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TESTIMONY

Statement of

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"A Bar Too High: Concerns with CEQ's Proposed Regulatory Hurdle for Federal Contracting"

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Executive Summary

Chairman Obernolte, Ranking Member Foushee, and Members of the Subcommittee:

My name is Victoria Killion, and I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for the opportunity to testify on potential legal issues concerning the proposed rule, *Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk*.[1] This testimony will focus mainly on two legal considerations: (1) the major questions doctrine; and (2) the private nondelegation doctrine.

If finalized as written, the proposed rule would require "significant" and "major" contractors seeking additional contracts with the U.S. government to make annual, public disclosures regarding their greenhouse gas emissions. It would also require major contractors to set targets for reducing emissions and obtain validation of those targets from a private entity.[2] Failure to comply with these rules could result in a determination of "nonresponsibility" by the contracting officer and loss of the contracting opportunity.[3]

An assessment of the rule's validity potentially could involve application of the major questions doctrine. The doctrine provides that when an agency seeks to regulate "a significant portion of the American economy,"[4] or the agency's assertion of regulatory authority has "vast 'economic and political significance,'"[5] its rule must be based on a clear grant of statutory authority. Notwithstanding the President's broad authority to prescribe policies for carrying out the procurement laws,[6] recent cases involving a federal vaccination requirement suggest that the major questions doctrine, if applicable, could impose a heightened threshold for a court to identify "clear congressional authorization" for some contractor requirements.[7]

The proposed rule could also implicate the private nondelegation doctrine, which generally prohibits the government from delegating regulatory power to a private entity.[8] The resolution of this question could depend on whether a reviewing court considers the private entities' role in this rule as regulatory or instead merely in aid of a federal agency's functions, and whether the federal agency exercises sufficient supervisory authority over the private entity.[9]

CRS remains available to the Committee to provide research and analysis of these issues or other questions related to the current rulemaking through testimony, briefings, and confidential memoranda.

[1] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (proposed Nov. 14, 2022).

[2] *Id.* at 68328.

[3] *Id.* at 68329.

[4] West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022).

[5] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

[6] *E.g.*, AFL-CIO v. Kahn, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc).

[7] *E.g.*, Louisiana v. Biden, 55 F.4th 1017, 1033 (5th Cir. 2022).

[8] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[9] Oklahoma v. United States, 62 F.4th 221, 230 (6th Cir. 2023).

Introduction

Chairman Obernolte, Ranking Member Foushee, and Members of the Subcommittee:

My name is Victoria Killion, and I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for the opportunity to testify on potential legal issues concerning the proposed rule, *Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk*.[10] This testimony will focus mainly on two legal considerations: (1) the major questions doctrine; and (2) the private nondelegation doctrine. Because of their complexity and constitutional underpinnings, both doctrines present challenging issues for Congress and the agencies that implement federal law. Additionally, recent Supreme Court and federal appellate decisions have spurred major developments in these legal doctrines, which federal courts, legislators, and agencies are working to synthesize and understand. This testimony will provide a foundation for evaluating these legal considerations as they may relate to the proposed rule and other agency regulations. CRS is available to assist further in analyzing these issues.

Executive Orders

In a series of executive orders, President Biden directed federal agencies to take certain actions to "reduce greenhouse gas emissions," including through amendments to the Federal Acquisition Regulation (FAR),[11] the primary rules governing federal contracts for supplies and services.[12] An executive order issued in January 2021 directed the Chair of the Council on Environmental Quality to "consider additional administrative steps and guidance to assist the Federal Acquisition Regulatory Council [(FAR Council)] in developing regulatory amendments to promote increased contractor attention on reduced carbon emission and Federal sustainability."[13] In May 2021, the President issued Executive Order 14030 (EO 14030), directing the FAR Council, "in consultation with the Chair of the Council on Environmental Quality and the heads of other agencies as appropriate" 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."[14] Then, in December 2021, the President directed the General Services Administration (GSA) Administrator to "track disclosure of greenhouse gas emissions, emissions reduction targets, climate risk, and other sustainability-related actions by major Federal suppliers, based on information and data collected through supplier disclosure" requirements of EO 14030.[15] On the same day, the Office of Management and Budget (OMB) published a memorandum recommending that the FAR Council "leverage existing third-party standards and systems" in "the development of regulatory amendments to promote contractor attention on reduced carbon emissions and Federal sustainability."[16]

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

[11] Federal Acquisition Regulation, ACQUISITION.GOV, https://www.acquisition.gov/browse/index/far (last visited Sept. 15, 2023).

[12] Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01765.pdf; *see generally Federal Acquisition Regulation (FAR)*, U.S. GENERAL SERVICES ADMINISTRATION (GSA), https://www.gsa.gov/policy-regulations/regulations/federal-acquisition-regulation (last visited Sept. 15, 2023).

[13] Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021), https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad.

[14] Exec. Order No. 14,030, 86 Fed. Reg. 27967 (May 25, 2021), https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.

[15] Exec. Order No. 14,057, 86 Fed. Reg. 70935 (Dec. 13, 2021), https://www.federalregister.gov/documents/2021/12/13/2021-27114/catalyzing-clean-energy-industries-and-jobs-through-federal-sustainability.

[16] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMO NO. M-22-06, CATALYZING CLEAN ENERGY INDUSTRIES AND JOBS THROUGH FEDERAL SUSTAINABILITY (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-06.pdf.

The Proposed Rule

On November 14, 2022, GSA, along with the Department of Defense (DoD) and the National Aeronautics and Space Administration (NASA),[17] issued a proposed rule to implement EO 14030.[18] The comment period for the rule closed on February 13, 2023.[19] The agencies received over 38,000 comments, 261 of which were posted publicly on *Regulations.gov*.[20]

The proposed rule would amend the FAR to create new qualification standards for "significant" and "major" contractors. The proposal defines "significant contractor" as "an offeror who received $7.5 million or more, but not exceeding $50 million, in total Federal contract obligations (as defined in OMB Circular A–11) in the prior Federal fiscal year as indicated in the System for Award Management (SAM)."[21] "Major contractor" is defined as "an offeror who received more than $50 million in total Federal contract obligations" in the prior federal fiscal year as indicated in SAM.[22]

Disclosure and Target Validation Requirements

The FAR currently requires offerors that are registered in SAM and that received $7.5 million or more in federal contract awards in the previous fiscal year to "[r]epresent whether they publicly disclose greenhouse gas emissions" and "a quantitative greenhouse gas emissions reduction goal," and to "[p]rovide the website for any such disclosures."[23] If finalized as written, the proposed rule would remove this requirement and create a new subpart of the FAR for "Public Disclosure of Climate Information."[24] The new subpart would require significant and major contractors seeking additional contracts to make annual, public disclosures regarding their Scope 1 and Scope 2 greenhouse gas emissions, starting one year after publication of the final rule.[25] Specifically, the prospective contractors would need to complete a "greenhouse gas inventory" of their annual Scope 1 and 2 emissions and report the total of those annual emissions in the SAM.[26] Among other requirements, the greenhouse gas inventory would have to be

[17] These three agencies "jointly issue the FAR." *Federal Acquisition Regulation*, GSA, https://www.gsa.gov/policy-regulations/regulations/federal-acquisition-regulation (last visited Sept. 15, 2023).

[18] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (proposed Nov. 14, 2022).

[19] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 78910 (proposed Dec. 23, 2022) (extension of comment period), https://www.federalregister.gov/documents/2022/12/23/2022-27884/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial.

[20] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (FAR Case 2021-015), REGULATIONS.GOV, https://www.regulations.gov/docket/FAR-2021-0015 (rulemaking docket).

[21] Proposed Rule, 87 Fed. Reg. at 68329. *See also* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A–11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2023), https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf; SAM.GOV, https://sam.gov/content/home (last visited Sept. 15, 2023).

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

[23] 48 C.F.R. § 23.802(d).

[24] Proposed Rule, 87 Fed. Reg. at 68328 (proposed amendments to 48 C.F.R. § 23.802 and proposed new subpart 23.XX). The proposed rule would also remove a related section requiring contracting officers to insert provisions about these representations in certain contracts. *Id.* (proposed amendments to 48 C.F.R. § 23.804).

[25] *Id.* at 68329. The proposed rule defines "Scope 1 emissions" as "direct greenhouse gas emissions from sources that are owned or controlled by the reporting entity," and "Scope 2 emissions" as "indirect greenhouse gas emissions associated with the generation of electricity, heating and cooling, or steam, when these are purchased or acquired for the reporting entity's own consumption but occur at sources owned or controlled by another entity." *Id.*

[26] *Id.* at 68329.

"conducted in accordance with the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard."[27]

The proposed rule would impose additional requirements on major contractors. These requirements would incorporate the standards and processes of three organizations that are not part of the federal government.[28] The first organization is CDP, "a not-for-profit charity that runs the global disclosure system for investors, companies, cities, states and regions to manage their environmental impacts."[29] CDP operates an online disclosure platform, through which companies can submit responses to CDP's annual Climate Change Questionnaire.[30] The second organization is the Task Force on Climate-related Financial Disclosures (TCFD), a group of 31 members "representing both preparers and users of financial disclosures."[31] TCFD was convened in 2015 by the Financial Stability Board, "an international body that monitors and makes recommendations about the global financial system."[32] In 2017, TCFD published "recommendations to improve and increase reporting of climate-related financial information."[33] The third organization is the Science Based Targets initiative (SBTi), "a partnership between CDP, the United Nations Global Compact, World Resources Institute (WRI) and the World Wide Fund for Nature (WWF)."[34] SBTi has a framework for companies to "commit to set a science-based target," "develop" that target, and have that target "validated" by SBTi.[35]

Under the proposed rule, major contractors would need to submit an "annual climate disclosure"[36] by "completing those portions of the CDP Climate Change Questionnaire that align with the TCFD recommendations as identified by CDP" and making that disclosure "available on a publicly accessible

[27] *Id.* at 68328 (proposed § 23.XX02).

[28] *Id.* at 68329 (proposed § 23.XX03(b)(1)).

[29] *About Us*, CDP, https://www.cdp.net/en/info/about-us (last visited Sept. 15, 2023).

[30] Proposed Rule, 87 Fed. Reg. at 68315; *see also Guidance for Companies*, CDP, https://www.cdp.net/en/guidance/guidance-for-companies (last visited Sept. 15, 2023).

[31] *About: Task Force Members*, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (TCFD), https://www.fsb-tcfd.org/about/ (last visited Sept. 16, 2023).

[32] *About the FSB*, FINANCIAL STABILITY BOARD (FSB), https://www.fsb.org/about/#mandate (last updated Nov. 16, 2020); TCFD, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES: 2022 STATUS REPORT 2 (2022), https://assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf.

[33] Proposed Rule, 87 Fed. Reg. at 68315; TCFD, RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (2017), https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf.

[34] *Who We Are*, SCIENCE BASED TARGETS INITIATIVE (SBTI), https://sciencebasedtargets.org/about-us (last visited Sept. 15, 2023).

[35] Proposed Rule, 87 Fed. Reg. at 68316; *see also How Can Companies Set a Science-Based Target?*, SBTI, https://sciencebasedtargets.org/how-it-works (last visited Sept. 16, 2023).

[36] Proposed Rule, 87 Fed. Reg. at 68329. The proposed rule defines "annual climate disclosure" as:

> [A]n entity's set of disclosures that—(1) Aligns with—(i) The 2017 Recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD) (see https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf), which cover governance, strategy, risk management, and metrics and targets (see figure 4 of the 2017 recommendations for an outline of disclosures); and (ii) The 2021 TCFD Annex: Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures, which includes updates to reflect the evolution of disclosure practices, approaches, and user needs (see https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFDImplementing_Guidance.pdf); and (2) Includes—(i) A greenhouse gas inventory of its Scope 1, Scope 2, and relevant Scope 3 emissions; and (ii) Descriptions of the entity's climate risk assessment process and any risks identified.

Id. at 68328 (proposed § 23.XX02).

website."[37] Among other things, the annual climate disclosure would have to include a major contractor's Scope 3 emissions, in addition to its Scope 1 and 2 emissions.[38]

The proposed rule would also require major contractors to develop a "science-based target," have that target "validated" by SBTi, and publish the validated target on a publicly accessible website.[39] The proposed rule defines "science-based target" as:

> [A] target for reducing greenhouse gas emissions that is in line with reductions that the latest climate science deems necessary to meet the goals of the Paris Agreement to limit global warming to well below 2°C above pre-industrial levels and pursue efforts to limit warming to 1.5°C (see SBTi frequently asked questions at https://sciencebasedtargets.org/faqs#what-are-science-based-targets). For information on the latest climate science see 2018 Intergovernmental Panel on Climate Change (IPCC) Special Report on 1.5°C at https://www.ipcc.ch/sr15/.[40]

Five groups of entities would be automatically exempt from the proposed disclosure and validation requirements: (1) an "Alaska Native Corporation, a Community Development Corporation, an Indian tribe, a Native Hawaiian Organization, or a Tribally owned concern, as those terms are defined at 13 CFR 124.3"; (2) a "higher education institution (defined as institutions of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001)"; (3) a "nonprofit research entity"; (4) a state or local government; and (5) an "entity deriving 80 percent or more of its annual revenue from management and operating contracts (see subpart 17.6) that are subject to agency annual site sustainability reporting requirements."[41] Additionally, the requirements specific to major contractors would not apply to a nonprofit organization or an entity listed as a small business for purposes of its primary code in the North American Industry Classification System.[42]

Consequence of Noncompliance

From a legal perspective, the main consequence of noncompliance with these requirements is potential ineligibility to receive a federal contract or sell goods or services to the federal government. The FAR provides that "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only."[43] A prospective contractor must "affirmatively demonstrate its responsibility" to the contracting officer reviewing its bid.[44] The contracting officer must evaluate seven criteria to determine whether the prospective contractor is responsible, including whether the company is "otherwise qualified and eligible to receive an award under applicable laws and regulations."[45] The proposed rule would explicitly include its disclosure and validation requirements as an example of potentially applicable regulations.[46] If a significant or major contractor did not comply with the disclosure and validation

[37] *Id.* at 68329 (proposed § 23.XX03(b)(1)).

[38] *Id.* at 68328 (proposed § 23.XX02). The proposed rule defines "Scope 3 emissions" as "greenhouse gas emissions, other than those that are Scope 2 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." *Id.* at 68329 (proposed § 23.XX02).

[39] *Id.* at 68329 (proposed § 23.XX03(b)(2)). Major contractors could rely on targets validated by SBTi within the previous 5 calendar years. *Id.*

[40] *Id.* at 68329 (proposed § 23.XX02).

[41] *Id.* at 68329 (proposed § 23.XX04(a)).

[42] *Id.* at 68329 (proposed § 23.XX04(b)).

[43] 48 C.F.R. § 9.103(a).

[44] *Id.* § 9.103(c).

[45] *Id.* § 9.104-1(g).

[46] Proposed Rule, 87 Fed. Reg. at 68327 (proposed amendment to 48 C.F.R. § 9.104-1).

requirements (as applicable), the proposed rule would require the contracting officer to "presume" that the contractor is nonresponsible unless the contracting officer makes certain determinations.[47]

The presumption of nonresponsibility would not apply to entities that are exempt from registering in SAM at the time of submitting an offer or quote.[48] Additionally, the proposed rule would permit the senior procurement executive of the contracting federal agency to grant waivers to non-exempt entities in certain circumstances. One type of waiver would dispense with the procedures to determine compliance with the reporting and validation requirements for "[f]acilities, business units, or other defined units for national security purposes" or "[e]mergencies, national security, or other mission essential purposes."[49] Alternatively, the senior procurement executive could provide a waiver of up to one year "to enable a significant or major contractor to come into compliance with" the reporting and validation requirements.[50]

Legal Considerations

As previously indicated, the agencies undertaking the rulemaking published hundreds of comments in favor of and in opposition to the proposed rule. These comments reflect a wide range of legal and policy issues. This testimony focuses on two legal questions that may arise if the agencies were to finalize the proposed rule in this form. The first is the major questions doctrine, and the second is the private nondelegation doctrine.

Major Questions Doctrine

Federal agencies derive their authority to regulate from Congress; in other words, from federal statutes.[51] If an agency exceeds its statutory authority through a given regulation, the Administrative Procedure Act authorizes a court to "hold unlawful and set aside" that regulation.[52]

Some statutory authorizations are explicit and specific; in other laws, Congress states an agency's authority in broad or general terms. In interpreting a statute that delegates authority to an agency, the Supreme Court generally begins—and often ends—with the statutory text.[53] In recent years, however, the Court has applied and elaborated on what some courts have called a "background rule"[54] of statutory construction or "extra-statutory limitation[]"[55] known as the major questions doctrine. Under this doctrine, when an agency seeks to regulate "a significant portion of the American economy,"[56] or its assertion of regulatory authority has "vast 'economic and political significance,'"[57] its rule must be based on a clear grant of statutory authority.[58] The Supreme Court has not drawn a line between "major" and

[47] *Id.* at 68327 (proposed amendment to 48 C.F.R. § 9.104-3).

[48] *Id.* at 68330 (proposed § 23.XX06(a)) (exempting "offerors and quoters" excepted from registration under 48 C.F.R. § 4.1102(a)).

[49] *Id.* at 68330 (proposed § 23.XX06(b)(1)).

[50] An agency would have to make waivers of this type publicly available on its website. *Id.* at 68330 (proposed § 23.XX06(b)(2)).

[51] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 665 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

[52] 5 U.S.C. § 706(2)(C).

[53] *See* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 553 (2014) (stating that the Court's "analysis begins and ends with the text" of the statutory provision at issue because the text was "patently clear").

[54] N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 296 (4th Cir. 2023).

[55] Louisiana v. Biden, 55 F.4th 1017, 1028 (5th Cir. 2022).

[56] West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022).

[57] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

[58] CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022).

"minor" questions for purposes of this doctrine or specified which legislative acts could constitute clear congressional authorization. Although the Court has twice applied the major questions doctrine in cases involving requirements related to greenhouse gas emissions, those cases involved the Environmental Protection Agency's authority and did not involve requirements for federal contractors.[59]

Some commenters have argued that the proposed rulemaking implicates the major questions doctrine and exceeds the agencies' statutory authority.[60] This section examines the statutes and executive orders that the agencies cited in support of the proposed rule as well as the cases that might inform a court's analysis of whether the rule involves a major question.

Procurement Authorities

The agencies issuing the proposed rule cite three statutes, four executive orders, and one OMB memorandum as authorities for promulgating the proposed changes to the FAR. The three statutory references—40 U.S.C. § 121(c), 10 U.S.C. chapter 137, and 51 U.S.C. § 20113—are listed in the current authority citations for Parts 1, 4, 9, 23, and 52 of Title 48 of the FAR (i.e., the parts that the proposed rule would amend).[61] The agencies did not propose any changes to these authority citations for purposes of the proposed rule.[62]

Section 121(c) of Title 40 provides that the GSA Administrator "may prescribe regulations to carry out this subtitle," referring to the Federal Property and Administrative Services laws in 40 U.S.C. §§ 101 to 1315 as well as Title III of the Federal Property and Administrative Services Act of 1949 (Procurement Act) concerning procurement procedure.[63] These provisions do not appear to specifically address contractor reporting of or targets to reduce greenhouse gas emissions.[64]

The second citation, invoking 10 U.S.C. chapter 137, refers to a chapter of the *U.S. Code* that Congress has repealed, though many of its provisions were transferred to other sections of the *U.S. Code*. Among the transferred sections are provisions directing the Secretary of Defense to promulgate regulations governing certain aspects of the procurement process.[65] The provisions transferred from chapter 137 do not appear to specifically address contractor reporting of or targets to reduce greenhouse gas emissions.[66]

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[59] *West Virginia*, 142 S. Ct. at 2587; *Util. Air Regulatory Grp.*, 573 U.S. at 302.

[60] *See, e.g.*, Crowley Maritime Corporation, Comment on Proposed Rule on Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Feb. 13, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0135 (comment ID FAR-2021-0015-0135). Chamber of Com. of the U.S., Comment on Proposed Rule on Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Feb. 14, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0254.

[61] *E.g.*, 48 C.F.R. Part 9—Contractor Qualifications (authority citation).

[62] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68327 (proposed Nov. 14, 2022).

[63] Pub. L. No. 107-217, § 111, 116 Stat. 1062, 1065 (2002) (codifying title 40 of the *U.S. Code*); Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, title III, 63 Stat. 377, 393 (codified as amended in scattered sections of title 41, *U.S. Code*). Section 121(c) also states that the GSA Administrator "shall prescribe regulations that the Administrator considers necessary to carry out the Administrator's functions under this subtitle." 40 U.S.C. § 121(c)(2).

[64] Based on a search of subtitle I of title 40 and title 41 of the *U.S. Code* in *Lexis Advance* for the terms "greenhouse," "climate," "emissions," and "net zero."

[65] *See, e.g.*, 10 U.S.C. §§ 3501(b)(1)–(2)(A) (directing the Secretary of Defense to "prescribe acquisition regulations" to "promote the use of multiyear contracting"); *id.* § 3069 (directing the Secretary of Defense to "prescribe regulations" to administer a section concerning the acquisition of "end items"); *id.* § 4507(a) (directing the Secretary of Defense to "prescribe regulations to ensure, to the maximum extent practicable, that professional and technical services are acquired on the basis of the task to be performed rather than on the basis of the number of hours of services provided").

[66] 10 U.S.C. ch. 137 (repealed and listing renumbered and transferred provisions), https://uscode.house.gov/view.xhtml?req=(title:10%20chapter:137%20edition:prelim)%20OR%20(granuleid:USC-prelim-title10-chapter137)&f=treesort&num=0&edition=prelim.

Section 20113 of Title 51 authorizes NASA 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."[67] Those powers include the authority to acquire certain real and personal property and to enter into such contracts with governmental and private entities "as may be necessary in the conduct of its work and on such terms as it may deem appropriate."[68]

Although not specifically cited in the proposed rule, two provisions of Title 51 authorize the NASA Administrator to take certain steps to address greenhouse gas emissions. Section 40112 directs the NASA Administrator to "establish an initiative to research, develop, and demonstrate new technologies and concepts . . . to reduce greenhouse gas emissions from aviation, including carbon dioxide, nitrogen oxides, other greenhouse gases, water vapor, black carbon and sulfate aerosols, and increased cloudiness due to contrail formation."[69] Objectives of the initiative include "a reduction of greenhouse gas emissions from new aircraft by at least 50 percent, as compared to the highest-performing aircraft technologies in service as of December 31, 2021," and "net-zero greenhouse gas emissions from aircraft by 2050."[70] Section 40702 similarly directs the Administrator to "establish an initiative involving the Administration, universities, industry, and other research organizations as appropriate, of research, development, and demonstration, in a relevant environment, of technologies to enable the following commercial aircraft performance characteristics: . . . [s]ignificant reductions in greenhouse gas emissions compared to aircraft in commercial services as of October 15, 2008."[71]

As authority for the reporting and target validation requirements specifically in the proposed rule, the agencies cited the executive orders and OMB memorandum discussed at the outset of this testimony.[72] As previously indicated, one of the executive orders, EO 14030, directed the FAR Council "in consultation with the Chair of the Council on Environmental Quality and the heads of other agencies as appropriate" 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."[73] This executive order was based on "the authority vested in [the President] by the Constitution and the laws of the United States of America."[74]

While EO 14030 does not indicate which particular statutes authorize the directives regarding the FAR amendments, the statute that authorizes the GSA Administrator to promulgate regulations to carry out the procurement laws also authorizes the President, in subsection (a), to "prescribe policies and directives that the President considers necessary to carry out this subtitle" and that are "consistent with this subtitle."[75] In the past, the executive branch has exercised this authority to impose conditions on federal contractors, which courts have largely upheld until recent years. In 1979, the U.S. Court of Appeals for the D.C. Circuit[76] observed that until that point "the most prominent use of the President's authority" under the predecessor Procurement Act was "a series of anti-discrimination requirements for Government

[67] 51 U.S.C. § 20113(a).

[68] *Id.* § 20113(c), (e).

[69] *Id.* § 40112(b).

[70] *Id.* § 40112(c)(A), (C).

[71] *Id.* § 40702.

[72] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68328 (proposed Nov. 14, 2022) (proposed § 23.XX01).

[73] Exec. Order No. 14,030, 86 Fed. Reg. 27967 (May 25, 2021), https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.

[74] *Id.*

[75] 40 U.S.C. § 121(a).

[76] For purposes of brevity, references to a particular circuit in the body of this testimony (e.g., the D.C. Circuit, the Second Circuit) refer to the U.S. Court of Appeals for that particular circuit.

contractors."[77] Although the "early anti-discrimination orders were issued under the President's war powers and special wartime legislation," an appellate court later upheld the orders as "a proper exercise of presidential authority" under the Procurement Act and "the 'declaration of policy' in the Defense Production Act of 1950."[78] In its 1979 decision in *AFL-CIO v. Kahn*, the D.C. Circuit ruled that the President had the authority to deny "Government contracts above $5 million to companies that fail or refuse to comply with . . . voluntary wage and price standards."[79] The court rejected the district court's conclusion that this limitation on federal contracts conflicted with another federal statute that, in the district court's view, prohibited certain "mandatory economic controls."[80] The D.C. Circuit reasoned that "any alleged mandatory character of the procurement program is belied by the principle that no one has a right to a Government contract."[81] The court quoted the Supreme Court's statement in a 1940 decision that "the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."[82]

The Fifth Circuit has observed that while "[t]he Supreme Court has had little occasion to review presidential authority" under 40 U.S.C. § 121(a) (formerly, the Procurement Act), since *Kahn* "courts have generally landed on a 'lenient' standard under which the President must demonstrate a 'sufficiently close nexus' between the requirements of the executive order and 'the values of 'economy' and 'efficiency.'"[83] For example, in 2003, the D.C. Circuit upheld an executive order requiring businesses with government contracts over $100,000 to post notices at all of their facilities to inform employees of certain rights under federal labor law and to require their subcontractors to do the same.[84] The order stated that "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced. The availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts."[85] The D.C. Circuit reasoned that although that "link may seem attenuated" and potentially "increase procurement costs" (at least in "the short run"), there was "enough of a nexus" to uphold the requirement.[86] In 2009, a federal district court in Maryland held that the Procurement Act authorized an executive order and FAR amendment requiring federal contractors to use a specific electronic system to verify employment eligibility of certain employees.[87]

These cases predated the Supreme Court's major questions decisions from the last few terms so it is unclear if the Court, presented with similar facts, would reach the same conclusion about the President's

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[77] AFL-CIO v. Kahn, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc); *see also* Kentucky v. Biden, 57 F.4th 545, 549 (6th Cir. 2023) (stating that the "Presidents' earliest invocations" of the statute "matched its relatively modest scope").

[78] *Kahn*, 618 F.2d at 790 (citing Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3d Cir. 1964)).

[79] *Id.* at 785.

[80] *Id.* at 794.

[81] *Id.*

[82] Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940).

[83] Louisiana v. Biden, 55 F.4th 1017, 1026 (5th Cir. 2022) (quoting UAW-Labor Emp't & Training Corp. v. Chao, 325 F.3d 360, 367 (D.C. Cir. 2003), and *Kahn*, 618 F.2d at 792). *But cf.* Kentucky v. Biden, 57 F.4th 545, 552 (6th Cir. 2023) (concluding that the "operative language in § 121(a) empowers the President to issue directives necessary to effectuate the Property Act's substantive provisions, not its statement of purpose").

[84] *Chao*, 325 F.3d at 362.

[85] *Id.* at 366 (quoting Exec. Order No. 13,201, 66 Fed. Reg. 11221 (Feb. 22, 2001)).

[86] *Id.* at 366–67.

[87] Chamber of Com. of the U.S. v. Napolitano, 648 F. Supp. 2d 726, 738 (D. Md. 2009). Like the D.C. Circuit in *Kahn*, the court was asked to decide whether a separate federal statute, which generally prohibited the government from requiring private participation in the e-verification system, prohibited the government from requiring contractors to use the system. The court concluded that it did not, reasoning that although the order and final rule "require government contracts to contain a clause regarding use of [the specific e-verification system], potential government contractors have the option not to contract with the government." *Id.* at 736.

procurement authority. As the next section explains, while there are many open questions regarding the major questions doctrine, it is possible that the doctrine may modify the application of the "close nexus" standard in the context of sufficiently significant assertions of agency authority.

Major Questions Considerations

In addition to the cases discussed above, a court reviewing the authority for the proposed rule might consider a series of appellate decisions concluding that the President likely did not have sufficient authority to require federal contractors to impose COVID-19 vaccination requirements on their workforces.[88] The courts in those cases decided that the President's order involved a major question because, in the words of the Fifth Circuit, it was "neither a straightforward nor predictable example of procurement regulations authorized by Congress to promote 'economy and efficiency.'"[89] In reviewing an order preliminarily enjoining the vaccination requirement, the Fifth Circuit recognized the breadth of the President's statutory authority under 40 U.S.C. § 121(a) and the "close nexus" test.[90] The court reasoned, however, that under the major questions doctrine, the order likely exceeded the President's "proprietary authority in federal contracting or employing" because it reached employees who were not working on a "federal job site" or on projects covered by a federal contract.[91] In another decision involving the same contractor requirement, the Eleventh Circuit declined to apply the "close nexus" test, holding that in light of the major questions doctrine, "[a]gencies' bare authority to set contract specifications and terms is not enough to show that when Congress passed the Procurement Act it contemplated the general power to mandate vaccination."[92] The court reasoned that "[o]ther statutes setting out procurement rules show that when Congress wants to further a particular economic or social policy among federal contractors through the procurement process—beyond full and open competition—it enacts explicit legislation."[93] As examples, the court cited statutes "prevent[ing] the government from contracting with any company that has criminally violated air pollution standards," and "legislation to respond to significant supply-chain risks" that "allow[ed] federal agencies to refuse to contract with firms that fail to meet certain cybersecurity qualifications."[94] Similarly, the Sixth Circuit concluded in another case addressing the contractor vaccine requirement that it was unlikely Congress authorized this "sweeping" authority based on "a 70-year-old procurement statute."[95]

A court considering whether to apply the major questions doctrine to the proposed FAR rule (if finalized) might first ask whether the proposed rule implicates a question of "vast economic and political significance."[96] According to the preamble of the proposed rule, because the federal government is "the world's single largest purchaser of goods and services," decisions about "[p]ublic procurement can shift markets, drive innovation, and be a catalyst for adoption of new norms and global standards."[97] The agencies posited that requiring major contractors to "set, disclose, and maintain validation of such ambitious climate targets can thus be an effective tool for addressing the Federal Government's Scope 3

[88] Kentucky v. Biden, 57 F.4th 545, 555 (6th Cir. 2023); Louisiana v. Biden, 55 F.4th 1017, 1033 (5th Cir. 2022); Georgia v. President of the United States, 46 F.4th 1283, 1301 (11th Cir. 2022).

[89] *Louisiana*, 55 F.4th at 1029.

[90] *Id.* at 1028 (reasoning that "[t]he statute introduces no serious limit on the President's authority and, in fact, places discernment explicitly in the President's hands").

[91] *Id.* at 1032.

[92] *Georgia*, 46 F.4th at 1301.

[93] *Id.* at 1297.

[94] *Id.*

[95] Kentucky v. Biden, 57 F.4th 545, 548 (6th Cir. 2023).

[96] Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 665 (2022).

[97] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68318 (proposed Nov. 14, 2022).

emissions and associated risks of climate change to the national economy."[98] While the line between major and minor questions has not been clearly drawn, some courts might view these statements as indicators that the rule would essentially "regulate 'a significant portion of the American economy'" or allow the agencies responsible for procurement processes to exercise a "policy judgment" about how best to "substantially restructure the American energy market."[99] On the other hand, some elements of the rule could be cited by a court in deciding that the rule is not sufficiently significant to invoke the major questions doctrine. For example, many of the statements in the preamble suggest that certain economic effects "may" occur or are contingent upon additional, voluntary actions by the regulated contractors.[100] Additionally, the proposed rule is potentially distinguishable from the COVID-19 vaccine requirement because it would apply only to significant and major contractors and would not affect the health decisions of their "individual employees."[101]

If a reviewing court were to conclude that the proposed rule presents a major question, then it would likely ask whether GSA, DoD, and NASA have "clear congressional authorization" to impose the requirements in the proposed rule.[102] As discussed in the previous section, the three statutory sections cited as authorities for the proposed FAR amendments do not explicitly address contractor reporting or targets related to greenhouse gas emissions. Two of the cited statutory provisions give GSA and NASA broad, general authority to promulgate regulations to carry out the duties and functions in their authorizing statutes.[103] At least one federal appellate court has suggested that this type of "catchall delegation language" may be "insufficient to delegate major questions."[104] As to the more specific directive for NASA to develop an "initiative" to research ways to reduce greenhouse gas emissions from aircraft,[105] it is unclear whether this provision would authorize the reporting and target validation requirements in the proposed rule.

By citing to the executive orders, the agencies also appear to rely on the President's authority under 40 U.S.C. § 121(a). If a reviewing court were to follow the reasoning of the Fifth, Sixth, and Eleventh Circuits, it could find that the proposed rule has some of the same breadth issues as the challenged COVID-19 vaccination requirement, because the rule would require certain federal contractors to set emissions targets that affect their operations broadly, not just those linked to the equipment or materials used to fulfill the federal contract.[106] Based on this conclusion, a court could conclude that the proposed rule's qualification standards exceed the "project-specific restrictions contemplated by the [Procurement] Act."[107] It is possible, on the other hand, that a court could distinguish the vaccine cases as involving individual health decisions that reflected a more significant departure from Presidents' past exercises of

[98] *Id.* at 68320.

[99] West Virginia v. EPA, 142 S. Ct. 2587, 2610–12 (2022).

[100] *See, e.g.*, Proposed Rule, 87 Fed. Reg. at 68319 (stating ways in which companies "may be prompted" to act).

[101] *Cf.* Louisiana v. Biden, 55 F.4th 1017, 1033 (5th Cir. 2022) (emphasis removed).

[102] *West Virginia*, 142 S. Ct. at 2609 (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[103] *See* 40 U.S.C. § 121(c) ("The [GSA] Administrator may prescribe regulations to carry out this subtitle."); 51 U.S.C. § 20113 ("In the performance of its functions, [NASA] is authorized 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.").

[104] *See* West Virginia v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1147 (11th Cir. 2023) (analyzing a provision that allowed the agency head to "issue such regulations as may be necessary or appropriate to carry out [the Act]").

[105] 51 U.S.C. § 40112(b).

[106] *See* Georgia v. President of the United States, 46 F.4th 1283, 1296 (11th Cir. 2022) ("To be sure, contract terms sometimes lead to changes in contractors' internal operations. But agencies procuring property or services may 'include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.'" (quoting 40 U.S.C. § 3306(a)(2)(B))).

[107] *Id.*

proprietary authority under the Procurement Act, particularly if a court concludes that the reasoning of *Kahn* is applicable.[108]

Private Nondelegation Doctrine

Article I of the Constitution vests "[a]ll legislative Powers" granted by the Constitution in Congress.[109] Through its "nondelegation doctrine," the Supreme Court has interpreted the Constitution as limiting Congress's authority to delegate "legislative power" to the other branches of government.[110] Under the related "private nondelegation doctrine," the Court has also limited delegations of federal authority to private entities.[111] In a foundational case on private nondelegation, *Carter v. Carter Coal Co.*, the Supreme Court in 1936 invalidated a federal statute that authorized the largest coal producers and a majority of the coal miners in a given region to impose maximum hour and minimum wage standards on all other miners and producers in that region.[112] The Court considered this arrangement "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[113]

Delegations to private entities are not entirely forbidden, however.[114] After Congress amended the statute at issue in *Carter Coal*, the Supreme Court upheld the revised law against a nondelegation challenge.[115] Under the revised law, private boards of coal producers acted as "an aid" to a federal agency with regulatory authority over the bituminous coal industry.[116] Although the statute authorized the boards to propose certain minimum prices, those prices were subject to "prescribed statutory standards" and the agency could approve, disapprove, or modify those prices.[117] The Court ruled that Congress had not unconstitutionally delegated its legislative authority to private industry because the private boards functioned "subordinately" to the federal agency, which had "authority and surveillance" over their activities.[118] In other words, the Court has drawn a distinction between authorizing private entities to assist the government, subject to its control and supervision, and authorizing private entities to engage in government functions or render a final decision on a policy matter without agency oversight.

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[108] AFL-CIO v. Kahn, 618 F.2d 784, 789–90 (D.C. Cir. 1979) (en banc) (reasoning that "several Executive actions taken explicitly or implicitly" under the predecessor to 40 U.S.C. § 121(a) "have also imposed additional considerations on the procurement process" beyond economy and efficiency).

[109] U.S. CONST. art. I, § 1.

[110] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . .") (first and second alterations in original) (quoting Loving v. United States, 531 U.S. 457, 472 (2001)).

[111] *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (holding that delegation to trade and industrial associations of the power to develop codes of "fair competition" for the poultry industry would be "unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress," invalidating broad Presidential authority to revise and approve industry proposed codes); Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 884 (5th Cir. 2022) (using the term "private non-delegation doctrine").

[112] *Carter Coal*, 298 U.S. at 310–12.

[113] *Id.* at 311.

[114] *See* CRS Report R44965, *Privatization and the Constitution: Selected Legal Issues*, by Linda Tsang and Jared P. Cole (2017).

[115] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).

[116] *Id.* at 387–88.

[117] *Id.* at 388.

[118] *Id.* at 399; *see also* Currin v. Wallace, 306 U.S. 1, 15–16 (1939) (upholding a law that authorized the Secretary of Agriculture to issue a regulation respecting the tobacco market, but only if two-thirds of the growers in that market voted for the Secretary to do so).

Judicial decisions involving the Horseracing Integrity and Safety Act (HISA) illustrate this distinction. HISA originally delegated "unsupervised" authority to a private entity that had the power to regulate anti-doping, medication, and racetrack safety programs for horseracing nationwide.[119] The statute required the Federal Trade Commission (FTC) to approve the private entity's regulations if the agency found that the regulations were consistent with HISA.[120] The FTC could not modify the substance of the regulations or disapprove them based on policy differences.[121] The FTC also could not propose regulations of its own except in cases of emergency.[122] In 2022, the Fifth Circuit held that this version of HISA violated the private nondelegation doctrine.[123] The Fifth Circuit determined that the FTC's authority to review was too limited to serve as independent oversight.[124] Congress then amended HISA by providing the FTC the authority to "abrogate, add to, and modify" regulations submitted to it by the private entity and to propose its own regulations.[125] The Sixth Circuit subsequently determined that HISA as amended created "true oversight authority" and no longer violated the private nondelegation doctrine.[126]

The proposed rule's requirements for major contractors could raise a private nondelegation question in two respects. First, the proposed rule would require major contractors to submit an annual climate disclosure "by completing those portions of the CDP Climate Change Questionnaire that align with the TCFD recommendations as identified by CDP."[127] It is not uncommon for agencies to incorporate third-party standards by reference.[128] Additionally, at least one federal statute encourages agencies to use private-sector standards in some circumstances.[129] A reviewing court might distinguish, however, between incorporating third-party standards by reference and allowing a private party to set the standards that other regulated entities must follow.[130] It is unclear whether the agencies are proposing to incorporate a certain version of the CDP Climate Change Questionnaire as of a fixed date (similar to the TCFD recommendations).[131] The CDP Climate Change Questionnaire might be updated on an annual basis.[132] Additionally, under the proposed rule, CDP would decide which portions of its questionnaire "align with

[119] Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 882, 890 (5th Cir. 2022).

[120] *Id.* at 884.

[121] *Id.* at 884–86.

[122] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 1204(e), 134 Stat. 3258 (2020) (prior to 2022 amendment).

[123] *Black*, 53 F.4th at 890.

[124] *Id.* at 884–86.

[125] 15 U.S.C. § 3053(e).

[126] Oklahoma v. United States, 62 F.4th 221, 230 (6th Cir. 2023). On remand from the Fifth Circuit and after Congress amended HISA, the district court in that case also concluded that HISA did not violate the private nondelegation doctrine. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, No. 21-CV-071-H, 2023 WL 3293298, at *7 (N.D. Tex. May 4, 2023), *appeal docketed*, No. 23-10520 (5th Cir. May 19, 2023).

[127] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68329 (proposed Nov. 14, 2022).

[128] Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., No. 22-7063, 2023 U.S. App. LEXIS 24037, at *4 (D.C. Cir. Sep. 12, 2023).

[129] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (1996).

[130] *See* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 883 (5th Cir. 2022) (reasoning that HISA delegated regulatory authority to a private entity because, among other reasons, it "broadly instruct[ed]" the private entity to "create a program that includes '[a] uniform set of training and safety standards and protocols consistent with the humane treatment of covered horses,' § 3056(b)(2), while leaving the policy details up to the [private entity]").

[131] *See* 1 C.F.R. § 51.1(f) (providing that for purposes of publication in the *Federal Register*, "[i]ncorporation by reference of a publication is limited to the edition of the publication that is approved" and "[f]uture amendments or revisions of the publication are not included"). The proposed rule specifies the 2017 TCFD recommendations with a 2021 annex providing guidance on their implementation. *See* Proposed Rule, 87 Fed. Reg. at 68328 (proposed § 23.XX02) (defining "annual climate disclosure").

[132] *See* Proposed Rule, 87 Fed. Reg. at 68315 (explaining that "[e]ach year CDP issues the proposed updates to the questionnaire, which are opened for public consultation in the fall," and finalized and available "early in the new year").

the TCFD recommendations," a determination that does not appear to be subject to agency supervision or revision under the proposed framework.[133]

Second, some commenters have suggested that the proposed rule violates nondelegation principles because it would require federal contractors—private entities—to obtain validation of their science-based targets from SBTi—another private entity—to certify compliance with qualification standards under the FAR.[134] While it is not entirely clear from the proposed rule, it appears that SBTi would conduct validation of proposed targets according to its own processes and applying its own and other third-party standards.[135] A court reviewing this framework (if finalized) would likely ask whether the rule delegates governmental authority to SBTi and the nature of that authority—in other words, does the proposed rule delegate regulatory power to SBTi or does it merely authorize SBTi to assist a federal contracting officer in making a contracting determination?[136]

On the one hand, the contracting process and the role allocated to SBTi under the proposed rule might indicate that SBTi would not be exercising regulatory authority. As discussed in the major questions section, some courts have concluded that federal contractors are not "required" to comply with contract provisions because they "have the option not to contract with the government."[137] Additionally, unlike the private entity at issue in the original HISA statute, SBTi would not be creating rules directly governing the conduct of regulated entities. Instead, it would be evaluating whether companies seeking government contracts created a target—effectively, a goal—that aligns with certain standards.[138] This target is one of several factors considered by a contracting officer in determining whether a prospective contractor is eligible to receive a federal contract.[139] A lack of SBTi validation results in a presumption of nonresponsibility for prospective contractors. The presumption can be overcome if the contracting officer makes three findings: (1) the "noncompliance resulted from circumstances properly beyond the prospective contractor's control"; (2) the prospective contractor's "documentation" sufficiently "demonstrates substantial efforts taken to comply" with the rule such as performing "one or more of the actions" that the proposed rule would require; and (3) the "prospective contractor has made a public commitment to comply as soon as possible (within 1 calendar year) on a publicly accessible website."[140]

A reviewing court could conclude, based on this process, that SBTi primarily provides expert assistance to a contracting officer in making a preliminary determination—akin to a recommendation—on whether a

[133] *Id.* at 68329 (proposed § 23.XX03(b)(1)).

[134] *E.g.*, Cargo Airline Assoc., Comment on Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Fed. 13, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0152 (comment ID FAR-2021-0015-0152).

[135] The proposed rule requires a "science-based target" to be "in line with reductions that the latest climate science deems necessary to meet the goals of the Paris Agreement to limit global warming to well below 2°C above pre-industrial levels and pursue efforts to limit warming to 1.5°C." Proposed Rule, 87 Fed. Reg. 68312, 68329 (proposed Nov. 14, 2022). The proposed rule then cites two documents: (1) SBTi's Frequently Asked Questions page; and (2) the 2018 Intergovernmental Panel on Climate Change's Special Report on 1.5°C. *Id.*

[136] Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 872 (5th Cir. 2022) ("A cardinal constitutional principle is that federal power can be wielded only by the federal government.").

[137] Chamber of Commerce of the United States v. Napolitano, 648 F. Supp. 2d 726, 736 (D. Md. 2009).

[138] In *Texas v. Rettig*, the Fifth Circuit rejected a nondelegation challenge to a rule requiring certain state Medicaid contracts to be certified as actuarially sound by a qualified actuary. 987 F.3d 518, 524–25, 533 (5th Cir. 2021). The Supreme Court denied certiorari, and three Justices wrote a statement suggesting that the rule might have violated the private nondelegation doctrine. Texas v. Commissioner, 142 S. Ct. 1308, 1309 (2022) (Alito, J., statement respecting the denial of certiorari).

[139] *Cf. Rettig*, 987 F.3d at 533 (reasoning that "certification is a small part of the approval process" for the contracts at issue).

[140] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312, 68327 (proposed Nov. 14, 2022) (proposed § 9.104(e)(1)).

prospective contractor has met a qualification standard that is technical in nature.[141] SBTi's role in this contracting process, a court might determine, is more similar to other instances in which courts have approved assistance provided by private entities to agencies, which hold the final decisionmaking authority. [142] Like the amended version of HISA upheld by the Sixth Circuit, for instance, the proposed rule does not bind the agency to a private entity's determination.[143] The promulgating agencies considered and rejected "making noncompliance a go/no-go decision for award" and opted instead to "allow[] contracting officers some flexibility to determine what actions a noncompliant contractor has taken to comply."[144]

On the other hand, a reviewing court might conclude that under the proposed rule, SBTi would exercise inadequately supervised regulatory power in violation of the private nondelegation doctrine. A court might find that because SBTi's validation decision is needed to avoid a presumption of ineligibility for a contract award, the proposed rule effectively authorizes this private entity to set the relevant regulatory standards. A court reaching this conclusion might find support in a statement issued by three Supreme Court Justices in a 2022 case, *Texas v. Commissioner*, that the Court declined to review.[145] The statement argued that the role of a private entity in establishing certain standards for certifying state payment plans under Medicaid raised "an important separation-of-powers question."[146] The Justices observed that "[w]hat was essentially a legislative determination—the actuarial standards that a State must meet in order to participate in Medicaid—was made not by Congress or even by the Executive Branch but by a private group," and that "this was no inconsequential matter" because it "has cost the States hundreds of millions of dollars."[147] Additionally, at least one commenter has argued that SBTi could be a competitor to

[141] *Rettig*, 987 F.3d at 531 (reasoning that "an agency does not improperly subdelegate its authority when it 'reasonabl[y] condition[s]' federal approval on an outside party's determination of some issue; such conditions only amount to legitimate requests for input").

[142] For example, in a decision issued earlier this year, the Sixth Circuit upheld the role of a private entity in assisting the Federal Communications Commission (FCC) with administering a certain government fund. The court found it significant that the agency had not granted the private entity "any authority to make actual decisions or establish or define standards." Consumers' Rsch. v. FCC, 67 F.4th 773, 796 (6th Cir. 2023). The Fifth Circuit has agreed to hear a similar challenge *en banc*. Consumers' Rsch. v. FCC, 72 F.4th 107, 108 (5th Cir. 2023) (per curiam).

[143] Proposed Rule, 87 Fed. Reg. at 68324.

[144] *Id.* Additionally, a contractor can obtain a waiver from the senior procurement officer under certain circumstances. Those situations are limited, however, to circumstances involving "[e]mergencies, national security, or other mission essential purposes." *Id.* at 68330 (proposed § 23.XX06(b)(1)). Another type of waiver allows the agency to delay the compliance period for up to one year. *Id.* at 68330 (proposed § 23.XX06(b)(2)).

[145] Texas v. Commissioner, 142 S. Ct. 1308, 1309 (2022) (Alito, J., statement respecting the denial of certiorari).

[146] *Id.*

[147] *Id.*

some of the companies that it would validate,[148] which, if demonstrated, could implicate the due process concerns raised by the Supreme Court in *Carter Coal*.[149]

Some other regulatory schemes authorize third-party testing or certification pursuant to federal standards. For example, manufacturers of certain children's products must submit product samples to a "third party conformity assessment body" accredited by the Consumer Product Safety Commission (CPSC), a government agency, "to be tested for compliance with" applicable CPSC rules, and obtain a certificate of compliance.[150] Congress has also allowed the FCC to "authorize the use of private organizations for testing and certifying the compliance of devices or home electronic equipment and systems with regulations promulgated under this section."[151] In both of these examples, private entities conducting the testing must adhere to rules and procedures specified by Congress or promulgated by the federal agency.[152] However, as signaled by the Justices' statement in *Texas*, some judges may be inclined to scrutinize such schemes more closely. One potentially novel question presented by the proposed rule is whether and under what circumstances a presumption in favor of a private party's testing or certification determination might erode an agency's decisionmaking authority enough to create a private nondelegation concern.

In finalizing the proposed rule, the agencies could potentially mitigate the prospect of a court finding a private nondelegation violation by creating additional mechanisms for the agencies to exercise oversight of SBTi's validation function. Congress also has the option to amend federal law to task a federal agency with the validation decision or to specify limitations on SBTi's role. Other options for Congress include enacting a law that prohibits the agencies from requiring contractor validation of emissions targets altogether or prohibiting validation by private entities.

[148] Crowley Maritime Corporation, Comment on Proposed Rule on Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Feb. 13, 2023), https://www.regulations.gov/comment/FAR-2021-0015-0135 (comment ID FAR-2021-0015-0135) (stating that SBTi's "board of directors includes multiple corporations that rotate on a regular basis," and suggesting that "[m]any if not most of the companies associated with SBTi likely have federal contracts or are affiliated with federal contractors").

[149] *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (holding that a law giving one person "the power to regulate the business of another, and especially of a competitor," is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment").

[150] 15 U.S.C. § 2063(a)(2).

[151] 47 U.S.C. § 302a(c).

[152] *See* 15 U.S.C. § 2063(d) (setting out "[a]dditional regulations for third party testing"); 47 C.F.R. §§ 2.960–964 (regulations concerning the accreditation of and requirements for Telecommunication Certification Bodies).