

# TURNING A BLIND EYE?

Respecting Human Rights in  
Government Purchasing



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The International Corporate Accountability Roundtable (ICAR)





**The International Corporate Accountability Roundtable (ICAR)** is a coalition of human rights, environmental, labor, and development organizations that creates, promotes, and defends legal frameworks to ensure corporations respect human rights in their global operations.

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# TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	1
BACKGROUND.....	1
THE PROJECT .....	2
REPORT FINDINGS .....	2
I. INTRODUCTION .....	4
II. FRAMING HUMAN RIGHTS IN THE CONTEXT OF PROCUREMENT .....	6
A. Which Human Rights Are Implicated in Government Procurement? .....	6
B. What Kind of Human Rights Harms Occur in Procurement Supply Chains? .....	8
Government Procurement—Electronic Products .....	8
Government Procurement—Electronics—Mineral Extraction .....	10
Government Procurement—Logistical and Security Support Abroad .....	11
Government Procurement—Apparel.....	13
Government Procurement—Agriculture, Seafood, and Meat .....	15
C. Why Are Human Rights Harms Occurring? .....	16
III. QUESTIONS OF LEGAL AUTHORITY .....	18
A. Executive Authority to Set Human Rights Standards .....	18
B. Executive Order Precedent .....	20
IV. UNPACKING THE FEDERAL PROCUREMENT PROCESS .....	22
A. Stages of Procurement.....	22
B. Gaps and Opportunities .....	24
Stage 1—Plan for Procurement Needs and Risks.....	24
Stage 2—Solicit Bids and Give Notice .....	28
Stage 3—Evaluate Potential Contractors.....	29
Stage 4—Award Contract and Set Terms.....	36
Stage 5—Monitor and Enforce .....	38
C. Summary .....	45
V. WAYS TO TARGET CHANGE .....	48
VI. TOWARD A SECTOR STRATEGY FOR APPAREL.....	50
Stage 1—Plan for Procurement Needs and Risks.....	52
Stage 2—Solicit Bids and Give Notice .....	52
Stage 3—Evaluate Potential Contractors.....	53
Stage 4—Award Contract and Set Terms.....	54
Stage 5—Monitor and Enforce .....	54
ANNEX.....	56
Executive Orders That Apply to Procurement .....	56
Executive Orders With Extraterritorial Application .....	57
ENDNOTES.....	59



# EXECUTIVE SUMMARY

## BACKGROUND

The U.S. federal government is the largest single purchaser in the global economy, with annual procurement spending that totals between \$350 and \$500 billion.<sup>1</sup> Like other mega-consumers, it procures through global supply chains that enable large-scale production of goods to varying specifications—all at the lowest possible cost—often in countries where rule of law and respect for human rights is weak or nonexistent. As such, the U.S. government’s global supply chains are linked to a range of human rights violations. For example, apparel purchased by the U.S. government is made in factories that lack adequate protections from health and safety risks, use child labor, pay low wages, and have excessive working hours. Apparel is not the only sector where these abuses occur. Other sectors with widespread human harms include electronics, mineral extraction, agriculture and seafood, and logistical and security support.

These abuses in U.S. government supply chains occur due in part to low-bid competition, lack of supply chain transparency, the large scale of U.S. government procurement, and the lack of government capacity to manage supply chains. At the same time, because the U.S. government spends so much money on procurement each year, it also has the purchasing power to avoid companies that violate human rights for the sake of competition. This report seeks to provide a preliminary road map of ways in which the procurement process can be used to leverage the U.S. government’s immense purchasing power to push government suppliers to respect human rights.

Using the U.S. government’s purchasing power in this way is in line with its duty to protect human rights under the United Nations Guiding Principles on Business and Human Rights (UNGPs).<sup>2</sup> Specifically, Guiding Principle 6 holds that “States should promote respect for human rights by business enterprises with which they conduct commercial transactions.”<sup>3</sup> Moreover, the Commentary to Guiding Principle 6 emphasizes that one of the greatest opportunities to support implementation of the full scope of the UNGPs is through government procurement, “including the terms of contracts.”<sup>4</sup>

## THE PROJECT

This report was initiated by the “Government Procurement Project” of the International Corporate Accountability Roundtable (ICAR), which commissioned three experts—Robert Stumberg, Anita Ramasastry, and Meg Roggensack—to research and answer the following questions:

1. Is the U.S. federal government purchasing from suppliers or sectors that are associated with human rights abuses, and, if so, how does the procurement process address or exacerbate such abuses?
2. What are the legal or practical concerns that constrain U.S. federal agencies from using the procurement process to improve suppliers’ respect for human rights?
3. How can U.S. federal procurement rules be expanded or strengthened to leverage the government’s purchasing power to promote respect for human rights by its suppliers?

A key objective of the Project was to focus on the rules that U.S. federal agencies must follow throughout the procurement process, which are laid out in the Federal Acquisition Regulation (FAR).<sup>5</sup> The Project also chose to focus on changes that can be made at the agency level as well based on the fact that individual agencies can go beyond the FAR through their own supplements, as long as they do not conflict with the FAR. Agencies are also authorized to test innovative procurement methods, with the consent of the Office of Management and Budget (OMB) and with notice to congressional oversight committees, as appropriate.<sup>6</sup>

The Project and this report aim to spark a discussion at the national, regional, and international levels around how the procurement process can be strategically reformed to enhance respect for human rights.

## REPORT FINDINGS

This report examines the existing Federal Acquisition Regulation (FAR) and related executive orders that address several human rights issues within the acquisition process. It then provides a policy menu at each stage of procurement and concludes by mapping how procurement reform can be scaled in a realistic way, including through approaches that are economy-wide, through specific sectors, or through specific products or services within a sector.

First, this report finds that changes can be made to the procurement process at five stages to enhance respect for human rights.

### ❖ Stage 1: Planning for Procurement Needs and Risks

The scope of protection should be expanded and human rights definitions should be clarified.

### ❖ Stage 2: Solicitation of Bids and Giving Notice

Notice of risks should be expanded to include a broad range of human rights abuses.

### ❖ Stage 3: Evaluation of Potential Contractors

Whether a bidder is “responsible” should be evaluated based on compliance with source-country laws that protect workers and communities. Moreover, the database that contains information on contractors should be expanded, contractors should be required to certify that they know with whom they subcontract, and a contractors’ capacity to manage its supply chain should be considered as an evaluation criterion.

### ❖ Stage 4: Award Contract and Set Contract Terms

Contractors should be required to disclose their supply chain and should be given “pre-award clearance” for high-risk services or sourcing regions. In addition, contract officers should be authorized to insert a contract clause to protect against human rights abuses when there is a risk of such abuses.

#### ❖ **Stage 5: Enforcement of Contract**

Due diligence should be made both a defense and a contract remedy for breaching compliance standards. Conventional remedies should also be used if a contractor violates its obligations to comply with human rights standards and independent organizations should be used to monitor compliance. Lastly, government staff could be set aside to focus on enforcement to increase capacity.

Second, this report recognizes that these five stages are only one dimension to consider. In deciding how to move forward and how to push for reform, strategic decisions must also be made about the scale of the government agencies and the scale of the economic sectors to be targeted. As such, this report maps how procurement reform can be scaled in a realistic way, including through approaches that are economy-wide (i.e. through all sectors that generate risk to human rights), through specific sectors (e.g., apparel), or through specific products or services within a sector (e.g., by creating a clean supply chain for one product):

#### ❖ **Economy-Wide—Strengthen Existing Standards in the FAR**

Without having to expand the current scope of protection for human rights, policymakers could strengthen existing standards that protect human rights. The FAR could be amended to clarify definitions of human rights, strengthen compliance obligations of contractors, or strengthen monitoring and enforcement of contract obligations.

#### ❖ **Sector-Specific Strategies—Amend Agency Supplements to the FAR**

One or more agencies could devise standards to prevent human rights violations that are prevalent in a high-risk sector, such as apparel or electronics. Section VI of this report focuses on outlining options in the apparel sector.

#### ❖ **Product- or Service-Specific—Create a Clean Supply Chain**

On a smaller scale, one or more federal agencies could invite suppliers to compete for multi-year contracts for a particular product or service that would support a “clean” supply chain. For example, a factory or small group of factories could be independently certified at the start and transparently monitored for respecting human rights in that particular supply chain.

These three dimensions can be combined in various ways. For example, an agency could decide that it wants to focus on the apparel sector and could further decide to apply reforms to its apparel procurement process at one or more of the five stages of procurement, as outlined above. Specifically, at Stage 3, the agency could require all of its apparel suppliers to certify that they know who their subcontractors are and then, at Stage 4, could require them to actually disclose the information.

Regardless of which combination of these dimensions is identified as the strategic choice for a policy proposal, a careful analysis of legal authority to make the chosen reforms will be required. Although that legal analysis is beyond the scope of this report, if undertaken it should include analysis of executive order authority, treaties, congressional legislation, and rulemaking.

## I. INTRODUCTION

The United States federal government is the largest single purchaser in the global economy, with annual procurement spending that totals between \$350 and \$500 billion.<sup>7</sup> Like other mega-consumers, it procures through global supply chains that source goods and services both domestically and abroad. Global supply chains enable large-scale production of goods to varying specifications—all at the lowest possible cost—often in countries where rule of law and respect for human rights is weak or nonexistent. As such, global supply chains are often associated with a range of human rights violations. Unfortunately, the U.S. government’s global supply chains currently fall under this umbrella. For example, apparel purchased by the U.S. government is made in factories that lack adequate protections from health and safety risks, use child labor, pay low wages, and have excessive working hours. Apparel is not the only sector where these abuses occur. Other sectors with widespread human harms include electronics, mineral extraction, agriculture and seafood, and logistical and security support.

These abuses in U.S. government supply chains occur due in part to low-bid competition, lack of supply chain transparency, the large scale of U.S. government procurement, and the lack of government capacity to manage supply chains. At the same time, because the U.S. government spends so much money on procurement each year, it also has the purchasing power to avoid companies that violate human rights for the sake of competition. This report seeks to provide a preliminary road map of ways in which the procurement process can be used to leverage the U.S. government’s immense purchasing power to push government suppliers to respect human rights.

Using the U.S. government’s purchasing power in this way is in line with its duty to protect human rights under the United Nations Guiding Principles on Business and Human Rights (UNGPs).<sup>8</sup> In 2011, the United Nations Human Rights Council (UNHRC) unanimously endorsed the UNGPs,<sup>9</sup> which hold that “States should promote respect for human rights by business enterprises with which they conduct commercial transactions.”<sup>10</sup> The UNGPs set out three pillars to guide governments and businesses: protect, respect, and remedy. Under Pillar I, governments retain their role as duty bearers of human rights, including “taking appropriate steps to prevent, investigate, punish[,] and redress . . . through effective policies, legislation, regulations[,] and adjudication.”<sup>11</sup> Moreover, the Commentary to Guiding Principle 6 emphasizes that one of the greatest opportunities to support all three pillars of the UNGPs is through government procurement, “including the terms of contracts.”<sup>12</sup>

The goals of this report are to: (1) strengthen implementation of existing procurement standards, including those outlined in the UNGPs, to protect human rights and (2) require suppliers to respect human rights through the same due diligence steps that are becoming the norm in the private sector. In addition to fulfilling international obligations, the fulfillment of these goals would bring U.S. federal procurement into alignment with existing U.S. labor, trade, investment, and assistance policies—all of which provide helpful precedents and models for the strengthening of procurement rules.

In addressing these goals, this report is split into six sections. Section I provides an introduction to the report. Section II discusses the human rights that are implicated in government procurement and provides examples of human rights abuses that are directly linked to government procurement, as well as examples of abuses that occur in a particular sector more generally. This Section also elaborates on why these abuses persist in the government supply chain. Section III briefly discusses the legal authority to set human rights standards in government procurement and provides a list of precedent for doing so through executive orders. Section IV unpacks the Federal Acquisition Regulation (FAR), explains the stages of the government procurement process, and describes gaps in protection as well as opportunities at each stage for increasing the protection of human rights in government supply chains. Section V describes the different scales at which changes to the procurement process, as laid out in Section IV, can be made. Specifically, it addresses the scale of government agencies, meaning government-wide reform or reform in an individual agency, and the scale of economic sectors, meaning economy-wide, sector-specific, or product- or service-specific. Finally, Section VI provides a case study of the apparel sector to illustrate ways in which sector-specific reforms can be made at each stage of procurement.

## II. FRAMING HUMAN RIGHTS IN THE CONTEXT OF PROCUREMENT

The UNGPs emphasize that governments must engage in their duty to protect human rights by adopting domestic policy, especially when they have leverage as major purchasers of goods and services. Moreover, the UNGPs respond to governance gaps that tolerate human rights abuses in most sectors of commerce. This Section of the report identifies the range of human rights implicated by the U.S. federal government's purchases of goods and services, outlines the human harms associated with global supply chains that operate in the United States and abroad, and explains why these harms are occurring.

### A. WHICH HUMAN RIGHTS ARE IMPLICATED IN GOVERNMENT PROCUREMENT?

Before the U.S. government can require its contractors to comply with human rights standards, it must define those rights and identify those definitions' sources. Such human rights definitions most often have an international source—either in a treaty or in customary international law. They must also have a domestic source in order to apply them to procurement. This usually takes the form of legislation, an executive order, or the U.S. Constitution.<sup>13</sup>

At the international level, the major instruments that establish human rights definitions include:

- ❖ The Universal Declaration of Human Rights (UDHR);<sup>14</sup>
- ❖ The International Covenant on Civil and Political Rights (ICCPR);<sup>15</sup>
- ❖ The International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>16</sup> and
- ❖ The International Labor Organization (ILO) Constitution and Core Labor Standards.<sup>17</sup>

The United States has ratified some (the ICCPR<sup>18</sup> and the ILO Constitution<sup>19</sup>) but not all (the ICESCR) of the UN's core treaties.<sup>20</sup> In its procurement code, entitled the Federal Acquisition Regulation (FAR),<sup>21</sup> the United States implements standards for some, but not all, of the rights laid out in the treaties it has ratified. For example, the FAR

recognizes some rights laid out in the ICCPR as it includes procurement standards to prohibit forced or indentured child labor and human trafficking, but it includes no provisions on the freedom of association (including the right to organize) or the right to life (including protection from life-threatening conditions while working to supply the government with goods or services).<sup>22</sup> Therefore, the U.S. government's procurement rules currently do not adequately mirror the set of human rights obligations the government has undertaken to protect. Figure 1 on the following page presents an overview of the federal government's coverage of human rights in the FAR, select U.S. treaty commitments, and domestic law sources that protect human rights (outside of the FAR). The left-most column indicates where current coverage extends either fully (Y), partially (P), or not at all (N).

**FIGURE 1: FAR COVERAGE OF SELECTED HUMAN RIGHTS**

Current FAR Coverage?	Human Right	Treaty Source	Domestic Source
<b>LABOR STANDARDS</b>			
Y	Prohibition on forced labor and forced child labor <sup>23</sup>	ILO Convention on Forced Labor, <sup>24</sup> ILO Convention on the Worst Forms of Child Labor <sup>25</sup>	EO 13126 <sup>26</sup>
Y	Prohibition on severe forms of trafficking <sup>27</sup>	Protocol to Prevent Trafficking <sup>28</sup>	EO 13627 <sup>29</sup>
P	Prohibition on discrimination at work (within U.S. territories) <sup>30</sup>	ICCPR	EO 11246 <sup>31</sup>
<b>CIVIL AND POLITICAL RIGHTS</b>			
P	Right to life <sup>32</sup>	ICCPR	Crime of Murder, <sup>33</sup> Occupational Health and Safety Laws <sup>34</sup>
N	Freedom of association/right to bargain collectively	ICCPR, ILO Constitution, ILO Declaration	National Labor Relations Act, <sup>35</sup> First Amendment <sup>36</sup>
N	Freedom of expression	ICCPR	First Amendment <sup>37</sup>
N	Free exercise of religion	ICCPR	First Amendment
N	Right to dignity	ICCPR	FLSA, <sup>38</sup> Minimum Wage Laws <sup>39</sup>
N	Right of privacy	ICCPR	Employee Polygraph Protection Act, HIPPA, Gramm-Leach Bliley, etc. <sup>40</sup>
N	Prohibition on torture	Convention Against Torture, ICCPR	Civil Rights Act, <sup>41</sup> Torture Victims Protection Act <sup>42</sup>

## B. WHAT KIND OF HUMAN RIGHTS HARMS OCCUR IN PROCUREMENT SUPPLY CHAINS?

Global supply chains enable large-scale production of goods to varying specifications—all at the lowest possible cost—often in countries where rule of law and respect for human rights is weak or nonexistent. As such, global supply chains are often associated with a range of human rights violations. This Section of the report explains what those violations are by specific business sectors. For each sector discussed below, there are several examples of abuses that are directly linked to U.S. government procurement and several that exemplify a pattern in specific sectors more generally.

The broader sectoral examples are important for two reasons. The first reason is that government procurement can demonstrate the viability of reforms that the private sector has resisted. The second reason is that many government purchases are for “commercial items” or “commercially available off-the-shelf-products” (COTS), a subset of commercial items that is sold in substantial quantities without modification.<sup>43</sup> For these items, the FAR requires fixed-price contracts for goods and a streamlined procurement process.<sup>44</sup> In addition, these items are excluded from a range of regulatory compliance and contractor accountability standards (e.g., compliance with wage and safety standards or personal conflict-of-interest standards).<sup>45</sup> The list of excluded laws is longer for COTS (e.g., portions of *Buy America* laws).<sup>46</sup> Consequently, the procurement risk of human rights abuses for commercial items and COTS is the same as the private market risk.

### Government Procurement—Electronic Products

In 2012, the U.S. government purchased about \$2.6 billion worth of electrical and electronic equipment components,<sup>47</sup> totaling about \$56 million in telecommunications hardware maintenance<sup>48</sup> and about \$5.9 billion in automatic data processing equipment (i.e. computers and related products).<sup>49</sup> In total, the U.S. government spends about \$74 billion on information technology each year.<sup>50</sup> As noted above, much of this is procurement of “commercially available off-the-shelf-products” (COTS), which are excluded from a range of domestic compliance, human rights, and contractor accountability standards.

Beyond government procurement, the electronics sector is an enormous market. Large portions of the electronics imported into the United States come from China, a country where abuses in the sector are well documented. In 2012, the United States imported \$124.8 billion in Electronic Data Processing (EDP) and office equipment (\$77.6 billion of which came from China) and imported \$141.9 billion in telecommunications equipment (\$70.8 billion of which came from China).<sup>51</sup> That same year, the United States imported \$38.6 billion in integrated circuits and electronic components (\$4.9 billion of which came from China).<sup>52</sup>

When the U.S. government purchases electronics made in whole or in part outside the United States, it may be purchasing items made in factories that pay low wages, require excessive work hours, expose workers to hazardous conditions, and violate core labor standards, including child labor.<sup>53</sup> There are also abuses when minerals are extracted for electronic components, as discussed further in this Section.

The following abuses occur in the electronic products sector:

- ❖ **Low Wages**—In 2013, an investigation revealed that four factories in China that are part of the supply chain of a computer manufacturer that supplies the U.S. government were not paying their workers enough to meet basic living costs.<sup>54</sup> At two of the factories, workers received base pay that did not meet the monthly minimum wage.<sup>55</sup> At the other two factories, although workers received the monthly minimum wage, it was not enough to support a dignified life.<sup>56</sup> Because the wages were so low, workers did not have the option to refuse overtime hours.<sup>57</sup>



- ❖ **Excessive Working Hours**—The same investigation into four Chinese factories that are part of the supply chain of a computer manufacturer that supplies the U.S. government revealed that all of the factories required daily overtime, ranging from two to four hours.<sup>58</sup> As a result, overtime hours per month ranged from forty-eight to 136 hours, which is much higher than the thirty-six allowed under Chinese law.<sup>59</sup> During non-peak season, all of the factories require six days of work per week, and, during peak season, one of the factories requires seven days of work per week.<sup>60</sup> Excessive working hours were one likely contributing factor to a string of suicides, discussed further below, at a large IT manufacturing company that is part of the U.S. government's supply chain for electronics.<sup>61</sup> One of the workers that jumped to his death, a nineteen-year-old boy, had worked 286 hours during the month before he died.<sup>62</sup> He had been working eleven-hour night shifts seven days a week.<sup>63</sup> As of 2013, weekly hours worked by employees were still not within the legal limit.<sup>64</sup>

These examples of excessive working hours linked to government procurement of electronic products reflect abuses present in the sector as a whole. For example, a Fair Labor Association (FLA) audit of three factories in China found that some workers did not have one day off a week, as mandated by Chinese law; they had worked every day for a month or more.<sup>65</sup> The legal monthly overtime was exceeded by over 50% of the employees at two of the factories and by 75% of employees at the third factory.<sup>66</sup>

- ❖ **Harsh Working Conditions**—In 2010, a large IT manufacturing company that is part of the U.S. government's electronics supply chain was in the news when seventeen of the company's employees allegedly tried to commit suicide during the same eight-month period.<sup>67</sup> Only four of them survived.<sup>68</sup> The majority of them fell to their deaths from the upper levels of their dormitories or other campus buildings.<sup>69</sup> Working conditions at the factories are believed to have contributed to the suicides.<sup>70</sup> Overtime at this company's factories regularly went far beyond the legal thirty-six hours per month allowed in China, and workers complained of being pushed to work thirteen days in a row.<sup>71</sup> Conditions at the company in 2010 also included signing a "voluntary overtime pledge," inhumane punishment for mistakes such as writing lines and reading "self-criticisms" out loud, military style drills,<sup>72</sup> and harassment from the security guards.<sup>73</sup> If a worker completes the production quota, the quota is increased.<sup>74</sup> In some departments, failure to meet the quota results in the loss of break time.<sup>75</sup> In 2013, two more workers at the same company committed suicide.<sup>76</sup>

- ❖ **Health and Safety Risks**—In 2011, there was an explosion and fire at a factory owned by a large manufacturing company that is part of the U.S. government electronics supply chain.<sup>77</sup> The explosion, which killed three workers and injured fifteen more, was caused by a build-up of combustible aluminum dust from poor ventilation.<sup>78</sup> A labor rights group had made the company aware of the aluminum dust problem just two months before the explosion.<sup>79</sup>

This example of health and safety risks linked to government procurement of electronic products reflects abuses present in the sector as a whole. For example, production of electronic goods may expose workers to toxic materials, which can have negative effects on health if proper equipment is not provided.<sup>80</sup> Specific health concerns include skin rashes and damage to the reproductive system, nervous system, or organs.<sup>81</sup> Workers in two factories in China were exposed to such toxic fumes produced by welding circuit boards.<sup>82</sup> Although the two factories provided the workers with gloves to protect them from the skin rashes they complained of, they were not given any equipment to protect them from inhaling the fumes.<sup>83</sup> In 2010, 137 Chinese workers were injured from a chemical they were using to clean telephone products.<sup>84</sup>

- ❖ **Child Labor**—Child labor is present in the electronics sector in general. The U.S. government’s own reports detail that child labor and forced labor is prevalent in China’s electronics industry, the world’s largest producer of electronic goods.<sup>85</sup> Recently, reports have surfaced that a factory in China that supplies phone components to a large telephone manufacturer employs children under the age of sixteen.<sup>86</sup> Three girls working at the factory reported working three hours of overtime, six days a week, in addition to their regular shift that lasted from 8:30 p.m. to 5:30 a.m.<sup>87</sup> According to the girls the factory had given them fake ID cards.<sup>88</sup>

### Government Procurement—Electronics—Mineral Extraction

The U.S. government is a major consumer of both minerals themselves and the products that contain them, including laptops, cellphones, and other technology. In 2012, the U.S. government spent about \$2.6 billion on ores, minerals, and their primary products.<sup>89</sup> The U.S. government purchased about \$2.6 billion worth of electrical and electronic equipment components,<sup>90</sup> about \$56 million in telecommunications hardware maintenance,<sup>91</sup> and about \$5.9 billion in automatic data processing equipment (i.e. computers and related products).<sup>92</sup>

Some of the minerals that are imported into the United States come from countries where human rights abuses occur in the mining process. From 2009 to 2012, the United States imported 1,763 metric tons of gold for consumption, with 10% coming from Colombia and 4% coming from Peru.<sup>93</sup> From 2009 to 2012, the United States imported 139,400 metric tons of refined tin for consumption, 17% of which came from Bolivia.<sup>94</sup>

When the U.S. government purchases electronic products that contain certain raw minerals from abroad, it is purchasing commodities that contain minerals that may have been extracted using child labor, forced labor, and with health and safety risks. In some countries, such as the Democratic Republic of Congo, extraction of these minerals also fuels conflict, instability, and related human rights abuses.

The procurement of minerals by the U.S. government cannot be directly linked to the abuses listed below, as the U.S. government does not directly purchase gold or other minerals from mines in countries such as the DRC. However, the U.S. government does purchase a massive volume of electronic products that contain these minerals. These minerals include tin, tantalum, tungsten, gold,<sup>95</sup> and copper.<sup>96</sup> Without close tracking and disclosure, it is not possible to tell whether minerals contained in those electronics came from areas where human rights abuses are widespread in the extraction process.<sup>97</sup> This is because, once the minerals enter the refinery stage, minerals from various sources are mixed, and it becomes impossible to tell the difference between minerals mined legitimately and minerals mined in areas where the industry is plagued by human rights abuses.<sup>98</sup> To help overcome his lack of transparency, the Extractive Industries Transparency Initiative (EITI) has developed a standard for participating governments. It encourages governments to publicly disclose contracts and licenses that they issue to extraction industries<sup>99</sup> and requires participating governments to provide comprehensive reports.<sup>100</sup>

Examples of abuses in the mineral extraction sector in general include the following:

- ❖ **Fueling Conflict in the DRC**—The Democratic Republic of the Congo (DRC) is a leading exporter of tantalum, copper, tin, and gold, which are needed to produce electronic products.<sup>101</sup> Extraction industries in the eastern DRC are rife with slavery, forced labor, human trafficking, and widespread rape and forced marriage.<sup>102</sup> Several rebel militia groups and state security force units profit from illegal trade and exploitation in the mineral sector.<sup>103</sup> Units of the national army (FARDC) and rebel militia groups have engaged in pillage, demanded protection fees to avoid pillage or to facilitate smuggling, extorted illegal taxes from civilians, and at times forced civilians to work for them or relinquish their mineral production.<sup>104</sup>

- ❖ **Child Labor**—Minerals that may be extracted using child labor include cassiterite (a tin ore),<sup>105</sup> tantalum ore (coltan), copper, and tungsten in the DRC; tin in Bolivia; and gold in many countries, including Colombia, Peru, Niger, and Ghana.<sup>106</sup> It is estimated that there are between 1 million and 1.5 million children working in the gold mining industry globally.<sup>107</sup> In Ghana, children working in gold mines are engaged in mining processes such as carrying heavy loads of dirt or rocks, digging tunnels, crushing ore, or processing gold dust with mercury.<sup>108</sup> In Mali, children as young as six years old are involved in the mining of gold, and it is estimated that 20,000 children total work in small Malian gold mines.<sup>109</sup> In 2013, a large mobile phone producer admitted that some of the tin used in its phones came from the Indonesian island of Bangka, where child labor in mining is widespread.<sup>110</sup>
- ❖ **Forced Labor**—Many minerals are extracted using forced labor. The U.S. Department of Labor includes gold from Burkina Faso and Peru and cassiterite (tin ore) and wolframite (tungsten ore) from the DRC, among others, on its “List of Goods” produced by forced labor.<sup>111</sup> It is estimated that approximately one-fifth of the gold exported from Peru comes from illegal mines, where there is a high risk of forced labor.<sup>112</sup> For example, a report produced by a U.S. non-profit tells the story of a sixteen-year-old boy who was sent by his cousin to work in a gold mine so that she could receive a recruitment fee.<sup>113</sup> Once he arrived at the mine, he was prevented from leaving and forced to work for ninety days (which turned into eight months due to his repeated injuries from unsafe working conditions) without pay in order to reimburse the mine owner for the “advance” paid to the boy’s cousin.<sup>114</sup> This system of induced indebtedness is not uncommon in Peru’s illegal and remote mining operations.<sup>115</sup>
- ❖ **Health and Safety Risks**—Workers involved in mineral extraction may also be exposed to health and safety risks without proper protection. For example, once extracted, gold is further refined with the use of mercury, which results in mercury exposure.<sup>116</sup> In Mali, for example, children and others working in gold mines touch and inhale mercury during this process.<sup>117</sup> In illegal gold mines in Peru, workers pour mercury into water and sand mixtures to separate gold particles, and then they use their bare hands to remove the mercury-covered gold.<sup>118</sup> Mines also collapse, injuring or killing workers. In April 2013, a mud wall of an open pit mine in Ghana fell in, killing sixteen workers and injuring others.<sup>119</sup>

### Government Procurement—Logistical and Security Support Abroad

In FY 2013, the U.S. Department of State’s Worldwide Security Protection (WSP) program—which provides security for overseas embassies and diplomatic personnel at heightened risk of terrorism—was funded at \$2.3 billion.<sup>120</sup> The U.S. Defense Department alone had contractual obligations in Iraq and Afghanistan totaling \$160 billion from FY 2007 to FY 2012, more than the total contractual obligations of any other U.S. federal agency.<sup>121</sup> Over half of the total military force in Iraq and Afghanistan consisted of private security contractors (PSCs), and, though U.S. law requires that such contractors not engage in “inherently governmental” functions, that definition is unclear and the lines have often blurred.<sup>122</sup>

The U.S. government’s reliance on private security services has exploded. As the Commission on Wartime Contracting concluded, U.S. oversight has not kept pace with the expanded use of private contractors. As NGO reports illustrate, some PSCs have engaged in serious misconduct, including violent attacks against civilians and questionable use of force, resulting in death and serious injuries.<sup>123</sup> PSCs are also implicated in other human rights abuses, including human trafficking, abuse of third-country nationals, and torture.<sup>124</sup>

The following abuses occur in the security and logistics support sector:

- ❖ **Violent Attacks**—In 2007, employees of a PSC hired by the Department of Defense killed seventeen and wounded twenty civilians, including women and children, in Nisour Square, Iraq while clearing the way for a diplomatic convoy.<sup>125</sup> The FBI found that the shooting was unjustified as there was no evidence that the guards were responding to a threat.<sup>126</sup> In Afghanistan, employees of the same PSC were involved in a car accident<sup>127</sup> wherein, when a civilian car tried to pass the crash site, the PSC employees fired shots, seriously injuring the driver, killing the passenger, and killing a man who was walking his dog.<sup>128</sup>
- ❖ **Questionable Use of Force**—In 2005, employees of a PSC hired by the United States allegedly fired at Iraqi civilians and U.S. Marines in Fallujah.<sup>129</sup> That same year, employees of another U.S. contractor opened fire at a vehicle that did not stop when they signaled, killing a nearby civilian.<sup>130</sup> In 2004, a convoy of yet another U.S. contractor shot the tire of a civilian car, shot into a crowded minibus, and shot at Iraqi police at a checkpoint in Umm Qasr, Iraq, for no apparent reason.<sup>131</sup>

These examples of PSCs hired by the U.S. government questionably using force reflect abuses present in the sector as a whole, both inside and outside of conflict zones. For example, the U.K. government hired a private contractor to conduct the deportation process for asylum applicants that were rejected. The United Kingdom fired the company after a deportee died due to abusive treatment.<sup>132</sup> The company that took its place allegedly also used unnecessary force and mistreated deportees.<sup>133</sup>

- ❖ **Human Trafficking and Forced Labor**—Subcontractors tasked with filling low-skill positions on U.S. military bases in Iraq and Afghanistan were involved with human trafficking, forced labor, and sexual exploitation.<sup>134</sup> The families of workers from Nepal allege that a U.S. defense subcontractor fraudulently recruited the workers in Nepal and transported them to Iraq via Jordan against their will.<sup>135</sup> While en route to a U.S. military base, the unarmed convoy was captured by Iraqi insurgents in a combat zone.<sup>136</sup> The workers were videotaped as they were executed, and the video was broadcast on Nepali television, to the horror of their families.<sup>137</sup> Surviving workers who made it to the military base were forced to stay and work there against their will.<sup>138</sup>
- ❖ **Fraud and Mistreatment of Third Country Nationals**—Subcontractors used fraud to bring third-country nationals into active warzones to work on U.S. military bases and then mistreated them.<sup>139</sup> For example, in Iraq, third-country national security guards were sometimes required to work 72-hour weeks, had their wages stolen (e.g., one subcontractor paid guards \$700 a month when the U.S. government had given them \$1,700 per month for each guard), or were not paid until the end of their contract, preventing them from going home.<sup>140</sup> In Afghanistan, subcontractors told workers they were going to Kuwait, but instead sent them to Afghanistan.<sup>141</sup>

These examples of fraud and mistreatment linked to government procurement reflect abuses present in the sector as a whole. It is common for small recruiting companies involved in the PSC supply chain to bring in laborers from other countries to fulfill tasks such as cleaning, cooking, and serving food on military bases.<sup>142</sup> These recruiters sometimes engage in fraudulent hiring practices, such as telling an applicant that he or she is going to be working in Dubai and then transporting them to a more dangerous country, such as Iraq, instead.<sup>143</sup> They have charged exorbitant application fees (\$2,000 to \$4,000) after claiming that a position pays much more than it really does.<sup>144</sup> Once these workers arrive, they have been mistreated and made to live in sub-standard conditions.<sup>145</sup> For example, twenty-five employees lived in a shipping container, sleeping on dirty mattresses.<sup>146</sup>

- ❖ **Abuse or Torture of Detainees**—Employees of a U.S. defense contractor allegedly directed or encouraged, and then covered up, the torture of four former Iraqi detainees at Abu Ghraib.<sup>147</sup>

### Government Procurement—Apparel

The U.S. government spends over \$1.5 billion at apparel factories overseas each year<sup>148</sup> and spent about \$2.4 billion on apparel in 2012.<sup>149</sup> This places the U.S. government in the upper level of apparel purchasers.<sup>150</sup> As noted above, much of this is procurement of “commercially available” products (COTS), which are excluded from a range of domestic compliance, human rights, and contractor accountability standards.

The United States imports large amounts of apparel each year, some of which comes from countries where abuses in the sector are well documented. The United States imported about \$25.9 billion in textiles in 2012.<sup>151</sup> These textiles came from India (\$3.2 billion), Pakistan (\$1.5 billion), Mexico (\$1.6 billion), Bangladesh (\$198 million), Thailand (\$195 million), the Dominican Republic (\$126 million), and Cambodia (\$38 million).<sup>152</sup> The United States imported about \$87.9 billion in clothing in 2012.<sup>153</sup> This clothing came from Bangladesh (\$4.6 billion), Mexico (\$3.9 billion), India (\$3.3 billion), Cambodia (\$2.6 billion), Thailand (\$1.8 billion), Pakistan (\$1.6 billion), Haiti (\$745 million), and the Dominican Republic (\$669 million).<sup>154</sup>

Key human rights abuses in the apparel sector include the violation of the freedom of association,<sup>155</sup> abusive working conditions such as excessive overtime and low pay, and hazardous working conditions.<sup>156</sup> As the U.S. government has reported, the textile and garment industry also uses illegal child labor.<sup>157</sup>

The following abuses occur in the apparel sector:

- ❖ **Health and Safety Risks**—U.S. government suppliers in various countries show a pattern of hazardous working violations, including padlocked fire exits, buildings at risk of collapse, and repeated hand punctures from sewing needles when workers were pushed to work faster.<sup>158</sup> Shirts with Marine logos were found in the charred rubble of a factory fire in Bangladesh that killed 112 workers.<sup>159</sup> In another factory in Bangladesh, which supplies clothing for sale at military bases, an audit conducted in 2012 found that 50% of workers did not have masks to protect them from cotton dust (as required by law) and 65% were working barefoot. Moreover, there were cracks in the walls that undermined the building’s structural integrity, and stairwells and exits were partially blocked.<sup>160</sup> Strictly speaking, when military exchanges acquire apparel for resale, they are not procuring goods “by and for the use of the federal government.”<sup>161</sup> They are, however, a “non-appropriated fund instrumentality of the Department of Defense (DoD)” that contributed \$2.4 billion over the past ten years to support recreation centers, golf courses, and other amenities at military bases.<sup>162</sup>

These examples of health and safety risks linked to government procurement of apparel reflect abuses present in the sector as a whole. Health and safety risks involved in the apparel industry include, among others, asthma or cancer from exposure to chemicals such as formaldehyde, musculoskeletal disorders, lead, and poisoning.<sup>163</sup> Additionally, many materials used in the apparel industry are flammable, and many apparel factories do not have proper fire safety measures in place.<sup>164</sup> For example, in 2012, there was a fire at an apparel factory in Pakistan that killed nearly 300 workers.<sup>165</sup> Workers at the factory were trapped inside the building as it burned because all the exits were locked except for one, and most of windows were barred.<sup>166</sup> Buildings that house these factories are often structurally unsound, as they may be repurposed, built cheaply, or have levels the building cannot support added to increase capacity.<sup>167</sup> For example, in 2013, an apparel factory in Bangladesh collapsed, killing 1,130 workers.<sup>168</sup> The building was eight stories tall, with three stories having been illegally added. The factory was built with poor construction material on swampy land that could not support a multistory building, and the building itself was not meant for industrial use.<sup>169</sup> All of this, coupled with the heavy machinery housed within the building, caused it to collapse.<sup>170</sup>

- ❖ **Child Labor**—In Bangladesh, according to an audit conducted in 2010, shirts with Marine Corps logos sold in military stores were made at a factory where children made up a third of the work force.<sup>171</sup> In Cambodia in 2014, close to two dozen underage workers, some as young as fifteen years old, were found working at a factory that makes clothes sold by the Army and Air Force.<sup>172</sup> In order to escape detection, they were instructed to hide from inspectors.<sup>173</sup>

These examples of child labor linked to government procurement of apparel reflect abuses present in the sector as a whole.<sup>174</sup> In Bangladesh, where workers under eighteen years old are only legally allowed to work five hours a day, apparel workers in some factories as young as thirteen years old must work eleven hour days, struggling to make enough money to eat.<sup>175</sup> In 2012, a raid on garment factories in India revealed that children under fourteen years old were working at spinning mills.<sup>176</sup> In a study conducted in 2012 in four apparel factories in India, three of the factories employed girls younger than sixteen years old, while two employed girls younger than fourteen years old.<sup>177</sup>

- ❖ **Low Wages and Excessive Hours**—In 2010, camouflage clothing for the U.S. government was produced in a factory in the Dominican Republic that paid eighty cents an hour and frequently failed to pay workers for overtime hours.<sup>178</sup> This production has since been moved to a factory in Haiti, where workers are paid only seventy-two cents an hour.<sup>179</sup> Employees at a factory in Chiang Mai, Thailand, which makes clothing sold by the Smithsonian Institution, make about \$10 per day.<sup>180</sup> Their wages were also illegally docked by 5% for clothing items with a mistake.<sup>181</sup>

These examples of low wages and excessive hours linked to government procurement of apparel reflect abuses present in the sector as a whole. In some apparel producing countries, workers are paid less than a living wage. Although some countries have improved, a July 2013 report shows that in many apparel-producing countries, such as Thailand and Bangladesh, real wages for apparel workers actually declined from 2001 to 2011.<sup>182</sup> The study also found that the prevailing wage in the apparel sector was below a living wage in all of the fifteen countries surveyed.<sup>183</sup> For example, in India, the prevailing monthly wage for apparel workers was only 23% of the living wage; the prevailing wage in Thailand was 43% of the living wage.<sup>184</sup> At an apparel factory in Bangladesh, one women worked eighty-nine hours in seven days, and workers are made to work late into the night when large orders come in.<sup>185</sup> In India, in the Tamil Nadu textile industry, workers are often required to work four hours of overtime per day during regular business, and are required to work double shifts (sixteen hours) or triple shifts (twenty-four hours) in a row when production has to increase.<sup>186</sup>

- ❖ **Freedom of Association**—A subcontractor in the Tehuacán region of Mexico that is part of the supply chain of a major defense contractor punished workers for organizing. The subcontractor fired thirteen leaders who organized to protest an “official union.”<sup>187</sup> After workers went further and voted to affiliate with a different union, the subcontractor shut down the factory and then blacklisted over 400 workers who supported the union from jobs in its other factories.<sup>188</sup> In Bangladesh, a labor advocate who was trying to organize workers at a factory that makes clothing for the General Services Administration was arrested and tortured by police in 2010 and was found dead with clear signs of foul play in 2012.<sup>189</sup>

These examples of restrictions on the freedom of association linked to government procurement of apparel reflect abuses present in the sector as a whole. For example, Individuals who try to organize unions at apparel factories may be threatened or forced to resign. In Bangladesh, a union organizer at a garment factory was told that if he returned to work he would be killed, and when he returned anyway he was

beaten by a group of men.<sup>190</sup> In 2013, five workers at an apparel factory in Cambodia were fired because of their work to set up an independent union.<sup>191</sup>

### Government Procurement—Agriculture, Seafood, and Meat

The U.S. government procured \$11.7 billion in food in 2012.<sup>192</sup> As noted above, much of this is procurement of “commercially available” products (COTS), which are excluded from a range of domestic compliance, human rights, and contractor accountability standards.

In 2012, the United States imported \$141.8 billion in agricultural products, some of which came from countries where there are documented abuses in the agriculture or seafood industry. For example, these products came from India (\$6.0 billion), Indonesia (\$4.8 billion), Thailand (\$4.7 billion), and Pakistan (\$169 million), among other countries.<sup>193</sup>

Abuses in the global agricultural sector range from lack of respect for workers’ rights to forced labor, bonded labor, and child labor (including the worst forms of child labor), and they are perpetrated by some of the world’s major producers in India, Brazil, Uzbekistan, Côte d’Ivoire, Ghana, and other countries.<sup>194</sup>

The following abuses occur in the agriculture and seafood sector:

- ❖ **Environmental Harms**—The U.S. government awards contracts for food products to a company that has caused environmental damage.<sup>195</sup> In 2003, the company pled guilty to violating the Clean Water Act by discharging large quantities of untreated wastewater into a nearby stream.<sup>196</sup> Multiple plants owned by the company also released anhydrous ammonia, a chemical that is toxic to people and the environment.<sup>197</sup>
- ❖ **Corruption**—This same company allegedly paid bribes to two Mexican plant inspectors who were tasked with examining the health and safety of meat.<sup>198</sup> The bribes were paid between 2004 and 2006 and amounted to \$90,000.<sup>199</sup>
- ❖ **Child Labor**—The U.S. government buys food products (including cocoa) from a company that, as of 2012, sourced 10% of its cocoa from Côte d’Ivoire,<sup>200</sup> where child labor on cocoa farms is widespread.<sup>201</sup> The Fair Labor Association (FLA) reported that child labor was a continuing problem on cocoa farms that are part of the company’s supply chain.<sup>202</sup>

This example of child labor linked to government procurement of agriculture and seafood reflects abuses present in the sector as a whole. For example, the majority of child labor in India occurs in the agricultural sector.<sup>203</sup> Coffee and sugarcane from Colombia, the Dominican Republic, El Salvador, Guatemala, and Kenya may be produced using child labor, according to the U.S. Department of Labor’s Bureau of International Labor Affairs (ILAB).<sup>204</sup> Child labor is also used on cocoa farms in various countries including Cameroon, Sierra Leone, Ghana, and Côte d’Ivoire.<sup>205</sup> Children working on cocoa farms in Côte d’Ivoire and Ghana, for example, suffer from hazardous work conditions; they may work long hours, use dangerous tools, and be engaged in spraying cocoa trees with pesticides or burning fields to clear them.<sup>206</sup> More than half of the children working in the production of cocoa have been injured in work-related activities.<sup>207</sup>

- ❖ **Bonded and Forced Labor**—In India, bonded labor in the agricultural sector remains a widespread problem, but the government does not effectively enforce related laws.<sup>208</sup> In Pakistan, children are sometimes forced into bonded agricultural labor in order to repay their families’ debts.<sup>209</sup> It was recently discovered that forced labor is widespread in the shrimp industry in Thailand.<sup>210</sup> Specifically, large numbers of individuals

are forced to work on fishing boats, catching fish that will then be used to feed shrimp.<sup>211</sup> The largest shrimp farmer in the world, which supplies many large retail stores globally, purchases this shrimp food.<sup>212</sup>

- ❖ **Human Trafficking**—In Pakistan, Department of State reports document the trafficking of children (and associated exploitation) for agricultural work.<sup>213</sup> Migrant workers from Burma and Cambodia were lured to Thailand and told they would be working in construction jobs or in factories, but were subsequently sold to work on fishing boats and were not allowed to leave.<sup>214</sup>
- ❖ **Torture**—Workers on fishing boats in Thailand describe being tortured, beaten, and even seeing fellow slaves killed.<sup>215</sup> One escaped slave described seeing a fellow slave tied to four boats and pulled apart.<sup>216</sup>
- ❖ **Freedom of Movement**—In Pakistan, workers have at times been restricted in their freedom of movement through the use of armed guards.<sup>217</sup>

### C. WHY ARE HUMAN RIGHTS HARMS OCCURRING?

When contractors are willing to compete for government business by violating human rights, they start a race to the bottom.<sup>218</sup> This has been the experience in the private sector, which for twenty years has struggled, with mixed results, to leverage its purchasing power to improve suppliers' respect for human rights.

The very same factors that drove the race to the bottom in the private sector—a focus on lowest cost and quickest turnaround, combined with single contract rather than longer-term sourcing arrangements—are at play in the public sector, with the same disastrous effects on workers and communities. The private sector has come to recognize that pricing and sourcing decisions at headquarters have immediate, and potentially deleterious, consequences in the factories producing goods bearing their brand name. The federal government plays the same role and bears the same responsibility for ensuring that its procurement policies “do no harm.”

In order to “do no harm,” the federal government has to recognize the potential for harm. Four factors contribute to government sourcing from suppliers associated with human rights harms, and explain why the government is slow to identify and respond to the risk.

1. **Low-Bid Competition**—Suppliers compete by maximizing hours of work and minimizing spending on wages, benefits, training, facilities, and equipment. Governments use competition to assure value, and the most common approach is to award a contract to the “lowest responsible bidder,” or, in some procurement, the “lowest price technically acceptable” (LPTA).<sup>219</sup> Lowest price competition often leads governments to favor contractors who can source their production through supply chains in low-wage countries that impose minimal regulations.<sup>220</sup> Their production is located outside of U.S. regulatory jurisdiction, and U.S. procurement standards do not hold them accountable for compliance with domestic law in the country of production.<sup>221</sup> Beyond that, suppliers often do not comply with even the lowest of regulatory standards for health and safety, working conditions, wages, privacy, and other domestic laws that implement human rights.
2. **Supply Chain Transparency**—Global supply chains diffuse responsibility and accountability among a network of often-unidentified suppliers and subcontractors. Supply chain managers—the government contractors themselves—enjoy the flexibility to shift sourcing decisions to obtain the best possible terms. For suppliers and their workers in the global supply chain, competition is intense and extremely sensitive to delivery, quality, and price issues, leading to a “lowest common denominator” approach to respect for labor, environmental, health, and safety concerns.<sup>222</sup>



3. **Scale**—Globally, procurement (including domestic) is equivalent to 82% of total exports.<sup>223</sup> In the United States and other Organisation for Economic Co-operation and Development (OECD) countries, procurement is about 20% of GDP (7% federal, 13% state and local); in non-OECD countries it is 14.5%. On this scale, government does not merely purchase *in* the market; it *creates* markets. For example, the U.S. government annually purchases \$2.7 billion of ores and minerals, \$2.6 billion of electrical equipment and \$2.4 billion of apparel.<sup>224</sup> This means that the government has the purchasing power to drive low-price competition, which is what procurement rules aim to accomplish. But it can also drive a race to the bottom, a dynamic for which that procurement rules are blind, except for a few select abuses (e.g., human trafficking). Yet, in a positive light, governments have the purchasing power to avoid companies that compete by violating human rights.<sup>225</sup>
  
4. **Government Capacity to Manage**—Efforts to persuade government to use its purchasing power have met with limited success. The federal procurement system has not kept pace with the challenges of globalization or the evolving private-sector responses. It has failed to take advantage of or leverage private sector efforts, as well as federal agency efforts, notably at the Department of State and the Department of Labor, to monitor high-risk countries and specific sectors to identify the risk of human rights abuses.<sup>226</sup> Procurement officers have limited flexibility and discretion to identify or take steps to address possible risks. Instead, managers of this system approach reform in terms of technical, incremental changes.<sup>227</sup> They have yet to respond on a scale that would address what some advocates see as “gaping holes in federal procurement policy, allowing the federal government to purchase products made . . . in the most egregious sweatshop conditions.”<sup>228</sup> By comparison, other countries such as Norway are beginning to make progress in avoiding suppliers that exploit sweatshop conditions.<sup>229</sup>

### III. QUESTIONS OF LEGAL AUTHORITY

This Section of the report explores questions about the legal authority to amend the FAR through executive branch action. It examines the executive authority of the President to enact such reforms and provides precedent for using executive orders to address social issues or human rights harms through procurement. However, this is not an exhaustive analysis; it does not address all legal questions that may arise in a particular sector or method of procurement.

In addition to executive orders, individual agencies may be able to use procurement to promote the protection of human rights. Federal agencies have the authority to create their own rules through their supplement to the FAR, so long as those rules do not conflict with the FAR. Agencies can also experiment with innovative methods of procurement, contingent on the approval of the Office of Management and Budget (OMB) and notice to congressional oversight committees.<sup>230</sup>

#### A. EXECUTIVE AUTHORITY TO SET HUMAN RIGHTS STANDARDS

The executive branch has often moved to change the FAR and federal procurement policy through an executive order. The most recent example of this is President Obama's Fair Pay and Safe Workplaces Executive Order, discussed below, which he signed on 31 July 2014.<sup>231</sup>

This is not the first time a U.S. President has signed an executive order with the goal of using government procurement to further socio-economic policies. This is also not the first time this type of order has been controversial, with disputes usually regarding the underlying socio-economic policy being pursued and arguments that the President has infringed on congressional authority.<sup>232</sup>

Presidential authority to issue executive orders must come from an act of Congress or from the Constitution. Presidential authority is greatest when exercising powers inherent in Article II of the Constitution, meaning powers that are military (i.e. the President is acting as Commander in Chief) or in the realm of foreign policy (i.e. when the President is acting as the Head of State). Among the latter powers is the authority to negotiate treaties. The President also possesses considerable authority as head of the executive branch of government, including authority to direct the promulgation of rules regarding government procurement policies.<sup>233</sup>

The President has typically relied on both inherent authority under the Constitution as well as congressional authorization pursuant to the Federal Property and Administrative Services Act of 1949 (FPASA). The FPASA empowers the President to establish any policies or directives that he believes are necessary to advance “economy” or “efficiency” in federal procurement.<sup>234</sup>

The lead Supreme Court case regarding presidential authority to issue executive orders is *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>235</sup> In *Youngstown*, the U.S. Supreme Court ruled that President Truman lacked the authority to issue an executive order seizing private steel mills in the United States in order to avoid a strike by workers during the Korean War.<sup>236</sup> The Court found that no express or implied statutory authority existed for such action and that Congress had debated and specifically rejected governmental seizure of private businesses as a way to settle labor disputes.<sup>237</sup> Justice Jackson’s concurring opinion set out the analysis that has prevailed in later cases: presidential power is at its highest when an express or implied grant of congressional authority exists, and presidential power is at its lowest point when the terms of the executive order are in direct conflict with congressional action.<sup>238</sup>

Recent executive orders focused on procurement and social issues have been issued based on presidential authority under the FPASA. In fact, President Obama specifically cited the FPASA (40 U.S.C. § 121) as a source of the President’s authority to sign the Fair Pay and Safe Workplaces Executive Order.<sup>239</sup> The FPASA’s purpose is to “provide the Federal Government with an economic and efficient system for the following activities: (1) procuring and supplying property and non-personal services, and performing related functions such as contracting.”<sup>240</sup> The FPASA empowers the President to “prescribe policies and directives that the President considers necessary to carry out” this purpose, as long as they are consistent with the act.<sup>241</sup> The FPASA also established the General Services Administration (GSA) to carry out these functions under the direction and control of the President.<sup>242</sup>

At times, parties have challenged the validity of executive orders that relate to federal contractors. Generally, two factors will affect the outcome of these legal challenges.<sup>243</sup> The first factor is under which authority the executive order was issued, and the second factor is whether the order conflicts with or is consistent with other statutes aside from the FPASA.<sup>244</sup> Thus, the issue is not whether a particular executive order is authorized by virtue of the FPASA, but whether there is some other statute in effect that preempts separate executive action. Challenged executive orders issued under the authority of FPASA will generally be upheld as long as there is the requisite nexus between the executive order and FPASA’s goals of economy and efficiency in procurement.<sup>245</sup> A nexus may exist when the order and FPASA’s purpose have an “attenuated link” or when the President offers a “reasonable and rational” explanation for how they are related.<sup>246</sup>

Arguably, the President has an express grant of congressional authority when the President signs an executive order under the FPASA.<sup>247</sup> Executive action taken pursuant to such congressional authorization falls under *Youngstown*’s first category and therefore is “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”<sup>248</sup>

Even if the President does have authority under FPASA to act, there is still a question as to the scope of such action. As discussed in Section II of this report, the United States has not ratified and is not a signatory to all core human rights treaties. This means that there is no express or implied grant of congressional authority to the President to issue executive orders regarding many of these rights. Thus, the scope of procurement standards is limited to those international human rights to which the United States is committed to protect by treaty or to rights protected by domestic legislation in the absence of a treaty. For example, the United States enacted anti-trafficking legislation before it ratified the Palermo Protocol on prevention of trafficking.<sup>249</sup> The domestic legislation formed the basis of the subsequent executive order<sup>250</sup> mentioned below.

Additionally, there is a presumption against the extraterritorial application of U.S. statutes. Hence, laws only apply overseas if they explicitly state that they do.<sup>251</sup> Thus, even if there is domestic legislation in place that protects human rights, it can only be applied abroad if it explicitly says that it has extraterritorial reach. An example of a statute with explicit extraterritorial reach is the U.S. Foreign Corrupt Practices Act (FCPA), which provides for criminal liability for U.S. companies that engage in bribery overseas.<sup>252</sup>

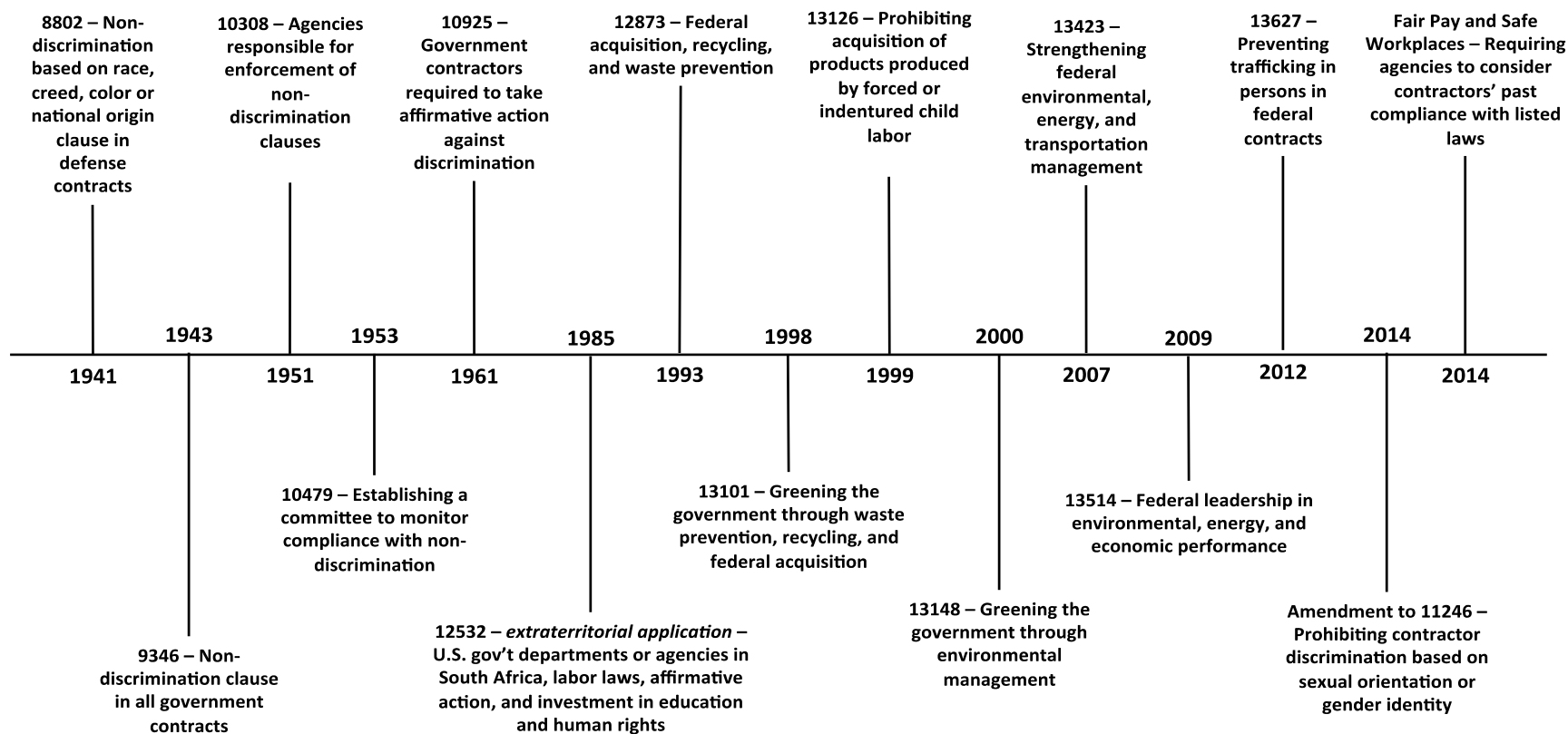
In sum, it is difficult for the Executive to act in setting human rights standards through procurement absent an express or implied grant of authority by Congress. It also means that rights contained in treaties that the United States has not ratified (e.g., those contained in the ICECSR) may not be included in federal procurement requirements unless Congress has enacted domestic legislation that protects rights contained in the treaty.

## B. EXECUTIVE ORDER PRECEDENT

Today, the global community faces an urgent problem. The number of human rights abuses is growing as “too many governments continue to tighten their grasp on free expression, association, and assembly, using increasingly repressive laws, politically motivated prosecutions, and even new technologies to deny citizens their universal human rights, in the public square, and in virtual space.”<sup>253</sup> In addition to targeting marginalized populations to suppress political dissent and curb civil society, over 20 million people around the world suffer a host of labor abuses as victims of human trafficking, a practice resembling a modern day slave trade.<sup>254</sup> The threat posed by these abuses is grave, and the need to address them is urgent.

Despite the challenges outlined above, there is ample precedent for using executive orders that apply to government procurement to address social issues or human rights harms. These executive orders are listed in Figure 2. For more information on these executive orders, please see Annex 1.

FIGURE 2: TIMELINE OF EXECUTIVE ORDERS THAT USE PROCUREMENT TO ADDRESS HUMAN RIGHTS AND OTHER SOCIAL ISSUES



## IV. UNPACKING THE FEDERAL PROCUREMENT PROCESS

### A. STAGES OF PROCUREMENT

The rules for procurement by federal agencies are contained in the Federal Acquisition Regulation (FAR). The FAR consolidates public laws adopted by Congress, executive orders by the President, and treaties that have the force of law in the United States.<sup>255</sup> It is managed by a “FAR Council,” which is composed of three federal agencies—the General Services Administration (GSA), the Department of Defense (DOD), and the National Aeronautics and Space Administration (NASA).<sup>256</sup>

The FAR’s length (2,017 pages) and complexity (fifty-three parts) make it challenging to analyze and even more challenging to amend. All agencies must comply with the FAR, but individual agencies may issue their own supplements. The most extensive supplement is the Defense Federal Acquisition Regulation Supplement (DFARS).<sup>257</sup> History teaches that amending the FAR—which affects all agencies with great diversity of needs and contractors—is considerably more difficult than working through agency supplements.

In 2000, the last year of the Clinton Administration, the FAR Council responded to the trend that federal contractors were among the largest law-breakers with respect to U.S. domestic regulation of their services and workplace conditions. The final rule that emerged in 2001 authorized, but did not require, contract officers to find that a prospective contractor is not “responsible” to do business with the federal government unless it has a satisfactory record of compliance. Amid litigation and lobbying that set a record in rulemaking, the rule was repealed in the second month of the Bush Administration.

In July 2014, the Obama Administration returned to the fray—again authorizing agencies to exclude contractors who are lawbreakers. But the new executive order is narrower in scope and more specific in defining a standard for responsible compliance than the rule did in 2000. In particular, the standard is a list of thirteen U.S. domestic laws, which means that a contractor is still not “responsible” for compliance with domestic laws in other countries where goods and services are sourced. Now, as before, there is no guidance in the FAR that clearly authorizes exclusion of

a prospective contractor who is convicted of criminal negligence or repeated and willful safety violations that result in the death of foreign workers.

The lesson of this history is not pessimism, but rather, that change is slow and lags behind the evidence of abuse from global supply chains. A careful study of the FAR reveals that there are multiple paths to reform, and it is possible to avoid the political and legal obstacles that the FAR Council encountered in 2001.

To map these paths, this Report begins by focusing on five stages of procurement. An obstacle at one stage can sometimes be avoided by changing another stage. In Stage 1, agencies plan and determine needs and risk of human harm. In Stage 2, agencies solicit bids and provide notice of the terms that the contract will contain. In Stage 3, agencies evaluate bids based on price and capacity and determine whether a contractor is responsible. In Stage 4, agencies award the contract. Finally, in Stage 5, agencies monitor and enforce contract obligations. These stages are listed in Figure 3.

As summarized below, the FAR has elements at each stage that could—and sometimes do—protect workers and communities from harm that is caused by government contractors.

This Section reviews each stage of the procurement process in order to identify gaps and opportunities. By “gap,” this report means a shortcoming in the FAR that enables government contractors to obtain or expand government business despite a track record of harming workers or communities. By “opportunity,” this report means that the FAR already contains an element of protection for human rights that the government could expand or adapt in order to prevent or minimize human rights harms.

**FIGURE 3: STAGES OF FEDERAL PROCUREMENT**

STAGE	PROTECTION AGAINST HUMAN HARMS
<b>1. Plan for Procurement Needs and Risks</b>	Agencies decide on whether their contractors must comply with specific human rights or protect against defined human harms as a contract obligation.
<b>2. Solicit Bids, Provide Notice</b>	Agencies notify potential contractors when there is a significant risk of a human rights violation. This notice can trigger specific compliance obligations.
<b>3. Evaluate Potential Contractors</b>	In addition to evaluating price and capacity, agencies evaluate whether contractors are responsible based on integrity and business ethics.
<b>4. Award Contract and Set Contract Terms</b>	Agencies confirm a contractor’s assurances and require development of compliance plans. As noted at Stage 1, agencies insert compliance obligations as part of a contract.
<b>5. Enforce Contract</b>	Agencies have financial and other remedies if a contractor violates human rights. In theory, agencies have information systems to monitor contractors that fail to meet their performance or compliance obligations.

## B. GAPS AND OPPORTUNITIES

### Stage 1—Plan for Procurement Needs and Risks

At the planning stage of procurement, agencies must decide whether to insert clauses that require contractors to comply with human rights standards—as the FAR defines them—and/or with domestic laws that protect human rights.

**Gaps in Protection**—The FAR prohibits forced child labor,<sup>258</sup> several types of human trafficking,<sup>259</sup> and discrimination within U.S. territory.<sup>260</sup> The Defense Federal Acquisition Regulation Supplement (DFARS) goes further and requires security contractors to comply with the Geneva Conventions, domestic law in the country of operations, and operational directives such as those governing use of weapons.<sup>261</sup>

The FAR does not, however, protect all human rights. For example, as Figure 1 in Section II illustrates, the FAR provides only partial protection for the prohibition of discrimination and the right to life (applying to U.S. territory only) and no protection for the rights to dignity, privacy, some of the core labor standards (e.g., freedom of association and the prohibition of child labor). Although there are FAR rules that require compliance with domestic laws that implement internationally recognized rights, they are limited to a few examples—such as paying overtime wages and nondiscrimination—and only apply to work in U.S. territory.

These and other human rights are routinely violated in global supply chains from which the federal government purchases goods and services. As discussed in Section II, the problematic sectors include:

- ❖ Apparel
- ❖ Agriculture
- ❖ Electronics
- ❖ Mineral Extraction
- ❖ Logistical and Security Support Abroad

Federal and state domestic laws set standards to protect workers and communities, and the FAR requires procurement officers to cooperate with federal and state agencies that enforce labor laws.<sup>262</sup> However, there is no explicit contract obligation for federal contractors to comply with domestic laws—either in the United States or another country of production. With some exceptions, like forced child labor and bribing government officials, the general approach of the FAR is that government contracts and compliance with civil and criminal law are worlds apart. The assumption is that there are prosecutors, enforcement agencies, and courts that can award damages for negligence if a contractor violates the law or hurts people. The FAR's procurement rules were not designed to protect workers or provide relief to victims, with a few exceptions, but rather to enable the government to enforce its contracts and ensure that taxpayers get their money's worth.

The FAR's foundation is the assumption of law-abiding competition, and that foundation is breaking down. As the economy evolves, more and more suppliers are using global supply chains to gain a competitive advantage or keep up with their competitors. This competition is increasingly shifting costs to workers and communities, particularly in countries where there is very little capacity for civil or criminal enforcement. The FAR does not take this lack of capacity into account.



For example, if an agency buys apparel from a supplier who knowingly violates fire codes to cut costs, the FAR provides scant guidance on how that agency can avoid doing business with that contractor. If a violation of fire codes results in injury and death, there is nothing in the FAR that requires the contractor to correct the violation or provide a remedy to workers or their families. Similarly, the FAR provides scant guidance to agencies that would prefer to avoid contractors who source production in another country and then fail to pay the legal minimum wage in that country.<sup>263</sup>

In this context of global competition, the UNGPs explain that sovereignty creates a State duty to protect human rights from harm that results from doing business. States do this through domestic laws that implement human rights standards and through the terms they set for direct dealings between government and business. The FAR has already been seeded with protections for some human rights; the question is how that protection should grow.

**Opportunities to Expand the Scope of Protection**—In its present form, the FAR includes three models for protecting human rights.

1. ***Specific Human Rights***—The FAR specifically addresses some human rights without limiting their scope of protection. An example is the prohibition on forced labor, as an element of trafficking.<sup>264</sup> This is one way that governments can meet their obligation, as emphasized in the UNGPs, to adopt domestic policies that require businesses to respect human rights. However, the UNGPs do not encourage a piecemeal approach of naming specific human rights. Rather, the UNGPs recommend domestic laws that require broad business compliance with all human rights that are relevant to a business.
2. ***Clusters of Human Rights***—The FAR defines number of human rights in clusters, meaning that closely related harms are grouped together. An example is human trafficking, which is a composite of commercial sex, forced labor, fraud, and the worst forms of child labor.<sup>265</sup>

The FAR could expand to protect additional clusters, for example, the ILO’s core labor standards, which include: freedom of association and the prohibitions of forced labor, child labor, and discrimination with respect to work. These “internationally recognized labor standards” are already operational in U.S. law for tariff preferences,<sup>266</sup> labor chapters of several free trade agreements,<sup>267</sup> the ban of imported goods made with forced or indentured child labor,<sup>268</sup> and support for private investment in developing countries through the Overseas Private Investment Corporation (OPIC).<sup>269</sup> As a consequence, the FAR is out of sync with U.S. trade policy in terms of international agreements, unilateral import prohibitions, and international development programs.

3. ***Broad Sectoral Policies***—For over twenty years, multi-stakeholder initiatives and U.S. development policies have responded to human rights harms in a number of high-risk sectors: footwear and apparel, extractive industries, electronics, information technology, and, most recently, private security. These initiatives have several common ingredients: codes of conduct (or performance standards) that reflect international human rights, independent external monitoring and remediation, grievance mechanisms, and public reporting on progress. In addition to the multi-stakeholder initiatives, some governments—as well as the UN and the ILO—have worked to address the capacity needs in countries of production. Typically, their goal is to strengthen local laws to align with international standards and build oversight capacity with engagement by industry and nonprofit stakeholders. Their results have been mixed.

Apparel is a leading sector in which governments and international institutions have worked with industry and workers to define risks and human rights standards. In this sector, industry-based standards and social auditing have been controversial because they do not engage the workers and communities they are supposed to protect (See

Stage 5 below). The ILO and World Bank, with U.S. government support, have sponsored a more balanced approach. This approach is the Better Work Programme, which includes tripartite engagement by business, governments and unions to build capacity in selected countries.<sup>270</sup> Another apparel initiative, the Accord on Fire and Building Safety in Bangladesh, has attracted participation by business, governments, and unions.<sup>271</sup>

The U.S. government takes a sector approach when investigating a country's compliance with standards to qualify for tariff preferences, under the Generalized System of Preferences (GSP). For example, in 2013, GSP status was denied to Bangladesh for failure to enforce safety standards and protect "internationally recognized worker rights" (as defined under the ILO core labor standards) in several sectors: apparel, shrimp processing, and manufacturing in export processing zones.<sup>272</sup>

On a broader scale, OPIC identifies a list of twenty-eight high-risk sectors that include agriculture, construction, integrated chemical installations, and large-scale industrial plants.<sup>273</sup> An OPIC award in one of these sectors automatically triggers human rights standards for the recipient business, including protection of "internationally recognized worker rights."<sup>274</sup> OPIC also uses a "special consideration" approach to assessing the risk of labor rights abuses based on five risk factors:<sup>275</sup>

1. Statistical likelihood that a labor-intensive industry or sector might infringe labor rights;
2. A clear history of labor rights abuses in a particular country's industry or sector;
3. Reliance on large pools of sub-contracted, unskilled, temporary, or migrant workers;
4. Adverse impacts on significant numbers of workers; and
5. Supply chain considerations in which the supply of raw materials creates a particularly high risk for the use of both forced labor and harmful child labor.

One of the first sector-wide reforms of federal procurement is developing in the private security sector. As the threat of terrorism and regional wars proliferate, the U.S. government has expanded its reliance on private contractors to protect U.S. personnel and facilities abroad. Ninety percent of security for the Department of State is now sourced in the private sector.<sup>276</sup>

The mounting toll of deaths, torture, trafficking, and other human rights abuses at the hands of private contractors prompted extensive media coverage<sup>277</sup> and a congressional directive for accountability.<sup>278</sup> In 2012, the U.S. government supported and joined an association to implement the International Code of Conduct for Private Security Service Providers (ICoC),<sup>279</sup> which implements the key principles of due diligence—respect, protect, and remedy.<sup>280</sup> The ICoC requires compliance with a wide cluster of human rights,<sup>281</sup> remediation if rights are violated,<sup>282</sup> and independent third-party monitoring.<sup>283</sup> The Department of State recently announced that it plans to reform the bidding process for its Worldwide Protective Services (WPS) Contract by requiring contractors to join the ICoC Association and demonstrate conformance with the code of conduct.<sup>284</sup> The Department of Defense has taken steps toward the same goal by funding development of industry-based standards to guide contractors in their implementation of the ICoC.<sup>285</sup>

***Opportunities to Clarify Human Rights***—There is an opportunity to clarify some of the definitions that the FAR provides for human rights.

- ❖ **Forced Labor**—The FAR defines "forced labor" to entail a threat of "serious harm or physical restraint"<sup>286</sup> as a consequence of nonperformance. In contrast, the definition of "forced child labor" requires only a

“menace” of penalty for nonperformance.<sup>287</sup> By implication, an employer’s threat of a penalty that is less than “serious” harm or physical restraint against an adult falls short of forced labor. It is not clear whether serious harm includes being fired or canceling a work visa if a worker refuses to work overtime. Similarly, it is not clear whether a “serious” physical restraint includes locking factory doors during work hours.

The definition of “forced labor” in the FAR is also inconsistent with the ILO’s definition under ILO Convention No. 29, Forced Labour (1930). The ILO defines “forced or compulsory labour” as “all work or service which is exacted from any person *under the menace of any penalty* and for which the said person has not offered himself voluntarily.”<sup>288</sup> Again, the FAR’s “threat of serious harm or physical restraint” is considerably narrower than the ILO’s “menace of any penalty.” U.S. law applies the ILO definition in the definition of “internationally recognized worker rights” to:

- Prohibit import of goods produced with convict, forced, or indentured labor in the Tariff Act of 1930;<sup>289</sup> and
- Enable developing countries to qualify for tariff preferences under the Generalized System of Preferences and several Acts of Congress promoting trade with Andean, Caribbean, and African countries.<sup>290</sup>

In sum, forced labor is defined inconsistently within the FAR, and the FAR is inconsistent with U.S. trade prohibitions and preferences that rely on the ILO definition of forced labor.

In 2014, the International Labor Conference of the ILO adopted a Protocol to the Forced Labor Convention (1930) that affirms the relevance of its definition to contemporary threats from trafficking, exploitation of migrant workers, and sexual exploitation of women.<sup>291</sup> The Protocol emphasizes that parties must “support[] diligence *by both the public and private sectors* to prevent and respond to risks of forced or compulsory labour”<sup>292</sup>. The Protocol applies directly to government standards for doing business with private sector suppliers. (See Stage 5 below for the Protocol’s relevance to enforcement.)

In the paragraphs above, note that due diligence can be applied to a specific human right (e.g., forced labor) or more broadly to the full scope of risks within a sector (e.g., human rights compliance by security contractors)

- ❖ **Discrimination**—The FAR’s Equal Opportunity Clause prohibits contractors and subcontractors operating in U.S. territory from discriminating against any employee or applicant “in employment” because of race, color, religion, sex, or national origin.<sup>293</sup> It is not clear whether discrimination “in employment” applies to more than hiring and firing—for example, to wages, promotion, and benefits.<sup>294</sup>

### Policy Menu at Stage 1 – Plan for Procurement Needs and Risks

#### ❖ Expand the Scope of Protection

- *Individual Right* – Expand protection from specific harms.
- *Cluster of Rights* – Expand protection for a cluster of human rights such as the ILO’s core labor standards.
- *Sector Standards* – Expand sector strategies based on due diligence, codes of conduct, compliance with domestic law, and compliance tools developed by the ILO, UN, or multi-stakeholder groups.

#### ❖ Clarify Human Rights – Resolve discrepancies in definitions of *forced labor* within the FAR so as to harmonize with the ILO definition. Resolve vagueness in the definition of discrimination “in employment.”

### Stage 2—Solicit Bids and Give Notice

At the stage of soliciting bids or proposals, the FAR requires agencies to notify potential contractors of capacities required of responsible bidders<sup>295</sup> and the language of contract clauses (e.g., compliance obligations or performance standards).<sup>296</sup> It requires contract officers to ensure, before awarding a contract, that all the solicitation documents provide notice of all evaluation factors and sub-factors.<sup>297</sup> Without notice that human rights practices are a factor that will be considered, agencies cannot exclude contractors based on evidence of human rights violations. Nor can they evaluate prospective contractors favorably based on respect for human rights.

The FAR requires a special notice to potential contractors that source products from countries included in the Department of Labor’s list of products and countries of origin where there is a significant risk of forced child labor.<sup>298</sup> Potential contractors must certify that they do not source their products from high-risk countries, or if they do, that they have no knowledge of forced child labor in their supply chain.<sup>299</sup>

**Gaps in Notice of Risk**—One gap is that suppliers are not required to certify “no knowledge” of forced labor if the work is performed in one of the forty-one countries with which the United States has a trade agreement.<sup>300</sup> Even if these countries effectively prohibit forced child labor, contractors from these countries could source the components of their products from other countries that do not police forced child labor.

Another gap is that the certification pertains only to fabrication of an “end product” (e.g., apparel) and not the components of a product (e.g., cotton fabrics),<sup>301</sup> even when there is evidence that components might be produced with forced child labor.

**Opportunity to Expand Notice of Risk and Standards**—Despite these gaps, the Department of Labor’s notice regarding risk of forced child labor is a model that could be expanded to protect other human rights. In 2013, the Department of Labor’s notice covered thirty-five products from twenty-six countries.<sup>302</sup>

In later stages of the procurement process, agencies could use expanded notice of risk by a federal agency as a trigger to strengthen evaluation of bidders (Stage 3) or contract terms (Stage 4). Several models of expanded notice merit favorable mention here:

- ❖ **Norway**—Norway offers a model for broader notice to potential contractors; it covers all of the ILO’s core labor standards, not just forced child labor, and, as a consequence, a broader range of products.<sup>303</sup> Norway identifies sectors (e.g. building materials, electronics, and garments) that are “high risk” for human rights violations.<sup>304</sup> In those sectors, bidders are on notice that they will be evaluated in terms of their

“competitive ability” on adhering to the ILO core conventions and the national legislation of the production country.<sup>305</sup> Additionally, compliance with core labor standards is a clause for contract performance.<sup>306</sup>

- ❖ ***Sweatfree Purchasing Consortium (SPC)***—In the United States, members of the SPC (three U.S. states and thirteen cities) focus on apparel as a high-risk sector. They notify prospective bidders that they must comply with a code of conduct that includes several clusters of standards—as broad as Norway’s, but more specific. They include compliance with ILO core labor standards, domestic labor law, and domestic health and safety standards.<sup>307</sup>
- ❖ ***Worker Rights Consortium (WRC)***—In the private sector, the WRC has developed a designated supplier program (DSP) to protect the rights of workers who sew university-logo apparel. Participating universities notify their suppliers in advance of solicitations and invite them to designate factories that will comply with ILO core labor standards, demonstrate respect for worker’s associational rights, and pay a living wage. These standards are later evaluated before the universities enter into a long-term production agreement.<sup>308</sup>

#### Policy Menu at Stage 2 – Solicit Bids and Provide Notice

- ❖ ***Notice of Risk***—Expand notice of risk that human rights are violated in a sector or supply chain.
- ❖ ***Notice of Standards***—Notify potential contractors of evaluation criteria, duties to certify knowledge they must later verify, and other compliance obligations.

#### Stage 3—Evaluate Potential Contractors

***Types of Contracts and Negotiations***—Agencies can include human rights factors to evaluate potential contractors. The reasons for doing so would be to either screen out contractors with bad records or, more likely, to ensure that contractors who win have the capacity to manage their supply chains and comply with contract clauses that protect human rights. An agency’s approach will depend on the type of contract it uses. Two commonly used types are:

1. ***Sealed Bidding***—Agencies can use sealed bids to purchase manufactured goods and raw commodities based upon “only price and the price-related factors included in the invitation.”<sup>309</sup> The opportunity to consider non-price human rights factors is limited to when an agency determines whether the lowest bidder is also a “responsible bidder,” a standard that is reviewed below.<sup>310</sup> As noted above, the government often purchases “commercial items” (including apparel or electronic products that are produced for the non-government market) or “commercially available off-the-shelf-products” (COTS), a subset of commercial items that is sold in substantial quantities without modification).<sup>311</sup> For these items, the FAR requires fixed-price contracts for goods and a streamlined procurement process.<sup>312</sup> Consequently, there is a higher risk of human rights abuses than there is when agencies can evaluate contractors based on factors other than price.
2. ***Contract by Negotiations***—Agencies can use negotiated contracts based on fixed price, cost-reimbursement, incentives, and other formats.<sup>313</sup> One of the most flexible negotiation options enables agencies to select the bidder who offers the best value to the government.<sup>314</sup> This process only applies to service contractors, but services can include distribution of a range of goods such as apparel, electronics, and food. Agencies must evaluate bids solely according to the factors they published at the solicitation stage.<sup>315</sup> Those factors must always include price and quality, but agencies have some

discretion to identify other factors, for example, capacity to manage a supply chain for purposes of compliance with human rights, an approach that is explained below.<sup>316</sup>

**Responsible Contractors**—Regardless of which type of contract they use, before awarding a contract an agency must first determine that a contractor is “responsible.”<sup>317</sup> The burden is on a prospective contractor to show that it meets the standards.<sup>318</sup> A responsible contractor is one who has:<sup>319</sup>

- ❖ Adequate financial resources to perform;
- ❖ Ability to comply with a schedule;
- ❖ Satisfactory performance record;
- ❖ Necessary equipment and facilities;
- ❖ Necessary organization, experience, accounting and operational controls, and technical skills or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors); and
- ❖ Satisfactory record of integrity and business ethics.

In theory, a contractor could be excluded for failure to have necessary operational controls and safety programs to cope with high risk of human rights violations. Similarly, in theory, a contractor could be excluded based on multiple violations of domestic laws that protect human rights, which amount to an unsatisfactory record of integrity and business ethics. But agencies have rarely excluded contractors based on the FAR’s narrow guidance on what is an “unsatisfactory” record. The Project on Government Oversight (POGO) is the leading monitor of misconduct by federal contractors. POGO’s database includes over 170 of the largest contractors that, collectively, have amassed 1,300 criminal, civil, and administrative instances of misconduct since 1995. These resulted in over \$60 billion in fines, penalties, settlements, and restitutions. In spite of this massive record, POGO found that pre-award determinations of contractor responsibility have “fallen by the wayside.”<sup>320</sup>

With the stroke of his pen on 31 July 2014, President Obama ordered the FAR Council to provide the guidance that has been missing. His executive order, entitled Fair Pay and Safe Workplaces, sets compliance with domestic labor laws as a basic standard of integrity and business ethics.<sup>321</sup> To appreciate the details of this executive order, it helps to first explain the legal context and political history of contractor integrity and ethics as a pre-requisite for doing business with the federal government.

**Gaps and Opportunities in Responsibility as a Standard**—Without the amendments required by the Obama executive order, the FAR standards to evaluate contractor integrity and ethics cover a limited list of procurement-related felonies:

- ❖ Prospective contractors must certify whether they have been convicted—in the prior three years—of fraud or a criminal offense in connection with a public contract, violation of antitrust statutes relating to the submission of offers, or embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property.<sup>322</sup>
- ❖ Principals of all contractors must disclose evidence of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations of Title 18 of the U.S. Code or the civil False Claims Act.<sup>323</sup>

- ❖ For contracts greater than \$5 million, the FAR requires contractors to prevent criminal conduct and disclose evidence of violations of federal criminal law involving fraud, conflict of interest, bribery, or gratuity, and the civil False Claims Act.<sup>324</sup>

In short, the FAR's current (2014) standards of integrity and ethics screen out a narrow range of recently convicted felons. There is no contract obligation to disclose these crimes unless the contract exceeds \$5 million. By citing the specific list of crimes, such as fraud and bribery, the FAR effectively turns a blind eye to a wide range of practices, including violation of labor standards and human rights, which often undermine fair competition. Criminal negligence that results in the death of workers does not even make the list.

In 2000, the last year of the Clinton Administration, the FAR Council recognized that the FAR's "simple reiteration of statutory language" provides no guidance: "This lack of guidance has an unfortunate consequence: contracting officers are extremely reluctant . . . to exercise their discretion in making this determination."<sup>325</sup> After over a year of rulemaking proposals and comments, the Council issued rules to provide guidance to agencies when they determine whether a contractor is responsible. Specifically, the Council decided that "[t]o be determined responsible, a prospective contractor must . . . (d) Have . . . satisfactory compliance with the law" including tax, labor and employment, environmental, antitrust, and consumer protection laws."<sup>326</sup>

This rule provided guidance that agencies could rely on "repeated, pervasive, or serious violations" as found in final enforcement rulings by federal courts and agencies and felony indictments by state or federal prosecutors.<sup>327</sup>

The rule took effect on the last day of the Clinton Administration (19 January 2001), but it was dead on arrival. The incoming Bush Administration took barely a month to suspend the rule amidst a storm of business protests and lawsuits.<sup>328</sup> The compliance standard prompted a feeding frenzy of business lobbying and set a record with 1,800 rulemaking comments in 2000 and 4,698 comments in 2001.<sup>329</sup> The business complaints, which found support within the Bush Administration, included the following:<sup>330</sup>

- ❖ Mandating satisfactory compliance provides no guidance to agencies because "satisfactory" is vague, and procurement agencies do not have the experience or expertise to judge compliance with multiple, broad categories of law.<sup>331</sup>
- ❖ "Satisfactory compliance" is not a clarification; it changes the definition of "responsibility." The rule said that contract officers must take account of compliance with the law, even when a failure of compliance is not directly related to a particular contract (i.e., the failure predates the contract).<sup>332</sup>
- ❖ The FAR Council exceeded its rulemaking authority because the compliance standard excludes contractors as a sanction for violating non-procurement laws, for which Congress has set a specific sanction in the regulatory statute. Thus, the regulatory statute should block any subsequent rule that attempts to set a different sanction.<sup>333</sup>
- ❖ A finding that a contractor is not responsible because of unsatisfactory compliance with laws would amount to de facto debarment from future contracts—a virtual death penalty for contractors—without the due process protections of the debarment process.<sup>334</sup>

An oft-repeated talking point was that the Clinton Administration failed to prove that such a major rule change was needed.<sup>335</sup> In fact, the Administration did make the case, citing over 100 instances of contractors who violated laws related to their procurement.<sup>336</sup> More persuasive evidence was generated twelve years later. In December 2013, the Senate Committee on Health, Education, Labor, and Pensions Committee (Tom Harkin, D-IA, Chair) found that

thirty of the top 100 violators of federal wage and safety laws were large federal contractors (more than \$500,000) for services such as cleaning, security, and construction.<sup>337</sup> Among companies that received \$81 billion in contracts in 2012, forty-nine of them had amassed 1,776 separate enforcement actions in a six-year period.<sup>338</sup>

The 2013 enforcement data explains a likely reason for the ferocity of business opposition in 2001. While the standard of satisfactory compliance was indeed vague, it appears in hindsight that scores of the largest federal contractors would have flunked the test—as defined by multiple violations based on final enforcement actions by federal courts or agencies. The vulnerability of compliance as a standard for being a responsible contractor is not its vagueness, which can be cured, but the likelihood that it would work to exclude a significant number of large federal contractors on grounds of safety and wage violations.

To summarize, the Clinton-era rule would have interpreted the statute—“a satisfactory record of integrity and business ethics”—to require satisfactory compliance with tax, labor and employment, environmental, antitrust, and consumer protection laws.<sup>339</sup> Less than “satisfactory” meant “repeated, pervasive, or serious violations” as found in final enforcement rulings by federal courts and agencies and felony indictments by state or federal prosecutors.<sup>340</sup>

President Obama’s executive order—Fair Pay and Safe Workplaces—is not a re-issue of the Clinton-era reform. Each element reflects a lesson from the previous rule:

- ❖ **Threshold**—The Obama executive order does not apply to contracts less than \$500,000 for goods and services; nor does it apply to commercially available off-the-shelf items.<sup>341</sup> By avoiding smaller contracts and commercial products, it avoids a disclosure burden on thousands of small business that mobilized against the Clinton-era rule.<sup>342</sup>
- ❖ **Scope of Compliance**—The Obama executive order requires compliance with labor laws,<sup>343</sup> which is considerably narrower than the Clinton-era rule, which also covered tax, antitrust, environment, and consumer laws.<sup>344</sup>
- ❖ **Specificity of Compliance**—The Obama executive order requires contracting officers to consider a prospective contractor’s record of compliance with thirteen specific federal laws and executive orders and equivalent state laws.<sup>345</sup> Among these are the National Labor Relations Act, the Occupational Safety and Health Act, the executive order on Equal Employment Opportunity, and the executive order on Minimum Wage for Contractors.<sup>346</sup> This is more specific than the Clinton-era rule that covered a generic class of “labor and employment” laws.<sup>347</sup>
- ❖ **Disclosure of Non-Compliance**—The Obama executive order requires a contractor (at the pre-award stage of determining responsibility) to disclose violations of listed labor laws within the prior three years.<sup>348</sup> The contractor must also disclose violations by subcontractors (greater than \$500,000) at the time of signing a contract.<sup>349</sup> Contractors must update this disclosure every six months.<sup>350</sup> The Clinton-era rule required contractors to certify the existence of labor-law violations, but not to disclose the specific violations by the contractor or covered subcontractors.<sup>351</sup>
- ❖ **Guidance on Mitigating Factors**—The Obama executive order requires the FAR Council to include mitigating factors in rulemaking: a single violation may not necessarily evidence a lack of responsibility; and agencies must consider remedial measures.<sup>352</sup> This is consistent with guidance in the Clinton-era rule.<sup>353</sup> In addition, the Obama executive order requires contract officers to notify suspension and debarment officers who are empowered to initiate a process with greater procedural protections for contractors.<sup>354</sup>



- ❖ ***Guidance on the Weight of Non-Compliance***—The Obama executive order requires the Secretary of Labor to develop guidance on the weight of violations using the standards of “serious” (e.g., number of employees affected, actual harm done, amount of damages, or fines), “willful” (e.g., acting with knowledge, reckless disregard, or plain indifference), “repeated” (more than one violation within the past three years), or “pervasive” (number of violations in relation to the size of the company).<sup>355</sup> This is consistent with the guidance in the Clinton-era rule, although the Obama executive order provides more specific definitions of the terms.<sup>356</sup>
- ❖ ***Rulemaking***—The Obama executive order calls upon the FAR Council to implement this policy through rulemaking.<sup>357</sup>

The Obama executive order fulfills a significant opportunity to use “a satisfactory record of business ethics and integrity” to protect human rights. But the specific list of U.S. laws limits the protection to procurement that is sourced in U.S. territory. The examples in Section II illustrate that widespread risk of human rights abuses is linked to federal procurement in supply chains that source outside of U.S. territory. Excluding commercially available products from the policy reinforces this effect; most of the electronic products (e.g. computers) and apparel (e.g. uniforms) are sourced from supply chains in developing countries where the risk of human rights abuses is moderate to high.<sup>358</sup>

As a consequence, the screening of “responsible” contractors remains a gap at the stage of evaluating potential contractors that source goods or services in other countries. The gap can be filled by linking compliance to domestic law, not just U.S. law, but the law of any source country.<sup>359</sup>

Apart from what it means to be responsible, two other elements of the FAR merit attention before turning to more novel alternatives. These include certification of knowledge by contractors and the database that Congress created to impart knowledge to contract officers.

***Gaps and Opportunities in Certification of Knowledge***—As noted above at Stage 2, federal agencies notify bidders when a product they are about to buy appears on a list compiled by the Department of Labor of products that may have been produced with forced or indentured child labor. If an end product is on the DOL list and the contract is over a threshold value, a bidder must either (a) certify that it will not supply the product from a country on the list, or (b) certify that it has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce or manufacture the product.<sup>360</sup>

Absent contrary knowledge, the FAR requires a purchasing agency to rely on this certification.<sup>361</sup> An agency may impose remedies later if it discovers the certification to be false. However, this is highly unlikely given the opaque nature of supply chains and the absence of contractor compliance data.<sup>362</sup> As a stand-alone provision, this certification has little value for evaluating bidders.

Rather than asking contractors to certify their ignorance of violations, it would be more meaningful to require them to certify that they know with whom they subcontract, they know the specific locations of production or supply, and that they have management systems to ensure compliance. Certification of knowledge—rather than “no knowledge”—would also set up a requirement at Stage 4 (award) for the winning contractor to confirm its certification by disclosing the full supply chain and addresses of factories or sites of production.

***Opportunity to Expand the Database of Contractor Performance***—Presuming that an agency has adequate guidance to determine contractor responsibility, it still needs evidence to find that a contractor is not responsible. The

database that contract officers must consult for that evidence is called the Federal Awardee Performance and Integrity Information System (FAPIS).<sup>363</sup>

From the beginning, Congress authorized FAPIS to include information on contractors with an award exceeding \$500,000 that pertains directly to federal contracts. That information includes prior findings of non-responsibility, suspension and debarment, and final court or agency convictions, dispositions, or findings of fault or liability in connection with a federal contract.<sup>364</sup> Congress also included two FAPIS provisions of importance to protecting human rights:

1. A lower threshold of evidence—a substantiated allegation in an administrative proceeding—for prohibited activities of trafficking in persons;<sup>365</sup> and
2. Delegation of authority to the FAR Council to include “other information” for purposes of determining whether a contractor is responsible.<sup>366</sup>

In its present configuration,<sup>367</sup> the FAPIS database has been roundly criticized as being so limited (by size of contract and direct connection to performance of a specific contract) that it does not support exercise of agency discretion to exclude a contractor who violates labor laws or human rights.<sup>368</sup> The Obama executive order directs the Office of Management and Budget to include contractor disclosures of labor law violations in the FAPIS database.<sup>369</sup> But as noted above, this data would not include violations related to commercially available products or goods and services sourced outside of U.S. jurisdiction.

The exception to the shortcomings of FAPIS is evidence of human trafficking, where the FAR Council has used its authority to include additional information in FAPIS. Specifically, the Council has proposed that FAPIS include “any allegation substantiated by [an agency’s] Inspector General” with respect to a human right (in this case, the prohibition of trafficking) that is protected by contract clauses required by the FAR.<sup>370</sup> A parallel approach would be to expand FAPIS to include agency or court findings that a contractor has violated another country’s domestic law that implements a human right.<sup>371</sup> The FAR Council appears to be open to the idea of expanding the evidence of compliance (or lack thereof) in FAPIS.<sup>372</sup>

**Opportunity to Evaluate Capacity**—To the FAR Council of the Clinton-era, it seemed like an “eminently reasonable proposition” that for a “responsible contractor” to establish a “satisfactory record of integrity and business ethics . . . the contractor is, essentially, law-abiding.”<sup>373</sup> The Obama executive order reinstates the standard of law-abiding as a standard of business ethics, although with a narrower scope of laws and contractors. Only compliance with U.S. law is evaluated, so the standard does not reach the global supply chains that source a great deal of federal procurement in high-risk sectors like apparel and electronics. Fortunately, there remains another approach that avoids determining that a contractor is not responsible, a decision that has significant business and reputational costs.

Agencies that negotiate service contracts, including distribution services for goods, have discretion to identify “best value” factors other than price.<sup>374</sup> If they do, they must state in the solicitation whether a factor is significantly more important, approximately the same, or significantly less important than cost or price.<sup>375</sup> Therefore, as long as the weight of tradeoffs is consistent with the solicitation, agencies could evaluate labor and human rights factors as part of a “tradeoff process” to decide whether perceived benefits of a higher-priced proposal merit the additional cost.<sup>376</sup>

The factor for evaluation would be a contractor’s capacity to manage a supply chain for purposes of compliance with human rights. A lack of capacity was recently demonstrated by suppliers to U.S. military exchanges. The

suppliers were surprised to learn that their goods were sourced in factories where fires killed hundreds of workers in Bangladesh.<sup>377</sup> A subsequent investigation found that even when the military exchanges adopted codes of conduct for contractors, they did not evaluate contractors' track records of noncompliance or contractor capacity to provide a remedy to workers and their families.<sup>378</sup> The lessons are that (1) capacity to manage a supply chain requires a contractor to know who its subcontractors are, and (2) that capacity should be a criterion to compete for a contract.

Working with U.S. state and local governments, the Sweatfree Purchasing Consortium has developed a number of criteria that agencies can use to evaluate a prospective contractor's capacity to comply with a code of conduct or other human rights standards (including a specific compliance plan). These include a contractor's capacity to:<sup>379</sup>

- ❖ Disclose the supply chain (including subcontractors and factory addresses),
- ❖ Identify risks of harm to workers or communities in the countries or regions of supply;
- ❖ Identify applicable domestic laws and international standards that protect against those risks;
- ❖ Implement a plan to correct past violations and prevent future violations; and
- ❖ Provide appropriate remedies if a contractor's supply chain harms workers or communities.

The City of Madison, Wisconsin, is working with the Consortium to implement this approach through a "piggyback" contract that can be joined by multiple state or local agencies. This approach could be replicated by federal agencies as well in order to achieve a sufficient scale for their contractors to sustain a factory of production. The Consortium will retain an independent auditor and create an expert review panel to evaluate prospective contractors and provide post-award oversight; a contract surcharge would fund independent monitoring of suppliers and factories where there is a high risk of violations.<sup>380</sup>

This approach of evaluating capacity to manage supply chains could be implemented with greater or lesser intensity. For example:

- ❖ ***Incremental Approach***—A purchasing agency could allocate points—say 5 out of 100—based on the quality of a competitor's compliance plan for protecting the human rights that are at risk, e.g., life-threatening conditions of work. The scoring would exclude a competitor with a weak or non-existent compliance plan. However, if price competition is relatively close, this the scoring would promote competition based on safety and accountability.
- ❖ ***Robust Approach***—A purchasing agency could allocate a greater number of points for capacity to protect human rights, to the extent that a winning bidder would have to establish a "clean" supply chain with a high degree of ownership or control and remedies in place for any breakdown in compliance. This capacity could be evaluated using compliance plans of the type now requested to control trafficking. An even stronger approach would be to enable bidders to qualify for pre-award clearance for capacity to protect the human rights involved. A similar approach is already used to prove capacity to prohibit discrimination (discussed at Stage 4 below). In essence, contractors could be invited to designate their factories, similar to the WRC's process for designated suppliers.

Both approaches would require a purchasing agency to have authority to require compliance with the human right that is at risk, or with domestic legislation that implements the human right. This scope of protection is discussed at Stage 1.

OPIC provides a federal model for evaluating a company's capacity to manage its supply chain. OPIC requires an applicant for investment financing or insurance to have in place an Environmental and Social Management System (ESMS) that includes capacity to identify risk of human rights abuses, management systems and agreements, monitoring systems, and accountability to affected people (i.e., workers and communities).<sup>381</sup> The level of detail and complexity of an ESMS depends on the degree of risk of human rights abuses in a sector or country.<sup>382</sup> For projects with a high risk of human rights abuses, OPIC requires applicants to prepare an Environmental and Social Impact Assessment and posts the assessment on OPIC's web page for public comments.<sup>383</sup>

#### *Policy Menu at Stage 3 – Evaluate Potential Contractors*

- ❖ ***Responsibility***—Evaluate responsibility based on compliance with a source country's domestic law that implements human rights, including labor rights.
- ❖ ***Expand the Database***—Expand FAPIIS to include final adjudications that a contractor has violated domestic law that implements human rights, including labor rights.
- ❖ ***Certification***—Require all contractors to certify that they know their suppliers, know specific locations of supply, and have management systems to ensure compliance.
- ❖ ***Evaluate Capacity***—Evaluate potential contractors' capacity to manage their supply chains for compliance with the human rights including domestic law that implements human rights. Offer an opportunity to maximize their score through pre-award clearance of a supply chain.

#### **Stage 4—Award Contract and Set Terms**

At Stage 4, agencies decide which competitor should win the contract based on price and other permissible criteria.

***Existing Compliance Obligations***—Protecting human rights through compliance obligations is not a novel idea, and there are several models already in the FAR that could be expanded:

- ❖ ***Prohibition of Discrimination***—The FAR requires most contractors and subcontractors in U.S. territory to develop a written affirmative action plan for each of its establishments.<sup>384</sup> This applies to contracts to supply goods ("government bills of lading") as well as services.<sup>385</sup> This policy is analogous to the UNGP's principle of due diligence because it focuses on an historic risk of harm. In addition to the written plan, two aspects of this policy stand out as worthy of replication.
  - First, for large contracts, the agency must request pre-award clearance to assure that the contractor has the capacity in place to avoid discrimination.<sup>386</sup> A contractor can meet this test on a standing basis by qualifying for a National Preaward Registry.<sup>387</sup> This approach of pre-award clearance could be expanded for contractors that work in high-risk regions or sectors and when there is evidence of human rights abuses in the supply chain for commercial goods.<sup>388</sup>
  - Second, the FAR provides for complaints and investigations, as well as inquiries from third parties about compliance status. All aspects of a complaint are strictly confidential.<sup>389</sup>
- ❖ ***Prohibition of Human Trafficking***—As noted at Stage 1, the FAR prohibits contractors from engaging in human trafficking. This prohibition is a material clause in procurement contracts.<sup>390</sup> The clause applies to

contracts for goods as well as services,<sup>391</sup> and it applies to work performed outside of U.S. territory.<sup>392</sup> Several elements of this compliance clause parallel the UNGPs human rights due diligence principles:

- Contractors must notify the agency of trafficking allegations and action taken in response;<sup>393</sup>
- The agency has a range of contract remedies that are designed to prevent or abate harm rather than to punish the contractor (e.g., remove an employee or suspend contract payments);<sup>394</sup> and
- Contractors can mitigate their risk of liability by engaging in due diligence, for example, by having an employee awareness program in place.<sup>395</sup>

In 2013, the FAR Council proposed amendments to strengthen the prohibition on trafficking. The amendments included greater specificity in prohibited practices (e.g., destroying immigration documents) and a contract obligation to investigate evidence of trafficking. For contracts that exceed \$500,000 for work outside U.S. territory, the proposed rule requires contractors to provide and publicly post a compliance plan upon request by the contract officer. While compliance plans would be required for both supplies and services, they would not apply to contracts for commercially available off-the-shelf items (COTS).<sup>396</sup> The exclusion of COTS is a significant gap in the proposed amendment. It denies contract officers the authority to request a compliance plan even when the commercial product is on the Department of Labor's list of prohibited products (forced or indentured child labor, EO 13126) and even when the contract officer has evidence that a principal good being purchased (e.g., seafood) was produced with forced labor or trafficking.<sup>397</sup>

In addition, the proposal requires contract officers to enter substantiated allegations of trafficking into FAPIIS, the database for accountability by federal contractors.<sup>398</sup>

- ❖ ***Dangerous Construction Work***—For certain construction or demolition projects, the FAR authorizes purchasing agencies to insert an accident prevention clause in a solicitation and contract.<sup>399</sup> The clause requires precautionary measures to “safeguard the public and Government personnel, . . . avoid interruptions . . . , control costs” and comply with workplace safety standards issued by the U.S. Department of Labor. The clause is limited to work within U.S. territory.<sup>400</sup>
- ❖ ***Contractors in Dangerous Areas***—When a contractor supports military operations or a diplomatic mission in a dangerous area, the DFARS requires the contractor to ensure that their employees “are familiar with and comply with, all applicable (1) United States, host country, and *third country national laws*; (2) Treaties and international agreements; (3) United States regulations . . . ; and (4) Force protection . . . directives.”<sup>401</sup>

***Gaps and Opportunities to Strengthen Compliance Obligations***—This selective review of contract clauses shows that the FAR is moving in the direction of requiring due diligence by its contractors—to identify the greatest risks, develop the capacity to prevent human rights harms, and provide remedies. At present, though, the FAR is a patchwork with major gaps. At Stage 1, this report maps the gaps in terms of the FAR's limited coverage of human rights. At Stage 4, this report observes the additional gaps in terms of compliance obligations:

- ❖ Some compliance obligations stop at the territorial boundary, e.g., compliance with regulations to prevent workplace hazards, but only within U.S. territory.
- ❖ Some compliance obligations apply to service contracts, but not supply of manufactured goods, particularly those that are commercially available off-the-shelf and those that use components that are made with minerals or fibers that are sourced deep in an obscure supply chain.

- ❖ Even at the fabrication and finishing stages of production, contractors who supply goods have denied that they have knowledge of violations. They lack capacity to manage their own supply chain.

At this stage, the FAR could authorize agencies to insert contract clauses that require supply chain transparency (disclosure of all subcontractors and specific factory locations) as well as compliance with domestic laws in the United States, a host country, or a source country. The FAR could also authorize agencies to incorporate contractors' assurances or compliance plans as contract obligations. In other words, the FAR could require that contractors comply with the law of the jurisdiction where they produce goods or provide services as a material term of the contract. Models for this approach include the Overseas Private Investment Corporation,<sup>402</sup> the Sweatfree Purchasing Consortium (Model Sweatfree Policy),<sup>403</sup> the California Procurement Code,<sup>404</sup> and the DFARS contract clauses for compliance with host-country laws.<sup>405</sup>

#### *Policy Menu at Stage 4 – Award Contract and Set Terms*

- ❖ Confirm Management Capacity with Disclosure—Require contractors to disclose their supply chain including specific subcontractors and addresses of factories or sites of supply.
- ❖ Pre-Award Clearance—Enable contractors to be screened for high-risk services or regions of sourcing.
- ❖ Expand Compliance Obligations Based on Risk—When a federal agency identifies a risk of human rights harm, authorize contract officers to insert a contract obligation to comply with domestic laws that implement the human right in the country of production or supply.

### **Stage 5—Monitor and Enforce**

There are two gaps at Stage 5 when agencies enforce procurement contracts. First, if a contractor violates protections for human rights, the available remedies are severe; they would likely cost workers their jobs. Agencies need more moderate contract remedies to minimize the unintended economic impacts of severing contracts. Second, enforcement capacity is weak. In fact, enforcement capacity at some agencies is so weak that they have awarded contracts after another agency excluded the contractor on grounds of fraud, tax evasion, and national security violations. Both gaps are explained in more detail below.

**Overview of Current Remedies**—The FAR provides several robust remedies for violation of existing human rights standards—including the prohibitions on discrimination, forced child labor, and human trafficking. These include debarment, suspension, and termination of a contract or subcontract. However, the scant record of invoking these remedies suggests that they are not feasible. They are perhaps too robust—the equivalent of imposing the death penalty for cheating on a test. Before explaining these gaps further, this Section first reviews the current remedies.

The strongest remedies confront a contractor with the prospect of losing business—ending a specific contract or being debarred from all government contracts for a period of years. Starting with the strongest, they include:

- ❖ **Suspension and Debarment**—If suspended, debarred or proposed for debarment, a contractor may not seek federal contracts or subcontracts, and agencies must not evaluate or award contracts to the contractor.<sup>406</sup> Debarment is for a period of years that is commensurate with an offense; suspension can be an interim status pending debarment.<sup>407</sup> The grounds for suspension or debarment that relate to human rights include, among others, judgment for fraud or a criminal offense regarding a public contract; serious violation of a government contract; and commission of an unfair trade practice.<sup>408</sup>

The FAR requires extensive procedures before an agency may suspend or debar a contractor.<sup>409</sup> Before taking action to debar a contractor, an agency should consider a number of factors that include whether a contractor:<sup>410</sup>

- Practiced due diligence;
- Has effective standards of conduct and internal control systems in place at the time of improper activity;
- Notifies the government of improper activity;
- Fully investigates improper activity;
- Cooperates with a government investigation;
- Agrees to pay for restitution and civil, criminal or administrative liability;
- Takes appropriate disciplinary action against individuals for improper activity; or
- Agrees to take action to remedy or prevent improper activity.

The burden of proof is relaxed for suspension, which makes it a more flexible remedy than debarment. Suspension requires “adequate evidence” or indictment for an offense for which a contractor can be debarred, or, for any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.<sup>411</sup> By giving notice of adequate evidence, an agency could, at the very least, trigger due diligence on the part of a contractor.

- ❖ **Termination**—The FAR’s extensive provisions for full or partial termination are specific to types of contracts.<sup>412</sup> The FAR requires contract clauses that enable the government to terminate for the government’s convenience or a contractor’s failure to perform its contractual obligations.<sup>413</sup> An agency could terminate a contract for violation of human rights compliance, certifications, or due diligence—but only if the standards are explicit obligations in the contract.<sup>414</sup> Assuming they have adequate evidence and staff capacity, agencies could use the threat of termination to persuade contractors to prevent or remedy human rights violations in their supply chain. For example, they could negotiate alternatives to terminating a contract such as requiring a prime contractor to subcontract part of the work or replace a subcontractor.<sup>415</sup>
- ❖ **Stopping Work**—The FAR provides contract clauses that authorize an agency to temporarily suspend, stop or delay any or all work of a contractor “for the convenience of the Government.”<sup>416</sup> Stopping work or delivery of products enables the government, depending on the circumstances, to abate human rights harm, facilitate an investigation, or persuade a contractor to prevent or remedy human rights violations.

**Inherent Limits of the Strongest Remedies**—While the strongest remedies are robust, they are also burdensome for the government in three ways. First, suspension, debarment, or termination for cause requires due process with formal notice and opportunities for a contractor to rebut the government’s evidence.<sup>417</sup> The evidentiary burden requires considerable investigation and agency resources. Second, these remedies interrupt the government’s flow of goods, services, and downstream work. The FAR authorizes agencies to favor the public interests (read agency interests) that weigh against debarment, even when there is cause to debar.<sup>418</sup> Third, debarment and termination

require the government to re-start the procurement process, which adds to the workload of the purchasing agency. Cumulatively, these burdens create inertia against using the remedies. Moreover, in some circumstances, the remedies may be disproportionately strong to the contractor's culpability in a violation of human rights. As a remedy for common contract violations, the remedies of suspension and debarment have been described by a leading commentator as "paper tigers—pretty to look at but not to fear."<sup>419</sup>

Another key observation is that the FAR already provides that due diligence (e.g., having adequate management systems in place) is a defense in a proceeding for suspension or debarment.<sup>420</sup> The FAR could also make explicitly clear that which is implicit: due diligence is not only a defense, it is an effective remedy. If there is evidence that a contractor is failing to comply with human rights obligations in a contract, the agency should have the power to order a contract-specific approach to due diligence.

It bears stressing that stopping work and terminating a contract are *contract* remedies for the government but could have unintended economic consequences on the workers and communities that form part of the supply chain. Seeing a sanction applied to a scofflaw employer provides no solace to a worker who loses her job. Survivors of forced labor, trafficking, and other human rights violations need remedies to make their human rights effective—e.g., restitution of lost wages, housing, reemployment assistance, and medical or psychological services.<sup>421</sup> As noted below, the FAR could provide for remedies through a combination of mid-range financial remedies (like liquidated damages) and contract clauses that require contractors to compensate workers or communities who are harmed by their supply chains.

***Opportunities to Expand Mid-Range Remedies***—The FAR provides a variety of mid-range remedies that do not interrupt the government's work or require an abundance of due process. The problem is that the FAR does not provide them for all contract obligations. Before explaining the gaps, this Section first reviews these remedies that the FAR provides for conventional enforcement of contractor obligations to provide services, and pay employees who are doing the work.

- ❖ ***Suspension, Reduction, or Withholding of Payments***—As a remedy for violating "material requirements of a contract" due to "fault or negligence," the FAR authorizes an agency to suspend or reduce progress payments (installments) to a contractor.<sup>422</sup> An agency must suspend payments if a contractor refuses to comply with contract clauses pertaining to wages,<sup>423</sup> and it must withhold payments if it believes a contractor has failed to pay wages required by federal law.<sup>424</sup> Authority to reduce or withhold payments appears to provide a mid-range remedy that might be more administratively feasible for the government than termination, suspension and debarment. However, it is not clear whether violation of human rights standards is a material requirement of a contract—either generally or in the context of certain sectors. Even if human rights standards are material, there remain significant evidentiary burdens of proving fault or negligence.
- ❖ ***Reduction of an Award Fee***—The purpose of an award fee is to "provide motivation for excellence in contract performance."<sup>425</sup> In effect, the reward fee is part of the contractor's profit, which agencies can reduce if a contractor's work is "below satisfactory."<sup>426</sup>
- ❖ ***Liquidated Damages***—The FAR authorizes liquidated damages as a remedy for contract violations; the damages are compensatory rather than punitive.<sup>427</sup> An agency is presently authorized to reduce damages if it finds that a contractor exercised "due care."<sup>428</sup> The FAR requires liquidated damages if a contractor fails to pay overtime to mechanics or laborers; the damages are \$10 per worker per day of violation.<sup>429</sup> However, damages are only available for service contracts of more than \$150,000 for work performed in the United



States or its territories.<sup>430</sup> While not presently applicable to violation of human rights standards, this model is a logical one for expanding remedies for violation of human rights. Liquidated damages could be used to:

- *Compensate the government* for the cost of investigating and resolving a violation (perhaps through a third-party investigator), which might increase the likelihood that the government would investigate.
  - *Compensate workers* for stolen wages, medical expenses, transitional housing, reemployment assistance, and other needs after the person is harmed by a contractor's supply chain.<sup>431</sup> Adopted in 2014, the ILO's Protocol requires parties to the Forced Labor Convention (1930) to provide "effective remedies, such as compensation, to victims, and to sanction the perpetrators of forced or compulsory labour."<sup>432</sup>
  - *Compensate families* of workers or others for whom a death benefit is an appropriate remedy.
- ❖ **Other Remedies**—In addition to the general remedies noted above, the FAR also provides remedies that appear to be specific to certain standards for respecting human rights. They include the following:
- *Remove an employee*—As a remedy for violating the prohibitions on human trafficking, the FAR authorizes an agency to require removal of an employee of a contractor or subcontractor.<sup>433</sup>
  - *Publish a contractor's name*—As a remedy for discrimination, the FAR authorizes an agency to publish a contractor's name.<sup>434</sup> Presumably, the threat of such adverse publicity is both a deterrent and an incentive to remedy discrimination.

The remedies discussed above are generally available for violation of contract performance obligations. However, some but not all of these general remedies are included in the remedy provisions for violation of human rights standards. The remedies also vary from one human right standard to the next. For example, suspension and debarment is available for all human rights standards. But termination and stopping work are stated as remedies only for human trafficking. The mid-range remedy of reducing payments is stated as a remedy for human trafficking, but not for forced child labor or discrimination. Figure 4 shows this pattern of variable remedies.

This pattern creates ambiguity as to whether general remedies that apply to contract obligations apply to the human rights obligations. If a general remedy is not recited for a particular human right, it supports an inference that the omission is intentional. Yet, there is no apparent reason for why remedies that are available for human trafficking, for example, should not also be available for forced child labor. The FAR could make it explicitly clear that the conventional mid-range remedies apply to all contract obligations, including compliance with human rights and domestic laws that implement those rights.

FIGURE 4: FAR REMEDIES

REMEDY	GENERAL REMEDY <sup>435</sup>	FORCED CHILD LABOR <sup>436</sup>	HUMAN TRAFFICKING <sup>437</sup>	DISCRIMINATION <sup>438</sup>
Suspend/debar contractor	x	x	x	x
Terminate contract	x	x		x
Terminate a subcontract	x		x	x
Stop work	x			
Suspend/reduce payments	x		x	
Liquidated damages	x			
Reduce an award fee	x		x	
Remove an employee			x	
Publish contractor's name				x
Disclose compliance record				

**Gaps and Opportunities in Agency Capacity for Monitoring and Enforcement**—The options to strengthen human rights in procurement will be for naught if federal agencies do not have the capacity to enforce their contracts. During the 1990s, Congress reduced the staff capacity at agency procurement offices by well over 50 %.<sup>439</sup> The enforcement capacity at some agencies is now so weak that on many occasions, agencies have awarded contracts after another agency excluded the contractor from future procurement on statutory grounds of fraud, tax evasion, and national security violations.<sup>440</sup> On the other hand, several agencies stand heads above the others because they have developed their internal capacity for enforcement.<sup>441</sup> A survey by the Government Accountability Office identifies three factors at agencies that do the best job at enforcement:<sup>442</sup>

- ❖ **Dedicated Staff**—Agencies dedicated a team to develop expertise and competence on enforcement.
- ❖ **Detailed Policies**—Agencies developed agency-specific guidance that goes well beyond the FAR standards—including investigating evidence of violations, coordinating with other organizations, and evaluating contractor misconduct.
- ❖ **Referral**—Agencies referred cases for debarment based on investigations and legal proceedings for violation of domestic law outside of procurement.<sup>443</sup>

The GAO found that the most active agencies “promote a culture of acquisition integrity,”<sup>444</sup> and their best practices enhance the compliance value of debarment. Since the GAO report, federal agencies have made progress in implementing the best practices,<sup>445</sup> which are particularly well suited to policing violators of human rights within global supply chains. Yet to be realistic, it will be difficult to persuade an agency that has generally weak

enforcement to step up its capacity solely in response to human rights abuses. The most logical next step is for agencies that already have a commitment to human rights to apply the best practices of enforcement to that end. The most efficient approach may be for two or more agencies to develop and share resources for enforcement of shared human rights standards.

***Gaps and Opportunities in Auditing and Investigation***—As noted above at Stage 1, a series of publicly reported abuses by private security contractors prompted a congressional directive to strengthen contractor accountability and the procurement process. As part of the USG's implementation of a code of conduct for the security sector, the ICoC, the Department of Defense supported development of industry-based standards, which provide guidance for implementing the ICoC.<sup>446</sup>

In other sectors like apparel and mining, this general approach of developing industry-based standards and “social audits” has developed and matured into a “Corporate Social Responsibility (CSR)” industry unto itself. CSR has imbedded operational standards in many global supply chains, but the audits have been stiffly criticized as a strategy for corporate self-regulation.<sup>447</sup>

Examples abound where social audits have approved factories where workers perished within months. For example, 1,800 workers were killed by fires and building collapses in Bangladesh between 2006 and 2013. Every one of those deaths occurred in factories supplying brands that use social audits to assure compliance with safety standards.<sup>448</sup> In some of the fatal factories, the auditors did not report visible hazards; in others, the suppliers did not act on the auditor's report of hazardous conditions.<sup>449</sup> Some of the same factories supplied U.S. military exchanges. But the exchanges, to date, have asked the factories only for a self-attestation or certification based on a private social audit.<sup>450</sup>

One lesson from the military exchanges is that social auditing has replicated the shortcomings of self-certification discussed at Stage 2 above. Audits produce a marketing assurance—which may or may not be factual—but often, nothing happens. One example is the Ali Enterprises fire that killed 300 workers in Pakistan. Social Accountability International (SAI), a leading CSR system, had certified the factory as safe, but neither the audit contractor nor its own subcontractors in Pakistan had been to the factory.<sup>451</sup>

In other settings (Cambodia, Jordan, Indonesia, Haiti, Viet Nam, Nicaragua, Lesotho, and Bangladesh) the U.S. government has actively supported the Better Work Programme of the ILO and World Bank, which entails tripartite engagement by management, government and unions.<sup>452</sup> Better Work develops explicit compliance assessment tools and builds capacity among all participants.<sup>453</sup> However, the program has been criticized for lack of progress over a decade, in part due to its lack of transparency and the absence of any link to economic incentives such as trade preferences or quotas.<sup>454</sup>

A more promising model is the Accord on Fire and Building Safety in Bangladesh. Composed of 180 retailers and brands from twenty countries, the Accord inspects apparel factories with participation by workers, unions, and NGOs.<sup>455</sup> The analogy between the Accord and the position of the U.S. government as a mega-purchaser is strong. In addition to its strategy of harnessing purchasing power, the Accord features a number of policies that are transferable to reform of U.S. procurement standards. They include:<sup>456</sup>

- ❖ ***Disclosure of Factories and Locations***—The Accord requires disclosure of all factories that supply participating brands and retailers.<sup>457</sup>
- ❖ ***Independent Factory Inspections***—The Accord requires inspection of all participating factories.<sup>458</sup> By June 2014, the Accord had inspected 1,000 out of 1,700 factories, eight of which have closed for repairs with

cooperation by factory owners.<sup>459</sup> The inspectors are accountable only to the Accord's steering committee, not to individual brands.<sup>460</sup> The Accord's safety standards are based largely on the Bangladesh National Building Code.<sup>461</sup>

- ❖ **Transparent Inspection Reports**—The Accord shares inspection reports with management and workers, and later, posts reports on the Internet.<sup>462</sup>
- ❖ **Financial Feasibility**—The Accord requires brands and retailers to negotiate commercial terms, or provide financing in other ways, that enables factory owners to repair and maintain safe workplaces.<sup>463</sup> In addition, the Accord requires brands and retailers to establish long-term contracts (at least two years) to help make factory repairs financially feasible.<sup>464</sup> The Accord's parties contribute to the cost of inspections based on a sliding scale that reflects volume of production.<sup>465</sup>
- ❖ **Supply-Chain Accountability**—The Accord requires brands and retailers to establish subcontract obligations to ensure that their supply chain meets safety standards and participates in inspections, training, and remediation. A brand or retailer is obligated to terminate a factory that refuses to repair unsafe conditions (considering that financing is available).<sup>466</sup>
- ❖ **Enforcement Capacity**—The Accord and its inspection reports are legally enforceable by its parties, which include worker representatives, not just other brands and retailers. The steering committee resolves disputes, and parties may appeal to binding arbitration.<sup>467</sup>

After the Accord was established, about twenty-six U.S. and Canadian companies decided not to participate because of “liabilities” inherent in the Accord's charter.<sup>468</sup> Instead, they formed their own organization, the Alliance for Bangladesh Worker Safety.<sup>469</sup> By June 2014, the Alliance or its participating companies had inspected over 600 factories, six of which have closed for repairs.<sup>470</sup>

While the Alliance has received some favorable reviews from business academics,<sup>471</sup> it has been criticized by the Worker Rights Consortium and others for avoiding full commitments to the policies listed above: “the Alliance's operational policy perfectly tracks its foundational documents: none of [the Accord's] requirements are being imposed on any Alliance company.”<sup>472</sup> For example, some of its inspections are independent, but not all are.<sup>473</sup> Some of its reports are publicly disclosed, but most are not.<sup>474</sup> Some of its companies voluntarily contribute financing, but not all do,<sup>475</sup> and the Alliance does not obligate its members to engage in multi-year contracts.<sup>476</sup> It identifies “unauthorized subcontracting” as a problem for supply chain accountability, but does not obligate members to do more than review their policies.<sup>477</sup> In addition, the Alliance's enforcement mechanism is to exclude a company that does not want to abide by safety standards, so non-compliance is its own reward.<sup>478</sup>

As an advisor to the Alliance remarked, completing inspections is “the easy part”; fixing the factories will require investments.<sup>479</sup> Factory owners are looking up the supply chain for support, and this is where the Alliance and the Accord differ the most.

Clearly, there is a strategic rift between the 180 companies of the Accord that are willing to commit to shared obligations for worker safety and the twenty-six companies of the Alliance that want to avoid enforceable “liabilities.” But these differences do not mute the impact that the Accord has already had as an experiment with purchasing power, from which the U.S. government can learn a great deal.

The U.S. government provided a strong incentive for the government of Bangladesh when it suspended U.S. trade preferences in response to the problems with safety and worker rights,<sup>480</sup> and it set a detailed action plan for

reinstatement.<sup>481</sup> However, a year later, Bangladesh had yet to meet the terms for reinstating the preferences.<sup>482</sup> The internal politics of Bangladesh are complex, including a backlash that is growing within the apparel industry, even to the point of government leaders accusing unions of undermining the Bangladesh economy. An industry leader demanded that the government should punish union leaders because their complaints about torture and harassment were subversive to the state.<sup>483</sup>

The Overseas Private Investment Corporation (OPIC) provides another federal model for monitoring and accountability. OPIC requires its contractors to report annually—both to OPIC and affected people (i.e., workers and communities) —on its risk management and remediation plans.<sup>484</sup> For projects with a high risk of labor abuses, the annual report must include: (1) compliance with labor-related conditions and covenants in OPIC agreements, (2) a summary of labor-related compliance issues identified by the local regulatory authorities, (3) worker complaints, and (4) responses to those complaints and efforts to improve the worker-management relationship.<sup>485</sup> OPIC also requires its contractors to verify self-reporting through third-party audits of projects with a high risk of human rights abuses.<sup>486</sup> OPIC reserves the right to conduct site visits and interview affected people.<sup>487</sup>

#### *Policy Menu at Stage 5 – Monitoring and Enforcement*

- ❖ Due Diligence—Provide for due diligence as both a defense and as a remedy for breach of compliance standards.
- ❖ Remedies—Use existing conventional remedies if a contractor violates contract obligations to comply with human rights standards in the FAR or domestic law.
- ❖ Monitoring—Provide transparent monitoring of compliance and investigation of worker complaints, preferably by independent organizations that are accountable to the U.S. government, UN, ILO, or worker unions.
- ❖ Enforcement Capacity—Dedicate staff for enforcement, provide them with detailed policies, and actively refer cases among agencies based on domestic law violations by contractors.

### C. SUMMARY

In recent decades, the FAR has been changing to protect workers and communities from some of the most egregious human rights violations like human trafficking. Yet the FAR's progress is a patchwork with glaring gaps in coverage and capacity at each stage of procurement. Many of the ideas for filling those gaps come from within the FAR itself. The best practices in one corner of the FAR serve as models for broader reform.

Figure 5 summarizes the menu of policy options that would strengthen human rights at each stage of procurement. The options can work alone or in combination with each other. Some of the options arise from standard setting in sectors of private industry, and many options have been tested in state and local procurement.

FIGURE 5: POLICY MENU—RESPECTING HUMAN RIGHTS IN FEDERAL PROCUREMENT

STAGE & GAP	POLICY OPTIONS
<b>1. Plan for Procurement Needs and Risks</b>	
Essential human rights are not protected, and major supply chains compete by avoiding costs of compliance with domestic laws that implement human rights.	<p>a. <u>Expand the Scope of Protection</u></p> <ul style="list-style-type: none"> <li>• <i>Individual Right</i>—Expand protection from specific harms.</li> <li>• <i>Cluster of Rights</i>—Expand protection for a cluster of human rights.</li> <li>• <i>Sector Standards</i>—Expand sector strategies based on due diligence, codes of conduct, compliance with domestic law, and compliance tools developed by the ILO, UN, or multi-stakeholder groups.</li> </ul> <p>b. <u>Clarify Human Rights</u>—Harmonize definitions of forced labor with the ILO definition. Resolve vagueness in the definition of discrimination.</p>
<b>2. Solicit Bids, Provide Notice</b>	
Notice of human rights abuses could prompt contractors to police their supply chains. However, notice is now limited to evidence of forced child labor, and contractors are prompted to merely certify their ignorance of forced child labor.	<p>a. <u>Notice of Risk</u>—Expand notice of risk that rights are violated in a sector or supply chain.</p> <p>b. <u>Notice of Standards</u>—Notify potential contractors of evaluation criteria, duties to certify knowledge they must later verify, and other compliance obligations.</p>
<b>3. Evaluate Potential Contractors</b>	
Lacking guidance in the FAR or data on past conduct, contract officers do screen contractors based on human rights standards or even extensive violations of federal law. In most cases, the FAR requires agencies to rely on contractor self-certification rather than demonstrated capacity to prevent or remedy human rights abuses in their own supply chains.	<p>a. <u>Responsibility</u> - Evaluate responsibility based on compliance with a source country's domestic law that protects safety and health of workers and communities.</p> <p>b. <u>Expand the Database</u>—Expand FAPIIS to include final adjudications if a contractor violates domestic law that implements a human right.</p> <p>c. <u>Certification</u>—Require contractors to certify that they know their subcontractors, including specific locations of production or supply, and have management systems to ensure compliance.</p> <p>d. <u>Evaluate Capacity</u>—Evaluate potential contractors' capacity to manage their supply chains for compliance with the human rights including domestic law that implements human rights. Offer an opportunity to maximize their score through pre-award clearance of a supply chain.</p>

4. Award Contract, Set Contract Terms	
<p>The FAR does not now require contractors to disclose information that would validate their earlier certifications. As noted at Stage 1, the scope of clauses to protect human rights falls short of U.S. obligations.</p>	<ul style="list-style-type: none"> <li>a. <u>Confirm Management Capacity with Disclosure</u>—Require contractors to disclose their supply chain including specific subcontractors and addresses of factories or sites of supply.</li> <li>b. <u>Pre-Award Clearance</u>—Enable contractors to be screened for high-risk services or high-risk regions of sourcing.</li> <li>c. <u>Expand Compliance Obligations Based on Risk</u>—When a federal agency identifies risk of harm or human rights abuses, authorize contract officers to insert a contract obligation to comply with domestic law that implements the human right in the country of production or supply.</li> </ul>
5. Enforce Contract	
<p>Some agencies have much better enforcement results than others—the result of developing a team with in-house expertise. The ultimate penalty of debarment is expensive in terms of agency resources, and more conventional remedies for contract breaches are not available for the FAR’s human rights standards. Except for forced child labor (DOL), there is no government-wide capacity to monitor human rights compliance.</p>	<ul style="list-style-type: none"> <li>a. <u>Due Diligence</u>—Provide for due diligence as both a defense and as a remedy for breach of compliance standards.</li> <li>b. <u>Remedies</u>—Use existing conventional remedies if a contractor violates contract obligations to comply with human rights standards in the FAR or domestic law.</li> <li>c. <u>Monitoring</u>—Provide transparent monitoring of compliance and investigation of worker complaints by independent organizations that are accountable to the U.S. government, UN, ILO, or worker unions.</li> <li>d. <u>Enforcement Capacity</u>—Dedicate staff for enforcement, provide them with detailed policies, and actively refer cases among agencies based on domestic law violations by contractors.</li> </ul>

## V. WAYS TO TARGET CHANGE

It is tempting to think of progress in terms of government-wide reform of procurement rules. That would mean amending the FAR, which applies to all federal agencies. However, this will be difficult considering the inertia of established business models and shrinking government budgets. In response, this report’s policy menu is designed to work either government-wide or at a smaller scale—within individual agencies or coalitions of agencies that have the staff capacity and political will to play a leadership role.

Individual federal agencies have the authority to supplement the FAR with their own rules and reforms, so long as they do not conflict with the FAR. Moreover, as noted in Section III, agencies have the authority to test innovative methods with the consent of OMB and notice to congressional oversight committees, as appropriate.<sup>488</sup> To summarize, one way to target procurement change is by scale of government agencies:

- ❖ ***Government-Wide***—Amend the FAR
- ❖ ***Specific Agencies***—Amend supplements to the FAR or test innovative procurement methods

Another way to target change is by scale of economic sectors:

- ❖ ***Economy-Wide***—all sectors that generate risk to human rights
- ❖ ***Sector-Specific***—individual high-risk sectors, e.g., apparel or electronics
- ❖ ***Product- or Service-Specific***—procurement change that focuses on a specific product or service for maximum control and accountability, e.g., to create a “clean” supply chain

Thinking in terms of these dimensions helps to identify forums for procurement reform that are realistic in terms of their economic, legal and political complexity. Figure 6 illustrates both ways to target change:



FIGURE 6: POTENTIAL FORUMS FOR PROCUREMENT CHANGE

SCALE OF SECTORS	SCALE OF AGENCIES	
	<i>Government-Wide</i>	<i>Individual Agencies</i>
<i>Economy-Wide</i>	Amend the FAR	Amend agency supplement Test innovative method
<i>Sector-Specific</i>	Amend the FAR	Amend agency supplement Test innovative method
<i>Product or Service-Specific</i>	Test innovate method	Test innovative method

As a thought experiment, this report offers a set of procurement changes at each economic level:

- ❖ ***Economy-wide—Strengthen Existing Standards in the FAR.*** Without expanding the current scope of protection for human rights, policymakers could strengthen existing standards that protect human rights in several respects:
  - Clarify language that defines a human right. For example, “forced labor” is defined in varying ways in the FAR, U.S. trade policy, and ILO conventions.
  - Strengthen compliance obligations. This is already happening with respect to compliance plans and remedies to deal with human trafficking. Agencies could go further by requiring due diligence in practice, beyond compliance plans on paper.
  - Provide for stronger monitoring and enforcement of contract obligations of suppliers. For example, the general remedies for defaulted performance (like suspending payments) could be explicitly made available for breach of contract obligations to protect human rights.
- ❖ ***Sector-Specific—Amend Agency Supplements to the FAR.*** One or more agencies could devise standards to prevent human rights violations that are prevalent in a particular sector. The sectors in which human rights abuses merit a procurement strategy include:
  - Apparel—Section VI outlines options for this sector;
  - Agricultural commodities and food;
  - Electronic products;
  - Electronics—mineral extraction for components; and
  - Logistical and security services abroad.
- ❖ ***Product- or Service-Specific—Create a Clean Supply Chain.*** On a smaller scale, one or more agencies could invite suppliers to compete for multi-year contracts for a particular product or service that would support a “clean” supply chain. For example, a factory or small group of factories could be independently certified at the start and transparently monitored for respecting human rights in that supply chain.

## VI. TOWARD A SECTOR STRATEGY FOR APPAREL

As reported above, federal agencies are sourcing apparel from the same factories where thousands of workers lost their lives. As the *New York Times* reported, “American government suppliers in countries including Bangladesh . . . show a pattern of legal violations and harsh working conditions . . . [Yet, f]ederal agencies rarely know what factories make their clothes, much less require audits of them.”<sup>489</sup>

Disaster stories about supply chain mismanagement dominate the news. However, through a new Alta Gracia brand,<sup>490</sup> Knights Apparel (the largest supplier of collegiate apparel in the United States) established a positive counter-narrative.<sup>491</sup> Alta Gracia replaced a Korean-owned operation in the Dominican Republic that made baseball caps for major footwear companies.<sup>492</sup> When the Korean company relocated production to cut costs in 2007, the workers and the community had no alternative employment options.<sup>493</sup> Encouraged by the expanding “sweatfree” market at universities, Knights Apparel saw an opportunity to compete by establishing a progressive reputation based on high standards of respect for human rights, which include:<sup>494</sup>

- ❖ Paying a living wage that is more than 300% of the minimum wage in the Dominican Republic;
- ❖ Establishment of a union, which is now working to ensure high levels of productivity and quality; and
- ❖ Meeting high standards to protect workplace safety and health.<sup>495</sup>

Knights Apparel was not naive. It was prepared to accept a lower profit margin as it built demand for the Alta Gracia brand over several years.<sup>496</sup> Two Georgetown professors of international business, John Kline and Edward Soule, report that Alta Gracia has reached its break-even point for production and profit in 2014, its fourth year.<sup>497</sup> They report that the living wage is having a profound impact on child nutrition, health, education, and housing renovation, with multiplier effects in the community.<sup>498</sup>

Yet the vision of Knights Apparel is not charity. A baseline fact is that Knight’s cost of paying 350% of the minimum wage is only about 3% of the unit cost of apparel.<sup>499</sup> The Alta Gracia model aims to offset that margin in several ways. The first is to lower employee turnover and training costs. Already, the factory’s annual turnover rate is around 4.6% (2013), which is ten times lower than industry turnover reported by the Fair Labor Association (averaging 5.6% per

month).<sup>500</sup> Looking to the future, the first Collective Bargaining Agreement (CBA) with the union at Alta Gracia links workers' performance bonuses to productivity gains and flexibility—after the point at which the factory reaches full capacity.<sup>501</sup> Knights Apparel also benefits from the ability to market its “ethical brand” in three ways: (1) market access (the wholesaler's ability to meet high standards of university licensing codes); (2) retailers' perception (citing Follett bookstores) that they benefit from the ethical brand as well; and (3) reinforcement of institutional reputations (in this case, university fundraising programs).<sup>502</sup>

Kline and Soule also contrast Alta Gracia with social-audit systems for promoting compliance with wage and safety standards, for example, the Fair Labor Association's (FLA) audits. The difference between Alta Gracia and the FLA factories is the “operating environment of the factory,” which includes pre-contract assessment of compliance with high standards (university codes and government labor codes), continual auditing of compliance by the Worker Rights Consortium, and effective on-site monitoring by the workers' union.<sup>503</sup>

The Alta Gracia story provides evidence that if federal agencies set high standards for procurement of apparel, there are companies that will rise to the opportunity, compete at market prices, and source from a law-abiding supply chain.<sup>504</sup> The key to this narrative is high standards—to assure that competition is not undermined by companies that profit from abuse of human rights and violation domestic laws.

As explained in Section V, there are three levels of economic scale on which to change the standards for protecting human rights in federal procurement. This Section outlines one of the levels—a sectoral strategy for apparel. This sector has the greatest public awareness and experience in testing ideas to harness purchasing power.

The following outline applies the policy menu from Section IV in a holistic way. A question frequently encountered is whether agencies have the authority to implement the policy menu in the absence of congressional legislation. Unfortunately, the FAR and agency supplements are codified in such a way that answering the question would require technical analysis that is well beyond the scope of this report. The most efficient way to approach the authority question is to first focus on a policy proposal from the menu and then define the agency scale and economic scale of reform. With that level of focus, legal analysis would consider the interplay of the following sources of law as they apply to a change in procurement rules:

- ❖ **Executive Orders**—Consistency with existing executive orders as well as the President's broad constitutional authority to manage executive functions and conduct foreign affairs.
- ❖ **Treaties**—Consistency with the scope of U.S. treaty commitments including UN conventions, the ILO Constitution and conventions, and trade agreements.
- ❖ **Congressional Legislation**—Consistency with acts of Congress that apply to procurement, human rights, and tariff preferences.
- ❖ **Rulemaking**—Consistency with administrative rules in the FAR and agency supplements.

Federal agencies have several ways to implement options for reform in this outline. Among others, these include: (1) authority for “test[ing] of innovative procurement methods” under 41 U.S.C. § 1124, (2) agency determination of best-value factors other than price,<sup>505</sup> (3) rulemaking changes in agency supplements to the FAR, (4) rulemaking changes in the FAR itself, or (5) a combination of these approaches. Additional authority may be needed in the form of an executive order or legislation, depending on legal analysis of specific proposals.

### Stage 1—Plan for Procurement Needs and Risks

- a. **Identify the Need for Protection** to include workers in factories that cut and sew apparel under contracts and subcontracts that supply federal agencies. This could be done on two levels:

1. *High-Risk Countries*—This would follow the current approach of identifying risk of forced child labor based on country of origin.
2. *Apparel Sector as a Whole*—The advantage of also defining the entire sector as high risk is that the sector uses global supply chains that concentrate sourcing in high-risk countries. In addition, covering the entire sector would avoid discrimination against high-risk countries in terms of treating their suppliers differently from those of other countries.

*Models*—Accord for Fire and Building Safety; Worker Rights Consortium; SPC Model Sweatfree Policy; California Procurement Code

- b. **Expand the Scope of Protection** to include three clusters of rights:

1. *ILO Core Labor Standards*—including freedom of association, prohibition of forced labor, prohibition of child labor, and prohibition of discrimination at work.
2. *Right to Dignity*—as protected by domestic labor laws that require a minimum wage, compensation for overtime, and protection from wage theft.
3. *Right to Life*—as protected by domestic laws that protect workplace safety and health.

*Models*—Generalized System of Preferences (GSP); African Growth and Opportunity Act; Caribbean Basin Initiative; Andean Trade Preferences; Labor Chapter of U.S. Free-Trade Agreements; DFARS rules for security contractors; SPC Model Sweatfree Policy; California Procurement Code.

### Stage 2—Solicit Bids and Give Notice

Contracting officers would expand existing notice to potential contractors, now focused exclusively on forced child labor, to include additional risks that reflect the scope of protection defined at Stage 1. This notice would trigger certain requirements of bidders at subsequent stages of the procurement process with regard to evaluating capacity and developing compliance plans.

- a. **Existing Sources of Notice to Contractors**—The U.S. Department of Labor lists eight countries where there is a significant risk of child labor and/or forced labor in the apparel industry.<sup>506</sup>
- b. **Expand Sources of Notice to Contractors**—Participating agencies can use the following sources of information that to expand notice to potential contractors:

1. *Existing U.S. Government Reports*
  - (a) Department of Labor—Annual reports on country efforts to eliminate worst forms of child labor—a condition of continued eligibility for trade preferences. This annual report also discusses the prevalence and sectoral distribution of worst forms of child labor.

- (b) Department of Labor—Investigation of complaints alleging country noncompliance with trade agreement commitments to observe identified labor standards and conditions for receiving benefits of the generalized system of preferences (GSP).

2. *Existing International Reports*

- (a) ILO investigations
- (b) ILO Better Work Programme

3. *Existing Multi-Stakeholder Agreements*

Accord on Fire and Building Safety in Bangladesh

### Stage 3—Evaluate Potential Contractors

Participating agencies would evaluate potential contractors’ capacity to exercise due diligence—to identify risk and prevent and remedy violations of the human rights standards outlined above.

- a. **Certification**—When they submit a proposal all potential contractors would be required to certify that they know who their subcontractors are, specifically where the apparel is made, that they have a system in place to manage their supply chain so as to protect against human rights abuses. Later, at Stage 4, the contractors would then be required to disclose this information as a pre-condition of signing a contract award.

*Model*—The FAR currently requires certification of “no knowledge” of forced child labor; this could be expanded to certify positive knowledge of a contractor’s own operations.

- b. **Strengthen the Database for Evaluation**

- 1. Participating agencies would include in FAPIIS, the database for evaluating contractors, final adjudications in which a federal agency or court found that potential contractor violated domestic laws that implement a human right. Beyond data required by the Obama executive order for labor law compliance, FAPIIS would include findings from courts or agencies of another country in which a good or service is sourced.
- 2. Procurement officers would be authorized to use this information when evaluating proposals in procurement competition.

*Model*—FAPIIS currently provides for disclosure of a substantiated allegation of trafficking (in an administrative proceeding) and the FAR Council is authorized to include other information. The Project on Government Oversight (POGO) has recommended a range of technical reforms of FAPIIS,<sup>507</sup> and more recently, so has the Senate HELP Committee.<sup>508</sup>

- c. **Evaluate Capacity to Manage Supply Chain**—When evaluating proposals, procurement officers would award up to XX points (or XX% of score) based on potential contractors’ —

- 1. Disclosure of the supply chain (including subcontractors and factory addresses),

2. System for identification of risks of harm to workers or communities in the countries or regions of supply; participation in initiatives such as the Accord for Fire and Building Safety or the Better Work Programme would support capacity to manage risks;
3. Identification of applicable domestic laws and international standards that protect against those risks;
4. Development of a compliance plan to correct past violations and prevent future violations;
5. Provision of appropriate remedies if a contractor's supply chain harms workers or communities; and
6. For all of these evaluation criteria, offer potential contractors an opportunity to maximize their score through pre-award clearance of a supply chain.

*Model*—SPC Model Sweatfree Policy; Worker Rights Consortium, Designated Supplier Program; Overseas Private Investment Corporation.

#### Stage 4—Award Contract and Set Terms

- a. ***Confirm Management Capacity with Disclosure***—Before signing a contract, a winning contractor would have to disclose its supply chain that supports the contract, including specific subcontractors and addresses of factories or sites of supply. These disclosures would be incorporated by reference into the contract, for purposes of ongoing oversight and enforcement in Stage 5.

*Models*—Accord for Fire and Building Safety; SPC Model Sweatfree Policy

- b. ***Pre-Award Clearance***—If the winning contractor sources apparel from a high-risk region (as defined at Stage 2, solicit bids and provide), contract officers would be authorized to verify information provided by the contractor with respect to its capacity to manage risk of human rights abuses.

*Models*—Worker Rights Consortium, Designated Supplier Program.

- c. ***Expand Compliance Obligations Based on Risk***—Contract officers would insert clauses into the contract that obligate the contractor to comply with domestic laws in the country of production including those that:

1. Implement the ILO's core labor standards.
2. Protect human dignity, including labor laws that regulate payment of wages.
3. Protect human life, including standards for workplace safety and health.

*Models*—DFARS rules for security contractors; SPC Model Sweatfree Policy; California Public Contracting Code; domestic-law compliance standards of the Overseas Private Investment Corporation

#### Stage 5—Monitor and Enforce

- a. ***Monitoring***—Participating agencies would engage independent organizations that are accountable only to the U.S. government to monitor compliance and investigate worker complaints. They would post monitoring reports on a public website.

*Models*—Worker Rights Consortium, Accord for Fire and Building Safety, Overseas Private Investment Corporation

- b. **Remedies**—Participating agencies would use the full range of remedies if a contractor violates the contract obligations outlined above. Remedies include:

1. Compensation or other appropriate remedy to affected workers or communities
2. Liquidated damages to cover costs of investigation and remedies for affected workers
3. Disclosure of violations in FAPIIS
4. Suspended payments
5. Reduced award fee
6. Publish a contractor's name\
7. Removal of employee
8. Termination of a subcontract

*Models*—Currently in the FAR; expand their application.

- c. **Due Diligence**—Participating agencies would provide for due diligence as both a defense and as a remedy for breach of compliance standards.

*Models*—UN Guiding Principles for Business and Human Rights; currently in the FAR as a defense to debarment.

- d. **Enforcement Capacity**—Participating agencies would dedicate staff for enforcement, provide them with detailed policies, and actively refer cases among agencies based on domestic law violations by contractors.

*Models*—Several federal agencies currently follow these practices.

## ANNEX

### Executive Orders That Apply to Procurement

The U.S. federal government is uniquely positioned to mitigate these harms with its annual procurement of \$350 billion.<sup>509</sup> As the largest single purchaser in the global economy, the supply chains it uses to procure goods and services shape the practices of businesses around the world. In the past, presidents used this immense power in tandem with their executive authority to stop discrimination,<sup>510</sup> provide equal opportunity,<sup>511</sup> and take affirmative action to protect the rights of workers employed by federal contractors.<sup>512</sup> More recently, presidents applied their executive authority to promote environmentally-friendly products and services<sup>513</sup> and curb global labor abuses.<sup>514</sup>

In 1941, President Franklin Delano Roosevelt took the first federal action to prohibit employment discrimination in the United States when he issued Executive Order 8802. The Order prohibited “discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin.”<sup>515</sup> By war’s end, the number of jobs held by African Americans was at an all-time high.<sup>516</sup> In 1943, President Roosevelt required all government contracts to include a discrimination clause in Executive Order 9346.<sup>517</sup>

Presidents Harry S. Truman and Dwight D. Eisenhower built on President Roosevelt’s achievements by holding agencies responsible for enforcing compliance with these antidiscrimination provisions<sup>518</sup> and creating a committee to monitor compliance.<sup>519</sup>

In 1961, President John F. Kennedy used his executive authority, like President Roosevelt, to lead the country into a new chapter of civil rights. To advance equal employment opportunities, President Kennedy signed Executive Order 10925, which is “widely recognized in the historical literature as the birth of affirmative action.”<sup>520</sup> The Order required government contractors to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin.”<sup>521</sup>

Presidents Bill Clinton, George W. Bush, and Barack Obama used their executive authority to steward the country towards a more environmentally sustainable future. In successive orders, Presidents Clinton, Bush, and Obama required federal agencies to incorporate environmental considerations into their day-to-day decision-making and long-term planning<sup>522</sup> and prefer acquiring environmentally friendly products.<sup>523</sup>



President Clinton also used his executive authority over procurement to lead the charge against child labor. In 1999, President Clinton signed Executive Order 13126, which prohibited federal agencies from procuring goods made by forced or indentured child labor.<sup>524</sup>

President Obama used his authority to leverage the federal government's buying power and lead the fight against human trafficking. After two reports highlighted the opportunities for human trafficking created by U.S. procurement, President Obama issued Executive Order 13627.<sup>525</sup> The Order prohibits contractors from engaging in a broad array of human trafficking-related activities and requires them to take proactive steps to prevent human trafficking.<sup>526</sup>

President Obama used his authority recently to amend Executive Order 11246, which was originally issued by President Lyndon B. Johnson.<sup>527</sup> President Obama's amendment, which was signed on 21 July 2014, prohibits federal contractors from discriminating against workers due to their sexual orientation or gender identity.<sup>528</sup>

As noted above, on 31 July 2014 President Obama signed an executive order that will make it harder to get a federal contract for companies that have violated labor laws.<sup>529</sup> Specifically, the executive order requires that contracting officers consider a contractor's record of compliance with certain listed labor laws when awarding contracts for goods and services over \$500,000.<sup>530</sup> Under this executive order, the Secretary of Labor must create guidance on the weight of violations of these labor laws.<sup>531</sup> Because of the nature of the particular labor laws listed in the executive order, the protection is limited to domestic workers.

### **Executive Orders With Extraterritorial Application**

The executive orders with the most plainly extraterritorial application have been those used to order the commencement of combat or military activities. These are usually brief and cite presidential authority under Article II of the Constitution. In such instances of military action, Presidents also often impose restrictions on trade and financial transactions with targeted countries by way of executive order.<sup>532</sup>

However, Presidents have also used executive orders similarly to effectuate foreign policy involving countries with which the United States is not engaged in military action, but with which the United States has diplomatic disputes often involving human rights or humanitarian abuses by government or military leaders operating in those countries. These executive orders rely on the following congressional delegations of authority: (i) the International Emergency Economic Powers Act (IEEPA),<sup>533</sup> (ii) the National Emergencies Act (NEA),<sup>534</sup> (iii) Section 5 of the United Nations Participation Act, as amended (UNPA),<sup>535</sup> and (iv) Section 301 of title 3, United States Code.<sup>536</sup>

Executive Order 12532, issued by President Reagan in response to the apartheid regime in South Africa, specifically addresses "fair labor principles which have benefitted those in South Africa who have been disadvantaged by the apartheid system."<sup>537</sup> The Order claims that the majority of U.S. firms in South Africa engaged in such fair labor practices and encouraged all others to do the same. Practices cited include facility desegregation, equal employment opportunity, equal pay, fair wages, measures to improve quality of life outside of the work environment, and even practices similar to affirmative action and collective bargaining rights.<sup>538</sup>

The Order also directs heads of U.S. government departments and agencies in South Africa to take "necessary steps to ensure that the[se] labor practices . . . are applied to their South African employees."<sup>539</sup> Further, the Order directs such agency heads "in procuring goods or services in South Africa, [to] make affirmative efforts to assist business enterprises having more than 50% beneficial ownership by person in South Africa disadvantaged by the apartheid system."<sup>540</sup> The Order also directs increased investment in education and human rights activities and legal assistance to South Africans, pursuant to the Foreign Assistance Act.<sup>541</sup> This Order may be an unlikely, but useful,

precedent for executive authority to encourage fair labor practices among private corporations and require government agencies to engage in progressive procurement practices when operating in other countries, particularly those with past and current human rights issues.

# ENDNOTES

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- <sup>1</sup> See *Mission Statement*, OFFICE OF MGMT. AND BUDGET, <http://www.whitehouse.gov/sites/default/files/omb/procurement/mission.html> (last visited Aug. 5, 2014); Ian Urbina, *The Shopping List as Policy Tool*, N.Y. TIMES (Jan. 25, 2014), <http://www.nytimes.com/2014/01/26/sunday-review/the-shopping-list-as-policy-tool.html>.
- <sup>2</sup> Human Rights Council Res. 17/4, 17th Sess., U.N. Doc. A/HRC/RES/17/4 (June 16, 2011).
- <sup>3</sup> John Ruggie, Special Representative of the Sec'y-Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, Principle 6 (June 2011) [hereinafter *Guiding Principles*], available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).
- <sup>4</sup> *Id.* at commentary to Principle 6.
- <sup>5</sup> Federal Acquisition Regulation (FAR), 48 CFR § 101 *et seq.* The FAR is available online and for downloading at <http://acquisition.gov/far/index.html>.
- <sup>6</sup> See 41 U.S.C.A. § 1124 (outlining tests of innovative procurement methods and procedures).
- <sup>7</sup> See *Mission Statement*, *supra* note 1; Urbina, *supra* note 1.
- <sup>8</sup> Human Rights Council Res. 17/4, *supra* note 2.
- <sup>9</sup> *Id.*
- <sup>10</sup> *Guiding Principles*, *supra* note 3.
- <sup>11</sup> *Id.* at Principle 1.
- <sup>12</sup> *Id.* at commentary to Principle 6.
- <sup>13</sup> When governments ratify a human rights treaty, they assume obligations to respect, protect, and fulfill human rights. Ratification, in turn, means that a State has committed to implementing its human rights obligations through domestic legislation and actions. See *id.*
- <sup>14</sup> While not a treaty, the Universal Declaration of Human Rights, adopted as a UN General Assembly Resolution, is viewed as the first articulation of a common set of human rights. The Universal Declaration led to the drafting of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
- <sup>15</sup> International Covenant on Civil and Political Rights, March 23, 1976, 2 U.S.T. 999, 30 U.N.T.S. 23 [hereinafter ICCPR].
- <sup>16</sup> International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].
- <sup>17</sup> Treaty of Versailles, XIII, June 28, 1919, 109 L.N.T.S. 219 [hereinafter ILO Constitution]; Convention Concerning Forced or Compulsory Labor, May 1, 1932, 49 Stat. 2712, 39 U.N.T.S. 55; Freedom of Association and Protection of the Right to Organize Convention, July 4, 1950, 68 U.N.T.S. 17; Right to Organize and Collective Bargaining Convention, July 18, 1951, 96 U.N.T.S. 257; Equal Remuneration Convention, May 23, 1953, 165 U.N.T.S. 303; Abolition of Forced Labor Convention, Jan. 17, 1959, 320 U.N.T.S. 291; Discrimination (Employment and Occupation) Convention, June 15, 1960, 362 U.N.T.S. 31; Minimum Age Convention, June 19, 1976, 1015 U.N.T.S. 298; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Nov. 19, 2000, 2133 U.N.T.S. 161.
- <sup>18</sup> ICCPR, *supra* note 15.
- <sup>19</sup> ILO Constitution, *supra* note 17. The United States has also ratified two of the eight core labor conventions: the Convention on the Abolition of Forced Labor and the Convention Concerning the Prohibition and Immediate Action for the Elimination

of the Worst Forms of Child Labor. (Abolition of Forced Labor Convention, Jan. 17, 1959, TREATY DOC. No. 88-11, 320 U.N.T.S. 291; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Nov. 19, 2000, S. TREATY DOC. No. 106-5, 2133 U.N.T.S. 161). In furtherance of both of these treaties, the executive branch issued executive orders to prevent forced labor and child labor in government contracts.

- <sup>20</sup> For a list of the human rights treaties the United States has ratified see *International Human Rights Documents*, U.S. DEP'T OF STATE, <http://www.humanrights.gov/references/international/> (last visited Aug. 5, 2014).
- <sup>21</sup> FAR 101 *et seq.* Congress authorized the Administrator of Federal Procurement Policy to implement procurement rules through the FAR at 41 U.S.C. § 1121(b). Congress authorized the Federal Acquisition Regulatory Council (FAR Council) to issue and maintain the FAR at 41 U.S.C. § 1303.
- <sup>22</sup> Exec. Order No. 13,126, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, 64 Fed. Reg. 32383 (June 16, 1999); FAR 22.1703-22.1704 (2009).
- <sup>23</sup> FAR 22.1504 (2009); Exec. Order No. 13,126, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, 64 Fed. Reg. 32383 (June 16, 1999).
- <sup>24</sup> Abolition of Forced Labor Convention, Jan. 17, 1959, TREATY DOC. No. 88-11, 320 U.N.T.S. 291.
- <sup>25</sup> Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Nov. 19, 2000, 2133 U.N.T.S. 161.
- <sup>26</sup> Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2012).
- <sup>27</sup> FAR 22.1703-22.1704 (2009).
- <sup>28</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Protocol to Prevent, Suppress and Punish Trafficking].
- <sup>29</sup> Exec. Order No. 13,627, 77 Fed. Reg. 60029 (Oct. 2, 2012).
- <sup>30</sup> FAR 22.807(b)(1)-(2) (2009).
- <sup>31</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 24, 1965).
- <sup>32</sup> FAR 252.225-7039 (2013).
- <sup>33</sup> *E.g.*, 18 U.S.C. § 1111 (2012).
- <sup>34</sup> *E.g.*, Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (2012).
- <sup>35</sup> National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012).
- <sup>36</sup> U.S. CONST. amend. I.
- <sup>37</sup> *Id.*
- <sup>38</sup> Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2012).
- <sup>39</sup> *E.g.*, Davis-Bacon Act, 40 U.S.C. § 3141 (2012); Walsh-Healey Public Contract Act, 41 U.S.C. §§ 6501-6511 (2012); McNamara-O'Hara Service Contract Act, 41 U.S.C. §§ 6701-6707 (2012).
- <sup>40</sup> *Existing Federal Privacy Laws*, CENT. FOR DEMOCRACY AND TECH., <https://cdt.org/insight/existing-federal-privacy-laws/> (last visited Aug. 5, 2013).
- <sup>41</sup> 42 U.S.C. § 1981 *et seq.* (2012).
- <sup>42</sup> Pub. L. No. 102-256, 106 Stat. 73 (codified in scattered sections of 28 U.S.C.).

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- <sup>43</sup> COTS is a subset of the definition of “commercial item.” It is available in substantial quantities and sold without modification. FAR 2.101 (Definitions, “Commercial item,” and “Commercially available off-the-shelf-item” (COTS)). See FAR 12.1 (Policy) (agencies shall acquire commercial items when available) and FAR 12.1-3 (Commercially available off-the-shelf) (all policies that apply to commercial items also apply to COTS).
- <sup>44</sup> See FAR 12.207 (Contract type).
- <sup>45</sup> See FAR 12.503 (Applicability of certain laws to Executive agency contracts for the acquisition of commercial items); FAR 12.504 (Applicability of certain laws to subcontracts for the acquisition of commercial items).
- <sup>46</sup> See FAR 12.505 (Applicability of certain laws to contracts for the acquisition of COTS items). See also Neil Gordon, *POGO Comments on FAR Case 2009-036* (Feb. 11, 2011) (exceptions for COTS items from duty contractors and subcontractors to disclose that they have been suspended or debarred), <http://www.pogo.org/our-work/letters/2011/co-ca-20110211.html> (last visited July 30, 2014).
- <sup>47</sup> *Prime Award Spending Data*, [www.usaspending.gov/search](http://www.usaspending.gov/search) (search by “product class” 59 for fiscal year “2012”) (last visited July 29, 2014).
- <sup>48</sup> *Prime Award Spending Data*, *supra* note 47 (search by “product class” D, sub-group D320, for fiscal year “2012”) (last visited July 29, 2014).
- <sup>49</sup> *Prime Award Spending Data*, *supra* note 47 (search by “product class” 70, all subsections except 7030, for fiscal year “2012”) (last visited July 29, 2014).
- <sup>50</sup> George Washington Univ., *U.S. Government Is Tops in IT Spending—But With How Much Waste?*, FACE THE FACTS USA (March 24, 2013), <http://www.facethefactsusa.org/facts/feds-spend-74-billion-it#sthash.HJH0hV0J.dpuf>.
- <sup>51</sup> WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE STATISTICS 2013, Tables II.40, II.41 and II.49 (2013), available at [http://www.wto.org/english/res\\_e/statis\\_e/its2013\\_e/its13\\_toc\\_e.htm](http://www.wto.org/english/res_e/statis_e/its2013_e/its13_toc_e.htm).
- <sup>52</sup> *Id.* Table II.53 (2013), available at [http://www.wto.org/english/res\\_e/statis\\_e/its2013\\_e/its13\\_toc\\_e.htm](http://www.wto.org/english/res_e/statis_e/its2013_e/its13_toc_e.htm).
- <sup>53</sup> See U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, LIST OF GOODS PRODUCED BY CHILD LABOR (2013), available at <http://www.dol.gov/ILAB/reports/child-labor/list-of-goods/>; Julianne Kippenberg, *Dispatches: Smartphones Without Smart Due Diligence*, HUMAN RIGHTS WATCH (Nov. 25, 2013), <http://www.hrw.org/news/2013/11/25/dispatches-smartphones-without-smart-due-diligence>; U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013: CHINA 78 (2013), available at <http://www.state.gov/documents/organization/220402.pdf>.
- <sup>54</sup> See SOPHIE STRACKE ET. AL., IT WORKERS STILL PAY THE PRICE FOR CHEAP COMPUTERS (2013), available at [http://www.danwatch.dk/sites/default/files/documents/dw\\_kina\\_181013\\_0\\_0.pdf](http://www.danwatch.dk/sites/default/files/documents/dw_kina_181013_0_0.pdf).
- <sup>55</sup> *Id.* at 11.
- <sup>56</sup> *Id.* at 11-12.
- <sup>57</sup> *Id.* at 9.
- <sup>58</sup> *Id.*
- <sup>59</sup> *Id.*
- <sup>60</sup> *Id.*
- <sup>61</sup> See David Barboza, *After Suicides, Scrutiny of China’s Grim Factories*, N.Y. TIMES (June 6, 2010), <http://www.nytimes.com/2010/06/07/business/global/07suicide.html>.
- <sup>62</sup> *Id.*
- <sup>63</sup> *Id.*

- <sup>64</sup> Vindu Goel, *Foxconn Audit Finds a Workweek Still too Long*, N.Y. TIMES (May 16, 2013), <http://www.nytimes.com/2013/05/17/business/foxconn-audit-reveals-workweek-still-too-long.html>.
- <sup>65</sup> U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013: CHINA 80 (2013), *available at* <http://www.state.gov/documents/organization/220402.pdf>
- <sup>66</sup> *Id.*
- <sup>67</sup> *See* STUDENTS & SCHOLARS AGAINST CORPORATE MISBEHAVIOUR (SACOM), WORKERS AS MACHINES: MILITARY MANAGEMENT IN FOXCONN 2 (Oct. 12, 2010), *available at* [http://sacom.hk/wp-content/uploads/2010/11/report-on-foxconn-workers-as-machines\\_sacom.pdf](http://sacom.hk/wp-content/uploads/2010/11/report-on-foxconn-workers-as-machines_sacom.pdf) [hereinafter SACOM]; Barboza, *supra* note 61.
- <sup>68</sup> SACOM, *supra* note 67, at 2.
- <sup>69</sup> Barboza, *supra* note 61.
- <sup>70</sup> *See* Jenny Chan, *A Suicide Survivor: the Life of a Chinese Worker*, 28 NEW TECH., WORK AND EMP'T 84, 84-96 (July 2013).
- <sup>71</sup> Barboza, *supra* note 61.
- <sup>72</sup> *Id.*
- <sup>73</sup> SACOM, *supra* note 67, at 14-15.
- <sup>74</sup> Chan, *supra* note 70, at 84, 88, 95-96.
- <sup>75</sup> *Id.*
- <sup>76</sup> STRAKE, *supra* note 54, at 25.
- <sup>77</sup> *See Fatal Blast and Fire Halt Work at Chinese Plant That Makes iPads*, N.Y. TIMES (May 20, 2011), <http://www.nytimes.com/2011/05/21/technology/21foxconn.html>.
- <sup>78</sup> *Id.*; Students & Scholars Against Corporate Misbehavior (SACOM), [Press release] SACOM's Video Proves Foxconn Has Been Ignoring Work Safety, SACOM (May 25, 2011), <http://www.sacom.hk/?p=844> [hereinafter SACOM Press Release].
- <sup>79</sup> David Barboza, *Explosion at Apple Supplier Caused by Dust, China says*, N.Y. TIMES (May 24, 2011), <http://www.nytimes.com/2011/05/25/technology/25foxconn.html>; SACOM Press Release, *supra* note 78.
- <sup>80</sup> STRACHE, *supra* note 54, at 13-14; PROCURE IT FAIR, BUY IT FAIR – GUIDELINE FOR SUSTAINABLE PROCUREMENT OF COMPUTERS 11 (2009), *available at* [http://goodelectronics.org/publications-en/Publication\\_3125/?searchterm=Government%20Procurement](http://goodelectronics.org/publications-en/Publication_3125/?searchterm=Government%20Procurement).
- <sup>81</sup> STRACHE, *supra* note 54, at 13-14.
- <sup>82</sup> *Id.*
- <sup>83</sup> *Id.*
- <sup>84</sup> Charles Duhigg & David Barboza, *In China, Human Costs Are Built Into an iPad*, N.Y. TIMES (Jan.. 25, 2012), <http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html?pagewanted=all>.
- <sup>85</sup> U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013: CHINA 78 (2013), *available at* <http://www.state.gov/documents/organization/220402.pdf>; U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, LIST OF GOODS PRODUCED BY CHILD LABOR (2013), *available at* <http://www.dol.gov/ILAB/reports/child-labor/list-of-goods>.
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- <sup>88</sup> *Id.*
- <sup>89</sup> *Prime Award Spending Data*, *supra* note 47 (search by “product class” 96 for fiscal year “2012”) (last visited July 29, 2014).
- <sup>90</sup> *Id.*
- <sup>91</sup> *Id.*
- <sup>92</sup> *Id.*
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- <sup>95</sup> E.g., Elizabeth Flock, *Minerals Found in Consumer Electronic Devices Help Finance War in Congo*, WASH. POST (Dec. 13, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/13/AR2010121304571.html>.
- <sup>96</sup> National Mining Association, *40 Common Minerals and Their Uses*, <http://www.nma.org/index.php/minerals-publications/40-common-minerals-and-their-uses> (last visited July 25, 2014).
- <sup>97</sup> E.g., FREDERIK JOHANNISSON, DANWATCH, CHILD MINED GOLD IN YOUR GADGETS?: CHILD LABOR IN GHANA AND MALI AND SOURCING POLICIES OF IT BRANDS 6 (2013), *available at* [http://www.danwatch.dk/sites/default/files/child\\_labour\\_in\\_ghana\\_and\\_mali\\_english\\_final.pdf](http://www.danwatch.dk/sites/default/files/child_labour_in_ghana_and_mali_english_final.pdf); *Mobile phone brands cannot guarantee child labour-free gold*, DANWATCH (Nov. 12, 2013) <http://www.danwatch.dk/en/articles/mobil-producenter-sikrer-sig-ikke-mod-boernearbejde/282>.
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- <sup>100</sup> *Id.* at REQUIREMENT 4 (The EITI requires the production of comprehensive EITI Reports that include full government disclosure of extractive industry revenues and disclosure of all material payments to government by oil, gas and mining companies).
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- <sup>104</sup> *Id.* at 14.
- <sup>105</sup> *Tin: Fact Sheet*, AUSTRALIAN MINES ATLAS, [http://www.australianminesatlas.gov.au/education/fact\\_sheets/tin.html](http://www.australianminesatlas.gov.au/education/fact_sheets/tin.html) (last visited July 25, 2014).
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- <sup>107</sup> JOHANNISSON, *supra* note 97, at 9.
- <sup>108</sup> *Id.*

- <sup>109</sup> *Mali: Artisanal Mines Produce Gold with Child Labor*, HUMAN RIGHTS WATCH (Dec. 6, 2011), <http://www.hrw.org/news/2011/12/06/mali-artisanal-mines-produce-gold-child-labor>.
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- <sup>112</sup> Barbara Fraser, *Tarnished Gold: Why Peru's Forced Labor Mining Matters to the US*, THE GUARDIAN (Oct. 16, 2013), <http://www.theguardian.com/sustainable-business/peru-gold-mining-forced-labor>; VERITÉ, RISK ANALYSIS OF INDICATORS OF FORCED LABOR AND HUMAN TRAFFICKING IN ILLEGAL GOLD MINING IN PERU 38-39 (Jan. 2013), *available at* <http://www.verite.org/research/goldminingperu> [hereinafter RISK ANALYSIS].
- <sup>113</sup> RISK ANALYSIS, *supra* note 112, at 40.
- <sup>114</sup> *Id.*
- <sup>115</sup> Fraser, *supra* note 112; RISK ANALYSIS, *supra* note 112, at 38-39.
- <sup>116</sup> JOHANNISSON, *supra* note 97, at 15-16.
- <sup>117</sup> *Mali: Artisanal Mines Produce Gold with Child Labor*, HUMAN RIGHTS WATCH (Dec. 6, 2011), <http://www.hrw.org/news/2011/12/06/mali-artisanal-mines-produce-gold-child-labor>.
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- <sup>253</sup> Secretary John F. Kerry, DEP’T OF STATE, PREFACE TO THE 2013 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2013) *available at* <http://www.state.gov/documents/organization/220286.pdf>.
- <sup>254</sup> INT’L LABOR ORG., GLOBAL ESTIMATE OF FORCED LABOR FACTSHEET (2012), *available at* [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_181921.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_181921.pdf).
- <sup>255</sup> FAR 1.101 (purpose).
- <sup>256</sup> Office of Mgmt. and Budget, *Federal Acquisition Regulatory Council*, THE WHITE HOUSE, [http://www.whitehouse.gov/omb/procurement\\_far\\_council](http://www.whitehouse.gov/omb/procurement_far_council) (last visited Aug. 11, 2014).
- <sup>257</sup> Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. § 201, *et seq.* The DFARS is available online and for downloading at <http://www.acq.osd.mil/dpap/dars/dfars/index.htm>.

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- <sup>258</sup> FAR 22.1504 (Violations and remedies); Exec. Order No. 13,126, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, 64 Fed. Reg. 32383 (June 16, 1999).
- <sup>259</sup> FAR 22.1703 (Combat human trafficking – policy); FAR 22.1704 (Violations and remedies).
- <sup>260</sup> FAR 22.807(b)(1) and (2) (Exemptions).
- <sup>261</sup> Contractors Performing Private Security Functions, 76 Fed. Reg. 52133 (Aug. 19, 2011) (to be codified 48 C.F.R. 225.302).
- <sup>262</sup> FAR 22.102 (Federal and State labor requirements); FAR 22.102-1 (Policy).
- <sup>263</sup> See FAR 22.101-2(a) (Contract pricing and administration).
- <sup>264</sup> FAR 22.1504 (Violations and remedies); Exec. Order No. 13,126, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor (June 12, 1999), 64 Fed. Reg. 32383 (June 16, 1999).
- <sup>265</sup> FAR 22.1703 (Combat human trafficking – policy); FAR 22.1704 (Violations and remedies). “Severe forms of trafficking in persons” means “(1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” FAR 22.1702 (Definitions). “Forced labor” means knowingly providing or obtaining the labor or services of a person—(1) By threats of serious harm to, or physical restraint against, that person or another person; (2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.” FAR 22.1702 (Definitions).
- <sup>266</sup> See, e.g., The Generalized System of Preferences (GSP), 19 U.S.C. § 2462-2467.
- <sup>267</sup> See, e.g., Korea—United States Free Trade Agreement, Chapter 19, Art. 19.2: Fundamental Labor Rights, (entered into force Mar. 15, 2012) *available at* [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file934\\_12718.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file934_12718.pdf) (last visited May 10, 2014).
- <sup>268</sup> See Tariff Act of 1930, 19 U.S.C. § 1307.
- <sup>269</sup> See *Doing Business With Us: Worker and Human Rights*, OPIC, <http://www.opic.gov/doing-business-us/OPIC-policies/worker-human-rights> (last visited Aug. 11, 2014); OPIC, OPIC—ENVIRONMENTAL AND SOCIAL POLICY STATEMENT § 4.8, Appendix B, & Appendix D (Oct. 15, 2010), *available at* [http://www.opic.gov/sites/default/files/consolidated\\_esps.pdf](http://www.opic.gov/sites/default/files/consolidated_esps.pdf) (viewed July 30, 2014) [hereinafter OPIC ENVTL. & SOC. POLICY STATEMENT].
- <sup>270</sup> See *Countries*, BETTER WORK, [http://betterwork.org/global/?page\\_id=314](http://betterwork.org/global/?page_id=314) (last visited Aug. 11, 2014); *Compliance Synthesis Reports*, BETTER WORK, <http://betterwork.org/global/?cat=12> (last visited Aug. 11, 2014); *Health & Safety in the Garment Industry: A Snapshot from Better Work*, BETTER WORK, <http://betterwork.org/global/?p=4056> (last visited Aug. 11, 2014).
- <sup>271</sup> See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH (May 13, 2013), *available at* [http://www.bangladeshaccord.org/wp-content/uploads/2013/10/the\\_accord.pdf](http://www.bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf); Robert Kuttner, *Fashioning Justice For Bangladesh*, THE AMERICAN PROSPECT (Aug. 13, 2013), <http://prospect.org/article/fashioning-justice-bangladesh>.
- <sup>272</sup> OFFICE OF U.S. TRADE REPRESENTATIVE, STATEMENT BY THE U.S. GOVERNMENT ON LABOR RIGHTS AND FACTORY SAFETY IN BANGLADESH (July 19, 2013), <http://www.ustr.gov/about-us/press-office/press-releases/2013/july/usg-statement-labor-rights-factory-safety> (last visited Aug. 11, 2014); see generally U.S. DEP’T OF STATE, HUMAN RIGHTS REPORTS, *available at* <http://www.state.gov/j/drl/rls/hrrpt/> (last visited July 30, 2014).
- <sup>273</sup> ENVIRONMENTAL AND SOCIAL POLICY STATEMENT, *supra* note 269, § 4.8, Appendix A—Illustrative List of Category A Projects (high risk), Appendix B (Categorical Prohibitions), & Appendix D (Glossary, Internationally Recognized Worker Rights), see 22 U.S.C.A. §§ 2191a - 2191b.
- <sup>274</sup> ENVIRONMENTAL AND SOCIAL POLICY STATEMENT, *supra* note 269, § 4.8, Appendix A—Illustrative List of Category A Projects (high risk), Appendix B (Categorical Prohibitions), & Appendix D (Glossary, Internationally Recognized Worker Rights).

- <sup>275</sup> *Id.* §§ 2.6, 2.8, and Appendix D (Glossary, Special Consideration Projects).
- <sup>276</sup> Sié Chéou-Kang Center, *Private Security Monitor: United States, Department of State Regulations*, UNIV. OF DENVER, [http://psm.du.edu/national\\_regulation/united\\_states/laws\\_regulations/state.html](http://psm.du.edu/national_regulation/united_states/laws_regulations/state.html) (last visited Aug. 11, 2014).
- <sup>277</sup> *See, e.g.*, Danielle Marie Mackey, *The Black Hole of U.S. Government Contracting*, LE MONDE DIPLOMATIQUE (July 28, 2014), <http://mondediplo.com/blogs/the-black-hole-of-us-government-contracting>; Kevin Gosztola, *Appeals Court Rules Victims of Torture at Abu Ghraib May Sue Private Military Contractor CACI*, FIREDOGLAKE (June 30, 2014, 5:06 PM), <http://dissenter.firedoglake.com/2014/06/30/appeals-court-rules-victims-of-torture-at-abu-ghraib-may-sue-private-military-contractor-caci/>; Shreeya Sinha, *Trafficked Into Tragedy: Abuse of Immigrant Workers in Afghanistan and Iraq*, N.Y. TIMES (July 9, 2012), <http://atwar.blogs.nytimes.com/2012/07/09/trafficked-into-tragedy-abuse-of-immigrant-workers-in-afghanistan-and-iraq/>; *Families of 12 Slain in Iraq File Lawsuit*, N.Y. TIMES (August 28, 2008), [http://www.nytimes.com/2008/08/29/world/middleeast/29contractor.html?\\_r=0](http://www.nytimes.com/2008/08/29/world/middleeast/29contractor.html?_r=0).
- <sup>278</sup> *See, e.g.*, National Defense Authorization Act for Fiscal Year 2011, P.L. 111–383, ¶ 833 (Jan. 7, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-111publ383/pdf/PLAW-111publ383.pdf>.
- <sup>279</sup> *See* SWISS CONFEDERATION, INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS (Nov. 9, 2010) *available at* [http://www.icoc-psp.org/uploads/INTERNATIONAL\\_CODE\\_OF\\_CONDUCT\\_Final\\_without\\_Company\\_Names.pdf](http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf) [hereinafter ICOC]; SWISS FEDERAL DEP’T OF FOREIGN AFFAIRS, THE MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT, ¶ 21(a) (September 17, 2008) [hereinafter MONTREUX DOCUMENT].
- <sup>280</sup> ICOC, *supra* note 279, at ¶ 1-3.
- <sup>281</sup> *Id.* ¶ 21 (Freedom of expression, association and peaceful assembly; Freedom against arbitrary or unlawful interference with privacy or deprivation of property), ¶ 22 (prohibition of war crimes, crimes against humanity, genocide, torture, enforced disappearance, forced or compulsory labour, hostage-taking, sexual or gender-based violence, human trafficking, the trafficking of weapons or drugs, child labour or extrajudicial, summary or arbitrary executions), ¶¶ 30-43 (restrictions on use of force, detention, and apprehending persons; prohibition of torture or other cruel, inhuman or degrading treatment or punishment, sexual exploitation and abuse or gender-based violence, human trafficking, slavery, forced labour, the worst forms of child labour, and discrimination), and ¶¶ 64-65 (requirements to provide a safe and healthy working environment, and prevent harassment).
- <sup>282</sup> ICOC, *supra* note 279, at ¶¶ 67-69.
- <sup>283</sup> *Id.* ¶ 7.
- <sup>284</sup> U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2013 ANNUAL REPORT OF THE GOV’T OF THE UNITED STATES OF AMERICA FOR THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS INITIATIVE REPORT (April 10, 2014), *available at* <http://www.state.gov/j/drl/rls/vprpt/2013/224673.htm>; Media Note, U.S. Dep’t of State, State Department to Incorporate International Code of Conduct into Worldwide Protective Services Contracts (Aug. 16, 2013), <http://www.state.gov/r/pa/prs/ps/2013/08/213212.htm> (viewed July 30, 2014).
- <sup>285</sup> *See* AM. NAT’L STANDARDS INST., MANAGEMENT SYSTEM FOR QUALITY OF PRIVATE SECURITY COMPANY OPERATIONS—REQUIREMENTS WITH GUIDANCE, ANSI/ASIS PSC.1-2012, § 9.5.1 (2012) [hereafter ANSI, PSC Standards], *available at* [http://www.acq.osd.mil/log/PS/psc/Item\\_2010\\_PSC\\_standards.2\\_STD.PDF](http://www.acq.osd.mil/log/PS/psc/Item_2010_PSC_standards.2_STD.PDF); Program Support, U.S. Dep’t of Defense, *Private Security Companies*, OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE, <http://www.acq.osd.mil/log/PS/psc.html> (last visited Aug. 11, 2014); National Defense Authorization Act for Fiscal Year 2011, P.L. 111–383, § 833(c) (Inclusion of third-party standards and certifications in revised regulations) (January 7, 2011).
- <sup>286</sup> “‘Forced labor’ means knowingly providing or obtaining the labor or services of a person—(1) By threats of serious harm to, or physical restraint against, that person or another person; (2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.” FAR 22.1702 (Definitions).



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- <sup>287</sup> “Forced or indentured child labor” means “all work or service—(1) Exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or (2) Performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.” FAR 22.1501.
- <sup>288</sup> The Generalized System of Preferences (GSP), 19 U.S.C. § 2467; International Labor Organization, Convention No. 29, Forced Labour (June 28, 1930); See LIANA SUN WYLER, CONG. RESEARCH SERV., R42487, TRAFFICKING IN PERSONS: INTERNATIONAL DIMENSIONS AND FOREIGN POLICY ISSUES FOR CONGRESS, 7 (July 24, 2013), *available at* <http://fas.org/sgp/crs/row/R42497.pdf> (emphasis added).
- <sup>289</sup> Section 307 of Title III, Chapter 497 (46 Stat. 689); Tariff Act of 1930, 19 U.S.C. § 1307.
- <sup>290</sup> Congressionally authorized trade preferences include the Generalized System of Preferences (GSP), 19 U.S.C. §§ 2462-2467; the U.S. Caribbean Basin Trade Partnership Act (CBTPA), 19 U.S.C. §§ 2701-2707; the Andean Trade Promotion and Drug Eradication Act (ATPDEA), U.S.C. §§ 3201-3206; and the African Growth and Opportunity Act (AGOA), 19 U.S.C. 3701-3706 and 19 U.S.C. § 2466a-b.
- <sup>291</sup> International Labour Conference, May–June 2014, *Fourth item on the agenda: Supplementing the Forced Labour Convention, 1930 (No. 29), to address implementation gaps to advance prevention, protection and compensation measures, to effectively achieve the elimination of forced labour* (9.Rev), 122 (2014), *available at* [http://www.ilo.org/ilc/ILCSessions/103/reports/WCMS\\_246188/lang--en/index.htm](http://www.ilo.org/ilc/ILCSessions/103/reports/WCMS_246188/lang--en/index.htm) [hereinafter *ILO Protocol to the Forced Labor Convention*]; See also *ILO Adopts New Protocol to Tackle Modern Forms of Forced Labour*, ILO (June 11, 2014), [http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS\\_246549/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_246549/lang--en/index.htm).
- <sup>292</sup> *ILO Protocol to the Forced Labor Convention*, *supra* note 291, at art. 2.e. (emphasis added)
- <sup>293</sup> FAR 52.222-26(c) (Equal Opportunity) (not applicable to preference for work on or near Indian Reservations).
- <sup>294</sup> See FAR 52.222-26(c) (Equal Opportunity).
- <sup>295</sup> FAR 9.104-7 (Solicitation provisions and contract clauses).
- <sup>296</sup> FAR 14.201-3, 14.201-5(a) (Representations and instructions); FAR 15.203 (Requests for proposals); FAR 15.204-3 (Contract clauses); FAR 15.204-5 (Representations and instructions).
- <sup>297</sup> FAR 14.408-1(c) (“(5) All provisions of the invitation for bids, including any acceptable additions or changes made by a bidder in the bid, shall be clearly and accurately set forth (either expressly or by reference) in the award document. The award is an acceptance of the bid, and the bid and the award constitute the contract.”); FAR 15.303 (Contracting by Negotiation, Source Selection, Responsibilities) (“(3) [contract officers must e]nsure consistency among the solicitation requirements, notices to offerors, proposal preparation instructions, evaluation factors and subfactors, solicitation provisions or contract clauses, and data requirements”); FAR 15.304 (Evaluation Factors and Significant Subfactors) (“(d) All factors and significant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation (10 U.S.C. 2305(a)(2)(A)(i) and 41 U.S.C. 253a(b)(1)(A)) (see 15.204-5(c))”).
- <sup>298</sup> For a list of products requiring contractor certification as to forced or indentured child labor, see *List of Products Produced by forced or Indentured Child Labor*, DEPARTMENT OF LABOR, <http://www.dol.gov/ilab/regs/eo13126/main.htm> (last visited Aug. 27, 2014).
- <sup>299</sup> FAR 52.222-18(c) (Certification regarding knowledge of child labor for listed end products). The FAR requires a specific clause for solicitation of products that might originate in countries where forced or indentured child labor is a problem. The required language regarding certification reads as follows: “(c) Certification. The Government will not make award to an offeror unless the offeror, by checking the appropriate block, certifies to either paragraph (c)(1) or paragraph (c)(2) of this provision.
- [ ] (1) The offeror will not supply any end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in a corresponding country as listed for that end product
- [ ] (2) The offeror may supply an end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product. The offeror certifies that it has made a good faith

effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture such end product. On the basis of those efforts, the offeror certifies that it is not aware of any such use of child labor.

<sup>300</sup> FAR 22.1503(b).

<sup>301</sup> FAR 22.1503(b)-(c).

<sup>302</sup> For the current list of products and countries on Exec. Order 13126 list, see *List of Products Produced by Forced or Indentured Child Labor*, *supra* note 298.

<sup>303</sup> DIFI, *supra* note 229.

<sup>304</sup> *Id.* at 7.

<sup>305</sup> *Id.* at 9.

<sup>306</sup> *Id.* at 12.

<sup>307</sup> See, e.g., SWEATFREE PURCHASING CONSORTIUM, MODEL SWEATFREE PROCUREMENT POLICY, 6.a(1) (Notice to prospective bidders) (2012), available at [http://buysweatfree.org/files/sweatfree\\_model\\_v1\\_7-1-12.pdf](http://buysweatfree.org/files/sweatfree_model_v1_7-1-12.pdf); 10 Los Angeles Admin. Code ch. 1, art. 17 (Sweatfree Procurement), 10.43 (Purpose) and 10.43.3 (Contractor Code of Conduct); Maine State Purchasing Code of Conduct for Suppliers of Apparel, Footwear or Textiles, M.R.S.A. 1825-O.

<sup>308</sup> WORKER RIGHTS CONSORTIUM, THE DESIGNATED SUPPLIERS PROGRAM—REVISED 2-3 (2012), available at <http://www.workersrights.org/dsp/>.

<sup>309</sup> FAR 14.10 (Elements of sealed bidding); FAR 14.408-7 (Documentation of award), (“(b) The documentation shall either state that the accepted bid was the lowest bid received, or list all lower bids with reasons for their rejection in sufficient detail to justify the award.”).

<sup>310</sup> FAR 14.103-2(d) (Limitations).

<sup>311</sup> See FAR 12.1 (Policy) (agencies shall acquire commercial items when available) and FAR 12.1-3 (Commercially available off-the-shelf) (all policies that apply to commercial items also apply to COTS).

<sup>312</sup> See FAR 12.207 (Contract type).

<sup>313</sup> See FAR 16.101 (General, et seq. (Part 16—Types of Contracts)).

<sup>314</sup> FAR 15.302 (Source selection objective); FAR 15.303(5) (Responsibilities) (10 U.S.C. 2305(b)(4)(B) and 41 U.S.C. 253b(d)(3)).

<sup>315</sup> FAR 15.303(4) (Responsibilities) (10 U.S.C. 2305(b)(1) and 41 U.S.C. 253b(d)(3)).

<sup>316</sup> FAR 15.304 (Evaluation factors and significant subfactors).

<sup>317</sup> FAR 14.408-2(a) (Responsible bidder—reasonableness of price).

<sup>318</sup> FAR 14.408-2(a) (Responsible bidder—reasonableness of price).

<sup>319</sup> FAR 9.104-1 (General standards).

<sup>320</sup> Testimony of Scott Amey, General Counsel Project on Government Oversight (POGO) before the House Committee on Oversight and Government Reform, 2 (June 12, 2013), available at <http://www.pogo.org/our-work/testimony/2013/testimony-of-pogos-scott-amey-on-suspension-debarment.html>; see generally POGO, Federal Contractor Misconduct Database (FCMD), <http://www.contractormisconduct.org/index.cfm> (viewed July 30, 2014).

<sup>321</sup> EO on Labor Compliance, *supra* note 231.

<sup>322</sup> FAR 52.209-5 (Certification regarding responsibility matters).

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- <sup>323</sup> FAR Subpart 3.10 (Contractor code of business ethics and conduct); FAR 3.1003(a) (Requirements).
- <sup>324</sup> FAR 3.1004 (Contract clauses); FAR 52.203-13 (Contractor code of business ethics and conduct).
- <sup>325</sup> FAR Council, Final Rule, Federal Acquisition Regulation: Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. 80256, 80264, amending FAR 9.104-1(d) (Dec. 20, 2000), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2000-12-20/html/00-32429.htm> [hereinafter FAR Council, Final Rule of December 2000].
- <sup>326</sup> *Id.* at 80256.
- <sup>327</sup> *Id.* at 80259, 80265, amending FAR 9.104-3.
- <sup>328</sup> FAR Council, Notice of Proposed Rulemaking, Federal Acquisition Regulation: Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 66 Fed. Reg. 17754, reverting FAR 9.104-1(d) (General standards) to its previous text (“Have a satisfactory record of integrity and business ethics.”) (Apr. 3, 2001) [hereinafter FAR Council, Suspension of April 2001]. The Bush Administration formally repealed the compliance standard in late 2001. FAR Council, Suspension of April 2001, at 66988; *see also* Kelly Sherrill & Kate McQueen, *The High Price of Campaign Promises: Ill-Conceived Labor Responsibility Policy*, 30 PUB. CONT. L.J. 267, 289-300 (2001).
- <sup>329</sup> U.S. Dep’t of Def., Gen. Servs. Admin. & Nat’l Aeronautics & Space Admin., Federal Acquisition Regulation, FAR Case 2001-014, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation, 66 Fed. Reg. 66986, 66987 (Dec. 27, 2001).
- <sup>330</sup> *See generally* Sherrill & McQueen, *supra* note 328, at 274.
- <sup>331</sup> FAR Council, Suspension of April 2001, *supra* note 328, at 69988; *see also* Sherrill & McQueen, *supra* note 328, at 286-90.
- <sup>332</sup> FAR Council, Suspension of April 2001, *supra* note 328, at 69988; *see also* Sherrill & McQueen, *supra* note 328, at 284-87.
- <sup>333</sup> FAR Council, Suspension of April 2001, *supra* note 328, at 69988-89; *see also* Sherrill & McQueen, *supra* note 328, at 299-305.
- <sup>334</sup> FAR Council, Suspension of April 2001, *supra* note 328, at 66988; *see also* Sherrill & McQueen, *supra* note 328, at 289-300.
- <sup>335</sup> FAR Council, Suspension of April 2001, *supra* note 328, at 80259 (“no evidence of a ‘problem’ which this rulemaking would ‘solve’”).
- <sup>336</sup> FAR Council, Final Rule of December 2000, *supra* note 325, at 80256. The FAR Council noted that the 100-plus companies paid more than \$400 million in fines and restitution, and the number of companies would have been larger if the analysis had expanded beyond laws that were directly related to procurement. *See also* U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-96-8, FEDERAL CONTRACTORS AND VIOLATIONS OF LABOR LAW 5 (1995), *available at* <http://www.gao.gov/assets/230/221816.pdf>.
- <sup>337</sup> U.S. Senate, Health, Education, Labor and Pensions Committee (Tom Harkin, Chairman), Acting Responsibly? Federal Contractors Frequently Workers’ Lives and Livelihoods at Risk, Majority Committee Staff Report, 1, 9 (Dec. 11, 2013) [hereinafter Senate HELP Report].
- <sup>338</sup> *Id.* at 9.
- <sup>339</sup> FAR 9.104-1(d).
- <sup>340</sup> FAR Council, Final Rule of December 2000, *supra* note 325, at 80259, 80265, amending FAR 9.104-3 (Application of standards).
- <sup>341</sup> EO on Labor Compliance, *supra* note 231.
- <sup>342</sup> *Compare* FAR Council, Final Rule of December 2000, *supra* note 325, at 80264, amending FAR 14.404-2 (Rejection of individual bids (sealed bids)) *with* FAR 15.503 (Notifications to unsuccessful offerors (negotiated contracts)).
- <sup>343</sup> EO on Labor Compliance, *supra* note 231, at § 2(a)(iii).

- <sup>344</sup> FAR Council, Final Rule of December 2000, *supra* note 325, at 80264, amending FAR 9.104–1(d) (General standards).
- <sup>345</sup> EO on Labor Compliance, *supra* note 231, at § 2(a)(iii).
- <sup>346</sup> *Id.* at § 2(a)(i).
- <sup>347</sup> FAR Council, Final Rule of December 2000, *supra* note 325, at 80264, amending FAR 9.104–1(d) (General standards).
- <sup>348</sup> EO on Labor Compliance, *supra* note 231, at § 2(a)(i).
- <sup>349</sup> *Id.* at § 2(a)(iv).
- <sup>350</sup> *Id.* at § 2(b)(i).
- <sup>351</sup> FAR Council, Final Rule of December 2000, *supra* note 325, at 80265–66, amending FAR 52.209–5 (Certification regarding debarment, suspension, proposed debarment, and other responsibility matters) and FAR 52.212–3 (Offeror representations and certifications—commercial items).
- <sup>352</sup> EO on Labor Compliance, *supra* note 231, at § 2(a)(ii), § 2(b)(ii), § 4(a)(i) and (ii).
- <sup>353</sup> FAR Council, Final Rule of December 2000, *supra* note 325, at 80264, amending FAR 9.104–3 (Application of standards).
- <sup>354</sup> EO on Labor Compliance, *supra* note 231, at § 4(a)(iii).
- <sup>355</sup> *Id.* at § 4(b).
- <sup>356</sup> *Compare* FAR Council, Final Rule of December 2000, *supra* note 325, at 80264, amending FAR 9.104–3 (Application of standards).
- <sup>357</sup> EO on Labor Compliance, *supra* note 231, at § 4.
- <sup>358</sup> *See infra* Section II.
- <sup>359</sup> The State of California requires contractors in the apparel sector to comply with domestic labor and safety laws of the country in which the goods are produced. CA Public Contracting Code § 1608.
- <sup>360</sup> FAR 22.1503(c)-(d) (Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor).
- <sup>361</sup> *Id.*
- <sup>362</sup> The remedies include termination, suspension, and debarment. FAR 22.1503(f) (Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor); FAR 22.1504(b) (Violations and remedies).
- <sup>363</sup> 41 U.S.C. § 2313(e)(2) (Review and assessment of data). *See* Senate HELP Report, *supra* note 337, at 23–27, 31.
- <sup>364</sup> 41 U.S.C. § 2313(b) (Persons covered).
- <sup>365</sup> 41 U.S.C. § 2313(c)(1)(E)(ii) (Information included).
- <sup>366</sup> 41 U.S.C. § 2313(c)(6) (Information included).
- <sup>367</sup> *See* FAR 9.104–6 (Federal awardee performance and integrity information system).
- <sup>368</sup> *See* Senate HELP Report, *supra* note 337, at 23–27; Letter from David Madland, Director, American Worker Project, Center for American Progress Action Fund, to Hada Flowers, General Services Administration (November 4, 2009), *available at* [http://www.americanprogressaction.org/wp-content/uploads/issues/2009/11/pdf/ndaa\\_letter.pdf](http://www.americanprogressaction.org/wp-content/uploads/issues/2009/11/pdf/ndaa_letter.pdf); Neil Gordon, *POGO Suggests Way to Improve Federal Contractor Accountability Database* (2012), <http://www.pogo.org/our-work/letters/2012/20120917-pogo-suggests-way-to-improve-federal-contractor-accountability.html> (last visited Aug. 12,

2014); Neil Gordon, *POGO Comments on FAR Case 2008-027* (Nov. 5, 2009), available at <http://www.pogo.org/our-work/letters/2009/co-fcmd-20091105.html> (last visited July 30, 2014).

<sup>369</sup> EO on Labor Compliance, *supra* note 231, at § 4(c).

<sup>370</sup> See FAR Council, Proposed Rule of September 2013, 78 Fed. Reg. 59317-03 (Sept. 26, 2013), amending FAR 9.104-6 (Federal awardee performance and integrity information system).

<sup>371</sup> For a skeptical review of options to expand FAPIIS, see John Brian Warnock, *Principled or Practical Responsibility: 60 Years of Discussion*, 41 PUB. CONT. L.J. 881, 901-909 (2012).

<sup>372</sup> U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation, FAR Case 2008-027, Federal Awardee Performance and Integrity Information System, 75 Fed. Reg. 14060 (Mar. 23, 2010).

<sup>373</sup> FAR Council, Final Rule of December 2000, *supra* note 325, at 80259.

<sup>374</sup> FAR 15.304 (Evaluation factors and significant subfactors).

<sup>375</sup> FAR 15.304(d) and (e) (Evaluation factors and significant subfactors) (10 U.S.C. 2305(a)(3)(A)(iii) and 41 U.S.C. 253a(c)(1)(C)).

<sup>376</sup> FAR 15.101-1 (Tradeoff process).

<sup>377</sup> Ian Urbina, *U.S. Flouts Its Own Advice in Procuring Overseas Clothing*, N.Y. TIMES (Dec. 22, 2013), [http://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html?pagewanted=all&_r=0); see also Robert Kuttner, *Fashioning Justice For Bangladesh*, THE AMERICAN PROSPECT (Aug. 13, 2013), <http://prospect.org/article/fashioning-justice-bangladesh>.

<sup>378</sup> INT'L LABOR RIGHTS FORUM (ILRF), DANGEROUS SILENCE—WHY THE U.S. MILITARY EXCHANGES NEED TO ADDRESS UNSAFE AND ILLEGAL CONDITIONS IN THEIR SUPPLIER FACTORIES 10-11 (2014), available at [http://www.laborrights.org/sites/default/files/publications/Dangerous\\_Silence--Low\\_Resolution\\_for\\_Viewing\\_Online.pdf](http://www.laborrights.org/sites/default/files/publications/Dangerous_Silence--Low_Resolution_for_Viewing_Online.pdf) [hereinafter ILRF, Dangerous Silence].

<sup>379</sup> See Sweatfree Purchasing Consortium, Model Sweatfree Procurement Policy, 6.b(2) (Evaluation criteria) (2012), available at [http://buysweatfree.org/model\\_policy](http://buysweatfree.org/model_policy); Sweatfree Purchasing Consortium, Cooperative Contract Review Panel, § 3.2.2 Compliance Plans (May 1, 2014), available at [http://buysweatfree.org/files/spc\\_contract\\_review\\_panel\\_5\\_1\\_14\\_final.pdf](http://buysweatfree.org/files/spc_contract_review_panel_5_1_14_final.pdf); see generally, Sweatfree Purchasing Consortium, *Uniform Management Program Request for Proposals*, [http://buysweatfree.org/uniform\\_management\\_program](http://buysweatfree.org/uniform_management_program) (last visited Aug. 12, 2014).

<sup>380</sup> SWEATFREE PURCHASING CONSORTIUM, A PIGGYBACK COOPERATIVE CONTRACT FOR FIRE AND POLICE UNIFORMS THAT YOUR AGENCY CAN USE (2014).

<sup>381</sup> OPIC ENVTL. & SOC. POLICY STATEMENT, *supra* note 269, at §§ 3.2, 3.7, 3.8.

<sup>382</sup> *Id.* at § 3.7.

<sup>383</sup> *Id.* at §§ 3.11, 5.5.

<sup>384</sup> For contracts other than construction, the FAR requires affirmative action programs for contracts of \$50,000 or more for contractors with 50 or more employees. FAR 22.804 (Affirmative action programs); FAR 22.804-1 (Nonconstruction). The FAR's affirmative action requirements for construction contracts are specific to "covered geographical areas." FAR 22.804-2 (Construction). An affirmative action clause is limited to work performed in U.S. territory, which is one of several exceptions that include work on Indian reservations and contracts with state and local governments. FAR 22.807 (Exemptions). See Exec. Order No. 11,246, parts II and IV, 30 Fed. Reg. 12319 (Sept. 24, 1965). The contents of an affirmative action program must comply with Department of Labor regulations to ensure equal opportunity in employment to minorities and women. FAR 22.801 (Definitions).

<sup>385</sup> FAR 22.804-1 (Nonconstruction); FAR 22.807 (Exemptions).

<sup>386</sup> The FAR requires pre-award clearance for contracts of \$10 million or more. FAR 22.805 (Procedures).

- <sup>387</sup> FAR 22.805(4).
- <sup>388</sup> See Int’l Labor Rights Forum & Sweatfree Purchasing Consortium, Comments on FAR Case 2013-001, Strengthen protections against trafficking in persons, 1, 5 (December 20, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=FAR-2013-0001-0019> [hereinafter ILRF, Comment on FAR Case 2013-001].
- <sup>389</sup> FAR 22.808 (Complaints); FAR 22.806 (Inquiries).
- <sup>390</sup> FAR 22.1705 (Contract clause); FAR 52.222-50.
- <sup>391</sup> FAR 52.222-50(b) (Combating trafficking in persons).
- <sup>392</sup> FAR 22.1705(b) (Contract clause); FAR 52.222-50 (Combating trafficking in persons, Alternate I).
- <sup>393</sup> FAR 22.1705(d) (Notification).
- <sup>394</sup> FAR 22.1705(e) (Remedies).
- <sup>395</sup> FAR 22.1705(g) (Mitigating factor).
- <sup>396</sup> Dep’t of Def. (DoD), Gen. Services Admin. (GSA), & Nat’l Aeronautics & Space Admin. (NASA), Federal Acquisition Regulation; Ending Trafficking in Persons, 78 Federal Register 59319, 59321-25 (Sept. 26, 2013) [hereinafter FAR Council, Proposed Rule of Sept. 2013].
- <sup>397</sup> See ILRF, Comments on FAR Case 2013-001, *supra* note 388, at 2-3; Scott H. Amey, *POGO comments on FAR Case 2013-001*, at 2 (Dec. 20, 2013), *available at* <http://www.pogo.org/our-work/letters/2013/pogo-implores-government-to-strengthen-zero-tolerance-policy.html> (last visited July 30, 2014).
- <sup>398</sup> *Id.*
- <sup>399</sup> FAR 36.513 (Accident prevention).
- <sup>400</sup> FAR 52.236-13 (Accident prevention); FAR 36.513 (Accident prevention).
- <sup>401</sup> *Id.* at (d) Compliance with laws and regulations (emphasis added).
- <sup>402</sup> OPIC ENVTL. & SOC. POLICY STATEMENT, *supra* note 269, at § 4.2 (laws of a host country), § 4.3 (internationally recognized worker rights), § 4.8 (laws of a host country), § 6.8 (covenants in the OPIC Agreement).
- <sup>403</sup> SPC Model Sweatfree Policy § 5.a.
- <sup>404</sup> CA Public Contracting Code § 1608.
- <sup>405</sup> DFARS 52.225-19; *see also* Dep’t of Def., Defense Acquisition Regulations System, 48 CFR Parts 203, 204, 212, 222, 252, [DFARS Case 2013-D007], RIN 0750-AH93, Defense Federal Acquisition Regulation Supplement: Further Implementation, 78 FR 59325 (Sept. 26, 2013).
- <sup>406</sup> FAR Subpart 9.4 (Debarment, suspension); FAR 9.405 (Effect of listing).
- <sup>407</sup> FAR 9.406-4 (Period of debarment).
- <sup>408</sup> FAR 9.406-2 (Causes for debarment); FAR 9.407-2 (Causes for suspension).
- <sup>409</sup> *See, e.g.*, FAR 9.406-3 (Procedures).
- <sup>410</sup> FAR 9.406 (Debarment); FAR 9.406-1 (General).
- <sup>411</sup> FAR 9.407-2 (Causes for suspension).
- <sup>412</sup> *See, e.g.*, FAR Subpart 49.5 (Contract termination clauses); FAR Subpart 49.2 (Additional principles for fixed-price contracts terminated for convenience); FAR 49.201 (General); FAR 49.208 (Equitable adjustment after partial termination); FAR

Subpart 49.3 (Additional principles for cost-reimbursement contracts terminated for convenience); FAR 49.301 (General); FAR 49.304 (Procedure for partial termination).

<sup>413</sup> See FAR Subpart 49.4 (Termination for default); FAR 49.401 (General); FAR 49.108-2 (Prime contractor's rights and obligations).

<sup>414</sup> See FAR 22.406-11 (Contract terminations); FAR 52.222-12 (Contract termination—debarment); FAR 14.201-5(a) (Contract clauses (fixed price contracts)); FAR 15.204-5 (Representations and instructions (contracting by negotiation)); FAR 52.209-5 (Certification regarding responsibility matters); FAR 22.1503(f) (Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor); FAR 22.1504(b) (Violations and remedies).

<sup>415</sup> FAR 49.402-4 (Procedure in lieu of termination for default).

<sup>416</sup> See, e.g., FAR 42.1305 (Contract clauses); FAR 52.242-14 (Suspension of work (fixed-price construction)); FAR 52.242-15 (Stop-work order (contracting by negotiation)); FAR 52.242-17 (Government delay of work (fixed price contract)).

<sup>417</sup> See *generally* KATE M. MANUEL, CONGRESSIONAL RESEARCH SERVICE, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS (2010).

<sup>418</sup> FAR 9.406-1(a); see John Brian Warnock, *Principled or Practical Responsibility: 60 Years of Discussion*, 41 PUB. CONT. L.J. 881, 913 (2012).

<sup>419</sup> Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, 5 PUB. PROCUREMENT L. REV. 211, 215 (2004).

<sup>420</sup> FAR 9.406 (Debarment); FAR 9.406-1 (General).

<sup>421</sup> See ILRF, Comment on FAR Case 2013-001, *supra* note 388, at 3.

<sup>422</sup> FAR 32.503-6, (Suspension or reduction of payments, (b) Contractor noncompliance); FAR 52.232-16 (Progress payments, (c) Reduction or suspension).

<sup>423</sup> FAR 22.406-9(b) (Withholding from or suspension of contract payments).

<sup>424</sup> FAR 22.406-9(a) (Withholding from or suspension of contract payments).

<sup>425</sup> FAR 16.305 (Cost-plus-award-fee contracts).

<sup>426</sup> FAR Subpart 16.4—Incentive Contracts, FAR 16.401 (General), (2) Award-fee amount (“Award fee shall not be earned if the contractor’s overall cost, schedule, and technical performance in the aggregate is below satisfactory.”); FAR 16.405-2 (Cost-plus-award-fee contracts).

<sup>427</sup> FAR Subpart 11.5 (Liquidated Damages), FAR 11.501(b) (Policy).

<sup>428</sup> FAR 22.302(c) (Liquidated damages and overtime pay).

<sup>429</sup> Liquidated damages for the government are in addition to paying overtime wages owed to workers. FAR 22.302 (Liquidated damages and overtime pay); FAR 22.305 (Contract clause); FAR 52.222-4 (Contract work hours and safety standards act—overtime compensation).

<sup>430</sup> *Id.*

<sup>431</sup> See ILRF, Comment on FAR Case 2013-001, *supra* note 388, at 4.

<sup>432</sup> *ILO Protocol to the Forced Labor Convention*, *supra* note 291, at art. 1.1.

<sup>433</sup> FAR Subpart 22.17—Combating Trafficking in Persons, FAR 22.1704 (Violations and remedies); FAR 52.222-50(e)(1) (Combating trafficking in persons).

<sup>434</sup> FAR 22.809 (Enforcement).

- <sup>435</sup> FAR 42.1305 (Contract clauses); FAR 52.242-14 (Suspension of work (fixed-price construction)); FAR 52.242-15 (Stop-work order (contracting by negotiation)); FAR 52.242-17 (Government delay of work (fixed price contract)).
- <sup>436</sup> FAR 22.1505 (Solicitation provision and contract clause); FAR 52.222-19 (Child labor—cooperation with authorities and remedies, in all solicitations and contracts for the acquisition of supplies).
- <sup>437</sup> FAR Subpart 22.17 (Combating trafficking in persons), FAR 22.1704 (Violations and remedies); FAR 52.222-50(e) (Combating trafficking in persons).
- <sup>438</sup> FAR 22.809 (Enforcement).
- <sup>439</sup> See OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., DOD ACQUISITION WORKFORCE REDUCTION TRENDS AND IMPACT 7, 17-20 (2000), available at <http://dodig.osd.mil/audit/reports/00-088.pdf> (insufficient staff to manage requirements, insufficient contract surveillance); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 671-672 (Feb. 2001).
- <sup>440</sup> U.S. Gov't Accountability Office, GAO-09-419T, Excluded Parties List System, Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds, 3-4 (Feb. 26, 2009).
- <sup>441</sup> For example, in fiscal years 2006 through 2010, the General Services Administration (procurement of \$73 billion) initiated 269 suspension and debarment cases, compared with 124 cases at Homeland Security (\$71 bn), 42 cases at NASA (\$73 bn), 29 cases at HHS, (\$80 bn), and 15 cases at Veterans Affairs (\$69 bn). U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-245T, SUSPENSION AND DEBARMENT—SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENT-WIDE OVERSIGHT COULD BE IMPROVED, APPENDIX I at 10 (2011).
- <sup>442</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-707T, SUSPENSION AND DEBARMENT—CHARACTERISTICS OF ACTIVE AGENCY PROGRAMS AND GOVERNMENT-WIDE OVERSIGHT EFFORTS 3 (2013).
- <sup>443</sup> The Project on Government Oversight (POGO) has proposed a broader set of reforms for suspension and debarment. See Testimony of Scott Amey, General Counsel Project on Government Oversight (POGO) before the House Committee on Oversight and Government Reform, 6 (June 12, 2013), available at <http://www.pogo.org/our-work/testimony/2013/testimony-of-pogos-scott-amey-on-suspension-debarment.html?print=t>; see also, Stop Unworthy Spending Act (SUSPEND Act), Discussion Draft (Feb. 5, 2013), available at [http://oversight.house.gov/wp-content/uploads/2013/02/Draft\\_SUSPEND\\_Act\\_2-5.pdf](http://oversight.house.gov/wp-content/uploads/2013/02/Draft_SUSPEND_Act_2-5.pdf).
- <sup>444</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 442, at 3.
- <sup>445</sup> A year after the GAO study, in 2012, the Interagency Suspension and Debarment Committee found that all 24 agencies that it surveyed had improved their rate of suspensions and debarments: up 39% from FY 2010 on average and up 119% since 2009. Interagency Suspension and Debarment Committee, *Fiscal Year 2011 Report to Congress on Federal Agency Suspension and Debarment Activities*, 8 (Sept. 18, 2012); Interagency Suspension and Debarment Committee, *Fiscal Years 2009 and 2010 Report to Congress on Federal Agency Suspension and Debarment Activities*, 4 (June 15, 2011).
- <sup>446</sup> ANSI, PSC Standards, *supra* note 285, at ¶ 7.4 (at 12), ¶ 9.8 (at 20); ICoC, *supra* note 279, at ¶ G-66-68 (at 14); MONTREUX DOCUMENT, *supra* note 279, at V-¶ 20 (Monitoring compliance and ensuring accountability).
- <sup>447</sup> See generally AFL-CIO, RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKER RIGHTS (2013), available at <http://www.aflcio.org/content/download/77061/1902391/CSReport.pdf> [hereinafter AFL-CIO, RESPONSIBILITY OUTSOURCED].
- <sup>448</sup> ILRF, Dangerous Silence, *supra* note 378, at ii, 29 (2014); Declan Walsh & Steven Greenhouse, *Inspectors Certified Pakistani Factory as Safe Before Disaster*, N.Y. TIMES (Sept. 19, 2012), [http://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html?pagewanted=all&_r=0); Garret Brown, *The Record of Failure and Fatal Flaws of CSR Factory Monitoring*, (Jan. 2013), [http://mhssn.igc.org/MHSSN\\_Statement\\_on\\_CSR\\_Monitoring-Jan2013.htm](http://mhssn.igc.org/MHSSN_Statement_on_CSR_Monitoring-Jan2013.htm) (last visited Feb. 3, 2014); Asia Monitor Resource Center, *The Reality of Corporate Social Responsibility: Experiences from China, South Korea, India and Indonesia*, <http://www.amrc.org.hk/node/1220> (last visited Feb. 3, 2014).
- <sup>449</sup> ILRF, Dangerous Silence, *supra* note 378, at 24, 27.



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- <sup>450</sup> ILRF, *Dangerous Silence*, *supra* note 378, at 32.
- <sup>451</sup> AFL-CIO, *RESPONSIBILITY OUTSOURCED*, *supra* note 447, at 37-38.
- <sup>452</sup> See Better Work, *Countries*, [http://betterwork.org/global/?page\\_id=314](http://betterwork.org/global/?page_id=314) (last visited Aug. 12, 2014); Better Work, *Compliance and Synthesis Reports*, <http://betterwork.org/global/?cat=12> (last visited Aug. 12, 2014); Better Work, *Health & Safety in the Garment Industry: A Snapshot from Better Work*, <http://betterwork.org/global/?p=4056> (last visited May 10, 2014).
- <sup>453</sup> See Better Work, *Assessment Services*, [http://betterwork.org/global/?page\\_id=333](http://betterwork.org/global/?page_id=333) (last visited May 10, 2014).
- <sup>454</sup> See *generally* INT'L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC, STANFORD LAW SCH. & WORKER RIGHTS CONSORTIUM, *MONITORING IN THE DARK* (2013), *available at* <https://www.law.stanford.edu/publications/monitoring-in-the-dark>.
- <sup>455</sup> Accord on Fire and Building Safety in Bangladesh (May 13, 2013)[hereinafter Accord]; Accord website, *Signatories*, <http://www.bangladeshaccord.org/signatories/> (last visited Aug. 14, 2014); WORKER RIGHTS CONSORTIUM, *THE ALLIANCE FOR BANGLADESH WORKER SAFETY: QUESTIONS AND ANSWERS 1* (2014) [hereinafter WRC CRITIQUE]; Robert Kuttner, *Fashioning Justice For Bangladesh*, *THE AMERICAN PROSPECT* (Aug. 13, 2013), <http://prospect.org/article/fashioning-justice-bangladesh>.
- <sup>456</sup> See *generally* *Bangladesh Accord—Guide for Potential Signatories* (Apr. 2014), <http://www.bangladeshaccord.org/wp-content/uploads/140508-Bangladesh-Accord-Guide-for-Potential-Signatories.pdf> (last visited Aug. 13, 2014).
- <sup>457</sup> Accord, *supra* note 455, at §§ 1-3.
- <sup>458</sup> *Id.* at §§ 1-3.
- <sup>459</sup> Steven Greenhouse & Julfikar Ali Manikjune, *Stalemate Over Garment Factory Safety in Bangladesh*, *N.Y. TIMES* (June 25, 2014), [http://www.nytimes.com/2014/06/26/business/international/stalemate-over-garment-factory-safety-in-bangladesh.html?\\_r=0](http://www.nytimes.com/2014/06/26/business/international/stalemate-over-garment-factory-safety-in-bangladesh.html?_r=0).
- <sup>460</sup> Accord, *supra* note 455, at § 8.
- <sup>461</sup> *Building Standards*, <http://www.bangladeshaccord.org/building-standards/> (last visited Aug. 13, 2014).
- <sup>462</sup> Accord, *supra* note 455, at § 8; *Inspection Reports*, <http://accord.fairfactories.org/ffcweb/Web/ManageSuppliers/InspectionReportsEnglish.aspx> (last visited Aug. 14, 2014).
- <sup>463</sup> Accord, *supra* note 455, at § 22.
- <sup>464</sup> *Id.* at § 23.
- <sup>465</sup> *Id.* at § 24.
- <sup>466</sup> *Id.* at § 21.
- <sup>467</sup> *Id.* at § 5.
- <sup>468</sup> See James Brudney & Catherine Fisk, *Op-Ed: Wal-Mart, Gap Skirt the Issue*, *L.A. TIMES* (May 17, 2013), <http://articles.latimes.com/2013/may/17/opinion/la-oe-fisk-bangladesh-apparel-accord-20130517> (last visited Aug. 14, 2014).
- <sup>469</sup> *About the Alliance*, <http://www.bangladeshworkersafety.org> (last visited Aug. 13, 2014).
- <sup>470</sup> Steven Greenhouse & Julfikar Ali Manikjune, *Stalemate Over Garment Factory Safety in Bangladesh*, *N.Y. TIMES* (June 25, 2014) [http://www.nytimes.com/2014/06/26/business/international/stalemate-over-garment-factory-safety-in-bangladesh.html?\\_r=0](http://www.nytimes.com/2014/06/26/business/international/stalemate-over-garment-factory-safety-in-bangladesh.html?_r=0).

- <sup>471</sup> See Cent. for Bus. & Human Rights, New York Univ. Stern Sch. of Bus., Written Submission to the U.S. Senate Committee on Foreign Relations, Hearing on Prospects for Democratic Reconciliation and Workers' Rights in Bangladesh 2 (Feb. 11, 2014), available at [https://www.stern.nyu.edu/sites/default/files/assets/documents/con\\_046298.pdf](https://www.stern.nyu.edu/sites/default/files/assets/documents/con_046298.pdf).
- <sup>472</sup> WRC CRITIQUE, *supra* note 455, at 1 ("Without these provisions, no program can succeed. We know this because brands and retailers for years carried out inspection programs in Bangladesh that lack these provisions and, as commonly known, those programs did not protect workers."); Steven Greenhouse & Elizabeth A. Harris, *Battling for a Safer Bangladesh*, N.Y. TIMES (Apr. 21, 2014), <http://www.nytimes.com/2014/04/22/business/international/battling-for-a-safer-bangladesh.html>.
- <sup>473</sup> WRC CRITIQUE, *supra* note 455, at 2; Alliance for Worker Safety in Bangladesh, Action Plan, Financial Structure 6-7 (July 9, 2013) [hereinafter Alliance Action Plan].
- <sup>474</sup> *Id.*; *Factory Inspection Reports*, <http://www.bangladeshworkersafety.org/factory-information/factory-inspection-reports> (last visited Aug. 13, 2014).
- <sup>475</sup> WRC CRITIQUE, *supra* note 455; Alliance Action Plan, *supra* note 473, at 8.
- <sup>476</sup> WRC CRITIQUE, *supra* note 455, at 2; Alliance Action Plan, *supra* note 473, at 8.
- <sup>477</sup> WRC CRITIQUE, *supra* note 455, at 2; Alliance Action Plan, *supra* note 473, at 9.
- <sup>478</sup> WRC CRITIQUE, *supra* note 455, at 2; Alliance Action Plan, *supra* note 473, at 5.
- <sup>479</sup> Steven Greenhouse & Julfikar Ali Manikjune, *Stalemate Over Garment Factory Safety in Bangladesh*, N.Y. TIMES (June 25, 2014), [http://www.nytimes.com/2014/06/26/business/international/stalemate-over-garment-factory-safety-in-bangladesh.html?\\_r=0](http://www.nytimes.com/2014/06/26/business/international/stalemate-over-garment-factory-safety-in-bangladesh.html?_r=0).
- <sup>480</sup> *Id.*; *Obama to Suspend Trade Privileges With Bangladesh*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/28/business/us-to-suspend-trade-privileges-with-bangladesh-officials-say.html?pagewanted=all>.
- <sup>481</sup> *Statement by the U.S. Government on Labor Rights and Factory Safety in Bangladesh*, OFFICE OF THE U.S. TRADE REP. (July 17, 2013), <http://www.ustr.gov/about-us/press-office/press-releases/2013/july/usg-statement-labor-rights-factory-safety>.
- <sup>482</sup> *GSP Action Plan Review Finds More Needs to be Done to Improve Worker Rights and Worker Safety in Bangladesh*, OFFICE OF THE U.S. TRADE REP. (July 2014), <http://www.ustr.gov/about-us/press-office/press-releases/2014/July/GSP-Action-Plan-Review-Finds-Need-to-Improve-Worker-Rights-Safety-in-Bangladesh>.
- <sup>483</sup> *Id.*
- <sup>484</sup> OPIC ENVTL. & SOC. POLICY STATEMENT, *supra* note 269, at § 5.21.
- <sup>485</sup> *Id.* at § 7.8.
- <sup>486</sup> *Id.* at § 7.9.
- <sup>487</sup> *Id.* at § 7.12.
- <sup>488</sup> See 41 U.S.C.A. § 1124 (Tests of innovative procurement methods and procedures).
- <sup>489</sup> Ian Urbina, *U.S. Flouts Its Own Advice in Procuring Overseas Clothing*, N.Y. TIMES (Dec. 22, 2013), [http://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html?\\_r=0](http://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html?_r=0).
- <sup>490</sup> See *About*, <http://altagraciaapparel.com/about.html> (last visited Aug. 14, 2014).
- <sup>491</sup> Knights Apparel brands most of its apparel under the name of professional sports leagues, including the NHL, NFL, NBA, MLB, NASCAR, NCAA, and numerous colleges, as well as brands including Starter and X-Games. See *Knights Apparel Story*, <http://www.knightsapparel.com/story> (last visited Aug. 14, 2014).

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- <sup>492</sup> Steven Greenhouse, *Factory Defies Sweatshop Label, But Can it Thrive?*, N.Y. TIMES (July 17, 2010), <http://www.nytimes.com/2010/07/18/business/global/18shirt.html>.
- <sup>493</sup> *Id.*
- <sup>494</sup> *Id.*
- <sup>495</sup> *Id.*
- <sup>496</sup> Jackie Northam, *Can this Dominican Factory Pay Good Wages and Make a Profit?*, NAT'L PUBLIC RADIO (June 20, 2013), <http://www.npr.org/blogs/parallels/2013/06/20/193491766/can-this-dominican-factory-pay-good-wages-and-make-a-profit>.
- <sup>497</sup> See JOHN KLINE & EDWARD SOULE, GEORGETOWN UNIV., ALTA GRACIA: FOUR YEARS AND COUNTING, REFLECTIVE ENGAGEMENT INITIATIVE (Aug. 2014), available at [ibd.georgetown.edu/alta-gracia](http://ibd.georgetown.edu/alta-gracia) (electronic copy forthcoming in late Aug. 2014).
- <sup>498</sup> KLINE & SOULE, *supra* note 497, at 17-27.
- <sup>499</sup> *Id.* at 32.
- <sup>500</sup> *Id.* at 15 (citing FAIR LABOR ASS'N, 2012 ANNUAL REPORT (2013), available at [http://www.fairlabor.org/sites/default/files/documents/reports/2012\\_fla\\_apr\\_0.pdf](http://www.fairlabor.org/sites/default/files/documents/reports/2012_fla_apr_0.pdf)).
- <sup>501</sup> *Id.* at 27.
- <sup>502</sup> *Id.* at 11-12.
- <sup>503</sup> *Id.* at 30.
- <sup>504</sup> *Id.*
- <sup>505</sup> FAR 15.304 (Evaluation factors and significant subfactors).
- <sup>506</sup> US Dep't of Labor, Bureau of Int'l Labor Affairs, List of Goods Produced by Child Labor (2013), available at <http://www.dol.gov/ILAB/reports/child-labor/list-of-goods/>.
- <sup>507</sup> See Neil Gordon, POGO Suggests Way to Improve Federal Contractor Accountability Database, Comment on Contracting Officers' Access to Relevant Integrity Information (Sept. 17, 2012), <http://www.pogo.org/our-work/letters/2012/20120917-pogo-suggests-way-to-improve-federal-contractor-accountability.html> (last visited Aug. 13, 2014); Neil Gordon, *POGO Comments on FAR Case 2008-027*, *supra* note 368.
- <sup>508</sup> Senate HELP Report, *supra* note 337, at 30-33.
- <sup>509</sup> *Mission Statement*, OFFICE OF MGMT. AND BUDGET, <http://www.whitehouse.gov/sites/default/files/omb/procurement/mission.html> (last visited June 9, 2014).
- <sup>510</sup> Exec. Order. No. 8802, 6 Fed. Reg. 3109 (June 27, 1941); Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 29, 1943); Exec. Order 10308, 16 Fed. Reg. 12303 (Dec. 6, 1951).
- <sup>511</sup> Exec. Order No. 10479, 18 Fed. Reg. 4899 (Aug. 18, 1953).
- <sup>512</sup> Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).
- <sup>513</sup> Exec. Order No. 13514, 74 Fed. Reg. 53635 (Oct. 19, 2009); Exec. Order No. 13423, 72 Fed. Reg. 3919 (Jan. 26, 2007).
- <sup>514</sup> Exec. Order No. 13126; Exec. Order No. 13627, Sec. 2(a)(1)(A), 77 Fed. Reg. 60029 (Oct. 2, 2012).
- <sup>515</sup> Exec. Order. No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).
- <sup>516</sup> The Eleanor Roosevelt Papers Project, *Fair Employment Practices Committee*, GEORGE WASH. UNIV., <http://www.gwu.edu/~erpapers/teachinger/glossary/fepc.cfm> (last visited June 9, 2014).

- <sup>517</sup> Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 29, 1943).
- <sup>518</sup> Exec. Order 10308, 16 Fed. Reg. 12303 (Dec. 6, 1951).
- <sup>519</sup> Exec. Order No. 10479, 18 Fed. Reg. 4899 (Aug. 18, 1953).
- <sup>520</sup> Judson MacLaury, *President Kennedy's E.O. 10925: Seedbed of Affirmative Action*, FED. HISTORY 2010, at 42, *available at* [http://shfg.org/shfg/wp-content/uploads/2011/01/4-MacLaury-design4-new\\_Layout-1.pdf](http://shfg.org/shfg/wp-content/uploads/2011/01/4-MacLaury-design4-new_Layout-1.pdf).
- <sup>521</sup> Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).
- <sup>522</sup> Exec. Order No. 12873, 58 Fed. Reg. 54911 (Oct. 22, 1993); Exec. Order No. 13101, 63 Fed. Reg. 49643 (Sept. 16, 1998); Exec. Order No. 13148, 65 Fed. Reg. 24595 (Apr. 26, 2000).
- <sup>523</sup> Exec. Order No. 13423, 72 Fed. Reg. 3919 (Jan. 26, 2007); Exec. Order No. 13514, 74 Fed. Reg. 53,635 (Oct. 19, 2009).
- <sup>524</sup> Exec. Order No. 13126, 64 Fed. Reg. 32793 (June 17, 1999).
- <sup>525</sup> Exec. Order No. 13627, 77 Fed. Reg. 60029 (Oct. 2, 2012).
- <sup>526</sup> *Id.*
- <sup>527</sup> David Hudson, *President Obama Signs a New Executive Order to Protect LGBT Workers*, WHITEHOUSE BLOG (July 21, 2014, 3:00 PM), <http://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers>.
- <sup>528</sup> *Id.*
- <sup>529</sup> Colleen McCain Nelson & Melanie Trottman, *Obama Signs Executive Order on Worker Rights at Federal Contractors*, WALL ST. J. (July 31, 2014), <http://online.wsj.com/articles/obama-signs-executive-order-on-worker-rights-at-federal-contractors-1406835873>.
- <sup>530</sup> EO on Labor Compliance, *supra* note 231, at § 2(a)(iii).
- <sup>531</sup> *Id.* at § 4(b).
- <sup>532</sup> President Clinton signed two such executive orders relating to the crisis in the former Yugoslavia in 1999. Exec. Order No. 13119, 64 Fed. Reg. 18798 (Apr. 13, 1999); Exec. Order No. 13121, 64 Fed. Reg. 24021 (Apr. 30, 1999). President George H.W. Bush signed two such executive orders relating to Iraq and Kuwait. Exec. Order No. 12724, 55 Fed. Reg. 33089 (Aug. 9, 1990); Exec. Order No. 12725, 55 Fed. Reg. 33091 (Aug. 9, 1990).
- <sup>533</sup> International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq.
- <sup>534</sup> National Emergencies Act (NEA), 50 U.S.C. § 1601 et seq.
- <sup>535</sup> United Nations Participation Act, 22 U.S.C. § 287c.
- <sup>536</sup> 3 U.S.C. § 301.
- <sup>537</sup> Exec. Order No. 12532, Sec. 2(a), 50 Fed. Reg. 36861 (Sept. 9, 1985).
- <sup>538</sup> *Id.* at Sec. 2(c).
- <sup>539</sup> *Id.* at Sec. 3.
- <sup>540</sup> *Id.* at Sec. 4.
- <sup>541</sup> *Id.* at Sec. 8.