

Congress of the United States  
U.S. House of Representatives  
Committee on Small Business  
2561 Rayburn House Office Building  
Washington, DC 20515-6515

November 2, 2023

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

The Honorable Christopher J. Williamson  
Assistant Secretary of Labor  
U.S. Mine Safety and Health Administration  
201 12<sup>th</sup> St. S. Suite 401  
Arlington, VA 22202

Dear Acting Secretary Su and Assistant Secretary Williamson:

The House Committee on Small Business (the Committee) writes regarding the Department of Labor's (DOL) policy to not discuss its proposed rules with Congress. As part of the Committee's investigation into how agencies comply with the Regulatory Flexibility Act (RFA), the Committee sent the DOL and the Mine Safety and Health Administration (MHSa) letters seeking a deeper explanation of two recently proposed rules' impact on small businesses.<sup>1</sup> In response, the DOL and the MHSa indicated they will not discuss proposed rules with Congress.<sup>2</sup> The Committee vehemently disagrees with the DOL's policy and seeks a deeper explanation of how the DOL complies with Congressional requests for information.

In response to letters from the Committee, the DOL and the MHSa indicated it was against their policy to comply with Congressional requests for information on its proposed rules.<sup>3</sup> In a follow up conversation between Committee and DOL staff, DOL staff indicated that this was an internal practice and they did not believe an actual written policy existed.<sup>4</sup> The DOL also indicated in their response that they would submit the Committee's letter as a comment on its rule, and may address the Committee's concerns in the preface to its final rule.<sup>5</sup> Leaving a comment on this proposed rule was not the Committee's intent when sending our communications, and our questions were not rhetorical comments for the record; the Committee is well aware of the process it should go through to submit comments on rules. The Committee

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<sup>1</sup> Letter from Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus., to Julie A. Su, *et al.* Acting Sec'y, U.S. Dep't of Labor (Jul. 20, 2023); Letter from Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Sept. 28, 2023).

<sup>2</sup> Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor., to Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus. (Sep. 1, 2023) (Through discussions with the DOL Office of the Solicitor, the Committee was informed that DOL would not provide substantive responses on any letters sent regarding its proposed rules).

<sup>3</sup> Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor., to Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus. (Sep. 1, 2023).

<sup>4</sup> Call between H. Comm. on Small Bus. Staff and Dep't of Labor Staff (Oct. 16, 2023) (notes on file with Committee Staff).

<sup>5</sup> Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor., to Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus. (Sep. 1, 2023).

disagrees with the DOL's conclusion that communications regarding this rule constitute comments for the record, and the DOL's belief that a nonspecific response included in the preamble to its final rule is a sufficient response to this Committee.

Pursuant to House Rule X, this Committee has a duty to the House of Representatives and the American people to legislate and conduct oversight on "the problems of all small business."<sup>6</sup> The Committee cannot conduct oversight if the DOL continues to withhold requested information. Similarly, the Committee cannot draft adequately informed legislation without the DOL's input on substantive questions. As a general rule, *ex parte* communications between federal agencies and Congress are encouraged for Notice-and-Comment rulemakings such as these.<sup>7</sup> Courts have found that better legislation and rules are created when agencies and Congress work together to create rules which implement legislation correctly.<sup>8</sup> This is valuable since agencies are tasked with implementing laws and have subject matter expertise in the relevant field, while Congress is responsible for passing the laws, thus having a better understanding of its intent and purpose.

In your responses to the Committee, you indicated "the Department examined the impact of the proposed rule on small businesses, in accordance with the Regulatory Flexibility Act."<sup>9</sup> While it is reassuring the DOL claims to have considered these interests, the purpose of our letter was to ensure that the DOL was, indeed, complying with their obligations to small businesses. Congress' authority to conduct oversight is inherent in Article I, sec. 1 which states: "All legislative powers herein granted shall be vested in a Congress of the United States." The United States Supreme Court has consistently affirmed Congress's authority to conduct oversight and investigations, holding that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."<sup>10</sup> Rule X of the Rules of the United States House of Representatives delegates this responsibility to standing committees.<sup>11</sup>

Denying the Committee the requested information prevents it from upholding and acting in furtherance of its legislative function, namely reviewing regulatory burdens imposed on small businesses by federal agencies and determining how they may be alleviated.<sup>12</sup> This includes the ability of this body to initiate investigations to inform itself about how existing laws function, whether new laws are necessary and if old laws should be repealed or altered. Responding substantively to the Committee's letter using information available in the docket, or information

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<sup>6</sup> Rules of the House of Representatives, Rule X(1), 118th Cong. (2022).

<sup>7</sup> MAEVE P. CAREY, *ET AL.*, CONG. RESEARCH SERV., IF12368, COMMUNICATIONS BETWEEN CONGRESS AND FEDERAL AGENCIES DURING THE RULEMAKING PROCESS (Mar. 30, 2023).

<sup>8</sup> *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981).

<sup>9</sup> Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor., to Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).

<sup>10</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

<sup>11</sup> *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

<sup>12</sup> Rules of the House of Representatives, Rule X(1)(q)(1), 118th Cong. (2022).

DOL makes available prior to the final rule, would in no way undermine the completeness of the docket or effectiveness of this rulemaking.<sup>13</sup>

It is important for agencies to examine small businesses interests—which make up 99.9 percent of all businesses in the United States—when passing any new rule. America’s small businesses deserve to have their voices heard and considered. Seeing no valid reason for the DOL withholding information on this rule, we reiterate our requests from our July 20, 2023 and September 28, 2023 letters as well as request the following additional information as soon as possible but no later than November 16, 2023:

1. A copy of DOL’s policy with regard to sharing information with Congress generally.
  - a. An explanation of when this policy was implemented, and any policy which may have predated DOLs current policy regarding sharing information with Congress.
2. A copy of DOL’s policy with regard to responding to Congressional oversight requests related to a proposed rule.
  - a. An explanation of when this policy was implemented, and any policy which may have predated DOLs current policy regarding sharing information with Congress.
3. An explanation of the legal reason the DOL believes sharing information with Congress regarding proposed rules is improper.
4. An explanation for DOL’s rationale for not engaging in *ex parte* communications with Congress about proposed rules.
5. All training and supplemental support materials provided by the DOL to its employees regarding the Regulatory Flexibility Act.
6. An explanation for how the DOL accounts for the disparate costs incurred by small businesses compared to larger businesses, when conducting rulemaking.

For your convenience, the requests from the July 20, 2023 and September 28, 2023 letters are copied below:

1. What impact would this rule have on entrepreneurs seeking to open a new mine?
2. In its Initial Regulatory Flexibility Analysis, MSHA proposed an alternative rule which would accomplish the department’s goals while reducing the cost of this rule on small

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<sup>13</sup> Administrative Procedure Act (APA), 5 U.S.C. § 553; *See also* JONATHAN GAFFNEY, CONG. RESEARCH SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) (Dec. 8, 2020).

businesses by nearly 30 percent. Why did the MSHA not select this option as its primary proposal?

3. This rule justifies not permitting mines to rely on Powered Air Purifying Respirators (PAPRs) because “respiratory protection should only be relied upon as an exposure control measure in limited situations and on a temporary basis.” During the multi-year COVID-19 Pandemic, the CDC asserted that the respiratory protection provided by cloth and N-95 masks was an effective, reliable, and useful tool in mitigating the inhalation and spread of the SARS-CoV-2 virus. Why would respiratory protection used by untrained civilians be effective at preventing the inhalation of a virus, which measured just microns, but superior respiratory protection, such as PAPRs, be ineffective at preventing the inhalation of silica dust particles, which are up to ten times larger?
4. What specific acts does MSHA expect small mines to undertake that will increase their compliance costs?
5. Table IV-3 within the proposed rule indicates that stone cutting operators were at nearly twice the risk of severe silica inhalation when compared to any other mining operator. Why then, does this rule not account for variations such as the location of the mine, or the material being mined, when creating the assessment and record keeping standards?
6. According to the proposed rule, there is no data available to determine whether small businesses are more or less likely than non-small businesses to employ exempt EAP workers or affected EAP workers. The DOL states that the best assumption available is to assign the same rates to all small and non-small businesses. How did the DOL come to this conclusion?
7. The DOL uses data from 2017 to estimate the number of impacted small businesses.<sup>6</sup> This data is already six years old and is out-of-date. Does the DOL have any more recent data to verify these numbers?
8. The DOL estimates that it would take only an hour for each entity to become familiar with the content of this rulemaking. However, since small entities often have limited human resources or legal personnel on staff, how did the DOL reach the conclusion that it will only take an hour?
9. The DOL expects that small entities would rely on compliance assistance materials provided by the DOL or industry associations to become familiar with the final rule.<sup>7</sup> Where exactly can small businesses access these materials and what materials are provided?
10. The DOL estimates that the rule would affect 1.3 million workers who are employed by between 179,700 and 1.3 million small entities; comprising from 2.8 percent to 20.8

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percent of all small entities. This is an unacceptable large range. Does the DOL expect the number of affected small entities to be closer to 1.3 million or 179,700?

11. The proposed rule states that it is possible that the costs of the proposed rule are disproportionately large for small entities. What alternatives have been considered to lessen the impacts on small businesses?

To schedule the delivery of your response or ask any related follow-up questions, please contact Committee on Small Business Majority Staff at (202) 225-5821. The Committee on Small Business has broad authority to investigate “problems of all types of small business” under House Rule X. Thank you in advance for your cooperation with this inquiry.

In God We Trust,

A handwritten signature in black ink, appearing to read "Roger Williams". The signature is fluid and cursive, with a large initial "R" and "W".

Roger Williams  
Chairman  
Committee on Small Business

cc: The Honorable Nydia M. Velasquez, Ranking Member  
Committee on Small Business