January 30, 2012

Office of Procurement and Property Management
Procurement Policy Division
MAIL STOP 9306
U.S. Department of Agriculture
1400 Independence Avenue, SW.
Washington, DC 20250-9303

RE: 48 CFR 422 Proposed Rule
Requiring Federal Contractors to Certify Compliance with Labor Laws

Ladies and Gentlemen:

Thank you for providing an opportunity to comment on the proposed amendment to the U.S. Department of Agriculture's acquisition regulations, which was published at 76 F.R. No. 231 (Thursday, December 1, 2011).

STATEMENT OF INTEREST

The National Chicken Council (NCC) is a trade organization that represents the vast majority of U.S. poultry processors, many of which are Federal contractors, subcontractors, and suppliers who provide poultry products to, among others, schools, hospitals, and soldiers, and would be subject to this requirement.

The National Turkey Federation (NTF) is the national advocate for all segments of the turkey industry, providing services and conducting activities which increase demand for its members' products by protecting and enhancing their ability to profitably provide wholesome, high-quality, nutritious products. Members of the National Turkey Federation include growers, processors, hatchers, breeders, distributors, allied services and state associations, many of which are Federal contractors, subcontractors, and suppliers who provide poultry products to, among others, schools, hospitals, and soldiers, and would be subject to this requirement.

The U.S. Poultry & Egg Association (USPOULTRY) is the world's largest poultry organization. Membership includes producers and processors of broilers, turkeys, ducks, eggs, and breeding stock, as well as allied companies, many of which are Federal contractors, subcontractors, and suppliers who provide poultry products to, among others, schools, hospitals, and soldiers, and

would be subject to this requirement.

COMMENTS

The Notice of Proposed Rule (NPR), which would add new sections 48 C.F.R. § 422.7001 and 48 C.F.R. § 452.222-7001[1] to existing USDA procurement regulations, would require Federal contractors to certify to USDA that they, all their subcontractors at any tier, and suppliers are in compliance with all Federal labor laws, subject to the sanctions imposed by the False Claims Act, 31 U.S.C. § 3229 *et seq.* The NPR also would require Federal contractors to report promptly to contracting officers when formal allegations or formal findings of non-compliance with labor laws are determined. While superficially appealing, the NPR is inconsistent with existing laws and will impose a regulatory burden and potential liability on Federal contractors disproportionate to its purported benefits, which at best duplicate existing legal responsibilities and, at worst, expose contractor to uncontrollable liability, while denying U.S. taxpayers their money's worth in Federal acquisitions.

The NCC, NTF and USPOULTRY oppose this regulation for the following reasons:

I. Federal contractors would be required to report all violations and allegations of violations of all labor laws, as well as determinations by courts or agencies. This offends the Due Process clause and the Fifth Amendment to the U.S. Constitution.

[1] The full text of the proposed contract clause reads as follows:

> In accepting this contract award, the contractor certifies that it is in compliance with all applicable labor laws and that, to the best of its knowledge, its subcontractors of any tier, and suppliers, are also in compliance with all applicable labor laws. The Department of Agriculture will vigorously pursue corrective action against the contractor and/or any tier subcontractor (or supplier) in the event of a violation of labor law made in the provision of supplies and/or services under this or any other government contract. The contractor is responsible for promptly reporting to the contracting officer when formal allegations or formal findings of noncompliance of labor laws are determined. The Department of Agriculture considers certification under this clause to be a certification for purposes of the False Claims Act. The Department will cooperate as appropriate regarding labor laws applicable to the contract which are enforced by other agencies.

76 F.R. No. 231 (Thursday, December 1, 2011).

A cornerstone of the U.S. Constitution is the presumption of innocence; in our legal system, a person is presumed innocent until guilt has been proved through due process of law. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger...." U.S. Const., Amdt. 5. *See also* United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). By requiring Federal contractors to include *allegations* of violations of all applicable labor laws, this regulation ignores due process and burdens the reporting contractor with a duty to report allegations against itself and its subcontractors, of any tier, and suppliers that may prove to be groundless. These baseless allegations could be used to deny a contractor an award that would otherwise be beneficial to the Federal government or to justify debarment proceedings.

Requiring the reporting of mere allegations also is inconsistent with the due process requirements for suspension and debarment proceedings. The causes for suspension or debarment do not include mere allegations, but do include actual violations of certain criminal and civil laws. 7 C.F.R. §§ 3017.700, 3017.800; see 48 C.F.R. §§ 9.406-2, 9.407-2. Notably, violation of labor laws is not among the list of offenses that justifies debarment. In addition, suspension is not appropriate unless the suspending official has *adequate evidence* that there may be cause for debarment and concludes that *immediate action is necessary* to protect the Federal interest. 7 C.F.R. § 3017.605. Furthermore, debarment is not appropriate unless the debarring official concludes, based on a *preponderance of the evidence*, that the contractor engaged in conduct that warrants debarment. 7 C.F.R. § 3017.605. In other words, there must be enough evidence to demonstrate that a violation has occurred and mere allegations are not evidence. The courts also have held that debarment cannot be based on mere allegations. See Herman B. Taylor Construction Co. v. Barram, 203 F.3d 808 (Fed. Cir. 2000).

In addition, the Proposed Rule suffers from vagueness. What does "all applicable labor laws" mean? What does "corrective action" mean? What does "violation of labor law" mean? What does "formal allegations" mean? What does "formal findings of non-compliance of labor laws" mean? For example, the phrase "labor laws" could be construed narrowly to refer to complaints of unfair labor practices or, broadly, to include allegations of discrimination and harassment giving rise to charges to the Equal Employment Opportunity Commission (EEOC) or the Office of Federal Contractor Compliance Programs (OFCCP) at the Department of Labor. Many states also have their own enforcement agencies that investigate complaints of harassment or discrimination in the workplace. Would a complaint of alleged violation of the Occupational Safety and Health Act qualify as a "labor violation"? It is very easy, and costs nothing, for employees to file complaints with such agencies, and not all complaints are determined by those agencies, or by the courts, to be meritorious. It would be not only burdensome to require contractors to report all such allegations,

as well as potentially misleading, since experience demonstrates that a substantial majority of such complaints are, after a thorough investigation, determined to lack merit.

Every major U.S. Corporation is likely to face some type of charge or some type of investigation. How is such a charge or investigation to be reported? For example, certain major U.S. corporations, such as WalMart are known to have hundreds of pending cases, some involving millions of potential class members. How is WalMart's "labor" violation record to be compared to a much smaller employer that only has a handful of charges but a much larger proportion of charges on per-employee basis? In the same way, how is one to evaluate the "seriousness" of the charge? For example, WalMart is defending national class action litigation that involves a claim of "corporate culture" discrimination and literally millions of female employees that have been under paid. How does that compare to another employer, which involves not a claim of millions of employees, but a claim dozens of employees have been wrongly discharged? Should contracting officers review the evidence supporting the charges? Should contracting officers obtain the positions of the employers on the merits of the charges?

It would be not only burdensome to require contractors to report all such allegations, as well as potentially misleading, since experience demonstrates that a substantial number of such complaints are, after a thorough investigation, determined to lack merit.

II. The NPR offends Constitutional free-speech protections, if the employer's speech is alleged to violate labor law, as when an employer exercises its rights under the National Labor Relations Act (NLRA) to inform employees about the disadvantages to Union representation during an organization campaign.

A contractor's interest in free speech may be infringed if the exercise of its rights produce an allegation of unfair labor practices, even if such a charge is later determined to be meritless. The rule is likely to have a chilling effect on free speech. An employer is less likely to exercise its free speech rights in a union election campaign because the union would retaliate by filing groundless charges in an attempt to threaten the employer's government contracts and future business opportunities. Indeed, the chilling effect goes way beyond a normal situation, as a penalty could be imposed in the form of a denial of government contracting privileges when the charges are groundless. Further, why isn't this a "prior restraint" on protected speech? In Allentown Mack Sales and Service, Inc. v. N.L.R.B., 522 U.S. 359, 118 S.Ct. 818 (1998), the employer petitioned for review of order of the National Labor Relations Board (NLRB) requiring it to recognize and bargain with union after the Board found that the employer had committed an unfair labor practice by polling employees concerning union support without a good-faith

reasonable doubt as to whether the union enjoyed majority support. The Supreme Court upheld the Board's "good faith" standard for the employer polling, but found that in this case, the Board had failed to support its finding that the employer lacked good faith with substantial evidence, and ruled for the employer. *See also* NLRB v. Gissel Packing Co., 395 U.S. 575, 616-617, 89 S.Ct. 1918, 1941-1942, 23 L.Ed.2d 547 (1969) (recognizing employer's interest in exercise of free speech).

The Proposed Rule would have required the employers in Gissel and Allentown to report the labor law complaints made against them as "labor violations," even though those complaints ultimately were invalidated by the Supreme Court. Denying opportunities to supply the U.S. Government's needs on the basis of mere complaints is not good policy.

It is important to note that National Labor Relations Act (NLRA) preemption doctrine applies equally to the Executive Branch of government as it does to the States. As noted by the D.C. Circuit Court in a case brought by the U.S. Chamber of Commerce and others challenging an Executive Order signed by President Clinton related to permanent replacement of striking workers, "the principles developed [in cases challenging state action based on NLRA preemption] … have been applied equally to Federal governmental behavior that is thought similarly to encroach into the NLRA's regulatory territory." Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996). The Proposed Rule similarly encroaches into the NLRA's regulatory territory. The primary activity that the proposal seeks to regulate is the reporting of violations and of allegations of violations of labor laws. Such authority has been given to the National Labor Relations Board and not to the Department. Furthermore, the Proposed rule may affect the exercise of free speech by employers related to whether or not employees should organize and bargain collectively or the manner in which they should do so. Employer free speech is a central component of the NLRA. As the NLRB has articulated, "Congress has already determined, as a matter of national labor policy, that employer free speech serves employee free choice." Brief for National Labor Relations Board as Amicus Curiae at 28, Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004) (Nos. 03-55166; 03-55169), *rev'd* 463 F.3d 1076 (9th Cir. 2006) (en banc), *rev'd sub nom.* Chamber of Commerce v. Brown, 554 U.S. 60 (2008).

The Proposed Rule encroaches on these rights. This encroachment is easiest to see in the case of Federal contractors for whom the entirety of their business consists of Federal contracts that would be amended by the Proposed Rule. For these contractors, the Proposed Rule amounts to a gag order with respect to speech related to unionization, a concept that is in direct conflict with the NLRA that instead reflects "congressional intent to encourage free debate on issues dividing labor and management."Linn v. Plant Guard Workers, 383 U.S. 53 (1966). Employers

who are Federal contractors will have no real choice but to forego free speech rights guaranteed by the NLRA.

III. The Proposed Rule makes contractors vulnerable to groundless allegations, giving potential accusers leverage over their employers. An accuser could subject a contractor to liability for failure to report, or repercussions for reporting, a "violation" even if the accuser knows the claim ultimately will prove false.

Unfortunately, it is not at all unusual for charges of unfair labor practices (ULPs) to proliferate when an organizing campaign is being conducted. Requiring such charges to be reported not only would place an additional burden on the employer to report potentially unjustified and certainly unproven charges, but also would give unions additional, unfair leverage over employers.

Unions are known for using so-called "corporate campaigns," in which many groundless charges are filed against an employer just to put pressure on the employer. "Corporate Campaigns and the NLRB: The Impact of Union Pressure on Job Creation," Hearing before the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, Serial No. 112-24, May 26, 2011. It is not uncommon for a union to file hundreds of NLRB, OSHA, and EEOC charges against the employer, or for a union to supply hidden tape recorders to employees in an effort to "bait" supervisors to make inappropriate statements. Thus, an employer may appear to have a lot of "alleged violations" and may not be awarded a contract or may be disbarred from government contracts simply by being picked for such a "corporate campaign" without regard to the merits of the charges.

IV. The Proposed Rule is inconsistent with the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 3105.

CICA is supposed to guarantee that competition for contracts with the Federal government is free and open, and that contracts will be awarded based on merit. according to market-oriented criteria such as price and quality. Criteria such as Union participation or a record of Equal Employment Opportunity Commission (EEOC) or Office of Federal Contract Compliance Programs (OFCCP) investigations should play no part in the award of contracts, according to CICA.

Administrations have attempted to impose social responsibility requirements on Federal contractors for decades, with very mixed results. *See, e.g.*, The High Price Of Campaign

Promises: Ill-Conceived Labor Responsibility Policy, by Kelly Sherrill and Kate McQueen, 30 Pub. Con. L. J. 267 (2001). The authors, critiquing a notice of proposed rulemaking (NPRM) in many ways comparable to the USDA's proposed regulation, point out that imposing "social responsibility" requirements on Federal contractors (1) politicizes the Federal procurement process, (2) disposes of current policies and systems for determining contractor responsibility, (3) creates confusion through vague language, (4) infringes upon contractors' due process rights, (5) usurps congressional power, (6) adversely affects small businesses, and (7) sets an untenable goal for contractors that even the Federal government itself cannot meet. All of those criticisms apply with equal force to this proposal.

Whenever the contracting authority is required to consider factors other than price and quality in awarding Federal contracts, the U.S. economy and taxpayer suffer because competition is undermined.

V. The Proposed Rule would in fact impose significant recordkeeping and reporting burdens on contractors.

To comply with this regulation, it appears that contractors will be required to certify and audit not only their own, but also their subcontractors' and suppliers,' records to identify any violations or allegations of violations of labor laws. This inquiry will take time and add to overhead, which will be reflected in increased costs passed along to the U.S. Government and the taxpayer. The amount of time required to research and prepare a certification will not be insignificant. As a point of comparison, it is widely estimated that it requires approximately 180 hours for an employer to prepare an initial Affirmative Action Plan (AAP), and nearly 75 hours each year thereafter to update it.

Because the Proposed Rule would require a contractor to certify not only its own compliance, but that of its subcontractors and suppliers, the costs and the liability will be multiplied. A contractor could be subjected to liability for a subcontractor's failure to disclose a pending complaint, even if the contractor is diligent in trying to collect that information.

Some contractors may have long-term contracts with their subcontractors. Is an employer supposed to breach or threaten to breach such a subcontract simply because the subcontractor is charged with a violation of a labor law? Further, any effort to "audit" subcontractors raises "separate employer" issues under the Federal labor laws. A contractor that takes such actions may be deemed a joint employer; thus the Proposed Rule interferes with general concepts of employer liability and responsibility.

VI. Contractors could face serious liability under the False Claims Act for conspiracy, including treble damages and attorneys' fees, for what could amount to no more than a failure to certify and report matters which already will have been made known to Federal enforcement agencies such as the NLRB or the EEOC.

The False Claims Act (FCA), 31 U.S.C. §§ 3729–3733, prohibits submitting false or fraudulent claims for payment to the United States, § 3729(a), and authorizes qui tam suits, in which private parties bring civil actions in the Government's name, § 3730(b)(1). The FCA includes a public disclosure bar, which generally forecloses qui tam suits that are "based upon the public disclosure of allegations or transactions ... in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." § 3730(e)(4)(A).

Disgruntled employees have attempted to use the FCA to win damages and attorneys' fees from their employers by claiming that the employers have failed to comply with other "responsible contractor" legislation. In Schindler Elevator Corp. v. U.S. ex rel. Kirk, 131 S. Ct. 1885 (2011), a former employee asserted that his employer had failed to submit annual reports to the Federal government required by the Vietnam Era Veterans Readjustment and Recovery Assistance Act (VEVRAA), 38 U.S.C. § 4212(d)(1). The Supreme Court held that a Federal agency's written response to a request for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, constituted a "report" within the meaning of the public disclosure bar, and could not be the basis for Kirk's FCA lawsuit.

While Schindler was a vindication for the employer, and created a "safe harbor" for documents received from the Government via FOIA requests, the case illustrates some of the serious and expensive consequences associated with using the FCA as a tool for enforcing reporting of violations and allegations of violations of labor laws. The employer in Schindler narrowly escaped liability for alleged failure to make adequate reports under VEVRAA, reversing the Second Circuit, which had held the employer liable.

We are not aware of any other regulations that impose liability under the FCA for failure to report violations or allegations of violations of labor laws. This new requirement extends way beyond past experiences with such regulatory rules.

The rule also creates a potential for abuse by competitors. For example, many government agencies conduct investigations based on anonymous complaints, and Immigration and Customs Enforcement (ICE) reports that it believes many of the complaints that ICE receives come from competitors. One can only imagine the potential for abuse if competitors sponsor or otherwise

encourage or support the reporting of unproven allegations against a government contractor, in order to gain competitive advantage over that contractor.

USDA's proposed regulation, which would employ the FCA to enforce the labor violation reporting requirement, would expose Federal contractors to the hazards of *qui tam* lawsuits as well as government prosecution merely for unreported violations or allegations of labor law violations that are unrelated to whether the contractor provided the goods or services to the Federal government for which it seeks payment. This, in turn, will add to the costs of being a Federal contractor and drive up the costs of goods and services supplied to the United States.

Furthermore, whether a contractor or its subcontractors and suppliers have violated or have allegedly violated labor laws should have absolutely nothing to do with whether the contractor is paid for the goods and services that it provides to the Federal government. The Federal government should not be in the position to delay, deny or recover payment for goods and services that the contractor has provided merely because the contractor failed, either intentionally or unintentionally, either in whole or in part, to report violations or allegations of violations of Federal labor laws by the contractor or its subcontractors or suppliers.

VII. The Proposed Rule places unacceptable and extraordinary administrative burdens on an overworked Federal acquisition workforce.

The pressures and demands on Federal acquisition personnel have reached a breaking point and it cannot reasonably be expected to implement and administer a proposed rule of this magnitude. As drafted, hundreds of thousand of hours of critical contracting workforce time would be required to modify existing contracts and to enforce and administer the rule. The Proposed Rule makes no attempt to account for the extraordinary use of contracting workforce resources to implement and enforce this rule. The Proposed Rule has clearly not considered costs associated with contracting officer time and effort.

Furthermore, in many instances, contractors will demand and be entitled to compensation for the costs of implementation and compliance with the new Labor Law Violations contract clause. The contracting officer's time for negotiation of a modification involving significant compensation for these costs could take in excess of 20 hours per modification per contract. Considering, the thousands of active contracts at the USDA, the USDA has significantly underestimated the effect and expense of requiring the modification of pre-existing contracts to require compliance with the new contract clause. The burden on contracting officers to simply modify pre-existing contracts will be an extraordinary expenditure of precious Federal resources that could be better spent focusing on higher priority contract issues.

In addition, as part of contract administration, contracting officers with very little guidance from the Proposed Rule will be forced to determine if contractors are complying with the Labor Law Violations contract clause; (2) how a non-compliant contractor should be treated; (3) whether contract performance must be delayed or contract payment withheld for non-confirmation or non-compliance; and (4) how much contractors can charge to their contracts as allowable costs for implementing and administering the Proposed Rule's requirements within their companies. This burden and complexity of these administrative duties cannot be underestimated. Moreover, contracting officers are left with no guidance regarding whether a failure to comply with the Labor Law Violations contract clause will be grounds for termination for default, suspension, debarment, or negative past performance evaluations.

In formulating the final rule, the USDA must consider, and attempt to limit, the costs and burden of this rule on the contracting workforce. The burden must be considered in terms of both expense and added stress to an already overburdened contracting workforce. Federal agencies must also recognize that Congress has already struck an intricate balance among effective labor law enforcement, avoiding burdens on employers, and preventing discrimination—a balance the Proposed Rule should not upset. If improving the Federal acquisition workforce is a priority, it cannot be done by imposing extraordinary labor law enforcement initiatives on the contracting workforce.

VIII. Flowing down the Labor Law Violations requirement to all tiers of subcontractors and suppliers is extraordinarily burdensome and the enforcement of such a requirement is unclear.

The Proposed Rule includes an extraordinary mandate to flowdown the Labor Law Violations requirements to all tiers of subcontractors. This mandate alone will significantly decrease the number of commercial companies that provide services at the subcontract level. Subcontractors enjoy the benefit of not being in privity of contract with the government and thus avoid many of the significant contract requirements and responsibilities incumbent upon a prime Federal contractor. Because of the additional burdens to be a prime Federal contractor, many companies have business models that focus solely on being a subcontractor in order to avoid the morass of all the contracting regulations and requirements. Many current subcontractors will simply refuse to provide services if the cost of providing services include reporting violations and allegations of violations of labor laws. In addition, the Proposed Rule does not clarify a prime Federal contractor's responsibility to ensure compliance with labor laws by all tiers of subcontractors. Since the Federal government will not be in privity of contract with the subcontractors and these companies are often not identified to the government, it is unclear how enforcement would flow down from prime Federal contractors. At a minimum, the Proposed

Rule should explicitly state that prime Federal contractors are not liable for their subcontractors' intentional misconduct or negligence in failing to report violations or allegations of violations of labor laws.

IX. The Proposed Rule does not comply with the Regulatory Flexibility Act (RFA).

The RFA requires agencies to perform an Initial Regulatory Flexibility Analysis (IRFA) when conducting notice and comment rulemaking. 5 U.S.C. §603(a). One exception to this requirement is available only if "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. §605(b). If such a certification is made, the agency must publish the certification along with the Notice of Proposed Rule Making and must include a statement providing the factual basis for the certification. Id. In this case, the USDA made such a certification, but did not include a statement providing the factual basis for the certification.

It is apparent that no IRFA was conducted in conjunction with the proposed rule. All too frequently it seems that agencies seek to avoid performing an IRFA if at all possible, even though OMB policy strongly favors conducting such an analysis. Responsible regulations do not suffer from increased scrutiny and debate that often surrounds an IRFA.

As justification for failing to conduct an IRFA, the USDA certifies that the proposed rule will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act. The Department asserts that no additional submission is required, that the rule will not have a significant impact of the small business community or on a substantial number of small businesses. The Department then invites comment on the potential impact of the rulemaking on small businesses. There is not one reference to any fact supporting the Department's conclusory statements.

This approach is inconsistent with the RFA. A certification must include, at a minimum, a description of the affected entities and the impacts that clearly justify the "no impact" certification. The agency's reasoning and assumptions underlying its certification should be explicit in order to obtain public comment and thus receive information that would be used to re-evaluate the certification. Clearly, an agency should identify the scope of the problem and the impact of the solution on affected entities before moving forward with a regulatory proposal. *See* SBA OFFICE OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT at 8-9, available at http://www.sba.gov/advo/laws/rfaguide.pdf.

The lack of analysis is significant because the Proposed Rule affects not only contractors with contracts that exceed the simplified acquisition threshold but also those who are subcontractors at any tier and suppliers to those contractors. In other words, the Proposed Rule requires the contractor to certify that its subcontractors and suppliers, including the small office supply company from which it purchases the paper for the invoice it submits to the Federal government, complies with all applicable labor laws. Given the potential for actions under the False Claims Act, the USDA should anticipate that the contractor will require certification of compliance with all applicable labor laws from its subcontractors at any tier and suppliers and that such requirements are a necessary consequence of this Proposed Rule.

X. The Proposed Rule does not comply with the Paperwork Reduction Act.

One of the purposes of the Paperwork Reduction Act is to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government." 44 U.S.C. § 3501(1). The OMB is responsible, with respect to the collection of information and the control of paperwork, for reviewing and approving proposed agency collections of information, for coordinating the review of the collection of information associated with Federal procurement and acquisition, and for minimizing the Federal information collection burden, with particular emphasis on those individuals and entities most adversely affected. 44 USC § 3504(c).

The USDA's conclusion that the Paperwork Reduction Act does not apply is erroneous. The Proposed Rule states that the contractor "is responsible for promptly reporting to the contracting officer when formal allegations or formal findings of non-compliance of labor laws are determined." The Proposed Rule also requires contracting officers to "report violations to the Office of Procurement and Property Management, Procurement Policy Division, within two working days following notification by the contractor." According to the plain language of the Proposed Rule, the USDA is collecting information from the contractor relating to Federal procurement and the USDA is using that information within the government. Thus, the information collection and reporting features of the Proposed Rule certainly are covered by the Paperwork Reduction Act.

XII. The Proposed Rule does not comply with Executive Orders 12866 and 13563.

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. There is no evidence that the USDA made an assessment of all the costs

and benefits of available regulatory alternatives. There is no evidence that the regulation is necessary, particularly given the fact that other Federal agencies are responsible for enforcement of labor laws. Furthermore, there is no evidence that the Proposed Rule maximizes net benefits. In fact, it is more likely that the reporting requirement has a negative effect on the Federal government and its contractors. The proposed rule does not save money. The proposed rule does not improve the delivery of goods and services. The Proposed Rule does nothing to improve the efficiency of the Federal government or of its contractors.

Furthermore, the NPR makes the nonsensical statement: "The Office of Management and Budget (OMB) designated this rule as not significant according to Executive Order 12866 and therefore this rule has not been reviewed by OMB." If OMB has not reviewed the rule, how can OMB properly designate the rule as not significant?

Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The NPR provides no evidence indicating that the USDA has quantified the costs and benefits of the Proposed Rule. It is clear that the Proposed Rule does nothing to reduce costs and actually will result in increased costs for the Federal government and its contractors. There is no evidence that the Proposed Rule is an effort to harmonize rules or to promote flexibility.

XII. The NPR does not comply with the Unfunded Mandates Reform Act of 1995.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies, unless otherwise prohibited by law, to prepare written statements before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in State, local, or tribal government and private sector expenditures, in the aggregate, of $100 million or more in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published. Section 202 requires such statement to: (1) identify the provision of Federal law under which the rule is being promulgated; and (2) contain specified estimates and analyses.

The NPR asserts that the Proposed Rule contains no Federal mandates under the regulatory provisions of the UMRA, but there is absolutely no evidence that this statement is true. In fact, given the vast amount of purchases made by the Federal government through the Department from many contractors, it is entirely conceivable that the information collection and reporting costs to the contractors could well exceed $100 million in any one year.

XIII. There is no express statutory authorization for the Proposed Rule.

It is also significant to note that the Proposed Rule is based only on the general rulemaking authority of the Department under 5 U.S.C. § 301 and 40 U.S.C. § 486(c). The Proposed Rule is not based on any statute expressly authorizing or requiring the Department to include the Labor Law Violations contract provision in Federal procurement contracts. For example, there is no provision of the Federal Property and Administrative Services Act of 1949 that authorizes or requires the Department to issue the Proposed Rule. See 40 U.S.C. § 101, et. seq.

XIV. What are the consequences if the contractor cannot make the certification or fails to report violations or allegations of violations of labor laws?

The Proposed Rule does not address what happens if the contractor cannot provide the certification because of violations of applicable labor laws by the contractor or its subcontractors and suppliers at any tier. Does it really make sense to not award a contract to a capable and reliable contractor simply because of labor law violations by the contractor or its subcontractors and suppliers? Does it really make sense to delay or deny payment under a contract to a capable and reliable contractor simply because of labor law violations by the contractor or its subcontractors and suppliers? Does it really make sense to begin debarment proceedings for a capable and reliable contractor simply because of labor law violations by the contractor or its subcontractors and suppliers? Does it really make sense to begin debarment proceedings for a capable and reliable contractor simply because of a failure to report violations or allegations of violations labor laws by the contractor or its subcontractors and suppliers, whether intentional or unintentional? The NCC, NTF and USPOULTRY contend that the certification and reporting requirements are not good policy.

XV. The Proposed Rule would create many other issues.

The Proposed Rule will have many unintended consequences, including without limitation the following:

- Labor and Employment Laws: Agency determinations of systemic or class discrimination by the OFCCP or EEOC, adverse OSHA or wage-hour findings, and NLRB ALJ ULP determinations all could place in jeopardy a contractor's "responsible" status despite the fact that none is a final adjudication. The Proposed Rule does not take into account that federal labor laws have carefully crafted remedies. For some of these laws, debarment from federal contracts for a period of time is one possible option, though for many laws it

is not. Furthermore, when debarment is an option, due process protections are available to be sure the remedy is an appropriate sanction. The amendment also does not take into account that under many federal labor laws intent is irrelevant. Employers can be in violation even though they never intended to undertake inappropriate conduct. Furthermore, it is very easy for even the best intentioned employer to make a mistake, for example with respect to paperwork or technical requirements. In this respect, it is worth emphasizing that the requirements of our employment laws—described through hundreds of pages of statutes, thousands of pages of regulations and countless court interpretations—are often far from clear. Indeed, government agencies often disagree with regard to the meaning of the very laws they enforce.

- Misuse of Information: The Proposed Rule requires collection of a significant amount of information. Yet, the rule provides no guidance to contracting officers as to how to utilize this information. Many contracting officers may lack the experience and/or training necessary to assess the weight of the various types of information.
- Disclosure of Contractor Information: The information likely is to be the target of Freedom of Information Act ("FOIA") requests by private citizens and watchdog groups leading to the potential disclosure of contractor-sensitive data.
- Delay to the Acquisition Process: As a result of the amount of information contracting officers may need to review as a result of the rule, and their efforts to collect additional information from contractors so as to document the file with an explanation for their award decision, including to support for awards to contractors with apparent adverse matters in their database, the acquisition process is likely to be further protracted by this new rule.
- Increase in Suspension and Debarment Inquiries/Actions: The rule is likely to generate a significant increase in referrals to suspension and debarment officers from contracting officers. Such an increase in referrals, in turn, is likely to result in additional inquiries from agency suspension and debarment officials to contractors in the form of requests for information and show cause letters. Contractors will be required to incur the cost and disruption of preparing present responsibility submissions, in many cases likely stemming from dated and insignificant matters.
- Increase in Bid Protests: Bid protests alleging erroneous and unreasonable agency decisions as to responsibility determinations are likely to increase. Not only will contract performance under these protested contracts be delayed, but the government and contractors will be required to spend considerable sums of money to resolve them.
- Decreased Contractor Incentive to Enter Into Administrative Agreements: The rule may act to discourage contractors from entering into administrative agreements concerning suspension and debarment because such agreements or the substance thereof could be used by a contracting officer to find a contractor non-responsible for a procurement,

despite the additional undertakings to which the contractor agreed, including remedial measures, enhancements to their compliance program, and new internal controls.

- De Facto Debarment: The compilation of apparent negative data may result in agencies repeatedly denying a contractor awards based on responsibility concerns without following the debarment procedures in violation of law and the contractor's due process rights.

CONCLUSION

The NCC, NTF and USPOULTRY oppose the proposed amendment to the USDA's acquisition regulations. This amendment should be withdrawn. Alternatively, USDA should conduct a full notice-and-comment proceeding, including public hearings, to develop the public record before this regulation is adopted. The NCC, NTF and USPOULTRY are confident that, if the public understands the full implications of the proposed rule change, this amendment will not be adopted.

Thank you for providing us an opportunity to comment on this proposed regulation.

Sincerely,

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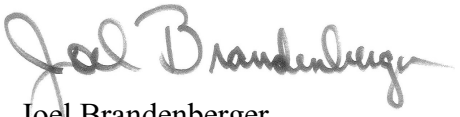

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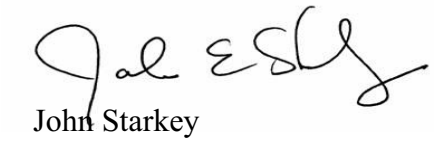

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