Tri-State Coalition for Responsible Investment

40 South Fullerton Avenue
Montclair, NJ 07042
973-509-8800
Fax: 973-509-8808
E-Mail: info@tricri.org
www.tricri.org

General Services Administration,
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F Street NW., 2nd Floor
Washington, DC 20405-0001

Re: Comments in response to FAR Case 2015-017: Combating Trafficking in Persons—Definition of "Recruitment Fees"

Dear Ms. Flowers,

The Tri-State Coalition for Responsible Investment ("Tri-State CRI") appreciates the opportunity to comment on on RIN 9000-AN02, Proposed Rule, Federal Acquisition Regulation; Combating Trafficking in Persons— Definition of ''Recruitment Fees'', 81 Fed. Reg. 29244-48 (May 11, 2016) ("FAR Case 2015-017"). The Tri-State Coalition for Responsible Investment strongly supports the Defense Department's ("DoD"), the General Services Administration's ("GSA"), and the National Aeronautics and Space Administration's ("NASA") proposal to revise the Federal Acquisition Regulation ("FAR") to add a definition of "recruitment fees" to subpart 22.17, Combating Trafficking in Persons, and the associated clause at 52.222-50 as a significant addition to the FAR. The proposed rule will bring greater clarity for all parties involved in the implementation of Executive Order 13627: *Strengthening Protections Against Trafficking in Persons in Federal Contracts* and title XVII of the National Defense Authorization Act for Fiscal Year 2013, both of which prohibit contractors, contractor employees, subcontractors, subcontractor employees, and their agents from charging employees recruitment fees. Moreover, the proposed rule will help to further promulgate the FAR by providing a definition that is both effective in reinforcing the prohibition on recruitment fees and can be consistently and uniformly applied by contractors charged with compliance with the FAR.

The Tri-State Coalition for Responsible Investment (www.tricri.org), founded in 1975, is a Coalition of 40 Catholic institutional investors that engages with companies in our investment portfolios to encourage improved practices related to human rights. One key area where we focus is related to worker rights in the global supply chain, and specifically, ethical recruitment practices to ensure that workers are not placed in a position of forced or bonded labor due to the circumstances of their hiring. We engage with companies on this issue not only because of our deep concern for the human rights and dignity of workers in the global supply chain, but also because of the significant financial, legal, and reputation risks this presents to global corporations. Many companies have

extensive global supply chains and we believe it is essential for them to have a policy prohibiting the use of recruitment fees in their operations and with all their suppliers.

The investor members of the Tri-State Coalition for Responsible Investment are deeply concerned about the myriad forms of recruitment fees and how the use of such fees by recruiters, employers, and in some cases governments is increasingly making men, women, and children more susceptible to severe forms of trafficking in persons as defined by Trafficking Victims Protection Act of 2000, as amended ("TVPA") (Public Law 106-386, Division A).

In summary, the Tri-State CRI commends DoD, GSA, and NASA for jointly promulgating this much-needed comprehensive definition of prohibited recruitment fees. We believe the Proposed Rule, FAR Case 2015-017, is timely, well balanced, and that it will go a long way towards addressing the risks to workers and companies posed by the use of recruitment fees. Specifically, the Tri-State CRI welcomes FAR Case 2015-017 for the changes it makes in the following areas:

- Addressing fees, charges, costs, assessments, or other financial obligations assessed against employees or potential employees, associated with the recruiting process, regardless of the manner or timing of their imposition or collection;
- Including charges for testing and training;
- Modifying language to include tips paid as a kickback; and,
- Adding language interpreters or translators.

Issues Highlighted for Public Comments

In particular, the Tri-State CRI would like to provide comments on the following specific questions posed by the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council ("the Councils"):

I. Are there any additional charges that should be considered recruitment fees?

The charges/fees included in the Proposed Rule are fairly comprehensive, however, **we believe the following should be included as well**: processing fees; breach fees for terminating a contract; transportation expenses (both within countries of origin and between countries); fees or charges related to trade, skill, or aptitude testing (typically conducted in sending countries as a requirement of the employer); fees or charges assessed to workers for pre-departure orientation or any form of pre-departure training, whether government or employer-mandated; payments made to governments abroad; and, collateral requirements.

We believe it is especially important to have included fees associated with medical examinations. We have provided further rationale on each of these items below.

II. Are all costs/fees associated with bringing an employee on board properly treated as recruitment fees?

We believe it is important for this aspect of the definition to be as broad as possible to avoid "leakage" of fees that should be considered recruitment fees being omitted to avoid coverage under the FAR. **Therefore, our perspective is that all costs/fees associated with bringing an employee on board should be treated as "recruitment fees."**

We believe this comprehensive approach will also reduce the burden of implementation for contractors so that there is complete clarity that any fees associated with onboarding are included. There may be various names or categories of fees unique to particular companies, and an approach that includes all on-boarding fees will reduce any ambiguity in implementation and therefore reduce risks of non-compliance.

Our rationale for this principle is partially derived from the definitions of involuntary servitude and forced labor in the TVPA. Under these definitions, labor obtained "by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint" is expressly prohibited. Serious harm may include financial harm. Often, trafficking schemes hinge on fraudulently inducing workers to make significant, upfront investments in order to secure employment (and, in many cases, to obtain the visa necessary to travel to the place of employment) in order to ensure that workers feel compelled to remain on the job to partially or fully recover this investment before departing and therefore continue to work despite experiencing conditions that grossly differ from those that were promised. Additionally, it is important to note that the trafficking scheme may not specifically require the payment of a fee to the individual offering recruitment-related services; and, in some cases direct-payment of fees is avoided by using various agents, middle men, or other third parties to disguise the intent of the trafficker. Therefore, it is important that the list of prohibited "fees" be broad enough to cover all forms of investments and payments that workers make in order to obtain a job, since all of these may be part of the coercive scheme intended to ensure that workers are compelled to remain in the employ of their trafficker or trafficker's network.

For example, we are concerned that the definition as currently drafted may not be broad enough to cover "all costs of bringing an employee on board" if that prospective employee lives in a rural area, far from the city center where job applications, passports, and visas are processed. The in-country expenses (i.e., within the employee's country of origin) associated with travelling from rural areas to urban centers to apply for a passport and visa, process other paperwork, attend job training sessions, etc. can be quite substantial. In many cases, back-and-forth travel costs for prospective

employees coming from rural areas add up to almost half their pre-departure debt. In one human trafficking case recently brought to federal court in Virginia, a worker was fraudulently recruited from rural Sumatra (an island in Indonesia). By the time her visa processing was complete and everything was settled with her employment contract through a job placement agency in Jakarta, she had incurred USD 3,000 in debt, almost half of which was not "fees" per se, but rather expenses from trips to and from Jakarta as mandated by her recruiter.

In some cases, workers living in rural areas pay a third party a "fee" for the service of having their paperwork filed on their behalf and thus saving them the expense of travel. The way the definition is currently drafted, such fees to third parties would clearly be prohibited, but it is not clear that the in-country "costs" borne directly by the prospective employee would also be prohibited though they are clearly integral to bringing the prospective employee on board. For this reason, we suggest making the inclusion of in-country costs more explicit in the definition so as to dispel any ambiguity or confusion. It is also important to note that these prospective workers are making these trips to the capital city because of the recruitment process. They are obtaining passports with the promise of a job from a recruiter; they would not be obtaining it for the prospect of a tourist trip. The notion that poor, migrant workers from rural areas would obtain a passport, get health certificates, and/or go through other migration procedures on their own (the way a more wealthy citizen might obtain a passport or get immunizations on the chance that they might go on a trip for pleasure) represents a misunderstanding of the realities many migrant worker face.

Additionally, the Global Workers Justice Alliance (http://www.globalworkers.org) --an NGO with many years of experience researching abusive labor recruitment practices in Mexico and Central America--has recently encountered reports from dozens of workers in Guatemala that the "contract price" for getting a job in the United States via the H-2 visa program is a fixed amount (whether it is $250 USD or $7000 USD). This practice is common in many other migration corridors. The "contract price" is not itemized or broken down in any way for the prospective employees. Indeed, the workers have no idea what the money is for -- because the amount is not tied to a specific cost (like a visa application fee, or an inbound plane ticket) we can only assume that the "contract price" is a recruitment fee including some sort of illegal compensation for the recruiter and/or employer. Breaking down the definition of a recruitment fee is useful because it explains what the money is potentially for – however, oftentimes prospective employees have no idea what they are paying for, simply that they have to pay the full amount or they won't get the job. Thus, there needs to be certainty in the regulation and FAR that all monies paid by a prospective employees to a recruiter and others associated with the recruiter and other agents of the employer are treated as prohibited recruitment fees.

III. Should the definition of a recruitment fee vary depending on whether the job is a professional high-paying, high-skill job or an unskilled, low-paying job? Is the location of the job a factor?

No. The fee definition should not vary based on skill level or location. Recruitment fees of any variety should be banned to avoid potential carve outs or loopholes. As mentioned above, one rationale for this is that the intent of this regulation is to prevent human trafficking rather than to inadvertently sanction it. We are concerned that if there is an exception for any type of job, it may lead to arbitrary renaming of positions that will enable a contractor to continue their current practices.

Particularly with global supply chains, where this issue is the greatest risk, where the nature of skilled and un-skilled labor may vary widely and become highly subjective, we believe that a blanket application related to all fees is appropriate.

IV. Are the boundaries (i.e., limitations) of the proposed definition clear? If not, what changes would make the limitations clearer?

The limitations should be made clearer by giving more explicit recognition to the fact that prohibited fees may be charged by agents and/or officials in *both* origin and destination countries (and sometime also in transit countries).

Furthermore, it needs to be made clearer that this definition includes fees that may be gathered long *after* "recruitment" is over. This could be accomplished by, for example, inserting after Section (1) "…regardless of the manner of their imposition or Collection…" a statement that this "includes wage deductions and/or withholdings made by the end employer."

V. 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 not?

Yes. The illustrative list of fees serves as a tool to identify the kinds of economic arrangements that have already been found to have coercive effects on workers in practice. This list will be helpful for companies in providing guidance to their suppliers on compliance, especially if they are unfamiliar with some of the risks inherent in recruitment processes. We believe this will also facilitate monitoring of the policies.

However, it is important to note that the list should not be limiting. Rather than adopting a formalist approach that only prevents specifically identified types of payments, the regulation should take a functionalist approach and prohibit payments and economic arrangements that could make workers more vulnerable to coercion at work. Even though the transition from a "worker pays" to "employer pays" recruitment model will entail disruption in economic arrangements that have enabled many to extract money from

vulnerable job-seekers, the difficulty and complexity of tracking fees charged and enforcing change are no excuse for permitting the maintenance of the status quo.

VI. What, if any, of the specifically enumerated fees in the proposed definition should be excluded and why?

None. We recommend keeping all of the types of fees that have already been enumerated in the Proposed Rule.

What, if any, of the specifically enumerated fees not included in the proposed definition should be added?

We recommend adding the following specifically enumerated fees:

1. Work permits, residence certificates, and security clearances (including renewals);
2. Sending, transit and receiving country government-mandated fees, levies, and insurance;
3. Receiving country medical examinations;
4. 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;
5. Transportation and subsistence costs from the airport or disembarkation point to the worksite;
6. Bribes, tips or tributes;
7. Security deposits and bonds; and,
8. Insurance fees.
9. Any fees or charges related to trade, skill, or aptitude testing (typically conducted in sending countries as a requirement of the 'employer') should be included as prohibited.
10. Uncompensated work (often described as "training") should be prohibited.
11. Any fees or charges assessed to workers for pre-departure orientation or any form of pre-departure training, whether government or employer-mandated should be prohibited.

VII. The Councils especially welcome feedback on the following specific aspects of the proposed rule (see below.) For each of the following, please comment on whether addition of the following described language to the illustrative list of recruitment fees would be helpful, unhelpful, or of no impact, and why.

We believe that addition of *all* of the following described language to the illustrative list of "recruitment fees" would be extremely helpful, and in some cases is essential to fully capturing the definition. We have included further comments on most items and provided several examples below.

A. Submitting applications, making recommendations, recruiting, reserving, committing, soliciting, identifying, considering, interviewing, referring, retaining, transferring, selection, or placing potential job applicants.

Including this would be helpful. All of these represent up-front costs that could put workers in a more vulnerable situation when they reach the worksite. The prospective loss of these investments, and workers' inability to recoup the investment without continuing to work (even in substandard conditions contrary to what was promised to them), could function as a form of coercion to keep workers in exploitative situations.

B. Labor broker services, both one-time and recurring.

This is important to include. Labor brokers can charge workers fees that equal as much as the fees charged by recruiters in order for the labor brokers to connect the worker with the employer. For example, in the *David v. Signal* case, the labor broker, labor recruiter, and immigration attorney each charged each worker at least $3,667 in fees. While the labor recruiter collected these fees, the workers were required to get cashiers' checks for one-third of the total payable to the labor broker.

C. Exit clearances, and security clearances associated with visas.

Including this would be helpful.

D. Pre-employment medical examinations or vaccinations in the sending country.

This would be helpful to include. Many migrant workers are required to undergo a general health check-up either by their recruiting agency or their prospective employers to ensure that they are "fit for service." For example, workers debarking from Indonesia to the Middle East frequently have to undergo a medical exam that will typically cost them anywhere from $20 to $100 USD.

E. Receiving country medical examinations.

Including this would be helpful. It should also be noted that workers sometimes have to undergo additional tests in the receiving country and/or when assigned a different job or switched by the recruiter to a different employer.

F. 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.

This would be helpful to include. Transportation expenses are often a significant component of the investment that foreign workers make to gain a job in another country. Many other workers who end up working for US contractors overseas have high travel costs as they move from their country of origin to the receiving country.

***G.* Transportation and subsistence costs from the airport or disembarkation point to the worksite.**

Including this would be helpful. The relative cost of this transportation, which must be paid in U.S. dollars, is disproportionately high for workers whose previous earnings have been in foreign currency, often valued significantly less than U.S. currency.

H. Security deposits and bonds.

Including this would be helpful. Collateral requirements in contracts, as well as security deposits and bonds, are also sometimes used as a way of keeping workers on the job against their will. Much like breach fees, they function as an explicit form of coercion that could lead to forced labor.

I. The inclusion of a collateral requirement, such as land deeds, in contracts.

Including this would be helpful because migrants are frequently required or coerced to sign over land deeds and other valuable assets as collateral against repayment of fees for the job. Thai farm workers in the landmark EEOC v. Global Horizons case, for example, reported being coerced to hand over deeds to their "ancestral lands" to recruiters as collateral for recruitment fees as high as 600,000 Thai baht, about 18,400 USD. Such collateral served to bind workers to discriminatory, unsanitary and dangerous living and working conditions. Global Horizons settled the claims in 2014 for $2.4 million.

J. Contract breach fees.

Inclusion of contract breach fees are very important to include in the definition. Worldwide, recruiters commonly operate under a model in which they recoup fees charged to migrants by taking some or all of their wages. If workers leave the job, the recruiter might not get all of the fee repaid (fees they, it should be underscored, should not have charged the worker in the first place). Therefore, recruiters impose a variety of mechanisms, such as breach fees, to dissuade workers from leaving a job. This happens with migrants to the United States too.

As a result, workers may be fearful or unable to leave their employment, and may be forced to stay in an employment situation they would otherwise have left.

K. An employer's recruiters, agents or attorneys, or other notary or legal fees.

Addition of this language to the illustrative list of recruitment fees would be extremely helpful. In fact, given the dependence that many employers have on recruiters, agents, attorneys and notaries around the world to process the paperwork of prospective employees, we think addition of this language is essential. Indeed, "legal fees" (including those that employers are already prohibited from passing on to prospective employees such as visa processing fees) currently make-up a large portion of the costs thrust on to prospective employees. It is important to note that these fees are sometimes charged to employees after they have begun work as illegal "deductions" or "security deposit" from their wages to cover their employer's various expenses from bringing them on board.

L. Insurance.

This would be helpful to include. The term "insurance" is often vaguely applied in the recruitment and placement process as a catch-all type of fee. It often refers to charges to workers before and/or during employment that serves as "runaway insurance," meaning that workers pay into a fund that may or may not be returned to them only if they finish out their contract. Thus, it serves as an additional mechanism to compel them to work. It can also refer to fees charged for insurance (such as medical coverage) that should be covered by the employer and often does not even exist.

M. Contributions to worker welfare funds or government provided benefits in sending countries required to be paid by supplier.

This would be helpful to include. Such charges not only are often fraudulent in that the services don't exist or are not made available to migrants, but also are simply charged to workers when the employer is responsible for them.

VIII. Comments on the specific Elements of the Definition

1. Recruitment fees means the following:

"*Recruitment fees include, but are not limited to, fees, charges, costs, assessments, or other financial obligations assessed against employees or potential employees, associated with the recruiting process,* ***regardless of the manner or timing*** *of their imposition or collection…*"

The Tri-State CRI advocates that the definition of recruitment fees should include the phrase "regardless of the manner or timing" in the sentence above. 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. We also think it is important that fees charged to "potential employees" should be included, as these practices should be prohibited even if a worker ends up working on another contract or is never hired at all. The definition needs to more clearly include fees paid long after recruitment is technically "over" such as:

1. Including kickbacks, wage withholdings, etc. (see above comment)
2. For covering the cost, in whole or in part, of advertising;
3. For any activity related to obtaining permanent or temporary labor certification;
4. For processing petitions;
5. For visas and any fee that facilitates an employee obtaining a visa such as appointment and application fees;
6. For government-mandated costs such as border crossing fees (*see below);
7. For procuring photographs and identity documentation, including any nongovernmental passport fees;
8. 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; and/or
9. For an employer's recruiters, agents or attorneys, or other notary or legal fees.

Payments made to governments abroad should also be prohibited, since these may also contribute to a worker's indebtedness. Some governments also charge exit fees. Although the definition includes "government-mandated costs", it is not clear whether these costs are limited to those imposed by the government of the employer/ receiving country. It is

important to note that many countries (sending and receiving) charge an array of fees (official and unofficial), which are often accompanied by demands for bribes and "facilitation payments." See Verite's report on government fees and corruption in several migration corridors for multiple illustrations of the way these fees are linked to trafficking: https://www.verite.org/sites/default/files/images/Verite-Report-Intl-Labour-Recruitment_0.pdf

2. Any fee, charge, cost, or assessment may be a recruitment fee regardless of whether the payment is in property or money, deducted from wages, paid back in wage or benefit concessions, paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute, remitted in connection with recruitment, or collected by an employer or a third party, including, but not limited to—

1. Agents;
2. Recruiters;
3. Staffing firms (including private employment and placement firms);
4. Subsidiaries/affiliates of the employer;
5. Any agent or employee of such entities; and
6. Subcontractors at all tiers.

Often, recruiters intentionally charge fees at later stages of the hiring or employment process and in different forms in order to induce workers to enter into a fraudulent employment arrangement. CDM recently received complaints from several groups of workers in Utah who were not charged recruitment fees in advance, but were informed that they would have these fees deducted from their wages once they arrived in the United States. The workers' calculations regarding the benefit of the employment bargain therefore changed significantly, and some workers considered that they would not have accepted the job had they known of the true costs of the exchange from the beginning. Nevertheless, the employer insisted that this was a condition of the job, and the handful of workers who complained were fired.

3. **Breach fees** should be included in the definition of recruitment fees:

The definition of recruitment fees should encompass breach fees; the principle underlying the prohibition against recruitment fees is that charging workers to work is inherently unethical. Permitting breach fees would undermine the worker protection and public policy objectives that led to the prohibition on recruitment fees.

Breach fees are explicitly designed to:

- Cover the costs of recruitment expenses borne by the employer or recruiter
- Compensate the employer or recruiter for forgone profits

For the first part, then, breach fees are simply recruitment fees in another form. Instead of being paid upfront, these fees are essentially delayed until the termination of employment or forgiven by the employer or recruiter at the conclusion of the contract. These fees are the equivalent of recruitment fees and should be treated as such. Moreover, a common problem in employer-labor contracting is the fundamental power imbalance between the parties. For fees that are delayed, this problem is exacerbated because they are unlikely to fully understand the likelihood or impact of having to pay their breach fees on their ability to freely participate in the labor market and to make unencumbered choices about whether to continue working in a particular job.

In terms of compensating employers or recruiters for lost profits, it is unreasonable to impose that obligation on employees. It is unreasonable to impose the burden of lost profits on potential employees, who could be trapped in positions which they would otherwise leave due to their perception of the balance of wages, benefits, or working conditions. Rather, employers or recruiters are in a better position to spread the risk of lost profits across their employees, just as they already do when the market declines or employees leave.

Breach fees increase the relative power of employers and recruiters in a situation where they already have excessive leverage over immigrant employees. Recruitment fees are negotiated when many potential migrants are willing to sign a contract with onerous terms for the opportunity to get a job. The FAR rule is designed to mitigate the imbalance inherent in market dynamics by precluding recruitment fees. Breach fees are determined at the same time and the same policy rationales apply. Essentially, breach fees are simply another form of recruitment fees that impede freedom of movement and agency and increase the risk of worker exploitation.

X. Conclusion

Thank you for the opportunity to comment on the FAR Case 2015-017. The Proposed Rule provides critical improvements to the FAR that will enable companies to comply with greater clarity and for the investment community to better assess and understand how a company in their investment portfolio is managing that risk. We encourage the Departments to maintain the FAR Case 2015-017's strong worker protections intact as the rule is finalized.

Sincerely,

Sister Patricia Daly, OP
Executive Director
Tri-State Coalition for
Responsible Investment

Mary Beth Gallagher, esq.
Associate Director
Tri-State Coalition for Responsible
Investment