



College and University Professional  
Association for Human Resources

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**VIA Electronic Transmission:** [Procurement@usda.gov](mailto:Procurement@usda.gov) & [Regulations.gov](http://Regulations.gov)

Ms. Lisa M. Wilusz  
Director  
Office of Procurement and Property Management  
Procurement and Policy Division  
U.S. Department of Agriculture  
1400 Independence Avenue SW  
Washington, D.C. 20250

**RE: Agriculture Acquisition Regulation, Labor Law Violations  
Direct Final Rule (76 Fed. Reg. 74722, December 1, 2011), RIN 0599-AA19 and  
Proposed Rule (76 Fed. Reg. 74755, December 1, 2011), RIN 0599-AA19**

Dear Ms. Wilusz:

The Society for Human Resource Management (SHRM) and the College and University Professional Association for Human Resources (CUPA-HR) appreciate this opportunity to provide comments on the Direct Final Rule (DFR) and the Notice of Proposed Rulemaking (NPRM) as set forth in the December 1, 2011, edition of the *Federal Register*.<sup>1</sup> The DFR and the NPRM would add a subpart to the Agriculture Acquisition Regulation (AGAR) requiring the insertion of a new clause to Department of Agriculture (USDA) contracts. Both the subpart and the contract clause are entitled "Labor Law Violations."

### **STATEMENT OF INTEREST**

SHRM is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society 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.

CUPA-HR serves as the voice of human resources in higher education, representing more than 14,000 HR professionals at over 1,800 colleges and universities across the country, including 92 percent of all U.S. doctoral institutions, 75 percent of all master's institutions, 60

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<sup>1</sup> 76 Fed. Reg. 74,722 (December 1, 2011) (direct final rule) and 76 Fed. Reg. 74,755 (December 1, 2011) (notice of proposed rulemaking).

<sup>2</sup> *Id.* at 74723 and 74756.

<sup>3</sup> *Id.*

percent of all bachelor's institutions and almost 600 two-year and specialized institutions. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 states.

Many of SHRM's and CUPA-HR's members are employed by federal contractors, including contractors governed by the AGAR. Our members are responsible for overseeing and implementing the human resource functions related to those contracts and would be directly and adversely impact by the new requirements set forth in the DFR and the NPRM.

## **COMMENTS ON DFR AND NPRM**

### **I. Summary**

The DFR and the NPRM would amend the AGAR to require the following clause be inserted into contracts that exceed the simplified acquisition threshold:

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 non-compliance of labor laws are determined. [*sic*] 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.<sup>2</sup>

Contracting officers would be required to report violations to the Office of Procurement and Property Management, Procurement Policy Division, within two working days following notification by the contractor.<sup>3</sup>

As HR professionals, SHRM and CUPA-HR members are dedicated to ensuring compliance with federal, state and local labor and employment laws and regulations and related employer policies. Thus, we fully appreciate USDA's desire to support "the policies and laws regarding labor protections." The DFR and NPRM, however, are fatally flawed both procedurally and substantively and should be withdrawn.

First, with respect to procedural flaws, a DFR is simply inappropriate in these circumstances. USDA claims it published a DFR without a prior proposal because it "views this as a non-controversial action and expects no adverse comments." We are surprised the agency would assume a proposal of such significant impact on contractors would be uncontroversial, particularly given a past proposal very similar in nature to the DFR and the NPRM—the Clinton

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<sup>2</sup> *Id.* at 74723 and 74756.

<sup>3</sup> *Id.*

Administration’s “blacklisting” regulation—was highly controversial, drawing over 1,800 public comments, a legal challenge and Congressional action.

The DFR and the NPRM are also flawed procedurally because they are arbitrary and capricious. USDA did not provide any rational basis for the contract clause or explain how the clause would advance any concrete objective. Nor did the agency provide proper certification under the Regulatory Flexibility Act, or an analysis with respect to costs or paperwork burdens to support its conclusions that the Paperwork Reduction Act does apply and the requirements of Executive Orders 12866 and 13563 have been met. The lack of paperwork and costs analysis is particularly glaring, given the agency’s rather suspect claim that certifying compliance with possibly hundreds of federal, state and local laws for not only the employer, but also its subcontractors and suppliers, and “promptly reporting all allegations and formal findings of non-compliance,” “would not impose any recordkeeping or information collection requirements that require approval by Office of Management and Budget.” Finally, the DFR and the NPRM are flawed procedurally because they are so vague that compliance with them is impossible and their provisions are contrary to the law.

Substantively, both the DFR and the NPRM fail because it is simply infeasible for contractors to comply with their requirements. First, neither the DFR nor the NPRM provide any guidance for contracting officers or contractors as to the meaning of various vague terms within the required contract clause, such as “labor laws,” “compliance,” “suppliers,” “promptly reporting,” or “formal allegations or formal findings.” Even if USDA adequately defined these terms, the certification requirement likely poses insurmountable hurdles for contractors. Not only would the DFR and the NPRM require contractors to certify compliance with possibly hundreds of relevant laws, no matter how vague, technical, or unsettled, it also requires contractors to certify “to the best of their knowledge” subcontractor and supplier compliance.

The DFR and the NPRM also impose severe penalties, which amplifies the infeasibility of compliance. According to the DFR and the NPRM, contractors who make errors in certification could face civil sanctions, including third party “*qui tam*” suits, under the False Claims Act.

In short, USDA has failed to provide any justification for the DFR and the NPRM or demonstrate that the contract clause will somehow improve, streamline or otherwise enhance the federal contracting process. Yet, the required clause promises to impose infeasible compliance requirements, invite litigation and costly paperwork burdens and place contractors in a vulnerable position vis-à-vis litigants, labor unions, nongovernmental organizations, competitors, and other groups that seek to manipulate the process to create leverage for exacting some concession from the contractor.

For these reasons, which are explained in more detail below, SHRM and CUPA-HR urge the agency to withdraw both the DFR and the NPRM.

## II. The DFR and NPRM Fail to Meet Procedural Requirements for Rulemaking

### A. Inappropriate Use of Direct Final Rule

USDA fails to explain why the AGAR requirement and the contract clause should be issued as a DFR. By design, DFRs are intended only for minor and uncontroversial adjustments in regulations, such as correcting typographical errors, inaccurate cross-references, and other non-substantive changes.<sup>4</sup> Because they are non-substantive, DFRs are allowed to bypass the usual requirements for public notice and comment and go into effect on a specified date unless adverse comments are filed in a timely way.<sup>5</sup> The contract clause and AGAR requirement proposed by USDA are neither non-substantive nor non-controversial.

As described more fully in the following sections, the proposed contract clause places significant, if not insurmountable, compliance challenges on contractors, exposes them to severe potential penalties, including debarment, and deprives them of due process. As a result, neither the clause nor the AGAR requirement can be characterized as non-substantive. Nor does USDA explain, or even discuss, anywhere in the DFR or the NPRM why its proposed contract clause is so minor that issuance as a DFR is justified.

We are surprised the agency would assume a proposal of such significant impact on contractors would be uncontroversial, particularly given a past proposal very similar in nature to the DFR and the NPRM—a Clinton Administration regulation widely viewed as “blacklisting,”—was highly controversial, drawing over 1,800 public comments.<sup>6</sup> The Council eventually withdrew the Clinton-era rule, stating that:

The FAR Council realized that there was a high degree of controversy about the merits of the December final rule (there were 1,800 public comments). The typical FAR rule generates about 1 percent of that amount. The two proposed rules that resulted in the December final rule were the most controversial ever published by the FAR Council. Adverse comments were made by individuals in the Government itself, as well as the public. (emphasis added)<sup>7</sup>

The controversy surrounding the rule also was evidenced by a bi-partisan effort to prevent its implementation by Congress<sup>8</sup> and a lawsuit challenging the rule by the U.S. Chamber of

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<sup>4</sup> See Administrative Conference of the United States recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (August, 18, 1995); see also <http://edocket.access.gpo.gov/2007/E7-3923.htm>, and [http://www.aphis.usda.gov/regulations/glossary/glossary\\_direct\\_final\\_rule.shtml](http://www.aphis.usda.gov/regulations/glossary/glossary_direct_final_rule.shtml).

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

<sup>6</sup> 64 Fed. Reg. 37,360. The proposal was revised and re-issued on June 30, 2009. 65 Fed. Reg. 40,830, published as a final rule on December 20, 2000. 65 Fed. Reg. 80,255, and rescinded on December 27, 2001, 66 Fed. Reg. 66986.

<sup>7</sup> 66 Fed. Reg. 66986, 66987 (December 27, 2001).

<sup>8</sup> For example, on July 20, 2000, the House of Representatives passed an amendment that would have prohibited the administration from proceeding with the regulation. The amendment was sponsored by Rep. Tom Davis (R-VA) and Rep. Jim Moran (D-VA) and passed by a vote of 228-190, 24 Democrats joined 1 Independent and 203 Republicans

Commerce, National Association of Manufacturers, the Business Roundtable, Associated Builders and Contractors and Associated General Contractors, which was filed two days after the rule was released.<sup>9</sup>

USDA notes, as it must, that it will withdraw the DFR if it receives adverse comments.<sup>10</sup> An adverse comment is one where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach or would be ineffective and unacceptable without a change. USDA should consider this comment an adverse comment, as well as the other comments it has received challenging the procedures or substance of the DFR.<sup>11</sup>

Because the contract clause and AGAR requirement proposed by USDA are neither non-substantive nor non-controversial and the agency has received this and other adverse comments, USDA must immediately withdraw the DFR.

## **B. Lack of Basis**

The most glaring procedural flaw in the DFR and the NPRM is USDA's failure to state any basis, rational or otherwise, for the proposed contract clause. In fact, other than referencing its respect for "the policies and laws regarding worker labor protections particularly as they pertain to the acquisition process,"<sup>12</sup> the agency provides no justification for the rule and related change in policy whatsoever. Neither the DFR nor the NPRM cite any empirical data or even anecdotal evidence supporting the contract clause; much less explain how the clause would address some existing deficiency.

In fact, it is unclear USDA even believes there is an existing deficiency the clause is intended to address. The agency never discusses the existing protections in the AGAR and FAR, let alone whether or not those protections are somehow insufficient. Nor does USDA explain how the contract clause would actually operate in practical terms, interface with existing protections and ensure due process for contractors.

This radical change in policy with such far-reaching and broad consequences without any basis or explanation is particularly striking given that in 2001, when rescinding a similar proposal, the FAR Council concluded:

[T]he current regulations governing suspension and debarment provide adequate protection to address serious waste, fraud, abuse, poor performance, and noncompliance. Any one of these concerns may authorize suspension or debarment under appropriate conditions and circumstances, subject to judicial review.

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in supporting the amendment. See 106<sup>th</sup> Cong., 2<sup>nd</sup> Sess. Roll Call No. 423 and Congressional Record pages H6672-84).

<sup>9</sup> See <http://www.ogc.doc.gov/ogc/contracts/cld/facs/caacltr2001.pdf>.

<sup>10</sup> See note 4 herein.

<sup>11</sup> See, e.g., Comments of the Equal Employment Advisory Council and Comments of the Chamber of Commerce of the United States, both filed in response to the DFR and the NPRM on January 24, 2011.

<sup>12</sup> 76 Fed. Reg. at 74,722 and 74755.

The FAR Council reminds members of the general public that anyone may submit to an agency debarment official relevant information about the responsibility of a company seeking to do business with the Government. Debarment and suspension provides a means of getting adverse information to appropriate Government officials with appropriate procedures, knowledge and skills to review and take appropriate actions on such matters. This process also provides subjects of those actions with due process procedures that will withstand judicial scrutiny.<sup>13</sup>

As drafted the DFR and the NPRM fail procedurally and are arbitrary and capricious as they do not provide a justification for this change in policy, including how such a requirement would improve, streamline, or otherwise enhance the contracting process under the AGAR, interface with existing protections, operate in practical terms and ensure due process requirements are met.

### **C. Insufficient Analysis for Regulatory Flexibility Act and Executive Orders**

In addition to its failure to address a proper basis for the rule or justify its issuance as a DFR, the USDA also fails to provide a proper certification under the Regulatory Flexibility Act (RFA). The RFA specifies that an agency must perform an initial regulatory flexibility analysis for a proposed regulation unless the agency can certify that the proposed regulation will not have a significant economic impact on a substantial number of small entities. To support this certification, the agency is required by the statute to provide “a statement providing the factual basis for such certification.”<sup>14</sup> The USDA’s certification under the RFA includes no such factual basis making it inadequate to support the Department’s avoidance of the RFA. The agency’s unsupported claim that the proposed rule “will not have a significant impact on the small business community or on a substantial number of small businesses” is simply insufficient.

Nor did the agency provide an analysis with respect to costs or paperwork burdens to support its conclusions that the Paperwork Reduction Act does apply and the requirements of Executive Orders 12866 and 13563 have been met. The lack of paperwork and costs analysis is particularly glaring, given the agency’s rather suspect claim that certifying compliance with possibly hundreds of federal, state and local laws for not only the employer, but also its subcontractors and suppliers, and “promptly reporting all allegations and formal findings of non-compliance,” “would not impose any recordkeeping or information collection requirements that require approval by Office of Management and Budget.”

For these reasons, the DFR and the NPRM fail to meet procedural requirements for rulemaking.

### **D. The DFR and NPRM Are Arbitrary and Capricious and Contrary to the Law**

USDA’s proposal does not define several key terms, including “compliance,” “all applicable labor laws,” “the best of its knowledge,” “formal allegations or findings,” among others. As a result, stakeholders lack the information needed to assess and provide feedback on

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<sup>13</sup> 66 Fed. Reg. at 66988.

<sup>14</sup> 5 U.S.C. §605(b).

the full scope of the proposal. In addition, the terms and conditions of the required clause are so vague as to preclude compliance therewith. This vagueness renders the proposal arbitrary and capricious.

For example, the term “compliance” could have various practical interpretations, each with different implications. On one end of the scale, an employer may simply need to certify it has in place internal policies that support compliance with the law. At the other, a contractor could be deemed out of compliance for a technical violation of any of the hundreds of laws governing the workplace.

Similarly, the term “all applicable labor laws” is subject to various interpretations. In the narrowest sense, the term refers to federal laws that govern labor relations, such as the National Labor Relations Act (NLRA), the Railway Labor Act and the Labor-Management Reporting and Disclosure Act. In the broadest sense, the term would encompass the hundreds of federal, state and local laws that regulate the relationship between employers and employees.<sup>15</sup>

The confusing and vague terms are further complicated by the fact the DFR and the NPRM do not appear to provide safeguards to ensure contractor due process.

Lastly, the DFR and the NPRM are contrary to the law. Both the NLRA and Civil Rights Act of 1964, as amended, (CRA) prohibit federal agencies and other government actors from imposing additional penalties for violations of those acts, including debarment.<sup>16</sup> While the DFR and the NPRM do not specify which labor laws are covered by the contract clause, presumably it includes the NLRA and could conceivably include the CRA.

For the reasons stated above, the DFR and the NPRM are arbitrary and capricious and contrary to the law.

### **III. The DFR and NPRM Fail Substantively**

In addition to the significant procedural concerns addressed above, SHRM and CUPA-HR also have substantial concerns with the practical application of the rule, its far-reaching scope, the inability of contractors to comply and the disconnect between the regulation and existing contracting schemes defined by Congress.

#### **A. Language of Proposed Contract Clause is Overbroad and Vague Making Compliance Infeasible**

The proposed USDA contract clause requires that a contractor certify “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.”

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<sup>15</sup> See Comments of the Equal Employment Advisory Council, filed in response to the DFR and the NPRM on January 24, 2011, for a list of the federal labor and employment laws.

<sup>16</sup> See *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986); *Chamber of Commerce v. Reich*, 74 F.3d 1422 (DC Circuit 1996); 42 U.S.C. Section 2000e-17.

As discussed in the previous section, these terms are so vague neither contractors nor contracting officers cannot possibly discern what is expected of them, making compliance impossible.

Even if USDA adequately defined these terms, the certification requirement likely poses insurmountable hurdles for contractors. For example, the “threshold” of compliance required by the contract clause is not clear, because USDA has not provided guidance on that issue. If we read the term in the broadest sense, however, and assume USDA means contractors must certify actual 100% compliance with “all applicable labor laws,” the task required of the contractors is, as a practical matter, unachievable. Contractors cannot possibly certify 100% the relevant laws, no matter how vague, technical, or unsettled with respect to their own company, let alone certifying compliance of subcontractors and suppliers. This is true if the term “all applicable labor laws,” refers only to a few laws governing labor relations and is certainly the case if the term applies to all federal, state and local laws governing the workplace.

HR professionals are uniquely aware of the magnitude and complexity of employment and labor law. They are tasked with the day-to-day implementation of and compliance with these laws, which are comprehensive, overlapping, complex and dynamic. Courts and regulatory authorities regularly nuance the interpretation of employment and labor laws—and these interpretations are not always consistent with one another. The mere fact that courts can disagree over the proper application of a single law to various workplace fact patterns speaks to the reality that good faith disagreements about legal compliance are inevitable. HR professionals know that even the most diligent employer cannot guarantee 100% compliance in the face of not only incredibly complex and dynamic laws, but an ever changing work environment, with shifts in management and corporate structures, and new technologies, locations, employees and managers.<sup>17</sup>

The NLRA, alone, is an intricate and dynamic law, enforced by an agency with budget of well over \$250 million that issues thousands of legal decisions and interpretations every year. But the NLRA is just one of hundreds of laws governing the workplace. From equal employment and anti-discrimination laws to laws governing immigration, compensation, labor relations, employee benefits, whistle blower protections and workplace safety, employers must keep abreast of a myriad of overlapping and sometimes inconsistent federal, state and local laws and regulations affecting nearly every activity in the workplace, in addition to avoiding running afoul of the terms of collective bargaining agreements and other employment contracts. .

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<sup>17</sup> The Comments of the U.S. Chamber of Commerce, filed in response to the DFR and the NPRM on January 24, 2011, note at page 9 the federal government itself is not in a position to certify 100% compliance with federal labor and employment laws and provides statistics on charges filed against the government for violations of labor and employment laws. The USDA has had its own highly publicized struggles with compliance, as noted in a 2009 testimony by the U.S. Government Accountability Office. Specifically, GAO found “Numerous reports and congressional testimony by officials of the U.S. Commission on Civil Rights, the U.S. Equal Employment Opportunity Commission, USDA’s Office of Inspector General (OIG), GAO, and others have described extensive concerns about discriminatory behavior in USDA’s delivery of services to program customers—in particular, minority farmers—and its treatment of minority employees.” April 29, 2009 Testimony by the Government Accountability Office Before the Subcommittee on Department Operations, Oversight, Nutrition and Forestry, Committee on Agriculture, House of Representatives entitled U.S. Department of Agriculture, Recommendations and Options Available to the New Administration and Congress to Address Long Standing Civil Rights Issues, available at <http://www.gao.gov/new.items/d09650t.pdf>.

Compounding the difficulty of certifying a contractor's own compliance, the clause requires a contractor to also certify that "its subcontractor of any tier, and suppliers, are also in compliance with all applicable labor laws." This requirement, even with the undefined and ambiguous caveat "to the best of its knowledge," is at best precarious. Contractors have limited ability to know and even less ability to guarantee that its subcontractors and suppliers meet whatever compliance threshold the clause contemplates.

### **B. The Term Violation of Labor Law is Vague and Overly Broad and the Provision Conflicts with Federal Law**

The proposed contract clause states, "[t]he 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." Yet, USDA does not define what constitutes a violation of the law and the term is vague. Does the agency mean final decision where all appeals have been exhausted or does it mean any adverse decision, including administrative findings? What about settlements following appealing decisions? Does violation mean intentional violation or any violation, including technical violations or violations of vague and previously unsettled areas of the law? Will the contractor have a hearing before USDA "will vigorously pursue corrective action" and what corrective actions does USDA contemplate? The mere fact these questions must be raised indicates the DFR and NPRM are overly broad and risk violating due process.

In any case, the requirement conflicts with established procedures for sanctions under the federal contracting process under the FAR, AGAR and federal statutes,<sup>18</sup> and the remedial schemes Congress has established for violations of the federal laws governing the workplace. Additionally, as mentioned in a previous section, the NLRA and Civil Rights Act of 1964, as amended, (CRA) prohibit federal agencies and other government actors from imposing additional penalties for violations of those acts, including debarment.<sup>19</sup>

### **C. Reporting Requirement Imposes Significant and Unnecessary Paperwork Burdens**

In addition, the regulation also requires that contractors report "when formal allegations or formal findings of non-compliance of labor laws are determined" [*sic*]. This requirement is simply over broad and would impose unnecessary and substantial paperwork burdens on contractors.

The contract clause only authorizes USDA to pursue corrective action in event of an actual violation of labor law, not alleged violations, so it is unclear why USDA would need this information. Particularly since information regarding allegations is not a good indicator of future labor law violations. The vast majority of employment claims are resolved without any finding of violations by employers. The Equal Employment Opportunity Commission (EEOC) received

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<sup>18</sup> See, e.g. 66 Fed. Reg. at 66988; Comments of the Chamber of Commerce of the United States, filed in response to the DFR and the NPRM on January 24, 2011, at note 29.

<sup>19</sup> See *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986); *Chamber of Commerce v. Reich*, 74 F.3d 1422 (DC Circuit 1996); 42 U.S.C. Section 2000e-17.

99,947 charges of discrimination in FY 2011.<sup>20</sup> After investigating those charges, the agency only found reasonable cause to believe there was unlawful discrimination in 3.8% of those claims and found no cause in 66% of the charges.<sup>21</sup> Similarly, the National Labor Relations Board only found merit in 37% of the 22,188 unfair labor practices charges it received in FY 2011.<sup>22</sup>

Yet, the paperwork burden associated with promptly reporting any and all formal allegations of labor law violations would be substantial. Furthermore, it appears from the reporting requirement that formal allegations would be considered as part of a contractor's record, even though statistics show eventual disposition of the case is likely to be in favor of the contractor. This raises substantial due process concerns. The requirement places an unreasonable paperwork burden on contractors and their HR departments with no justification.

In addition, the requirement that contractors report any formal finding of non-compliance is vague and overly broad. Does this require the employer to report any adverse findings? The error in the text of the clause "formal finding of non-compliance of labor laws *are determined*" [sic], emphasis added, suggests USDA contemplated limited reportable findings, but chose not to do so. We hope that is not the case. Findings are not conclusive unless they represent final decisions where all appeals have been exhausted. Even in those circumstances, adverse findings may have resulted as part of a legitimate dispute over an unsettled or confusing area of law. Moreover, reporting of technical, minor and unintentional violations seems excessive and irrelevant. Again, the mere fact these questions must be raised indicates that the DFR and NPRM are overly broad and risk violating due process.

#### **D. The False Claims Act Provision Exposes Contractor to Unreasonable Risk and Allows Third Parties to Manipulate and Abuse the Procurement Process**

USDA states that the certification under the new contract clause is a certification for purposes of the False Claims Act (FCA). The FCA not only provides for civil liability through government prosecution, but also allows third parties to bring suit on the government's behalf in a *qui tam* suit. The FCA liability along with the *qui tam* suits and the vague and infeasible compliance requirements invites litigation and coercion. It places contractors in a vulnerable position vis-à-vis litigants, labor unions, nongovernmental organizations, competitors, and other groups that seek to abuse and manipulate the process in order to create leverage for exacting some concession from the contractor. The government contracting process should not be used in this manner. The FCA provisions should be removed.

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<sup>20</sup> <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

<sup>21</sup> *Id.*

<sup>22</sup> National Labor Relations Board, Performance and Accountability Report 2011, at 44, available at: [http://www.nlr.gov/sites/default/files/documents/189/nlr\\_2011\\_par\\_508.pdf](http://www.nlr.gov/sites/default/files/documents/189/nlr_2011_par_508.pdf).

## IX. Conclusion

For the aforementioned reasons, we respectfully urge the USDA to withdraw both the DFR and the NPRM. We appreciate the opportunity to submit these comments. If we can be of further assistance on this matter, please do not hesitate to contact us.

Respectfully submitted,



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cc: The Honorable Cass Sunstein, Administrator OIRA