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January 30, 2023

Hon. Lloyd J. Austin III, Secretary of Defense  
Hon. Robin Carnahan, Administrator of General Services  
Hon. Bill Nelson, Administrator, National Aeronautics  
and Space Administration  
c/o Regulatory Secretariat Division, GSA  
FAR Case 2021-015 Comments  
1800 F Street NW, Washington, DC 20405

Dear Mr. Secretary, Madam Administrator, and Mr. Administrator:

RE: DOD/GSA/NASA Notice of Proposed Rulemaking titled "Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk," FAR Case 2021-015, 87 *Fed. Reg.* 68312 (November 14, 2022) and 78910 (December 23, 2022)

This letter presents comments of the National Federation of Independent Business (NFIB)<sup>1</sup> in response to the joint Department of Defense (DOD)/General Services Administration (GSA)/National Aeronautics and Space Administration (NASA) notice of proposed rulemaking cited above. The proposed rule would revise government contracting regulations to require significant contractors to conduct and report to the government an annual inventory of their greenhouse gas<sup>2</sup> (GHG) emissions and major contractors to conduct and report a more extensive inventory of GHG emissions, an annual climate disclosure including climate-related financial risks, and an annual GHG reduction target. DOD, GSA, and NASA have no legal authority to impose the proposed rule and NFIB recommends and requests that they withdraw the proposal. If the agencies nevertheless proceed with the proposed rule, then NFIB requests and recommends that they except small businesses from the scope of the proposed rule.

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<sup>1</sup> NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty states hear the voice of small business as they formulate public policies. The proposed rule would apply to small businesses that are significant or major contractors with the federal government.

<sup>2</sup> In the proposed rule "greenhouse gas" means "carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, nitrogen trifluoride, or sulfur hexafluoride." 87 *Fed. Reg.* at 68328, col. 1.

## 1. DOD, GSA, and NASA Lack Authority to Issue the Proposed Rule

DOD, GSA, and NASA lack the authority to impose extensive GHG information collection, information reporting, and reduction requirements on businesses that have contracts with the federal government. An agency has no power unless Congress has conferred the power on the agency by statute.<sup>3</sup> Moreover, when agencies claim power of the breadth and impact of the power to require GHG emissions reporting and reduction, they must show a clear congressional authorization in law that grants such a power to the agencies.<sup>4</sup> DOD, GSA, and NASA cited as the legal authority for the proposed rule "40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113."<sup>5</sup> None

<sup>3</sup> *NFIB v. Department of Labor, OSHA*, 142 S. Ct. 661, 665 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

<sup>4</sup> *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022) ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].' Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme. Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.' We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.' Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." (citations omitted)). Courts often call this requirement for a clear statement in law the "Major Questions Doctrine."

<sup>5</sup> 87 *Fed. Reg.* at 68327, col. 2. See *National Association of Broadcasters v. Federal Communications Commission*, 39 F. 4<sup>th</sup> 817, 819 (D.C. Cir. July 12, 2022) ("An agency must identify statutory authority for any action it takes."); see also 5 U.S.C. 553(b)(2) (in notice-and-comment rulemaking, notice must include "reference to the legal authority under which the rule is proposed"). With respect to 40 U.S.C. 121(c), the provision is a general grant of authority to make rules to carry out the Federal Property and Administrative Services Act, an Act that does not grant authority to mandate GHG emissions reporting or reduction. "An agency's general rulemaking authority plus statutory silence does not, however, equal congressional authorization." *Merck & Co., Inc. v. U.S. Dept. of Health and Human Services*, 385 F. Supp. 3d 81, 92 (D.D.C. 2019), *aff'd* 962 F. 3d 531, 541 (D.C. Cir. 2020) ("Although the Secretary's regulatory authority is broad, it does not allow him to move the goalposts to wherever he kicks the ball."). Similarly, 51 U.S.C. 20113(a), (c), and (e) contain general grants of authority to make rules to govern NASA operations and carry out its powers vested by law, acquire and use property, and enter into contracts, but the only authority of the Administrator of NASA with respect to GHG emissions is to establish initiatives of research, development, and demonstration to reduce GHG emissions (51 U.S.C. 40112(b) and 40702). The cited DOD authority of "10 U.S.C. chapter 137" has been repealed, although title 10 refers to a number of chapter 137 legacy provisions (10 U.S.C. 3016). In any event, Part V of subtitle A of title 10 of the U.S. Code, governing DOD acquisition, contains no clear congressional statement granting authority to DOD to regulate GHG emissions of DOD contractors. Congress has by law required DOD to "submit to Congress a plan to reduce the greenhouse gas emissions of the Department of Defense" and report to congressional committees on "progress of the Department of Defense toward meeting science-based emissions targets in the plan," in section 323 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117-81, December 27, 2021), 10 U.S.C. 2911 note. The imposition of a duty to submit a "plan" does not grant authority to execute the plan and the duty to report "progress" toward emissions reduction targets does not grant any new authority. Moreover, section 323 specifically addresses the reduction of the GHG emissions of DOD and not the GHG emissions of others, such as federal contractors. Thus, section 323 would not provide authority for the proposed rule.

of these statutes shows any clear congressional authorization in law for DOD, GSA, or NASA to regulate the GHG emissions of government contractors. And a general statute authorizing government procurement does not suffice to show clear congressional authorization in law for DOD, GSA, and NASA to regulate GHG emissions by government contractors.<sup>6</sup> Accordingly, DOD, GSA, and NASA have no authority to issue the proposed rule and therefore should withdraw it.

## 2. If DOD, GSA, and NASA Proceed with the Proposed Rule, They Should Except Small Businesses From the Rule

Under the proposed rule, many federal contractors must collect and report to the government and the public a range of GHG emissions information. The proposed rule requires contractors receiving at least \$7.5 million (a "significant contractor") to undertake and report an annual inventory of its direct GHG emissions from sources it owns or controls and its indirect GHG emissions associated with generation of electricity, heating or cooling, or steam that it uses.<sup>7</sup> The proposed rule further requires contractors receiving more than \$50 million (a "major contractor") to submit to the government and make public an annual climate disclosure (which adds, to the requirements to report direct and indirect GHG emissions, a requirement to report GHG emissions that are a consequence of the business's operations but occur at sources other than those the business owns or controls, plus a requirement to disclose climate-related financial risks) and a science-based target for reducing GHG emissions.<sup>8</sup>

Proposed section 23.XX03(b) of title 48 of the Code of Federal Regulations requires major contractors to meet the proposed climate disclosure, reduction target, and related reporting requirements.<sup>9</sup> Proposed 48 CFR 23.XX04(b)(1) grants an exception from those requirements for "a major contractor who is -- (1) Considered a small business for the North American Industry Classification System (NAICS) code identified in its SAM registration as its primary NAICS code . . . ."<sup>10</sup> This exception from the major contractor GHG requirements, but not the significant contractor GHG requirements, provides

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<sup>6</sup> See *Louisiana v. Biden*, 55 F. 4<sup>th</sup> 1017 (5<sup>th</sup> Cir. December 19, 2022) (general statutory grant to President of authority to provide economical and efficient federal procurement system does not constitute a clear congressional statement of a grant of authority to impose a requirement on federal contractors to get their employees vaccinated against COVID-19); see also to the same effect *Commonwealth of Kentucky v. Biden*, 2023 WL 164614 (6<sup>th</sup> Cir. January 12, 2023).

<sup>7</sup> 87 *Fed. Reg.* at 68329, col. 2.

<sup>8</sup> 87 *Fed. Reg.* at 68329, cols. 2 and 3.

<sup>9</sup> 87 *Fed. Reg.* at 68329, cols. 2 and 3.

<sup>10</sup> 87 *Fed. Reg.* at 68329, col. 3. "SAM" is the System for Award Management used in federal contracting. See <https://sam.gov/content/home>. The provision granting an exception from major contractor requirements for small businesses also grants an exception for nonprofit organizations.

insufficient protection for small businesses from the cost and burden of the proposed rule.

Congress has by law made clear the importance of taking careful account of the needs of small businesses in agency rulemaking.<sup>11</sup> Unless DOD, GSA, and NASA take great care to protect small businesses, the final rule will have a substantial adverse financial impact on small businesses.

The government must recognize that the collection and reporting of information on GHG emissions would absorb a significant amount of a small business's scarce human and financial resources. Small and independent businesses cannot afford the burden and expense of tracking and reporting GHG-related information. Unlike large businesses, small and independent businesses cannot afford the experts, accountants, and lawyers needed to comply with complex government reporting regimes; regulatory compliance often is a do-it-yourself project for an already overburdened small business owner. If the proposed rule were in force, by the government's estimate 2,835 significant contractor small businesses and 389 major contractor small businesses would have the burden and expense of conducting and reporting annually a GHG inventory, at an aggregate cost of \$79,710,176 in the first year and \$60,095,360 every year thereafter.<sup>12</sup> And the cost of the GHG inventory to small businesses is likely to be much higher.<sup>13</sup>

Protection of small and independent businesses merits careful attention from DOD, GSA, and NASA. As President Biden has said:

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<sup>11</sup> In paragraph 2(a)(4) of the Regulatory Flexibility Act (RFA), Public Law 96-354, 5 U.S.C. 601 note, Congress declared that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity [.]". Congress also noted in paragraph 2(a)(6) of the RFA that "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation [.]".

<sup>12</sup> 87 *Fed. Reg.* at 68313, cols. 1 and 2; 87 *Fed. Reg.* at 68322, cols. 1 and 2.

<sup>13</sup> The government estimate assumed that it would take a significant or major contractor small business "20 hours for one business specialist, 10 hours for one management analyst, and 1 hour for one senior manager" and "153 external consultant hours" to produce the annual GHG inventory. 87 *Fed. Reg.* at 68322, col. 1. A small business must understand a rule before it can implement the rule. The proposed rule is no simple rule. Under the rule, before a small business can conduct its annual GHG inventory, the small business must review, understand, and follow the 116-page *GHG Protocol Corporate Accounting and Reporting Standard* (<https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf>). 87 *Fed. Reg.* at 69318, col. 1. And that Standard is supplemented by the 9-page *Required Greenhouse Gases in Inventories: Accounting and Reporting Amendment* ([https://www.ghgprotocol.org/sites/default/files/ghgp/NF3-Amendment\\_052213.pdf](https://www.ghgprotocol.org/sites/default/files/ghgp/NF3-Amendment_052213.pdf)) and is accompanied by further implementing instructions in the 120-page *GHG Protocol Scope 2 Guidance, 2015* ([https://ghgprotocol.org/sites/default/files/ghgp/standards/Scope%20%20Guidance\\_Final\\_0.pdf](https://ghgprotocol.org/sites/default/files/ghgp/standards/Scope%20%20Guidance_Final_0.pdf)). 87 *Fed. Reg.* 68328, col. 3, to 68329, col. 1. Reading, comprehending, and applying these extensive regulatory documents would take a small business owner or the owner's staff a great deal more time and money than the government's cost estimate allows.

Small businesses are critical to our success as a Nation. They make up 90 percent of businesses in the United States, employ nearly half of America's private sector workers, and create two-thirds of new jobs, and bring opportunity to every corner of our Nation.<sup>14</sup>

The White House also has noted that small businesses "account for 44 percent of U.S. GDP[.]"<sup>15</sup>

To ensure proper protection of America's small and independent businesses from the cost and burden of the proposed rule, NFIB recommends and requests that DOD, GSA, and NASA, in adopting their final rule, revise proposed 48 CFR 23.XX04(b)(1) to read:

**(b) The requirements in section 23.XX03 do not apply to a significant contractor or a major contractor that is--**

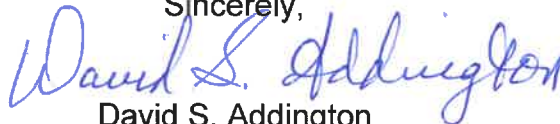
**(1) Considered a small business for any North American Industry Classification System (NAICS) code identified in its SAM registration; or**

**(2) A nonprofit organization.**

The revised provision would grant a broad exception for small businesses from the requirements for an annual GHG inventory, climate disclosure, GHG reduction target, and related reporting requirements.

For lack of statutory authority to promulgate the proposed rule, DOD, GSA, and NASA should withdraw the proposed rule. If DOD, GSA, and NASA fail to do so, then they should grant an exception from the rule for small businesses.

Sincerely,



David S. Addington

Executive Vice President and General Counsel

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<sup>14</sup> Presidential Proclamation No. 10187, 86 *Fed. Reg.* 22339 (April 23, 2021) (World Intellectual Property Day).

<sup>15</sup> White House Fact Sheet: Biden-Harris Administration Increases Lending to Small Businesses in Need, Announces Changes to PPP to Further Promote Equitable Access to Relief (February 22, 2021) (available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/22/fact-sheet-biden-harris-administration-increases-lending-to-small-businesses-in-need-announces-changes-to-ppp-to-further-promote-equitable-access-to-relief/?msclkid=935daf0ad12a11ecb8023b2209d859a3>) (visited January 20, 2023).