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Office of Labor-Management Standards

29 CFR Part 471

**Notification of Employee Rights Under
Federal Labor Laws; Proposed Rule**

DEPARTMENT OF LABOR**Office of Labor-Management Standards****29 CFR Part 471****RIN 1215-AB70****Notification of Employee Rights Under Federal Labor Laws**

AGENCY: Office of Labor-Management Standards, Employment Standards Administration, Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) proposes a regulation to implement Executive Order 13496, which was signed by President Barack Obama on January 30, 2009. Executive Order 13496 (“the Executive Order,” “the Order,” or “EO 13496”) requires nonexempt Federal departments and agencies to include within their Government contracts specific provisions requiring that contractors and subcontractors with whom they do business post notices informing their employees of their rights as employees under Federal labor laws. The Executive Order requires the Secretary (“Secretary”) of the Department of Labor (“Department”) to initiate a rulemaking to prescribe the size, form, and content of the notice that must be posted by a contractor under paragraph 1 of the contract clause described in section 2 of the Order. Under the Executive Order, Federal Government contracting departments and agencies must include the required contract provisions in every Government contract, except for collective bargaining agreements and contracts for purchases under the Simplified Acquisition Threshold, and except in those cases in which the Secretary exempts a contracting department or agency with respect to particular contracts or subcontracts or class of contracts or subcontracts pursuant to section 4 of the Order. As required by the Executive Order, this proposed rule establishes the content of the notice required by the Executive Order’s contract clause, and implements other provisions of the Executive Order, including provisions regarding sanctions, penalties, and remedies that may be imposed if the contractor or subcontractor fails to comply with its obligations under the Order and the implementing regulations.

DATES: Comments regarding this proposed rule must be received by the Department of Labor on or before September 2, 2009.

ADDRESSES: You may submit comments, identified by 1215-AB70, only by the following methods:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through <http://www.regulations.gov>. To locate the proposed rule, use key words such as “Department of Labor” or “Notification of Employee Rights Under Federal Labor Laws” to search documents accepting comments. Follow the instructions for submitting comments.

Delivery: Comments should be sent to: Denise M. Boucher, Director of the Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5609, Washington, DC 20210. Because of security precautions the Department continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments.

The Office of Labor-Management Standards (OLMS) recommends that you confirm receipt of your delivered comments by contacting (202) 693-0123 (this is not a toll-free number). Individuals with hearing impairments may call (800) 877-8339 (TTY/TDD). Only those comments submitted through <http://www.regulations.gov>, hand-delivered, or mailed will be accepted. Comments will be available for public inspection at <http://www.regulations.gov> and during normal business hours at the above address.

The Department will post all comments received on <http://www.regulations.gov> without making any change to the comments, including any personal information provided. The <http://www.regulations.gov> Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public via the <http://www.regulations.gov> Web site. It is the responsibility of the commenter to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter’s e-mail address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Denise M. Boucher, Director, Office of Policy, Reports and Disclosure, Office of Labor-Management Standards,

Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5609, Washington, DC 20210, (202) 693-1185 (this is not a toll-free number), (800) 877-8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION: *The Proposed Rule is organized as follows:*

- I. Background—provides a brief description of the development of the Proposed Rule
- II. Authority—cites the legal authority supporting the Proposed Rule, Departmental re-delegation authority, and interagency coordination authority
- III. Overview of the Rule—outlines the proposed regulatory text
- IV. Regulatory Procedures—sets forth the applicable regulatory requirements and requests comments on specific issues

I. Background

On January 30, 2009, President Barack Obama signed Executive Order 13496, entitled “Notification of Employee Rights Under Federal Labor Laws.” 74 FR 6107 (February 4, 2009). The purpose of the Order is “to promote economy and efficiency in Government procurement” by ensuring that employees of certain Government contractors are informed of their rights under Federal labor laws. *Id.*, Sec. 1. As the Order states, “When the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest. The attainment of industrial peace is most easily achieved and workers’ productivity is enhanced when workers are well informed of their rights under Federal labor laws, including the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.*” The Order reiterates the declaration of national labor policy contained in the National Labor Relations Act (“NLRA”), 29 U.S.C. 151, that “encouraging the practice and procedure of collective bargaining and * * * protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection” will “eliminate the causes of certain substantial obstructions to the free flow of commerce” and “mitigate and eliminate these obstructions when they have occurred.” *Id.*, Section 1, quoting 29 U.S.C. 151. As the Order concludes, “[r]elying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government’s contracts.” *Id.*

The Order achieves the goal of notification to employees of federal contractors of their legal rights through two related mechanisms. First, Section 2 of the Order provides the complete text of a contract clause that Government contracting departments and agencies must include in all covered Government contracts and subcontracts. 74 FR at 6107–6108, Sec. 2. Second, through incorporation of the specified clause in its contracts with the Federal government, contractors thereby agree to post a notice in conspicuous places in their plants and offices informing employees of their rights under Federal labor laws. *Id.*, Sec. 2, Para. 1.

The Order states that the Secretary of Labor (“Secretary”) “shall be responsible for [its] administration and enforcement.” 74 FR at 6108, Sec. 3. To that end, the Order delegates to the Secretary the authority to “adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.” *Id.*, Sec. 3(a). In particular, the Order requires the Secretary to prescribe the content, size, and form of the employee notice. *Id.*, Sec. 3(b). In addition, the Order permits the Secretary, among other things, to make modifications to the contractual provisions required to be included in Government contracts (Sec. 3(c)); to provide exemptions for contracting departments or agencies with respect to particular contracts or subcontracts or class of contracts or subcontracts for certain specified reasons (Sec. 4); to establish procedures for investigations of Government contractors and subcontractors to determine whether the required contract provisions have been violated (Sec. 5); to conduct hearings regarding compliance (Sec. 6); and to provide for certain remedies in the event that violations are found (Sec. 7). *Id.*, 74 FR at 6108–6109. Accordingly, the Secretary proposes the following regulations to implement the policies and procedures set forth in the Executive Order. The specific standards and procedures proposed to implement the Executive Order will be discussed in detail in Section III., Overview of the Rule, below.

II. Authority

A. Legal Authority

The President issued Executive Order 13496 pursuant to his authority under “the Constitution and laws of the United States,” expressly including the Federal Property and Administrative Services Act “Procurement Act,” 40 U.S.C. 101 *et seq.* The Procurement Act

authorizes the President to “prescribe policies and directives that [he] considers necessary to carry out” the statutory purposes of ensuring “economical and efficient” government procurement and supply. 40 U.S.C. 101, 121(a). Executive Order 13496 delegates to the Secretary of Labor the authority to “adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.” 74 FR at 6108, Sec. 3. The Secretary has delegated her authority to promulgate these regulations to the Assistant Secretary for Employment Standards. Secretary’s Order 01–2008 (May 30, 2008), 73 FR 32424 (published June 6, 2008).

B. Interagency Coordination

Section 12 of the Executive Order requires the Federal Acquisition Regulatory Council (FAR Council) to take action to implement provisions of the Order in the Federal Acquisition Regulation (FAR). 74 FR at 6110. Accordingly, the Department has coordinated with the FAR Council in inserting language implementing the Executive Order into the FAR.

III. Overview of the Rule

The Department’s proposed rule, which establishes standards and procedures for implementing and enforcing Executive Order 13496, is set forth in subchapter D, Part 471 of Volume 29 of the Code of Federal Regulations (CFR). Subpart A of the proposed rule sets out definitions, the prescribed requirements for the size, form and content of the employee notice, exceptions for certain types of contracts, and exemptions that may be applicable to contracting departments and agencies with respect to a particular contract or subcontract or class of contracts or subcontracts. Subpart B of the proposed rule sets out standards and procedures related to complaint procedures, compliance evaluations, and enforcement of the rule. Subpart C sets out other standards and procedures related to certain ancillary matters. The discussion below is organized in the same manner, and explains the Department’s adoption of the standards and procedures set out in the regulatory text, which follows. The Department invites comments on any issues addressed by the proposals in this rulemaking.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Subpart A contains definitions of terms used in the rule, requirements for the content, size and form of the notice

that a contractor must post to its employees, the types of contracts that are excepted from the rule and applicable exemptions available to a contracting department or agency with respect to a particular contract or subcontract or class of contracts or subcontracts.

Definitions

The definitions proposed in this rule are derived largely from the definitions of the same terms in the Department’s Office of Federal Contract Compliance Programs (OFCCP) regulations at 41 CFR part 60–1.3 and the former regulations implementing Executive Order 13201, 29 CFR Part 470 (2008), rescinded under authority of E.O. 13496, 74 FR 14045 (March 30, 2009). Slight variations between the definitions proposed here and those upon which they were modeled were made in order to accommodate the terms to Executive Order 13946. The Department invites comments regarding the definitions proposed in Section 471.1 below.

Requirements for Employee Notice

As noted above, Executive Order 13496 requires the Secretary to “prescribe the size, form and content of the notice” that contractors must post to notify employees of their rights. Sec. 3(b), E.O. 13496, 74 FR at 6108. The proposed rule fulfills the Secretary’s obligation to establish standards and procedures regarding each of these issues, which are discussed in turn below.

Section 471.2(a) of the proposed rule sets out in full the four paragraphs that the Executive Order requires to be included in all non-excepted Government contracts. The first paragraph of the proposed contract clause specifies the content of the notice that must be provided to employees of Federal contractors. The proposed notice contains those employee rights established under the National Labor Relations Act (“NLRA”), 29 U.S.C. 151, *et seq.* The Secretary believes providing notice of the rights under the NLRA best effectuates the purpose of the Executive Order. Section 1 of the Executive Order clearly states that the Order’s policy is to attain industrial peace and enhance worker productivity through the notification of workers of “their rights under Federal labor laws, including the National Labor Relations Act.” 74 FR at 6107, Sec. 1. The policy of the Executive Order goes on to emphasize the foundation underlying the NLRA, which is to encourage collective bargaining and to protect workers’ rights to freedom of association and self-organization, and notes that

efficiency and economy in government contracting is promoted when contractors inform their employees of "such rights." Further, the contract clause prescribed by the Order requires Federal contractors to post the notice "in conspicuous places in and about plants and offices *where employees covered by the National Labor Relations Act* engage in activities related to performance of the contract * * *." 74 FR at 6107, Sec. 2, Para. 1 (emphasis added). As a result, the Executive Order's terms provide that the employee notice it requires must be posted only by employers in the private sector, with some statutory exceptions, and need not be posted by employers in the public sector.¹

In establishing a description of rights under the NLRA in the proposed notice, the Department believes that such rights are best presented to employees following a concise preamble that provides context to such rights. Therefore, section 471.2 of the proposed rule sets out the following text for inclusion in the notice to employees prior to the description of employee rights under the NLRA:

It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.

The content of the above notice derives from section 1 of the NLRA, 29 U.S.C. 151, and E.O. 13496, Section 1. The Department seeks comments on this description of policy in the proposed section 471.2.

In proposing to include the statutory rights under the NLRA in the required notice, the Secretary considered the level of detail the notice should contain regarding those statutory rights. A broad statement of employee rights under the NLRA appears in section 7 of the Act, which states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

29 U.S.C. 157. The Department considered requiring a verbatim replication of the statute's enumeration of employee rights in Section 7 of the NLRA. Alternatively, the Department considered including a simplified list of rights based upon the statutory provision, which would include the right of employees to: Organize; form, join, or assist any union; bargain collectively through representatives of their own choice; act together for other mutual aid or protection; or choose not to engage in any of these protected concerted activities.

However, the Department does not believe that posting the statutory language itself or a simplified list of rights in a notice will be likely to convey the information necessary to best inform employees of their rights under the Act. Instead, the Department proposes that the statement of employee rights contained in Appendix A to Subpart A of Part 471 be required for inclusion in the notice. This statement contains greater detail of NLRA rights, derived from Board or court decisions implementing such rights—which will more effectively convey such rights to employees. A more complete and readable text will also better enable employees to apply the rights to actual workplace situations. Additionally, employees will be better apprised of their rights under the NLRA if the notice also contains examples of general circumstances, also derived from Board or court decisions further implementing section 7 and other provisions of the NLRA, that constitute violations of their rights under the Act. With the above principles in mind, the Department devised a notice that provides employees with a more than rudimentary overview of their rights under the NLRA, in a user-friendly format, while simultaneously not overwhelming employees with information that is unnecessary and distracting in the limited format of a notice.

The Department invites comment on this statement of employee rights proposed for inclusion on the required notice to employees. In particular, the Department requests comment on whether the notice contains sufficient information of employee rights under the Act; whether the notice effectively conveys the information necessary to best inform employees of their rights under the Act; and whether the notice achieves the desired balance between providing an overview of employee

rights under the Act and limiting unnecessary and distracting information.

Moreover, proposed § 471.2 also requires that the notice of employee rights contain NLRB contact information and basic enforcement procedures to enable employees to find out more about their rights under the Act and to proceed with enforcement if necessary. Accordingly, the required notice confirms that illegal conduct will not be permitted, provides information regarding the NLRB and filing a charge with that agency, and indicates that the Board will prosecute violators of the Act. Furthermore, the notice indicates that there is a 6-month statute of limitations applicable to making allegations of violations and provides NLRB contact information for use by employees. The Department invites suggested additions or deletions to these procedural provisions that would improve the content of the notice of employee rights.

Paragraph 4 of the contract clause in the Executive Order requires the contractor to incorporate only paragraphs 1 through 3 of the clause in its subcontracts. See 74 FR at 6108, Sec. 2, para. 4. A narrow reading of the operation of this provision outside the full context of the Executive Order might suggest that the obligation to include the contract clause is limited to contracts between the government agency and the prime contractor. Under this reading, subcontractors would be required only to post the notice of employee rights, and their subcontractors (sometimes called second tier contractors) would have no responsibilities under the Executive Order. However, the provisions of the Executive Order establishing exemptions and exceptions for the application of the Executive Order's obligations do not expressly specify that its obligations do not flow past the first tier subcontractor, a significant limitation that one would expect to be made explicitly in the text of the Executive Order rather than by operation of the contract clause's incorporation provision. In addition, in the Department's past regulatory treatment of a similar issue, it has adapted through regulation the application of an Executive Order's contract inclusion provisions so that the obligation to abide by the mandates of the orders flows to subcontractors below the first tier. See, e.g., 69 FR 16376, 16378 (Mar. 29, 2004) (final rule implementing E.O. 13201) (based on identical contract incorporation provision, "the intent of the Order was clearly that the clause be passed to

¹ Under the NLRA, the term "employer" excludes the United States government, any wholly owned government corporation, or any State or political subdivision. 29 U.S.C. 152(2). As a result, employees of these public-sector employers are not "employees" covered by the NLRA. The NLRA's definition of "employee" also excludes those employed as agricultural laborers, in the domestic service of any person or family in a home, by a parent or spouse, as an independent contractor, as a supervisor, or by an employer subject to the Railway Labor Act, such as railroads and airlines. 29 U.S.C. 152(3).

subcontractors below the first tier"); 57 FR 49588, 49591 (Nov. 2, 1992) (final rule implementing E.O. 12800) ("It is clear, however, that the intent of Executive Order 12800 was that the clause flow down below the first tier level"). The Department's experience with regulatory implementation of all these Executive Orders is that requiring the obligations of the Executive Order to flow past the first tier subcontractor best achieves the purposes of the Executive Orders. For these reasons, the Department has concluded that in order to fully implement the intent of E.O. 13496, Sec. 471.2(a) has been adapted to require the inclusion of paragraphs 1 through 4 of the contract clause. The Department seeks comments on this proposal.

Proposed § 471.2(b) provides that the employee notice clause is to be set out verbatim in a contract, subcontract or purchase order, rather than being incorporated by reference in those documents. Proposed § 471.2(c) implements Section 3(c) of the Executive Order, 74 FR 6108, permitting the Secretary to modify the contract clause under certain specified circumstances as needed from time to time. The Department requests comment regarding the utility of setting out the employee notice clause verbatim, as opposed to incorporation by reference, to ensure that contractors will be aware of their contractual obligation to post the required notice.

The contract clause in the Executive Order requires a contractor to post the employee notice conspicuously "in and about its plants and offices * * * including in all places where notices to employees are customarily posted both physically and electronically." 74 FR 6107, Sec. 2, para. 2. As a result, a contractor is required to post the notice physically at its place of operation where employees are likely to see it. Proposed § 471.2(d) provides that the Department will print the required employee notice poster and supply it to Federal contractors through the Federal contracting agency. In addition, the poster may be obtained from OLMS, whose contact information is provided in this subsection of the proposed rule, or can be downloaded from OLMS's Web site, <http://www.olms.dol.gov>. The Secretary has concluded that the Department's printing of the poster and provision of it to Federal contractors will reduce the burden on those contractors to comply with the Executive Order and this regulation, and will ensure conformity and consistency with the Secretary's specifications for the notice. Proposed § 471.2(d) also permits contractors to reproduce in

exact duplicate the poster supplied by the Department to satisfy their obligations under the Executive Order and this rule. The Department invites comment on its proposal to make available print and electronic format posters containing the employee notice.

Those contractors that customarily post notices to employees electronically must also post the required notice electronically. In § 471.2(e), the Department proposes that such contractors may satisfy the electronic posting requirement on any web site that is maintained by the contractor or subcontractor and customarily used for employee notices, whether external or internal. A contractor must display prominently on its Web page or electronic site where other employee notices are customarily placed a link to the DOL's web page that contains the full text of the employee notice. The contractor must also place the link in the prescribed text contained in § 471.2(e). The prescribed text is the introductory language of the notice. The Department seeks comments on this proposal for electronic compliance. In addition, the Department seeks comment on whether it should prescribe standards regarding the size, clarity, location, and brightness with regard to the link, including how to prescribe electronic postings that are at least as large, clear and conspicuous as the contractor's other posters.

Exceptions for Specific Types of Contracts and Exemptions Available to Contracting Departments or Agencies With Respect to Particular Contractors or Subcontracts

The Executive Order expressly excepts from its application two types of Government contracts: Collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and contracts involving purchases below the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403; 74 FR at 6107, Sec. 2. The simplified acquisition threshold is currently set at \$100,000. 41 U.S.C. 403. Section 471.3(a)(1) and (2) of the proposed rule implement these exceptions. In addition, the Executive Order's provision regarding its effective date excepts contracts resulting from solicitations issued prior to the effective date of the final rule promulgated pursuant to this rulemaking. 74 FR 6111, Sec. 16. Proposed § 471.3(a)(3) implements this provision of the Executive Order.

As proposed in § 471.2(a), all nonexempt prime contractors and subcontractors are required to include

the employee notice contract clause in each of their nonexempt subcontracts so that the obligation to notify employees of their rights flows to subcontractors of a government contract as well. The Executive Order does not except from its coverage subcontracts involving purchases below the simplified acquisition threshold. The Department has defined "subcontract" in the definitional section of the rule to include only those subcontracts that are necessary to the performance of the government contract. *See* § 471.1(r); *see also OFCCP v. Monongahela R.R.*, 85–OFC–2, 1986 WL 802025 (Recommended Decision and Order, April 2, 1986), *aff'd*, (Deputy Under Secretary's Final Decision and Order, Mar. 11, 1987) (railroad transporting coal to power generation plant of energy company contracting with GSA was subcontractor because delivery of coal is necessary to for the power company to perform under its contract with GSA). Although this rule may result in coverage of subcontracts with relatively *de minimis* value in the overall scheme of government contracts, covered subcontractors include only those who are performing subcontracts that are necessary to the performance of the prime contract. The Department invites comment on whether a further limitation on the application of the rule to subcontracts is necessary, and if it is, whether such a limitation is best accomplished through the application of this or another standard, for instance, a threshold related to the monetary value of the subcontract.

In addition to the exceptions for certain contracts, the Executive Order establishes two exemptions that the Secretary, in her discretion, may provide to contracting departments or agencies that the Secretary finds appropriate for exemption. 74 FR 6108, Sec. 4. These provisions permit the Secretary to exempt a contracting department or agency or group of departments or agencies from the requirements of any or all of the provisions of the Order with respect to a particular contract or subcontract or any class of contracts or subcontracts if she finds either that the application of any of the requirements of the Order would not serve its purposes or would impair the ability of the government to procure goods or services on an economical and efficient basis, or that special circumstances require an exemption in order to serve the national interest. *Id.* Proposed § 471.3(b) implements these exemptions. Proposed § 471.3(b) provides for the submission of written requests for exemptions to the

Deputy Assistant Secretary for Labor-Management Programs, and further provides that the Deputy Assistant Secretary may withdraw an exemption if a determination is made that such action is necessary or appropriate to achieve the purposes of the rule. The Department invites comments on the standards and procedures for requesting an exemption and the Department's withdrawal of a granted exemption.

Finally, proposed § 471.4 implements the policy noted above that the Executive Order requires notice-posting in those workplaces in which employees covered by the NLRA perform their work under the Federal contract. Thus, this rule does not apply to employers excluded from the definition of "employer" in the NLRA, 29 U.S.C. 152(2), and employers of employees excluded from the definition of "employee" under the NLRA, 29 U.S.C. 152(3). As a result, Federal, State and local public-sector employers are not covered by this rule. 29 U.S.C. 152(2). Also excluded are employers of workers employed: as agricultural laborers; in the domestic service of any person or family in a home; by a parent or spouse; as an independent contractor; as a supervisor; or by an employer subject to the Railway Labor Act, such as railroads and airlines. 29 U.S.C. 152(3).

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

Subpart B of the proposed rule establishes standards and procedures the Department will use to determine compliance with obligations of the rule, take complaints regarding noncompliance, address findings of violations, provide hearings for certain matters, impose sanctions, including debarment, and provide for reinstatement in the case of debarment. The standards and procedures proposed in this subpart are taken largely from the Department's prior rule administering and enforcing Executive Order 13201, 66 FR 11221 (February 22, 2001). *See* 29 CFR Part 470 (2008), rescinded under authority of E.O. 13496, 74 FR 14045 (March 30, 2009). The Department invites comment on the administrative and enforcement procedures proposed in Subpart B.

The Department's Office of Federal Contract Compliance Programs ("OFCCP") administers and enforces several laws that ban discrimination and require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment. Therefore, OFCCP already has

responsibility for monitoring, evaluating and ensuring that contractors doing business with the Federal government conduct themselves in a manner that complies with certain Federal laws. Proposed § 471.10 builds on this practice and expertise, and establishes authority in the Deputy Assistant Secretary for Federal Contract Compliance to conduct evaluations to determine whether a contractor is in compliance with the requirements of this rule. Under proposed § 471.10(a), such evaluations may be done solely for the purpose of assessing compliance with this rule, or may be undertaken in conjunction with an assessment of a Federal contractors' compliance with other laws under OFCCP's jurisdiction. This proposed section also establishes standards regarding location of the posted notice that will be used by OFCCP to assess compliance and indicates that an evaluation record will reflect efforts made toward conciliation, corrective action and/or recommendations regarding enforcement actions.

Proposed § 471.11 provides for the Department's acceptance of written complaints alleging that a contractor doing business with the Federal government has failed to post the notice required by this rule. The proposed section establishes that no special complaint form is required, but that complaints must be in writing. In addition, as proposed in § 471.11, written complaints must contain certain information, including the name, address and telephone number of the person submitting the complaint, and the name and address of the Federal contractor alleged to have violated this rule. This proposed section establishes that written complaints may be submitted either to OFCCP or OLMS, and the contact information for each agency is contained in this subsection. Finally, proposed § 471.11 establishes that OFCCP will conduct investigations of complaints submitted under this section, make compliance findings based on such investigations, and include in the investigation record any efforts made toward conciliation, corrective action, and recommended enforcement action.

Proposed § 471.12 sets out the initial steps that the Department will take in the event that a contractor is found to be in violation of this rule, including making reasonable efforts to secure compliance through conciliation. Under this proposed section, a noncompliant contractor must take action to correct the violation and commit in writing to maintain compliance in the future. If the contractor fails to come into

compliance, OLMS may proceed with enforcement efforts proposed in § 471.13.

Proposed § 471.13 implements Section 6 of the Executive Order, 74 FR 6108–6109, and establishes steps that the Department will take in the event that conciliation efforts fail to bring a contractor into compliance with this rule. Under this proposed section, enforcement proceedings may be initiated if violations are found as a result of either a compliance evaluation or a complaint investigation, or in those cases in which a contractor refuses to allow a compliance evaluation or complaint investigation or refuses to cooperate with the compliance evaluation or complaint investigation, including failing to provide information sought during those procedures. The enforcement procedures proposed in § 471.13 rely primarily on the Department's regulations at 29 CFR part 18, which govern administrative hearings before Administrative Law Judges (ALJ), and, in particular, on the provisions for expedited hearings at 29 CFR 18.42. The procedures in this proposed section establish that an ALJ will make recommended findings and conclusions regarding any alleged violation to the Assistant Secretary for Employment Standards ("Assistant Secretary"), who will issue a final administrative order. The final administrative order may include a cease-and-desist order or other appropriate remedies in the event that a violation is found. The procedures in this proposed section also establish timetables for submitting exceptions to the ALJ's recommended order to the Assistant Secretary, and also provide for the use of expedited proceedings.

Proposed § 471.14 addresses the imposition of sanctions and penalties in cases in which violations are found, and establishes post-hearing procedures related to such sanctions or penalties. Section 7 of the Executive Order provides the framework for the scope and nature of remedies the Department may order in the event of a violation. 74 FR 6109. Section 7(a) of the Executive Order provides that the Secretary may issue a directive that the contracting department or agency cancel, terminate, suspend, or cause to be cancelled, terminated or suspended any contract or portion of a contract for noncompliance. *Id.* In addition, the Executive Order indicates that contracts may be cancelled, terminated or suspended absolutely, or their continuance may be conditioned on a requirement for future compliance. *Id.* Prior to issuing such a directive, the Secretary must offer the head of the contracting department or

agency an opportunity to object in writing to the remedy contemplated, and the objections must contain reasons why the contract is essential to the agency's mission. *Id.* Finally, Section 7 of the Executive Order prevents the imposition of such a remedy if the head of the contracting department or agency, or his or her designee, continues to object to the issuance of the directive. *Id.* Proposed § 471.14(a), (b), (c), and (d)(1) fully implement the standards and procedures established in Section 7(a) of the Executive Order.

Section 7(b) of the Executive Order provides that the Secretary may issue an order debarring noncompliant contractors "until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of the order." 74 FR 6109. As with the remedies discussed above, prior to the imposition of debarment, the Secretary must offer the head of the contracting department or agency an opportunity to object in writing to debarment, and the objections must contain reasons why the contract is essential to the agency's mission. *Id.* Finally, Section 7(b) of the Executive Order prevents the imposition of debarment if the head of the contracting department or agency, or his or her designee, continues to object to it. *Id.* Proposed § 471.14(d)(3) of the rule establishes the availability of the debarment remedy. Section 471.14(f) of the proposed rule indicates that the Assistant Secretary will periodically publish and distribute the names of contractors or subcontractors that have been debarred for noncompliance.

Proposed § 471.15 permits a contractor or subcontractor to seek a hearing before the Assistant Secretary before the imposition of any of the remedies outlined above. Finally, proposed § 471.16 provides contractors or subcontractors that have been debarred under this rule an opportunity to seek reinstatement by requesting such in a letter to the Assistant Secretary. Under this proposed provision, the Assistant Secretary may reinstate the debarred contractor or subcontractor if he or she finds that the contractor or subcontractor has come into compliance with this rule and has shown that it will fully comply in the future.

As noted above, § 471.2(a) requires all nonexempt prime contractors and subcontractors to include the employee notice contract clause in each of its nonexempt subcontracts so that the obligation to notify employees of their rights is binding upon each successive subcontractor. Regarding enforcement of the requirements of the rule as to subcontractors, the Executive Order

requires the contractor to "take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance." 74 FR 6108, Sec. 2, para. 4. Accordingly, in the event that the Department determines that a subcontractor is out of compliance with the requirements of this rule regarding employee notice or inclusion of the contract clause in the subcontractor's own subcontracts, the Secretary may direct the contractor to require the noncompliant subcontractor to come into compliance. As indicated in the Executive Order, if such a directive causes the contractor to become involved in litigation with the subcontractor, the contractor may request the United States to enter the litigation in order to protect the interests of the United States. 74 FR 6108, Sec. 2, para. 4. If the contractor is unable to compel subcontractor compliance on its own accord, the compliance review, complaint, investigation, conciliation, hearing and decision procedures established in Sections 471.10 through 471.16 to assess and resolve contractor compliance with the requirements of this rule are also applicable to subcontractors. In those instances in which a contractor fails to take the action directed by the Secretary regarding a subcontractor's noncompliance, the contractor may be subject to the same enforcement and remedial procedures that apply when it is determined to be out of compliance regarding the requirements to provide employee notice or include the contract clause in its contracts. *See* § 471.13(a)(1).

Subpart C—Ancillary Matters

A number of discrete issues unconnected to the issues addressed in the two previous subparts merit attention in this proposed rule, and they are set out in this subpart. Consequently, this Subpart addresses delegations of authority within and outside the Department to administer and enforce this proposed rule, rulings under or interpretations of the Executive Order, standards prohibiting intimidation, threats, coercion or other interference with rights protected under this rule, and other provisions of the Executive Order that are included in this proposed rule. The Department invites comment on any issues addressed in this subpart.

Proposed § 471.20 implements Section 11 of the Executive Order, 74 FR 6110, which permits the delegation of the Secretary's authority under the Order to Federal agencies within or

outside the Department. Section 471.21 of the proposed rule indicates that the Assistant Secretary has authority to make rulings under or interpretations of this rule. Proposed § 471.22 seeks to prevent intimidation or interference with rights protected under this rule, so it proposes that the sanctions and penalties available for noncompliance set out in § 471.14 be available should a contractor or subcontractor fail to take all steps necessary to prevent such intimidation or interference. Activities protected by this proposed section include filing a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, a complaint investigation, hearing or any other activity related to the administration and enforcement of this rule. Finally, proposed § 471.23 implements Section 9 of the Executive Order, 74 FR 6109, which requires that contracting departments and agencies cooperate with the Secretary in carrying out her functions under the Order, and implements Section 15 of the Executive Order, 74 FR 6110, which establishes general guidelines for the Order's implementation.

IV. Regulatory Procedures

Executive Order 12866

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. 58 FR 51735, 51735–51736. The Department has determined that this rule is not an "economically significant" regulatory action under section 3(f)(1) of Executive Order 12866. 58 FR 51738. Based on the Department's analysis, including a cost impact analysis set forth more fully below with regard to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, this rule is not likely to: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or (4) raise novel legal or policy issues. 58 FR 51738. As a result, the Department has concluded that a full economic impact and cost/benefit analysis is not required for the rule under section 6(a)(3)(B) of the Executive Order. 58 FR 51741. However, because of its importance to the public,

the rule was reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies “review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].” Executive Order 13272, Sec. 1, 67 FR 53461 (“Proper Consideration of Small Entities in Agency Rulemaking”). However, an agency is relieved of the obligation to prepare an initial regulatory flexibility for a proposed rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C 605. Based on the analysis below, in which the Department has estimated the financial burdens to covered small contractors and subcontractors associated with complying with the requirements contained in this proposed rule, the Department has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this rule will not have a significant economic impact on a substantial number of small entities.

The primary goal of the Executive Order and these implementing regulations is the notification to employees of their rights with respect to collective bargaining and other protected, concerted activity. This goal is achieved through the incorporation of a contract clause in all covered Government contracts. The Executive Order and this rule impose the obligation to ensure that the contract clause is included in all Government contracts not on private contractors, but on Government contracting departments and agencies, which are not “small entities” that come within the focus of the RFA. Therefore, the costs attendant to learning of the obligation to include the contract clause in Government contracts and modifying those contracts in order to comply with that obligation is a cost borne by the Federal government, and is not incorporated into this analysis.

Once the required contract clause is included in the Government contract, contractors then begin to assume the burdens associated with compliance.

Those obligations include posting the required notice and incorporating the contract clause into all covered subcontracts, thus making the same obligations binding on covered subcontractors. For the purposes of this analysis, the Department estimates that, on average, each prime contractor will subcontract some portion of its prime contract three times, and the prime contractor therefore will expend time ensuring that the contract clause is included in its subcontracts and notifying those subcontractors of their attendant obligations. To the extent that subcontractors subcontract any part of their contract with the prime contractor, they, in turn, will be required to expend time ensuring that the contract clause is included in the next tier of subcontracts and notifying the next-tier subcontractors of their attendant obligations. Therefore, for the purpose of determining time spent on compliance, the Department will not differentiate between the obligations of prime contractors and subsequent tiers of subcontractors in assessing time spent on compliance; the Department assumes that all contractors, whether prime contractor or subcontractor, will spend equivalent amounts of time engaging in compliance activity.

The Department estimates that each contractor will spend a total of 3.5 hours per year in order to comply with this rule, which includes 90 minutes for the contractor to learn about the contract and notice requirements, train staff, and maintain records; 30 minutes for contractors to incorporate the contract clause into each subcontract and explain its contents to subcontractors; 30 minutes acquiring the notice from a government agency or Web site; and 60 minutes posting them physically and electronically, depending on where and how the contractor customarily posts notices to employees. The Department assumes that these activities will be performed by a professional or business worker, who, according to Bureau of Labor statistics data, earned a total hourly wage of \$31.02 in January, 2009, including accounting for fringe benefits. The Department then multiplied this figure by 3.5 hours to estimate the average annual costs for contractors and subcontractors to comply with this rule. Accordingly, this proposed rule is estimated to impose average annual costs of \$108.57 per contractor (3.5 hours × \$31.02). These costs will decrease in subsequent years based on a contractor’s increasing familiarity with the rule’s requirements and having already satisfied its posting requirements in earlier years.

Based upon figures obtained from USASpending.gov, which compiles information on federal spending and contractors across government agencies, the Department concludes that there were 186,536 unique Federal contractors holding Federal contracts in FY 2008.² Although this rule does not apply to Federal contracts below the simplified acquisition threshold, the Department does not have a means by which to calculate what portion of all Federal contractors hold *only* contracts with the government below the simplified acquisition threshold to which the rule would not apply in any respect. Therefore, in order to determine the number of entities affected by this rule, the Department used all Federal contractors as a basis, regardless of the size of the government contract held. Based on data analyzed in the Federal Procurement Data System (fpds.gov), which compiles data about types of contractors, of all 186,536 unique Federal prime contractors, approximately 35% are “small entities” as defined by the Small Business Administration (SBA) size standards.³

² The Federal Funding Accountability and Transparency Act of 2006, Pub.L. 109–282, (Sept. 26, 2006), requires that the Office of Management and Budget establish a single searchable Web site, accessible by the public for free, that includes for each Federal award, among other things: (1) The name of the entity receiving the award; (2) the amount of the award; (3) information on the award including transaction type, funding agency, etc.; (4) the location of the entity receiving the award; and (5) a unique identifier of the entity receiving the award. See 31 U.S.C.A. § 6101 note. In compliance with this requirement, USASpending.gov was established.

³ The Federal Procurement Data System compiles data regarding small business “actions” and small business “dollars” using the criteria employed by SBA to define “small entities.” In FY 2008, small business actions accounted for 50% of all Federal procurement action. However, deriving a percentage of contractors that are small using the “action” data would overstate the number of small contractors because contract actions reflect more than just contracts; they include modifications, blanket purchase agreement calls, task orders, and federal supply schedule orders. As a result, there are many more contract actions than there are contracts or contractors. Accordingly, a single small contractor might have hundreds of actions, *e.g.*, delivery or task orders, placed against its contract. These contract actions would be counted individually in the FPDS, but represent only one small business.

Also reflected in FPDS, in FY 2008, small business “dollars” accounted for 19% of all Federal dollars spent. However, deriving a percentage of contractors that are small using the “dollars” data would understate the number of small contractors. Major acquisitions account for a disproportionate share of the dollar amounts and are almost exclusively awarded to large businesses. For instance, Lockheed Martin was awarded \$34 billion in contracts in FY 2008, which accounted for 6% of all Federal spending in that year. The top five federal contractors, all large businesses, accounted for over 20% of contract dollars in FY 2008. As a result, because the largest Federal contractors disproportionately represent “dollars” spent by the

Therefore, for the purposes of the RFA analysis, the Department estimates that this rule will affect 65,288 small Federal prime contractors.

As noted above, for the purposes of this analysis, the Department estimates that each prime contractor subcontracts a portion of the prime contract three times, on average. However, the community of prime contractors does not utilize a unique subcontractor for each subcontract; the Department assumes that subcontractors may be working under several prime contracts for either a single prime contractor or multiple prime contractors, or both. In addition, some subcontractors may also be holding prime contracts with the government, so they may already be counted as affected entities. Therefore, in order to determine the unique number of subcontractors affected by this rule, the Department estimates there are the same number of unique subcontractors as prime contractors, resulting in the estimate that 186,536 subcontractors are affected by this rule. Further, for the purposes of this analysis, the Department assumes that all subcontractors are "small entities" as defined by SBA size standards. Therefore, in order to estimate the total number of "small" contractors affected by this rule, the Department has added together the estimates for the number of small prime contractors calculated above (65,288) with the estimate of all subcontractors (186,536), all of which we assume are small. Accordingly, the Department estimates that 251,824 small prime and subcontractors are affected by this rule.

Based on this analysis, the Department concludes that this proposed rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act does not define either "significant economic impact" or "substantial" as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, "what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact." See A

Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, Office of Advocacy, U.S. Small Business Administration at 17, available at <http://www.sba.gov>. As to economic impact, one important indicator is the cost of compliance in relation to revenue of the entity or the percentage of profits affected. *Id.* In this case, the Department has determined that the average cost of compliance with this rule in the first year for all Federal contractors and subcontractors will be \$108.57. The Department concludes that this economic impact is not significant. Furthermore, the Department has determined that of the entire regulated community of all 186,536 prime contractors and all 186,536 subcontractors, 67% percent of that regulated community constitute small entities (251,824 small contractors divided by all 373,072 contractors). Although this figure represents a substantial number of federal contractors and subcontractors, because Federal contractors are derived from virtually all segments of the economy and across industries, this figure is a small portion of the national economy overall. *Id.* at 20 ("the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall"). Accordingly, the Department concludes that the rule does not impact a substantial number of small entities in a particular industry or segment of the economy. Therefore, under 5 U.S.C. 605, the Department concludes that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform

For purposes of the Unfunded Mandates Reform Act of 1995, this proposed rule would not include any Federal mandate that might result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than \$100 million in any one year.

Paperwork Reduction Act

Certain sections of this proposed rule, including § 471.11(a) and (b), contain information collection requirements for purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA). As required by the PRA, the Department has submitted a copy of these sections to OMB for its review.

The proposed rule requires contractors to post notices and cooperate with any investigation into a failure to comply with the requirements of part 471 as the result of a complaint

or a compliance evaluation. It also permits employees to file complaints with the Department alleging that a contractor has failed to comply with those requirements. The application of the PRA to those requirements is discussed below.

The proposed rule imposes certain minimal burdens associated with the posting of the employee notice poster required by the Executive Order and § 471.2(a). As noted in § 471.2(e), the Department will supply the notice, and contractors will be permitted to post exact duplicate copies of the notice. Under the regulations implementing the PRA, "[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public" is not considered a "collection of information" under the Act. See 5 CFR 1320.3(c)(2). Therefore, the posting requirement is not subject to the PRA.

The proposed rule would also impose certain burdens on the contractor associated with cooperating with an investigation into failure to comply with the requirements of part 471 as the result of a complaint or in connection with a compliance evaluation. The regulations implementing the PRA exempt any information collection requirements imposed by an administrative agency during the conduct of an administrative action against specific individuals or entities. See 5 CFR 1320.4. Once the agency opens a case file or equivalent about a particular party, this exception applies during the entire course of the investigation, before or after formal charges or complaints are filed or formal administrative action is initiated. *Id.* Therefore, this exemption would apply to the Department's investigation of complaints alleging violations of the Order or this proposed rule as well as compliance evaluations.

As for the burden hour estimate for employees filing complaints, we estimate, based on the experience of the Office of Federal Contract Compliance Programs (OFCCP) administering other laws applicable to Federal contractors, that it will take an average of 1.28 hours for such a complainant to compose a complaint containing the necessary information and to send that complaint to the Department. This number is also consistent with the burden estimate for filing a complaint under E.O. 13201 and the now-revoked part 470 regulations.

The Department has estimated it would receive a total of 50 employee complaints in any given year, which is significantly larger than the estimate contained its most recent PRA submission for E.O. 13201. In that

Federal government, the FPDB's data on small "dollars" spent understates the number of small entities with which the Federal government does business.

The Department concludes that the percentage of all Federal contractors that are "small" is probably somewhere between 19% and 50%, the two percentages derived from the FPDS figures on small "actions" and small "dollars." The mean of these two percentages is approximately 35%, and the Department will use this figure above to estimate how many of all Federal contractors are "small entities" in SBA's terms.

submission, the Department estimated it would receive 20 employee complaints. This number itself had been revised downwards because the Department never received any employee complaints pursuant to the now-revoked 29 CFR part 470 regulations. Because the applicability of the proposed rule and E.O. 13496 is greater in scope than the now-revoked part 470 and E.O. 13201 in terms of geography (the now-revoked part 470 regulations only applied to states without right-to-work laws, whereas the proposed rule applies nationwide), the Department has revised upwards its estimate of employee complaints under the proposed rule from 20 to 50. In addition, E.O. 13201 required the posting of a notice containing information of interest to only a few—employees who may have objected to paying union dues or fees for non-representational activities—while the information in the poster required by this regulation should be of interest to all employees.

The Department calculated the estimates of annualized cost to respondents for the hour burdens associated with this collection of information. Specifically, it used the data from the Bureau of Labor Statistics (BLS) National Compensation Survey: Occupation Wages in the United States (NCS), 2007 (Bulletin 2704), to calculate the cost of the burden hours associated with employee complaints. The NCS Bulletin indicates that the average hourly wage for all workers during 2007, the most recent year available, was \$19.88 per hour. Therefore, we estimate that the cost to a complainant of filing a complaint under E.O. 13496 will be \$25.92, or \$25.45 (\$19.88 × 1.28) + \$0.47 for postage and envelope (\$0.44 postage and \$0.03 for the envelope). We further estimate, as stated above, that 50 individual complaints will be filed each year. Therefore, we project that this collection of information will impose on employees who file complaints a total annual cost burden of \$1,296.00 (\$25.92 per complaint × 50 complaints).

Proposed § 471.3(b) permits contracting departments to submit written requests for an exemption from the obligations of the Executive Order (waiver request) as to particular contracts or classes of contracts under specified circumstance. The PRA does not cover the costs to the Federal government for the submission of waiver requests by contracting agencies or departments or for the processing of waiver requests by the Department of Labor. The regulations implementing the PRA define the term “burden,” in pertinent part, as “the total time, effort, or financial resources expended by

persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.” 5 CFR 1320.3(b)(1). The definition of the term “person” in the same regulations includes “an individual, partnership, association, corporation (including operations of government-owned contractor-operated facilities), business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or a political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision.” 5 CFR 1320.3(k). It does not include the Federal government or any branch, political subdivision, or employee thereof. Therefore, the cost to the Federal government for the submission of waiver requests by contracting agencies and departments need not be taken into consideration.

The Department invites the public to comment on whether each of the proposed collections of information: (1) Ensures that the collection of information is necessary to the proper performance of the agency, including whether the information will have practical utility; (2) estimates the projected burden, including the validity of the methodology and assumptions used, accurately; (3) enhances the quality, utility, and clarity of the information to be collected; and (4) minimizes the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses). Comments must be submitted by September 2, 2009 to: Desk Officer for the Department of Labor, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503.

Executive Order 13132 (Federalism)

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that the proposed rule does not have “federalism implications.” The employee notice required by the Executive Order and part 471 must be posted only by employers covered under the NLRA. Therefore, the proposed rule does not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

Executive Order 13084 (Consultation and Coordination With Indian Tribal Governments)

The Department certifies that this Proposed Rule does not impose substantial direct compliance costs on Indian tribal governments.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Request for Comments

This proposed rule would implement Executive Order 13496. The Department invites comments about the NPRM from interested parties, including current and potential Government contractors, subcontractors, and vendors, and current and potential employees of such entities; labor organizations; public interest groups; Federal contracting agencies; and the public.

List of Subjects in 29 CFR Part 471

Administrative practice and procedure, Government contracts, employee rights, Labor unions.

Text of Proposed Rule

Accordingly, a new Subchapter D, consisting of Part 471, is proposed to be added to 29 CFR Chapter IV to read as follows:

Subchapter D. Notification of Employee Rights Under Federal Labor Laws

PART 471—OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS; NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Sec.

- 471.1 What definitions apply to this part?
 - 471.2 What employee notice clause must be included in Government contracts?
 - 471.3 What exceptions apply and what exemptions are available?
 - 471.4 What employers are not covered under the rule?
- Appendix A to Subpart A of Part 471—Text of Employee Notice Clause

Appendix B to Subpart A of Part 471—
Electronic Link Language

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

- 471.10 How will the Department determine whether a contractor is in compliance with Executive Order 13496 and this part?
- 471.11 What are the procedures for filing and processing a complaint?
- 471.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?
- 471.13 Under what circumstances, and how, will enforcement proceedings under Executive Order 13496 be conducted?
- 471.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?
- 471.15 Under what circumstances must a contractor be provided the opportunity for a hearing?
- 471.16 Under what circumstances may a contractor be reinstated?

Subpart C—Ancillary Matters

- 471.20 What authority under this part or Executive Order 13496 may the Secretary delegate, and under what circumstances?
- 471.21 Who will make rulings and interpretations under Executive Order 13496 and this part?
- 471.22 What actions may the Assistant Secretary take in the case of intimidation and interference?
- 471.23 What other provisions apply to this part?

Authority: 40 U.S.C. 101 *et seq.*; Executive Order 13496, 74 FR 6107 (February 4, 2009); Secretary's Order 01-2008, 73 FR 32424 (June 6, 2008).

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

§ 471.1 What definitions apply to this part?

Assistant Secretary means the Assistant Secretary for Employment Standards, United States Department of Labor, or his or her designee.

Collective bargaining agreement means an agreement, as defined in the Federal Service Labor-Management Relations Statute, entered into by an agency and the exclusive representative of employees in an appropriate unit to set terms and conditions of employment of those employees.

Construction means the construction, rehabilitation, alteration, conversion, extension, demolition, weatherization, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term construction

also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

Construction work site means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair, and any temporary location or facility at which a contractor or subcontractor meets a demand or performs a function relating to the contract or subcontract.

Contract means, unless otherwise indicated, any Government contract or subcontract.

Contracting agency means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, that enters into contracts.

Contractor means, unless otherwise indicated, a prime contractor or subcontractor.

Department means the U.S. Department of Labor.

Employee notice clause means the contract clause that Government contracting departments and agencies must include in all Government contracts and subcontracts pursuant to Executive Order 13496 and this part.

Government means the Government of the United States of America.

Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale, or use of personal property or non-personal services. The term "personal property," as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term "non-personal services" as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term Government contract does not include:

(1) Agreements in which the parties stand in the relationship of employer and employee; and

(2) Federal financial assistance, as defined in 29 CFR 31.2.

Labor organization means any organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

Modification of a contract means any alteration in the terms and conditions of that contract, including amendments, renegotiations, and renewals.

Order or Executive Order means Executive Order 13496 (74 FR 6107, January 30, 2009).

Person means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

Prime contractor means any person holding a contract with a contracting agency, and, for the purposes of subparts B and C of this part, includes any person who has held a contract subject to the Executive Order and this part.

Related rules, regulations, and orders of the Secretary of Labor, as used in § 471.2 of this part, means rules, regulations, and relevant orders of the Assistant Secretary for Employment Standards, or his or her designee, issued pursuant to the Executive Order or this part.

Secretary means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

Simplified acquisition threshold means the dollar amount set by Congress under the Office of Federal Policy Procurement Act. As indicated in this Part, government contracts valued below the dollar amount set in the Simplified Acquisition Threshold are not subject to this Part.

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or non-personal services that, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

Subcontractor means any person holding a subcontract and, for the purposes of subparts B and C of this part, any person who has held a subcontract subject to the Executive Order and this part.

Union means a labor organization as defined in paragraph (k) of this section.

United States, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

§ 471.2 What employee notice clause must be included in Government contracts?

(a) *Government contracts.* With respect to all contracts covered by this part, Government contracting departments and agencies shall, to the extent consistent with law, include the language set forth in Appendix A to Subpart A of Part 471 in every Government contract, other than collective bargaining agreements as defined in § 471.1 and purchase orders under the simplified acquisition threshold as defined in § 471.1.

(b) *Inclusion by reference not permitted.* The employee notice clause must be quoted verbatim in a contract, subcontract, or purchase order. The clause may not be made part of the contract, subcontract, or purchase order by words of incorporation or inclusion.

(c) *Adaptation of language.* Whenever the Assistant Secretary finds that an Act of Congress, clarification of existing law by the courts or the National Labor Relations Board, or other circumstances make modification of the contractual provisions necessary to achieve the purposes of Executive Order 13496 and this part, the Assistant Secretary promptly shall issue such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government contracts thereafter entered into.

(d) *Obtaining employee notice poster.* The required employee notice poster, printed by the Department, will be provided by the Federal contracting agency or may be obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5609, Washington, DC 20210, or from any field office of the Department's Office of Labor-Management Standards or Office of Federal Contract Compliance Programs. A copy of the poster may also be downloaded from the Office of Labor-Management Standards Web site at <http://www.olms.dol.gov>. Additionally, contractors may reproduce and use exact duplicate copies of the Department's official poster.

(e) *Electronic postings of employee notice poster.* A contractor or subcontractor that customarily posts notices to employees electronically must also post the required notice electronically. Such contractors or subcontractors satisfy the electronic posting requirement by displaying prominently on any Web site that is maintained by the contractor or subcontractor and customarily used for employee notices, whether external or

internal, a link to the Department of Labor's Web site that contains the full text of the poster. The language that must constitute the link is contained in Appendix B to Subpart A to Part 471.

§ 471.3 What exceptions apply and what exemptions are available?

(a) *Exceptions for specific types of contracts.* The requirements of this part do not apply to

(1) Collective bargaining agreements as defined in § 471.1.

(2) Government contracts that involve purchases below the simplified acquisition threshold as defined in § 471.1. Therefore, the employee notice clause need not be included in contracts for purchases below that threshold, provided that:

(i) No agency or contractor is permitted to procure supplies or services in a way designed to avoid the applicability of the Order and this part; and

(ii) The employee notice clause must be included in contracts and subcontracts for indefinite quantities, unless the contracting agency or contractor has reason to believe that the amount to be ordered in any year under such a contract or subcontract will be less than the simplified acquisition threshold.

(3) Government contracts resulting from solicitations issued prior to the date of the effective date of this rule.

(b) *Exemptions for certain contracts.* The Deputy Assistant Secretary for Labor-Management Programs may exempt a contracting agency department or agency or groups of departments or agencies from the requirements of this part with respect to a particular contract or subcontract or any class of contracts or subcontracts when the Deputy Assistant Secretary finds that:

(1) The application of any of the requirements of this part would not serve its purposes or would impair the ability of the Government to procure goods or services on an economical and efficient basis; or

(2) Special circumstances require an exemption in order to serve the national interest.

(c) *Procedures for requesting an exemption and withdrawals of exemptions.* Requests for exemptions under this subsection from an agency or department must be in writing, and must be directed to the Deputy Assistant Secretary for Labor-Management Programs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5603, Washington, DC 20210. The Deputy Assistant Secretary for Labor-Management Programs may withdraw an exemption granted under this section

when, in the Deputy Assistant Secretary's judgment, such action is necessary or appropriate to achieve the purposes of this part.

§ 471.4 What employers are not covered under this part?

(a) The following employers are excluded from the definition of "employer" in the National Labor Relations Act (NLRA), and are not covered by the requirements of this part:

(1) The United States or any wholly owned Government corporation;

(2) Or any Federal Reserve Bank;

(3) Or any State or political subdivision thereof, or any person subject to the Railway Labor Act;

(4) Or any labor organization (other than when acting as an employer);

(5) Or anyone acting in the capacity of officer or agent of such labor organization.

(b) Additionally, employers exclusively employing workers who are excluded from the definition of "employee" under the NLRA are not covered by the requirements of this part. Those excluded employees are employed:

(1) As agricultural laborers;

(2) In the domestic service of any family or person at his home;

(3) By his parent or spouse;

(4) As an independent contractor;

(5) As a supervisor as defined under the NLRA; or

(6) By an employer subject to the Railway Labor Act.

Appendix A to Subpart A of Part 471—Text of Employee Notice Clause

"1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The "Secretary's Notice" shall include the following information:

"NOTICE TO EMPLOYEES**RIGHTS OF EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT**

"It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.

"Under federal law, you have the right to:

Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

Form, join or assist a union.

Bargain collectively through a duly selected union for a contract with your employer setting your wages, benefits, hours, and other working conditions.

Discuss your terms and conditions of employment with your co-workers or a union; join other workers in raising work-related complaints with your employer, government agencies, or members of the public; and seek and receive help from a union subject to certain limitations.

Take action with one or more co-workers to improve your working conditions, including attending rallies on non-work time, and leafleting on non-work time in non-work areas.

Strike and picket, unless your union has agreed to a no-strike clause and subject to certain other limitations. In some circumstances, your employer may permanently replace strikers.

Choose not to do any of these activities, including joining or remaining a member of a union.

"It is illegal for your employer to:

Prohibit you from soliciting for the union during non-work time or distributing union literature during non-work time, in non-work areas.

Question you about your union support or activities.

Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in other activity for mutual aid and protection, or because you choose not to engage in any such activity.

Threaten to close your workplace if workers choose a union to represent them.

Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances, for example, as where doing so might interfere with patient care.

Spy on or videotape peaceful union activities and gatherings or pretend to do so.

It is illegal for a union or for the union that represents you in bargaining with your employer to: discriminate or take other adverse action against you based on whether you have joined or support the union.

"If your rights are violated:

Illegal conduct will not be permitted. The National Labor Relations Board (NLRB), an agency of the United States government, will protect your right to a free choice concerning union representation and collective bargaining and will prosecute violators of the National Labor Relations Act. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits and may order an employer or union to cease violating the law. The NLRB can only act, however, if it receives information of unlawful behavior within six months.

"If you believe your rights or the rights of others have been violated, you must contact the NLRB within six months of the unlawful treatment. Employees should seek assistance

from the nearest regional NLRB office, which can be found on the Agency's Web site: <http://www.nlrb.gov>.

"Click on the NLRB's page titled About Us, which contains a link, Locating Our Offices. You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

"This is an official Government Notice and must not be defaced by anyone.

"2. The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor.

"3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order 13496 of January 30, 2009. Such other sanctions or remedies may be imposed as are provided in Executive Order 13496 of January 30, 2009, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

"4. The contractor will include the provisions of paragraphs (1) through (4) herein in every subcontract or purchase order entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13496 of January 30, 2009, so that such provisions will be binding upon each subcontractor. The contractor will take such action with respect to any such subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: Provided, however, if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Appendix B to Subpart A of Part 471—Electronic Link Language

RIGHTS OF EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT

"It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection."

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

§ 471.10 How will the Department determine whether a contractor is in compliance with Executive Order 13496 and this part?

(a) The Deputy Assistant Secretary for Federal Contract Compliance may conduct a compliance evaluation to

determine whether a contractor holding a covered contract is in compliance with the requirements of this part. Such an evaluation may be limited to compliance with this part or may be included in a compliance evaluation conducted under other laws, Executive Orders, and/or regulations enforced by the Department.

(b) During such an evaluation, a determination will be made whether:

(1) The employee notice required by § 471.2(a) is posted in conspicuous places in and about each of the contractor's establishments and/or construction work sites, including all places where notices to employees are customarily posted both physically and electronically; and

(2) The provisions of the employee notice clause are included in government contracts, subcontracts or purchase orders entered into on or after [THE EFFECTIVE DATE OF FINAL RULE], or that the government contracts, subcontracts or purchase orders have been exempted under § 471.3(b).

(c) The results of the evaluation will be documented in the evaluation record, which will include findings regarding the contractor's compliance with the requirements of Executive Order 13496 and this part and, as applicable, conciliation efforts made, corrective action taken and/or enforcement recommended under § 471.13.

§ 471.11 What are the procedures for filing and processing a complaint?

(a) *Filing complaints.* An employee of a covered contractor may file a complaint alleging that the contractor has failed to post the employee notice as required by Executive Order 13496 and this part; and/or has failed to include the employee notice clause in subcontracts or purchase orders. Complaints may be filed with the Office of Labor-Management Standards (OLMS) or the Office of Federal Contract Compliance Programs (OFCCP) at 200 Constitution Avenue, NW., Washington, DC 20210, or with any OLMS or OFCCP field office.

(b) *Contents of complaints.* The complaint must be in writing and must include the name, address, and telephone number of the employee who filed the complaint (the complainant), the name and address of the contractor alleged to have violated Executive Order 13496 and this part, an identification of the alleged violation and the establishment or construction work site where it is alleged to have occurred, and any other pertinent information that will assist in the investigation and

resolution of the complaint. The complainant must sign the complaint.

(c) *Complaint investigations.* In investigating complaints filed with the Department under paragraph (a) of this section, the Deputy Assistant Secretary for Federal Contract Compliance will evaluate the allegations of the complaint and develop a case record. The record will include findings regarding the contractor's compliance with the requirements of Executive Order 13496 and this part, and, as applicable, a description of conciliation efforts made, corrective action taken, and/or enforcement recommended.

§ 471.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?

(a) If any complaint investigation or compliance evaluation indicates a violation of Executive Order 13496 or this part, the Deputy Assistant Secretary for Federal Contract Compliance will make reasonable efforts to secure compliance through conciliation.

(b) The contractor must correct the violation found by the Department (for example, by posting the required employee notice, and/or by amending its subcontracts or purchase orders with subcontractors to include the employee notice clause), and must commit, in writing, not to repeat the violation, before the contractor may be found to be in compliance with Executive Order 13496 or this part.

(c) If a violation cannot be resolved through conciliation efforts, the Deputy Assistant Secretary for Federal Contract Compliance will refer the matter to the Deputy Assistant Secretary for Labor-Management Programs, who may proceed in accordance with § 471.13.

(d) For reasonable cause shown, the Deputy Assistant Secretary for Labor-Management Programs may reconsider, or cause to be reconsidered, any matter on his or her own motion or pursuant to a request.

§ 471.13 Under what circumstances, and how, will enforcement proceedings under Executive Order 13496 be conducted?

(a) *General.* (1) Violations of Executive Order 13496 and this part may result in administrative proceedings to enforce the Order and the part. The bases for a finding of a violation may include, but are not limited to:

- (i) The results of a compliance evaluation;
- (ii) The results of a complaint investigation;
- (iii) A contractor's refusal to allow a compliance evaluation or complaint investigation to be conducted; or

(iv) A contractor's refusal to cooperate with the compliance evaluation or complaint investigation, including failure to provide information sought during those procedures.

(v) A contractor's refusal to take such action with respect to a subcontract as is directed by the Deputy Assistant Secretary for Federal Contract Compliance or the Deputy Assistant Secretary for Labor-Management as a means of enforcing compliance with the provision of this part.

(vi) A subcontractor's refusal to adhere to the requirements of this part regarding employee notice or inclusion of the contract clause in its subcontracts.

(2) If a determination is made by the Deputy Assistant Secretary for Federal Contract Compliance that the Executive Order or the regulations in this part have been violated, and the violation has not been corrected through conciliation, he will refer the matter to the Deputy Assistant Secretary for Labor-Management Programs for enforcement consideration. The Deputy Assistant Secretary for Labor-Management Programs may refer the matter to the Solicitor of Labor for institution of administrative enforcement proceedings.

(b) *Administrative enforcement proceedings.* (1) Administrative enforcement proceedings will be conducted under the control and supervision of the Solicitor of Labor, under the hearing procedures set forth in 29 CFR part 18, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.

(2) The administrative law judge will certify his or her recommended decision issued pursuant to 29 CFR 18.57 to the Assistant Secretary. The decision will be served on all parties and amici.

(3) Within 25 days (10 days in the event that the proceeding is expedited) after receipt of the administrative law judge's recommended decision, either party may file exceptions to the decision. Exceptions may be responded to by the other parties within 25 days (7 days if the proceeding is expedited) after receipt. All exceptions and responses must be filed with the Assistant Secretary.

(4) After the expiration of time for filing exceptions, the Assistant Secretary may issue a final administrative order, or may make such other disposition of the matter as he or she finds appropriate. In an expedited proceeding, unless the Assistant Secretary issues a final administrative order within 30 days after the expiration of time for filing exceptions, the

administrative law judge's recommended decision will become the final administrative order. If the Assistant Secretary determines that the contractor has violated Executive Order 13496 or the regulations in this part, the final administrative order will order the contractor to cease and desist from the violations, require the contractor to provide appropriate remedies, or, subject to the procedures in § 471.14, impose appropriate sanctions and penalties, or any combination thereof.

§ 471.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?

(a) After a final decision on the merits has been issued and before imposing the sanctions and penalties described in paragraph (d) of this section, the Assistant Secretary will consult with the affected contracting agencies, and provide the heads of those agencies the opportunity to respond and provide written objections.

(b) If the contracting agency provides written objections, those objections must include a complete statement of reasons for the objections, among which reasons must be a finding that, as applicable, the completion of the contract, or further contracts or extensions or modifications of existing contracts, is essential to the agency's mission.

(c) The sanctions and penalties described in this section, however, will not be imposed if:

(1) The head of the contracting agency, or his or her designee, continues to object to the imposition of such sanctions and penalties, or

(2) The contractor has not been afforded an opportunity for a hearing.

(d) In enforcing Executive Order 13496 and this part, the Assistant Secretary may:

(1) Direct a contracting agency to cancel, terminate, suspend, or cause to be canceled, terminated or suspended, any contract or any portions thereof, for failure of the contractor to comply with its contractual provisions as required by section 7(a) of Executive Order 13496 and the regulations in this part. Contracts may be canceled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon compliance.

(2) Issue an order of debarment under section 7(b) of Executive Order 13496 providing that one or more contracting agencies must refrain from entering into further contracts, or extensions or other modification of existing contracts, with any non-complying contractor.

(3) Issue an order of debarment under section 7(b) of Executive Order 13496

providing that no contracting agency may enter into a contract with any non-complying subcontractor.

(e) Whenever the Assistant Secretary has exercised his or her authority pursuant to paragraph (d) of this section, the contracting agency must report the actions it has taken to the Assistant Secretary within such time as the Assistant Secretary will specify.

(f) Periodically, the Assistant Secretary will publish and distribute, or cause to be published and distributed, to all executive agencies a list of the names of contractors and subcontractors that have, in the judgment of the Assistant Secretary under § 471.13(b)(4) of this part, failed to comply with the provisions of the Executive Order and this part, or of related rules, regulations, and orders of the Secretary of Labor, and as a result have been declared ineligible for future contracts or subcontracts under the Executive Order and the regulations in this part.

§ 471.15 Under what circumstances must a contractor be provided the opportunity for a hearing?

Before the Assistant Secretary takes the following action, a contractor or subcontractor must be given the opportunity for a hearing before the Assistant Secretary:

(a) Issues an order for cancellation, termination, or suspension of any contract or debarment of any contractor from further Government contracts under sections 7(a) or (b) of Executive Order 13496 and § 471.14(d)(1) or (2) of this part; or

(b) Includes the contractor on a published list of non-complying contractors under section 7(c) of Executive Order 13496 and § 471.14(f) of this part.

§ 471.16 Under what circumstances may a contractor be reinstated?

Any contractor or subcontractor debarred from or declared ineligible for further contracts or subcontracts under Executive Order 13496 and this part may request reinstatement in a letter to the Assistant Secretary. If the Assistant Secretary finds that the contractor or subcontractor has come into compliance

with Executive Order 13496 and this part and has shown that it will carry out Executive Order 13496 and this part, the contractor or subcontractor may be reinstated.

Subpart C—Ancillary Matters

§ 471.20 What authority under this part or Executive Order 13496 may the Secretary delegate, and under what circumstances?

Section 11 of Executive Order 13496 grants the Secretary the right to delegate any of his/her functions or duties under the Order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

§ 471.21 Who will make rulings and interpretations under Executive Order 13496 and this part?

Rulings under or interpretations of Executive Order 13496 or the regulations contained in this part will be made by the Assistant Secretary or his or her designee.

§ 471.22 What actions may the Assistant Secretary take in the case of intimidation and interference?

The sanctions and penalties contained in § 471.14 of this part may be exercised by the Assistant Secretary against any contractor or subcontractor who fails to take all necessary steps to ensure that no person intimidates, threatens, or coerces any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, complaint investigation, hearing, or any other activity related to the administration or enforcement of Executive Order 13496 or this part.

§ 471.23 What other provisions apply to this part?

(a) The regulations in this part implement Executive Order 13496 only, and do not modify or affect the interpretation of any other Department of Labor regulations or policy.

(b) Consistent with section 9 of Executive Order 13496, each contracting

department and agency must cooperate with the Assistant Secretary, the Deputy Assistant Secretary for Labor-Management Programs, and/or the Deputy Assistant Secretary for Federal Contract Compliance, and must provide such information and assistance as the Assistant Secretary or Deputy Assistant Secretary may require, in the performance of his or her functions under the Executive Order and the regulations in this part.

(c)(1) Consistent with section 15 of Executive Order 13496, nothing in this subpart shall be construed to impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) Consistent with section 15 of Executive Order 13496, nothing contained in the Executive Order or this part, or promulgated pursuant to Executive Order 13496 or this part, is intended to create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Neither Executive Order 13496 nor this part creates any such right or benefit.

Signed in Washington, DC, July 20, 2009.

Shelby Hallmark,

Acting Assistant Secretary for Employment Standards.

John Lund,

Deputy Assistant Secretary, Office of Labor-Management Standards.

Lorenzo D. Harrison,

Director, Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs.

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