THE CUMULATIVE BURDEN OF PRESIDENT OBAMA'S EXECUTIVE ORDERS ON SMALL CONTRACTORS

HEARING

BEFORE THE

SUBCOMMITTEES ON INVESTIGATIONS, OVERSIGHT, AND REGULATIONS AND CONTRACTING AND WORKFORCE

OF THE

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TUESDAY, SEPTEMBER 13, 2016

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT,
AND REGULATIONS,
JOINT WITH THE
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE,
Washington, DC.

The Subcommittees met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building, Hon. Cresent Hardy [chairman of the Subcommittee on Investigations, Oversight, and Regulations] presiding.

Present: Representatives Hardy, Knight, Hanna, Kelly, Adams, and Lawrence.

Chairman HARDY. Good morning. I would like to call this hearing to order.

I would like to start by thanking our witnesses, especially the small business owners who have traveled from different parts of the country, for being here.

Today, we are going to take a look back at all the executive actions President Obama has taken throughout his presidency that have a direct effect on the Federal contractors. More specifically, we want to examine how these actions have affected small firms that do business with the Federal Government.

Throughout this Congress, our full Committee, as well as several of our Subcommittees, including mine and Mr. Hanna's, have held hearings highlighting the negative outcomes of several of these actions, doing our best to defend the small business community. Regrettably, President Obama either was not listening, or worse, he simply ignored our appeals.

For example, last September, Mr. Hanna and I held a joint hearing discussing the negative outcomes small businesses would have faced should Executive Order 13673, commonly referred to as "the Blacklisting rule," become final. We received testimony at that hearing that would undermine the government's longstanding policy of maximizing contracting opportunities for small businesses and that it was an opportunity to extort settlements out of small businesses. These pleas were ignored by the Department of Labor, and the Blacklisting rule became final on August 24th.

The Blacklisting rule is one of many new Federal regulations that have been spawned by the President's decree hampering economic growth in our small business communities.

Aside from the circumventing of the Congress' legislative authority, I am particularly concerned that these executive actions will lead to fewer small businesses participating in the Federal marketplace.

We need a healthy industrial base with many small businesses working to provide the government with innovative goods and cost-effective services. When fewer small businesses compete for federal contracts, the outcome will be less innovation and a higher cost to taxpayers.

Regrettably, this exodus has already started. We currently have 100,000 fewer small businesses registered to do business with the Federal Government than we did just 4 years ago. This is not good for the United States.

In meeting after meeting with my constituents back home in Nevada, and listening to small business after small business testify before this Subcommittee, I have come to the conclusion that Washington regulators, and particularly those appointed in the Obama administration, do not understand how much their actions affect the day-to-day operations of small firms.

This is unfortunate, and I hope to work with this administration to make them understand just how difficult they are making it for small Federal contractors.

We have an outstanding panel here today with us this morning, and I am very interested in hearing how bad it is getting out there for our small federal contractors. We will keep yelling, and maybe the President will finally hear us.

Now I yield to the Ranking Member, Ms. Adams, for her opening statement.

Ms. ADAMS. Thank you, Mr. Chairman, for holding this important meeting. To our panelists today, our witnesses, for your presence and your participation, I thank you as well.

Each year, the Federal Government spends over $400 billion in taxpayer dollars to pay private companies for goods and services. In the past, Congress has used this significant financial might to help drive forward a number of policy goals. One such policy goal that is a priority for this Committee and for Congress is the participation of small businesses in the federal marketplace. As such, we have passed legislation aimed at ensuring all small businesses get a fair shot at these projects. Likewise, this Committee has worked in a bipartisan manner to help women- and minority-owned businesses navigate the procurement process, recognizing that as the country's largest consumer of goods and services, the Federal Government has the ability to use its buying power to advance priorities important to our Nation.

President Obama signed several executive orders and presidential memorandum setting standards for contractors doing good work for the government, and while funds received from Federal contracts boost local economies and allow firms to hire more employees, some firms play by their own set of rules to win these lucrative dollars. As a result, law-abiding businesses are disadvantaged and pushed out of the marketplace. Therefore, these execu-

tive actions are aimed at leveling the playing field for all contractors. From ensuring that contracting officers are looking at labor law violations when evaluating a firm's responsibility to protecting employees from discrimination on the basis of sexual orientation and providing sick leave and a higher minimum wage, these executive actions cover a wide range of areas to not only protect employees, but also protect the government from undue risk. So we should be clear of the businesses that perform work for the government. The overwhelming majority comply with laws and do right by their employees while providing excellent goods and services at competitive prices.

However, this Committee has heard of a number of bad actors that skirt the law and continue to receive Federal contract work. For instance, according to one report, almost half of the total initial penalty dollars assessed for Occupational Safety and Health Administration violations in 2012 were against companies holding Federal contracts. However, these businesses were rarely debarred or suspended from the federal marketplace as a result of their unsafe working environments.

Labor laws are crucial to a healthy economy. Allowing habitual violators to continue working with the federal government without requiring remedies puts employees at risk of injury and the government at risk of delays and additional costs.

So with regards to the executive orders on increasing wages and protecting employees seeking equal pay, studies have shown that higher wages lead to better quality of services, lower employee turnover, and more robust bidding by high-road employers, all of which improve the efficiency and the economy of federally contracted work.

While these executive actions have resulted or will result in new processes and procedures for Federal contractors, many of the changes will fit into the existing procurement process with the contracting officer using additional criteria to consider. Yet, as we hear today, many small firms are concerned with the cumulative impact impacting all executive orders will have on their businesses. Small businesses provide quality goods and services at affordable prices, meaning a better deal for the government and the taxpayer, yet they have smaller margins, and new regulations can be harder for them to absorb. With small businesses creating over two-thirds of new jobs, our economy needs both small businesses and sufficient employee protections to properly operate. Accordingly, it is important that we find the balance in which small businesses are not overly burdened by complying with the guidelines, while not diluting the protections afforded to law-abiding contractors through these executive orders.

With that, I look forward to hearing the witnesses' perspective on these important topics, and I yield back. Thank you, Mr. Chair.

Chairman HARDY. Thank you, Ms. Adams.

I would like to turn some time over to the chairman of the Subcommittee on Contracting and Workforce, Chairman Hanna.

Chairman HANNA. Thank you, Chairman. I appreciate it.

I am going to forego my statement today. So much of this is self-evident and it is often mostly, most of the time it is the case that witnesses have much more insight, and I do not want to take up

any time to read my statement because I have a lot of questions and I want to get some feedback and want to take the time to do it. So thank you, Chairman.

Chairman HARDY. Thank you, Mr. Chairman.

If the Committee members have any opening statements prepared, I would like to ask that they submit them for the record.

Now, I would like to explain how things kind of work around here, which many of you probably already know.

You will have 5 minutes to deliver your testimony. The light will start out as green. When you have 1 minute remaining, the light will turn yellow, and finally, when your 5 minutes is up, it will turn red. I ask you to adhere to this time limit if you could, please.

Now, I would like to introduce our witnesses.

Our first witness is Mr. James Hoffman, president of Summer Consultants, Inc., a small mechanical, electrical, and plumbing engineering firm in McLean, Virginia, testifying on behalf of the American Council of Engineering Companies. He possesses 24 years of experience preparing studies and designs of federal historic and institutional facilities and complex renovation projects. Mr. Hoffman is a Project Manager for indefinite delivery, indefinite quantity contracts with Baltimore District of the Army Corps of Engineers Naval Facilities, Engineering Command Washington, and the National Institute of Standards and Technology. Other past and current federal experience includes work with the Architect of the Capitol, the 11th Wing of the Department of the Air Force, and the General Services Administration. Thank you for being here, Mr. Hoffman.

Up next we have Ms. Donna Huneycutt, Chief Operating Officer and Co-owner of the Wittenberg Weiner Consulting, testifying on behalf of the National Defense Industrial Association, or the NDIA. Prior to joining the WWC, she practiced business immigration law representing Fleet Boston Financial and Vertex Pharmaceuticals. Previously, Ms. Huneycutt practiced corporate law in New York, focusing on private placement startups and structured finance. She holds a B.A. from the University of California-Berkeley, and a J.D. from Columbia University. She is an active member of the Committee on Acquisition Management and Small Business Division Legislative Affairs and Policy Team of the NDIA. She co-chaired the Small Business Committee on Pathways to Transformation, Response on Acquisition Reform prepared by the NDIA at the request of the Senate Arms Service Committee and the House Arms Service Committee. Thank you for being here, Ms. Huneycutt.

Next, we have Jimmy Christianson, Regulatory Counsel for the Associated General Contractors, or the AGC. Working with AGC for nearly 6 years, Mr. Christianson lobbies Congress and federal agencies on transportation authorizations and appropriations, procurement, public-private partnership, labor, and environmental bills. He has success in this which he has led the enactment of favorable provisions in the National Defense Authorization Act for the fiscal years 2014, 2105, and 2016; the Water Resources Reform and Development Act of 2014; and various appropriation bills. He also works with the association members from CEOs of multibillion-dollar companies to middle managers and business owners to identify, prioritize, and advance industries' legislative and regu-

latory agencies. He received his B.A. from the University of Pennsylvania and his J.D. from the University of Maine. Thank you for your participation, and we look forward to hearing from you, Mr. Christiansen.

Now, I would like to yield to Ms. Adams to introduce our next witness.

Ms. ADAMS. Thank you, Mr. Chair.

It is my pleasure to introduce Dr. David Madland. Dr. Madland is a Senior Fellow and a Senior Advisor to the American Worker Project at the Center for American Progress. He has written extensively about the economy, including the middle class, economic inequality, retirement policy, labor unions, and workplace standards, such as the minimum wage. He has appeared frequently on television shows, including PBS NewsHour, and has been cited in publications such as The New York Times, The Wall Street Journal, and The Washington Post. Dr. Madland has a doctorate in government from Georgetown University and received his bachelor's degree from the University of California-Berkeley. Welcome, Dr. Madland.

Chairman HARDY. Again, I would like to thank you all for being here.

Mr. Hoffman, we will start with you. You have 5 minutes.

STATEMENTS OF JAMES P. HOFFMAN, P.E., PRESIDENT, SUMMER CONSULTANTS, INC.; DONNA S. HUNEYCUTT, CO-OWNER AND CHIEF OPERATING OFFICER, WITTENBERG WEINER CONSULTING, LLC; JIMMY CHRISTIANSON, REGULATORY COUNSEL, ASSOCIATED GENERAL CONTRACTORS OF AMERICA; DAVID MADLAND, PH.D.,SENIOR FELLOW & SENIOR ADVISOR, AMERICAN WORKER PROJECT CENTER FOR AMERICAN PROGRESS

STATEMENT OF JAMES P. HOFFMAN

Mr. HOFFMAN. Subcommittee Chairman Hanna, Chairman Hardy, Ranking Member Adams, and members of this Committee, I appreciate the opportunity to testify before you today about the issues surrounding the cumulative burden of President Obama's executive orders on small contractors.

My name is James Hoffman, and I am the President of Summer Consulting, a mechanical, electrical, and plumbing engineering firm, headquartered in McLean, Virginia. Summer Consultants is a small business with 36 people, and we have been in the federal marketplace for over 50 years.

My firm is an active member of the American Council of Engineering Companies, the voice of America's engineering industry. ACEC's over 5,000 member firms represent hundreds of thousands engineers and other specialists throughout the country that are engaged in a wide range of engineering work that propel the Nation's economy and enhance and safeguard America's quality of life. Almost 85 percent of these firms are small businesses. ACEC appreciates the efforts that the Department of Labor and the FAR Council play to ensure compliance with labor laws. The industry is committed to following the rules, but the Federal Government must

understand the burdens on the private sector and that the cost is passed on to the government with duplicative requirements.

The blacklisting rule creates burdens for engineering firms and other contractors working for federal agencies. While we understand the rationale behind the order, it should be noted that the bad actors are less than 0.01 percent of the total contracting workforce. Let me repeat that, less than 0.01 percent of the total contracting workforce.

The Sick Leave Executive Order also creates unnecessary administrative and financial burdens on contractors. While the Council supports paid sick leave, the amount of reporting and the changes required to implement the rule create more expense for contractors and the government. Most of the Council's firms offer equivalent paid sick leave, so the requirement is repetitive.

These orders create a more burdensome and expensive process for federal contractors, which drives up taxpayer costs while driving businesses out of the Federal market. For example, my firm is a prime contractor and manages many subcontractors. Under the blacklisting rule, I will have to preclear my subcontractors before I develop a response. Developing a response takes time and focus away from other business as I develop the full scope of the requirements to make sure that the subcontractors have the business and ethical credentials to help me win the work. I question that I will be able to consult with both the contracting officer and the agency labor compliance advisor to find out if these subcontractors are okay, and I am concerned about the alleged labor violations, or violations that are beyond the 3-year period will be held against my firm or any subcontractors during the solicitation and within the context of the contract.

My firm already reports compliance with the required rules and orders up to the applicable agency. Adding another set of reporting that is duplicative increases my overhead. Engineering firms across the Nation complain that contracting officers are looking to reduce firm overhead and expenses in this tight budget environment.

Under the Sick Time rule, engineering firms also face increased overhead by mandating employee weekly sick time reports. This requires new systems and potentially adds employees to implement the changes, and generally, firms are typically paid on a monthly or biweekly cycle and report sick leave and other time off with each pay period. Member firms respond that implementation costs in the first year are estimated to be in excess of $50,000, with additional costs in the subsequent years.

Both these rules will add to the overhead that the government is already trying to limit. Implementation of these rules will further add to those overhead expenses, putting firms in a difficult situation of possibly leaving the federal marketplace, which dilutes competition for critical services as taxpayers or adding costs to the agency if the expenses are accepted.

I ask that the Committee consider asking the FAR Council and the Department of Labor to withdraw the proposed sick time guidance and the final blacklisting guidance, to redraft it to better align with the current contracting process. I also ask that the members of this Committee support either the House or Senate NDAA language to limit implementation of the FAR rule and DOL guidance.

Thank you for the opportunity to participate in today's hearing, and I will be happy to respond to any questions from the Committee members.

Chairman HARDY. Thank you for your testimony.

Ms. Huneycutt?

STATEMENT OF DONNA S. HUNEYCUTT

Ms. HUNEYCUTT. Thank you. Good morning.

Subcommittee Chairman Hanna and Chairman Hardy, Ranking Member Adams, and members of the Committee, thank you for the opportunity to appear before you this morning.

I am here on behalf of the National Defense Industrial Association, the Nation's oldest and largest defense industry association, comprised of nearly 1,600 corporate and 90,000 individual members.

Small businesses are a critical component of the U.S. economy, serving as a catalyst for economic development, providing employment opportunities, and as the engine of new ideas and innovations. Accordingly, the federal government has established programs to ensure participation opportunities to small businesses to fulfill the public policy objectives of the Federal Acquisition Regulation, and access a source of innovative products and services for federal government customers. Explicit and implicit in the desired outcomes for small business programs is achieving effective competition by maximizing small business participation and enabling small businesses to grow through diversification of the goods and services they provide and expansion into the nongovernmental marketplace.

As outlined at the onset of the FAR, the guiding principles of the federal acquisition system are to satisfy government customers by maximizing use of commercial products and services, utilizing contractors with superior past performance, and promoting competition. At the same time, the federal acquisition system shall minimize operation costs, conduct business with fairness and integrity, and fulfill policy objectives. The EOs attempt to fulfill the latter two guiding principles, but in the process, undermine each of the others.

The rationale for the procurement-related EOs have been to "promote economy and efficiency in procurement" through their intended outcomes. Industry does not necessarily disagree with the logic, but rather, how that efficiency and economy is achieved. Supporting documentation for the EO on Fair Pay and Safe Workplaces states, "The vast majority of federal contractors play by the rules." However, the implementation approach to each of the EOs punishes that vast majority of good actors through costly, government-unique compliance requirements, a particularly inefficient means to promote efficiency.

The most efficient and economic means to fulfill the policy objectives of the EOs is to alter government buying practices. For example, the rationale for the Fair Pay and Safe Workplace EO is, "Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the federal government." Thus, if the govern-

ment makes contract awards based on the offeror that provides a good or service for the best value, it would have already chosen an offeror that adheres to existing labor laws and has workplace practices that enhance productivity. Unfortunately, as industry has long pointed out, the government has poor buying habits that have equated "best value" with "lowest cost," and valued compliance to government-unique requirements over actual performance in delivering goods and services, creating a perverse incentive to "race to the bottom" to win contracts.

Congress has already passed sufficient legislation to ensure protections of federal contractor employees and to ensure that the government only contracts with responsible sources. The federal government should focus on enforcing the objectives of existing laws, rather than using EOs to prescribe in excessive detail how to comply.

A major frustration for small businesses is that in many cases they agree with the intended outcome of an EO, such as providing for the well-being of federal contractor employees or making sure that competitors play by the rules, but object to the process by which the EOs have been developed and implemented.

Small businesses are not only concerned with the collective impacts of the EOs on their bottom line, but also the detrimental impacts they will have on government customers and their ability to carry out missions, the most consequential of which is national security. In recent years, the Department of Defense, the federal government's biggest spender by a substantial margin, has placed a renewed emphasis on an innovation and acquisition reform, led by top officials in the Office of the Secretary of Defense and the Services.

Unfortunately, the EOs undermine these initiatives. The resultant accumulation of government-unique requirements and their compliance costs will continue to deter new suppliers from entering the government marketplace and drive exits by firms already selling to the government, restricting competition.

In closing, several of the recent EOs have, through flawed processes, installed burdensome, unnecessary, inefficient, and in many cases duplicative and overlapping regulatory regimes that have the cumulative effect of dramatically increasing the cost of doing business with the federal government. Over time, these will decrease efficiency and economy in federal procurement, while undermining small business growth and development, and limiting the federal government's access to innovative products and services to fulfill their needs.

Thank you again for the opportunity to appear before you this morning, and I am happy to answer any questions you may have.

Chairman HARDY. Thank you, Ms. Huneycutt.

Mr. Christianson?

STATEMENT OF JIMMY CHRISTIANSON

Mr. CHRISTIANSON. Chairman Hanna, Chairman Hardy, Ranking Member Adams, and members of the Committee, thank you for inviting the Associated General Contractors of America to testify today on this important topic. My name is Jimmy Christianson. I am Regulatory Counsel for AGC, which represents

more than 26,000 union and open-shop commercial construction companies throughout the Nation.

The construction industry has historically supported and provided opportunities for small businesses. It includes more than 660,000 firms throughout the United States, of which 93 percent have fewer than 20 employees. Generally speaking, those employees may include cost estimators, proposal managers, superintendents, craft labor, equipment operators, and other staff whose primary purpose is construction work.

The business of a construction small business is construction. When it comes to compliance issues, many small businesses may have one or two employees that handle safety, labor, human resources, and environmental compliance for the entire company. In many companies, the safety director is also the environmental compliance director. The human resource director is also the accountant and the general office manager. The reality is that small business employees are often working "double duty" because small businesses have extremely limited resources.

That stated, abiding by laws and regulations is part of the cost of doing business. The requirements of the statutes and regulations imposed, however, can also represent barriers to entry for small emerging businesses and barriers of growth to existing ones. Laws and regulations are necessary to help maintain a level and competitive playing field. Nevertheless, not all laws are necessarily good laws, and similarly, not all regulations are necessarily good regulations or practical. Laws and regulations enacted and finalized, even with the best intentions, can have unintended consequences and needlessly duplicate or confuse existing legal frameworks.

Of the more than 400 executive orders and presidential memoranda issued by President Obama, AGC has identified 22 that impact the construction contracting industry and its small businesses. Several of those actions, which I am happy to discuss in detail during the question-and-answer period, will individually and cumulatively expose small business construction contractors to significant legal costs, legal liabilities, and other risks. Small business contractors will have to consider these executive actions in the context of the potential risks versus rewards of participating in the federal construction market.

Given the overall state of the economy today, as we experience a workforce shortage, more than two-thirds of our members say they are looking for workers. The private market, other markets out there are more competitive. They will have to consider whether they will continue to work in the federal market or, as they have told me, plan to or strongly consider walking away. The administration probably did not intend to drive small businesses out of the Federal market in implementing these actions; nevertheless, it appears to be a realistic impact.

AGC looks forward to working with this Committee on ways to prevent small businesses from leaving the Federal market and addressing the problems with several of these executive actions. I hope today that we can talk about the practical realities that these executive orders place on small businesses. I hope we can talk about the reality that many small businesses already in the con-

struction industry have Davis-Bacon requirements that require them to pay prevailing wage rates. How will these different executive orders on paid sick leave take into account, because many of them do not, existing statutory requirements that are already in there? We will also remember that most small businesses, veteran-owned small businesses, minority-owned small businesses, the small businesses we represent, consider their workers in many cases to be part of their family, just as many of you consider your employees and your congressional staff to be part of your family, and it is hard when rules and regulations come down that make them have to make decisions that have to say we have to let go of some members of our family.

I look forward to your questions. Thank you.

Chairman HARDY. Thank you, Mr. Christianson.

Dr. Madland?

STATEMENT OF DAVID MADLAND

Dr. MADLAND. Thank you, Chairman Hardy and Chairman Hanna, Ranking Member Adams, and members of the Subcommittee. I very much appreciate the opportunity to be here.

My name is David Madland. I am a Senior Fellow at the Center for American Progress Action Fund. CAP Action is an independent, nonpartisan, and progressive education and advocacy organization dedicated to improving the lives of Americans through ideas and actions.

The President's executive actions that are the subject of today's hearing draw widespread support from a broad coalition of supporters. Not only do organizations representing workers, veterans, women, the elderly, and taxpayers support many of these actions, but so, too, do a number of small businesses. Many small businesses feel that these executive actions will help them compete on a level playing field and make the contracting process more welcoming to businesses like theirs. Indeed, in 2015, small business contracting, as a percentage of total government contracting, was at record high levels.

Though I think the general points I make could be applied to most, if not all, of the President's contracting reforms, I will focus my remarks on those that address minimum wage, require paid sick, ban discrimination based on sexual orientation and gender identity, and ensure companies comply with workplace laws before getting new government contracts.

The federal government has a long and successful history of starting important social changes with federal contractors. For example, President Lyndon Johnson prevented companies that contract with the federal government from discrimination on the basis of race, color, religion, sex, or national origin. Actions by President Richard Nixon furthered these protections. Ronald Reagan sought to promote minority contractors. Bill Clinton encouraged contractors in economically distressed areas. George W. Bush sought to ensure contractors employed only American citizens or legal residents.

President Obama's efforts to raise standards for workers on federal contracts build on this history and are an important part of making the economy work for everyone, not just the wealthy few.

In the United States today, wages have been stagnant for decades, while economic inequality is near record levels. Too many people are struggling to pay bills, especially those working in low-wage industries where wage theft is rampant as employers pay workers less than they are legally required. Many Americans cannot take time off if they get sick, and people often face discrimination because of their sexual orientation and gender identity. Discrimination based on race and gender still occurs, despite previous federal actions.

At the same time these executive actions address important economic and social challenges, they also promote economy and efficiency in government contracting. The basic idea is that treating workers fairly leads to better results for taxpayers. Human capital is the core input into many federal contracts, and taxpayers receive the most efficient and effective utilization of all available manpower when workers are treated fairly.

Not surprisingly, giving these benefits to taxpayers, businesses, and workers, many state and local governments have already implemented similar policies, and evidence shows that these policies tend to work pretty well. A study of New York City's paid sick leave found that after 1-1/2 years after the law went into effect, 86 percent of employers supported the policy.

Studies examining LGBT contracting policies in state and local governments found that in almost all localities, any resistance to these policies was minimal and short-lived. The State of Maryland's living wage law conducted by the state found that the number of bids increased after the State adopted the policy by nearly 30 percent. Statements from officials in San Francisco and Los Angeles indicate that their responsible contracting systems have increased the pool of experienced firms willing to bid for their work. Private companies are also adopting similar wage and responsibility review processes.

That is why there are a number of small businesses that support these kinds of policies. Indeed, a Maryland state contractor who first decided to bid only after the living wage was enacted said without these standards, "the bids are a race to the bottom. That is not a relationship we want to have with our employees. Living wage puts all bidders on the same footing."

The president of American Small Business Chamber of Commerce explained that the President's executive order on the minimum wage will "help level the playing field." A poll from the small business majority found that nearly 80 percent of small business owners support a law to ban discrimination against LGBT employees, and a hearing at this very Committee, construction contractor Bill Albanesi stated that the Fair Pay and Safe Workplace Executive Order "makes good business sense." It makes good sense to vet the contractor before he gets a job. It is common in our industry. We do it all the time and we do not see it as being a burden to any legitimate fair contractor that is playing by the rules.

In summary, executive actions help address problems in the economy and they are supported and help workers, businesses, and taxpayers. Thank you.

Chairman HARDY. Thank you, Dr. Madland.

I would like to begin our first round of questioning. I am going to yield myself along with everybody else as we go through.

Mr. Hoffman, I would like to start with you. You know, a bad rule is a bad rule. But do you think some of these concerns that could have been alleviated by the DOL if they followed the Regulatory Flexibility Act and actually allowed small business firms to be part of that conversation to maybe come up with a better outcome. What are your thoughts on that?

Mr. HOFFMAN. Yes, sir. Having a greater voice in these regulations is important, and the Office of Advocacy does an excellent job in listening to small businesses. We feel that greater input from the small and large business community into this far-reaching regulation is necessary to make it workable.

Chairman HARDY. Thank you.

Ms. Huneycutt, it is stated that there are about 100,000 small businesses that have left the federal marketplace in just the last 4 years. Do you think any of these actions would make any of those small business firms ever want to come back doing business with the federal government with some of those actions that have been put in place?

Ms. HUNEYCUTT. Well, I can tell you that there is a continuum along which each different firm is going to opt out of something. It might be with increasing layers of regulation which often conflict with each other or are hard to make work with state regulations or other agency regulations and require additional investments in, for example, recordkeeping systems and lawyers at 400- to $700 an hour. I can tell you that we recently spent $10,000 to implement a human resources information system that was totally compliant and is a commercial system, and now with the sick leave recordkeeping that will be required by the new EO, we will be required to potentially opt out of it or pay for special coding to have that work for us. So some firms are going to opt out, and my firm at this time does not engage in service contract work because the very prescriptive ways that the recordkeeping has to be done and things need to be structured are simply too pricey for us to implement and continue to run our business, although we actually do meet all of those objectives. So we have sick leave. We do not have any claims against us. And even still they are a barrier to entry to the SCA.

Along that same continuum, unfortunately, what we are seeing is that there are a lot of firms that are opting out of compliance, and sinning first and asking forgiveness later. The contracting officers who are already so burdened with so many different pieces that they need to evaluate in a proposal really do not have the bandwidth or the autonomy to ensure compliance with those, especially in a lowest price, technically acceptable environment where costs are continually being driven down. So unfortunately, what we are seeing is that oftentimes the government is getting exactly the opposite of what it wants because it is rewarding the actors that are noncompliant without knowing it and driving compliant firms out of business.

Chairman HARDY. Thank you.

Mr. Christianson, in your testimony, you mentioned the use of project labor agreements for federal construction projects, executive order or your written testimony. Can you talk a little bit about how

this might affect the open shop contractor or even those who are located in the right-to-work states?

Mr. CHRISTIANSON. Sure. The fact is that the agency's position is that we leave it up to—we believe it is the decision of the contractor and laborer to come to a collectively bargained agreement, project labor agreement, and that government mandating those agreements is not a good idea because they do not have the expertise necessarily to do so. They do not have the parties in the construction industry to do so. But when you are dealing with open shop, take for example a very open shop area maybe in the middle of Nevada where there are not many union contractors, if you are all of a sudden mandating that there has to be some sort of union work in an area that is predominately open shop, you are going to have these companies basically change the way that they do work to do a project and they are probably just not going to fit the project.

Chairman HARDY. Thank you.

My time is expired. I would like to turn the time over to Ms. Adams.

Ms. ADAMS. Thank you, Mr. Chair.

Before we address the topic, I wanted to just get the panel's reaction to comments made by the CEO of Science Applications International Corporation, SAIC, last week in which the CEO indicated that small business set-asides and contract unbundling were making it harder for his company to get contracts. Do you feel like these comments are representative of what is going on in the federal marketplace? Anyone who would like to answer it?

Mr. HOFFMAN. I will start. There are opportunities for large firms to participate with small firms in the federal market, there was recently passed legislation for mentor-protege. There are also other agreements, and recently there is the new Small Business Multi-Tier rule that is allowing prime contractors to count small business subcontracts to their goal. Ultimately, this is helping the agency to meet their small business goals. I think there is still opportunity for large firms to partner with small firms to get work done.

Ms. ADAMS. Dr. Madland, do you have a comment?

Dr. MADLAND. Yes. As I said in my opening statement, the share of government contract dollars that are going to small businesses is at record highs, which indicates that the President's efforts to focus on small business are working. Yet I think there is significant room for large contractors to do quite well because the scope of government dollars going to government contracts over the past several decades has increased significantly, so there is more total work out there even if a significant percentage now is going to small businesses.

Ms. ADAMS. Okay. Thank you.

Would anybody else like to comment? Yes, ma'am?

Ms. HUNEYCUTT. I would agree as a small business that we are the beneficiaries of set-asides. I think that has been working increasingly well in the last couple of years. I wonder whether some of the reasons SAIC is having trouble competing is because a lot of the statutes that currently exist that were passed by Congress are not being enforced and small businesses have an easier

time staying under the radar, thereby lowering their prices and becoming more price competitive. If they choose, or not knowingly, if they do not comply.

Ms. ADAMS. Thank you, ma'am.

Okay, Mr. Christianson, with many construction firms doing business in the millions, why is it so difficult for these firms to keep track of their legal infractions over a 3-year period?

Mr. CHRISTIANSON. Construction is an inherently regional business. In many states, different coasts, you have different projects in different areas. You are working out of trailers. Especially in small businesses, you may not have the technology that a multibillion-dollar company has to track these things. I think the more fundamental question is why do the agencies that actually charge these contractors with infractions not have these records? They are the ones that are ultimately bringing these actions. Why are they asking contractors to do this? Should they not already have this information?

Ms. ADAMS. Okay. Let me follow up. There has been a lot of discussion about the negative impact that these executive orders will have on small businesses. However, are there any welcomed changes that help those in your industry or are there areas where you feel more action is needed?

Mr. CHRISTIANSON. I do not think so, what is going on here is there is more problems that are created. I think many of these are solutions looking for problems in the sense that, for example, with paid sick leave, most of our union contractors as we found out, do not really provide paid sick leave, because through collective bargaining, they collectively bargain for higher wages than even Davis-Bacon wages to take into account things like you are not working. It is a seasonal industry, so you are not working all the time. If you have paid sick leave during the time that people should be on the job, you are going to change construction schedules. You are going to delay projects, you are going to add to costs. We had one company, for example, that said take off the entire month of December. But now, because of the paid sick leave executive order, they are not going to be able to do that. Take off extra time for the holidays, they are not going to be able to do it.

The other thing is, in certain states and cities, you have state paid sick leave rules. You have city paid sick leave rules and now federal paid sick leave rules. So if you are on a federal contract, some of your employees may have federal paid sick leave requirements. If you have a state contract, you have state paid sick leave requirements. And then local, what do you follow? That is really the problem.

Ms. ADAMS. Thank you, sir. I am out of time.

Mr. Chair, I yield back.

Chairman HARDY. Thank you. I would like to turn the time over to Chairman Hanna.

Chairman HANNA. You know, it is pretty clear we are in slow growth. Very slow growth. Historically slow growth. It is also true, Dr. Madland, that real wages have not gone up in a very, very long time, which nobody can be happy about.

I have got 25 years in the Operating Engineers Union. I believe you are earnest in your perspective, but what bothers me about it,

Dr. Madland, is so much of it is conjecture and subjective in its nature. I wonder, when you hear three other individuals say that these rules are burdensome and overcomplicated and are discouraging people from entering the marketplace—and of course, what you said is true, that there are more small businesses as a percentage of total government contracts, but it is also true that the number of distinct small businesses' actions has declined, and it is true that there are 100,000 less people.

You do not believe these other three panelists? Do you think they are wrong or they are somehow saying something that is completely designed for their own self-interests? Because I hear this every day from business that it is not just the fact that these regulations are out there but that they are not considered in the process. It is the cumulative effect of it all. I do not see people out there trying to—I mean, one-tenth of 1 percent, sure they are bad actors, but why should you hold Mr. Hoffman responsible for every general contractor or subcontractor beneath him which he may or may not have any control over? Frankly, as you said, I think Mr. Hoffman mentioned that those are known people that it is the government's job to keep track of.

This is not meant to be personal, but it is surprising to me that you can speak in such general terms about people and have very specific notions about overtime and new overtime rules and the 30-hour work week rule that even the Congressional Budget Office has said will cause up to 2 million people to leave their jobs. I am just interested.

Dr. MADLAND. Sure. I think most of my testimony comes based on the experience when state and local governments implement similar policies. While I am by no means discounting the concerns that the panelists here have stated, you often find, before the policies get enacted, significant concerns, but after they go into a place they are less significant.

Just to read one very small quote. This was San Francisco. The Vice President of the local Chamber of Commerce, which led the fight against the city's paid sick leave before it passed, reported that the law's impact was "minimal," and that "by and large paid sick days has not been much of an issue." We have actual evidence from, for example, I cited the Maryland study of the living wage where the first and only State to pass a living wage, much higher wages for government contracts, and they actually found that the number of bidders for state projects increased after they implemented the law.

Chairman HANNA. I do not disagree that that person said that about that, and I do not know of the Maryland study. I will take your word for it. But do you think that really that is generally the preponderance of regulations and rules that—I mean, I was in business for 35 years. Mr. Hardy was. There is a point that people who have been successful in their lives say it is not worth it anymore. It is just too damn much work to keep up with the government. I am going to walk away. We have a lot of evidence to that, anecdotal and real, 100,000 businesses fewer. They are not sitting here whining at you. They are saying to you we want to do business with the federal government. We appreciate the opportunity,

but at some point you are breaking our back and it is not worth it.

I think that is the difference between the value system that you lay out which, one can prove individually yes or no, but that is what I hear, that we just kind of cannot take it anymore. Particularly, it strikes me that there is a point for a lot of people where they say, you know, I am out. It is not worth it. You are not worth it. The federal government is too complicated and too much in our face. I think that is a real concern.

My time is up. Thanks.

Chairman HARDY. Thank you.

I would like to turn the time over to Congressman Kelly.

Mr. KELLY. Thank you, Mr. Chairman and Chairman Hanna. Thank you both and Ranking Member. Thank all you witnesses for being here.

Just as a follow-up, more in a comment than a question with Chairman Hanna. Having been a small business owner, throughout my August I spent almost every day at town halls and those type of things with local folk and small businesses, veterans, being a member of the Mississippi National Guard and serving for over 30 years. I just left the National Guard Conference where I was there as a participant, not as a congressman.

It confuses me that we have think tank people in here, and I am not just talking about this panel, but I am talking about the entirety of the panels that have been here in 14 months. We have think tank panels. We have government employees. We have academia people who say that these rules have no effect on small businesses, but I have yet to have a small business person sit at that table and say that they felt that we did not have any effect. Most of the people that we have in front are just like you, three small business owners who actually own small businesses who say it has a tremendous impact on how we do business and whether we do business.

So I ask you to continue to fight as small businesses and continue to keep up the dialogue to let them know that these things impact because I, as you, and I think Mr. Christianson said this, as a small business owner, I know we pay our employers all that we can and we are going to preserve and keep and pay as well as we can, all small business employees because they are part of our family. They are. We want to see them do well.

That being said, this week I had Kopis Mobile, which is an app business that does a lot with DOD, and they are anchored in Flowood, Mississippi. Aside from keeping small businesses from being created and putting small businesses out of business, I am also concerned about the negative impact these regulations are having on innovation.

Ms. Huneycutt, can you talk a little more about how these actions will affect technological innovation?

Ms. HUNEYCUTT. I have been following very closely the efforts to get Silicon Valley and more R&D-oriented commercial firms to participate in the bidding process for government work. I think it is something that is critical for maintaining our technological edge, particularly at DOD. They move at the speed of business.

As an anecdote, I can tell you that we tried to team with a firm that provides a platform by which to—and we were looking at the State Department—by which to communicate through social media through a centralized hub that would send the same messaging out through Twitter and Facebook and all of these. They were flummoxed at the way that the process worked. They were flummoxed at all of the different ways that they would need to change their business model in order to be compliant, and the hoops, the time that it took. This is not how they are used to doing business.

I would suggest, especially if you want to increase the participation of commercial firms in bidding for government work, you do not—either these regulations and these new requirements should be passed as comprehensive legislation. It is not unique to the government, so that everybody needs to engage in it. I would suggest that there be more enforcement of the way companies are characterizing the way they engage people, because oftentimes they will mischaracterize them as 1099 subcontractors, have them sign a contract that says they are complying with everything, and then they get everything cheaper and there is not any real compliance there.

I would suggest that you be aware that this puts commercial companies in a position where now they need to treat their government contract employees differently than their commercial contract employees, and they cannot treat them differently. That keeps them out of the government.

Mr. KELLY. Mr. Hoffman, just briefly, have about 45 seconds left. What impact do all these new requirements have on the procurement process for small companies like yours?

Mr. HOFFMAN. My question is how are we going to, for example, vet our subcontractors? I just had the opportunity to negotiate overhead rates with a government agency and they were pointing to one of the consultants as to having low overhead or lower rates on a different contract. I asked, well, what contract or what is the name of that firm so I can reference it? While they gave me the last four, they were not even willing to give me the name of the contractor. If they will not give me the name of the contractor in a straightforward environment, when will the government give me the name of a contractor which potentially is negative and they are worried about backlash or something like that? So I am concerned myself.

Mr. KELLY. Thank you, Mr. Chairman. I yield back.

Chairman HARDY. Thank you, Mr. Kelly. We will turn the time over to Mr. Knight.

Mr. KNIGHT. Thank you, Mr. Chair.

Just a couple of questions. I was reading through some articles and watching what government is doing and what business is trying to adhere to, and some of the comments by all of the panel today. It begs the question that if government does something, or they say they are going to do something and people rebel against it, but then it happens anyway, people just have to adhere to it and that is just the way it is. That is what I look at when we start talking about the overtime rule and we start talking about $15 an hour going across the country and what is happening in cities like Se-

attle since they have seen the biggest decline in jobs in restaurants since 2009 since they have done the $15 an hour ordinance. So when government gets involved, too heavy-handed, then we tend to see a problem.

But my questions are about something recently our Vice President said. He said, "Because of the administration's efforts to rebuild the basic bargain, the economy has gone from crisis to recovery to resurgence. Today's expansion of overtime protections will build on this momentum."

Do any one of you or do all of you agree with this?

Yes, sir?

Dr. MADLAND. Yes. I think the overtime regulations are an important step forward to ensuring that workers, when they work more than 40 hours a week when they are lower income, will receive time and a half, which is the basic bargain of overtime. As you know, the standard had been eroded over decades so that very few salaried workers were receiving overtime. It used to be that the majority of salaried workers received overtime and the new regs will do that, which is part of how you ensure that workers have wages to spend that can go into the pockets of small business owners.

Mr. CHRISTIANSON. We do not disagree necessarily that it has been a long time since the overtime wages have been increased or the thresholds have been increased. But the issue is the practicality of more than doubling that threshold and making small businesses have to adhere to that in under a year's time. To have to plan for that is really just not——

Mr. KNIGHT. Before everyone continues I will put the second question on that, and maybe you can answer, too. Would any of your members be opposed to talking about an increase? We went from a little over 23,000 to almost 51,000. Would any of your members be opposed to talking about an increase that would probably put us into a more acceptable for small business, acceptable for continuing our economy to move forward? I am not trying to——

Mr. CHRISTIANSON. We are always interested in talking. We did not really have the opportunity to talk. That is what happened here is we had an opportunity to talk about the impacts but it does not seem like the administration did any listening.

Mr. KNIGHT. Okay. And again, I will say the flip side, too. It has been a long time since that has been changed. We do not keep minimum wage at 25 cents an hour. It moves and it ends up trying to be at a wage that is commensurate to the timeframe. Some people think that that is too low and some people think that the jumps are too high. But, when we talk about the overtime rule, and moving it, I think it is a 113 percent jump. That seems to me to be a jump that small business is going to not just push back on, but have a very difficult time adhering to.

Mr. CHRISTIANSON. You know, you cannot get something from nothing. Small businesses are not all of a sudden going to be able to pay everyone overtime that are under this threshold. Some people are now going to be hourly workers. They basically feel like they have been demoted, which is not necessarily true, but just the reality if they want to stay on the job, the company has the same amount of finite limited amount of funds. They are going to re-

address what level certain people are paid, how many hours people work, so that they can adjust accordingly.

Mr. KNIGHT. In my last 20 seconds, do you think that that takes away some of the flexibility for small businesses? Because like you say, now we are going to turn some of them into hourly wages. In California, we have done some things that have taken away the ability for employers and employees to have a conversation, and say you have to have certain breaks at certain times, and if you do not have these certain breaks, then you are in violation. It takes away the flexibility. Then it turns it into, I am the employer, you are the employee, and that is the way it is and we do not talk and you follow the rules and I have to fill these forms out, and have a nice day.

Yes, ma'am?

Ms. HUNEYCUTT. My response is to what was discussed a little bit earlier. With the exempt rules referencing a higher salary point, I can tell you the practical impact that that has had on us where, actually, we have very few people that were below that point to begin with, but those that were near that point got pay raises because the cost of giving them another couple of thousand dollars raise was nothing compared to the cost of having to change our recordkeeping systems. But what that also means is that we are very hesitant to hire at that lower salary level or that lower wage level because, again, the cost of the recordkeeping, the cost of changing our payroll system. A lot of commercial payroll companies do not—actually, if that is global they will be abiding by that. If it is a government-specific thing, a lot of commercial payroll companies, human resources information systems companies, will not accommodate that. So you are back to square one having to look for another service or having to pay to customize their recordkeeping.

Particularly, a lot of the work that is done at the lower wage levels, a lot of it can be automated. I do think that some firms will be looking to automation or noncompliance or other ways to—from my point of view, for my company only, it is really the recordkeeping and changing. If you have 15 different categories of employees, it is very hard to keep track of what the rules are. The employees say, well, he is getting this, why can I not get that? It sows some havoc.

Mr. KNIGHT. Thank you. My time is well expired. Thank you, Mr. Chair.

Chairman HARDY. Thank you. There is a desire to go around with another round of questions, so I am going to start off with Ms. Adams if she would like.

Ms. ADAMS. Thank you, Mr. Chair.

Mr. Christianson, I wanted to follow up on something. You hinted about the lack of consistency between federal and state laws regarding regulations. If there were better consistencies between the federal and state statutes, would you be open to an executive order that promotes paid leave and other similar measures?

Mr. CHRISTIANSON. The fact is an executive order cannot do that. It is not lawful. They cannot change state law by executive fiat. So the question itself is one that I do not think is even realistic.

Ms. ADAMS. Well, not so much lawful, but what about consistency?

Mr. CHRISTIANSON. If the federal government contracts were to fall in line with other requirements, that would be, beneficial assuming that requirement in itself is beneficial.

Ms. ADAMS. Okay, Mr. Hoffman, much of the objections to the Fair Pay and Safe Workplace Executive Order center on blacklisting, the idea that contracting officers are spoiling to disqualify firms for superfluous reasons. Do you feel that these concerns have been addressed in the final rules that the Department of Labor has issued?

Mr. HOFFMAN. Right now, it is not clear to me the concept of, first of all, that something is going to occur in 3 days. Our experience with contracting officers is things do not happen that quickly. If it is an issue of an allegation, perhaps there should be an investigation. Is that adequate time to do that? Are we going to provide records or provide information to the private sector so that we can select our teammates correctly? I gave an example earlier as to whether that actually happens. I gave a very simple example, we cannot even identify who is the prime contract on a contract number, though at some point I will figure it out. So, I have some doubts.

Ultimately, it seems to me, Ms. Adams, that we have these different reports and the government collects them. If we could take the information that we already have and act upon that and put in a secure deposit repository, collect all the information that we are already collecting, that would be a good idea. It strikes me that the government has fantastic intentions, but we have a significant amount of regulation, and not all regulation is good. We would really like to go ahead and design innovative solutions for our clients and not looking back at forms and annual reports and this and that. Potentially hiring people to do administrative compliance is not growing the business.

Ms. ADAMS. Thank you, sir.

Dr. Madland, while we recognize the concerns that some small firms have expressed regarding the new overtime rules, as well as the increase in minimum wage, can you discuss some of the benefits for employers and the economy as a result of the changes?

Dr. MADLAND. Sure. The basic story, as I said, wages have been stagnant for quite some time. They are just starting to tick up. That has caused a lack of overall demand in the economy, which has reduced new hiring by small businesses and all businesses because there is not enough new consumers out there. Raising people's wages through the minimum wage and through overtime will help boost overall demand in the economy, which can help create a virtuous cycle and grow the larger economy.

Ms. ADAMS. Thank you. I yield back, Mr. Chair.

Chairman HARDY. Thank you. I turn some time over to Mr. Hanna.

Chairman HANNA. Thank you, Chairman.

What I hear here is people who fundamentally agree with one another, but it is the preponderance and the lack of input that is given that is not adequate. In a national debate, it is really discouraging to hear both parties vilify small business in one way or

another, because we both know the business of America is business and that is really where all the jobs come from and all the growth, the growth that we are not seeing right now.

You had a phrase, Dr. Madland, that you used, and I am not taking a position on it. I am wondering what you mean by the term "wage theft." I can imagine what you mean by it, but I think what I see out there is people who feel put upon that in order to run a business well, you cannot have every outcome perfect. A lot of time in the government's pursuit of a perfect outcome, it actually does what that common phrase is, it kills the goose. That a certain amount of slippage, which you may regard as something wrong or illegal or immoral or unethical, is really part of, not that anyone on any case would approve it, but the ability of business to do business in an environment that is welcoming and not punitive, where they are not always feeling like they are probably, likely, on every given day doing something wrong, is also important. Businesses need to be let to do what it is they do best and government does not always have the best answer for that. It has the outcome it likes, but it does not get there necessarily in the right way.

The overtime rule. I have talked to a lot of people who have no problem with what the President has done other than they doubled it. I have spoken to a lot of businesses that say if you went to 35,000, we get it. I would be the first person to admit that there are companies out there that take advantage of that, just like Ms. Huneycutt talked about 1099s. There are companies that take advantage of the 1099 rule. You see that playing out in court, and I agree that is wrong because it denies benefits and keeps people out of a system that provides them with a decent lifestyle and hope for a decent—but what do you mean by "wage theft?" Do you feel as though businesses are bad somehow? I know you are going to say no, but what do you mean?

Dr. MADLAND. Wage theft is when companies do not pay the legally required wages. That typically means they are paying less than, for example, the minimum wage. One of the key examples actually in support of the Fair Pay and Safe Workplace Executive Order was a worker named Helen Avalos, who worked up at Walter Reed as a contractor janitor. Her company just stopped paying her, stopped paying her and all the other workers. She has got rent, got kids. Does not have, you know, low income. What is she going to do? The company continued to receive new government contracts. That is kind of what I mean by wage theft. It is breaking the law by failing to pay legally required wages. The independent contractors——

Chairman HANNA. But are there not laws that cover that in the State of Virginia? I mean, the minimum wage laws?

Dr. MADLAND. Yes. But if they are not doing it, that is wage theft. That is what wage theft is, is breaking——

Chairman HANNA. I mean, she has recourse without the federal government getting involved in it.

Dr. MADLAND. She was working as a federal contractor and, no, she actually did not really have much recourse. She and her coworkers protested outside and said what is going on? It was weeks of not getting paid.

Chairman HANNA. Okay. I accept that. I am sure it is true. I have no reason to believe otherwise. But how about the notion that one incident or a bunch of incidents would give you cause to react to affect thousands, if not millions, of businesses around the country so that the actual—and this is the common complaint—that the benefits of what you have done are real and positive, but yet they cost much, much more than they are worth and that the government does not really look at that?

Dr. MADLAND. I think you are talking about the Fair Pay and Safe Workplaces. For most companies without legal violations, they will simply check a box certifying they do not have legal violations, akin to what is done for tax violations. For those that do, there will be some additional reporting requirements. However, again, the goal of those reporting——

Chairman HANNA. I am sorry. Go ahead. I do not mean to interrupt you.

Dr. MADLAND. The goal of those reporting requirements is to provide sort of a warning to have further review of the company's larger——

Chairman HANNA. But you heard what Ms. Huneycutt said, that these recording requirements, which you say are a few hours, other people say are tens if not hundreds of hours, you do not have a good perspective on what it actually costs these businesses going forward, and that you are placing a disproportionate cost on tens of thousands of businesses without regard to that cost because of the outcome you desire, that perhaps that should be taken into account.

Dr. MADLAND. Yes. Obviously, you need to weigh the cost and the benefits and the time that is required.

Chairman HANNA. It does not feel like you do.

Dr. MADLAND. Well, as I said, most of the time, most companies will have a very simple process. There will be a more involved process for companies with legal violations. But again, the goal is to get those companies into compliance with the law, that seems like a worthy goal. Also, the studies of the cost estimates suggest it is going to be less than a cent for every hundred dollars of federal contracts of the additional cost, and that is a burden, but also, you are helping draw in more law-abiding companies that then will want to contract with the government that are familiar with similar processes. Lots of private companies——

Chairman HANNA. Losing a hundred thousand companies does not support that and does not support that notion. Also, the cost that we—excuse me, Mr. Hardy, just 1 second. Do you mind? The cost associated with it, I have never heard of anybody who would say to you it is 1 penny on a dollar. But with that I yield back. Thank you, Dr. Madland.

Chairman HARDY. Thank you. And I would like to go ahead and let Ms. Huneycutt, she had the desire to address that question, and yield my time to it.

Ms. HUNEYCUTT. Sure. It sounds to me like that situation is already addressed by DOL regulations, which do not permit an employer to have somebody work and then not pay them. There are very specific regulations regarding the timeliness of payment, so that already exists. Again, my concern remains the same, which is

that if we diffuse the responsibility for enforcement to the contracting officers, then they really do not have the bandwidth to do this or the autonomy. They are going to say, well, that is really DOL's enforcement issue and I am not going to worry about it until DOL tells me something. DOL is going to say that is the contracting officer's responsibility and I am not going to enforce it until the contracting officer tells me something. My concern is that with the increasing layers or duplicative regulations there will be less accountability and more bad actors invited to leverage that.

Chairman HARDY. Thank you.

One quick question I would like to address, and of these 100,000 contractors we have lost in the last 4 years, Mr. Christianson, being a small business owner myself in the past, and going from two or three employees and working your way up to 350 over time, when you step into the contracting world with the government agencies, do you believe that other small businesses that are say 50 and under will have the ability to step into this field? Because now you have grown your internal staff or office staff to two or three times the size that you would have had at a normal site. Do you believe these contractors, are you hearing that as some of the challenges? Would you like to elaborate on that? Anybody else who would like to?

Mr. CHRISTIANSON. First of all, Mr. Kelly mentioned or acknowledged that I am a small business owner. I am not. I am a regulatory counsel. I do not have that honor of being a small business owner, I represent them.

Chairman HARDY. But you work with many small businesses?

Mr. CHRISTIANSON. Work with many, and I have my job in many thanks to the regulations and the confusion that the President has put forth. AGC created this position recently for me as a result of all the questions small businesses were asking. So I, in part, am part of the job growth lawyers as a result of this. I do not think that is what you all think of job growth when you think of small businesses.

But on your question, in the commercial construction industry, small businesses could be $36.5 million or below. If you have a contractor that is $5 million versus $30 million, and you are going after the same set-aside work and now you have to comply with equally confusing and burdensome regulations, your overhead costs as a percentage if you are that $5 million company is going to be way higher than that one for that $30 million company. So you are now at a competitive disadvantage completely. You are going to have to hire, not me as the association lawyer, me as the outside counsel because I can tell you that I talked to our general counsel before coming. He does not know of any commercial construction company that had their own in-house lawyers or attorney below $100 million. They hire outside counsel at $400 an hour and hire consultants to do this.

Chairman HARDY. Thank you.

Anybody else care to elaborate on that?

With that, that is the final question. Again, I want to thank each of you [our panelists] for being here today and testifying.

Small businesses play a critical role in our federal marketplace. A vibrant, competitive, and robust small business sector lowers

prices, spurs innovation, and creates jobs. As all of us here at our Committee, Democrat and Republican alike, recognize the importance of having worked in a bipartisan fashion throughout the 114th Congress, passing numerous pieces of legislation designed to help small firms compete in the federal marketplace.

Unfortunately, our President is either unable to understand how hard it is complying with these executive actions for small businesses, or worse, unwilling to listen. We here on the Small Business Committee, will continue to speak up and fight so that the folks have a seat at the table.

I ask unanimous consent that members have 5 legislative days to submit statements and supporting materials for the record.

Without objection, so ordered.

We are adjourned.

[Whereupon, at 11:21 a.m., the Subcommittees were adjourned.]

APPENDIX

ACEC
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Testimony of James Hoffman, P.E
President, Summer Consultants, Inc.

Before the House Committee on Small Business,
Subcommittees on Contracting and Workforce and
Investigations, Oversight and Regulations
September 13, 2016

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ACEC
AMERICAN COUNCIL OF ENGINEERING COMPANIES

Introduction

Subcommittee Chairmen Hanna and Hardy, Ranking Member Adams, and members of the committee,

The American Council of Engineering Companies (ACEC) appreciates the opportunity to testify before you today about the issues surrounding the federal government's regulatory burden on small businesses. The Council would like to use two Executive Orders; Fair Pay and Safe Workplaces Executive Order, (E.O. 13, 673) and the Establishing Paid Sick Leave for Federal Contractors Executive Order, (E.O. 13, 706) to examine the impact federal regulations on contractors. ACEC appreciates the efforts that the Department of Labor (DOL) and the FAR Council play to ensure compliance with labor laws. The industry is committed to following the rules, but the federal government must understand the burden on the private sector and the cost that is passed onto the government with duplicative requirements. ACEC's small, medium and large firms believe that small businesses can flourish in the federal market, but there must be continued oversight by this and other committees to reduce regulatory barriers to market entry.

The Fair Pay and Safe Workplaces E.O. (Blacklisting) will create burdens for engineering firms and other contractors working for federal agencies. While we understand the rationale behind the order, it should be noted that bad actors are less than .01 percent of the total contracting force.[1] Even President Obama has said that "the vast majority of the companies that contract with our government,...play by the rules. They live up to the right workplace standards."[2] The Chairmen of the House Education and Workforce, Oversight and Government Reform and Small Business Committees have previously stated that the order is "fixing a problem that does not exist."[3]

The Establishing Paid Sick Leave for Federal Contractors (Sick Leave) E.O. also creates unnecessary administrative and financial burdens on contractors. While the Council supports paid sick leave, the amount of reporting and the changes required to implement the rule create more expense for both the contractors and government. Most of the Council's firms offer equivalent paid sick leave, so the requirement is duplicative.

My name is James Hoffman and I am President of Summer Consultants, a consulting mechanical, electrical, and plumbing engineering firm located in McLean, Virginia. Summer

[1] Karla Walter and David Madland, Center for American Progress, At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers (2013), available at https://www.americanprogressaction.org/issues/labor/report/2013/12/11/80799/at-our-expense/.
[2] President Barak Obama, Remarks by the President at the Signing of Fair Pay and Safe Workplace Executive Order (Jul. 31, 2014)
[3] Press Release, House Small Business Committee, House Committee Chairmen Call for Withdrawal of Administration's Harmful, Unnecessary Blacklisting Proposal (July 15, 2015) (on file with author).

Consultants is a Small Business with 36 employees. We are committed to providing our clients sound engineering designs for various sized projects. Our practice focuses on the federal market and we have worked on many federal projects in the past 50 years.

My firm is an active member of ACEC – the voice of America's engineering industry. ACEC's over 5,000 member firms employ more than 500,000 engineers, architects, land surveyors, and other professionals, responsible for more than $500 billion of private and public works annually. Almost 85% of these firms are small businesses. Our industry has significant impact on the performance and costs of our nation's infrastructure and facilities.

The engineering industry, which suffered significantly during the recent recession, is finally coming back to fiscal health. Unfortunately, these and other regulatory actions could put that recovery at risk and create disincentives for engineering firms of all sizes to participate in the federal market.

Blacklisting Rule:

I. Process

The process as outlined by the Guidance requires two-steps. First, the prime contractor must disclose labor violations for awards greater than $500,000 for "goods and services including construction,"[4] and any violations or allegations of violations of labor laws within the preceding three years once the Guidance is fully implemented in 2018. This is done through an initial check-the-box representation at the beginning of the process.[5] If there is a labor violation, then the contracting officer, prior to making an award, must allow for the firm to provide mitigating information about the violation. Then, the contracting officer, in consultation with Agency Labor Compliance Advisor (ALCA)[6] shall determine if the prime or any related subcontractors are a "responsible source with a satisfactory record of integrity and business ethics."[7] Finally, even after a contract has been awarded, the Guidance requires semiannual reporting of any new violations.

The Guidance also applies to subcontracts at every tier, so subcontractors, whether they have a direct contract with the prime or not, must submit this information. If the contract has been executed and there is an accusation of a labor violation, the contracting officer has four potential courses of action; require remedial measures; decline to exercise an option; terminate the contract; or refer for suspension and debarment.[8]

The Council has three broad areas of concern with the Guidance. First, the reporting is overly burdensome. It requires both prime and subcontractors to furnish information that the Government already receives. Second, the reporting burdens the business relationship between the contractor and subcontractor by creating a blacklist of allegedly "unqualified" contractors

[4]Department of Labor Guidance 81 FR at 58663.
[5] *Id* at 58663.
[6] The Labor Compliance Advisor is a senior official designated within each agency to provide "guidance on whether (a) contractors' actions rise to the level of a lack of integrity or business ethics." *Id* at 30577.
[7] *Id* at 58718.
[8] *Id* at 30577.

and subcontractors. Third, non-final judgments or complaints and allegations of non-compliance with labor laws are required to be reported to the contracting officer. This mandate could allow for contracts to be terminated on claims that may be proven invalid, raising very serious due process concerns. All of these concerns could have the effect of prompting well-qualified firms to withdraw from the federal market altogether.

II. Reporting

There are three problems with the reporting requirement in the proposed Guidance. First, it is duplicative and burdensome where both small and large subcontractors will have to report to prime contractors. Second, the process envisions a seamless transfer of information between the ALCA and the responsible contracting officer, which is inconsistent with current practice. Third, with the amount of data that DOL requires to be shared between primes and subcontractors, there are unintended market consequences for those participants not addressed by the Guidance.

A. Burdensome

DOL's Guidance identified 14 federal labor laws and executive orders or equivalent State laws that are applicable to the reporting requirement.[9]

The Fair Labor Standards Act (FLSA)	The Occupational Safety and Health Act of 1970 (OSH Act)
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	National Labor Relations Act (NLRA)
Davis-Bacon Act	Service Contract Act
Equal Employment Opportunity Executive Order (EEOC)	Section 503 of the Rehabilitation Act of 1973
Vietnam Era Veterans' readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974	Family and Medical Leave Act (FMLA)
Title VII of the Civil Rights Act of 1964	Americans with Disabilities Act of 1990 (ADA)
Age Discrimination in Employment Act of 1967 (ADEA)	Establishing a Minimum Wage for Contractors Executive Order

However, the Guidance proposes further review of applicable equivalent state laws, which makes the rule still subject to further amendment and growth. This failure to include applicable state laws at the current time precludes for a thorough review of consequences. It creates instability for firms to accurately assess the burdensome scope of the Guidance and FAR regulations, even as the Order is implemented.

The broad scope of this change has massive implications for the engineering community. These laws and executive orders already require reporting and/or judicial hearings. For example, firms are required to report annually on compliance with the EEOC, the Vietnam Era Veterans' Act, OSHA and the Rehabilitation Act. Under Davis-Bacon, weekly submissions are sent to the DOL. In addition, the firm must submit annual reports to the federal System for Award Management

[9] *Id* at 58718.

(SAM) database to maintain their eligibility for government work, which also reports on their subcontractor's compliance with the Service Contractor Act. Between existing weekly and annual reporting, asking business to resubmit this information is duplicative and wasteful. Given that almost 85 percent of ACEC firms qualify as small-businesses, these additional requirements create new hurdles for small firms participating in government work. Not only will the firms have to comply with the data gathering, but many will need to hire additional legal and human resources employees or consultants to review their files for the past three years. This data gathering will entail additional overhead on firms. As the margins on engineering work are quite small, typically 3 percent, new overhead requirements may preclude firms, including many small firms, from participating in this market. As many prime contractors work to meet admirable small business subcontracting requirements, fewer small businesses will be able to afford to participate in this market. The cost of compliance will hurt their margins even more than larger firms which have greater resources. This reporting burden will reduce innovation and competition on government contracts that are integral to best performance while ultimately increasing the cost of the project to the government.

B. Transition Issues Between the ALCA and the Contracting Officer

The envisioned process requires that the ALCA and the contracting officer review all Labor violations within a three day window. The contracting officer will make the determination regarding the prime or subcontractor's status as a responsible source if the window lapses. This paradigm is deeply flawed by the nature of federal contracting. Federal contracting takes time—and the GAO has reported "services acquisitions have been plagued by inadequate acquisition planning"[10] ACEC members report that acquisition planning can take over 18 months, and that is before these new regulations are implemented. This requirement adds an additional and unnecessary layer to an already overburdened system. The flawed assumption that decisions will be made in three days will prove to further slow the system.

C. Data Sharing with Competitors

Within the engineering industry, primes and subcontractors often change roles in different projects. There is a disincentive for subcontractors to share sensitive labor information with the prime when there is the potential that the firm will compete against that prime in another solicitation. Data sharing of confidential business information could eliminate a competitive advantage between two companies. While this problem might be mitigated if the government received information from subcontractors directly, fundamental concerns over how the process will work linger within the Guidance. There are no guarantees that information sharing will be prohibited given that it is currently an optional enforcement mechanism within the FAR comments. Firms face a level of insecurity between small margins and the potential that competitors could force them out of the federal market due to labor violations that include valuable business intelligence. Even though subcontractors submit their violations to DOL, there must be a level of disclosure to the Prime contractor. Otherwise, the Prime cannot make a reasonable risk assessment of the subcontractor. There needs to be a way for the industry to work reasonably with these guidelines, and the current Guidance does not advance that effort.

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[10] U.S. Government Accountability Office, GAO-11-672, Acquisition Planning: Opportunities to Build Strong Foundations for Better Services Contracts, Report to Congressional Requesters (2011), available at http://www.gao.gov/new.items/d11672.pdf.

II. Contractor –Subcontractor Relationship

The FAR Council requires that the subcontractors report their own labor violations to DOL, which would then assess the violations and submit a written report to the contracting officer. Under this scenario, the prime would have to check with the contracting officer or with the DOL to see if the proposed subcontractors in the contract would qualify to work for the government. This raises a difficult choice for prime contractors. Before they sign the contract, they must in effect "pre-clear" their subcontractors. This may sound like a simple situation, but many subcontracts are signed hours before the prime submits their contracts. This creates a further tension as the contracting officer must clear all potential subcontractors prior to the contractor awarding the work. The requirement incorporates an additional step in an already lengthy process.

The unintended consequence would be the creation of a "blacklist" for subcontractors, triggering claims by subcontractors against the prime contractor and/or the federal government for improper disqualification for award of a subcontract. The proposed blacklist could further entrench the encumbered process while eliminating new talent from the federal labor market.

This situation is particularly problematic for engineering firms as these entities subcontract up to 50 percent of their contract. This is required due to the level of technical specifications in engineering contracts, from geotechnical to HVAC to mapping, requiring multiple specialty firms to meet these needs. The new requirements proposed under the Guidance would simply multiply existing burdens on the team while failing to recognize the realities of providing design services to the public.

The current relationship between the prime and the subcontractor will be damaged under this proposed regulation. Given that prime contractors seek to select subcontractors on the basis of qualifications, adding a further element to the selection process is extremely burdensome. Design and construction is a highly complicated business. Engineers design buildings to meet myriad requirements including safety, energy efficiency, functionality, and rigorous standards for homeland and national security. Firm employees must be able to meet the federal security clearance requirements in many instances, which serves to limit market participation. If the subcontractors must now also be pre-approved by the government, the contractor is further limited to an ever narrowing pool of subcontractors. The end result of the government's "blacklist" policy will be to limit the participation of both small and large firms in the federal market; and, once again, many firms will just choose not to participate.

III. Due Process Implications

Primes and subcontractors must report violations of Labor laws that include administrative merits determinations; civil judgements, and arbitral awards or decisions that have occurred within the past three years starting in October 25, 2018.[11] The contractors and subcontractors must report even if underlying violation occurred more than three years prior to the reporting

[11] *Id* at 58719.

date.[12] Moreover, these groups must report even if the violation is outside of the scope of any federal procurement.

The scope of this requirement is too broad. Administrative merits determinations encompasses any complaint from the following:

DOL Wage and Hour division	DOL's OSHA or any state agency designated to administer an OSHA-approved State Plan
DOL's Office of Federal Contract Compliance Program	EEOC
NLRB	Federal or state court complaint alleging that the contractor violated any Labor Law provision
Any order or finding by an administrative judge, administrative law judge, or DOL Administrative Review Board, the OSHRC or state equivalent, or NLRB which states that contractor or sub has a violation of Labor laws	To be determined at a later date—violations of equivalent State labor laws. [13]

These determinations are not limited to "notices or findings issued following adversarial or adjudicative proceedings...nor limited to notices and findings that are final and unappealable."[14] Instead, these are notices of complaint without the firm having the benefit of a response to a third party. This provision forces companies to report on complaints that have not been fully investigated nor had any judicial oversight. The Fifth Amendment guarantees that no person shall "be deprived of life, liberty or property, without the due process of law"[15] by the federal government. By allowing federal contracts to be terminated without full judicial proceedings, the Guidance does exactly what the Fifth Amendment prohibits.

While the Department of Labor could counter that the contractors and subcontractors "may submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the determination has been challenged),"[16] this argument ignores the fact that the ALCA has three days to return their determination. In this situation, there may not be enough time to fully document or investigate claims by either the company or the accusing agency, or for the ALCA or the contracting officer to make a fair assessment of whether the violation meets the standards to break a contract. Essentially, the contracting officer, if in the likely event the ALCA cannot meet the three day threshold for a determination, must become the judge on this labor matter. The contracting officer is not suited to this position. They are specialists in Federal contracting law, not labor law. There is a concern that it will incentivize the contracting officer to disqualify the contractor or subcontractor rather than take the risk of censure. This reporting requirement has the potential to cause work slow-downs or stoppage as these investigations compound upon one another through protests and review.

[12] *Id* at 58719.
[13] *Id* at 58665.
[14] *Id* at 58721.
[15] U.S. CONST. amend. IV.
[16] Proposed Guidance at 30579.

DOL's Sick Time Rule

The Department of Labor's proposal would require all engineering firms working for a federal agency – as well as subcontractors at all tiers -- to provide their employees with 56 hours of annual sick leave. The proposal would also expand reporting requirements on those firms. While well intentioned, the Council is concerned that the proposal will result in increased costs and administrative burdens on firms working for federal clients, as well as increased costs to the federal government.

Engineering firms typically pay on a monthly or biweekly cycle, and report sick leave and other paid time off with each pay period. The reporting requirement included in DOL's proposal would disrupt this process, mandating that employees receive weekly reports of accrued time off, requiring new systems and potentially adding employees to implement these changes. In circulating the proposed rule to member firms for comment, implementation costs in the first year are estimated to be in excess of $50,000, with additional costs in subsequent years.

As noted earlier, engineering firms working in the federal marketplace already operate under very tight margins, and this latest proposal from DOL – together with other initiatives that have come from the agency over the last year – will put further financial pressures on firms. In addition, the industry is also experiencing increased pressure from federal agencies demanding arbitrary reductions in overhead expenses. Implementation of DOL's sick leave proposal will further add to those overhead expenses, putting firms in the difficult situation of possibly leaving the federal marketplace – which dilutes competition for critical services to the taxpayer – or adding costs to the agency if the expenses are accepted.

Finally, while engineering firms frequently offer benefits that meet or exceed the DOL's proposal on sick leave, we are concerned that this initiative will limit the flexibility of firms to design benefit packages that will attract and retain employees. This is a particularly relevant concern at a time when there is a growing deficit of qualified professional engineers. By setting mandated levels of sick leave, which fails to allow for flexible benefits packages that reflect the locality and employee needs, firms will find it more difficult to retain key employees for their projects.

Conclusions and Recommendations

The engineering services industry is unique in how firms are team, compete and are selected for work in the federal market. Most firms in the industry are small, specialized, and have a business plan to remain that way to assure performance and reputation. Most do not have marketing departments, limited in-house HR functionality, and few if any, have in-house legal counsel. These factors result in the need for special considerations when trying to ensure appropriate small business participation in federal procurements.

We ask that the committee consider the following actions for the DOL and FAR Council Guidance:

- Ask the FAR Council and the Department of Labor to withdraw the proposed Sick Time Guidance and the final Blacklisting Guidance to redraft it to better align with the current contracting process.
- Support the House or Senate 2017 NDAA language to limit the implementation of the FAR Rule and DOL Guidance.

ACEC and I thank the Committee for the privilege and opportunity to address engineering and construction industry issues with current regulatory challenges and I am pleased to answer any questions.

The Cumulative Burden of President Obama's Executive Orders on Small Contractors

Testimony before the Committee on Small Business

United States House of Representatives

Subcommittee on Investigations, Oversight and Regulations

And

Subcommittee on Contracting and Workforce

Donna S. Huneycutt

Co-Owner and Chief Operating Officer

WWC, LLC

On behalf of:

National Defense Industrial Association

10:00 AM

Tuesday, September 13, 2016

Rayburn House Office Building, Room 2360

Chairman Chabot, Ranking Member Velazquez, and Members of the Subcommittees, thank you for the opportunity to appear before you this morning. I am here this morning on behalf of the National Defense Industrial Association, the nation's oldest and largest defense industry association, comprised of nearly 1,600 corporate and 90,000 individual members. While several Executive Orders (EOs) issued in recent years have, or will have, a detrimental impact on small businesses that contract with the federal government, such as the Department of Labor's so-called "Overtime Rule", for the purposes of my testimony this morning I would like to focus on the EOs specific to government procurement or federal contractors.

Small businesses are a critical component of the U.S. economy, serving as a catalyst for economic development, providing employment opportunities, and as the engine of new ideas and innovations. Accordingly, the Federal Government has established programs to ensure participation opportunities to small businesses to fulfill the public policy objectives of the Federal Acquisition Regulation (FAR), and access a source of innovative products and services for Federal Government customers. Explicit and implicit in the desired outcomes for small business programs is achieving effective competition by maximizing small business participation and enabling small businesses to grow through diversification of the goods and services they provide and expansion into the nongovernmental marketplace.

Several EOs and Presidential Memoranda specific to government procurement or federal contractors have overwhelmed small business contractors and undermined small business goals. Small businesses have borne the cost of having to understand not only additions and changes to the Federal Acquisition Regulation (FAR) and regulations of various Departments and agencies, but also how the agencies will implement those changes. This requires careful study of resulting agency procedures, guidance, and instructions, in addition to projecting workforce behaviors, which are largely driven by the actual or perceived interpretation of the original regulations by oversight actors (Government Accountability Office, agency Inspectors Generals, etc.). Once those are understood, small businesses must incur significant initial and reoccurring compliance costs. These costs place a burden on small business, and take the place of investments in research and development (R&D), human capital, and other means to grow businesses.

As outlined at the onset of the FAR, the guiding principles of the Federal Acquisition System are to satisfy government customers by maximizing use of commercial products and services, utilizing contractors with superior past performance, and promoting competition. At the same time, the Federal Acquisition System is to minimize operation costs, conduct business with fairness and integrity and fulfill policy objectives. The EOs attempt to fulfill the latter two guiding principles, but in the process, undermine each of the others.

The rationale for the procurement-related EOs have been to "promote economy and efficiency in procurement" through their intended outcomes. Industry does not necessarily disagree with the logic, but rather, how that efficiency and economy is achieved. Supporting documentation for the EO on Fair Pay and Safe Workplace states, "the vast majority of federal contractors play by the rules." [1] However, the implementation approach to each of the EOs punishes that vast majority of good actors through costly, government-unique compliance requirements—a particularly inefficient means to promote efficiency. In fact, the proliferation of government-unique requirements imposed by the EOs undermines efficiency and economy by limiting the government to suppliers that are willing and able to comply. Their neither promotes competition, innovation, nor does it maximize the use of commercial products and services.

Further, the most efficient and economic means to fulfill the public policy objectives of the EOs is to alter government buying practices. For example, the rationale for the Fair Pay and Safe Workplaces EO is "Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government." Thus, if the government makes contract awards based on the offeror that provides a good or service for the best value, or in other words, the offeror most likely to deliver or perform on time, predict-

[1] See "FACT SHEET: Fair Pay and Safe Workplaces Executive Order." Available at: https://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order.

ably, and with satisfactory performance, it would have chosen an offeror that adheres to existing labor laws and has workplace practices that enhance productivity. Unfortunately as industry has long pointed out, the government has poor buying habits that have equated "best value" with "lowest cost" and valued compliance to government-unique requirements over actual performance in delivering goods and services, creating a perverse incentive to "race to the bottom" to win contracts.

Congress has already passed sufficient legislation to ensure protections of federal contractor employees, and to ensure that the government only contracts with responsible sources. Rather than using EOs to alter the enforcement or interpretation of legislation, the Federal Government should ensure that they are enforcing existing laws to ensure protections for workers, and then alter buying practices to reward best value.

A major frustration for small businesses is that in many cases they agree with the intended outcome of an EO such as, providing for the well being of federal contractor employees, or making sure that competitors play by the rules, but object to the process by which the EOs have been developed and implemented and the resulting burdens. This starts with the Federal Government's assessment of burdens on small entities. The Small Business Administration's (SBA) independent Office of the Advocate [2] has commented that the Federal Government underestimated the compliance costs and entities affected in implementing regulations for Fair Pay and Safe Workplaces, Paid Sick Leave for Federal Contractors, and Establishing a Minimum Wage for Federal Contractors EOs. Unfortunately, since the EOs are published without the public vetting inherent in the legislative process, the public has no means of providing input, or accountability, on the likely burdens prior to publication.

This lack of engagement with small businesses prior to development of the EO, or their implementing regulations, has resulted in unnecessarily burdensome requirements. For instance, the proposed rule to implement EO 13706, "Establishing Paid Sick Leave for Federal Contractors," requires federal contractors to "calculate an employee's accrual of paid sick leave no less frequently than at the conclusion of each workweek," and provide an employee in writing their accrued sick leave at the employee's request. However, most companies have internal business systems calibrated for biweekly or semi-monthly pay periods, which is the same frequently for employees to input hours worked or taken for leave. Forcing small businesses to invest in customized business systems or man hours to adjust to these intervals, while accommodating the various standard and nonstandard employee schedules within their business, is unnecessary, and does not "increase efficiency and cost savings in the work performed by parties that contract with the Federal Government," as the EO intends. Or in the case of the "Fair Pay and Safe Workplaces" EO, the implementing "guidance," was not subjected to the rulemaking process, despite its "regulatory na-

[2] Regulatory comments by the SBA Office of Advocacy can be found here: https://www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters.

ture," as pointed out by the SBA Office of the Advocate. Further, implementation of the EOs have not provided adequate compliance support for small businesses. For example, the FAR rules implementing EO 13627, "Strengthening Protections Against Trafficking In Persons In Federal Contracts," was made effective without Congressionally-mandated guidance to help contractors comply with new requirements, severely limiting the ability of small business to comply most effectively with new regulations.

One EO in particular, Fair Pay and Safe Workplaces, is simply unfair to businesses of all sizes. Under this EO, small businesses would have to disclose alleged and adjudicated violations of 14 Federal laws and EOs in addition to yet-to-be fully-determined equivalent state laws in the preceding three years to either government contracting officers (COs), or the Department of Labor (DoL). Once disclosed, the DoL or CO (with help from agency labor compliance advisors [ALCAs]) would determine, based on the details of the alleged or adjudicated violations and any mitigating factors, whether they are serious, repeated, willful, and/or pervasive in making a responsibility determination.

Aside from the enormous associated compliance burden, the EO unfairly places these subjective determinations in the hands of COs who are incredibly risk averse and untrained in labor law. Although they are able to seek the advice of an ALCA, DoD alone for instance, has nearly 24,000 contracting officers (COs) that enter into contracts worth billions of dollars annually, with only one DoD ALCA and a handful of representatives. Common sense indicates that the small-dollar contracts that SBs compete for as primes would at the bottom of the list of priorities for ALCAs, leaving the onus on COs to assess and interpret actual and alleged violations and a range of mitigating factors, and leaving scarce resources for the government to engage with small business to develop and implement labor compliance plans. This aligns with industry's long-stated contention that this EO is punitive-based, with the intent of blacklisting businesses, rather than the supposed intent of "helping companies improve."

Small businesses are not only concerned with the collective impacts of the EOs on their bottom-line, but also the detrimental impacts they will have on government customers and their ability to carry out missions, the most consequential of which is national security. In recent years, the Department of Defense (DoD), Federal Government's biggest spender by a substantial margin, has placed a renewed emphasis on innovation and acquisition reform, led by top officials in the Office of the Secretary of Defense and the Services. These efforts have been initiated as a result of the current state of the acquisition process, which is unable to keep up with the rapid pace of technological innovation and security threats, and the reality that innovation is driven by private sector R&D, requiring DoD to access nontraditional and commercial suppliers that have historically been deterred from the government marketplace by procurement policies, to stay at the forefront of technological innovation.

Unfortunately, the EOs undermine these initiatives. The resultant accumulation of government-unique requirements and their compliance costs will continue to deter new suppliers from entering the government marketplace and drive exits by firms already selling to the government, restricting competition. Further, Fair Pay and Safe Workplaces, alone, figures to drive a substantial increase in bid protests, slowing down the acquisition process even more.

In closing, several of the recent EOs have, through flawed processes, installed burdensome, unnecessary, inefficient, and in many cases duplicative and overlapping regulatory regimes that have the cumulative effect of dramatically increasing the cost of doing businesses with the federal government. Over time, these will decrease efficiency and economy in federal procurement, while undermining small business growth and development, and limiting the Federal Government's access to innovative products and services to fulfill their needs, in direct contradiction of ongoing initiatives.

Thank you again for the opportunity to appear before you this morning and I am happy to answer any questions you may have.

Statement of

Jimmy Christianson
Regulatory Counsel

For

The Associated General Contractors of America

to the

U.S. House of Representatives

Committee on Small Business Subcommittees on Investigations, Oversight, and Regulations and Contracting and Workforce

For a hearing on

"The Cumulative Burden of President Obama's Executive Orders on Small Contractors"

September 13, 2016

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 26,000 firms, including America's leading general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

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Statement of Jimmy Christianson
Associated General Contractors of America, Arlington, Virginia
Subcommittees on Investigations, Oversight, and Regulations and Contracting and Workforce
Committee on Small Business
United States House of Representatives
September 13, 2016

Chairmen Hanna and Hardy, Ranking Member Adams and members of the committee, thank you for inviting AGC to testify on these important topics concerning small business contractors. My name is Jimmy Christianson. I am regulatory counsel for the Associated General Contractors of America ("AGC"), where I focus on analyzing executive agency actions and informing construction contractors on how they may comply with those actions.

In this testimony, I will discuss:

I. The construction industry, its small business construction contractors and regulatory compliance in general;
II. Recent executive actions and their impact on small business construction contractors; and
III. The cumulative impacts of new regulatory mandates on small business construction contractors.

I. THE CONSTRUCTION INDUSTRY, ITS SMALL BUSINESS CONSTRUCTION CONTRACTORS & REGULATORY COMPLIANCE IN GENERAL

A. Small Businesses Represent the Vast Majority of Construction Firms

The construction industry has historically supported and provided opportunities for small businesses, as it accounts for nearly five percent of total nonfarm payroll employment and more than 660,000 firms throughout the United States, of which 93 percent have fewer than 20 employees.[1] As such, federal agencies generally rely heavily upon the construction industry to meet their annual small business prime contracting and subcontracting goals.

B. Small Businesses are an Essential Component of Construction Projects

Construction is usually accomplished under the leadership of a general, or prime, contractor. It is the job of the general contractor to integrate the work of the numerous trade and specialty contractors—acting as subcontractors—to complete the project. A significant construction project (like a $50 million office building) may have anywhere from 20 to 50—and in some instances more—trade and specialty contractors. These subcontractors are organized within the project delivery team in tiers so that each subcontractor can deliver its services in a highly integrated process. Small business subcontractors, operating at the appropriate tiers, are critical and essential to the success of construction projects and the construction industry as a whole. The subcontractors typically perform 60 to 90 percent of the work on a

[1] Most recent year of available data online at http://www.census.gov/econ/susb/?eml=gd&utm_medium=email&utm_source=govdelivery.

construction project.[2] As such, the industry cannot succeed without a large pool of qualified small business trade and specialty subcontractors.

C. Small Business Construction Contractors Have Limited Resources

Like any small business, small business construction contractors have limited resources. To be successful, they must manage those precious resources in an effective and efficient manner. The most valuable and expensive resources for small business construction companies are their employees.

As noted above, the vast majority of construction companies across the industry have fewer than 20 employees. Generally speaking, those employees may include cost estimators, proposal managers, project managers/superintendents, skilled (craft) labor, laborers, equipment operators, and other staff. When it comes to compliance issues, many small businesses may have one or two employees that handle the safety, labor, human resources and environmental compliance for the entire company. In many companies, the safety director is also the environmental compliance director and the human resources director is also an accountant and general office manager. The reality is that these small business employees are often working "double duty."

Small business construction contracting companies—which generally include prime contractors with $36.5 million or less in gross annual revenues and subcontractors with $15 million or less in gross annual revenues—do not have in-house counsel. They do not have teams of attorneys on staff. In fact, AGC is unaware of any construction contracting company—small business or otherwise—with gross annual revenues below $100 million that has in-house legal counsel or staff. As a result, these small businesses pay outside counsel or other compliance experts in the range of about $400 an hour or more to establish and audit company compliance programs; to routinely train their employees; and to rectify compliance issues as they arise.

D. Regulatory Compliance is Part of the Cost of Operating a Small Construction Contracting Business, But Regulatory Compliance Does Not Grow that Business.

Small construction contractor businesses seek federal construction contracts—building levees to protect our cities from floods, hospitals and clinics for our veterans, and barracks for the troops and schools of their children—in an effort to grow their companies, and even as a means to serve their nation. Building infrastructure and facilities is the lifeblood of their business. And, ultimately, building that infrastructure and those facilities is why federal agencies awarded them the contracts.

Abiding by laws and regulations is part of the cost of doing business. However, the requirements those statutes and regulations impose can also represent barriers to entry for emerging small businesses and barriers to growth for existing ones. Laws and regulations are necessary to help maintain a level, competitive playing field, among other things. Nevertheless, not all laws are necessarily good laws, and, similarly, not all regulations are necessarily good regulations. Laws and regulations enacted and finalized, even with the best intentions, can have unintended and deleterious consequences or duplicate other statutory and regulatory measures It is with that point in mind that, that I now turn to a number of executive orders and presidential memoranda put forth by the current administration.

[2] http://www.gao.gov/products/GAO-15-230

II. RECENT EXECUTIVE ACTIONS & THEIR IMPACTS ON SMALL BUSINESS CONSTRUCTION CONTRACTORS

During his tenure in office, President Obama has issued more than 240 executive orders and over 200 presidential memoranda.[3] Of these various executive actions, AGC identified 22 that impact, directly or indirectly, the construction contracting industry. Some of these 22 executive orders and presidential memoranda help coordinate government responses to and resources for rebuilding after Hurricane Sandy and the Deepwater Horizon oil spill; and others seek to improve federal permitting and review of infrastructure projects. AGC generally supports the president's taking such actions within the confines of his constitutionally enumerated powers to coordinate the federal government response to disasters and streamline bureaucratic processes across federal agencies. However, AGC is deeply troubled by the executive actions this administration has taken that go beyond simply managing federal agencies' responses to disasters and reducing their internal review processes.

For the purpose of this testimony today, AGC identified and will discuss its concerns with just three executive orders and only two presidential memorandum, which include the:

A. Fair Pay and Safe Workplaces Executive Order 13673
B. Use of Project Labor Agreements for Federal Construction Projects 13502
C. Establishing Paid Sick Leave for Federal Contractors Executive Order 13706
D. Updating and Modernizing Overtime Regulations Presidential Memorandum
E. Advancing Pay Equality Through Compensation Data Collection Presidential Memorandum

These executive actions individually and cumulatively will expose small business construction contractors to significant costs, legal liabilities and other risks that can serve as deterrents to small business entry into the construction marketplace and impediments to small business growth.

A. Fair Pay and Safe Workplaces Executive Order 13673

On July 31, 2014, President Obama issued Executive Order 13673, entitled Fair Pay and Safe Workplaces, under which federal prime and subcontractors must report violations of 14 federal labor laws before contract award and again every six months after contract award on federal contracts exceeding $500,000. Prime contractors would also be responsible for evaluating the labor law violations of subcontractors at all tiers. On August 25, 2016, the Federal Acquisition Regulation (FAR) Council and U.S. Department of Labor issued more than 850 pages of text for the final rule and guidance implementing the executive order.

AGC submitted extensive comments outlining its concerns with this unfounded, unnecessary, unworkable and unlawful executive action.[4] The association supports provisions in the House and Senate versions of the National Defense Authorization Act for Fiscal Year 2017 (NDAA), H.R. 4909 and S. 2943, which limit the applicability of the executive order and its implementing regulations. As such, we urge members of this committee to encourage conferees of the NDAA bill to include the strongest possible language prohibiting implementation or enforcement of this executive order. AGC also supports legislative efforts to prohibit funding to carry out the executive order through the appropriations process.

[3] https://cei.org/10KC/Chapter-3
[4] https://www.agc.org/news/2015/08/28/agc-submits-comments-opposing-blacklisting-executive-order

i. The Executive Order and Implementing Regulations Will Drive Up Risk to Small Business, Ultimately Leading Some Small Businesses (And Large Businesses as Well) to Leave the Federal Marketplace

The executive order and its regulations impose significant risks for small business contractors in the form of new legal liabilities. Under this executive order, small business contractors will:

- Make responsibility determinations for their subcontractors;
- Subject themselves to the possibility of suspension and debarment;
- Subject themselves to the possibility of "negotiating" labor law compliance agreements with enforcement agencies; and
- Subject themselves to making public disclosures of their labor law violations.

There is no level of certainty concerning the possible recourse a subcontractor would have when a prime contractor denies the subcontractor a potential subcontract based on the subcontractor's record of labor law compliance. When the contracting officer denies the prime contractor the ability to compete for a prime contract based on similar circumstances, a prime contractor's ability to seriously challenge that decision is very limited. The legal threshold for overturning a contracting officer's responsibility determination is high. However, when the prime contractor takes the contracting officer's role in making such determinations in relation to its subcontractors, there is no legal certainty as to the deference of the prime contractor's evaluation or what legal avenues may be available to the subcontractor.

Just as prime contractors are unclear of the legal ramifications of denying a subcontractor a potential subcontract before contract award under the proposed rule, prime contractors are also uncertain about the legal ramifications for terminating a subcontractor—at the instruction of a contracting officer—during contract performance as a result of its labor record. Arguably, such a termination would provide a greater risk of legal action by the subcontractor, as an actual—not potential—subcontract will have been breached. There is no guidance in the regulations as to whom would be responsible—the government or prime contractor—for the delay and costs associated with subcontractor termination.

The executive order and its implementing regulations create a significant possibility that a small business contractor with labor law violations may either have to enter into a labor law compliance agreement[5] or face possible suspension or debarment proceedings. While bad actors should not be considered for or awarded federal contracts, AGC is concerned about those contractors that have taken remedial steps to correct their violations that could fall subject to overzealous actors. The issue here rests with the subjectivity of the regulations. While not all labor law violations may be considered serious, pervasive,

[5] A labor compliance advisor can recommend and a contracting officer can request that a prime contractor enter into "labor compliance agreements" to enable that contractor to be considered for contract award. A contractor may enter into such an agreement with one or more enforcement agencies to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or "other related matters." AGC is very concerned that such nebulous agreements place contractors in a difficult place when negotiating with enforcement agencies—completely disinterested in the procurement or delivery of a federal construction contracts—in order to be considered for contract award. There appears to be no limitation on:

- The duration of such agreements;
- The frequency of such agreements;
- The depth of training, mitigation or remedial action required;
- The frequency or depth of any recordkeeping or reporting they might require;
- The circumstances under which enforcement agencies might require a firm to go so far as to engage a third-party monitor; or
- The "related matters" enforcement agencies might require a firm to address.

repeated or willful that give rise to considerations for either of these options, those considerations will be left up to individual labor compliance advisors to advice contracting officers, who ultimately make such determinations. The reality is that AGC small business contractors already face situations where contracting officers within the same office disagree with one another or take different approaches to interpreting the FAR that can have damaging results. Given the subjective determination framework within this rule and the realistic possibility to encounter overzealous contracting officers, small businesses that may otherwise be responsible may begin to walk away from the federal marketplace for fear of having to enter into one of these agreements, or worse, being recommended for suspension or debarment.

Lastly, no business likes to publicly air its mistakes. Under this executive order, federal contractors will be required to do just that through the Federal Awardee Performance and Integrity Information System for their labor law violations. Small businesses that want to grow in the construction market may avoid or leave the federal market to avoid any potential stigma created by this system. They will be punished over and over for any inadvertent mistakes in the complex world of federal contracting.

ii. The Executive Order and Implementing Regulations Will Drive Up Small Business Costs, Ultimately Leading Some Small Businesses to Leave the Federal Marketplace

As previously noted, small business construction companies do not have in-house lawyers. As such, they often rely on outside counsel and other consultants to assist with their compliance efforts. Unfortunately, the reality is that most small business federal contractors do not yet fully appreciate the magnitude of this rule making. The reality and breadth of this executive order will lead to these small businesses to (1) hire these expensive outside experts; or (2) leave the federal construction market.

A small business construction company would need up to two days of about 15 hours of orientation for understanding these new requirements, the effect on the bidding and contract performance of work and the needed revision to contract forms and the subcontract and purchase order bid procedures. The preparation of this type of program would easily require 50 hours of work including the analysis of the contractor's current bid/subcontracting documents and procedures. An experienced labor attorney would be required to participate in this process. According to a well-respected construction law firm, legal advice from an experienced labor law attorney is likely to run from $350 to $450 per hour. At $400 per hour, the costs of preparation would easily reach $20,000. Additionally, the costs of modifications to forms and procedures would easily cost $10,000 to $15,000 per firm as the change is far more complex than simply adding another certification requirement. The risk of a "quick and simple" revision is too great.

The realistic, ongoing legal cost data involved with maintaining a compliance program for this executive order would also be significant.[6] Given the risks and potential cost associated with an erroneous responsibility determination, experienced counsel will invest at least 15 to 20 hours in reviewing a disclosure from a subcontractor and advising the client on the responsibility determination. The risks involve the effect on the bid price of rejecting an attractive offer or the risks of the government later pressing for a termination of a subcontractor. Using a figure of $400 hourly rate for 15 hours results in a

[6] Under the regulations, subcontractors are required to disclose their labor law violation information to DOL, not the prime contractor, for an assessment of its record. The subcontractor then relates that information to the prime contractor, as the prime contractor must ultimately make the final responsibility determination, not DOL. However, in the event that DOL does not respond to the subcontractor after three business days, the prime contractor must use its business judgment to make a determination based on either publically available records or what the subcontractor is willing to share. AGC is highly skeptical that the DOL will be able to provide timely assessments and notes that—no matter what—the liability for the determination ultimately rests with the prime contractor, not DOL.

cost of at least $6,000 for outside counsel's involvement to comply with this one rule. This does not include the time invested by the contractor.

Furthermore, prospective subcontractors will bid to almost every prime contractor that it can identify. These regulations impose the same obligation on each prospective prime, as well as lower-tier potential subcontractors. As noted above, building construction projects may require the hiring of 50 or more subcontractors on a project. Imagine on a $10 million building project a prime contractor has 10 subcontracts valued at $500,001. If there are six prospective subcontractors per subcontract, this task and its associated costs will be incurred six times per subcontract, this process could cost as much as $360,000 before the prime contractor submits its bid.[7]

Small business contractors do not win every contract on which they bid. And, small business contractors often do not receive any money from the federal government for submitting a proposal that does not win the contract. In an environment where the cost of submitting a proposal dramatically increases and the odds of winning the contract do not, at least some small business construction contractors will seek its work outside the federal construction marketplace.

B. Use of Project Labor Agreements for Federal Construction Projects Executive Order 13502

On February 6, 2009, President Obama issued Executive Order 13502, entitled Use of Project Labor Agreements for Federal Construction Projects, which encourages federal government agencies to use project labor agreements (PLAs) for large-scale federal construction projects where the total cost to the government is $25 million or more. To address these perceived challenges, Executive Order 13502 encourages, but does not mandate, the use of PLAs on large-scale construction projects. Rather, agencies may on a project-by-project basis, require the use of a PLA by a contractor. The Administration issued the final rule in the Federal Register on April 13, 2010, amending the Federal Acquisition Regulation (FAR) to implement the Executive Order.

AGC submitted comments on the proposed rule and has sent well over 100 letters in response to federal agency inquiries regarding the use of government-mandated PLAs on specific projects.[8] AGC urges Congress and members of this committee to support and pass the Government Neutrality in Contracting Act, H.R. 1671.

i. AGC Opposition to Government-Mandated Project Labor Agreements

AGC neither supports nor opposes contractors' *voluntary* use of PLAs, but strongly opposes any *government mandate* for contractors' use of PLAs. AGC is committed to free and open competition for publicly funded work, and believes that the lawful labor relations policies and practices of private construction contractors should not be a factor in a government agency's selection process. AGC believes that neither a public project owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, as PLAs effectively do. AGC also believes that government mandates for PLAs can restrain competition, drive up costs, cause delays, and lead to jobsite disputes. If a PLA would benefit the construction of a particular project, the contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement.

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[7] $6,000 per legal review of subcontractor labor law record multiplied by 60 subcontractors (6 per subcontract and 10 total subcontracts).

[8] For AGC's comments, letters and more information, go to https://www.agc.org/industry-priorities/procurement/government-mandated-project-labor-agreements-pla

ii. The Executive Order Encourages Agencies to Mandate PLAs That will Have the Effect of Limiting Small Business Competition for and Participation on Federal Construction Contracts

Government mandates for PLAs—even when competition, on its face, is open to all contractors—can have the effect of limiting the number of competitors, including small business construction contractors, on a project, increasing costs to the government and, ultimately, the taxpayers. This is because government mandates for PLAs typically require contractors to make fundamental, often costly changes in the way they do business. For example:

- PLAs typically limit open shop contractors' rights to use their current employees to perform work covered by the agreement. Such PLAs usually permit open shop contractors to use only a small "core" of their current craft workers, while the remaining workers needed on the job must be referred from the appropriate union hiring hall. While such hiring halls are legally required to treat union nonmembers in a nondiscriminatory manner, they may, and typically do, maintain referral procedures and priority standards that operate to the disadvantage of nonmembers.

- PLAs frequently require contractors to change the way they would otherwise assign workers, requiring contractors to make sharp distinctions between crafts based on union jurisdictional boundaries. This imposes significant complications and inefficiencies for open-shop contractors, which typically employ workers competent in more than one skill and perform tasks that cross such boundaries. It can also burden union contractors by requiring them to hire workers from the hiring halls of different unions from their norm and to assign work differently from their norm.

- PLAs typically require contractors to subcontract work only to subcontractors that adopt the PLA. This may prevent a contractor (whether union or open shop) from using on the project highly qualified subcontractors that it normally uses and trusts and that might be the most cost-effective.

- PLAs typically require open-shop contractors to make contributions to union-sponsored fringe benefit funds from which their regular employees will never receive benefits due to time-based vesting and qualification requirements. To continue providing benefits for such employees, such contractors must contribute to both the union benefit funds and to their own benefit plans. This "double contribution" effect significantly increases costs.

- PLAs typically require contractors to pay union-scale wages, which may be higher than the wage rates required by the Secretary of Labor pursuant to the Davis-Bacon Act. They often also require extra pay for overtime work, travel, subsistence, shift work, holidays, "show-up," and various other premiums beyond what is required by law.

Such changes are impractical for many potential small business contractors and subcontractors, particularly those not historically signatory to collective bargaining agreements (CBAs).

iii. Federal Agencies are not Equipped for Dealing with Construction Labor Negations, Which Could Lead to Inappropriate, Unfair or Unrepresentative Terms in the PLA that Drive Away Small Businesses

Another way that government mandates for PLAs can drive up costs and create inefficiencies is related to who negotiated the terms of the PLA and when the PLA must be submitted to the agency. With regard to who negotiates the PLA, the FAR Rule implementing executive order allows (but does not require or even encourage) agencies to include in the contract solicitation specific PLA terms and conditions. Exercising that option, though, can lead to added costs, particularly when the agency representatives

selecting the PLA terms lack sufficient experience and expertise in construction-industry collective bargaining.

AGC strongly believes that, if a PLA is to be used, its terms and conditions should be negotiated by the employers that will employ workers covered by the agreement and the labor organizations representing workers covered by the agreement, since those are the parties that form the basis for the employer-employee relationship, that have a vested interest in forging a stable employment relationship and ensuring that the project is complete in an economic and efficient manner, that are authorized to enter into such an agreement under the National Labor Relations Act ("NLRA"), and that typically have the appropriate experience and expertise to conduct such negotiations. Under no circumstances should a contracting agency require contractors to adopt a PLA that was unilaterally written by a labor organization or negotiated by the agency or by a contractor (or group of contractors) not employing covered workers on the project. It do so places small business contractors in a precarious position if they so choose to bid.

C. Establishing Paid Sick Leave for Federal Contractors Executive Order 13706

On September 7, 2015, President Obama signed Executive Order 13706 that requires federal prime contractors and subcontractors to provide employees up to seven days of paid leave for sickness and other purposes annually. On February 25, 2016, the Wage and Hour Division of the U.S. Department of Labor issued an 81-page notice of proposed rulemaking.

AGC submitted extensive comments on April 12, 2016.[9] A final rule is expected by September 30, 2016. AGC highlights some of its primary concerns below. AGC urges Congress and members of this committee to support legislative efforts to prohibit implementation and application of this executive action.

i. The Scope of Workers Entitled to Paid Leave Under the Executive Order and Proposed Rule Do Not Address the Unique Nature of the Construction Industry

Requiring federal contractors to provide paid leave to employees who are considered "laborers and mechanics" under the Davis-Bacon Act ("DBA") – commonly referred to as construction craft workers – presents significant practical, economic, and legal problems for both contractors and the government. The proposed coverage of construction craft workers is not workable. It threatens to turn practical, long-established compensation practices of the industry upside-down and replace them with impractical, ill-fitting and difficult to manage obligations.

Work in the commercial construction industry is typically project-based, transitory and seasonal. Most craft workers move from project to project and from employer to employer, often within short periods of time. They may earn fluctuating rates of pay due to changes in project type and location, or changes in assigned tasks, that call for different rates of pay under applicable wage determinations or because no wage determination applies (when moving to work not covered by the DBA). They may have days with no work to do, when their skills are not needed on a job at that time or when the daily weather prevents work. Likewise, they may experience longer periods of layoff due to seasonal weather or a downturn in the demand for construction. This is the unique, immutable nature of the work and is well-known to those employed in the industry.

The administrative difficulty for contractors employing transient, intermittently employed craft workers is just too heavy. As one typical contractor told us, "We have hundreds of employees per year who come

[9] https://www.agc.org/sites/default/files/Galleries/labor_member_files/AGC%20Comment%20Letter_1.pdf

and go and may work for us for varying short periods. Keeping track of sick pay eligibility and hours would be a nightmare." Given the nature of the work, craft workers traditionally have been paid only for time actually worked.[10]

ii. The Scope of Workers Entitled to Paid Leave Under the Executive Order and Proposed Rule Exceed and Conflict with the Requirements of the Davis-Bacon Act

The executive order and proposed rule impose compensation mandates that not only exceed the statutory provisions of the DBA, but also conflict with them. First, the statute provides that wages (defined in Section 3141(2)(B) as including the basic hourly rate of pay plus bona fide fringe benefits) shall be paid based on the prevailing rate in the geographic area for the type of project involved. The executive order and proposed rule require contractors to pay wages for sick leave that have absolutely no correlation to prevailing practices in the area, for the type of project involved, or, as discussed above, even in the industry overall. Second, the statute provides that contractors may meet their obligations by making contributions to bona fide fringe benefit trust funds, assuming a commitment to bear the costs of a bona fide fringe benefit plan or program, or doing either or both in combination with paying cash wages. The Executive Order and proposed rule apparently require contractors to pay wages for sick leave in the form of cash with no option for meeting their paid leave obligations through contributions to fringe benefit trust funds or commitments to bear the costs of a fringe benefit plan or program.

iii. The Scope of Workers Entitled to Paid Leave Under the Executive Order and Proposed Rule will Further Burden Small Business Construction Contractors

Coverage of construction "laborers and mechanics" will also lead to serious consequences for small business construction contractors and their federal construction costs and schedules. It will hinder economy and efficiency in federal procurement, rather than promote it as stated in the executive order and proposed rule.

Contractors that do not already provide paid leave benefits will incur substantial costs in compliance with the new mandate. First, they must pay the individual using paid leave for time not worked while, in many cases, also pay a substitute worker for time worked in place of the worker on leave. Those contractors already providing paid leave benefits would see their expenses rise under the rule as proposed as well, since they would no longer be permitted to take credit for the benefit toward meeting prevailing wage obligations and will have to make up that cost through payment in cash or other benefits. All covered contractors – whether they currently offer paid leave benefits or not – will also incur substantial costs in preparing for and administering compliance with the new rule. Numerous AGC member contractors subject to state and local paid leave mandates have told us of the considerable costs that they have incurred in complying with such mandates. These include costs related to:

- Staff time to create a paid leave policy or revise current policy;
- Hiring outside counsel or a consultant to develop, draft, and/or review a new paid leave policy;

[10] Payment specifically for sick time is quite rare and likely only provided by those open shop contractors employing less-transitory workforces. A recent AGC survey of commercial construction contractors indicates that only 32 percent of contractors operating on an open-shop basis outside any state or local mandate to provide paid sick leave actually provide such a benefit. In the union sector, the percentage is much lower. In fact, AGC is unaware of any collective bargaining agreement ("CBA") in the commercial construction industry that specifically provides for paid sick leave. Contractors and organized labor have always negotiated compensation on the assumption that wages must be high to compensate for days when the employee is not needed or cannot come to work and will not be paid. These high wages have carried over into the open-shop sector as well, as market forces call for above-average pay to compensation workers for the inconvenience of irregular work and other challenging conditions.

- Training office, managerial, and/or supervisory staff on administering the new policy;
- Educating nonsupervisory employees about the new policy;
- Revising subcontract documents;
- Educating subcontractors about their new obligations;
- Purchase of new hours-tracking, payroll, accounting, and/or other software, or upgrading and implementing current software;
- Revising manual systems for tracking hours, computing payroll, and the like; and
- Ongoing tracking, recordkeeping, and reporting of leave accruals, carryover, and use.

Contractors that work in multiple jurisdictions have also decried the added complexities and costs associated with having to comply with different rules, with varying specifications, in different states and cities.

In addition to the direct costs of compliance with the rule, federal construction costs – and schedules – also will be harmed by the secondary effect of lost productivity. It seems self-evident, and research[11] supports the premise, that the availability of paid leave leads to increased absenteeism. Of course, absenteeism may be a good or a bad thing depending on the circumstances, but increased absenteeism surely encompasses increased abuses of the benefit as well as legitimate uses. In fact, AGC-member contractors working in Massachusetts, where a paid leave mandate took effect last July, report facing mass numbers of employees calling in sick the day before Labor Day weekend for the first time. They have also experienced a noticeable uptick in workers calling in sick as projects wind down and when the construction season wound down before winter's seasonal layoffs.

Increased absenteeism is particularly problematic in the construction industry, where cost and schedule concerns are critical and highly dependent on labor productivity. As researcher Seungjun Ahn put it, "Even today, many tasks in construction have to be manually performed by construction workers on job sites, which is indicated by [sic] that labor costs typically range from 33% to 50% of the total construction cost (Hanna 2001). Therefore, workers' timely attendance and operation at the site is crucial to the success of a construction project."[12]

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[11] See, e.g., Ahn, T. & Yelowitz, A. Paid Sick Leave and Absenteeism: The First Evidence from the U.S, 2016. Retrieved April 11, 2016, from http://ssrn.com/abstract=2740366.

[12] Ahn, Seguin. "Construction Workers' Absence Behavior Under Social Influence." Ph.D diss., University of Michigan, 2014. Retrieved April 11, 2016, from http://ssrn.com/abstract=2740366. Ahn examined the implications of construction worker absenteeism on productivity and construction costs, reporting:

> Researchers have attempted to estimate the cost impact of missed work in construction. Nicholson et al. (2006) have used economic models to estimate that when a carpenter in construction is absent, the cost of the absence is 50% greater than his/her daily wage, and when a laborer in construction is absent, the cost is 9% greater than his/her daily wage. Researchers have also investigated the impact of absenteeism on overall productivity in construction. Hanna et al. (2005) looked at electrical construction projects and revealed that productivity decreased by 24.4% when the absence rate on a job site was between 6% and 10%, whereas productivity increased by 3.8% when the absence rate was between 0% and 5%. They also reported that 9.13% of productivity loss on average was measured in electrical construction projects. These analyses imply that the costs of absenteeism increase nonlinearly in the level of absenteeism. For example, 10% absenteeism is not just a 10% decrease in productivity, and if absenteeism increases from 5% to 10%, the decrease in productivity caused by absenteeism might more than double. The decrease in productivity is one of the main causes of cost overruns in construction projects. Therefore, maintaining a low absence rate is critical to cost-effective construction.

The Business Roundtable reported similar findings when it studied the most quantifiable direct effects of absenteeism in construction, namely: time spent by crew members waiting for replacements; time spent moving

iv. The Executive Order and Proposed Rule Extends Liability to Prime and Upper-Tier Contractors for Subcontractor Violations about Which these Contractors Could not Know

The executive order and proposed rule places liability upon prime and upper-tier contractors for violations by their subcontractors. However, determining whether a subcontractor is abiding by this order is impossible for prime and upper-tier contractors. A prime contractor has no available means to determine whether or not a subcontractor happens to be working for that prime contractor at the time of the paid leave request. Given the carryover provisions of this order, subcontractor violations can occur years after the relationship between subcontractor and prime contractor has ended.

v. The Executive Order and Proposed Rule will Punish Innocent, Compliant Contractors for Violations of Bad Actors

Under the executive order and proposed rule, a federal agency contracting officer can withhold payments to the prime contractor as necessary to pay employees the full amount owed. However, the prime contractor may not be the violator. Rather, a subcontractor could be. So, when a contracting officer withholds payment to a prime contractor for one subcontractor's violation on a project involving 100 subcontractors, the compliant prime contractor and 99 compliant subcontractors will not receive payment for work they completed and their employees may not be paid.

For all of the above reasons, AGC, again, urges Congress and members of this committee to support legislative efforts to prohibit implementation and application of this executive action.

D. Updating and Modernizing Overtime Regulations Presidential Memorandum

On March 13, 2014, President Obama issued a presidential memorandum entitled Updating and Modernizing Overtime Regulations, to implement changes to the Fair Labor Standards Act (FLSA) in regards to employee overtime payment. On May 18, 2016, the U.S. Department of Labor's Wage and Hour Division (WHD) issued a final rule implementing changes to the FLSA overtime regulations, scheduled to go into effect on December 1, 2016. The most significant change is a doubling off the standard salary threshold for exempt employees—from $455 per week ($23,660 per year) to $913 per week ($47,476 per year).

AGC submitted individual comments[13] to WHD on its proposed rule and signed onto joint coalition comments[14] as well. AGC urges Congress and members of this committee to support the Protecting Workplace Advancement and Opportunity Act, H.R. 4773, which would require DOL to perform a deeper analysis of the rule's impact on employer costs, employee flexibility and career advancement before it goes into effect. Congress and members of the committee should also consider supporting the Overtime Reform and Enhancement Act, H.R. 5813, which takes a commonsense approach to raising and implementing the final overtime rule by phasing in the salary threshold over three years. AGC also

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replacements to and from other work locations; and lost time by supervisory personnel in reassignment of work activities and locating replacements. The study team concluded that "each 1% increase in daily absenteeism produces a 1½% increase in labor costs . . . a 15% increase in direct labor cost for 10% absenteeism." "Absenteeism and Turnover," Construction Industry Cost Effectiveness Project (Report C-6), Business Roundtable, 1982 (reprinted 1993).

[13] https://www.agc.org/sites/default/files/Files/Labor%20%26%20HR%20%28public%29/AGC%20Comments%20to%20Overtime%20NPRM%20-%20Final_2.pdf

[14] https://www.agc.org/sites/default/files/Files/Labor%20%26%20HR%20%28public%29/PPWO%20Comments%20Overtime_1.pdf

supports efforts and encourages members to prohibit funds for implementation, administration and enforcement of this effort through the appropriations process.

i. The Presidential Memorandum and its Implementing Regulations will Impose Significant New Costs For Small Businesses to Absorb in Too Short of a Time

WHD's final rule to implement the changes required under the presidential memorandum represents an overtime threshold increase that is too much to absorb all at once. To impose such a large and immediate increase as proposed will result in unintended consequences, particularly for small construction companies, construction employers in lower-wage regions, and construction personnel.

The final rule increases the minimum weekly salary threshold for white collar exemptions by more than 100 percent. To understand the full impact of this change on the construction industry, AGC surveyed its members. AGC was not surprised to learn that nearly 70 percent of the companies that participated in the survey have employees who are currently and lawfully classified as exempt under the FLSA and earn an annual salary was less than the proposed $50,440. Most of those impacted were in areas where the cost of living and, consequently, wages are lower than in other areas of the country.

While the administration may believe that a simple solution to this problem is to raise the salaries of the impacted workers to the proposed threshold amount, it is in fact not a practical one. Construction contractors operate at a very slim profit margin and cannot afford to increase salaries of all affected employees up to 100 percent overnight.

The impracticality of this solution is reflected in AGC's survey results, which show that an increase in the salary threshold will force construction employers to take drastic measures to maintain the integrity of their compensation budgets. When asked how their companies would comply with a new salary threshold at the proposed level, 74 percent of AGC-surveyed construction contractors responded that they would likely reclassify some or all of the impacted exempt workers to a non-exempt hourly status at their current salaries. The survey results also show that: over 60 percent of respondents expect the rule to result in the institution of policies and practices to ensure that affected employees do not work over 40 hours a week, 40 percent expect affected employees to lose some fringe benefits (like flex time, paid leave, work from home options), 33 percent expect some positions to be eliminated, and 23 percent expect to exchange some fulltime positions for more part-time positions. Furthermore, about 80 percent of respondents expect employee morale to be damaged because employees who are reclassified to hourly, non-exempt status will feel as if they have been demoted despite eligibility for overtime pay.

E. Advancing Pay Equality Through Compensation Data Collection Presidential Memorandum

On April 8, 2014, President Obama issued a presidential memorandum entitled "Advancing Pay Equality through Compensation Data Collection," which requires federal contractors and subcontractors to disclose to the DOL summary data on the compensation paid their employees, including data by sex and race. The U.S. Equal Employment Opportunity Commission (EEOC) issued a proposed rule on February 1, 2016, to incorporate the presidential memorandum's requirements in a revised version of the Employer Information Report (EEO-1). Based on public comments received, the EEOC issued a revised EEO-1 report for public comment on July 14, 2016.

All employers with 100 or more employees would have to submit the revised EEO-1 report. Prime and first-tier subcontractors who perform work directly for the federal government and have 50 or more employees would be required to submit the currently used EEO-1 report that does not include compensation and hours-worked data.

AGC submitted comments to the EEOC on both of its proposals.[15] AGC urges Congress and members of this committee to prohibit funds for implementation, administration and enforcement of this executive action through the appropriations process. In addition, AGC supports and urges members of this committee to consider introducing and passing legislation like the EEOC Reform Act, S. 2693, which would require the EEOC to collect information, consistent with the proposed revisions to the EEO-1 report, from federal agencies and the Executive Branch before the proposed data collection mandates are imposed on private employers.

i. The Presidential Memorandum Initiative and the EEOC's Proposed Revisions are Unnecessary Given Existing Statutes Governing Compensation in Construction and other Commercially Available Compensation Data Reports on the Industry

The EEOC's proposal notes that it and DOL's Office of Federal Contract Compliance Program (OFCCP) plan to "compare the firm's or establishment's data to aggregate industry data or metropolitan-area data." For the construction industry, such collection and analysis of compensation data for benchmarking purposes is not necessary because resources establishing such standards already exist. For example, wage determinations issued by the DOL pursuant to the Davis-Bacon and Service Contract Acts ostensibly manifest the prevailing wages paid for many job classifications in a particular area. The Department's Bureau of Labor Statistics also provides compensation data useful for identifying industry standards.

In addition, various private sector resources offer compensation benchmarking data. For example, in the construction industry, the nonprofit Construction Labor Research Council and consulting firms such as PAS, Inc. and FMI, Inc. publish such data. Many of these resources segment the data by geographic location, company size, industry sector, and other useful factors.

Given all of the compensation data resources already available, AGC believes that it is unnecessary for the EEOC or OFCCP to subject contractors to the proposed new compensation data reporting requirement.

ii. The Collection of Hours-Worked Data is Overly Burdensome for Construction Employers and Should not be Required, Regardless of Worker FLSA Status

According to a survey of AGC members, 88 percent of respondents stated that the reporting of hours-worked data by pay band would be burdensome with nearly 40 percent stating it would be extremely burdensome to track hours-worked for non-exempt employees, particularly due to the unique nature of the construction industry.

As previously mentioned, the construction industry is project based, transitory and often seasonal, which makes it difficult to collect and track hours-worked data in the way the EEOC suggests. Unlike work performed in other industries, once a construction project is complete, workers often relocate to another project for the same or different employer, depending upon labor needs. This alone would make it extremely difficult for construction contractors to track hours-worked data and ensure the accuracy of such data. In addition, construction contractors could collect such data, but the data may significantly change as early as the next day because workers often move around to other projects or when workers are provided by union hiring halls, the workforce itself may change.

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[15] https://www.agc.org/sites/default/files/Revised%20EEO-1%20Report%20-%20Final%20Comments.pdf https://www.agc.org/sites/default/files/Galleries/labor_member_files/OMB%20Review%20of%20Revised%20EEO-1%20Report%20-%20Final_0.pdf

III. THE CUMULATIVE IMPACT OF NEW REGULATORY MANDATES ON SMALL BUSINESS CONSTRUCTION CONTRACTORS

The collective impact of the aforementioned executive orders and presidential memorandum on small business construction contractors will be significant in terms of financial cost, liability, risk and loss of work opportunities. From a cost perspective, at a minimum, these contractors will have to:

- Hire outside counsel and/or consultants to help educate and train existing employees as well as establish new compliance programs for employees to follow;
- Hire outside counsel to adjust contractual documents accordingly;
- Hire outside counsel or consultants to adjust employee staffing arrangements to account for new overtime requirements;
- Consider existing staff resources for implementing and monitoring compliance programs and determine whether additional staff is needed or if existing staff can effectively handle these new burdens; and
- Consider purchasing new or updated compliance software programs as a means for collecting previously unmonitored or documented data.

The costs to small businesses to undertake could easily amount in the tens, if not, hundreds of thousands of dollars in new costs. The initial cost of establishing such new compliance regimes will place a heavy burden on all small business contractors, especially emerging small businesses and those planning on entering the construction market. The routine costs of maintaining these compliance systems and meeting these new mandates will additionally place new, fixed financial constraints on small businesses.

Concerning liabilities, small business construction contractors, particularly in the federal market, will have to consider the liability of:

- Agreeing to undefined mandates included in labor compliance agreements "negotiated" with federal compliance agencies as a means to avert suspension or debarment proceedings;
- Giving the competition their labor compliance records;
- Being deemed "not responsible" based on their labor compliance records;
- Deeming any subcontractors as "not responsible" based on their labor compliance records;
- Publically disclosing labor law violations for which they have paid fines, taken remedial actions and resolved;
- Abiding by federal paid sick leave requirements in addition to other state and local paid sick leave requirements;
- Being shut out of work because the government mandates a project labor agreement; and
- Providing unrepresentative compensation data according to one-size fit all standards that opens them up to increased risks of government audit.

Lastly, small business contractors will have to consider these executive action[16] in context of risk versus reward of participating in the construction market, and again, particularly the federal construction market. Given the overall state of the construction economy today, several small business contractors have expressed to AGC that they are strongly considering or plan to walk away from the federal construction market. The result of these new requirements may, therefore, include reduced competition and, in turn, higher prices to the federal government and taxpayers. Thank you for inviting AGC to participate in this worthwhile hearing.

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[16] In addition to the executive actions discussed, it is important to note that we have not addressed new mandates of the Environmental Protection Agency and Occupational Health and Safety Administration that will also impose new burdens upon small business construction contractors.

Testimony before the House Committee on Small Business Subcommittees on Investigations, Oversight, and Regulations and Contracting and Workforce

David Madland, PhD
Senior Fellow
Center for American Progress Action Fund

September 13, 2016

Thank you Chairmen Hardy and Hanna, Ranking Member Adams, and Members of the Subcommittees for the invitation to appear before you today.

My name is David Madland and I am a Senior Fellow at the Center for American Progress Action Fund. CAP Action is an independent, nonpartisan, and progressive education and advocacy organization dedicated to improving the lives of Americans through ideas and actions.

Today's hearing is focused on the impact of President Obama's contracting executive actions. While the title of this hearing implies that the Presidents' actions are a burden, his actions will benefit workers, taxpayers and businesses.

The President's executive actions draw widespread support from a broad coalition of supporters. Not only do organizations representing workers, veterans, women, the elderly, and taxpayers support a number of these contracting actions, but so too do a number of small businesses.[1] Many small businesses feel that these executive actions will help them compete on a level playing field and make the contracting process more welcoming to businesses like theirs. Indeed, in 2015 small business contracting as a percentage of total government contracting was at record high levels.[2]

Though I think the general points I make could be applied to most if not all of the President's contracting reforms, I will focus my remarks on contracting executive actions that establish a minimum wage, require paid sick leave, ban discrimination based on sexual orientation and gender identity and ensure companies comply with workplace laws before receiving new government contracts.

Government can be a leader setting standards

Because President Obama's executive actions are part of a tradition of presidential actions involving federal contractors, I think it is important to provide some history on similar executive actions before discussing the policies that are the focus of today's hearing. The federal government has a long and successful history of starting important social changes with federal contractors. And these kinds of actions have been taken by presidents of both parties.

For example, Executive Order 11246, signed in 1965 by President Lyndon Johnson, prevented companies that contract with the federal government from discrimination on the basis of race, color, religion, sex, or national origin. The executive order helped to significantly increase the percentage of women and minority managers at firms that contract with the federal government. Employment increased 6 percent faster for black males working for government contractors than those in non-contractor establishments,

12 percent faster for other minority males, 3 percent faster for white females, and 11 percent faster for black females.[3]

Actions by President Richard Nixon furthered the protections articulated by President Johnson. Under his administration, the Department of Labor issued "Order No. 4," which required contractors to analyze their workforce and determine if they were hiring fewer minority workers than would be expected based on the local labor market.[4] If contractors found that this was the case, they were to set goals to remedy this underrepresentation.[5]

Virtually every recent president has used their power over federal procurement to pursue social goals. Ronald Reagan sought to promote minority contractors.[6] Bill Clinton encouraged contractors in economically distressed areas.[7] George W. Bush sought to ensure contractors employed only American citizens or legal residents.[8]

President Obama's Executive Actions Address Significant Problems

President Obama's efforts to raise standards for workers on federal contracts build on this history and are an important part of making the economy work for everyone not just the wealthy few. In the United States today, wages have been nearly stagnant for decades, while economic inequality is near record levels.[9] Too many people are struggling to pay bills, especially those working in low-wage industries where wage theft is rampant as employers pay workers less than legally required. Many Americans cannot take time off if they get sick, and people often face discrimination because of their sexual orientation and gender identity. And discrimination based on race and gender still occurs, despite advances made in part because of previous federal actions.

The President's executive actions address significant problems with today's economy. For example:

Low minimum wage: The federal minimum wage today remains at $7.25 per hour and has not been increased since 2009. That means someone working full time can still be in poverty – they would earn just $15,080 annually, which is below the federal poverty line for a family of two.[10] If the minimum wage had merely kept pace with inflation since 1968 it would be worth $11.06.[11] And if the minimum wage had kept up with productivity, it would be even higher. We are a much richer and more productive nation than we were in the 1960s, and yet the minimum wage is worth less today than it was fifty years ago.

Lack of paid sick leave: Currently, 36 percent of private sector workers lack paid sick leave.[12] Without this vital protection, workers can be forced to choose between caring for themselves or a family member and keeping their job. This not only harms workers, but the economy as a whole, as workers without access to paid sick leave are more likely to spread contagious diseases like the flu.[13]

Absence of protections for LGBT Americans: Today, there are no explicit protections under federal law to prevent workers from being fired based on their sexual orientation or gender identity. Unfortunately, LGBT Americans often face discrimination and harassment in the workplace. Up to 43 percent of gay, lesbian, and bisexual workers have been discriminated against or harassed at work, as have up to 90 percent of transgender workers.[14]

Weak review of contractors' records: Despite the fact that federal law requires the government to award contracts only to companies with a satisfactory record of performance, integrity, and business ethics our current system fails to actually achieve this in practice, nor does it adequately impose conditions on violators to encourage them to improve their practices.[15]

As a result, billions of federal dollars flow to companies that break the law. According to a 2013 report from the Senate Health, Education, Labor, and Pensions Committee, 30 percent of the top violators of workplace safety and wage laws between fiscal years 2007 and 2012 continued to receive federal contracts despite their violations.[16] And these violations can have deadly consequences. During these years, at least 42 people died from workplace accidents and injuries at the companies with the highest penalties.[17] In fiscal year 2012, the government awarded $81 billion in contracts to companies with large violations of labor law – nearly 16 percent of all spending on federal contracts.[18] The Government Accountability Office has come to similar conclusions, finding that one-third of companies with the largest penalties for violations of wage and hour and workplace safety laws went on to receive a government contract.[19]

Ideally, policies such as a higher minimum wage, paid sick days, and respect for LGBT rights should be applied to all workers. But until Congress acts, executive actions can produce important improvements for a large number of workers, high road businesses and taxpayers.

Executive actions also promote economy and efficiency

At the same time these executive actions address important economic and social challenges, they also promote economy and efficiency in government contracting.

The basic idea is that treating workers fairly leads to better results for taxpayers. Human capital is the core input into many federal contracts and taxpayers receive "the most efficient and effective utilization of all available manpower" when workers are treated fairly.[20] When workers are adequately paid, have safe workplaces, do not need to fear losing their job because they or their children get sick, and are not discriminated against, they can efficiently produce high quality work. In contrast, when basic standards are not upheld, contracting becomes a race to the bottom that does not deliver for workers or taxpayers.

There is a large body of academic research backing up these basic ideas. For example, paying higher wages has been shown to decrease absenteeism and turnover.[21] Higher wages can also lead to higher performance from employees. Often called the efficiency wage theory, this body of research finds that wages and working environment can affect productivity, through effects on morale.[22] Paid sick leave can increase efficiency by allowing workers to stay home when sick instead of spreading their illness to their coworkers and customers and letting them take time off to get necessary preventative health care.[23] And a more diverse workforce can lead to less discrimination and more openness, greater job commitment, improved workplace relationships, and increased productivity.[24]

Moreover, there is also a body of research showing that when contractors cut corners with their workers, they often do so with taxpayers. A CAP Action report analyzing the businesses that received federal contracts despite having committed the worst workplace violations between FY 2005 and 2009 found that 25 percent of them had significant performance problems.[25] According to the report, these problems ranged from:

> "... contractors submitting fraudulent billing statements to the federal government; to cost overruns, performance problems, and schedule delays during the development of major weapons systems that cost taxpayers billions of dollars; ... to an oil rig explosion that spilled millions of barrels of oil into the Gulf of Mexico."[26]

This connection has been known for decades. The U.S. Department of Housing and Urban Development found a "direct correlation between labor law violations and poor quality construction" on HUD projects thirty years ago, also finding that this poor performance led to increase maintenance costs.[27] According to a 2003 study, construction contractors in New York with workplace law violations were more than five times more likely to have low performance than contractors without workplace law violations.[28] Similarly, a 2008 CAP Action report found that labor law violations by contracting companies were associated with wasteful practices.[29]

State and Local Governments and Many Businesses Already Have Similar Policies

Not surprisingly, given the benefits to taxpayers, businesses and workers, many state and local government have already implemented policies similar to these federal actions. And the evidence from these policies shows that they work well and that opponents' concerns are often overblown.

A number of states and local governments have policies similar to the Fair Pay and Safe Workplaces executive order and require companies to report on their workplace records. California[30], Connecticut[31], Illinois[32], Massachusetts[33], Minnesota[34], and New York[35]—as well as the District of Columbia[36] and other major cities, such as Los Angeles[37] and New York City[38]— all have responsible bidder programs that use self-reporting to improve contractor quality by identifying companies with long track records of committing fraud, wasting taxpayer funds, and violating workplace laws.

Similarly, since Baltimore passed the country's first living wage law for contractors in 1994, more than 100 municipalities and one state – Maryland – have instituted living wage laws that require contractors to pay a higher minimum wage.[39] Requirements to provide paid sick leave are not uncommon. Five states and many municipalities set paid sick leave standards for area employers.[40] Local governments have also used their contracting power to protect LGBT workers from discrimination. As of 2012, 61 localities prohibited local contractors from discriminating based on sexual orientation, with 42 also banning discrimination due to gender identity.[41]

The experience from state and local governments and private businesses with these kinds of policies has been quite positive.

After the implementation of San Francisco's paid sick leave ordinance, a majority of employers – including a majority of firms with fewer than 10 employees – reported that they supported the ordinance.[42] Similarly, a study of New York City's paid sick leave policy found that one and a half years after the law went into effect, 86 percent of employers supported the policy.[43] The study also found that 85 percent of employers reported that the new law had no effect on their overall business costs, and a two percent actually reported a decline in overall costs.[44] A study examining LBGT contracting policies found that that businesses were generally willing to adopt and comply with local ordinances to

protect LGBT workers, noting that "in almost all localities that responded, any resistance to these policies was minimal and short-lived."[45]

A study of Maryland's living wage conducted by the state's Department of Legislative Services found that the number of bids actually increased after the state adopted the policy. The study found that the average number of bidder per contract increased from 3.7 to 4.7, a nearly 30 percent increase.[46] What's more, of the contracting companies interviewed by the state of Maryland, nearly half indicated that the higher standards made them more likely to bid because it leveled the playing field. [47]

Similar results have been found by a number of studies of local efforts to raise contracting labor standards. According to a study of the Boston, Hartford and New Haven living wage laws, "competitive bidding remains strong under living wage ordinances, and ... such laws may even boost the number of bidders on city contracts."[48] And statements from officials in San Francisco and Los Angeles indicate that their responsible contracting "prequalification" system has increased the pool of highly experienced firms willing to bid for its work and created an environment in which firms of similar caliber compete against one other for agency contracts.[49] As Russell Strazzella, a chief construction inspector for the Los Angeles Bureau of Contract Administration explained, with strong responsibility reviews, "you get a level playing field and a pool of good contractors."

Private sector companies are also increasingly adopting similar policies to help their bottom line.

Companies that hire contractors in the private sector are finding that reviewing potential contractors' workplace safety records is a cost effective way to ensure future compliance. Raytheon Company, for example, requires that companies it contracts with follow safety requirements and report any safety citations "from any U.S. Government, city, or local entity for the past ten years."[50] So too do smaller companies. Family-owned construction contractor Lawrence Building Corp. requires bidders to report if they have had any Occupational Safety and Health Administration citations in the past 3 years.[51] And industry associations—such as the Construction Users Roundtable[52], the American National Standards Institute[53], and FM Global—recommend evaluating the safety record of companies bidding for contracts.[54]

Similarly, many companies already provide high wages, paid leave and respect LGBT rights. About 60 percent of U.S. workers currently have access to paid sick leave.[55] One in three small business owners have a policy in place protecting LGBT employees, with many noting that it improves their ability to attract and retain talented employees.[56] And of course, many companies pay their workers well above the minimum wage.

Small Businesses Often Support These Policies

Finally, there are a number of small businesses that support these kinds of contracting policies. When low standards prevail in government contracting, many high-road companies stay away. But when higher standards become the norm, high road companies feel that the competition is fair and want to do business with the government.

As previously mentioned, the state of Maryland found that more companies wanted to do business with the state after they raised standards. According to the official state report on the impact of the living wage, several companies commented that in the future they will only bid on living wage contracts because of the leveling effect it has on competition. One contractor noted that her contract was the first state procurement for which her firm had submitted a bid. She explained that without strong labor standards, "the bids are a race to the bottom. That's not the relationship that we want to have with our employees. [The living wage] puts all bidders on the same footing." [57]

Raising the minimum wage is also popular among small business owners. As the president of the American Small Business Chamber of Commerce explained, the president's executive order will "help level the playing field," making sure that companies that pay their workers good wages are not undercut by low-road employers.[58] A poll from Small Business Majority finds that 60 percent of U.S. small businesses support raising the minimum wage to $12 by 2020.[59] And leaked polling by Republican pollster Frank Luntz for the Chamber of Commerce found that 80 percent of business executives supported increasing the minimum wage in their state.[60] That same poll found that 73 percent of respondents supported requiring paid sick leave. [61]

A poll from Small Business Majority and CAP found that a majority of small business owners believe that owners should not be allowed to fire or refuse to hire LGBT employees based on their religious beliefs.[62] That same poll found roughly 80 percent of small business owners support a federal law to ban discrimination against LGBT employees in the workplace.[63]

In localities that have mandated paid sick leave, companies' often find that the law is less disruptive than anticipated. As one San Francisco business owner explained about their city's paid leave policy: "A lot of small business owners were really freaked out when this first went into effect, especially smaller retail stores and restaurants. I don't hear too many griping about it any longer...It's made a highly positive impact on staff morale. I think it's a win/win situation for employees and employers."[64] Experiences like these are why the Main Street Alliance, a national network of small business coalitions strongly supports the paid sick leave executive order.[65] As Main Street Alliance explained in their comments supporting the paid sick leave executive order: "Preventing the spread of illness in the workplace saves money; healthy employees are more productive. Further, providing earned sick time improves morale and keeps turnover low."[66] Indeed, the Main Street Alliance found that 65 percent of the over 1,000 small businesses they questioned would support a national sick time standard.[67]

Similarly, many small businesses support responsible contractor policies. High-road businesses have reported that they are more likely to bid on contracts since Washington DC enacted its enhanced responsibility review process. Allen Sander, chief operating officer of Olympus Building Services Inc. wrote that:[68]

> "Too often, we are forced to compete against companies that lower costs by short-changing their workers out of wages that are legally owed to them. The District of Columbia's contractor responsibility requirements haven't made the contracting review process too burdensome. And now we are more likely to bid on contracts because we know that we are not at a competitive disadvantage against law-breaking companies."

That's why many law-abiding businesses are supporting the Fair Pay and Safe Workplaces Executive Order: because they believe it will help them compete on an even playing field without representing an

undue burden on their company.[69] Indeed, in 2015 at a hearing in this very committee, construction contractor Bill Albanese stated, "It makes good business sense to vet the contractor before he gets the job. It's common in our industry; we do it all the time, and we don't see it as being a burden to any legitimate fair contractor that's playing by the rules."[70]

Conclusion

President Obama's contractor executive actions can help address significant problems in the economy, benefiting not only workers, but also businesses and taxpayers. The President's actions often build upon similar policies at the state and local level that have proven quite successful. What's more, many private companies already employ similar practices.

Not surprisingly, these executive orders draw a wide range of support. Organizations ranging from civil rights groups to good government groups, worker organizations, people with disabilities, veterans groups, women's organizations, and a number of businesses have expressed support for many of these executive actions.[71] In short, these executive actions represent good policy.

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[1] Below is a partial list of supporters of some of the executive actions. For example, the NAACP, AFL-CIO, National Women's Law Center, and National Disability Rights Network have supported Executive Order 13658 to increase the minimum wage for federal contractors. The Leadership Conference on Civil and Human Rights, NAACP, National Women's Law Center, and National Employment Law Project, support Executive Order 13706 to extend paid sick leave to federal contractors. The Human Rights Campaign, Anti-Defamation League, American Civil Liberties Union, and NCAAP have supported an executive order to ban federal contractors from discriminating against LGBT employees. The Leadership Conference on Civil Rights the Project on Government Oversight, AARP, SEIU, the Consortium for Citizens with Disabilities, Paralyzed Veterans of America, and the Campaign for Quality Construction, a coalition of 20,000 employers, have supported the Fair Pay and Safe Workplaces Executive Order. NAACP, "NAACP Statement on Increasing the Minimum Wage of Employees of Federal Contractors," available at http://www.naacp.org/press/entry/naacp-statement-on-increasing-the-minimum-wage-of-employees-of-federal-cont (last accessed September 2016); U.S. Department of Labor, "Establishing a Minimum Wage for Contractors: Final Rule," available at https://www.federalregister.gov/articles/2014/10/07/2014-23533/establishing-a-minimum-wage-for-contractors ; Leadership Conference on Civil and Human Rights, "Comments Re: Paid Sick Leave for Federal Contractors," available at http://www.civilrights.org/advocacy/letters/2016/proposed-rule-regarding-paid-sick-leave.html (last accessed September 2016); Anti-Defamation League and others, "Comments on an executive order that would bar discrimination by federal contractors on the basis of sexual orientation and gender identity," July 15, 2014, available at http://www.adl.org/assets/pdf/civil-rights/religiousfreedom/relatedmats/lgbt-eo-sign-on-president-obama-letter-2014-07-15.pdf (last accessed September 2016); Leadership Conference on Civil and Human Rights, "The Fair Pay and Safe Workplaces Executive Order," available at http://www.civilrights.org/advocacy/letters/2014/the-fair-pay-and-safe.html (last accessed September 2016); Project on Government Overreach, "POGO Supports Government Access to Contractor Labor Violations to Improve Compliance, Avoid Bad Actors, and Level the Playing Field," available at http://www.pogo.org/our-work/letters/2015/pogo-supports-government-access.html (last accessed September 2016); Consortium for Citizens with Disabilities, "Concerned About NDAA Language on VEVRAA and Section 503," available at http://www.c-c-d.org/fichiers/CCD-Concerned-About-NDAA-Langauge-on-VEVRAA-and-Section-503.pdf (last accessed September 2016); Campaign for Quality Construction, "Comments on Executive Order 13673: Fair Pay and Safe Workplaces," August 2015, available at http://src.bna.com/vU (last accessed September 2016).

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Opening Statement of

Chairman Richard Hanna

House Committee on Small Business

Subcommittee on Contracting and the Workforce

Hearing: "The Cumulative Burden of President Obama's Executive Actions on Small Contractors"

September 13, 2016

Thank you, Chairman Hardy. I, too, would like to start by thanking the witnesses for taking time from their busy schedules to be with us. We really do appreciate it.

Most of the issues we will examine today are not new. As Chairman Hardy mentioned in his opening statement, the Small Business Committee has done extensive work over the past two years to improve how small businesses work with the federal government. During the 114th Congress, our Committee has reported nearly 40 pieces of bipartisan legislation aimed at making it easier for small firms to do business with the federal government. Nearly 20 of these bills became law as part of last year's National Defense Authorization—and nearly 20 more are still in play in this year's NDAA.

The bipartisan work we have done here in the Small Business Committee is stark contrast to what President Obama has done during his time in office. Since 2009, the President has issued 15 Executive Orders and presidential memoranda that specifically relate to government contracting. While these mandates may be well-intentioned, too often the cost significantly outweigh the benefits. In fact, it is estimated that compliance with unique government regulations costs almost 30 cents of every contract dollar—a figure sure to increase as more of these executive actions are fully implemented.

To make matters worse, we have seen time and time again that the proposed regulations stemming from these executive actions consistently fail to comply with the Regulatory Flexibility Act, or RFA. At its most basic, the RFA is a simple, yet critical law that mandates that federal agencies give small businesses a seat at the table when they are developing both proposed and final rules.

In recent years, agencies' inability to comply with the RFA has created further difficulties for small businesses. For example, agencies frequently publish regulations that have significant flaws in their economic impact analyses or lack a discussion of significant alternatives that reduce impacts on small businesses.

Agencies also certify rules as not having a significant economic impact on a substantial number of small businesses but fail to provide a factual basis for this conclusion as the law requires. Sometimes agencies do not conduct the kind of affirmative outreach that is required under the RFA and accordingly limit the opportunity

for small businesses to provide adequate input in the rulemaking process. Unfortunately, the regulations that have come out of these presidential actions are no different in their lack of small business input. These issues cannot persist or we will continue to see innovative small firms exiting the federal marketplace, leaving taxpayers on the hook for more expensive products purchased by our federal agencies.

We have an excellent panel with us today and I look forward to hearing their testimony. Again, thank you all for being here.