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PRESS RELEASE

WRF Urges FAR Council to Withdraw Proposed Blacklisting Regulations

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Washington, DC—On August 29, 2000, Wiley, Rein & Fielding submitted comments on the proposed "blacklisting regulations" on behalf of the National Alliance Against Blacklisting (NAAB), contending that the proposed regulations should be abandoned immediately as unlawful, arbitrary, and capricious. The proposal, published June 30, 2000, in the *Federal Register* (65 Fed. Reg. 40,830), would amend FAR Part 9's responsibility criteria to provide that government contracting officers could *withhold contract awards* to companies that cannot demonstrate *(certify)* "satisfactory compliance with federal laws including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws." They also would modify FAR 31.205-47 to *prohibit contractors from recovering legal defense costs* in government proceedings if they are found to have violated any law, regardless of the reasonableness of defending the charge and regardless of the nature of the violation or the number of successfully-defended allegations. The blacklisting regulations also would amend FAR 31.205-21 to *deny contractors the recovery of costs associated with responding to unionization efforts*.

The comments, which were prepared by Rand Allen, Scott McCaleb, Kevin Maynard, and Derek Yeo, are actually comprised of three separate comments on different aspects of the proposed regulations: (1) the substantive portions of the blacklisting regulations; (2)the Initial Regulatory Flexibility Analysis (IRFA) finding, incredibly, that the regulations would not likely have a significant economic impact on a substantial number of small entities; and (3) the Paperwork Reduction Act (PRA) analysis estimating that the blacklisting regulations would impose 606,667 annual burden hours. NAAB's substantive comments

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demonstrate that the proposed regulations should be abandoned because (1) the supporting IRFA and PRA analyses were flawed; (2) the Part 9 amendments violate substantive and procedural due process requirements, interfere and conflict with statutorily-prescribed administrative responsibilities and remedies, and otherwise lack a rational basis; and (3) the Part 31 amendments violate the Major Fraud Act of 1988, impinge contractors' free speech rights, create internal inconsistencies in the regulations, and violate the government's neutrality obligation on labor relations issues.

WR&F's comments on the IRFA contend that the FAR Council failed to articulate a rational need for the Proposed Rule, failed to evaluate adequately the Rule's compliance costs, and failed to assess the Rule's impact on overlapping federal laws and regulations. Furthermore, the FAR Council did not conduct a meaningful analysis of the impacts of the Proposed Rule on small businesses and did not consider whether there are any less onerous alternatives available. Likewise, the NAAB's comments on the PRA indicates that analysis is inadequate because the proposed regulations and corresponding new certification relating to compliance with federal laws are not necessary to the proper functioning of the FAR and government procurement system and because the analysis understates the true impact of the proposed rules on the economy.