December 20, 2013

Via Federal eRulemaking Portal

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F. Street, NW, 2nd Floor
Washington, D.C. 20405-0001
Fax: (202) 501-4067

Re: Comments to the Federal Acquisition Regulation: Ending Trafficking in Persons (FAR Case No. 2013-001)

Dear Ms. Flowers:

The Society for Human Resource Management (“SHRM”) and the Council for Global Immigration (“the Council”), a SHRM affiliate, are pleased to submit these comments in response to the FAR Council’s Notice of Proposed Rulemaking titled, “Federal Acquisition Regulation; Ending Trafficking in Persons,”1 which was published in the Federal Register on September 26, 2013 (hereinafter “NPRM”).

I. BACKGROUND ON SHRM AND THE COUNCIL

SHRM is the world’s largest association devoted to human resource (“HR”) management. Representing more than 250,000 members in over 140 countries, SHRM serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

The Council is comprised of over 200 corporations, universities and research institutions engaged in the global movement of talent. The Council members are the in-house professionals responsible for ensuring compliance with immigration and related employment laws worldwide. Founded in 1972, the Council is the only employer network dedicated to employment-based immigration.

With many federal contractors among our members, both SHRM and the Council strongly support efforts to eliminate trafficking in persons in federal contracting.

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II. OVERVIEW OF THE COMMENTS AND RECOMMENDATIONS

SHRM and the Council strongly support the U.S.’s zero-tolerance policy with respect to Government employees and contractor personnel engaging in any form of human trafficking activities, and, specifically, the important mission of ensuring that U.S. tax dollars do not contribute to human trafficking anywhere in the world. To this end, both SHRM and the Council support modifications to the FAR that would clarify for Government contractors and subcontractors the steps necessary to comply with this zero-tolerance policy.

Following a thorough review of the NPRM and consultation with federal contractors, we have concluded that, although the intent behind the proposed regulations is the furtherance of an important global objective, as drafted, the regulations place impractical compliance obligations and unreasonable burdens on contractors. Most importantly, the regulations, as proposed, are not likely to result in effective programs being implemented by federal contractors to ensure that U.S. funds do not flow down to organizations engaged in human trafficking activities. In some provisions, the proposed regulations improperly seek to expand the contractor obligations beyond those statutory duties that are prescribed by the National Defense Authorization Act for Fiscal Year 2013 (“NDAA”). Our overarching concern is that the proposed regulations cannot be effectively implemented or enforced in their current form. In a nutshell, as proposed, the regulations impose far-reaching responsibilities on federal contractors that realistically cannot be fulfilled. Accordingly, in an attempt to address these shortcomings, SHRM and the Council respectfully submit the following comments to the NPRM to assist the FAR Council in promulgating effective regulations. Our goal is to provide specific recommendations so that when implemented, the final regulations will more effectively enable contractors to prohibit and detect human trafficking within contractor supply chains, and will impose appropriate, proportional corresponding liabilities for failing to meet these obligations.

At the outset, we note that both SHRM and the Council understand that the FAR Council is constrained in drafting regulations that comport with the framework set forth in Executive Order No. 13627, Strengthening Protections against Trafficking in Persons in Federal Contracts, and the NDAA, which contained the Ending Trafficking in Government Contracting Act. Our comments provide functional alternatives to the proposed regulations and propose practices and procedures that necessarily comply with the statutory requirements.

We look forward to working with the FAR Council to improve the proposed regulations to achieve the shared goal of combatting human trafficking.

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III. COMMENTS ON PROVISIONS OF THE FAR NPRM

A. Compliance Plan and Certification Requirements

In the case of contracts in which the value of services performed outside the United States exceeds $500,000, the NDAA mandates the establishment of minimum requirements for contractor compliance plans and procedures. With regard to required certifications, the NDAA mandates that:

The head of an executive agency may not provide or enter into a grant, contract, or cooperative agreement if the estimated value of the services required to be performed under the grant, contract, or cooperative agreement outside the United States exceeds $500,000, unless a duly designated representative of the recipient of such grant, contract, or cooperative agreement certifies to the contracting or grant officer prior to receiving an award and on an annual basis thereafter, after having conducted due diligence, that—

(1) the recipient has implemented a plan to prevent the activities described in section 7104(g) of this title, as amended by section 1702, and is in compliance with that plan;

(2) the recipient has implemented procedures to prevent any activities described in such section 7104(g) of this title and to monitor, detect, and terminate any subcontractor, subgrantee, or employee of the recipient engaging in any activities described in such section; and

(3) to the best of the representative’s knowledge, neither the recipient, nor any subcontractor or subgrantee of the recipient or any agent of the recipient or of such a subcontractor or subgrantee, is engaged in any of the activities described in such section.4

The NDAA also provides that any plan or procedures implemented pursuant to subsection (a) “shall be appropriate to the size and complexity of the grant, contract, or cooperative agreement and to the nature and scope of its activities, including the number of non-United States citizens expected to be employed.”5

With these statutory requirements in mind, we recommend alternative provisions to the specific, prescribed requirements that are mandated by the proposed regulations. Simply stated, based on our experience and the feedback we have received from our members, we firmly believe that federal contractors will not be able to meet the requirements as stated in the proposed regulations. As a result, the proposed regulations fail to meet the shared goal of preventing and eliminating human trafficking.

5 Id. at § 1703(b) (codified at 22 U.S.C. § 7104a(b)).
1. **Pre-Award Certification Requirements – Section 22.1703 of the NPRM**

Under Section 22.1703 of the NPRM, prior to the award of a contract, contractors would be required to submit detailed certifications regarding their compliance plans and the conduct of their subcontractors.\(^6\) Based on the input of our members, we have concluded that many of the proposed certification requirements are not feasible and cannot be met in the actual application of the regulations. Therefore, we recommend that a revised certification process be provided.

As proposed, the pre-contract award certification contains two parts. First, contractors must certify that the contractor has implemented a compliance plan and has implemented procedures to prevent any prohibited activities and to monitor, detect and terminate the contract with a subcontractor or agent engaging in prohibited activities. Second, the certification must state that, after having conducted due diligence, either (i) to the best of the contractor’s knowledge and belief, neither it nor its agents, nor any of its subcontractors or their agents, has engaged in any such activities, or (ii) if abuses have been found, the contractor or subcontractor has taken the appropriate remedial and referral actions.\(^7\) While these provisions largely paraphrase the NDAA statutory provisions, the regulations fail to provide meaningful guidance for contractors in fulfilling these requirements.

As a threshold matter, in almost all instances, contractors will not be able to comply with the second requirement of the certification process prior to being awarded a contract. It is reasonable and realistic to require contractors to certify that they, themselves, are not engaged in any activities in violation of the TVPA and that they either have or will implement a compliance plan and procedures to prevent any prohibited activities. However, prior to the actual award of a contract, contractors typically would not be able to provide certifications about their potential subcontractors, or their potential subcontractors’ agents based on the normal sequencing and procedures that are followed in awarding contracts and subcontracts.

To comply with the subcontractor portion of the certification requirement as drafted, contractors would have to reinvent the manner in which they do business and expend significant financial resources prior to being awarded a contract. First, in order to comply with the certification requirements, contractors would be required to identify each of the subcontractors that would be engaged to fulfill the contract prior to being awarded the contract. In addition, each subcontractor would be required to identify each of its possible subcontractors. The prime contractor would then be required—pre-contract award—to expend significant time and resources to perform the required due diligence review of all possible subcontractors, and their agents, in order to certify that, to the best of the contractor’s knowledge and belief, none of the subcontractors or their agents, has engaged in any prohibited activity. Simply put, this is an unreasonable, and unattainable, burden to place on a contractor prior to the actual award of the contract.

\(^6\) 78 Fed. Reg. at 59322, § 22.1703(d).

\(^7\) 78 Fed. Reg. at 59322, § 22.1703(d)(1).
As an alternative to the proposed regulations, we recommend that the pre-award certification provisions be amended to require that the prime contractor submit a certification prior to the award of a contract in which it certifies that it is not engaged in any activities in violation of the TVPA and that, upon award of the contract, the contractor will implement a compliance plan and procedures to prevent any prohibited activities and to monitor, detect, and, in the case of a subcontractor found to be engaging or to have engaged in such prohibited activities, to terminate the contract with a subcontractor. In addition, each subcontractor should be required to obtain the same certification of current compliance and commitment to implement a compliance plan if awarded the subcontract from each of their respective subcontractors prior to awarding a subcontract. Allowing for the subcontractor certification procedures initially and then the compliance program by those entities that are awarded subcontracts will eliminate the burden on potential subcontractors who are not ultimately awarded a contract.

2. **Scope of Certifications and Compliance Plans – Sections 22.1703(d)(3) & 52.222-50(h)(3) of the NPRM**

As proposed, both the certifications and the minimum requirements for the compliance plans place the unreasonable and unattainable burdens on prime contractors to monitor, detect and provide certifications regarding the conduct of each subcontractor, and agent thereof, throughout the supply chain. Under the NPRM certification requirements, contractors would be required to provide annual certifications that “after having conducted due diligence, either (i), to the best of the contractor’s knowledge and belief, neither it nor its agents, nor any of its subcontractors nor their agents, has engaged in any such activities, or (ii), if abuses have been found, the contractor or subcontractor has taken the appropriate remedial and referral actions.” 8 Similarly broad in scope, the proposed minimum requirements of the compliance plans would require contractors to develop “[p]rocedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in trafficking in persons (including activities in paragraph (b)) and to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in such activities.” 9 Again, while these provisions track the NDAA and Executive Order, the Proposed Regulation fails to provide contractors with any guidance on how to comply with the monitoring and detection requirements in the compliance plans and what will be considered sufficient “due diligence” prior to submitting the required certifications.

The NPRM contains no limits on the contractor’s obligation to monitor the activities of all subcontractors, at every tier. A contractor will be required to perform undefined due diligence reviews of all subcontractors down the entire supply chain. Further, the prohibited activities extend beyond actions conducted in the furtherance of the contract; so the conduct of all employees down the supply chain during their personal time is also subject to monitoring. In practical application, the NPRM sets forth an overly burdensome, and likely impossible, monitoring and detecting requirement for a

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prime contractor to administer. The prime contractor will have no contractual relationship with the lower-tier subcontractors and no means of obtaining reliable information from those subcontractors. It is unfathomable how a prime contractor would be able to realistically monitor the conduct of all of the employees of all its subcontractors at any tier and any level…in all aspects of their lives.

SHRM and the Council support the implementation of reasonable and workable compliance plans and certification programs. However, the requirement that prime contractors are directly responsible for monitoring and detecting prohibited activity by any subcontractor at any tier and any dollar value is unduly burdensome on the prime contractor and, in practice, impossible to meet.\(^{10}\) Such a requirement demonstrates a fundamental misunderstanding of the supply chain process and the amount of information and oversight that prime contractors have concerning the subcontractors of their subcontractors.

Often, a prime contractor’s supply chain contains numerous levels of subcontractors, many of whom have no direct contact with or knowledge of the prime contractor. While SHRM and the Council agree with the FAR Council that the prime contractor should bear the responsibility of monitoring the activities of its direct first-tier subcontractors, placing this same responsibility on the prime contractor with regard to each subcontractor all the way down the supply chain is neither efficient nor, more importantly, effective. In order to establish effective mechanisms for attaining this goal, the burden of monitoring subcontractor activity should be placed on the entity that has the most direct contractual relationship with the subcontractor and is, therefore, in a position to efficiently and effectively monitor for prohibited activities.

The FAR Council should modify the proposed regulations to eliminate the requirement that the primary contractor directly monitor each subcontractor at any tier and any dollar value while still meeting the statutory requirements by providing guidance and structure to the due diligence requirements. One alternative that would provide a more reasonable and realistic approach would be to require that each contractor be responsible for monitoring its direct subcontractors, with each subcontractor being similarly responsible to monitor its direct subcontractors. Each subcontractor would, in turn, be responsible for certifying to its efforts back up the supply chain so that the primary contractor would be able to access certifications from each subcontractor with subcontracts.

The American Bar Association (“ABA”) in its draft Model Business and Supplier Policies on Labor Trafficking and Child Labor advocates and recommends this direct contractor responsibility model.\(^{11}\) As of the last draft viewed by SHRM and the Council, the proposed ABA policy is intended to apply only to the prime contractor and its first tier subcontractors. However, if a risk assessment reveals credible evidence that there is

\(^{10}\) In addition, this comment addresses the prohibition against charging recruitment fees in Section III.C.2 below.

\(^{11}\) Neither SHRM nor the Council was directly involved in the drafting of the ABA policy. While we agree with the monitoring provisions contained in the draft policy, SHRM and the Council are not formally endorsing the ABA draft policy.
a material risk of labor trafficking with a specific subcontractor or elsewhere in the supply chain, additional due diligence and monitoring efforts beyond the first tier may be required. Under this draft policy, contractors should encourage and/or require its subcontractors to adopt the policy, which would result in the policy and due diligence efforts extending down the entire supply chain with each contractor or subcontractor being responsible for monitoring its first-tier subcontractors. An approach such as this reflects a balance between the burdens placed on contractors and ensuring that appropriate processes can be put in place to monitor, detect and prohibit human trafficking activities within the contractor supply chain.

A second alternative would be to adopt a “good faith effort” approach. One example of such an approach is the certification requirement in FAR Subpart 22.15, regarding the Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor. Under that provision, contractors must make the following certification:

(c) Certification. The Government will not make award to an offeror unless the offeror, by checking the appropriate block, certifies to either paragraph (c)(1) or paragraph (c)(2) of this provision.

(1) The offeror will not supply any end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in a corresponding country as listed for that end product.

(2) The offeror may supply an end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product. The offeror certifies that it has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture such end product. On the basis of those efforts, the offeror certifies that it is not aware of any such use of child labor.12

This would require the contractor to make a good-faith effort to determine whether its subcontractor was engaged in any of the prohibited activities. As in the child labor certification, termination of the contract or debarment could only be imposed as penalties for contractors that submit a knowingly false certification.

3. **Lack of Safe Harbor or Affirmative Defenses**

One of the most notable deficiencies in the proposed regulations is the lack of a “safe harbor” provision. The NPRM could be read to allow the contracting officer to impose sanctions against a contractor for violations made by the “contractor, contractor employee, subcontractor, subcontractor employee, or their agents,”13 but does not provide

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12 48 C.F.R. § 52.222-18 (c) (as prescribed in 48 C.F.R. § 22.1505(a)) (emphasis added).
contractors with any protections from the potential sanctions even if the contractor, after conducting due diligence, has not been able to detect such violations.

Notably, the NPRM mandates that the contractor notify the contracting officer and the Inspector General, immediately, of “any credible information it receives from any sources . . . that alleges that a [c]ontractor employee, subcontractor, subcontractor employee, or their agent has engaged in conduct that violates [the TVPA].”14 However, there is no safe harbor provision for the reporting contractor. Since contractors could potentially be subject to penalties, up to and including debarment, for the actions of its subcontractors, this notification requirement is essentially a self-incrimination requirement. Arguably, failing to provide contractors with a safe harbor from penalties or other adverse consequences from conduct arising out of conduct within its supply chain discourages contractors from performing proper due diligence – for fear of uncovering trafficking or conduct that would subject the contractor to liability.

In addition, as drafted, the regulations fail to provide an affirmative defense to protect contractors from liability when they have adhered to all mandated compliance efforts. For example, as drafted, a contractor that has a compliance plan in place, actively monitors the activities of all of their subcontractors, properly flows-down these requirements to their subcontractors, and conducts due diligence prior to submitting the required certifications could still be subject to penalties—including debarment—if it is discovered that somewhere in their supply chain an employee of a subcontractor of a subcontractor engaged in any of the defined human trafficking activities wholly unrelated to their work for the subcontractor of the subcontractor. Even if a contractor has a robust compliance and monitoring system, trafficking abuses can be complex, and evidence of such activities can be difficult to uncover—particularly where there are various subcontractors and agents in the supply chain. This cannot be the intended level of liability intended by the FAR Council. Clearly, neither incentivizing the lack of reporting nor attempting to impose absolute, strict liability reasonably should be the outcome of these regulations.

We submit that adding a safe harbor-type provision would avoid such unintended consequences and provide for enhanced compliance by federal contractors. We further note that adding a safe harbor provision would not run afoul of the statutory requirements of the NDAA. Rather, allowing a safe harbor for self-reporting and in recognition of compliance with the due diligence requirements would, in fact, enhance contractor compliance with the statutory requirements. As drafted currently, contractors could be penalized for reporting conduct discovered during a due diligence review. This could be perceived as a disincentive to comply with the regulatory due diligence requirements. By providing a safe harbor, contractors will be incentivized to ensure proper due diligence measures are in place, and to properly report any substantiated allegations of conduct that violated the TVPA. For example, in the child labor provisions, the remedies of suspension or debarment of the contractor are only appropriate if the contractor knew of

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14 78 Fed. Reg. at 59324, § 52.222-50(d).
the violation prior to discovering it through their good faith efforts. These same concepts should be adopted and followed in these regulations for human trafficking.

Accordingly, SHRM and the Council recommend a modification to Section 22.1704(b) to strengthen the protections provided to contractors who are in compliance with the regulations to ensure that all contractors are properly incentivized to fully and completely comply with the regulations.

4. **Adopt a Definition of “Agents” Consistent with the FAR Contractor Code of Business Ethics and Conduct**

As noted above, a contractor will be required to certify that, to the best of its knowledge and belief, its contractors and their agents have not engaged in prohibited activities or that, if abuses have been found, the contractor or subcontractor has taken the appropriate remedial and referral actions. The term “agents” is not defined in the NDAA or the legislative history of the Act, nor do the proposed regulations provide a definition of the term “agents” to be applied to these provisions.

Accordingly, as drafted, the NPRM leaves the determination of whether an individual or entity is acting as an agent of a subcontractor will be left to the federal common law of agency. Under the federal common law, agency is a legal determination that requires the existence of certain facts; it is a mixed question of law and fact to be determined on a case-by-case basis. The contractor will not be privy to information that will enable it to determine whether an individual or entity has the real or apparent authority to act on behalf of a subcontractor, as its agent, and therefore, the contractor cannot in good faith certify that any agent of the subcontractor has—or has not—engaged in prohibited activities.

As an alternative, SHRM and the Council recommend that the FAR Council modify the proposed regulations to adopt the definition of “agent” contained in the FAR Contractor Code of Business Ethics and Conduct (hereinafter “FAR Business Ethics Rule”). Specifically, section 52.203-13(a) of the FAR defines the term “agent” to include “any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.” Adopting this definition of “agent” will provide uniformity across the FAR provisions and provide contractors with a level of consistency and certainty with regard to determining its “agents.”

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15 48 C.F.R. § 22.1504(b).
18 Id. at *8; see also Wolfchild v. U.S., 78 Fed. Cl. 472, 482 (2007).
19 48 C.F.R. § 52.203-13(a).
5. **Projected Reporting and Recordkeeping Burdens**

The NPRM provides an estimate that it will take approximately 24 hours to comply with the compliance plan requirements and 4 hours to comply with the certification requirements.\(^\text{20}\) It is not clear whether these estimates are per contract, or per contractor regardless of the number of contracts held by the contractor. Either way, these estimates materially understate the burdens that federal contractors will incur under the proposed regulations as drafted.

The NPRM requires that contractors develop “procedures to prevent agent and subcontractors at any tier and at any dollar value from engaging in trafficking in persons . . . and to monitor, detect, and terminate any agents, subcontractors, or subcontractor employees that have engaged in such activities.”\(^\text{21}\) If the intent behind the NPRM is to mandate that contractors monitor the activities of their subcontractor at any tier and at any dollar value down their entire supply chain, it is neither practical nor reasonable to estimate such substantial monitoring requirements to take only 4 hours per contract.

B. **Cooperation and Reporting Requirements**

1. **FAPIIS Reporting Requirements – Section 9.104-6 for the NPRM**

The NDAA amends the United States Code provisions governing the information that must be included in the Federal Awardee Performance and Integrity Information System (“FAPIIS”).\(^\text{22}\) Under the NDAA, the head of an executive agency shall ensure that any substantiated allegations that are contained in an Inspector General’s report following a completed investigation be included in FAPIIS “and that the contractor has the opportunity to respond to any such report in accordance with applicable statutes and regulations.”\(^\text{23}\) The Executive Order does not address FAPIIS reporting.

While Section 9.104-6 of the NPRM comports with the statutory text, the regulation fails to provide any framework or structure to the reporting requirements. The proposed regulations fail to set forth the due process requirements for establishing whether allegations are “substantiated.” Further, the proposed regulations fail to set forth the process by which contractors may “respond to any such report in accordance with applicable statutes and regulations.”\(^\text{24}\) Absent clear standards and procedures to determine whether allegations are substantiated and to facilitate the contractors’ opportunity to review, the regulations will create an ad hoc system without consistency or clarity.

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\(^\text{20}\) 78 Fed. Reg. at 59320.  
\(^\text{23}\) Id. at § 1704(d)(1).  
Specifically, the regulations need to include a framework to these reporting and review requirements. The regulations should set forth the process by which the Inspector General determines whether the allegation is substantiated, including the applicable standard of proof. The regulations should also set forth specific procedures for contractor review and rebuttal of the General Inspector report. These procedures should include time periods for review and comment; procedures for submission of rebuttal evidence; an affirmative requirement that the rebuttal evidence be reviewed and taken in to consideration prior to the reporting of information in FAPIIS; and a right, at the discretion of the contractor, to post rebuttal documents on FAPIIS along with the investigative report.

2. **Cooperation Requirement in the NPRM Should be Limited to Federal Agencies as Provided in the NDAA – Section 22.1703(e) of the NPRM**

Under the Executive Order, contractors must “agree to cooperate fully in providing reasonable access to allow contracting agencies and other responsible enforcement agencies to conduct audits, investigations, or other actions to ascertain compliance with the TVPA . . . .” The NDAA clarifies that contractors must “fully cooperate with any Federal agencies responsible for audits, investigations, or actions relating to trafficking in persons.” The NPRM adopts the ambiguous “other responsible enforcement agencies” language of the Executive Order rather than the clear provision of the NDAA. The NRPM provides:

. . . the contractor and subcontractors to cooperate fully in providing reasonable access to their facilities and staff (both inside and outside the U.S.) to allow contracting agencies and other responsible enforcement agencies to conduct audits, investigation, or other actions to ascertain compliance with the Trafficking Victims Protection Act (22 U.S.C. chapter 78), Executive Order 13627, or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor.

The NRPM does not define the phrase “other responsible enforcement agencies.” As drafted, the provisions of this section are overly broad due to the vague and ambiguous requirement that contractors and subcontractors permit “other responsible enforcement agencies” into their facilities to conduct “audits, investigations, or other actions.” This overly broad and vague provision, arguably, would provide carte blanche access to contractor facilities by a wide range of potential entities and agencies, both inside and outside the United States, such as local law enforcement, non-governmental organizations, labor organizations, and potentially a wide array of other entities that otherwise would not have access to a federal contractor’s property, operations, workforce

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and proprietary information. These provisions need to be significantly narrowed to comport with the statute.

SHRM and the Council do not object to the proposed requirement that contractors and subcontractors cooperate with investigations of allegations of TVPA violations in their workplaces. We recommend, however, that the regulations be revised to narrow the facility access requirements to federal agencies as expressly stated in the NDAA. This position is consistent with the statutory language of the NDAA as well as other provisions contained in the FAR. For example, the child labor prohibitions require that the contractor agree “to cooperate fully with authorized officials of the contracting agency, the Department of the Treasury, or the Department of Justice by providing reasonable access to records, documents, persons, or premises upon reasonable request by the authorized officials.”28 A similar provision should be included in the human trafficking regulations so that federal contractors’ duties and obligations relating to investigations are clearly spelled out in a legally sound manner.

3. **NPRM Reporting Requirement Should Permit Internal Investigations to Determine “Credibility” of Information Prior to “Immediate” Reporting – Section § 52.222-50(d) of the NPRM**

Under the NDAA and NPRM, contractors would be required to immediately report to the Contracting Officer and the agency Inspector General any credible information it receives from any source (including host country law enforcement) that alleges a contractor employee, subcontractor, subcontractor employee, or their agent has engaged in conduct that violates this policy . . . .”29 The NPRM does not, however, provide contractors with any guidance on how to determine whether information is “credible” or what triggers the “immediate” reporting requirement.

The FAR currently contains a self-reporting requirement that should be used as the model by the FAR Council for defining the NDAA reporting requirements. Under the FAR Business Ethics Rule, contractors are currently required to timely disclose any credible evidence of violations of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).30 By using different key terms – “immediately” instead of “timely” and “information” instead of “evidence” – the reporting requirements in the NDAA and NPRM create ambiguity. Additionally, the proposed regulations conflict with the FAR provisions. This conflict should be resolved by ensuring that the reporting triggers are consistent.

Through the regulatory drafting process, the FAR Council should strive to create a clear and consistent regulatory scheme and, where necessary, provide context and meaning to otherwise vague statutory provisions. As drafted, contractors have no guidance as to whether they are required to report information “immediately,” or whether they are permitted to first determine that the information is “credible” before their

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28 48 C.F.R. § 52.222-19(b).
29 78 Fed. Reg. at 59324, § 52.222-50(d) (emphasis added).
reporting requirement is triggered. In addition, the NDAA reporting provisions are silent as to whether a contractor has the right to assert its right against self-incrimination and/or the attorney-client privilege during the reporting stage. This is another important issue that is addressed in detail in the FAR Business Ethics Rule.31

In sum, because the FAR Business Ethics Rule are existing provisions with which contractors currently comply, the FAR Council should look to those sections for guidance in crafting the TVPA reporting provision. In order to remedy the inconsistencies and ambiguities, SHRM and the Council recommend that the FAR Council utilize the existing reporting scheme as set forth in the FAR Business Ethics Rule for determining whether the information is “credible.” The revised regulations could direct contractors to FAR 52.203-13 for the purposes of determining whether the information obtained meets the credibility standards, and it is only after the information is deemed credible that a contractor’s immediate reporting requirements are triggered. Through these modifications to the NPRM, the FAR Council will create an unambiguous and consistent reporting standard that federal contractors reasonably can be expected to follow.


1. Use of “misleading information” in recruitment - Section 22.1703(5) of the NPRM

Under the NDAA, the categories of prohibited activities that directly support or advance trafficking in persons were expanded to include “[s]oliciting a person for the purpose of employment, or offering employment, by means of materially false or fraudulent pretenses, representations, or promises regarding that employment.”32 The NPRM deviates from the statutory text by proposing to amend Section 22.1703(5) to prohibit the following activities:

Using misleading or fraudulent recruitment practices, such as failing to disclose basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing (if employer provided or arranged), any significant costs to be charged to the employee, and, if applicable, the hazardous nature of the work.33

The NPRM provision goes beyond the statutorily prohibited activity by proposing to prohibit the use of “misleading” recruitment practices including making “material misrepresentations.” These provisions are vague and ambiguous and improperly expand the scope of prohibited conduct in a manner that cannot be accurately monitored and detected.

31 See 48 C.F.R. § 52.203-13(a).
SHRM and the Council recommend that NPRM Section 22.1703(5) be revised to comport with the statute, which prohibits “materially false” representations. Such a change will ensure that the regulations are consistent with the statutory provisions, which will add consistency and legal certainty in the application of the regulations.

2. Prohibition on Recruitment Fees – Section 22.1703(6) of the NPRM

The Executive Order contains a vague and undefined prohibition against “charging employees recruitment fees.” The NDAA provides clarity and guidance on this restriction by limiting the prohibition to:

(IV) Charging recruited employees unreasonable placement or recruitment fees, such as fees equal to or greater than the employee’s monthly salary, or recruitment fees that violated the law of the country from which an employee is recruited.

The NPRM again ignores the plain language of the NDAA and adopts the broad and ambiguous provision contained in the Executive Order. This blanket prohibition is also adopted by the NPRM in the proposed minimum requirements of the compliance plans. The role of regulatory rule making process is to provide guidance for compliance with statutory requirements. By utilizing the Executive Order’s vague and ambiguous language, the FAR Council has failed to promulgate a meaningful regulatory provision and expressly ignored clarifying statutory language. Accordingly, the proposed regulations should be amended to comport with the statutory text.

In addition, the NPRM fails to provide a definition of “recruitment fees,” which will leave contractors to guess at the regulations intent. SHRM and the Council recommend that the proposed regulations be amended to adopt the definition of “recruitment costs” found in FAR Section 31.205-34, which defines “recruitment costs” as the following:

(1) Costs of help-wanted advertising.

(2) Costs of operating an employment office needed to secure and maintain an adequate labor force.

(3) Costs of operating an aptitude and educational testing program.

(4) Travel costs of employees engaged in recruiting personnel.

(5) Travel costs of applicants for interviews.

(6) Costs for employment agencies, not in excess of standard commercial rates.\(^{38}\)

For these reasons, SHRM and the Council recommend that the proposed regulations be revised to comport with the statutory language of the NDAA, which prohibits charging “unreasonable placement or recruitment fees . . .” and to ensure that there is no ambiguity in the prohibition by providing a definition of “recruitment fees” that is already contained in the FAR.

IV. **CONCLUSION**

SHRM and the Council appreciate the opportunity to submit these comments and would be pleased to provide the FAR Council with additional information or clarification. We look forward to continuing to partner with the FAR Council to effectuate the promulgation of regulations that will reasonable, enforceable and effective regulations that will aid in eliminating human trafficking activities within the federal contractor supply chain.

Respectfully Submitted,

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\(^{38}\) 48 C.F.R. § 31.205-34.