Transparent and Accountable Rulemaking Require Robust Economic Analysis and DOL Has Work to Do to Fulfill this Role

Testimony of Jonathan Wolfson, The Cicero Institute, at the Hearing of the House Committee on Education and the Workforce Subcommittee on Workforce Protections on CUTTING CORNERS AT WHD: EXAMINING THE COST TO WORKERS, SMALL BUSINESSES, AND THE ECONOMY

Chairman Kiley, Ranking Member Adams, and members of the House Committee on Education and the Workforce Subcommittee on Workforce Protections: Good morning and thank you for having me today. It is an honor to testify before this subcommittee on Agency responsibility to fairly analyze the costs and benefits of potential regulations and Congress' role in scrutinizing those analyses.

My name is Jonathan Wolfson and I am the Chief Legal Officer & Policy Director for the Cicero Institute, a nonprofit think tank with a mission of identifying, developing, and advancing entrepreneurial solutions to society's toughest public policy problems. Previously I had the honor of serving as the head of the Office of the Assistant Secretary for Policy at the US Department of Labor (DOL) where I also served as the Regulatory Policy Officer and Regulatory Reform Officer or chair of DOL's Regulatory Reform Task Force.

Today's hearing focuses on recent DOL rulemakings and their costs to workers, businesses, and the economy. This discussion is important given Congress' role to ensure that agencies both accurately enforce Congress' laws and do not abuse their limited authority.

I will focus my remarks on four key points. First, a transparent, accountable regulatory process is vital for quality agency rulemaking. Second, DOL's Wage and Hour Division's (WHD) recent proposed and final rules could have far-reaching economic effects, but the Department is not fully evaluating their likely outcomes. Third, DOL is improperly using past "guidance" as evidence the public is already on notice of its new regulations. And finally, Congress has an ongoing role to play to rein in DOL and other agencies to ensure the proper Constitutional balance of powers.

1. Quality Rulemaking Requires Transparent and Accountable Regulatory Processes

Regulatory agencies hold a unique role in our Constitutional republic – they implement and enforce legislation passed by Congress and signed by the President. Regulators play quasi-legislators, filling in the blanks where statutes lack sufficient clarity. But unlike legislators, regulators can only act under authority from federal statutes and regulators also are disconnected from voters so it is difficult for the public to hold them accountable for bad regulations. In light of these challenges, past Congresses and Presidents have created a robust scheme of regulatory

process.[1] The process requirements have generally had bipartisan support, but the current efforts to revise OMB Circular A-4 depart from such a pattern.[2] Rather than using OMB's Office of Information and Regulatory Affairs (OIRA) to help ensure regulations are justified, this new proposal would have OIRA look for ways to justify imposing new regulations. If the current administration finalizes such a change, agencies may fundamentally change their protocols even though the general public has little understanding that there is a thumb on the scale in favor of more government power for all future cost-benefit analyses.

These processes encourage transparent rulemaking. Transparency means clearly articulating the need for a proposed or final rulemaking, the legal basis for the rulemaking, and the pros and cons of the rulemaking, including the estimated real costs and benefits expected to be incurred, and providing defined windows for public participation and comments. This allows the public to review a proposed regulation, submit comments, and fully participate in the rulemaking process. But when the agency opts to make law with guidance that circumvents the full rulemaking process, dismisses reasonable criticism, or misconstrues research to paint a more favorable picture for its preferred outcome, the process breaks down.

And this matters because, absent a court stepping in to invalidate a rulemaking for violating one of these required processes, there is often little accountability for such acts. Accountability is especially important when there are trade-offs between different constituents and competing interests. When, for example, one group argues that minimum wages ought to increase, but another group claims an increase will result in layoffs, the legislature must weigh those claims, but the regulatory agency need only "respond" to the concerns raised during formal notice and comment. If the Secretary supports a particular policy, and the agency staff do as well, that policy will likely prevail in a final rule. If the policy turns out to harm thousands of workers who wind up laid off, the Secretary and agency staff that wrote the response and finalized the rule will face limited accountability, if any.

Regulatory process is also important because regulatory agencies are led by political appointees who are agents of the President and may have little if any connection to the elected officials who voted for and signed the original legislation. Presidents staff federal agencies with Secretaries and others to advance the President's agenda, but the agencies frequently rely on long-ago adopted statutes for their regulatory authority. For example, the Fair Labor Standards Act was first adopted in 1938, but Wage and Hour Division regulations to this day are still rooted in that nearly century-old statute.

The regulatory process protects the public from a system that lets unaccountable bureaucrats make laws. And Congress should do everything in its power to maintain these protections, even if those protections wind up slowing down regulatory changes members of Congress or their constituents might prefer.

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[1] S*ee,* e.g., The Administrative Procedures Act, Regulatory Flexibility Act, Paperwork Reduction Act, Executive Order 12866, OMB Circular A-4, etc.
[2] 88 FR 20915.

2. Recent Wage & Hour Division Rulemakings Lack Transparency in Comparing Costs and Benefits

The Wage and Hour Division has issued or proposed multiple regulations that could have significant effects on the economy. On their face, the proposals and final rules generally argue that the costs are low and the benefits would far exceed the costs. Unfortunately, DOL is failing to fully evaluate the costs and benefits of these rules, which undermines the opportunity for the public and Congress to scrutinize and provide oversight. As discussed above, by ignoring or giving short shrift to the necessary analysis, these rules wind up undermining the entire notice and comment regime's transparency goals.

Because WHD's regulations reach into nearly every business in the country, transparent economic analysis is vital. These rules should include robust discussion of the tradeoffs that will inevitably occur when the government requires businesses to pay higher wages or provide certain fringe benefits. But unfortunately, some of DOL's regulatory impact analysis and costs and benefits discussion appear to be looking for ways to ignore costs or claim benefits well in excess of the costs, even if those benefits are merely a preference for a hoped-for policy outcome and have no foundation in a detailed economic analysis.

For example, in the Independent Contractor NPRM, DOL claims a benefit because some current independent contractors will be reclassified as employees, but fails to acknowledge that some other independent contractors will have their contracts cancelled.[3] Specifically, DOL claims that the proposed rule will not result in massive reclassifications from independent contractor to employee in order to avoid admitting that employers could face substantial transition costs,[4] but a few pages later claims that misclassification is substantial[5] and relies on the substantial number of currently misclassified workers who would be converted to employees as a primary benefit of the proposed rule. In fact, DOL claims these reclassified workers would receive over $15,000 in fringe benefits, the most sizable financial justification for implementing the rule, while simultaneously ignoring the real risk that these fringe benefits will come at the cost of a decrease in take-home pay as employers shift compensation to pay for the new benefits.

Unfortunately, this is not the only game DOL is playing in its cost-benefit analysis. The other, likely more impactful, omission is the fact that some independent workers may be at risk of losing their opportunity if the business is concerned that the work *could* now fall into the employment category. California's adoption of the ABC test under Assembly Bill 5 in 2019 is illustrative as we know that many freelancers were told their contracts would not be renewed post-AB5.[6]

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[3] *See* 87 FR 62218.
[4] S*ee* 87 FR 62260.
[5] *See* 87 FR 62266.
[6] *See* Los Angeles Times "Vox Media cuts hundreds of freelance journalists as AB 5 changes loom" available at: https://www.latimes.com/business/story/2019-12-17/vox-media-cuts-hundreds-freelancers-ab5; Society for Human Resource Management "California Freelancers Closer to Getting a Break from Strict Contractor Rules" available at: https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/california-freelancers-closer-to-getting-a-break-from-strict-contractor-rules.aspx.

By ignoring the potential that workers will lose opportunity, DOL can claim that the benefits of the policy will far exceed the "regulatory familiarization" costs. But not presenting substantial counter arguments leaves workers, businesses, the public, and Congress without details they should be able to rely upon when deciding whether and how to comment on the proposed regulation.

The public comment process nonetheless provides an avenue for vigilant outside parties to raise these issues that DOL omitted, and DOL still received tens of thousands of comments on the Independent Contractor NPRM. DOL could review all the comments it received on the proposed Independent Contractor rule, identify this concern, and adjust its economic analysis accordingly.

Possibly more problematic is how DOL deals with comments that raise facts the Department prefers to ignore. For example, in the Federal Contractor Minimum Wage final rule[7] DOL tried to argue that a comment from Chairwoman Foxx and Representative Keller vastly overstates the risk that a higher federal contractor minimum wage would have a disemployment effect:

> Representatives Foxx and Keller also cite a 2021 working paper by David Neumark and Peter Shirley that reviewed 30 years of literature on the impacts of a minimum wage increase. The commenters note that 79 percent of the studies showed that an increase in the minimum wage leads to a decrease in the level of employment. However, only 54 percent of the cited studies found a statistically significant negative impact at a 10 percent significance threshold; not statistically significant impacts cannot be distinguished from zero impact. Additionally, the median elasticity from the literature is −0.112. This implies that for a 1 percentage point increase in wages, employment would fall by 0.112 percent. **An elasticity of this magnitude is generally considered small.** Finally, many of the studies in this review are not applicable to this specific rule.[8]

To bolster dismissing the concern, the Department claims "The consensus among a substantial body of research is that disemployment effects [from minimum wage hikes] can be small or non-existent. Therefore, the Department believes this final rule would result in negligible or no disemployment effects."[9] However, these claims ignore the Department's own calculations and the Department's own admission that "The employment effects of a $15 minimum wage can be quite different depending on whether current wages are already close to $15 or substantially lower."[10]

Using the Department's own calculations would mean that contractors will reduce their employee headcount by between 39,000 and 210,000.[11] But rather than try to argue that the

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[7] *See* 86 FR 67126.
[8] 86 FR 67212 (emphasis added).
[9] 86 FR 67211.
[10] 86 FR 67211.
[11] Since the current federal minimum wage is $7.25/hour, an increase to $15 is a 106 percentage point increase. By the Department's own calculations, that means that some 39,000 of the 327,000 federal contractor employees making below President Biden's minimum wage would lose their jobs, a 12% reduction in employment. [106 x -.00112 = 11.972%]. If the spillover effect of higher wages across a contractor's employees means that the overall

benefits to the federal government, the citizens, and those with higher pay will exceed the costs from a reduction in employment, the Department merely claims there will be "small or non-existent" job loss and proceeds to quantify the many benefits it hopes will come with higher pay.

In sum, the Department's decision to highlight benefits and ignore costs or to pretend that costs are negligible when they might be quite high, makes it more difficult for citizens to participate in the rulemaking process and evaluate the proposed and final rules. It also greatly hinders Congress' oversight function and the courts' ability to fully evaluate whether the rulemaking meets the Administrative Procedure Act requirements.

3. Rulemaking by Guidance Is All the More Problematic

To avoid scrutiny, sometimes agencies attempt to call their regulatory actions "guidance." Guidance ought to be compliance assistance – materials designed to help regulated businesses and individuals know their options to comply with the law. But far too often, an agency will make a new rule and, rather than subject it to the required process, simply call it "guidance." Guidance need not go through notice and comment under the Administrative Procedures Act, but can still influence how businesses operate.

Guidance has been a flashpoint for political controversy with conservatives arguing that agencies are abusing their authority and liberals responding that this concern is overblown and that agencies rarely issue guidance that meets the definition of binding law. This controversy became all the more pronounced under President Trump's Executive Order 13891 when every agency was required to review and make every guidance document publicly available.[12] On his first day in office, President Biden revoked Executive Order 13891.[13] Under President Biden's revocation, DOL rescinded the PRO Good Guidance Rule limiting the improper use of guidance and the Wage and Hour Division has not posted a single guidance document to DOL's guidance portal this calendar year.[14]

But the Current DOL has gone even further than President Biden's Executive Order. Not only is DOL still issuing guidance documents which some contend ought to go through the regulatory process, but now DOL is misusing the existence of past guidance as proof that employers and

contractor labor force would be affected by such a change and not only those currently making below the new threshold, some 210,000 federal contractor employees would be at risk of losing their jobs. And even assuming that every federal contractor employee is making at least the $10.95 required under President Obama's previously rescinded executive order, nearly 73,000 federal contractor employees would be at risk of losing their jobs due to this policy [37 percentage point * (-.00112 = 4.14%; .0414 x 176,1700 = 72,977].

[12] Executive Order 13891 Promoting the Rule of Law Through Improved Agency Guidance Documents, available at: https://www.federalregister.gov/documents/2020/03/04/2020-04458/executive-order-13891-promoting-the-rule-of-law-through-improved-agency-guidance-documents.

[13] Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation, available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-revocation-of-certain-executive-orders-concerning-federal-regulation/.

[14] https://www.dol.gov/guidance?combine=&field_agency_target_id=57&field_form_of_guidance_target_id=All&year_issued=&field_date_posted_website=2023&field_significant_value=All&sort_by=field_date_issued_updated_value&items_per_page=10

other regulated entities will be satisfied with the new regulation or at least that the new regulation will not surprise the public. And in their economic analysis of regulations, the current DOL claims that it need not account for major changes in behavior if the regulation merely codifies prior DOL guidance.[15]

Agencies cannot have it both ways. DOL must decide either that guidance is binding across all regulated entities, in which case it typically will need to go through the regulatory notice and comment process or that guidance is not binding and that imposing new binding regulations that codify guidance must be analyzed as the new burden it is.

4. Congress Must Reclaim Its Oversight and Legislative Roles

In light of these challenges, Congress can and should take three steps. First, Congress should pursue oversight to ensure agencies stay within their statutory authority and, more importantly, follow every required regulatory process. Second, Congress should write clearer and more detailed laws and add greater detail to statutes about what activity Congress seeks to promote or punish to leave less room for agency interpretations that will have such dramatic effects on the economy. And finally, Congress may want to consider its own regulatory analysis body to complement the REINS Act which would give Congress power to evaluate significant regulations before they become legally binding.[16]

Agencies do not have absolute power over a bill once it becomes a law. Rather, Congress has continued authority to review the work of agencies, via the Congressional Review Act, appropriations, and oversight hearings. Congress may conduct oversight to scrutinize the analysis that goes into a proposed or final regulation. For the most impactful regulations, Congress could convene hearings with outside experts to scrutinize the economic analysis supporting a proposed regulation. And Congress must intervene if the executive branch tries to alter the regulatory process and make it easier for a regulator to ignore costs and exaggerate benefits.

But Congress shares some responsibility for a large and growing administrative state. Members and staff should scrutinize their own bills, do all they can to reduce ambiguity, and minimize delegating authority to agencies to do the hard work of parsing out specifics. And for old statutes that Congress no longer wants agencies to rely upon or that were written in a time that lacks many of the modern economic relationships workers have come to rely upon, Congress has a responsibility to revise, modernize, or rescind outdated statutes to protect work relationships, like independent contracting, that can free workers to grow our economy into the future.

Congress' role is to write the laws and Congress should take this responsibility seriously. Laws that restrict administrative agency legislative activity are one way to restore the proper relationship between the legislative and executive branches. Policies like the REINS Act can do

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[15] *See, e.g.,* Davis Bacon: "The Department proposes a number of revisions to § 1.5 to clarify the applicability of general wage determinations and project wage determinations. Except as noted below, these revisions are consistent with longstanding Department practice and subregulatory guidance." (87 FR 15713); Tips rule (Federal Register :: Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal) (86 FR 60116-60118); Independent Contractor: (87 FR 62222-62224).

[16] H.B. 277 "Regulations from the Executive in Need of Scrutiny Act"

just that: it can restore constitutional order and rebalance legislative authority into the legislative branch. But even the REINS Act itself relies on regulatory analysis written by the administrative state. Congress could consider its own regulatory analysis office akin to the Office of Management and Budget's Office of Information and Regulatory Affairs, that would provide independent review and economic analysis of proposed regulations.

Complaining about overly burdensome regulations written by unelected, unaccountable bureaucrats is easy, but the American people – workers, small business owners, and the customers who rely on their goods and services – need more than complaints. They need regulations that will advance the policies passed by our elected representatives in the most cost-effective manner possible. They need the opportunity to participate in a transparent rulemaking process. And they need legislators who will write clear laws and step in when agencies try to exceed their authority.

I am grateful for the opportunity to share my perspective and look forward to your questions.