

Chris Netram

Managing Vice President,  
Tax and Domestic Economic Policy

February 13, 2023

Regulatory Secretariat Division  
General Services Administration  
1800 F Street NW  
Washington, DC 20405

Re: FAR Case 2021-015, Docket No. FAR-2021-0015, Sequence No. 1; Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk

To whom it may concern:

The National Association of Manufacturers (“NAM”) appreciates the opportunity to provide comment to the Federal Acquisition Regulatory Council (“FAR Council”) on FAR Case 2021-015, proposed amendments to the Federal Acquisition Regulation (“FAR”) on Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk.<sup>1</sup>

The NAM is the largest manufacturing trade association in the United States, representing manufacturers of all sizes and in all 50 states. Manufacturers in the U.S. are leaders in combatting climate change and safeguarding the economy and the world from its impacts. After all, it is manufacturers who will make the products and technologies needed to face this challenge—clean energy, carbon capture, batteries, microgrids, and more.

Manufacturers also play a vital role as federal contractors, subcontractors, and partners throughout the contracting supply chain. Manufacturers of all sizes and from a wide range of industrial sectors are dedicated to ensuring that the federal government, including the U.S. military, has the tools it needs to serve and protect the American people.

Manufacturers, including those supplying the federal government, care deeply about improving the sustainability of their businesses. A recent survey of senior manufacturing executives conducted by the Manufacturing Leadership Council (“MLC”), the NAM’s digital transformation division, found that 90% of respondents believed that manufacturing has a special responsibility to society to become more sustainable.<sup>2</sup> And companies are putting this belief into action—according to the survey, 90% of manufacturers are focused on improving energy efficiency and reducing energy use, 85% have a company-wide strategy to address sustainability or have embedded sustainability into their business practices, and 57% either have or are developing a net zero greenhouse gas (“GHG”) emissions-reduction goal.<sup>3</sup>

Clearly, sustainability is a priority for the manufacturing industry—as is appropriate reporting on companies’ sustainability efforts and climate-related risks and impacts. Many manufacturers are

---

<sup>1</sup> *Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk*, 87 Fed. Reg. 68312 (14 November 2022). FAR Case 2021-015, Docket No. FAR-2021-0015, Sequence No. 1; available at <https://www.govinfo.gov/content/pkg/FR-2022-11-14/pdf/2022-24569.pdf>.

<sup>2</sup> *Survey: Sustainability Momentum Surges Dramatically* (29 November 2022). Manufacturing Leadership Council. Available at <https://www.manufacturingleadershipcouncil.com/survey-the-sustainability-shift-accelerates-31159/>.

<sup>3</sup> *Ibid.*

already taking steps to disclose emissions data and other climate-related information, including by publishing sustainability and corporate social responsibility reports and voluntarily aligning with third-party frameworks like the Task Force on Climate-related Financial Disclosures (“TCFD”), the Sustainability Accounting Standards Board (“SASB”), and the Global Reporting Initiative (“GRI”).

However, the NAM’s Manufacturers’ Outlook Survey for Q4 2022 found that 77% of respondents were concerned that the increased *regulatory* focus on environmental, social, and governance (“ESG”) disclosures could increase reporting costs and divert funds from their business.<sup>4</sup> More than half of respondents said that mandatory reports expose companies to increased legal liability.<sup>5</sup> Manufacturers are leaders in developing products to combat climate change and in implementing sustainable business practices, and the industry is dedicated to providing relevant information about those efforts to the appropriate stakeholders—but one-size-fits-all regulatory mandates can significantly increase costs and liability, with little corresponding benefit.

Last year, the Securities and Exchange Commission (“SEC”) proposed a regulatory mandate of its own,<sup>6</sup> which would apply to publicly traded companies within the SEC’s purview—and impact businesses throughout those public companies’ supply chains. The NAM expressed serious concerns about the SEC’s proposal, calling it “a wide-ranging mandate for public companies to generate and report pages upon pages of information, much of which is not material to their operations or financial performance.”<sup>7</sup> To mitigate the impact of the proposed disclosure overload, the NAM called on the SEC to re-propose a more tailored and workable rule with a narrower scope, an acknowledgement of the evolving nature of climate reporting, and a reduced compliance burden for manufacturers.

Unfortunately, the FAR Council’s proposed rule features many of the same problems as the SEC proposal, including a one-size-fits-all approach to climate disclosure and significant upstream and downstream impacts on companies’ supply chains. In some areas, the FAR Council has proposed to go even further than the SEC, including by requiring many federal contractors to set aggressive emissions-reductions targets (whereas the SEC’s rule would only require disclosure of any targets that public companies voluntarily set on their own). As a result, manufacturers providing critical goods and services to the federal government, as well as the businesses throughout their supply chains, will be directly and adversely impacted by the proposed amendments to the FAR. The national security of the United States could likewise be harmed, as critical contractors could be disqualified from supplying the military, and the required disclosures could expose sensitive information to America’s adversaries.

The proposed rule would impose significant costs on manufacturers as they work to meet the complex—and in many cases impractical or impossible—requirements of the rule. And some of the proposed rule’s requirements may be duplicative of or in conflict with the SEC’s proposal, putting critical federal contractors at risk of noncompliance due to dueling federal directives. Further, the proposed requirements would not be imposed via a transparent process based on stakeholder input and industry consensus; rather, the proposed rule outsources the government’s standard-setting

---

<sup>4</sup> *NAM Manufacturers’ Outlook Survey: Fourth Quarter 2022* (4 January 2023). National Association of Manufacturers. Available at [https://www.nam.org/wp-content/uploads/2023/01/Manufacturers\\_Fourth\\_Quarter\\_Outlook\\_Survey\\_December\\_2022.pdf](https://www.nam.org/wp-content/uploads/2023/01/Manufacturers_Fourth_Quarter_Outlook_Survey_December_2022.pdf).

<sup>5</sup> *Ibid.*

<sup>6</sup> *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (11 April 2022). Release Nos. 33-11042, 33-94478; available at <https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf>.

<sup>7</sup> NAM Comments on File No. S7-10-22 (6 June 2022). Available at [https://documents.nam.org/tax/nam\\_comments\\_sec\\_climate\\_rule.pdf](https://documents.nam.org/tax/nam_comments_sec_climate_rule.pdf).

authority to unaccountable non-governmental organizations (“NGOs”) like the Science-Based Targets initiative (“SBTi”), CDP (formerly the Carbon Disclosure Project), and TCFD—none of whose standards were designed to serve as across-the-board regulatory requirements or to support one-size-fits-all compliance.

These organizations have no obligation to maintain an “economical and efficient” system for federal procurement,<sup>8</sup> nor to support the operational capability of the federal government or the readiness of the U.S. military. It is clear that these third-party standards, which the proposed rule would impose on thousands of federal contractors across the country, were not designed with the best interests of the federal government in mind and would in fact hamper manufacturers’ ability to supply critical goods. For example, requiring contractors to set targets to reduce their GHG emissions on the aggressive timeline mandated by SBTi would limit their operational capabilities, disproportionately impact critical industries for which SBTi has declined to promulgate sector-specific guidance, and put important decisions about companies’ ability to serve as federal contractors at the mercy of SBTi’s validation process, timeline, and discretion. Similarly, the provisions of the proposed rule mandating that contractors disclose their Scope 3 emissions and set Scope 3 emissions-reduction targets would impose significant costs on contractors and the smaller businesses within their supply chains, while also producing confusing and unhelpful reports given the evolving nature of Scope 3 estimation and reporting.

The proposed rule will harm contractors and businesses within their supply chains, and it will negatively impact the capacity and readiness of the federal government and the U.S. military. The burden of complying with the rule could disincentivize companies from serving as federal contractors and significantly increase costs for those that remain, potentially driving up costs that would be borne by taxpayers. This will limit the pool of contractors available to the federal government, including within the defense industrial base, diminishing competition and hampering the government’s ability to find innovative and technically superior solutions to the problems it faces. In addition to the harms to the national security of the United States caused by the weakening of the government’s and military’s operating capacity, the proposed rule could also create a more direct risk to national security by forcing companies to provide disclosure about the current and anticipated usage patterns of classified or sensitive products—potentially exposing information about U.S. military missions or operations. In short, the rule as proposed would impact national security by reducing America’s capacity to defend itself and increasing visibility on our operational capabilities to potential adversaries.

These significant issues—and others highlighted throughout the NAM’s comments—illustrate the pitfalls of the FAR Council’s decision to outsource its regulatory authority to entities with no obligation to support efficient procurement and no accountability to the federal government or the American people. The FAR Council’s reliance on these organizations also raises significant legal questions, as the proposed rule would:

- Implicate the private nondelegation doctrine and separation of powers concerns by delegating regulatory authority to unsupervised non-governmental actors;
- Exceed the President’s authority to regulate federal contractors by pursuing policy goals unrelated to economical and efficient procurement;
- Violate the rules guiding the government’s use of industry standards by relying on frameworks that are not sufficiently consensus-based nor developed with the participation of government experts; and
- Disregard the procedural safeguards of the Administrative Procedure Act (“APA”) by failing to explain the FAR Council’s policy choices and deferring future policy changes to third parties outside the executive branch that lack notice-and-comment rulemaking procedures.

---

<sup>8</sup> 40 U.S.C. 101.

The NAM has serious concerns about the FAR Council's authority to promulgate such a far-reaching and consequential rule, as well as the wisdom of imposing such costly and impractical burdens on federal contractors. For these reasons, the NAM strongly but respectfully encourages the FAR Council to set aside the rule in its entirety.

If the FAR Council is determined to impose climate-related requirements on federal contractors, certain changes are critical to ensuring that any final rule is as workable as possible for manufacturers and minimally damaging to the operational capacity of the federal government and the national security of the United States. If it decides to move forward with a climate rule, the FAR Council should first freeze its rulemaking process to allow the SEC to promulgate a final climate disclosures rule, which would enable the FAR Council to consider that rule's implications for federal contractors and ensure that any final amendments to the FAR do not duplicate, contradict, or exceed the SEC's requirements. Upon resumption of its rulemaking process—which should include re-proposal of an amended rule—the FAR Council should:

- **Abandon its reliance on unaccountable third parties** and instead promulgate regulatory standards pursuant to the legally required processes for notice-and-comment rulemaking;
- **Rescind the proposed requirement that federal contractors set emissions-reduction targets and have those targets validated by SBTi**;
- **Rescind the proposed Scope 3 emissions reporting requirement**, or at a minimum grant significant flexibility to companies to determine which categories and sources of emissions are relevant, practical, and safe to disclose, provide more time for companies to come into compliance, and create a robust, clear national security exemption;
- **Rescind the proposed requirement that contractors report their climate-related risks to CDP**, and instead propose for public comment a climate-related risk disclosure framework that is narrowly tailored to provide specific insights into the federal government's exposure to climate-related risks and which does not exceed the climate-related risk disclosures required by any final SEC rule;
- **Amend the definitions of "significant" and "major" contractor** to focus the proposed rule's compliance obligations on only the largest federal contractors;
- **Permit federal contractors to be deemed "responsible" under the FAR when they provide climate disclosures pursuant to any final SEC rule** as of the compliance dates required by the SEC, and allow companies to disclose GHG emissions, climate-related risks, and emissions-reduction targets via their SEC filings, sustainability reports, or other forums;
- **Provide a clear national security exemption** that allows companies to forgo disclosures that might implicate classified information or national security concerns;
- **Extend the compliance dates** for the proposed rule's most difficult provisions (including, if included in any final rule, the requirements related to Scope 3 emissions disclosures and emissions-reduction target-setting);
- **Clarify that any requirements imposed by the rule will only be used to determine a company's eligibility to serve as a federal contractor**, not to compare companies to one another or as a factor in the contract bidding process; and
- **Provide clarification** about the practical application of the proposed requirements.

Manufacturers are leaders in the fight against climate change, but the proposed rule would impose novel and costly requirements on thousands of companies supplying the government, as well as on businesses throughout those contractors' value chains, including those with no connection to federal contracting. It would also have severe consequences for the operational capacity of the federal government, the readiness of the U.S. military, and the national security of the United States. The NAM appreciates the FAR Council's consideration of these comments, which illustrate the importance of rescinding, or at a minimum drastically reforming, the proposed rule.

I. **The proposed rule would have a direct and damaging impact on companies supplying the federal government and on the government's readiness and operational capacity.**

As proposed, the amendments to the FAR would increase costs on federal contractors, disincentivize or outright prohibit certain companies from supplying the federal government, diminish competition, and damage the government's ability to access the goods and services it needs to operate efficiently.

With respect to contractors and prospective contractors, the proposed rule would impose significant costs and burdens. The difficulty associated with the specific provisions in the proposed rule—in particular the requirement to have emissions-reduction targets validated by SBTi and to disclose Scope 3 GHG emissions—cannot be overstated. These novel requirements would require extensive tracking and aggressive commitments, and compliance with the rule will significantly increase the cost of doing business with the federal government.

Some businesses may not be able to meet the requirements of the proposed rule at all, especially given the expedited timeframe proposed for implementation. These companies could be forced to forgo federal contracting altogether. This will particularly be the case for small and medium-sized businesses. Moreover, the proposed rule creates numerous opportunities for companies to be deemed “nonresponsible” due to factors outside their control and thus disqualified from supplying the government. For example, the two-year deadline proposed for SBTi target validation means that companies will be at the mercy of SBTi's capability and willingness to handle the influx of validation requests that will follow if the rule is finalized as proposed. Similarly, SBTi's lack of sector-specific guidance for many critical industries could discourage or disqualify companies in those industries from becoming federal contractors, or at the very least prevent companies from incorporating industry-specific data or adapting to industry-specific challenges in the target-setting process.

This confluence of effects will have a direct and deleterious impact on the federal government itself. A reduced contractor pool will stifle competition and limit the government's ability to contract for technically superior or preferred products and services, while higher costs for the contractors still able to supply the government will in turn raise costs for taxpayers, the antithesis of an “economical and efficient system” for procurement.<sup>9</sup>

The same dynamic will likely emerge with respect to subcontractors and supply chain partners for major contractors given the requirement that major contractors report Scope 3 emissions and engage with suppliers and downstream users of their products to set emissions-reduction targets. Under the rule, small businesses will be forced either to design and implement costly new processes to meet their major-contractor partners' compliance obligations or to opt out of the contracting supply chain. This will significantly increase costs on these businesses and limit the availability and capability of companies needed to work with major contractors to meet the federal government's needs.

---

<sup>9</sup> *Ibid.*

**A. The FAR Council should amend the proposed definitions of “significant” and “major” contractor.**

The compliance difficulties for federal contractors and their suppliers, and the operational challenges for the federal government, are compounded by the proposed definitions of “significant” and “major” contractor. Under the proposed rule, a significant contractor is defined as any contractor with \$7.5 million or more, but less than \$50 million, in annual federal contract obligations. A major contractor is any contractor with \$50 million or more in annual federal contract obligations. Both of these thresholds are significantly lower than necessary to accomplish the stated goals of the proposed rule.

In order for the FAR Council to “analyze and mitigate climate risks”<sup>10</sup> to which the federal government is exposed by virtue of its suppliers, it only needs to understand the GHG emissions and climate-related risks of its largest contractors, which have annual contract obligations in the *billions* of dollars. Not only are these larger contractors more relevant to the government’s climate-related risk exposure, but they also have more resources to comply with the costly and difficult requirements in the proposed rule. To be clear, the NAM is urging the FAR Council to make significant changes to the rule, discussed in more detail below, to make it *far less* costly and difficult. But even a more tailored version of the rule will impose considerable burdens on federal contractors, and the FAR Council should adjust its “significant” and “major” contractor definitions accordingly.

The NAM respectfully encourages the FAR Council to substantially increase the annual-federal-contract-obligation thresholds that qualify companies as either a “significant” or “major” contractor. A significant contractor should be defined as any contractor with \$75 million or more, but less than \$500 million, in annual federal contractor obligations, while a major contractor should be defined as any contractor with \$500 million or more in annual federal contract obligations. Combined with the NAM’s other suggested changes to the rule, these revamped definitions should both focus the rule on companies whose exposure to climate-related risks may most impact the federal government and make the rule more workable for businesses throughout the contracting supply chain.

In addition to amending the definitions of “significant” and “major” contractor, the FAR Council should provide that, for any size of federal contractor, reporting pursuant to any final SEC climate disclosures rule would suffice to be deemed “responsible” pursuant to any final amendments to the FAR. Such a clarification would allow companies to avoid duplicative reporting, while the NAM’s proposed modifications to the “significant” and “major” contractor definitions would ensure that only the largest federal contractors would be impacted by the proposed rule at all. The NAM respectfully encourages the FAR Council to pause its rulemaking until the SEC promulgates a final rule, and then to ensure that any final amendments to the FAR do not exceed the SEC’s requirements and can be complied with by completing the newly required SEC filings as of the compliance dates in the SEC’s final rule.<sup>11</sup>

**B. The FAR Council should clarify that the information reported pursuant to the rule will not be used to compare companies or as a factor in the contract bidding process.**

The NAM is seriously concerned about how the emissions, emissions-reduction, and climate-related risk data reported under the proposed rule will be used in the future, and about the impact that any

---

<sup>10</sup> Proposed Rule, *supra* note 1, at 68312.

<sup>11</sup> Under such an approach, public companies should be able to show compliance with the amendments to the FAR by providing the requisite information within their SEC filings. Non-public companies subject to the FAR amendments should have a similar compliance option, such as by making the requisite information available via their publicly available sustainability reports.

decisions based on this information could have on significant contractors, major contractors, and the federal government.

Under the current version of the FAR Council's proposal, contracting officers are simply required to verify that a contractor has completed each of the tasks required by the rule. But compliance with these requirements will generate vast amounts of data from significant and major contractors on an ongoing basis. In the future, then, federal agencies might decide that prospective contractors should be evaluated based on the *content* of those responses rather than whether or not the required responses were submitted.

Climate reporting is an evolving and complex field, which is why the NAM has advocated for flexible and principles-based climate disclosure requirements. As discussed, the proposed rule's attempts to transmute voluntary industry guidelines for such reporting into strict regulatory mandates are extremely concerning to manufacturers—and so, too, would be any attempts to use the required disclosures to set decision-making criteria for the federal government.<sup>12</sup> The data collection and reporting methodologies are simply not sufficiently evolved to compare companies against one another or to make decisions based on any such comparisons. As the NAM said in response to the SEC's proposed Scope 3 reporting requirement, comparison of Scope 3 information across companies is "extremely difficult,"<sup>13</sup> which is why the GHG Protocol specifically notes that its Scope 3 disclosure framework is "not designed to support comparisons between companies based on their Scope 3 emissions."<sup>14</sup>

If the FAR Council moves forward with a final rule that requires federal contractors to disclose their GHG emissions and climate-related risks and to set emissions-reduction targets, the NAM respectfully encourages the FAR Council to clarify that the only way in which data reported pursuant to the rule can be used is to verify whether or not a contractor completed each of the requirements to which it is subject. The FAR Council should be explicit that the federal government will not compare companies' responses against one another nor make decisions based on the content of the required disclosures. Such a clarification will communicate to federal contractors that the government understands the limitations of climate reporting data and methodologies, and that any information reported pursuant to the rule will not be used against them in the contract bidding process.

## **II. The FAR Council should not, and cannot, outsource its regulatory authority to unaccountable NGOs.**

From the beginning, the proposed rule commits a fundamental error by claiming that Office of Management and Budget ("OMB") memorandum M-22-06 authorizes, or perhaps even requires, the FAR Council to outsource its regulatory obligations to foreign third parties like SBTi, CDP, and TCFD. While the proposal is correct that the OMB memo says that the FAR Council should "leverage" existing standards and systems,<sup>15</sup> it is clear from the text of the memo (and from the common-usage definition of the word "leverage") that OMB meant for the FAR Council to learn from companies' experience with SBTi, CDP, and TCFD so that the FAR Council might promulgate

---

<sup>12</sup> Notably, the proposed rule states that the government plans to use the disclosures made pursuant to the rule "to reduce climate risks and GHG emissions associated with Federal procurement activities." See Proposed Rule, *supra* note 1, at 68323.

<sup>13</sup> NAM Comments on SEC Climate Rule, *supra* note 7, at 22.

<sup>14</sup> *Corporate Value Chain (Scope 3) Accounting and Reporting Standard*. Greenhouse Gas Protocol (October 2011). Available at [https://ghgprotocol.org/sites/default/files/standards/Corporate-Value-Chain-Accounting-Reporting-Standard\\_041613\\_2.pdf](https://ghgprotocol.org/sites/default/files/standards/Corporate-Value-Chain-Accounting-Reporting-Standard_041613_2.pdf).

<sup>15</sup> *Office and Management and Budget Memorandum M-22-06: Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability* (8 December 2021). Available at <https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-06.pdf>.

workable regulatory requirements similar to or based on these frameworks.<sup>16</sup> The FAR Council has instead proposed a rule that includes no substantive requirements of its own, based on companies' experience or otherwise. Rather, the proposed rule would require federal contractors to comply with standards set by (and subject to change by) NGOs that are unaccountable to the American people, and then to interface directly with those NGOs to have their compliance with said standards processed, graded, and validated—all without the involvement of the federal government.

The National Technology Transfer and Advancement Act of 1995 (“NTTAA”) governs the federal government’s use of external standards (primarily for “technical specifications,” unlike the disclosure requirements at issue here).<sup>17</sup> But SBTi, CDP, and TCFD are not “voluntary consensus standards bodies,” nor are their standards developed with the participation of the U.S. government, both requirements under the NTTAA. Absent these important procedural safeguards, the proposed rule would simply “entrust[ ] the entire regulatory scheme” to non-governmental entities, an unlawful delegation of federal authority.<sup>18</sup>

These features are not the hallmarks of reasoned rulemaking conducted within the bounds of the APA. Indeed, a core requirement of the APA is that interested parties be given a meaningful opportunity to provide comment on any proposed regulation.<sup>19</sup> Yet, in this case, rather than propose a regulatory framework about which commenters could opine and which, once finalized, the federal government could take steps to implement, the FAR Council is proposing to remove itself from the standard-setting process and defer entirely to the whims of SBTi, CDP, and TCFD. While commenters will presumably provide the FAR Council with feedback on these organizations’ standards as they currently exist, the federal government has no ability to make SBTi, CDP, and TCFD change their rules in response to commenters’ suggestions, and these groups have no obligation to stay true to the frameworks currently in place on an ongoing basis. And as these frameworks continue to evolve over time, SBTi, CDP, and TCFD have no responsibility to provide opportunities for public comment, as would be the case for evolving regulatory standards. Furthermore, these organizations’ objectives (which will be expressed through the standards they promulgate) are indisputably not to provide an “economical and efficient system” for federal procurement<sup>20</sup> nor to protect the national security of the United States.

In effect, the proposed rule would leave a question critical to the functioning of the U.S. government and the readiness of the U.S. military entirely in the hands of unregulated third parties with no accountability to the American people: “Which companies are or are not eligible to serve as federal contractors?” These organizations have no obligation to set consistent or reasonable standards that support regulatory certainty, economic growth, and efficient procurement. In outsourcing the federal government’s regulatory powers to these groups, the FAR Council would undermine these critical goals, which should serve as a guide to any decisions related to federal contractor qualifications.

---

<sup>16</sup> The proposed rule notes that the SEC, in promulgating its proposed climate disclosures rule, was also able to “leverage” existing standards. See Proposed Rule, *supra* note 1, at 68312. But the SEC rule does not require that companies comply with the guidelines published by TCFD or any other third party. Rather, its climate-related risk disclosures are “modeled...in part on the TCFD disclosure framework” so as to “leverage the framework with which many investors and issuers are already familiar.” See Proposed SEC Rule, *supra* note 6, at 21346 (emphasis added). In other words, the SEC sought to utilize companies’ experiences with existing third-party frameworks in order to craft a more workable rule—not to completely outsource its regulatory authority to those third parties.

<sup>17</sup> *National Technology Transfer and Advancement Act of 1995*. Pub.L. 104-113 (1996).

<sup>18</sup> *National Horsemen’s Benevolent and Protective Association v. Black*, 53 F.4th 884, 889 (5th Cir. 2022).

<sup>19</sup> See 5 U.S.C. 553(c), requiring an agency adopting a binding legislative rule to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”

<sup>20</sup> 40 U.S.C. 101.



The FAR Council's decision to abdicate its regulatory responsibilities will result in substantial damage to federal contractors and the companies within their supply chains, including businesses throughout the defense industrial base. This will negatively impact the readiness of the federal government and the national security of the United States. As such, the NAM respectfully encourages the FAR Council to rescind the provisions of its proposed rule that rely on third-party standards and instead, if it chooses to move forward with a climate disclosures rule for federal contractors, to propose for public comment regulatory requirements that are narrowly tailored to meet the federal government's needs.

**A. *The third-party organizations to which the FAR Council is proposing to outsource its regulatory authority have no obligation to adopt reasonable standards or consider those standards' impact on federal contractors and the federal government.***

As noted, SBTi, CDP, and TCFD have no obligation to set achievable, reasonable standards for federal contractors. Given that these organizations' frameworks are designed for a much wider user base than just federal contractors, there is no reason to believe that they might tailor any standards to the needs of the federal government or its suppliers or consider the impact of any given standard on a contractor's status as responsible or nonresponsible.

Absent any incentive to promulgate standards that are workable for the contractors that the federal government and the U.S. military need to operate, these standard-setters will have the latitude to mandate inflexible, unrealistic, and costly requirements. In fact, the frameworks *currently in place* are unachievable for many contractors, and future amendments could put compliance even further out of reach. For example, SBTi currently lacks sector-specific guidance for many industries critical to the federal government, including aerospace & defense, aviation, and oil & gas.<sup>21</sup> In fact, companies in the oil & gas industry are completely barred from engaging with SBTi, as the current target-setting criteria state that SBTi is "is unable to accept commitments or validate targets for companies in the [oil & gas] or fossil fuels sectors."<sup>22</sup> These barriers mean that compliance with SBTi is effectively impossible *today* (or at the very least extremely difficult) for companies in industries like aerospace & defense, aviation, oil & gas, and more. Yet the FAR Council has proposed to adopt today's SBTi framework as well as any future iterations. This represents a significant abdication of the government's regulatory authority and a violation of the government's "obligation to engage in reasoned decision-making" under the APA.<sup>23</sup> Moreover, these third-party requirements could change over time to impose new, binding requirements on federal contractors without the participation of the federal government or any of the legally required opportunities for input or legal recourse for federal contractors. This raises considerable due process concerns. Worse still, future changes to these third-party standards could risk compromising the operational capability and military readiness of the United States.

Put simply, the *best-case scenario* under the proposed rule is that standards imposed by these unregulated third parties "only" increase contractor costs and make it more difficult to supply the federal government. The worst-case scenario, on the other hand, immediately disqualifies hundreds of contractors and prospective contractors because they cannot or will not bear the costs of compliance—and then continues to erode the contractor base over time as the standards evolve. A regulatory framework proposed by the federal government and updated via notice-and-comment rulemaking in future years would be able to adapt to these challenges by continually evaluating the

---

<sup>21</sup> See Sector Guidance, Science-Based Targets initiative. Available at <https://sciencebasedtargets.org/sectors>.

<sup>22</sup> See Oil and Gas, Science-Based Targets initiative. Available at <https://sciencebasedtargets.org/sectors/oil-and-gas>.

<sup>23</sup> *Miss. Comm'n on Env't Qual. v. EPA*, 790 F.3d 138, 145 (D.C. Cir. 2015).

mounting costs and declining benefits. But SBTi, CDP, and TCFD have no obligation to conduct any sort of cost-benefit analysis that considers the operational needs of the federal government, the U.S. military, and the thousands of federal contractors that would be subject to the proposed rule.

**B. *The proposal ignores the serious national security implications of outsourcing critical decisions about federal contractor eligibility.***

The NGOs developing the standards incorporated into the proposed rule may be influenced by any number of factors or pursuing a range of agendas, but there is no reason to believe that the national security of the United States would be among them. This leaves the United States vulnerable to potential national security threats arising both from the erosion of the contractor base and from compulsory disclosures that could reveal, even unintentionally, sensitive information.

A robust contractor base is critical to the readiness of the U.S. military. The technical specifications to which defense contractors design and manufacture goods result in the highest-quality protections for America's servicemembers, and these standards are so exacting that only the most qualified contractors can meet the military's needs. If the proposed rule requires the federal government's contracting officers to deem technically superior contractors "nonresponsible" based on criteria set by unaccountable NGOs, then the military will lose access to that expertise. Additionally, in many areas of its operations the military's resource needs are enormous, and it can take dozens of contractors to supply a sufficient quantity of a necessary product. Yet some number of those suppliers could be deemed "nonresponsible" and thus disqualified from one or more military contracts, ultimately limiting the military's operational capacity.

Based on the standards currently in place at these organizations, these outcomes are not far-fetched. As noted, SBTi does not have sector-specific guidance for aerospace & defense and aviation companies, and oil & gas businesses are currently prohibited from participating in the target-setting process entirely. These industries are critical to the operational capacity of the U.S. military. But SBTi has no obligation to consider military readiness in its cost-benefit analyses, and the national security of the United States could suffer as a result as critical contractors are disqualified from the defense industrial base.

The U.S. government has no control over the development of the SBTi, CDP, and TCFD frameworks, and thus will be unable to ensure that these risks to our national security are considered during the standard-setting process. The NAM respectfully encourages the FAR Council to remain mindful of the potential national security implications of its proposed rule and to reconsider its decision to outsource critical decisions about companies' qualifications to be defense contractors to unaccountable NGOs.

**C. *The proposed rule's third-party frameworks differ significantly from other consensus-based technical standards upon which the federal government relies.***

In evaluating the FAR Council's proposed rule, it is important to note the critical differences between SBTi, CDP, and TCFD and other industry standards the government leverages to ensure technical uniformity and reliable performance.

The FAR Council purports to rely on the NTTAA to support its adoption of third-party standards as regulatory mandates.<sup>24</sup> However, the NTTAA requires the government to use, where practical, technical standards that are developed by "voluntary consensus standards bodies" and to "participate with such bodies in the development of technical standards."<sup>25</sup> Putting aside that the

---

<sup>24</sup> Proposed Rule, *supra* note 1, at 68315.

<sup>25</sup> NTTAA, *supra* note 17.

NTTAA's requirements are designed for "technical specifications" (i.e., "characteristics for products," "test methods and sampling procedures," "labeling requirements," and the like<sup>26</sup>—substantially different in nature from the reporting burdens envisaged by the proposed rule), SBTi, CDP, and TCFD are not "voluntary consensus standards bodies" within the meaning of the NTTAA. Per OMB Circular No. A-119, the NTTAA requires these bodies' standard-setting processes to feature openness, balance, due process, consensus, and an appeals process, elements notably lacking from SBTi, CDP, and TCFD.<sup>27</sup> While some of these organizations' policies and prescriptions may have been opened to stakeholder input at some point in time, the constituency to whom the groups' standards are now proposed to be applied—government contractors—had no reason to believe that they would in the future be subject to these standards via a regulatory mandate, and therefore that they should have been participating in their development. Nor does the FAR Council provide any information about any U.S. government agency's participation, as would be required by the NTTAA. Ultimately, the FAR Council's attempt to outsource its regulatory authority to these third parties differs from other technical standards utilized by the federal government in four key ways.

First, SBTi, CDP, and TCFD were not designed as across-the-board regulatory standards to support one-size-fits-all compliance. Each provides a different type of guidance for companies seeking to understand, report, and/or reduce their GHG emissions, but these frameworks were never intended to be regulatory mandates, so they lack design features that allow for universal adoption.

Critically, these standards' voluntary nature means there is no need for a cost-benefit analysis of any of their provisions, nor a feasibility screen with regard to any aspirational aspects of their guidance. In practice, this means that companies for which the standards are most relevant and workable can opt in to an entire framework or to its most useful components. Similarly, companies for which the standards are less relevant or workable can fully or partially opt out. This flexibility allows companies to choose which frameworks are right for them, which elements of the individual frameworks are relevant to their operations, and which provisions are feasible to implement. But if the FAR Council adopts the SBTi, CDP, and TCFD standards as its own, companies will no longer have any flexibility as to whether and how they utilize these frameworks. Rather, federal contractors, regardless of their industry and whether SBTi, CDP, and TCFD are relevant or workable for them, may be required to comply with provisions of these frameworks that are extraneous to their operations or inefficient to complete. Utilizing voluntary guidelines in this manner is inconsistent with their intended purpose.

Second, SBTi, CDP, and TCFD lack the robust stakeholder input characteristic of standards that qualify as consensus-based under the NTTAA. For example, ASTM International (formerly the American Society for Testing and Materials) has more than 30,000 members, ranging from producers to consumers to academics, representing more than 140 countries (including the United States).<sup>28</sup> The current SBTi, CDP, and TCFD frameworks, on the other hand, cannot claim to have been developed in consultation with the particular community of regulated entities (i.e., federal contractors) to whom this proposed rule would apply. And the limited stakeholder engagement processes that do exist lack transparency and consistency, and there is little recourse for companies to challenge any unworkable standards. These failings violate the NTTAA's requirement that any external standards adopted by the government be based on industry consensus.<sup>29</sup> Additionally, this lack of industry consensus also makes the underlying standards less useful, since they were not

---

<sup>26</sup> OMB Circular No. A-119, Revised. Available at [https://www.whitehouse.gov/wp-content/uploads/2020/07/revised\\_circular\\_a-119\\_as\\_of\\_1\\_22.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf).

<sup>27</sup> *Ibid.*

<sup>28</sup> See About Us, ASTM International. Available at <https://www.astm.org/about/overview.html>.

<sup>29</sup> See OMB Circular No. A-119, *supra* note 26.

developed with the government contracting community in mind and, as such, do not consider the feasibility or the national security implications of their requirements.

Third, there is no U.S. government oversight of or participation in these organizations or their standard-setting processes. As noted, SBTi, CDP, and TCFD lack the robust consensus-building process envisioned by the NTTAA in which stakeholders, including the U.S. government, might participate. But it is particularly notable that the government has no control over these standards given that the FAR Council is proposing to outsource the federal government’s decision-making authority to these organizations and to allow them to dictate which companies can serve as federal contractors. The NTTAA specifically requires federal agencies to “consult” with private sector standard-setters and “participate with such bodies in the development of technical standards” if their frameworks are to be relied upon.<sup>30</sup> There is no indication in the proposed rule that the FAR Council plans to engage in any such consultation.

Finally, SBTi, CDP, and TCFD are relatively new organizations in the context of American industry, and their standards are continuing to grow and evolve. It is also unclear, from a practical perspective, whether and to what extent these organizations are prepared to handle the influx of new users that would result from the FAR Council adopting the rule as proposed. This is a critical concern: a company’s eligibility to be a federal contractor will depend entirely on the ability of CDP and SBTi to process the thousands of new questionnaire responses and validation requests, respectively, that they receive—all within the time constraints imposed by the proposed rule. There is no indication in the proposal that the FAR Council has considered this potential compliance difficulty, nor that CDP and, especially, SBTi are capable of handling such an influx.

It is clear that the third-party frameworks at the heart of the proposed rule bear little resemblance to the consensus-based technical standards on which the federal government relies in other contexts. Accordingly, the FAR Council should not outsource its regulatory authority to these organizations.

***D. The FAR Council lacks the legal authority to delegate regulatory oversight to non-governmental entities or to promulgate a rule of such significance, and it has failed to provide a reasonable explanation for the proposal, in violation of the APA.***

The FAR Council’s decision to delegate its standard-setting authority to non-governmental third parties, without sufficient governmental supervision, raises serious constitutional concerns. Indeed, federal courts have recognized “that federal power can be wielded only by the federal government” and that “private entities may do so only if they are subordinate to an agency.”<sup>31</sup> Where, as here, the government empowers a non-governmental entity with “sweeping” powers to establish regulatory standards and to determine compliance, thereby “entrusting the entire regulatory scheme to the [entity],” federal courts have found such delegation to be unconstitutional.<sup>32</sup> The FAR Council has proposed to require contractors to comply with standards issued by SBTi, CDP, and TCFD, without any input from the federal government. Contractors will face the risk of being deemed “nonresponsible” and thus ineligible for federal contract awards based solely on the determination of these non-governmental entities. Further, the proposed rule provides no mechanism for the FAR Council to review and approve the standards selected by these entities, whether now or in the future. This confluence of factors raises serious constitutional delegation issues.

---

<sup>30</sup> NTTAA, *supra* note 17.

<sup>31</sup> *National Horsemen’s Benevolent and Protective Association v. Black*, 53 F.4th 869, 872 (5th Cir. 2022).

<sup>32</sup> *Id.* at 884, 889.

Putting aside the narrow yet important issue of private party delegation, the FAR Council's proposed rule and the Executive Order directing the FAR Council to issue the rule<sup>33</sup> implicate questions with respect to whether either the President or the FAR Council possess the statutory authority to promulgate such a far-reaching regulation. Federal courts have made clear that the Federal Property and Administrative Services Act of 1949 ("FPASA")<sup>34</sup> does not provide the President with limitless authority to regulate federal contractors.<sup>35</sup> These courts have emphasized that the language of FPASA, in its most expansive reading, only authorizes the President to pursue objectives that improve the efficiency of the government's system of entering into contracts, not to carry out the President's policy agenda under the guise of regulating federal contractors.

Likewise, the Supreme Court's recent decision in *West Virginia v. EPA*<sup>36</sup> cautions against reading statutes as authorizing federal agencies to wield sweeping power beyond what Congress has expressly provided. The Court held that under the "major questions" doctrine, "we expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."<sup>37</sup> Under this doctrine, the FAR Council simply does not possess the congressional grant of authority to issue the proposed rule, which as the NAM has explained will have "vast economic" consequences for all federal contractors subject to the rule's mandate, as well as for the businesses within those contractors' supply chains.

Furthermore, the FAR Council's decision to outsource its regulatory authority to SBTi, CDP, and TCFD does not meet the APA's requirements that the government engage in reasoned decision-making and avoid arbitrary and capricious rulemaking. As discussed, the proposed rule presents significant compliance difficulties for federal contractors, impacts the operational capacity of the federal government, and violates the NTTAA requirement that any external standards be consensus-based and developed in partnership with government experts. Even assuming *arguendo* that the FAR Council could legally rely on these third-party standards, there is little if any justification for that decision found in the proposed rule—a clear violation of the APA. There is minimal discussion in the proposed rule of why disclosure of GHG emissions and climate-related risks, and validation of emissions-reduction targets, is necessary at all. And there is no mention of the benefits or burdens associated with utilizing SBTi, CDP, and TCFD, nor how adopting their specific standards (whether now or in the future) would support any legitimate exercise of administrative authority. In short: how and why did the FAR Council choose these specific organizations?

The APA requires that "agency action be reasonable and reasonably explained."<sup>38</sup> But the FAR Council's choices in the proposed rule are not explained *at all*. Why is TCFD's climate risk disclosure framework preferable to, for example, that of SASB or GRI? What specific reporting recommendations within the TCFD guidelines are necessary for the federal government to understand its contractors' exposure to climate-related financial risks? Why is completion of the TCFD-aligned portions of the CDP Climate Change Questionnaire preferable to compliance with TCFD on its own terms? Why did the FAR Council not write its own climate risk disclosure

---

<sup>33</sup> *Exec. Order No. 14030: Climate-Related Financial Risk*, 86 Fed. Reg. 27967 (25 May 2021). Available at <https://www.govinfo.gov/content/pkg/FR-2021-05-25/pdf/2021-11168.pdf>.

<sup>34</sup> 40 U.S.C. 101 *et seq.*

<sup>35</sup> See *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022) ("[T]he Procurement Act's delegation to the President was not unlimited; the Act confers broad but not unbounded authority."); see also *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022); *Commonwealth v. Biden*, 57 F.4th 545 (6th Cir. 2023).

<sup>36</sup> 142 S. Ct. 2587 (2022).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Data Mktg. P'ship*, 45 F.4th at 855 (quoting *Prometheus Radio Project*, 141 S. Ct. at 1158).

framework, as the SEC did, rather than rely on TCFD and CDP? Why did the FAR Council not pause its rulemaking efforts in order to pursue alignment with a final SEC rule?

These failings are even more pronounced with respect to SBTi. With all of the federal government's environmental expertise at its disposal, why did the FAR Council not collaborate with its sister agencies to develop standards for "science-based" targets? Why is SBTi's rigid 10-year time horizon appropriate for all emissions-reduction targets? Are SBTi's target-setting guidelines the only way for companies to take steps to limit global warming to well below 2°C above pre-industrial levels and pursue efforts to limit warming to 1.5°C? How can contractors set a downstream emissions-reduction target when their main source of emissions is the federal government's use of their products? Why is compliance required within two years when developing and having validated a science-based target takes much longer? The rule is silent on these critical questions, and its overreliance on SBTi endorses one single pathway for climate-related target-setting rather than allow for innovation on this important topic.

Ultimately, the proposed rule can be boiled down to a very simple premise: SBTi, CDP, and TCFD have published a series of guidelines for corporate climate-related disclosure and target-setting, and federal contractors will be required to comply with those guidelines within one-to-two years, or else they may no longer be eligible to supply the federal government. Why those guidelines were selected, what benefits compliance will provide to the government, and how contractors are expected to meet these costly and burdensome requirements are left unexplained by the FAR Council.

This is an egregious failing, which is made even more pronounced when considering how ambitious the various standards are and the fact that the third parties to which the federal government is outsourcing its regulatory authority have no obligation to consider the feasibility or cost of their standards or their impact on the capacity of the federal government and the national security of the United States. The NAM respectfully encourages the FAR Council to re-propose a rule that includes regulatory standards set by the federal government rather than by foreign NGOs and explains how and why those standards are necessary and appropriate to achieve a legitimate governmental goal.

**III. The FAR Council should rescind the proposed requirement that major contractors set emissions-reduction targets using the SBTi criteria and have those targets validated by SBTi.**

Among the standards included in the proposed rule, manufacturers are most concerned by the mandate for major contractors to set emissions-reduction targets by using the criteria established by SBTi and to have those targets validated by SBTi.

The NAM strongly supports manufacturers' efforts to reduce their GHG emissions. Over the past decade, manufacturers in America have made tremendous strides in reducing the carbon footprint of their products,<sup>39</sup> and more than half of respondents in the recent MLC survey on sustainability and the circular economy either have or are developing net-zero goals.<sup>40</sup> The NAM has specifically called for a comprehensive climate treaty on the international stage as well as a unified federal climate policy here at home, saying that both should include the goal of meeting science-based targets.<sup>41</sup>

---

<sup>39</sup> *The Promise Ahead: Manufacturers Taking Action on Climate* (19 January 2021). National Association of Manufacturers. Available at <https://www.nam.org/wp-content/uploads/2021/01/The-Promise-Ahead.pdf>.

<sup>40</sup> See MLC Survey, *supra* note 2.

<sup>41</sup> See *The Promise Ahead*, *supra* note 39.

In short, manufacturers are at the forefront of the sustainability strategies and technological innovations that will foster a lower-carbon economy. But the target-setting criteria enforced by SBTi are unworkable as a one-size-fits-all regulatory mandate, and the proposed rule over-relies on SBTi at the expense of other pathways to emissions reduction. In fact, the GSA's own research shows that only 20% of tracked federal contract spending goes to companies that have set or committed to set SBTi targets.<sup>42</sup> This illustrates the novelty and magnitude of the proposed requirement that companies come into compliance with SBTi within two years. The NAM respectfully encourages the FAR Council to abandon its plan to require emissions-reduction target-setting and validation via SBTi.

**A. *The targets and methodologies required under SBTi's target-setting framework are too aggressive to serve as a regulatory requirement for all major contractors across all industries.***

SBTi's target-setting criteria require companies to set ambitious targets that cover at least two-thirds of their Scope 3 emissions (assuming Scope 3 emissions make up at least 40% of a company's emissions). As discussed in further detail below, the methodologies for calculating Scope 3 emissions are evolving and uncertain, and the data necessary for these calculations often can be inaccessible or unreliable. Simply arriving at a baseline for a company's current Scope 3 emissions (i.e., evaluating all 15 Scope 3 categories for relevancy and then estimating the emissions attributable to each category) is a burdensome exercise, which is why the NAM opposes the proposed Scope 3 reporting mandate. But the SBTi framework goes further, requiring companies to calculate their Scope 3 baseline and then set aggressive emissions reductions targets covering Scope 3 emissions that must be designed to be achieved within 10 years.

The NAM supports companies' efforts to understand and then reduce their GHG emissions (Scope 1, Scope 2, and Scope 3 alike), and many manufacturers are at the forefront of these important efforts. However, it is not yet feasible for all major federal contractors to commit to or achieve SBTi's ambitious target-setting requirements, particularly with respect to Scope 3 emissions. The recent MLC survey found that only 18% of manufacturers have a formal Scope 3 emissions reporting process currently in place,<sup>43</sup> and many companies will not be able to reduce their emissions by the amount needed to achieve their targets without significant emissions-reduction efforts on the part of the federal government (i.e., the customer that may be their main source of Scope 3 emissions). Yet all major contractors would be required to set an SBTi target, even if there is not currently the requisite data to establish or a viable path to achieve such a target.

In addition to the methodological difficulties associated with emissions tracking, more time is needed for the technology to develop to effectively and efficiently reduce emissions to the extent necessary to meet SBTi's target-setting requirements. This is the case for manufacturers in the contracting supply chain as well as for the federal government itself. In short, under an aggressive SBTi mandate, the purchasing requirements of the government will be in direct conflict with companies' potential needs to reduce production and usage in order to meet emissions-reduction targets. Companies may have no choice but to pull back in order to achieve an SBTi-enforced target, leaving the government short of critical materials, products, and services. The technologies simply do not yet exist in all sectors and for all products that would enable certain goods and services to be delivered to the government at current levels while also allowing the providers of those goods and services to achieve the aggressive targets required by SBTi. This dynamic will have an adverse impact on the readiness and capacity of the federal government and U.S. military.

---

<sup>42</sup> *GSA Federal Contractor Climate Action Scorecard*, General Services Administration. Available at <https://d2d.gsa.gov/report/gsa-federal-contractor-climate-action-scorecard>.

<sup>43</sup> See MLC Survey, *supra* note 2.

**B. Federal contractors' ability to commit to SBTi's customer-engagement and emissions-reduction requirements will depend in no small part on the participation of the federal government.**

The requirement that SBTi-approved targets cover two-thirds of a company's Scope 3 emissions presents an additional, unique problem for federal contractors that the proposed rule fails to address: for the many contractors for which the federal government is their sole or primary customer, a significant source of their Scope 3 emissions is the use of their products by the federal government itself.

SBTi requires that businesses set "customer engagement targets," and businesses' engagement with their customers *must* result in those customers setting science-based emissions-reduction targets of their own, in line with SBTi's criteria.<sup>44</sup> For many contractors, though, the federal government is their main or only customer. The proposed rule leaves two critical questions unaddressed with respect to this aspect of SBTi: does the federal government plan to engage with its suppliers to support their efforts to set Scope 3 emissions-reduction targets, and will the government set emissions-reductions targets of its own to enable its contractors' compliance with the proposed rule? Anything short of an ironclad commitment by the federal government to engage with suppliers and set its own science-based targets renders compliance with SBTi as required by the proposed rule functionally impossible.

It is unclear from the proposed rule how the FAR Council expects the largest and most important federal contractors to set customer engagement targets if their primary customer (and, consequently, a major source of their Scope 3 emissions) is not yet prepared to participate in either the customer-engagement or target-setting processes. Absent any such clarity, it appears as though many large contractors, particularly in the aerospace & defense sector, will be unable to have their emissions-reduction targets validated by SBTi—and thus would be disqualified from supplying the government.<sup>45</sup>

The SBTi framework was not designed to serve as a litmus test for federal contractors, and the difficulties it presents are only compounded by the practical reality that federal contractors' emissions and those of the federal government are inextricably linked.

**C. The SBTi framework lacks the necessary sector-specific guidance to enable efficient compliance by many federal contractors.**

Another critical barrier to compliance with the proposed rule's emissions-reduction provisions is that SBTi does not have sector-specific guidance for all industries on which the federal government depends for its procurement needs. In fact, SBTi has finalized industry guidance for just *seven* economic sectors.<sup>46</sup> SBTi will presumably continue to develop standards for other industries over time, but mandating that all major contractors in all industries utilize the SBTi framework within two years when the relevant industry standards do not even exist renders compliance with the proposed rule highly burdensome at best and effectively impossible at worst.

---

<sup>44</sup> *SBTi Criteria and Recommendations: Version 5.0* (October 2021). Available at <https://sciencebasedtargets.org/resources/files/SBTi-criteria.pdf>.

<sup>45</sup> The NAM is also concerned by the potential national security implications of the government being limited by SBTi-enforced emissions-reduction targets, particularly in the aerospace & defense space. In brief, the government's ability to utilize certain national security products could be hampered if aerospace & defense contractors are forced to adhere to aggressive SBTi targets.

<sup>46</sup> See SBTi Sector Guidance, *supra* note 21.



For example, two critical industries of significant importance to the U.S. military are the aerospace & defense and oil & gas sectors, neither of which has SBTi guidance available. It is not clear from the proposed rule whether the FAR Council has considered the difficulties that contractors in these industries would face in complying with the proposed target-setting requirement. In the absence of industry-specific guidance, most sectors are encouraged to use SBTi's "core methodologies"<sup>47</sup>—a one-size-fits-all approach that is unlikely to be useful given the unique nature of aerospace & defense, oil & gas, and other industries integral to the defense industrial base. Oil & gas suppliers face an even higher barrier: the oil & gas industry is *forbidden* from using the standard framework, and SBTi has announced that it is "unable to accept commitments or validate targets" for companies in the sector.<sup>48</sup>

If major federal contractors are required by the proposed rule to have emissions-reduction targets validated by SBTi, and oil & gas companies are prohibited from participating in the SBTi validation process, then under the terms of the proposed rule the federal government and the U.S. military may not be able to purchase fossil fuels in just two years. Such an outcome would be impractical and economically disastrous. The federal government cannot rely on third-party standards to determine companies' eligibility to serve as federal contractors: the unintended consequences to military readiness and the functioning of the government could be severe.

Aerospace & defense and oil & gas are stark illustrations of the pitfalls of relying on SBTi, but numerous other industries will find compliance with the proposed rule's emissions-reduction requirements extremely difficult (if not impossible) given the lack of sector-based methodologies. Without sector-specific guidance for a much broader range of industries, mandating that all federal contractors have emissions-reduction targets validated by SBTi is simply not a workable administrative requirement.

***D. The proposed two-year deadline for SBTi target validation is not feasible.***

The proposed timeline for setting and verifying a major contractor's emissions-reduction target is far too short to be workable. Under the proposed rule, major contractors will have just two years to develop a science-based target and have that target verified by SBTi. However, developing a science-based target is a multi-year project, as is the SBTi validation process. It is simply not practical to require every major contractor, and particularly those in industries without sector-specific SBTi guidance, to meet this aggressive two-year timeline.

If a company is not already in the target-setting process, then it likely will need at least three years to understand its emissions baseline and develop a corresponding emissions-reduction target. This is especially true for growing companies, where baselines may not be steady year-over-year as the business expands. After establishing a baseline, a company will then need at least another two years to undertake the SBTi validation process. Some targets may take even longer to develop and validate given that the technology may not yet exist to enable the requisite emissions reductions. The proposed rule fails to recognize this reality. If any final rule includes a requirement that contractors set and/or have validated any emissions-reduction targets, the NAM respectfully encourages the FAR Council to provide a much longer transition period for companies to come into compliance.

Additionally, the NAM is very concerned that a federal contractor's status as "responsible" will hinge on whether SBTi has the capacity to validate its target by the required deadline. The requirement laid out in the proposed rule is not that a major contractor apply for validation, or that it exercise its

---

<sup>47</sup> *Ibid.*

<sup>48</sup> SBTi Oil & Gas Policy, *supra* note 22.

best efforts to achieve validation—but that SBTi *grant* validation. As such, it is possible that contractors complying with the rule could do everything in their power to develop, adopt, and seek validation for an emissions-reduction target on a timely basis, only to be deemed “nonresponsible” because SBTi was unable to process the glut of validation requests that is sure to result from the promulgation of any final rule. Alternatively, a contractor could make those same best efforts and SBTi could *choose* not to validate a given target, irrespective of its capacity to do so. After all, as discussed, SBTi has no obligation to consider the needs of the U.S. government or its suppliers, so it would be well within its rights to withhold validation for any number of reasons.

Conditioning contractors’ eligibility to supply the federal government on a third party’s actions rather than on a company’s best efforts to meet the requirement in question would put our economy and national security at risk. The NAM respectfully encourages the FAR Council to rescind this damaging aspect of the proposed rule.

***E. The target-setting requirements in the proposed rule would impose new SEC disclosure obligations on publicly traded federal contractors.***

The SEC’s proposed climate rule would require a public company to make certain disclosures “if it has set any targets or goals related to the reduction of GHG emissions.”<sup>49</sup> Companies would be required to disclose each emissions-reduction target adopted and provide additional information about the activities and emissions included in the target, the baseline for comparison, and the time horizon and intended methods for achieving it. The proposed SEC rule also would require a public company to disclose its Scope 3 emissions “if it has set a GHG emissions reduction target or goal that includes its Scope 3 emissions.”<sup>50</sup>

The proposed amendments to the FAR would force major contractors to set emissions-reduction targets, and most companies’ targets would be required to include Scope 3 emissions, which would trigger both the targets and goals requirement and the Scope 3 requirement found in the SEC rule. In other words, setting an emissions-reduction target in order to comply with the proposed amendments to the FAR would effectively opt publicly traded major contractors into two significant provisions of the SEC rule to which they might not otherwise have been subject.

Since the SEC’s rule was proposed, SEC Chairman Gary Gensler has maintained that the SEC is “a disclosure-based agency”<sup>51</sup>—i.e., that the SEC’s proposed rule does not compel companies to take any specific actions with respect to climate, just to provide climate-related disclosures. Specific to the disclosure requirements triggered by companies’ emissions-reduction targets, Chairman Gensler has been clear that if companies “have made no commitment to the future on [emissions-reduction]” then they “don’t have a disclosure obligation.”<sup>52</sup> But the proposed amendments to the FAR would directly undercut these important guardrails by compelling the exact climate actions (i.e., emissions-reduction target-setting) that would necessitate costly and complex reporting under the SEC rule. The two rules would thus work in concert to subject companies to increasing disclosure burdens.

The NAM has already raised concerns that certain provisions within the SEC’s proposal may not be “narrowly tailored to the SEC’s mission” of providing material information to investors, but rather may

---

<sup>49</sup> Proposed SEC Rule, *supra* note 6, at 21471.

<sup>50</sup> *Id.* at 21468.

<sup>51</sup> Hood, Julia. *Insider Q&A: SEC Chair Gary Gensler unpacks proposed climate rule changes*. *Business Insider* (21 April 2022). Available at <https://www.businessinsider.com/sec-chair-gary-gensler-benefits-of-the-climate-change-rule-2022-4>.

<sup>52</sup> Tyson, Jim. *Gensler sees limit to SEC rule on carbon emissions disclosure*. *CFO Dive* (14 June 2022). Available at <https://www.cfodive.com/news/gensler-sees-limit-sec-rule-carbon-emissions-disclosure/625501/>.

“seek to institute standards or guide corporate behavior for the purpose of achieving specific environment-, energy-, or climate-related policy outcomes.”<sup>53</sup> These worries are significantly magnified by the interaction between the proposed SEC and FAR Council rules. In short, the NAM does not believe it is appropriate for the government to use the proposed amendments to the FAR to dramatically expand the scope of the proposed SEC rule. For this reason, as well as the many others highlighted herein, the NAM respectfully encourages the FAR Council to rescind the proposed rule’s emissions-reduction target-setting requirement.

**F. If any final rule includes an emissions-reduction provision, the FAR Council should consider a disclosure requirement rather than its proposed target-setting and target-validation mandates.**

At their core, the provisions of the proposed rule requiring major contractors to set emissions-reduction targets and have those targets validated by SBTi are fundamentally unworkable. There is simply no way to justify outsourcing a critical regulatory decision to an unaccountable NGO with inflexible standards and limited industry-specific guidance, especially when compliance with said standards would require unprecedented engagement with and emissions-reduction commitments from the federal government, all on an accelerated and unrealistic timeline. The FAR Council should rescind the proposed target-setting provisions of its proposed rule and abandon any attempts to mandate compliance with SBTi.

If the FAR Council is determined for a final rule to address target-setting by federal contractors, it should consider the approach proposed by the SEC. Under the SEC’s proposal, public companies would be required to disclose certain information about any climate-related targets they *choose* to adopt, including the activities or emissions included in a target, the baselines for measurement and evaluation, the time horizon for meeting the target, and any interim targets adopted, among other data points.<sup>54</sup>

The FAR Council could consider mirroring the SEC’s proposed requirement by requiring contractors to disclose information about any emissions-reduction targets they choose to adopt so that the federal government can understand efforts underway to reduce GHG emissions throughout the contracting supply chain. A disclosure-based requirement would be far more appropriate than the target-setting and target-validation mandates included in the proposed rule. If any final amendments to the FAR include provisions related to emissions-reduction efforts by federal contractors, the NAM strongly encourages the FAR Council to implement disclosure requirements rather than the onerous and unworkable SBTi mandate currently proposed.

If the FAR Council insists on mandating emissions-reduction target-setting by federal contractors, it should re-propose a rule explicitly identifying what criteria the FAR Council—not SBTi—considers necessary for a target to be deemed “science-based.” Additionally, any target-setting requirements should be limited to just Scope 1 and Scope 2 emissions, and companies should be allowed to self-certify their targets rather than being forced to undergo SBTi validation. Further, any emissions-reduction provision should take effect much later than the two-year compliance window included in the proposed rule (an unreasonably short deadline for major contractors to “commit to, develop, and obtain SBTi validation of a science-based target”<sup>55</sup>). But the most direct way to ease compliance with the rule and protect federal contractors and the federal government itself would be to rescind the proposed rule’s target-setting and target-validation requirements in their entirety.

---

<sup>53</sup> NAM Comments on SEC Climate Rule, *supra* note 7, at 50.

<sup>54</sup> See Proposed SEC Rule, *supra* note 6, at 21405; see also NAM Comments on SEC Climate Rule, *supra* note 7, at 43.

<sup>55</sup> Proposed Rule, *supra* note 1, at 68316.

**IV. The FAR Council should rescind the proposed requirement that major contractors disclose their Scope 3 emissions.**

Manufacturers have made significant strides in estimating and reporting their GHG emissions. Most large companies have at least some ability to identify at the local source level their Scope 1 and Scope 2 emissions, and some are able to aggregate this data on a company-wide basis. Many companies thus voluntarily publish relevant emissions data from operations owned or controlled by the company (Scope 1) and the purchased energy attributable to those operations (Scope 2). Some companies also have begun evaluating the indirect emissions that result from activities within their supply chain (Scope 3), though the methodologies and data sources for Scope 3 reporting are still evolving. Manufacturers are leading efforts to better understand this complex web of climate relationships and to appropriately report their GHG emissions—but at present only 18% of manufacturers have established a formal process to monitor both upstream and downstream Scope 3 emissions,<sup>56</sup> a figure which includes both direct emissions tracking and indirect estimation and modeling.

The NAM respectfully encourages the FAR Council to rescind its proposed Scope 3 mandate. Doing so would protect major contractors and smaller companies in their supply chains from the costs and confusion associated with Scope 3 reporting. Eliminating the Scope 3 requirement from any final rule would also protect the federal government by removing a significant barrier to contractors supplying the government, preventing the dissemination of potentially unreliable Scope 3 data, and limiting threats to national security associated with the publication of sensitive information about the government's use of certain products.

**A. *Quantifying and reporting Scope 3 emissions is a costly, difficult, and uncertain process.***

The proposed Scope 3 emissions reporting requirement would impose significant costs and burdens on major contractors and on the businesses within those contractors' supply chains. Indeed, it is difficult to overstate the challenges associated with tracking and reporting Scope 3 emissions data.

First and foremost, the critical challenge associated with Scope 3 reporting is that the emissions in question are outside of a company's control. While a business may have some amount of insight into and influence over the activities of the entities upstream and downstream in its value chain, the interconnected nature of the modern economy virtually assures that most information about these activities remains out of reach. Many large manufacturers have tens of thousands of suppliers and create goods that are utilized by countless customers around the globe. This is particularly true for federal contractors, especially those in the defense industrial base. The sheer magnitude of the number of potential inputs for a Scope 3 calculation is simply overwhelming. Mandating Scope 3 disclosures would require far-reaching and detailed tracking of emissions far beyond sources that companies can reasonably access.

Additionally, suppliers, vendors, and customers have no obligation to share emissions data with the contractors subject to the proposed rule. While a large company may attempt to engage with its supply chain partners, there is not currently an accepted process by which it might do so, nor a guarantee that these entities would be willing or able to provide the requisite data. For example, many small and privately held businesses do not yet track their Scope 1 and Scope 2 emissions, as emissions data collection can impose significant costs. Additionally, it is not always clear how companies are expected to subdivide their Scope 1 and Scope 2 emissions so that their value chain partners know which portions should be incorporated into Scope 3. This reality significantly limits the

---

<sup>56</sup> See MLC Survey, *supra* note 2.

ability of larger companies to include such data in their Scope 3 calculations. In practice, this leads to a high degree of estimation and modeling rather than actual data tracking.

Further, pushing Scope 3 data collection to suppliers would simply increase costs and burdens for companies elsewhere in major contractors' supply chains. These burdens would extend to smaller contractors that are supposedly exempt from the Scope 3 requirement and businesses that do not directly supply the federal government at all. A Scope 3 mandate could also incentivize companies to prioritize larger suppliers who have emissions data more readily available, at the expense of small businesses powering local economies across the country. The increased burdens associated with Scope 3 reporting could increase costs for consumers as well.

Even if companies could access from their supply chain partners the emissions data necessary to comply with the proposed Scope 3 disclosure requirement, there is no guarantee that said data would be accurate or reliable. Companies are at different stages on the path toward standardized climate data acquisition and reporting, and many smaller entities do not yet have a complete picture of their own emissions or the ability to commit significant funds toward the equipment and expertise necessary to develop such an understanding. Similarly, there are not standardized methodologies for larger companies to verify any data received from small or privately held companies. Smaller businesses' knowledge about their emissions will continue to evolve over time, and the NAM applauds and supports these companies' ongoing work to track and reduce GHG emissions, as well as larger companies' efforts to engage with smaller entities in their supply chain in pursuit of the same goal. However, the necessary data collection and verification processes are simply not yet sufficiently widespread and mature to enable the required Scope 3 analysis.

***B. The methodologies for Scope 3 emissions tracking and reporting are evolving and often inexact.***

Given the potential lack of availability and questionable reliability of existing Scope 3 information, many manufacturers that report Scope 3 emissions utilize emissions factors, assumptions, and methodologies to estimate data not readily accessible to them. Despite manufacturers' best efforts to understand indirect GHG emissions, these metrics and methods are still maturing. They also are not standardized across companies and industries. This reliance on indirect estimates and complex modeling will present a significant challenge for anyone seeking to understand the resulting data, including the federal government.

Despite the significant cost to produce this data, the evolving and uncertain nature of Scope 3 reporting means that the disclosures required by the proposed rule could ultimately be misleading or less-than-useful for the federal government. Companies will of course take care to verify data to the extent practical, but the breadth and depth of modern global value chains and the lack of mature tracking and reporting infrastructure among suppliers and customers will inevitably result in instances of imprecise or incorrect data being incorporated into Scope 3 calculations. Manufacturers are making significant strides in improving Scope 3 methodologies so they can better understand the indirect emissions in their value chain, but at present this data is not yet fully reliable. As such, the FAR Council should not require every major contractor to meet this prescriptive, difficult to calculate, and potentially unreliable standard.

It is also important to note the "double counting" inherent in Scope 3 reporting. Put simply, an issuer's Scope 3 emissions are its suppliers' and customers' Scope 1 and Scope 2 emissions. In many instances, those suppliers' Scope 1 and Scope 2 emissions will be incorporated into multiple companies' Scope 3 calculations. This is especially the case in the most interconnected supply chains, like those in several key contracting sectors such as the defense industrial base. Under the proposed amendments to the FAR, this dynamic will result in disclosure overload, with companies' emissions being reported to the government over and over again as different entities up and down

the supply chain manufacture, sell, buy, and use the same products. Comparison of Scope 3 information across companies will thus be extremely difficult, as will any attempts to aggregate the collective emissions associated with government contracts. In short, aggregating multiple contractors' emissions (or, in the case of the federal government, *all* contractors' emissions) will generate a number far in excess of the actual emissions associated with those companies' operations because of this "double counting" dynamic.

Despite manufacturers' ongoing efforts to improve their understanding of their Scope 3 emissions, the requisite processes are not yet sufficiently mature to enable across-the-board compliance with the proposed Scope 3 disclosure requirement. As a result, the costs and burdens to major contractors and the smaller businesses in their supply chains would be substantial. Accordingly, the NAM opposes the proposed Scope 3 reporting requirement and respectfully encourages the FAR Council to refrain from imposing such a broad and prescriptive mandate.

**C. *The proposed Scope 3 reporting requirement is impractical given the federal government's role as a source of Scope 3 emissions—and could potentially pose a threat to national security.***

A mandate for companies to disclose their Scope 3 emissions presents additional, unique issues specific to federal contracting. Most critically, for many contractors (especially those in the aerospace & defense sector), the federal government is a primary customer. As such, many of these businesses' Scope 3 emissions are the Scope 1 emissions *of the federal government itself*. This dynamic presents significant concerns and compliance difficulties from both a practical and a national security perspective.

The main practical difficulty is that the federal government does not currently report its own Scope 1 emissions at any meaningful level of detail. As a result, major contractors will not have the inputs necessary to calculate their Scope 3 emissions without further cooperation from the government. For contractors with a significant share of their business devoted to federal purchasing, these un- or under-reported governmental Scope 1 emissions represent a significant share of their Scope 3 emissions. There is no indication in the proposed rule that the government plans to partner with major contractors to ensure they have access to the governmental emissions data they would need to produce accurate and useful Scope 3 reports. Nor does the proposed rule grant contractors any flexibility to work around this barrier.

Public disclosure of Scope 3 emissions becomes even more problematic in the national security context. All contractors will have difficulty accessing information on the government's use of their products, but those supplying the military or other sensitive operations will face even more significant barriers. In many cases, the products or projects these businesses are supplying are classified or otherwise confidential. As such, the contractors themselves may not know how or how often their products are being used. To the extent they do have access to information about the current or anticipated use cases of their products, they are likely prohibited from disclosing that data—or perhaps even that the product exists. This is for good reason: manufacturers provide vital products for sensitive and classified operations around the world, and disclosing information about these efforts could endanger American servicemembers and the national security of the United States.

It is easy to imagine a major contractor's emissions reports being analyzed to ascertain how, where, and how often a given product is being used, or to determine in what type of end-use product a given component might be installed. It is not in the national interest for America's enemies to be able to extrapolate from Scope 3 emissions data critical information about missions, projects, or products being operated by the U.S. military and the government writ large.

At present, there is limited clarity from the federal government as to how contractors should approach such situations, including a lack of guidance as to what information the defense and intelligence agencies will share with contractors (e.g., whether the emissions associated with a given product would be provided on an individual basis, as part of an aggregate, or not at all). It is thus unclear how federal contractors, particularly in the aerospace & defense industry, should incorporate the government's use of their products into their Scope 3 disclosures (and, relatedly, into their Scope 3 target-setting). The NAM respectfully encourages the FAR Council and the relevant federal agencies to work with industry to determine best practices for Scope 3 disclosures and national security before the finalization of any amendments to the FAR that mandate one-size-fits-all Scope 3 reporting.

These national security concerns are real, and they illustrate the significant risks associated with mandating Scope 3 emissions reporting as a prerequisite to a company being deemed eligible to serve as a federal contractor. Scope 3 emissions are difficult to calculate and can be unreliable given the evolving nature of Scope 3 calculations and modeling, so the required reports will present little benefit to the federal government and its contractors. But the downside risk is substantial: if contractors are required to incorporate data about classified missions and products in order to produce accurate Scope 3 reports, then the very accuracy of those reports means that bad actors may be able to conduct their own analysis in search of information that will endanger American lives.

Given the potential damage to the national security of the United States that could result from an inflexible mandate that major federal contractors publicly disclose their Scope 3 emissions, the NAM respectfully encourages the FAR Council to rescind its proposed Scope 3 reporting requirement.

***D. The proposed Scope 3 mandate will have a disproportionate impact on small businesses throughout the contracting supply chain.***

In addition to the impact on the major contractors subject to the Scope 3 reporting requirement and the potential threats to U.S. national security, the NAM is also concerned about the effects that the Scope 3 requirement could have on small businesses. Though nominally exempt from the Scope 3 disclosure requirement, small business contractors and non-contractor small businesses throughout major contractors' supply chains would nevertheless experience significantly increased costs and burdens as a result of the proposed rule.

Many small businesses are suppliers for larger entities, and as such they would be swept into those larger companies' obligations to track emissions throughout their supply chains. These small businesses could find themselves in the untenable position of choosing between incurring significant costs to report their GHG emissions and potentially losing a valuable customer. Worse, the choice could be between incurring these costs and exiting the federal contracting supply chain entirely. This would deal a significant blow to the breadth and depth of the defense industrial base and other critical federal supply chains.

The consequences of the proposed Scope 3 disclosure requirement on smaller companies are significant and far-reaching. Many larger companies are already working with their smaller suppliers as part of their ongoing efforts to understand and report their Scope 3 emissions. However, a regulatory mandate would prevent suppliers and customers from working together productively to access some degree of emissions data while still respecting small businesses' resource constraints. The NAM respectfully urges the FAR Council to rescind its proposed Scope 3 mandate and instead allow greater flexibility for contractors to choose how they should track supply chain emissions data. Such a change would help protect small businesses throughout the country.

Small businesses would be similarly impacted by the proposed rule's requirement that major contractors set Scope 3 emissions-reduction targets. As discussed, SBTi requires that companies

setting Scope 3 targets engage with entities in their value chain, which would ultimately require small business suppliers or customers to set their own emissions-reduction targets in service of meeting a major contractor's Scope 3 targets. As with the Scope 3 reporting requirement, this mandate will have a significant impact on small businesses throughout the contracting supply chain; as such, the NAM respectfully encourages the FAR Council to rescind both Scope 3-related provisions in any final rule.

**E. *If a Scope 3 reporting requirement is maintained in any final rule, the FAR Council should make targeted changes to reduce burdens on major contractors, protect small businesses, and safeguard America's national security.***

The proposed requirement that major contractors disclose their Scope 3 emissions on an annual basis would impose significant costs on a wide range of businesses. The breadth and depth of the requirement will ensure that these burdens will fall on companies up and down the supply chain, including smaller contractors nominally exempt from the proposed rule, as well as non-contractors. Further, the data collection, estimation, and verification processes for Scope 3 reporting are constantly evolving, calling into question the utility and reliability of Scope 3 disclosures. And the national security implications of publicly disclosing information about the federal government's use of classified and sensitive products could be significant.

As such, the NAM respectfully encourages the FAR Council to rescind its proposed Scope 3 reporting requirement. Manufacturers will continue to lead in improving their understanding of Scope 3 emissions and evolving the methodologies necessary to quantify and report this data, but the NAM does not believe a Scope 3 disclosure requirement is necessary or appropriate for the government to impose on federal contractors.

To the extent a final rule mandates Scope 3 emissions disclosure, several improvements could make the provision somewhat more workable—though, again, the NAM urges the FAR Council to avoid mandatory disclosure of Scope 3 emissions.

“Relevant” Scope 3 Emissions

The proposed rule would require major contractors to disclose “relevant” Scope 3 emissions, a term the rule leaves undefined. In one instance, the proposal uses the phrase “relevant *categories of* Scope 3 emissions” in reference to the GHG Protocol,<sup>57</sup> but when referring to the reporting requirement itself the rule simply refers to “relevant Scope 3 emissions.” More clarity is needed for this to be a workable regulatory requirement.

First and foremost, any final rule that includes a Scope 3 mandate should be explicit that companies will have the flexibility to determine which categories and sources of Scope 3 emissions are “relevant” to them. The rule should be explicit that companies can forgo reporting on irrelevant categories and sources based on those assessments. To support this flexibility, the FAR Council should also consider adopting safe harbor thresholds below which a given category or source of emissions would be considered *de facto* irrelevant—while still allowing categories or sources of emissions above the safe harbor thresholds to be excluded based on an individual company's relevancy determinations.

The GHG Protocol outlines 15 categories of Scope 3 emissions “intended to provide companies with a systematic framework to organize, understand, and report on” the emissions throughout their supply chain.<sup>58</sup> The FAR Council should make clear that companies can and should review these

---

<sup>57</sup> Proposed Rule, *supra* note 1, at 68315.

<sup>58</sup> GHG Protocol Scope 3 Standard, *supra* note 14, at 33.



categories and determine which categories may be relevant to their overall Scope 3 emissions. Similarly, companies should be allowed to evaluate the relevance of individual sources of Scope 3 emissions (e.g., specific suppliers) in order to focus their data collection and analysis efforts on only those sources that have a material impact on their business. The FAR Council should be clear that a company's determination that a given category or source of Scope 3 emissions is relevant would necessitate reporting of emissions associated with *only that category or source*, and that such a determination would not subject the company to a disclosure requirement with respect to other categories and sources of Scope 3 emissions.

Explicitly allowing companies to exclude irrelevant categories and sources of Scope 3 emissions would significantly improve the proposed Scope 3 reporting requirement. The NAM has called for a similar approach with respect to the SEC's proposed requirement that companies disclose Scope 3 emissions if "material" for investors, saying that the SEC should "reinforce the traditional materiality standard and only require disclosure of Scope 3 emissions to the extent they would be material to a reasonable investor's understanding of a company's financial condition and risk exposure" and "make clear that companies would be allowed to conduct materiality analyses with respect to individual categories and sources of Scope 3 emissions—and to forgo reporting on immaterial categories and sources based on those assessments."<sup>59</sup> As the FAR Council is working to provide clarity to federal contractors with respect to whether Scope 3 emissions (and individual categories of Scope 3 emissions) are "relevant," the NAM strongly encourages the FAR Council to leverage companies' experiences determining materiality in the SEC context and clarify that the two definitions (materiality and relevance) are functionally equivalent for purposes of the FAR Council's rule.

The NAM believes that the FAR Council should not mandate Scope 3 emissions disclosure, but making clear that the requirement only extends to categories and sources that a company determines to be relevant—and thus that it can forgo reporting on irrelevant categories and sources—would at least prevent companies from being forced to undertake the costly and burdensome process of tracking categories and sources of Scope 3 emissions that are ultimately immaterial to their operations or for which reasonably reliable information is simply not available.

#### National Security Exemption

If a Scope 3 reporting requirement is included in any final rule, the FAR Council should take steps to protect the national security of the United States.

The proposed rule describes a waiver process that would allow a senior procurement executive to grant a waiver with respect to a contracting officer's obligation to determine whether a contractor is responsible or nonresponsible under the terms of the proposed rule. Such a waiver could be granted "for emergencies, national security, or other mission essential purposes."<sup>60</sup> Notably, this is not a waiver from the requirement that the contractor make the required reports—just from the requirement that the contracting officer review those reports to determine if the contractor can be deemed responsible. Though described in scant detail, this waiver appears to be designed to allow expeditious decision-making by a contracting officer in a national security situation, not to protect national security from the potential threats posed by potential disclosure of sensitive information. Moreover, contractors are only eligible for a temporary waiver "to enable [them] to come into compliance" with the rule.<sup>61</sup> Neither of these waiver opportunities are sufficient to safeguard the national security of the United States.

---

<sup>59</sup> NAM Comments on SEC Climate Rule, *supra* note 7, at 28.

<sup>60</sup> Proposed Rule, *supra* note 1, at 68316.

<sup>61</sup> *Ibid.*

The NAM respectfully encourages the FAR Council to adopt an explicit exemption from the Scope 3 reporting requirement for any information that might expose classified or security-sensitive information or otherwise endanger national security. Such an exemption would allow companies to determine, consistent with their existing obligations not to divulge classified information, what data to exclude from any Scope 3 reporting—or whether Scope 3 reporting at all could present a significant danger. This approach would ensure that critical information about military operations and other classified projects remains confidential, to the benefit of servicemembers and all Americans.

### Scope 3 Compliance Date

The proposed Scope 3 emissions reporting requirement would take effect just two years after the promulgation of a final rule. A two-year transition period is impractical given the significant uncertainty associated with Scope 3 emissions reporting and the many time-consuming and detailed new processes that companies will be forced to establish to comply with the provision.<sup>62</sup>

The complexity and novelty of the Scope 3 reporting requirement necessitates additional time for businesses to transition into compliance. If Scope 3 reporting is required by any final rule, the NAM respectfully encourages the FAR Council to extend the compliance date for the Scope 3 disclosure requirement. Specifically, the FAR Council should provide at least four years for major contractors to come into compliance with the Scope 3 reporting requirement—a two-year extension of the proposed two-year transition period. The NAM strongly believes that the FAR Council should not mandate Scope 3 disclosure, but at the very least a Scope 3 disclosure requirement with a significant phase-in period would grant companies more time than currently proposed to come into compliance with such a difficult and burdensome requirement.

### “Major” Contractor Definition

As discussed, the NAM believes that the proposed definitions of “significant” and “major” contractor do not accurately reflect the impact that companies of those sizes have on the federal government’s exposure to climate-related risks. This is particularly notable with respect to Scope 3 emissions, where the largest contractors’ supply chain emissions are far more relevant to the government’s carbon footprint than those of smaller businesses. Exempting more contractors from the major contractor definition would protect smaller businesses from the costs and burdens of compliance without meaningfully reducing the Scope 3 data available to the government.

As such, the NAM respectfully encourages the FAR Council to substantially increase the annual-federal-contract-obligation threshold that qualifies companies as a “major” contractor. Specifically, a major contractor should be defined as any contractor with \$500 million or more in annual federal contract obligations—an increase from the \$50 million threshold in the proposed rule.

### SEC Compliance

The SEC’s proposed climate disclosures rule would require public companies to report Scope 3 emissions if material to their business or if they have set an emissions-reduction target that includes Scope 3 emissions. As with the FAR Council’s proposed rule, the NAM has suggested that the SEC rescind its proposed Scope 3 reporting requirement. However, to the extent that any final SEC rule includes a Scope 3 requirement, the NAM believes that the FAR Council should treat a publicly traded contractors’ compliance with the SEC rule as sufficient to be deemed “responsible” under any

---

<sup>62</sup> These difficulties also implicate the proposed two-year transition period for the proposed rule’s SBTi target-setting requirement. SBTi requires that companies’ emissions-reduction targets include Scope 3 emissions—which by definition necessitates that they set a Scope 3 baseline.

final amendments to the FAR. Additionally, the NAM believes that companies disclosing Scope 3 emissions outside the SEC context (e.g., via a publicly available sustainability report) should similarly be deemed in compliance with the FAR Council's rule.

**V. The FAR Council should make targeted changes to the Scope 1 and Scope 2 emissions reporting requirements in order to ease compliance and align with current industry practice.**

As noted, many manufacturers have processes in place to track and report emissions directly attributable to their operations, so Scope 1 and Scope 2 reporting pursuant to the proposed rule should prove achievable for these companies. However, the NAM respectfully encourages the FAR Council to provide two important clarifications with respect to Scope 1 and Scope 2 GHG emissions reporting in order to increase companies' flexibility and reduce compliance burdens on manufacturers.

First, the FAR Council should provide a *de minimis* exception for facilities with insignificant GHG emissions or for individual greenhouse gases that are inconsequential to a contractor's Scope 1 and Scope 2 emissions. In some cases, large companies with sophisticated GHG emissions reporting practices already apply a *de minimis* threshold to avoid the cost of tracking information attributable to trivial sources of GHG emissions. Such a threshold could apply to a small facility with minimal emissions or to an individual greenhouse gas that is not a natural result of the company's operations. The EPA's Greenhouse Gas Reporting Program, for example, only requires reporting of facilities emitting more than 25,000 metric tons of carbon dioxide equivalent ("CO<sub>2</sub>e") per year.<sup>63</sup> The FAR Council should mirror these existing practices by making clear that tracking *de minimis* sources or types of emissions, which do not significantly impact a company's top-line Scope 1 or Scope 2 data, is not necessary to comply with the proposed reporting requirement.

The FAR Council also should make clear that companies have flexibility to disclose their Scope 1 and Scope 2 emissions either in absolute terms or in terms of GHG intensity—and, if reporting GHG intensity, either in CO<sub>2</sub>e per unit of total revenue or in CO<sub>2</sub>e per unit of production. Physical intensity and economic intensity metrics have different strengths and limits as applied to different sectors, and absolute emissions metrics may be preferable to either intensity metric for some companies. The NAM respectfully encourages the FAR Council to make clear that companies have the flexibility to choose whichever Scope 1 and Scope 2 disclosure metric(s) are relevant for their operations and emissions.

**VI. The FAR Council should rescind the proposed requirement that major contractors complete the TCFD-aligned portions of the CDP Climate Change Questionnaire and instead re-propose a rule more narrowly tailored to provide insights into the government's exposure to climate-related risks.**

Manufacturers are leaders in communicating information about the climate-related risks their businesses face. Many companies report climate-related information in their SEC filings, publish widely accessible sustainability reports, and voluntarily comply with third-party standard setters like TCFD, SASB, and GRI.

In response to the SEC's proposed amendments to Regulation S-K to require disclosure of material climate-related risks, the NAM said that it "welcome[d] the SEC's efforts to enhance and standardize disclosures with respect to public companies' climate-related risks."<sup>64</sup> Given the SEC's role of

---

<sup>63</sup> 40 CFR 98.2(a)(2).

<sup>64</sup> NAM Comments on SEC Climate Rule, *supra* note 7, at 37.

facilitating material disclosure to public company investors, the NAM's comments on the SEC's proposal noted that climate change "may pose a material risk to public companies" and as such that "appropriate disclosure of any material climate-related risks can enable investors to make informed investing and voting decisions."<sup>65</sup>

According to the FAR Council's proposed rule, the federal government itself is now seeking to "properly analyze and mitigate climate risks" of federal contractors via "public and standardized disclosure."<sup>66</sup> The NAM respectfully encourages the FAR Council to reconsider its reliance on the CDP Climate Change Questionnaire and instead propose a more narrowly tailored rule that reduces burdens on federal contractors while still providing tailored information to the federal government on its exposure to climate-related risks.

**A. *Completing the CDP Climate Change Questionnaire is costly and complex—and is not necessary to understand a company's climate-related risks.***

As discussed, many manufacturers already leverage the TCFD guidelines to report their climate-related risks. The NAM applauded the SEC for basing its proposed climate risk disclosure requirements on TCFD given companies' familiarity with the framework. However, completion of the "TCFD-aligned" sections of the CDP Climate Change Questionnaire—as would be required by the proposed amendments to the FAR—is not an appropriate measure for determining whether a company has appropriately disclosed its climate-related risks.

TCFD provides a set of guidelines for climate risk disclosure, which companies can use and adapt to ensure that their stakeholders have access to the information they need about the business's climate-related risks. CDP, on the other hand, requires companies to complete a complex questionnaire that is far more detailed than what would be required by TCFD. It is in effect its own reporting paradigm, with the "TCFD-aligned" questions loosely based on TCFD—not a proxy for TCFD alignment or more detailed risk disclosure. CDP maintains a mapping document with dozens of questions and sub-questions that it has determined are TCFD-aligned;<sup>67</sup> these questions and sub-questions collectively represent a significant portion of the questionnaire, and CDP can update or change them at any point. Critically, the additional, detailed questions that CDP asks are not always necessary to understand a company's climate-related risks. At present, companies can answer "not applicable" to some questions on the CDP questionnaire, but it is not at all clear that doing so would be compliant with the proposed rule. Rather, the proposed rule could be interpreted to require that major contractors complete the entirety of the TCFD-aligned sections of the CDP questionnaire in order to be deemed "responsible." This would delegate to CDP the determination as to which sections and questions contractors must complete, even after the rule is finalized.

In short, if a company is utilizing the TCFD framework or otherwise reporting its climate-related risks, there is simply no need for it to take the additional step of submitting information to CDP. Companies should of course be free to utilize the CDP Climate Change Questionnaire if the data required are appropriate and relevant to their business, but the NAM respectfully encourages the FAR Council not to require federal contractors to complete the so-called "TCFD-aligned" portions of the questionnaire in order to be eligible to supply the federal government.<sup>68</sup>

---

<sup>65</sup> *Ibid.*

<sup>66</sup> Proposed Rule, *supra* note 1, at 68312.

<sup>67</sup> See *CDP Technical Note on the TCFD*, CDP. Available at [https://cdn.cdp.net/cdp-production/cms/guidance\\_docs/pdfs/000/001/429/original/CDP-TCFD-technical-note.pdf](https://cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/001/429/original/CDP-TCFD-technical-note.pdf).

<sup>68</sup> If the CDP mandate is maintained in any final rule, the FAR Council should at least clarify that contractors would be free to answer "not applicable" to TCFD-aligned CDP questions and still be in compliance with the requirement to "complete" the TCFD-aligned portions of the questionnaire. This flexibility would not address other pressure points

**B. *The proposed requirement to complete the TCFD-aligned portions of the CDP questionnaire is effectively a requirement to complete the entirety of the questionnaire.***

In addition to setting the requirements for its questionnaire, CDP also scores companies on their responses. After completion of the questionnaire, reporting companies are given a letter grade, from A (leadership) to F (failure to disclose).<sup>69</sup> Federal contractors completing only the TCFD-aligned portions of the questionnaire can be sure that their public grade will not be an “A” given their “failure to disclose” answers to the remaining questions. As a result, they will be compelled to complete the rest of the questionnaire (and incur the associated costs and burdens) in order to avoid a poor score. In effect, then, the FAR Council mandate that significant and major contractors complete the TCFD-aligned portions of the CDP questionnaire is actually a mandate that they complete the *entire* CDP questionnaire.

While the proposed rule claims that the requirement’s focus on only the TCFD-aligned questions means that companies can “determine what responses in the CDP questionnaire are appropriate or necessary” and treat the other questions as “optional,”<sup>70</sup> the NAM is concerned that companies would not have this degree of flexibility. Rather, the prominence of the CDP scoring system and the public nature of companies’ compliance with CDP would effectively result in a mandate to complete the entire questionnaire. As such, the NAM respectfully encourages the FAR Council to reconsider the proposed requirement.

**C. *The FAR Council should re-propose a rule featuring tailored disclosures designed to provide relevant information about the federal government’s exposure to its contractors’ climate-related financial risks.***

The NAM understands that the FAR Council is seeking more information about the federal government’s exposure to its contractors’ climate-related financial risks. The best way to access that information, though, is for the FAR Council to draft and publish for public comment a disclosure requirement that actually focuses on the risk exposures that are relevant to the government. That disclosure framework can and should be based on companies’ existing experiences with TCFD and other reporting regimes. A narrowly tailored set of disclosures directly focused on the government’s exposure to these risks would be far preferable to outsourcing the reporting mandate to CDP’s far-reaching and costly questionnaire.

The NAM respectfully encourages the FAR Council to re-propose a rule that outlines the actual information the federal government needs to know in order to understand its contractors’ exposure to climate-related risks. By including specific risk disclosures in a re-proposed rule, the FAR Council would allow the public to evaluate, understand, and provide feedback on the requirements that would fall on federal contractors. Taking such an approach would also ensure that the FAR Council has complied with its rulemaking obligations under the APA. The NAM would welcome the opportunity to comment on such a proposal, and we would hope that its requirements would be narrowly tailored, cost-effective, and generally aligned with existing reporting paradigms like TCFD. Such a framework would truly allow the FAR Council to “leverage” companies’ experiences with existing frameworks while still ensuring that contractors’ disclosure obligations are narrowly tailored to provide the information actually necessary to understand the government’s climate-related risks.

---

compelling completion of the entire questionnaire (e.g., the CDP grading system and the public nature of CDP compliance), but it would at least narrow the regulatory requirement.

<sup>69</sup> See CDP Scores Explained, CDP. Available at <https://www.cdp.net/en/scores/cdp-scores-explained>.

<sup>70</sup> Proposed Rule, *supra* note 1, at 68315.

Irrespective of the final form of any climate-related risk disclosure mandate, contractors should be allowed to provide the necessary information via their publicly available sustainability reports, reporting pursuant to TCFD or other frameworks, compliance with any final SEC rule on climate-related risk disclosures, voluntary completion of the CDP questionnaire, or direct reporting to the FAR Council. Given that the proposed rule’s aim is to ensure public reporting of this information—not to aggregate contractors’ data, compare them against one another, or make award decisions based on the answers provided—disclosure via any publicly available means should be sufficient for contractors to be deemed “responsible” pursuant to the rule.

**VII. The FAR Council should provide much-needed clarification about the application of the proposed requirements.**

The proposed rule will present substantial costs and burdens for significant and major contractors, as well as for thousands of smaller businesses within those contractors’ supply chains. The FAR Council should take steps to ease compliance with the rule by clarifying several open questions about how and to whom the rule will be applied.

First, it is not clear from the proposed rule how broad the definition of “federal contract obligations” would be for purposes of qualifying as a significant or major contractor. For example, would the definition include financial assistance awards and procurements? Would it cover funding from other governmental entities like the Tennessee Valley Authority (which is a government-owned corporation) or loans made under the Inflation Reduction Act and other government incentive programs? Would dollars received indirectly via subawards and subcontracts count toward the definition? These questions are critical, as the amount of federal contract obligations a company has will determine its status as a significant or major contractor—and thus whether and to what extent it is subject to the proposed rule. The proposed rule simply cites to OMB Circular A-11, but “federal contract obligations” does not appear to be a defined term in that circular. More clarity is needed so that contractors can understand their status under the new reporting regime.

Similarly, the FAR Council needs to clarify the treatment of the various corporate structures that contractors often use to supply the government. For instance, some companies with a substantial commercial business use a separate affiliated entity for their contracting work. Under the proposed rule, does the reporting obligation fall on the parent or the affiliate? If the affiliate, can it report its parent’s emissions, targets, and climate-related risks (since those metrics are more likely tracked at the corporate level)? Other contractors may have multiple entities registered in the System for Award Management. Do each of these entities have a standalone reporting obligation, does the ultimate parent have multiple reporting obligations, or does the parent have a single reporting obligation covering all of the entities in combination? How should companies participating in a joint venture report their emissions? Federal contracting is a complex business, and companies have adapted their corporate structures to be maximally efficient in supplying the government. The FAR Council should provide clear guidance about whether and how the proposed rule applies to a wide range of corporate structures so that contractors can prepare to comply with its complicated requirements.

In addition to these specific questions, the FAR Council should ensure that any final rule is as clear as possible about what new requirements contractors will face and how and to whom they will apply. As a starting point, the FAR Council should abandon its reliance on third-party standard-setters and instead set specific requirements of its own. But whatever the form of the final rule, the FAR Council must provide as much regulatory certainty as possible to the thousands of federal contractors it will impact.

\* \* \* \* \*

Manufacturers are leaders in America’s fight against climate change, and these innovative companies are working tirelessly to develop new technologies and business strategies in response to this generational challenge. They also are investing in processes that enable them to better understand their own impact on the climate. These efforts are critical to addressing climate-related risks and building a safe, resilient economy for the future.

Manufacturers also are taking strides to produce useful disclosures about this important work. Many companies currently utilize voluntary disclosure frameworks and corporate sustainability reporting, and these ongoing efforts are critical to ensuring that accurate information is available about their climate-related risks. Similarly, many manufacturers have set emissions-reduction or net-zero targets, and the industry as a whole is committed to reducing its carbon footprint.

Unfortunately, the FAR Council’s proposed rule would mandate a one-size-fits-all approach to these important efforts. In addition to limiting companies’ flexibility and hampering innovation, the rule would impose significant costs and burdens on federal contractors and the smaller businesses within contractors’ supply chains. Compounding these difficulties, the rule’s requirements are not set or enforced by the federal government at all, but rather by unaccountable NGOs with no obligation to consider the practicality of their standards or promote efficient procurement—raising serious legal questions about the FAR Council’s authority to promulgate such a rule and potentially endangering the national security of the United States.

The NAM respectfully encourages the FAR Council to rescind the proposed rule in its entirety. If the FAR Council is determined to move forward, it must re-propose a rule with substantial revisions to make its requirements more cost-effective and workable for federal contractors and more narrowly tailored to the actual climate-related risks to which the federal government is exposed. But, as proposed, manufacturers—and U.S. taxpayers, who will ultimately bear the costs—simply cannot afford such an impractical and overbroad regulation.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Netram". The signature is fluid and cursive, with a long horizontal stroke at the end.

Chris Netram  
Managing Vice President, Tax and Domestic Economic Policy