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August 15, 2023

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Acting Secretary Su:

The Committee on Education and the Workforce (Committee) is conducting oversight on the Department of Labor's (DOL) compliance with federal law as it promulgates new regulations. During a recent hearing held by the Committee's Subcommittee on Workforce Protections, we heard testimony that DOL has failed to comply with important rulemaking procedures.¹ The hearing examined how the Small Business Administration's (SBA) Office of Advocacy found significant noncompliance with the *Regulatory Flexibility Act* (RFA) by the Wage and Hour Division (WHD).² As part of our oversight, the Committee requests information relating to the concerns raised by the Office of Advocacy to ensure DOL is taking its RFA requirements seriously.

The RFA requires federal agencies to consider the effects of their regulations on small businesses and other small entities. Under the RFA, when an agency publishes a Notice of Proposed Rulemaking (NPRM), it must also publish an initial regulatory flexibility analysis (IRFA).³ Furthermore, an agency must also publish a final regulatory flexibility analysis (FRFA) when the rule is final.⁴ An agency can avoid conducting an IRFA or FRFA when the agency head certifies that the rule does not "have a significant economic impact on a substantial number of small entities."⁵ This process includes the publication of that certification in the Federal Register at the time of the NPRM with a factual basis for making the certification.⁶ Under the RFA, the SBA's Chief Counsel for Advocacy is in charge of monitoring agency compliance and reporting this

¹ *Cutting Corners at WHD: Examining the Cost to Workers, Small Businesses, and the Economy: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 118th Cong. (2023).

² *Id.* (statement of Elizabeth Milito, Exec. Dir., NFIB Small Bus. Legal Ctr.).

³ 5 U.S.C. § 603(a).

⁴ *Id.* § 604(a).

⁵ *Id.* § 605(b).

⁶ *Id.*

information to Congress.⁷ The Office of Advocacy also routinely submits comment letters on rulemakings that analyze agencies' compliance with the RFA.

The National Federation of Independent Businesses (NFIB) Small Business Legal Center noted in a review of the Office of Advocacy's comment letters that there were 28 instances during the 117th Congress where agencies across the federal government failed to follow the RFA.⁸ DOL was responsible for nearly 18 percent of these failures. DOL exceeded most agencies in the number of letters received from the Office of Advocacy, eclipsed only by the Environmental Protection Agency.⁹

In DOL's NPRM titled "Increasing the Minimum Wage for Federal Contractors," DOL appeared to double dip in its requirements under the RFA. DOL produced both an IRFA as well as a certification that the proposed regulation would not have a significant impact on a substantial number of small entities.¹⁰ The Office of Advocacy responded in its comment letter on the proposed rule that because DOL issued both an IRFA and certification, the IRFA rendered the certification invalid. The Office of Advocacy explained that by issuing the IRFA, DOL demonstrated that the regulation would have an impact.¹¹

In another instance, the Office of Advocacy stated that DOL should revise its cost estimate and produce an IRFA with regulatory alternatives. During the rulemaking on tip regulations under the *Fair Labor Standards Act* (FLSA), the Office of Advocacy wrote in a comment letter that it was concerned DOL's certification "lacks an adequate factual basis" because DOL omitted some compliance costs of the proposed rule and underestimated others.¹² The Office of Advocacy explained that DOL failed to estimate small business compliance costs for increased wages under the rule and underestimated the costs of regulatory familiarization for businesses.

Two other cases identified by NFIB's review show that DOL issued deficient IRFAs. The Office of Advocacy noted in its comment letter regarding the proposed rule on "Employee or Independent Contractor Under the [FLSA]" that the IRFA for the proposed rule was "deficient and severely underestimates the economic impacts of this rule on small businesses and independent contractors."¹³ In its comment letter on the proposed rule titled "Updating the Davis-Bacon and Related Acts Regulations," the Office of Advocacy stated that the IRFA was

⁷ 5 U.S.C. § 612(a).

⁸ ROB SMITH, NFIB, THE REGULATORY FLEXIBILITY ACT: TURNING A PAPER TIGER INTO A LEGITIMATE CONSTRAINT ON ONE-SIZE-FITS-ALL AGENCY RULEMAKING 12 (2023), <https://strgnfibcom.blob.core.windows.net/nfibcom/NFIB-RFA-White-paper.pdf>.

⁹ *See id.* at 29–32.

¹⁰ Increasing the Minimum Wage for Federal Contractors, 87 Fed. Reg. 38,816 (proposed Sept. 30, 2022).

¹¹ SBA, OFF. OF ADVOC., COMMENT LETTER ON INCREASING THE MINIMUM WAGE FOR FEDERAL CONTRACTORS (Aug. 27, 2021), <https://advocacy.sba.gov/wp-content/uploads/2021/08/Advocacy-Comment-Letter-Minimum-Wage-For-Federal-Contractors.pdf>.

¹² SBA, OFF. OF ADVOC., COMMENT LETTER ON PROPOSED RULE ON TIP REGULATIONS UNDER THE FAIR LABOR STANDARDS ACT (FLSA); PARTIAL WITHDRAWAL (Aug. 20, 2021), <https://advocacy.sba.gov/wp-content/uploads/2021/08/Final-Advocacy-Comment-Letter.-Tip-Credits.pdf>.

¹³ SBA, OFF. OF ADVOC., COMMENT LETTER ON EMPLOYEE OR INDEPENDENT CONTRACTOR UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (Oct. 13, 2022), <https://advocacy.sba.gov/wp-content/uploads/2022/12/Comment-Letter-DOL-Independent-Contractor-508c.pdf>.

“deficient and does not properly inform the public about the impact of the rule on small entities.”¹⁴

By failing to analyze the effects on small businesses adequately, DOL is undermining confidence in its rulemakings and engaging in rule by executive fiat. The lapses identified by the Office of Advocacy demonstrate DOL’s calculated approach to fulfilling its obligations under the RFA to fit regulatory and informational requirements to the size and scope of businesses.¹⁵ Moreover, failing to adhere to the principles of the RFA can open DOL up to litigation.¹⁶

To ensure that DOL takes these requirements seriously, we request that DOL provide written responses to the following requests and questions as soon as possible, but by no later than August 29, 2023:

1. DOL received comments from the Office of Advocacy in the rulemaking on “Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal” suggesting that DOL needed to complete an IRFA. However, DOL proceeded without an IRFA and published a final rule without this analysis. How does DOL respond to the following specific suggestions in the Office of Advocacy’s comment letter?
 - a. DOL should assess changes to wage costs;
 - b. DOL has underestimated the costs of regulatory familiarization;
 - c. DOL should revise its estimate of adjustment costs; and
 - d. DOL should revise its estimate of management costs.

2. During the rulemaking on “Increasing the Minimum Wage for Federal Contractors,” DOL issued both an IRFA as well as a certification that the rule would not have a significant economic impact on a substantial number of small entities pursuant to RFA Section 605(b). DOL stated in the preamble to the final rule that the inclusion of the IRFA was merely done as a “courtesy” and disagreed with the Office of Advocacy that this inclusion of the IRFA constituted an acknowledgement that the rule would have a significant economic impact.¹⁷ However, in the NPRM, DOL stated that it prepared an IRFA because the rule was “expected to have a significant economic impact.”¹⁸ A small entity that is adversely affected or aggrieved by a rule that is subject to the RFA is entitled to seek judicial review of agency compliance with several RFA sections, including Section 605(b).¹⁹ Why would DOL issue a certification under Section 605(b) while including an IRFA that provides factual grounds contradicting that certification?

¹⁴ SBA, OFF. OF ADVOC., COMMENT LETTER ON UPDATING THE DAVIS-BACON AND RELATED ACTS REGULATIONS (Mar. 18, 2022), <https://advocacy.sba.gov/wp-content/uploads/2022/05/SBA-Advocacy-Davis-Bacon-Act-Comment-Letter.pdf>.

¹⁵ See 5 U.S.C. § 601 note.

¹⁶ See *id.* § 611.

¹⁷ Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126, 67,222 (Nov. 24, 2021).

¹⁸ Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 38,816, 38,877 (proposed July 22, 2021).

¹⁹ 5 U.S.C. § 611.

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3. With regard to the rulemaking on “Employee or Independent Contractor Under the [FLSA],” does DOL plan to issue a supplemental IRFA or a new IRFA to address the concerns outlined by the Office of Advocacy?

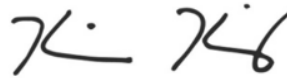
The Committee has jurisdiction over issues dealing with workers and labor policy, and it reviews the general management of DOL as set forth in House Rule X. These requests and any documents created as a result of these requests will be deemed congressional documents and property of the Committee on Education and the Workforce.

Thank you for your prompt attention to this matter.

Sincerely,



Virginia Foxx
Chairwoman



Kevin Kiley
Chairman
Subcommittee on Workforce Protections

CC: The Honorable Roger Williams, Chairman, Committee on Small Business