

**NEW PROPOSED RULES INCREASE GOVERNMENT CONTRACTORS'  
RESPONSIBILITIES FOR PREVENTING HUMAN TRAFFICKING**

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**Human Trafficking.** An estimated 27 million men, women, and children worldwide are victims of human trafficking – the highest number in history.<sup>1</sup> “Human trafficking” usually brings to mind the tragic scenario of young girls being forced into lives of sexual servitude. Human trafficking also includes using fraud or coercion to obtain services from a person and subjecting him or her to involuntary debt or servitude. Rarely contemplated in any of these scenarios is the role that U.S. companies can play, perhaps unwittingly, in perpetuating trafficking. But that lack of focus changed on September 26, 2013, when the Federal Acquisition Regulatory (“FAR”) Council published a proposed rule to hold federal contractors and subcontractors responsible for preventing the use of trafficked labor in company operations and supply chains.<sup>2</sup> On the same date, the U.S. Department of Defense (“DOD”) also published a proposed rule to enhance the DOD’s existing trafficking policy.<sup>3</sup> The impetus behind these proposed rules is President Obama’s Executive Order 13627, signed nearly one year earlier on September 25, 2012, which spotlights human trafficking related to federal contracts and seeks to ensure a “zero-tolerance” approach towards its perpetrators.<sup>4</sup> The comment period for the FAR proposed rule was recently extended from November 26, 2013 to December 20, 2013.<sup>5</sup>

**Requirements of the FAR’s Proposed Rule.** The Executive Order builds upon FAR provisions 22.1700-05, which already prohibit federal contractors from engaging in “severe forms of trafficking in persons,” procuring commercial sex, or using forced labor under a contract.<sup>6</sup> The FAR proposed rule, which largely tracks the Executive Order, prohibits federal contractors and their subcontractors from engaging in an expanded universe of trafficking-related activities. Specifically, the proposed rule prohibits:

- (1) destroying or confiscating an employee’s identity documents (e.g. passport or driver’s license), or otherwise denying the employee’s access to them;
- (2) using false or misleading practices during the recruitment of employees (e.g. failing to disclose basic information or making material misrepresentations);

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<sup>1</sup> United States Department of State, *2013 Trafficking in Persons Report – Remarks by Secretary Kerry* (June 19, 2013), available at <http://www.state.gov/secretary/remarks/2013/06/210911.htm>; U.S. Attorney General Eric Holder, “Attorney General Holder on Human Trafficking,” Frank and Kula Kumpuris Distinguished Lecture Series, Little Rock, Arkansas (April 24, 2012), available at <http://www.humanrights.gov/2012/04/25/attorney-general-holder-on-human-trafficking/>.

<sup>2</sup> 78 Fed. Reg. 59317 (Sept. 26, 2013).

<sup>3</sup> 78 Fed. Reg. 59325 (Sept. 26, 2013).

<sup>4</sup> Exec. Order No. 13627, Sec. 1, 77 Fed. Reg. 60031 (Sept. 25, 2012).

<sup>5</sup> 78 Fed. Reg. 69812 (Nov. 21, 2013).

<sup>6</sup> See Federal Acquisition Regulation Combating Trafficking in Persons, 71 Fed. Reg. 20,301, 20,201-03 (Apr. 19, 2006). The FAR provisions were enacted under the Trafficking Victims Protection Act of 2000 (22 U.S.C. §§7101-7112) (2000).

(3) charging employees recruitment fees, providing or arranging housing that fails to meet the host country housing and safety standards; and

(4) failing to provide in writing an employment contract, recruitment agreement or similar work paper in the employee's native language prior to the employee departing from his or her country of origin.<sup>7</sup>

The proposed rules would also require a contractor to provide return transportation costs for employees who have completed work that was undertaken outside of their national residence. Should a contractor suspect an employee of being a victim of or witness to prohibited activities, the contractor would be required to protect and interview the employee prior to his/her return to his/her country of origin, and contractors would be prohibited from hindering employees from cooperating fully with government authorities. Finally, the proposed rule would update the Federal Awardee Performance and Integrity Information System ("FAPIIS"), FAR 9.104-6, to require the contracting officer to include in FAPIIS any allegations sustained in an Inspector General report in which the contractor violated the provisions of the Executive Order or the Trafficking Victims Protection Act.<sup>8</sup>

Where the value of the supplies acquired or services required to be performed outside the U.S. exceeds \$500,000, the proposed rule requires individual contracting companies to undertake unprecedented, company-specific compliance measures.<sup>9</sup> Specifically, the proposed rule mandates federal contractors and subcontractors to:

(1) maintain a detailed compliance plan during the performance of the contract that includes:

- an awareness program to inform employees about the company's policy of prohibiting activities related to human trafficking and the consequences for those who violate the policy,
- a method for employees to report violations of trafficking laws without fear of retaliation,
- plans for employee recruitment and wages that only permit the use of recruitment companies with trained employees, prohibit charging recruitment fees to the employee, and ensure that the wages meet applicable host country legal requirements or explain any variance,
- a housing program, if provided by the employer, that meets host-country legal requirements and safety standards, and
- procedures by which contractors can monitor, detect and terminate agents and subcontractors who have engaged in trafficking or related activities; and

(2) certify prior to award and then on an annual basis thereafter that the required compliance program is in effect, and that neither the contractor nor its agents or subcontractors have engaged

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<sup>7</sup> 78 Fed. Reg. 59318 (Sept. 26, 2013).

<sup>88</sup> Id.

<sup>9</sup> In addition to limiting the application of these provisions to services performed outside of the U.S., the proposed rule is also inapplicable to contracts or subcontracts that are solely for commercially available off-the-shelf items. Id.

in trafficking; or, if “abuses” have been identified, that appropriate remedial and referral steps have been taken.<sup>10</sup>

Companies must be able to provide the compliance plan to a contracting officer upon request, and the contractor is required to post the relevant contents of the compliance plan for inspection.<sup>11</sup>

**Requirements of the DOD Proposed Rule.** Also on September 26, 2013, the DOD proposed to amend the Defense Federal Acquisition Regulation Supplement (“DFARS”) to further enhance its trafficking policy in conformance with the Executive Order to help eradicate trafficking in the DOD’s supply chain.<sup>12</sup> The new DFARS requirements would include ensuring that employees of DOD contractors are aware of their labor rights and have a method for reporting suspected labor violations directly to the DOD Inspector General. In particular, the proposed rule identifies three significant changes to the existing DFARS:

- (1) update the existing hotline posters to include posters regarding trafficking in persons and post them when performing either inside or outside of the U.S. The posters should be in the language spoken by a substantial portion of the workforce;
- (2) add a new representation that the employers’ hiring practices address combating trafficking in persons and that the company is compliant with the proposed rules. This representation would also add requirements to notify employees and subcontractors regarding their obligation to report trafficking in persons violations and that they will be afforded whistleblower protection;
- (3) integrate a contractor employee bill of rights and ensure that contractor employees are aware of it and it is posted in employee workspaces in applicable languages.<sup>13</sup>

**Implications for U.S. companies.** The scope of FAR’s proposed rule is vast. Every company providing supplies or services to the federal government, including any of its agencies, offices, administrations, bureaus, etc., must adhere to the proposed rule’s provisions. As a result, the Order reaches an estimated 300,000 contractors, not to mention the hundreds of thousands of subcontractors who provide supplies and services to those contractors.<sup>14</sup> Contractors who supply desks to public schools, musical instruments to the Air Force Band, or food services to the U.S. embassy in Iraq – all must take steps to comply with the the proposed rules and ensure that trafficked persons play no role in producing their goods or providing their services.

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<sup>10</sup> 78 Fed. Reg. 59319 (Sept. 26, 2013).

<sup>11</sup> Id.

<sup>12</sup> 78 Fed. Reg. 59326 (Sept. 26, 2013).

<sup>13</sup> 78 Fed. Reg. 59326 (Sept. 26, 2013).

<sup>14</sup> Mikhail Reider-Gordon and T. Markus Funk, *Switching to Offense in Government Contracting: Contractors Conscripted to Join the Fight Against Human Trafficking*, 26 Westlaw Journal Government Contract 13 (Oct. 29, 2012). Note, however, that the Order contains a significant exception for contracts and subcontracts for commercially available off-the-shelf items, meaning that contractors who sell commercial items in large amounts in the commercial market are not likely subject to the compliance plan and certification requirements. See Exec. Order No. 13627, Sec. 2(a)(3), 77 Fed. Reg. 60031 (Sept. 25, 2012).

The scope of the DOD's proposed rule is similarly vast. Currently, there are about 57,760 small entities that are engaged in business with the DOD. The mandatory disclosure requirements and hotline poster apply to small business concerns with DOD contracts or subcontracts in excess of \$5 million. The representation pertaining to hiring practices applies to all small business concerns that respond to solicitations with an estimated value exceeding the simplified acquisition threshold. The requirement to display the contractor employee bill of rights applies to contracts that authorized contractor personnel to accompany the U.S. Armed Forces deployed outside the U.S. in contingency operations, humanitarian or peacekeeping operations, or other military operations or exercises, when designated by the combatant commander.<sup>15</sup>

Once the FAR Council and the DOD have considered the comments and the rules are finalized, U.S. contractors and subcontractors subject to the rules must determine what policies and protocols they will need to ensure compliance. Failure to comply with the provisions or the proposed rules may result in suspension or debarment of contractors. Additionally, if a contractor certifies that neither it nor its subcontractors have engaged in trafficking, when in fact the contractor knows otherwise, the contractor could be criminally liable.<sup>16</sup> As a result, contractors must fully understand the rules' requirements and take steps towards ensuring compliance with their provisions – and make sure their subcontractors do the same.

President Obama declared in the Order, “As the largest single purchaser of goods and services in the world, the U.S. government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons.”<sup>17</sup> With this Order and its implementing rules, the U.S. reaches far into the business practices of U.S. contractors operating around the world in a bold effort to lessen the prevalence of trafficking. What remains to be seen is how these rules will be implemented and enforced, especially given that they are so broad in scope. Nonetheless, for federal contractors, it will be important to track the rules' implementation and ensure the adequate adoption of policies and procedures under their terms.

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<sup>15</sup> 78 Fed. Reg. 59326 (Sept. 26, 2013).

<sup>16</sup> See 18 U.S.C. §1001. The End Human Trafficking in Government Contracting Act (S. 2234/H.R. 4259), which reportedly died in committee, would have directly implicated criminal charges by rendering anyone who intentionally engaged in foreign labor bondage on a U.S. contract subject to imprisonment of up to five years. See <https://www.govtrack.us/congress/bills/112/s2234>.

<sup>17</sup> Exec. Order No. 13627, Sec. 1, 77 Fed. Reg. 60031 (Sept. 25, 2012).