

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2018–0001, Sequence No. 6]

Federal Acquisition Regulation; Federal Acquisition Circular 2019–01; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of a final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2019–01. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the internet at <http://www.regulations.gov>.

DATES: For effective date see the separate document, which follows.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia Davis, Procurement Analyst, at 202–219–0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2019–01, FAR case 2015–017.

RULE LISTED IN FAC 2019–01

Subject	FAR case	Analyst
Combating Trafficking in Persons—Definition of “Recruitment Fees”	2015–017	Davis.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR Case, refer to the specific item number and subject set forth in the document following this item summary. FAC 2019–01 amends the FAR as follows:

Combating Trafficking in Persons—Definition of “Recruitment Fees” (FAR Case 2015–017)

This final rule amends the Federal Acquisition Regulation (FAR) to provide a definition of “recruitment fees” in FAR subpart 22.17 and the associated clause at FAR 52.222–50 to further implement the FAR policy on combating trafficking in persons. One element in combating trafficking in persons is to prohibit contractors from charging employees or potential employees recruitment fees.

This final rule will not have a significant economic impact on a substantial number of small entities.

Federal Acquisition Circular (FAC) 2019–01 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2019–01 is effective December 20, 2018 except for FAR Case 2015–017, which is effective January 22, 2019.

Dated: December 10, 2018.
William F. Clark,
Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Dated: December 14, 2018.
Kim Herrington,
Acting Principal Director, Defense Pricing and Contracting.

Dated: December 11, 2018.
Jeffrey A. Koses,
Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: December 13, 2018.
William G. Roets, II,
Acting Assistant Administrator, Office of Procurement National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22 and 52

[FAC 2019–01; FAR Case 2015–017; Docket No. 2015–0017; Sequence No. 1]

RIN 9000–AN02

Federal Acquisition Regulation; Combating Trafficking in Persons—Definition of “Recruitment Fees”

AGENCY: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to provide a definition of “recruitment fees” to further implement the FAR policy on combating trafficking in persons. One element in combating trafficking in persons is to prohibit contractors from charging employees recruitment fees.

DATES: *Effective Date:* January 22, 2019.
FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202–219–0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2019–01, FAR Case 2015–017.

SUPPLEMENTARY INFORMATION:

I. Background

This rulemaking is intended to clarify the prohibition on the charging of recruitment fees set forth in FAR subpart 22.17 and clause 52.222–50. This regulatory language reflects a final rule published by DoD, GSA, and NASA on January 29, 2015 (FAR Case 2013–001, 80 FR 4967) to implement Executive Order (E.O.) 13627, entitled “Strengthening Protections Against Trafficking in Persons in Federal Contracts,” and title XVII of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, entitled “Ending Trafficking in Government Contracting.” Pursuant to FAR 22.1703(a) and 52.222–50(b),

which became effective on March 2, 2015, contractors, contractor employees, subcontractors, subcontractor employees, and their agents are prohibited from charging employees recruitment fees. This second rulemaking is meant to clarify the prohibition in the 2015 rule by defining “recruitment fees” for purposes of the prohibition (e.g., fees for processing applications, fees for acquiring visas).

Prior to the publication of the 2015 rule, in November 2014, the Government Accountability Office (GAO) issued report GAO-15-102, which recommended that agencies “develop a more precise definition of recruitment fees.” The GAO explained that without a clear definition, agencies would face challenges enforcing the prohibition. The Senior Policy Operating Group for Combating Trafficking In Persons (established under the President’s Interagency Task Force for Monitoring and Combatting Trafficking in Persons) agreed with the GAO’s conclusion and requested that the Federal Acquisition Regulatory Council (FAR Council) consider developing a definition for the term “recruitment fees” to create consistency and certainty for contracting parties. In response, the FAR Council published an early engagement opportunity on a draft definition on the Defense Acquisition Regulations System’s website, with interested parties encouraged to submit feedback through March 2015. The original posting and results are currently available at: https://www.acq.osd.mil/dpap/dars/archive/2015/early_engagement_opportunity_2015.html. After review of the comments, DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 81 FR 29244 on May 11, 2016, to provide a definition of “recruitment fees” in FAR subpart 22.17 Combating Trafficking in Persons, and the associated clause at FAR 52.222-50, Combating Trafficking in Persons. The objective of the proposed rule, and this final rule, is to identify the types of charges and fees that contractors, subcontractors, and their employees or agents are prohibited from charging to employees or potential employees, under the Government policy on combating trafficking in persons. Additionally, the rule enables clarity and consistency in the application and enforcement of the prohibition. Twenty-eight respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils)

reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

The following significant changes from the proposed rule were made in the final rule as a result of the comments received.

Definition. For ease of reading and clarification, the wording and paragraphs in the definition are restructured. In addition—

- In the introductory text of the definition, the phrase “regardless of the manner” of imposition or collection of the fee has been expanded to “regardless of the time, manner, or location.”
- Several additional illustrative examples of prohibited fees have been added to the definition for clarification, e.g., fees associated with obtaining permanent or temporary labor certification; processing of applications; immigration documents such as passports; government-mandated levies such as border crossing fees or worker welfare funds; transportation and subsistence costs while in transit or from the airport or disembarkation point to the worksite; security deposits, bonds, and insurance; or equipment charges.
- The second paragraph of the definition clarifies that a recruitment fee is still a recruitment fee regardless of whether collected by an employee or a third party, whether licensed or unlicensed, including labor brokers.

B. Analysis of Public Comments

1. Scope of the Definition “Recruitment Fees”

Comment: Many respondents indicated they agreed with the scope of the proposed definition of “recruitment fees.”

Response: Noted.

a. Too Narrow

Comment: Many respondents indicated the definition of “recruitment fees” was too narrow and should be expanded to be sufficiently broad to encompass anything of value. One respondent warned against a definition that would give recruiting parties the ability to define or “reallocate” fee elements of the recruiting process outside of the definition. Many respondents stated it was extremely important not to cordon off some fees from recruitment fees, because any “cordoned fees” would fall outside of enforcement. These respondents believed that all costs and fees associated with bringing an employee on board should be treated as recruitment fees. Many respondents also

expressed concern that the definition may not be broad enough to cover “all costs of bringing an employee on board” if that prospective employee lived in a rural area, far from the city center where job applications, passports, and visas are processed.

Response: This category of comments is addressed in the responses to the more specific categories of comments on this rule.

b. Too Broad

Comment: Many respondents stated the proposed definition was too broad. These respondents thought that the proposed definition improperly classified costs associated with valid preconditions or prequalifications as recruitment fees. One respondent thought that the definition implied that it was not permitted for employers to require proof of identification, because proof of identification can cost money to obtain. Three respondents stated the purpose of the rule was to distinguish misleading and fraudulent behavior designed to elicit fees illegally from those actions that may be part of the ethical hiring practices. Several respondents asked that the proposed definitions be modified to reflect fraudulent or misleading conduct of recruiters. Two respondents stated not all costs and fees associated with hiring an employee should be treated as recruitment fees since companies have legitimate business interests in identifying and hiring qualified candidates. Another respondent indicated there were legitimate costs any individual should bear when they presented themselves at the factory door for employment and other de minimis costs, such as a bus fare to work which employees properly bear. One respondent stated it was inappropriate for liability to attach along every link in the labor recruitment chain, regardless of intent, knowledge, or ability to prevent the conduct in question, because of the potentially severe penalties that could be imposed.

Response: This category of comments is addressed in the responses to the more specific categories of comments on this rule.

2. General Elements of the Definition

a. Introductory Text

i. Use of the Phrase “Include, But Are Not Limited To”

Comment: One respondent cautioned against any approach that is restricted to enumerating the various costs that could fall under the definition of “recruitment fees.” As such, any enumerated list should begin with the phrase

“recruitment fees include, but are not limited to.” However, another respondent recommended striking out “not limited to” and adding “any” as this language could encompass very small cost items and incidentals that should not be included in the definition due to the cost to track.

Response: The phrase “include, but are not limited to” has been relocated and serves as the introduction to a list of examples of recruitment fees, in paragraph (1) of the definition. These revisions to the definition clarify the term “recruitment fees” and prevent it from being overly broad. The definition has been revised to make clear that it comprises a broad principle, and then provides illustrative examples of recruitment fees in paragraph (1) of the definition. The examples are meant to be helpful, but are not intended to be exhaustive or capture every possible example of a recruitment fee. Therefore, if a fee is associated with the recruiting process, but is not listed in the example, it would still be captured by the standard in the rule.

ii. Potential Employees

Comment: Many respondents concurred with the inclusion of fees charged to potential employees, because they thought that the practice of charging workers recruitment fees should be prohibited even if a worker ends up working on another contract or is never hired at all.

Response: Although the phrase “assessed against employees or potential employees” has been removed from the definition of “recruitment fees” in the final rule, because to whom the fee is charged is not an integral part of the definition, the final rule amends the existing FAR prohibition on charging recruitment fees to employees by adding the phrase “potential employees” at FAR 22.1703(a)(5) and (6) and 52.222–50(b)(5) and (6) and (h)(3)(iii) so that employers and contractors are prohibited from charging both employees and potential employees recruitment fees.

iii. Legitimate and Necessary Business Practices and Costs

Comment: Several respondents commented that the definition should only cover fraudulent or misleading practices, as opposed to legitimate and necessary business practices and costs.

One respondent considered the definition to be unclear as to whether the term “recruitment fees” only applied to fees charged by the recruiter or employer on top of, or in addition to, legitimate and necessary costs, or whether it also applied to the

underlying costs. The respondent concurred with the intent to prevent trafficking in persons by eliminating the possibility that a job candidate be required to pay for his or her position through the imposition of recruitment fees or similar costs. The respondent stated that this goal can be achieved while also preserving the legitimate and necessary business practice of, and the legitimate costs associated with, employee recruitment.

Another respondent recommended amending the definition to prohibit recruitment fees assessed against employees or potential employees, associated with the recruiting process, “with the knowledge and intent to defraud or mislead such employees or potential employees.” According to the respondent, this would distinguish between the illegal conduct of a recruiter (contractor or other third party) and standard hiring activities and would not undermine the intent of the E.O. 13627 and the governing statutes to discover individuals or contractors systemically engaging in the prohibited activities or attempting to entrap individuals in a life of indentured servitude or slavery. According to the respondent, in some cases, the rule can be viewed as criminalizing the human resources process of overseas hiring, which the respondent trusted is not the intended purpose of defining “recruitment fees.” This respondent suggested that the rule should distinguish between fraudulent or misleading practices in recruiting employees tied to the prohibited costs and those traditionally ministerial human resources tasks performed during the hiring process by contractors, contractor employees, or their agents, such as submitting applications or interviewing job candidates.

Similarly, another respondent stated that the definition ignores the key element of whether the employer intends to defraud or deceive the employee, which is suggested as the core indicator of whether there is vulnerability to human trafficking. The respondent suggested that in many cases this rule conflates human trafficking with legitimate interactions that occur as part of the recruitment and hiring process.

Response: With regard to distinguishing between fraudulent or misleading practices and legitimate business costs, FAR subpart 22.17 and clause 52.222–50 already prohibit charging recruitment fees to employees. The purpose of this rule is to provide a definition of “recruitment fees,” not to create exceptions for when recruitment fees may be charged, such as under

nonfraudulent circumstances. The standard is whether the fees are associated with the recruiting process.

Additionally, the introductory paragraph of the definition has been revised to clarify that the standard is that “recruitment fees” are fees associated with the recruiting process. The introductory paragraph of the definition has been revised to highlight and make clear this standard so that employers and contractors have clarity regarding the existing FAR prohibition on charging employees recruitment fees and ensure that employees and potential employees are not charged such fees. It is important to note that fees that fall within the definition of recruitment fees may still be incurred as part of normal business practices; they just cannot be passed on to employees or potential employees.

iv. Timing

Comment: Many respondents commented that the definition should apply regardless of when fees are imposed or collected. Many respondents suggested inclusion of “or timing” after the phrase “regardless of the manner” (*i.e.*, to read “regardless of the manner or timing of their imposition or collection”). Many respondents stated that timing is important to include, since fees can take the form of kickbacks after arrival at the jobsite, fees at the end of a job for future recruitment, for safe passage home, for return of collateral at the end of a job, etc. The respondents further stated that the definition needs to clearly state that recruitment fees may be paid long after recruitment is technically over, but are still recruitment fees, regardless of when the fees are accrued, charged, or collected. One respondent noted that in some countries, such as Singapore and Taiwan, labor agents or brokers are legally allowed ongoing placement fees that are deducted from the workers’ pay, which are just recruitment fees shifted in time. This respondent noted that the proposed definition should note that prohibited fees include fees connected with the “recruiting process and employment relationship” in order to clarify that the scope of the rule relates to more than just fees connected with the sourcing, recruiting, and hiring of the worker.

Response: The definition in the final rule has been amended to include the phrase “regardless of the time, manner, or location of imposition or collection of the fee.” The Councils agree that the timing of the fees is not relevant to the question of whether a fee is a recruitment fee since the operative standard is whether the fees are

associated with the recruiting process, even if imposed or collected later in time.

v. Adding Additional Terms to the Definition

Comment: One respondent recommended adoption of a definition of fees that is broad in time, term, and form to ensure the utmost protection of vulnerable individuals from exploitation by unethical recruitment practices. The respondent noted that recruitment fees are not limited solely to the act of recruiting of a worker, but also encompass hiring, transportation, onboarding, ongoing employment, separation, and the return trip to the worker's home country. According to the respondent, any prohibition against fees needs to take this continuum into account, as each of these fees, when levied individually or collectively at the outset or during the course of employment, can facilitate debt bondage and exacerbate the likelihood that forced labor will occur.

Response: The definition has been revised to state "regardless of the time, manner, or location of imposition or collection of the fee."

vi. Equating to Prohibition Against Kickbacks

Comment: One respondent suggested the following addition to the definition of "recruitment fees":

"The items identified in this section are illustrative only. They are not a comprehensive list of all possible costs charged to a prospective/current worker that would be prohibited under the rule. Rather, for purposes of application, the same meaning given a kickback as identified in FAR 3.502-1 will apply to the solicitation of anything of value from the worker as a condition to receiving employment under the contract."

This respondent stated that by referencing an applicable and well-settled standard under the law, it will more clearly define the boundaries and limitations of the prohibitions against fees.

Response: The final rule clarifies that the definition is based upon a broad principle and an illustrative list of examples. The definition is not limited by the examples, as explained further in the response to comment 2.a.i.

The Councils decline to adopt the same meaning as kickback, as defined in FAR section 3.502-1. Reference to a kickback defined in section 3.502-1 is not necessarily relevant to this rule and section 3.502-1 could be viewed as limiting the definition of "recruitment fees." Under this final rule, a kickback

as understood colloquially is a recruitment fee if it is associated with the recruiting process.

vii. "Assessed"

Comment: One respondent stated that the rule should clarify the meaning of the term "assessed" as used in the proposed definition of "recruitment fees."

Response: The term "assessed" was removed from the definition, because it is redundant and could potentially limit the FAR prohibition on charging employees or potential employees recruitment fees.

b. Paragraph (2) of Definition

i. Third Parties

Comment: Several respondents commented on the list of third parties in paragraph (2) of the definition.

Two respondents commented that a number of third parties, including recruiters, staffing firms, subsidiaries or affiliates, subcontractors, and the vaguely defined "agents," whose actions to seek recruitment fees from an individual not yet employed by the contractor, may be unknown to the contractor. According to the respondents, this could result in liability for the contractor when actions of third parties, unrelated to the contractor recruitment or hiring, violate the prohibition on charging of recruitment fees. One respondent noted that the definition does not limit such prohibited fee or payment actions to those done for the purpose of employment on a specific contract to which the clauses pertain. These respondents recommended that the Councils clarify that fees or other payments made by third parties have to relate directly to the contractor and/or contract to which compliance is sought.

However, another respondent suggested a change in subparagraph (2)(v), from "Any agent or employee of such entities . . ." to "Any agent or employee of such entities, including 'subagents' or other licensed or unlicensed representatives" According to this respondent, the worker may often pay recruitment fees to locally-based subagents prior to direct contact with the employer's official representative.

A respondent also thought the rule was not clear as to when a contractor's recruitment fees obligations become effective and noted that on occasion, companies will fill open positions on contracts with third country nationals who have been brought into the performance country by another contractor for a different contract.

Response: FAR subpart 22.17 already prohibits charging recruitment fees to employees. Subpart 22.17 also prescribes the clause at 52.222-50, which makes this prohibition a requirement in contracts. The FAR does not contain any exceptions to this prohibition for a second recruiting process. Paragraph (2) of the definition makes clear that regardless of who actually collects the fee, if the fee is imposed in association with the recruiting process, it is still a recruitment fee under the definition. The Councils have reformatted paragraph (2) of the definition for greater clarity. Paragraph (2)(v) of the definition in the rule has been revised to add the phrase "whether licensed or unlicensed." The term subagent was not added, because the phrase "collected by an employer or third party" already covers subagents, and the list of examples is meant to be illustrative and nonexhaustive, with the phrase "including, but not limited to."

ii. "Remitted in Connection With Recruitment"

Comment: One respondent stated that the term "remitted in connection with recruitment" in paragraph (2) of the definition of "recruitment fees" is confusing and out of context with the remainder of the paragraph, which describes varying types of payment or remunerations that could be considered "recruitment fees," but it has no other clear meaning with respect to recruitment fees or is duplicative or circular in its meaning, and should be stricken from the definition.

Response: The phrase "remitted in connection with recruitment" has been deleted from the definition. This standard is adequately covered in the introductory paragraph of the definition, *i.e.*, that a fee is considered a recruitment fee if it is associated with the recruiting process.

3. Should the Definition of Recruitment Fee Vary Depending on—

a. Whether the job is a professional high-paying, high-skill job, or an unskilled, low-paying job?

Comment: Numerous respondents supported a definition that does not vary based on salary or skill level, and stated that attempting to define different recruitment fees for different skill levels may create loopholes that could be exploited by employers changing employee titles and terminology.

One respondent commented that there are legitimate circumstances where fees are appropriate, particularly when the laborer in question is a professional,

white collar, or a highly-skilled worker who is well compensated for his or her abilities.

Another respondent stated that fees associated with recruiting for professional, highly-skilled jobs are treated the same as fees associated with recruiting for low-skilled jobs, which may increase costs and delays in providing professional, high-skilled workers to contracting agencies. The concern was that the definition is so broad that it may encompass not only the recruitment fees that are trafficking-related, but also the myriad customary pre-qualifications for professional employment that are not trafficking-related. For example, a Federal agency's solicitation may include minimum qualifications for professional positions, such as a security clearance or a professional certification, or both. Applying the broad definition of recruitment fee to include security clearances and professional certifications may have the unintended consequence of interfering with contractors' recruitment of professional employees, something the Council explicitly stated it wanted to avoid. Therefore, the respondent recommends that the definition exclude those costs and charges associated with pre-conditions or pre-qualifications for professional, highly-skilled labor.

One respondent stated that in terms of skill level, those needing the protection seem to be the workers pursuing unskilled, low-paying jobs; therefore, the definition should apply to them.

Response: The purpose of this rule is to provide a definition of "recruitment fees" in FAR subpart 22.17. Subpart 22.17 already prohibits the charging of recruitment fees to employees. The final rule does not include an exception for providing professional high-paying, high-skilled jobs as it is outside the scope of this rule to address exceptions. If a fee is associated with the recruiting process, it is a recruitment fee, regardless of the industry or type of job.

b. Location of job?

Comment: Numerous respondents supported a definition that does not vary based on location of the job. One respondent stated that in terms of location, it is difficult to see where or why the definition should change or vary, and while there are different approaches in some countries, having a single approach is needed for effective and efficient implementation.

Another respondent recommended that costs and charges associated with pre-conditions or pre-qualifications for professional, highly-skilled labor should be excluded from the definition when

the requirement relates directly to an underlying solicitation requirement or when part of a recruitment effort is in the continental United States, where the risk of trafficking in labor, particularly among the professional workforce, is far lower.

Response: As explained in the response to comment 3.a., subpart 22.17 prohibits the charging of recruitment fees to employees. The purpose of this rule is to provide a definition of "recruitment fees," not to create exceptions for when recruitment fees may be charged, such as in certain locations. If a fee is associated with the recruiting process, it is a recruitment fee, regardless of the location of employment.

4. Are the Boundaries of the Proposed Definition Clear?

a. Definition Is Not Clear as to the Type of Fee Included

Comment: Many respondents stated that the current definition is not clear. One respondent believed that the definition is ambiguous and can be interpreted in dramatically different ways including being limitless (comprising not only a fee that a recruiter or employer attempts to charge to a job candidate or new employee, in exchange for access to a job, but also any and all actual and legitimate costs associated with the recruiting process). The respondent stated that another reasonable and good faith interpretation of the proposed definition of "recruitment fees" is to read it as including only those fees (or fees that are disguised as costs) that a recruiter or employer may attempt to charge a job candidate that are on top of, or in addition to, necessary and actual costs associated with recruitment. The respondent noted that if the intent is to only include fees that a recruiter or employer may attempt to charge a job candidate on top of, or in addition to, legitimate and necessary costs associated with the recruitment of employees, but also all underlying costs associated with the recruiting process, they suggested that that intent should be more clearly stated.

Response: See response to comment 2.a.iii.

b. Definition Should Include Additional Terms To Clarify

One respondent stated the definition is clear more or less but it should note that prohibited fees include fees connected with the "recruiting process and employment relationship" in order to clarify that the scope of the rule relates to more than just fees connected

with sourcing, recruitment, and hiring of the worker. This respondent noted that there are other fees charged to the workers after the commencement of employment that should also be prohibited.

Other respondents recommended that the definition make clear that it covers fees charged by agents and/or officials in both origin and destination countries as well as sometimes in transit countries. The respondents also suggested, to make clearer that the definition includes fees that may be gathered long after "recruitment" is over, adding "includes wage deductions and/or withholdings made by the end employer" after the phrase "regardless of the manner of their imposition or collection" at the end of the sentence in paragraph (1) of the definition.

Response: The definition has been revised to make clear that if a fee is associated with the recruiting process, it is a recruitment fee. Therefore, a fee that is charged during employment can be a recruitment fee if it was associated with the recruiting process, regardless of timing. An additional phrase regarding timing and location has been inserted into the definition, as explained in response to comment 2.a.iv. In addition, see response to comment 7.g.

c. Definition Should Include a Statement of Principles

Comment: One respondent thought that it is important the definition applies regardless of the manner of collection and the payee, and referenced paragraph (2) of the proposed definition. The respondent noted that the term "recruitment" can be very limiting and provide opportunity for fees or costs to simply be renamed or classified in another way, without further clarification in the rule. The respondent suggested that a statement or set of principles might be helpful and suggested the following: "All fees, costs associated with recruitment, hiring, on boarding, ongoing employment and end of employment and return to home country," or "Fees at any stage of the recruitment process; during or after employment," or "All fees incurred once an offer has been made or accepted."

Response: Noted. The final definition retains paragraph (2). The definition has a statement of principles that a recruitment fee is any fee that is associated with the recruiting process. The definition has been revised to insert the phrase "regardless of the time, manner, or location" to make clear that all fees that are imposed in association with the recruitment process are captured by the definition, as explained

in the responses to comments 2.a.iv. and 4.b.

d. Definition Should Include a Time Cut-Off

Comment: One respondent stated the boundaries of the proposed rule are clear, but it would be clearer to use a time cut-off (for example, the stage at which a candidate is provisionally selected for the role) as a point at which recruitment costs should be covered. It suggested that contractors should not be put in a position where they are required to reimburse potential employees for the incidental unknown costs of submitting their initial application or attending the initial interview. This respondent suggested that a time-cutoff would need to be carefully defined so that it couldn't be used as a loophole to charge fees to the candidates. It stated that all costs directly associated with selection such as skills testing, medical assessment, qualifications verification, security clearance, etc. should always be included in the recruitment fee and therefore not charged to the candidate.

Response: The definition in the final rule has been amended to include the phrase "regardless of the time, manner, or location of imposition or collection of the fee." The timing of the fees is not relevant to the question of whether or not a fee is a recruitment fee since the operative standard is whether the fees are associated with the recruiting process, even if imposed or collected later in time, as explained in the response to comment 2.a.iv.

5. As a general matter, is the illustrative list of recruitment fees helpful in understanding what costs an employee may not be charged? If not, why?

Comment: Many of the respondents noted that although they were in support of an illustrative list of recruitment fees to serve as examples, they recommended that the regulation also adopt a functionalist approach and prohibit economic arrangements that make workers more vulnerable to coercion. One respondent was in support of an illustrative list of recruitment fees, but thought that the list was under inclusive.

Two respondents were supportive but thought that guiding principles would be helpful to add, and noted as a justification, that terminology may differ by industry or region of the world. One respondent cautioned against only putting forth an enumerated list without language suggesting that the list could be more expansive.

One respondent recommended eliminating a list and including a

standard of either recruitment fees or fees that have fraudulent intent. Another respondent supported a list, but cautioned that it shouldn't be seen as an exhaustive list and suggested that there should not be fees or costs charged of any kind to the employee, directly or indirectly.

Response: The definition has been revised to make clear that the introductory paragraph provides the standard for defining "recruitment fees." The definition adopts a "functionalist approach" using the phrases "any type of fees, including charges, costs, assessments, or other financial obligations," "associated with the recruiting process," and "regardless of the time, manner, or location of imposition or collection of the fee." The phrase "associated with the recruiting process" is the principal concept in the definition of "recruitment fees."

All fees meeting this definition, *i.e.*, associated with the recruitment process, are recruitment fees whether or not the fees are included as examples in paragraph (1) of the definition. The definition also captures indirect fees by noting that any fee associated with the recruiting process is a recruitment fee regardless of the timing of it, the type of fee, how it is paid, or to whom it is paid. In addition, any fee that is associated with the recruiting process is captured by the definition, whether or not there was fraudulent intent, as explained in the response to comment 2.a.iii.

6. What, if any, of the specifically enumerated fees in the proposed definition should be excluded or otherwise modified?

Comment: Many of the respondents recommended keeping all of the types of fees enumerated.

Response: The majority of the enumerated fees in the proposed rule are retained in the final rule. Specific modifications are discussed in the following paragraphs.

a. For Soliciting, Identifying, Considering, Interviewing, Referring, Retaining, Transferring, Selecting, Testing, Training, Providing New-Hire Orientation, Recommending, or Placing Employees or Potential Employees

Comment: Many of the respondents expressed support for all of the items. One respondent recommended specifying the parameters of training to include courses recruiters lead victims to believe they need, regardless of whether the training is mandatory. Another respondent suggested eliminating the word "transferring" for the reason that physical transfers should be covered in transportation.

Response: These remain covered by the rule. "Training" captures legitimate and illegitimate training associated with the recruiting process, if the fee is charged to the worker for training. The term "transferring" is not entirely duplicative of the word "transportation" and, therefore, is retained. For example, should workers be charged a "transfer" fee for changing hands from one recruiter to another recruiter, that would be a cost associated with the recruiting process.

b. For Covering the Cost, in Whole or in Part, of Advertising

Comment: Many respondents supported keeping this language in the definition.

Response: The rule captures this in paragraph (1)(ii) of the definition, but the language has been streamlined.

c. For Any Activity Related to Obtaining Permanent or Temporary Labor Certification

Comment: Many respondents expressed support for this. One respondent suggested removing "any activity related to" and adding "passport, visa, identification documents."

Response: The Councils removed "any activity related to" and replaced it with "including any associated fees." The rule captures passports, visas, and identity documents in paragraph (1)(iii), (1)(v), and (1)(vi) in the definition.

d. For Processing Petitions

Comment: Many respondents expressed support for processing petitions.

Response: This is retained in the final rule at paragraph (1)(iv) in the definition.

e. For Visas and Any Fee That Facilitates an Employee Obtaining a Visa Such as Appointment and Application Fees

Comment: Many respondents expressed support for this. One respondent recommended that F-1 visa fees be exempt because the primary purpose of the F-1 visa is to study at an academic institution, and not employment.

Response: Noted. If the fee for a visa is one that is associated with the recruiting process for employment, then it falls under the definition and is prohibited.

f. For Government-Mandated Costs, Such as Border Crossing Fees

Comment: Many respondents supported inclusion. Two respondents referenced the private sector Electronic

Industry Citizenship coalition (EICC) Code of Conduct Interpretive Guidance, which includes border crossing fees.

Response: Noted. Border crossing fees are listed in the definition as an example of a recruitment fee in paragraph (1)(x) of the definition.

g. For Procuring Photographs and Identity Documentation, Including Any Nongovernmental Passport Fees

Comment: Many respondents recommended keeping this. Two respondents commented that the inclusion of fees “for procuring photographs and identity documentation, including any nongovernmental passport fees” added confusion to the definition of “recruitment fees.” Two respondents referenced the private sector EICC Code of Conduct, which prohibits charging workers the costs associated with documentation such as new passports and identity documents, as instructive.

Response: Noted. The definition provides that recruitment fees include fees for “acquiring photographs and identity or immigration documents, such as passports, including any associated fees” that are associated with the recruiting process.

Comment: One respondent provided a general comment that the inclusion of paragraph (1)(vii) fees “for procuring photographs and identity documentation, including any nongovernmental passport fees” in the definition of “recruitment fees” “adds confusion and implies that it is not allowed to require provision of an identity card for employment.”

Response: The Councils do not agree that the definition implies that an employer cannot require a job applicant to provide a form of valid identification as part of the application process. The FAR already has the prohibition on charging employees recruitment fees. Therefore, an employer, as part of the recruiting process, cannot charge or seek reimbursement from an employee or applicant for fees associated with acquiring photographs and identity or immigration documents.

Comment: Using the example of requiring a job candidate to possess a passport or other identity document, one respondent offered two different interpretations of the definition—one which, in addition to disguised costs, “does not include the actual cost of the passport” and one which, in addition to disguised fees or costs, “also includes the actual cost of the passport, to be paid to the appropriate government agency in the job candidate’s home country.”

Response: In an effort to clarify the ambiguity surrounding this example of what is considered a recruitment fee, the Councils revised the definition to include fees for “Acquiring photographs and identity or immigration documents, such as passports, including any associated fees.” (See paragraph (1)(vi) in the definition). This does not imply that an employer cannot require an applicant to possess a valid form of identification when applying for a job. The regulation does, however, restrict an employer or its agents from directly charging an employee for these items when associated with the recruiting process. The essential element is that the worker is not required to pay the employer, labor recruiter, or any agent of the employer for these expenses. For example, an employer cannot charge a new hire employee for a new passport required for the position.

Comment: In direct response to the Councils’ question, one respondent stated that, “de minimis expenses such as the fee for a passport photo (without any markup) can be borne by the worker.” Similarly, one respondent recommended “removing this clause as these are small cost incidentals which should be the responsibility of the worker.”

Response: The final definition does not quantify the extent of the fees when it provides that a recruitment fee is any fee that is “associated with the recruiting process.” The underlying FAR rule prohibits the charging of recruitment fees to employees. The purpose of this rule is to provide a definition of “recruitment fees”, not to create exceptions for when recruitment fees may be charged. Therefore, the final definition does not contain a de minimis exception to the prohibition on charging employees when a fee is “associated with the recruiting process.”

Comment: One respondent stated that “the proposed definition requires that fees be paid by employers even when those fees are permitted by federal immigration law to be borne by the employee” The respondent asserted that the proposed rule is ambiguous as written and, by way of example, cited a scenario in which “a worker chooses on his/her own accord to pay for their passport photos and obtain their passport so they can make themselves a more attractive employment prospect for a job in the U.S.” In this scenario, the respondent asserts that the employer’s obligation is uncertain. Similarly, another respondent stated that “voluntary renewal of one’s own passport, including the cost of obtaining new

photographs, and payment for replacement of a lost passport or visa” should not be treated as prohibited recruitment fees.

Response: Recruitment fees include costs to acquire photographs and identity or immigration documents such as passports, which are associated with the recruiting process. Were there to be a situation of an individual who is not involved with a recruiting process but chooses to acquire a passport, such fees not associated with the recruiting process would not fall under the definition. Similarly, renewal of a passport if for leisure travels, for example, and not associated with a recruiting process, would not fall under the definition.

h. Charged as a Condition of Access to the Job Opportunity, Including Procuring Medical Examinations and Immunizations and Obtaining Background, Reference and Security Clearance Checks and Examinations; Additional Certifications

Comment: One respondent supports inclusion of these fees. Another respondent proposed that the FAR Councils break paragraph (1)(viii) into two separate subparagraphs with the first paragraph as “For the cost of procuring medical examinations and immunizations and obtaining background, reference and security clearance checks and examinations; “additional certifications” and the second paragraph as “Charged as a condition of access to the job opportunity by any entity enumerated in paragraph (2) below, and/or for any reason listed in this section.”

Response: Fees that are charged as a condition of access to the job opportunity, and are associated with the recruiting process, are captured under this definition. It is deemed unnecessary to make the other requested change.

Comment: One respondent listed the practice of requiring job candidates to demonstrate a successful medical pre-screening in order to be eligible to apply for an open position as another example of a legitimate cost the respondent thought should be paid by the candidate. The respondent offered two different interpretations of the rule as presently drafted. The first interpretation excluded the actual cost of the medical screening from the definition of “recruitment fees” and the second interpretation included the actual cost of the medical exam in the definition of proscribed fees. As with the previous section, the respondent recommended that subsection (1)(viii) be excluded from the definition or clarified.

Response: Regarding medical screening, if the medical screening is associated with the recruiting process, it falls under this definition and is a recruitment fee, along with any associated fees.

Comment: One respondent expressed concern that the proposed definition including fees or costs “charged as a condition of access to the job opportunity,” along with the catch-all phrase “additional certifications,” could encompass any pre-condition or pre-qualification requirement for professional, high-skill positions—including educational or license requirements. The respondent expressed concern that this definition would include “customary pre-qualifications for professional employment” that are not typically associated with human trafficking (e.g., holding a security clearance or professional certification such as Project Management Professional).

Response: This rule provides a definition of recruitment fees. The underlying FAR rule prohibits the charging of recruitment fees to employees. The purpose of this rule is to provide a definition of “recruitment fees,” not to create exceptions for when recruitment fees may be charged. The standard is whether the fee is associated with the recruiting process. If the certification is being charged in order to access the job opportunity and is associated with the recruiting process, then it is a recruitment fee. If degrees or certifications are obtained outside of any recruiting process, such as professional certifications earned years earlier in school, then they would not meet the standard of “associated with the recruiting process” (see response to comment 7.o.).

i. For an Employer’s Recruiters, Agents or Attorneys, or Other Notary or Legal Fees

Comment: Many respondents support inclusion of these fees.

Response: Noted.

j. For Language Interpreters or Translators

There were no specific comments in response to this item, apart from the respondents expressing general support for each of the enumerated fees.

7. What, if any, fees not included in the proposed definition should be added?

a. Submitting Applications, Making Recommendations, Recruiting, Reserving, Committing, Soliciting, Identifying, Considering, Interviewing, Referring, Retaining, Transferring, Selection, or Placing Potential Job Applicants

Comment: Many respondents specifically supported including these fees.

Response: The final definition captures each of these fees, whether or not specifically mentioned, to the extent they are fees associated with the recruiting process. Of the five types of fees not listed already in the definition in the proposed rule at paragraph (1)(i)—i.e., “submitting applications, making recommendations, recruiting, reserving, committing”—four of them are already captured as fees “associated with the recruiting process” and by the language in paragraph (1)(i). Fees for “submitting applications” are captured by the language in paragraph (1)(iv) and have been added to the final definition for greater clarity to that paragraph.

b. Labor Broker Services, Both One Time and Recurring

Comment: Several respondents supported including these fees. One respondent noted that the fees should be paid by the employer.

Response: The final definition makes clear that it encompasses fees for “labor broker services” by referencing fees “collected by an employer or third party,” including agents, recruiters, labor brokers, staffing firms, and subcontractors, among other entities, in paragraph (2). Further, temporal issues and recurrence are addressed by the insertion in paragraph (1) of the language “regardless of the time, manner, or location of imposition or collection of the fee.”

c. Exit Clearances, and Security Clearances Associated With Visas

Comment: Several respondents supported including these fees. Another respondent suggested adding “and nongovernmental passport fees” after “For visas.”

Response: The final definition includes these fees by referencing “government-mandated fees” at paragraph (1)(x) and fees associated with acquiring visas at paragraph (1)(v).

d. Sending, Transit, and Receiving Country Government-Mandated Fees, Levies, and Insurance

Comment: Numerous respondents supported including these fees.

Response: Government-mandated fees and levies are included in the final definition at paragraph (1)(x). Insurance

is addressed under section 7.m. of these comments.

e. Pre-Employment Medical Examinations or Vaccinations in the Sending Country

Comment: One respondent supported including these fees.

Response: The definition in the proposed rule included these fees at paragraph (1)(viii), and the final definition includes these fees at paragraph (1)(vii). The final definition also addresses questions regarding location of fees charged or paid including in countries of origin, countries of transit, and countries of performance or “receiving countries” in paragraph (1) as the definition states that it is a fee that is associated with the recruiting process “regardless of the time, manner, or location of imposition or collection of the fee.”

f. Receiving Country Medical Examinations

Comment: One respondent supported including these fees.

Response: The final definition includes these fees at paragraph (1)(vii). The final definition also addresses questions regarding location of fees charged or paid including in countries of origin, countries of transit, and countries of performance or “receiving countries” in paragraph (1) as the definition states that it is a fee that is associated with the recruiting process “regardless of the time, manner, or location of imposition or collection of the fee.”

g. Transportation and Subsistence Costs While in Transit, Including, But Not Limited to, Airfare or Costs of Other Modes of International Transportation, Terminal Fees, and Travel Taxes Associated With Travel From Sending Country to Receiving Country and the Return Journey at the End of the Contract

Comment: Numerous respondents supported including transportation fees.

Response: The final definition includes these fees at paragraph (1)(xi). Costs imposed on workers in association with the recruiting process, for travel from the country of origin to the country of performance, and the return journey, are included in the final definition for clarity as to the transportation costs. For example, while a worker is being recruited, if a worker is made to pay a lump sum for a return ticket and a destination ticket, that cost would fall under the final definition. This is distinct from the affirmative obligation to provide or cover the costs of return transportation at FAR 22.1703(a)(7).

h. Transportation and Subsistence Costs From the Airport or Disembarkation Point to the Worksite

Comment: Numerous respondents supported including transportation costs.

Response: See response to comment 7.g.

i. Security Deposits and Bonds

Comment: Many respondents supported including security deposits and bonds. One respondent noted that security deposits and bonds are similar to collateral requirements and can be used to keep workers in debt bondage.

Response: Noted. The definition includes these fees at paragraph (1)(xii) in the definition.

j. The Inclusion of a Collateral Requirement, Such as Land Deeds, in Contracts

Comment: Two respondents supported including collateral requirements. One respondent noted that anytime a worker is required to offer something of value as collateral it leaves the worker vulnerable to forced labor.

Response: The final definition encompasses collateral requirements in paragraph 1 by including “other financial obligations” and in paragraph (2)(i) in the definition by referring to fees “paid in property or money.” In addition, paragraph (1)(xii) in the definition prohibits fees charged for security deposits and bonds which, like other forms of collateral, are held to prevent or dissuade employees from leaving the job.

k. Contract Breach Fees

Comment: Many respondents supported including contract breach fees. Many respondents noted that breach fees are designed to cover the costs of recruitment expenses borne by the employer or recruiter or to compensate the employer or recruiter for forgone profits. This respondent suggested that breach fees are actually recruitment fees in another form—instead of being paid upfront they are delayed until the termination of employment. They also noted that using these fees to compensate employers or recruiters for lost profits should not be a cost borne by the employee, and that breach fees increase the relative power of employers and recruiters over employees.

Response: The term “contract breach fee” is not specifically included in the final definition. However, if the fee is associated with the recruiting process, regardless of when the fee is charged or what it is called, it falls under the

definition in the final rule. The practices described by respondents’ concern fees charged to the employee to cover the costs of recruitment. Therefore, such fees are prohibited, regardless of when the fee to the employee is charged. Employers are prohibited from charging employees any fee, including when called a “contract breach fee,” if the fee is associated with the recruiting process.

l. An Employer’s Recruiters, Agents or Attorneys, or Other Notary or Legal Fees

Comment: Several respondents supported including these fees.

Response: The definition in the proposed rule included these fees at paragraph (1)(ix) and definition includes them at paragraph (1)(viii).

m. Insurance

Comment: Numerous respondents supported including insurance. One respondent suggested that the language should read, “any associated insurance costs over and above those mandated by governments”.

Another respondent suggested the language, “all insurance fees, including, but not limited to health, medical, and dental insurance.”

One respondent noted that insurance could be used fraudulently and cited one case in which the victim made the trafficker the beneficiary of her work life insurance, because the trafficker told the beneficiary that she could not put a family member down. The trafficker promised to send the money to the victim’s family should anything ever happen to her.

Response: A fee to purchase insurance, in association with the recruiting process, is included under (1)(xii) of the definition. This does not include a situation where an employee purchases insurance separate and apart from the recruiting process, such as if an employee who has been employed by a company, chooses to start purchasing dental insurance.

n. Contributions to Worker Welfare Funds or Government Provided Benefits in Sending Countries Required to be Paid by Suppliers

Comment: Two respondents supported including these fees.

Response: The definition encompasses these fees under paragraph (1)(x), which prohibits charging workers for government-mandated fees.

o. Other

Comment: One respondent suggested including “providing advice” and “arranging for travel and/or accompanying the applicant on that

travel,” noting that recruiters often make employees who have never traveled abroad feel that this is a service they need to pay for.

Response: The final definition includes these fees at (1)(ix).

Comment: One respondent suggested including “any activity related to labor procurement” and noted that recruiters often charge workers for a variety of costs incurred in the duration of the recruiting process.

Response: The standard is whether the “charges, costs, assessments, or other financial obligations” are “associated with the recruiting process.” Paragraph (1) of the definition lists examples for further clarity incorporating more examples than in the proposed rule. However, the list is not intended to be exhaustive and other fees not listed are recruitment fees if they are “associated with the recruiting process.”

Comment: One respondent suggested including bribes and kickback payments made by an employer or any of its agents.

Response: These fees were included in the proposed definition and are included in the definition in the final rule at paragraph (2)(iv).

Comment: Many respondents suggested including fees that relate to pre-departure training or “onboarding fees” such as skills tests, additional certifications beyond those required for job eligibility, and pre-departure orientation.

Response: As noted above, fees for certifications for accessing the job opportunity are listed in (1)(vii) of the definition as an example of a recruitment fee, if the fee is charged in association with the recruiting process, without regard to the question of eligibility. If degrees or certifications are obtained outside of any recruiting process, such as professional certifications earned years earlier in school, then they would not meet the standard of “associated with the recruiting process.” In contrast, if for example, workers are asked to pay a fee, while they are being recruited, to take a language course or obtain a certification from the employer in the specific skill set of their job, those costs would be associated with the recruiting process. Fees for skills testing and orientation are included in the definition as examples in paragraph (1)(i).

Comment: One respondent suggested including fees that would be charged to the worker for equipment, such as laptop computers.

Response: Paragraph (1)(xiii) of the definition lists equipment charges as an

example of a cost that can be associated with the recruiting process.

Comment: One respondent suggested adding “or of any activity related to labor procurement.” Another respondent suggested adding “and overhead.”

Response: Overhead costs are included generally in the examples in paragraph (1)(i) of the definition. Regarding activities related to labor procurement, the language has been streamlined to make clear that the definition captures fees for activities associated with the recruiting process.

Comment: Two respondents suggested including “ongoing fees.” One respondent noted that some countries allow labor brokers to deduct recruitment fees from workers’ paychecks on an ongoing basis.

Response: The definition in the final rule addresses the temporal aspect of fees charged in the introduction paragraph as it includes fees “associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.”

8. Need for Advanced Notice of Proposed Rulemaking

Comment: One respondent stated that the proposed rule contains an extensive list of questions to public respondents and feels that these questions should have been addressed through information collection and research prior to issuing it as a proposed rule. The respondent recommended that research should have been done in the “Early Engagement Opportunity” that closed in March 2015. An advanced notice of proposed rulemaking would have been more appropriate than the “Early Engagement Opportunity.” According to the respondent, the proposed definition places on the public the onus to conduct analysis and provide information that the Councils should have addressed before issuing the proposed rule.

Response: The “Early Engagement Opportunity” promoted substantive public input early in the process, similar to what might have been solicited through an advanced notice of proposed rulemaking. Asking questions in the preamble to the proposed rule did not put an unfair burden on the public, but provided the public an opportunity to provide input on the proposed rule and potential alternatives to the rule.

9. Economic Analysis of Benefits and Costs Under Executive Order 12866

Comment: One respondent stated that the proposed rule is designated a “significant” rulemaking and is subject to Office of Information and Regulatory

Affairs (OIRA) review. The respondent stated that the Councils have not conducted any economic analysis of benefits and costs under Executive Order’s 12866 and 13563. The respondent further stated that the proposed rule does not provide either quantitative or qualitative assessment of alternatives. The respondent noted that Executive Order 12866 requires the agencies to consider the alternative of no regulation. According to the respondent, a simple survey of potentially affected contractors would have provided useful data regarding the extent to which different types of charges to employees are made and could have informed assessment of the incidence and severity of impacts of including or excluding certain types of charges under the definition.

Response: As detailed further in section IV, DoD, GSA, and NASA have concluded that there is a regulatory cost impact associated with this final rule.

The “Early Engagement Opportunity” and the proposed rule provided opportunity for the public, including potentially affected contractors, to provide data on the potential impact of the rule. The questions asked in the preamble identified some of the alternatives that the Councils were considering, and specifically requested comment on these alternatives.

The alternative of “no regulation” is not helpful, because the FAR already prohibits the charging of recruitment fees to employees or potential employees per the E.O. and the final rule (FAR Case 2013–001) published in 2015 in the **Federal Register** at 80 FR 4967. This rule is meant to clarify the 2015 rule by identifying the types of expenses that are considered to be recruitment fees for purposes of the prohibition (e.g., fees for processing applications, fees for acquiring visas). Leaving the term undefined will perpetuate inconsistent interpretation and enforcement of the FAR requirement.

10. Comments Regarding the Initial Regulatory Flexibility Analysis Under Executive Order 13563

For comments and responses relating to the initial regulatory flexibility analysis, see section VII of this preamble.

11. Issues Outside the Scope of the Current Rule

Comment: One respondent raised the issue of providing workers, in their home country, with a contract in a language that workers understand that specifies certain working terms. The respondent also suggested that receiving

companies should keep notarized documents certifying that they have paid recruiters all recruiting fees and receipts of such, and should compensate workers who paid any recruitment fees.

Response: These issues are outside the scope of a definition for the term “recruitment fees.” Additionally, the FAR already contains, at 22.1703(a)(5)(i), the requirement that contractors, contractor employees, subcontractors, and subcontractor employees, and their agents not use “misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language accessible to the worker, basic information.”

Comment: One respondent stated that from a practical standpoint the proposed rule as currently written fails to provide guidance or direction on several issues that frequently arise for contractors performing work overseas. The respondent thought that the scope of the contractor’s obligation is currently unclear as it relates to the utilization of employment websites. This respondent stated that it isn’t uncommon for companies to utilize commercial or local employment websites to identify potential job candidates and thought that under the proposed rule it isn’t clear who has the obligation to vet those websites. The respondent suggested including guidance in the rule related to this type of situation would be very helpful so that contractors fully understand their obligations.

Response: These issues are out of the scope of the definition of “recruitment fees.”

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not affect the applicability of FAR clause 52.222–50, Combating Trafficking in Persons. Pursuant to 41 U.S.C. 1905 and 1906, the FAR Council signed determinations on January 20, 2015, that Title XVII of the NDAA for FY 2013 (as implemented in FAR clause 52.222–50), should apply to contracts and subcontracts in amounts not greater than the simplified acquisition threshold, except for the requirement for certification and a compliance plan; and the acquisition of commercial items (other than commercially available off-the-shelf items). Likewise, pursuant to 41 U.S.C. 1907, the Administrator for Federal Procurement Policy signed a determination on the same date that

Title XVII of the NDAA for FY 2013 (as implemented in FAR clause 52.222–50), should apply to contracts for the acquisition of commercially available off-the-shelf items, except for the requirement for a compliance plan and certification.

IV. Expected Cost Impact to the Public

DoD, GSA, and NASA have concluded that there is a regulatory cost impact associated with this final rule. However, as explained in this section, some costs associated with the rule are difficult to quantify.

Since 2015, FAR 22.1703(a)(6) and the associated clause at FAR 52.222–50(b)(6) have prohibited Government contractors from charging their employees recruitment fees. This prohibition was published in a final rule (FAR Case 2013–001) to implement Title XVII of the NDAA for FY 2013 and E.O. 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, dated September 25, 2012. The prohibition took effect on March 2, 2015 (80 FR 4967). The prohibition did not prevent contractors from charging fees for recruitment services; it simply precluded such fees from being charged to prospective or actual employees on Government contracts or subcontracts. To the extent these fees were being paid by employees, the rule effectively shifted these costs so that they are borne by contractors that have hired the recruiters or to the contractors themselves (if they are handling recruitment activities in-house).

This rule clarifies the 2015 rule by identifying the types of expenses that are considered to be recruitment fees for purposes of the prohibition (e.g., fees for processing applications, fees for acquiring visas). Similar to the 2015 rule, this rule does not prohibit the entity performing recruitment from charging for its services; it only protects prospective or actual contract and subcontract employees from having to bear the costs. It is possible, if not likely, that some contractors will be required to pay higher costs to recruiters as they switch from unethical to ethical recruitment companies. However, no assertion of such higher costs were made by the commenters in response to this rulemaking, presumably because contractors have already been taking action to eliminate unethical recruitment companies from their supply chains as a result of the recruitment fee prohibitions that went into effect in 2015.

Equally important, this final rule does not change FAR rules addressing the allowability of costs in FAR Part 31—

meaning the rules governing what recruitment costs may be otherwise reimbursed to a prime contractor remain unchanged.

Because the FAR did not originally provide a definition of “recruitment fees,” there has been some disparity in the interpretation of what constitutes a recruitment fee. For this reason, DoD, GSA and NASA are unable to quantify the net change in burden due to the addition of the definition.

DoD, GSA, and NASA have calculated the cost of regulatory familiarization with the new definition, based on FPDS data for FY 2017, estimating that for the first year 89,565 entities will be subject to the prohibition, 30 minutes per entity; and due to turnover and new entrants, 20 percent of that amount in subsequent years. The estimated public cost for familiarization, calculated in 2016 dollars at a 7 percent discount rate in perpetuity is as follows:

Annualized	\$.8 million.
Present Value	\$11.9 million.
Annualized Value Costs as of 2016 if Year 1 is 2019.	\$.7 million.

V. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This final rule is considered an E.O. 13771 regulatory action. The total estimated annualized cost of this rule will be \$.8 million (with a total present value of \$11.9 million). The annualized value as of 2016 if year 1 is 2019 is \$.7 million. More details on the costs associated with this rule can be found in the expected cost impact section of this preamble (section IV).

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a final regulatory flexibility analysis (FRFA) consistent with the Regulatory

Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

The purpose of this final rule is to provide a standard definition of “recruitment fees” in order to clarify how the Government treats this prohibited practice associated with labor trafficking on Government contracts.

The objective of this final rule is to clarify the types of charges and fees that contractors, subcontractors, and their employees or agents are prohibited from charging to employees or potential employees, under the Government policy on combating trafficking in persons.

One respondent submitted the following comment on the initial regulatory flexibility analysis published in the proposed rule:

Comment: According to the respondent, the initial regulatory flexibility analysis of the impact on small entities is without meaningful content. The respondent stated that such a pre-proposal research survey as recommended for the cost benefit analysis could have also provided the data those agencies cited as needed, but missing, for analysis of small business impacts under the Regulatory Flexibility Act.

Response: The initial regulatory flexibility analysis laid out the number of small entities that could potentially be affected, and how they could be impacted by this rule. DoD, GSA, and NASA invited comments from small business concerns and other interested parties on the expected impact of the rule on small entities. As noted, only one respondent raised this concern. While the anticipated costs associated with this rule are difficult to quantify, Section IV, above, provides an overview of cost estimates. The Councils anticipate that any such impact will be outweighed by the expected benefits of this rule.

This final rule will apply to all entities, whether small or other than small, that are contractors or subcontractors on U.S. Government contracts. As of 2018, there were about 450,000 active registrants in the System for Award Management (SAM). Approximately 75 percent of those registrants (338,000) certified to meeting the size standard as small for their primary NAICS code. However, there would be no actual impact from this rule unless the small entity was planning to charge or allow another entity acting on their behalf to charge, a recruitment fee to an employee or potential employee, which is already prohibited under FAR clause 52.222–50, Combating Trafficking in Persons. There is no data available to estimate this impact. Further, for the definition of “small business,” the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: “(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American

products, materials or labor.” Therefore, this final regulatory flexibility analysis does not need to address impact on foreign small entities with Government contracts or subcontracts that are not small businesses as defined by the Small Business Act.

There were no significant alternatives identified that would meet the objective of the rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. Although there are information collection requirements associated with FAR 52.222-50 and FAR 52.222-56 (OMB Control Number 9000-0188, which has been extended to September 30, 2021), this case does not impact the information collection requirement, because it just adds a definition of “recruitment fees” to FAR 52.222-50.

List of Subjects in 48 CFR Parts 22 and 52

Government procurement.

Dated: December 10, 2018.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA and NASA are issuing a final rule amending 48 CFR parts 22 and 52 as set forth below:

■ 1. The authority citation for parts 22 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 2. Amend section 22.1702 by adding, in alphabetical order, the definition “Recruitment fees” to read as follows:

22.1702 Definitions.

* * * * *

Recruitment fees means fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.

(1) Recruitment fees include, but are not limited to, the following fees (when they are associated with the recruiting process) for—

(i) Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training,

providing orientation to, skills testing, recommending, or placing employees or potential employees;

(ii) Advertising;

(iii) Obtaining permanent or temporary labor certification, including any associated fees;

(iv) Processing applications and petitions;

(v) Acquiring visas, including any associated fees;

(vi) Acquiring photographs and identity or immigration documents, such as passports, including any associated fees;

(vii) Accessing the job opportunity, including required medical examinations and immunizations; background, reference, and security clearance checks and examinations; and additional certifications;

(viii) An employer’s recruiters, agents or attorneys, or other notary or legal fees;

(ix) Language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;

(x) Government-mandated fees, such as border crossing fees, levies, or worker welfare funds;

(xi) Transportation and subsistence costs—

(A) While in transit, including, but not limited to, airfare or costs of other modes of transportation, terminal fees, and travel taxes associated with travel from the country of origin to the country of performance and the return journey upon the end of employment; and

(B) From the airport or disembarkation point to the worksite;

(xii) Security deposits, bonds, and insurance; and

(xiii) Equipment charges.

(2) A recruitment fee, as described in the introductory text of this definition, is a recruitment fee, regardless of whether the payment is—

(i) Paid in property or money;

(ii) Deducted from wages;

(iii) Paid back in wage or benefit concessions;

(iv) Paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute; or

(v) Collected by an employer or a third party, whether licensed or unlicensed, including, but not limited to—

(A) Agents;

(B) Labor brokers;

(C) Recruiters;

(D) Staffing firms (including private employment and placement firms);

(E) Subsidiaries/affiliates of the employer;

(F) Any agent or employee of such entities; and

(G) Subcontractors at all tiers.

* * * * *

■ 3. Amend section 22.1703 by—

■ a. Revising paragraph (a)(5)(i); and

■ b. Removing from paragraph (a)(6) “employees” and adding “employees or potential employees” in its place.

The revisions read as follows:

22.1703 Policy.

* * * * *

(a) * * *

(5)(i) Using misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language understood by the employee or potential employee, basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant costs to be charged to the employee or potential employee, and, if applicable, the hazardous nature of the work;

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.212-5 by—

■ a. Revising the date of the clause and paragraphs (b)(33)(i) and (e)(1)(xiii)(A); and

■ b. In the Alternate II, revising the date and paragraph (e)(1)(ii)(K)(1).

The revisions read as follows:

52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (JAN 2019)

* * * * *

(b) * * *

* * * * *

(33)(i) 52.222-50, Combating Trafficking in Persons (JAN 2019) (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

(e)(1) * * *

(i) * * *

(xiii) * * *

(A) 52.222-50, Combating Trafficking in Persons (JAN 2019) (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

Alternate II (JAN 2019). * * *

* * * * *

(e)(1) * * *
(ii) * * *

(K) (1) 52.222-50, Combating Trafficking in Persons (JAN 2019) (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

■ 5. Amend section 52.213-4 by revising the date of the clause and paragraphs (a)(2)(viii) and (b)(1)(viii)(A) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (JAN 2019)

(a) * * *
(2) * * *

(viii) 52.244-6, Subcontracts for Commercial Items (JAN 2019).

* * * * *

(b) * * *
(1) * * *

(viii)(A) 52.222-50, Combating Trafficking in Persons (JAN 2019) (22 U.S.C. chapter 78 and E.O. 13627) (Applies to all solicitations and contracts).

* * * * *

■ 6. Amend section 52.222-50 by—

■ a. Revising the date of the clause;

■ b. Adding to paragraph (a), in alphabetical order, the definition “Recruitment fees”;

■ c. Revising paragraph (b)(5)(i);

■ d. Removing from paragraph (b)(6) “employees” and adding “employees or potential employees” in its place; and

■ e. Removing from paragraph (h)(3)(iii) “employee,” and adding “employee or potential employee,” in its place.

The revisions and addition read as follows:

52.222-50 Combating Trafficking in Persons.

* * * * *

Combating Trafficking in Persons (JAN 2019)

(a) * * *

Recruitment fees means fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.

(1) Recruitment fees include, but are not limited to, the following fees (when they are associated with the recruiting process) for—

(i) Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing,

recommending, or placing employees or potential employees;

(ii) Advertising;

(iii) Obtaining permanent or temporary labor certification, including any associated fees;

(iv) Processing applications and petitions;

(v) Acquiring visas, including any associated fees;

(vi) Acquiring photographs and identity or immigration documents, such as passports, including any associated fees;

(vii) Accessing the job opportunity, including required medical examinations and immunizations; background, reference, and security clearance checks and examinations; and additional certifications;

(viii) An employer’s recruiters, agents or attorneys, or other notary or legal fees;

(ix) Language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;

(x) Government-mandated fees, such as border crossing fees, levies, or worker welfare funds;

(xi) Transportation and subsistence costs—

(A) While in transit, including, but not limited to, airfare or costs of other modes of transportation, terminal fees, and travel taxes associated with travel from the country of origin to the country of performance and the return journey upon the end of employment; and

(B) From the airport or disembarkation point to the worksite;

(xii) Security deposits, bonds, and insurance; and

(xiii) Equipment charges.

(2) A recruitment fee, as described in the introductory text of this definition, is a recruitment fee, regardless of whether the payment is—

(i) Paid in property or money;

(ii) Deducted from wages;

(iii) Paid back in wage or benefit concessions;

(iv) Paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute; or

(v) Collected by an employer or a third party, whether licensed or unlicensed, including, but not limited to—

(A) Agents;

(B) Labor brokers;

(C) Recruiters;

(D) Staffing firms (including private employment and placement firms);

(E) Subsidiaries/affiliates of the employer;

(F) Any agent or employee of such entities; and

(G) Subcontractors at all tiers.

* * * * *

(b) * * *

(5)(i) Use misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language understood by the employee or potential employee, basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant costs to be charged to the employee or potential employee, and, if applicable, the hazardous nature of the work;

* * * * *

■ 7. Amend section 52.244-6 by revising the date of the clause and paragraph (c)(1)(xiii)(A) to read as follows:

52.244-6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (JAN 2019)

* * * * *

(c)(1) * * *

(xiii)(A) 52.222-50, Combating Trafficking in Persons (JAN 2019) (22 U.S.C. chapter 78 and E.O. 13627).

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**DEPARTMENT OF DEFENSE
GENERAL SERVICES
ADMINISTRATION NATIONAL
AERONAUTICS AND SPACE
ADMINISTRATION**

48 CFR Chapter 1

[Docket No. FAR 2018-0001, Sequence No. 6]

**Federal Acquisition Regulation;
Federal Acquisition Circular 2019-01;
Small Entity Compliance Guide**

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small entity compliance guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement