July 28, 2014

The Honorable Dr. David Weil
Administrator, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Ms. Mary Ziegler
Director of the Division of Regulations, Legislation, and Interpretation
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Electronically submitted: www.regulations.gov

RE: Proposed regulations implementing Executive Order 13658, Establishing a Minimum Wage for Contractors, 79 Fed. Reg. 34568, (June 17, 2014)

Dear Administrator Weil and Ms. Ziegler:

The U.S. Chamber of Commerce and the National Federation of Independent Business (NFIB) combined have members in every state of the country and in a wide variety of industry sectors who will be impacted by Executive Order 13658 and the accompanying regulations raising the minimum wage for federal contractors. The proposed regulation that is the subject of these comments flows from a flawed executive order, and instead of providing clarity for employers, it increases the questions and confusion employers will face when trying to comply with its requirements. The administration's claims that raising the minimum wage for workers on federal contracts will provide benefits to the employers and the federal government are driven by faith rather than data and evidence, and accordingly both the E.O. and proposed regulation should be withdrawn.

The Chamber is the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region. NFIB is the nation's leading small business advocacy association representing about 350,000 independent business owners, in Washington, D.C., and all 50 state capitals in varying industries that cover virtually all of the industries potentially affected by this proposed rule.

Roughly 15 percent of NFIB members employ 10-20 people and approximately 28 percent have 10 or more employees.[1]

Unlike most rulemakings that are driven by a statutory mandate, or initiated by an agency consistent with statutory authority, this rulemaking has been ordered by E.O. 13658 which dictates much of the content of the proposed regulation. Thus, while the Department of Labor's proposal is lacking in several key respects, as detailed below, the true source of the problems is E.O. 13658.

I. E.O. 13658 Is Based On A Flawed Premise And Executive Orders Are No Substitute For Legislation For Implementing Broad Policies.

Executive Order 13658 relies on the authority given to the president under the Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. 101 et seq. to make changes to federal contracting if they are deemed to be "'necessary to carry out' the statutory purposes of ensuring 'economical and efficient' government procurement and administration of government property." 40 U.S.C. 101, 121(a), as quoted 79 Fed. Reg. 34570. The E.O. then goes on to assert, with no supporting data, studies, or evidence, that increasing the minimum wage for workers on federal contracts will produce an array of benefits to fit the "economical and efficient" effect required by the statute including that doing so "increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs." 79 Fed. Reg. 9851.

The DOL's treatment of these benefits will be discussed in more detail below in the section on economic costs and benefits. However, as a logical matter, if raising wages was as reliable a panacea to such an array of business management problems as the president claims, employers would be competing with each other to have the highest wages. As this is not the case, the administration's argument that raising the minimum wage will generate all of these benefits is not credible. Nevertheless, the president has unilaterally decided what works best for employers and has moved forward with this scheme to raise the minimum wage for workers on federal contracts.

When the first announcement of this increase was made, before the actual E.O. was issued, it sounded limited in scope, and straightforward in concept. However, the release of the E.O. and now the NPRM for the implementing regulations has made clear that this change is anything but limited or straightforward. With undefined terms like "contract-like instrument" and application to companies who have not traditionally been considered federal contractors, the president is explicitly trying to do through executive order what he has been unable to do through Congressional legislation—raise the minimum wage for as many workers as possible.

The fact that this regulation will cover businesses who have not been considered federal contractors previously (e.g. franchise operators on military bases and retail or other services leasing space in federal buildings), and employees whose work was not previously considered part of a federal contract (e.g. those whose work merely supports the contracting activity), means there will be enormous confusion about compliance, and significant exposure to employers for

[1] http://www.nfib.com/about-nfib/what-is-nfib-/who-nfib-represents (last visited July 26, 2014).

non-compliance. One result of these problems will likely be companies deciding to no longer continue their operations where they are covered by this regulation. This comment has been made by several restaurant franchise operators with locations on military bases. If they decide to cease operations on these bases, it will mean fewer jobs for residents of these bases (in particular young and unskilled workers who have the greatest difficulty getting started and acquiring skills), the loss of revenue to various base causes supported by these businesses, and the loss of the convenience to base residents of their services and products.

That Congress has not yet acquiesced to the president's wish to increase the minimum wage can be attributed to several reasons. But at least one of them is the belief held by many members of Congress of both parties that doing so will have negative economic consequences. This point was highlighted by the Congressional Budget Office's conclusion that the proposed increase to $10.10/hour would result in the loss of 500,000 and perhaps as much as 1,000,000 jobs. The economics columnist Robert Samuelson went further in endorsing these arguments in a February 24, 2014 column. While he was commenting on the bills in Congress, his comments could just as easily have pertained to the executive order:

> This is fairy-tale economics. Many studies find negative job effects. The CBO didn't make them up. As important, the CBO shows — and this is its real contribution — why many recent studies may not be relevant to today's proposal. The reason: The proposed increase is much "larger than most of the increases that have been studied." Even after inflation, it would likely be about a third. Moreover, the minimum would be indexed to inflation, rising automatically with prices. This, too, is new.
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> All these differences suggest larger job effects, says the CBO. Cutting jobs involves one-time costs and disruptions that companies may avoid for small increases in the minimum — but not for big increases. Similarly, more workers would be affected than in the past (about 10 percent of workers compared with 5 percent for increases since 1980). Finally, indexing the minimum wage to inflation implies a permanence that may inspire firms to make deep cuts in labor costs. Companies won't hire unless new workers are profitable.
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> Hiking the minimum wage is more compelling as politics than as social policy….
>
> The minimum wage is liberals' symbol for showing how much they care for the poor — and how much they despise inequality — while demonstrating conservatives' callousness….
>
> To be sure, weak labor markets still reflect the Great Recession's hangover. But the administration isn't helping. It needs a new spirit: Make jobs, not propaganda.

Edicts like E.O. 13658 are no substitute for the necessarily arduous legislative process. They lack any element of accountability—one of the foundational principles of our system of government. The president, in the midst of his final term, is entirely unaccountable to the voters or the public for his actions, while members of Congress must regularly face their constituents and defend their choices. This is another reason Congress has not increased the minimum

wage—many members of Congress do not believe doing so will be well received by those whose support they need to remain in office. The president taking this action subverts the role of Congress as the primary policy setting authority in our government, and the associated accountability that is the cornerstone of our government's policy setting apparatus.

Not only does this executive order bypass Congress' role in setting the minimum wage under the FLSA, it overrides the already established, and statutorily driven, method for calculating wages under the Davis-Bacon Act (DBA) and Service Contract Act (SCA). These two laws specifically require a locally prevailing wage be paid for the different employee job descriptions on work covered by them. By decreeing that contracts under these laws will now have a minimum wage of $10.10/hour with an annual adjustment for inflation, the president has usurped Congress' control over making changes to these laws.[2]

The president's executive order will not produce the results required to justify it under the terms of the Procurement Act, and makes changes to the underlying laws in an *ultra vires* manner. The increase in the minimum wage did not cause the recession, but it clearly had no impact in helping end it. The economy is still in recovery mode and adding more labor cost burden to employers will not serve as a stimulus, nor spur economic growth, no matter how much the administration wishes this to be the case. Accordingly, the proposed regulations implementing it rest on an invalid foundation. Both of these actions should be withdrawn.

II. The Proposed Regulation Adds To The Confusion And Problems Employers Will Have Instead Of Providing Guidance And Clarity.

The proposed regulation provides no relief to employers looking for help in understanding their obligations. The following discussions highlight particular issues that the NPRM presents.

a. The proposed regulation does not adequately describe which employers are covered, or which employees are covered.

E.O. 13658 uses vague and open ended terms like "contract-like instruments" to expand the range of agreements covered by it. *See* Sec. 7 (d), 79 Fed. Reg. 9853. It also directs that it will apply not only to employees who are normally subject to federal contract requirements, such as those covered by the SCA and DBA, but also to those whose wages are governed by the FLSA. *See* Sec. 7 (d) (ii), 79 Fed. Reg. 9853. The level of connection to the contracting activity is not specified in the E.O. leaving the Department of Labor the task of determining how to define these terms and draw these lines.

The administration's desire to circumvent the legislative process means they have gone well beyond what was understood by the term federal contractor to create the maximum impact. This expansive reach means there are more problems with this regulation than there should be. Unfortunately, the DOL's proposed definitions only add to the confusion and lack of clarity. "Contract-like instrument" is never defined other than to be just put in with contracts. This is a

[2] For a more thorough discussion of how the Executive Order and the proposed regulations violate the DBA and SCA, please see the comments submitted by the Associated Builders and Contractors.

term that is unknown to everyone in the federal contracting realm, and yet the president chose to use it in his Executive Order. Not using it would have been just as easy, so it must have some meaning, but the Department's proposed regulations fail to give it one. Indeed, there is an extensive list of other specific types of agreements that are covered but "contract-like instrument" remains undefined. *See* 79 Fed. Reg. 34611. Instead of providing clarity and bright lines, this creates the impression that the administration is leaving a catch-all phrase to allow for some sort of *ex post facto* determination that an agreement was covered if an employer tries to argue otherwise.

Another example where clarity is lacking in who is covered, is the question of whether suppliers or vendors to concessionaires or federal contractors will be covered? Notwithstanding the broad definition of "contract or contract-like instrument" in proposed Sec. 10.2, coupled with the requirement that any tier of contractor is covered, and the further discussion of coverage under proposed Sec. 10.3, this issue is not addressed. Nor does the preamble discussion provide an answer. *See,* 79 Fed. Reg. 34576-77. If suppliers to concessionaires and other covered entities are covered, the reach of this executive order and its regulations will be increased many fold, along with the complications and negative consequences. If supplier and vendors are to be covered, where is the limit? To illustrate, consider this example: is the soft drink supplier to a Subway franchise on a military base considered a subcontractor under the E.O. and the implementing regulations? What about a cleaning service that handles these types of companies? What about the utility provider to the franchise restaurant that gives the restaurant the power to operate? What level of nexus to the federal agreement is necessary to warrant the inclusion of these vendors? The Department needs to explain what is expected of contractors and others covered by this requirement.

The Department interprets the executive order's direction to cover employees covered by the FLSA on federal contracts to include employees who have not previously been considered affected by federal contracting requirements such as those providing support to the contracting activity. The example given in the preamble is that of an accounting clerk "who exclusively processes invoices and work orders and responds to other administrative matters on an SCA-covered contract…" 79 Fed. Reg. 34577.[3] This requirement will create tremendous uncertainty for employers who will have to decide which employees not directly involved in the contracting activity are covered. Furthermore, only their activities that qualify under the Executive Order and proposed regulations will have to meet the E.O. specified wage. In most businesses, employees are not allocated exclusively to such a narrow range of duties and customers. Staying with the example above of the soft drink supplier to the Subway franchise on a military base, which employees are covered by this requirement—just the driver and/or delivery person? The sales person who arranged the delivery? How about those involved in the bottling? This provision is likely to be one of the most problematic for employers as there are no clear boundaries and employees that were never previously considered covered by federal contracting requirements will now be included.

[3] The discussion describing the breadth of this requirement is not reflected in the drafting of the proposed regulation at Sec. 10.2 definition of "worker," and Sec. 10.3 Coverage. Neither of these includes any mention of employees who are merely supporting the contracted activity as being covered.

b. The proposed regulation makes no allowance for collective bargaining agreements.

The proposal makes no allowance for collective bargaining agreements (CBAs) with a wage rate lower than $10.10/hour or the inflation adjusted wage in future years. The new E.O. specified minimum wage will impose costs that these companies did not anticipate and which go beyond what they bargained for. Labor contract negotiations are a delicate balance of competing interests. Unions will often trade lower starting wages for some other benefit or compensation level for more senior employees. By imposing a higher wage than what they could achieve through the bargaining process, unions will be getting something without having to give anything up. Moreover, as the minimum wage is increased in the out years with the inflation adjustment, this will mean other wages tied to the starting wage will have to be adjusted as well, resulting in a ripple effect that will multiply the cost impact of this change.

One argument in favor of having a CBA is that labor costs are more predictable and companies can plan their expenses more closely. The new minimum wage with the inflation adjustment undermines that value of having a CBA. One company has determined that it will cost them $5.8 million to raise the 22,000 employees they have making $10.09/hour or less to $10.10/hour and with the inflation adjustment, this impact will only go up over the life of the contract.

The Department should consider suspending this new wage requirement for companies with collective bargaining agreements until the current agreement expires. This will preserve the value of the bargain struck between employers and their unions, and give employers the certainty about their wage structures that is associated with having a CBA.

c. The proposed regulations will hurt companies that will not be able to recover the increased wage costs.

Because the coverage of employers is so expansive and includes companies who are not normally considered federal contractors, many of these will not be able to simply pass through the increased costs to the federal government like traditional federal contractors. The result will be a significant decrease in their already thin profit margins and the likelihood that they will cease operations that trigger this requirement.

Among the companies that have indicated they will not be able to recover an increase in their wage burden are restaurant franchise operators on military bases. These businesses are contractually obligated to keep their prices at or below the levels of similar facilities within three miles of the base. Thus if those operating on the base have to increase their wages, they will not be able to charge more for their products and will eventually lose their entire profit margin as the minimum wage is increased through the inflation adjustment. This will be a losing proposition for all concerned: the business owners, the employees (many of whom are young and unskilled who need these jobs to get started), the bases that derive revenue from these operations, and the customers who will lose the convenience of having these choices so close by. The other option some of these businesses may choose is to cease hiring employees who are not worth the elevated new wage. If these employers are to be forced to pay a higher wage, they will only be

able to afford to hire employees who can produce at that level. This will mean no more jobs for high school or young workers who have yet to develop skills. No one is served by including these businesses under this E.O. and the regulations.

Another example of a company that will not be able to recover the increased wage costs will be one that runs skilled nursing centers that work with the local Veterans Administration hospitals and facilities to care for some of the VA referred patients. The definition of contracts is worded so broadly that it appears to include the VA "provider agreements." Proposed Sec. 10.2, 79 Fed. Reg. 34611. These facilities have no ability to pass their costs onto outside customers or the federal government as their revenue is entirely driven by insurance reimbursement schedules. This company will be forced to cease taking in these patients which they do not want to do as they believe providing services to veterans is a privilege and one they want to continue doing. Again, no one's interests will be served by including these companies under these requirements.

d. The proposed regulation includes apprentices as covered employees despite the Executive Order not mentioning them.

The Executive Order makes no mention of apprentices as being among the covered workers, yet the Department has explicitly included them in the proposed regulation. *See* Sec. 10.2 definition of "worker," 79 Fed. Reg. 34612. As a result, apprentices could be paid the same wages as the full time workers on the SCA and DBA jobs. This is inconsistent with the way apprentices have been treated and will reduce or eliminate the financial advantage of using them, thus damaging their ability to get the necessary experience to complete their training.[4]

e. The Department never determined whether an Initial Regulatory Flexibility Analysis was required.

The Department includes an Initial Regulatory Flexibility Analysis under its Regulatory Flexibility Act discussion, 79 Fed. Reg. 34602. However, the Department never declares whether this proposed regulation will have a significant economic impact on a substantial number of small entities.

The Department goes on to conclude that the impact of raising the wage on small businesses is "de minimis", 79 Fed. Reg. 34603, but the only wage increase considered is the initial increase to $10.10/hour. There is no discussion about the inflation adjustment that will follow in future years. Nor does the Department do an adequate job identifying other compliance costs beyond just increasing the wage level, as detailed below in Section III.

While the Executive Order limits the Department's discretion in how to structure this regulation, and therefore the Department's discussion of alternatives is restricted, it did have choices such as whether to include apprentices, or how to handle the requirement to include workers who are not normally considered affected by federal contracts. Since the E.O. does not distinguish between sizes of contractors, any decisions made by the Department will flow

[4] For a thorough treatment of the problems with including apprentices as covered workers, see the comments submitted by the Associated Builders and Contractors.

through to small entities and have a greater impact on them than large contractors. Furthermore, the lack of clarity in terms and absence of guidance on key terms will create more problems for small businesses than other contractors. The Department could start its effort at making this regulation less burdensome for small contractors by improving those elements of this regulation.

III. The Department's Analysis of the Economic Impact and Other Required Analyses Are Flawed and Lack Actual Data.

a. The Department's Paperwork Reduction Act burden estimate is low.

The Department has not adequately analyzed the impact of the proposed rule to increase Paperwork Reduction Act burdens reported under OMB Control Numbers 1235-0021 (Form WH-3) and 1235-0018 (FLSA recordkeeping). The proposed rule, by the Department's own estimate, will affect 183,814 workers who will be entitled to wage increases to the $10.10 minimum. The Department's assertion that only 35 additional complaints will be filled is not founded on any credible facts.

With such a large number of persons becoming entitled to this new and highly publicized wage level, a reasonable expectation would be that the number of disputes and new complaints will be in the thousands. The proposed rule does not entitle every worker employed by a federal contractor to the $10.10 minimum, and in addition to disputes and complaints arising from the estimated 183,814 covered workers, significant numbers of disputes and complaints will likely arise from workers not covered as questions of who performs work on a covered contract, what contracts are covered, and definition of covered subcontractors, and many other disputable issues arise in the first years of implementation of the proposed rule.

The form WH-3 paperwork burden is the same whether a complaint is found to have merit or not. According to the Department's Office of Federal Contract Compliance Programs, about 26 million people work for private companies that hold one or more federal contracts or subcontracts,[5] and while only a few may actually work directly on federal contract assignments, there is a large potential for claims, disputes and complaints. The potential for complaints resulting in new Form WH-3 reporting burdens will be exacerbated by the significant unanswered questions in the proposed rule, including the implications of extension of coverage down the sub-contractor supplier chain (see earlier discussion about whether suppliers/vendors are considered subcontractors for the purposes of coverage under the Executive Order).

The proposed rule will also increase the burden of employer recordkeeping now associated with OMB Control Number 1235-0018. In addition to existing wage and hours records already required for FLSA compliance, affected employers will have to keep new records separately identifying wage rates, hours worked and wages paid to workers for work done on federal contract projects distinguished from work done on non-federal projects. This recordkeeping burden will extend beyond the set of workers currently earning less than $10.10/hour. To show compliance with the proposed rule, the employer will have to keep a

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[5] See http://www.dol.gov/ofccp/regs/compliance/aa.htm. "OFCCP's jurisdiction covers approximately 26 million or nearly 22% of the total civilian workforce (92,500 non-construction establishments and 100,000 construction establishments)." Since the data cited by OFCCP is for 1995, the number is likely much larger today.

record (available to compliance inspectors) for every worker, no matter how high the wage rate, to document wage rate, hours worked weekly on federal and non-federal contract projects, and total wages paid. This means that current federal contract-holding companies will eventually (when the rule becomes fully applicable as current contracts are renewed) have to keep new and expanded records for wages, hours and earnings that separate federal and non-federal contract work for about 26 million employees. The number will be even greater because the proposed rule will also apply to state and local governments, universities and other public institutions that receive payments for services work through federal contracts rather than grants.

b. The Department's analysis under E.O.s 12866 and 13563 on compliance costs and benefits lacks credibility.

The Department estimates that when the rule is fully implemented after about five years (as existing contracts are replaced with new ones), the rule will increase wages to 183,814 workers (who currently earn less than $10.10) by $501 million annually (an increase on average of $1.31 per affected worker per hour worked). The Department assumes that this amount will be paid ultimately by the federal government as contractors pass through their wage costs through contract bid prices, ignoring and not attempting to capture the amount related to companies that will not be able to pass these costs onto the federal government such as those with concessionaire agreements or leases where they are restricted from increasing their prices. Because of the pass-through assumption, the Department characterizes this amount as a "transfer" rather than a cost to society.

The Department's estimate of the wage increase transfer cost associated with the proposed rule is purely speculative. There is no basis provided to support the Department's assumption that wages among Federal contractor employees follow the same distribution in terms of below and above $10.10 per hour as the wider group of private sector wage earners for whom data is available. This is an important question that goes to the heart of the issue of whether the proposed minimum wage will provide benefits in proportion to the administrative compliance costs that it will impose on contractors and that will ultimately be borne by taxpayers. Rather than relying on data analogies to estimate the number of affected workers, the Department could have and should have gone directly to the definitive data source – existing Federal contractors. The Department should conduct a survey of contractors to obtain definitive data regarding the number of workers performing tasks on Federal projects who are paid at each of various wage cut points. Indeed, much of the required data may already be available through information currently collected by the Department's Office of Federal Contract Compliance Programs in relation to that office's enforcement of affirmative action/non-discrimination regulations.

The Department's estimate of compliance costs in addition to the wage transfer component is simply not credible. The Department correctly identifies the task for contractors "to read the contract clause [requiring the minimum wage], evaluate and adjust their pay rates to ensure workers on covered contracts receive a rate not less than the Executive Order minimum wage, and modify their [sub]contracts to include the required contract clause." The Department's estimate that these formidable tasks can be accomplished by one management employee of a contractor company in just one hour of labor time, however, is unsupported by

any reasoning or evidence. The Department's time estimate of one hour is arbitrary and without merit.

For one person to simply read with comprehension the proposed contract clause (Appendix A of the proposed regulatory text) and to read the full text of the regulation itself which is incorporated by references into the contract clause and, therefore, must also be read and understood by a prudent contractor would alone take more than an hour. Furthermore, the idea that only one member of the contractor company management would be sufficient to read and implement the clause is not credible except for the smallest of small contractors. For the typical contractor company with 50 to 100 employees, a core management senior group of three to five executives would each need to read and understand the rule, and their attorney, at higher hourly rates, would likely also need to be involved. For a larger contractor firm with 500 or more employees, the number of personnel and attorneys involved in the initial familiarization process would likely number in the scores. Rather than to present unsupported speculation, the Department should conduct surveys or interviews with contractors regarding the level of effort that was experienced to become familiar with prior regulations to inform its time estimates for this proposal.

The process of evaluating and adjusting pay rates to comply will be a significant and costly time-consuming task for every contractor. For even the smallest of small contractors with fewer than 50 employees, this could take hours of time by the owner and others. For a large size employer with many contracts and complicated combinations of Federal and non-Federal projects, the evaluation and adjustment process could take hundreds of labor hours – multiple human resource professionals, lawyers and project managers each devoting significant time alone and in consultation together. Again, DOL should inform its analysis by compiling real data from evaluations of the adjustments by contractors or others to similar past regulatory changes. This is a research task that the Department's Chief Evaluation Officer in the Office of the Assistant Secretary for Policy is well-equipped to perform if the Department will merely take the time and care to seek credible data.

In addition to reviewing the wages of workers currently earning under $10.10, employers in many cases will find it necessary as a matter of proper personnel management to review and possibly modify the wages of more highly paid workers in order to maintain appropriate wage progressions in relation to duties, performance and seniority. Furthermore, this process of adjusting other wages will have to be repeated each year as the inflation adjustment takes effect. Data on these additional wage increases is attainable through surveys or other methods of direct contact with federal contractors.

The Department also refers to the contractor "modifying" its subcontracts with affected suppliers. The task of merely determining what subcontracts are and are not covered by the proposed rule will require significant legal time to research by each contractor. Many contractors may have hundreds of potentially affected subcontract arrangements. For large defense contractors the number may be in the thousands. Modifying these subcontracts will not be a simple matter. Instead of "modify," the more appropriate term is "re-negotiate," and that will take significant time for each case. In addition, collective bargaining agreements with labor unions may need to be re-negotiated as a consequence of implementation of the proposed rule.

The Department needs to take care to do the diligent research that is needed to understand this potentially costly dimension of the proposed rule.

The Department should consider whether there may be alternative definitions and specifications of the rule that might clarify the process and reduce the costs of each of the familiarization elements.

The Department's estimate of the direct impact of the minimum wage increase mandate is incomplete. In addition to the increase in wage payments (e.g., $1.31 per hour on average for each affected worker according to the Department's estimate), the proposed rule will trigger increased payments to or on behalf of the affected workers for elements of compensation that are calculated in relation to base wages. For example, employers' share of social security payroll taxes will increase, employer payments for unemployment insurance and workers' compensation insurance will increase, employer costs for sick leave and disability pay benefits will increase, and employer costs for retirement pensions or defined contribution retirement savings plans will increase. As the minimum wage increases each year through the inflation adjustment, these contributions will also increase. The Department should revise its economic cost/transfer impact estimates to account for these items.

The Department has addressed the potential benefits of the proposed rule exclusively in qualitative terms: The Department claims that the proposed rule will reduce absenteeism, that it will reduce employee turnover, thereby saving hiring and training costs, that it will reduce supervisory costs (because better-paid workers require less supervision) and that it will increase labor productivity, thereby reducing the costs of the goods or services produced under Federal contracts. Each of these qualitative claims involves directly measurable parameters that can readily be used to calculate monetary estimates of benefits for comparison to compliance cost of the regulation. The extensive list of econometric studies that the Department cites as evidence for its qualitative argument themselves provide quantitative parameters that can be applied to calculate monetary estimates of the benefits: the studies provide a ready basis for calculating the economic change in absenteeism cost, turnover cost, and productivity that may be expected in relation to a given increase in wages. The Department has already identified the expected increase in wages as $1.31 per hour for the average affected worker and estimated the number of affected workers who will receive this expected increase. The Department should take the logical step of calculating the monetary benefit amount for comparison with the proposed rule compliance cost. The Department should reveal whether the proposed rule will or will not yield a positive net quantified social benefit.

c. The analysis of small business impacts uses an arbitrarily high threshold for significance and does not capture many costs small businesses will incur.

The Department's finding that "the increased wage cost resulting from the proposed rule is de minimis relative to revenue," 79 Fed. Reg. 34603, on small contractors is based on the false and arbitrary premise that three percent of revenue is the appropriate benchmark for testing impact significance. The Department offered no explanation or justification for selecting three percent of revenue as its significance test benchmark. Proper reasoning would have examined the relation of contractor profits to

revenue and derived a cost to revenue impact test based on the implicit impact on profits. The Department presented no data on contractor profits in relation to revenue.

If, for example, the typical small contractor earns a profit of five percent of revenue, the Department's three percent of revenue cost test benchmark would imply that a rule that eliminated over half of profit is not a significant economic impact. Even if profit were ten percent of revenue (which is highly unlikely), the Department's test would countenance elimination of one-third of profit as not significant. Such a significance test would be untenable.

The Department estimates that the direct wage effect of the rule will increase the typical small contractor's costs by 2.31% to 2.94% of revenue. If profits are typically 5% of revenue the proposed rule would eliminate half of profit for the typical firm, and, even if profits were an extraordinary 10% of revenue, the proposed rule would cut out one-quarter of typical profits – hardly a non-significant impact. Furthermore, all firms do not earn the same profit rate relative to revenue. Profits vary for a variety of reasons by industry, firm size, location and other parameters.

The impact of a regulation on small firms should be examined in terms of the distribution of firms around the "typical" firm. For firms near the lower end of the profit spectrum, the impact of a rule may be devastating, even if the typical firm is not significantly harmed. Firms at the margin may be less able to pass along higher costs to their federal contract customers or the general public in the case of companies covered because of lease or concession agreements. The analysis of small business impacts should include analysis of the distribution of impacts and estimate the number, if any, of contractors who will be forced out of the market.

The Department's small business impact analysis is further flawed by the failure to account for other compliance costs besides the direct wage increase in its calculation of the cost impact on small contractors. In addition to the direct wage impact, the proposed rule will increase contractors' labor costs for items that are calculated based on direct wages, including payroll taxes for Social Security, unemployment insurance and workers compensation insurance, sick leave pay and disability insurance, life insurance, and employer contributions to pension or retirement savings plans. In addition, small contractors will face significant initial costs for familiarization and adaptation to the new regulation, including review and adjustment of existing salaries and re-negotiation of subcontracts affected by the rule. Small employers will also face the same type of on-going recordkeeping costs as larger employers to distinguish hours and work performed on federal contracts by workers from hours and work performed on non-federal contracts, but for small contractors these on-going annual recordkeeping costs may comprise a larger proportion of total costs than for larger contractors.

Small concessionaires are a category of affected small contractors that should be provided special assessment treatment by the Department in its regulatory flexibility analysis. Unlike contractors who are reimbursed for costs by the government for their construction or operational services to the government, concessionaires on defense bases

cannot raise their prices to mitigate increased costs. Defense base concessionaires (e.g., restaurant franchise operators on military base property) are required by law to charge no higher prices than they charge at their civilian property locations in the same area. The proposed minimum wage regulation will have a more direct impact on the profits of such contractors than on other types of small contractors.

d. The analysis under the Unfunded Mandates Act is not adequate.

The Department admits that the cost of the proposed rule is large enough to trigger (over $141 million in one year) the Unfunded Mandates Act requirement to analyze the cost of the rule. The Department's analysis of the impact of the proposed regulation in response to the Unfunded Mandates Act, however, is inadequate. Rather than merely cite to its total cost estimates in response to Executive Orders 12688 and 13563, the Department should fully comply with the language of the Act by assessing separately "the effects of Federal regulatory action on State, local, and tribal governments."[6] There will be substantial impacts on state and local governments as many of them contract with the federal government for services and their universities and other public institutions that receive payments for services work through federal contracts rather than grants. Separate totals for impacts on each category (States, local governments and tribes) should be presented as well as averages or ranges for typical state, local government or tribal units affected. Such detailed analysis will fulfill the intent of the Act to alert affected governments of the impending impact so that they can plan budgets or otherwise react appropriately. Such analysis will also fulfill the intent of the Act to inform Congress so that it can deliberate regarding potential actions to mitigate or compensate affected government units or other affected entities.

IV. E.O. 13658 And The Proposed Regulation Implementing It Are Both Incurably Flawed And Should Be Withdrawn.

The president's Executive Order increases the minimum wage for a wide array of businesses with a nexus to the federal government beyond just those traditionally understood to be federal contractors. The E.O. imposes this increase, with annual inflation adjustments, in the name of improving "economy and efficiency" in federal contracting, so as to be consistent with the authority granted the president under the Procurement Act. However, neither the E.O. nor the proposed regulation implementing it, provide any actual data or support for the proposition that such an increase will yield these results.

Indeed, quite the opposite effect is likely to emerge. The expansive reach of the E.O. and the proposed regulation to companies not normally affected by federal contracting requirements and employees not normally included in federal contracting activities means there will be considerable confusion and uncertainty about exactly who must comply and which employees must be taken into account. The Department's proposed regulation does not provide the clarity and guidance needed for employers to determine with confidence whether they must comply with this new requirement.

[6] Public Law 104-4, Title II, Sec. 201 at http://www.gpo.gov/fdsys/pkg/PLAW-104publ4/html/PLAW-104publ4.htm.

In addition, the expressed intent of the Executive Order is to circumvent the normal Congressional legislative process. By doing so, the president has undermined the key concept of accountability for government policy decisions, and usurped Congress' role in deciding when changes in laws are warranted. He has also violated the wage setting methods already established for the SCA and DBA.

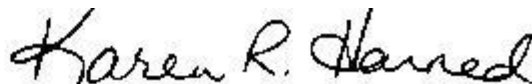
Many employers that will be newly ensnared by this requirement are looking seriously, and have proclaimed their intent, to shut down operations on military bases and in federal buildings, that trigger them being covered by this requirement. In many cases, these employers are prohibited from raising their prices to absorb the increased labor and administrative costs associated with this change. If they are unable to increase their revenues, they will have no choice but to shut down with the associated loss of jobs and other benefits.

Furthermore, the Department puts forward an unrealistic and simplistic example of an accounting clerk dedicated to federal contract matters to illustrate how employees beyond just those involved in the contracting activities would be included. Rarely will such supporting employees be so limited in their activities meaning that employers will have to segregate the hours worked on specific matters which will greatly increase the administrative burden associated with this regulation. This increased burden is absent from any analysis provided by the Department.

The analyses of the paperwork burden, economic impact, benefits, and small business impact are all lacking in credibility and actual data. They ignore various types of impact and rely instead on theoretical studies to create an unduly optimistic picture of benefits the administration believes will flow from this change. This kind of analysis is often referred to as the "rosy scenario" for assuming all outcomes will be positive despite there being reliable evidence to suggest otherwise. The Department should have surveyed actual federal contractors to develop a realistic and legitimate profile of the impact this new minimum wage, and the annual inflation adjustment, will have.

Accordingly, the U.S. Chamber and the NFIB urge that the Executive Order and the proposed implementing regulations be withdrawn. If the president is so determined to increase the minimum wage, the only appropriate method is through Congressional action.

Sincerely,



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