February 13, 2023

**Re: FAR Case 2021-015, Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk**

On behalf of Public Citizen and Americans for Financial Reform Education Fund, we welcome the proposed Federal Acquisition Regulation: *Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk*. It represents an important step forward in protecting the security of federal government supply chains and strengthening American competitiveness with respect to the critical energy transition. The required disclosures will help contracting agencies and the public understand the climate risks that government suppliers face and how they plan to address them, and will further advance the federal government's emissions policy goals.[1] Requiring suppliers to set science-based targets will also help reduce the risk of climate-related supply chain impacts and help fulfill Congressional goals to direct investment towards the clean energy transition through the Inflation Reduction Act.[2]

In 2016, the FAR Council promulgated FAR 52.223-22, its only rule to date addressing GHG emissions from federal suppliers operating across the entire U.S. economy. The disclosure framework was strictly voluntary, however, with the contractors' only affirmative obligation being to represent *whether* they publicly disclose their GHG emissions and quantitative GHG emissions reduction goals. The 2016 rule was an important step forward, but the optional nature of disclosures left gaps that undercut the federal government's ability to assess climate-related financial risks in its supply chain.

The FAR Council's proposed rule is a major advancement over the 2016 framework, expanding and mandating certain types of disclosure, and reflecting the Biden Administration's "whole of government"[3] approach to climate change. The proposed rule will "ensure major Federal suppliers make the required disclosures and set targets to reduce their GHG emissions,"[4] deeming contractors that fail to adhere to the new requirements "nonresponsible." However, there remain several challenges with the proposed rule that could result in under-disclosure of material information on climate risk and fail to achieve the proposed rule's objectives. Specifically, we recommend that the FAR Council consider the following changes to strengthen the proposed rule:

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[1] In 2021, President Biden announced a new target for the United States to achieve a 50-52 percent reduction from 2005 levels in economy-wide net greenhouse gas pollution in 2030. See Fact Sheet, The White House, *President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies* (April 22, 2021), http://bit.ly/3YHN6IH

[2] The Inflation Reduction Act of 2022, Pub. Law No. 117-169, 136 Stat. 1818.

[3] Fact Sheet, The White House, *President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government* (Jan. 27, 2021), http://bit.ly/3jOWFXt

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

1. Require Scope 3 emissions disclosure for all major contractors.
2. Limit contractors' ability to take advantage of waivers.
3. Require use of an accountability mechanism to assess contractors' alignment and progress with their own science-based targets over time.
4. Require disclosure around respect for environmental and worker justice, as well as Free, Prior and Informed Consent of Indigenous peoples.

We discuss these recommendations in detail in Part II of this comment.

**Part I. The proposed rule is urgently needed and stands on good authority**

As the world's largest purchaser of goods, the federal government is both uniquely vulnerable to the supply chain threats posed by climate change and the energy transition, and well positioned to use its purchasing clout to support and implement congressional and administration policy seeking to address these challenges. Maintaining the resiliency and efficiency of federal procurement during this time of transition requires long term planning to identify and cultivate suppliers who can meet not just today's needs, but also those of the future. And where procurement supports efforts to reduce emissions, it helps advance national security goals by reducing negative climate impacts on critical infrastructure and geopolitical stability. As the President has broad, constitutionally grounded powers to direct federal procurement in ways that support his policy goals, it is both permissible and advisable for the administration to incorporate climate change into procurement rules.[5] Moreover, one of the explicit purposes of the Federal Acquisition System (FAR) is to fulfill public policy objectives.[6]

Climate-fueled natural disasters pose a growing threat not just to the health and welfare of America's citizens, but to the safety and security of supply chains as well. Indeed the physical risks of climate change will affect every segment of the economy. For instance, according to a recent study by McKinsey, the probability of a hurricane of sufficient intensity to disrupt semiconductor supply chains may grow two to four times by 2040.[7] Congress's bipartisan passage of the CHIPS Act in summer 2022 reflects a policy consensus that semiconductor production is essential to national defense and other critical sectors.[8] Fortunately, the McKinsey study also finds that being well-prepared for climate-related shocks can cut the impact by as much as sevenfold.

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[5] Federal courts have interpreted the extent of the president's Procurement Act authority through the "close nexus test" established in AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979). The test asks whether there is "a sufficiently close nexus between [economy and efficiency] and the procurement program established." Historically, the courts have viewed the executive branch as possessing "broad powers" to manage procurement and, accordingly, have applied "lenient standards" to the close nexus inquiry. See Kahn and UAW-Labor Employment & Training Corp. v. Chao, 325 F.3d 360 (D.C. 2003); 45 GC ¶ 201.

[6] Federal Acquisition Regulation System, 48 CFR § 1.102 (2001).

[7] "McKinsey & Company, *Could Climate Change Become the Weak Link in Your Supply Chain?* (Aug. 6, 2020), http://bit.ly/3xiyAvy.

[8] Fact Sheet, The White House, *CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China* (Aug. 9. 2022), http://bit.ly/3S0l4Gf.

At the same time, Congress and the Biden administration have also agreed on the critical importance of a clean energy transition. The passage of the Inflation Reduction Act, the decision to rejoin the Paris Agreement, and numerous administration rules and orders reflect the need both to address the threats that climate change poses to the American people and to position the economy to remain competitive in a shifting global marketplace. Companies that cannot rise to this challenge are vulnerable to rapid changes in their solvency, as economic, technological, policy, and consumer shifts amplify the importance of transition readiness.[9]

Reliance on suppliers who are not prepared for these sorts of transition risks creates new vulnerabilities in rapidly shifting critical supply chains. President Biden's Executive Order on Climate-Related Financial Risk makes clear that true preparedness will require "consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk including both physical and transition risks" by government contractors among others.[10]

The proposed rule appropriately leverages existing work on disclosure of climate-related financial risks, in accordance with instructions from the Office of Management and Budget,[11] and the FAR Council's mandate to assist in the direction and coordination of government-wide procurement policy.[12] While the federal government is the largest entity seeking to manage its climate-related financial risks, it is not the first or only such entity. In particular, private market participants have identified such risks as a major area of focus and developed common standards for companies to use when reporting these risks. As the Securities and Exchange Commission has recognized in its proposed rule on disclosures of climate-related financial risk,[13] the Task Force on Climate-Related Financial Disclosures (TCFD) is the global standard for such disclosures to market participants.

Among the most important pieces of information recommended by the TCFD and required in the proposal is disclosure of Scope 1, 2, and 3 greenhouse gas (GHG) emissions. GHG emissions are a key part of climate-related risk reporting because they offer a comparable indicator of an entity's exposure to and management of transition risks and opportunities. Where a supplier has high Scope 1 and 2 emissions and no plan for reducing them, its own business is vulnerable to disruption by economic, political, social,or technological changes that advance the energy transition. A supplier's Scope 3 emissions reflect the transition risk embedded in its own supply chain, as well as the extent to which its business model relies on unsustainable levels of emissions by downstream clients. Rising costs tied to emissions within any part of a product's value chain can change the profitability of bringing that product to market. Furthermore, disclosure of Scope 3 emissions is critical to prevent companies with significant transition risk from obscuring that risk by moving high emitting activities off of their balance sheets.

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[9] Americans for Financial Reform, *Letters to Regulators: The Inflation Reduction Act Bolsters the Case for SEC's Climate Disclosure Rule* (Dec. 1, 2022), http://bit.ly/3IhvwFY.
[10] Exec. Order No. 14030, 86 FR 27967 (May 20, 2021).
[11] OMB Memorandum M-22-06 at Sec. Sec II.1 (Dec. 8, 2021).
[12] Federal Acquisition Regulatory Council, 41 U.S.C. § 421 (2009).
[13] *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 FR 21334 (Apr. 11, 2022).

The proposed rule distinguishes between "significant" and "major" contractors and defines separate disclosure obligations for each. Significant contractors have annual federal contracting obligations between $7.5 million and $50 million, while major contractors have federal contracts exceeding $50 billion. While significant contractors are required to disclose Scope 1 and 2 emissions, major contractors have three additional obligations: Disclose relevant Scope 3 emissions; publish an annual climate disclosure report on a public-facing website; and publish validated science-based emissions targets.

The proposal's requirement that major suppliers set a validated science-based GHG target is an important step for managing climate-related financial risks and implementing congressional and administration policy. The passage of the IRA and subsequent adoption of state-level climate investments and regulations aiming to phase out internal combustion engine (ICE) vehicles show how quickly the clean energy transition can accelerate.[14] Firms may be at elevated risk of underperformance or failure if they lack clear plans for aligning their own business with the transition by adopting technologies and business models that reduce their emissions. Adopting targets now will give these firms the runway to adapt and shift their business models gradually, rather than face situations in which they must attempt to pivot abruptly. Along with gaining resilience, firms that pursue science-based targets will help incentivize innovation and create a market for scaling the technologies and products needed to accelerate progress toward the policy goal of a clean energy transition. Harmonizing procurement with that goal will help create efficiencies, lower costs, and promote financial stability.

To achieve these goals, the Council should strengthen several provisions of the proposed rule. The proposal's general framework is appropriate. But it has gaps that, if not remedied, may allow suppliers to create the appearance that they are addressing climate-related financial risks despite actually leaving critical supply chains exposed.

**Part II: Recommendations**

*(1) The rule should require Scope 3 emissions disclosure for all major contractors*

(a) <u>The Council should create a bright line rule on Scope 3 emissions</u>

The preamble to the proposed rule suggests that major contractors should disclose "relevant Scope 3 emissions." However, the rule does not provide specific guidance regarding what is "relevant." This gap would permit suppliers with significant Scope 3 emissions to avoid disclosing them, undermining the efficacy of the rule. One solution would be to strictly define what constitutes "relevant Scope 3 emissions."

A better option is to require disclosure of *all* Scope 3 emissions according to the categories and guidance set forth in the GHG Protocol. The protocol includes 15 major categories of Scope 3

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[14] *See, e.g.*, Brad Plumer, *California Approves a Wave of Aggressive New Climate Measures*, N.Y. Times (Sept. 1, 2022), http://bit.ly/3xCB3kF.

emissions. Not all will apply to each contractor, but contractors should be required to disclose Scope 3 emissions in every category that is applicable.[15] Scope 3 emissions are vitally important to the government's ability to assess a contractor's vulnerability to the energy transition and, consequently, to the safety and soundness of federal supply chains. The Council should take the guesswork and subjectivity out of Scope 3 disclosures. This approach will foster apples-to-apples comparisons that will benefit all parties, further the administration's climate goals, promote efficiency in procurement and, ultimately, benefit taxpayers.

Requiring major contractors to disclose all Scope 3 emissions serves another purpose as well: preventing major contractors from moving emissions off their balance sheets to upstream or downstream clients. The proposal permits a contractor to choose whether to conduct its GHG inventory at either its own level, or at the level of its immediate or highest-level owner. Without a Scope 3 inventory requirement, a contractor could move high emitting activities to a related company and set an organizational boundary in a way that avoids capturing that activity in the contractor's own Scope 1 or 2 emissions disclosures. Without a firm Scope 3 disclosure requirement, the rule would allow contractors to subvert meaningful disclosure of emissions and transition risk by using accounting gimmicks or fiddling with their corporate structures.

*(b) <u>The rule should require major contractors to publish Scope 3 inventories in SAM.</u>*

The proposal's Scope 3 requirements also only explicitly appear in the preamble. They should be placed in the operative text of the rule. The "Procedures" section of the proposed rule at 23.XX05 delineates the representations a prospective contractor must make in the System for Award Management (SAM) in order to be considered "responsible," and therefore eligible for business with the federal government. It requires both significant and major contractors to represent their Scope 1 and Scope 2 totals.

However, there is no requirement for major contractors to disclose their Scope 3 inventory totals in their representations in the SAM. See Figure 1 below. Instead major contractors are only required to indicate *whether* they publish annual disclosures and science-based targets on a public website. The proposed rule elsewhere notes that major contractors provide their Scope 3 inventories within their annual disclosure. If contractors are already disclosing their Scope 3 emissions as part of their annual climate disclosure, then adding a requirement for Scope 3 disclosure in SAM will add very little burden. By contrast, if major contractors are choosing not to disclose Scope 3 in their annual climate disclosure, then they should still have to provide their totals for relevant Scope 3 emissions as part of their representations, the same as they do Scope 1 and Scope 2.

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[15] Greenhouse Gas Protocol, *Corporate Value Chain (Scope 3) Accounting and Reporting Standard* *accessed Feb. 13, 2023), https://bit.ly/40VMi4P.

Major Contractors

| Representations in 52.223-22(d) or equivalent at 52.212-3(t)(3) | Offeror responses | |
|---|---|---|
| | Small business or nonprofit organization | Other than small business or nonprofit organization |
| (i) Paragraph (d)(2)(ii) or (t)(3)(ii)(B). *Excepted entities*. | If Offeror checked "is" for (A) or (B), then: | If Offeror checked "is not" for (A) and (B), then: |
| (ii) Paragraph (d)(3)(i) or (t)(3)(iii)(A). *Greenhouse gas inventory*. | Response must be "has". | Response must be "has". |
| (iii) Paragraph (d)(3)(ii) or (t)(3)(iii)(B). *Greenhouse gas inventory*. | Scope 1 and Scope 2 totals must be provided. | Scope 1 and Scope 2 totals must be provided. |
| (iv) Paragraph (d)(4) or (t)(3)(iv). *Annual climate disclosure*. | Response may be "does" or "does not". | Response must be "does". |
| (v) Para (d)(5) or (t)(3)(v). *Science-based targets*. | Response may be "does" or "does not". | Response must be "does". |

Figure1. SAM representations applicable to major contractors

*(2) The rule should limit contractors' ability to take advantage of waivers.*

The significant exceptions and waivers provided for in the proposed rule are also troubling, threatening to weaken its impact and to encourage procurement from less competitive contractors. These are two aspects of the proposal on which the notice specifically requests public comment, namely the appropriateness of the exceptions identified and potential alternatives to be considered in the formation of the final rule.

***Waivers***

A senior procurement executive is empowered to waive the rule's requirements for facilities, business units, or other defined units "for national security purposes," or "for emergencies, national security, or other mission essential purposes." The rule does not define "national security," "emergencies," or "mission essential." Nor does it require public notice on the agency's website of grants of these types of waivers.

Discretion over waiver should be constrained by strictly defining the key terms, namely "national security purposes," "emergencies," and "mission essential purposes," and requiring approval by a Cabinet level agency official. Without additional guardrails, these catch-all categories could be used to exempt a vast array of procurement contracts outside the letter and spirit of the rules.

*(3) Require use of an accountability mechanism for contractors' target-setting and progress.*

The proposed rule introduces an affirmative obligation on major contractors to set and disclose validated science-based targets in order to manage risk and promote efficiency in procurement. Setting targets is not enough, however, it is vital also to require participation in an accountability mechanism to ensure progress towards those goals. The rule does not detail any such mechanism beyond suggesting that major contractors follow the guidance of the CDP.[16]

Science-based emissions targets are an important way for a company to manage climate-related risk, so long as it actually attempts to meet its targets. A target without accountability may in fact increase risk by creating the appearance of remedial action while the contractor actually continues to operate its business as usual. For that reason, the final rule should require contractors to certify that they participate in an accountability mechanism, such as remaining in compliance with the UN's Race to Zero criteria.[17] While these standards are in their early stages, they are an internationally convened effort to designate the criteria needed to actually achieve science-based targets. Continued membership in that group or a similar accountability mechanism will show that contractors are taking their science based targets seriously.

*(4) Require disclosures regarding respect for environmental and worker justice, as well as Free, Prior, and Informed Consent of Indigenous peoples.*

Companies engaged in activities that exacerbate climate change impacts and associated inequities face increasing reputational, operational, and legal risks that will only grow in the future.[18] This is true for both physical and transition risks. For example, physical risks threaten fenceline communities, workers, and public health and safety, increasing operational and legal costs, as well as regulatory scrutiny around pollution control. In the transition to a low-carbon economy, companies in carbon-intensive industries face unprecedented community resistance—a result of both growing public support for climate action and historical harms to local communities that have undermined their land rights, access to clean air and water quality,

[16] A CDP technical note identifies key TCFD-recommended questions, including a request to "describe the targets used by the organization to manage climate related risks and opportunities and performance against targets." *CDP Technical Note on the TCFD* (accessed Feb. 12 2023*)*, https://bit.ly/3YJqyXZ.
[17] The UN Race To Zero criteria include "the 5 Ps," Pledge, Plan, Proceed, Publish and Persuade. *See* United Nations Climate Change, *Race to Zero Campaign Criteria* (accessed Feb. 12, 2022), https://bit.ly/3xkayA0.
[18] *See e.g.*, Public comment to the SEC on behalf of 22 climate, environment, public interest, racial justice, and Indigenous rights organizations, June 14, 2021, https://bit.ly/3HNzBQY; First Peoples Worldwide, *Social Cost and Material Loss: The Dakota Access Pipeline*, Nov. 2018, http://bit.ly/3RVJd0G; The Toxic Tides Project, S*ea Level Rise, Hazardous Sites, and Environmental Justice in California, http://bit.ly/3HNzGEg; Center for International and Environmental Law, Formosa Plastics Group: A Serial Offender of Environmental and Human Rights (A Case Study)*, Oct. 2021, http://bit.ly/3xjZq6e.

and healthy ecosystems.[19] This resistance delays and derails projects, and it can result in often underestimated and under-disclosed operational, legal, and regulatory costs for companies.[20]

The administration and Congress have also emphasized the importance of climate justice in other policymaking. For instance, the IRA allocated billions in funding for climate justice, and Executive Order 14008 requires agencies to make environmental justice part of their mission.

To that end, the final rule should require registrants to represent that they disclose how they manage intersecting climate and community risks (for example, risks caused by land use change and deforestation, natural resources use, air and water pollution, infringement of land rights, and associated disruption to local economies and harm to public health and safety, as well as worker dislocation) that stem from regular business operations, climate mitigation efforts, or transition activities. Additionally, they should represent that they disclose their outreach and engagement efforts toward members of communities that have been or are likely to face climate-related impacts due to corporate activities, any grievance resolution procedures in place, and their track record of seeking and achieving Free, Prior and Informed Consent from Indigenous communities.

**Conclusion**

This proposal represents an important policy for protecting federal supply chains and critical industries and for meeting the administration's policy goals related to a clean and just energy transition. Over time, the information that agencies and contractors develop will be a central part of their strategy development as they work to reduce costly transition risk and ensure timely delivery of critical products and services. With its mandate for emissions disclosures by significant and major contractors and for science-based targets and annual risk disclosures by major contractors, the proposal will enable agencies to compare disclosures among contractors and work with them to improve disclosure quality. These goals will be strengthened by the recommendations in this comment. We encourage the Council to make these changes and issue a rule that protects suppliers, taxpayers, and the American people.

We thank you for your time and consideration. If you have any questions, please contact Clara Vondrich (cvondrich@citizen.org).

Sincerely,

Public Citizen
Americans for Financial Reform Education Fund

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[19] United Nations University, *Our World, Energy Investing: The Indigenous Rights Bubble*, Jan. 31, 2014, http://bit.ly/3jO13WX.
[20] Harvard Kennedy School, Shift, and The University of Queensland, *Costs of Company-Community Conflict in the Extractive Sector*, 2014, https://bit.ly/3E3qbQ7.