CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

MARC FREEDMAN
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August 27, 2021

Ms. Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
Washington, DC 20210

By electronic submission: http://www.regulations.gov

RE: RIN 1235-AA41—Increasing the Minimum Wage for Federal Contractors; Notice of Proposed Rulemaking, 86 Fed. Reg. 38816 (July 22, 2021)

Dear Principal Deputy Administrator Looman:

The U.S. Chamber of Commerce presents these comments on the Wage and Hour Division's proposed regulation implementing President Biden's Executive Order 14026, Increasing the Minimum Wage for Federal Contractors. As detailed below, this E.O. and the accompanying proposed regulations rely on faulty justifications, seek to alter the Fair Labor Standards Act which the president has no authority to do, and carry forward confusing and detrimental elements of E.O. 13568. Accordingly, the Chamber believes the E.O. and the proposed implementing regulations must be withdrawn.

I. E.O. 14026 Is Based on A Flawed Premise and Executive Orders Are No Substitute for Legislation for Implementing Broad Policies.

The genesis of E.O. 14026, as it was for E.O. 13568, is the inability of the administration to enact an increase in the minimum wage through legislation, including by seeking to include one in the budget reconciliation process. This E.O. and proposed regulations build on E.O. 13568 issued by President Obama that initially set a minimum wage for workers on federal contracts at $10.10 per hour. Through the indexing mechanism put in place by E.O. 13568, that minimum wage is now $10.95 per hour. Increasing the minimum wage to $15 per hour would be a 37 percent increase. The Chamber opposes using the federal procurement and acquisition process as a substitute for legislating. Congress is the branch of government imbued with the authority to make laws and establish policies.

Executive Order 14026 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 promote economy and efficiency in procurement" 86 Fed. Reg. 22835. The E.O. then goes on to assert that "raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reduc[es] absenteeism and turnover; and lower[s] supervisory and training costs. Accordingly, ensuring that Federal contractors pay their workers an hourly wage of at least $15.00 will bolster economy and efficiency in Federal procurement." *Id.*

That Congress has not yet acquiesced to the president's wish to increase the minimum wage to $15 per hour can be attributed to several reasons. At least one of them is the belief held by many members of Congress of both parties that doing so has negative economic consequences. This point was well stated by the economics columnist Robert Samuelson in a February 24, 2014 column during the consideration of increasing the minimum wage to $10.10 per hour and certainly resonates in the debate over increasing the minimum wage to $15 per hour. 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 [referring to a 2014 CBO analysis]. 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….

Presidential actions like E.O. 14026 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. Members of Congress must regularly face their constituents and defend their choices. This is another reason Congress has not increased the minimum wage to $15 per hour; 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. Accordingly, the proposed regulations implementing it rest on an invalid foundation. Both of these actions should be withdrawn.

II. Several Provisions of E.O. 14026 and the Proposed Regulations Are in Direct Conflict with the Fair Labor Standards Act.

E.O. 14026 would eliminate the credit employers are allowed to take in compensating tipped employees. Similarly, the executive order would eliminate the exemption for employees with disabilities to be paid a wage less than the minimum wage. These are provisions in the Fair Labor Standards Act and only Congress can make such changes. Even E.O. 13568 did not attempt such direct attacks on the FLSA.

Under the FLSA's "tip credit," an employer is allowed to pay an employee a specified lower minimum wage as long as the employee's tips make up the difference with the actual minimum wage. *See,* 29 U.S.C. 203(m). However, E.O. 14026 section 3 phases out the tip credit so that beginning January 1, 2024 an employer would be required to pay a tipped employee the full $15 per hour, and any new wage increased through indexing. *See,* 86 Fed. Reg. 22836. This is a direct contradiction of the FLSA and cannot be retained.

The FLSA also provides that under certain conditions, workers with disabilities may be paid a wage lower than the minimum wage to enhance their opportunities for employment. *See,* 29 U.S.C. 214 (c). Yet, E.O. 14026 specifies that "workers whose wages are calculated pursuant to special certificates issued under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)), shall be" paid the same wage as other workers covered by the FLSA. 86 Fed. Reg. 22835. Again, this is in direct conflict with the FLSA and cannot be retained.

These two direct rewrites of the FLSA evoke the oft-cited concurring opinion of Justice Jackson from the *Youngstown Sheet and Tube* case which dealt with an executive order from President Truman seeking to take control of steel mills during the Korean War. The majority opinion held that President Truman did not have the authority to do so since Congress had expressly rejected giving the president that authority when it passed the Taft-Hartley Act. Jackson distilled the relationship between presidential authority and Congress' authority to legislate: "When the President takes measures *incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,* for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Sawyer v Youngstown Sheet &Tube*, 343 U.S. 579, at 638 (1952). (emphasis added)

III. E.O. 14026 and the Proposed Regulations Continue, and Exacerbate, Problems Created by E.O. 13568.

E.O. 14026, and the proposed regulations, maintain the same scope of coverage and definitions established under E.O. 13568. This means that terms like "contract like instruments" and "a worker 'performing in connection with a' contract" will continue to cause confusion. 29 C.F.R. 23.20 Definitions, in 86 Fed. Reg. 38887, 38888. Because of the dramatic increase in the new minimum wage, there are likely to be more employees subject to the new regulations. Furthermore, only activities associated with the federal contract are subject to the new minimum wage. In most businesses, employees are not allocated exclusively to such a narrow range of duties and customers, meaning that employers will have to isolate the time spent on work associated with the federal contract from time spent doing other duties. This will be a tremendous administrative burden.

Similarly, the new minimum wage, and the future wages increased through indexing, will likely override 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. *See*, 40 U.S.C. 3142 (b), 41 U.S.C. 351 (a). By decreeing that contracts under these laws will now have a national, not local, minimum wage of $15 per hour with an annual adjustment for inflation, the new minimum wage is more likely to be in excess of DBA and SCA wage determinations than the current wage of $10.95, thereby creating direct conflicts with the DBA and SCA.

Absence of any allowance for collective bargaining agreements (CBAs) with a wage rate lower than $15 per hour and the inflation adjusted wage in future years is another problem under the earlier E.O. and regulations. Again, the dramatic increase in the minimum wage will exacerbate this problem. The new 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 would 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.

IV. Conclusion

E.O. 14026, and the proposed implementing regulations, rely on flawed assumptions of creating benefits of efficiency and economy for the federal government. Several of the provisions of the E.O. conflict directly with the FLSA, in ways even President Obama's precursor E.O. did not. Furthermore, the new wage levels will likely override the statutorily created system for wage determinations under the DBA and SCA. For all these reasons, E.O. 14026 and the proposed regulations implementing it should be withdrawn.

Sincerely,

Marc Freedman

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Employment Policy Division