeting or adjourned meeting to which it relates; or (in the case of a poll not taken on the same day as the meeting or adjourned meeting) the time appointed for taking the poll to which it relates.

12.5 If a Proxy Notice is not executed by the person appointing the proxy, it must be accompanied by written evidence of the authority of the person who executed it to execute it on the appointer's behalf.

13. **Power to postpone general meetings**

13.1 The Trustees may postpone a general meeting if, after the notice of meeting (or adjourned meeting) is sent, but before the meeting (or adjourned meeting) is held, they reasonably believe that it is an appropriate and proportionate measure to preserve the safety and security of attendees or the wider public, or to comply with law or government guidance. The Trustees must then provide such notice of the date, time and place (and any Remote Attendance details) of the postponed meeting and any such other information as they shall determine. No business shall be dealt with by the postponed meeting that could not have been dealt with if it had not been postponed.

14. **Amendments to resolutions**

14.1 An ordinary resolution to be proposed at a general meeting may be amended by a further ordinary resolution if:

14.1.1 notice of the proposed amendment is given to the Charity in writing by a person entitled to vote at the general meeting at which it is to be proposed not less than 48 hours (excluding Saturdays, Sundays and Public Holidays) before the meeting is to take place (or such later time as the chair of the meeting may decide); and

14.1.2 the proposed amendment does not, in the reasonable opinion of the chair of the meeting, materially alter the scope of the resolution.

14.2 A special resolution to be proposed at a general meeting may be amended by ordinary resolution, if:

14.2.1 the chair of the meeting proposes the amendment at the general meeting at which the resolution is to be proposed; and

14.2.2 the amendment does not go beyond what is necessary to correct a grammatical or other non-substantive error in the resolution.

14.3 If the chair of the meeting, acting in good faith, wrongly decides that an amendment to a resolution is out of order, the chair's error does not invalidate the vote on that resolution.

WE MEAN BUSINESS

# GRANTS AND PROGRAM ASSOCIATE

We Mean Business, a project of the New Venture Fund is recruiting a full time Grants and Program Associate.

The Associate is a full time, non-exempt position working as part of the operations team where we manage fundraising, grants + programs, finance, and our partner board. The associate role works very closely with the Managing Director and reports directly to the Director of Operations + Culture.

This is an essential role for our operations and development responsibilities for the entire coalition. A successful person in this role loves to work with people, is extremely detail oriented, has a good sense of humor and loves working in fast-paced entrepreneurial environments.

## ESSENTIAL RESPONSIBILITIES

Grants + Programs

- Work with Strategic Projects Manager to develop, plan for, and execute on granting cycles. Includes end-to-end support ranging from gantt calendar development, setting meetings + review time, overview material development, and having visibility on contracts
- Support Strategic Projects Manager in developing biannual grant reports for funders, including coordination of partner reporting and drafting materials following templates

Board Management

- Manage board meetings (and other) logistics including venue selection, catering, transportation, fulfillment and other related tasks
- Scheduling board and compliance committee calls, working across time zones and with multiple staff
- Working with Strategic Project Manager and Managing Director on various board communications, including planning, drafting materials and staff outreach

Managing Director support:

- Calendar + scheduling meetings and calls across time zones, manage travel schedules
- Drafting emails on behalf of the Managing Director
- Track emails for Managing Director and surface high priority items
- Research and write briefings for various meetings and/or future ideas to develop

jobs@wemeanbusinesscoalition.org
wemeanbusinesscoalition.org
@WMBtweets | #wemeanit
wemeanbusiness

**WE ME▲N BUSINESS**

General Responsibilities

- Lead on coordinating meeting and events logistics for all meetings - board meetings and calls, full team meetings, smaller team meetings for operations team
- Provide support and logistics for various special projects and events, including research and event production management
- Act as leading liaison between fiscal sponsor account team and operations team on select questions and items

## EDUCATION + EXPERIENCE

- Bachelors Degree
- Minimum three years of full-time work experience

## SKILLS

- Impeccable interpersonal and client relationship skills
- Excellent written and oral communication skills
- Excellent organizational skills
- Proven ability to work both independently and collaboratively
- Meticulous attention to detail
- Have enthusiastic team spirit, and the discipline and confidence to work solo
- High level of computer proficiency, including Microsoft Office (Word, Excel, PowerPoint), Salesforce and Asana experience a plus
- Ability to plan long term and proactively plan and provide materials needed
- Enthusiasm for - and is very good at - managing multiple demands, projects and deadlines

## TO APPLY

- Send resume and cover letter as one document to jobs@wemeanbusinesscoalition.org
- Use subject line "Grants and Program Associate"
- Applications will be accepted until the right candidate is found

We Mean Business is a project of New Venture Fund (NVF), a 501(c)(3) public charity that incubates new and innovative public-interest projects and grant-making programs. NVF is committed to attracting, developing and retaining exceptional people, and to creating a work environment that is dynamic, rewarding and enables each of us to realize our potential. NVF's work environment is safe and open to all employees and partners, respecting the full spectrum of race, color, religious creed, sex, gender identity, sexual orientation, national origin, political affiliation, ancestry, age, disability, genetic information, veteran status, and all other classifications protected by law in the locality and/or state in which you are working.

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