

Client Alert: Federal Contractors Will Be Required to Report and Set Reduction Targets for Greenhouse Gas Emissions

Publications

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On November 11, 2022, the FAR Council issued a proposed rule to implement section 5(b)(i) of Executive Order 14030. Executive Order 14030, issued by President Biden on May 20, 2021, began the regulatory process to require “major Federal suppliers” to publicly disclose greenhouse gas (GHG) emissions and climate-related financial risk and to set reduction targets. The proposed FAR rule lays out the specifics of these requirements and to whom they will apply.

1. Summary of the proposed rule

The proposed rule identifies that it seeks to “enable the Federal Government to conduct prudent fiscal management of all major Federal suppliers” through “public and standardized disclosure” that will “leverage existing third-party standards and systems.” The rule only applies to “significant contractors” and “major contractors”: “significant contractors” are those receiving \$7.5 million to \$50 million in federal contract obligations per year; “major contractors” are those receiving more than \$50 million in federal contract obligations per year.

Both “significant contractors” and “major contractors” must inventory and disclose “Scope 1” and “Scope 2” emissions. “Major contractors” must also inventory and disclose “Scope 3” emissions and “set science-based targets to reduce their GHG emissions.”

- Scope 1 emissions are direct GHG emissions from sources that are owned or controlled by the reporting contractor.
- Scope 2 emissions consist of GHG emissions associated with the generation of electricity, heating and cooling, or steam, when these are purchased or acquired for the reporting contractor’s own consumption but occur at sources owned or controlled by another entity.
- Scope 3 emissions are indirect GHG emissions and consist of emissions that are a consequence of the operations of the reporting contractor but occur at sources other than those owned or

controlled by the contractor. For example, Scope 3 emissions include emissions associated with the goods and services purchased by a contractor.

Disclosure will be made in the System for Award Management (SAM.gov), and the proposed rule also includes a compliance demonstration related to the requirements. Failure to comply will result in the contractor being presumed to be a nonresponsible prospective contractor for federal procurements. Unless a contracting officer determines certain exceptions apply, this means the contractor will be ineligible for federal contract awards. See 48 C.F.R. § 9.103(a). Notably, the nonresponsibility determination is a departure from the questions the FAR Council posed in advance of rulemaking, which had indicated the government might “give preference to bids and proposals from suppliers . . . to achieve reductions in greenhouse gas emissions.”^[1] Instead of a preference regime, the proposed rule advances a binary approach.

The proposed rule “acknowledges that significant and major contractors will need time to come into compliance” and provides “delayed starting dates”: one year from the date of the final rule for Scope 1 & 2 inventory/disclosure and two years for Scope 3 disclosure and validation of a reduction target.

2. Standards to be used under the proposed rule

The proposed rule provides information about the standards to be used for these disclosures and the reduction targets:

- Covered contractors conducting the GHG inventory must follow the GHG Protocol Corporate Accounting and Reporting Standard to develop quantified lists of their Scope 1 and Scope 2 GHG emissions.
- Major contractors must submit annual climate disclosures that align with the 2017 Recommendations^[2] 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 annual climate disclosure includes: a GHG inventory of the major contractor’s Scope 1, Scope 2, and relevant Scope 3 emissions; and descriptions of the major contractor’s climate risk assessment process and any climate-related financial risks identified. Major contractors must submit their annual climate disclosures through the CDP’s Climate Change Questionnaire. Major contractors are only required to complete those portions of the Questionnaire “that align with the TCFD recommendations as identified by CDP.”
- Major contractors are also required to develop reduction targets and have the targets validated by SBTi within the previous five calendar years and made available on a publicly accessible website. “Science-based targets” are described as targets for reducing Scope 1, 2, and 3 GHG emissions that are in line with reductions that the latest climate science deems necessary to meet the goals of the Paris Agreement (limiting global warming to well below 2 °C above pre-industrial levels and pursuing efforts to limit warming to below 1.5 °C above pre-industrial levels).

Notably, the reduction target requirement is broader than the requirement in the SEC’s parallel proposed rule on climate-related disclosures, which did not include a requirement for reduction targets and would only require disclosure of Scope 3 emissions if they are “material, or if the registrant has set a GHG emissions reduction target or goal that includes its Scope 3 emissions.”^[3]

3. Exceptions to the proposed rule

The proposed rule will not apply to:

- Alaska Native Corporations, Community Development Corporations, Indian tribes, Native Hawaiian Organizations, or Tribally owned concerns;
- Higher education institutions;
- Nonprofit research entities;
- State or local governments; and
- Entities deriving 80 percent or more of their annual revenue from federal management and operating (M&O) contracts that are subject to agency annual site sustainability reporting requirements.

Also, major contractors that are either a small business^[4] or a nonprofit organization will not be required to complete an annual climate disclosure or set reduction targets. However, these major contractors are still required to complete a GHG inventory of their Scope 1 and Scope 2 emissions and must report these total annual emissions in SAM.

4. Summary of Proposed Obligations for Significant and Major Federal Contractors

<p>Significant Contractors</p> <ul style="list-style-type: none"> • Offeror received \$7.5 million or more, but not more than \$50 million, in federal contract obligations in the prior federal fiscal year as indicated in SAM. 	<p>Starting one year after publication of final rule, must have:</p> <ul style="list-style-type: none"> • completed a GHG inventory of annual Scope 1 and Scope 2 GHG emissions; and • reported the total annual Scope 1 and Scope 2 emissions from its most recent inventory in SAM. <p>All offerors that register in SAM will be required to make various representations in SAM on an annual basis for compliance purposes.</p>
<p>Major Contractors</p>	<p>Starting one year after publication of final rule, must have:</p>

- Offeror received more than \$50 million in federal contract obligations in the prior federal fiscal year as indicated in SAM.

- completed a GHG inventory of annual Scope 1 and Scope 2 GHG emissions; and
- reported the total annual Scope 1 and Scope 2 emissions from its most recent inventory in SAM.

Starting two years after publication of final rule, must have:

- submitted annual climate disclosure within its current or previous fiscal year (including an inventory of Scope 3 GHG emissions); and
- developed a reduction target and had the target validated by SBTi within the previous five calendar years.

All offerors that register in SAM will be required to make various representations in SAM on an annual basis for compliance purposes.

Footnotes

[1] 86 Fed. Reg. 57404, 57405.

[2] The TCFD recommendations cover governance, strategy, risk management, and metrics and targets.

[3] 87 Fed. Reg. 21334, 21345.

[4] The Small Business Administration establishes small business size standards on an industry-by-industry basis. 48 C.F.R. §19.102(a)(1). These standards are provided at 13 C.F.R. §121.201.

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