



August 27, 2021

VIA ELECTRONIC SUBMISSION

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Room S-3502
Washington, DC 20210

Re: Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 38816

Dear Secretary Walsh and Ms. DeBisschop:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments to the Department of Labor's Wage and Hour Division (DOL) on its proposed rule, which increases the minimum wage for federal contractors to \$15.00 per hour beginning January 30, 2022.¹

In this proposed rule, DOL has provided an Initial Regulatory Flexibility Analysis (IRFA), indicating that the proposed rule will have a significant economic impact on a substantial number of small entities. However, the agency has also provided a certification that the rule will not

¹ Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 38816 (July 22, 2021) (hereinafter "2021 Proposed Rule").

have such an impact. As the agency itself has provided evidence of the rule’s impact, the certification under Section 605 lacks a factual basis and is invalid.

Advocacy is concerned that this proposed rule will result in financial hardship for affected small businesses that are not normally considered government contractors, such as concessionaries, lease holders, and seasonal recreational businesses who have contracts and permits on Federal property or lands. Many of these small businesses will be unable to pass on these increased wage costs to the federal government like traditional federal contractors.

Advocacy also believes that DOL’s IRFA underestimates the small business compliance costs including increased wages under this regulation. Advocacy recommends that DOL prepare and make available for public comment a supplemental IRFA that adequately assesses the small business compliance costs of this regulation and includes consideration of significant alternatives that would accomplish the objectives of the regulation while minimizing the economic impacts to small entities.

I. Background

A. The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule’s publication in the *Federal Register*, the agency’s response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation,

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”⁶

B. The Proposed Rule

Executive Order 13658 (“Order”) increased the hourly minimum wage for federal contractors, subcontractors, and their workers to \$10.10 per hour, beginning January 1, 2015, and beginning January 1, 2016, and annually thereafter, to an amount determined by the Secretary of Labor.⁷ On June 17, 2014, DOL issued a proposed rule implementing this Order.⁸ On July 25, 2014, the Office of Advocacy submitted a public comment letter on this regulation.⁹

On May 25, 2018, Executive Order 13838, “Exemption from Executive Order 13658 for Recreational Services on Federal Lands,” exempted “Federal contracts or contract-like instruments...in connection with seasonal recreational services or seasonal recreational equipment for the general public on Federal lands.” Executive Order 13838 stated that seasonal recreational services include “river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps.” This exemption did not apply to “lodging and food services associated with seasonal recreational activities.”¹⁰

On April 27, 2021, President Biden issued Executive Order 14026, which increases the hourly minimum wage paid to federal contractors, subcontractors, and their workers to \$15.00 per hour beginning January 30, 2022, and annually thereafter, to an amount to be determined by the Secretary in accordance with the Executive Order.¹¹ The order applies to “any new contract; new contract-like instrument; new solicitation; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument.” This includes (A) procurement contracts; (B) contracts for services covered by the Services Contract Act (SCA); (C) contracts for concessions; (D) contracts entered into with the Federal Government in connection with Federal property or lands and related to offering of services for Federal employees, their dependents, or the general public; and (E) wages for workers under such contracts governed by the Fair Labor Standards Act (FLSA), the SCA, or the Davis-Bacon Act (DBA). Executive Order 14026 revokes Executive Order 13838. DOL

⁶ 5 U.S.C. § 601 note.

⁷ Executive Order 13658, Establishing a Minimum Wage for Contractors, 79 Fed. Reg. 9851 (Feb. 20, 2014) (hereinafter “2014 Executive Order”).

⁸ Establishing a Minimum Wage for Federal Contractors, 79 Fed. Reg. 34568 (June 17, 2014) (hereinafter “2014 Proposed Rule”).

⁹ Comment letter from the Office of Advocacy to the U.S. Department of Labor (July 25, 2015) at: <https://www.sba.gov/advocacy/7252014-establishing-minimum-wage-contractors-notice-proposed-rulemaking>.

¹⁰ Executive Order 13838, Exemption from Executive Order 13658 for Recreational Services on Federal Lands, 83 Fed. Reg. 25341 (May 25, 2018) (hereinafter “2018 Executive Order”).

¹¹ Executive Order 14026, Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 38816 (April 30, 2021) (hereinafter “2021 Executive Order”).

released a proposed rule implementing this Executive Order on July 22, 2021.

II. Advocacy is Concerned that the Proposed Rule Will Have a Significant Economic Impact on a Substantial Number of Small Entities; DOL Should Revise Its Cost Estimates and Produce a Supplemental Initial Regulatory Flexibility Analysis with Regulatory Alternatives that Minimize the Economic Impact on Small Entities.

A. The Agency's Certification that the Rule Will Not Have a Significant Economic Impact on a Substantial Number of Small Entities is Not Valid.

Section 603 of the Regulatory Flexibility Act (RFA) requires that regulatory agencies prepare an Initial Regulatory Flexibility Analysis (IRFA) to accompany every proposed rule.¹² A proper IRFA must describe the impact of the proposed rule on small entities and contain the following information: (1) a description of the reasons why the agency's action is being considered; (2) a succinct statement of the objectives of, and the legal basis for, the proposed rule; (3) a description of small entities to which the rule will apply; (4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (5) an identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.¹³

Section 605 of the RFA allows an agency to avoid the requirements of Section 603 if it can certify that the proposed regulation will not have a significant economic impact on a substantial number of small entities. If an agency certifies the rule, it must provide a statement containing a factual basis for this certification. An agency's certification is subject to judicial review.¹⁴

Here, DOL has both provided an IRFA under Section 603, indicating that the rule will in fact have a significant economic impact on a substantial number of small entities, and certified under Section 605 that the rule will not have such an impact. As the agency itself has provided evidence of the rule's impact, the certification under Section 605 lacks a factual basis and is invalid.

B. The Agency Must Publish a Supplemental IRFA and Consider Regulatory Alternatives that Would Minimize the Impact of the Rule on Small Entities; It Can Do So by Re-examining the Kinds of Employees Covered by the Rule and the Wage Costs of the Rule.

Agencies must present significant alternatives for regulatory relief as part of an IRFA as required by § 603(a). At a minimum, the agency should consider: (1) the establishment of different compliance or reporting requirements for small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements for small entities; (3) use of

¹² 5 U.S.C. § 603, 605.

¹³ 5 U.S.C. § 603.

¹⁴ 5 U.S.C. § 611.

performance rather than design standards; and (4) exemption for certain or all small entities from coverage of the rule, in whole or in part.¹⁵

Advocacy recommends that DOL prepare and make available for public comment a supplemental IRFA that adequately assesses the small business compliance costs of this regulation and includes consideration of significant alternatives that would accomplish the objectives of the regulation while minimizing the economic impacts to small entities. Advocacy believes that re-examining the types of employees covered by the proposed rule and the wage costs imposed by the rule would provide such alternatives to consider.

1. DOL Needs to Clarify Workers Affected by this Rulemaking

Advocacy had multiple conference calls and conversations with small businesses affected by this rulemaking, primarily concessionaires, lease holders, and seasonal recreational businesses with contracts and permits on Federal property and Federal land. In DOL's RFA section, the agency estimates that there are over 385,100 small entities affected by this regulation, and 46,500 small businesses operating under covered contracts on Federal properties or lands.¹⁶ The following comments are reflective of issues raised in those conversations.

As a threshold matter, small businesses with concessions contracts or use permits on Federal properties or lands need clarification on which of their workers are covered by this rule and are required to receive a higher minimum wage and the type of federal nexus needed for coverage. For example, one outfitter providing river tours has multiple Forest Service permits but only 60 percent of their employees work in areas that have anything to do with these permits. Another outfitter providing river tours has multiple federal permits, but also has nearby activities, restaurants, and lodging on private lands. Small businesses seek clarification on which of these workers are covered by this proposal, and whether administrative personnel such as guest relations, human resources, and marketing are also covered. Small businesses in the recreational industries also seek clarification on how this rule applies to seasonal workers or students.¹⁷ Small businesses in the tourism industry also seek clarification on worker coverage, such as a tour companies that may have many stops in its itinerary and only a few of those stops in federal lands requiring a permit.

2. DOL Has Underestimated the Wage Costs from this Rulemaking

Advocacy believes that DOL's IRFA is flawed because it underestimates the small business compliance costs for increased wages under this regulation. DOL estimates that the first-year

¹⁵ 2021 Proposed Rule, at 86 Fed. Reg. 38859, 38877.

¹⁶ *Id.* Of these affected firms on federal properties and lands, over 43,000 have a concessions contract or use permit with the National Park Service (NPS), Forest Service (FS) and the Bureau of Land Management (BLM).¹⁶ There are 2,165 small businesses in public buildings and on military bases.

¹⁷ 2021 Proposed Rule, at 86 Fed. Reg. 38830. Small businesses commented that this provision on application of this rule to students and seasonal staff, and possible exclusions/exemptions, was confusing.

wage cost ranges from \$3,947 to \$12,558 per small entity.¹⁸ This proposed rule increases the minimum wage for federal contractors from \$10.95 per hour to \$15.00 per hour, which is an almost 37 percent increase in minimum wage for these workers.¹⁹

Small businesses have told Advocacy that the proposed rule will result in much higher wage costs than DOL has estimated, which will have severe economic impacts for affected small businesses that are not normally considered government contractors, including concessionaries, lease holders, and seasonal recreation businesses. Many of these small businesses will be unable to pass on these increased wage costs to the federal government like traditional federal contractors. DOL must analyze these higher compliance costs in a supplemental IRFA for this rule.

For example, Advocacy spoke to restaurant franchise operators on military bases who stated that they would not be able to recover these increased wages from the federal government or from customers. The increased wages from this rule would apply to any concessionaire or lease holder who rents property at a federal property or on federal lands, such as retail, hotels, and daycare facilities. One franchise operator with two Subway stores on military bases would incur \$60,000 in increased wages per year. This concessionaire does not receive money from the federal government but pays higher rent for the privilege of doing business on a military installation. This franchisee's contract states that they must have the same or lower prices as other Subway locations within a three-mile radius; this business cannot increase their menu prices but must still compete with those nearby outside restaurants who pay a minimum wage of \$7.25 per hour. The owner, who is already facing pandemic losses, will be forced to close one of their stores. This rule will result in prohibitive costs for the business owners, unemployment for many employees, and fewer choices for customers at these federal facilities.

Advocacy is concerned that this proposed rule will result in financial hardship for affected small recreational businesses such as outfitters and guides, who have permits to operate on Federal lands. These businesses do not obtain funds from the government and may not be able to pass on or recover the new wage costs from their customers. Advocacy spoke to a small business in Washington state who operates rock-climbing tours who stated that he must get approval from the National Park Service before he can increase any prices.

DOL must count the extra costs of overtime in its wage estimates in a supplemental IRFA. Small recreational businesses such as outfitters and guides commented that the higher minimum wage requirement would be extremely costly and unprofitable because they operate multi-day trips in National Parks and log many overtime wage hours; at a cost of \$22.50 per hour the increased costs would have a significant impact. While some employers can manage costs by limiting employees to 40 hours per week, it would not be feasible to switch out these recreational workers after 40 hours as they would be in the middle of remote trips in these parks.

¹⁸ 2021 Proposed Rule, at 86 Fed. Reg. 38882 (Table 14: Average Costs and Transfers per Small Contractor with Affected Employees).

¹⁹ 2021 Proposed Rule, at 86 Fed. Reg. 38817.

Small businesses in these recreation industries told Advocacy that their payroll accounts for 45-60 percent of their costs for these businesses. One small outfitter providing river tours, food service, and lodging operations under Forest Service permits in three southeastern states with 250 full-time, seasonal, and part-time staff estimated that this rule would result in an additional \$400,000 in expenses for one year. This estimate does not include the ripple effect of other employees that will expect a commensurate raise in compensation, which would add an additional expense of \$600,000 for this small business. These costs, if incurred, could then account for up to 25 percent of the annual gross revenue for this small business and would make it unprofitable.

Small businesses in recreation industries on federal lands may not be able to pass on these extra wage costs to their customers because of competition from nearby recreation businesses that do not have ties to Federal land. One outfitter providing river tours noted that they had multiple competitors nearby that are not on federal land and only pay a minimum wage of \$7.25 an hour. It will be hard for this outfitter to compete when they must increase their prices by 30 to 40 percent to pay \$15 per hour. Small businesses also told Advocacy that they must compete with other types of local recreation such as theme parks and ski areas, and with foreign travel competition from other countries providing similar activities.

Advocacy believes that DOL has the authority to exempt certain small businesses from this rulemaking if warranted. In its RFA section, DOL states that Executive Order 14026 “is prescriptive and does not authorize the Department to consider less burdensome alternatives for small business.” DOL also states that this Order “establishes its own coverage and exemption requirements; therefore, the Department has no authority to exempt small businesses from the minimum wage requirements of this order.”²⁰ However, Executive Order 14026 states that “[t]he Secretary shall, consistent with applicable law, issue regulations... [S]uch regulations shall include both definitions of relevant terms and, as appropriate, exclusions from the requirements of this order.”²¹

III. Conclusion

Advocacy is concerned that this proposed rule will result in financial hardship for affected small businesses that are not normally considered government contractors, such as concessionaries, lease holders, and seasonal recreational businesses who have contracts and permits on Federal property or lands. Many of these small businesses will be unable to pass on these increased wage costs to the federal government like traditional federal contractors.

In this proposed rule, DOL has provided an Initial Regulatory Flexibility Analysis (IRFA), indicating that the proposed rule will have a significant economic impact on a substantial number of small entities. However, the agency has also provided a certification that the rule will not

²⁰ 2021 Proposed Rule, at 86 Fed. Reg. at 38884, 38885 (RFA Section).

²¹ See 2021 Executive Order, at 86 Fed. Reg. 38816.

have such an impact. As the agency itself has provided evidence of the rule's impact, the certification under Section 605 lacks a factual basis and is invalid.

Advocacy believes that DOL's IRFA underestimates the small business compliance costs including increased wages under this regulation. Advocacy recommends that DOL prepare and make available for public comment a supplemental IRFA that adequately assesses the small business compliance costs of this regulation and includes consideration of significant alternatives that would accomplish the objectives of the regulation while minimizing the economic impacts to small entities.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Janis Reyes at (202) 619-0312 or by email at Janis.Reyes@sba.gov.

Sincerely,

/s/

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Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Janis C. Reyes
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Office of Advocacy
U.S. Small Business Administration

Copy to: Sharon Block, Acting Administrator
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