Via Electronic Submission

August 27, 2021

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington DC 20210

Re: RIN 1235–AA41, Notice of Proposed Rulemaking on Increasing the Minimum Wage for Federal Contractors

Dear Ms. DeBisschop:

The Home Care Association of America (HCAOA) respectfully submits these comments to the U.S. Department of Labor's Wage and Hour Division in response to the above-referenced proposed rule published in the Federal Register on July 22, 2021, at 86 Fed. Reg. 38816 (the Proposed Rule), promulgated pursuant to Executive Order 14026 (April 27, 2021) (the Executive Order). For the reasons set forth below, we request the Department provide clarity in its Final Rule that certain home care providers providing care to veterans by way of Veterans Care Agreements with the Veterans Administration or Agreements with the entities operating the Veterans Affairs Community Care Network (VACCN) ae exempt from the requirements of the Executive Order, and that any final regulation implementing the Executive Order make that exemption explicit. Such language would ensure consistency with the implementation of the prior Executive Order for Federal Contractor minimum wage issued by President Obama in February, 2014. It would also ensure consistency with the implementation of the Executive Order to providers of home and community based services (HCBS) for Medicaid and Medicare beneficiaries. The Executive Orders by both Administrations exempt providers participating in Center for Medicare & Medicaid Services (CMS) HCBS programs.

By way of background the HCAOA is the home care industry's leading trade association, and currently represents nearly 4,000 companies that employ more than 500,000 caregivers across the United States. The HCAOA member provides a broad range of services that supports seniors, the disabled and the medically-frail's wellbeing and enables them to age in place. The HCAOA protects industry interests, promotes industry values by setting the standard of high-quality care, tackles barriers to growth and represents the industry's voice in Washington DC and state governments across the country. HCAOA is a champion and advocate for its members, for caregivers, and for seniors, the disabled and the medically-

frail across America. Among its purposes, the HCAOA seeks to support care in the home, which is the least risk setting to our aging population and to foster economic growth.

Home health providers deliver services in the home often identical to those provided in post-acute care facilities, in a non-acute setting. In simpler terms, this means the delivery of these services in an isolated environment, consistent with guidance for "social distancing" and non-exposure to COVID-19 promulgated by health officials. Additionally, home health providers deliver emergency back-up staffing services to hospitals, rehabilitation facilities, and nursing homes. These health care workers are an integral component of post-hospitalization or other acute care, and help to prevent readmission to the acute health care system, an outcome particularly desirable where, as now, there is great concern that our acute health care delivery system may be overloaded by those exposed to or who have contracted COVID-19.

Home health providers work to ensure that seniors and medically frail individuals—those most at risk in the fact of COVID-19—stay out of hospitals and other acute-care facilities, and ensure that those facilities are able to maintain adequate staffing levels, and are not unnecessarily over-taxed where quality care can be provided in a non-acute setting. Moreover, in many instances, they provide continuity of care to patients in post-acute setting, on either a short-term or long-term basis.

When seniors and other medically-frail individuals are unable to obtain home or residential care, they are, of necessity, required to obtain this care in hospitals or other acute care facilities. The increased cost of obtaining care in these settings is likely then to be borne by patients, further exacerbating the cost of care, and increasing the burden on our already over-taxed health care system.

In fact, as explained in greater detail below, Congress has already recognized the need to exempt much of VA health care contracting from the laws governing federal contracts for the acquisition of good or services, making it unlawful to apply the Executive Order and accompanying rules to the contracts under which our members provide home care to veterans.

Many home care agencies have agreements with the entities that operate the VACCN provider network to provide home care for qualified veterans. The current VA fee schedule is set based on market conditions and does not currently account for a nationwide $15/hour minimum wage. Should clarity not be provided in the Final Rule, there could be a severe reduction in the number of providers in many areas of the country, particularly rural areas that are already struggling to meet healthcare needs. The Center for American Progress reports that 1/5th of the U.S. population – and consequently many veterans needing home care – reside in rural areas.[1] Without corresponding reimbursement for a federal

[1] "Redefining Rural America," Olugbenga Ajilore & Zoe Willingham, Center for American Progress (July 17, 2019), available at: https://www.americanprogress.org/issues/economy/reports/2019/07/17/471877/redefining-rural-america/.

mandated minimum wage for these services, providers will need to withdraw participation from these sorely-needed programs.

For these reasons, we urge that the Department include in any Final Rule an express exemption for home care providers providing services pursuant to certain agreements with the U.S. Veterans Administration, including Veterans Care Agreements and services provided via the VACCN. More broadly, HCAOA respectfully submits that the Executive Order pursuant to which the Department has engaged in this rulemaking exceeds the bounds of what may permissibly imposed on contractors absent explicit Congressional action, and should be withdrawn.

I. *Congressional Instruction Requires that Providers Providing Services Under Veteran's Care Agreements and Community Care Networks Must Be Expressly Excluded from the Definition of Covered "Federal Contractors" or "Subcontractors" Under the Final Rule.*

The failure of our nation's provision of timely, quality health care to veterans in too many instances is well-documented.[2] For this reason, in 2018, Congress recognized the need to provide veterans with better access to health care by way of the VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act (VA MISSION Act), P.L. 155-182, *codified at* 38 U.S.C § 1703A *et seq*. The VA MISSION Act enables the Veterans Administration to provide certain authorized forms of community care by way of "Veteran's Care Agreements" (VCAs) with community providers:

> AGREEMENTS AUTHORIZED.—(1)(A) When hospital care, a medical service, or an extended care service required by a veteran who is entitled to such care or service under this chapter is not feasibly available to the veteran from a facility of the Department or through a contract or sharing agreement entered into pursuant to another provision of law, the Secretary may furnish such care or service to such veteran through an agreement under this section with an eligible entity or provider to provide such hospital care, medical service, or extended care service.

38 U.S.C. § 1703A(1)(a). In so doing, the law made clear that subject to exceptions not relevant here, these VCAs would not result in providers being classified as "federal contractors" for any other purpose:

> APPLICABILITY OF OTHER PROVISIONS OF LAW.—(1) A Veterans Care Agreement may be authorized by the Secretary or any Department official authorized by the Secretary, and such action shall not be treated as— (A) an award for the purposes of such laws that

[2] *See, e.g.,* Government Accountability Office Report, "VA HEALTH CARE: VA Faces Challenges in Meeting Demand for LongTerm Care" (March 2020), available at: https://www.gao.gov/assets/gao-20-463t.pdf.

> would otherwise require the use of competitive procedures for the furnishing of care and services; or (B) ***a Federal contract for the acquisition of goods or services for purposes of any provision of Federal law governing Federal contracts for the acquisition of goods or services…***

38 U.S.C. § 1703A(i)(1) (emphasis added).

Subsequent to the enactment of the MISSION Act, and so as to fulfill the law's requirements, the Veterans Administration created the VACCN so as to ensure that veterans receive "timely, high-quality care."[3] The VACCN is composed of six regional networks operated by two entities (TriWest Healthcare Alliance and OptumServe) that serve as the contract vehicle for the VA to purchase care from community providers, such as home health care providers. By way of the VACCN, home care providers enter into ancillary agreements with TriWest Healthcare Alliance or OptumServe. The VACCN is now the primary delivery mechanism for home health care to veterans.

Consistent with the MISSION Act, VACCN ancillary agreements do not impose on home care providers any obligations under the Service Contract Act (SCA) or Executive Order 11246, which places certain affirmative action and non-discrimination requirements on federal contractors and is enforced by the Office of Federal Contracts Compliance Programs (OFCCP). The exclusion of CCN providers recognizes that application of these requirements to them would result in an inability of many providers to participate and provide service by way of the VACCN. Indeed, OFCCP itself recognized this fact when on October 20, 2021, it extended its 2014 moratorium on enforcement of Executive Order 11246 against VACCN providers through May 2023.[4]

While we understand the salutary purpose of the Executive Order and Proposed Rule, we submit that with respect to home care providers providing services to veterans by way of VACCN agreements, we fear that a Final Rule which does not recognize and expressly exclude these providers from the definition of federal contractor for purposes of the Order will have the opposite effect. If home care providers providing services through the VACCN cannot be certain that they are excluded from the increased minimum wage mandate, this will inevitably lead numerous providers to cease operating under these agreements as a matter of economic viability. The result will diminish the needed and cost-effective care veterans are now getting through the VACCN—plainly not what Congress intended when it adopted the VA MISSION Act, nor what the VA intended when it created the VACCN to fulfill its statutory requirements. It would also be inconsistent with the implementation of President Obama's Executive Order on the same subject, and the application to other HCBS services in CMS programs.

[3] *See* https://www.va.gov/COMMUNITYCARE/providers/Community_Care_Network.asp.
[4] *See* USDOL OFCCP Dir. 2021-01, available at: https://www.dol.gov/agencies/ofccp/directives/2021-01.

II. *The Executive Order, and the Department's Proposed Rule, Exceeds the Authority of the Executive Branch and Should Be Withdrawn.*

Beyond the issue specific to our membership set forth above, the HCAOA submits that given the comprehensive scheme of federal contractor minimum wage regulation which Congress has established under various statutes, including the SCA, the Davis-Bacon Act (which applies to federal construction projects), and the Fair Labor Standards Act, the Executive Order and Proposed Rule exceed the statutory and constitutional authority of the Executive Branch and is thus unlawful.

Through the SCA and the Davis-Bacon Act, Congress has set forth a comprehensive legal scheme regulating the wages paid to workers on various federal contracts and specifically the minimum wage for government construction and services contracts.[5] The Executive Order would bypass that scheme, and impose an across-the-board minimum wage increase for federal contractors, which Congress has expressly declined to do.

As courts have plainly held, an Executive Order that seeks to regulate conduct in contravention of statute, or where Congress has expressly set the metes and bounds of lawful conduct unlawfully usurps the power of the legislative branch, and is thus invalid. *See, e.g., Chamber of Commerce v. Reich,* 74 F.3d 1322 (D.C. Cir. 1996) (holding that Federal Property and Administrative Service Act governing federal procurement was intended to ensure only that federal procurement was conducted in an "efficient and economical manner" and did not authorize president to prohibit government contractors from hiring strike replacements where such is expressly permitted under National Labor Relations Act). Insofar as the subject Executive Order seeks to impose wage requirements on federal contractors beyond those expressly set by Congress, it unduly and unlawfully impinges on the prerogatives of the Legislative Branch., and should be withdrawn.

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We thank the Department for consideration of these comments.

Sincerely yours,

Vicki Hoak
Executive Director
Home Care Association of America

[5] *See* 40 U.S.C. § 3142(b) (providing under Davis Bacon Act that "minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing"); 41 U.S.C. § 6703 (requiring contract under Service Contract Act to specify minimum wage "in accordance with prevailing rates").