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Proposed Disclosure of  
Greenhouse Gas Emissions and  
Climate-Related Risk Rule:  
Majority of Respondents Push  
Back on Proposed Requirements**



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# Comments on the FAR Council's Proposed Disclosure of Greenhouse Gas Emissions and Climate-Related Risk Rule: Majority of Respondents Push Back on Proposed Requirements

by Thomas E. Daley and Catherine Campbell  
DLA Piper US

In November 2022, the Federal Acquisition Regulation (“FAR”) Council published a proposed rule requiring that significant contractors (*i.e.*, those that received between \$7.5 million and \$50 million in federal contract obligations in the prior federal fiscal year) inventory and disclose their Scope 1 and 2 GHG emissions. The proposed rule also requires that major contractors (*i.e.*, those that received in excess of \$50 million in federal contract obligations in the prior federal fiscal year) inventory and disclose their Scope 1, 2, and 3 GHG emissions, complete an annual climate disclosure, and set validated science-based targets for reducing GHG emissions.<sup>1</sup>

The comment period for the FAR Council's proposed rule recently closed. In total, the FAR Council received 38,102 comments, of which 259 were publicly posted. Approximately one-third of the posted comments were submitted by private citizens. The other posted comments were submitted by contractors who potentially will be affected by the rule, trade associations, think tanks and advisory firms, the Ranking Member of the U.S. Senate Committee on Small Business & Entrepreneurship, state Attorneys General, and companies that provide climate-change related goods and services.

This article identifies and discusses key topics raised in the comments on the proposed rule and addresses how those comments may impact the final rule, which we expect to be published in late 2023 or early 2024.

## I. Overview of Comments

The FAR Council received comments that ranged from fully supportive to vehemently opposed to the proposed rule. The majority of the comments either completely opposed the rule or offered suggestions for how to improve the regulatory scheme and reduce the burden imposed on small businesses and contractors in specific sectors.

The respondents who opposed the proposed rule generally argued that the requirements were burdensome, unachievable, and will result in additional costs being passed onto the federal government. With respect to Department of Defense and military contractors, respondents asserted that the proposed rule puts environmental concerns over national security considerations and jeopardizes contractors' ability to develop and maintain state-of-the-art military equipment, which, according to one respondent, "necessarily rel[ies] heavily on fuel and manufactured machines and goods." Another respondent argued that F-16 fighters, military cargo transport, and Black Hawk helicopters all require liquid fuels and that "[c]urrent and projected future 'zero-emission' technologies cannot provide the same level of speed, flexibility, or range."

Furthermore, respondents stated that contractors may underestimate their emissions in their annual assessments in order to be more competitive in future procurements in which agencies evaluate offerors' GHG emissions when making award decisions.<sup>2</sup> Additionally, respondents argued that the FAR Council lacks the authority to implement the requirements in the proposed rule under the Federal Property and Administrative Services Act ("FPASA"), as well as under the "major questions" doctrine. *See supra* Section IX.

Respondents who opposed the proposed rule also argued that the FAR Council significantly underestimated the cost that contractors will incur to comply with the disclosure requirements. In the proposed rule, the FAR Council stated that

it expected that contractors would use external consultants with an hourly rate of \$104. In contrast, the U.S. Securities and Exchange Commission ("SEC"), in its proposed climate-related disclosure rule, estimated that external consultants would have an hourly rate of \$400. Respondents asserted that the FAR Council's failure to reasonably estimate the proposed costs undermines its conclusion that the benefits of the proposed rule exceed the costs of compliance and renders the proposed rule arbitrary and capricious under the Administrative Procedure Act. Additionally, in their view, the compliance costs will limit the government's ability to obtain the goods and services it needs to operate efficiently because the costs will disincentivize contractors from bidding on new work.

Respondents in favor of the proposed rule stated the proposed rule is consistent with the FAR Council's policy of updating the FAR to address emerging procurement challenges and opportunities. According to those respondents, the proposed disclosure requirements will provide federal agencies with the information needed to consider the social cost of contractors' GHG emissions when evaluating proposals and, when appropriate, give preference to proposals from contractors with a lower social cost of GHG emissions, as the Biden Administration directed agencies to do in Executive Order 14030 ("Climate-Related Financial Risk"). Those respondents suggested that requiring disclosure of GHG emissions will incentivize contractors to reduce their GHG emissions in line with the "what gets measured gets managed" mantra. Indeed, one respondent noted that "publicly listed companies in the United Kingdom have been required to disclose their emissions since 2013, which has led to average emissions reductions of 8 to 16%." Certain respondents also noted that their respective industries were already in the process of adopting practices discussed in the proposed rule or other practices that address climate change and emissions reductions.



## II. Challenges Associated With Inventorying GHG Emissions

Respondents asserted that the proposed rule downplays the difficulty in accurately inventorying Scope 1, 2, and 3 emissions. In their view, current carbon accounting practices are imprecise and inaccurate, and the total annual emissions that will be disclosed in the System for Award Management will not provide agencies with the information needed to reliably determine whether one contractor has a larger carbon footprint than another. They also contended that the proposed rule increases the likelihood of contractors inconsistently calculating emissions, as contractors are permitted to use “the calculation tool of their choice, as long as it is in alignment with the GHG Protocol Corporate Accounting and Reporting Standard.” To address this potential inconsistency, one respondent proposed that the FAR Council require that all contractors disclose the “details of the calculation tools, methods, activity data, and emissions factors used in developing their emissions report.”

Respondents requested clarification as to whether GHG emissions should be stated in gross or net terms. They suggested that contractors should be allowed to use net GHG emissions, as requiring the use of gross emissions would exclude the benefits associated with offsets, credits, and other similar mechanisms. In their view, excluding offsets, credits, and other similar mechanisms would unfairly disadvantage contractors in hard-to-abate sectors, such as the aviation sector.

Respondents disagreed regarding whether contractors should be required to use actual energy consumption data or estimated energy consumption in their GHG inventories. One respondent, which described itself as a “market leader in facilitating customer access to customer utility data,” stated that access to energy consumption data varies based on state law and policy and that the varied access will “undermine the accuracy of GHG inventories” reported by signif-

icant and major contractors. Conversely, another respondent, which stated that it provides “utility consumption and usage data” in more than 52 countries, asserted that final rule should require that contractors use actual emissions data related to energy consumption. In that respondent’s view, actual energy consumption data is readily available and requiring the use of actual energy consumption data is standard practice in the climate accounting industry and consistent with the proposed rule’s goal of reducing GHG emissions.

Additionally, some respondents requested that the FAR Council remove the requirement that major contractors must report their Scope 3 GHG emissions. They doubted that contractors will be able to accurately inventory Scope 3 emissions, arguing that those emissions result from activities that are outside of a contractor’s control and that data regarding those emissions is not uniformly available. Respondents also expressed concern that contractors may not know their second- and third-tier subcontractors well enough to obtain meaningful data relating to their emissions, which would make it difficult to accurately inventory those Scope 3 emissions. According to respondents, this would be particularly true when a major contractor is utilizing small business subcontractors who lack the resources or expertise to accurately calculate their GHG emissions and report those to the major prime contractor. That said, other respondents argued that contractors have the ability to manage many of their Scope 3 emissions by, for example, proactively changing their operations (*e.g.*, reducing business travel) or selecting their supply chain partners based on climate-related considerations.

Several respondents noted that the proposed rule requires that major contractors inventory and disclose “their relevant Scope 3 emissions” but does not define what makes a Scope 3 emission “relevant.” Those respondents requested that the FAR Council clarify the meaning of “relevant Scope 3 emissions” in the final rule and

provide explicit guidance on how contractors should assess whether their Scope 3 emissions are relevant. Respondents suggested that the FAR Council provide emissions thresholds below which a given category or source of emissions is considered irrelevant.

### III. Financial Thresholds for Significant and Major Contractors

Respondents addressed whether the financial thresholds for significant contractors (*i.e.*, \$7.5 million) and major contractors (*i.e.*, \$50 million) were appropriate. Some respondents argued that, given the substantial time and costs associated with meeting the proposed requirements, the thresholds should be higher so as to avoid placing unreasonable burdens on small businesses. One respondent suggested increasing the threshold for significant contractors to \$75 million and the threshold for major contractors to \$500 million (*i.e.*, increasing both thresholds ten-fold). According to that respondent, the higher standards would “focus the rule on companies whose exposure to climate-related risks may most impact the federal government” and who have the resources needed to comply with the proposed rule.

Conversely, other respondents contended that the thresholds should be lower, particularly for major contractors, so that the federal government is able to obtain the information it needs to achieve its climate-related procurement goals and reduce federal supply chain emissions. Respondents who preferred lower financial thresholds also proposed that the FAR Council consider incrementally lowering the thresholds over time.

Additionally, respondents sought clarification on how “federal contract obligations” is defined for purposes of determining whether a contractor is a significant or major contractor. They asserted that, in order to avoid confusion and inconsistency among contractors, the final rule should

explicitly define the term and state that federal contract obligations only include prime contract awards and that subcontracts are excluded. One respondent further stated that the proposed rule did not indicate whether “non-procurement awards,” such as other transaction agreements, should be considered as federal contract obligations. That respondent asserted that the System for Award Management (“SAM”) does not currently provide a mechanism by which contractors can easily identify their total federal contract obligations for the prior federal fiscal year and requested that SAM be updated to include that field.

### IV. Science-Based Targets and SBTi

Under the proposed rule, a major contractor is required to develop science-based targets to reduce the contractor’s GHG emissions in a manner that meets the goals of the Paris Agreement to limit global warming to well below 2 °C above pre-industrial levels and pursue efforts to limit warming to 1.5 °C. The targets must be validated by the Science Based Targets Initiative (“SBTi”) within the previous five years and be made available on a publicly accessible website. The SBTi is a partnership between CDP (formerly the Carbon Disclosure Project), the United Nations Global Compact, the World Resources Institute, and the World Wide Fund for Nature.

Out of all the requirements in the proposed rule, the reliance on third-party standards, and the SBTi in particular, was the most controversial aspect of the proposed rule. Many respondents expressed concern about providing an “international organization” with validation authority over science-based targets. Those respondents suggested that contractors would have no recourse, or ability to seek judicial review, if SBTi were to arbitrarily withhold validation over contractors’ targets and or were to take unreasonably long to review and validate targets.

Moreover, respondents stated that it was

imprudent for the federal government to delegate regulatory responsibility to organizations that the government does not oversee or manage. One respondent argued that this aspect of the proposed rule “sets a disadvantage for the United States military and scientific establishment and puts a nongovernmental agency in a position of power over the agencies and their vendors/contractors.” Several respondents observed that SBTi receives funding from third parties and asserted that these third parties can influence the standards that SBTi publishes, which can result in “biased” or arbitrary decision-making regarding SBTi’s pathway programs. Respondents noted that their concerns regarding SBTi are heightened by the fact that, if a major contractor fails to obtain SBTi validation, it will be presumed to be nonresponsible and, therefore, ineligible for new federal contract awards.

Respondents also pointed out that SBTi currently does not have a methodology for oil and gas companies to set science-based targets. SBTi is in the process of developing that methodology, but it is currently unable to validate targets for companies in the oil and gas sector. Thus, it is unclear how oil and gas companies who qualify as major contractors will be able to satisfy the requirement in the proposed rule that they have science-based targets that are validated by the SBTi.

To address these concerns, respondents requested that, in the final rule, the FAR Council remove the SBTi validation requirement or permit contractors to validate their science-based targets through alternative means, such as using other third-party standards or demonstrating to a federal agency how their targets align with the goals of the Paris Agreement. To the extent that the SBTi requirement remains in the final rule, respondents requested that the deadline for SBTi validation be extended beyond the current two-year deadline to account for the issues identified above. Respondents also suggested that the SBTi

validation requirement could be replaced by a requirement that major contractors be required to publicly disclose their emission targets for achieving net-zero emissions by 2050.

## V. Exemptions to the Proposed Rule

The proposed rule sets forth limited exceptions (*e.g.*, Alaska Native Corporations, non-profit research entities) to the requirements that apply to significant and major contractors. A small business contractor that exceeds the thresholds for being a significant or major contractor must comply with the requirements applicable to significant contractors for Scope 1 and Scope 2 emissions, but it is not required to inventory its Scope 3 emissions, complete an annual climate disclosure, or set science-based targets, provided that the contractor is small under its primary North American Industry Classification System code.

Multiple respondents requested that small businesses be exempted from all of the requirements in the proposed rule. Those respondents typically asserted that it would be administratively burdensome and cost-intensive to require small businesses to comply with the proposed rule and that small businesses typically lack the resources and understanding necessary to accurately inventory and disclose GHG emissions. The respondents also expressed concern that small businesses who are unable to meet the deadlines for compliance would be presumed to be nonresponsible and would lose their ability to be awarded new federal work, which “will increase the likelihood of business closures and layoffs.”

The FAR Council may not be persuaded by these comments regarding a blanket exemption for small businesses, as, in the proposed rule, the FAR Council considered exempting small businesses from all of the requirements but decided

against doing so because “[i]t was determined that the limited Scope 1 and 2 reporting will be beneficial for these small businesses and the Government.” According to the FAR Council, small businesses will benefit from inventorying Scope 1 and 2 emissions because they “can find opportunities to minimize climate risks both in their operations and their own supply chains,” and the federal government will benefit because it needs the data “to have a more complete understanding of the impact of GHG emissions on the Federal supply chain and to calculate its own emissions and set its own reduction targets.”

In addition to an exemption for small business, respondents requested that the FAR Council include an exemption for contractors who perform work relating to national security. In those respondents’ view, subjecting national security contractors to climate-change related requirements would lead to delays in production of critical goods and services and increased compliance expenses, which would reduce the availability of resources that are needed to deal with “serious global conflicts.” They also raised concerns that requiring national security contractors to disclose their emissions information might expose classified or security-sensitive information. As an alternative to an exemption, one respondent suggested that the FAR Council provide for a waiver process that would permit contractors to receive a waiver from the reporting requirements, in their entirety, when compliance would implicate national security concerns.<sup>3</sup>

Respondents also requested that the FAR Council add an exemption for commercial item contractors because requiring commercial item contractors to comply with the requirements in the proposed rule conflicts with the goals of reducing purchasing requirements on commercial item contractors and simplifying commercial item procurements. In their view, imposing the requirements in the proposed rule on commercial item contractors would discourage those

contractors from providing goods and services to the federal government and would be contrary to customary commercial practices.

More than fifteen non-profits that participate in the AbilityOne program<sup>4</sup> submitted comments requesting that AbilityOne non-profits be exempted from the requirements applicable to both significant and major contractors. Those comments generally argued that AbilityOne providers typically perform service contracts at federal government sites and are already subject to comprehensive sustainability performance and reporting requirements. The comments also argued that the proposed rule is burdensome and would adversely affect AbilityOne non-profits’ goal of providing employment opportunities and support for people with significant disabilities.

In contrast to the requests for additional exemptions, several respondents stated that there should *not* be any exemptions to the proposed rule because the exemptions impede the federal government’s ability to accurately account for all of its GHG emissions. Other respondents contended that it was unfair to exempt Alaska Native Corporations, Native Hawaiian Organizations, and Tribally owned concerns while requiring other socio-economically disadvantaged small businesses to comply with the disclosure requirements.

## VI. Coordination With The Proposed SEC Rule

On March 21, 2022, the SEC published a proposed rule that requires SEC registrants, including publicly listed/traded companies, to disclose certain climate-related information and GHG emissions in registration statements and annual reports. As we have previously written, there is some overlap between the SEC’s proposed rule and the FAR Council’s proposed rule, but there also are some significant differences.

Respondents requested that the FAR Council



align its proposed rule with the SEC's proposed rule. In their view, alignment would create efficiencies for contractors who are subject to both rules and would "harmonize" the FAR Council's proposed rule "with the broader climate disclosure landscape." Respondents also suggested that contractors who meet the SEC reporting requirements should be deemed to be in compliance with the FAR Council's requirements.

Although efficiencies may be realized if the SEC and FAR Council implement the same disclosure and climate-change requirements, the FAR Council explained in the proposed rule that "[e]fforts were also taken to align with the approach of the SEC proposed rule," including the use of the same GHG accounting standard (*i.e.*, the GHG Protocol Corporate Accounting and Reporting Standard). However, the FAR Council determined that it needed to impose additional requirements (*e.g.*, having validated science-based targets) to achieve the goals set forth in the Biden Administration's executive orders.

## VII. Potential Legal Challenges to the Final Rule

As noted above, respondents opposed to the rule asserted that the FAR Council lacks the legal authority to impose the requirements in the proposed rule.

For instance, respondents argued that the FPASA (*i.e.*, one of the authorities cited in the proposed rule), which provides the government with authority to promote economy and efficiency within the federal procurement system, does not permit the FAR Council to impose the requirements in the proposed rule. Those respondents contended that the government's authority under FPASA, although broad, is not limitless and that it cannot be used to carry out the Biden Administration's policy agenda under the guise of regulating federal procurement. They asserted that the executive order on which the proposed rule is based plainly seeks to implement climate-change policies rather than streamline

federal procurement. Moreover, they argued that the proposed rule fails to identify specific benefits that compliance would provide to the procurement system and, instead, speculates that it may reduce inefficiencies. In fact, respondents argued that the proposed rule conflicts with the economical and efficient administration of the procurement system by imposing significant costs on contractors and potentially reducing the pool of eligible contractors. Additionally, respondents asserted that third parties identified in the proposed rule, such as SBTi, have no obligation to maintain an economical and efficient system for federal procurement.<sup>5</sup> In contrast to those arguments, respondents who were in favor of the proposed rule argued that courts have upheld FPASA directives so long as the government provides good-faith reasons for connecting the policy at issues to the goals of economy and efficiency, and the proposed rule does that by connecting the rule to greater climate disclosure transparency, supply chain transparency, and possible cost savings.

Respondents also argued that the proposed rule runs afoul of the "major questions doctrine," which requires that, in order to make decisions of "vast economic and political significance," an agency must be able to point to clear congressional authorization providing authority for it to do so. According to those respondents, the FAR Council lacks a grant of Congressional authority to regulate environmental matters and to impose such significant economic burdens on federal contractors. Respondents contended that climate change has long been considered a significant political issue and has been recognized by the U.S. Supreme Court as being a controversial subject. In their view, the FAR Council lacks the expertise needed to develop a solution to climate change. One respondent warned that, if the rule is not found to violate the major questions doctrine, "it will lay the groundwork for the executive branch to discriminate in its selection of contractors by political ideology."

Notably, respondents did not uniformly agree



that the major questions doctrine applies to the proposed rule. Respondents argued that the federal government has routinely imposed requirements that are as burdensome as, or more burdensome than, the proposed rule, which they argue indicates that the proposed rule is not a question of vast economic and political significance. Respondents also noted that at least one federal judge has questioned whether the major question doctrine even applies to actions that are based on executive orders, such as the order that the proposed rule stems from. Thus, in their view, the validity of the proposed rule does not turn on the major question doctrine.

Respondents further argued that outsourcing regulatory authority to third parties (e.g., SBTi, CDP) does not meet the requirement in the Administrative Procedure Act that the FAR Council engage in reasoned decision making and avoid acting in an arbitrary and capricious manner. In general, those respondents argued that the proposed rule contains little justification regarding reliance on those third parties and that it provides minimal discussion of why certain requirements, such as having emission-reduction targets, are necessary at all.

In addition to those challenges, respondents advanced a number of other arguments regarding the validity of the proposed rule, such as asserting that the proposed rule violates the First Amendment, the non-delegation doctrine, the Spending Clause, and due process. One respondent asserted that the proposed rule violates the Competition in Contracting Act by imposing unduly restrictive climate-change requirements on contractors. Although the legitimacy of these challenges remains to be seen, the number of comments arguing that the proposed rule is invalid further indicates that the final rule will be subject to litigation.

## VIII. Conclusion

The final rule will undoubtedly be challenged on numerous legal grounds, including violations of the U.S. Constitution and the Administrative Procedure Act. We are closely monitoring the proposed rule, as well as other similar developments in this area. If you have any questions or are interested in learning more, please contact the authors or your DLA Piper relationship attorney.

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### Footnotes

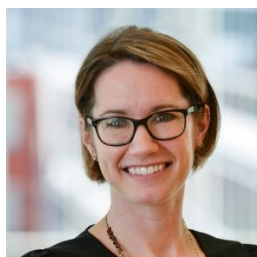
- 1 PubK and attorneys from DLA Piper published [a whitepaper detailing the requirements of the proposed rule](#).
- 2 A few respondents asserted that a contractor's knowing misrepresentation of its GHG emissions could lead to liability under the False Claims Act.
- 3 The proposed rule contains a waiver process that allows a contracting officer to waive the requirements for purposes of making a responsibility determination when a procurement involves national security matters, but it does not, as respondents request, currently contain a waiver or exemption from the requirements in their entirety for national security contractors.
- 4 The AbilityOne program provides employment opportunities for individuals who are blind or who have significant disabilities.
- 5 Respondents also asserted that delegating approval authority to SBTi would be an unconstitutional delegation of authority to a non-governmental third party.

## About the Authors



**Thomas E. Daley**  
Associate, DLA Piper

**Tom Daley** focuses his practice on assisting government contractors with litigation matters, regulatory counselling and compliance issues, environmental matters, and investigations. Tom has successfully litigated bid protests before the US Court of Federal Claims and US Government Accountability Office, as well as size protests before the Small Business Administration and Office of Hearings and Appeals. Tom is a widely published author who writes about emerging and complex issues within the government contracts field, including bid protests, the False Claims Act, and cybersecurity. Tom's works have been published in leading government contracts publications, including the *Public Contract Law Journal* and *The Procurement Lawyer*. Tom may be contacted at [tom.daley@dlapiper.com](mailto:tom.daley@dlapiper.com).



**Catherine Campbell**  
Of Counsel, DLA Piper

**Catherine Campbell** focuses on several traditional and emerging areas of environmental law. Her practice focuses on emerging areas of environmental law, including the legal aspects of domestic and international carbon credit (or "offset") markets. She focuses on the development and structuring of emissions reduction projects under the Verified Carbon Standard and Kyoto Protocol's Clean Development Mechanism. She also negotiates the purchase and sale of carbon credits, drafting the related agreements and conducting diligence on the crediting projects. She has advised clients on the establishment of carbon credit registries and offers strategic counseling on navigating the dynamic carbon market. Catherine may be contacted at [catherine.campbell@dlapiper.com](mailto:catherine.campbell@dlapiper.com).

This publication provides an overview of a specific issue related to government contract law. It is not intended to provide legal advice.

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