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I Can See Clearly Now (Well, Almost): Congress Initiates Legislation to Abolish the Contractor Blacklisting Regulations

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It's not quite time for federal contractors to pop the cork and pour the champagne, but it may be time to get out the flutes and chill a bottle.

The new Congress has taken the first step toward extinguishing the so-called "contractor blacklisting" regulations. On January 30, 2017, Republicans in the U.S. House of Representatives and Senate introduced H.J.Res.37, a joint resolution of disapproval that would declare that the regulations, which were issued in August of 2016 to implement Executive Order 13673 (EO 13673), Fair Pay and Safe Workplaces, have no force or effect. The joint resolution would serve as a legislative veto under the Congressional Review Act (CRA), which enables Congress to block a regulation from taking effect and thereby prevent the same or similar regulation from being promulgated in the future. The joint resolution will require only a simple majority of the House and the Senate and President Trump's signature.

If H.J.Res.37 is successful—and there is no reason to expect otherwise—it will end a regulatory scheme that has loomed over federal contractors since President Obama signed EO 13673 on July 31, 2014. Among other things, the executive order would have given enforcement personnel at the National Labor Relations Board, the U.S. Equal Employment Opportunity Commission, the Occupational Safety and Health Administration, the Office of Federal Contract Compliance Programs, and the U.S. Department of Labor's Wage and Hour Division the ability to use preliminary enforcement decisions to bar access to federal contracts.

The regulations—which consist of a final rule from the Federal Acquisition Regulatory Council and final guidance from the U.S. Department of Labor—were set to take effect on October 25, 2016. They were halted at the last minute by a nationwide injunction entered by Judge Marcia Crone of the U.S. District Court for the Eastern District of Texas. The U.S. Department of Justice (DOJ) filed a notice of appeal with the Fifth Circuit Court of Appeals on December 22, 2016, seeking reversal of Judge Crone's order.

The preliminary injunction granted by Judge Crone enjoined the portions of the final rule concerning labor law disclosures and restrictions on pre-dispute arbitration agreements. It did not affect the final

rule's paycheck transparency provisions, which took effect, as planned, on January 1, 2017. The joint resolution applies to the entire final rule; it does not distinguish between the components of the final rule or include a carve-out for the paycheck transparency provisions. We therefore expect the joint resolution, if successful, to extinguish the final rule in its entirety.

While the joint resolution is pending in Congress, it is possible that President Trump could decide to rescind the executive order or instruct the DOJ to withdraw its appeal to the Fifth Circuit. In the long term, the preferred solution for government contractors would be for the president to withdraw the Fifth Circuit appeal and then let the joint resolution make its way through Congress so he can sign it when it reaches his desk. Signing the joint resolution under the CRA is preferable to unilateral rescission, because the CRA solution will prevent the same or substantially similar regulation from being issued in a future administration unless specifically authorized by legislation.

Passage by Congress and approval by President Trump would mark only the second time that the CRA has resulted in the invalidation of a federal regulation. The first occasion was in March of 2001, when Congress and President George W. Bush took action to nullify the ergonomics regulation that had been put in place by the Occupational Safety and Health Administration toward the end of the Clinton administration.

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