

August 27, 2021

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

Submitted electronically www.regulations.gov

Re: Increasing the Minimum Wage for Federal Contractors; Proposed Rulemaking
RIN 1235-AA41

Dear Director DeBisschop:

Thank you for providing the twelve undersigned local, state, and national associations representing the U.S. facilitated outdoor recreation industry, including America Outdoors Association, Grand Canyon River Outfitters and Guides Association, Colorado Outfitters Association, Dude Ranchers Association, Idaho Outfitters and Guides Association, Middle Fork Outfitters Association, Montana Outfitters and Guides Association, New Mexico Council of Outfitters and Guides, Ocoee River Outfitters Association, Oregon Outfitters and Guides Association, Professional Outfitters and Guides Association, Utah Guides and Outfitters, and the Wyoming Outfitters and Guides Association (“Affiliated Outfitter Associations”) the opportunity to submit the following comments in response to the proposed rule issued by the Department of Labor (“Department”) on July 22, 2021, to implement Executive Order 14026 (“Executive Order”), which would require federal contractors and subcontractors to pay their employees a minimum of \$15.00 per hour, effective January 30, 2022, and “beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary [of Labor] pursuant to the Executive order.” *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 38,816, 38,819 (July 22, 2021) (“Proposed Rule”).¹

I. Introduction and Summary

The combined Affiliated Outfitter Associations represent thousands of member businesses providing facilitated outdoor recreation experiences across the country. From the Ocoee River Outfitters in the East to the Oregon Outfitters and Guides Association in the west, outfitters drive a substantial portion of the U.S. economy. According to the Bureau of Economic Analysis’s 2020 estimates, guided tours and outfitted travel contributed approximately \$11.1 billion in value added in 2017 and nearly \$68.5 billion total value added from 2012 to 2017. The guide and outfitter industry is of particular importance to the economies of rural communities across the country. These operators provide economic opportunity in communities where tourism may be a job-creating industry. They are actively engaging in efforts to connected underserved communities with the outdoors. Such businesses rely heavily on federal lands to execute their work and provide services to clients.

¹ The Department of Labor extended the period for submitting written comments on the Proposed Rule from August 23, 2021, to August 27, 2021. 86 Fed. Reg. 41,907 (Aug. 4, 2021).

Outfitters, whether providing seasonal outdoor single-day outings or extended, multi-day backcountry trips, will see significant impacts to their operations. A North Carolina provider estimates that meeting the minimum wage increase would entail a 40% increase in base price to cover minimum wage and would increase payroll to \$1.2 million, a sixfold increase. This operator provides extended multi-day trips across the country on several federal land use permits. A Colorado river outfitter estimates that it will be an overall 30% increase, adding \$300,000 to \$400,000 to their payroll.

The Proposed Rule raises important questions and will have significant economic and other implications for the Affiliated Outfitter Associations' memberships. Executive Order 14026 "explains that increasing the hourly minimum wage paid to workers performing on or in connection with covered Federal contracts to \$15.00 beginning January 30, 2022 will 'bolster economy and efficiency in Federal procurement.' 86 FR 22835." 86 Fed. Reg. at 38,816. The arrangements under which our members are authorized to provide services to the public, however, are not procurement contracts. Our members typically operate under contracts and permits that are not subject to the provisions of the Service Contract Act ("SCA") or Davis Bacon Act ("DBA"). Moreover, land use permits through federal agencies like the USFS, BLM, and FWS do not create a "contractor" relationship between the permit holder and the federal government. Nonetheless, the Proposed Rule is drawn broadly, bringing these authorizations within the scope of these higher minimum wage requirements for federal contractors.

Because of the significant differences between the types of arrangements under which our members operate and government procurement contracts, and other unique characteristics of the outfitting and guiding industry, application of the Proposed Rule to guides, outfitters, and others in the industry is not straightforward as it is to ordinary federal government contractors. Unlike procurement contracts, in which the federal government offers payment in return for goods and/or services, holders of these contracts and other instruments pay the government for the opportunity to provide services to the public on federal lands. As a result, holders of these contracts and other instruments cannot simply build these additional costs of performance into their bids for or contracts with the government. They must instead endure the costs themselves or, if and to the extent that the market and land managing agency allow, pass those costs on to the members of the public who utilize the businesses' services to facilitate their enjoyment of our National Parks, Forests, Refuges, and other public lands. Notably, the ability to pass on these costs to the public is limited, as rates typically are subject to government regulation. Further, increasing costs to the public is contrary to current policy efforts to expand access to outdoor recreation opportunities, particularly among traditionally underrepresented or underserved populations. Because these services may compete with other recreational services on non-federal lands that may not be subject to the higher federal minimum wage, those businesses operating under these contracts or permits may simply lose their customers to providers not subject to these higher operational costs. As a result, the implications of the Proposed Rule for these businesses—and the members of the general public who they serve—are significantly different, and more impactful, from those for ordinary federal contractors.

Application of the Proposed Rule as proposed will be devastating to those companies—the majority of which are small businesses—that rely on these permits for their business model and to provide important services not to the government, but to members of the general public who wish to employ outfitters and guides to facilitate their access to and enjoyment of their federal lands. And application to these arrangements in no way promotes the "Federal Government's procurement interests in economy and efficiency," as suggested by the Proposed Rule. 86 Fed. Reg. at 38,817.

Recognizing the unique concerns of guides and outfitters as they pertain to a mandated higher federal minimum wage, in May 2018, President Trump issued Executive Order 13838 exempting entities providing seasonal recreational services or seasonal recreational equipment rental to the public on federal lands from the federal contracting minimum wage requirements that otherwise would have been required by Executive Order 13658. This exemption offered a lifeline to these businesses, which otherwise would have faced potential financial ruin from the consequences of paying a mandated minimum wage to employees working substantial overtime hours on backcountry trips. By revoking this important relief provided to guides and outfitters under Executive Order 13838, Executive Order 14026 reinstates a regulatory regime that threatens the continued viability of businesses providing services to public lands visitors and could further reduce the public's access to outdoor recreation activities, including by historically underrepresented or underserved communities.

The Proposed Rule raises many important questions and concerns that must be answered and addressed prior to its implementation. Among them:

The Proposed Rule grossly misstates the future applicability of Executive Order 13658 and Executive Order 14026 to contracts and contract-like instruments covered by Executive Order 13838. Although the preamble to the Proposed Rule includes at least some helpful discussion of "subcontract" and "subcontractor," the final regulations should include specific language limiting the scope of subcontract and subcontractor, as well as clarifying the obligations of the prime contractor. The Department should acknowledge that, for concession contracts or contracts on federal lands, the rule will have the practical effect of affecting wages that are not on or in connection with a federal contract, and it must consider this reality in its assessment of the impacts of the Proposed Rule's minimum wage requirements, particularly on small businesses that may be more likely to have employees splitting time between federal and non-federal work. The proposed timing of annual adjustments will create uncertainty regarding budget and pricing for small business concessioners.

Critically, the Proposed Rule reflects a dearth of data and analysis related to the potential impact on the guide and outfitter industry. None of the data presented or examples of federal contractor operations in the Initial Regulatory Flexibility Analysis ("IRFA") reflect the realities of the seasonal operation of backcountry guide and outfitter operations. The Department's conclusion that "this proposed rule will not have a significant impact on small businesses," 86 Fed. Reg. at 38883, is wholly unsupported. The Department must specifically assess the impacts of the Proposed Rule on the outfitter and guiding industry in order to meet its legal obligations under the Regulatory Flexibility Act ("RFA"). In this regard, the Affiliated Outfitter Associations very much appreciate and support the comments filed by the U.S. Small Business Administration's Office of Advocacy in response to the Proposed Rule.

II. The Revocation of Executive Order 18383 Removes Important Protections for the Outfitter and Guiding Industry.

Significant concerns regarding the adverse implications of implementation of Executive Order 13658 and the associated Department regulations with respect to the seasonal outfitter and guide industry, owing to the unique characteristics of that industry and the nature of the authorizations under which they operate, led members of the Affiliated Outfitter Associations to seek relief from the new and unduly burdensome requirements under that Executive Order. Key members of

Congress and the Administration recognized the merits of these concerns, appreciating that application of the requirements to outfitter and guide and similar seasonal recreation services created unique challenges for outfitters and guides and for the public, increasing the costs of those services at a time when the federal government and the outdoor recreation industry are looking to increase accessibility to these outdoor recreation experiences, particularly among underrepresented or underserved populations, rather than erect new barriers to their participation.

In May 2018, “to ensure that the Federal Government can economically and efficiently provide the services that allow visitors of all means to enjoy the natural beauty of Federal parks and other Federal lands,” President Trump issued Executive Order 13838—Exemption From Executive Order 13658 for Recreational Services on Federal Lands, 83 Fed. Reg. 25341 (June 1, 2018). Executive Order 13838 amended Executive Order 13658 by inserting language stating that Executive Order 13658 “shall not apply to contracts or contract-like instruments entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands, but this exemption shall not apply to lodging and food services associated with seasonal recreational services. Seasonal recreational services include river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps.” 83 Fed. Reg. at 25341.

Executive Order 13838 recognized that outfitters and guides operating on Federal lands “often conduct multiday recreational tours through Federal lands,” and that their employees “may be required to work substantial overtime hours.” *Id.* It further recognized that the application of the higher minimum wage for federal contractors to these entities “threaten[ed] to raise significantly the cost of guided hikes and tours on Federal lands, preventing many visitors from enjoying the great beauty of America’s outdoors.” *Id.* Thus, it concluded that distinguishing characteristics relatively unique to this industry make it such that applying Executive Order 13658 to this industry “[did] not promote economy and efficiency in making these services available to those who seek to enjoy our Federal lands.” *Id.*

As the Department explained in its regulations implementing Executive Order 13838:

Lowering the cost of business for outfitter providers could incentivize small outfitters to enter the market. Likewise, it could also incentivize existing outfitters to hire more guides and to increase the hours of current employees. What all this translates into is more affordable guided tours and recreational services for visitors to Federal lands. And ultimately, greater access to outfitter services affords ordinary Americans a greater opportunity to experience “the great beauty of America’s outdoors.” E.O. 13838.

Minimum Wage for Contractors; Updating Regulations To Reflect Executive Order 13838, 83 Fed. Reg. 48537, 48540 (Sept. 26, 2018).

The Affiliated Outfitter Associations are deeply disappointed by the decision in Executive Order 14026 to do away with the important relief provided to our industry by Executive Order 13838. Executive Order 13838 is an appropriate, narrowly tailored exception addressing unique circumstances and furthering important public policy goals. As implementation of the new Executive Order moves forward, we urge the Administration and the Department, as well as the federal land managing agencies authorizing the contracts and permits under which these services

are provided, to be mindful of the concerns that appropriately led to the issuance of Executive Order 13838.

III. Detailed Comments

A. The Proposed Rule Grossly Misstates the Applicability of Executive Order 13658 and Executive Order 14026 to Contracts and Contract-Like Instruments Covered by Executive Order 13838.

The Proposed Rule grossly misstates the applicability of Executive Order 13658 and Executive Order 14026 to contracts and contract-like instruments covered by Executive Order 13838. The Proposed Rule states that “Section 6 of Executive Order 14026 revokes Executive Order 13838 as of January 30, 2022. See 86 FR 22836. Accordingly, as of January 30, 2022, contracts entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands will be subject to the minimum wage requirements of either Executive Order 13658 or Executive Order 14026 depending on the date that the relevant contract was entered into, renewed, or extended.” 86 Fed. Reg. at 38835. This is absolutely wrong and must be corrected in the final rule.

As of January 30, 2022, existing contracts or contract-like instruments covered by Executive Order 13838 will be subject to *neither* the minimum wage requirements of Executive Order 13658 *nor* the minimum wage requirements of Executive Order 14026. Section 3 of Executive Order 13838 explicitly required agencies to modify existing authorizations and solicitations by removing clauses requiring compliance with Executive Order 13658. 83 Fed. Reg. 25341. Executive Order 14026’s revocation of Executive Order 13838 is not effective until January 30, 2022. 86 Fed. Reg. at 22836. Agencies may not now go back and unilaterally amend existing authorizations to insert (or re-insert) language requiring compliance with Executive Order 13658. Moreover, any solicitations issued while Executive Order 13838 remains in place are prohibited from requiring compliance with Executive Order 13658 and therefore would not require compliance with Executive Order 13658 in the first instance, so there is no basis to suggest that contracts issued pursuant to those solicitations would somehow become subject to Executive Order 13658 upon the revocation of Executive Order 13838 on January 30, 2022. There are also existing contracts in place pre-dating Executive Order 13658 that would not have been considered “new” contracts under Executive Order 13658 and thus also not would not be subject to the minimum wage requirements of that Executive Order. Further, contracts covered by Executive Order 13838 would not be subject to Executive Order 14026 unless they are “new contracts” within the meaning of that Executive Order. Accordingly, as of January 30, 2022, contrary to the Proposed Rule, existing “contracts or contract-like instruments entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands” are subject to *neither* Executive Order 13658 *nor* Executive Order 14026. This legal error must be corrected in the final rule.

For the same reason, it is inappropriate for the Department to propose the wholesale removal of section 10.4(g) in the regulations implementing Executive Order 13658. Section 6 of Executive Order 14026 revokes Executive Order 13838 and supersedes Executive Order 13658 (to the extent inconsistent with Executive Order 14026) contemporaneously, effective January 30, 2022. It is beyond the Department’s authority to remove the exclusion required by Executive Order 13838 for contracts covered by that Order in a manner inconsistent with the terms of that Order. To the extent the Department retains regulations implementing Executive Order 13658, it must also retain

the regulations implementing Executive Order 13838, which amended that Order, with respect to contracts or contract-like instruments covered by Executive Order 13838 that were entered into or solicited prior to January 30, 2022.

B. The Final Rule Should be Clarified to Reflect Preamble Language Limiting the Definitions of Subcontract and Subcontractor.

The Proposed Rule's discussion of what and who would qualify as a "subcontract" and "subcontractor" is vague, leaving open the possibility that workers more appropriately defined and treated as vendors or suppliers could inappropriately be brought within the ambit of the new minimum wage requirement. The final rule must clarify the scope of the regulations and their applicability to certain agency authorizations.

The Proposed Rule states that it "sets forth the minimum wage rate requirement for Federal contractors *and subcontractors* established in Executive Order 14026." 86 Fed. Reg. at 38,835 (emphasis added). It defines the term *contractor* as "any individual or other legal entity that is awarded a Federal Government contract or subcontract under a Federal Government contract," and notes that the term "refers to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government." 86 Fed. Reg. at 38,821. It adds, "[t]he proposed definition of the term *contract* broadly includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing." 86 Fed. Reg. at 38,820.

While the definitions of these terms appear to be broadly drafted to bring as many federal-private agreements into the scope of the rule as possible, the Department does indicate that relationships more appropriately defined as vendor and supplier arrangements are not meant to be subject to the minimum wage requirements. To this effect, there is helpful discussion of the appropriate distinction between subcontractors and groups more typically classified as vendors and suppliers in the preamble, which explains that the latter group would be excluded from the minimum wage requirement. Specifically, the preamble acknowledges that the Executive Order:

[d]oes not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment. In other words, the Executive order does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment between a manufacturer or other supplier and a covered contractor for use on a covered Federal contract. For example, a subcontract to supply napkins and utensils to a covered prime contractor operating a fast food restaurant on a military base is not a covered subcontract for purposes of this order. The Executive order likewise does not apply to contracts under which a contractor orders materials from a construction materials retailer.

86 Fed. Reg. at 38,829. This is an important distinction for operators of outfitting and guiding and similar recreation services.

However, this important clarification is not included in the actual proposed regulatory definition of "subcontract" or otherwise in the actual proposed regulatory language. For clarity's sake, the Department must define "subcontractor" to reflect the explanation in the preamble so that vendors

and other similar groups are not inadvertently lumped in with true subcontractors subject to Executive Order 14026's minimum wage requirements.

This is particularly important given the lack of clarity in the Proposed Rule with regard to how the Department intends that the minimum wage requirements would be enforced as applied to subcontractors. Proposed section 23.210(b) would require "[t]he contractor and any subcontractors [to] include in any covered subcontracts the Executive Order minimum wage contract clause referred to in § 23.110(a) and . . . require, as a condition of payment, that the subcontractor include the minimum wage contract clause in any lower-tier subcontracts." 86 Fed. Reg. at 38890. It further states that: "The prime contractor and any upper-tier contractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements, whether or not the contract clause was included in the subcontract." *Id.* What is not clear, though, is how, other than including the required contract clause in any covered subcontract, the Department intends that a contractor could ensure compliance by a subcontractor. Obviously, contractors lack the enforcement authority of a governmental entity. Although the Proposed Rule acknowledges that the "flow-down structure" in the Proposed Rule may be less familiar to "some sub-set of contractors" than it is for SCA and DBA contractors, it fails to clearly explain that structure and the limits of upper-tier contractor "flow-down liability." See 86 Fed. Reg. at 38869. The Department should make clear what specific burdens it intends to impose on upper-tier contractors in this regard, including whether and, if so how, it intends that a contractor is to ensure compliance by any subcontractor with the minimum wage requirements in accordance with applicable law. Specifically, the Department should clarify that, other than including the required contract clause in any covered subcontract, contractors have no further obligation with respect to enforcement and compliance by any subcontractor with the Executive Order's minimum wage requirements.

C. The Proposed Rule Will Have the Practical Effect of Extending the Higher Minimum Wage to Work That is Not On or In Connection With a Covered Federal Contract.

Many of the businesses in our industry that have federal permits and contracts also derive a portion of their income from operations unrelated to any federal agreement or authorization. The Proposed Rule states that the Executive Order's minimum wage requirements apply only to those workers' activities that are under the contract, i.e., they "only extend to the hours worked by covered workers performing on or in connection with covered contracts." 86 Fed. Reg at 38,830. The Department explains that, "in situations where contractors are not exclusively engaged in contract work covered by the Executive order, and there are adequate records segregating the periods in which work was performed on or in connection with covered contracts subject to the order from periods in which other work was performed, the Executive order minimum wage does not apply to hours spent on work not covered by the order." *Id.*

However, while this may be true for purposes of strict application of the regulation, as a practical matter it is absurdly unrealistic to believe that a company could pay an employee engaged in work both on and apart from a covered contract one wage for their time they spend working on or in connection with a covered contract and a different wage for the time they spend working on other activities. And, even if it were practically feasible, the recordkeeping alone associated with doing so would be cost-prohibitive (and certainly well beyond that estimated in the Proposed Rule's Regulatory Flexibility Analysis). Thus, despite the proposed regulatory text at section 23.220(a), the practical effect of the Proposed Rule would be to apply the minimum wage to work on non-federal activities where an employee is not exclusively engaged in work under covered federal

contracts. The Department should specifically acknowledge this practical impact of the Proposed Rule, and it must consider this reality in its assessment of the impacts of the Proposed Rule's minimum wage requirements, particularly on small businesses that may be more likely to have employees splitting time between federal and non-federal work.

D. Annual Adjustments as Proposed Will Create Uncertainty Regarding Budget and Pricing for Small Business Concessioners.

As stated in the Executive Order and the Proposed Rule, federal contractors and subcontractors would be required to pay their employees a minimum of \$15.00 per hour, beginning January 30, 2022, and "beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary [of Labor] in accordance with the Executive order." 86 Fed. Reg. 38,817. Allowing the Secretary of Labor to set and raise the minimum wage annually for businesses included under the Proposed Rule (presumably raising it consistent with the Consumer Price Index) on this timeframe will present significant operational complications for our industry.

Such uncertain annual adjustments will make it impossible for many of our members to forecast and accurately adjust their prices in time to market and sell their services for future bookings. Due to the popularity of some of the trips that our members provide, bookings can be made a year or more in advance, which locks in the price of the trip at that time. Moreover, rates for the services that our members provide under federal contracts in the National Parks generally are subject to federal rate approval processes that require long lead times for approval of rate requests. In order to comply with agency rate approval requirements and/or for purposes of taking advance reservations, many outfitters must set their prices in July or August of one year for the trips occurring in the next year. The Executive Order, as proposed to be implemented by the Proposed Rule, requires the Department to determine the minimum wage for covered contracts and solicitations on an annual basis beginning January 30, 2022, providing at least 90 days advance notice to the public before the new minimum wage is to take effect. See proposed § 23.50(a)(b), 86 Fed. Reg. at 38889. Thus, such new minimum wage rate is unlikely to be available when these outfitters set their prices, making pricing and accurate budgeting impossible. Requiring outfitters and guides to increase their wage rates after the prices have been set for those services would impose a substantial burden on many of our members, and further increase the potential negative economic impacts of the Proposed Rule on our industry.

This requirement would have particularly serious ramifications for outfitters and guides entering longer-term concession contracts or other longer-term and short-term covered contract-like instruments with the federal resource agencies, as well as for the agencies that manage them. For example, pursuant to the Concessions Management Improvement Act ("CMIA"), contracts for NPS concession contracts are awarded based upon consideration of several factors; one such factor is the amount of a "franchise fee" or other monetary consideration to the federal government. The CMIA provides that, "[a] concession contract shall provide for payment to the Federal Government of a franchise fee or other monetary consideration as determined by the Secretary, on consideration of the probable value to the concessioner of the privileges granted by the particular contract involved. Probable value shall be based on a reasonable opportunity for net profit in relation to capital invested and the obligations of the concession contract." 54 U.S.C. § 101917. The uncertainty, and likelihood, of increased costs, on a regular, incremental basis over the term of longer-term contracts would make it impossible for businesses in our industry to accurately predict their operational costs and bid appropriately for longer-term contracts, as well as raise significant implications for NPS's ability to develop prospectuses for longer-term contracts that

ensure a reasonable opportunity for profit as required by federal concessions law. In the event that the agency is inclined to consider the financial impact of the increased obligations under Executive Order 14026 and the Department's implementing regulations on the business opportunity, such a requirement also would further stress the agency's already tight budget, by potentially reducing the amount of franchise fees paid to the government in order to ensure the financial viability of concession contracts.

E. The Department Fails to Meet its Obligations Under Executive Order 13563 to Assess Impacts of the Proposed Rule on the Guide and Outfitter Industry, As Well As Its Obligations under the Regulatory Flexibility Act to Analyze the Proposed Rule's Impact on Small Businesses.

As described in the Proposed Rule, "Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits." 86 Fed. Reg. 38,855. The Department's analysis wholly failed to even attempt to evaluate the impacts of the Proposed Rule on the guide and outfitter industry, rendering its assessment grossly deficient. Further, the Proposed Rule's IRFA is disturbingly off base. For the Department to claim that it "believes this proposed rule will not have a significant impact on small businesses," 86 Fed. Reg. at 38883, demonstrates that the Proposed Rule wholly fails to account for its impact on the outfitter and guiding industry.

As an initial matter, the Department vastly underestimated the time needed for "regulatory familiarization." Outfitters and guides are typically small businesses who do not usually have on staff employees with the expertise to review and digest such a comprehensive rulemaking, and certainly not in the 30 minutes estimated in the Proposed Rule. 86 Fed. Reg. 38,867. Even for large government contractors with compliance officers on staff, it is wildly unrealistic that the Department would estimate that it would take each firm's human resources manager only 30 minutes (at \$52.65 per hour) to review a rulemaking to determine whether the firm is in compliance when the proposed rulemaking is 82 pages. *Id.* The Department attempts to downplay the significance of the time and expertise involved in such analysis, stating this short time estimate is because "most of the affected firms will already be familiar with the previous requirements and will only have to familiarize themselves with the parts that have changed (predominantly the level of the minimum wage)." 86 Fed. Reg. 38,867-68. But businesses cannot establish what has changed within a new regulation without, at minimum, reviewing the entire rule. It is absolutely disingenuous for the Department to estimate that it will cost small businesses less than \$30.00 to determine whether they are in compliance with such a comprehensive regulation.

Similarly, the Proposed Rule underestimates the implementation costs at ten minutes per newly affected employee. 86 Fed. Reg. 38,868. For example, if businesses were required to begin to parse out the time for employees that perform both covered and exempt work by the hour to establish different hourly rates for each group of time, as the Proposed Rule suggests would be allowable, implementing such a practice would take far more time than the estimated ten minutes per employee. Separating out such time would be an outgoing, time-consuming practice, not a one-time implementation cost. The Department must specifically acknowledge this practical impact of the Proposed Rule in its impact estimates.

Aside from vastly underestimating these few costs it did attempt to quantitatively evaluate, the Proposed Rule fails to grasp the severity of other costs that will be imposed on guides and outfitters, summarily dismissing them or entirely failing to acknowledge them.

The Department recognizes that, in addition to the regulatory and familiarization costs, “there may be additional costs that have not been quantified,” namely, “compliance costs, increased consumer costs, and reduced profits.” 86 Fed. Reg. 38,869. Yet without making any quantitative evaluation of such costs, the Department makes the bold statement that it “believes the benefits to firms will outweigh the costs and hence adverse impacts to prices or profits are unlikely.” *Id.* Such a proposition is completely unsupported and flies in the face of the realities of our businesses.

Though “Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts,” 86 Fed. Reg. 38,855, the Department used this exception to justify wholly failing to conduct any sort of in-depth analysis of the types of costs that will be incurred by the guide and outfitter industry. See 86 Fed. Reg. 38,867 (“The Department quantified two direct employer costs: (1) Regulatory familiarization costs and (2) implementation costs. **Other employer costs are considered qualitatively.**”) (emphasis added). The Department is obligated to consider these costs of implementing its Proposed Rule—such as specifically transfer payments, reduced profits, and increased consumer costs—in more than the cursory manner they were presented to justify the Department’s puzzling determination that “adverse impacts to prices or profits are unlikely.” 86 Fed. Reg. 38,869.

Critically, the Department seriously mischaracterizes the nature of what it refers to as a “transfer payment,” claiming that while “[d]irectly, these are transfers from employers to the employees . . . ultimately these transfer costs to firms may be offset by higher productivity, cost-savings, or cost pass-throughs to the government and consumers.” 86 Fed. Reg. 38,869. What the Department labels a “transfer payment” is in reality a labor cost to the employer. While traditional government contractors can build such prices into their procurement bids, guides and outfitters cannot. Such costs must either be absorbed by the customer (i.e., the general public) or by the guides and outfitters. Labeling it a “transfer payment” obfuscates the reality that this cost is likely being transferred to no one but the guide and outfitter businesses.

The Department’s analysis does not even account for the true impact of these transfer payments, as the Proposed Rule acknowledges that its evaluation of transfer payments does not even capture all of these seasonal recreational workers that are currently exempt from the present federal minimum wage for federal contractors under Executive Order 13838. See 86 Fed. Reg. 38,871 (“As discussed in section IV.B.4., the number of affected workers may exclude some seasonal recreation workers currently exempt under Executive Order 13838 (approximately 1,200 employees as estimated as affected by E.O. 13838). Excluding these workers may result in a slight underestimate of transfers. However, some of these currently exempt workers, those earning between \$10.60 and \$15 per hour, are captured in the analysis. And for these workers, transfers may be somewhat overestimated because we have applied weekly transfers to all 52 weeks. As seasonal employees, the applicable number of work weeks would be lower.”). Moreover, given that Grand Canyon National Park alone has over 1,000 seasonal recreational workers, the analysis also grossly underestimates the number of seasonal recreational workers implicated by the Proposed Rule, and therefore the full impact of these “transfer payments.”

The Proposed Rule claims that “[i]n some instances, such as concessions contracts, increased contractor costs may be passed along to the public in the form of higher prices.” 86 Fed. Reg. 38,869. However, despite acknowledging that “[t]he literature tends to find that minimum wages result in increased prices, but that the size of that increase can vary substantially,” the Proposed Rule reaches the contrary conclusion that “because employer costs are relatively small, any pass-through to prices will be small.” *Id.* The Proposed Rule then proceeds to offer an example of how increased wages were largely passed through to consumers by increasing the cost of Big Macs. *Id.* This nonsensical comparison glosses over the impacts of increased wages for the guide and outfitter industry, including operators of multi-day, backcountry trips. In fact, the Department considered no analysis relevant to the guide and outfitter industry, and certainly none that would support such a conclusion that the increased cost to concessioners from a rate increase would be small.

The reality is that these costs could not be easily passed onto the consumer. As discussed above, guide and outfitter businesses typically are not free to simply set their prices at whatever rates they chose. Their rates are often closely controlled by the government. When they are not, they are subject to market forces, which suggest that customers will go elsewhere. The Department’s purported analysis does not consider the potential consequences of raising rates for our customers or driving our customers away from our industry, such as potential reductions in service. Raising rates could price customers out of the concessions market. It could lead operators to shut down their federal lands operations, either closing entirely, reducing services, or transitioning their operations to non-federal lands. Higher wage costs also can reduce investments in new equipment as well as lead to cut-backs in staff, with potential adverse implications for public safety. All of these impacts would undermine current government and industry efforts and policies that aim to improve, not reduce, accessibility to opportunities to experience the nation’s federal lands.

If the increased costs cannot be borne by the customers, they will be passed onto the small business guides and outfitters. The Proposed Rule concedes that “[i]mpacts to profits may be larger for firms that pay lower wages, for firms with more affected workers, and for firms that cannot pass increased costs onto the government or the consumer,” 86 Fed. Reg. 38,869, but fails to make any attempt to analyze these impacts to profits of guides and outfitters. Instead, the Department concludes that “because the increase in gross costs is such a small share of contracting revenue . . . in this case, the average impact on profits will be negligible.” 86 Fed. Reg. 38,869. Again, the Department’s conclusion is arbitrary and reflects no effort to understand and meaningfully address the impacts to this industry and its small business members.

Critically, the Proposed Rule admittedly fails to consider the impact of overtime, a significant concern for the guides and outfitters that would be subject to this rule. See 86 Fed. Reg. 38,870 (“Conversely, transfers may be underestimated because the Department did not account for higher overtime pay premiums due to an increase in the regular rate of pay.”). Such a dramatic increase in the minimum wage is not sustainable for outfitters, camps and other recreation providers who have to pay overtime after 40 hours on multi-day trips, and they threaten the viability of these businesses and the opportunities they provide to facilitate enjoyment of federal lands and waters by the public. The admitted failure to address overtime is egregious.

Unlike front country businesses, outfitters and guiding businesses often operate deep in the backcountry where it is impossible to bring on a second or third shift to avoid paying overtime after 40 hours. The documentation requirements and nature of the trips virtually ensure that many of

these guides are on duty twenty-four hours per day while in the backcountry. As such, overtime essentially starts on the second day of a seven-day trip. Some businesses providing guided hikes and excursions to youth, for example, estimate that they would have to increase their prices by 33% to 40% or more just to cover the higher minimum wage and overtime requirements. Even seasonal businesses offering day trip services often use entry level employees and youth. In some areas, a \$15.00 minimum wage creates a significant issue for these businesses and makes them only marginally profitable. This does not even begin to address any potential “spillover” effects to other, more experienced workers who must be paid more than entry-level employees or youth, yet another significant effect that the Department admittedly failed to quantify. See 86 Fed. Reg. 38,872 (“The Department agrees with this literature that there will likely be wage increases for some workers earning about \$15 per hour. However, the Department has not quantified this change.”). The higher wage rates also increase other costs, such as workers compensation insurance premiums.

The Department makes the unsubstantiated claim that these increased costs will be offset by some unquantifiable “higher productivity” and “cost savings.” The Department stated that “[t]he proposed rule elaborates that raising the minimum wage enhances worker productivity and generates higher quality work by boosting workers’ health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs.” 86 Fed. Reg. at 38,819. Such propositions, in the context of the outfitter and guide industry, are without support. Even more specifically, the Proposed Rule states, “the Department believes that, by increasing the quality and efficiency of services provided to the Federal Government, the Executive order will improve the value that taxpayers receive from the Federal Government’s investment.” 86 Fed. Reg. at 38,819. Such a position is not only untrue but disregards the countervailing considerations about how the increased minimum wage would harm our industry and the customers we serve.

Many businesses in our industry believe that increasing their wages will force them out of business or, at a minimum, result in modification of their trips to limit wage costs. Executive Order 13838 was issued in recognition that neither result is in the public interest. Guides receive fair compensation for their work (who, as a group, have high morale and job satisfaction), and the Proposed Rule actually threatens to reduce their income and employment by making seasonable businesses unsustainable or requiring changes that have the effect of reduced their work hours. Concessioners who provide recreation services on federal lands compete with providers of similar services on non-federal lands. They will be forced to make changes to services elsewhere that could reduce visitor experience and opportunities in order to remain competitive in the market, thus decreasing the value that taxpayers receive.

For the reasons described above, the Proposed Rule’s impact analysis is grossly deficient—as a general matter, but particularly so with regard to the outfitting and guiding industry and the small businesses that comprise the overwhelming majority of members of the industry. Before it can finalize the rule, the Department must provide a meaningful analysis of potential impacts, including specifically addressing the various aspects of the rule’s potential impacts that it acknowledges it omits but that are nonetheless critically important, including, but not limited to, entities covered by Executive Order 13838, overtime, and spillover effects. As part of this analysis, the Affiliated Outfitter Associations request that the Department specifically model and assess the potential impacts, including payment for overtime, associated with a multi-day (e.g., one-week or longer) backcountry trip (such as a river trip) on federal lands.

IV. Conclusion

As reflected in the comments above, the Proposed Rule is vague and overly broad, and will have significant economic impacts on the hardworking small business owners who constitute our membership and who provide a valuable service to the American public by facilitating their use and enjoyment of America's treasured recreation lands. Before promulgating a final rule, the Department must fully address the implications of the rescinded Executive Order on the concessions industry and engage in further, meaningful economic analysis to include the outfitting and guiding and outdoor recreation industry. As implementation of Executive Order 14026 and the development of this rule moves forward, we urge the Administration and the Department, as well as the federal land managing agencies authorizing the contracts and permits under which these services are provided, to be mindful of the concerns that appropriately led to the issuance of Executive Order 13838, and to exercise their discretion, to the maximum extent possible, in a manner that minimizes potential adverse impacts on the industry. This includes calling on the Administration to reconsider and reverse the decision to revoke Executive Order 13838.

Thank you for your consideration of these comments.

Sincerely,

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