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Submitted via https://www.regulations.gov

Jennifer Hawes
General Services Administration
1800 F Street, NW
Washington, DC 20405

Re: Proposed Rule Regarding "Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk" (FAR Case 2021–015, Docket No. FAR– 2021–0015, Sequence No. 1)

Dear Ms. Hawes:

The American Petroleum Institute "API" welcomes the opportunity to comment on the FAR Council's Proposed Rule: "Federal Acquisition Regulation Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk" ("Proposed Rule").[1]

API represents all segments of America's oil and natural gas industry. Its nearly 600 members produce, process, and distribute most of the nation's energy. API member companies are committed to transparent, clear, concise, and comparable greenhouse gas (GHG) reporting that can be useful to various federal procurement stakeholders. API supports timely and accurate reporting of GHG emissions from all emitting sectors in the economy to provide a transparent fact base to address climate change through market-based solutions and appropriate government policy. API is committed to transparency and recognizes the importance of climate-related information to policymakers and industry stakeholders. To that end, we have laid out the Climate Action Framework that presents actions we are taking to accelerate technology and innovation, further mitigate emissions from operations, endorse a carbon pricing policy, advance lower-carbon fuels, and importantly, drive consistent, comparable, and reliable climate reporting.[2]

Moreover, API is promoting the continued improvement of industry reporting of GHG emissions and is working to enhance consistency, comparability, and reliability of reporting. We work with industry

[1] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (Nov 14, 2022) (to be codified at 48 C.F.R. pts. 1, 4, 9, 23 and 52).

[2] API, *Climate Action Framework* (2021), https://www.api.org/-/media/Files/EHS/climate-change/2021/api-climate-action-framework.pdf?la=en&hash=E6BB3FA3013B52153E10D3E66C52616E00411D20.

partners—IPIECA and the International Association of Oil & Gas Producers (IOGP)—to update sector-wide guidance for voluntary sustainability reporting, providing companies a common framework for assessing environmental, social, and governance issues.[3] In addition, API developed the Guidance Document for GHG Reporting ("Guidance"), which is intended to offer further consistency, comparability, and clarity of information to the industry's key stakeholders.[4]

The oil and natural gas industry is subject to federal procurement regulations as the industry supplies federal agencies with fuel supplies critical to their operations. As such, it is critical that the FAR Council consider industry input in developing a final rule given the significant impacts that changes to federal procurement regulations may have on the oil and natural gas industry and their ability to supply federal agencies with oil and natural gas products. This past year, API submitted comments on the SEC's Proposed Rule, "The Enhancement and Standardization of Climate-Related Disclosures"[5], and submitted comments on EPA's update to their annual reporting program, the Greenhouse Gas Reporting Program (GHGRP).[6] API also submitted comments on the FAR Council's request for comment on a potential amendment to the FAR in accordance with Executive Order (E.O.) 14030 and E.O. 13990[7].[8] In our letters, API reiterated our commitment to supporting timely and accurate reporting of GHG emissions and recognized the importance of climate-related information to policymakers and industry stakeholders.

API commends the government's objective of reducing global GHG emissions but has significant concerns with the Proposed Rule and cannot support it as written. Specifically, we believe the FAR Council must consider the following issues, each discussed more thoroughly below:

- The Proposed Rule may limit federal agencies' ability to procure critical fuels;
- The Proposed Rule's compelled disclosure raises significant First Amendment concerns;
- The Proposed Rule's delegation of federal regulatory power to CDP and SBTi is unconstitutional;
- The Executive Order that provides the basis for the Proposed Rule exceeds the President's authority;
- The Proposed Rule should not be implemented through the contractor responsibility process;
- The Proposed Rule is inconsistent with the Federal Acquisition Streamlining Act;
- The Proposed Rule's prescriptive requirements impose climate targets on companies that should be set on a company-by-company case;
- The Proposed Rule's reliance on SBTi is inappropriate;

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[3] IPIECA, API & IOGP, *Sustainability Reporting Guidance for the Oil and Gas Industry* (2020), https://www.ipieca.org/our-work/sustainability/performance-reporting/sustainability-reporting-guidance/.

[4] API, *API Guidance Document for Greenhouse Gas Reporting* (March 2022), guidance-api-template-for-climate-related-reporting-initiative-march-2022.pdf.

[5] API Letter Dated June 17, 2022 regarding The Enhancement and Standardization of Climate-Related Disclosures for Investors, SEC File No. S7-10-22.

[6] API letter Dated October 6, 2022 regarding the Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule; Docket No. EPA-HQ-OAR-2019-0424.

[7] Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

[8] API Letter Dated January 13, 2022 regarding Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions; Docket number FAR-2021-001.

- The Proposed Rule does not consider its effects on subcontractors but would create significant compliance burdens for them;
- The Proposed Rule's mandated disclosures lack a consistent standard, preventing federal contractors from determining what qualifies as a climate-related risk;
- The Proposed Rule's Scope 3 reporting requirements are not relevant to the federal procurement process and therefore are not within the purview of the FAR Council;
- The Proposed Rule's requirements and timeline are inconsistent and misaligned with existing and proposed reporting requirements and timelines;
- By relying on different methodologies and standards from other GHG reporting Rules, the Proposed Rule unnecessarily increases contractors' risk of False Claims Act allegations; and
- The Proposed Rule may discourage the development of low carbon fuels.

1. The Proposed Rule May Limit Federal Agencies' Ability to Procure Critical Fuels.

US national security, space exploration, and the energy utilized by the US federal government all rely on a consistent supply of oil and natural gas. For the reasons discussed throughout this comment letter, the FAR Council's proposal may jeopardize the ability of contractors to supply agencies with the critical oil and natural gas products that they need in order to operate.

Given that SBTi is not currently validating any science-based targets established by fossil fuel companies, all oil and natural gas companies that are considered major contractors under the Proposed Rule will be unable to comply with the FAR rulemaking if it is finalized as proposed. This may result in them being deemed non-responsible and unable to receive contract awards, therefore preventing these companies from supplying federal agencies with critical fuel supplies.

For example, DOD is the primary US government consumer of most energy types, presenting significant opportunities for US oil and natural gas companies to contract with the agency.[9] In FY 2021, DOD used 346,302 billion Btus of jet fuel, 74,058 billion Btus of natural gas, 10,083 billion Btus of gasoline, and 95,071 billion Btus of diesel.[10] Some oil and natural gas companies may be considered major contractors under the Proposed Rule based on their contracts to supply DOD with these oil and natural gas products and would therefore be subject to the Proposed Rule's SBTi target-setting and validation requirements. This creates significant national security concerns, as oil and natural gas companies will be unable to comply with this component of the Proposed Rule and therefore will not be able to supply federal agencies with these essential fuel supplies.

The FAR Council's Proposed Rule does allow senior procurement executives to waive the regulation's requirements for specific facilities, business units, or other defined units for national security purposes, emergencies, or other mission essential purposes. Additionally, the senior procurement executive may

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[9] US Energy Information Administration, *U.S. federal government energy costs at lowest point since fiscal year 2004* (Oct. 2, 2017), https://www.eia.gov/todayinenergy/detail.php?id=33152.

[10] US Department of Energy, *Comprehensive Annual Energy Data and Sustainability Performance* (last accessed Dec. 19, 2022), https://ctsedwweb.ee.doe.gov/Annual/Report/SiteDeliveredEnergyUseAndCostBySectorAndTypeAndFiscalYear.aspx.

provide a waiver to a significant or major contractor providing an additional year to come into compliance with the Proposed Rule.[11] However, the Proposed Rule does not include any details on the process for obtaining a waiver or the criteria that must be met to warrant a waiver. While providing facilities, business units, and/or federal suppliers of oil and natural gas with a waiver may alleviate some of these national security concerns, it is unclear whether the waiver process will be adequately able to address such concerns.

Due to oil and natural gas companies' current inability to comply with the Proposed Rule's requirements for major contractors and the uncertainty surrounding the waiver process, the Proposed Rule threatens federal agencies' ability to acquire the oil and natural gas resources critical to their operations.

2. The Proposed Rule's Compelled Disclosure Raises Significant First Amendment Concerns.

The Proposed Rule imposes "disclosure requirements."[12] Specifically, the Proposed Rule would amend the Federal Acquisition Regulation to require that "major Federal suppliers disclose their GHG emissions and climate-related financial risk" using a standardized "questionnaire" developed by a third-party.[13] This scheme implicates the First Amendment because it would regulate speech by "telling people what they must say" about their GHG emissions and about climate change.[14] This regulation of speech goes far beyond requiring the reporting of GHG emissions and ties this compelled speech to companies' ability to compete for contracts.

As a general matter, the Supreme Court reviews "compelled disclosure" laws under "strict scrutiny," meaning such laws will be upheld "only if the government proves that they are narrowly tailored to serve compelling state interests."[15] The Supreme Court has sometimes applied a more deferential standard to laws that require persons to disclose "purely factual and uncontroversial information about the terms under which . . . services will be available."[16] Even under this lower standard, however, a compelled disclosure must advance a sufficiently important governmental interest and be "purely factual," "uncontroversial," "not unjustified," and not "unduly burdensome."[17]

A. The Proposed Rule's Required Disclosures may be Controversial and Misleading.

The Proposed Rule raises serious First Amendment issues under any potentially applicable standard. To begin with, it is not clear from the preamble how the required disclosures could be purely factual and noncontroversial. Under the Proposed Rule, the Federal Government would outsource responsibility for the content of the disclosures to CDP—a private, non-governmental organization. That entity would, in turn, "propose [annual] updates to the questionnaire" that covered federal contractors would be

[11] Proposed Rule, 87 Fed. Reg. at 68323.
[12] Proposed Rule, 87 Fed. Reg. 68312, 68313.
[13] Proposed Rule, 87 Fed. Reg. at 68312–14.
[14] *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (citations omitted). It is well settled that First Amendment protection applies in the government procurement context. *See O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712 (1996). Furthermore, while the Proposed Rule applies only to "significant" and "major" federal contractors, its disclosure requirement encompasses GHG emissions unrelated to contracted activities.
[15] See, e.g., *Natl. Inst. of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371, 2376 (2018) (citation omitted).
[16] *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985).
[17] *Id*.

required to complete and would then finalize its proposed updates after a "public consultation"[18] (a consultation that would, apparently, occur outside the protections of the Administrative Procedure Act.)

The potential for this system to produce controversial and misleading disclosure obligations is obvious. API agrees that the accurate reporting of GHG emissions is indispensable to responsibly addressing the issue of climate change.[19] In furtherance of accuracy and transparency regarding GHG emissions, API developed detailed methodologies for natural gas and oil industry segments to consistently estimate direct GHG emissions over the entire value chain.[20] However, standards that could be selected by an unaccountable non-governmental organization such as CDP may be subject to pressures from various stakeholders, some of whom may not share the objective to realize the most accurate reporting of GHG emissions. Because there is a high probability that the outsourced, unaccountable process contemplated by the Proposed Rule will produce controversial disclosure obligations, the Proposed Rule raises serious questions under the First Amendment.[21]

These potential First Amendment problems would not be alleviated by permitting individual companies "to determine what responses in the CDP questionnaire are appropriate or necessary to complete in order to provide a TCFD-aligned annual climate disclosure."[22] A company wishing to guarantee its compliance with the Proposed Rule would be forced to complete the entire CDP questionnaire lest its selection of appropriate and necessary responses be second guessed, resulting in a determination of non-responsibility or allegations of a False Claims Act violation for non-compliance after the fact. Far from alleviating First Amendment concerns, courts have recognized that "alternative" disclosure regimes that increase regulatory risk are "unduly burdensome."[23] Further, the CDP questionnaire is by no means objective (unlike the TCFD framework) and is highly subjective in that it bases a company's performance relative to their position on addressing climate risk. The Proposed Rule's incorporation of the CDP Questionnaire also raises questions as to how the questionnaire's scoring mechanism will be factored in the Proposed Rule's implementation. CDP responding companies receive a letter score that "provides a snapshot of a company's disclosure and environmental performance" based on the company's responses.[24] Therefore, it appears that any federal contractor who submits the CDP climate change questionnaire in line with the Proposed Rule's requirements would receive a CDP score. It is

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[18] Proposed Rule, 87 Fed. Reg. at 68315; *see also id.* at 68314 ("For the purposes of this rule, a major contractor submits its annual climate disclosure by completing those portions of the CDP Climate Change Questionnaire that align with the TCFD as identified by CDP within its current or previous fiscal year. The annual climate disclosure must be made available on a publicly accessible website, which could be the company's own website or the CDP website." (parenthetical omitted).

[19] *E.g.*, API, *Climate Change*, (last accessed Dec. 13, 2022), https://www.api.org/oil-and-natural-gas/environment/climate-change.

[20] *See* API, *Compendium of Greenhouse Gas Emissions Methodologies for the Oil and Natural Gas Industry* (Nov. 2021), https://www.api.org/-/media/files/policy/esg/ghg/2021-api-ghg-compendium-110921.pdf.

[21] *See, e.g.*, *California Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022) (holding compelled disclosure violated First Amendment where, "[g]iven this robust disagreement by reputable scientific sources, the court did not abuse its discretion in concluding that the warning is controversial").

[22] Proposed Rule, 87 Fed. Reg. at 68315. *But see id.* at 68314 ("a major contractor submits its annual climate disclosure by completing those portions of the CDP Climate Change Questionnaire that align with the TCFD *as identified by CDP*").

[23] *See California Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 479 (9th Cir. 2022) ("only the safe harbor warning is actually useable in practice").

[24] CDP, *CDP Scores Explained* (last accessed Jan. 31, 2023), https://www.cdp.net/en/scores/cdp-scores-explained.

unclear whether and how this score will be incorporated into Proposed Rule's implementation, and whether companies will be required to achieve a certain score to be eligible to submit a bid or win a contract. Through their questionnaire and scoring, CDP appears to drive performance towards an accelerated end to the use of fossil fuels. This runs counter to the Department of Defense's significant need for jet fuel, gasoline, natural gas, and diesel.

B. The Proposed Rule's Required Disclosures Appear Designed to Compel the Oil and Natural Gas Industry to Condemn Itself, Contrary to Established Legal Precedent.

Perhaps most troubling from a First Amendment perspective is the intended effect of the disclosures. The US Government describes "cut[ting] U.S. greenhouse gas emissions" as "a moral imperative."[25] According to the US climate envoy, "a lot of countries are now being very negatively impacted as a consequence of the continued practice of how the developed world chooses to propel its vehicles, heat its homes, light its businesses, produce food."[26] "People are dying."[27] And even though, here, the agencies candidly concede that "disclosure alone does not reduce emissions and climate risk,"[28] they contend "the expectation of increased public transparency and accountability may prompt suppliers to take action."[29] "Through this rule," the agencies explain, "the Federal Government will communicate to its prospective contractors and their supply chains that transparent disclosure and management of supply chain GHG emissions and climate risk can be a matter of social license to operate."[30]

The point, in other words, is to force federal contractors to confess individual responsibility for climate change when, in reality, climate change is a global issue, and these companies may not agree with the government's message about responsibility for climate change. Courts have rejected similar efforts to force "a company to publicly condemn itself" as a conduit for a government message.[31] In *National Association of Manufacturers v. SEC*, for example, the D.C. Circuit set aside a federal rule that obligated companies to disclose whether the minerals in their products were "conflict free" or "not conflict-

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[25] *Remarks at the United Nations Climate Change Conference in Glasgow, United Kingdom*, 2021 Daily Comp. Pres. Documents 905, at 1–2 (Nov. 1, 2021).
[26] J. Worland, *'Moral Obligation.' John Kerry Says Developed Countries Need to Ramp Up Help for Growing Climate Losses*, Time (Oct. 28, 2022), https://time.com/6225834/john-kerry-loss-and-damage-climate-interview/.
[27] S. Mufson & M. Birnbaum, *United States reclaims the leadership role at COP26*, Wash. Post (Nov. 13, 2021), https://www.washingtonpost.com/climate-environment/2021/11/13/climate-kerry-us-role/. ("'We believe that this is existential,' said U.S. climate envoy John F. Kerry on Friday in a passionate speech on the floor of a plenary meeting. 'And for many of you it's existential today. People are dying. Today,' Kerry said.").
[28] Proposed Rule, 87 Fed. Reg. at 68318.
[29] *Id.* at 68318.
[30] *Id.* at 68320.
[31] *Nat'l Ass'n of Manufacturers v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (citation omitted); *see also, e.g.*, *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (invalidating mandate that required beverage manufacturers to disclose in their advertising that sugar-sweetened beverages are linked with tooth decay and obesity); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (invalidating mandate that required dairy manufacturers to label products derived from cows receiving recombinant Bovine Somatotropin).

free."[32] The court found "constitutionally offensive" the government's position that a federal agency could require a company "to tell consumers that its products are ethically tainted."[33]

Applying similar First Amendment reasoning to the procurement context, a federal district court more recently enjoined a FAR rule that would have required "government contractors to publicly condemn themselves by stating that they have violated one or more labor or employment laws."[34] As these precedents show, a disclosure requirement forcing individual companies to confess individual blame for a global problem is incompatible with the First Amendment.

3. **The Proposed Rule's Delegation of Federal Regulatory Power to CDP and SBTi is Unconstitutional.**

The US Constitution permits "only the federal government to exercise federal power."[35] Under the private nondelegation doctrine, federal courts will invalidate laws that purport to give "regulatory power to 'private persons whose interests may be and often are adverse to the interests of others.'"

The Proposed Rule's disclosure requirements and target-setting and validation methodology appear to violate this doctrine as the agencies would outsource responsibility for the content of the required GHG emissions disclosures to two private organizations, CDP and SBTi.

Under the Proposed Rule, CDP could issue annual updates to the proposed questionnaire that federal suppliers would be required to complete in order to be eligible to bid on contracts. However, there appears to be no mechanism in the Proposed Rule for the agencies to approve, disapprove, or modify the disclosure requirements adopted by CDP. It also does not include any description of the process that CDP will utilize when adjusting the guidance's requirements, such as allowing for stakeholder input. Further, the Proposed Rule would require major contractors "to develop science-based targets and have the targets validated by SBTi."[36] SBTi would establish the criteria that a company's target must meet and would provide the validation required for the Proposed Rule. While SBTi has developed (and continues to develop) sector-specific guidance for the creation of science-based targets -- but, importantly, not for the oil and natural gas sector -- SBTi is not "the federal government".

Further, SBTi's ability to objectively set and validate targets is in question. The Proposed Rule requires

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[32] *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, __ (5th Cir. 2022); *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Currin v. Wallace*, 306 U.S. 1, 15–16 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

[33] *Id.* The court explained that a company "who condemns the atrocities of the Congo war in the strongest terms[ ] may disagree with that assessment of its moral responsibility." *Ibid.* Furthermore, the company may choose to "convey that 'message' through 'silence.'" *Ibid.* (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995)). So too here, a company that believes there is an urgent need to reduce GHG emissions may disagree with a disclosure requirement that falsely attributes moral responsibility for global climate change to that company.

[34] *Associated Builders & Contractors of Se. Texas v. Rung*, No. 1:16-cv-425, 2016 WL 8188655, at *10 (E.D. Tex. Oct. 24, 2016) (quotation marks omitted).

[35] *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, __ (5th Cir. 2022); *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Currin v. Wallace*, 306 U.S. 1, 15–16 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

[36] Proposed Rule, 87 Fed. Reg. At 68314.

contractors to engage and financially compensate SBTi for both target-setting and validation services. Using the same entity to both set and validate a target and charging for these services creates a potential conflict of interest. If an entity setting the target ultimately validates its own targets, that raises questions as to the veracity and integrity of both the target setting and validation process. When it also charges for these services, an entity may have an incentive to structure arrangements in a way that benefits their own financial interests rather than acting in the best interests of the contractor. Or, in the case of the oil and natural gas industry, it could lead to situations where a company's target is set at an artificially high or low level, as the case may be. By dictating how a company must set its individual climate goals, SBTi can use its business model to promote its own goals, such as eliminating the further development of hydrocarbons.

Therefore, the breadth of the Proposed Rule in permitting CDP and SBTi to exercise federal regulatory authority on the determination of who can supply or contract with the federal government without any apparent means of federal control outsources this significant role to a private organization in violation of the private non-delegation doctrine.

4. The Executive Order That Provides the Basis for the Proposed Rule Exceeds the President's Authority.

The Proposed Rule implements Section 5(b)(i) of Executive Order (EO) 14030, "Climate-Related Financial Risk", which directs the FAR Council to consider amending the FAR to "require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets."[37] EO 14030 purports to rely on the President's authority under "the Constitution and the laws of the United States of America," while the Proposed Rule cites general procurement statutes as the authority for the new and amended FAR provisions.[38] But neither the Proposed Rule nor the EO cite any specific statutory authority for requiring federal suppliers to take the contemplated actions. Instead, the Proposed Rule provides only that "[t]he authority citation for 48 CFR parts 1, 4, 9, 23, and 52 continues to read as follows: Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113." 40 U.S.C § 121(c), which is part of the Federal Property and Administrative Services Act of 1949 (also known as the Procurement Act), authorizes the GSA Administrator to "prescribe regulations to carry out this subtitle"; 10 U.S.C. chapter 137 has been repealed and renumbered elsewhere in Title 10 but generally addressed acquisition requirements for the Department of Defense and the National Aeronautics and Space Administration; and 51 U.S.C. § 20113, as relevant here, authorizes the Administration "to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of its operations and the exercise of the powers vested in it by law," acquire personal property, and to enter into contracts and other agreements.[39]

The Proposed Rule identifies no language in any of these statutes having anything to do with GHG emissions, climate-related financial risk, or science-based reduction targets. The Eleventh and Fifth Circuits recently confirmed that Congress's general delegations of procurement authority to the

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[37] Proposed Rule, 87 Fed. Reg. at 68312; Presidential Documents, Executive Order 14030 of May 20, 2021: Climate-Related Financial Risk, 86 Fed. Reg. 27967, 27969 (May 25, 2021) (hereinafter, "EO 14030").
[38] EO 14030, 86 Fed. Reg. at 27967; Proposed Rule, 87 Fed. Reg. at 68327.
[39] The Procurement Act currently encompasses Subtitle I of Title 40 and most of Title 41, Subtitle I, Division C.

Executive Branch do "not grant the President free-wheeling authority to issue any order he wishes relating to the federal government's procurement system."[40] Rather, the President may lawfully carry out only those activities specifically authorized in the U.S. Code.[41] And agency action in response to an executive order likewise must be "reasonably within the contemplation" of the "statutory grants of authority" relied on by the regulating agency.[42] Here, the Proposed Rule does not purport to identify any delegation of authority from Congress in the statutes cited that authorize the FAR Council to require that every government agency include a clause in every government contract requiring contractors to disclose their GHG emissions. The FAR Council should reconsider the Proposed Rule in light of these limitations on Executive authority.

5. The Proposed Rule Should Not Be Implemented Through the Contractor Responsibility Process.

The Proposed Rule would likely result in de facto debarment of contractors without due process. To be compliant with the Proposed Rule, contractors would have to represent in SAM.gov whether they (1) are a significant contractor or major contractor or subject to any exceptions to the inventory and reporting requirements; (2) have completed the annual Scope 1 and Scope 2 inventory and publicly reported the results; (3) have publicly disclosed relevant portions of the completed CDP Climate Change Questionnaire; and (4) have made publicly available a science-based target that has been validated by SBTi.[43] If a contractor does not provide responses indicating compliance with the relevant requirements for its size and status, the contracting officer "shall treat" the contractor "as non-responsible" unless an exemption or a waiver from the agency's senior procurement executive applies or the contracting officer determines the noncompliance resulted from circumstances outside the contractor's control and the contractor has documented substantial efforts to comply and publicly committed to compliance within one year.[44]

The Proposed Rule confirms that this is essentially a "check the box" exercise with little room for contracting officer discretion. Indeed, the new FAR 23.XX05 procedures include tables that contracting officers can use to evaluate contractor responses, showing "the specific responses from offerors that are required to indicate that the offeror is in compliance."[45] Thus, contracting officers at different agencies are likely to reach the same conclusions regarding a contractor's responsibility status, meaning that a finding of non-responsibility will effectively apply governmentwide. And for major contractors, those responsibility decisions will largely be driven by the validation decision of SBTi, a third-party, non-

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[40] *Georgia v. President of the United States*, 46 F.4th 1283, 1293 (11th Cir. 2022) (affirming injunction of federal agencies from enforcing the federal contractor vaccine mandate against plaintiffs); *see also Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022) (applying "major questions doctrine" to affirm injunction of federal contractor vaccine mandate because "Congress has not authorized the issuance of this mandate").
[41] *Georgia*, 46 F.4th at 1293; *see also, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").
[42] *Chrysler Corp. v. Brown*, 441 U.S. 281, 303-06 (1979).
[43] Proposed Rule, 87 Fed. Reg. at 68316, 68330.
[44] *Id.* at 68327-68330. Notably, the Proposed Rule authorizes waivers by agency senior procurement executives but provides no procedures for contractors to request or senior procurement executives to grant those waivers. *See id.* at 68330.
[45] *Id.* at 68316, 68323, 68329-68330.

governmental organization, essentially outsourcing this inherently governmental function. Thus, the Proposed Rule would result in agency action that effectively excludes a contractor from federal contracting without the due-process protections that are currently provided for contractors under FAR subpart 9.4.[46]

Under the FAR, suspension and debarment are "serious" steps that should not be imposed for "purposes of punishment," but "only in the public interest for the Government's protection."[47] The FAR's suspension and debarment regulations already allow the Government to exclude contractors that are not presently responsible because of serious violations of law. For example, a Suspension and Debarment Official ("SDO") may debar a contractor based on a conviction or civil judgment for commission of an offense "indicating a lack of business integrity or business honesty that seriously and directly affects the [contractor's] present responsibility," or for "any other cause of so serious and compelling a nature that it affects" the contractor's present responsibility.[48] Notably, even when cause exists, suspension and debarment are not automatic responses to findings of contractor misconduct; instead, these protective measures should be taken only if necessary to protect the US Government and only after consideration of ten different mitigating factors.[49] Indeed, application of the various mitigating factors in FAR 9.406-1 may lead an SDO to find that a contractor is presently responsible, notwithstanding the commission of an offense that may be "of so serious and compelling a nature that it affects" the contractor's present responsibility.[50] This regulatory structure recognizes that exercising suspension or debarment is a business decision that considers the totality of the contractor's contributions and performance history and that should only be taken if it is necessary to exclude a contractor from federal contracting.

By departing from this settled practice, the Proposed Rule would effectively result in contractor debarments without consideration of the FAR-mandated mitigating factors or other business issues such as the contractor's overall performance history and availability (or lack thereof) of other sources of supply. The Proposed Rule would also require contracting officers to make a binary responsible/non-responsible decision and does not allow for alternative remedies such as administrative agreements, show cause notices, and other pre-notice letters that agency SDOs often use to "properly address business risks and promoted competition and retention of jobs for Americans" and tailor remedies to particular contractors and circumstances.[51]

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[46] *See*, e.g., *Leslie & Elliott Co. v. Garrett*, 732 F. Supp. 191 (D.D.C. 1990) (finding de facto debarment when the representatives of the Navy found a low bidder non-responsible on two contracts and made statements evidencing that the Navy did not want to do business with the contractor); *Shermco Indus., Inc. v. Sec'y of the Air Force*, 584 F. Supp. 76 (N.D. Tex. 1984) (finding de facto suspension when the agency made repeated determinations of non-responsibility on the same basis).IV

[47] FAR 9.402(b); *see also United States v. Hatfield*, 108 F.3d 67 (4th Cir. 1997).

[48] FAR 9.406-2(a)(5); FAR 9.406-2(c); *see also* FAR 9.407-2(a)(9), (c) (similar grounds for suspension).

[49] *See* FAR 9.406-1.

[50] FAR 9.406-2(c); FAR 9.407-2(c).

[51] Interagency Suspension and Debarment Committee ("ISDC") Section 873 Report to Congress for Fiscal Year 2020 at 5 (Mar. 22, 2022) (showing agency SDOs issued 103 pre-notice letters and entered into 58 administrative agreements in Fiscal Year 2020 and noting "agencies are more actively engaging a broader range of remedial tools afforded in the Federal system than seen in earlier reported years").

The Proposed Rule also fails to provide contractors with adequate procedural protection when faced with a possible finding of non-responsibility, departing from FAR subpart 9.4 and the increasing practice of SDOs. For example, the Proposed Rule provides no mechanism for a major contractor that commits to a science-based target that SBTi does not validate to challenge or appeal that validation decision during the responsibility process.[52] Rather, the contractor's only hope of overcoming a presumption of non-responsibility is to convince the contracting officer that the contractor is making progress and has publicly committed to compliance within the year—even though the outcome and timeline for an SBTi validation decision are outside the contractor's control.[53] This is an especially acute problem for API members because, as explained above, SBTi's published policy states that it will not "validate targets for companies in the oil and gas or fossil fuels sectors."[54]

Moreover, measuring and reporting of GHG emissions and implementation of science-based targets for emissions reductions are far afield from most contracting officers' substantive areas of expertise, which calls into question the contracting officers' ability to provide a meaningful opportunity to be heard.[55] In contrast, in cases in which a proposed suspension is not based on an indictment, or in which a proposed debarment is not based on a conviction or final judgment—which would be the case for a contractor's non-compliance with the GHG reporting requirements—the FAR currently requires that the Government "[a]fford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents."[56] Thus, an SDO would typically hold an evidentiary proceeding, transcribed by a court reporter, at which the respondent may appear with counsel, submit documentary evidence, present witnesses, confront any person the agency presents, and obtain a copy of the administrative record. Furthermore, under the FAR's suspension and debarment procedures, contractors are afforded an opportunity to present evidence regarding the cause for suspension or debarment as well as mitigating factors. The Proposed Rule does not afford any such opportunity.

And once the contracting officer obtains and considers information from the contractor "to determine what efforts it has made to comply and the basis for its failure to comply," the Proposed Rule does not require the contracting officer to provide notice to the contractor of a non-responsibility determination.[57] This means that a contractor will likely hear of a non-responsibility finding only after it has been determined to be non-responsible and not awarded the contract. The only current method of challenging such a determination is a bid protest, which is difficult and costly to pursue. Moreover, bid

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[52] *See* Proposed Rule, 87 Fed. Reg. at 68327.
[53] *See id.*; *see also id.* at 68317-68318 (describing SBTi validation process).
[54] SBTi, *Oil and Gas* (last accessed Dec. 13, 2022), https://sciencebasedtargets.org/sectors/oil-and-gas#what-is-the-sb-tis-policy-on-fossil-fuel-companies.
[55] *Nat'l Ass'n of Psychiatric Treatment Ctrs. for Children v. Mendez*, 857 F. Supp. 85, 94-95 (D.D.C. 1994) ("Due process requires that a person be given notice and a meaningful opportunity to be heard.") (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).
[56] *See* FAR 9.406-3(b)(2)(i); 9.407-3(b)(2)(i).
[57] Proposed Rule, 87 Fed. Reg. at 68327.

protest rules for the GAO limit consideration of affirmative responsibility determinations because such determinations are inherently discretionary.[58]

As a number of courts have recognized, a determination that a contractor lacks a record of business integrity involves a liberty interest recognized by the Fifth Amendment. Agencies therefore must afford contractors sufficient procedural due process before denying contracts based on an unsatisfactory record of integrity or ethics.[59] As one court explained, "[t]he due process clauses of the fifth and fourteenth amendments require that a determination by governmental authority stigmatizing a person as so lacking in integrity that he is to be deprived of . . . the liberty to enjoy rights which he would otherwise enjoy must be preceded by written notice of the facts upon which the charge is based and a reasonable opportunity to submit facts in response."[60]

6. The Proposed Rule is Inconsistent with the Federal Acquisition Streamlining Act.

With limited exceptions, the Proposed Rule applies the representation and reporting requirements to all contractors that meet the $7.5 million and $50 million thresholds, without any relaxation of requirements for contractors, like certain industry members, that provide commercial products or services under FAR Part 12 or Federal Supply Schedule contracts. Specifically, the Proposed Rule expands the climate-related representations in the solicitation provisions at FAR 52.212-3, Offeror Representations and Certifications – Commercial Products and Commercial Services, which are included in all FAR Part 12 solicitations.[61] Applying these requirements to contractors supplying commercial products and services is unduly burdensome and contrary to the purpose and goals of commercial item contracting.

First, as discussed later in this comment, significant amounts of similar information are already being disclosed or generated under existing requirements, or contemplated under other requirements (*i.e.*, the SEC Proposed Rule[62]), albeit in different formats and using different methodologies. Thus, the Proposed Rule adds significant compliance burdens for commercial contractors without appreciably advancing the FAR Council's regulatory goal beyond the existing agency reporting requirements. Second, any consideration of imposing additional reporting obligations must be weighed against the purpose, goals, and requirements of the Federal Acquisition Streamlining Act[63] (FASA) and FAR Part 12. Notably, representations, GHG emissions reporting, and development of science-based targets of the kind contemplated by the Proposed Rule are not customary in commercial practice. The volume and

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[58] 4 C.F.R. § 21.5(c) ("Because the determination that a bidder or offeror is capable of performing a contract is largely committed to the contracting officer's discretion, GAO will generally not consider a protest challenging such a determination. The exceptions are protests that allege that definitive responsibility criteria in the solicitation were not met and those that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation.").

[59] *See Old Dominion Dairy Prods., Inc. v. Sec'y of Defense*, 631 F.2d 953 (D.C. Cir. 1980).

[60] *ATL, Inc. v. United States*, 3 Cl. Ct. 259, 267 (1983) (citing *Perry v. Sindermann*, 408 U.S. 593, 601-03 (1972)).

[61] *See* Proposed Rule, 87 Fed. Reg. at 68313, 68317.

[62] *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (Apr. 11, 2022).

[63] 41 U.S.C. § 3307 (2021).

type of information-sharing that would be required to fulfill the Proposed Rule's requirements exceeds standard commercial practice. Yet, the FAR Council does not appear to have considered this issue.[64]

FASA sought to improve federal acquisitions by encouraging private sector companies to sell products and services to the Government. It aimed to simplify acquisitions from the private sector in three ways: (1) reduce unique purchasing requirements, (2) simplify acquisition procedures, and (3) ensure that agencies could obtain goods and services faster and reduce purchasing costs.[65] In enacting FASA, Congress encouraged the Government to reduce the number of contract clauses included in contracts for commercial products or services:[66]

> To the maximum extent practicable, the list shall include only those contract clauses that are--
> (i) required to implement provisions of law or executive orders applicable to acquisitions of commercial products, commercial components, or commercial services; or
> (ii) determined to be consistent with standard commercial practice.

FASA similarly counsels that prime contractors shall not be required to apply any contract clauses to their subcontractors or suppliers except under those same conditions.[67] FAR Part 12 implements FASA's mandate by reiterating that contracts for the acquisition of commercial products or commercial services should follow policies "more closely resembling those of the commercial marketplace."[68] The Federal Circuit interprets FASA and FAR Part 12 as "preclud[ing] the inclusion of 'any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice.'"[69]

The types of representations and reporting requirements contemplated in the Proposed Rule are inconsistent with commercial practice. It is not customary to include a contract term that requires either (1) representations about GHG disclosures, or (2) reporting of emissions related to the products or services provided in the contract. Some companies are considered major contractors and would be required to obtain data from their subcontractors, materials suppliers, and third-party logistics providers and data regarding customer use of products and services to assess their Scope 3 emissions.[70] Logistically, contractors will likely need to add clauses to their commercial supply contracts to obtain information from other sources. These types of clauses are not standard commercial practice and suppliers are likely to reject these outlier terms or charge significantly higher prices for compliance, which could increase costs to the Government.

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[64] *See* Proposed Rule, 87 Fed. Reg. at 68317 (no analysis of whether Proposed Rule comports with standard commercial practices).
[65] *See generally* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-55, § 8104, 108 Stat. 3243 (1994).
[66] 41 U.S.C. § 3307(2)(B).
[67] 41 U.S.C. § 3307(2)(C).
[68] FAR 12.000; FAR 12.201 (2022) ("This subpart identifies special requirements for the acquisition of commercial products and commercial services intended to more closely resemble those customarily used in the commercial marketplace . . . .").
[69] *CGI Federal v. United States*, 779 F.3d 1346, 1352 (Fed. Cir. 2015) (citing FAR 12.302(c)) (holding that solicitation terms inconsistent with customary commercial practice violate the FAR Part 12 proscription against using such terms in acquisitions of commercial products or services).
[70] *See* Proposed Rule at 68314 (defining Scope 3 emissions as "emissions that are a consequence of the operations of the reporting entity but occur at sources other than those owned or controlled by the entity").

In addition, obtaining this information, and segregating information for each supplier, vendor, and customer, is a significant logistical burden. This type of burden could have a chilling effect and may discourage private sector companies from commercial item contracting at a time when Congress and executive agencies are encouraging engagement with technology start-ups and other nontraditional contractors that may be more likely to offer cutting-edge technology solutions.

The Proposed Rule does not consider FASA's purpose, goals, and requirements. The only explanation provided for imposing these requirements on contractors that provide commercial products, commercial services, and acquisitions valued at or below the Simplified Acquisition Threshold is that "[f]ailure to apply the new procedures and standards for responsibility determinations to these types of acquisitions would not accomplish the intended policy objective of the Executive Order."[71] There is no mention of FASA or FAR Part 12, or any consideration of the impacts specific to commercial acquisitions.[72] This is yet another reason why the Proposed Rule is inappropriate and unworkable.

7. The Proposed Rule's Prescriptive Requirements Impose Climate Targets on Companies that Should be Set on a Company-by-Company Basis.

There are many pathways for society to progress toward reducing greenhouse gas emissions. The scope of actions companies can take that could contribute to national efforts to meet climate goals is immense, and such actions are best aligned for success by taking into account the business's attributes such as geographic profile, commodity, supplier and customer mix, and the segments in which a company operates. API believes that setting targets or working directly to track or help implement companywide climate targets is not appropriate for the FAR Council. Companies are already subject to existing environmental regulations across the segments in which they operate. Many of these regulations already stipulate certain actions companies are required to take to address their GHG emissions. Therefore, requiring companies to develop prescriptive, one-size-fits-all GHG emissions targets is duplicative of existing government requirements that are better-suited to move the US toward its desired national emissions targets. Further, as expressed below, it is certainly not acceptable to sole-source the process of science-based climate target setting. Even as SBTi works to finalize guidance, API believes that prescribing a singular protocol for all companies to follow in setting climate targets is inappropriate.

On the issue of emission targets, API believes the setting of an organization's climate targets is best situated within the purview of a company's strategic business plan, and therefore left to the company's leadership team and board of directors. For example, target setting can take many forms; net zero by a certain date, absolute emissions targets, emissions intensity targets, and year over year improvement targets. The FAR Council should recognize that these different pathways can all contribute to country-led efforts to reduce emissions and meet national efforts to meet climate goals. Dictating one set of pathways, such as use of SBTi targets, will mis-align industry for success as it prevents individual companies from taking more efficient individual actions that would, in sum, likely allow for the greatest emissions reductions. Furthermore, many industry members are global companies operating in multiple

[71] Proposed Rule, 87 Fed. Reg. at 68317.
[72] *See generally id.*

jurisdictions – the FAR Council should not dictate guidance for establishing or tracking targets that cover emissions in other countries which have their own distinct environmental regulations and for operations unrelated to any potential government contract.

8. The Proposed Rule's Reliance on SBTi is Inappropriate.

Notwithstanding that delegating SBTi regulatory powers is unconstitutional, SBTi is particularly unsuitable for incorporation into the Proposed Rule as both a setter and verifier of climate targets.

A. SBTi's published policy is to categorically exclude the oil and natural gas industry and oil and natural gas products, and to eventually deny all financial support to the industry.

API cautions the FAR Council against adopting procurement mandates categorically excluding oil or natural gas, and products derived from oil and natural gas. Oil and natural gas companies supply energy and a range of products derived from oil and natural gas to the US Federal Government and to state and local governments across the United States.

SBTi is currently exclusionary to the oil and natural gas industry, raising doubt as to its independence, integrity, and veracity in setting and verifying climate-based targets. In fact, SBTi's Oil and Gas Interim Report notes that evidence suggests that ongoing fossil fuel exploration and the development of new fossil fuel production infrastructure is incompatible with the temperature goals of the Paris Agreement and that *there is no need for investment in new fossil fuel supply* provided low and zero carbon technologies are rapidly deployed.[73] This is directly contrary to the US Energy Information Administration's 2022 outlook report finding that petroleum and natural gas will remain the most-consumed sources of energy through 2050.[74] In addition, the SBTi Finance Net-Zero Foundations paper identifies a 'disclosure, transition, phase-out' approach, whereby financial institutes are encouraged to: a) *End financing of all new fossil fuel exploration and production* and b) *End all financial support to existing coal assets by 2030 and oil and gas assets by 2040*. [75] To employ a standard setter for the oil and natural gas industry that has a public position of phasing out all oil and natural gas exploration is unacceptable given how oil and natural gas, for decades to come, will remain an essential part of both the national energy mix and the energy supply chain of federal agencies, particularly DOD, NASA, and GSA.

B. It is impossible to comply with the Proposed Rule as SBTi does not validate targets for the industry.

The proposed delegation to SBTi would also create practical problems as it has yet to finalize guidance for the oil and natural gas industry. Currently, SBTi's published policy states that it will not "validate

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[73] SBTi, *Oil and Gas Project Interim Report* (Sept. 2022), https://sciencebasedtargets.org/resources/files/SBTi-OG-Interim-Report-Final.pdf.
[74] US Energy Information Agency, *Annual Energy Outlook 2022* (Mar. 3, 2022), https://www.eia.gov/outlooks/aeo/narrative/introduction/sub-topic-01.php.
[75] SBTi, *Oil and Gas Project Interim Report* (Sept. 2022), https://sciencebasedtargets.org/resources/files/SBTi-OG-Interim-Report-Final.pdf.

targets for companies in the oil and gas or fossil fuels sectors."[76] SBTi defines these companies as those "… with any level of direct involvement in exploration, extraction, mining and/or production of oil, natural gas, coal or other fossil fuels, irrespective of percentage revenue generated by these activities, i.e. including, but not limited to, integrated oil and gas companies, integrated gas companies, exploration and production pure players, refining and marketing pure players, oil products distributors, gas distributors and retailers and traditional oil and gas service companies."[77] Therefore, it is currently impossible for industry members to comply with the Proposed Rule or make informed comments or decisions regarding the Proposed Rule. The industry cannot make an informed decision or reply to this Proposed Rule regarding a standard that does not currently exist.

API understands that SBTi is evaluating its oil and natural gas target setting process, and certain API members are currently involved in a peer review process. API commends SBTi for including stakeholders from the oil and natural gas industry in this development. Yet, concerns remain that if and when SBTi revises its policy,[78] the oil and natural gas industry cannot expect to be treated fairly by an organization that is publicly committed to depriving them of all financial support. This too counsels against the private delegation contemplated by the Proposed Rule.

C. SBTi's target guidance is inconsistent with the Proposed Rule.

SBTi recommends that targets be set at the parent company level, even if only a subsidiary is required to report under the Proposed Rule itself.[79] Many companies in the oil and natural gas industry participate in joint ventures or own subsidiaries. The Proposed Rule allows companies to report for the contracting entity or at the level of either the immediate owner or at the highest-level owner, which is defined as the entity that controls an immediate owner of the offeror, or that controls one or more entities that control an immediate owner of the offeror.[80] Therefore, if the subsidiary of a parent company is considered a major or significant contractor, the company is allowed to report the required emissions inventories and annual climate disclosure and develop a science-based target only relevant to the subsidiary. SBTi, however, recommends that targets be set at the parent company level, or at the "highest owner level." This is inconsistent with the Proposed Rule and may create additional burden for companies, as establishing targets and reporting emissions at the parent company level (or higher) may require significantly more effort and resources than would be needed for the US Government to understand the GHG emission of its contractors.

D. Current SBTi standard guidelines directly conflict with the stated policies of the Biden Administration on carbon capture, use and sequestration ("CCUS").

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[76] SBTi, *Oil and Gas* (last accessed Dec. 13, 2022), https://sciencebasedtargets.org/sectors/oil-and-gas#what-is-the-sb-tis-policy-on-fossil-fuel-companies.

[77] *Id.*

[78] SBTi, *Oil and Gas Project Interim Report* (Sept. 2022), https://sciencebasedtargets.org/resources/files/SBTi-OG-Interim-Report-Final.pdf.

[79] SBTi, *SBTi Criteria and Recommendations* (April 2020), https://sciencebasedtargets.org/resources/legacy/2019/03/SBTi-criteria.pdf.

[80] Proposed Rule, 87 Fed. Reg. at 68314.

SBTi only allows for the accounting of "direct CO_2 removals from atmosphere that occur within energy sector activities," which would include only direct air capture (DAC) technology that removes GHG emissions from the atmosphere. SBTi further states that "indirect removals of CO_2 shall not be accounted… Thus, even if participation of the Oil and Gas companies in a CCUS sector - which can also deliver removals when done on sustainably sourced biomass - seems one likely transition mode for companies, it is not possible at the moment to clearly attribute the credit for removals along this value chain".[81] While the DAC removals allowed by SBTi remove emissions directly from the atmosphere, indirect removals using CCUS capture and store emissions *before* they are emitted, providing emissions reductions throughout the oil and natural gas value chain. Under SBTi's criteria, "Avoided emissions fall under a separate accounting system from corporate inventories and do not count toward science-based targets."[82] Both direct removals and indirect removals present the opportunity to lower the carbon intensity of oil and natural gas – by prohibiting the use of indirect removals in meeting science-based targets, SBTi disregards the role CCUS is expected to play in meeting climate goals.

The need to develop and deploy carbon capture and removal technologies to meet climate targets has been made clear by both global climate experts and the current administration. The International Energy Agency (IEA) states that reaching net-zero will be "virtually impossible" without the use of CCUS.[83] Additionally, the IPCC notes that in several cases, CCUS would lead to the deep emissions reductions required in energy-intensive industries to limit warming to 1.5°C.[84] The Department of Energy also found that CCUS was predicted to be the largest source of long-term emission reductions,[85] when modeling decarbonization pathways for the industrial sector.

Most recently, the Environmental Protection Agency prepared a report for Congress in which it states: "To reach the President's ambitious domestic climate goal of net-zero emissions, economy-wide, by 2050, the United States will likely have to capture, transport, and permanently sequester significant quantities of carbon dioxide".[86] The report also provides that the Department of Energy has "invested more than $1 billion during the past two decades through its Carbon Storage Research and Development (R&D) Program to develop the technologies and capabilities for widespread commercial deployment of geologic storage, including research projects that have injected 11–12 million tons of CO_2" further demonstrating the commitment of the United States government to carbon capture.[87]

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[81] SBTi, *Guidance on setting science-based targets for Oil, Gas, and Integrated Energy Companies* (Aug. 2020), https://sciencebasedtargets.org/resources/legacy/2020/08/OG-Guidance.pdf.
[82] SBTi, *SBTi Criteria and Recommendations* (April 2020), https://sciencebasedtargets.org/resources/legacy/2019/03/SBTi-criteria.pdf.
[83] International Energy Agency, *CCUS in Clean Energy Transitions* (Sept. 2020), https://www.iea.org/reports/ccus-in-clean-energy-transitions.
[84] Intergovernmental Panel on Climate Change, *Strengthening and Implementing the Global Response* (last accessed Dec. 19, 2022), https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Chapter_4_LR.pdf.
[85] US DOE, *Industrial Decarbonization Roadmap* (Sept. 2022), https://www.energy.gov/sites/default/files/2022-09/Industrial%20Decarbonization%20Roadmap.pdf.
[86] US EPA, *EPA Report to Congress: Class VI Permitting* (Oct. 2022), https://www.epa.gov/system/files/documents/2022-11/EPA%20Class%20VI%20Permitting%20Report%20to%20Congress.pdf.
[87] *Id*.

With the passing of the Inflation Reduction Act (IRA), Congress reiterated the federal government's commitment to expanding the use of CCUS by expanding the 45Q tax credit. 45Q is a performance-based tax credit that incentivizes CCUS.[88] The IRA increased the amount of credit per tonne of CO_2 captured, extended the deadline for beginning construction of eligible capture facilities, and lowered the capture threshold and required design capacity for power plants installing capture technology. By increasing and expanding the incentive for facilities to install carbon capture, the IRA emphasized the federal government's commitment to supporting CCUS development and the role that it will play in enabling the US to meet national climate goals. Additional congressional action supporting the expansion of CCUS includes the $12B in funding for CCUS included in the Infrastructure Investment and Jobs Act.[89]

Because SBTi's framework disallows the use of CCUS, it arbitrarily discriminates against companies that support the transition to a lower-carbon economy through the production of lower-emissions oil and natural gas. This goes against a technology-agnostic approach that prioritizes the most cost-effective emissions reductions.

E. SBTi does not allow the use of nature-based offsets.

SBTi does not allow for the use of nature-based offsets as part of an oil and natural gas company's strategy to meet its climate goals, stating that "The use of offsets must not be counted as emissions reduction toward the progress of companies' science-based targets… Offsets are only considered to be an option for companies wanting to finance additional emission reductions beyond their science-based targets."[90] API member companies work diligently to improve carbon efficiencies and reduce direct and indirect GHG emissions from their operations and products, and, where not yet possible or cost effective, neutralize those GHG emissions through carbon offsets. This approach is aligned with the GHG Protocol's guidance, which recommends use of offsets when internal reduction costs are high or opportunities for reduction are limited.[91]

Nature based offsets are defined as actions that conserve, restore, or improve the use or management of high-carbon ecosystems (e.g., peatlands, forests, wetlands, grasslands, agricultural lands, coastal ecosystems) while increasing carbon storage and avoiding greenhouse gas emissions. The use of such offsets is a key tool to support the goals of the Paris Agreement because they can provide "over one-third of the cost-effective climate mitigation needed between now and 2030 to stabilize warming to well below 2°C."[92]

Under the Paris Agreement, limiting the global average increase in temperature to well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels requires rapid, deep, and sustained reductions in global GHG emissions, including reducing global

[88] *Inflation Reduction Act,* Pub. L. No. 117-169 (2022), https://www.congress.gov/117/plaws/publ169/PLAW-117publ169.pdf.
[89] *Infrastructure Investment and Jobs Act*, Pub. L. No. 117-58 (2021), https://www.congress.gov/bill/117th-congress/house-bill/3684/text.
[90] SBTi, *SBTi Criteria and Recommendations* (April 2020), https://sciencebasedtargets.org/resources/legacy/2019/03/SBTi-criteria.pdf.
[91] The Greenhouse Gas Protocol*, A Corporate Accounting and Reporting Standard* (last accessed Dec. 19, 2022), https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf.
[92] Griscom et. al, *Natural Climate Solutions* (Oct. 16, 2017), https://www.pnas.org/doi/10.1073/pnas.1710465114.

carbon dioxide emissions by 45% by 2030 relative to 2010 levels and to net zero around mid-century. Carbon based offsets, including the restoration of degraded lands and REDD+ projects (projects focused on reducing emissions from deforestation and forest degradation), could provide at least 30% of the emissions reductions needed to achieve this target.[93]

In addition, limiting the use of offsets may limit the development of the voluntary carbon market (VCM), a critical tool in progressing towards climate targets. The total transaction value of the VCM in 2019 was $320 million.[94] Depending on different price scenarios and their underlying drivers, the voluntary carbon market size in 2030 could be between $5 billion and $30 billion at the lowest end of the spectrum, and up to over $50 billion at the highest end.[95] By funding offset projects, voluntary carbon markets generate revenues for GHG emissions reductions, support investment in innovation, and mobilize climate finance. Voluntary carbon credits direct private financing to offset projects that need funding - once completed, these projects can provide additional benefits such as biodiversity protection, pollution prevention, public-health improvements, and job creation.[96] Carbon credits also support investment into the innovation required to lower the cost of emerging climate technologies, further supporting future emissions reductions. And scaled-up voluntary carbon markets would facilitate the mobilization of capital to the Global South, where there is the most potential for economical nature-based emissions-reduction projects.[97] Limiting the use of offsets in meeting climate targets, as the Proposed Rule would do through its reliance on SBTi, may limit the development of the market and its ability to provide these benefits. Many efforts are currently underway to ensure the integrity of the VCM – this includes the work of the Voluntary Carbon Markets Integrity Initiative, the Integrity Council for the Voluntary Carbon Market, and the Taskforce on Scaling Voluntary Carbon Markets.

API also notes that on November 8, 2022, the White House released a Fact Sheet entitled: Biden-Harris Administration Announces Roadmap for Nature-Based Solutions to Fight Climate Change, Strengthen Communities, and Support Local Economies.[98] The Nature-Based Solutions Roadmap ("the Roadmap") details strategic recommendations which will enable the U.S. to leverage nature-based solutions to address climate change, nature loss, and inequity. Nature-based solutions have already been put into use in support of achieving President Biden's commitment to reduce GHG emissions 50-52% below 2005 levels by 2030. The Roadmap reinforces the criticality of leveraging nature-based solutions in the fight against climate change, and enabling oil and natural gas companies to procure offsets generated by these projects further mobilizes capital to make incremental improvements.

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[93] Intergovernmental Panel on Climate Change, *Global Warming of 1.5 °C* (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_LR.pdf.

[94] Taskforce on Scaling Voluntary Carbon Markets, *Final Report* (Jan. 2021), https://www.iif.com/Portals/1/Files/TSVCM_Report.pdf.

[95] *Id.*

[96] Blaufelder et al., *A blueprint for scaling voluntary carbon markets to meet the climate challenge* (Jan. 29, 2021), https://www.mckinsey.com/capabilities/sustainability/our-insights/a-blueprint-for-scaling-voluntary-carbon-markets-to-meet-the-climate-challenge.

[97] *Id.*

[98] White House Council on Environmental Quality, White House Office of Science and Technology Policy, White House Domestic Climate Policy Office, *Opportunities for Accelerating Nature-Based Solutions: A Roadmap for Climate Progress, Thriving Nature, Equity, and Prosperity*. Report to the National Climate Task Force, (Nov. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/11/Nature-Based-Solutions-Roadmap.pdf.

F. The proposed timeline for compliance does not provide adequate time to complete the SBTi validation process.

Finally, the Proposed Rule provides companies only two years to comply with the requirement to develop and receive validation for a science-based target through SBTi, which is likely inadequate given the amount of time that may be needed to complete the SBTi process. After signing a commitment letter, companies have 24 months to submit their target. The target then goes through an initial screening process before companies can sign the target validation service contract. After that contract is received, SBTi will communicate its decision regarding whether they will validate the target within 30 days for companies.[99] The Proposed Rule notes that there were approximately 964 "major" contractors (excluding small businesses that would be exempt) in FY2021, providing a relative estimate for the number of companies who would be required to establish a science-based target through SBTi under the Proposed Rule.[100] With so many companies likely developing targets with SBTi within the same time period, there may be further process delays. It may very well take companies more than the allotted two years to complete these steps after any FAR Council rule is finalized.

Additionally, if SBTi finds that a company's submitted target is inadequate and determines it cannot be validated, there is an additional resubmission process where SBTi provides feedback to the company who must then go back and address SBTi's concerns and resubmit their target.[101] The timeline required to receive a validated target will be further extended if companies must resubmit their proposed targets, making it even more difficult to comply with the rule's proposed timeline.

9. The Proposed Rule Does Not Consider Its Effects on Subcontractors and Will Create Significant Compliance Burdens for Them.

The Proposed Rule exclusively focuses on prime contractors' reporting requirements and overlooks the implications for subcontractors. Although the Proposed Rule does not address subcontractor compliance or include subcontractors in the Regulatory Impact Analysis,[102] the Proposed Rule imposes new obligations on subcontractors. As written, the Proposed Rule will lead to confusion and can adversely impact the supply chain by increasing the compliance burden for subcontractors, many of which do not hold prime contracts of their own that would subject them to the Proposed Rule's inventory and reporting requirements. It would be inappropriate to effectively impose these requirements on subcontractors without a Regulatory Impact Analysis that expressly considered impacts on those entities.

Under the Proposed Rule, major contractors would be required to comply with Scope 3 emissions reporting requirements. This would entail obtaining the GHG emissions data from emissions "that are a consequence of the operations of the reporting entity but occur at sources other than those owned or controlled by the entity," including emissions generated by subcontractors.[103] Prime contractors would

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[99] SBTi, *How it works* (last accessed Dec. 19, 2022), https://sciencebasedtargets.org/how-it-works#how-long-does-the-sbti-process-take-how-much-does-it-cost.

[100] Proposed Rule, 87 Fed. Reg. at 68325.

[101] *Id.*

[102] FAR Case 2021-015: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, Regulatory Impact Analysis (hereinafter, "RIA") at 31-40 (estimating impact on federal contractors based only on costs expected for significant contractors and major contractors).

[103] Proposed Rule, 87 Fed. Reg. at 68329.

ultimately be responsible for ensuring the validity of the data they submit, which places an unreasonable burden on prime contractors to confirm the validity of their subcontractors' GHG emissions data.[104] It can also lead to untimely reports as prime contractors will be responsible for tracking down data from numerous subcontractors and lower-tier suppliers, many of which may not have sufficient resources to promptly produce this data.

The Proposed Rule provides a financial threshold so that not all government contractors will be subject to the reporting obligations and specifically exempts from compliance with the requirements for Scope 3 reporting and science-based targets contractors that qualify as a small business under their primary North American Industry Classification System ("NAICS") Code.[105] In doing so, the Proposed Rule impliedly recognizes that small businesses may have difficulty complying with the reporting requirements. And yet, by requiring prime contractors to produce an inventory of their Scope 3 emissions, the Proposed Rule effectively disregards this concern and applies the reporting requirements to all subcontractors, many of which are small businesses and/or receive annual federal contractor or subcontract obligations below the Proposed Rule's reporting threshold of $7.5 million, and certainly below the Scope 3 reporting threshold of $50 million. Thus, entities that would have no reporting obligation under the Proposed Rule as a prime contractor, will nonetheless be required to inventory and report their emissions—by customer—to one or more prime contractors or higher-tier subcontractors. Even if those subcontractors are reporting only Scope 1 and Scope 2 emissions, this is approximately $30,000-$74,000 *per subcontractor* initially and $19,000-$48,000 *per subcontractor* for each subsequent year that is not included in the RIA.[106] Those unaccounted-for costs could balloon to $500,000 initially and $400,000 annually *per subcontractor* if prime contractors require subcontractors to report Scope 3 emissions, a scenario that does not appear to be prohibited or discouraged by the Proposed Rule.[107]

Subcontractors will also face unique challenges in reporting their GHG emissions data that are not addressed in the Proposed Rule. Unlike prime contractors, which can report company-wide (or even parent-level) GHG emissions, subcontractors will have to report their GHG emissions for specific subcontracts or customers.[108] Such granular information will be extremely difficult to compile accurately. Even if subcontractors can ascertain this information, the process for doing so will require significant time and resources, two things small businesses often do not have. If a subcontractor fails to timely provide this information to its prime contractors, or provides inaccurate information, it could strain their business relationship and further damage the already tenuous supply chain for government contracts.

Moreover, some industry members serve as both prime and subcontractors on federal procurements. The Proposed Rule does not address how, if at all, a company's reporting obligations would be affected in that situation. Instead, it appears the contractor would need to report all the company's GHG emissions in SAM.gov (Scope 1 and Scope 2) and possibly CDP or the company's own website (Scope 3) and also submit subcontract-specific GHG emissions data to its prime contractors for their reporting.[109]

[104] *See id*. at 68314.
[105] *Id*. at 68333.
[106] *See* RIA at 40.
[107] *See id.*
[108] *See* Proposed Rule, 87 Fed. Reg. at 66318.
[109] *Id*. at 68313-68314.

This will result in the Government double-counting (at least) the contractor's GHG emissions, leading to inaccurate and useless data.

Finally, in addition to providing insufficient time for SBTi validation of Scope 3 reporting, the Proposed Rule does not provide enough time for subcontractors to create internal policies to ensure compliance with the reporting requirements. The Proposed Rule contemplates a one-year implementation period before contractors must submit their Scope 1 and Scope 2 emissions reports and a two-year implementation period for Scope 3 emissions reports.[110] Companies, especially subcontractors, will need additional time to determine the necessary processes for tracking and allocating their GHG emissions based on specific subcontracts or customers. Rushing this process will further increase the risk of contractors submitting inaccurate or, at the very least, incomplete, data.

10. The Proposed Rule's Mandated Disclosures Lack a Consistent Standard, Preventing Federal Contractors from Determining What Qualifies as a Climate Related Risk.

The proposed mandated disclosures lack a consistent standard for determining what needs to be reported. There is no baseline for transition and physical climate risks for companies to compare events and, therefore, the Proposed Rule would require companies to make speculative judgments regarding specific risks and impacts. Furthermore, transition risks can be multiple and very broad, particularly in jurisdictions that lack comprehensive climate policy, such as carbon pricing, and in an environment of geopolitical uncertainty that can impact demand and prices for oil and natural gas products.

Aligned with TCFD, the Proposed Rule would require the disclosure of information related to climate-related risks. Climate risks are separated into both "physical" and "transition" risks. The Proposed Rule defines transition risks as "risks associated with the transition to a lower-carbon global economy, the most common of which relate to policy and legal actions, technology changes, market responses, and reputational considerations."[111] Physical risks are defined as "physical risks emanating from climate change, which can be event-driven (acute) such as increased severity of extreme weather events (e.g., cyclones, droughts, floods, and fires) as well as longer-term shifts (chronic) in precipitation and temperature and increased variability in weather patterns (e.g., sea level rise)."[112]

Without a consistent standard, companies will lack the necessary guidance to consistently determine what qualifies as a physical or transition climate-related risk. With respect to physical risks, assume for example that two hurricanes formed in the Gulf of Mexico in a reporting year that disrupted operations for three companies with onshore operations located in a similar geographic area. One company could determine that two hurricanes were normal for a year. The second company could determine that it was normal for one hurricane to make landfall, but that a second was unusual and may be tied to climate change. And the third company might determine that the instance of two hurricanes was not unusual, but that the intensity of the hurricanes was exceptional and that a portion of the disruptions therefore was due to climate change (by reason of intensity). Any of these determinations could be reasonable based on the companies' subjective assessment yet lead to significant differences in reporting under the Proposed Rule.

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[110] *Id*. at 68318.
[111] Proposed Rule, 87 Fed. Reg. at 68318.
[112] *Id.*

Disclosures related to "transition risks" under the Proposed Rule present a separate set of challenges. The Proposed Rule would require contractors to forecast changing climate policies, regulations, and legislation as the CDP questionnaire requires the reporting of climate-related risks over the short, medium, and long-term. Contractors will inevitably make different predictions about the direction of future policies and their implementation timelines, leading to inconsistent reporting among federal contractors and limited opportunities for government analysis of the data due to the lack of a common baseline. Additionally, identifying and measuring these types of risks is particularly difficult for the oil and natural gas industry where the most material item affecting revenue is the commodity price of oil or natural gas. For example, consider the recent spike in natural gas prices for consumers in Europe. It is unclear how a company would be able to determine what portion of this event was caused by normal cold weather, climate change-induced cold weather, changes in government policy, or the geopolitical conflict in Eastern Europe. With no uniform way to determine these risks, contractors will be unable to consistently assess what risks need to be reported under the Proposed Rule.

11. The Proposed Rule's Scope 3 Reporting Requirements are not Relevant to the Federal Procurement of Oil and Natural Gas Products and Therefore are not Within the Purview of the FAR Council.

The Proposed Rule requires the reporting of relevant Scope 3 emissions by major contractors. SBTi requires the setting of Scope 3 targets if they account for more than 40% of a company's total emissions, and all companies involved in the sale/distribution of fossil fuel products must set targets for emissions from the use of sold products.[113] However, outside of the emissions generated by a federal agency's own activities, a contractor's Scope 3 emissions have no relevance in the federal procurement process.

The Proposed Rule would require companies to report all relevant Scope 3 emissions through the CDP Climate Change Questionnaire. CDP's technical note on the relevance of Scope 3 categories by sector includes Category 11 "Use of sold products" and Category 1 "Purchased goods and services" as the categories likely to be relevant for the oil and natural gas sector, although other categories not listed may also be determined to be relevant and should be evaluated.[114]

While CDP's technical note highlights Category 1 as a relevant category for oil and natural gas companies to report, the small amount of Category 1 emissions relative to other Scope 3 categories does not warrant relevance. In its technical note, CDP states that "This category may be significant for some companies, though it is a small proportion of Scope 3 across the sector as a whole, comprising 4% of total Scope 3 emissions and 4% of total Scope 1+2+3 emissions reported by Oil & Gas companies responding to CDP on behalf of investors in 2021."[115] As CDP acknowledges, Category 1 does not typically make up a large, traditionally relevant proportion of oil and natural gas companies' Scope 3 emissions. Based on CDP questionnaire responses, Category 11 emissions typically represent 81% of the

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[113] SBTi, *SBTi Criteria and Recommendations* (April 2020), https://sciencebasedtargets.org/resources/legacy/2019/03/SBTi-criteria.pdf.

[114] CDP, *CDP Technical Note: Relevance of Scope 3 Categories by Sector*, (last revised Jan. 2023), https://cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/003/504/original/CDP-technical-note-scope-3-relevance-by-sector.pdf.

[115] CDP, *CDP Technical Note: Relevance of Scope 3 Categories by Sector*, (last revised Jan. 2023), https://cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/003/504/original/CDP-technical-note-scope-3-relevance-by-sector.pdf.

total emissions of oil and natural gas companies and 91% of their total Scope 3 emissions.[116] This further brings into question the relevance and necessity of requiring oil and natural gas companies to report Scope 3 emissions from categories outside of Category 11. Requiring the disclosure of irrelevant Scope 3 emissions will create significant problems and burdens for contractors, as discussed earlier in this letter.

As previously stated, Category 11 emissions typically represent 81% of the total emissions of oil and natural gas companies.[117] However, these emissions are not within the control of the oil and natural gas company, but instead are generated by the users of their products. In the case of the Proposed Rule, the emissions from the use of sold products are under the direct control of the federal agencies procuring them, not the companies who, as proposed, would be required to report them. These emissions would be considered the relevant federal agency's Scope 1 emissions, or the emissions resulting from sources owned or controlled by the agency.[118] Given that these are their direct emissions, the federal agencies are better suited to collect and report this emissions data.

As discussed above, if finalized as proposed the Proposed Rule would require federal contractors to report emissions resulting from the federal government's use of products. However, the Proposed Rule does not include any mechanism for the federal agencies to report the emissions from the use of their purchased products back to the federal contractors. Contractors will be unable to satisfy the Scope 3 reporting requirements without such information. The need for such a mechanism in order to implement the Proposed Rule reiterates how the emissions in question are the responsibility of the federal agency who has direct control over such emissions and are outside of the control of the federal contractors supplying goods and services.

12. The Proposed Rule's Requirements and Times are Inconsistent and Misaligned with Existing and Proposed Reporting Requirements and Timelines.

A. The Proposed Rule is both duplicative and conflicting with the Securities and Exchange Commission's (SEC's) proposed climate-related disclosure rules and creates additional reporting requirements.

The SEC has pending a significant Proposed Rule[119] (the "SEC Proposed Rule") that would require the vast majority of public companies – many of whom may be significant or major federal contractors under this Proposed Rule – to disclose certain emissions and other climate-related risks. The Proposed Rule contains many of the same disclosure requirements that public companies would be obligated to

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[116] CDP, *CDP Technical Note: Relevance of Scope 3 Categories by Sector*, (last revised Jan. 2023), https://cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/003/504/original/CDP-technical-note-scope-3-relevance-by-sector.pdf.

[117] CDP, *CDP Technical Note: Relevance of Scope 3 Categories by Sector*, (last revised Jan. 2023), https://cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/003/504/original/CDP-technical-note-scope-3-relevance-by-sector.pdf.

[118] *See* Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* (last accessed Dec. 20, 2022), https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf (definition of Scope 1 emissions: "Direct GHG emissions occur from sources that are owned or controlled by the company, for example, emissions from combustion in owned or controlled boilers, furnaces, vehicles, etc.; emissions from chemical production in owned or controlled process equipment.").

[119] *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (Apr. 11, 2022).

report under the SEC's Proposed Rule. This includes disclosing Scope 1, Scope 2, and Scope 3 emissions, and information on climate-related risks and climate-related targets.

The Proposed Rule also expands upon the requirements proposed in the SEC Proposed Rule. The SEC Proposed Rule requires companies to disclose any climate-related targets that they have set, while the FAR Council Proposed Rule goes so far as to require companies to establish science-based targets if they have not already developed any. Concerns regarding the prescriptive requirement to set company targets and that those targets be validated by a non-government third party are discussed earlier in this comment.

The Proposed Rule states that "the SEC Proposed Rule and the FAR Proposed Rule leverage the GHG Protocol Corporate Accounting and Reporting Standard; therefore, the rules are considered to be in alignment";[120] however, there are significant differences in how the two Proposed Rules would require organizations to calculate their emissions inventory. The boundaries used to report emissions under the Proposed Rule are different than those used in the SEC Proposed Rule. The SEC Proposed Rule requires reporting of emissions along a consolidated financial statement boundary. As API highlighted in our previous comments to the SEC, this organizational boundary is not consistent with the GHG Protocol guidelines or the GHGRP, nor is it a customary practice among companies. The Proposed Rule requires emissions to be reported according to the GHG Protocol Corporate Standard, which instructs companies to report under the equity share or control approach. Additionally, the emissions inventories required by the SEC Proposed Rule and the Proposed Rule are reported in different locations: SEC would require emissions data to be published in a company's annual corporate filings, whereas the FAR Council Proposed Rule would require submission via SAM. By requiring companies to report their emissions inventories in two different locations and along different boundaries, the Proposed Rule creates duplicative, overly burdensome reporting requirements that will lead to stakeholder confusion.

Additionally, the SEC Proposed Rule requires the disclosure of "material" Scope 3 emissions, where the CDP Questionnaire used in the Proposed Rule requires disclosure of "relevant" Scope 3 emissions.[121] The use of different thresholds for Scope 3 reporting creates additional burden and confusion for reporting companies. Furthermore, Scope 3 emissions would be reported in a different location from both the SEC's required emissions disclosures as well as the Scope 1 and Scope 2 emissions inventories required by the Proposed Rule, likely leading to further inefficiencies and stakeholder confusion.

The inconsistency in reporting requirements will result in substantially different emissions data being reported under each Proposed Rule. The use of different boundaries and terms between the two Proposed Rules will create disparate disclosures that may give rise to SEC enforcement action and could give rise to reputational risk if one set of disclosures presents lower emissions than the other set. If the SEC rule is finalized as proposed and requires companies to submit climate-related disclosures within their financial statements, reporting companies will be liable for the reported information. Given how the rules' differences may result in members reporting different numbers between the two reporting mechanisms, there is concern that the numbers reported in the SEC filings may be mistakenly misinterpreted as fraudulent, misstated, or incorrect if they don't match those reported under the FAR

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[120] Proposed Rule, 87 Fed. Reg. At 68325.

[121] CDP, *CDP Technical Note on the TCFD* (last revised Jan. 21, 2022), https://cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/001/429/original/CDP-TCFD-technical-note.pdf?1512736184.

Proposed Rule. In addition, as discussed below, disparate filings under different standards may lead to increased allegations of False Claims Act violations.

B. The proposed timeline is unclear and may be misaligned with timelines for existing reporting requirements.

API appreciates the Proposed Rule's general consistency with the GHGRP, but notes that the FAR Council proposal, SEC Proposed Rule, and the GHGRP utilize different timelines for reporting.

The timing of the Proposed Rule may be inconsistent with existing Proposed Rules and regulations, creating additional confusion as to how the different sets of reported information can be interpreted. The lack of a uniform approach to GHG emissions reporting across regulatory requirements may cause confusion and conflicting reporting, contrary to the Administration's goals of transparent, useful climate reporting. For example, companies submit their initial GHGRP data to EPA by the end of March for the previous year and in May companies start to receive comments and requests for adjustments from EPA on their submission. Recognizing the vast amount of data that companies need to review and report to EPA, the EPA GHGRP may allow up to 75 days to close out the EPA review process. EPA also has their own verification and assessment process over the GHGRP data submission. The proposed SEC rule would require the emissions from a fiscal year to be published in a company's annual report, due 90 days after the end of that fiscal year.

The FAR Council's Proposed Rule does not provide specific dates, only that a contractor must have published the required emissions inventories in SAM to be considered responsible. The CDP questionnaire required for major contractors to submit also requires Scope 1 and Scope 2 emissions to be reported. The questionnaire typically comes out in January and responses can be submitted once the Online Response System opens, any time before the questionnaire's due date (which is typically during Q3). With companies reporting emissions at so many different points throughout the year, the data that they publish at the different points in time may vary based on factors such as data availability and whether the data undergoes additional review throughout the year. The publication of varying data may lead to inconsistencies and increased stakeholder confusion. There is no evidence in the Proposed Rule that the FAR Council attempted to maximize alignment with existing reporting regulations to decrease the reporting burden and stakeholder confusion and to increase clarity and understanding surrounding reported emissions.

C. The Proposed Rule references multiple regulatory and voluntary standards and guidelines creating an undue compliance burden.

The Proposed Rule references and requires the use of the following standards and guidance: the CDP (formerly Carbon Disclosure Project) Climate Change Questionnaire, the Science Based Targets Initiative (SBTi), the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard, the Greenhouse Gas Protocol Corporate Standard (2004), the Greenhouse Gases in Inventories: Accounting and Reporting Amendment (2013), the GHG Protocol Scope 2 Guidance (2015), the GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard Guidance, the 2017 Recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD), and the 2021 TCFD Annex: Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures.

The application of all these reporting standards may be appropriate for some companies, but not all. Requiring no less than 8 emissions reporting obligations, in addition to the SEC Proposed Rule

requirements, is excessive and duplicative, especially considering that many oil and natural gas companies already provide Scope 1 and some provide Scope 2 GHG emissions data through a combination of regulatory reporting requirements (e.g., the GHGRP requiring Scope 1 data), sustainability reports, voluntary disclosures, and other means. Requiring the publishing of Scope 1 and Scope 2 GHG emissions in SAM is duplicative of existing regulations and company efforts.

13. By Relying on Different Methodologies and Standards from Other GHG Reporting Rules, the Proposed Rule Unnecessarily Increases Contractors' Risk of False Claims Act Allegations.

As explained later in this comment, oil and natural gas companies are already reporting data on GHG emissions to other federal agencies, including the EPA and potentially the SEC. By requiring industry members to also report GHG-related information under the Proposed Rule, which uses different standards and reporting requirements, the Proposed Rule will result in confusing and overlapping GHG emissions reports that unnecessarily increase the risk of alleged False Claims Act (FCA) violations.[122] Although companies will strive to ensure their data is accurate, reporting redundancies and differing methodologies increase the likelihood that some of the information submitted to various federal agencies could contradict each other and lead to the perception that reporting is inaccurate or misleading.

Moreover, many oil and natural gas companies are considered major contractors under the Proposed Rule, which means their Scope 3 emissions reports will include data obtained from their subcontractors, materials suppliers, third-party logistics providers, and estimates of customer use of products and services.[123] The Proposed Rule anticipates that major contractors will use a combination of disclosed and modeled data to calculate upstream and downstream emissions, but the Proposed Rule does not explain the consequences, if any, of a major contractor incorporating into its Scope 3 emissions reporting third-party data that turns out to be inaccurate; nor does it provide a safe harbor for a major contractor that relies in good faith on such data.[124] Without any such protections, the Proposed Rule is effectively imposing a duty on prime contractors to audit the emissions data they receive from outside companies and consumers. Such an obligation is impractical at best, as prime contractors do not have the knowledge or resources to verify every input to the emissions data they receive.

Although the Proposed Rule does not expressly establish a regime to penalize contractors for allegedly inaccurate reporting, there is precedent for the Government investigating and penalizing alleged violations of these types of reporting requirements and encouraging qui tam suits on similar legal theories. For example, in 2021, the Department of Justice launched the Civil Cyber-Fraud Initiative, which pursues government contractors under the FCA for, among other things, alleged misrepresentations of their compliance with contractual cybersecurity standards and reporting

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[122] These reports are also based on different methodologies than those developed by API and its members. *See* API, *Compendium of Greenhouse Gas Emissions Methodologies for the Oil and Natural Gas Industry* (Nov. 2021), https://www.api.org/-/media/Files/Policy/ESG/GHG/2021-API-GHG-Compendium-110921.pdf.

[123] Proposed Rule, 87 Fed. Reg. at 68333 (citing GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard Guidance (2011), https://ghgprotocol.org/sites/default/files/standards/Corporate-Value-Chain-Accounting-Reporing-Standard_041613_2.pdf).

[124] *See* Proposed Rule, 87 Fed. Reg. at 68320.

requirements.[125] Government contractors found to violate the FCA will be liable for up to $23,000 per false claim, plus potentially treble damages that the Government may allege equal the entire contract value.[126] Should a similar task force be put in place to investigate GHG emissions reporting issues, government contractors could be facing significant financial penalties for inadvertent reporting mistakes under one of the several applicable U.S. Government or international standards or for good faith reliance of third-party data that the Government later determines to be inaccurate.

14. The Proposed Rule May Discourage the Development of Low Carbon Fuels.

API members are eager to support the federal government in its decarbonization efforts and the Proposed Rule may limit members' ability to supply agencies with low-carbon products. The industry sees great opportunity in supporting the federal government in decarbonizing through the development of sustainable fuels and other low-carbon technologies. For example, many companies are working to produce sustainable aviation fuel with lower carbon intensities than traditional fuel. Given SBTi's lack of standards for the oil and natural gas industry, which may lead to agency findings of non-responsibility, API member companies would be unable to support the agencies in decarbonizing their fuel use. By preventing oil and natural gas companies from being deemed responsible contractors, the Proposed Rule would limit agencies' access to low-carbon fuels.

On the whole, the federal government is the largest purchaser in the world with an annual purchasing power of $650 billion.[127] The Department of Defense obligated $365 billion in FY22 alone.[128] If the oil and natural gas industry are restricted from participating in the market for these low-carbon fuels, the Proposed Rule may have the unintended consequence of slowing their development, creating further obstacles for decarbonization.

Conclusion

In conclusion, API appreciates the opportunity to provide feedback to the Council as it considers whether to amend its rules to incorporate GHG emission data and climate targets in the Federal procurement process. As noted, API and its members support efforts to reduce GHG emissions through voluntary actions, direct regulation of methane, and the establishment of an economy-wide price on carbon dioxide. As the FAR Council considers amending federal acquisition regulations, the Council should continue to evaluate acceptable alternatives in the procurement process that include other relevant performance measures in addition to GHG emissions, and not give undue weight to GHG emissions. API also urges the federal agencies to avoid duplication of efforts led by other federal

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[125] Press Release, Department of Justice, Office of Public Affairs, Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative (Oct. 6, 2021), https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-new-civil-cyber-fraud-initiative. The announcement directs individuals with tips and complaints about potential cyber-related fraud, waste, abuse, and mismanagement to a webpage that lists "filing a '*qui tam*' action in federal court" as one of the three most common ways to report suspected fraud against the Government. Report Fraud Against the Federal Government, https://www.justice.gov/civil/report-fraud (last accessed Dec. 16, 2022).

[126] *See* U.S.C. § 3729(a)(1).

[127] Office of the Federal Chief Sustainability Officer, *Federal Buy Clean Initiative* (last accessed Dec. 19, 2022), https://www.sustainability.gov/buyclean/#:~:text=The%20Federal%20Government%20is%20the%20largest%20purchaser%20in,with%20annual%20purchasing%20power%20of%20over%20%24650%20billion.

[128] USASpending, *Department of Defense (DoD)* (data through Sept. 29, 2022), https://www.usaspending.gov/agency/department-of-defense?fy=2022.

entities, such as the SEC, on climate-related data reporting and risk. But for the reasons stated above, we respectfully request that the FAR Council withdraw the Proposed Rule.

Thank you again for your consideration of these comments. We welcome the opportunity to respond to any questions or to discuss these comments as warranted.

Sincerely,

Jennifer Stewart
Director, Climate & ESG Policy