

February 13, 2023

Via Federal eRulemaking Portal (<http://www.regulations.gov>)

Federal Acquisition Regulatory Council:  
Department of Defense  
General Services Administration  
National Aeronautics and Space Administration

**Re: Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (FAR Case 2021-015)**

To Whom It May Concern:

Columbia Law School’s Sabin Center for Climate Change Law (“Sabin Center”) and Environmental Defense Fund (“EDF”) respectfully submit the following comments to the Federal Acquisition Regulatory Council (“FAR Council”) in response to its proposed rule titled *Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk* (the “Proposed Rule”).<sup>1</sup>

The Sabin Center develops legal techniques to fight climate change, trains students and lawyers in their use, and provides the public with resources on key topics in climate law and regulation. It is affiliated with the Columbia Climate School, designed to advance new areas of climate inquiry, research, and impact across Columbia University. One of the world’s leading international nonprofit organizations, EDF creates transformational solutions to the most serious environmental problems. To do so, EDF links science, economics, law, and innovative private-sector partnerships. EDF is U.S.-headquartered, has offices across the U.S., and respectfully offers these comments on behalf of over 2 million members in the U.S.

## **I. Introduction**

As detailed below, the Sabin Center and EDF support the Proposed Rule as an important step to safeguarding and promoting efficient and economical procurement, and ensuring resilience of essential government functions in light of escalating climate-related financial and operational risks. Climate change-driven shifts in weather and environmental conditions, and in markets and society, pose increasing, costly risks to efficient and economical operations—and the U.S. government and its supply chain are not immune. The disclosure and target-setting requirements in the Proposed Rule would benefit federal agencies and contractors by increasing the transparency of climate risks to their supply chains and operations, how contractors are managing those risks, and opportunities for collaboration and cost-savings. The Proposed Rule

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<sup>1</sup> Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68,312 (Nov. 14, 2022) [hereinafter Proposed Rule].

would thus help enable the federal government “to properly analyze and mitigate climate risks” and ensure “prudent fiscal management” of the federal supply chain.<sup>2</sup>

In these comments, the Sabin Center and EDF:

- detail the considerable physical and transition risks that climate change poses to the federal supply chain and federal government operations;
- describe the need for the proposed climate risk and greenhouse gas (“GHG”) disclosure and target-setting requirements, which would have significant economic and efficiency benefits for federal procurement; and
- describe the firm legal foundation for the Proposed Rule, which fits squarely within longstanding government-wide procurement policy and practice.

## **II. Climate-Related Risks Pose a Significant and Growing Threat to the Federal Supply Chain and Government Operations**

Broadly speaking, climate-related financial risks are typically organized into two categories: physical risk and transition risk. As federal agencies have increasingly recognized, assessment and management of both types of risk is necessary to ensure the efficiency and resilience of federal supply chains and operations.

### **A. Physical Climate Risk**

Physical climate risk refers to the harmful effects of climate change on an entity’s physical assets and operations. These harmful effects can result from acute weather events (such as hurricanes) or chronic conditions (such as changing baselines, like rising sea levels). Such effects can cause direct economic impacts (*e.g.*, the cost of repairing a damaged facility or adapting to changes in baseline weather conditions) or indirect economic impacts (*e.g.*, increasing insurance premiums or dropped coverage). Climate-driven events can also cause economic harm by damaging the infrastructure upon which people and businesses rely, such as the electricity grid or transportation systems. All regions and industries throughout the United States are subject to physical climate risk, but the type and severity of risks depends on the nature and location of an entity’s physical assets, infrastructure, workers, and supply chain partners. Each federal agency will be susceptible to different climate risks due to variations in each agency’s critical industries, supply chains, and geographic reach. The contractors upon which agencies rely likewise face varying climate risks and may differ widely in their approaches to assessing and managing those risks.

Physical climate change-driven hazards already pose significant financial risk. For example, in 2022 alone, the United States experienced 18 “billion-dollar weather events,”<sup>3</sup>

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<sup>2</sup> *Id.* at 68,312.

<sup>3</sup> *Billion-Dollar Weather and Climate Disasters*, NOAA NAT’L CTRS. FOR ENVTL. INFO., <https://www.ncei.noaa.gov/access/billions/> (last visited Feb. 10, 2023). The National Oceanic and Atmospheric Administration (“NOAA”) defines a “billion-dollar weather event” as an extreme weather event that causes over \$1 billion in direct economic damages. See Adam B. Smith, *U.S. Billion-dollar Weather and Climate Disasters, 1980 -*

resulting in \$165 billion in total damages—the third highest total on record. Since 1980, the United States has endured 341 weather and climate disasters where total damages reached or exceeded \$1 billion, adding up to more than \$2.475 trillion in damages.<sup>4</sup> Billion-dollar weather events are also becoming more frequent. The number of billion-dollar weather events nearly doubled between 2000-2009 (67 events) and 2010-2019 (128 events).<sup>5</sup> And overall damages reached \$936.3 billion in the 2010s, compared to \$586.8 billion in the 2000s.<sup>6</sup> According to CDP (formerly the Carbon Disclosure Project), companies face an estimated \$120 billion in costs from environmental risks in their supply chains between 2021 and 2026.<sup>7</sup>

In the context of the Proposed Rule, physical risk encompasses the harmful effects of climate change on federal suppliers' infrastructure, goods, services, operations, and associated supply chains. Physical climate risk is already threatening the federal government's ability to procure critical goods and services efficiently and economically, and federal agencies have recognized this threat. For instance, the Department of Defense ("DoD")—which was responsible for over half of federal contract spending in recent years<sup>8</sup>—has recognized that climate change is a "critical national security issue," and a "climate-resilient supply chain" that can continue to serve the DoD in the face of climate change impacts is critical to ensuring "[u]ninterrupted access to key supplies, materials, chemicals, and services."<sup>9</sup>

DoD has military installations around the world. Many of these installations, and the contractors who supply essential goods and services to support them, are already experiencing the impacts of climate change. For example, Hurricane Michael's landfall near Panama City, Florida as a Category Five storm caused approximately \$4.7 billion in damage to the Tyndall Air Force Base.<sup>10</sup> This base is home of the 325<sup>th</sup> Medical Support Squadron, which is "responsible

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present (NCEI Accession 0209268), NOAA NAT'L CTRS. FOR ENVTL. INFO. (2020), <https://www.ncei.noaa.gov/access/metadata/landing-page/bin/iso?id=gov.noaa.nodc:0209268>.

<sup>4</sup> *Billion-Dollar Weather and Climate Disasters*, NOAA NAT'L CTRS. FOR ENVTL. INFO., <https://www.ncei.noaa.gov/access/billions/> (last visited Feb. 10, 2023).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Environmental Supply Chain Risks to Cost Companies \$120 Billion by 2026*, CDP (Feb. 9, 2021), <https://www.cdp.net/en/articles/supply-chain/environmental-supply-chain-risks-to-cost-companies-120-billion-by-2026>. CDP defines environmental risks as those that "stem from climate change, deforestation, and water-related impacts. These cover physical impacts, for example, increased severity and frequency of cyclones and floods; increased cost of raw materials; and regulatory and market changes as the world addresses environmental crises, such as carbon pricing and increased spending on product innovation due to changing customer demands." *Id.*

<sup>8</sup> See, e.g., CONG. RSCH. SERV., DEFENSE PRIMER: DEPARTMENT OF DEFENSE CONTRACTORS 1 (2023), <https://crsreports.congress.gov/product/pdf/IF/IF10600>; *A Snapshot of Government-Wide Contracting for FY 2020*, U.S. GOV'T ACCOUNTABILITY OFF. (June 22, 2021), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic>.

<sup>9</sup> DEP'T OF DEF., OFF. OF THE UNDERSEC'Y OF DEF. (ACQUISITION AND SUSTAINMENT), DEPARTMENT OF DEFENSE DRAFT CLIMATE ADAPTATION PLAN 3, 4, 16 (2021), <https://www.sustainability.gov/pdfs/dod-2021-cap.pdf>.

<sup>10</sup> See, e.g., Andrew Eversden, 'Climate Change Is Going to Cost Us': How the US Military Is Preparing for Harsher Environments, DEFENSENEWS (Aug. 9, 2021), <https://www.defensenews.com/smr/energy-and-environment/2021/08/09/climate-change-is-going-to-cost-us-how-the-us-military-is-preparing-for-harsher-environments/>; AMY MYERS JAFFE ET AL., COUNCIL ON FOREIGN REL., IMPACT OF CLIMATE RISK ON THE ENERGY

for [...] supplies crucial to the health and well-being of Airmen,”<sup>11</sup> as well as a \$126-million primary operating stock warehouse, which “stocks, stores, issues, and receives 27,309 line items of supplies and equipment” that are necessary in the maintenance and repair of vehicles and vehicular equipment at the base.<sup>12</sup> Any delays in the procurement of necessary pharmaceuticals, vaccines, and medical equipment resulting from extreme weather events like Hurricane Michael could result in delayed or canceled medical appointments, leaving those stationed at Tyndall unable to be deployed.

Tyndall Air Force Base is also home to a sizeable fleet of F-22 fighter jets,<sup>13</sup> which are built for DoD by Lockheed Martin Corporation and The Boeing Company at a unit cost of \$143 million.<sup>14</sup> When Hurricane Michael made landfall, about 95 percent of the buildings at Tyndall were damaged, including aircraft hangars that lost roof sections and multiple buildings that collapsed completely.<sup>15</sup> As a result, several aircraft experienced “damage in multiple areas including coatings, doors, canopies, leading edge[s] and engine inlet[s].”<sup>16</sup> Lockheed Martin had to deploy engineers located about 70 miles away from the base to support repair and recovery efforts of the damaged F-22s; it took approximately one month to get the planes ready to depart the base for additional repairs off-site.<sup>17</sup>

The Army Corps of Engineers (“USACE”) has also highlighted the need for a “[c]limate-[r]eady [s]upply of [p]roducts and [s]ervices,” noting that the agency faces “several critical supply chain challenges related to climate change and weather disruptions.”<sup>18</sup> An internal assessment conducted by USACE across “business line managers, acquisitions professionals, and logistics leaders revealed foreseeable shortages in goods and services, which could result in contract modifications and/or negative impacts on project delivery.”<sup>19</sup> To help fulfill its mission to “[d]eliver vital engineering solutions, in collaboration with our partners, to secure our Nation,

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SYSTEM: EXAMINING THE FINANCIAL, SECURITY, AND TECHNOLOGY DIMENSIONS 56 (2019), [https://cdn.cfr.org/sites/default/files/report\\_pdf/Impact%20of%20Climate%20Risk%20on%20the%20Energy%20System\\_0.pdf](https://cdn.cfr.org/sites/default/files/report_pdf/Impact%20of%20Climate%20Risk%20on%20the%20Energy%20System_0.pdf). “Hurricane Michael was the strongest hurricane on record to make landfall along the Florida panhandle” and “was only the 4th Category 5 hurricane to make landfall in the U.S. since 1850.” *Hurricane Michael Hits Georgia*, NOAA Nat’l Weather Serv. (Oct. 10, 2018), [https://www.weather.gov/ffc/2018\\_hurricane\\_michael](https://www.weather.gov/ffc/2018_hurricane_michael).

<sup>11</sup> Anabel Del Valle, *325th MDSS: Supply and Demand*, TYNDALL AIR FORCE BASE (Nov. 29, 2022), <https://www.tyndall.af.mil/News/Article-Display/Article/3230756/325th-mdss-supply-and-demand/>.

<sup>12</sup> *325th Logistics Readiness Squadron*, TYNDALL AIR FORCE BASE (Oct. 20, 2021), <https://www.tyndall.af.mil/About/Fact-Sheets/Display/Article/669133/325th-logistics-readiness-squadron/>.

<sup>13</sup> *See id.*

<sup>14</sup> *See F-22 Raptor*, AIR FORCE, <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104506/f-22-raptor/> (last visited Feb. 10, 2023).

<sup>15</sup> *F-22 After the Storm: Tyndall’s Raptors Ride Out Hurricane Michael*, LOCKHEED MARTIN, <https://www.lockheedmartin.com/en-us/news/features/2019-features/f-22-after-the-storm--tyndalls-raptors-ride-out-hurricane-michae.html> (last visited Feb. 10, 2023).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> U.S. ARMY CORPS OF ENG’RS, USACE CLIMATE ACTION PLAN 20 (2021), <https://www.sustainability.gov/pdfs/usace-2021-cap.pdf>.

<sup>19</sup> *Id.*

energize our economy, and reduce disaster risk,”<sup>20</sup> USACE uses construction contractors to ensure project delivery. Disruptions in the procurement of critical construction supplies, staff, and materials can hinder this mission.

In its Climate Action Plan, USACE identified ports and inland waterways as one of the most critical services at-risk due to climate change.<sup>21</sup> Globally, about 90 percent of all freight is transported via ship and the majority of the world’s coastal ports are a few feet to 15-feet above sea level, making them vulnerable to rising sea levels and coastal inundation.<sup>22</sup> Extreme precipitation can damage ports and channels, and “[r]iver floods can impact waterborne supply lines, [such] as when aids to navigation (e.g., buoys, beacons, and foghorns) are damaged and cannot be immediately replaced.”<sup>23</sup> According to USACE, “[d]amages from coastal storms can be expected to increase in frequency and severity in the future due to sea level rise.”<sup>24</sup>

In addition to relying upon ports for the arrival of project materials needed to carry out its mission, USACE is also responsible for upgrading ports to be more resilient to climate change impacts. Last year, the White House announced that the USACE will receive \$14 billion for improvements to ports, waterways, and related infrastructure—nearly a third of which will focus on repairing the damage from previous extreme weather events and increasing protection from climate change.<sup>25</sup> For example, the federal government will invest \$69 million in the port at Norfolk, Virginia to “improve navigation and expand capacity” by “deepening and widening the harbor’s shipping channels.”<sup>26</sup>

Periods of extreme drought related to climate change also can disrupt supply chains serving federal agencies. Decreased water levels can reduce port accessibility and create “traffic jams” through the constriction of the depth and width of rivers used for cargo transport.<sup>27</sup> For example, the flow of goods along the Mississippi River—typically “one of the busiest cargo waterways” in the United States—was cut by 45 percent during a drought in 2022, resulting in an estimated \$20 billion in losses.<sup>28</sup> Ships transport over half of all U.S. grain exports along this river, and shallower barges with reduced cargo loads must be used to account for declining water

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<sup>20</sup> *Mission and Vision*, U.S. ARMY CORPS OF ENG’RS, <https://www.usace.army.mil/About/Mission-and-Vision/> (last visited Feb. 10, 2023).

<sup>21</sup> U.S. ARMY CORPS OF ENG’RS, *supra* note 18, at 20.

<sup>22</sup> Jacques Leslie, *How Climate Change Is Disrupting the Global Supply Chain*, YALE ENV’T 360 (Mar. 10, 2022) <https://e360.yale.edu/features/how-climate-change-is-disrupting-the-global-supply-chain>.

<sup>23</sup> U.S. ARMY CORPS OF ENG’RS, *supra* note 18, at 20.

<sup>24</sup> *Id.*

<sup>25</sup> *U.S. Army Corps Gets \$14B for Ports, Waterway and Costal Investments*, MAR. EXEC. (Jan. 19, 2022), <https://maritime-executive.com/article/u-s-army-corps-gets-14b-for-ports-waterway-and-costal-investments>.

<sup>26</sup> *Id.*

<sup>27</sup> William Brangham, *Drought’s Impact on Mississippi River Causes Disruptions in Shipping and Agriculture*, PBS NEWSHOUR (Nov. 17, 2022), <https://www.pbs.org/newshour/show/droughts-impact-on-mississippi-river-causes-disruptions-in-shipping-and-agriculture>.

<sup>28</sup> *Id.*

levels.<sup>29</sup> According to the USACE, every foot of draft (the measurement from the waterline to the bottom of a boat)<sup>30</sup> that is lost is equivalent to about 6,000 bushels of soybeans.<sup>31</sup>

Winter storms, which climate change may worsen,<sup>32</sup> can also disrupt supply chains and slow the federal government’s procurement of goods and services. For example, Winter Storm Uri—which brought extreme cold to several southern states in February 2021—resulted in “the worst involuntary energy blackout in U.S. history” and the shutdown of many railroads, “severing heavily used supply chain links between Texas and the Pacific Northwest for three days.”<sup>33</sup> Additionally, Uri’s deep-freeze across Texas and resultant power-outages “forced three major semiconductor plants to close, exacerbating a global pandemic-triggered semiconductor shortage and further slowing production of microchip-dependent cars.”<sup>34</sup>

Due to the interconnected—and often global—nature of federal supply chains, climate change impacts in other regions of the world can impact the price of goods procured by the U.S. government. For example, a prolonged heatwave in India last year drove up the global price of wheat “to record levels, and [drew] warnings of looming food shortages around the globe,” with the price of wheat futures reaching “an all-time high of \$12.68 per half bushel” in May.<sup>35</sup>

Reliance upon a single supplier, especially when located in a region that is particularly vulnerable to climate-amplified extreme weather events, can further exacerbate risk. For example, Hurricane Maria severely damaged multiple Baxter International factories—a major manufacturer of intravenous (“IV”) fluid bags that has previously received contracts from federal agencies including the Department of Health and Human Services, the Department of Veterans Affairs, and the DoD<sup>36</sup>—when the storm made landfall in Puerto Rico in 2017.<sup>37</sup> The damage to these manufacturing facilities resulted in a “major national shortage” of IV bags to hospitals

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<sup>29</sup> *Id.*

<sup>30</sup> See *Nomenclature of Naval Vessels*, NAVAL HISTORY AND HERITAGE COMMAND, <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/n/nomenclature-naval-vessels.html> (last visited Feb. 10, 2023).

<sup>31</sup> Brangham, *supra* note 27.

<sup>32</sup> See Katharine Hayhoe et al., *Our Changing Climate*, in IMPACTS, RISKS AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT, Vol. II 94 (D.R. Reidmiller et al. eds., 2018), <https://nca2018.globalchange.gov/chapter/2/>.

<sup>33</sup> See Leslie, *supra* note 22.

<sup>34</sup> *Id.*

<sup>35</sup> Arshad R. Zargar, *Wheat Prices Hit Record High as India’s Heat Wave-Driven Export Ban Compounds Ukraine War Supply Woes*, CBS News (May 17, 2022), <https://www.cbsnews.com/news/india-heat-wave-wheat-prices-soar-climate-change-ukraine-war-supplies/>.

<sup>36</sup> See *Baxter Healthcare Corporation*, USASPENDING.GOV, <https://www.usaspending.gov/recipient/d210a162-3405-47ee-3252-a38b8c00f8a6-C/latest> (last visited Feb. 10, 2023).

<sup>37</sup> See Jordan Ecker, *How Neglect of Puerto Rico Sparked a National IV Bag Shortage*, AM. PROSPECT (Feb. 20, 2018), <https://prospect.org/environment/neglect-puerto-rico-sparked-national-iv-bag-shortage/>.

across the United States during a severe flu season, underscoring that “if one link in the supply chain breaks, people suffer.”<sup>38</sup>

## B. Transition Climate Risk

Transition risk refers to indirect impacts that arise from societal shifts in response to climate change, such as changes in technology, markets, consumer preferences, or policy in various jurisdictions, including actions to facilitate the transition to a low- or net-zero carbon economy. Certain industries or companies that are not well-prepared for such changes could experience higher operating costs or decreased demand for their products, while other industries or companies will be prepared to take advantage of transition opportunities. GHG emissions metrics can serve as an important proxy for transition risk because companies with higher GHG emissions may need to make more drastic changes to their business models to align with the transition to a low- or net-zero carbon economy.<sup>39</sup>

According to CDP, “most supply chains run[] on very tight profit margins,” so changes that increase costs to suppliers “are expected to be passed up the chain in a domino effect to their buyers.”<sup>40</sup> On the supply side, climate change-related shifts in technology, market dynamics, or regulation can increase the cost of raw materials (as well as other production costs) or render those materials unavailable entirely. For example, a risk analysis conducted by Lockheed Martin noted that “[s]carcity and carbon-based costs are expected to drive up the cost of materials globally,” which would impact the affordability of the products offered via contracts to the federal government.<sup>41</sup> On the demand side, emergent preferences for and availability of climate-friendly goods and services could result in the rapid loss of asset values for carbon-intensive industries.<sup>42</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., *Climate: Transition Risks*, S&P GLOBAL, <https://www.spglobal.com/esg/education/essential-sustainability/climate/transition-risks> (last visited Jan. 26, 2023); EMILY GASTON ET AL., FINANCED AND FACILITATED EMISSIONS 6 (IFRS Staff Paper, 2022), <https://www.ifrs.org/content/dam/ifrs/meetings/2022/september/issb/ap4d-climate-related-disclosures-financed-and-facilitated-emissions.pdf> (“Financed and facilitated emissions metrics can be used as proxy for measuring transition risk to a low carbon economy. Counterparties, borrowers or investees with higher emissions may be more susceptible to transition risks such as technological changes, shifts in supply and demand and policy change [...].”); SANTE CARBONE ET AL., THE LOW-CARBON TRANSITION, CLIMATE COMMITMENTS AND FIRM CREDIT RISK 8 (ECB Working Paper Series, No. 2631, 2021) <https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2631~00a6e0368c.en.pdf> (“[E]nvironmental scores may not be an adequate proxy for transition risk. By contrast, GHG emissions are likely to be a better proxy [...]”).

<sup>40</sup> *Environmental Supply Chain Risks to Cost Companies \$120 Billion by 2026*, CDP (Feb. 9, 2021), <https://www.cdp.net/en/articles/supply-chain/environmental-supply-chain-risks-to-cost-companies-120-billion-by-2026>.

<sup>41</sup> LOCKHEED MARTIN CORP., CLIMATE-RELATED RISKS AND OPPORTUNITIES 9 (2020), <https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/sustainability/LM%20Climate%20Risk%20and%20Opportunities%20Disclosure%202020.pdf>.

<sup>42</sup> See Madison Condon et al., *Mandating Disclosure of Climate-Related Financial Risk*, 23 NYU J. LEGIS & PUB. POL’Y 745, 757–61 (2022), <https://nyujlpp.org/wp-content/uploads/2022/05/Condon-et-al-Mandating-Disclosure-of-Climate-Related-Financial-Risk-PROOF.pdf>.

To build supply chain resilience to transition risks, the DoD highlights “[l]everag[ing] [p]urchasing [p]ower” as a key focus area and identifies a need to “[e]xplore [the] potential for major suppliers to disclose GHG emissions, treat climate change vulnerabilities as a ‘material weakness’ on financial reports, and expect commitment to public reporting on Environment, Social and Government (ESG) features of their business operations.”<sup>43</sup> The importance of addressing transition risks and opportunities in DoD’s supply chain has been affirmed by Congress, which added electric vehicle battery recycling provisions to the most recent National Defense Authorization Act with bipartisan support,<sup>44</sup> and by former Secretary of the Navy Ray Mabus, who has underscored the fiscal and national security benefits of shifting the military to renewable energy.<sup>45</sup> Disclosures on climate-related transition risks that contractors face and on any plans they have to manage those risks, including through setting emissions reduction targets, can help inform efforts to improve resilience of the federal supply chain.

### **III. The Proposed Rule is Necessary for Agencies and Suppliers to Identify and Mitigate Climate-Related Risks to the Federal Supply Chain and Government Operations**

An efficient and resilient supply chain is essential to federal agencies’ ability to carry out their missions and provide critical goods and services to the public. In order to develop effective strategies to safeguard their own missions and operations from the impacts of climate change, federal agencies must understand how climate-related risks impact major contractors, such as by causing delays and disruptions in contractors’ business operations or increasing overall contract costs, and how those contractors are managing those risks. But the federal government currently lacks visibility into the climate-related vulnerabilities in its supply chain. Without accurate and timely disclosure of information relating to supply chain vulnerabilities, it is difficult for agencies to properly prepare for them. And as the DoD has recognized, failing to “properly integrate a climate change understanding of related risks may significantly increase [agencies’] adaptation and operating costs over time, lead to a suboptimal allocation of resources, imperil the supply chain, and/or result in degraded and outdated [government] capabilities and operating concepts.”<sup>46</sup>

The Proposed Rule’s disclosure and target-setting requirements will help federal agencies address critical information gaps, better understand contractors’ risks, and plan for safeguarding government missions and activities through procurement processes. The disclosures and emission-reduction targets made under the Proposed Rule will also prompt suppliers to examine vulnerabilities in their operations and business models and identify opportunities to mitigate those vulnerabilities. Leveraging the widely used Task Force on Climate-Related Financial Disclosures (“TCFD”) Recommendations, the Proposed Rule would for example improve the

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<sup>43</sup> DEP’T OF DEF., OFF. OF THE UNDERSEC’Y OF DEF. (ACQUISITION AND SUSTAINMENT), DEPARTMENT OF DEFENSE DRAFT CLIMATE ADAPTATION PLAN 16 (2021), <https://www.sustainability.gov/pdfs/dod-2021-cap.pdf>.

<sup>44</sup> See Megan Quinn, *Senate Passes Bill to Increase EV Battery Recycling as Part of Defense Budget*, WASTE DIVE (Dec. 20, 2022), <https://www.wastedive.com/news/ev-battery-recycling-senate-romney-ndaa/639166/>.

<sup>45</sup> See Ray Mabus, *Under President Biden the U.S. Military Must Lead the Way on Climate Change*, TIME (Nov. 13, 2020), <https://time.com/5911084/military-lead-climate-change-transition/>.

<sup>46</sup> *Id.* at 7.



availability of reliable information on the largest federal contractors' climate-related governance, risk management, strategy, and metrics and targets.<sup>47</sup>

Identifying and reducing risks will also reduce costs for suppliers—and those efficiency and performance improvements will flow through federal contracts. According to CDP, disclosure can tangibly benefit companies by enabling them to “[p]rotect and improve [the] company’s reputation,” “[b]oost [the company’s] competitive advantage,” “[t]rack and benchmark progress,” “[u]ncover risks and opportunities,” and “[g]et ahead of regulation.”<sup>48</sup> An advisory committee of the Commodity Futures Trading Commission identified similar benefits of disclosure for companies—“the improved ability: (i) to identify, assess, manage, and adapt to the effects of climate change on operations, supply chains and customer demand; (ii) to relay risk and opportunity information to capital providers, investors, derivatives customers and counterparties, markets, and regulators; and, (iii) to learn from competitors about climate-related strategy and risk management best practices.”<sup>49</sup> Shared information will increase the ability of contractors and the government to work together, and for contractors to learn from each other, regarding strategies to reduce costs and enhance efficiency in federal procurement.

#### **IV. The Proposed Rule’s Requirements Are Feasible and Would Promote Efficiency**

##### **A. Federal Suppliers Have Ready Access to Data and Tools to Support Compliance with the Proposed Disclosure Requirements**

Information is widely available that would allow a supplier to assess climate risks to its operations and meet the requirements of the Proposed Rule, including from publicly accessible sources and from private service providers. This section briefly describes the availability of physical climate risk data and tools, a subject that is detailed further in a comment letter submitted to this docket by the Sabin Center on behalf of leading climate science experts.<sup>50</sup>

Broadly speaking, information about physical climate risk can be divided into two categories: information on *where* climate hazards, such as extreme weather events, are likely to occur and information on the *frequency and severity* of climate hazards. The information that is most pertinent to a supplier will vary across sectors, industries, and geographies. Information on where climate hazards are likely would allow a supplier to assess which of its physical assets and supply chains are located in areas susceptible to extreme weather events that could disrupt business operations. An assessment of these hazards would enable a supplier to better understand (and plan for) future vulnerabilities and reduce costs throughout its supply chain. Appropriate climate models and tools can be selected for further analysis and assessment of physical risks.

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<sup>47</sup> *Recommendations*, TCFD, <https://www.fsb-tcfd.org/recommendations/> (last visited Feb. 3, 2023).

<sup>48</sup> *Why Disclose as a Company*, CDP, <https://www.cdp.net/en/companies-discloser> (last visited Feb. 10, 2023).

<sup>49</sup> COMMODITY FUTURES TRADING COMM’N CLIMATE-RELATED MARKET RISK SUBCOMM. OF THE MARKET RISK ADVISORY COMM., *MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM* 87 (2020), <https://perma.cc/UT9M-FG2Y>.

<sup>50</sup> Letter from Susana Camargo et al., Sabin Ctr. for Climate Change Law, Columbia Law Sch., to Mathew C. Blum, Acting Adm’r for Fed. Procurement Policy, Off. of Fed. Procurement Policy (Feb. 1, 2023), <https://www.regulations.gov/comment/FAR-2021-0015-0092>.

Climate models can also be used to assess how the frequency and severity of hazards are predicted to change. These hazards include both acute and chronic physical risks, as described above. Methodologies like scenario analysis can further aid companies in understanding their potential climate vulnerabilities. CDP and TCFD provide guidance that companies can consult on how to conduct scenario analyses and how to use and disclose the results.<sup>51</sup>

## **B. Harnessing Existing Disclosure Standards Promotes Efficiency**

Aligning the Proposed Rule with leading standards that many federal suppliers and other U.S. companies are already using—including CDP, TCFD, and the Science Based Targets Initiative (“SBTi”)—is a sensible strategy that will reduce compliance burdens. It will also generate efficiencies and reduce overall costs for suppliers that may be subject to other rules or regulations leveraging those standards.<sup>52</sup> There are multiple ways that the FAR Council could leverage these existing frameworks, including an approach of incorporating disclosure requirements from these frameworks directly into the text of the rule, an approach of pointing to these frameworks as examples or options for acceptable disclosures, or the approach it has taken in the Proposed Rule. Leveraging existing frameworks through any of these mechanisms provides efficiency benefits.

Thousands of companies already assess and publicly report on climate risks to their operations in alignment with these frameworks. For example, in 2020, more than 8,000 companies at various positions throughout the supply chain that disclose to CDP reported that “\$1.26 trillion of revenue is likely to be at risk over the next five years due to climate change, deforestation and water insecurity.”<sup>53</sup> And many of the largest government contractors already assess physical and transition climate risks to their operations and collect and disclose information on their GHG emissions. As the FAR Council notes, of the 964 “major,” non-small-business contractors that would be impacted by the Proposed Rule, 293 currently disclose their GHG emissions and 242 set emission reduction goals.<sup>54</sup> Many of those companies already align their practices with the global third-party standards and systems that the Proposed Rule leverages, including CDP’s centralized data-reporting platform, the TCFD Recommendations, and the SBTi GHG emissions reduction target-setting methodologies and criteria.

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<sup>51</sup> See generally CDP, CONDUCTING AND DISCLOSING SCENARIO ANALYSIS (2023), [https://cdn.cdp.net/cdp-production/cms/guidance\\_docs/pdfs/000/001/430/original/CDP-technical-note-scenario-analysis.pdf?1643629797](https://cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/001/430/original/CDP-technical-note-scenario-analysis.pdf?1643629797); TCFD, THE USE OF SCENARIO ANALYSIS IN DISCLOSURE OF CLIMATE-RELATED RISKS AND OPPORTUNITIES (2017), <https://www.fsb.org/wp-content/uploads/Technical-Supplement-1.pdf>.

<sup>52</sup> See, e.g., *A Guide to Preparing for Greater Climate Disclosure in 2023*, AON (Nov. 2022), <https://www.aon.com/insights/articles/2022/preparing-for-greater-climate-disclosure-in-2023> (noting that emerging disclosure requirements in the U.S., UK, Canada, and EU all reflect “acceptance of and alignment to the TCFD’s recommendations on climate-related financial disclosures”).

<sup>53</sup> See CDP, TRANSPARENCY TO TRANSFORMATION: A CHAIN REACTION – CDP GLOBAL SUPPLY CHAIN REPORT 2020 9 (2021), [https://cdn.cdp.net/cdp-production/cms/reports/documents/000/005/554/original/CDP\\_SC\\_Report\\_2020.pdf?1614160765](https://cdn.cdp.net/cdp-production/cms/reports/documents/000/005/554/original/CDP_SC_Report_2020.pdf?1614160765).

<sup>54</sup> *FAR Case 2021-015: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk Regulatory Impact Analysis*, Docket ID No. FAR-2021-0015-0004, at 20 (Nov. 14, 2022) [hereinafter RIA].

For example, Lockheed Martin, one of the largest providers of products for defense, civil, and commercial applications to the federal government, would be classified as a major supplier under the Proposed Rule based on the value of its 2022 contracts.<sup>55</sup> Lockheed Martin owns or leases building space for offices, manufacturing plants, warehouses, and other facilities at over 375 locations, primarily in the United States, and operates in more than 590 facilities across all 50 states.<sup>56</sup> With operations spread across differing geographies that are impacted by a range of physical climate risks (some overlapping, some different), Lockheed Martin recognizes that identifying and assessing climate risks is crucial to avoiding potential disruptions in operations and the sustainable supply of goods and services.<sup>57</sup>

According to Lockheed Martin's 2020 Climate Change report to CDP, the company assessed both physical and transition risks through a process "based on the same climate risk drivers suggested in the [TCFD] documentation for physical and transitional risks, with greater distinction given to individual manifestations of acute physical risks."<sup>58</sup> Based on 22 distinct risk drivers, the company assessed more than 120 distinct risks using two of the IPCC's RCP scenarios: RCP 2.6 (the rise in global temperatures was limited to 2° Celsius) and RCP 8.5 (no limit to increased temperatures).<sup>59</sup> The company determined its overall level of risk by "qualitatively assessing the likelihood and impact of each risk driver on [its] facilities, production operations, supply chain and workforce."<sup>60</sup>

Additionally, Lockheed Martin calculates and reports its Scope 1, 2, and 3 GHG emissions, using the GHG Protocol's market-based methodology for Scope 2 emissions.<sup>61</sup> For Scope 3 emissions, the company "completed an economic input-output life cycle assessment" of its supply chain, its facilities, and use of its "most material products and services to understand and prioritize the environmental issues that may have the most impact on [its] business."<sup>62</sup> Lockheed Martin states that the life-cycle assessment provided a "comprehensive analysis of [its] overall footprint, including the emissions [...] associated with purchased goods and services."<sup>63</sup>

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<sup>55</sup> See, e.g., *Contracts for Dec. 30, 2022*, U.S. DEP'T OF DEF., <https://www.defense.gov/News/Contracts/Contract/Article/3256832/> (last visited Jan. 18, 2023) (noting that Lockheed Martin was awarded a nearly \$8 billion modification on one of its contracts).

<sup>56</sup> See LOCKHEED MARTIN CORPORATION - CLIMATE CHANGE 2020 1 (2020), <https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/2020%20CDP%20Report.pdf> (CDP climate change disclosure).

<sup>57</sup> See, e.g., *id.* at 10.

<sup>58</sup> *Id.* at 7.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 25-26.

<sup>62</sup> *Id.* at 26.

<sup>63</sup> *Id.*

Boeing, which was the second largest government contractor in Fiscal Year 2021 behind Lockheed Martin,<sup>64</sup> has also already aligned its sustainability reporting with the TCFD Recommendations. According to Boeing, the company has “used TCFD recommendations to perform qualitative scenario analysis for 2030 and 2050 time horizons, assessing moderate and extreme physical risks using [RCPs] 4.5 and 8.5, and a combination of internationally developed low-carbon scenarios, including a Well Below 2°C (WB2C) scenario, for moderate and extreme transition risks and opportunities.”<sup>65</sup> In its response to CDP’s climate questionnaire, Boeing reports its “metrics, performance, and progress toward [its] targets” and calculates and discloses “Scope 1, Scope 2, and two of the relevant categories of Scope 3 data (Business Travel and Use of Sold Products),” as well as “relevant energy data.”<sup>66</sup>

That some of the largest federal suppliers are already assessing and disclosing climate risks in alignment with the Proposed Rule shows that the proposed requirements are reasonable and feasible, and may even benefit affected companies. In comments on the advance notice of proposed rulemaking in FAR Case 2021-016,<sup>67</sup> numerous large contractors and trade associations expressed support for leveraging CDP, TCFD, SBTi, and existing standards generally in potential FAR disclosure or target-setting requirements.<sup>68</sup>

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<sup>64</sup> See *These Are the Top 10 Government Contractors*, BLOOMBERG GOV’T (July 14, 2022), <https://about.bgov.com/these-are-the-top-10-government-contractors/>.

<sup>65</sup> Letter from Boeing to GSA at 2 (Jan. 13, 2022), Docket ID No. FAR-2021-0016-35000, <https://www.regulations.gov/comment/FAR-2021-0016-35000>.

<sup>66</sup> See *id.* at 2, 3.

<sup>67</sup> Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions (FAR Case 2021-016), 86 Fed. Reg. 57,404 (Oct. 15, 2021).

<sup>68</sup> See, e.g., Letter from Prof’l Servs. Council to GSA at 5 (Jan. 13, 2022), Docket ID No. FAR-2021-0016-35006, <https://www.regulations.gov/comment/FAR-2021-0016-35006> (“Several PSC member companies have recommended CDP, whose GHG data collection methodologies were frequently modeled by GSA in its April 2010 Recommendations for Vendor and Contractor Emissions.”); Letter from Council of Def. and Space Indus. Ass’n to FAR Council at 8 (Jan. 13, 2022), Docket ID No. FAR-2021-0016-35027, <https://www.regulations.gov/comment/FAR-2021-0016-35027> (“[T]o demonstrate compliance with greenhouse gas reduction targets in a flexible manner [...] we recommend that the Government allow suppliers to attest to or certify conformance with internationally recognized voluntary consensus standards.”); Letter from Aerospace Indus. Ass’n to FAR Council at 2 (Jan. 13, 2022), Docket ID No. FAR-2021-0016-35030, <https://www.regulations.gov/comment/FAR-2021-0016-35030> (“The government should utilize existing reporting methods - Global Reporting Initiative (GRI), Sustainability Accounting Standards Board (SASB), Task Force on Climate-related Financial Disclosures (TCFD) etc. - or as verification is currently achieved, on a voluntary basis via third-party assurers.”); Letter from U.S. Tire Mfrs. Ass’n to GSA at 6 (Jan. 13, 2022), Docket ID No. FAR-2021-0016-35015, <https://www.regulations.gov/comment/FAR-2021-0016-35015> (“[S]ince many undertakings are global, there is a strong need to align methodologies. Reference to international standards like the Carbon Disclosure Project’s (CDP) most recent Climate Change Report [...] can facilitate the process of standardization and verification. In addition, the consideration of targets validated by independent organism like Science Based Targets initiative (SBTi) can also contribute to the standardization of reporting methods.”).

## V. The Proposed Rule Is Squarely Within the Executive’s Authority to Direct Federal Procurement

As the Supreme Court has recognized, the federal government has power “to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.”<sup>69</sup> The President plays a critical role in setting the terms and conditions of federal procurement, both in the capacities of Chief Executive and Commander-in-Chief, and under statute, including the Federal Property and Administrative Services Act of 1949 (“Procurement Act”).<sup>70</sup> In the Procurement Act, Congress expressly affirmed the President’s authority to “prescribe policies and directives that the President considers necessary to carry out”<sup>71</sup> the Act, which promotes “an economical and efficient” federal procurement system.<sup>72</sup> For decades, Presidents of both parties have regularly exercised their authority to establish government-wide procurement policies that, in the President’s judgment, promote economy and efficiency; and courts have largely upheld those policies.<sup>73</sup>

The Proposed Rule falls squarely within the President’s clear authority to direct procurement. As discussed below, the Rule is consistent with the Procurement Act and its values of economy and efficiency. The Rule is also in line with longstanding procurement policy and practice; and like the Proposed Rule, prior Presidential procurement policies have mandated disclosures, established contractor responsibility requirements, and promoted increased efficiency in contractor operations consistent with broader public policy goals. Even under the narrower construction of the President’s powers recently embraced by a minority of U.S. Courts of Appeals,<sup>74</sup> the proposed disclosure requirements would be clearly authorized as a policy integral to the efficiency of the contracting system. Overall, the Proposed Rule’s requirements are reasonable, feasible, sensibly tailored, and key to the Executive’s ability to conduct economical and efficient procurement in the face of climate change.

### A. The Proposed Rule Would Promote Economy and Efficiency

The Proposed Rule and the directive in Executive Order No. 14,030,<sup>75</sup> which the Proposed Rule would implement,<sup>76</sup> fit comfortably within the President’s authority under the Procurement Act. “It is a fundamental canon of statutory construction that the words of a statute

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<sup>69</sup> *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *see also AFL-CIO v. Kahn*, 618 F.2d 784, 794 (D.C. Cir. 1979) (en banc), *cert. denied*, 443 U.S. 915 (1979) (“Those wishing to do business with the Government must meet the Government’s terms; others need not.”).

<sup>70</sup> 40 U.S.C. §§ 101 *et seq.*

<sup>71</sup> *Id.* § 121(a).

<sup>72</sup> *Id.* § 101(1).

<sup>73</sup> *See Louisiana v. Biden*, No. 22-30019, slip op. at 10-17 (5th Cir. Dec. 19, 2022) (discussing historical and modern use of Procurement Act authority and caselaw reviewing such actions); *see also Farmer v. Phila. Elec. Co.*, 329 F.2d 3, 7 (3d Cir. 1964); *Kahn*, 618 F.2d at 790-91.

<sup>74</sup> *See Georgia v. President of the United States*, 46 F.4th 1283, 1301 (11th Cir. 2022); *Commonwealth v. Biden*, No. 21-6147, 2023 WL 164614, at \*7 (6th Cir. Jan. 12, 2023).

<sup>75</sup> Exec. Order No. 14,030 § 5(b)(i), 86 Fed. Reg. 27,967 (May 25, 2021).

<sup>76</sup> *See Proposed Rule*, *supra* note 1, at 68,312.

must be read in their context and with a view to their place in the overall statutory scheme.”<sup>77</sup> In addition, courts “often look to history and purpose to divine the meaning of language.”<sup>78</sup> Here, the text, structure, purpose, and history of the Procurement Act all support the Proposed Rule.

The text of the Procurement Act expressly grants the President authority to manage and direct federal procurement through government-wide procurement policies.<sup>79</sup> Specifically, the Act provides that “[t]he President may prescribe policies and directives that the President considers necessary to carry out [the Act].”<sup>80</sup> That “broad”<sup>81</sup> language “explicitly authorizes Executive Orders”<sup>82</sup> directing government-wide procurement policy, like Executive Order No. 14,030.

The Act also states that Presidential procurement policies “must be consistent with”<sup>83</sup> the Act, the purpose of which “is to provide the Federal Government with an economical and efficient system for [...] [p]rocurring and supplying property and nonpersonal services, and performing related functions including contracting.”<sup>84</sup> Courts reviewing the scope of the President’s authority “have generally landed on a ‘lenient’ standard,”<sup>85</sup> upholding procurement policies that further the Procurement Act’s economy and efficiency objectives.<sup>86</sup> In other words, most courts have found that the Act’s “values of ‘economy’ and ‘efficiency’”<sup>87</sup> “act[] as a set of guidelines within which those policies must reside.”<sup>88</sup>

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<sup>77</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (quoting *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007)).

<sup>78</sup> *Id.* (cleaned up).

<sup>79</sup> 40 U.S.C. §§ 101(1), 121(a).

<sup>80</sup> *Id.* § 121(a).

<sup>81</sup> *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967); *see also City of Albuquerque v. Dep’t of Interior*, 379 F.3d 901, 914 (10th Cir. 2004) (“Congress chose to utilize a relatively broad delegation of authority in the [Procurement Act].”).

<sup>82</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 306 n.34 (1979).

<sup>83</sup> 40 U.S.C. § 121(a).

<sup>84</sup> *Id.* § 101(1).

<sup>85</sup> *Louisiana v. Biden*, slip op. at 14-15 (citing *UAW-Labor Employment & Trading Corp. v. Chao*, 325 F.3d 360, 367 (D.C. Cir. 2003)).

<sup>86</sup> *See, e.g., Farmer*, 329 F.2d at 7; *Kahn*, 618 F.2d at 790-91; *Chao*, 325 F.3d at 366-67; *City of Albuquerque*, 379 F.3d at 914; *Contractors Assoc. of Ea. Pennsylvania v. Sec’y of Labor*, 442 F.2d 159, 167, 171 (3d Cir. 1971); *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981). *But cf. Georgia*, 46 F.4th at 1301 (finding, on appeal of preliminary injunction, that COVID-19 employee vaccination requirements for federal contractors likely exceeded the President’s Procurement Act authority and declining to adopt the D.C. Circuit’s economy and efficiency nexus test); *Kentucky v. Biden*, 23 F.4th 585, 610 (6th Cir. 2022) (same on motion for stay of preliminary injunction); *Commonwealth v. Biden*, 2023 WL 164614, at \*7 (same on appeal of preliminary injunction).

<sup>87</sup> *Kahn*, 618 F.2d at 792.

<sup>88</sup> *Louisiana v. Biden*, slip op. at 9 n.17.

“‘Economy’ and ‘efficiency’ are not narrow terms.”<sup>89</sup> As the U.S. Court of Appeals for the D.C. Circuit has recognized, “they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions.”<sup>90</sup> Furthermore, the Act “grants the President particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole.”<sup>91</sup> In keeping with this broad understanding of the President’s authority, many court decisions over the span of decades—and multiple Presidential Administrations of both parties—have found a wide range of policies to be consistent with the Act’s economy and efficiency objectives.<sup>92</sup> Those policies have included conditions that affect contractor operations,<sup>93</sup> such as anti-discrimination standards for contractors,<sup>94</sup> requirements for contractors to inform employees of certain labor rights,<sup>95</sup> and a requirement that contractors use an electronic system to verify employees’ work authorization status.<sup>96</sup>

Courts have also found that “in addition to promoting economy and efficiency,” Presidential policies can “serve[] other, not impermissible, ends as well.”<sup>97</sup> As the U.S. Court of Appeals for the Fifth Circuit has recognized, Presidents have, for decades, “routinely and explicitly relied upon Procurement Act authority to issue social-policy oriented procurement orders to contracting entities.”<sup>98</sup> Prior procurement policies have had tandem goals such as slowing down inflation, increasing employment opportunities for minorities, and preventing racial discrimination.<sup>99</sup> Courts reviewing such policies have generally affirmed that “the

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<sup>89</sup> *Kahn*, 618 F.2d at 789.

<sup>90</sup> *Id.*; see also *Reich*, 74 F.3d at 1333 (“[T]he President’s authority to pursue ‘efficient and economic’ procurement” permits “measures which certainly reach beyond any narrow concept of efficiency and economy in procurement.”).

<sup>91</sup> *Kahn*, 618 F.2d at 789.

<sup>92</sup> See *Georgia*, 46 F.4th at 1311-12 (Anderson, J. concurring in part & dissenting in part) (discussing “the longstanding Presidential practice of issuing Executive Orders related to contracting and procurement that has been routinely upheld by court decisions” and citing examples).

<sup>93</sup> But see *Commonwealth v. Biden*, 2023 WL 164614, at \*7 (the Procurement Act “does not confer the authority to promulgate a rule [...] that simply makes contractors more efficient”).

<sup>94</sup> *Contractors Assoc. of Ea. Pennsylvania v. Sec’y of Labor*, 442 F.2d 159, 167, 171 (3d Cir. 1971) (upholding Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965) on the basis of the government’s “vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects”).

<sup>95</sup> *UAW-Labor Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (upholding Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (Apr. 14, 1992) on the basis that “[w]hen workers are better informed of their rights [...] their productivity is enhanced”).

<sup>96</sup> *Chamber of Commerce of U.S. v. Napolitano*, 648 F. Supp. 2d 726, 738 (D. Md. 2009) (upholding Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 11, 2008) on the basis that contractors would be less likely to experience immigration law enforcement actions and thus operate more efficiently).

<sup>97</sup> *Carmen*, 669 F.2d at 821. Cf. 48 C.F.R. §§ 1.102-1(b), 2.101 (“Best value must be viewed from a broad perspective and is achieved by balancing the many competing interests” of federal procurement to “provide[] the greatest overall benefit.”); *Id.* § 1.102-2(d) (stating that one of the primary objectives of the FAR is to “support the attainment of public policy goals adopted by the Congress and the President”).

<sup>98</sup> *Louisiana v. Biden*, slip op. at 21-22.

<sup>99</sup> See *Carmen*, 669 F.2d at 821.

President, in implementing the Procurement Act, may [...] draw upon [...] policy views that are directed beyond the immediate quality and price of goods and services purchased.”<sup>100</sup> That is the case even where a procurement policy may increase contract costs in the near term. For instance, considering a challenge to a policy setting wage and price controls as a condition of eligibility for federal contractors, the D.C. Circuit deferred to “the President’s judgment that the overall impact of those controls would reduce government procurement costs” even though the court recognized the policy “could result in the government actually paying more for individual government contracts than might be so otherwise.”<sup>101</sup>

Statutory history likewise supports a broad interpretation of the President’s authority to direct procurement. The President’s longstanding practice of issuing policies to promote economical and efficient procurement “and the many judicial decisions repeatedly upholding this longstanding practice provided the backdrop for Congress’s recodification of the Procurement Act in 2002.”<sup>102</sup> Notably, Congress recodified the Act without restricting or altering the scope of the President’s authority.<sup>103</sup> When “the President’s view of his own authority under a statute [...] has been acted upon over a substantial period of time without eliciting congressional reversal, it is ‘entitled to great respect.’”<sup>104</sup>

Overall, the text, structure, purpose, and history of the Procurement Act all point in the direction of Congress’ intent to grant the President broad authority to set the terms and conditions of federal contracting so long as those terms are, in the President’s judgment, sufficiently related to “an economical and efficient system” for federal contracting and procurement.<sup>105</sup> That is so even if a Presidential policy imposes conditions that affect contractors’ business operations, and even if the policy furthers a tandem social policy goal in addition to economical and efficient procurement.

The Proposed Rule fits comfortably within that well-established scope of authority. As discussed in sections III and IV above, the Proposed Rule’s climate risk and GHG disclosure and science-based target-setting requirements would promote economy and efficiency by, among other things: (1) providing critically needed information for agencies and suppliers to reduce costly vulnerabilities, and increase efficiencies in their supply chains and operations; (2) prompting suppliers to identify and better manage climate risks to their businesses, which would result in cost-savings and competitiveness benefits that will flow through federal contracts; (3) increasing opportunities for collaboration between suppliers and the federal government, and among suppliers, to mitigate costly climate harms; and (4) promoting efficiency in disclosure through reliance on widely accepted global standards, which would reduce disclosure costs and burdens for suppliers subject to multiple disclosure regimes. The Proposed Rule thus has a much

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<sup>100</sup> *Reich*, 74 F.3d at 1337.

<sup>101</sup> *Reich*, 74 F.3d at 1337 (citing *Kahn*, 618 F.2d at 793); *see also Chao*, 325 F.3d at 367 (recognizing that “in the short run,” the policy upheld in *Kahn* would “increase procurement costs”).

<sup>102</sup> *Georgia*, 46 F.4th at 1312 (Anderson, J. concurring in part & dissenting in part).

<sup>103</sup> *See* Pub. L. No. 107-217, 116 Stat. 1062, 1068 (2002).

<sup>104</sup> *Kahn*, 618 F.2d at 790 (quoting *Bd. of Governors of the Fed. Reserve Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978)).

<sup>105</sup> 40 U.S.C. § 101.



stronger nexus to economical and efficient procurement than many procurement policies that courts, including multiple U.S. Courts of Appeals, have previously upheld.<sup>106</sup>

Even under the narrower construction of the Procurement Act recently embraced by a minority of U.S. Courts of Appeals, the Proposed Rule would be lawful.<sup>107</sup> The U.S. Courts of Appeals for the Sixth Circuit and the Eleventh Circuit recently declined to follow the longstanding caselaw from other circuits interpreting the scope of the President’s authority under the Procurement Act. In upholding preliminary injunctions of an executive order requiring federal contractors and subcontractors to be vaccinated against COVID-19,<sup>108</sup> those Circuits both interpreted the Act to authorize policies that improve the efficiency of the government’s contracting system—not policies that seek to make contractors themselves more efficient.<sup>109</sup> The Sixth Circuit stated, “that goods and services are cheaper has no necessary relationship to whether the government’s system of entering into contracts for those goods and services will be more efficient.”<sup>110</sup>

Even that narrower construction of the President’s Procurement Act powers encompasses the Proposed Rule’s requirements, which would improve the efficiency of the federal government’s system of contracting (in addition to improving the efficiency of contractors’ operations more generally). As noted above, the proposed disclosures would enable federal agencies to understand the climate risks facing major contractors and “develop and improve their own plans to safeguard their assets and missions” through procurement processes.<sup>111</sup> Indeed, enhancing the efficiency of procurement processes and safeguarding the federal supply chain is a primary objective of the Proposed Rule. Moreover, the disclosure requirements provide a basis for evaluating a company’s responsibility where appropriate, and promote competition in contracting by leveling the playing field across prospective contractors. These benefits of the Proposed Rule are closely connected to the federal government’s interests in the contracting process itself, and would fall within even the narrowest reading of the President’s authority under the Procurement Act.

## **B. The Proposed Rule Is in Line with Established Procurement Policy and Practice**

The core mechanisms of the Proposed Rule are annual disclosure requirements and updates to the FAR standard of contractor responsibility,<sup>112</sup> which have long been features of

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<sup>106</sup> Compare, e.g., *Contractors Assoc.*, 442 F.2d at 171; *Chao*, 325 F.3d at 366; *Napolitano*, 648 F. Supp. 2d at 738.

<sup>107</sup> See *Georgia*, 46 F.4th at 1298-1301; *Commonwealth v. Biden*, 2023 WL 164614, at \*7.

<sup>108</sup> Exec. Order No. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021).

<sup>109</sup> See *Georgia*, 46 F.4th at 1295 (the Procurement Act “establishes a framework through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want”); *Commonwealth v. Biden*, 2023 WL 164614, at \*7 (the Act does not authorize “executive action that would make contractors, rather than contracting, more efficient”).

<sup>110</sup> *Commonwealth v. Biden*, 2023 WL 164614, at \*6.

<sup>111</sup> RIA, *supra* note 54, at 11-12.

<sup>112</sup> See 48 C.F.R. § 9.104.

federal procurement policy.<sup>113</sup> These mechanisms are well understood by contractors and agency contracting officers, offer important flexibility for affected companies, and will integrate seamlessly into the FAR.

Disclosure requirements generally, and climate risk-related disclosure requirements in particular, have been a feature of the FAR for years. Since December 2016, the FAR has required certain prospective contractors to make climate risk-related disclosures to help agencies “better understand both direct and indirect greenhouse gas emissions that result from Federal activities.”<sup>114</sup> Specifically, prospective contractors that received \$7.5 million or more in federal contract awards in the prior fiscal year must represent annually whether they publish on a website: (1) “the results of a greenhouse gas inventory, performed in accordance with an accounting standard with publicly available and consistently applied criteria, such as the Greenhouse Gas Protocol Corporate Standard,” and/or (2) “a target to reduce absolute emissions or emissions intensity by a specific quantity or percentage,” and if so, to provide the web address.<sup>115</sup> The Proposed Rule builds on those familiar disclosure requirements.

Notably, the Proposed Rule differs significantly from the disclosure requirements of the so-called “Blacklisting Rule,”<sup>116</sup> which was enjoined by a federal district court<sup>117</sup> and ultimately reversed by Congressional resolution.<sup>118</sup> The Blacklisting Rule amended the FAR to require contractors and subcontractors to publicly disclose information on violations of federal labor laws—including alleged violations pending final determination<sup>119</sup>—and required agency contracting officers to determine whether companies’ reported violations rendered the company “nonresponsible.”<sup>120</sup> In enjoining the Blacklisting Rule, the district court found the rule likely conflicted with federal labor laws.<sup>121</sup> The court also found that the Rule appeared to violate the First Amendment because the Executive “reach[ed] far beyond any claimed impact on government procurement and instead [relied] entirely on speculation in claiming that the burdensome new disclosures of non-final determinations demonstrate any likelihood of poor performance on government contracts.”<sup>122</sup> The Proposed Rule is clearly distinguishable. Unlike the Blacklisting Rule, the Proposed Rule would require disclosure of factual and scientific information about a company’s climate risks, risk management processes, and emissions, and the

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<sup>113</sup> See RIA, *supra* note 54, at 7.

<sup>114</sup> *Id.* 48 C.F.R. §§ 23.802(d).

<sup>115</sup> *Id.* § 52.223-22; see also §§ 23.802(d), 52.212-3(t).

<sup>116</sup> 81 Fed. Reg. 58,562 (Aug. 25, 2016); see also Exec. Order No. 13,673, 81 Fed. Reg. 58,654 (Aug. 25, 2016).

<sup>117</sup> *Associated Builders & Contractors of Se. Texas v. Rung*, No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016).

<sup>118</sup> Joint Resolution, Pub. L. No. 115-11, 131 Stat. 75 (2017).

<sup>119</sup> The Blacklisting Rule required the inclusion of information on “non-final administrative merits determinations, regardless of the severity of the alleged violation, or whether a government contract was involved, and without regard to whether a hearing has been held or an enforceable decision issued.” *Associated Builders*, 2016 WL 8188655, at \*3.

<sup>120</sup> 81 Fed. Reg. at 58,642.

<sup>121</sup> *Associated Builders*, 2016 WL 8188655, at \*8.

<sup>122</sup> *Id.* at \*10.

content of that disclosure would *not* factor into agency contracting officers' responsibility determinations. Additionally, the proposed disclosures are narrowly tailored to advance the federal government's substantial interest in assessing and mitigating the significant, disruptive climate risks facing its supply chain, as discussed above.

An approach that leverages existing voluntary frameworks or third-party validators likewise has precedent under the FAR and the Defense Federal Acquisition Regulation Supplement ("DFARS"). Where "voluntary consensus standards" exist,<sup>123</sup> general policy under the FAR is that agencies "must use" these standards "in lieu of Government-unique standards, except where inconsistent with law or otherwise impractical."<sup>124</sup> While the CDP, TCFD, and SBTi frameworks vary with respect to their adoption in the marketplace, their widespread use across major companies for years meets the FAR's purpose in prioritizing voluntary consensus standards, and their use conveys analogous benefits in terms of standardization, efficiency, and workability. The FAR and DFARS leverage third-party assurance, standard, and certification providers in multiple contexts.<sup>125</sup>

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<sup>123</sup> The FAR defines "voluntary consensus standards" as "common and repeated use of rules, conditions, guidelines or characteristics for products, or related processes and production methods and related management systems.... developed or adopted by domestic and international voluntary consensus standard making bodies (e.g., International Organization for Standardization (ISO) and ASTM-International)." 48 C.F.R. § 2.1.

<sup>124</sup> 48 C.F.R. § 11.101(b).

<sup>125</sup> *See, e.g.*, 48 C.F.R. § 46.202-4 (FAR requirement for "higher-level quality standards [...] in solicitations and contracts for complex or critical items"); 48 C.F.R. § 23.704 (FAR requirement for agencies to use the third-party global Electronic Product Environmental Assessment Tool Product Registry and the Institute of Electrical and Electronics Engineers 1680 Standard for Personal Computer Products in all solicitations and contracts for personal computer products); 48 C.F.R. § 234.201 (FAR requirement for defense contracts valued at \$20 million or more for contractors to have an "earned value management system" that complies with the American National Standards Institute/Electronic Industries Alliance ("ANSI/EIA") Standard 748); 48 C.F.R. § 252.234-7001 (DFARS sample contract clause specifying that solicitations and contracts over \$20 million should reference the most current version of the ANSI/EIA-748 standard available); 48 C.F.R. §§ 204.7503, 252.204-7021 (implementing a cybersecurity program for defense contractors that incorporates third-party assessment and certification).

## VI. Conclusion

The Sabin Center and EDF thank the FAR Council for its attention to the critical risks climate change poses to the federal supply chain, and its consideration of these comments. Please do not hesitate to contact us with any questions.

Respectfully submitted,

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