AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

BURDENSOME REGULATIONS: EXAMINING THE BIDEN ADMINISTRATION'S FAILURE TO CONSIDER SMALL BUSINESSES

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

SECOND SESSION

HEARING HELD
MAY 22, 2024



Small Business Committee Document Number 118–052
Available via the GPO Website: www.govinfo.gov

U.S. GOVERNMENT PUBLISHING OFFICE
55–530 WASHINGTON : 2024

HOUSE COMMITTEE ON SMALL BUSINESS

ROGER WILLIAMS, Texas, *Chairman*
BLAINE LUETKEMEYER, Missouri
PETE STAUBER, Minnesota
DAN MEUSER, Pennsylvania
BETH VAN DUYNE, Texas
MARIA SALAZAR, Florida
TRACEY MANN, Kansas
JAKE ELLZEY, Texas
MARC MOLINARO, New York
MARK ALFORD, Missouri
ELI CRANE, Arizona
AARON BEAN, Florida
WESLEY HUNT, Texas
NICK LALOTA, New York
CELESTE MALOY, Utah
NYDIA VELÁZQUEZ, New York, *Ranking Member*
JARED GOLDEN, Maine
KWEISI MFUME, Maryland
DEAN PHILLIPS, Minnesota
GREG LANDSMAN, Ohio
MARIE GLUESENKAMP PEREZ, Washington
SHRI THANEDAR, Michigan
MORGAN MCGARVEY, Kentucky
HILLARY SCHOLTEN, Michigan
JUDY CHU, California
SHARICE DAVIDS, Kansas
CHRIS PAPPAS, New Hampshire

BEN JOHNSON, *Majority Staff Director*
MELISSA JUNG, *Minority Staff Director*

CONTENTS

OPENING STATEMENTS

Hon. Roger Williams 1
Hon. Sharice Davids 3

WITNESSES

Mr. Paul J. Ray, Director, Roe Institute for Economic Policy Studies, The Heritage Foundation, Washington, DC 5
Mr. Daniel Goldbeck, Director of Regulatory Policy, American Action Forum, Washington, DC 7
Mr. Robert T. Smith, Senior Attorney, NFIB Small Business Legal Center, National Federation of Independent Business, Washington, DC 8
Mr. Todd Phillips, Assistant Professor, Georgia State University, Atlanta, GA 10

APPENDIX

Prepared Statements:
- Mr. Paul J. Ray, Director, Roe Institute for Economic Policy Studies, The Heritage Foundation, Washington, DC 28
- Mr. Daniel Goldbeck, Director of Regulatory Policy, American Action Forum, Washington, DC 39
- Mr. Robert T. Smith, Senior Attorney, NFIB Small Business Legal Center, National Federation of Independent Business, Washington, DC 45
- Mr. Todd Phillips, Assistant Professor, Georgia State University, Atlanta, GA 89

Questions and Answers for the Record:
- Questions from Hon. Alford to Mr. Paul Ray and Answers from Mr. Paul Ray 100
- Questions from Hon. Alford to Mr. Robert Smith and Answers from Mr. Robert Smith 103
- Questions from Hon. Velázquez to Mr. Todd Phillips and Answers from Mr. Todd Phillips 106

Additional Material for the Record:
- H.R. 8033 - the Regulatory Transparency for Small Businesses Act 115
- The Accurate Accounting of Regulatory Impact Act 118
- To amend Title 5, United States Code, to make certain changes in how agencies conduct periodic reviews of agency rules 121
- To amend Title 5, United States Code, to add the Department of Labor to the covered agency definition for certain regulatory flexibility analysis requirements 123
- The Assurance for Small Business Act of 2024 125
- The Enhanced Regulatory Flexibility Assessment Act 127
- The Regulatory Agenda Clarity Act 131
- The Small Business Regulatory Challenge Act of 2024 133
- Associated Builders and Contractors (ABC) 140
- Competitive Carriers Association (CCA) 142
- Job Creators Network 144
- Regulatory Flexibility Act (RFA) Report: Agencies' Noncompliance with the RFA 145
- U.S. Chamber of Commerce 196

BURDENSOME REGULATIONS: EXAMINING THE BIDEN ADMINISTRATION'S FAILURE TO CONSIDER SMALL BUSINESSES

WEDNESDAY, MAY 22, 2024

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 10:03 a.m., in Room 2360, Rayburn House Office Building, Hon. Roger Williams [chairman of the Committee] presiding.

Present: Representatives Williams, Luetkemeyer, Stauber, Meuser, Molinaro, Bean, Davids, McGarvey, Gluesenkamp Perez, Scholten, and Thanedar.

Chairman WILLIAMS. Okay. Before we get started I want to recognize Congressman Luetkemeyer from the great state of Missouri to lead us in the Pledge and a prayer.

Mr. LUETKEMEYER. Thank you, Mr. Chairman. Everybody stand. Heavenly Father, this coming weekend is Memorial Day and we want to ask your blessing on the lives of those who have served our country and died in service. Especially bless their families and give them strength to endure the hardships that they have to with their loved ones gone and also to relieve the hardships of those veterans who survive and are here among us today.

Please lead us today in our negotiations and in our endeavors here as we work for the benefit of our constituents and great people of this country. We have a lot of issues before us so we need your help. We need your leadership. We will put our hand in your hand as you lead us to make the right decisions and do your work. And in Jesus name we pray, amen.

The Pledge, please put your hand over your heart.

I pledge allegiance to the flag of the United States of America. And to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

Chairman WILLIAMS. Good morning, everyone, and I now call the Committee on Small Business to order. Without objection, the Chair is authorized to declare a recess of the committee at any time. I now recognize myself for my opening statement.

Welcome to today's hearing which will focus on how the Biden administration's burdensome regulatory agenda has negatively impacted Main Street America. I would like to start off by thanking our witnesses for being here with us today. Your input on these important issues is greatly appreciated.

One of the top priorities of this committee has been combating the burdensome red tape and regulation that hamper small businesses across America. On the flip side, since day one, this administration has unleashed their regulatory onslaught on small businesses across the country.

Unfortunately, they have repeatedly shown that they do not consider the best interests of small business owners when making rules and making regulations. The Regulatory Flexibility Act was created with the sole purpose of ensuring federal agencies consider small businesses during the rulemaking process.

This committee conducted a 15-month investigation and found most federal agencies are dodging the RFA's requirements and failing to consider the interests of small firms in the rulemaking process. All you need to do is to look at the numbers.

All final rules issued by this administration have cost over $1.4 trillion and will make over 230 million paperwork hours to comply with it. Put simply, the RFA needs to be significantly improved.

Today, in the furtherance of that effort, the committee is releasing a staff report detailing all of the problems the committee uncovered and offering potential legislative solutions. I ask that unanimous consent to enter this report into the record, and so ordered.

Now, because the RFA is now operating as a shield like it should, main street is suffering. Every business owner will tell you that regulations don't happen in a vacuum. They have a real world consequence.

Complying with the mountains of regulations is no small task for a small business. Just a couple of months ago we heard from a small business manufacturer in this hearing room that his regulatory costs have gone up 460 percent in the last 8 years. And to make matters worse, he testified that the regulations have not made products better or safer.

This is unacceptable in every way and we aren't giving our small businesses and small firms a chance to be successful if we continue down the road of regulation.

Small businesses do not have the luxury of large businesses with dedicated compliance departments. When new regulations are finalized or changed it is up to the business owner themselves to take away from their core responsibilities to understand the new requirements.

In a time when businesses are still struggling with stubborn inflation, high interest rates, and a bleak labor market, we would not be adding mountains of—we should not be adding mountains of regulations as an additional challenge that they must overcome.

So as a small business owner myself for over 52 years, I know all too well the consequences that come with piles of regulations. Every small business owner knows it, too.

It is my hope that this hearing those shed further light on the issue at hand and that we use this hearing to advance solutions that will help Main Street America. To that end, we have eight pieces of legislation attached to this hearing, and I hope our conversation today will further shape these potential problems.

I want to thank you all again for being here with us and I am looking forward to today's conversation.

And with that, I yield to my distinguished Member from the great state of Kansas, Ms. Davids.

Ms. DAVIDS. Thank you, Chairman.

Federal regulations provide the rules of the road for business nationwide impacting the everyday lives of Americans. Throughout this Congress this committee has heard testimony from witnesses that have talked about some of the benefits of these regulations. For example, the Environmental Protection Agency's rules safeguard our nation's air, lands, and waters. The Food and Drug Administration regulates products to protect and promote public health, and the Department of Labor keeps our workplaces safe.

With that said, we have also heard testimony from small businesses that certain regulations can be onerous and difficult to comply with.

Part of our role as Members of the Small Business Committee is to recognize the impact regulations have on small businesses and work to find ways to balance the shared goal of minimizing the burdens and achieving the intended effects of those regulations.

To that end, our committee passed the bipartisan One Stop Shop for Small Business Compliance Act in the 117th Congress, which was enacted into law. This bill gives small businesses nationwide a clearinghouse for regulatory compliance guides when dealing with federal rulemaking.

Democratic Members of this committee have also led on the Small Business Regulatory Relief Act introduced by Mr. Mfume, which would give the Office of the National Ombudsman the authority to work with federal agencies and provide meaningful compliance assistance and increase outreach to better serve our small businesses.

Hearing more directly from small businesses affected by federal regulations will greatly improve the rulemaking process, and this administration has taken steps to broaden public engagement and community participation in that rulemaking process.

As part of the President's executive order to modernize regulatory review, agencies are encouraged to hold listening sessions, to hear directly from impacted communities, and reduce barriers to participation.

President Biden has also issued an executive order to promote competition in the American economy. Americans have been frustrated in recent years by increased costs driven by a lack of competition, hampered supply chains, and unfair price gouging. Corporate consolidation is accelerating, which is hurting main street businesses, including small grocers, local stores, and innovators in the tech industry.

I am looking forward to hearing from our witnesses today about the impact of these executive orders, especially on boosting competition for entrepreneurs. And I firmly believe that smart, well-crafted, commonsense regulations have the potential to unleash innovation and provide critical health, safety, and environmental protections.

My hope is that we strive to find the right balance today to promote solutions that are truly going to benefit small businesses and not special interests. Thank you. I yield back.

Chairman WILLIAMS. The lady yields back.

And now I will introduce our witnesses. Now, the first witness here with us today is the Honorable Paul Ray. Mr. Ray is the director of the Roe Institute for Economic and Policy Studies at the Heritage Foundation located right here in Washington, D.C. At the Heritage Foundation, Mr. Ray's research focuses on administrative law and policy and is a frequent speaker on the federal regulatory system.

Prior to his current role, Mr. Ray served as the administrator of the Office of Information and Regulatory Affairs within the White House's Office of Management and Budget. And as the administrator Mr. Ray supervised the review of hundreds of regulations and led federal efforts on regulatory reform.

Mr. Ray is a graduate of Harvard Law School where he served on the Harvard Law Review and holds a bachelor's degree from Hillsdale College. Thank you, Mr. Ray, for being with us now. I look forward to your conversation with you, okay?

Our next witness here with us today is Mr. Dan Goldbeck. Mr. Goldbeck is the director of regulatory policy at the American Action Forum located here in D.C., and Mr. Goldbeck's research focuses on notable developments in the administrative state, the accumulation of paperwork requirements, and executive and legislative regulatory reform efforts. His research and expertise have appeared in a wide variety of media outlets, including the New York Times, The Bloomberg News, The Washington Examiner, The Hill, Investor's Business Daily, and Federal News Network.

Mr. Goldbeck earned his bachelor of arts in political science with a history minor from the University of California, Santa Barbara. And thank you for joining us today, and we look forward to conversation with you.

Our next witness here with us today is Mr. Rob Smith. Mr. Smith is senior attorney in the National Federation of Independent Businesses, also known as the NFIB located here in Washington. Since joining the NFIB, Mr. Smith has authored amicus briefs for cases affecting small businesses, including in the Supreme Court, written working papers on important issues to the small business community, including the Regulatory Flexibility Act, and created posts informing small businesses owners of new legal developments.

Mr. Smith earned his bachelor's degree in criminal justice and political science at the University of Michigan, Dearborn, and went on to earn his J.D. from George Mason University's Antonin Scalia Law School. Thank you for joining us here today, and I am looking forward to our conversation.

I now recognize Ms. Davids to briefly introduce our last witness appearing before us today.

Ms. DAVIDS. Thank you, Chairman.

The minority witness today is Todd Phillips, who is an assistant professor at Georgia State University and has a wealth of experience and knowledge in this area, and I appreciate you taking the time today to come and testify before the committee. I yield back.

Chairman WILLIAMS. The lady yields back. Thank you.

And we appreciate, again, all of you being here today.

So I will remind all of you oral testimony is restricted to 5 minutes in length. And if you see the light turn red in front of you it

means you have concluded and you should wrap up your testimony. And if you hear this, I am tapping to remind the red light that you are done, okay?

And so with that being said, I now recognize the Honorable Paul Ray for his 5-minute opening remarks.

STATEMENTS OF PAUL J. RAY, DIRECTOR, ROE INSTITUTE FOR ECONOMIC POLICY STUDIES, THE HERITAGE FOUNDATION; DANIEL GOLDBECK, DIRECTOR OF REGULATORY POLICY, AMERICAN ACTION FORUM; ROBERT T. SMITH, SENIOR ATTORNEY, NFIB SMALL BUSINESS LEGAL CENTER, NATIONAL FEDERATION OF INDEPENDENT BUSINESS; AND TODD PHILLIPS, ASSISTANT PROFESSOR, GEORGIA STATE UNIVERSITY

STATEMENT OF PAUL RAY, DIRECTOR, ROE INSTITUTE FOR ECONOMIC POLICY, THE HERITAGE FOUNDATION

Mr. RAY. Thank you, Mr. Chairman, Vice Chairman Luetkemeyer, Ms. Davids, and distinguished Members of the committee, it is a real honor to be here with you today. Thank you for the invitation.

I am the director of the Heritage Foundation's Roe Institute for Economic Policy Studies where we focus on research and education about economic and regulatory issues. As the Chair mentioned, previously from 2018 through 2021 I served in the Office of Information and Regulatory Affairs within OMB.

For the last year of that period I had the honor to serve as administrator of OIRA. In that capacity, I had the chance to form views about many of the ways our regulatory system affects the ability of small businesses to survive and thrive.

The views I express in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation.

As this committee's hearings have recently documented, America's regulatory system fails small businesses. In particular, the system does not provide a predictable pro-growth environment that small businesses need.

Today I would like to focus on some legislative initiatives that would help small businesses as they navigate the regulatory system.

The most obvious place to begin is the Regulatory Flexibility Act, but precisely because the RFA often garners so much attention in discussions about small business and regulation, I am going to talk about other potential statutory reforms that could help small businesses obtain the predictable pro-growth environment they need. After all, our small businesses need all the help they can get. Merely admitting the RFA, while essential, won't be enough.

One major problem with today's regulatory system is that it allows regulations to be issued, amended, and rescinded relatively easily, so agencies change them often and in large numbers. These frequent changes are tremendously disruptive for small business which faces much greater difficulty than their larger peers in predicting and coping with alterations in governing law.

The reason for the frenetic pace of change is simply that the executive finds it much easier to issue regulations than Congress does to legislate. One bill that would help curb the alarming pace of regulatory change is the Regulations from the Executive in Need of Scrutiny, or REINS, Act.

The REINS Act would require affirmative congressional approval for the most economically significant regulations. This approach would effectively import back into the regulatory process the deliberateness of Article I's legislative process, stabilizing the regulatory environment for our small businesses.

To survive and succeed under a regulatory system as mutable as the current one, businesses need to be able to predict future regulatory changes as far in advance as possible. But small businesses often lack the resources to monitor future regulatory developments as closely as their larger competitors.

One solution is the All Economic Regulations Are Transparent, or ALERT, Act. The bill would require agencies to submit monthly information to OIRA about each pending rule. This information would include the agencies' latest estimates of the completion dates of the rulemakings.

The bill would require OIRA to post the information received from agencies online. By requiring online publication of frequent updates to anticipated rulemaking timelines, the ALERT Act would level the playing field between large and small business, ensuring that all businesses can plan efficiently in light of the most recent developments in ongoing rulemakings.

Another major problem small businesses face is that today's regulatory system fails to provide the pro-growth environment they need to thrive. Federal agencies impose enormous costs on business owners and consumers, as the Chair mentioned. One solution is for politically accountable actors to set a regulatory budget.

The Renewing Efficiency in Government by Budgeting, or REG Budgeting Act, would direct the OMB director to set an annual regulatory budget for the federal government as a whole and for each agency.

It would forbid agencies to make a rule effective if doing so would push the author agency over its budget unless the agency first obtains permission from Congress. And it would require congressional approval of any positive regulatory budget.

Issuing regulations is not the only way agencies shape private sector conduct. They also issue guidance documents which, though they lack the force and effect of law, can powerfully influence regulated parties. Often, small businesses have trouble simply finding agency guidance, which historically has been housed on websites or even in filing cabinets scattered across the government.

The Guidance Out of Darkness, or GOOD, Act would ameliorate the difficulties of small businesses by requiring each agency to post its guidance on a single website. Guidance not featured on an agency's guidance portal would be rescinded.

Finding guidance is not the only difficulty small businesses have. Unlike more sophisticated competitors, they may not understand the difference between non-binding guidance and binding regulations. The Guidance Clarity Act would require agencies to provide

a disclaimer explaining the nonbinding quality of guidance on the first page of each guidance document.

These are some of the measures that Congress could take to level the playing field and give small businesses the stable, pro-growth environment they need. Thank you.

Chairman WILLIAMS. The gentleman yields back.

I now recognize Mr. Dan Goldbeck for his 5-minute opening remarks.

STATEMENT OF DAN GOLDBECK, DIRECTOR OF REGULATORY POLICY, AMERICAN ACTION FORUM

Mr. GOLDBECK. Chairman Williams, Congresswoman Davids, and Members of the committee, thank you for the opportunity to discuss the economic impacts small businesses face from recent rulemakings and ways agencies can improve how they examine and adjust these rulemakings under the Regulatory Flexibility Act to provide some degree of regulatory relief.

The following is a summation of points made in my written testimony focusing on, one, the current overall regulatory environment; two, rules that particularly affect small businesses; and three, issues agencies should consider further under the RFA.

First, as of May 17, the total estimated cost for final rules under the current administration adds up to more than $1.6 trillion. For perspective, this sum exceeds the fiscal year 2024 federal budget deficit by more than $100 billion and is roughly equivalent to the GDP of Spain. What is more is that a sizable portion of these costs have hit the books in only the past few weeks.

As of early April, the Biden regulatory cost total surpassed the total imposed on the entire first term of the Obama administration. Then, partially due to a single rule, the EPA Tailpipe Emissions Rule with $870 billion in costs, the Biden total jumped well past the entirety of the Obama administration into trillion-dollar territory. Ensuing weeks have seen dozens of notable rulemakings that continue to push the total upward and upward at a rapid clip.

Second, in examining the cost of these rules on the administration I found 36 that contained some sort of partial acknowledgment of small business impacts. The total of these rules adds up to approximately $235 billion.

The most significant rule here is the FinCEN rule on beneficial ownership reporting requirements with more than $84 billion in costs. FinCEN states that for purposes of estimating costs to small businesses, all reporting companies are small businesses. Thus, this rule is an example of regulation where small businesses bear the entirety of the cost burden.

Another key example is the recent rule from CMS setting staffing minimums for nursing homes. CMS estimates that the cost involved with meeting these requirements will be more than $43 billion. The agency admits that, " 95 percent of the healthcare entities impacted are considered small businesses."

But since the cost versus revenue ratio, at roughly 2.3 percent, is apparently just below the 3 percent threshold that CMS uses under the RFA, the agency has declared that, " This final rule will not have a significant economic impact on a substantial number of small entities."

Third and finally, and I go into more detail on these in my written testimony, I believe these examples and others highlight the need for improvements to the RFA. Agencies ought to consider cumulative impacts more.

For instance, the nursing home rule may not cross the RFA threshold on its own, but it is certainly not the only regulation these facilities must respond to.

Any given rule may be well-intentioned and defensible as a standalone measure, but in real-world practice multiple rules begin to add up quickly, especially if such new requirements all become effective within a relatively short timeframe.

Agencies also need to further examine indirect costs to businesses, small businesses. Take the EPA Tailpipe Rule. It doesn't directly regulate small businesses, but given its magnitude there are almost certainly downstream effects. If it leads to material price increases on vehicles, which EPA's analysis suggests is possible on some level, then they now have an impact on small businesses like construction companies that often have fleets of vehicles to manage.

Furthermore, agencies simply need to do better at implementing the RFA. Last year in my analysis of the Office of Advocacy's report on our agency RFA and compliance, I found that agencies produced the lowest amount of small business savings in a decade. This was despite high levels of rulemaking activity and high levels of advocacy input into those rulemakings.

The RA has been around for more than 40 years across administrations and Congresses of both parties, serving as an important tool in helping to better craft regulations by accounting for the inherent asymmetries small businesses face in complying with regulatory requirements versus large businesses.

Such adjustments are not exercises in wanton deregulation but rather changes made at the margins providing targeted relief to the entities that need it the most. Now in this current period of unprecedented regulatory activity overall, it is even more important that agencies refocus and expand their efforts in addressing these concerns.

Thank you. I look forward to your questions.

Chairman WILLIAMS. The gentleman yields back.

I now recognize Mr. Rob Smith for 5-minute opening remarks.

STATEMENT OF ROB SMITH, SENIOR ATTORNEY, NATIONAL FEDERATION OF INDEPENDENT BUSINESSES

Mr. SMITH. Chairman Williams, Congresswoman Davids, and Members of the committee, on behalf of the National Federation of Independent Business, NFIB, thank you for inviting me to testify today about the impact of burdensome regulations on small businesses.

My name is Rob Smith, and I am a senior attorney with the NFIB Small Business Legal Center. NFIB is the nation's leading small business association consisting of nearly 300,000 small business members.

NFIB's mission is to protect the right of its members to own, operate, and grow their businesses. The average NFIB member has 8 employees and the majority of them have been in business for

over 15 years. In the words of President Biden, they are " the heart and soul of our communities."

Small businesses employ almost half of this country's private sector workforce and account for 99.9 percent of all American businesses. Thus, for America to succeed, small businesses must succeed. Helping small businesses is not a Republican or Democrat issue. The Regulatory Flexibility Act demonstrates this bipartisan understanding.

Republicans and Democrats have joined together to recognize that one-size-fits-all government regulations are ineffective and inefficient. This was true over 40 years ago when Congress unanimously passed the RFA and President Carter signed it into law.

It was also true in 1996 when a Republican-led Congress updated the RFA and President Clinton signed it into law. I hope that same bipartisanship holds true today.

The RFA was meant to address the disproportionate impact of federal regulations on small businesses. Unfortunately, many agencies have figured out how to bypass the law's requirements. With my testimony today I would like to address two points: first, how the regulatory burden disproportionately harms small businesses, and second, NFIB's work examining the RFA.

As discussed in my written statement, the regulatory burden on small businesses has drastically increased since the RFA was signed into law. This burden is now one of the biggest obstacles to small business success.

NFIB members currently and historically have ranked unreasonable government regulations as a top 10, if not a top 5, problem in running their business.

According to one study, the total regulatory cost in 2022 exceeded $3 trillion and businesses with less than 50 employees are paying over $50,000 a year per employee. This current accumulation of regulations and regulatory costs is unsustainable for small businesses.

Moving to the RFA, in 2023 NFIB examined the RFA compliance during the 117th Congress. We exclusively relied on SBA Office of Advocacy comment letters to determine if an agency complied. Therefore, the determination did not come from NFIB but from the administration itself.

This analysis revealed a few disturbing trends. First, agencies routinely failed to comply with the RFA. There were at least 28 instances of RFA noncompliance during the 117th Congress.

Second, certain agencies, such as the EPA and Department of Labor, are consistent violators.

Third, agencies often bypass the RFA requirements by improperly using the Section 605(b) certification to skip the small business impact analyses. Nearly half of the 28 instances of RFA noncompliance included an improper certification. Two examples are the Waters of the United States rule and the Department of Labor's Tip Credit rule.

Finally, agencies misrepresent the cost of regulations on small businesses by ignoring the indirect costs of regulations and severely underestimating the direct costs.

Now, how can Congress fix this problem? Congress should require that agencies consider both the direct and indirect costs of

regulations on small businesses. Many bills have sought to do this, including a 2007 Democrat-led bill that I highlighted in my written testimony. This should be a starting point.

Additionally, Congress should strengthen the SBA Office of Advocacy's role in upholding the RFA. The bipartisan Prove It Act of 2024 achieves both aims. It has been approved by the Judiciary Committee, and I hope that this committee will do the same.

On behalf of NFIB's nearly 300,000 small business members, thank you for holding this hearing and inviting me to speak. I look forward to our discussion.

Chairman WILLIAMS. The gentleman yields back.

I now recognize Mr. Todd Phillips for his 5-minute opening remarks.

STATEMENT OF TODD PHILLIPS, ASSISTANT PROFESSOR, GEORGIA STATE UNIVERSITY

Mr. PHILLIPS. Chairman Williams, Ranking Member Davids, and Members of the committee, thank you for the opportunity to testify. I am Todd Phillips, assistant professor of legal studies at Georgia State University.

I previously served as an attorney advisor working on administrative process in two federal agencies and as counsel with what was then the House Oversight and Government Reform Committee. My research focuses include administrative law and the rulemaking process. My testimony is my own and not of any organization.

The Administrative Procedure Act provides for notice and comment when agencies are writing regulations, but for too long agencies have primarily heard from large businesses that hire high-priced lobbyists and have lacked important input from entrepreneurs and small businesses.

To address this disparity, President Biden signed Executive Order 14094, Modernizing Regulatory Review, which requires agencies to engage in expanded outreach to ensure the meaningful participation of those affected by regulations, including small businesses.

Simply ensuring small business' participation in rulemakings is insufficient, however, and rules must be crafted to ensure that small businesses survive and thrive. To that end, President Biden's OIRA updated Circular A-4 to require agencies to strive to reduce small business' compliance burdens.

Moreover, a centerpiece of President Biden's regulatory agenda is to increase competition in all areas of the economy so that small businesses can effectively compete in the marketplace against their larger competitors. Unfair methods of competition prevent small businesses from hiring workers and obtaining fairly priced inputs, from selling their goods and services or fairly advertising their products to the public, and from contributing to a growing economy.

Among the administration's many efforts are updated bank merger guidelines to ensure continued lending to small businesses, lawsuits against Amazon and Apple for unfairly favoring their own products over small business competitors, regulations that prohibit pay-for-play Internet fast lanes and noncompete agreements, and

actions to tackle junk fees that tilt the playing field against honest businesses that are transparent with their customers and towards their larger competitors that profit by hiding the ball from consumers, leading to a race to the bottom.

I am concerned that two bills the committee is considering would, if enacted, halt these efforts by unnecessarily slowing down the regulatory process without providing corresponding benefits to small businesses. The Prove It Act would unnecessarily lengthen the rulemaking process, permit unnecessary litigation, and delay rules' effectiveness without consideration for the benefit small businesses receive from regulation.

I oppose this bill for many reasons that I articulate in my written testimony, but among them are that the act would allow litigation over initial regulatory flexibility analyses for the first time, ignore long-held principles of standing to allow large companies to launder their complaints under the guise of promoting small businesses, and give courts broad latitude to retroactively impose analysis requirements on agencies that they cannot possibly anticipate.

In addition, the Prove It Act's penalty for failing to conduct retrospective reviews prohibiting rules from being enforced against any business, not just small businesses, is unnecessarily severe.

Next, the Regulatory Transparency for Small Businesses Act would impose costs on agencies without any corresponding benefit for small businesses. Again, I oppose this bill for reasons that I articulate in my written testimony, including that it is simply a solution in search of a problem

The Regulatory Flexibility Act currently requires agencies to provide a factual basis for certifying that the rules will not have a significant economic impact on a substantial number of small entities and subjects those factual bases to judicial review.

Agencies must already demonstrate that they were not arbitrary or capricious. Imposing new requirements on those analyses would simply provide no benefit.

Contrary to those two bills, the committee is considering the Small Business Regulatory Relief Act, legislation that would benefit small businesses. This bill would provide the Small Business Administration's national ombudsman new authority to assist federal agencies with better helping small businesses, making government work more effectively and efficiently.

Today, the ombudsman role is to assist small businesses when they are being investigated or are the subject of compliance or enforcement activities, and the Small Business Regulatory Relief Act would expand the authority of the ombudsman to work with small businesses before they get into trouble, helping small businesses avoid being the subject of investigations or enforcement actions in the first place.

I wish to make one final point. Consideration of regulations' costs must include corresponding considerations of their benefits. The American Action Forum's assertions that the Biden administration has finalized 930 rules imposing combined costs of $1.63 trillion tells you nothing about the sensibility of those regulations as their analyses lack a similar quantification of regulatory benefits.

Yet in a single rule, the EPA has finalized a policy that provides quantified benefits of between $1.7 trillion and $2.1 trillion, far in

excess of the total cost AFF has claimed for all Biden administration rules.

Thank you and I am happy to answer any questions.

Chairman WILLIAMS. The gentleman yields back.

And I now move the Member questions under the 5-minute rule. I recognize myself for 5 minutes.

Main street's concerns should revolve around meeting payroll, supporting their employees, and growing their businesses. Unfortunately, like you all have highlighted today, America's small businesses must spend valuable time and resources complying with regulations meant to their slow success.

Over the last 15 months the committee has been sending information requests to agencies rules they put out, and we have often found that if an economic analysis took place it would often fail to take into account the cumulative effect of their regulations coming out of Washington.

So, Mr. Ray, given your past experience working on regulation in the Trump administration, how would you recommend that we ensure agencies don't only view their actions in a vacuum and turn a blind eye to the other regulations harming small businesses?

Mr. RAY. Mr. Chairman, thank you for the question. I think absolutely essential to remedying this problem which you highlight and which is indeed a very grave problem, would be some sort of regulatory budget. The budget should apply both at the level of individual agencies and at the level of the federal government as a whole.

Any given family who is trying to make ends meet has to think about all their expenses put together. Only federal agencies are able to think just about the costs that they are imposing in particular rulemakings or, in the best case scenario, in a suite of rulemakings.

Federal agencies and the federal regulatory system as a whole should have to play by the same rules that American families do when they engage in a holistic budgeting exercise.

Chairman WILLIAMS. Mr. Goldbeck, the numbers you stated in your testimony are jarring and make it blatantly clear that the Biden administration is pushing an agenda out of line with the best interests of America's job creators.

You highlight how some rules are hard to quantify or just below the RFA threshold and thus do not require an analysis to be done, despite having a clear impact on small business. So my question is what changes can be made to make agencies be more accurate in their assessment of a rule's impact?

Mr. GOLDBECK. Thank you, Mr. Chairman. One aspect I think that, again to my written testimony on with that, is that particularly with the one I cite, you have the 3 percent threshold that has just kind of become standard practice for CMS in this case. But you have across agencies different thresholds for this cost-to-revenue ratio.

And part of that is to be flexible for different industries having different profit margins and everything, but I think it is important to re-examine those ratios to see if they are truly accurate. It seems like they have kind of settled into a basic practice rather than really come up with a solid estimate there.

Chairman WILLIAMS. There is not much a business owner can do once a regulation has gone final. They have already spent the time and resources to understand the regulation and how they plan on complying and while some things can be undone in future administrations, the whipsaw back and forth is not beneficial for small business. So this is why it is so important to get the appropriate safeguards in place to protect small business on the front end.

So, Mr. Smith, in the time we have left, both NFIB's and this committee's investigations found that agencies treat the RFA like a check-the-box exercise rather than a way to protect small businesses from the worst regulations coming from D.C. It is my sincere hope that Members on this committee can come together to find a bipartisan solution to address the shortcomings of the RFA.

So what do you believe are the first steps Congress should take in reforming the RFA and ensuring it works for small businesses like it is intended?

Mr. SMITH. Thank you, Chairman, for the question. I think there are a couple of steps that I would recommend. First, agencies must be forced to consider the indirect costs of the regulations on small businesses. Okay. To allude to a point that Mr. Ray mentioned, it is when the normal person thinks of what they are spending they are thinking of direct costs and indirect costs. They are thinking of the whole picture.

Without thinking of indirect costs, which is the current environment, you are only looking at half the picture and small businesses oftentimes are hurt worse by the indirect costs than the direct costs.

And I could cite a multitude of rules for this point, the Waters of the United States rule where EPA claimed it wasn't even regulating businesses, but businesses that own land would, obviously, be subject to that rule. And there are other rules as well, such as interchange fee rules from the Federal Reserve. Anything that can harm a small business needs to be taken into account.

Second and very important, that I am sure your report probably touches on that ours found as well, the certification is being abused, the 605(b) certification. Agencies are abusing that to try and get out of having to perform small business impact analyses that the RFA requires.

I am not going to say that they are doing it in bad faith, but it appears, based on what we have looked at, that they are just trying to check the box. And whenever they can they are ignoring their requirements and the certification is the way that they can do that.

So those would be the two things I would recommend.

Chairman WILLIAMS. Okay, thank you.

And now I yield my time to Ms. Davids for her questions.

Ms. DAVIDS. Thank you, Chairman.

And thank you again to all of our witnesses for being here to testify and share your recommendations and expertise.

I want to check in real quick on something. Yesterday afternoon I know that committee majority uploaded eight regulatory reform bills ranging from, like, two to seven pages to the committee's repository. I am just curious for each witness, can you tell me when

you received a copy of the bills that were made available on the committee repository yesterday?

Mr. RAY. I cannot.

Ms. DAVIDS. Okay.

Mr. GOLDBECK. I haven't received.

Mr. SMITH. I don't know what bills you are referring to.

Mr. PHILLIPS. I only saw them yesterday afternoon when they were posted online.

Ms. DAVIDS. Oh, okay. Okay. Just thank you, checking in on that. Like, I appreciate the chance for us to get to talk about regulatory burdens and what can sometimes be onerous for small business owners for sure, but regulations can also be an important tool to improve our nation's air and water, to ensure that food and medicines are safe and effective, and make sure that consumer products are not harmful.

The Small Business Committee plays an important role in ensuring that federal guidance doesn't burden small businesses but allows them to thrive and compete certainly with major corporations. And a key part of that is the Regulatory Flexibility Act, and for the last several decades this law has required federal agencies to consider their effects on entrepreneurs.

It has also given small businesses nationwide additional opportunities to, hopefully, participate in the rulemaking process, including small business advocacy review panels for certain agencies.

Mr. Phillips, I was curious, in your opinion, can you tell us a bit about what might be working well with the Regulatory Flexibility Act and what might not be? What do we need to do to——

Mr. PHILLIPS. Sure.

Ms. DAVIDS.—improve some of the process for our small businesses out there?

Mr. PHILLIPS. One of the things to remember is that the Regulatory Flexibility Act was enacted to allow small businesses to really participate in the rulemaking process. And to that end, they have been able to do so.

They have been able to do so effectively. SBREFA panels do allow small businesses to participate. Initial and final regulatory flexibility analyses, allow small businesses information that helps them provide effective comments to the agencies.

I am especially proud that this administration has increased its effort to go out into the country to solicit the opinions of small businesses. I think that one of the things that could be improved here is really helping small businesses end up complying with the regulations once they have been enacted.

To that end, that is why I appreciate the Small Business Regulatory Relief Act. It would allow the SBA's ombudsman to help small businesses figure out how to comply with these regulations that do, yes, impose costs, but also do provide benefits to them. So that is my recommendation.

Ms. DAVIDS. And can you maybe talk a little bit more about what are some of the specifics? You said that in your opinion the current administration is doing a bit more outreach to try to engage.

I know we heard—I believe Mr. Smith mentioned, you know, inviting people to join is not the same thing as actively taking the

thoughts, opinions, and impacts of our small business owners. Can you talk a little bit about what are some of the specific things you are seeing that you think constitute improvement?

Mr. PHILLIPS. The President signed Executive Order 14094 on modernizing regulatory review that I spoke about. His OIRA has issued guidance on broadening public participation and community engagement in the rulemaking process.

The Administrative Conference of the United States under President Biden released a collection of 16 principles for ensuring public engagement and many of these things that they encourage agencies to do or are requiring agencies to do is hosting Internet and social media forums, using focus groups, using advisory committees, holding public meetings, hearings, listening sessions out in the country, stuff like that.

Ms. DAVIDS. Okay. Well, thank you so much, and I know entrepreneurs nationwide don't always have time to give feedback to the SBA.

But I yield back.

Chairman WILLIAMS. The lady yields her time back.

I now recognize Congressman Luetkemeyer from the great state of Missouri for 5 minutes.

Mr. LUETKEMEYER. Thank you, Mr. Chairman.

I would like to sort of set the stage for my discussion this morning. Here is the Wall Street Journal from today. On the second page we find a headline that says, " Survey finds parents suffer financially."

In the article it says that, " The parents living with children under the age of 18 said they were doing all right financially in 2023. That number is down 5 percent from 2022, and more than a third of the survey respondents, including the parents or people who did not have children, cited inflation as their biggest financial challenge."

So what are we talking about this morning? We are talking about rules and regulations and the cost of complying with that.

And, Mr. Goldbeck, your colleague at the American Action Forum, Mr. Holtz-Eakin, was here a while back, about a year ago, and indicated to us that one of the four main drivers of inflation are the rules and regulations. So that is we are talking about today the impact of rules and regulations and increased cost, number 1, causing inflation; and number 2, the cost of complying with that with the small businesses itself.

So one of the things that we are talking about here, and I have got a bill, the Regulatory Transparency Small Business Act, what Mr. Phillips doesn't seem to like, but it is a great bill from the standpoint that what it does is it would encourage an agency to include information that a rule will not have a significant economic impact on a sustainable number of small businesses. And in its certification process that it will estimate the total cost of compliance for a small entity affected by the measure.

Mr. Goldbeck, what do you think about that rule or that bill?

Mr. GOLDBECK. I think any sort of legislation that helps to strengthen the process of determining a significant impact on small businesses is welcome. I think there is clear evidence from both the

Office of Advocacy and some of my panel mates here that agencies are not meaningfully responding to these requirements.

Mr. LUETKEMEYER. You know, we talked a little about the cost of these things, and I think a cost-benefit analysis to show what the benefit is versus the cost of it. This is why every single rule needs to be looked at very carefully. They may think it is okay, but the overall cost indicates it is going to cost more than the benefit.

It may be well-intentioned, but the cost is going to override the actual benefit of what you are trying to do here. This is why it is important that you have these cost-benefit analysis done on every single rule.

Now, we talked about thresholds a little bit of how it is implemented. I think we need to have a—I don't think we need to have a threshold on any of these things when it comes to cost-benefit rules. They need to have every single rule have a cost-benefit analysis on it.

What do you think about that, Mr. Smith?

Mr. SMITH. I would agree, Congressman. Agencies should be forced to consider all costs along with benefits of each rule that they——

Mr. LUETKEMEYER. Yeah, I do. That is a fair way to go about it. If the rule is worthwhile let's have it. If it is not, get it fixed or change it to where it is not going to cost more than the benefits of it.

So, Mr. Goldbeck, you talked about regulations being one of the biggest problems of small businesses here and the agencies not complying with the RFA. How do we enforce the RFA? How do we enforce the rules and regulations, this situation that we are talking about this morning here of forcing them to do their job of estimating costs?

Mr. GOLDBECK. Yes, Congressman. In my testimony I talked about the most recent Office of Advocacy report on RFA compliance, and what I found when I looked at it.

Compared to past reports, the agencies came up with only about $73 million in savings, which was far lower than any year in the decade preceding it. In the preceding decade I think it averaged about $1.7 billion in small business savings per year from Office of Advocacy input to agencies.

And so I think that that shows a clear pattern that agencies are not meaningfully responding to this input and not making the necessary adjustments to these rules, even though you keep seeing more and more rules come across the transom.

Mr. LUETKEMEYER. You know, Mr. Holtz-Eakin testified last year when he was here that this administration was costing about $150 billion per year to businesses in new regulations that they were putting out. And now that estimate is for the first 4 months of this year a trillion dollars in costs.

And I think all of you alluded to that number. That is staggering. It is staggering especially when you figure that it has got to go to—you know, regulations are like a tax increase. It takes money out of the system so businesses have less money to spend on employees, research, expansion, whatever it may be and as a result it is very, very anti-economic.

It actually harms and that is a case that is not usually taken into consideration. Is that right, Mr. Smith?

Mr. SMITH. That is correct. I actually spoke to a Member of ours earlier this month who said she spends half of each day on regulatory compliance.

Mr. LUETKEMEYER. That is not making her any money, is it?

Mr. SMITH. No, sir, it is not.

Mr. LUETKEMEYER. Well, I thank all of you for being here this morning. My time is about to expire and I yield back to the Chairman.

Chairman WILLIAMS. The gentleman yields back.

I now recognize Representative McGarvey from the great state of Kentucky for 5 minutes.

Mr. MCGARVEY. Thank you, Mr. Chairman.

I appreciate everyone being here today. You know, I will say this is our fifth hearing so far since we have been on this committee that is focused on what we call burdensome regulations.

And before I got to Congress I was an attorney and part of my practice was representing small businesses. I have seen rules and regulations that can be burdensome for small businesses. I have also seen rules and regulations that have helped small businesses in my hometown of Louisville, Kentucky.

And so I think just like anything when we talk about it, maybe it is the lawyer in me, but we are freaked out by words like " never" and " always" . But, you know, you can't say that all regulations are good. You cannot say that all regulations are bad, and it is finding some balance here.

So, like, I will give you an example of some things we have talked about in this. Last week we talked about—we had Administrator Frost here. We had a constructive discussion about lending to small businesses and how we get more capital in the hands of small businesses.

And, of course, I have heard people here talk today about making money. Mr. Luetkemeyer just talked about businesses making money. So let's talk about small businesses making money and how we can do that through this committee and through rules and regulations.

Each federal agency is required, required of course by rule or regulation, to have a small business contracting goal of 23 percent. And agencies must cover each of the subcategory goals like women-owned businesses, service-disabled veteran-owned small businesses, HUBZones.

Guess what the impact is? The impact of this rule and regulation is that the federal government awarded 26.5 percent of federal contract dollars to small businesses, 26.5 percent. That is that is nearly a quarter of contracting. It might not seem like a lot, but it is $162.9 billion that are going to our small businesses.

So in the interest of that sort of spirit of balance, and we are talking about rules and regulations, I want to know a little bit, too, about what happens if we deregulate some of these things?

So, Mr. Phillips, are there costs of deregulation that are borne by small businesses and their employers?

Mr. PHILLIPS. Absolutely. Every regulation has some costs and also has benefits. When you roll back regulations that businesses

have already been complying with, rolling regulations back places additional burdens on them. They need to understand what the new requirements are. This flip-flopping is just very, very difficult for businesses. It imposes significant costs.

Mr. MCGARVEY. You know, and I think all of us on this committee would agree small businesses make up the backbone of our economy. They are a wonderful part of the fabric of my community in Louisville and, of course, we do hear complaints from small businesses in things that they have to deal with.

One of the complaints I hear, and my guess is that many other Members of this committee hear the same thing, is that they don't like the inconsistency. And so would you say that setting those regulations or rolling them back every election cycle is something that is confusing, good or bad for small business owners?

Mr. PHILLIPS. No. It is definitely bad. Small businesses, just like all businesses, need consistency and when there is inconsistency—when there is flip-flopping, rolling back and putting in place new regulations—it imposes costs on everyone.

One of my issue areas is banking and financial regulation, and small banks really, really, really dislike when a new administration comes in and starts rolling back everything. They need to update their software. They need to get new software. It is just very burdensome to comply with such changes.

Mr. MCGARVEY. Yeah, and, you know, I like that we are here talking about the RFA, right? The RFA put in place in 1980 was meant to say what are the impacts of these on our small businesses. But rather than just attacking the RFA, I would like to see us come together to show that commitment to our small businesses of America, to set these regulations where we want them, where our small businesses can have them make consistent manner that is good and is fair.

And I worry sometimes with hearings like this that we get focused more on the theater and not actually what is going to impact and help our small businesses.

So there have been some claims that the Office of Advocacy has found the Biden administration frequently violates the RFA. Mr. Phillips, do you agree with that assessment? Do you agree that these are truly violations or are they more policy disagreements?

Mr. PHILLIPS. No. The Office of Advocacy is not an adjudicator. They are not a court. What they do is provide comments to the agencies during the rulemaking process. Their role is to ensure that the participation of small businesses occurs.

When SBA Deputy Chief Counsel Major Clark was last here before the committee, he made clear that these were comment letters and not adjudications.

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

Chairman WILLIAMS. The gentlemen yields back.

I now recognize Representative Stauber from the great state of Minnesota for 5 minutes.

Mr. STAUBER. Thank you, Mr. Chair, and Ranking Member for holding this hearing today.

This past Congress we have held many hearings examining the regulatory burdens placed on American small businesses by this administration across 17 different agencies. The rulemaking proc-

ess has grown out of control and has restricted growth on Main Street America.

This committee has had the opportunity to hear directly from small business owners, many of them who feel the federal government is not listening to their concerns.

I have been on this Small Business Committee since 5-1/2 years and not one small business owner, not one, said we need more regulations. Not one raised their hand and said please, please, government put more regulations on us, not one.

I would like to ask unanimous consent to enter into the record a letter from U.S. Chamber of Commerce, Mr. Chair. In this letter, Traci Tapani, the co-president of Wyoming Machine, outlines her concerns over costly and restrictive federal regulations and the lack of transparency in the rulemaking process.

She also points to the loopholes in the Regulatory Flexibility Act, the RFA. The RFA requires agencies to " consider the impact of their rules on small businesses, but agencies often did not properly consider the cost."

Mr. Ray, to what extent does the current RFA achieve its goal of reducing burdens on small businesses in federal rulemaking?

Mr. RAY. Thank you for the question, Mr. Stauber. I would say the Regulatory Flexibility Act, while tremendously well-intended and beneficial as far as it goes, is generally ineffective at driving down costs for small businesses.

We can talk about a few ways in which it is ineffective. One provision to which I would like to draw the committee's attention that has not come up so far is Section 610 of the RFA, which requires retrospective review of certain rulemakings.

Retrospective review is widely acknowledged within the regulatory community as one of the principal and most effective ways to update for real-world changes to regulations and allow for more sensible and cost effective compliance, including especially by small entities.

Section 610 reviews are notoriously ineffective at actually driving regulatory change.

Mr. STAUBER. And I know that small businesses under the Biden administration, the small businesses are struggling. In this letter that I put forward for small businesses with 50 or fewer employees, the costs in the manufacturing sector, small manufacturers incur costs of $34,671 per employee per year. $34,671 per employee per year. You have got to be kidding me.

This is the regulations that are put on our manufacturing and small business. Nobody is going to convince me that that is good for that small business.

Mr. Goldbeck, how does the economic impact of regulations issued by the Biden administration compare to previous administrations?

Mr. GOLDBECK. Congressman, to date the total costs accumulated by agencies under the current administration is more than five times that of the Obama administration's total at this point in time.

Mr. STAUBER. More than five times——

Mr. GOLDBECK. Yeah.

Mr. STAUBER.—the Biden administration's rule and regs have put forth five times the amount than the Obama administration.

Mr. GOLDBECK. To this point in their administration.

Mr. STAUBER. To this point, right. I mean you have got—I mean, can you—the small businesses in our country are being crushed by this administration. Having been a small business owner for 31 years, every single rule or regulation costs money. Every single rule or regulation costs money. Go ahead. You wanted to comment?

Mr. GOLDBECK. Yeah. I think it is important to note just the magnitude and how even if these rules aren't necessarily applicable to the RFA in their current form, however that may be, just the magnitude has to have downstream effects and it goes through the entire economy basically.

Mr. STAUBER. Yeah, to the—exactly.

I think we talked about Representative Finstad's bill, H.R. 7198, that this can help strengthen the RFA to avoid agency evasions by allowing small businesses to directly challenge an agency certification and by requiring agencies to be fully transparent about how regulations will impact the small business community.

I will just tell you that three of the four I agree with you here on the panel, what is happening. The punishment that this administration is putting forth in our small businesses is devastating to our local economy.

And our local communities, our small businesses are the engine of our economy and when you have them being attacked on a daily basis because of rules and regulations, we are going to find ourselves as a country in deep trouble. And these entrepreneurs that want to get involved with the American dream and own their own home and company are going to find out it is very difficult. We cannot continue down this path.

And I yield back.

Chairman WILLIAMS. The gentleman yields back.

I now recognize Representative Glusenkamp Perez from the great state of Washington for 5 minutes.

Ms. GLUESENKAMP PEREZ. Thank you, Chairman. Thank you, Ranking Member. And thank you to the witnesses for being here today.

Mr. Phillips, I am interested in exploring which kinds of small businesses are considered when agencies are addressing the potential impacts of any given regulation on small businesses through the Regulatory Flexibility Act process.

Earlier this Congress I spoke with Mr. Frank Knapp, a small business owner, about how agencies should do a better job of reaching out to small businesses across the country and not just those with Washington-based trade associations.

So in your opinion, how are agencies doing now in making sure that they are getting feedback from a representative sample of businesses, from like mom-and-pop, not just people with hundreds of employees and, you know, groups with, you know, trade associations?

Mr. PHILLIPS. This administration has done very well with that. As I said in my opening testimony, the President signed an

executive order effectively requiring agencies to go out into the country and solicit information from small businesses.

If you look at the Federal Trade Commission's recent regulation on noncompete agreements, there are pages and pages and pages of testimony from small businesses talking about how they have been harmed by noncompete agreements. This administration is doing a very effective job at reaching out to small businesses rather than simply relying on D.C.-based trade associations that generally can speak for the largest of companies.

Ms. GLUESENKAMP PEREZ. What do you think that Congress should do to conduct more engagement and outreach throughout the country to make sure that we really are reaching small businesses in the rulemaking process?

Mr. PHILLIPS. I think that what this administration is doing by really requiring agencies to go out is very effective. To the extent that Congress does want to legislate something, Congress could legislate that kind of outreach, could legislate hosting forums, focus groups, and things like that.

That being said, one thing I am very concerned about generally is although agencies try very, very hard to comply with the law, there are courts who are willing to overturn months and months and months of work on the part of agencies for failing to comply with just one de minimis part of a statue. I am very cautious about Congress allowing judicial review over failing to perhaps do one of those small things.

Ms. GLUESENKAMP PEREZ. When Mr. Frank was here he said it would be helpful for agencies to project costs for different size small businesses. In your view, would that work? How could it work?

Mr. PHILLIPS. I think one of the problems with the RFA today is that the term " small business" can apply to firms that have tens of millions of dollars in revenue and 1,000 or more employees. One of the purposes of the RFA really was to ensure the participation of the smallest of the small businesses.

To the extent that Congress wanted to really focus agencies' attention on those smallest of the small, the businesses that have 8 or 10 employees, I think that would be absolutely appropriate.

Ms. GLUESENKAMP PEREZ. You also talk in your testimony about excessive market concentration and how unfair methods of competition hurt small businesses. What do you think should be done to help level the playing field?

Mr. PHILLIPS. I think that what this administration is doing is very effective. Bringing lawsuits to enforce the antitrust laws is absolutely appropriate. Issuing regulations to prohibit junk fees to ensure competition is very important. I would want to see the administration just keep on doing that work.

Ms. GLUESENKAMP PEREZ. Thank you to all of our witnesses for being here. I yield back.

Chairman WILLIAMS. The lady yields back.

I now recognize Representative Meuser from the great state of Pennsylvania for 5 minutes.

Mr. MEUSER. Thank you, Mr. Chairman.

Thank you to our witnesses. So perhaps the largest burden facing small businesses are regulations. I think if anyone spends any

time with local chambers, as I do, walks the streets of main street, visits with small businesses, retailers, manufacturers, distributors, I think that they would learn pretty fast, and if they had an open mind and didn't think they knew better than the small business that has been there for 2 years, 5 years, 10 years, 20 years in our government, that they would realize that taxes, excessive taxes are not a good thing for small business. Okay?

Competitive tax rates, there are taxes that have to be paid but excessive taxes like eliminating the so-called Tax Cuts and Jobs Act that was for the rich, let's face it, every small business in America benefited by it and continues to benefit by it. And if we eliminate it we are going to add burdens to them.

But still the regs are that much more significant. This inflation, okay, that we call Bidenomics and we call greedflation and all this utter nonsense that is being spewed by the left regarding our economy, the assault on American energy, the inflation is hurting really three groups: small business, those on fixed income which tend to be elderly, and low- to middle-income families. That is who gets hurt primarily by it.

Meanwhile, we have an SBA that is focused on registering voters in the state of Michigan, okay? So it is not really within their scope and it is a real problem to this committee—the SBA leadership, I should clarify.

So, Mr. Ray, with the general state of small business, you know, right now small business, by the way, tax revenues are way down. I mean, like, tens of billions, hundreds of billions of dollars.

And the reason for that is because their profitability is down so therefore there is less tax revenues to pay for all the things that our government pays for. What do you think is the general state of small business right now?

Mr. RAY. Congressman, as far as I can tell it is pretty dire facing the onslaught of regulations. I remember when I was serving in OIRA speaking with a Member, a leader of the small business community and asking what regulation was most helpful for your business and those of others to thrive? And he said, well, it wasn't any one regulation. It was just having certainty in the regulatory environment. It was just knowing that we are not going to get buried under new regulations in a few months.

Mr. MEUSER. Exactly. I hear the same thing. Rules over ideology, which is the vagueness that they get hit with.

Mr. Goldbeck, the regs of the $1.6 trillion, could you try to get us a list of those? I mean, and do they include the beneficiary ownership rule, the CFBP's 1071s, the climate rule of Basel III, which isn't in effect yet, but go ahead, please.

Mr. GOLDBECK. So, yes, Congressman. The number I ascribed is basically I go through and catalog all regulations that have some sort of quantified cost or paperwork estimate and we have that available on our website. And I can provide that——

Mr. MEUSER. Right. Yeah. I would love to get that, thanks.

Mr. Smith, you represent NFIB. How many members in your organization, small business members?

Mr. SMITH. Almost 300,000.

Mr. MEUSER. All right, over 300,000. What do you think that group would say to Mr. Phillips' here assertion that regs actually

help these small businesses create a stronger economic climate for them and in the end raise—somehow raise money for them as well as the economy? What do you think your members would say to that?

Mr. SMITH. Thank you, Congressman. I don't have to say what I think because I know. I have talked to the members and I could not even begin to count how many members have told me what I am about to tell you.

The number one thing I hear from members on this issue is do people in Washington not know what it takes to run a small business? Do they not know the impact of these regulations on me running my business?

So to Mr. Phillips' point, I do not believe they would agree with him.

Mr. MEUSER. Yeah.

Mr. SMITH. I know they would not.

Mr. MEUSER. Yeah.

Mr. Phillips, did you spend any time running a small business?

Mr. PHILLIPS. I currently run a small consulting firm.

Mr. MEUSER. You do?

Mr. PHILLIPS. I do.

Mr. MEUSER. Oh, okay. I would like take a look at that because it doesn't show up and you have a pretty extensive background, but you don't include that.

Mr. PHILLIPS. It is in my written testimony, sir.

Mr. MEUSER. I see. Okay, that is great. So let me ask you guys this, you witnesses this. Wouldn't it be great if our SBA rather than trying to register primarily those who benefit their party in Michigan, maybe we enjoined in a group where we went line by line and did everything we could to weigh the pros and cons of these massive regulations? Of course, it would take a long time and line item them out along the way and then have the SBA present such a report to this committee? What would you think about that?

Mr. RAY. I would certainly support that, sir.

Mr. MEUSER. Okay.

With that, Mr. Chairman, I yield back.

Chairman WILLIAMS. The gentleman yields back.

I now recognize Representative Thanedar from the great state of Michigan for 5 minutes.

Mr. THANEDAR. Thank you, Chair. Thank you, Ranking Member, for this hearing.

And I thank all of our witnesses here. I ran a technology small business for over 25 years, so I understand, you know, the struggles small businesses have in coping with understanding the regulations and complying with.

My question to you, Professor Phillips, is in your testimony you mentioned that many small businesses simply need help understanding what the law expects of them from a regulatory compliance standpoint. The Small Business Regulatory Relief Act that I and many of my Democratic colleagues co-sponsored, would allow the SBA to establish programs that would help small businesses comply with federal regulations.

How large of an impact would the Small Business Regulatory Relief Act would have on small businesses seeking assistance to meet regulatory requirements?

Mr. PHILLIPS. Congressman, I think it would be huge. The RFA currently requires small business guides to help small businesses comply with regulatory requirements, and that is an excellent first start.

However, this bill that you co-sponsored would allow SBA's ombudsman to really work with small businesses to help them understand what is happening. It would give them a point of contact with SBA and with the regulatory agencies to help them understand how to effectively comply with the law.

As I said, small businesses want to comply with the rules of the road. They want to do the right thing. Congress and the agencies need to give them the resources to help them with that.

Mr. THANEDAR. Thank you, Professor. And today the SBA can help small businesses when they experience federal regulatory enforcement actions. How often does the SBA assist small businesses when they are subject of investigations, and how would the Small Business Regulatory Relief Act further help small businesses thrive in the United States?

Mr. PHILLIPS. Sure. I don't have exact numbers but I will tell you so the national ombudsman serves as a point of contact for small businesses that will help facilitate communication between them and regulatory agencies.

And I think that is an excellent service that they provide. However, it is just insufficient. We need to help small businesses before they become the subject of investigations or enforcement actions. We need to help them, again, figure out how to comply with the law, so that they don't end up on the other side of the table in the first place.

Mr. THANEDAR. Makes sense, yeah. Professor Phillips, you also mentioned that the Biden administration has focused much of its efforts on promoting transparency to ensure that small businesses with upfront pricing can compete fairly by eliminating hidden fees and junk fees which attempt to conceal the true cost.

As a result, the Consumer Financial Protection Bureau, the Federal Trade Commission, and the Department of Transportation have all acted to ensure small businesses can fairly compete and to protect consumers from deceiving prices. Can you explain how the Biden administration's push for transparency has benefited consumers and small businesses?

Mr. PHILLIPS. Absolutely. I think everyone in this room can appreciate the experience of going online and searching for a plane ticket or a concert ticket or something like that and as you check out, you are hit with fees that double the price. We all hate that. Everyone hates that experience.

What the administration is doing is to make this pricing transparent so that people can understand just looking at the menu prices what the price will be and can comparison shop that way. It helps small businesses be able to compete. Small businesses tend to have lower cost than their larger competitors, and really showing that all-in price when people are doing cost comparison helps

small businesses have a fighting chance at obtaining the customer's business.

Mr. THANEDAR. Thank you so much. My time is up and I yield back, Mr. Chair.

Chairman WILLIAMS. The gentleman yields back his time.

I now recognize Representative Bean from the great state of Florida for 5 minutes.

Mr. BEAN. A very good morning, Mr. Chairman. Thank you for holding the fifth hearing on overregulation.

And to our All Star panel, welcome. We are glad to have you here. Five meetings means it is a big deal.

You know, it reminds me I used to play a game when my kids were toddlers. We called it the block game. We would just take blocks and stack them up until the tower collapsed, the whole blocks collapsed.

It seems as if the Biden administration—that Joe Biden is playing this game with America's small business, just thinking that small businesses are strong enough to handle an endless supply of overregulations.

As Chairman Williams has said, the fact that there was $875 million—billion dollars with a B, billion, in new costs from final rules issued in 1 week, it is hard to fathom even for this President.

Some have said that the Biden administration doesn't fully appreciate what the rule—what the burden does to small business and that they just check a box when they are trying to comply with the Regulatory Flexibility Act, which Congress created to help protect small business.

Would you agree? Mr. Paul Ray, would you agree that they fully don't understand what the impact is to small businesses?

Mr. RAY. Absolutely, Congressman. You know, every agency tends to want to maximize achievement of whatever its special goal is, right? And they tend to——

Mr. BEAN. Just check in that box.

Mr. RAY. Yeah, just disregard the costs that they incur along the way.

Mr. BEAN. Right. You know, the blocks, is it true, Mr. Goldbeck, the blocks that they already have to carry even before the Biden administration starts putting more blocks on, they are dealing with inflation? That is a very heavy block that businesses have to carry.

We know that the average household is spending over $1,000 a month just to keep up with what they purchased 2 years ago, $1,000 more. They have also got supply chain issues. They have also got trying to hire people.

I am in another committee, Education and Workforce, and we are trying to protect this whole new classification of independent contractors. They want to put independent contractors on the banks of some small businesses.

So would you agree, too, Mr. Goldbeck, that they don't fully understand what is happening to small businesses?

Mr. GOLDBECK. Yeah. I think one of the aspects is they analyze these rules in a vacuum as a standalone basis, but as you allude to with the block example, if you keep stacking the cumulative impact maybe 1 rule is justifiable in its own right, but if three rules fall on top of you then it is a different story.

Mr. BEAN. Yeah, I got you. You know, one of the—Mr. Chairman, you had a great hearing on energy and we had energy companies, some of the energy companies were about to keel over from the sheer weight of all the regulations.

So, Mr. Ray, what if I just say I am a small business owner and I just say I don't want to comply? I can't comply. What is the cost of just saying I can't do it anymore? What are the consequences to the small businesses?

Mr. RAY. Well, absolutely devastating. I mean you could be facing millions of dollars in fines or, for regulations involving criminal penalties, jail time.

Mr. BEAN. So it is serious.

Mr. RAY. It is, sir.

Mr. BEAN. It is serious weight on there.

Mr. RAY. Absolutely.

Mr. BEAN. Very good.

Mr. Smith, you represent thousands of businesses with NFIB. I have asked multiple businesses that have sat in the same chairs that you have sat, how is the regulatory environment right now on a scale from 1 to 10, 1 being you know what, it is just the cost of doing business. Ten is just we have never seen it like this before. What would you rate the current environment?

Mr. SMITH. Thank you, Congressman. I would rate it as a 10 and, in fact, there are recent numbers that April had the most significant—economically significant rules dating all the way back to the 1980s in that month alone. And that this administration is currently pushing through an unprecedented rate of economically significant rules on small businesses.

Mr. BEAN. Got you. No, I am with you. We have heard 9s and 10s consistently throughout the five hearings that it is serious business.

Now, you also represent, again, NFIB, thousands of businesses. We already heard from Mr. Ray you can't ignore these things. You have got to comply or there is jail time, there is fines, there is all kinds of stuff.

What about the actual hours to comply? What about trying to do the paperwork and trying to comply? Is that taking its toll as well on small business, Mr. Smith?

Mr. SMITH. Thank you, Congressman. Absolutely. As I mentioned earlier, I spoke to one of our members out in Oregon earlier this month about a rule, and she told me that the cumulative burden, hours, is half of every day, each day. Half of a week, half of a month——

Mr. BEAN. Too many.

Mr. SMITH. Yeah.

Mr. BEAN. Too many. Eventually we have to learn from that toddler game. You put enough blocks, small businesses just can't cope.

With that, Mr. Chairman, thank you for your leadership. I yield back.

Chairman WILLIAMS. The gentleman yields back.

And I would like to thank our witnesses today for the testimony for you appearing with us.

And without objection, Members have 5 legislative days to submit additional materials and written questions for the witnesses to the Chair which will be forwarded to the witnesses. I would ask the witnesses to please respond promptly.

So with that in mind, there is no further business and so, without objection, the committee is adjourned. Thank you.

[Whereupon, at 11:18 a.m., the committee was adjourned.]

APPENDIX

The Heritage Foundation

Prepared Statement of Paul J. Ray

Paths for Reform: How Congress Can Improve the Federal Regulatory System for Small Businesses

Testimony Before the House Committee on Small Business

May 22, 2024

Chairman Williams, Vice Chairman Luetkemeyer, Ranking Member Velázquez, and distinguished members of the Committee, thank you for inviting me to testify today on ways to improve the regulatory environment for small businesses. I am the director of The Heritage Foundation's Roe Institute for Economic Policy Studies, where we focus on research and education about economic and regulatory issues. From June 2018 through January 2021, I served in the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB); for the last year of that period, I had the honor to serve as Administrator of the office. Before that, I served as Counselor to the U.S. Labor Secretary and practiced administrative appellate law at Sidley Austin LLP here in Washington. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

As this Committee's hearings have recently documented, America's regulatory system fails small businesses. In particular, the system does not provide the predictable, pro-growth environment that small businesses need to thrive.[1] The story of that failure is too long to tell here; suffice it to say that each of the three branches of government bears some responsibility for the regulatory system's disappointing performance, and there are remedies that each branch can offer. Today, I would like to focus on legislative initiatives that would help small businesses as they navigate the regulatory system, while acknowledging that without reform by the executive and judicial branches, legislative reforms will not be enough to help America's small businesses.

Congress is no stranger to reforms to ameliorate the plight of small businesses facing a difficult regulatory environment. But the principal piece of legislation on point, the Regulatory Flexibility Act (RFA) of 1980,[2] leaves much to be desired. Reforms to the RFA, such as to make its retrospective review requirement[3] more meaningful and enforceable, are much needed. But reforms to the RFA are not nearly enough; America's small businesses need a more comprehensive suite of changes to the way government regulates them. The purpose of my testimony today is to discuss several important potential statutory amendments outside the RFA context. While some of the proposals I discuss here would effect sweeping transformations of the regulatory landscape, others are more limited, yet nevertheless important, repairs to the system.

I. The Regulations from the Executive in Need of Scrutiny (REINS) Act

One major problem with today's regulatory system is that it allows regulations to be issued, amended, and rescinded relatively easily, with the result that agencies issue, amend, and rescind them often and in large numbers. These frequent changes to governing law are tremendously disruptive for small businesses. As James Madison put it, rapid and extensive changes to governing law give an

> unreasonable advantage…to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation…presents a

[1] See, for instance, testimony of Paul J. Ray before the House Committee on Small Business, October 19, 2023.
[2] 5 U.S. Code §§ 601 et seq.
[3] Ibid., § 610.

> new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens.[4]

Small businesses, which generally lack access to sophisticated lobbyists and lawyers, are at a significant disadvantage compared to their larger peers when it comes to predicting and preparing for regulatory change.

One of the main reasons for the regulatory system's mutability is that the system reverses the roles of Congress and the executive. The Founders designed Congress to be slow and deliberative, the executive to be decisive and swift.[5] Critical to the constitutional balance of powers was Congress's first-mover advantage: Congress possessed the initiative in setting policy, with the President and his veto cast in a fundamentally responsive role. But the regulatory system reverses things. Executive agencies can push through regulations far more easily, and faster, than Congress can legislate. While the Administrative Procedure Act[6] and internal executive practice together impose a number of procedural demands that prevent agencies from acting as swiftly and easily as at the administrative state's inception,[7] regulating nevertheless remains far less costly and subject to far fewer obstacles than legislating. All this effectively makes the executive branch the first mover in many policy areas, leaving Congress to counteract any regulations to which it objects. But Congress is simply not set up for the repeated mustering of legislative will that would be necessary to exercise effective control over the many regulations that the energetic executive branch can issue. Congress has attempted to keep up with the executive by streamlining the process for disapproving rules in the Congressional Review Act,[8] but that act's utility has proven extremely limited because under it, regulations go into effect unless Congress acts (and the President signs) a resolution of disapproval. In other words, the executive retains its first-mover advantage under the Congressional Review Act.

The Regulations from the Executive in Need of Scrutiny (REINS) Act[9] would be an important step toward restoring the Constitution's original roles for Congress and the executive and thus stabilizing the regulatory system. The REINS Act would require affirmative congressional approval of major agency rules.[10] The bill, which applies to executive branch and independent agencies alike,[11] defines major rules as those that either OIRA or the regulating agency has determined are likely to result in an annual economic effect of $100 million or more; a major increase in costs or prices; or significant adverse effects on certain other desiderata, such

---

[4] Alexander Hamilton, John Jay, and James Madison, *The Federalist* No. 62.
[5] Ibid., No. 70.
[6] 5 U.S. Code § 551 et seq.
[7] James M. Landis, *The Administrative Process* (New Haven, CT: Yale University Press, 1938) ("I have seen as little as twenty minutes elapse between the drafting and promulgation of a permissive rule where the exigencies of the situation called for quick action").
[8] 5 U.S. Code § 801 et seq.
[9] The REINS Ac has been introduced many times in recent years. See, for example, REINS Act of 2023, H.R. 277 (2023).
[10] Ibid., proposed § 801(b)(1).
[11] Ibid., § 804(1).

as competition.[12] The bill also contains provisions for expedited congressional review of pending regulations.[13]

The REINS Act would in some measure revive the legislative process for the most important regulations, thus layering the robust deliberative procedures specified in Article I of the Constitution atop the much less stringent procedures employed by agencies today. In addition to protecting the separation of powers, such an arrangement would recover a measure of stability of the sort that the Founders hoped to achieve when they designed the Constitution's rigorous legislative process. To be sure, the REINS Act is imperfect. The most recent draft contains loopholes of which agencies would surely avail themselves.[14] And under it, agencies would retain something of a first-mover advantage as the drafters of regulations. Nevertheless, the bill would materially improve the regulatory system's present mutability and thus help small businesses to achieve the stability they need.

II. The All Economic Regulations Are Transparent Act

To survive and succeed under a regulatory system as mutable as the current one, businesses need to be able to predict future regulatory changes as far in advance as possible; doing so allows them to adopt more efficient strategies for managing compliance and helps them to avoid business decisions that are unwise in light of pending regulatory changes. But small businesses often lack the resources to monitor future regulatory developments as closely as their larger competitors. After all, the government announces pending regulatory changes only twice a year in the Unified Agenda of Regulatory and Deregulatory Actions, a massive publication that many small business owners would find difficult to navigate. Moreover, the anticipated timelines for many of the rulemakings covered by each Unified Agenda are notoriously unreliable. Specialist trade publications and lobbyists can provide much more accurate and granular information about the timeline for development of pending regulations, but many small businesses lack access to these sources of information. Further, some regulations move swiftly from commencement to completion within the interval between publications of the Unified Agenda.

The All Economic Regulations Are Transparent (ALERT) Act[15] would help to rectify this problem. The bill would require agencies to submit to OIRA monthly information about each pending rule.[16] The submitted information would include a summary of the rule and its legal basis; for rulemakings in the final rule phase and for which the agency anticipates finalization within a year, the bill would require disclosure of the rule's anticipated costs and economic effects as well.[17] Crucially, the bill would require that agencies provide "an approximate

[12] Ibid., § 804(2).
[13] Ibid., §§ 802 and 803.
[14] For instance, agencies could circumvent the bill's reach by breaking their economically significant regulations up into clusters of rules, each with only a modest impact on the economy or other relevant metrics.
[15] H.R. 262 (2023).
[16] See ibid., proposed § 651.
[17] Ibid., § 651(1) and (2).

schedule for completing action on" any proposed rule to be finalized within a year.[18] OIRA must publish online the information received from agencies within 30 days of its receipt,[19] and agencies are forbidden to give effect to a final rule until the author agency's information submission to OIRA has been available online for at least six months.[20]

By requiring online publication of frequent updates to anticipated rulemaking timelines, the ALERT Act would level the playing field between large and small businesses, ensuring that all businesses can plan efficiently in light of the most recent developments in ongoing rulemakings. And by requiring publication at least six months in advance of effectiveness, the bill would prevent small businesses from being blindsided by fast-moving regulatory changes.

III. The Renewing Efficiency in Government by Budgeting Act

Another major problem that small businesses face is that today's regulatory system fails to provide the pro-growth environment they need to thrive. Federal agencies impose enormous costs on business owners and consumers. Indeed, the American Action Forum, using agency-provided data, estimates regulatory costs from 2021 to the present day at about $1.6 trillion[21]—a staggering figure larger than the annual gross domestic product of all but the 13 largest economies.[22] And while some of these costs are doubtless reasonable ones for the benefits they purchase, there is reason to believe that agencies place a higher value on the benefits they create than the American people do.

That is because agencies tend to overemphasize the worth of their own specialized goals. After all, an "agency succeeds by accomplishing the goals Congress set for it as thoroughly as possible—not by balancing its goals against other, equally worthy goals."[23] From their statutory missions to the metrics by which their success is evaluated to the priorities of their staff,[24] agencies tend to prioritize achieving their specialized goals more highly than the median member of the public would, which is one reason to think that the costs of federal regulation are higher than the people would be willing to pay. Another reason is that agencies generally do not coordinate with respect to the costs they impose on the public, so costs that seem reasonable to each agency that imposes them may together total far more than the people would choose to pay. Excessively costly regulations can be especially burdensome for small businesses, which often

---

[18] Ibid., § 651(2)(A).
[19] Ibid., § 652.
[20] Ibid., § 653.
[21] American Action Forum, "Regulation Rodeo: Explore the Data," https://www.regrodeo.com/ (accessed May 16, 2024).
[22] The World Bank, Data, GDP (using GDP estimates from 2022), https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true (accessed May 7, 2024).
[23] Christopher C. DeMuth and Douglas H. Ginsburg, "White House Review of Agency Rulemaking," *Harvard Law Review*, Vol. 99 (1986), p. 1081.
[24] See, for example, David B. Spence, "Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control," *Yale Journal on Regulation*, Vol. 14 (1997), p. 424.

lack the margins and economies of scale that give their larger competitors room to respond efficiently to the imposition of new regulatory costs.

One solution to this problem is for politically accountable actors to set a regulatory budget. The Renewing Efficiency in Government by Budgeting (REG Budgeting) Act[25] would direct the OMB Director to set an annual regulatory budget (specifically, a limit on additional unfunded regulatory costs) for the federal government as a whole and for each agency.[26] It would forbid agencies to make a rule effective if doing so would push the author agency over its budget, unless the agency first obtains permission from Congress.[27] The bill would require congressional approval of any positive regulatory budget, that is, a budget allowing agencies to impose additional unfunded regulatory costs.[28]

The REG Budgeting Act of course bears a strong resemblance to President Trump's Executive Order 13771,[29] though EO 13771 included a "2-for-1" requirement that the REG Budgeting Act lacks. EO 13771 achieved a large measure of success; under its guidance, agencies eliminated $198.6 billion in regulatory costs.[30] While the debt that the REG Budgeting Act owes to EO 13771 is obvious, one should not overestimate it. After all, EO 13771 itself drew on regulatory budgeting efforts in other countries, and in the United States the idea of regulatory budgeting is neither new nor the exclusive province of the federal government; the REG Budgeting Act thus takes its place in a history larger and longer than the story of EO 13771.[31] Further, the bill departs from EO 13771 in some important (and, to my mind, helpful) ways. Most significantly, by requiring congressional approval for positive regulatory budgets and for agency exceedances of their budgets, the bill would introduce Congress into the regulatory budgeting process in a way that EO 13771 did not.

All told, the REG Budgeting Act would represent an important step toward getting regulatory costs under control by those most likely to understand the negative impact of these costs on small businesses.

IV. The Unfunded Mandates Accountability and Transparency Act

Too often, agencies issue regulations that impose unnecessary costs or costs that are not justified by corresponding benefits. Among the most promising ways to prevent such wasteful

---

[25] H.R. 7867 (2024).
[26] See ibid., proposed § 210(a)(1)(A).
[27] See ibid., § 210(b)(1).
[28] See ibid., § 210(a)(1)(C).
[29] *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9339 (2017).
[30] Office of Information and Regulatory Affairs, "Regulatory Reform under Executive Order 13771: Final Accounting for Fiscal Year 2020," https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2020.pdf (accessed May 17, 2024).
[31] See, for example, James Broughel, "The Regulatory Budget in Theory and Practice: Lessons from the U.S. States," *Harvard Journal of Law & Public Policy*, Vol. 25 (2022) (describing regulatory budget proposals in the United States in the 1970s and 1980s as well as regulatory budgeting efforts in the United Kingdom and Canada and several U.S. states).

regulations is cost-benefit analysis (CBA). CBA is one of the cornerstones of OIRA review under EO 12866.[32] Under that executive order, agencies must identify and compare (and quantify where possible) the benefits and costs of proposed and final regulations, as well as the benefits and costs of feasible alternative approaches (for economically significant regulations).[33] CBA prepared under EO 12866 leads agencies to propose and finalize regulations that are more efficient and less costly than alternative regulatory approaches.

EO 12866 exists, like all executive orders, only at the discretion of the sitting President. And while every President since the order's issuance under President Clinton has endorsed EO 12866, its continuing existence under future administrations is by no means guaranteed. Further, EO 12866's demand for CBA is not binding at law; agencies can disregard it at the President's command or with his dispensation or forgiveness. These facts point to the need for a statutory command to conduct CBA.

The Unfunded Mandates Reform Act (UMRA) of 1995[34] was a step in this direction, but it suffers from a number of weaknesses. First, its focus is on states, cities, and tribes rather than the private sector, though analysis under UMRA must anticipate costs and benefits to the private sector.[35] Second, while it requires consideration of feasible alternatives, it does not require the preparation of CBA for them.[36] And third, it gives agencies wide leeway to prefer qualitative (and thus less informative) CBA over quantitative CBA.[37]

The Unfunded Mandates Accountability and Transparency Act (UMATA)[38] would remedy these weaknesses. It would require CBA for alternatives, potentially greatly assisting agencies as they choose between regulatory options.[39] It would also instruct agencies to quantify anticipated costs and benefits to the extent feasible.[40] These changes would serve as a helpful backstop to EO 12866 and lend Congress's imprimatur to the order's CBA requirements, in turn impeding issuance of wasteful or unjustified regulations that can impose excessive burdens on small businesses.

Perhaps most important for present purposes, UMATA would put the private sector, and small businesses in particular, at the front and center of legislative concern. It would extend UMRA's regulatory intergovernmental consultation provisions[41] to the private sector, and it would specifically require agency officials to consult with small businesses and affirmatively seek out their input.[42] UMATA would further improve on UMRA's consultative process,

---

[32] *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (1993).
[33] Ibid., § 6(a)(3).
[34] 2 U.S. Code §§ 1501 et seq.
[35] Ibid., § 1532(a)(2).
[36] Ibid., §§ 1532 and 1535.
[37] Ibid., § 1532.
[38] H.R. 3230 (2023).

[40] Ibid., proposed § 202(c)(1)(A).
[41] 2 U.S. Code § 1534.
[42] H.R. 3230 § 3.

requiring that consultations begin before issuance of a notice of proposed rulemaking (thus ensuring that the agency has small business input when the agency's own thinking is maximally malleable).[43] The bill would also require agencies to hear from parties to the consultations about the "cumulative impact of regulations" on them.[44] These improvements stand to amplify the voice of small business in the rulemaking process and so foster the pro-growth regulatory environment that small businesses need to thrive.

V. The Guidance Out of Darkness Act and the Guidance Clarity Act

Issuing regulations is not the only way agencies shape private-sector conduct. They also issue guidance documents which, though they lack the force and effect of law, can powerfully influence regulated parties. That is often less because they represent the best interpretation of the law and more because they indicate a path for avoiding litigation with the author agency: regulated parties who follow the agency's guidance are unlikely to be the objects of enforcement action, whereas those who go their own way are more likely to have to prove the lawfulness of their conduct in administrative or judicial proceedings. For many regulated parties, the mere prospect of litigation is sufficiently concerning to make compliance with agency guidance the best course of action.

But there is no equivalent of the Code of Federal Regulations for guidance, which historically has been housed on websites, or even in filing cabinets, scattered across the federal government. During my time leading OIRA, I discovered that even agencies themselves were uncertain where, or even how, to find all their guidance. Difficulty finding guidance, of course, bears most severely on individuals and small entities, who often cannot afford to hire sophisticated counsel with specialized knowledge of all the guidance a particular agency has issued over the years. In 2019, President Trump addressed this problem by issuing EO 13891, which required each agency to put all its guidance online on a single, searchable website; all guidance omitted from the website would be rescinded.[45] President Biden, though, revoked that order in January 2021.[46]

The Guidance Out of Darkness (GOOD) Act[47] would ameliorate the difficulties of small businesses by requiring each agency to post its effective guidance on a single website. The guidance must be suitably subcategorized, which would allow the public to browse guidance by topic.[48] Guidance not featured on an agency's guidance portal is to be rescinded.

Finding guidance is not the only difficulty small businesses have; unlike more sophisticated competitors, they may not understand the difference between non-binding guidance and binding regulations. EO 13891 required agencies to provide a disclaimer on their guidance

---

[43] Ibid.
[44] Ibid.
[45] *Promoting the Rule of Law Through Improved Agency Guidance Documents*, 84 Fed. Reg. 55235 (2019).
[46] *Revocation of Certain Executive Orders Concerning Federal Regulation*, EO 13992, 86 Fed. Reg. 7049 (2021).
[47] H.R. 890 (2023).
[48] Ibid., § 3.

documents clarifying that they are non-binding.[49] The Guidance Clarity Act[50] would require agencies to provide such a disclaimer on the first page of each guidance document.

VI. The Information Quality Assurance Act

The content of a regulation is, of course, heavily influenced by the information on which the regulator relies in crafting it. That is why large businesses and trade associations invest significantly in educating their regulators, supplying them with studies and other sources of data that can profoundly shape the requirements of final regulations. But small businesses are at a disadvantage in this regard. Often, they lack the sophistication and resources to prepare thorough-going evidentiary submissions. By the same token, they are less likely than their larger peers to be able to survey for themselves the extant scholarly literature on which agencies draw in regulating and so less likely to be able to engage that literature effectively in their comments submitted under 5 U.S.C. § 553. They are also less likely than their peers to be able to critique the data sources on which agencies rely.

The Information Quality Assurance Act (IQAA)[51] would help small businesses to understand and engage the sources of information on which agencies rely in rulemaking. The IQAA would mark significant progress in information quality control for federal rulemakings, which at present is governed by the very sparse requirements of the Information Quality Act and by the OMB and agency guidelines issued thereunder.[52] The bill would require OMB's guidelines to demand that, where influential information is concerned, agencies use the "best reasonably available information and evidence" in rulemakings.[53] It would also require disclosure in the public docket for each rulemaking of "any model, methodology, or source of scientific, technical, demographic, economic, or statistical information or evidence" on which the agency relied or plans to rely in regulating.[54]

These new provisions would help small businesses in several ways. First, they would give small businesses access to the information universe relevant to an agency's regulatory decisions, something that larger businesses can already obtain for themselves in some measure through hiring experts familiar with the relevant scholarship. Second, by requiring that agencies use the best reasonably available information, the IQAA would diminish the ability of larger entities to influence the content of regulations by submitting thinly supported, outcome-driven studies. This provision would push agencies to investigate the reliability of the studies on which they intend to rely—something small businesses are often unable to do for themselves.

---

[49] Ibid., § 4(a)(1).
[50] H.R. 4428 (2023).
[51] H.R. 7219 (2024).
[52] Public Law 106-554 § 515.
[53] H.R. 7219, proposed § 3522(b)(1).
[54] Ibid., § 3522(c).

Conclusion

The regulatory system's failures make it much more difficult than it should be for small businesses to survive and thrive. Fixing the system's many deficiencies will require a comprehensive set of legislative reforms. The legislative proposals I have discussed above would constitute important steps toward a regulatory system that provides the predictable, pro-growth environment that small businesses need.

APPENDIX

The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

On information and belief, Heritage Foundation is the most broadly supported think tank in the United States. During 2023, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2023 operating income came from the following sources:

Individuals 82%

Foundations 14%

Corporations 1%

Program revenue and other income 3%

The top five corporate givers provided The Heritage Foundation with 1% of its 2023 income. The Heritage Foundation's books are audited annually by the national accounting firm of RSM US, LLP.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position of The Heritage Foundation or its board of trustees.

Testimony on:

"Burdensome Regulations: Examining the Biden Administration's Failure to Consider Small Businesses"

Daniel Goldbeck

Director of Regulatory Policy, the American Action Forum*

United States House of Representatives

Committee on Small Business

May 22, 2024

* The views expressed here are my own and not those of the American Action Forum.

Chairman Williams, Ranking Member Velázquez, and members of the Committee, thank you for convening this hearing and providing the opportunity to discuss the economic impacts small businesses face from recent rulemakings and ways federal agencies can improve how they examine and adjust these rulemakings to provide some degree of targeted regulatory relief.

In my testimony I wish to make three main points:

- The regulatory record for federal agencies currently stands at an unprecedented level under the Biden Administration with total estimated costs from final rulemakings exceeding $1.6 trillion since the current administration came into office;
- While, of course, not all these costs fall directly on small businesses, there has been a subset of rules that will have an outsized impact on small businesses, whether they carry an official Regulatory Flexibility Act (RFA) designation or not; and
- An examination of this overall increased volume of significant rulemaking reveals potential deficiencies in the current RFA analytic framework worth remedying, including the need for greater consideration of the cumulative impact of multiple rulemakings, further analysis of indirect costs imposed on small businesses by rules for which the RFA currently does not apply, and more robust agency acknowledgement of small business concerns overall.

Let me consider these in turn.

The Overall Biden Administration Regulatory Record

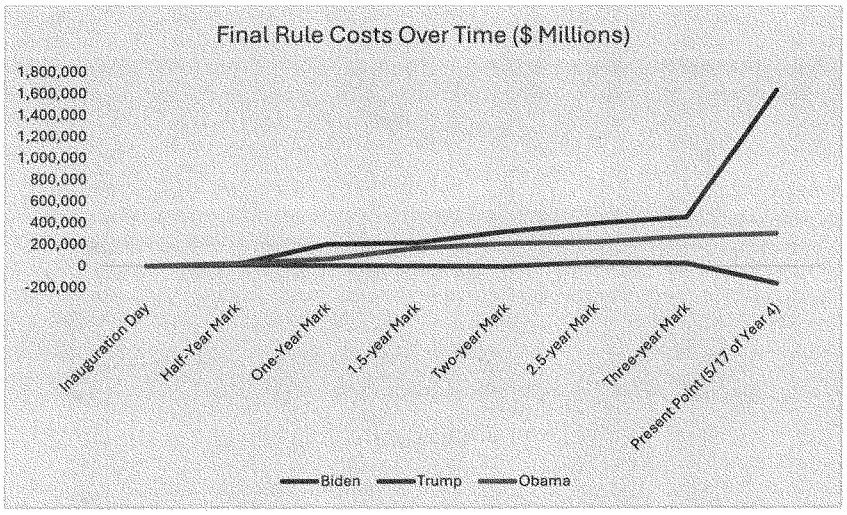
The level of regulatory activity under the Biden Administration has been immense. As of May 17, the total estimated costs from final rules emanating from federal agencies under the current administration added up to more than $1.6 trillion. For perspective, this sum exceeds the federal government's current projected fiscal year (FY) 2024 budget deficit by more than $100 billion and is roughly equivalent to the gross domestic product of Spain.

This estimate is not one I came up with through some stand-alone projection or model, but rather by simply cataloguing the agencies' own quantified estimates in their rulemaking analyses. This total represents the agencies' own calculations. The scale of this figure is even more jarring when compared to the two immediately preceding administrations. The Biden Administration's current final cost total is more than five times that of the total accumulated by agencies through this point in the Obama Administration.

Administration	Rules	Costs ($ Billions)	Paperwork (Hours)
Biden	930	1,637.0	292,238,565
Trump	993	-160.0	74,035,021
Obama	1255	303.3	237,987,881

What's more is that a sizeable portion of these costs was finalized in only the past few weeks. As the graph below illustrates, the Biden Administration has consistently been ahead of its

predecessors throughout this term. As of early April, its regulatory cost total had already surpassed the total imposed under the entire first term of the Obama Administration. Then, largely due to a single rule (the Environmental Protection Agency's (EPA) latest "tailpipe rule" for passenger vehicles) that total jumped well past the entirety of the Obama Administration and into trillion-dollar territory. Ensuing weeks have seen dozens of notable rulemakings that continue to push the total upward and upward at a prodigious pace. In short, since the beginning of this year, the Biden regulatory cost total has essentially quadrupled.



Notable Recent Rulemakings and the RFA

Considering how approximately half of the current Biden regulatory cost comes from the latest EPA tailpipe rule – a rule that does not directly regulate small businesses – it is clear that not all of these costs necessarily fall on small businesses. Nevertheless, as I am sure most of the members of this committee already appreciate, regulatory burdens are generally more acute for small businesses since they inherently have fewer resources at hand to deal with compliance costs compared to the phalanxes of lawyers and other regulatory affairs personnel that large companies can deploy. As such, the Regulatory Flexibility Act (RFA) – one of the main points of our discussion here today – was enacted in order to have agencies address the unique issues small businesses face during the rulemaking process.

Using the RFA analyses included in these agency rulemakings, one can begin to discern which pieces of this $1.6 trillion pie directly apply to small businesses. In examining the 100 costliest rules under the Biden Administration thus far – which account for 99 percent of that overall cost total – I have found 36 rules that contain at least partial acknowledgement of small business impacts. The total combined costs of these rules add up to approximately $235 billion. In 23 of these rules, the agencies have either stated affirmatively and explicitly that the rule "may" or "will"

impose a "significant impact on a substantial number of small entities" (sometimes referred to by the acronym: SISNOSE) or implicitly signaled such a determination with the inclusion a full small business impact analysis as required under the RFA. The remaining 13 rules either include a partial RFA analysis or an analysis that finds that while the rule may impact small businesses, such effects do not meet the SISNOSE threshold.

Of those rules that have a clear SISNOSE designation, the most consequential action is the Financial Crimes Enforcement Network (FinCEN) rule regarding "Beneficial Ownership Information Reporting Requirements." The rule requires "certain entities to file with FinCEN reports that identify two categories of individuals: the beneficial owners of the entity, and individuals who have filed an application with specified governmental authorities to create the entity or register it to do business." Per FinCEN's own analysis, this rule's total costs over a 10-year period could add up to $84.1 billion (using a 7 percent discount rate). In the RFA analysis section, FinCEN states that "that for purposes of estimating costs to small businesses, all reporting companies are small businesses." Thus, this rule is an example of a regulation where small businesses bear the entirety of the burdens.

The most significant rule from those where the impacts either do not meet the SISNOSE threshold or where such a designation is ambiguous is the recent rule from the Centers for Medicare and Medicaid (CMS) regarding "Minimum Staffing Standards for Long-Term Care [LTC] Facilities and Medicaid Institutional Payment Transparency Reporting." This rule would require that covered LTC facilities have "an RN [registered nurse] to be on site 24 hours per day and 7 days per week," and maintain a minimum of "3.48 total nurse staffing hours per resident day (HPRD) of nursing care, with 0.55 RN HPRD and 2.45 NA [nurse aide] HPRD." CMS estimates that costs involved with meeting these requirements will be more than $43.1 billion over a 10-year period. In the RFA analysis section, CMS finds that annual costs will across the industry amount to 2.2–2.3 percent of total revenue. While the agency admits that "95 percent of the health care entities impacted are considered small businesses," since the cost-to-revenue ratio is slightly below the "3 to 5 percent" threshold that the agency uses for such determinations, CMS declares that "this final rule will not have a significant economic impact on a substantial number of small entities."

Areas Where the RFA Could Improve

These examples and others help to illustrate some of the current deficiencies of the RFA process. The LTC staffing rule provides a prime opportunity to review the issue of how agencies establish their threshold for what constitutes "a significant economic impact" while also opening up greater consideration of cumulative regulatory impacts. For instance, another major SISNOSE rule under the Biden Administration was a Food and Drug Administration (FDA) rule regarding "Requirements for Additional Traceability Records for Certain Foods." In that rule's RFA analysis, FDA utilizes a 1 percent cost-to-revenue threshold. Granted, per the "Flexibility" part of the RFA's title, different industries may face different profit margin considerations and require different thresholds, but this is an instance where perhaps it is worth a more rigorous reexamination of why each agency has arrived at its particular RFA threshold.

Additionally, especially in instances where such determinations fall within tenths of a percentage point, there may be value in having agencies take greater consideration of the cumulative regulatory environment. For instance, this recent LTC staffing rule may not result in a given facility incurring

costs equal to 3 percent of its revenue by itself, but what if such a facility must also prepare and file the aforementioned Beneficial Ownership reports to FinCEN? What if the recent Department of Labor rule on overtime pay already has this hypothetical facility making significant payroll adjustments on top of those that would be required in hiring the requisite nursing staff? Any of these rules may be well-intentioned and defensible as a stand-alone measure in a vacuum, but in real-world practice they begin to add up quickly – especially if such new regulatory requirements all become operable within a relatively short timeframe.

Another aspect of the economic impact from rulemakings that is also underexplored – if meaningfully explored at all – in RFA analysis is the question of "indirect costs." A potential example of this is the EPA tailpipe rule discussed earlier. Since the rule's primary focus is on automobile manufacturers – some of the largest companies in the world – it typically would not be a major part of the RFA discussion. With an overall cost total of $870 billion, however, it is difficult to imagine that it will not have some appreciable downstream effects on small businesses. Take, for instance, this section of the rule's Regulatory Impact Analysis where EPA estimates the potential per-vehicle cost increases for "medium-duty" vehicles:

Table 12-144: Projected Manufacturing Costs Per Vehicle, Final Standards - Medium Duty Vehicles

	2027	2028	2029	2030	2031	2032	6-year avg
Vans	$178	$185	$1,443	$2,732	$4,128	$4,915	$2,264
Pickups	$97	$88	$531	$1,432	$1,516	$2,416	$1,013
Total	**$125**	**$122**	**$847**	**$1,881**	**$2,416**	**$3,275**	**$1,444**

EPA notes that these figures do not necessarily represent direct price increases and that certain tax credits may ease the effective burden, but it is reasonable to assume that at least some of these costs will be passed on to the consumer in the form of higher prices. Say you are a small courier business with a fleet of delivery vans or a small construction company with a fleet of work trucks looking to determine when and how to upgrade such fleets in coming years. Having the sticker price of each vehicle potentially be thousands of dollars more than it would be otherwise represents a not-insignificant consideration. While including further indirect cost analysis may not necessarily change the substantive course of a rule like the tailpipe rule, having a more robust understanding of these impacts may help to better inform such exercises as the cumulative impact analysis discussed above.

And finally, beyond instituting new aspects of small business impact analysis, agencies need to be more rigorous and thorough in the RFA analysis they are already supposed to conduct. Roughly one year ago, the Small Business Administration Office of Advocacy (Advocacy) released its Report on the Regulatory Flexibility Act, FY 2022. This annual report details agency responsiveness to Advocacy's input into the rulemaking process – particularly in its formulation of RFA analyses and of alternatives that could provide regulatory relief for small businesses. In my analysis of this report at the time, I found that the adjustments agencies made to their rules in response to Advocacy's concerns amounted to merely $73.5 million in cost savings for small businesses, which represented the lowest such figure in a decade. This was despite the fact that: A) FY 2022 had an overall higher level of regulatory activity and B) Advocacy provided more input to agencies than in

any of the preceding nine years. Taken together, these factors suggest that agencies do not take the RFA process as seriously as they should.

The RFA has been around for more than 40 years across administrations and Congresses of both parties, serving as an important tool in helping to better craft federal rules by accounting for the inherent asymmetry small businesses face in complying with regulatory requirements versus large businesses. These are not exercises in wanton elimination of federal regulation. Changes made to rules as a part of RFA deliberations are often at the margins and provide targeted relief to the subset of affected entities that need it most. Now, in this current period of unprecedented regulatory activity overall, it is even more important that agencies refocus and expand their efforts in addressing these concerns.

Thank you. I look forward to your questions.

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS



Statement for the Record of Robert T. Smith

Senior Attorney, NFIB Small Business Legal Center

United States House of Representatives
Committee on Small Business

Burdensome Regulations: Examining the Biden Administration's Failure to Consider Small Businesses

May 22, 2024

National Federation of Independent Business
555 12th Street NW, Suite 1001
Washington, D.C., 20004

Chairman Williams, Ranking Member Velázquez, and distinguished members of the House Committee on Small Business:

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to participate in today's hearing on the impact of burdensome regulations on small business.

My name is Rob Smith, and I am currently a Senior Attorney with the NFIB Small Business Legal Center. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

NFIB is the nation's leading small business association, consisting of nearly 300,000 small business owner members. NFIB's mission is to protect the right of its members to own, operate, and grow their businesses. Across the Nation, in Washington, D.C., and all 50 state capitals, NFIB represents the interests of its members and small businesses. NFIB is proud to represent small businesses nationwide from every industry and sector.

NFIB members are not some far-off entities operating in the distance. Quite the contrary; the average NFIB member has 8 employees and more than 50% of NFIB members have been in business for at least 15 years. In the words of President Biden, these small businesses are "the heart and soul of our communities."[1] They are the local ice cream parlor where your family cools off on a hot summer day, the pizza place in your community that you swear is better than the national or regional chains, the privately run daycare that cares for your kids, the mechanic who fixes your car, your local barber, landscaper, and plumber.

[1] *A Proclamation on National Small Business Week, 2024*, The White House (April 26, 2024), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2024/04/26/a-proclamation-on-national-small-business-week-2024/.

Small businesses employ nearly half of this country's private sector workforce and represent 99.9% of all American businesses.[2] Thus, it is no exaggeration to say that for America to succeed, small businesses must succeed. Their success is America's success. To quote President Reagan, "When you are talking about the strength and character of America, you are talking about the small business community."[3]

I spend time describing NFIB's membership and the small business community because small businesses are a bipartisan issue. Unfortunately, in Washington, we are too quick to categorize policies as simply pro-business or anti-business. However, small business owners can be Republicans, Democrats, Independents, or even agnostic.

I provide that qualifier because the issues relating to today's hearing are grounded in long-standing bipartisan support. Republicans and Democrats have stood together to recognize that "one-size-fits-all" regulations can be ineffective, inefficient, and more harmful than helpful.

Congress recognized this principle over 40 years ago when it ***unanimously*** passed the Regulatory Flexibility Act (RFA). In Section 2(a) of the RFA, Congress expressly stated that:

> (3) uniform Federal regulatory and reporting requirements have . . . imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses . . . with limited resources;
>
> (4) the failure to recognize differences in the scale and resources of regulated entities has . . . adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

---

[2] *Frequently Asked Questions About Small Business 2023*, U.S. Small Business Administration, Office of Advocacy (March 7, 2023), available at https://advocacy.sba.gov/2023/03/07/frequently-asked-questions-about-small-business-2023/.

[3] Ronald Reagan, 40th President of the United States, President Reagan's Speech at a Briefing on the State of Small Business (Mar. 1, 1982), available at https://bit.ly/3CyyvHw.

. . .

> (6) the practice of treating all regulated businesses . . . as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation[.][4]

The RFA was meant to address the disproportionate impact of federal regulations on small businesses. Unfortunately, it is no longer effective in achieving this goal. Administrative agencies have figured out how to bypass the law's requirements, take advantage of loopholes, and engage in faulty cost analyses.

In my testimony today, I would like to focus on two areas. First, the concern that NFIB members have about overregulation and how the regulatory burden disproportionately harms small businesses. Second, NFIB's work on the RFA, our findings, and what must happen going forward to properly account for small business needs.

1. **Overregulation Hurts Small Businesses, and Small Businesses Disproportionately Bear the Burden of Regulatory Costs.**

The regulatory burden has significantly increased in the decades since the RFA was passed and signed into law. The rise of the "administrative state with its reams of regulations would leave [the Framers] rubbing their eyes."[5] Today's "vast and varied federal bureaucracy" and the authority agencies exercise over nearly every aspect of our daily lives would be foreign to the Framers.[6]

---

[4] Regulatory Flexibility Act, Pub. L. No. 96-354, § 2(a), 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 note).

[5] *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting).

[6] *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting).

The Code of Federal Regulations has grown from 111,830 pages and 186 volumes in 1984 to 190,000 pages and 245 volumes in 2021.[7] There were less than 25 economically significant final rules published in 1984.[8] In 2016, that number ballooned to nearly 100, over 125 in 2020, and was just shy of 50 in 2022.[9]

NFIB members consistently rank this overregulation as one of the most significant obstacles to running their small business. Quadrennially, the NFIB Research Center surveys small businesses to determine the most pressing obstacles to their success. In its 2020 survey, small business owners ranked "Unreasonable Government Regulations" as the sixth-biggest obstacle, with almost 20% labeling it a critical problem.[10] In each survey dating back to 1991, small business owners ranked "Unreasonable Government Regulations" as a top ten problem, and in four of those eight surveys, it was a top five obstacle to small business success.[11] In a 2017 poll of small businesses, 55% identified the volume of regulations coming from many different sources as their biggest regulatory problem.[12]

Not only does the number of regulations harm small businesses, but small businesses disproportionately bear the burden of regulatory costs. A recent analysis concluded that the total cost of federal regulations in 2022 was $3.079 trillion, with businesses having less than 50 employees spending an estimated

---

[7] Code of Federal Regulations Total Pages 1938–1949, And Total Volumes and Pages 1950–2021, https://tinyurl.com/3f76enh9.

[8] George Washington University Regulatory Studies Center, *Economically Significant Final Rules Published by Presidential Year*, https://tinyurl.com/yeyt3862.

[9] *Id.*

[10] NFIB Research Center, Small Business Problems and Priorities 9 (2020), https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf.

[11] *Id.* at 22-23.

[12] *NFIB National Small Business Poll, Regulations* (2017), available at http://www.411sbfacts.com/files/Regulations%202017.pdf.

$50,100 per employee.[13] For the smallest businesses—those with less than 20 employees—a 10% increase in regulatory costs leads to a 5-6% reduction in the number of small businesses.[14]

This is only a snapshot of the overregulation problem. Unfortunately, the problem continues to grow as the current Administration has imposed $1.6 trillion in final rule costs, resulting in nearly 290 million additional paperwork hours.[15] This tsunami of new regulatory costs falls disproportionately on small businesses that do not have lawyers or compliance officers to assist with these complex rules.

The key to remember about overregulation is that a small business owner does not suffer from each new regulation in a vacuum. Each new regulatory burden compounds and layers on top of the existing regulatory requirements, until the pressure is too much to bear. The reality is that the current burdensome regulatory path is unsustainable, and something has to give.

2. The RFA: NFIB's White Paper, the Findings, and What Should Come Next

As previously mentioned, the aim of the 96th Congress in passing the RFA was to address the disproportionate impact regulations had on small businesses and eliminate, to the extent possible, "one-size-fits-all" agency rulemaking.

To do so, the RFA imposed numerous procedural obligations on administrative agencies. For example, when issuing a notice of proposed rulemaking (NPRM), the RFA requires an agency to conduct an Initial Regulatory Flexibility Analysis (IRFA),

---

[13] Nicole V. Crain & W. Mark Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, October 2023, https://nam.org/wp-content/uploads/2023/11/NAM-3731-Crains-Study-R3-V2-FIN.pdf.

[14] Ben Gitis & Sam Batkins, *Regulatory Impact on Small Business Establishments* Table 1, American Action Forum (Apr. 24, 2015), https://tinyurl.com/52z28uvb.

[15] Dan Goldbeck, *The Spring Surge Resumes*, American Action Forum, May 13, 2024, https://www.americanactionforum.org/week-in-regulation/the-spring-surge-resumes/.

which must include reasons for the rulemaking, the legal basis for the rule, a description and estimate of the number of small entities that will be subject to the rule, and the projected reporting, recordkeeping, and compliance requirements.[16] Congress also required agencies to include in the IRFA significant alternatives to the proposed rule.[17]

The RFA also requires a back-end Final Regulatory Flexibility Analysis (FRFA), which must include, among other things, the agency's response to public comments, the agency's response to comments from the Chief Counsel for the U.S. Small Business Administration's Office of Advocacy (SBA), and a description of the steps taken to minimize the economic impact of the rule on small entities.[18]

Through the RFA, Congress gave the SBA's Chief Counsel for Advocacy the authority to "monitor agency compliance" with the law's mandates.[19]

A. NFIB Publishes Comprehensive Snapshot of RFA Compliance During the 117th Congress.

In May 2023, NFIB published its white paper entitled *The Regulatory Flexibility Act: Turning a Paper Tiger Into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*. The paper looked at RFA compliance during the 117th Congress, spanning from January 2021–January 2023. To determine whether agencies complied with the RFA, we exclusively relied on SBA Office of Advocacy Chief Counsel comment letters identifying whether the agency fully complied. In other words, the determination of whether an agency complied with the RFA came not from NFIB, but the Administration itself.

---

[16] § 3(a), 94 Stat. at 1166–67 (codified at 5 U.S.C. § 603(b)).

[17] § 3(a), 94 Stat. at 1167 (codified at 5 U.S.C. § 603(c)).

[18] § 3(a), 94 Stat. at 1167 (codified at 5 U.S.C. § 604(a) (as amended by Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104–121, 110 Stat. 857, 857 and Small Business Jobs Act of 2010, Pub. L. No. 111–240, § 1601, 124 Stat. 2504, 2551)).

[19] § 3(a), 94 Stat. at 1170 (codified at 5 U.S.C. § 612(a)).

This paper revealed that agencies are playing fast-and-loose with the RFA and its requirements, and that the RFA has become a "paper tiger." During the 117th Congress, the SBA identified at least 28 separate instances of RFA noncompliance.

B. NFIB White Paper Findings

Our review of SBA comment letters revealed some disturbing trends regarding RFA compliance.

1. *Certain Agencies Were Repeat Violators.*

Of the 28 instances of RFA noncompliance during the 117th Congress, half came from just two agencies—-the Environmental Protection Agency (EPA) and Department of Labor (DOL). SBA identified RFA problems in 9 EPA rules during this timeframe and RFA problems in 5 DOL rules.

2. *Agencies Routinely Used the § 605(b) Certification Loophole to Avoid IRFA and FRFA Analyses for Rules that Would Have a Significant Economic Impact on Small Businesses.*

The RFA permits agencies to bypass IRFA and FRFA analyses where the rule would not "have a significant economic impact on a substantial number of small entities." To do so, the agency head must certify that the rule does not have a significant economic impact on small entities, publish that certification in the Federal Register, provide a factual basis for the certification, and submit the certification to the Chief Counsel of Advocacy for the SBA.[20]

The Office of Advocacy routinely cited agencies for improperly using this § 605(b) certification to avoid necessary IRFAs or FRFAs. That is, agencies claimed regulations would not have a significant economic impact on a substantial number of small entities even where they would, simply in order to avoid compliance with the RFA. Of the 28 instances of RFA noncompliance during the 117th Congress, 13 letters identified erroneous § 605(b) certifications as the reason, or one of the reasons, for RFA noncompliance.

[20] § 3(a), 94 Stat. at 1168 (codified at 5 U.S.C. § 605(b) (as amended by § 243, 110 Stat. at 866)).

Agencies made these certifications even where rules would obviously have a significant impact on small businesses. A few examples:

i. EPA's *Revised Definition of Waters of the United States* (WOTUS) – EPA certified that its broad WOTUS definition would not have a significant economic impact on small entities. As the Supreme Court acknowledged, there are significant costs to obtaining WOTUS permits, up to 788 days and $271,596.[21] SBA's letter chastised EPA for improperly certifying the proposed rule, because it imposed "costs directly on small entities, and those costs will be significant for a substantial number of them."[22]

ii. DOL's *Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal* – DOL certified that its rule restriction the use of the FLSA's tip-credit would not have a significant economic impact on small entities. This defies common sense. A restaurant that cannot utilize the tip credit will be forced to pay the difference in the tip credit and minimum wage. Advocacy cried foul, noting that the certification lacked a factual basis and proposing that the agency conduct an IRFA due to the substantial costs on small businesses.[23]

3. *Agencies Routinely Underestimate the Costs of their Regulations on Small Businesses.*

NFIB's report also demonstrated that agencies fail to accurately account for the costs of its regulatory requirements on small businesses. Part of this is the judiciary's fault.

---

[21] *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 594 (May 31, 2016).

[22] U.S. Small Business Administration Office of Advocacy, Comment Letter on EPA and Army's Proposed Rule Defining "the Waters of the United States" under the Clean Water Act, 86 Fed. Reg. 69372 (Dec. 7, 2021), available at https://advocacy.sba.gov/wp-content/uploads/2022/02/Comment-Letter-Proposed-WOTUS-Definition-2022.pdf.

[23] U.S. Small Business Administration Office of Advocacy, Comment Letter on Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 32818 (Aug. 20, 2021), available at https://bit.ly/3N0rC7f (citing one business with a $286,000 increase in wage costs due to DOL's rule, and another that could have a $500,000 per year cost due to the rule).

While the text of the RFA does not distinguish between direct or indirect costs, the D.C. Circuit has wrongfully concluded that agencies need not consider indirect costs of regulations on small businesses.[24] To accurately determine whether a regulation will have a significant economic impact on small businesses, one must consider both direct and indirect costs of compliance. Failure to do so results in looking at only half of the picture.

Even when not accounting for indirect costs, SBA found that agencies tended to underestimate the costs of a regulation on small businesses. In 21 of the 28 letters sent during the 117th Congress, SBA determined that an agency had ignored costs to small businesses or underestimated these costs. To put it bluntly, in 3 out of 4 rulemakings, agencies misrepresent the costs of compliance for small businesses. One example:

i. DOL's *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* – In a blatant example of agency disregard for the RFA, DOL severely underestimated the costs of compliance with its Independent Contractor rule. Advocacy characterized DOL's IRFA as "deficient" because it "severely underestimates the economic impacts of the rule on small businesses" and "failed to estimate any costs for small businesses and independent contractors to reclassify workers as independent contractors, for lost work, and for business disruptions." DOL claimed the familiarization cost of the rule was just 30 minutes, while Advocacy determined the 200-page rule would take four hours to read. DOL also failed to consider in its RFA analysis the extra benefits that employers provide to employees versus independent contractors—such as health insurance, retirement, and paid leave—that could result from more individuals being classified as employees. These additional costs could exceed $15,000 per employee annually.[25]

---

[24] *Mid-Tex Elec. Co-op., Inc. v. F.E.R.C.*, 773 F.2d 327, 342–43 (D.C. Cir. 1985).

[25] U.S. Small Business Administration Office of Advocacy, Comment Letter on Employee or Independent Contractor Under the Fair Labor Standards Act (FLSA), 87 Fed. Reg. 62218 (Oct. 13, 2022), available at https://advocacy.sba.gov/wp-content/uploads/2022/12/Comment-Letter-DOL-Independent-Contractor-508c.pdf.

C. What Comes Next: Properly Considering Small Businesses

NFIB has two recommendations to ensure the intent of the RFA is fulfilled and to properly consider the costs and needs of small businesses.

First, Congress must amend the RFA to make clear that agencies consider both direct and indirect costs of a regulation. The bipartisan Prove It Act of 2024 does so, by requiring that agencies consider "any reasonably foreseeable potential indirect costs", defined to include situations where small businesses are not directly regulated by a rule but engage in business activity with entities that are.

Additionally, in 2007, Rep. Brad Ellsworth (D-IN) introduced the Small Business Regulatory Improvement Act, which among other things defined the "economic impact" of a rule to include both direct and indirect economic effects on small entities.[26] This bipartisan bill had 12 cosponsors, including Ranking Member Velazquez. Requiring a complete economic impact analysis of a regulation is an area of bipartisan agreement, and this Congress should prioritize increasing the transparency and accountability of regulatory costs.

Second, Congress must strengthen the SBA Office of Advocacy's role in upholding the RFA. The Prove It Act of 2024 attempts to do so by allowing regulated small entities to petition the Chief Counsel for Advocacy to review a rule's RFA compliance. While NFIB would welcome this development as significantly better than the current regime, we would go even further. Congress could empower the Office of Advocacy to enforce the RFA on the front end. This means that the Chief Counsel for Advocacy would approve every final rule as complying with the RFA before that final rule takes effect. Doing so ensures that agencies have conducted proper IRFA and FRFA analyses and will put teeth into the RFA.

***

To conclude this testimony, I want to return to a subject I began with. President Biden is right that small businesses are the "heart and soul of our communities." Helping small businesses is not a Republican or Democrat issue. It is an American issue and small businesses are desperate for relief.

---

[26] Small Business Regulatory Improvement Act, H.R. 4458, 110th Cong. (2007), https://www.congress.gov/bill/110th-congress/house-bill/4458.

Unfortunately, federal agencies have recently issued three significant rules that will have an enormous impact on small businesses—DOL's rule raising the minimum salary threshold for "white-collar" exempt employees under the FLSA, DOL's OSHA walkaround rule, and the FTC's ban on noncompete agreements.

Small businesses are looking to this body for help in strengthening the RFA, ensuring agencies comply with the law, and easing the regulatory burden they face. They need relief and they need it fast. Passing the Prove It Act of 2024 would be a good first step.

On behalf of NFIB's nearly 300,000 small business members, thank you for holding this hearing examining ways to provide small businesses with regulatory relief and inviting me to testify before the committee.

NFIB

The Regulatory Flexibility Act:

Turning a Paper Tiger Into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking

*by Rob Smith**

INTRODUCTION

Every U.S. President since Jimmy Carter has recognized the importance of small businesses.[1] In the words of President Joe Biden, "[s]mall businesses account for 44 percent of U.S. GDP, create two-thirds of net new jobs, and employ nearly half of America's workers."[2] But while every President pays lip service to the importance of small businesses, executive branch agencies continue to skirt the law by engaging in rulemaking without properly considering the effects on small business. Congress has made clear the importance of taking careful account of the needs of small businesses in agency rulemaking.[3]

---

* Rob Smith is a Staff Attorney with the NFIB's Small Business Legal Center. The author acknowledges, with gratitude, the assistance in preparing this paper of NFIB's Federal Government Relations team.

[1] *See* Joseph Biden, 46th President of the United States, Remarks by President Biden on Helping Small Businesses (Feb. 22, 2021), https://bit.ly/3SPlgqU ("Small businesses are the engines of our economic progress; . . . they are 90 percent of the businesses in America."); Donald Trump, 45th President of the United States, President Trump Update on Small Business Coronavirus Support (Apr. 7, 2020), https://bit.ly/3SQWojj ("America's small businesses are the backbone of our communities."); Barack Obama, 44th President of the United States, Proclamation 9270–National Small Business Week, 2015 (May 1, 2015), https://bit.ly/3V3TMA3 ("America's small businesses are the backbone of our economy[.]"); George W. Bush, 43rd President of the United States, President Bush Discusses National Small Business Week (Apr. 23, 2008), https://bit.ly/3EhcAWr ("[S]mall businesses create over two-thirds of all new jobs in America."); William Clinton, 42nd President of the United States, Message to the Congress Transmitting a Report on the State of Small Business (May 5, 1998), https://bit.ly/3RtP8Iw ("[T]he creativity and sheer productivity of America's small businesses make our Nation's business community the envy of the world."); George H. W. Bush, 41st President of the United States, Small Business Week Awards Ceremony (May 7, 1991), https://bit.ly/3CrmYsj ("There's an extraordinary force at work inside America, a force that does the good work of this country, a force that embodies America's 'can do' spirit. And that force, . . . is small business[.]"); Ronald Reagan, 40th President of the United States, President Reagan's Speech at a Briefing on the State of Small Business (Mar. 1, 1982), https://bit.ly/3CyyvHw ("America is small business. . . . When you are talking about the strength and character of America, you are talking about the small business community."); Jimmy Carter, 39th President of the United States, Memorandum From the President on Regulation of Small Businesses and Organizations (Nov. 16, 1979), https://bit.ly/3e83ZdZ (describing "small businesses" as "a vital force in our Nation's life").

[2] White House, FACT SHEET: Biden-Harris Administration Increases Lending to Small Businesses in Need, Announces Changes to PPP to Further Promote Equitable Access to Relief (Feb. 22, 2021), https://bit.ly/3E2moDH

[3] In paragraph 2(a)(4) of the Regulatory Flexibility Act (RFA), Public Law 96–354, 5 U.S.C. 601 note, Congress declared that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity[.]" Congress also noted in paragraph 2(a)(6) of the RFA that "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation [.]"

In 1980, Congress ***unanimously*** passed, and President Carter signed into law, the Regulatory Flexibility Act (RFA or Act). The RFA was meant to address the "disproportionate impact of federal regulations on small businesses" by requiring agencies to consider the impacts of each new proposed and final rule on small business.[4] Now, over 40 years later, the Act is hardly taken seriously. Currently, the RFA's requirements may politely be deemed a mere formality; more accurately, a paper tiger. While the RFA has yet to fall into complete desuetude, for all practical purposes, that is its current trajectory without legislative action.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) publishes this white paper for three purposes. First, we seek to bring attention to the RFA and its mandate that agencies consider the effects of any proposed or final rule on small businesses. Second, we aim to highlight the recent lack of compliance with the RFA by administrative agencies. Finally, we offer legislative recommendations to ensure agency compliance with the RFA and protect small businesses from disproportionately bearing the burden of one-size-fits-all rulemaking. With this paper and the legislative recommendations herein, we do not seek to handcuff administrative agencies altogether. Instead, our aim is simply that of the unanimous Congress that passed the RFA — "that agencies shall endeavor . . . to ***fit regulatory and informational requirements to the scale of the businesses*** . . . ***subject to regulation*** [and] ***are required to solicit and consider flexible regulatory proposals*** and to explain the rationale for their actions to assure that such proposals are given serious consideration."[5]

I. THE REGULATORY FLEXIBILITY ACT

Congress enacted the RFA to remedy what it viewed as a growing problem and danger to the national interest—the increasing number of one-size-fits-all regulations. In the five years prior to the RFA's enactment, there were an average of 7,358 rules, 4,757 proposed rules, and 41,553 total documents published in the Federal Register per year.[6] One need look no further than the RFA's text for evidence of the 96th Congress's concern.

---

[4] SBA OFF. OF ADVOC., REPORT ON THE REGULATORY FLEXIBILITY ACT, FY2021 3 (2022) (hereinafter RFA REPORT).
[5] Regulatory Flexibility Act, Pub. L. No. 96–354, § 2(b), 94 Stat. 1164, 1165 (1980) (codified at 5 U.S.C. § 601 note) (emphasis added).
[6] *Federal Register Documents Published 1976-2018*, https://bit.ly/3GWBgEf.

SEC. 2. (a) The Congress finds and declares that—

(1) when adopting regulations . . . Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, . . . even though the problems that gave rise to government action may not have been caused by those smaller entities;

(3) uniform Federal regulatory and reporting requirements have . . . imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses . . . with limited resources;

(4) the failure to recognize differences in the scale and resources of regulated entities has . . . adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

(5) unnecessary regulations create entry barriers . . . and discourage potential entrepreneurs from introducing beneficial products and processes;

(6) the practice of treating all regulated businesses . . . as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses . . . ;

(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses . . . to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

(b) It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle,

> agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.[7]

There is some statistical evidence demonstrating that the RFA was quite successful in initially constraining one-size-fits-all agency rulemaking. For example, in the first year the RFA was in effect, 1981, there was a 16% decrease in agency rules and a 28% decline in agency proposed rules compared to 1980.[8] Both represent the largest one-year decreases recorded since tracking began in 1976.[9]

The Act's substantive provisions impose numerous obligations on agencies. Those most constraining to one-size-fits-all agency rulemaking require agencies to conduct two separate analyses during rulemaking. First, agencies must conduct a front-end Initial Regulatory Flexibility Analysis (IRFA). Then, when finalizing a rule, agencies must conduct the back-end Final Regulatory Flexibility Analysis (FRFA).

A. *Initial Regulatory Flexibility Analysis*

When an agency proposes a new rule, the Administrative Procedure Act (APA) requires that it publish a general notice of proposed rulemaking (NPRM) in the Federal Register.[10] When an agency is required to publish an NPRM in the Federal Register, the RFA imposes an additional requirement—that the agency also conduct and publish in the Federal Register, at the same time as the NPRM, an Initial Regulatory Flexibility Analysis (IRFA).[11]

The reason for the IRFA is to "describe the impact of the proposed rule on small entities."[12] Congress set forth specific requirements to ensure agencies conduct proper IRFAs:

> (b) Each initial regulatory flexibility analysis required under this section *shall contain*—
> (1) a description of the reasons why action by the agency is being considered;
> (2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

---

[7] § 2(a–b), 94 Stat. at 1164–65 (codified at 5 U.S.C. § 601 note).
[8] *Federal Register Documents Annual Percent Change 1976-2017*, https://bit.ly/3GWBgEf.
[9] *Id.*
[10] 5 U.S.C. § 553(b). There are extremely narrow circumstances in which the Administrative Procedure Act does not require notice and comment. *See* 5 U.S.C. § 553(a), (b)(A)-(B).
[11] 5 U.S.C. § 603(a).
[12] *Id.*

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule . . . ;

. . . [13]

Congress went one step further. Not only did it require agencies to include the above information in an IRFA, but it also mandated that they consider specific alternatives to the proposed rule for small entities:

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—
(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
(3) the use of performance rather than design standards; and
(4) an exemption from coverage of the rule, or any part thereof, for such small entities.[14]

B. *Final Regulatory Flexibility Analysis*

Whether because of a keen awareness of human nature and government bureaucracy, or just extraordinary prescience, Congress implemented a backstop to ensure the IRFA and reaction to the proposed rule would not be ignored by agencies. Or at least that is how it was supposed to be. This backstop is a second analysis, the Final Regulatory Flexibility Analysis (FRFA). As with the IRFA, Congress imposed specific obligations on agencies when conducting an FRFA:

(a) . . . Each final regulatory flexibility analysis shall contain—
(1) a statement of the need for, and objectives of, the rule;

[13] § 3(a), 94 Stat. at 1166–67 (codified at 5 U.S.C. § 603(b)) (emphasis added).
[14] § 3(a), 94 Stat. at 1167 (codified at 5 U.S.C. § 603(c)).

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;
(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
(5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
(6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected[.][15]

C. *Additional Provisions to Protect Small Businesses*

In addition to the IRFA and FRFA, the RFA includes other constraints on agency one-size-fits-all rulemaking.

Section 605(b) allows agencies to skip the IRFA and FRFA in certain situations where the rule will not "have a significant economic impact on a substantial number of small entities." However, in order to utilize this carve-out, the agency head must make a certification to this effect, publish it in the Federal Register, provide a factual basis for the certification, and finally, submit the certification to the Chief Counsel

[15] § 3(a), 94 Stat. at 1167 (codified at 5 U.S.C. § 604(a) (as amended by Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104–121, 110 Stat. 857, 857 and Small Business Jobs Act of 2010, Pub. L. No. 111–240, § 1601, 124 Stat. 2504, 2551)).

of Advocacy of the Small Business Administration (SBA).[16] Submitting the certification to the SBA is important for small businesses because it establishes the SBA as a check on agencies wrongfully using the carve-out to avoid the IRFA and FRFA requirements.

Where a proposed rule will have a significant impact on small entities, the RFA directs agencies to ensure "small entities have been given an opportunity to participate in the rulemaking" through specific participation-enhancing measures. These measures entail including in "an advance notice of proposed rulemaking . . . a statement that the proposed rule may have a significant economic effect on a substantial number of small entities"; "publication of general notice of proposed rulemaking in publications likely to be obtained by small entities"; "direct notification of interested small entities"; conducting "open conferences or public hearings concerning the rule for small entities"; and the "adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities."[17]

The current iteration of the RFA allows small businesses to legally challenge agency rulemaking that failed to comply with the RFA's requirements. Specifically, a small business detrimentally harmed by a final agency action can seek judicial review for agency compliance with the definitions of the RFA (§ 601), conducting the FRFA (§ 604), agency certification allowing it to bypass the IRFA and FRFA (§ 605(b)), waiver or delay of the FRFA (§ 608), and periodic review of rules having a substantial economic impact on small businesses (§ 610). In a review of an agency's FRFA, courts may also review agency compliance with the participation-enhancing measures described above and the requirement, codified in § 607, that agencies provide in the analyses "a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable."[18] When agencies fail to comply with the RFA's requirements, courts must direct the agency to take corrective action, which may include remand of the rule for the agency to cure its flaws, or defer enforcement of the rule against small businesses.[19]

Finally, the RFA grants the Chief Counsel for Advocacy of the SBA authority to "monitor agency compliance" and "report at least annually" on compliance to the

[16] § 3(a), 94 Stat. at 1168 (codified at 5 U.S.C. § 605(b) (as amended by § 243, 110 Stat. at 866)).
[17] § 3(a), 94 Stat. at 1168–69 (codified at 5 U.S.C. § 609(a)).
[18] 5 U.S.C. § 611(a)(1).
[19] 5 U.S.C. § 611(a)(4).

President and Committees on the Judiciary and Small Business of both the Senate and House of Representatives.[20] Similar to the certification check, the SBA as a monitor for agency compliance establishes a strong check and advocate for small businesses.

These provisions, taken together, afford some protections for small businesses against one-size-fits-all agency rulemaking.

II. STRENGTHENING THE ORIGINAL REGULATORY FLEXIBILITY ACT

While the RFA was an achievement for small businesses, it was by no means perfect. In the early 1990s, it became apparent that the RFA, in its original form, did not adequately entrench small business interests in agency rulemaking. Leading up to the 1995 White House Conference on Small Business, individual state conferences occurred across the country on a multitude of small business issues. In the SBA's official handbook of issues for these conferences, it noted the then-problems with the RFA: "agencies often use exceptions to avoid their analytical responsibilities", "agencies sometimes do as little as necessary to comply with the RFA", and "the RFA . . . does not require an assessment of the cumulative impact of regulations."[21]

Also troubling was a 1995 report to the SBA concluding that small businesses continued to disproportionately bear the financial burden of regulatory costs. In 1992, businesses with more than 500 employees spent $2,979 per employee on regulatory costs, while businesses with 1-19 employees spent a whopping $5,532 per employee on regulatory costs.[22]

Two legislative enactments, the Small Business Regulatory Enforcement Fairness Act (SBREFA) and the Small Business Jobs Act, tried to strengthen RFA requirements.

Small Business Regulatory Enforcement Fairness Act

In 1996, following the 1995 White House Conference on Small Business, Congress enacted the first major amendment to the RFA. Included in the Contract with America Advancement Act of 1996, SBREFA passed through a Republican-

[20] § 3(a), 94 Stat. at 1170 (codified at 5 U.S.C. § 612(a)).
[21] OFFICE OF ADVOCACY U.S. SMALL BUSINESS ADMINISTRATION, THE WHITE HOUSE CONFERENCE ON SMALL BUSINESS: FOUNDATION FOR A NEW CENTURY (hereinafter CONFERENCE ON SMALL BUSINESS REPORT) 82 (2d. ed. 1995), available at https://bit.ly/412a7Ib.
[22] Thomas D. Hopkins, *Profiles of Regulatory Costs, Report to the U.S. Small Businesses Administration*. *4 (Nov. 1995), https://bit.ly/3XGUcwa.

controlled Congress with bipartisan support and was signed by a Democratic president. As the 96th Congress did when passing the RFA, the 104th Congress included in SBREFA express findings on the regulatory burden for small businesses. These findings included that "small businesses bear a disproportionate share of regulatory costs and burdens" and "the requirements of [the RFA] have too often been ignored by government agencies, resulting in greater regulatory burdens on small entities than necessitated by statute."[23] Purposes of the Amendments were to "provide for judicial review" of the RFA and "encourage the effective participation of small businesses in the Federal regulatory process."[24] Substantively, SBREFA included four major provisions to ease the regulatory burden on small businesses.

First, SBREFA required agencies to publish "small entity compliance guides" whenever the RFA required the agency to conduct an FRFA. These guides were to assist small business compliance with rules by providing a roadmap of steps necessary for full compliance.[25]

Second, the Amendments added a section to the RFA that established small business input early in the rulemaking process. Under this provision, prior to publication of an IRFA, the agency must notify the SBA Office of Advocacy's Chief Counsel that the proposed rule will have a negative impact on small entities. The Chief Counsel must then obtain input from representatives of the affected small businesses regarding the effects of the proposed rule. Small Business Advocacy Review (SBAR) Panels then review the rule and input received from representatives of the affected entities and issue a report covering the proposed rule and input received from the affected entities. Unfortunately, this panel requirement applies only to rulemaking from the Environmental Protection Agency, Occupational Health and Safety Administration, and Consumer Financial Protection Bureau.[26]

SBREFA also imposed more requirements on what agencies are to include in an FRFA. The original RFA contained only three:

(1) a succinct statement of the need for, and the objectives of the rule;

---

[23] Small Business Regulatory Enforcement Fairness Act (SBREFA), Pub. L. No. 104–121, § 202, 110 Stat. 857, 857 (1996) (codified at 5 U.S.C. § 601 note).
[24] § 203, 110 Stat. at 857–58 (codified at 5 U.S.C. § 601 note).
[25] § 212, 110 Stat. at 858 (codified at 5 U.S.C. § 601 note).
[26] § 244, 110 Stat. at 867 (codified at 5 U.S.C. § 609(b)). While SBREFA only applied the panel requirement to the Environmental Protection Agency and Occupational Health and Safety Administration, Congress later added the Consumer Financial Protection Bureau. *See* Consumer Financial Protection Act of 2010, Pub. L. No. 111–203, § 1100G, 124 Stat. 1955, 2112 (codified at 5 U.S.C. § 609(d)).

(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and
(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.[27]

SBREFA amended the third requirement (appearing at number 5 below) to require agencies provide more reasoning for the rule and details about alternatives, and added two more:

(3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
(4) a description the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.[28]

Lastly, and most important for small businesses, SBREFA amended the RFA to allow small entities adversely affected by an agency action to seek judicial review.[29] The RFA in original form prevented judicial review of the agency's IRFA, FRFA, or compliance with other provisions of the Act.[30] The lack of judicial review in the RFA meant there was no enforcement mechanism to hold agencies accountable when they cut corners. With judicial review, small businesses, in theory, have a

[27] § 3(a), 94 Stat. at 1167.
[28] § 241, 110 Stat. at 865.
[29] § 242, 110 Stat. at 865–66 (codified at 5 U.S.C. § 611).
[30] § 3(a), 94 Stat. at 1169–70.

means to enforce the RFA in court. But filing a lawsuit after the fact offers small businesses limited relief.[31]

Small Business Jobs Act

In the Small Business Jobs Act of 2010 (Jobs Act), Congress again amended the RFA. While a minor change compared to SBREFA, the Jobs Act added a sixth requirement of what agencies must include in an FRFA. Congress mandated that agencies include an official agency response to comments on the rule filed by the Chief Counsel for Advocacy of the SBA, and detail what changes were made in response to those comments.[32]

SBREFA represents the most significant legislative attempt to align the RFA's application to its stated purpose "that agencies . . . fit regulatory and informational requirements to the scale of the businesses . . . subject to regulation."[33] But as will be shown below, neither it nor the Jobs Act were enough. As NFIB testified to Congress in 2017, "SBREFA has been instrumental in tamping down the 'one-size-fits-all mentality'" of rulemaking, but the previous "20 years have also exposed loopholes and weaknesses in the law that allow federal agencies to act outside of the spirit of SBREFA when it comes to small business regulation."[34] Agencies continue to cut corners, ignore RFA requirements, and engage in one-size-fits-all rulemaking to the detriment of small businesses.

III. AGENCIES RUN AMOK

The RFA, as amended, "establish[es] small business consideration as a necessary part of federal rulemaking."[35] But like the pre-SBREFA environment of the early 1990's, agencies are playing fast-and-loose with the RFA and its requirements. As previously noted, the RFA establishes that the SBA Office of Advocacy's Chief Counsel will monitor agency compliance and provide yearly reports of agency failures to follow RFA requirements.[36] In each report, the Office of Advocacy details

[31] While judicial review in the RFA is undoubtedly a good thing, judicially-created doctrines like *Chevron* deference have tipped the scales in favor of agencies and continue to prevent meaningful and thorough review of agency rules. *See Chevron U.S.A., Inc., v. National Resources Defense Council*, 467 U.S. 837 (1984). In the Supreme Court's 2023-2024 term, the Court will consider whether it should overrule *Chevron* in the case *Loper Bright Enterprises v. Raimondo*. Overruling or limiting *Chevron* would be a step toward easing the crushing regulatory burden on small businesses. NFIB urged the Court to grant review in *Loper*, and will file a merits amicus brief in the case on behalf of America's small businesses.

[32] Small Business Jobs Act of 2010, Pub. L. No, 111–240, § 1601, 124 Stat. 2504, 2551 (codified at 5 U.S.C. § 604(a)).

[33] § 2(b), 94 Stat. at 1165 (codified at 5 U.S.C. 601 note).

[34] *Improving Small Business Input on Federal Regulation: Ideas for Congress and a New Administration*: Hearing Before the Subcomm. On Reg. Affairs and Fed. Management of the S. Comm. on Homeland Security and Gov't Affairs, 115th Cong. 3 (2017) (statement of Karen R. Harned, Executive Director, NFIB Small Business Legal Center), available at https://bit.ly/41rFRXk.

[35] RFA REPORT, *supra* note 4, at 2.

[36] § 3(a), 94 Stat. at 1170 (codified at 5 U.S.C. § 612(a)).

total RFA shortcomings by agencies within the past year, the type of noncompliance, and which agencies are the biggest offenders.

Between October 1, 2020, and September 30, 2021, the Office of Advocacy submitted 17 total comment letters to federal agencies detailing subpar RFA compliance.[37] Of these 17, almost half came from just two federal agencies—the Environmental Protection Agency (EPA) (5) and Department of Labor (DOL) (3).[38]

Broadening the timeframe, the NFIB Legal Center reviewed the Office of Advocacy's comment letters during the 117th Congress (January 2021–January 2023). This review revealed that the Office of Advocacy identified 28 separate RFA inadequacies by government agencies during this time span. What follows is information on the 28 instances of RFA noncompliance the SBA Office of Advocacy identified during the 117th Congress.[39]

SBA Office of Advocacy's Identified RFA Deficiencies During the 117th Congress

Date: 05/25/21

Rule: 86 Fed. Reg. 18901 – *Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Testing Procedures for Consumer Products and Commercial/Industrial Equipment*

Agency: Department of Energy (DOE)

Noncompliance Summary: The SBA Office of Advocacy letter deemed the DOE as failing to comply with the RFA due to its lack of considering significant alternatives that would lessen the impact of its proposal on small businesses. It urged DOE to retain the comparative analysis of trial standard levels (TSLs) when selecting energy conservation standards, which would "ensure compliance with the RFA." Additionally, "one of the requirements of the RFA is to discuss significant alternatives which minimize the economic impacts on small entities. DOE on multiple occasions fails to discuss such alternatives[.]"

[37] RFA REPORT, *supra* note 4, at 21.
[38] RFA REPORT, *supra* note 4, at 22.
[39] Table 1 at the end of this paper provides this same information in a more condensed fashion for readability.

Date: 07/12/21

Rule: 86 Fed. Reg. 26023 – *National Pollutant Discharge Elimination System (NPDES) 2022 Issuance of General Permit for Stormwater Discharges from Construction Activities*

Agency: Environmental Protection Agency (EPA)

Noncompliance Summary: Advocacy chastised the EPA for not following the Administrative Procedure Act's definition of a rule and the RFA requirements. Under the RFA, an agency must either certify that the rule would not have a significant economic impact on a substantial number of small entities or conduct an IRFA. "EPA failed to do either. EPA does not provide any estimate of small businesses affected by this rule."

Date: 08/20/21

Rule: 86 Fed. Reg. 32818 – *Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal*

Agency: Department of Labor (DOL)

Noncompliance Summary: In the Tip Regulation Rule, DOL tried to certify that the rule would not have a significant economic impact on a substantial number of small entities. Advocacy determined that "DOL's certification lacks an adequate factual basis." This was because "the agency omitted some and underestimated other compliance costs" of the Rule. Advocacy recommended that DOL conduct an IRFA, taking better account of changes to wage costs, the costs of regulatory familiarization, adjustment costs, and management costs, for small entities.

Date: 08/27/21

Rule: 86 Fed. Reg. 38816 – *Increasing the Minimum Wage for Federal Contractors*

Agency: Department of Labor (DOL)

Noncompliance Summary: In this rule, the DOL both provided an IRFA and certified that the rule will not have a significant economic impact on a substantial number of small entities. Advocacy concluded that "the certification . . . lacks a factual basis and is invalid" and that "DOL's IRFA underestimates the small business compliance costs including increased wages under this regulation." DOL failed to consider in its

IRFA the impacts on "small businesses that are not normally considered government contractors, such as concessionaries, lease holders, and seasonal recreation businesses who have contracts and permits on Federal property or lands."

Date: 09/27/21

Rule: 86 Fed. Reg. 33926 – *TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances*

Agency: Environmental Protection Agency (EPA)

Noncompliance Summary: EPA certified that the rule would not have a significant economic impact on a substantial number of small entities. But Advocacy concluded otherwise, noting that "EPA has underestimated the impacts of the rule and underestimated the number of small entities subject to the rule" and that "EPA's factual basis does not meet the standard set by the agency's own guidance for how to conduct a threshold analysis under the RFA." Advocacy urged the EPA to conduct a SBREFA panel and consider less burdensome alternatives.

Date: 01/06/22

Rule: 86 Fed. Reg. 56356 – *Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B)*

Agency: Consumer Financial Protection Bureau (CFPB)

Noncompliance Summary: Upon review of the rule, Advocacy asserted that the IRFA was insufficient because the "CFPB may have underestimated the costs" of the proposed rule, indicating that even the CFPB "acknowledge[d] that several SBREFA panel SERs [Small Entity Representatives] considered its estimate of training costs, for example, to be too low." Beyond this underestimation, the proposed rule was determined to be unnecessarily burdensome for small businesses and inferior to less costly alternatives.

Date: 01/31/22

Rule: 86 Fed. Reg. 68174 – *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*

Agency: Department of Labor (DOL)

Noncompliance Summary: Advocacy determined that DOL's "certification that the rule will not have a significant economic impact on a substantial number of small entities is improper and lacks an adequate factual basis." Costs underestimated by DOL included "thousands of dollars in administrative costs" and "wage increases of $5.35-$11.76 per hour." Advocacy cited two specific farmers which would be subject to an additional $44,393 in compliance costs and $124,235 in fees, respectively, due to the rule. Advocacy urged the DOL to conduct an IRFA that adequately considers these compliance costs and less burdensome alternatives.

Date: 01/31/22

Rule: 86 Fed. Reg. 63110 – *Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review*

Agency: Environmental Protection Agency (EPA)

Noncompliance Summary: Advocacy decided that compliance with the RFA was lacking because EPA's IRFA was insufficient. EPA did not consider the impact of its proposed Appendix K requirements on small entities, limited its burden timeframe to just three years, and failed to consider regulatory alternatives in the IRFA. Overall, "EPA's cost estimates overstate the cost effectiveness of some provisions in its proposal and understate the impact on small businesses, particular[ly] businesses at the smaller end of the range of small businesses."

Date: 02/07/22

Rule: 86 Fed. Reg. 69372 – *Revised Definition of "Waters of the United States"*

Agency: Environmental Protection Agency/Army Corps of Engineers

Noncompliance Summary: In broadening the definition of Waters of the United States, the agencies used two baselines for its economic analysis: 1) 1980's

regulations and Supreme Court guidance, and 2) the Trump administration's Navigable Waters Protection Rule (NWPR). Advocacy concluded that "using either baseline" "the Agencies have improperly certified this proposed rule. Advocacy, and the small entities [it has] spoken to, believe that the Agencies have failed to state a factual basis for its certification that the rule will not have a significant economic impact on a substantial number of small entities. The proposed rule imposes costs directly on small entities, and those costs will be significant for a substantial number of them."

Date: 03/23/22

Rule: 87 Fed. Reg. 1014 – *Safety Standard for Operating Cords on Custom Window Coverings*

Agency: Consumer Product Safety Commission (CPSC)

Noncompliance Summary: In its letter to the CPSC, Advocacy claimed that the agency's IRFA was insufficient because it did not "offer enough detail about firm size or cite all of its sources in the analysis." Further, it encouraged the CPSC to "do more to consider reasonable modifications to the proposed rule that would ease the burden on small businesses[.]"

Date: 04/18/22

Rule: 87 Fed. Reg. 6246 – *Safety Standard for Clothing Storage Units*

Agency: Consumer Product Safety Commission (CPSC)

Noncompliance Summary: Advocacy averred that the CPSC's IRFA was insufficient because it "underestimates the impact the proposed rule will have on small businesses." The CPSC's IRFA determined the increased cost for a clothing storage unit to be between 5 and 25 percent. But Advocacy's small business roundtables revealed the actual additional costs to be as high as 44%, with many small businesses estimating higher costs of 30-40%. The "small businesses report[ed] that an increase of this magnitude will put many of them out of business." With "[o]ver half of the businesses in [the affected industries] hav[ing] fewer than five employees[,]" the proposed rule and insufficient IRFA would pose a significant detriment to the smallest of small businesses.

Date: 05/06/22

Rule: 87 Fed. Reg. 16590 – *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*

Agency: Securities and Exchange Commission (SEC)

Noncompliance Summary: Advocacy deemed the SEC's IRFA for its proposed rule insufficient due to its "not adequately describ[ing] the regulated small entities and potential impacts on those entities." The IRFA did not detail what small entities would be subject to the rule and it assumed costs would be the same for large and small businesses. The SEC also failed to "adequately discuss specific alternatives that might reduce the impacts on small entities."

Date: 05/17/22

Rule: 87 Fed. Reg. 15698 – *Updating the Davis-Bacon and Related Acts Regulations*

Agency: Department of Labor (DOL)

Noncompliance Summary: In its comment letter, Advocacy labeled DOL's IRFA as "deficient" based on numerous shortcomings. DOL did "not properly analyze the number of small businesses and the industries affected" by the rule, "severely underestimated the administrative burdens and compliance costs of this rule for small businesses" and provided proposed alternatives that "do not minimize the significant impacts of this rule" as required by the RFA.

Date: 05/23/22

Rule: 87 Fed. Reg. 10504 – *Required Minimum Distributions*

Agency: Internal Revenue Service (IRS)

Noncompliance Summary: Advocacy found the IRS improperly certified that the rule would have no significant economic impact on a substantial number of small entities. The agency did not identify or estimate the number of regulated small entities and its "explanation regarding the proposed rule's burden is inaccurate." These flaws led Advocacy to conclude there was no "valid factual basis for

certification under the RFA" and recommend the agency publish a supplemental certification or IRFA.

Date: 06/17/22

Rule: 87 Fed. Reg. 21334 – *The Enhancement and Standardization of Climate-Related Disclosures for Investors*

Agency: Securities and Exchange Commission (SEC)

Noncompliance Summary: Advocacy determined that the SEC's IRFA "lacks essential information required under the Regulatory Flexibility Act (RFA). Specifically, the IRFA does not adequately describe the costs of the proposed disclosure requirements on the small entities that would be directly regulated. Nor does the IRFA set forth significant alternatives which accomplish the stated objectives, and which minimize the significant economic impact of the proposal on regulated small entities beyond accommodations that are already included in the rulemaking. Second, the proposal does not consider indirect impacts to privately owned businesses that are not generally subject to SEC regulation. Based upon feedback received by Advocacy from multiple industries, the costs of the proposal to small private businesses could be extensive."

Date: 07/05/22

Rule: 87 Fed. Reg. 27060 – *Asbestos: Reporting and Recordkeeping Requirements under the Toxic Substances Control Act (TSCA)*

Agency: Environmental Protection Agency (EPA)

Noncompliance Summary: In this letter, Advocacy expressed concern that the "EPA has improperly certified the rule under the Regulatory Flexibility Act." Specifically, Advocacy noted that "EPA did not include compliance cost information for small businesses who would be required to report asbestos as an impurity under the proposed rule" in its RFA certification analysis, and that "EPA does not include the number of small businesses who would be required to report for asbestos as an impurity to support its RFA certification."

Date: 08/05/22

Rule: 87 Fed. Reg. 35318 – *Clean Water Act Section 401 Water Quality Certification Improvement Rule*

Agency: Environmental Protection Agency (EPA)

Noncompliance Summary: Advocacy concluded that EPA improperly certified the proposed rule as having no significant economic impact on a substantial number of small entities. "The proposed rule imposes costs directly on small entities, but EPA has not provided a comprehensive factual basis to certify[.]" Advocacy lamented that EPA provided "no facts [in the certification analysis] to describe the burden placed on small entities by requiring them to obtain draft Federal permits and licenses" while admitting in the rule itself that the requirement would cause work delays.

Date: 08/08/22

Rule: 87 Fed. Reg. 34625 – *Endangered and Threatened Wildlife and Plants: Designation of Experimental Populations*

Agency: Department of Interior (DOI)

Noncompliance Summary: DOI certified that the rule would not have a significant economic impact on a substantial number of small entities. Advocacy declared the agency's certification erroneous, recommending the agency conduct an IRFA instead. "[T]he Service asserts that it is the only entity directly affected by the proposed rule . . . [and] that no external entities including small businesses would face impacts from the rulemaking. Advocacy believes any designation of critical habitat, or in this instance experimental populations, has a direct economic impact on small entities. This proposed rule has the potential to allow the Service to introduce invasive and predatory species to habitats in which they do not reside. This may limit or inhibit small business operations by posing a safety concern to agricultural small businesses and delaying new development projects due to lengthy permitting reviews."

Date: 09/08/22

Rule: 87 Fed. Reg. 42012 – *Motor Vehicle Dealers Trade Regulation Rule*

Agency: Federal Trade Commission (FTC)

Noncompliance Summary: While the FTC tried to certify the rule would not have a significant economic impact on a substantial number of small businesses, Advocacy cried foul. First, "Advocacy asserts that the FTC's certification is not supported by a factual basis." Second, the "FTC does not provide information to support th[e] claim" that the rule will not have a significant economic impact on small businesses, and moreover, "the FTC does not provide specific information about the economic impact on small entities at all." Finally, "FTC's estimation of the number of small entities impacted is inaccurate."

Date: 09/13/22

Rule: 87 Fed. Reg. 41390 – *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*

Agency: Department of Education (DOE)

Noncompliance Summary: In this rulemaking, the DOE performed an IRFA as required by the Regulatory Flexibility Act. However, Advocacy maintained that DOE's IRFA was insufficient. This was due to the agency "understat[ing] the costs to small educational institutions and [] fail[ing] to analyze costs to other small entities that will be subject to Title IX such as libraries, museums, and nonprofits."

Date: 10/28/22

Rule: 87 Fed. Reg. 53556 – *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention*

Agency: Environmental Protection Agency (EPA)

Noncompliance Summary: EPA certified that "this action will not have a significant economic impact on a substantial number of small entities under the RFA." Yet in the same section, EPA admitted that 96.9 percent of the small entities regulated "may experience . . . an *average small entity cost of $10,618*" and 2.9 percent "may

experience . . . an *average small cost entity [sic] of $108,921*."[40] For good reason, Advocacy deemed the certification improper. It determined that EPA's certification analysis was "neither transparent nor [a] sufficient factual basis for certification." Moreover, Advocacy identified "missing and underestimated costs" in EPA's analysis, such as "documentation requirement" costs, "employee training," and "costs of information."

Date: 11/01/22

Rule: 87 Fed. Reg. 46921 – *Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule*

Agency: National Marine Fisheries Service (NMFS)

Noncompliance Summary: NMFS's IRFA determined that its proposed rule would have an annual cost of between 0.6 and 2.9% of annual business revenue. Advocacy expressed concern that this IRFA was insufficient. Specifically, "NMFS has not estimated all costs of the rule for small entities." The analysis only considered additional operating costs from expected delays caused by the rule, but not the opportunity costs on small businesses from those delayed trips.

Date: 11/07/22

Rule: 87 Fed. Reg. 54415 – *Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*

Agency: Environmental Protection Agency (EPA)

Noncompliance Summary: EPA certified that its rule would not have a significant economic impact on a substantial number of small businesses. Advocacy found that EPA did "not provide an adequate factual basis to support its certification[.]" This was due to EPA engaging in a sleight-of-hand—labeling some costs falling directly on regulated small businesses, such as cleanup and liability management costs, as indirect costs and thus not taking them into consideration. Advocacy

[40] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention, 87 Fed. Reg. 53556, 53561 (Aug. 31, 2022) (to be codified at 40 C.F.R. pt. 68).

recommended that the EPA convene a SBREFA Panel and consider alternatives to the rule as part of its IRFA.

Date: 11/18/22

Rule: 87 Fed. Reg. 58021 & 58043 – *Implementation of Refund Procedures for Craft Beverage Modernization Act Federal Excise Tax Benefits Applicable to Imported Alcohol*

Agency: Department of Treasury (Treasury)

Noncompliance Summary: In this rule, Treasury certified under 5 U.S.C. § 605 that the rule would not have a significant economic impact on a substantial number of small businesses. Advocacy declared the certification improper because it "does not identify the small entities affected by the rules, nor does it adequately describe the costs of the rules to those small entities." In the certification, the agency admitted that the "majority of businesses subject to the regulations are small businesses"[41] but did not identify which types of businesses those would be. More concerning, the agency "omitted and underestimated compliance costs associated with the proposed rules" as well as "costs associated with the refund method of obtaining CBMA tax benefits."

Date: 11/29/22

Rule: 87 Fed. Reg. 54641 – *Standard for Determining Joint-Employer Status*

Agency: National Labor Relations Board (NLRB)

Noncompliance Summary: NLRB conducted an IRFA for its joint-employer rule. After review, Advocacy found the "NLRB's expanded joint employer definition is too broad and confusing and provides no guidance for small businesses." The agency's IRFA "underestimated the compliance costs and burden of th[e] rule for small businesses." Advocacy noted that the NLRB did not consider small business input on the rule that "th[e] proposal may add costs of thousands of dollars a year[,]" "these costs will prohibit small business expansion," and "would create increased litigation exposure."

[41] Implementation of Refund Procedures for Craft Beverage Modernization Act Federal Excise Tax Benefits Applicable to Imported Alcohol, 87 Fed. Reg. 58021, 58030 (Sep. 23, 2022) (to be codified at 27 C.F.R. pts. 26 & 27).

Date: 12/12/22

Rule: 87 Fed. Reg. 62218 – *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*

Agency: Department of Labor (DOL)

Noncompliance Summary: DOL's Independent Contractor rule may be the perfect example of blatant agency disregard for the purposes and mandates of the RFA. Like so many other agency rules today, the rule contained an IRFA in name only. From a practical matter, the IRFA was offensive to small businesses. Advocacy determined the IRFA was entirely "deficient" because it "severely underestimates the economic impacts of this rule on small businesses" and will be "detrimental and disruptive to millions of small businesses that rely upon independent contractors as part of their workforce." DOL "*failed to estimate any costs* for small businesses and independent contractors to reclassify workers as independent contractors, for lost work, and for business disruptions." The estimated compliance costs and administrative burdens cited in the rule were a mere 30 minutes and less than $25 for small businesses.[42] But as advocacy noted, the first proposed rule was 200 pages long and "would take four hours to read." Small businesses also expressed concern to DOL about the costs of hiring outside professionals to determine worker status under the rule and the significant litigation risk and costs due to misclassification. For workers needing to be reclassified as employees from independent contractors, the rule failed to consider employer-provided benefits like health insurance, retirement, and paid leave that could "average more than $15,000 annually" per employee. Nor did the rule adequately consider industries whose business model depends on independent contractors, like sales, insurance, financial advisors, construction, and trucking. For example, the rule could be a fatal disruption to the construction industry, which depends on contractors and subcontractors with specialized experience.

[42] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, 62266, 62272 (Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, & 795).

Date: 12/19/22

Rule: 87 Fed. Reg. 72439 – *TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances; Notice of Data Availability and Request for Comment*

Agency: Environmental Protection Agency (EPA)

Noncompliance Summary: This EPA request for comment included an IRFA and updated economic analysis for its previous proposed rule on reporting and recordkeeping requirements for perfluoroalkyl and polyfluoroalkyl substances from September 2021. In that proposal, EPA attempted to certify that the rule would not have a significant economic impact on a substantial number of small entities. After Advocacy suggested this was improper, EPA conducted this IRFA and economic analysis. On this attempt, Advocacy asserted that EPA's IRFA was insufficient, as it "underestimated" compliance costs and "does not identify whether it will consider any of the regulatory flexibility alternatives discussed in the IRFA as viable policy options to address small business concerns."

Date: 12/21/22

Rule: 87 Fed. Reg. 45564 – *Train Crew Size Safety Requirements*

Agency: Federal Railroad Administration (FAA)

Noncompliance Summary: This proposed rule from the FAA established regulations for safe minimum requirements for the size of train crews, to require at least two crewmembers for most railroad operations. After review, Advocacy maintained that FAA's IRFA was insufficient because it "significantly understated the cost and number of small businesses that would be impacted by the proposed rule." FAA's cost analysis also ignored the "cost of recruiting, hiring, and training new employees in order to meet the crew size requirements, the labor costs of additional crew members, or the various costs related to operational changes[.]"

The NFIB Legal Center's review of SBA Office of Advocacy-identified instances of subpar RFA compliance during the 117th Congress revealed concerning rulemaking habits. First, some agencies routinely ignore Congressional mandates of the RFA and the needs of small businesses. NFIB Legal Center's analysis of the

entire 117th Congress revealed the most egregious violators of the RFA were EPA with nine violations and DOL with five violations.[43] Additionally, agencies often used the certification loophole in 5 U.S.C. § 605(b) to evade IRFA and FRFA analyses. Advocacy flagged 13 instances of agencies improperly using the certification of no significant economic impact work-around under § 605(b) to evade necessary IRFAs or FRFAs. Alarmingly, agencies did this on regulations for which even the most cursory review would reveal obvious significant economic effects for small businesses and the economy. Examples of these include:

1) EPA's *"Revised Definition of Waters of the United States"* – EPA's broadening of the WOTUS definition and expansion of its jurisdiction under the Clean Water Act (CWA) exposes more small businesses to liability for modifications on their land without a permit. The first CWA violation can result in civil damages, a prison term of up to 1 year, and a fine of $2,500–$25,000 per day. A second violation can cost small businesses up to $50,000 per day and expose them to 2 years in a government prison.[44] As the U.S. Supreme Court has acknowledged, "[t]he costs of obtaining such a permit are significant. For a specialized 'individual' permit . . . one study found that the average applicant 'spends 788 days and $271,596 in completing the process,' without 'counting costs of mitigation or design changes.' Even more readily available 'general' permits took applicants, on average, 313 days and $28,915 to complete."[45]

2) DOL's *Increasing the Minimum Wage for Federal Contractors* – In this rulemaking, DOL both conducted an IRFA and certified that the rule would not have a significant economic impact on a substantial number of small entities. If the agency truly believed its certification, it would not have conducted an IRFA in the first place. Moreover, the DOL's IRFA acknowledged that the rule would raise wage costs on businesses by thousands of dollars annually.

[43] The NFIB Legal Center's review of Advocacy comment letters during the 117th Congress revealed that the Environmental Protection Agency (EPA) and Department of Labor (DOL) were the most consistent RFA violators, which aligns with the Office of Advocacy's FY2021 report concluding the same from October 1st, 2020 – September 3, 2021. *See* RFA REPORT, *supra* note 4, at 22.
[44] 33 U.S.C. § 1319(c)(1)–(2); *Criminal Provisions of Water Pollution*, ENVIRONMENTAL PROTECTION AGENCY (Nov. 10, 2022), https://bit.ly/3USY0e0.
[45] *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 594 (May 31, 2016) (citations omitted).

3) DOL's *Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal* – The FLSA allows employers to pay tipped employees less than minimum wage, utilizing a "tip credit" (i.e., the employee's tips) to make up the difference. DOL's restricting the number of employers who can claim the "tip credit" would obviously lead to higher wage costs. One need not be a rocket scientist to make this conclusion. A small restaurant that is forced to pay an employee minimum wage, instead of the required $2.13 per hour when claiming the tip credit (in addition to paying tips) will have to make up the wage difference between the $2.13 and that state's minimum wage. For some businesses, this increase in wage costs could be hundreds of thousands of dollars.[46]

Another concerning habit is agencies routinely engaging in deceptive practices regarding the costs of a rule. Of the 28 comment letters by Advocacy during the 117th Congress, 21 included a determination that the agencies either ignored costs on small businesses or underestimated these costs in their analysis. In more blunt terms, in 75% of rulemakings, agencies misrepresent the costs on small entities.

To summarize, the small business community currently finds itself in the same predicament as the early 1990's prior to SBREFA. As the NFIB Legal Center analysis of SBA Office of Advocacy comment letters during the 117th Congress demonstrates, agencies continue to routinely "use exceptions to avoid their analytical responsibilities."[47] They also engage in a box-checking and minimalist approach to RFA compliance, doing "as little as necessary to comply with the RFA."[48] Moreover, the agencies continue to not consider, and Congress has not mandated they do so, the "cumulative impact of regulations." [49] There are steps that Congress can take to remedy the current small business regulatory plight.

IV. RFA LEGISLATIVE RECOMMENDATIONS

For over 40 years, Presidents and Congress have affirmed the importance of providing relief to small businesses harmed by burdensome regulations. Unfortunately, federal agencies often have ignored the calls for relief

[46] *See* U.S. Small Business Administration Office of Advocacy, Comment Letter on Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 32818 (Aug. 20, 2021), https://bit.ly/3N0rC7f (citing one business with a $286,000 increase in wage costs due to DOL's rule, and another that could have a $500,000 per year cost due to the rule).
[47] CONFERENCE ON SMALL BUSINESS REPORT, *supra* note 21, at 82.
[48] *Id.*
[49] *Id.*

and flexibility for the small businesses they regulate. To ensure agencies are taking into consideration the regulatory concerns of small businesses, Congress and the President should:

A) *Strengthen the RFA*

The RFA needs modernization and should incorporate lessons learned over the last 40 years. Congress should strengthen the requirements of the RFA regarding the economic impact of regulations. One improvement would require agencies to consider the indirect economic impacts of proposed rules on small businesses. Congress should also strengthen the requirements for agencies to examine and certify the economic impact of rules. These changes would increase transparency of the regulatory process and provide a more accurate assessment of the cost of regulations.

B) *Increase Transparency of Less Costly Alternatives to Regulation*

Since the RFA was enacted in 1980, Congress has updated the law to require agencies to consider less costly alternatives to regulation, and a statement of the reasons why each alternative was rejected by the agency. However, as the SBA Office of Advocacy has documented, federal agencies have often glossed over these requirements. Congress should require agencies to publicly disclose the regulatory alternatives the agency examined to reduce any significant economic impact on small businesses. The agencies should provide the economic impact of each alternative and ensure regulated entities have opportunities to provide input on the alternatives.

The RFA should also be amended to require agencies to not only "consider" less burdensome alternative rules for small businesses, but to fully "promulgate" separate, less burdensome alternative rules for small businesses. This will prevent agencies from simply rubber-stamping the requirement to consider less burdensome alternatives without ever seriously entertaining the idea of adopting a less burdensome alternative.

C) *Strengthen the SBA Office of Advocacy*

As noted in this paper, the SBAR Panels are an important mechanism for small businesses to discuss the impacts of regulation. However, SBAR Panels are only required for EPA, OSHA, and CFPB rulemaking. Congress should expand the

number of agencies subject to SBAR Panels to increase opportunities for small businesses to engage on burdensome regulations.

The Office of Advocacy does a commendable job in alerting agencies when they have improperly certified a rule as having no significant economic impact or drafted a deficient RFA analysis. However, Advocacy has no real power to enforce the RFA. Advocacy should be empowered by requiring the Chief Counsel for Advocacy to approve agency RFA analyses in both an IRFA and FRFA, prior to the publishing of a rule. No final rule should be allowed to take effect without RFA-compliance approval from the Chief Counsel for Advocacy. This will ensure that RFA analyses are done properly and in accordance with the law and congressional intent.

CONCLUSION

To realize the congressional intent of the RFA, action must be taken, and it must be taken fast. Upholding this intent and protecting small businesses from one-size-fits-all agency rulemaking is not a slippery slope toward eliminating the "fourth branch of the Government"[50] or killing the regulatory Leviathan. While the general rise of the administrative state will one day need to be confronted in order to preserve our Constitutional separation of powers,[51] today need not be that day. This paper does not seek to destroy or handcuff administrative agencies.

With that said, Congress must take action to prevent the RFA from falling into complete desuetude. The above-analysis of SBA Office of Advocacy comment letters during the 117th Congress demonstrates that administrative agencies are giving short-shrift to, or altogether ignoring, the RFA's mandates. Agencies routinely include improper certifications that rules will not have a significant economic impact on small entities, underestimate costs in their analyses, or misstate the number of entities to be impacted by a rule. To ameliorate this behavior, while still allowing agencies to act, when necessary, Congress should consider and pass into law the recommendations offered herein.

---

[50] *See, e.g., FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies probably has been the most significant legal trend of the last century . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.").

[51] *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) ("The administrative state 'wields vast power and touches almost every aspect of daily life.' The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities. '[T]he administrative state with its reams of regulations would leave them rubbing their eyes.' And the federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies." (citations omitted)).

Table 1

Date	Rule	Agency	Topic	Type of RFA Noncompliance
05/25/21	86 Fed. Reg. 18901	Department of Energy	Energy Conservation Program for Appliance Standards	Insufficient IRFA
07/12/21	86 Fed. Reg. 26023	Environmental Protection Agency	Proposed 2022 Construction General Permit	Failure to Conduct an IRFA or Certify No Significant Impact
08/20/21	86 Fed. Reg. 32818	Department of Labor	Tip Regulations Under the Fair Labor Standards Act	Improper Certification of No Significant Impact
08/27/21	86 Fed. Reg. 38816	Department of Labor	Increasing the Minimum Wage for Federal Contractors	Improper Certification of No Significant Impact
09/27/21	86 Fed. Reg. 33926	Environmental Protection Agency	Reporting and Recordkeeping Requirements for Certain Substances	Improper Certification of No Significant Impact
01/06/22	86 Fed. Reg. 56356	Consumer Financial Protection Bureau	Small Business Lending Data Collection	Insufficient IRFA
01/31/22	86 Fed. Reg. 68174	Department of Labor	Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations	Improper Certification of No Significant Impact

Date	Rule	Agency	Topic	Type of RFA Noncompliance
01/31/22	86 Fed. Reg. 63110	Environmental Protection Agency	Standards of Performance for Sources of Oil and Natural Gas	Insufficient IRFA
02/07/22	86 Fed. Reg. 69372	Environmental Protection Agency/Army Corps of Engineers	Proposed Rule Defining "Waters of the United States"	Improper Certification of No Significant Impact
03/23/22	87 Fed. Reg. 1014	Consumer Product Safety Commission	Safety Standard for Operating Cords on Custom Window Coverings	Insufficient IRFA
04/18/22	87 Fed. Reg. 6246	Consumer Product Safety Commission	Safety Standard for Clothing Storage Units	Insufficient IRFA
05/06/22	87 Fed. Reg. 16590	Securities and Exchange Commission	Cybersecurity Risk Management and Incident Disclosure	Insufficient IRFA
05/17/22	87 Fed. Reg. 15698	Department of Labor	Updating the Davis-Beacon and Related Acts Regulations	Insufficient IRFA
05/23/22	87 Fed. Reg. 10504	Internal Revenue Service	Required Minimum Distributions	Improper Certification of No Significant Impact
06/17/22	87 Fed. Reg. 21334	Securities and Exchange Commission	Climate-Related Disclosures for Investors	Insufficient IRFA
07/05/22	87 Fed. Reg. 27060	Environmental Protection Agency	Reporting and Recordkeeping Requirements for Asbestos	Improper Certification of No Significant Impact
08/05/22	87 Fed. Reg. 35318	Environmental Protection Agency	Clean Water Act Quality Certification Improvement Rule	Improper Certification of No Significant Impact

Date	Rule	Agency	Topic	Type of RFA Noncompliance
08/08/22	87 Fed. Reg. 34625	Department of Interior	Designation of Experimental Populations of Threatened Wildlife	Improper Certification of No Significant Impact
09/08/22	87 Fed. Reg. 42012	Federal Trade Commission	Motor Vehicle Dealers Trade Regulation Rule	Improper Certification of No Significant Impact
09/13/22	87 Fed. Reg. 41390	Department of Education	Title IX – Nondiscrimination Based on Sex	Insufficient IRFA
10/28/22	87 Fed. Reg. 53556	Environmental Protection Agency	Accidental Chemical Release Prevention	Improper Certification of No Significant Impact
11/01/22	87 Fed. Reg. 46921	National Marine Fisheries Service	North Atlantic Right Whale Vessel Strike Reduction Rule	Insufficient IRFA
11/07/22	87 Fed. Reg. 54415	Environmental Protection Agency	CERCLA Hazardous Substance Designations	Improper Certification of No Significant Impact
11/18/22	87 Fed. Reg. 58021 & 58043	Department of Treasury	Implementing Refund Procedures for Federal Excise Tax Benefits on Imported Alcohol	Improper Certification of No Significant Impact
11/29/22	87 Fed. Reg. 54641	National Labor Relations Board	Joint Employer Status	Insufficient IRFA
12/12/22	87 Fed. Reg. 62218	Department of Labor	Employee/Independent Contractor Classification	Insufficient IRFA

Date	Rule	Agency	Topic	Type of RFA Noncompliance
12/19/22	87 Fed. Reg. 72439	Environmental Protection Agency	IRFA on reporting and recordkeeping for certain substances under the TSCA	Insufficient IRFA
12/21/22	87 Fed. Reg. 45564	Federal Railroad Administration	Train Crew Size Safety Requirements	Insufficient IRFA

*This table does not include Office of Advocacy Letters merely offering solutions to better a rule, asking for extensions before implementation, or not specifically mentioning an RFA obligation.

Statement by

Todd Phillips, Assistant Professor, Georgia State University

Before the United States House of Representatives Committee on Small Business

May 22, 2024

Chairman Williams, Ranking Member Velazquez, and members of the Committee, thank you for the opportunity to testify. I am Todd Phillips, Assistant Professor of Legal Studies at Georgia State University's J. Mack Robinson College of Business, a Fellow with the Roosevelt Institute, and principal with the small business Phillips Policy Consulting, LLC. I previously served as an attorney advisor with the Federal Deposit Insurance Corporation and the Administrative Conference of the United States, and as counsel with what was then known as the House Oversight and Government Reform Committee. My research focuses are on administrative law, the rulemaking process, and financial regulation. I am testifying today on the basis of my expertise and not as a representative of any organization.

My testimony today will discuss the Biden Administration's regulatory efforts to support small businesses and its compliance with the Regulatory Flexibility Act; my concerns about two bills the Committee is considering, H.R. 8033, the Regulatory Transparency for Small Business Act and H.R. 7198, the Prove It Act; my support for a third, H.R. 5999, the Small Business Regulatory Relief Act; and the need to consider both the costs and benefits of regulations.

I. The Biden Administration's Regulatory Support for Small Businesses

The Biden Administration has been intent on ensuring small businesses are at the proverbial table when agencies craft regulations and receive substantial benefits from rules, not only bear their costs.

For too long, agencies have primarily heard from larger and better resourced businesses that hire high-priced lobbyists and dominate industry trade associations to influence agencies during and after rulemaking comment periods, and have lacked important input from entrepreneurs, small businesses, and other members of the public.[1] To address this disparity, President Biden signed Executive Order 14094, *Modernizing Regulatory Review*, which requires agencies to promote meaningful participation by and receive input from "interested or affected parties in the private sector and other regulated entities," among others.[2] In particular, the Executive Order required agencies to go beyond the Administrative Procedure Act's (APA) notice-and-comment requirements[3] and engage in expanded outreach to ensure the meaningful participation of those

---

[1] *See generally* Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking: Final Report for the Administrative Conference of the United States (2018), https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf; Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 Ann. Rev. Pol. Sci. 37 (2019).

[2] Modernizing Regulatory Review, 88 Fed. Reg. 21879 (Apr. 11, 2023).

[3] *See* 5 U.S.C. § 553 (providing notice-and-comment procedures).

affected by regulations, including small businesses.[4]

Building on this executive order, the Biden Administration's Office of Information and Regulatory Affairs (OIRA) and Administrative Conference of the United States (ACUS) issued guidance to help agencies with this new mandate. OIRA issued a memorandum, *Broadening Public Participation and Community Engagement in the Regulatory Process*, that provided guidance for how to better engage with underrepresented communities to ensure that they are truly represented in the rulemaking process.[5] Similarly, ACUS released a collection of 16 principles for ensuring public engagement in rulemakings based on its extensive catalog of recommendations developed through its own public engagement process.[6]

The Biden Administration has made clear that simply ensuring small businesses' participation in rulemakings is insufficient; rules must be crafted to ensure that small businesses can survive and thrive. To that end, OIRA updated Circular A-4—its guidance to agencies for conducting regulatory impact analyses—to require agencies to consider whether the compliance burdens faced by small businesses and their larger competitors will differ and strive to reduce small businesses' compliance burdens accordingly.[7]

Moreover, a centerpiece of the Biden Administration's regulatory agenda is to increase competition in all areas of the economy so that entrepreneurs and small businesses can effectively compete in the marketplace against their larger, monopolistic competitors. The Administration has recognized that "excessive market concentration threatens … the welfare of workers, farmers, small businesses, startups, and consumers" and that unfair methods of competition prevent small businesses from hiring workers and obtaining fairly priced inputs, from selling their goods and services or fairly advertising their products to the public, and from contributing to a growing economy.[8] When the government addresses monopolization, startups and small businesses have an opportunity to shine.

President Biden's Executive Order 14036, *Promoting Competition in the American Economy*, implemented a whole-of-government effort to promote competition in the American economy.

---

[4] *See* Modernizing Regulatory Review, 88 Fed. Reg. 21879 (Apr. 11, 2023) (requiring "community-based outreach; outreach to organizations that work with interested or affected parties; use of agency field offices; use of alternative platforms and media for engaging the public; and expansion of public capacity for engaging in the rulemaking process").

[5] Memorandum Regarding Broadening Public Participation and Community Engagement in the Regulatory Process (July 19, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf.

[6] *See* Administrative Conference of the United States, Office of the Chair, Statement of Principles for Public Engagement in Agency Rulemaking (rev. Sept. 1, 2023), https://www.acus.gov/sites/default/files/documents/Statement_of_Principles_for_Public_Engagement_in_Rulemaking_2023.09.01.pdf. *See also* Admin. Conf. of the U.S., Recommendation 2023-2, *Virtual Public Engagement in Agency Rulemaking*, 88 Fed. Reg. 42680 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36082 (July 8, 2021).

[7] *See* OFFICE OF MANAGEMENT & BUDGET, CIRCULAR NO. A-4 24(Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf ("Benefits and costs can differ depending on the size of the firms being regulated. Small firms may find it more costly to comply with regulation, especially if there are large fixed costs required for compliance.").

[8] Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 14, 2021).

This order created the White House Competition Council to "coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy" and tasked administrative agencies with knocking down barriers to competition in all sectors.[9] OIRA identified "market power" as a key market failure that requires regulatory action[10] and issued guidance encouraging agencies to take care that rules do not inhibit small businesses' abilities to compete effectively against their larger competitors.[11]

Agencies across the Biden Administration have followed the White House's lead by taking steps to allow small businesses to compete effectively in the marketplace. The examples are too numerous to list, but several demonstrate the importance and breadth of these efforts:

- The Department of Justice's Antitrust Division, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency have updated or are in the process of updating their bank merger guidelines to ensure mergers do not limit the provision of financial services.[12] Bank concentration may increase lending costs for small businesses,[13] and large banks are less likely to provide loans to small businesses than community banks.[14] Stopping egregious bank mergers will increase the capacity of small businesses to thrive.

- The Federal Trade Commission (FTC) and Antitrust Division challenged more mergers in Fiscal Year 2022 than in any year since 1976,[15] and that work is ongoing. In September 2023, the FTC initiated a lawsuit against Amazon for, among other things, biasing its platform's search results in favor of its own products and against those of third-party sellers, and requiring those sellers to use Amazon Prime shipping to gain high placement in search

---

[9] *Id.*

[10] OFFICE OF MANAGEMENT & BUDGET, *supra* note 7 at 16–17. *See also id.* at 24 (warning against regulations that "can potentially lead small firms to exit the market, resulting in reduced competition in some markets").

[11] *See generally* Office of Info. & Regulatory Affairs, Guidance on Accounting for Competition Effects when Developing and Analyzing Regulatory Actions 12–13 (Oct. 2023), https://www.whitehouse.gov/wp-content/uploads/2023/10/RegulatoryCompetitionGuidance.pdf. *See also id.* at 13 (describing how "a health and safety regulation that requires all firms to pay a fixed fine for each violation, instead of a fine that varies with the cost of the harm caused by the violation, may inappropriately advantage larger producers of a product over smaller producers of that product").

[12] Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide, Dept. of Justice (last accessed May 16, 2023), https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide; Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, 89 Fed. Reg. 29222 (Apr. 19, 2024); Business Combinations Under the Bank Merger Act, 89 Fed. Reg. 10010 (Feb. 13, 2024).

[13] *See, e.g.*, Steven G. Craig & Pauline Hardee, *The Impact of Bank Consolidation on Small Business Credit Availability*, 31 J. BANKING & FIN. 1237 (2007) (concluding that bank consolidation has reduced credit availability for small businesses).

[14] *See* Julapa Jagtiani & Raman Quinn Maingi, *How Important Are Local Community Banks to Small Business Lending? Evidence from Mergers and Acquisitions* (Fed. Res. Bank of Phila., Working Paper No. 18-18), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2018/wp18-18.pdf (identifying community banks as principal lenders to small businesses).

[15] Leah Nylen, *Biden Antitrust Enforcers Set New Record for Merger Challenges*, BLOOMBERG LAW (Dec. 18, 2023), https://news.bloomberglaw.com/mergers-and-acquisitions/biden-antitrust-enforcers-set-new-record-for-merger-challenges.

results.[16] The Commission alleges that Amazon's pay-to-play advertising has alone cost businesses billions in lost revenue.[17] Similarly, the Antitrust Division initiated a lawsuit against Apple for, among other things, blocking third-party app stores that may charge small developers lower fees and imposing developer agreements on its App Store that allow it to extract high fees and thwart competition from small developers.[18]

- The Federal Communications Commission finalized a regulation to prohibit internet service providers from creating "fast lanes" that prioritize internet users' access to firms that pay for access and slowing down access to their smaller competitors.[19] This "net neutrality" rule will help startups and small businesses compete by permitting them equal access to customers.

- The FTC enacted a regulation prohibiting non-compete agreements, which limit the pool of potential employees from which small businesses may hire and inhibit entrepreneurs from forming small businesses in the first place.[20] One survey found that more than one-third of small business owners have been prevented from hiring an employee due to non-competes, and nearly half said that they have been subject to a non-compete agreements themselves.[21] The Commission estimates the rule will increase the formation of new businesses by 2.7-3.2%.[22]

- The FTC also challenged more than 100 drug patents listed in the Food and Drug Administration's *Orange Book*.[23] Listings may lead to statutory stays that blocks the introduction of competing drug products for 30 months, prohibiting competitors—including small businesses and startups—from introducing lower-cost alternatives.

- The Biden Administration has made tackling "junk fees" one of its key priorities. Junk fees tilt the playing field against honest businesses that are transparent with their customers and towards their larger competitors that profit by hiding the ball from consumers—leading to a race to the bottom. The Consumer Financial Protection Bureau (CFPB), FTC, Department of Transportation, and other agencies have all acted to ensure small businesses compete in fair

---

[16] *See generally* Complaint, FTC v. Amazon, 23-cv-01495 (W.D.Wa., Nov. 2, 2023).

[17] *See id.* at 10 ("Amazon took in [redacted] billion in revenue from U.S. Marketplace seller fees in 2021 alone.").

[18] *See generally* Complaint, United States v. Apple, 24-cv-04055 (D.N.J., Mar. 21, 2024).

[19] *See generally* In the Matter of Safeguarding and Securing the Open Internet, Restoring Internet Freedom, FCC 24-52 (May 7, 2024).

[20] *See generally* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024).

[21] *See Opinion Poll: Small business owners support banning non-compete agreements*, SMALL BUSINESS MAJORITY (Apr. 13, 2023), https://smallbusinessmajority.org/our-research/fair-competition/opinion-poll-small-business-owners-support-banning-non-compete-agreements ("The poll reveals that nearly half of small businesses (46%) report that they were subject to a non-compete agreement that prevented them from starting or expanding their business. More than a third (35%) have been prevented from hiring an employee due to a non-compete agreement.").

[22] Non-Compete Clause Rule, 89 Fed. Reg. at 38470.

[23] *See generally FTC Challenges More Than 100 Patents as Improperly Listed in the FDA's Orange Book*, FED. TRADE COMM'N (Nov. 7, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-challenges-more-100-patents-improperly-listed-fdas-orange-book.

markets.[24]

- The Department of Agriculture enacted its Inclusive Competition and Market Integrity rule to establish clear, effective standards for fair competition.[25] This rule, which prohibits discrimination against agricultural producers on a variety of bases, retaliation against farmers for engaging in protected activities, and fraud in the formation of contracts, will support family farmers as they compete on a national and international stage.

Of course, competition has not been the only focus of the Biden Administration. President Biden signed Executive Order 14058, *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government*, to require agencies to improve the manner in which they interact with customers, including small businesses.[26] Similarly, the CFPB finalized a regulation requiring lenders to collect demographic information of small business applicants to stop discrimination against minority small business owners and ensure fairer lending.[27]

II. The Biden Administration's Compliance with the Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) was enacted by Congress to ensure that agencies take into consideration the views of small businesses when enacting regulations.[28] Applicable to this hearing, the RFA requires agencies to conduct an initial regulatory flexibility analysis for each rule proposed that estimates the rules' significant expected impacts on small businesses, solicit comments on such analyses, and issue a final analysis responding to such comments and describing the steps taken to minimize expected impacts.[29] If an agency finds that a rule will not have a significant economic impact on a substantial number of small entities, it may certify that finding and need not conduct the aforementioned analyses.[30] These certifications must be published in the *Federal Register* "with a statement providing the factual basis for such certification," alongside rules' proposals and finalizations.[31] The RFA also requires agencies to conduct retrospective reviews of rules that have a significant economic impact upon a substantial number of small entities every ten years.[32]

The Biden Administration has a history of compliance with the RFA, and the Office of

---

[24] *See generally* Brian Deese et al., *The President's Initiative on Junk Fees and Related Pricing Practices*, The White House (Oct. 26, 2022), https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/

[25] *See generally* Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 89 Fed. Reg. 16092 (Mar. 6, 2024).

[26] *See generally* Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government, 86 Fed. Reg. 71357 (Dec. 16, 2021).

[27] *See generally* Small Business Lending Under the Equal Credit Opportunity Act (Regulation B), 88 Fed. Reg. 35150 (May 31, 2023).

[28] Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601 *et seq.*). *See also id.* § 2(a) ("the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules").

[29] *See* 5 U.S.C. § 603–04.

[30] *See id.* § 605(b).

[31] *Id.*

[32] *See id.* § 610.

Advocacy notes that in Fiscal Years 2021 and '22 (the only years for which data is available), compliance with the RFA resulted in over $150 million in quantifiable regulatory cost savings; had the Supreme Court not overturned the Biden Administration's COVID-19 Emergency Workplace Safety Standard, that number would be billions higher.[33]

III. Proposed Legislation Will Inhibit Agencies' Ability to Regulate for the Benefit of Small Businesses

In my personal experience, agencies recognize the importance of small business participation in the regulatory process and strive to comply with the RFA. Unfortunately, this Committee is considering two bills that would make compliance that much more difficult, unnecessarily slowing down the regulatory process without providing corresponding benefits to small businesses. I discuss each in turn.

H.R. 7198, the Prove It Act

The Prove It Act would unnecessarily elongate the rulemaking process, permit unnecessary litigation, and delay rules' effectiveness without consideration for the benefits small businesses receive from regulations.

The RFA currently requires agencies to conduct "regulatory flexibility analyses" alongside each notice-and-comment regulation that "describe the impact of the proposed rule on small entities"[34] unless agencies certify that the rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities."[35] The Prove It Act would amend the RFA to permit small businesses, or any organization claiming to represent small businesses, to challenge agencies' certifications before the Chief Counsel for Advocacy of the Small Business Administration. If agencies fail to comply with the Chief Counsel's orders or participate in adjudicatory process at all, the rules would be invalidated as they pertain to small businesses. The Prove It Act would also require agencies to consider "reasonably foreseeable potential indirect costs" of their rules when conducting regulatory flexibility analyses and require agencies to conduct retrospective reviews of all rules not certified every ten years lest those rules be deemed unenforceable.

I oppose this bill for several reasons.

First, the Prove It Act would unnecessarily delay the rulemaking process by offering new avenues by which rules' opponents may litigate, including litigation over *initial* regulatory flexibility analyses for the first time. The RFA today only allows for judicial review of *final*

---

[33] *See* CHIEF COUNSEL FOR ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY2021 32 (Apr. 2022), https://advocacy.sba.gov/wp-content/uploads/2022/03/Report-on-the-Regulatory-Flexibility-Act-FY-2021.pdf (identifying $3.277 billion in savings, $3.200 billion of which was from the COVID-19 workplace standard); CHIEF COUNSEL FOR ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY2022 41 (Apr. 2023), https://advocacy.sba.gov/wp-content/uploads/2023/05/FY2022RFA_Final-508c.pdf (identifying $73.5 million in savings).

[34] 5 U.S.C. § 603–04.

[35] *Id.* § 605(b).

regulatory flexibility analyses,[36] whereas this bill would permit appeals of both *initial* and *final* analyses to the Chief Counsel, and then appeal the Chief Counsel's decisions to federal court.

Second, the Prove It Act ignores long-held principles of standing to allow trade associations to launder their complaints under the guise of helping small businesses. In the federal court, organizational standing is granted only to organizations that have at least one member who has itself been (or will be) harmed, and organizations who claim organizational standing must identify that member to the court.[37] This bill would allow "organization[s] representing the interests of small entities" to challenge agencies' regulatory flexibility analyses without requiring them to identify *which* small businesses they purport to represent or *how* those small businesses would be harmed by the rules they are challenging.

Third, the Prove It Act would effectively allow the Chief Counsel to order agencies to adopt its interpretation of rules' impacts on small businesses, lest their rules be invalidated as they apply to small businesses. The three considerations upon which the bill requires the Chief Counsel to base its analysis are ambiguous and give the Chief Counsel broad authority to pause rulemakings it does not like. For example, although the RFA does not define the term "small entity," requiring the Chief Counsel to consider "whether the agency … correctly determined which small entities will be affected by the proposed rule" simply allows the Chief Counsel to make a policy decision instead of the agency. Because appeals under the Prove It Act are of the Chief Counsel's decisions and not the agencies', courts will review the Chief Counsel's decision under the arbitrary and capricious standard and not the agencies' even if both are valid. Furthermore, since it is the *agency* that will be defending its analyses in court, it may be impossible for the agency to defend the Chief Counsel's determination under a legal standard that investigates the agency's thought processes.

Fourth, the Prove It Act would require the Administrator of OIRA to attend the meetings upon which the Chief Counsel makes its decisions and not the Administrator's delegates.[38] This requirement is unnecessarily burdensome on the Administrator, and OIRA would most likely direct agencies to accede to the Chief Counsel's determinations so as to avoid these meetings.

Fifth, the Prove It Act would unnecessarily increase White House oversight of independent regulatory agencies. The Act would require the OIRA Administrator to attend all meetings regarding appeals of regulatory flexibility analyses, including those of agencies for which OIRA plays no role. Failing to omit the Administrator from meetings regarding independent agencies' rules serves only to reduce those agencies' independence.

Sixth, the Prove It Act does not provide an appeals process allowing agencies to appeal the Chief Counsel's decisions. In other statutory schemes under which one agency may rule against

---

[36] *See id.* § 611(a)(1) (providing for judicial review of section 604, which requires agencies to promulgate final regulatory flexibility analyses, but not section 603, which requires agencies to promulgate initial analyses).

[37] *See* Summers v. Earth Island Institute, 555 U.S. 488, 494 (2009) (providing that "organizations can assert the standing of their members" but rejecting standing where the organization could not identify a member with standing).

[38] *Compare* the bill's requirement that "representatives of the agency that promulgated the proposed rule" attend a meeting *with* the bill's requirement that "the Administrator of the Office of Information and Regulatory Affairs" attend.

another, statutes generally provide specific the appeals processes.[39] This bill seems to erroneously presume that only the private sector will appeal the Chief Counsel's decisions.

Seventh, in expanding the universe of effects agencies must consider in their regulatory impact analyses to include "reasonably foreseeable potential indirect costs," the Prove It Act gives courts broad latitude to retroactively impose analysis requirements on agencies that they cannot anticipate. Indirect costs are speculative and devoid of context if not also accompanied by consideration of direct and indirect benefits, and courts likely have different impressions of which indirect costs are reasonably foreseeable and may identify indirect costs agencies never considered. In the APA's notice-and-comment process, judicial review of agencies' considerations is limited to those facts arguments that commenters presented to agencies. Here, the Act would permit courts to strike down regulations for agencies' failure to consider costs never expected they would be required to consider.

Eighth, the Prove It Act's penalty for failing to conduct retrospective reviews unnecessarily severe. Retrospective reviews can certainly be worthwhile, but deeming a rule invalid and unenforceable for failing to conduct an analysis by a set date may lead to catastrophic consequences. Agencies frequently face competing priorities, and—as the Supreme Court has noted—agency officials are "far better equipped" than others "to deal with the many variables involved in the proper ordering of [agency] priorities."[40] For example, the Federal Reserve may be facing a financial crisis at the time when its 10-year period has expired, and the American public would be better served by officials focusing on the larger crisis than conducting a retrospective review of its regulations, lest regulations promoting the stability of the financial system suddenly cease operation. Whereas the notice-and-comment process at least provides for good cause exceptions, the Prove It Act does not.[41]

Moreso, rules' invalidation would not just apply to the small businesses the retrospective reviews are meant to help, but *all* businesses. The Prove It Act is, perhaps, best thought of as a backdoor way of imposing retrospective review requirements that legislators have not been able to enact in Congresses past.

Ninth and finally, the Prove It Act provides no additional resources that would allow agencies or the Chief Counsel to comply with its new requirements.

H.R. 8033, the Regulatory Transparency for Small Business Act

The Regulatory Transparency for Small Business Act (RTSBA) would amend the RFA to require agencies to include additional information in certifications that rules will not have significant economic impacts on substantial numbers of small entities. This bill would require those certifications include, at minimum, an estimate of the "number of small entities" affected; an estimate of the rule's implementation costs on small businesses; a "determination of whether the costs of compliance … represent a significant economic impact;" and a "determination of the

---

[39] *See, e.g.*, 29 U.S.C. § 660 (providing judicial review for appeals of decisions by the Occupational Safety and Health Review Commission).

[40] Heckler v. Chaney, 470 U.S. 821, 831–832 (1985).

[41] *See* 5 U.S.C. § 553(b)(B).

number of small entities that will experience a significant economic impact as a result of the rule."

The RTSBA would impose costs on agencies without resulting in any tangible benefit for small businesses. I oppose it for several reasons.

First, the RTSBA is a solution in search of a problem. Although claims that agencies are misusing the certification process to avoid conducting regulatory flexibility analyses abound, the RFA currently requires agencies to provide a "factual basis for such certification"[42] and subjects those bases to judicial review.[43] Today, agencies must demonstrate that their factual bases were not arbitrary or capricious. Imposing new requirements on those analyses would simply provide no benefit.

Second, the information the RTSBA would require is frequently unavailable to agencies. The notice-and-comment process was appropriately designed to allow the public to provide agencies with information necessary to make informed decisions, and to that end, the RFA currently allows commenters who disagree with agencies' certifications to provide information to the contrary and permits agencies to issue final regulatory flexibility analyses if persuaded. Requiring regulators to obtain information they do not already have before they can issue rule proposals simply serves to impose a burden on agencies and delay the rulemaking process.

Third, the RTSBA would impose what is essentially a cost-benefit analysis requirement when every regulation is proposed. The APA does not require economic analyses when rules are proposed; Executive Order 12866 requires regulatory impact analyses at the proposal stage only of "significant regulatory action;" and the RFA requires initial regulatory flexibility analyses only on rules that will "have a significant economic impact on a substantial number of small entities."[44] The RTSBA would impose an economic analysis requirement when rules are proposed for *all* regulations, upending the rulemaking process that has existed since 1946.

Fourth and finally, the RTSBA provides no additional resources that would allow agencies to comply with its new requirements.

IV. H.R. 5999, the Small Business Regulatory Relief Act, Would Benefit Small Businesses

Despite these two problematic bills, the Committee is considering legislation that would benefit

---

[42] *Id.* § 605(b).

[43] *Id. See also id.* § 611(a) (allowing small businesses to obtain "judicial review of agency compliance with the requirements of," *inter alia*, section 605(b)).

[44] *See id.* § 704 (providing that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review"); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (explaining that the APA requires agencies to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'") (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)); Executive Order 12866 § 6(a)(3)(b)(ii) ("For each matter identified as … a significant regulatory action, the issuing agency shall provide to OIRA … [a]n assessment of the potential costs and benefits of the regulatory action"); 605(b) (providing that initial reg flex analyses are not required when rules "will not, if promulgated, have a significant economic impact on a substantial number of small entities").

small businesses. The Committee should quickly approve H.R. 5999, the Small Business Regulatory Relief Act.

The Small Business Regulatory Relief Act would provide to the Small Business Administration's Office of the National Ombudsman new authority to assist federal agencies with better helping small businesses. Specifically, the bill would authorize the Ombudsman to work with federal agencies to establish programs to assist small businesses in meeting regulatory requirements and completing mandated forms, train small businesses with regulatory compliance, and otherwise address small businesses' questions or concerns. The Small Business Regulatory Relief Act would also permit the Ombudsman to increase outreach to small businesses and establish a single point of contact for the Ombudsman at each agency.

As opposed to the Prove It Act and RTSBA, which serve to styme agencies' efforts that benefit small businesses, the Small Business Regulatory Relief Act makes government work more effectively and efficiently. It would expand the authority of the Ombudsman to work with small businesses when its help may be most needed. Existing law provides that the Ombudsman's role is to assist small businesses when they are being investigated or are the subject of compliance or enforcement activities. At that point in the regulatory process, however, many small businesses have already attempted to understand and comply with agency regulations, and enforcement actions are a result of their misunderstanding legal requirements. Many small businesses simply need help understanding what the law expects of them. Allowing the Ombudsman to aid small businesses *before* they get into trouble will help small businesses avoid being the subject of investigations or enforcement actions in the first place.

In addition, the Small Business Regulatory Relief Act would authorize funding to allow the Ombudsman to undertake these new activities, ensuring that they do not detract from the Ombudsman's existing role.

V. Considering Costs and Benefits of Regulation

I wish to make one final point: Considerations of regulations' costs must include corresponding considerations of their benefits. The American Action Forum's assertions that the Biden Administration has finalized 851 rules imposing combined costs of $1.37 trillion tells you nothing about the sensibility of those regulations, as their analysis lacks a similar quantification of regulations' benefits.[45] Yet in a single rule, the Environmental Protection Agency has finalized a policy that provides quantified benefits of between $1.7 and $2.1 *trillion*—far in excess of the total costs AAF has claimed for *all* Biden Administration rules.[46] Any consideration of rules' effects on small businesses should include considerations of both their costs and benefits, lest rules with positive expected outcomes be unnecessarily thwarted.

***

---

[45] *See* Dan Goldbeck, *The Biggest Week on Record*, AMERICAN ACTION FORUM (Apr. 22, 2024), https://www.americanactionforum.org/week-in-regulation/the-biggest-week-on-record/.

[46] *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 89 Fed. Reg. 27842, 28107 (Apr. 18, 2024).

For nearly four years, the Biden Administration has worked to promote the interests of small businesses in its regulatory efforts. It has broken from a tradition of hearing primarily from well-resourced businesses to ensure that agencies affirmatively solicit input from the small businesses affected by their rules. But more than simply facilitating participation, the Administration has put effectuated an agenda that ensures entrepreneurs and small businesses can effectively compete in the marketplace against their larger, monopolistic competitors. And in undertaking these efforts, the Biden Administration has complied with the Regulatory Flexibility Act.

Unfortunately, this Committee is considering several bills that would make compliance with the Act much more difficult, unnecessarily slowing down the regulatory process without providing corresponding benefits to small businesses. The Committee should, however, quickly approve H.R. 5999, the Small Business Regulatory Relief Act.

Thank you, and I am happy to answer any questions.

House Committee on Small Business
Questions for the Record
"Burdensome Regulations: Examining the Biden Administration's Failure to Consider Small Business"
Hearing held on May 22, 2024
Witness: ***Hon. Paul Ray***

Questions from Rep. Alford:

Rep. Alford Remarks:

The Consumer Product Safety Commission (CPSC) has been pursuing a rule that would mandate all table saws include a safety break. This technology is the intellectual property of one manufacturer, SawStop, which owns patents around the safety technology. This proposed rule would drastically increase the price of table saws, harming the thousands of small businesses that utilize table saws every day.

For Hon. Paul Ray:

1. Given the unreliable injury data used to justify the rule, as well as the CPSC acknowledgement that the rule would effectively consolidate the market to one company (CPSC report: "the most immediate market impediment" to industry not having already incorporated the proposed technology into table saws is "the market power exercised by the primary holder of the AIM technology patents. Ordinarily, when the market failure is related to excessive market power, the remedy is to reduce the market power or to mitigate its effects…. the proposed rule would likely consolidate the power of the patent holder, by forcing most table saw manufacturers to adopt the AIM technology via licensing agreements) Does the CPSC have the authority to issue a mandatory rule that effectively creates a monopoly for one company?

2. What precedent would the CPSC set if it is to move forward with finalizing the table saw rule?

Response of Paul J. Ray to Questions for the Record Re: House Small Business Committee Hearing of May 22, 2024

1. I am unfamiliar with the Consumer Product Safety Commission's authorities and the caselaw interpreting those authorities, so I do not know whether the Commission has the authority in question.
2. Generally speaking, regulations should mandate performance standards rather than design standards.[1] One positive consequence of doing so is the avoidance of unduly privileging manufacturers of particular technologies, which otherwise can unjustifiably increase the costs of compliance for regulated entities. Agency practice to the contrary should generally be discouraged.

[1] *See* Executive Order 12866 sec. 1(b)(6).

House Committee on Small Business
Questions for the Record
"Burdensome Regulations: Examining the Biden Administration's Failure to Consider Small Business"
Hearing held on May 22, 2024
Witness: **Mr. Rob Smith, NFIB Senior Attorney**

Questions from Rep. Alford:

Rep. Alford Remarks:

The Consumer Product Safety Commission (CPSC) has been pursuing a rule that would mandate all table saws include a safety break. This technology is the intellectual property of one manufacturer, SawStop, which owns patents around the safety technology. This proposed rule would drastically increase the price of table saws, harming the thousands of small businesses that utilize table saws every day.

For Mr. Rob Smith:

1. Does the CPSC consider the indirect impacts of its regulation on small businesses when finalizing a rule?

Witness Response:

Thank you for these questions, Congressman Alford.

As I discussed in my written statement, agencies generally do not consider the indirect costs of their regulations on small businesses. This is in part due to an erroneous D.C. Circuit decision which read a distinction between direct and indirect effects into the Regulatory Flexibility Act (RFA).[1] NFIB maintains that the text of the RFA does not support that distinction.

---

[1] *Mid-Tex Elec. Co-op., Inc. v. F.E.R.C.*, 773 F.2d 327, 342–43 (D.C. Cir. 1985).

Small businesses agree with President Bill Clinton's pronouncement in Executive Order 12866, dated September 30, 1993, that "[i]n deciding whether and how to regulate, agencies should assess *all costs and benefits* of available regulatory alternatives, including the alternative of not regulating."

I understand your question to be about the CPSC's proposed rule, *Safety Standard Addressing Blade-Contact Injuries on Table Saws*, 88 Fed. Reg. 74909 (Nov. 1, 2023). The CPSC performed an Initial Regulatory Flexibility Analysis (IRFA), a summary of which is included in the proposed rule. *Id.* at 74932–34. This IRFA summary stated that redesign and retooling costs associated with the rule would range from "$100,000 to $700,000 per model." *Id.* at 74933. Beyond retooling and redesign costs, there would be additional component costs from incorporating active injury mitigation (AIM) technology. These costs would "increase the manufacturing cost of a table saw by between $58 and $74." *Id.* My review of this IRFA summary reveals that the agency only considered direct costs to small saw manufacturers. The agency did not consider the reasonably foreseeable costs that would be incurred, due to the rule, by small businesses purchasing table saws from these manufacturers.

Moreover, in a January 26, 2024 comment letter, the SBA Office of Advocacy's Deputy Chief Counsel described the CPSC's IRFA as "deficient" because it "does not adequately estimate the costs of the proposal or perform an appropriate analysis of the impact of those costs to small entities." Advocacy also stated that the IRFA "ignores the indirect impact of the regulation on small businesses that purchase consumer table saws for sale or use" and that these entities will "face higher costs due to the indirect effects of the regulation."[2]

---

[2] U.S. Small Business Administration Office of Advocacy, Comment Letter on Safety Standard Addressing Blade-Contact Injuries on Table Saws, 88 Fed. Reg. 74909 (Nov. 1, 2023), available at https://advocacy.sba.gov/wp-content/uploads/2024/01/Comment-Letter_CPSC-Table-Saws.pdf.

2. How would the CPSC finalizing mandatory safety standards for table saws impact small businesses that purchase consumer table saws for sale or use?

Witness Response:

Costs flow downstream. If an item costs more to manufacture, it will generally cost a business or consumer more to purchase that item.

CPSC admitted that its rule would cause the least expensive bench saw available to "more than double" in price, "to $400 or more." 88 Fed. Reg. at 74922, 74937. It also admitted that the "retail prices of bench saws could increase by as much as $285 to $700 per unit" while the "retail prices of contractor and cabinet saws could rise by as much as $450 to $1,000 per unit." *Id.* at 74922; *see also id.* at 74937 (listing the top of the range for contractor and cabinet saws as "$1,080 per unit").

Unless CPSC's expectation is that manufacturers will eat these production-cost increases (which would be unmoored from business reality), consumers and small businesses purchasing these table saws will ultimately bear the burden of this regulatory cost.

Hearing: Burdensome Regulations: Examining the Biden Administration's Failure to Consider Small Businesses

May 22, 2024

Questions for the Record from Representative Nydia Velázquez, Ranking Member to Mr. Todd Phillips, Assistant Professor, Georgia State University, J. Mack Robinson School of Business

Concerns have been raised that trade associations and law firms – which represent both big and small businesses – are actively involved in the process associated with the Regulatory Flexibility Act. What steps should Congress take to ensure that the feedback being solicitated is truly that of small businesses, and not just those large firms that have more resources to hire Washington attorneys and consultants?

To ensure that the feedback received pursuant to the Regulatory Flexibility Act (RFA) is truly that of small businesses, regulatory agencies should do more than simply publish proposals in the *Federal Register* and expect small businesses' comments to roll in. Agencies should consider hosting public meetings, hearings, and listening sessions outside the Beltway so that affected small businesses may provide comments orally and with opportunities for agency officials to ask follow-up questions. Agencies should also consider using focus groups and conducting targeted outreach to small businesses to get their input, rather than relying on trade associations to collate small businesses' comments. Indeed, the Administrative Conference of the United States has indicated that such outreach activities are best practices.[1]

Congress could certainly consider making these sorts of outreach activities required under the RFA. However, I am concerned about the opportunity for regulations' opponents to use such a requirement to overturn regulations in court. If Congress chooses to amend the RFA to require such outreach, I encourage it to provide that these activities do not provide independent bases for judicial review.

In your written testimony, you express concerns with the H.R. 7198, the Prove It Act, legislation that would amend the Regulatory Flexibility Act that would allow small businesses to challenge an agency's certification that a rule does not have a significant economic impact on a substantial number of small businesses. Could you elaborate on your concerns?

My largest concern with the Prove It Act is that it would unnecessarily delay agency rulemakings by offering new avenues by which rules' opponents may litigate. When Congress originally enacted the RFA, it made clear that it "should result in no unwarranted agency delays in rulemaking due to legal challenges,"[2] was "not intended to provide a basis for a substantive

---

[1] *See* Administrative Conference of the United States, Office of the Chair, Statement of Principles for Public Engagement in Agency Rulemaking (rev. Sept. 1, 2023), https://www.acus.gov/sites/default/files/documents/Statement_of_Principles_for_Public_Engagement_in_Rulemaking_2023.09.01.pdf.

[2] S. Rep. No. 96-878 at 9 (1980).

challenge to the exercise of discretion by the agency,"[3] and the initial and final regulatory flexibility analyses were not independent bases for judicial review.[4] Although Congress upset this regime with the Contract with America Advancement Act of 1996, which allowed agencies' failure to comply with the RFA's *final* regulatory flexibility analysis requirements to serve as a basis for judicial review, the RFA nevertheless allowed agencies to finalize their regulations before litigation may commence.[5] This upholds the longstanding principle of allowing judicial review only for agency actions that have been thoroughly ventilated.[6]

The Prove It Act would, for the first time, allow litigation over agencies' *initial* regulatory flexibility analyses before regulations are even finalized. This legislation would permit appeals of both initial and final analyses to the Chief Counsel, and then appeal the Chief Counsel's decisions to federal court. This is wholly unnecessary. The purpose of initial regulatory flexibility analyses is to supplement the Administrative Procedure Act's (APA) notice-and-comment process in a way that allows small businesses to effectively comment on the burdens they face. Agencies' initial analyses demonstrate to the public their understanding of how proposed rules would affect small businesses,[7] small businesses provide comments on those analyses, and agencies' final analyses serve as responses to comments received.[8] Allowing litigation over agencies initial analyses serves no purpose but to delay the rulemaking process.

Moreover, the Prove It Act would ignore long-held principles of standing to allow trade associations to launder their complaints under the guise of helping small businesses. Organizational standing is permitted in federal court only to organizations that have at least one member who has been or will be harmed, and organizations who claim organizational standing must identify that member to the court.[9] The Prove It Act would overturn this principle by allowing "organization[s] representing the interests of small entities" to challenge agencies' regulatory flexibility analyses without requiring them to identify *which* small businesses they purport to represent or *how* those small businesses would be harmed by the rules they are challenging. In fact, it may be the case that organizations could challenge regulatory flexibility analyses before the Chief Counsel without being able to appeal the Chief Counsel's decision to federal court.

Do you think the term "significant economic impact on a substantial number of small

---

[3] *Id.* at 10.

[4] *See* Regulatory Flexibility Act § 3(a), Pub. L. No. 96–354, 94 Stat. 1169 (1980) (codified at 5 U.S.C. § 611) ("Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review.").

[5] *See* Contract with America Advancement Act of 1996 § 242, Pub. L. No. 104–121, 110 Stat. 865 (amending 5 U.S.C. § 611) (providing for judicial review of section 604, which requires agencies to promulgate final regulatory flexibility analyses, but not section 603, which requires agencies to promulgate initial analyses).

[6] *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

[7] *See id.* § 603 (requiring analyses that "describe the impact of the proposed rule on small entities").

[8] *See id.* § 604 (requiring analyses to, *inter alia*, describe "the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments").

[9] *See* Summers v. Earth Island Institute, 555 U.S. 488, 494 (2009) (providing that "organizations can assert the standing of their members" but rejecting standing where the organization could not identify a member with standing).

entities" should be defined?

No. This term is used in the RFA to provide that regulatory flexibility analyses are not required for rules that "will not, if promulgated, have a significant economic impact on a substantial number of small entities."[10] Congress should not define it for two reasons. First, quantifying what constitutes a "significant economic impact" for purposes of initial regulatory flexibility analyses would effectively require regulators to conduct cost-benefit analyses before rules are even proposed, unnecessarily using scarce agency resources. Second, because what constitutes a small business in one industry may be much larger than that in another, defining what constitutes a "small entity" in statute may exclude from agencies' consideration businesses that should have their costs considered.

The Prove It Act would require retrospective review of agency rules and would sunset rules after ten years if an agency does not go back and review. Could you expound on your concerns with this particular provision?

Retrospective review of agency regulations is a worthwhile endeavor, but the Prove It Act's penalty for failing to conduct such reviews—deeming rules invalid and unenforceable—is unnecessarily severe and could lead to catastrophic consequences. Agencies face competing priorities that cannot possibly be predicted years in advance, and it may be prudent for agencies to direct their resources toward more immediate concerns. For example, the nation may be facing a pandemic or a financial crisis at a time when important public health or banking regulations are poised to be reviewed. The American public would be better served by officials focusing on the larger crises than on conducting retrospective review of regulations lest those rules suddenly cease operation and make the problems worse. Although I oppose invalidation provisions like the one in the Prove It Act, the bill could nevertheless be improved by including the option for a good-cause exception.

Moreover, the Prove It Act's invalidation provision is over-inclusive. The bill would, if enacted, prohibit agencies from enforcing those rules not reviewed within the mandated timeframe against *all* businesses, not just the *small* business that the RFA's retrospective reviews are meant to help. The Prove It Act's invalidation provision is, perhaps, best thought of as a backdoor way of imposing retrospective review requirements that legislators have not been able to enact in Congresses past, and not a targeted effort to help ensure that the regulations affecting small businesses are effective and efficient means of accomplishing their goals.

H.R. 8033, the Regulatory Transparency for Small Businesses Act would require agencies to include additional information in the rules when certifying that it would not have a significant economic effect on a substantial number of small entities. Could you discuss your concerns with this piece of legislation?

The RTSBA is a solution in search of a problem. Although some claim that agencies are abusing the RFA's certification process to avoid conducting regulatory flexibility analyses, the facts disagree. For fiscal years 2021 and 2022, the Chief Counsel for Advocacy disagreed with regulatory agencies' certifications only nine times—a small fraction of the thousands of

[10] 5 U.S.C. § 605(b).

regulations that are proposed and finalized each year.[11] Furthermore, the RFA currently requires agencies to provide a "factual basis for [each] certification"[12] and subjects those bases to judicial review.[13] Agencies must provide such a basis and demonstrate to courts' satisfaction that their factual bases were not arbitrary or capricious.[14] Imposing new requirements on those analyses would simply provide no benefit.

Furthermore, the information the RTSBA would require agencies to analyze is frequently unavailable to them. The APA's notice-and-comment process exists to allow the public to provide agencies with information necessary to make informed decisions. To that end, the RFA currently allows commenters who disagree with agencies' certifications to provide information to the contrary and permits agencies to issue final regulatory flexibility analyses if persuaded. Requiring regulators to obtain information they do not already have before they can issue rule proposals is contrary to more than seven decades of history and simply serves to impose a burden on agencies and delay the rulemaking process.

Lastly, the RTSBA would impose what is essentially a cost-benefit analysis requirement when every regulation is proposed. The APA does not require economic analyses when rules are proposed; Executive Order 12866 requires regulatory impact analyses at the proposal stage only of "significant regulatory action;" and the RFA requires initial regulatory flexibility analyses only on rules that will "have a significant economic impact on a substantial number of small entities."[15] The RTSBA would impose an economic analysis requirement when rules are proposed for *all* regulations.

For what purpose did Congress enact the RFA and create the Office of Advocacy?

The early 1970s saw small business organizations indicate to Congress that "they were not wholly satisfied with the [Small Business Administration's] advocacy efforts."[16] In response, Congress created the position of Chief Counsel for Advocacy in 1974 to "serve as an ombudsman for small business[es]" in their interactions with the SBA and other government

---

[11] CHIEF COUNSEL FOR ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY2021 21 (Apr. 2022), https://advocacy.sba.gov/wp-content/uploads/2022/03/Report-on-the-Regulatory-Flexibility-Act-FY-2021.pdf; CHIEF COUNSEL FOR ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY2022 22 (Apr. 2023), https://advocacy.sba.gov/wp-content/uploads/2023/05/FY2022RFA_Final-508c.pdf.

[12] 5 U.S.C. § 605(b).

[13] *Id. See also id.* § 611(a) (allowing small businesses to obtain "judicial review of agency compliance with the requirements of," *inter alia*, section 605(b)).

[14] *See, e.g.*, Wellness Pharmacy, Inc. v. Becerra, 2021 WL 4284567, at *18 (D.D.C. Sept. 21, 2021) ("FDA was required to comply with the Regulatory Flexibility Act before issuing it. It did not. The Court, accordingly, will remand the MOU to FDA…").

[15] *See id.* § 704 (providing that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review"); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (explaining that the APA requires agencies to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'") (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)); Executive Order 12866 § 6(a)(3)(b)(ii) ("For each matter identified as … a significant regulatory action, the issuing agency shall provide to OIRA … [a]n assessment of the potential costs and benefits of the regulatory action"); 605(b) (providing that initial reg flex analyses are not required when rules "will not, if promulgated, have a significant economic impact on a substantial number of small entities").

[16] https://crsreports.congress.gov/product/pdf/R/R43625/34

agencies.[17] Congress built on this position with the Small Business Investment Act of 1976,[18] which created the Office of Advocacy—led by the Chief Counsel—and assigned it the "primary responsibility" of completing a "small business study" assessing the government's relationships with small businesses, including "measur[ing] the direct costs and other effects of government regulation on small businesses" and making legislative and non-legislative recommendations.[19] Congress's goal with the 1976 legislation was to have the Office of Advocacy complete the study then return to the ombudsman role for which the position of Chief Counsel had originally been created two years before.[20]

Four years later, Congress enacted the Regulatory Flexibility Act.[21] Congress explained that, to its dismay, "[r]egulations tend to be uniform in design" and that "efforts to promote regulatory flexibility have until now been sporadic, lacking in overall congressional guidance and, at times, ill-considered."[22] Congress believed that the way to rectify this concern would be "to stimulate a much greater degree of participation in rulemaking by affected parties."[23] To that end, the RFA serves to require agencies solicit comment from small businesses, provide sufficient information for which small businesses may base their comments, and take those comments into consideration when finalizing regulations. The RFA also directed the Chief Counsel for Advocacy "to monitor and evaluate agency compliance with the" RFA.[24]

Importantly, Congress did not require agencies to adopt the policy alternatives that are least burdensome or maximize benefits to small businesses; with the RFA, Congress was simply wanting to ensure that agencies consider how small businesses would be affected by their rules and evaluate regulatory alternatives. In addition, Congress did not assign the Chief Counsel the responsibility of adjudicating whether agencies comply with the RFA, but to evaluate whether—in its opinion—agencies have or have not; agencies' compliance with the RFA is determined by federal courts.

Why is the focus only on costs the wrong metric for considering rules' effect on small business?

Regulations necessarily impose costs and provide benefits. In understanding how a particular regulation affects small businesses, it is necessary to consider their costs of compliance as well as any benefits they receive.

Could you explain your concerns with requiring agencies to consider "indirect costs" when

---

[17] H.R. Rep. No. 93-1178 (1974). *See also* Small Business Amendments of 1974 § 10, Pub. L. No. 93-386, 88 Stat. 749 (creating the position of Chief Counsel for Advocacy and assigning it five enumerated duties).

[18] Pub. L. No. 94-305, 90 Stat. 663 (1976).

[19] H.R. Conf. Rep. No. 94-1115 at 15 (1976). *See also* Small Business Investment Act of 1976 §§ 202, 206 (collectively requiring a study).

[20] *See* H.R. Conf. Rep. No 94-1115 at 15 ("Upon completion of that study, his concentration is to shift to the role of small business advocate as defined in the original section 5(e) language."). *See also* Small Business Investment Act of 1976 § 203 (detailing five duties of the Office).

[21] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. § 601 *et seq.*).

[22] S. Rep. No. 96-878 at 3, 7 (1980).

[23] *Id.* at 7.

[24] *Id.* at 15.

drafting regulations?

I am not opposed to agencies considering indirect costs so long as (1) agencies also consider indirect benefits and (2) consideration of indirect costs (and benefits) is not used as hooks for overturning agencies rules in judicial review. Cost-benefit analysis serves as an important tool for agencies in determining whether to promulgate regulations or what shape those regulations should take. The process of cataloguing benefits and costs can help agencies understand the consequences of their actions.

Taken alone, however, indirect costs are speculative, devoid of context, and are not helpful in determining whether agencies should or should not finalize rules. In addition, cost-benefit analysis has been weaponized by courts, which may overturn agencies' rules for failure to consider costs or benefits that judges believe should have been considered but were not. My concern with legislation like the Prove-It Act, which would require agencies to consider the "reasonably foreseeable potential indirect costs" of their rules, is that evaluations of rules' indirect costs alone paint incomplete pictures of regulations' ultimate effects and judges are likely to have different impressions of which indirect costs are reasonably foreseeable, and may overturn agencies' rules for failing to consider indirect costs that agencies *ex ante* never contemplated would be required.

Are you familiar with studies conducted by Mark and Niccole Crain on the cost of regulations and the concerns that have been raised over the misuse of data that has resulted in gross overestimates of the regulatory costs?

Yes. Their report, titled *The Impact of Regulatory Costs on Small Firms* and published in 2010, argued that "[t]he annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008."[25] This study has been roundly criticized for using flawed data, having methodological flaws, and intentionally providing no estimates of regulations' benefits. I encourage you to review the Congressional Research Service's analysis of the report, which eloquently explains its flaws.[26] In short, the report's authors misused an index in a way that "result[ed] in an erroneous and overstated cost estimate;" used decades-old cost-estimates, including from before rules went into effect, such that they were of questionable relevance; and used the highest cost-estimates, even when sources offered ranges.[27]

Are you familiar with the annual reports issued by the Office of Management and Budget (OMB) evaluating the costs and benefits of regulations? What have those reports determined?

Yes. The Regulatory Right-to-Know Act requires the Office of Management and Budget (OMB) to annually estimate "the total annual costs and benefits (including quantifiable and nonquantifiable effects) of Federal rules and paperwork," and these reports fulfill OMB's

---

[25] NICOLE V. CRAIN & W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS iv (2010), *available at* https://dair.nps.edu/bitstream/123456789/3664/1/SEC809-MKT-10-0055.pdf.

[26] *See generally* CURTIS W. COPELAND, CONGRESSIONAL RESEARCH SERVICE, R41763, ANALYSIS OF AN ESTIMATE OF THE TOTAL COSTS OF FEDERAL REGULATIONS (Apr. 6, 2011), *available at* https://sgp.fas.org/crs/misc/R41763.pdf.

[27] *Id.* at Summary.

requirements with the Act.[28] These reports demonstrate that rules promulgated each year provide quantified benefits in excess of quantified costs. For example, OMB reports that for fiscal year 2022, the estimated quantified benefits of agencies' major rules were between $25.2 billion and $48.2 billion annually, with estimated quantified costs of between $16.9 billion and $19.4 billion annually.[29] In addition, OMB reports that major rules promulgated in fiscal year 2021 actually *reduced* regulatory burdens while providing between $9.8 billion to $12.2 billion in estimated annual benefits.[30] Moreover, these reports demonstrate that major rules promulgated during the first two years of the Biden Administration have estimated benefits (between $35 billion and 60.4 billion) far in excess of those promulgated during the four years of the Trump Administration (-$4.0 billion to $6.9 billion).[31] All above numbers are adjusted for inflation to 2001 dollars.

We have heard a lot today about the cost of regulations and the burden they impose on small businesses, and many of my colleagues are citing a number from the American Action Forum (AAF). They allege that the Biden Administration's regulatory burden exceeds $1.6 billion in regulatory costs. But their tracker "Regulations Rodeo" only includes cost estimates and excludes potential savings or benefits of rules. Do you think the AAF figure is misleading?

I agree that the American Action Forum's (AAF) "Regulations Rodeo" is misleading. The Regulations Rodeo is a website that tallies the number of regulations promulgated each year and totals the "finalized cost" of (in a 10-year time window) and paperwork hours required by those regulations.[32] The "finalized cost" number is misleading in two ways. First, and most importantly, AAF provides no information about rules' estimated benefits, completely ignoring the reason why regulations are issued in the first place and providing a lopsided picture of how regulations affect the public. For example, although AAF provided that, as of May 20th, the total costs of promulgated rules during the Biden Administration were $1.6 trillion, a single rule by the Environmental Protection Agency provided quantified benefits of between $1.7 and $2.1 trillion—far in excess of the total costs AAF has claimed for *all* Biden Administration rules.[33]

Second, although most agencies provide cost estimates of their regulations as a range (usually by using multiple discount rates), AAF uses the larger number "in virtually all cases" rather than

---

[28] Treasury and General Government Appropriations Act, 2001, Pub. L. No. 106-554, tit. VI, § 624, 114 Stat. 2763A-161 (Dec. 21, 2000) (codified as amended at 31 U.S.C. § 1105 note).

[29] OFFICE OF MANAGEMENT AND BUDGET, REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT: FISCAL YEARS 2020, 2021, 2022 11 (2024), *available at* https://www.whitehouse.gov/wp-content/uploads/2024/02/FY-20-21-22-BCA-Report-FINAL.pdf.

[30] *Id.*

[31] OFFICE OF MANAGEMENT AND BUDGET, 2018, 2019, AND 2020 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 11, *available at* https://www.whitehouse.gov/wp-content/uploads/2021/01/2018_2019_2020-OMB-Cost-Benefit-Report.pdf. These numbers demonstrate that the Trump Administration's major rules may have decreased total regulatory benefits.

[32] *See* American Action Forum, *Regulation Rodeo*, https://regrodeo.com/ (last accessed June 7, 2024).

[33] *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 89 Fed. Reg. 27842, 28107 (Apr. 18, 2024).

providing that range.[34]

The picture painted by AAF is a highly misleading one, with a thumb on the anti-regulation side of the scale.

Do you agree that Federal agencies need resources to conduct analysis, understand the impact on small businesses, and provide valuable compliance assistance? Any efforts to pare back funding for agencies could hurt small businesses, correct?

The government does not operate on magic; everything is the result of the time and effort of hardworking civil servants across the government who must be paid. Analyses of rules' impacts are the work product of analysts, and compliance assistance is provided by the employees who respond to phone calls and emails. Reductions in funding (or even stable funding in light of inflation) will reduce the total mix of activities that agencies may take, resulting in fewer pro-business regulations or fewer businesses receiving the assistance they require.

Do you agree that agencies should conduct more outreach and engagement throughout the country to ensure that small businesses are part of the rule-making process?

It is imperative that the government engage with small businesses as part of the rulemaking process, and doing so effectively requires agencies to meet them where they are. The perspectives and concerns of small businesses are often quite different from those of large corporations, and without targeted outreach, the voices of small businesses may be drowned out by bigger industry players—including inside trade associations that purport to represent all members. Agencies must undertake the admittedly difficult work of holding forums and roundtables about their rulemakings outside the Beltway and virtually so that small businesses may effectively contribute their knowledge, experiences, and thoughts to the regulatory process.

Agencies have to work within a well-defined framework when issuing regulations, which include a number of procedural and analytical requirements. Could you describe this process and how it prevents agencies from making arbitrary decisions?

Federal agencies must follow a clearly defined, multi-step process—codified by Congress in the APA, RFA, and other statutes and supplemented by executive orders—that helps to prevent arbitrary decisions and ensure adherence to the laws Congress enacted when issuing new regulations.

At the highest level of generality, the APA requires agencies to provide notice to the public that they intend to promulgate regulations.[35] Agencies do this by publishing notices of proposed rulemaking in the *Federal Register*. These notices include regulatory text and preambles explaining the rules' purposes, legal authorities, and potential impacts. Agencies must then allow the public opportunities to submit comments on those proposed rules for a time period of not less than 30 days (many agencies permit 60 or 90 days for comments). Finally, agencies publish final rules in the *Federal Register* after considering the public's comments. These documents include regulatory text and preambles explaining the rules' purposes and responding to the public's comments. This process allows the public an opportunity to weigh in on regulations the

[34] American Action Forum, *Regulation Rodeo: Frequently Asked Questions* (last accessed June 7, 2024).
[35] *See generally* 5 U.S.C. § 553.

government is considering, requires agencies to thoroughly consider those comments, and explain their thought processes to ensure their decisions are not arbitrary.

In addition, the APA allows affected persons to challenge in court rules for which this process was not followed, rules promulgated in excess of agencies' statutory authority, and rules that are "arbitrary, capricious, [or] an abuse of discretion."[36]

This multi-stage process involving public input, structured analyses, external oversight and the potential for judicial review prevents agencies from unilaterally issuing arbitrary and unjustified rules.

[36] *Id.* § 706.

I

118TH CONGRESS
2D SESSION

H. R. 8033

To amend title 5, United States Code, to clarify the information required to be included in a certification by an agency that a rule will not have a significant economic impact on a substantial number of small entities.

IN THE HOUSE OF REPRESENTATIVES

APRIL 17, 2024

Mr. LUETKEMEYER (for himself, Mr. MEUSER, Mr. MANN, and Ms. SALAZAR) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Small Business, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To amend title 5, United States Code, to clarify the information required to be included in a certification by an agency that a rule will not have a significant economic impact on a substantial number of small entities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Transparency for Small Businesses Act".

SEC. 2. INFORMATION REQUIRED TO BE INCLUDED IN A CERTIFICATION BY AN AGENCY THAT A RULE WILL NOT HAVE A SIGNIFICANT ECONOMIC IMPACT ON A SUBSTANTIAL NUMBER OF SMALL ENTITIES.

Section 605 of title 5, United States Code, is amended by adding at the end the following:

"(d) The certification under subsection (b) shall include, at a minimum, the following:

"(1) The approximate number of small entities, if any, impacted by the rule, and an identification of any such small entity (including the North American Industry Classification System code, if applicable).

"(2) An estimate of the total cost of implementing the rule, including the cost of compliance with the rule, which may be measured as an estimated percentage of the revenue of the small entities determined to be impacted under paragraph (1), or another reasonable measure of economic significance.

"(3) A determination of whether the costs of compliance under paragraph (2) represent a significant economic impact, and the criteria used to make such determination.

"(4) A determination of the number of small entities that will experience a significant economic

impact as a result of the rule, whether that number is substantial, and the criteria used to make such determinations.''.

○

[DISCUSSION DRAFT]

118TH CONGRESS
2D SESSION

H. R. __

To amend title 5, United States Code, to require greater transparency and accurate accounting of the cost Federal regulatory decisions will have on small businesses, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M_. _____ introduced the following bill; which was referred to the Committee on

---

A BILL

To amend title 5, United States Code, to require greater transparency and accurate accounting of the cost Federal regulatory decisions will have on small businesses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Accurate Accounting of Regulatory Impact Act".

SEC. 2. INITIAL REGULATORY FLEXIBILITY ANALYSIS.

(a) IN GENERAL.—Chapter 6 of title 5, United States Code, is amended—

(1) in section 603(b)—

(A) in paragraph (5), by striking the period at the end and inserting "; and"; and

(B) by adding at the end the following:

"(6) where feasible, any reasonably foreseeable or potential indirect costs the proposed rule may impose on small entities, which shall include small entities that—

"(A) purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule;

"(B) are directly regulated by other governmental entities as a result of the rule; or

"(C) are not directly regulated by the agency as a result of the rule but are otherwise subject to other agency rules as a result of the rule."; and

(2) in section 605(b), by striking "The agency" and inserting "Not later than 10 days after completing the certification described in this subsection, the agency"; and

SEC. 3. REVIEW PROCEDURES FOR PERIODIC REVIEW OF RULES.

(a) IN GENERAL.—Section 610 of title 5, United States Code, is amended—

(1) in subsection (b)—

(A) in the matter preceding paragraph (1), by striking "the following factors";

(B) in paragraph (4), by striking "and" at the end;

(C) in paragraph (5), by striking the period at the end and inserting "; and"; and

(D) by adding at the end the following:

"(6) any indirect costs described in the initial regulatory flexibility analysis under section 603(b)(6), and any other indirect costs that may have during the 10-year period beginning on the date of publication of the rule; and

(2) by adding at the end the following:

"(d) If an agency fails to conduct a review of a rule as required under subsection (a)—

"(1) that rule shall cease to have effect;

"(2) the agency shall publish in the Federal Register a notification that the rule has ceased to be effective, and solicit comments for why the rule should be reinstated; and

"(3) if, based on the comments received under paragraph (2), the agency determines that the rule should be reinstated—

"(A) the agency shall have 180 days beginning on the date of that determination to complete the review of the rule under this section; and

"(B) upon completion of the review under subparagraph (A), the rule shall be reinstated, notwithstanding the notice and comment rulemaking procedures under section 553 of this title.".

(b) APPLICATION.—The amendment made by subsection (a)(2) shall apply with respect to any final rule issued by an agency—

(1) during the 5-year period preceding the date of enactment of this Act; or

(2) on or after the date of enactment of this Act.

[DISCUSSION DRAFT]

118TH CONGRESS
2D SESSION

H. R. _____

To amend title 5, United States Code, to make certain changes in how agencies conduct periodic reviews of agency rules.

IN THE HOUSE OF REPRESENTATIVES

M__. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To amend title 5, United States Code, to make certain changes in how agencies conduct periodic reviews of agency rules.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CHANGES TO PERIODIC REVIEW OF RULES.

Section 610 of title 5, United States Code, is amended—

(1) in subsection (a)—

(A) by inserting after "in a statement" the following: "that includes an explanation for the delay"; and

(B) by striking "by one year at a time for a total of not more than five years" and inserting "by not more than one year"; and

(2) in subsection (b)—

(A) in paragraph (4), by striking "and" at the end;

(B) in paragraph (5), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following:

"(6) the cost and paperwork hours the rule has required of businesses since the rule took effect.".

[DISCUSSION DRAFT]

118TH CONGRESS
2D SESSION

H. R. _____

To amend title 5, United States Code, to add the Department of Labor to the covered agency definition for certain regulatory flexibility analysis requirements, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M__. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To amend title 5, United States Code, to add the Department of Labor to the covered agency definition for certain regulatory flexibility analysis requirements, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. REGULATORY FLEXIBILITY ANALYSIS REQUIREMENTS FOR DEPARTMENT OF LABOR.

Section 609(d) of title 5, United States Code, is amended—

(1) in paragraph (2), by striking "and" at the end;

(2) in paragraph (3), by striking the period and inserting "; and"; and

(3) by adding at the end the following new subsection:

"(d) the Department of Labor.".

[DISCUSSION DRAFT]

118TH CONGRESS
2D SESSION

H. R. __

To require Federal agency heads to submit a report on the implementation of the Regulatory Flexibility Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M_. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To require Federal agency heads to submit a report on the implementation of the Regulatory Flexibility Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Assurance for Small Business Act of 2024".

SEC. 2. REPORT ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT.

Not later than 90 days after the date of the enactment of this Act, the head of each agency shall submit to Congress a report describing the application of chapter 6 of title 5, United States Code (commonly

know as the "Regulatory Flexibility Act"), with respect to each rule of the agency. Such report shall include—

(1) any definitions used by the agency to determine a "significant economic impact" and a "substantial number of small entities", as such terms are used in such chapter 6; and

(2) a comprehensive list of factors considered by the agency in applying such terms in any regulatory flexibility analyses of such agency.

[DISCUSSION DRAFT]

118TH CONGRESS
2D SESSION

H. R. __

To amend chapter 6 of title 5, United States Code (commonly known as the "Regulatory Flexibility Act"), to ensure complete analysis of potential impacts on small entities of rules, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M_. _____ introduced the following bill; which was referred to the Committee on

---

A BILL

To amend chapter 6 of title 5, United States Code (commonly known as the "Regulatory Flexibility Act"), to ensure complete analysis of potential impacts on small entities of rules, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Enhanced Regulatory Flexibility Assessment Act".

SEC. 2. REQUIREMENTS PROVIDING FOR MORE DETAILED ANALYSES.

(a) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Section 603(b) of title 5, United States Code, is amended to read as follows:

"(b) Each initial regulatory flexibility analysis required under this section shall contain a detailed statement—

"(1) describing the reasons why action by the agency is being considered;

"(2) describing the objectives of, and legal basis for, the proposed rule;

"(3) estimating the number and type of small entities to which the proposed rule will apply;

"(4) describing the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report and record;

"(5) describing all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule, or the reasons why such a description could not be provided;

"(6) estimating the additional cumulative economic impact of the proposed rule on small entities beyond that already imposed on the class of small entities by the agency or why such an estimate is not available;

"(7) describing any disproportionate economic impact on small entities or a specific class of small entities; and

"(8) describing any impairment of the ability of small entities to have access to credit.".

(b) FINAL REGULATORY FLEXIBILITY ANALYSIS.—

(1) IN GENERAL.—Section 604(a) of title 5, United States Code, is amended—

(A) in paragraph (4)—

(i) by inserting "detailed" before "description"; and

(ii) by striking "an explanation" and inserting "a detailed explanation";

(B) in paragraph (5), by inserting "detailed" before "description";

(C) in paragraph (6)—

(i) by inserting "detailed" before "description"; and

(ii) by striking "and" at the end;

(D) in paragraph (7), as so redesignated, by striking the period at the end and inserting "; and"; and

(E) by adding at the end the following:

"(8) a detailed description of any disproportionate economic impact on small entities or a specific class of small entities.".

(2) INCLUSION OF RESPONSE TO COMMENTS ON CERTIFICATION OF PROPOSED RULE.—Section 604(a)(2) of title 5, United States Code, is amended by inserting "(or certification of the proposed rule under section 605(b))" after "initial regulatory flexibility analysis".

(3) PUBLICATION OF ANALYSIS ON WEBSITE.—Section 604(b) of title 5, United States Code, is amended to read as follows:

"(b) The agency shall make copies of the final regulatory flexibility analysis available to the public, including placement of the entire analysis on the website of the agency, and shall publish in the Federal Register the final regulatory flexibility analysis, or a summary thereof which includes the telephone number, mailing address, and link to the website where the complete analysis may be obtained.".

(c) CROSS-REFERENCES TO OTHER ANALYSES.—Section 605(a) of title 5, United States Code, is amended to read as follows:

"(a) A Federal agency shall be treated as satisfying any requirement regarding the content of a regulatory flexibility agenda or regulatory flexibility analysis under section 602, 603, or 604 if the Federal agency provides in the agenda or analysis a cross-reference to the specific portion of another agenda or analysis which is required by any other law and which satisfies the requirement.".

(d) CERTIFICATIONS.—Section 605(b) of title 5, United States Code, is amended by striking "statement providing the factual basis for such certification." and inserting "detailed statement providing the factual and legal basis for such certification. The detailed statement shall include an economic assessment or a summary thereof that is sufficiently detailed to support the certification of the agency.".

(e) QUANTIFICATION REQUIREMENTS.—Section 607 of title 5, United States Code, is amended to read as follows:

"§ 607. Quantification requirements

"In complying with sections 603 and 604, an agency shall provide—

"(1) a quantifiable or numerical description of the effects of—

"(A) the proposed or final rule; and

"(B) alternatives to the proposed or final rule; or

"(2) a more general descriptive statement and a detailed statement explaining why quantification is not practicable or reliable.".

[DISCUSSION DRAFT]

118TH CONGRESS
2D SESSION

H. R. __

To amend chapter 6 of title 5, United States Code (commonly known as the "Regulatory Flexibility Act"), to ensure complete disclosure of an agency's annual regulatory agenda.

IN THE HOUSE OF REPRESENTATIVES

M_. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To amend chapter 6 of title 5, United States Code (commonly known as the "Regulatory Flexibility Act"), to ensure complete disclosure of an agency's annual regulatory agenda.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Agenda Clarity Act".

SEC. 2. EXPANSION OF REPORT OF REGULATORY AGENDA.

Section 602 of title 5, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (2), by striking ", and" at the end and inserting a semicolon;

(B) by redesignating paragraph (3) as paragraph (4); and

(C) by inserting after paragraph (2) the following:

"(3) a brief description of each sector of the North American Industrial Classification System that is primarily affected by any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities; and"; and

(2) by amending subsection (c) to read as follows:

"(c) Not later than 3 days after the date on which an agency publishes a regulatory flexibility agenda in the Federal Register under subsection (a)—

"(1) such agency shall prominently display on the website of such agency a plain language summary of the information contained in the regulatory flexibility agenda;

"(2) the Chief Counsel for Advocacy shall compile, by agency, and prominently display on the website of the Small Business Administration a plain language summary of each such regulatory flexibility agenda.".

[DISCUSSION DRAFT]

118TH CONGRESS
2D SESSION

H. R. __

To amend title 5, United States Code, to give small entities the ability to petition the Office of Advocacy to review a regulatory decision that impacts small entities, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M_. _____ introduced the following bill; which was referred to the Committee on

---

A BILL

To amend title 5, United States Code, to give small entities the ability to petition the Office of Advocacy to review a regulatory decision that impacts small entities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Small Business Regulatory Challenge Act of 2024".

SEC. 2. INITIAL REGULATORY FLEXIBILITY ANALYSIS.

(a) IN GENERAL.—Chapter 6 of title 5, United States Code, is amended—

(1) by inserting after section 605 the following:

"§ 605A. Review procedures relating to initial regulatory flexibility analysis certifications

"(a) FILING A PETITION TO REVIEW AGENCY CERTIFICATION OF A PROPOSED RULE.—

"(1) IN GENERAL.—Any small entity, group of small entities, or organization representing the interests of small entities may petition the Chief Counsel for Advocacy of the Small Business Administration (in this section referred to as the 'Chief Counsel') to review a certification published under section 605(b) that a proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

"(2) FORM.—The Chief Counsel shall—

"(A) determine the method, timing, and form of the submission a petition described in paragraph (1); and

"(B) display the information described in subparagraph (A) on a website of the Office of Advocacy of the Small Business Administration in a conspicuous manner.

"(3) CONTENTS.—Each petition described in paragraph (1) with respect to a certification published under section 605(a) for a proposed rule shall clearly and concisely—

"(A) specify the name of the petitioner and a telephone number, a mailing address, and an email address that the Chief Counsel may use to communicate with the petitioner;

"(B) if the petitioner is an organization, provide additional identifying information, including, as applicable—

"(i) the organizational or corporate status of the petitioner;

"(ii) any State of incorporation of the petitioner;

"(iii) any registered agent of the petitioner;

"(iv) the interest of the petitioner in representing small entities affected by the proposed rule and the certification at issue; and

"(v) the name and authority of the individual who signed the petition on behalf of the organizational or corporate petitioner;

"(C) present the specific issues the petitioner believes should be addressed through a review of the certification, such as—

"(i) examples of why the certification is improper due to the significant economic impact the proposed rule would have on a substantial number of small entities; and

"(ii) which small entities would experience this significant impact;

"(D) cite, enclose, or reference, any relevant and non-protected or confidential technical, scientific, or other data or information supporting any assertion of the problem with the certification;

"(E) present a proposed solution to the issues raised in the petition, including potential regulatory or compliance alternatives to the proposed rule;

"(F) provide an analysis, discussion, or argument that explains how the proposed solution described in subparagraph (E) solves the issues raised in the petition; and

"(G) **[**cite, enclose, or reference/*same comment*] any other publicly available data or information supporting the proposed solution described in subparagraph (E).

"(b) CONSULTATION.—

"(1) IN GENERAL.—Any person desiring to file a petition under subsection (a) may request a consultation with the Chief Counsel before or after filing the petition.

"(2) FORM.—The Chief Counsel shall—

"(A) determine the method, timing, and form of requesting a consultation with the Chief Counsel under paragraph (1); and

"(B) display the information described in subparagraph (A) on the website of the Office of Advocacy of the Small Business Administration in a conspicuous manner.

"(3) LIMITATIONS ON ASSISTANCE.—In any consultation regarding a petition under paragraph (1), the Chief Counsel—

"(A) may only—

"(i) describe the process for filing, docketing, tracking, closing, amending, withdrawing, and resolving the petition; and

"(ii) assist the petitioner to clarify the petition so that the Chief Counsel is able to understand the issues of concern to the petitioner; and

"(B) may not advise a petitioner on whether the petition should be amended or withdrawn.

"(c) PRIMA FACIE REVIEW.—

"(1) IN GENERAL.—Upon receipt of a petition filed under this section with respect to the certification of a proposed rule, the Chief Counsel shall make a prima facie determination on the merit of the issues raised in petition as to the properness of the certification and whether the proposed rule in question would, if

promulgated, have a significant economic impact on a substantial number of small entities.

"(2) NO FURTHER REVIEW.—If, following the prima facie review of a petition under paragraph (1), the Chief Counsel determines that the issues raised in the petition do not merit further review by the Chief Counsel, the Chief Counsel shall, not later than 10 days after receipt of the petition, inform the petitioner of that determination and shall deny the petition and no further review thereof may occur.

"(3) FURTHER REVIEW.—If, following the prima facie review of a petition under paragraph (1), the Chief Counsel determines that the issues raised in the petition do merit further review by the Chief Counsel, the Chief Counsel shall, not later than 10 days after receipt of the petition, inform the petitioner and the agency that promulgated the proposed rule that the Chief Counsel shall conduct a full review of the certification and proposed rule to which the petition relates under subsection (d).

"(d) FULL REVIEW.—

"(1) CONSIDERATIONS; MEETING.—In conducting a full review under this subsection with respect to the certification made under section 605(b), the Chief Counsel shall—

"(A) consider—

"(i) whether the agency that promulgated the proposed rule correctly determined which small entities will be affected by the proposed rule;

"(ii) whether the agency considered adequate economic data to assess whether the proposed rule will have a significant impact on a substantial number of small entities; and

"(iii) the economic implications of the proposed rule; and

"(B) convene a meeting between the Chief Counsel, the petitioner, representatives of the agency that proposed the rule who are determined appropriate by the Chief Counsel, and the Administrator of the Office of Information and Regulatory Affairs to—

"(i) respond to the allegations in the petition for those positions regarding the certification of the proposed rule; and

"(ii) allow the Chief Counsel to ask questions as the Chief Counsel determines necessary to make a final determination as to the validity of the certification.

"(2) PUBLICATION.—Not later than 30 days after the date on which the Chief Counsel begins a full review of a certification made with respect to a proposed rule under paragraph (1), the Chief Counsel shall submit to the petitioner and the agency that proposed the rule and publish in the Federal Register and on the website of the Office of Advocacy of the Small Business Administration, the results of the review conducted under paragraph (1).

"(3) REQUIREMENT TO PERFORM ANALYSES.—If, after a full review of a certification made with respect to a proposed rule under paragraph (1), the Chief Counsel determines that the proposed rule will, if promulgated, have a significant economic impact on a substantial number of small entities, the agency that promulgated the proposed rule shall perform an initial regulatory flexibility analysis and a final regulatory flexibility analysis for the proposed rule under sections 603 and 604, respectively.

"(4) PENALTY.—If an agency fails to attend the required meeting under paragraph (1)(B) or in any other way fails to assist the Chief Counsel in a full review under paragraph (1) with respect to a proposed rule of the agency, as determined by the Chief Counsel, the final rule shall not apply to small entities.

"(5) JUDICIAL REVIEW.—For purposes of judicial review under chapter 7 of this title, a certification made by an agency under section 605(b) for which a petition is filed under subsection (a) shall be considered final agency action as of the date on which the Chief Counsel—

"(A) makes a determination under subsection (c)(2) that the issues raised in the petition do not merit further review; or

"(B) publishes the results of a full review of the certification under paragraph (1).".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 6 of title 5, United States Code, is amended by inserting after the item relating to section 605 the following:

"605A. Review procedures relating to initial regulatory flexibility analysis certifications.".



May 22, 2024

The Honorable Roger Williams
Chair
House Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

The Honorable Nydia Velázquez
Ranking Member
House Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Williams, Ranking Member Velázquez and Members of the Committee on Small Business:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 68 chapters representing more than 23,000 members, I appreciate the opportunity to comment on today's hearing, "Burdensome Regulations: Examining the Biden Administration's Failure to Consider Small Businesses." This hearing is particularly relevant to ABC, as the majority of ABC's general contractor and subcontractor members qualify as small businesses as defined by the Small Business Administration. The industry consistently has one of the highest concentrations of small business participation and its members play an integral role in building America's infrastructure.

Since January 2021, the Biden administration has advanced numerous regulations that create substantial burdens for America's small businesses. ABC's Construction Confidence Index, based on an ABC member survey conducted between April 22 and May 6, reveals that over 20% of respondents expect a decrease in sales and profit margins. In addition, the National Federation for Independent Business' Small Business Optimism Index moved to 89.7 in April, which marks the 28th consecutive month below the 50-year average of 98. Yet, despite these statistics, the Biden administration continues to prevent small businesses from competing for federal construction projects through discriminatory policies.

ABC is deeply concerned that the below rulemakings advanced by the Biden administration disregard small businesses, diminish their ability to compete and undermine their integral role in building America's infrastructure.

Overtime Rule: On April 23, the U.S. Department of Labor issued its final rule on overtime, which will change overtime regulations under the Fair Labor Standards Act. The final rule increases the minimum annual salary level threshold for exemption in two phases: from the current level of $35,568 to $43,888 on July 1, 2024, and to $58,656 on Jan. 1, 2025. In addition, salary thresholds will update every three years starting on July 1, 2027. Many employees who qualify for exempt status would be reclassified as nonexempt under phase II of the rule in a move likely to disrupt the entire construction industry. This specifically harms small businesses by restricting employee workplace flexibility in setting schedules and hours, hurting career advancement opportunities. An increase in the salary level every three years will only further harm small businesses.

Project Labor Agreement Rule: The Federal Acquisition Regulatory Council's final rule, Use of Project Labor Agreements for Federal Construction Projects, took effect on Jan. 22, implementing President Joe Biden's Executive Order 14063, which requires federal construction contracts of $35 million or more to be subjected to controversial PLAs. The final rule will needlessly increase construction costs and reduce opportunities for local contractors and skilled tradespeople. Government-mandated PLAs increase the cost of construction by 12% to 20% and reduce competition from 89.3% of the construction industry workforce that does not belong to a union.

Relative to this hearing, the final rule discriminates against the majority of our nation's small, women-, veteran- and minority-owned businesses, which deserve a fair opportunity to help rebuild their communities.

Independent Contractor Rule: In addition, the U.S. Department of Labor's Wage and Hour Division announced the final rule on Employee or Independent Contractor Classification Under the Fair Labor Standards Act, which rescinds the ABC-supported 2021 final rule and replaces it with a confusing multifactor analysis to determine whether a worker is an employee or an independent contractor. The final rule took effect on March 11, 2024. Independent contractors play an essential role for large and small contractors, delivering construction projects safely, on time and on budget for their government and private customers. This move will jeopardize the ability of construction firms to continue the industry's longstanding practice of utilizing legitimate independent contractors, many of which are small businesses.

ABC estimates that the construction industry will need to attract 501,000 additional workers on top of the normal pace of hiring in 2024 to meet labor demands and the Biden administration's rulemakings will only further exacerbate the construction industry's skilled workforce shortage.

ABC applauds the committee for evaluating the Biden administration's regulatory agenda, which will directly harm small businesses and the U.S. economy. ABC appreciates the opportunity to comment on the committee's analysis of the administration's agenda, and we look forward to continued efforts to relieve the small business community from a barrage of harmful regulations.

Sincerely,



Kristen Swearingen
Vice President, Legislative & Political Affairs

rural.
regional.
nationwide.®

May 22, 2024

The Honorable Roger Williams
Chairman
Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515

The Honorable Nydia Velázquez
Ranking Member
Committee on Small Business
U.S. House of Representatives
2069 Rayburn House Office Building
Washington, DC 20515

The Honorable Blaine Luetkemeyer
Vice Chairman
Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Rogers, Ranking Member Velázquez, and Vice Chair Luetkemeyer:

Competitive Carriers Association (CCA)[1] respectfully submits this letter for the record for today's hearing on *"Burdensome Regulations: Examining the Biden Administration's Failure to Consider Small Businesses."* CCA appreciates the Committee's focus on ways that policymakers can reduce regulatory burdens on small businesses.

As this Committee knows well, small businesses play vital roles in the communities they serve, including community-based wireless carriers. Regional and smaller rural wireless carriers are critical to closing the digital divide by continuing to invest in their hometowns and connecting communities with vital wireless broadband services, both in their homes and on the go. The majority of CCA's members live and work in the communities that they serve and share in the benefits powered by expanded connectivity and the deployment of next-generation technologies. Robust wireless broadband networks are necessary infrastructure for the 21st century, particularly for small businesses and the consumers who they serve. In addition to connecting with consumers, wireless services revolutionize how entire industries operate and provide key economic development opportunities. From telehealth to precision agriculture, distance learning and the internet of things, these and other services are economic multipliers and job creators that depend on reliable wireless broadband coverage, and the continued deployment of 5G promises new and exciting opportunities for businesses.

Yet regulatory burdens, considered individually and even more importantly when considered in a cumulative manner, threaten the ability of small wireless providers to continue providing services – and

[1] CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. Members range from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers, as well as vendors and suppliers that provide products and services throughout the wireless communications ecosystem.

to upgrade and expand coverage – to more customers and additional service areas. An onslaught of new regulatory proposals, ever-increasing reporting requirements, and often unbalanced approaches to regulating telecommunications providers, results in significant burdens that ultimately threaten consumers and competition. In some instances, regulations added under the guise of helping consumers result in little to no benefit. This over-reach threatens to erode the positive provider-consumer relationship that many of our carriers offer their customers.

Excessive regulation and sometimes duplicative federal reporting requirements to various agencies also redirect valuable resources and efforts, which would otherwise be employed in direct support of the provider's mission: connecting the community. Employees of smaller wireless carriers, like other small businesses, often wear many hats and share multiple responsibilities under their given titles, as well as have limited resources to prioritize for meeting new regulatory requirements while also maintaining and expanding their networks. The demands on their time require careful consideration of how and where to direct resources. Additional regulatory and compliance burdens from the federal government should not pre-occupy business planning and practices.

Decisions made by policymakers can stimulate innovation, competition, and economic growth – or, if not properly accounting for cumulative regulatory burdens on smaller companies, stymie expanded connectivity, leaving rural America behind. Small businesses depend on policies that preserve and expand wireless broadband services, especially in rural America. When it comes to additional regulatory requirements, duplicative reporting requirements, and unnecessary federal interference – regardless of the issue – federal agencies must consider the both the incremental and the cumulative burdens placed on smaller companies, the negative unintended consequences and competitive harms regulations may have on small businesses, and apply practical and common-sense policies to allow small businesses to comply or provide reasonable exemptions for non-nationwide providers.

CCA is pleased to have this opportunity to engage with the Committee, and thanks you for addressing these critical issues. We welcome further discussion and collaboration to reduce the weight of regulatory burdens on small businesses.

Sincerely,



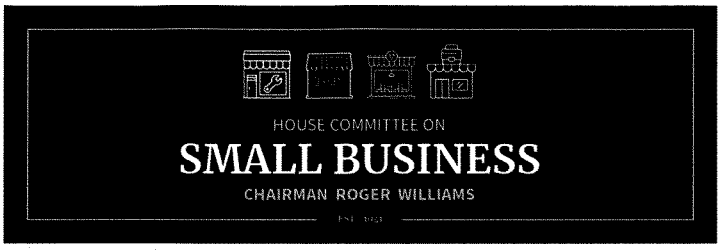
Tim Donovan
President and CEO

Press Release / May 21, 2024

Job Creators Network Commends House Small Business Committee for Holding Regulatory Relief Hearing

Alfredo Ortiz, CEO of Job Creators Network, released the following statement on Wednesday's House Small Business Committee's hearing on the Biden administration's overregulation and its consequences to small businesses:

"On behalf of America's 33 million small businesses, Job Creators Network commends the House Small Business Committee for holding a hearing to protect small businesses from overregulation. The Biden administration is currently in the midst of a regulatory onslaught that disproportionately hurts small businesses. The hearing shows how the Regulatory Flexibility Act is not working as advertised and why it's vital that Congress passes the Prove It Act to provide small businesses with real regulatory relief. JCN worked with Sen Joni Ernst to introduce this legislation in the Senate and recently sent a letter to House leadership urging swi passage. Today's hearing is an important step forward in advancing such solutions to Democrats' overregulation that hurts American job creators and the economy as a whole."



REGULATORY FLEXIBILITY ACT (RFA) REPORT: AGENCIES' NONCOMPLIANCE WITH THE RFA

The House Committee on Small Business
Staff Report 2024

Table of Contents

I. Committee Action 4

II. Executive Summary 5

III. Introduction to the RFA 6

IV. The Committee's Investigation 8

A. Certification 8
1. EPA WOTUS Rule 9
2. EPA Clean Power Plant Rule 10
3. DOL / OSHA: Walkaround Rule 11
4. CFPB: Credit Card Penalty Fees Rule (Regulation Z) 12
5. FMC: Demurrage and Detention Billing Requirements Rule 13

B. Overall Impact 13
1. Underestimating Compliance Cost and Burden 15
a. DOL: Davis-Bacon and Related Acts; Apprentice Rule; Non-Displacement Rule; Fiduciary Rule; and Joint Employer Rule 15
i. David-Bacon and Related Acts 16
ii. Apprentice Rule 16
iii. Non-Displacement Rule 17
iv. Fiduciary Rule 18
v. Joint Employer Rule 18
b. CPSC: Residential Gas Furnaces and Boilers Rules 20
c. DOE: Commercial Refrigeration and Distribution Transformers Rules 20
i. Commercial Refrigeration Rule 20
ii. Distribution Transformers Rule 21
d. EPA: EtO Rule; Methane Rule; PFAS Rule; Air Quality Standards Rule; and Clean Power Plant Rule 21
i. EtO Rule 22
ii. Methane Rule 22
iii. PFAS Rule 23
iv. Air Quality Standards Rule 23
v. Clean Power Plant Rule 24
e. FDA: Tobacco Product Standard for Characterizing Flavors in Cigars Rule 24
f. BOEM: Rice's Whale Rule 25
g. FTC: Non-Compete Clause Rule 26
2. Underestimating the Number of Small Entities Impacted 26
a. Federal Energy Regulatory Commission Rules 27

b. DOL: Fiduciary Rule; Non-Displacement of Qualified Workers Rule Davis-Bacon and Related Acts; Overtime Rule under Fair Labor Standards Act; and Independent Contractor Classification .32
i. Fiduciary Rule....32
ii. Non-Displacement of Qualified Workers Rule....33
iii. Davis-Bacon and Related Acts....33
iv. Overtime Rule under Fair Labor Standards Act....34
v. Independent Contractor Classification....34
3. Alternative Rules....35
a. DOL: Davis-Bacon and Related Acts and Overtime Rule under Fair Labor Standards Act....35
b. ATF: Definition of "Engaged in the Business" as a Dealer in Firearms Rule....36
c. FDA: Tobacco Product Standard for Characterizing Flavors in Cigars....36

C. Compounding Impact of Duplicative Regulations....36
1. DOL: Fiduciary Rule and Workplace Injury Rule....40
a. Fiduciary Rule....40
b. Workplace Injury Rule....40
2. DOE and FTC: Ceiling Fans Rules....41
3. OMB/FAR Council and SEC: Climate Disclosure Rule....41
4. EPA and DOE: Electric Vehicles....42

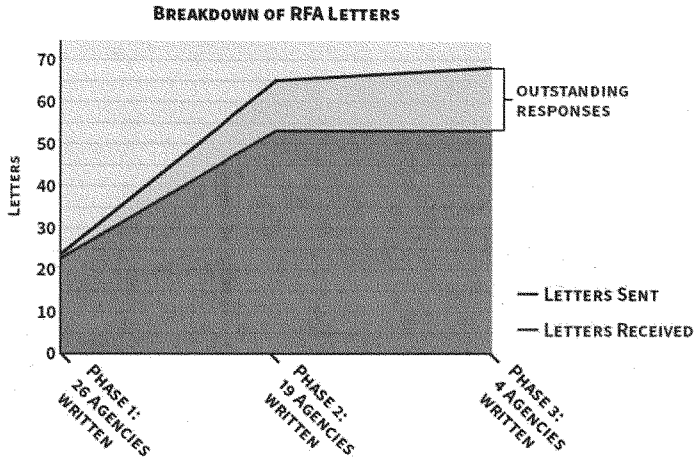
D. Congressional Oversight and Administrative Procedure Act....43
1. The FDA, BOEM, and DOL: Policy not to Discuss Proposed Rules with Congress....43
2. The DOE, DOL, and SEC: Ramifications of Shortened Comment Period....44

V. Solutions....45
A. Significant Impact on a Substantial Number of Small Entities Certification....45
B. Regulatory Flexibility Act Reforms....46
C. Rule Challenges....46
D. Periodic Review of Rules....46
E. Cumulative Economic Impact of the Rule....47

VI. Conclusion....47

Appendix 1

I. Committee Action



II. Executive Summary

On February 22, 2023, the Committee on Small Business (Committee), under Chairman Roger Williams, launched an official investigation into federal agencies' compliance with the Regulatory Flexibility Act (RFA). These letters were a continuation of an investigation that began in October 2022 by then Committee Ranking Member Blaine Luetkemeyer. In the 118th Congress, the Committee conducted a comprehensive, three-phase investigation to identify the main compliance issues and find solutions to prevent agencies from overregulating small businesses. This included investigating federal agencies' rulemaking process, the adequacy of their RFA analysis, and the burden their regulations impose on small businesses. This report examines these processes and burdens by analyzing agencies' rules, responses to the Committee's letters, and findings from the hearings. Furthermore, this report examines potential legislative solutions resulting from these investigative findings.

Nearly every week, the Biden Administration finds new ways to hamper businesses across America by creating burdensome new regulations and mandates on small businesses. This Administration has repeatedly shown that they do not consider the best interests of business owners when making their rules and regulations. Since President Biden took office, his Administration has passed **891 final rules costing $1.47 trillion and 232.4 million paperwork hours**.[1] In a single week alone in April, the Biden Administration issued $875 billion in new costs from final rules.[2] This is an unfortunate reality that the small business owners must face every day; trying to run their businesses while battling against a mountain of ever-changing regulations.

During this investigation, the Committee reviewed more than 100 proposed and final rules, sent 66 letters to 34 different federal government agencies, and held 13 hearings on the regulatory burdens created by the Biden Administration. This work established the evidence to support four findings that show the main issues with the agencies' RFA compliance.

Finding 1: The RFA allows agencies to certify a rule if it does not have a significant impact on a substantial number of small entities. However, often, agencies improperly certify the rules in order to avoid conducting the RFA analysis, which means that rules are being finalized without adequately assessing the true impacts to small businesses.

Finding 2: Agencies often underestimate both the costs and the number of impacted small businesses when conducting an RFA analysis. This creates a disparity between what the agency claims and what the real-world impact of the rules are on small businesses. Furthermore, the agencies often fail to adequately consider less burdensome alternatives, or they choose to finalize a rule that is even more harmful to small businesses than other alternatives, without adequate justification.

Finding 3: Agencies repeatedly fail to appropriately assess if a rule is duplicative or conflicts with other rules, which causes small businesses to suffer from multiple overlapping regulations from both within the same agency and across the federal government.

Finding 4: Some agencies refused to comply with congressional oversight and provide Congress with requested information during their rulemaking process. This violates both the Constitution and Administrative Procedure Act and prevents this Committee from its duty to protect Main Street America.

Unfortunately, most agencies are failing to properly comply with the RFA's requirements—in fact many are treating it like a check the box exercise rather than actually analyzing the effects of their regulations. This is failing to live up to the spirit of letter of the law and is causing small businesses to suffer. Both the first and second phases of the Committee's investigation revealed that agencies often neglect to adequately assess how

[1] *Regulation Rodeo*, AM. ACTION FORUM, (last visited May 10, 2024), https://www.regrodeo.com.
[2] Dan Goldbeck, *The biggest week on record*, AM. ACTION FORUM (Apr. 22, 2024).

their regulations would affect small businesses. The third phase showed that even after Congressional oversight, agencies still persistently refuse to comply with the RFA's requirements and to provide this Committee with the required information to conduct Constitutionally mandated oversight. The issues with the RFA compliance identified by this Committee harm American small businesses and require a cross-jurisdictional approach to be remedied.

In nearly every hearing held by the Committee this Congress, small businesses noted the increased burden and harms they face due to the Biden Administrations regulatory state. The Committee will continue evaluating federal agencies' RFA compliance and seek legislative solutions to better protect small businesses. The Committee's in-depth investigation uncovered a number of potential solutions to strengthen the protections for small entities, particularly in the Biden Administrations climate of over-regulation.

III. Introduction to the RFA

The massive number of regulations that federal agencies pass each year and the number of paperwork hours to comply are detrimental to a small business. Staying on top of this ever-changing regulatory system is no small undertaking, and often business owners must either take time away from their core duties to stay in compliance, or hire an employee solely dedicated to the task. Compliance diverts critical resources from being reinvested into a business, helping it to grow, innovate, and succeed.

The RFA was created to prevent excessive regulatory burdens from being imposed on small businesses.[3] The RFA was signed into law by President Jimmy Carter on September 19, 1980 with the aim of requiring federal agencies to consider the impact their regulations will have on small entities, who often are disproportionately impacted by federal bureaucracy.[4] The RFA requires agencies to analyze whether proposed regulations are expected to have a "significant economic impact on a substantial number of small entities."[5] However, this Committee's investigation shows that federal agencies are no longer following the law in a way that lives up to its intent when it was initially passed.

The agencies must take three steps to comply with the RFA in their rulemaking process. First, the agency must determine whether the RFA applies to a particular regulation. The RFA applies to rules subject to notice and comment rulemaking under the Administrative Procure Act (APA) or any other relevant law.[6] If the agency concludes that the RFA applies—which it does for almost all rules issued by agencies these days—they move onto the second step to provide further economic impact analyses. However, an agency can get around the intent of the law if it determines that a rule will not have a significant economic impact on a substantial number of small entities. This loophole allows agencies to pass burdensome regulations that are detrimental to small businesses without ever attempting to calculate the true cost of the regulation. This certification must include a factual basis analysis for this determination, which provides, at minimum, a description of the affected entities and the impacts that clearly justify the "no impact" certification.[7]

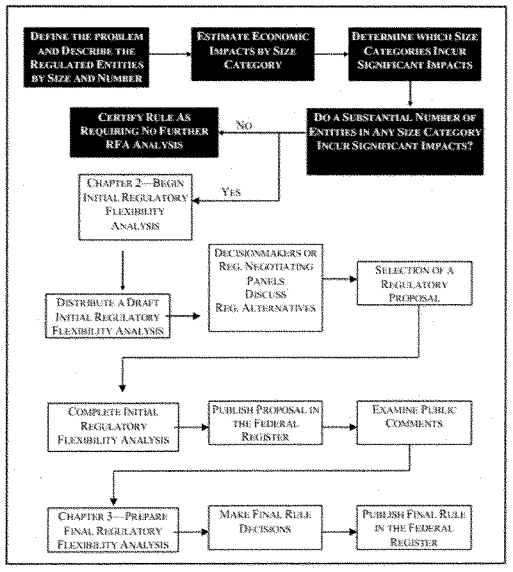
Second, if the agency determines that the RFA applies, agencies must conduct a front-end Initial Regulatory Flexibility Analysis (IRFA).[8] The IRFA is designed to "describe the impact of the proposed rule on small entities."[9] The agency must examine the costs and other economic implications for the different industries targeted by the

[3] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).
[4] *See* U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT, 93 (Aug. 2017).
[5] 5 U.S.C. § 603(c).
[6] 5 U.S.C § 553(b); *see also* 5 U.S.C. § 601(2).
[7] 5 U.S.C. § 605(b).
[8] *Id.* at § 603(a).
[9] *Id.*

rule.[10] The direct impacts of a rule include compliance costs and economic implications that derive from additional compliance costs, such as economic viability, competitiveness, productivity, and employment. Additionally, the agency must include a prescription of any significant alternatives to the proposed rule which minimizes any significant economic impact on small entities while still accomplishing the objectives of the rule.[11] This analysis must discuss these alternatives, such as exempting certain businesses from the rule or establishing different reporting requirements.[12]

Lastly, when finalizing a rule, agencies must conduct a back-end Final Regulatory Flexibility Analysis (FRFA). The FRFA must include the agency's responses to comments made by the SBA's Office of Advocacy's (Advocacy) Chief Counsel, incorporating a detailed statement of any changes made to the proposed rule in the final rule as a result of such comments.[13] The agencies also must revise the IRFA based on the public comments they received.

SBA Office of Advocacy, RFA Compliance Guide



[10] U.S. SMALL BUS. ADMIN. OFF. OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT, 32-34 (Aug. 2017).
[11] 5 U.S.C. § 603(c).
[12] *Id.*
[13] *Id.* at § 604(3).

In addition to the IFRA and FRFA, the RFA requires three agencies, the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), and Consumer Financial Protection Bureau (CFPB), to conduct Small Business Advocacy Review (SBAR) panels or "SBREFA panels."[14] These panels review proposed rules that will have a negative impact on small entities. They collect advice and recommendations from the representatives of affected small entities and also review relevant materials that the agency has collected. The panels must make a public report as a part of the rulemaking record. The agency then shall modify the proposed rule and the IFRA as appropriate.

IV. The Committee's Investigation

The Committee conducted a comprehensive, three-phase investigation into federal agencies' compliance with the RFA to identify the main issues and find solutions to prevent agencies from overregulating small businesses. The Committee found that most agencies are failing to properly comply with the RFA's requirements which, in turn, hurts small businesses. The investigation revealed four main areas in which the agencies mostly fail to properly consider small businesses: (1) improper certification; (2) underestimated overall impact (costs, number of small entities, and alternatives); (3) overlapping regulations; and (4) lack of compliance with Congressional oversight and the APA-issues.

During the first phase of the investigation, the Committee examined the resources agencies use during the rule-making process to ensure compliance with the RFA, the resources available to small businesses related to new regulations, recent regulations imposed, and the impact/burden they had on small businesses. The Committee sent a total of 25 letters to 25 agencies in this phase.[15] These letters specifically requested documents and communications related to rule certification, SBREFA panels (for those that are required to conduct them), factual basis analysis, and alternative rules considered. Unfortunately, many of the agencies were incredibly delayed in their responses to the Committee and when they did respond, they failed to provide many of the requested documents.

The second phase of the investigation focused on agency compliance with the RFA on a rolling case-by-case basis as proposed and final regulations were published. This review found that agencies often improperly certified that a rule would not have a significant impact on a substantial number of small entities or agencies downplayed the burden of the rule on small businesses, despite frequent evidence to the contrary. The Committee's 66 letters to 34 agencies in this phase focused on certification, overall impact of the rules, overlapping rules, and APA issues.[16]

The third phase of the investigation followed up with the agencies who failed to respond to, or adequately address, the issues noted during the first and second phases. During this last phase, the Committee sent letters to the Department of Energy (DOE), the Department of Labor (DOL)/ the OSHA, and the EPA. The Committee requested all communications relating to four separate DOE rules, six DOL/OSHA rules, and eight EPA rules. Even in instances where the agencies responded to the Committee's previous letters, they all failed to produce any requested communications, obstructing Congressional oversight.

A. Certification

The certification process is one of the primary obstacles to RFA compliance. Numerous agencies attest that the rule has no significant effect on a substantial number of small entities but fail to provide sufficient justification for their reasoning. The RFA states that the agencies can only certify if a substantial number of small entities are not significantly adversely affected by the rule.[17] In order to guarantee that the agencies thoroughly evaluate the possible certification and do not merely certify to avoid conducting the IRFA and FRFA, Advocacy—the independent voice for small businesses in the federal government—supplies guidelines to agencies on what a

[14] *Id.* at § 609(b).
[15] *See* Appendix 1.
[16] *See* Appendix 1.
[17] *See* 5 U.S.C. § 605(b).

proper certification should include.[18]

Advocacy provides factors agencies should consider to provide a sufficient factual basis when certifying a rule.[19] These factors include description of small entities affected, economic impacts on small entities, significant economic impact criteria, substantial number criteria, description of assumptions and uncertainties, and certification statement.[20] This threshold analysis must provide a factual basis for the determination of why the agency believes that rule will not have a significant economic impact on a substantial number of small entities.[21] According to Advocacy, the factual basis requirement means that "at a minimum, a certification should contain a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."[22]

The courts have clarified when and how the agencies can certify. In one of the landmark cases, *North Carolina Fisheries Ass'n v. Daley*, the court explained that a mere conclusory statement that there is no significant impact on small businesses is insufficient.[23] The court explained that "[w]hile the federal government cannot be expected to explore every possible contingency before certifying that there is no significant impact, the government must make some showing that it has at least considered the potential effects."[24]

During the first phase of the Committee's investigation into the agencies' compliance with the RFA, several agencies were asked to provide the name, docket number, and citation of all rules, proposed and final, that the agency certified as having no significant impact on a substantial number of small entities from 2020 to February 2023. None of the agencies provided an adequate response to this request. Throughout the course of this investigation, the Committee identified six agencies and at least 12 instances where these agencies improperly certified rules from 2020 to May 2024.[25] These agencies failed to provide a factual basis and instead used conclusory statements certifying the rules, against what the RFA, the Advocacy's guidelines, and the courts require. The biggest offenders were the EPA and DOL. Below are just five examples where agencies failed to provide adequate factual basis analysis and improperly certified rules.

1. EPA WOTUS Rule

The Committee held a hearing on EPA's Waters of the United States Proposed Rule (WOTUS Rule) on March 8, 2023.[26] The 141-page WOTUS Rule would, among other things: (1) impose burdensome and expensive obligations; (2) have a significant impact on many lands intensive industries such as farming, mining, and real estate development; and (3) cause unnecessary and expensive delays in the permitting process.[27] Importantly, the ambiguity of the rule failed to provide the certainty small businesses desperately needed on the definition of a waterway that is covered by the WOTUS Rule. In fact, the rule was so ambiguous and broad that the Supreme Court limited the scope of the definition of a waterway covered by the WOTUS rule.[28]

In an attempt to quickly finalize this rule, the EPA certified that the WOTUS rule would not have a significant impact on a substantial number of small entities, allowing the agency to skip the full RFA analysis process.

[18] U.S. SMALL BUS. ADMIN., OFF. OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT, 12-13 (Aug. 2017).
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 13.
[23] North Carolina Fisheries Ass'n, Inc. v. Daley, 16 F. Supp. 2d 647 (E.D. Va. 1997).
[24] *Id.*
[25] *See e.g., Letters to Agencies*, U.S. SMALL BUS. ADMIN., OFF. OF ADVOCACY (last visited Apr. 14, 2024), https://advocacy.sba.gov/category/regulation/letters-to-agencies/.
[26] *See Small Business Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule: Hearing Before H. Comm. on Small Bus.*, 118th Cong. (Mar. 8, 2023).
[27] *Id.*
[28] *See* Sackett v. Env'r Prot. Agency, 598 U.S. 651 (2023).

However, as this Committee identified during the hearing, the EPA improperly certified the rule.[29] According to Chairman Williams, "the EPA … unilaterally decided that they do not need to conduct any further analysis on the rule. According to the SBA's Office of Advocacy, which is charged with speaking out against overly burdensome regulations, this determination by the EPA was not based on any factual analysis."[30] Specifically, the EPA overlooked direct, and significant cost on small businesses, when certifying the rule would lack such an impact.

According to testimony given in the Committee on Transportation and Infrastructure hearing, Missouri Farm Bureau President stated, "the process to arrive at a jurisdictional determination is tortuous and costly."[31] A jurisdictional determination could take between six months and a year to receive, and in the meantime a farmer or rancher is stuck in limbo.[32] Adding insult to injury, the use of case-by-case determinations threatens to create a seriously unequal playing field, where identical features may be viewed as jurisdictional or not depending upon where the property is located."[33] This rule would impose these uncertainties on all private landowners, not just farmers. However, the EPA still determined that the WOTUS rule would not affect small businesses and were able to skirt the requirements to calculate the cost of these delays on small business owners.

2. EPA Clean Power Plant Rule

The EPA also inadequately certified its Clean Power Plant Proposed Pule.[34] This rule would require power plants to implement carbon capture technology and/or integrate hydrogen into their fuel cycle; plants that do not implement these technologies and meet emissions goals could be shut down.[35] In addition to the letter sent inquiring into the certification that this rule would not have a significant impact on substantial number of small entities, on February 14, 2024, the Committee held a hearing titled "Burdensome regulations: Examining the Impact of EPA Regulations on Main Street."[36] Among other rules, this hearing examined the Clean Power Plant Rule, illustrating how the EPA's analysis was inadequate. The hearing exposed that rule would force plants to shut down, which would increase energy costs for small businesses and may deprive some small businesses of the energy needed to conduct its business, especially in rural communities.[37] Additionally, the cost of compliance for manufacturers under this rule ranges from an estimated $10 to $14 billion.[38] Unfortunately, the EPA finalized this rule without remedying the certification issue on May 9, 2024, despite objections from the Committee, Advocacy, and other relevant stakeholders.[39] Additionally, the EPA took two months to provide a surface level response to the Committee's inquiry.[40]

---

[29] *See Small Business Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule: Hearing Before H. Comm. on Small Bus.*, 118th Cong. (Mar. 8, 2024).
[30] *See id.*
[31] Press Release, Comm. on Transp. and Infrastructure, Infrastructure Stakeholders Highlight Numerous Negative Impacts of Biden Administration's Flawed, Burdensome WOTUS Rule (Feb. 8, 2023).
[32] *Id.*
[33] *Id.*
[34] *See* New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (2023) (to be codified at 40 C.F.R. § 60).
[35] *See id.*
[36] *Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street: Hearing Before H. Comm. on Small Bus.*, 118th Cong. (Feb. 9, 2024).
[37] *Id.*
[38] *See* New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (2023) (to be codified at 40 CFR § 60); *See also NAM Fights Restrictive Power Plant Rule*, NAT'L ASSOC. OF MFRS. (Nov. 29, 2023).
[39] *See id.*
[40] *See* Letter from Tim Del Monico, Assoc. Adm'r. U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).

The Committee discovered that the EPA, instead of conducting an IRFA, relied on historical data to make estimates to support its determination that no significant impact on a substantial number of small entities results from the proposed rule.[41] To adequately analyze whether certification is appropriate in the particular situation, the EPA should have used current instead of historical data, which is likely out of date given the constantly changing economic landscape. Specifically, the EPA did not fully consider the costs or the Best System of Emissions Reduction (BESR), relying instead "on promises by large businesses about future investments, which is an unreasonable standard by which to regulate small entities."[42] Promises by large entities are not an acceptable factual basis on which the EPA can argue they complied with the RFA.

Further, several assumptions in the EPA's analysis "are at a high level of generality and do not demonstrate recognition of the serious barriers that would face small entities under the proposed rule" and "based on optimistic projections and announced investment decisions by large businesses."[43] Thus, the EPA largely ignored the reality of how small businesses operate. This rule will likely result in "significant delay in any future investment" in the small entities operating in this space, "despite the need for greater investment due to the projected electrification of our economy."[44]

Additionally, the EPA did not provide a sufficient answer to this Committee's inquiry in identifying the rules it certified from 2020 to February 2023.[45] At a minimum, the EPA improperly certified five rules during this time period.[46] This is a very concerning trajectory for small businesses, and the regulatory burdens imposed on them by the EPA alone.

3. DOL / OSHA: Walkaround Rule

OSHA certified its Employee Representation During Workplace Inspections Proposed Rule (Walkaround Rule) which would expand the definition of what types of "third parties" may accompany the officers on OSHA inspections. Under the proposed rule, third parties, such as union representatives and community activists, would gain access to non-organized private businesses on private property, where unions normally would not have such access.[47] OSHA alleged that there are no costs of compliance for employers.[48] However, OSHA failed to provide a factual basis for that certification.

OSHA stated that if an entity has to implement safety policies and rules for third parties, any costs associated with these policies are not attributable to this proposed rule.[49] However, without the proposed rule, these safety procedures and other compliance costs would not be triggered during the inspection. Thus, OSHA failed to consider potential costs to employers. These costs could include additional screening and security, training employees on new third-party visitor protocols, providing additional protections for confidential business information, potential liability for injuries to third parties at the workplace and during the inspection, and providing additional personal protective and other safety and health equipment.[50]

---

[41] *See* Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., to Michael S. Reagan, Adm'r, U.S. Env't Prot. Agency, 3 (Aug. 8, 2023). Importantly, this certification only covers the elements of this rule that apply to new sources.

[42] *Id.* at 4.

[43] *Id.*

[44] *Id.* at 7. Additionally, the EPA failed to consider that the small entities subject to the proposed rule that are prevented from making investments are also significantly impacted, even if their compliance costs appear to be zero.

[45] *See* Letter from Ron Pierce, Dir., Off. of Small and Disadvantaged Bus. Utilization, U.S. Dep't of Energy, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 12, 2023).

[46] *See* Rob Smith, *The Regulatory Flexibility Act: Turning a paper tiger into a legitimate constraint on one-size-fits-all agency rulemaking*, NAT'L FEDERATION OF INDEP. BUS., 29-32 (May 2, 2023).

[47] Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825 (2023) (to be codified at 29 C.F.R. § 1903).

[48] *Id.*

[49] *Id.*

[50] *See* Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., to Douglas L. Parker, Assistant Sec'y of Labor for Occupational Health, U.S. Occupational Safety & Health Admin., 4-5 (Nov. 13, 2023).

This Committee wrote to OSHA requesting further information about this certification, however, OSHA failed to substantively answer the Committee's questions relating to potential costs and ambiguous terms used in the regulation.[51] On April 1, 2024, OSHA finalized the rule without conducting the proper RFA analysis and despite objections from the Committee, Advocacy, and other small businesses.[52] In the final rule, OSHA states that it "has determined that, while these revisions may impose societal costs and that some employers may decide to undertake actions not directly required to comply with any requirements in this rule, the revisions impose no new direct cost burden on employers."[53] This is fundamentally untrue. OSHA not only ignored stakeholder input but acknowledged that there would be costs to small entities and still did not conduct the proper analysis.

This is not the only time OSHA (as part of the DOL) failed to adequately certify its rule or provide this Committee with requested information. During this Committee's investigation, the DOL ignored the Committee's request to identify the rules it certified from 2020 to February 2023.[54] Nonetheless, the Committee found the DOL improperly certified at least three rules during this time period.[55]

4. CFPB: Credit Card Penalty Fees Rule (Regulation Z)

The Consumer Financial Protection Bureau's (CFPB) certified its Credit Card Penalty Fees Rule without providing sufficient factual basis analysis.[56] The rule change would lower the amount consumers may owe to crediting institutions to eight dollars for late payments, end the automatic annual inflation adjustment, and cap late fees at 25 percent of the required minimum payment.[57] This change will negatively impact small credit firms the most and restrict access to credit in local communities.[58] This is particularly concerning as small businesses' access to capital has become more strained under the Biden Administration. This Committee wrote to the CFPB requesting further information about their certification.[59] The CFPB, in response, assured the Committee of its commitment to "direct and meaningful engagement across the full range of businesses that are impacted by the agency's work, including small businesses and the financial institutions that serve them."[60] In the same letter, the CFPB noted the proposed Credit Card Penalty Fees Rule "would not have a significant economic impact on a substantial number of small entities," because

> . . . credit cards represent a very small fraction of both assets and revenue for small banks [and] for this reason and for most small banks, even a large reduction in credit card late fee revenue would represent well below one percent of bank revenue and, therefore, would not have a significant economic impact on those entities.

However, the Committee found that this assertion was not supported by an adequate factual basis as required by the RFA.[61] In the CFPB's analysis, small banks and credit unions were grouped together, seemingly to downplay

---

[51] *See* Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Jan. 31, 2024).
[52] *See* Worker Walkaround Representative Designation Process, 39 Fed. Reg. 22558 (2024) (to be codified at 29 C.F.R. § 1903).
[53] *See Id.*
[54] *See* Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Mar. 10, 2023).
[55] *See* Rob Smith, *The Regulatory Flexibility Act: Turning a Paper Tiger into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, NAT'L FEDERATION OF INDEP. BUS., 29-32 (May 2, 2023).
[56] *See* Credit Card Pentalty Fees (Regulation Z), 89 Fed. Reg. 19128 (2024) (to be codified at 12 C.F.R. § 1026).
[57] *Id.*
[58] Chelsey Cox, *Consumer Financial Protection Bureau targets excessive credit card fees in new rule proposal*, CNBC (Feb. 1, 2023).
[59] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Rohit Chopra, Dir., U.S. Consumer Fin. Prot. Bureau (May 17, 2023).
[60] Letter from Rohit Chopra, Dir., U.S. Consumer Fin. Prot. Bureau, to Roger Williams, Chairman, H. Comm. on Small Bus., 3 (Jun. 1, 2023).
[61] *See* Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., to Rohit Chopra, Dir., U.S. Consumer Fin. Prot. Bureau, 4 (May 5, 2023).

the burdens imposed by the proposed rule.[62] As a result, small banks and credit unions may experience impacts beyond the scope of what the CFPB addressed.[63] Several examples exist regarding the deficiency of the CFPB's analysis. For instance, the CFPB does not provide any information regarding whether some of the proposed fees cover the costs incurred by a small institution or whether the fees are sufficient to encourage on-time payments.[64] This information is important to address in the analysis to determine whether a significant impact on small entities results from the proposed rule.

Notably, in just the first year of the 118th Congress, the CFPB improperly certified at least three additional rules.[65]

5. FMC: Demurrage and Detention Billing Requirements Rule

The Federal Maritime Commission (FMC) failed to provide a sufficient factual basis when it certified its Demurrage and Detention Billing Requirements Rule. The rule increased billing costs by changing the manner in which ocean carriers, marine terminal operators, and non-vessel-operating common carriers invoice and collect demurrage or detention from others.[66] Based on the FMC's data, a shocking number of these impacted entities are small businesses—out of about 8,700 impacted entities 97 percent are small businesses. At a time of rising shipping costs, this additional regulatory burden makes matters worse for small businesses in the shipping industry.[67]

The FMC certified that the rule does not have a significant economic impact on a substantial number of small entities.[68] However, the certification did not include sufficient factual basis analysis as required by statute.[69] Instead the FMC's conclusory statement was solely based on presumptions. The FMC presumed that the large entities would bear most of the rulemaking costs and small entities would face only be minimal costs.[70] Conclusory statements and presumptions do not show that the agency "has at least considered the potential effects" of the rule on small entities.[71] To consider potential effects, agencies must conduct a proper certification analysis which shows how they came to an conclusion that the rule does not have a significant economic impact on a substantial number of small entities.

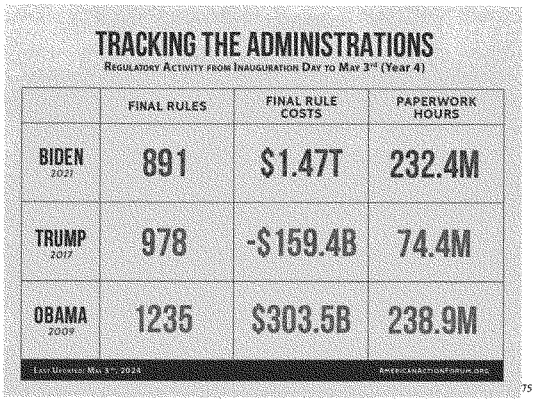
These are just five examples from rules proposed and passed during the 118th Congress. Agencies taking advantage of this loophole in the RFA is not a new problem. In Fiscal Year 2022, Advocacy noted at least six rules that were improperly certified as not affecting a significant number of small businesses.[72] NFIB noted at least 13 instances of improper certification between May 2021 and December 2022.[73] Reforms must be made to ensure that this check the box exercise comes to an end and agencies are held accountable to their legal obligations during their rulemaking.

B. Overall Impact

The agencies' rulemaking imposes widespread impacts on small businesses. This has been particularly true under the Biden Administration that has imposed final rules totaling nearly $1.5 trillion to date—with the number expected to increase before the end of this year. It is worth nothing that the Biden Administration's rules have

[62] *See id.*
[63] *See id.*
[64] *See id.*
[65] *See* Rob Smith, *The Regulatory Flexibility Act: Turning a Paper Tiger into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, NAT'L FEDERATION OF INDEP. BUS., 29-32 (May 2, 2023).
[66] Demurrage and Detention Billing Requirements, 89 Fed. Reg. § 14330 (2024) (to be codified at 46 C.F.R. 541).
[67] *See generally* Yan Carriere-Swallow, *et. al., How soaring shipping costs raise prices around the world,* IMF BLOG (Mar. 28, 2022).
[68] Demurrage and Detention Billing Requirements, 89 Fed. Reg. § 14330 (2024) (to be codified at 46 C.F.R. 541).
[69] *See id.;* 5 U.S.C. § 605(b).
[70] *See* Demurrage and Detention Billing Requirements, 89 Fed. Reg. § 14330 (2024) (to be codified at 46 C.F.R. 541).
[71] N. C. Fisheries Ass'n, Inc. v. Daley, 16 F. Supp. 2d, 647 (E.D. Va. 1997).
[72] U.S SMALL BUS. ADMIN., OFF. OF ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY2022 (Apr. 2023).
[73] Rob Smith, *The Regulatory Flexibility Act: Turning a Paper Tiger Into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, NAT'L FED. OF INDEPENDENT BUS. (May 2023).

disproportionately cost a high amount compared to past Administrations. In a single week alone in April 2024, the Biden Administration added $875 billion in new costs—nearly as much in one week as the entire eight years of the Obama Presidency.[74]



[75]

The RFA requires agencies to assess the overall impact of a proposed rule, evaluating the compliance burden and costs, number of impacted small entities, and alternative rules. Furthermore, the analysis should be conducted with the backdrop of economic realities small businesses face. Several economic headwinds in the last couple of years have negatively impacted small businesses—supply chain disruptions, staffing shortages, and inflation.[76] Many small businesses continue to be challenged by labor shortages, with 20 percent of small businesses facing significant labor shortages, and another 25 percent facing a moderate shortage.[77]

Inflation remains an immense burden for small businesses, with 70 percent of small businesses reporting increased average selling prices due to inflation.[78] Complying with regulations further increases the inflationary pressure across the country. When a business is forced to spend more time and resources on compliance costs, they are forced to pass the associated costs along to consumers. To make matters worse, the Committee's investigation revealed that agencies either omit, or consciously ignore, the economic realities small businesses face when promulgating rules and conducting the RFA impact analyses.

Small businesses face various compliance costs caused by the agencies' rulemaking. They might need to hire additional employees or outside counsel to help familiarize and keep them in compliance with the ever-changing regulatory landscape. Rule changes that affect the small businesses' suppliers also cause downstream effects on a small entity that increase costs. Furthermore, the rules often impact more entities than the agencies estimate. This means that the effects are broader than agencies lead to believe in their RFA analyses.

This section highlights how the agencies downplay the compliance costs, underestimate the number of impacted small businesses, and fail to consider alternative rules—harming small businesses in the process.

---

[74] Dan Goldbeck, *The biggest week on record*, AM. ACTION FORUM (Apr. 22, 2024).
[75] *Regulation Rodeo*, AM. ACTION FORUM, (last visited May 10, 2024), https://www.regrodeo.com.
[76] *Covid-19 Small Business Survey (23)*, NAT'L FEDERATION OF INDEP. BUS., 2 (Jan. 5, 2023).
[77] *Id.*
[78] *Id.*

1. Underestimating Compliance Cost and Burden

Despite the requirements in the RFA, the Committee repeatedly found that the agencies underestimate the costs that compliance with the rules will impose on small entities. The agencies both downplay costs of compliance and understate number of affected entities.[79] These underestimations have serious implications for small businesses. By conducting inaccurate economic analysis, agencies are able to hide the true cost of their regulations and small businesses are forced to pick up the tab. This tactic circumvents the intent of the RFA and can force small businesses to deal with an onslaught of regulations that can be detrimental to their operations.

Not only do many regulations have direct monetary implications for small businesses, but they also have broader associated costs that agencies often fail to consider. The agencies must, as required by the RFA, take into account compliance costs and economic implications, such as economic viability, competitiveness, productivity, and employment.[80] According to the compliance guidance provided to agencies by Advocacy, the agencies should also identify cost burdens for both the affected industry sectors and the individual small entities.[81] These costs include, for example, engineering and hardware acquisition, maintenance and operation, employee skill and training, administrative practices, productivity, and promotion.[82] For the agency to develop a rational rule, it "will require the acquisition of data that describe the scope of the problem, the entities affected, and the extent of those effects on the entities and the problem being addressed."[83]

There are costs imposed by rules that might not be clear on their face, but in order to ensure small businesses interests are actually considered, agencies should include these costs in their RFA analysis. For instance, when a rule relates to privacy concerns the practical cost of implementing the rule should be considered, such as providing additional protections for confidential business information, training staff, or implementing additional screening and security. Even though some agencies have estimated the additional physical equipment that would need to be purchased or the extra manpower hours required to comply with the regulation, these estimations still tend to neglect other intangible costs, such as the amount of money necessary to conduct staff training or install necessary software. While the RFA does not explicitly require consideration of intangible costs, Advocacy guidance and training does.

Agencies also tend to underestimate the time it takes for small businesses to familiarize themselves with the rules. The majority of small businesses lack legal and compliance staff to assist them in comprehending the implications of the regulations. In addition to numerous stakeholders expressing concerns regarding the agencies' failure to account for the time required to fully understand how to comply with the rules, outside legal counsel costs are also often higher than the agencies' estimates. Consequently, the time and cost to become familiar with the rules are underestimated and the burden on small businesses is larger than the agencies lead on.

a. DOL: Davis-Bacon and Related Acts; Apprentice Rule; Non-Displacement Rule; Fiduciary Rule; and Joint Employer Rule

The Committee wrote to the DOL about multiple rules that could substantially harm small businesses. The Committee's investigation found that the DOL has been one of the worst offenders of underestimating compliance costs for small businesses. Furthermore, on October 19, 2023, the Committee held a hearing titled "Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators" that focused on the impacts of the DOL burdensome regulations and economic pressures on small businesses.[84] Among other things, the hearing examined the rules discussed below showing how the DOL has failed to consider the costs its regulations

[79] "Compliance Costs" refers to costs small businesses incur *only* to be compliant with the Rule.
[80] U.S. SMALL BUS. ADMIN OFF. OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT, 32-34 (Aug. 2017).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators, Hearing before the H. Comm. On Small Bus.* 118th Cong. (Oct. 19, 2023).

impose on small businesses.

i. Davis-Bacon and Related Acts

Davis-Bacon and Related Acts final rule from the DOL makes two major changes to the methodology used to determine the prevailing wage for construction workers employed in federal and federally subsidized construction projects.[85] The rule implements the three-step method, known as "30 percent rule," to identify prevailing wage.[86] This method increases prevailing wages for approximately 32 percent of construction workers and revokes the separation of metro and rural wage data.[87] The revocation and separation of metropolitan and rural data sets will improperly skew the data towards the higher metropolitan cost of living prices rather than rural cost of living which is often lower.[88] The direct employer costs for small businesses are estimated to be an additional $39.3 million during the first year.[89]

This Committee wrote to the DOL concerned about these compliance costs and the number of small businesses impacted.[90] The DOL responded, after the deadline, without addressing any of the Committee's direct questions.[91] Especially concerning in the DOL's response was that they said the DOL "estimates that 67 percent of firms holding Davis-Bacon contracts are small businesses, which indicates small businesses are successfully competing for such contracts today."[92] The DOL's reasoning is flawed. The fact that small businesses are successfully competing in the contracts today does not support the DOL's reasoning that this rule change will not significantly burden small businesses. It will be very likely that the small businesses who have been successful until now will not be in the future once the full impact of the rule comes into effect. The massive compliance costs will jeopardize small entities' success and make it harder for them to compete against their larger counterparts. Unfortunately, despite objections from the Committee, Advocacy, and stakeholders, on October 23, 2023, this rule which clearly imposes exceptionally high costs and burden on small businesses, went into effect.[93]

ii. Apprentice Rule

Another example of the DOL ignoring compliance burden and cost is their proposed Apprentice Rule, which seeks to enhance the National Apprenticeship System by modernizing regulations for Registered Apprenticeships.[94] The Committee wrote to the DOL requesting more information, however, in its delayed response, the DOL failed to answer the Committee's questions but instead provided general information about the rule and its rulemaking process.[95] This Committee found that the rule would impose significant compliance costs for small businesses. The proposed rule would introduce significant changes to how training programs are structured, including prescribing minimum quality and content requirements to a program's standards and its apprenticeship agreements as well as establishing procedures concerning the registration, cancellation, and deregistration of apprenticeship programs.[96] The current apprenticeship program has adequate standards making these additions not only burdensome but also

[85] *See* Updating the Davis-Bacon and Related Acts Regulations, 88 Fed. Reg. 57526 (2023) (to be codified at 29 CFR §§ 1, 3, 5).
[86] *See id.*
[87] *See id.*
[88] Isabella Hindley, *DOL's Davis-Bacon Final Rule Could Worsen Inflation*, AM. ACTION FORUM (Aug. 16, 2023).
[89] *See* Updating the Davis-Bacon and Related Acts Regulations, 88 Fed. Reg. 57526 (2023) (to be codified at 29 CFR §§ 1, 3, 5).
[90] Letter from Roger Williams, *et. al.*, Chairman, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Dep't of Labor, (Sept. 28, 2023).
[91] *See* Letter from Liz Watson, Assistant Sec'y, Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).
[92] *See id.*
[93] *See* Updating the Davis-Bacon Rule & Related Acts Regulations, 88 Fed. Reg. 57526 (2023) (to be codified at 29 C.F.R. §§ 1, 2, 5).
[94] *See* National Apprenticeship System Enhancements, 89 Fed. Reg. 3118 (2024) (to be codified at 29 C.F.R. §§ 29, 30).
[95] Letter from Roger Williams, *et. al.*, Chairman, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Dep't of Labor, (Feb. 15, 2024); Letter from Liz Watson, Ass. Sec'y, Dep't of Labor, Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 29, 2024).
[96] *See* National Apprenticeship System Enhancements, 89 Fed. Reg. 3118 (2024) (to be codified at 29 C.F.R. §§ 29, 30).

duplicative.

Moreover, the proposed rule would require the adoption of a time-based model—effectively eliminating flexible competency-based approaches to workforce development—thereby discouraging employer participation in the government-registered apprenticeship programs.[97] The rule would place an especially high burden on small businesses by imposing unrealistic administrative requirements, including, requiring mandatory disclosures from training program sponsors, submitting an equitable recruitment plan, keeping records of employment decisions that affect apprentices, and providing details about the operation, performance, and advancement of the training program.[98] These new requirements will discourage small business participation in the apprenticeship programs. Discouraging participation in a program designed to bolster the American workforce is counterproductive. Especially given the labor shortage of skilled workers nationwide—nearly 90 percent of small business owners with job openings are struggling to find qualified applicants.[99]

Despite all of these compliance costs and burdens imposed by the rule, the DOL does not seem to believe they are significant enough. In the DOL's RFA analysis, while the DOL acknowledges the significant costs on small businesses, the DOL brushes over this burden and instead focuses on the alleged benefits of protecting "the safety and welfare of apprentices."[100]

iii. Non-Displacement Rule

In some cases, agencies have underestimated the familiarization and paperwork hour burdens. The DOL's Non-Displacement of Qualified Workers Under Service Contracts Rule is an example of this.[101] This rule implements and enforces the Executive Order 14055 to mandate the contractors and subcontractors who are engaged in federal service contracts to offer the right of first refusal for employment on the successor contracts to service employees previously employed under the predecessor contract.[102]

The Committee wrote to the DOL requesting more information about the DOL's justification for its time estimate for businesses to comply and familiarize themselves with the rule, however, the DOL's delayed response was very high level.[103] The DOL claimed, referring to the final rule, that "the Department believes that its average time estimate is appropriate based on a range of factors. These include the fact that many firms will familiarize themselves with the content of the rule in ways other than reading the final rule as published in the federal register."[104] The rule is 70 pages long and includes complex requirements—even if some firms would familiarize themselves with the content other ways, the DOL's estimate of 30 minutes to review and understand the rule is hardly enough for an average small business owner.

The DOL not only understated how long it would take to review the rule but also how long it would take to comply with the rule. The underestimation is clear—the DOL's explanation of how long it will take to complete various steps to comply with the rule does not match with their final time estimation.[105] The rule imposes time-consuming compliance burdens, such as notices to affected workers and their representatives, possible location-

[97] Rebecca Rainey, *New apprenticeship proposal draws warning on scope of overhaul,* BL, (December 27, 2023).
[98] *See* National Apprenticeship System Enhancements, 89 Fed. Reg. 3118 (2024) (to be codified at 29 C.F.R. §§ 29, 30).
[99] NAT'L FED'N OF INDEP. BUS., SMALL BUS. OPTIMISM INDEX, 2 (Dec. 2023).
[100] *See* National Apprenticeship System Enhancements, 89 Fed. Reg. 3118 (2024) (to be codified at 29 C.F.R. §§ 29, 30).
[101] See Nondisplacement of Qualified Workers Under Service Contracts, 88 Fed. Reg. 86736 (2023) (to be codified at 29 C.F.R. § 9).
[102] *See id.*
[103] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Dep't of Labor (Feb. 1, 2024).
[104] *See* Letter from Julie Su, Acting Sec'y, Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Mar. 20, 2024).
[105] *See* Nondisplacement of Qualified Workers Under Service Contracts, 88 Fed. Reg. 86736 (2023) (to be codified at 29 C.F.R. § 9).

continuity notices, and successor contractor's mandatory offer letters.[106] Additionally, the final rule imposes additional far-reaching compliance costs for small entities that could result in inefficiencies in the procurement process since the contractor cannot bring its own uniquely qualified employees to the project.[107]

iv. Fiduciary Rule

The Committee wrote to the DOL about its proposed rule changes to the Retirement Security Rule and amendments to Prohibited Transaction Exemptions (Fiduciary Rule).[108] The Committee expressed concerns about the changes imposing considerable costs for small businesses—mainly in the form of lost income.[109] These changes would amend nearly 50-year-old standards and subject more small business financial professionals to the strictest fiduciary standards of conduct. This threatens the commission of many small entity broker-dealers and insurance agents selling IRAs and annuities to 401(k) participants rolling their savings out of an employer-sponsored plan.[110] The proposed changes would eliminate the exemption they have historically used to earn commissions on those sales.[111] The Committee is concerned that the increased burden and historic level of lost commission would lead these small financial professionals to go out of business or limit their services—negatively impacting both the business owners and the consumers. The direct costs are significant as well; during the first year alone, the estimated aggregate cost is $248 million on all small entities due to the proposed amendments, amounting to approximately $22,459 per entity.[112] Despite of these substantial impacts on small businesses, the DOL stated that it "believes the costs associated with the amendments are modest because the rulemaking was developed in consideration of other regulatory conduct standards."[113]

On April 25, 2024, the DOL finalized the rule against this Committee's, Advocacy's, and stakeholders' objections.[114] Even though the DOL made some changes and clarifications to this rule, the final rule still significantly hurts small businesses. The rule will require significant investment of both money and time to implement the compliance processes and supervision for incorporating the products to comply with this new fiduciary standard. According to the study conducted by Oxford Economics, the proposed rule would result in over $2.5 billion in costs, 120 million sheets of papers annually, and the industry startup costs are estimated to run almost $3.9 billion.[115] Since there were only minor changes in the final rule, the burden imposed is similar to these estimations by Oxford Economics about the proposed rule.[116]

v. Joint Employer Rule

The Committee wrote to the National Labor Relations Board (NLRB) about its costly and burdensome rule change to the Standard for Determining Joint Employer Status.[117] This change expands the joint-employer definition under the National Labor Relations Act (NLRA) by allowing a joint employer finding based solely on indirect and unexercised control.[118] In its response, the NLRB failed to adequately answer the Committee's

---

[106] *See id.*
[107] *Id.*; *DOL issues nondisplacement of qualified workers under service contracts final rule, ABC disappointed,* ABC (Dec. 18, 2023).
[108] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Dep't of Labor (Dec. 7, 2023).
[109] *See id.*
[110] *Id.;* Austin R. Ramsey, *Biden touts 401(k) fiduciary rules as attack against 'junk fees'.* BLOOMBERG LAW (Oct. 31, 2023).
[111] *Id.*
[112] *See* Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (2023) (to be codified at 29 C.F.R. 2510).
[113] *See Id.*
[114] *See* Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32122 (2024) (to be codified at 29 C.F.R. 2510).
[115] *The economic consequences of the US Department of Labor's proposed new fiduciary standard,* OXFORD ECON. (Aug. 18, 2015).
[116] *Id.*
[117] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Lauren McFerran, Chairman, Nat'l Labor Rel. Bd. (Dec. 7, 2023).
[118] *See* Standard for Determining Joint Emp'r Status, 88 Fed. Reg. 73946 (2023) (to be codified at 29 C.F.R. 103).

questions.[119] Instead of providing answers to the questions about the NLRB's reasoning and rationale related to the issues the Committee raised, such as costs and alternatives, the NLRB mostly just directed the Committee to the final rule which does not include the requested information.[120]

Despite the lack of appropriate response from the NLRB, the Committee found that this rule is significantly burdensome for small businesses. Removing the current clear and predictable joint employer standards prevents employers from predicting the risks and costs of their contracts with providers, vendors, subcontractors, and franchisees.[121] Beyond predictability, the rule expands liability to alleged joint employers which will almost certainly increase costs.

The rule changes rescind and replace the current joint employer rule adopted in 2020 that defines an entity as a joint employer only if it exercises actual and direct control over a specified and clearly defined essential terms and conditions of employment.[122] As such, the new rule deems entities as joint employers if they have authority or control over any essential term or condition of their employment, even they do not actually exercise such control.[123] The rule also expands the definition of "essential terms and conditions of employment," by including additional undefined terms.[124] Further, it extends the entities' bargaining responsibility to representatives of the other purported joint employer's employees.[125]

Several stakeholders raised the concern that the NLRB has underestimated the compliance costs for small entities. This is a reasonable concern, given that the estimated compliance costs are minimal, based only on the time estimate that it takes to become familiar with the new rule. The NLRB thereby dismisses legitimate concern about the costs for small entities if an entity is determined to be a joint-employer under this new rule contrary to its previous status. These costs include, for example, increased operational costs because the rule extends the entities' bargaining responsibility to representatives of the other purported joint-employer's employees. According to the rule, the joint-employer must participate in collective bargaining with the other employer's unionized employees.[126] Since the new rule significantly extends the definition of joint employer creating a large joint employer net, this will make bargaining responsibilities extremely burdensome for small businesses.

This rule was so outrageous that it was vacated by the U.S. District Court for the Eastern District of Texas before it could even go into effect on March 11, 2024.[127] The Court reasoned that the rule was overly broad in regard to common law and inconsistent with the National Labor Relations Act.[128] The court pointed out—the same concern that this Committee raised in its letter—that the rule "would treat virtually every entity that contracts for labor as a joint employer because virtually every contract for third-party labor has terms that impact, at least indirectly, at least one of the specified 'essential terms and conditions of employment.'"[129]

---

[119] *See* Letter from Lauren McFerran, Chairman, Nat'l Labor Rel. Bd., to Roger Williams, Chairman, H. Comm. on Small Bus. (Feb. 15, 2024).
[120] *See id.*
[121] Mark G. Kisicki, *et al.*, *NLRB casts wider joint-employer net with new final rule,* OGLETREE DEAKINS (Oct. 27, 2023).
[122] *See* Standard for Determining Joint Emp'r Status, 88 Fed. Reg. 73946 (2023) (to be codified at 29 C.F.R. 103).
[123] *See id.*
[124] *See id.*
[125] *See id.*
[126] *See id.*
[127] *Chamber of Com. et. al. v. Nat'l Labor Rel. Bd., et. al.*, No. 6:23-cv-00553, Dkt. 44 (Mar. 8, 2024).
[128] *Chamber of Com. et. al. v. Nat'l Labor Rel. Bd., et. al.*, No. 6:23-cv-00553, Dkt. 44 (Mar. 8, 2024).
[129] *Id.* at 25.

b. CPSC: Residential Gas Furnaces and Boilers Rules

The Committee wrote to the Consumer Product Safety Commission's (CPSC) regarding their proposed rule that would create new product safety standards for residential furnaces and boilers.[130] The CPSC responded to the Committees' inquiry, however, it claims that the proposed rule will not have a significant impact on small importers.[131] However, this Committee found that the rule imposes a significant direct cost on small entities and is attempting to reiterate pursuing policy over the requirements of the law. These new standards laid out in the rule would require the small businesses that manufacture residential furnaces and boilers to abandon or redesign many of their product lines—an endeavor which could cost each small business up to $13.8 million.[132] $13.8 million compliance cost is clearly significant and will be extremely detrimental to small businesses. Even though the analysis showed an astronomical price tag, the CPSC continues to move forward with the regulation. This example demonstrates that even when the RFA analysis takes place, agencies are simply able to ignore the results of their work to move forward with their agenda, regardless of the small businesses that are harmed in the process.

c. DOE: Commercial Refrigeration and Distribution Transformers Rules

The Committee wrote to the DOE about multiple rules that could substantially harm small businesses. Furthermore, on November 3, 2023, the Committee held a hearing titled "Burdensome Regulations: Examining the Effects of Department of Energy Rulemaking on America's Job Creators."[133] This hearing examined the impacts of the DOE's burdensome regulations and economic pressures on small businesses and American consumers. The following rules were also discussed in the hearing and the Committee found them to be extremely burdensome on small entities.

i. Commercial Refrigeration Rule

The DOE's proposed rule change to the energy conservation standards for commercial refrigeration equipment imposed a significant compliance burden on small businesses.[134] The proposed rule would decrease the maximum estimated energy consumption permissible for commercial refrigeration equipment.[135] This rule would require the small businesses that manufacture commercial refrigeration equipment to abandon or redesign many of their product lines—an extremely costly endeavor.[136] This, in turn, will lead to extremely high compliance costs for small entities despite the fact that the DOE says that small entities would only incur "some conversion costs."[137] The Committee sent a letter to the DOE inquiring about the proposed rule's impact on small entities.[138] A month after the deadline for response, the DOE provided a high level response without adequately answering the Committee's questions.[139] Particularly, the Committee asked about the additional costs to comply with the updated standards, however, the DOE completely ignored the question.[140]

---

[130] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Alexander Hoehn-Saric, Chairman, Consumer Prod. Safety Comm. (Nov. 9, 2023).

[131] *See* Letter from Alexander Hoehn-Saric, Chairman, Consumer Prod. Safety Comm., to Roger Williams, Chairman, H. Comm. on Small Bus., (Nov. 9, 2023); Safety Standard for Residential Gas Furnaces and Boilers, 88 Fed. Reg. 73272 (2023) (to be codified at 16 C.F.R. § 1408).

[132] *See id.*

[133] *Burdensome Regulations: Examining the Effects of Department of Energy Rulemaking on America's Job Creators, Hearing Before H. Comm. on Small Bus.*, 118th Cong. (Nov. 3, 2023).

[134] *See* Energy Conservation Program: Energy Conservation Standards for Commercial Refrigerators, Freezers, and Refrigerator-Freezers, 88 Fed. Reg. 70196 (2023) (to be codified at 10 C.F.R. § 431).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] Letter from Roger Williams, *et. al.*, Chairman, H. Comm. on Small Bus., to Jennifer Granholm, Sec'y, Dept. of Energy (Nov. 2, 2023).

[139] Letter from Mandy Mahoney, Bldg. Technologies Off. Dir., Off. of Energy Efficiency and Renewable Energy, to Roger Williams, Chairman, H. Comm. on Small Bus. (Dec. 18, 2023).

[140] *Id.*

ii. Distribution Transformers Rule

The Committee inquired about the DOE's rule change to energy conservation standards for distribution transformers. The rule amends the energy conservation standards for three categories of distribution transformers that are manufactured in, or imported into, the United States.[141] During this time of historically high energy prices, it appears this rule would have a substantial impact on small businesses nationwide. The rule fails to consider all direct economic impacts to small utilities who are required to purchase and use distribution transformers. Despite asserting this rule will not have a substantial impact on small entities, the DOE recognized "that distribution transformer manufacturers, including small businesses, will incur conversion costs to comply with standards."[142]

The Committee sent a letter to the DOE, raising concerns about the cost burdens of the proposed rule.[143] However, despite of the Committee's concerns that the DOE failed to consider small entities in its rulemaking process, the DOE finalized the rule on April 22, 2024.[144] Over two months after the deadline to respond had passed, the agency provided an inadequate response; the DOE explained its RFA policies and procedures yet failed to answer any questions about the proposed rule's impact on small businesses specifically.[145]

d. EPA: EtO Rule; Methane Rule; PFAS Rule; Air Quality Standards Rule; and Clean Power Plant Rules

The Committee has written to the EPA about multiple rules that could substantially harm small businesses.[146] The EPA took over two months to respond and provided an inadequate response to the Committee, simply alleging "the EPA starts considering small business impacts early in the rulemaking process."[147] Furthermore, on February 14, 2024, the Committee held a hearing titled "Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street." This hearing examined some of the EPA's most damaging rules illustrating how the EPA has overregulated American industries stifling innovation and making it hard for small businesses to function.[148] Since 2021, rules issued by the EPA are estimated to have cost the U.S. economy over $249.7 billion across all industries and increased paperwork hours for all businesses by nearly 6.5 million hours.[149] The rules discussed below, also covered in the hearing, will have a significant impact on a substantial number of small businesses, increasing costs and regulatory burdens.

---

[141] *See* Energy Conservation Program: Energy Conservation Standards for Distribution Transformers, 88 Fed. Reg. 1722 (2023) (to be codified at 10 C.F.R § 431).
[142] *See* Energy Conservation Program: Energy Conservation Standards for Distribution Transformers, 89 Fed. Reg. 29834 (2024) (to be codified at 10 C.F.R § 431).
[143] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer Granholm, Sec'y, Dept. of Energy (May 16, 2023).
[144] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer Granholm, Sec'y, Dept. of Energy (May 16, 2023); *Energy Conservation Program:* Energy Conservation Standards for Distribution Transformers, 89 Fed. Reg. 29834 (2024) (to be codified at 10 C.F.R § 431).
[145] *See* Letter from Alejandro Moreno, Acting Assistant Sec'y, Dept. of Energy, to Roger Williams, Chairman, H. Comm. on Small Bus. (Aug. 2, 2023).
[146] *See* Letter to Michael Reagan, Adm'r, Env't Prot. Agency, from Roger Williams, Chairman, H. Comm. on Small Bus. (Feb. 14, 2024).
[147] *See* Letter from Tim Del Monico, Assoc. Adm'r. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).
[148] *Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street: Hearing Before H. Comm. on Small Bus.*, 118th Cong. (Feb. 14, 2024).
[149] *Regulation Rodeo*, AM. ACTION FORUM, (last visited May 10, 2024), https://www.regrodeo.com.

i. EtO Rule

The Committee wrote to the EPA about its National Emission Standards for Hazardous Air Pollutants: Commercial Ethylene Oxide (EtO) Sterilization Technology Review (EtO) proposed rule's harmful impact on small businesses.[150] However, the EPA failed to address the Committee's concerns and finalized this rule on April 5, 2024.[151] In the EPA's response to the Committee's letter, it assured that "the EPA considered the latest data and science, while taking into account the importance of a safe and reliable supply of sterilized medical devices for patients and hospitals."[152] However, this is contrary to the Committee's findings. This rule would effectively ban the commercial use of Ethelyne Oxide (EtO).[153] EtO is an essential chemical used throughout numerous industries in the U.S., most notably in the sterilization of medical equipment.[154] Dr. Lishan Aklog, M.D., the Chairman and CEO of PAV Med Inc., testified before the Committee on February 14, 2024, that banning ethylene oxide leads to supply chain issues, patient suffering, and even death.[155] Eliminating EtO would require manufactures to change how they sterilize medical equipment, either adopting more costly or less effective solutions.[156] Further, Dr. Aklog said that "alternatives to sterilize medical devices are not appropriate" or do not work, and the only available technology is EtO.[157] Small medical device manufacturers may not be able to sterilize their equipment properly with alternatives to EtO, and it will be costly for these entities to receive new Food and Drug Administration (FDA) approval for the new sterilization techniques. While larger entities may be able to afford to comply with this rule, small businesses may not be able to shoulder the costs and could be forced to shut down.[158] Despite the EPA initially indicating this rule would cost companies only $86 million to comply with, industry estimates that the true total cost is over $220 million for all businesses.[159]

ii. Methane Rule

The EPA's Methane Rule implements unnecessary requirements that oil and gas companies must constantly and actively search for methane leaks in their facilities.[160] This undertaking would be costly, and incomplete compliance may result in businesses being fined. Oil and gas companies already have an incentive to monitor for and stop leaks, given that each leak is lost profit. Additionally, the rule could require businesses to capture excess methane that is currently being released or flared. This would require a costly retooling.[161] Industry has described this regulation as incoherent and indicated it would limit the ability of companies to innovate.[162] The Committee wrote to the EPA being concerned that nearly 90 percent of all oil and gas extractors are small businesses, these

---

[150] *See* Letter to Michael Reagan, Adm'r. Env't Prot. Agency, from Roger Williams, Chairman, H. Comm. on Small Bus. (Feb. 14, 2024).

[151] *See* National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Emissions Standards for Sterilization Facilities Residual Risk and Technology Review, 89 Fed. Reg. 24090 (2024) (to be codified at 40 C.F.R. § 60, 63).

[152] *See* Letter from Tim Del Monico, Assoc. Adm'r. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).

[153] *NAM pushed back on restrictive chemical rule,* NAT'L ASSOC. OF MFRS. (Nov. 15, 2023).

[154] *See* National Emission Standards for Hazardous Air Pollutants: Commercial Ethylene Oxide (EtO) Sterilization Technology Review, 88 Fed. Reg. 22790 (2023) (to be codified at 40 CFR § 63).

[155] *Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street Before H. Comm. on Small Bus.,* 118th Cong. (Feb. 14, 2024) (statement of Dr. Lishon Aklog, Chair & CEO PAVMed, Inc.).

[156] Letter from Cathy McMorris Rodgers, *et al.*, Chair, H. Comm. on Energy & Com., to Lael Brainard, *et al.*, Dir., U.S. Nat'l Econ. Council. (Sept. 28, 2023); *NAM Pushed Back on Restrictive Chemical Rule,* NAT'L ASSOC. OF MANUFACTURERS (Nov. 15, 2023).

[157] *Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street Before H. Comm. on Small Bus.,* 118th Cong. (Feb. 14, 2024) (statement of Dr. Lishon Aklog, Chair & CEO PAVMed, Inc.).

[158] Katie Hobbins, *EtO Proposal Could Cost Companies More Than the $220 Million Estimated,* MEDICAL DEVICE & DIAGNOSTIC INDUS. (Jun. 14, 2023).

[159] *Id.*; *Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street Before H. Comm. on Small Bus.,* 118th Cong. (Feb. 14, 2024).

[160] *See* Standards of Performance for New, Reconstructed, and Modified Sources and Emissions, Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 87 Fed. Reg. 74702 (2023) (to be codified at 40 C.F.R. § 60).

[161] Jennifer Hijazi, *Popular EPA Methane Rule Comes with Cost, Monitoring Concerns,* BL (Dec. 8, 2023); *EPA Finalizes Methane Rule,* NAT'L ASSOC. OF MFRS. (Dec. 6, 2023).

[162] News Release, Am. Petrolium Inst., API Calls on Congress to Repeal IRA's Methane Fee (Jan. 12, 2023).

rules will disproportionately increase costs for them, and may result in many small wells closing.[163] Yet, in its delayed response, the EPA claims it has evaluated "the economic impact of the proposed standards on small entities and appropriate steps that could be taken to minimize economic impacts in a final rule."[164]

iii. PFAS Rule

The Committee sent a letter to the EPA raising concerns that the small businesses that use perfluoroalkyl and polyfluoroalkyl substances (collectively "PFAS") may experience substantial disruptions to their operations when the PFAS National Primary Drinking Water Regulations are enforced.[165] Two months after the deadline to respond had past and only two days prior the EPA finalized the rule, the EPA finally responded the Committee. However, the response was high-level without addressing all the Committee's questions. Furthermore, unfortunately, the EPA failed to properly consider small entities and finalized the rule on April 26, 2024.[166]

In the final rulemaking, the EPA alleges it has "provided maximum flexibility for small systems."[167] The EPA's PFAS National Primary Drinking Water Rule would require treatment of PFAS used in manufacturing under certain circumstances.[168] These new standards are purportedly aimed at reducing the amount of PFAS in the water supply.[169] The EPA issued this rule despite concerns over whether this rule would actually improve health outcomes, and it is estimated to cost water systems, big and small, approximately $40 billion.[170] PFAS is used in the production of medical devices, cell phones, and numerous other products. Regulating its use will create additional regulatory burdens on water systems and manufacturers, and likely increase consumer costs on many goods.[171]

iv. Air Quality Standards Rule

The Committee wrote to the EPA regarding its proposed rule's Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (PM2.5).[172] The EPA responded to the Committee two months late and nearly two months after finalizing the rule without answering any of the Committee's questions. The Committee raised concerns that the rule would require the enactment of significant controls to mitigate the emission of particulate matter 2.5 micrometers or smaller—which is emitted when almost anything is burned, destroyed, or crushed.[173] This new rule will most heavily impact industries that must heat or burn raw materials and mining operations.[174] This will increase the regulatory burden for companies of all sizes, make the permitting process more difficult, and lead to increased outsourcing.[175] Small businesses would be faced with significant and costly operations adjustments, with the rule's projected costs between $162 and $197 billion for all companies to comply

---

[163] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael Reagan, Adm'r. Env't Prot. Agency (Feb. 14, 2024).
[164] *See* Letter from Tim Del Monico, Assoc. Adm'r. U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).
[165] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael Reagan, Adm'r. Env't Prot. Agency (Feb. 14, 2024).
[166] PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32532 (2024) (to be codified at 40 CFR §§ 141, 142).
[167] *Id.*
[168] PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18638 (Mar. 29, 2023).
[169] *EPA Proposes PFAS Standards,* NAT'L ASSOC. OF MFRS. (Mar. 16, 2023).
[170] *Id.*
[171] Pat Rizzuto, *PFAS Rule to Cost Many Millions More, EPA Analysis* Finds, BLOOMBERG LAW (Nov. 23, 2023).
[172] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael Reagan, Adm'r. Env't Prot. Agency (Feb. 14, 2024); *See* Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 88 Fed. Reg. 5558 (2023) (to be codified at 40 CFR §§ 50, 53, 58).
[173] *See id.*
[174] *NAM pushed back on harmful new air regulations*, NAT'L ASSOC. OF MFRS. (Feb. 9, 2023).
[175] *Id.*

with. It is also estimated that this rule could put nearly one million jobs at risk.[176] Despite of the Committee's objections and these heavy consequences, the EPA finalized the rule on March 6, 2024, certifying that the action will not have a significant economic impact on small entities because "it will not impose any requirements on small entities."[177]

v. Clean Power Plant Rule

The EPA's Clean Power Plant proposed rule would require power plants to implement carbon capture technology and/or integrate hydrogen into their fuel cycle; plants that do not implement these technologies and meet emissions goals could be shut down.[178] At the time of proposal, the EPA certified "that the proposed standards would not have a significant impact on a substantial number of small entities."[179] However, in its letter to the EPA, the Committee raised concerns that the process of integrating carbon capture or hydrogen technologies would be costly for manufacturers—estimates range from $10 to $14 billion across the industry.[180]

While the cost of this rule is substantial, it also relies on technology that is either unproven or has not been deployed on a large scale.[181] Implementing cutting edge, expensive technologies increases cost for small businesses. This would also have a knock-on effect of increasing energy costs for consumers.[182] Small businesses are reliant on the electric grid and this rule would increase the cost of energy, while also potentially creating energy scarcity in more rural communities. Additionally, such a large change could amount to a "generational shift" in technology, which the Supreme Court has previously ruled as an impermissible way to implement best practices in emission reduction standards.[183] The EPA took two months to provide a surface level response to the Committee's inquiry.[184] Unfortunately, despite objections from the Committee, on May 9, 2024, the EPA finalized the rule which clearly imposes exceptionally high costs and burden on small businesses.[185]

e. FDA: Tobacco Product Standard for Characterizing Flavors in Cigars Rule

The FDA's proposed a rule to create a product standard for cigars that would result in a product ban of all cigars with a "characterizing flavor" other than tobacco.[186] This Committee raised significant questions about downstream impacts on small business resulting from revenue losses—not just from sale of menthol products, but by secondary sales, such as someone purchasing a soda when purchasing menthol products—for convenience

[176] Letter from Shelly Moore Capito, *et al.*, Ranking Member, Sen. Comm. on Env't and Pub. Works, to Michael Reagan, *et al.*, Adm'r, U.S. Env't Prot. Agency (Dec. 18, 2023); *U.S. Air Quality Standards and the Manufacturing Sector*, NAT'L ASSOC. OF MFRS. (Apr. 2023).

[177] Letter from Tim Del Monico, Assoc. Adm'r. U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus., (Apr. 24, 2024); Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16202 (2024) (to be codified at 40 CFR §§ 50, 53, 58).

[178] *See* New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (2023) (to be codified at 40 CFR § 60).

[179] Letter from Tim Del Monico, Assoc. Adm'r. U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).

[180] *Id.*, *See also NAM Fights Restrictive Power Plant Rule*, NAT'L ASSOC. OF MFRS. (Nov. 29, 2023).

[181] Erin Kelly, *Thousands of Co-op Members Voice Opposition to EPA's Power Plant Rule*, NRECA (Aug. 22, 2023); *Id.*

[182] *The Biden Administration's Executive Overreach and Its Effect on American Energy Independence: Hearing Before H.Comm. on Natural Resources Subcomm. on Oversight and Investigations,* 118th Cong., 3 (May 11, 2023) (statement of Diana Furchtgott-Roth, Dir., Ctr. on Energy, Climate, & Env't, & The Herbert and Joyce Morgan Fellow in Energy & Env't Policy, The Heritage Found.).

[183] Letter from Shelly Moore Capito, *et al.*, Ranking Member, Sen. Comm. on Env't & Pub. Works, to Michael Reagan, *et al.*, Adm'r, U.S. Env't Prot. Agency (Dec. 18, 2023); *See also* W.V. v. EPA, 142 S. Ct. 2587 (2022).

[184] *See* Letter from Tim Del Monico, Assoc. Adm'r. U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).

[185] *See* New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 39798 (2024) (to be codified at 40 CFR § 60).

[186] *See* Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26396 (2022) (to be codified at 21 C.F.R. § 1166).

stores and other small retailers nationwide.[187] The analysis indicated that more than 115,000 small business retailers of flavored tobacco products will be impacted by the proposed rule. The FDA acknowledged that "the proposed rule would have a significant economic impact on a substantial number of small entities," however, in its RFA analysis, the FDA failed to quantify the revenue loss that banning the products under the proposed rule would have on average small business retailers by category.[188]

Nearly four months after the Committee sent a letter to the FDA, the FDA finally responded. However, the FDA refused to answer any of the Committee's questions and stated that "because the rulemaking process is ongoing, FDA is unable to respond to many of the questions outlined in your letter at this time."[189] Fortunately, even though the FDA refused to answer any specific questions, after pressure from the Committee and other parties, the implementation of this rule was paused and the FDA continues to review the rule based on the comments.[190]

f. BOEM: Rice's Whale Rule

The Committee wrote to the Bureau of Ocean Energy Management (BOEM) about its proposed Rice's Whale Rule.[191] The rule would exclude nearly six million acres from Lease Sale 261 and create additional requirements for operators and vessels in the Gulf of Mexico.[192] Specifically, the BOEM added an additional term to the Gulf of Mexico Oil and Gas Lease Sale No. 261, and all future sales, which reduced the land available for purchase and what that land is permitted to be used for, requires operators and vessels adhere to a 10-knot speed limit during the day, and prohibits nighttime travel in the Rice's Whale's protective area.[193] This removes opportunities for small oil and gas producers to lease land to run and grow their businesses. The 10-knot speed limit restrictions on shipping will increase inefficiencies in the supply chain, which will in turn increase costs for consumers and create logjams at ports.[194] This cost will be felt disproportionately by small oil and gas operators in the Gulf, who are less able to take advantage of economies of scale. Together, these provisions have a substantial impact on a significant number of small businesses.

In its letter to the BOEM, the Committee expressed concerns that the BOEM inadequately considered the economic impacts of its rule.[195] Initially, the BOEM refused to answer any of the Committee's questions but finally six months after the deadline for response had passed, the BOEM provided a response to the Committee's inquiry answering a few of the questions.[196] Importantly, however, the BOEM failed to answer the Committee's inquiry about the costs the small businesses may incur to comply with the rule. Unfortunately, despite objections from the Committee, on April 24, 2024, the BOEM finalized the rule which clearly imposes exceptionally high costs and burden on small businesses.[197] In the final rule, the BOEM acknowledged that since 69 percent of affected

---

[187] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Shalanda Young, Dir, Off. Mgmt. & Budget, *et al.* (June 28, 2023).

[188] *See* Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26396 (2022) (to be codified at 21 C.F.R. § 1166).

[189] Letter from Erin O'Quinn, Food and Drug Admin.to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).

[190] Alexander Tin, *Menthol cigarette ban delayed due to "immense" feedback, Biden administration says*, CBS NEWS (Apr. 26, 2024).

[191] Letter from Roger Williams, *et. al.*, Chairman, H. Comm. on Small Bus., to Liz Klein, Dir., Bureau of Ocean Energy Mgmt. (Oct. 12, 2023); Risk Management & Financial Assurance for OCS Lease & Grant Obligations, 88 Fed. Reg. 42136 (2023) (to be codified at 30 C.F.R. §§ 550, 556, 590).

[192] Bureau of Ocean Energy Mgmt, BOEM NTL No. 2023-G01, *Notice to Lessees and Operators of Federal Oil and Gas, and Sulphur Leases in the Gulf of Mexico Outer Continental Shelf*, 1 (Aug. 17, 2023).

[193] *Id.*

[194] Samuel Stettheimer, *Alabama Port Authority Rejects Possible Whale-Saving Rule*, THE ALA. POL. REPORTER (Jul. 17, 2023); Nathan Cobb, *Council Says Proposed Rule on Rice's Whales could Cripple Ports, Including Panama City*, PANAMA CITY NEW HERALD (Jul. 6, 2023).

[195] Letter from Roger Williams, *et. al.*, Chairman, H. Comm. on Small Bus., to Liz Klein, Dir., Bureau of Ocean Energy Mgmt. (Oct. 12, 2023).

[196] Letter from Liz Klein, Dir., Bureau of Ocean Energy Mgmt., to. Roger Williams, Chairman, H. Comm. on Small Bus (Apr. 11, 2024).

[197] Risk Management & Financial Assurance for OCS Lease & Grant Obligations, 88 Fed. Reg. 31544 (2024) (to be codified at 30 C.F.R. 550, 556, 590).

companies are small businesses, "BOEM expects the rule will affect a substantial number of small entities."[198]

g. FTC: Non-Compete Clause Rule

The Committee wrote to inquire about the Federal Trade Commission's (FTC) Non-Compete Clause rule.[199] However, in its response, the FTC failed to adequately answer any of the Committee's questions but instead gave a general answer about considering various commenters concerns, including the Committee's.[200] This proposed rule would ban the use of non-compete clauses in employment contracts, impacting competition and legal liability.[201] This rule would impose significant costs on small businesses and pose a serious risk of loss and potential closures. This rule demonstrates the failure to consider the economic benefits of non-compete agreements for small businesses, and the impact the rule may have on competition and on the U.S. economy altogether.[202] Specifically, the FTC failed to consider that banning non-compete agreements could make it more challenging for small businesses to prevent their workers from being poached by large corporations with more resources, threatening the innovation small businesses contribute to the American economy.[203]

The Committee raised concerns that the FTC underestimated the costs and impact of this proposed rule on small businesses.[204] The FTC estimated that 2.94 million small firms will be impacted by the proposed rule, but maintains the costs are limited to updating contractual practices—only costing small businesses between $317.88 to $563.84 per entity.[205] However, the FTC has ignored significant implications for small businesses—failing to include the costs of hiring additional legal resources or hiring and retaining additional workers.[206] Additionally, this fails to recognize that small businesses have harder times attracting and retaining talented workers. As this Committee continually hears about the effects of labor shortages across the country, this will put small firms in a weaker position compared to their larger counterparts.

Despite of this Committee's objections, the FTC finalized the rule on April 23, 2024.[207] The main issues still remain: the rule removes a crucial tool to protect trade secrets, it stifles innovation coming from small businesses, and large corporations can easily poach talent from these small entities.[208] Furthermore, the rule has already led to lawsuits from interested parties. One of them accurately argued that "the sheer economic and political significance of a nationwide noncompete ban demonstrates that this is a question for Congress to decide, rather than an agency."[209]

2. Underestimating the Number of Small Entities Impacted

The RFA requires the agencies to estimate how many small entities will be impacted by any new rule. However, the Committee frequently discovered during the investigation that agencies underestimate the number of impacted small entities. Regulations have broader effects than agencies often account for, which will cause some small businesses to be excluded from these calculations. While a few agencies have asked interested parties to submit more information and data in public comments, not all agencies request data as they ought to in order to

[198] *Id.*
[199] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Lina M. Khan, Chair, Fed. Trade Comm'n (Mar. 14, 2024); *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (2023) (to be codified at 16 C.F.R. § 910).
[200] Letter from April J. Tabor, Sec'y, Fed. Trade Comm'n, to Roger Williams, Chairman, H. Comm. on Small Bus. (Mar. 14, 2024).
[201] *See id.*
[202] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Lina M. Khan, Chair, Fed. Trade Comm'n (Mar. 14, 2024).
[203] *Id.*
[204] *Id.*
[205] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (2023) (to be codified at 16 C.F.R. § 910).
[206] *See* Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., *et al.*, to April Tabor, Acting Sec'y of the Comm'n, Fed. Trade Comm'n (Mar. 20, 2023).
[207] *See* Press Release, Fed. Trade Comm'n, FTC announces rule banning noncompetes (Apr. 23, 2024).
[208] Eric Rivell, *FTC votes to ban noncompete agreements.* Fox News (Apr. 23, 2024).
[209] Chamber of Com. v. Fed. Trade Comm'n, Pl. Compl. for Declaratory & Injunctive Relief ¶ 20.

accurately estimate the number of small entities affected. Incorrect certifications and the enactment of excessively onerous regulations without triggering an RFA analyses are often the result of underestimating the number of affected small entities.

The agencies frequently restrict the proposed regulation costs to only the small entities that directly fall under the affected industry and leave the other affected small entities out of these calculations. However, the Committee found that small entities face financial hardships as a result of supplier regulations and other business-related regulations. These small businesses should be accounted for when estimating the number of impacted small entities. Agencies must carefully consider these downstream impacts and the actual number of impacted small entities during the rulemaking process to avoid further harm to small businesses down the supply chain.

Besides underestimating the number of impacted small businesses, the regulations often disproportionally impact small entities. Small businesses already have fewer resources than their larger counterparts and adding regulations that disproportionately impact small businesses is outrageous. Whether the issue is that the rule has a disproportional impact on small entities, or the agency has underestimated its impact, it has real world implications for small businesses making their operations harder. On some occasions, agencies might even do these calculations with willful ignorance. The Committee found that several agencies either omitted the number of small entities impacted by a proposed rule or appeared to manipulate existing guidelines to downplay the number of small entities impacted, as the following example demonstrates.

a. Federal Energy Regulatory Commission Rules

In response to the Committee's letter, the Federal Energy Regulatory Commission (FERC) produced documents regarding their RFA analysis that show just how far some agencies will go to avoid proper compliance with the RFA. The FERC's production included an email chain where the FERC career staff discussed what should be considered a "small entity" prior to publishing a Notice of Proposed Rulemaking (NPRM) to update its Standards for Business Practices of Interstate Natural Gas Pipelines in March 2021.[210] The emails show how the FERC career personnel applied the SBA's size regulations to minimize the number of small entities included in their initial RFA impact analysis, without regard for accuracy. At the outset of the emails, the Committee was alarmed by the lack of knowledge as to which small entities should be counted. The emails revealed that the FERC career employees did not know what small entities to include. Specifically, one career employee acknowledged they did not know how to "discern whether a company should be excluded from the list of small entities," and noted it "probably won't make a difference if we just bury this and not make a [big] deal out of it."[211]

[210] *See* Standards for Business Practices of Interstate Natural Gas Pipelines, 86 Fed. Reg. 12879 (2021) (to be codified at 18 C.F.R. § 284).

[211] E-mail from Michael Goldenberg, Off. of the Gen. Counsel, Fed. Energy Reg. Comm'n, to Stanley Wolf, *et. al.*, Economist, Fed. Energy Reg. Comm'n (Nov. 20, 2020, 10:34 am ET) (on file).

From: Michael Goldenberg <Michael.Goldenberg@ferc.gov>
Sent: Friday, November 20, 2020 10:34 AM
To: Stanley Wolf <Stanley.Wolf@ferc.gov>; Kayla Williams <Kayla.Williams@ferc.gov>; Carla Pettus <Carla.Pettus@ferc.gov>; Michael Tita <Michael.Tita@ferc.gov>; Oscar Santillana <Oscar.Santillana@ferc.gov>
Cc: Ellen Brown <Ellen.Brown@ferc.gov>
Subject: RE: For your review by COB 11/10 - Draft NOPR for NAESB Gas Standards 3.2

Raton is like a two mile pipeline and Sherri Booye (so Stan you know how long ago that was) and I, back in the day, negotiated with them as to how they should comply with Commission regulations. We would not have given them an explicit waiver of GISB back then, because GISB did not exist. While technically, Raton should have filed an eTariff, I don't want to be the one to tell them they have to spend money on making an eTariff filing.

As to your ultimate question, I don't know how to answer that. My concern is that we begin to look silly, changing our small company enumeration for every rulemaking based on some different mode of analysis. However, it probably won't make a difference if we just bury this and not make a bid deal out of it.

From: Stanley Wolf <Stanley.Wolf@ferc.gov>
Sent: Friday, November 20, 2020 10:03 AM
To: Michael Goldenberg <Michael.Goldenberg@ferc.gov>; Kayla Williams <Kayla.Williams@ferc.gov>; Carla Pettus <Carla.Pettus@ferc.gov>; Michael Tita <Michael.Tita@ferc.gov>; Oscar Santillana <Oscar.Santillana@ferc.gov>
Cc: Ellen Brown <Ellen.Brown@ferc.gov>
Subject: RE: For your review by COB 11/10 - Draft NOPR for NAESB Gas Standards 3.2

The list of eTariff pipelines that Kayla has includes Raton. I can readily believe that Raton should not have to comply with NAESB, but exactly why? Did they ask for and receive a waiver of compliance with NAESB requirements? Did the Commission grant such a waiver sua sponte? Implicitly? How can one discern whether a company should be excluded from the list of small entities?

Additionally, the number and percentage of small entities substantially impacted by the NPRM varied significantly throughout the email chain, starting with an estimated 62 entities, or 35 percent, and ending with 11 entities, or 6.2 percent. The FERC was able to reduce this estimation by selectively interpreting the SBA's size standards and picking data that represents the lowest possible estimate of small businesses significantly impacted by the NPRM, not the most accurate estimation.

The FERC states in its published NPRM that "most of the natural gas pipelines regulated by the Commission do not fall within the RFA's definition of a small entity, which is currently defined for natural gas pipelines as a company that, in combination with its affiliates, has total annual receipts of $30 million or less."[212] The FERC settled on "only 11 companies [representing] six percent" of the total possible small businesses that may have a significant burden imposed on them by the proposed rule.[213] Yet, emails show the FERC career personnel explaining, with reference to the "SBA [size determination] regulation" that the total respondents should be 35 percent, approximately 62 entities, which is much higher than the 11 small entities the FERC ultimately reported in the NPRM.[214]

[212] Standards for Business Practices of Interstate Natural Gas Pipelines, 86 Fed. Reg. 12879 (2021) (to be codified at 18 C.F.R. § 284).
[213] Email from Oscar Santillana, Off. of Energy Market Regul., Fed. Energy Reg. Comm'n, to Stanley Wolf, *et. al.*, Economist, Fed. Energy Reg. Comm'n, et. al. (Nov. 26, 2020, 2:37 am ET) (on file).
[214] Email from Oscar Santillana, Off. of Energy Market Regul., Fed. Energy Reg. Comm'n, to Kayla Williams, Mgmt. Analyst, Fed. Energy Reg. Comm'n, et. al., (Nov. 20, 2020, 9:49 pm ET) (on file).

From: Oscar Santillana <Oscar.Santillana@ferc.gov>
Sent: Monday, November 2, 2020 9:49 PM
To: Kayla Williams <Kayla.Williams@ferc.gov>; Stanley Wolf <Stanley.Wolf@ferc.gov>; Christy Walsh <Christy.Walsh@ferc.gov>; Marsha Palazzi <Marsha.Palazzi@ferc.gov>; Elizabeth Zerby <Elizabeth.Zerby@ferc.gov>; Anuj Kapadia <Anuj.Kapadia@ferc.gov>; Brian S. White <Brian.White@ferc.gov>; Matthew Roy <Matthew.Roy@ferc.gov>; David Maranville <David.Maranville@ferc.gov>; Leslie Kerr <Leslie.Kerr@ferc.gov>; Aileen Roder <Aileen.Roder@ferc.gov>; Ellen Brown <Ellen.Brown@ferc.gov>
Cc: Carla Pettus <Carla.Pettus@ferc.gov>; Jordan Hinds <Jordan.Hinds@ferc.gov>; Jing Huang <Jing.Huang@ferc.gov>; Jean Sonneman <Jean.Sonneman@ferc.gov>; Kirsten Dalboe <Kirsten.Dalboe@ferc.gov>; Justin Storms <Justin.Storms@ferc.gov>; Jacob Brodsky <Jacob.Brodsky@ferc.gov>; Robert McLean <Robert.McLean@ferc.gov>; Michael Tita <Michael.Tita@ferc.gov>; Michael Goldenberg <Michael.Goldenberg@ferc.gov>
Subject: RE: For your review by COB 10-22 - Draft NOPR for NAESB Gas Standards 3.2

Issue – Number/percentage of small pipelines significantly burdened by NAESB NOPR

Staff opinion – Reported number/percentage of small pipelines significantly burdened by NAESB NOPR too high

Staff recommendation – Out of the reported 62 small companies, how many small companies are *not affiliated with larger companies*? Reported number/percentage should be lower

Analysis

The 2018 NAESB NOPR stated that only 11 (small) companies *not affiliated with larger companies* could be considered a small entity under the Regulatory Flexibility Act (RFA). The 2018 NAESB NOPR further stated that this represents about seven percent of the total universe of potential respondents that may have a *significant burden* imposed on them.

However, the draft NOPR states that 62 companies not affiliated with larger companies could be considered a small entity under the RFA. The draft NOPR further states that this represents about 35 percent of the total universe of potential respondents that may have a significant burden imposed on them.

Going from 11 small companies reported in 2018 to 62 "small" companies reported in 2019 appears to be a big jump in the number of small companies that should be reflected in the NAESB NOPR. Further, stating that 35 percent of small companies may have a significant burden imposed on them appears to be a large percentage of small companies significantly burdened by the NAESB NOPR, particularly during COVID-19 when many small companies are facing economic hardship. I doubt 51 small pipelines were built and/or placed in-service from 2018 to 2019. I see what is currently written in the NOPR as ammunition for 63 small companies to argue, either via comments to the NOPR and/or their subsequent compliance filings to the final rule, that they cannot comply with the new cybersecurity related standards for a while because doing so would "significantly burden them." If this sounds over-analytical, please note that, based on my recent experience with other Commission orders, the 11th floor has even commented on citations and language in footnotes.

Accordingly, the question is **"whether the team thinks the 62 companies/35 percent is an ok number of small companies to be significantly burdened by the NOPR."** If ok, then I stand on the minority who thinks those numbers are too high for small pipelines that may be significantly burdened by a NAESB NOPR and we can move on.

If not ok, then the question is **"how many small companies *are not affiliated with larger companies*?"** It reasons that number would be a lot lower than 62 companies/35 percent. My unscientific/estimated/ballpark/fabricated data calculations based on the number of compliance filings received the last round and the total number of pipelines subject to the rule show that number to be more around 16 companies/nine percent. Those numbers appear to be more in line with the 11 companies/seven percent numbers in the 2018 NAESB NOPR.

If the team does not want to rely on my "fabricated data/non-actual numbers," then I would suggest asking whoever came up with the numbers for small pipelines (which by the way, I never saw the analysis, just the results/findings), to recalculate the numbers based on 2020 data and narrow the small companies' calculation to the number of small companies *not affiliated with larger companies*, if possible and within reason, and revise the draft NOPR accordingly, if necessary.

What we should NOT do is simply change numbers just because I suggested doing so.

Philip Morel

From: Stanley Wolf
Sent: Friday, November 27, 2020 8:58 AM
To: Oscar Santillana
Cc: Ellen Brown; Kayla Williams; Kirsten Dalboe; Carla Pettus; Michael Goldenberg; Michael Tita; Matthew Roy
Subject: RE: For your review by COB 11/10 - Draft NOPR for NAESB Gas Standards 3.2

Thanks Oscar

I think Oscar's revised table is ok. There were some other adjustments, but the primary difference between his table and the one I sent out on Tuesday is the addition of more entities that were affiliated, the sort of additional adjustments I invited in my Tuesday email accompanying the prior version of the table. Oscar did not describe his methodology for finding additional affiliated entities, but I reviewed a few of them and looked at line 17 of their Form 2/2A and these adjustments were supported by the affiliation statements appearing there. I agree with Oscar that it is time to move on. Unless I receive comments on his revised table by COB Monday 11/30, I plan to send the draft NOPR to senior staff on Tuesday, 12/1.

Stan

From: Oscar Santillana <Oscar.Santillana@ferc.gov>
Sent: Thursday, November 26, 2020 2:37 AM
To: Stanley Wolf <Stanley.Wolf@ferc.gov>
Cc: Ellen Brown <Ellen.Brown@ferc.gov>; Kayla Williams <Kayla.Williams@ferc.gov>; Kirsten Dalboe <Kirsten.Dalboe@ferc.gov>; Carla Pettus <Carla.Pettus@ferc.gov>; Michael Goldenberg <Michael.Goldenberg@ferc.gov>; Michael Tita <Michael.Tita@ferc.gov>; Matthew Roy <Matthew.Roy@ferc.gov>
Subject: RE: For your review by COB 11/10 - Draft NOPR for NAESB Gas Standards 3.2

See revised table (attached). Consistent with Mike G.'s robust guidance, **11 companies/six percent (i.e., 6.2 percent to be exact)** are the numbers that should be reported in the NOPR, which are in line with the 11 companies/seven percent reported in the 2018 NAESB NOPR. Reason for revised column H – See revised columns F and G. Glad to see excel spreadsheets still cannot replace work-related experience. In short, Mike G.'s/OED's assessment/calculations (ok, perhaps in their head) was/were correct in 2018 and are factually supported for this NOPR (even with 2019 data). I think it is time to move on. Happy Thanksgiving.

From: Stanley Wolf <Stanley.Wolf@ferc.gov>
Sent: Tuesday, November 24, 2020 11:36 AM
To: Oscar Santillana <Oscar.Santillana@ferc.gov>
Cc: Ellen Brown <Ellen.Brown@ferc.gov>; Kayla Williams <Kayla.Williams@ferc.gov>; Kirsten Dalboe <Kirsten.Dalboe@ferc.gov>; Carla Pettus <Carla.Pettus@ferc.gov>; Michael Goldenberg <Michael.Goldenberg@ferc.gov>; Michael Tita <Michael.Tita@ferc.gov>; Matthew Roy <Matthew.Roy@ferc.gov>
Subject: RE: For your review by COB 11/10 - Draft NOPR for NAESB Gas Standards 3.2

All

See the attached table, which is Kayla's table of 38 small pipelines, but which adds column F showing apparent affiliation or relation to larger companies, column G showing which companies filed in response to Order No. 587-Y, and column H showing those of the 38 that from my review of the elibary docket sheets filed in response to Order No. 587-Y less those that appear affiliated or related to larger pipelines or companies. This results in 20 pipelines in column H that appear

1

subject to the new NAESB proposed rule. It's worth noting that a quick review of the companies that filed in response to 587-A appears to include quite a few small pipelines that do not show up on Kayla's table of 38 small pipelines. So the resulting 20 small pipes appears to be, if anything, a potentially significant underestimate of the small pipes who will be complying with an order on the proposed rule. Why this is greater than the 11 small pipelines thought in Order 587-Y to be potentially to be subject to that rule I don't know since it is unclear what methodology was used to come up with the 11 small pipelines referred to in that order. In any event, I am all ears if anyone believes that particular pipelines should not appear among the 20 remaining. Feel free to delete any of those pipelines but please provide a specific reason for deleting any pipeline you think should be deleted. Unless I hear from you all otherwise by COB Monday 11/30, I intend to use the 20 small pipeline figure in the draft NOPR and send that draft on to senior staff early next week.

Thanks

Stan

Internally, there were several questions about the FERC's reduced estimate. For instance, the FERC career personnel warned that the reported number "appears to be, if anything, a potentially significant underestimate of the small [pipeline companies] who will be complying with an order on the proposed rule."[215] Another email raises concerns that the career employee coming to this figure "did not describe his methodology," and noted the consensus among the FERC career personnel that it was "time to move on."[216] The FERC career personnel also noted the number appears to be the "unscientific/estimated/ballpark/fabricated data calculations based on the number of compliance filings received … for 2019."[217] This ballpark estimate was the number small businesses needed to rely on in issuing comments about the economic impact.

The FERC emails also revealed a motivation to publish an initial analysis with deflated figures. For example, one FERC career employee cautioned that including a larger number of small entities is "ammunition for 63 small companies to argue, either via comments to the NPRM and/or their subsequent compliance filings to the final rule, that they cannot comply . . . because it would 'significantly burden them.'"[218] Notably, the number in the NPRM

[215] Email from Stanley Wolf, Economist, Fed. Energy Reg. Comm'n, to Oscar Santillana, Off. of Energy Market Regulation, Fed. Energy Reg. Comm'n, et. al. (Nov. 24, 2020, 11:36 am ET) (on file). Additional emails reveal that the "lowest number of entities come to 22 percent [roughly 42 entities] for 2019." Email from Kayla Williams, Mgmt. Analyst, Fed. Energy Reg. Comm'n, to Oscar Santillana, Off. of Energy Market Regul., Fed. Energy Reg. Comm'n (Nov. 5, 2020, 4:57 pm ET) (on file).

[216] Email from Stanley Wolf, Economist, Fed. Energy Reg. Comm'n, to Oscar Santillana, Off. of Energy Market Regul., Fed. Energy Reg. Comm'n, et. al. (Nov. 27, 2020, 8:58 am ET) (on file).

[217] Email from Oscar Santillana, Off. of Energy Market Regul., Fed. Energy Reg. Comm'n, to Kayla Williams, Mgmt. Analyst, Fed. Energy Reg. Comm'n, et. al., (Nov. 20, 2020, 9:49 pm ET) (on file). FERC's burden estimate for the proposals in this NOPR are for one-time implementation of the information collection requirements of the NOPR, and estimated the one-time implementation cost of the proposals in the NOPR is $1,977,580 (or $11,110 per entity, regardless of entity size), and did not consider the estimated $11,110 impact per entity to be significant. *See* 86 Fed. Reg. at 12883, 12885.

[218] Email from Oscar Santillana, Off. of Energy Market Regul., Fed. Energy Reg. Comm'n, to Kayla Williams, Mgmt. Analyst, Fed. Energy Reg. Comm'n, et. al., (Nov. 20, 2020, 9:49 pm ET) (on file).

aligned with the "unscientific/estimated/ ballpark/fabricated data calculations based on the number of compliance filings received the last round and the total numbers for 2019."[219] This ballpark estimate was the baseline small businesses had to rely on to make comments.

It is extremely concerning that an analysis of the number of impacted small businesses is conducted in this manner among the FERC career staff. The lack of knowledge, using inaccurate numbers, the mindset of "we just bury this," and selectively interpreting the SBA's size standards is shocking. Even after the career staff acknowledged that the number is potentially a significant underestimate—without being transparent about the methodology used—they chose to use the "unscientific/estimated/ ballpark/fabricated" data in the NPRM. What makes matters even worse, some career employees have been with the FERC for nearly thirty years. This shows a deep-rooted agency culture of evading the RFA's requirements and manipulating numbers for their own benefit. If this is happening at FERC it is certainly happening elsewhere—they are not unique.

b. DOL: Fiduciary Rule; Non-Displacement of Qualified Workers Rule; Davis-Bacon and Related Acts; Overtime Rule under Fair Labor Standards Act; and Independent Contractor Classification Rule

The Committee has written to the DOL about multiple rules that could substantially harm small businesses due to their inability to properly estimate impacted entities. Furthermore, on October 19, 2023, the Committee held a hearing titled "Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators" that focused on the impacts of the DOL burdensome regulations and economic pressures on small businesses.[220] Among other things, the hearing examined the rules discussed below showing how the DOL has failed accurately estimate the number of impacted small businesses and how its rules impact a disproportional number of small entities.

i. Fiduciary Rule

The Committee wrote to the DOL about its proposed rule changes to the Fiduciary Rule noting how the number of affected entities were disproportionally small entities.[221] While addressing some of the questions in its response, the DOL failed to substantively answer most of the Committee's questions.[222] The Committee found that nearly all the impacted entities are small businesses—over 97 percent of broker-dealers and 99 percent of registered investment advisors are small businesses.[223] While the DOL included the analysis of affected small entities, it did not acknowledge that such a large percentage of impacted entities for being small was an issue.[224] Furthermore, the DOL minimized this impact by claiming that "the costs associated with the amendments are modest."[225] Rule such as this, where the impacts of the rule are significant and almost all entities impacted are small businesses, is exactly what the RFA is attempting to prevent from being promulgated.

On April 25, 2024, the DOL finalized the rule against this Committee's objections.[226] Even though the DOL made some changes and clarifications to this rule, they did not make any changes to avoid the disproportional harm to small businesses.

---

[219] *Id.*

[220] *Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators*, Hearing Before H. Comm. on Small Bus., 118th Cong. (Oct. 19, 2023).

[221] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Dep't of Labor (Dec. 7, 2023).

[222] Letter from Julie Su, Acting Sec'y, Dep't of Labor., to Roger Williams, Chairman, H. Comm. on Small Bus (Feb. 15, 2024).

[223] *See* Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 FR 75890 (2023) (to be codified at 29 CFR 2510).

[224] *See id.*

[225] *See id.*

[226] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32122 (2024) (to be codified at 29 C.F.R. 2510).

ii. Non-Displacement of Qualified Workers Rule

Similarly, the DOL's Non-Displacement of Qualified Workers under Service Contracts rule disproportionally impacts small entities. This rule implements and enforces the Executive Order 14055 to mandate the contractors and subcontractors who are engaged in federal service contracts to offer the right of first refusal for employment on the successor contracts to service employees previously employed under the predecessor contract.[227] The Committee wrote to the DOL expressing concerns about the rule impacting a disproportional number of small contractors and subcontractors, however, the DOL's delayed response was very high level.[228] The DOL barely answered any of the Committee's questions and gave empty assurances that it "recognizes the important role small businesses play in our economy."[229] This rule disproportionally impacts small entities—up to 74 percent of impacted entities are small contractors and subcontractors.[230] However, even majority of the impacted entities are small, the DOL did not address this disparity in the final rule.[231] This rule will likely discourage these small contractors and subcontractors from federal contracts, causing widespread impact on small businesses and the whole US economy.[232]

iii. Davis-Bacon and Related Acts

Another example in which the rule impacts a disproportional number of small entities and underestimates this number is the DOL's rule change entitled "Davis-Bacon and Related Acts."[233] This final rule from the DOL makes two major changes to the methodology used to determine the prevailing wage for construction workers employed in federal and federally subsidized construction projects.[234] The DOL estimates that majority of potentially affected entities are small businesses—ranging from 67 to 70 percent of all affected firms. Many stakeholders, including this Committee, wrote to the DOL noting that this number being an underestimation. Yet, when finalizing the rule, the DOL refused to significantly amend the rule to make it less burdensome for this disproportionately large number of small businesses.

The Committee wrote to the DOL expressing concern about the number of small businesses impacted and specifically asked about the likelihood that the DOL underestimated to the number of impacted small entities.[235] The DOL responded, after the deadline, without addressing any of the Committee's direct questions.[236] Neither did the DOL address the Committee's concern about the number of impacted small businesses or the potential underestimation of the number of entities.[237] Unfortunately, despite objections from the Committee and other relevant stakeholders, the rule went into effect on October 23.[238]

---

[227] Nondisplacement of Qualified Workers Under Service Contracts, 88 FR 86736 (2023) (to be codified at 29 CFR 9).
[228] Letter from Roger Wiliams, Chairman, H. Comm. on Small Bus., to Liz Watson, Assistant Sec'y, Congressional and Intergovernmental Affairs, Dep't of Labor (Feb. 1, 2024); Letter from Liz Watson, Assistant Sec'y, Congressional and Intergovernmental Affairs, Dep't of Labor, to Roger Wiliams, Chairman, H. Comm. on Small Bus. (Mar. 20, 2024).
[229] Letter from Liz Watson, Assistant Sec'y, Congressional and Intergovernmental Affairs, Dep't of Labor, to Roger Wiliams, Chairman, H. Comm. on Small Bus. (Mar. 20, 2024).
[230] Nondisplacement of Qualified Workers Under Service Contracts, 88 Fed. Reg. 86736 (2023) (to be codified at 29 C.F.R. § 9).
[231] *Id.*
[232] *See id.*
[233] *See* Updating the Davis-Bacon and Related Acts Regulations, 88 Fed. Reg. 57526 (2023) (to be codified at 29 CFR §§ 1, 3, 5).
[234] *See id.*
[235] Letter from Roger Williams, Chairman, H. Comm. on Small Bus. to Julie Su, Acting Sec'y, Dep't of Labor (Sept. 28, 2023).
[236] Letter from Liz Watson, Assistant Sec'y for Congressional & Intergovernmental Affairs, Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).
[237] *Id.*
[238] *See* Updating the Davis-Bacon and Related Acts Regulations, 88 Fed. Reg. 57526 (2023) (to be codified at 29 CFR §§ 1, 3, 5).

iv. Overtime Rule under Fair Labor Standards Act

In addition to providing high estimates, agencies also provide unacceptably large ranges of the number of small entities that could be impacted. One example is the DOL's proposed Overtime Rule under the Fair Labor Standards Act (FLSA), where the DOL both provided an overly broad estimate of the number of small entities and imposed significant monetary impacts on those small businesses.[239] The Committee wrote to the DOL about this rule's disproportional impact on small businesses, however, the DOL refused to provide the Committee with any information.[240]

The proposed rule would expand eligibility for overtime pay for about three million workers under the FLSA.[241] It would raise the threshold for time-and-a-half overtime pay from $35,568 to $55,000.[242] 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 percent of all small entities.[243] This burdensome rule change will cost direct employers between $294.6 million to $356.0 million for affected small entities just during the first year.[244] As this Committee stated in its letter to the DOL, this is an unacceptably large range of businesses that may be impacted, because it obfuscates the real impact of the rule.[245] Despite of this Committee's pressure, the DOL finalized this rule on April, 26, 2024.[246] Contrary to the Committee's objections, the final rule impacts even more entities than the proposed rule estimated—the small businesses will comprise from 3.2 percent to 23.9 percent of all affected entities.[247]

v. Independent Contractor Classification Rule

The Committee wrote to the DOL about it finalizing the rule titled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" expressing concerns about the rule's extremely detrimental impact on small businesses and urging the DOL to delay the rule from coming into effect until DOL provides proper consideration of small entities.[248] However, in its response, the DOL claimed that it has "carefully considered the views and concerns of independent contractors and other small businesses in drafting its Classification Rule" and the DOL will not delay the rule's scheduled effective date of March 11, 2024.[249]

The Committee strongly disagreed with the DOL's stand because this rule disproportionally impacts small businesses—particularly in construction, trucking, and health care sectors.[250] It will make it harder for businesses

---

[239] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842 (2023) (to be codified at 29 CFR §541).

[240] Letter from Roger Williams, Chairman, H. Comm. on Small Bus. to Julie Su, Acting Sec'y, Dep't of Labor (Sept. 28, 2023); Letter from Liz Watson, Assist. Sec'y for Congressional & Intergovernmental Affairs, Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).

[241] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842 (2023) (to be codified at 29 CFR §541).

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Sept. 28, 2023).

[246] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842 (2024) (to be codified at 29 CFR §541).

[247] *Id.*

[248] Letter from Roger Williams, Chairman, H. Comm. on Small Bus. to Julie Su, Acting Sec'y, Dep't of Labor (Sept. 28, 2023); *See* Employee or Indep. Contractor Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (2024) (to be codified at 29 C.F.R. §§ 780, 788, 795).

[249] Letter from Liz Watson, Assist. Sec'y for Congressional and Intergovernmental Affairs, Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).

[250] Leah Shepherd, *DOL's Rule Narrows Scope of Independent Contractor Classification*, SHRM (Jan. 10, 2024); Chris Marr & Rebecca Rainey, *Labor Department Cements Rule Change on Gig Worker Status (1)*, BL (Jan. 9, 2024).

to classify workers as independent contractors (IC)—which in turn will decrease flexibility and employment opportunities resulting in lost earnings for millions of Americans.[251] This rule impacts over 22 million ICs and threaten their status.[252] Many ICs who will be forced to be classified as employees under the new rule would no longer be able to operate as their own small business. With that, they lose the unique freedom of being a small business and the ability to innovate, adapt, and improve to survive and grow. These factors could prevent small businesses from hiring employees if the costs are too prohibitive. Businesses utilizing ICs are concerned that the rule will make it harder to hire, which is particularly concerning given today's labor shortages.[253] In fact, according to Advocacy, the only way employers would have certainty is by classifying their workers as employees requiring additional costs for benefits and wages.[254] However, the DOL did not take these factors into consideration in their estimate. These consequences of the rule are so catastrophic that the rule has already triggered multiple lawsuits.[255]

3. Alternative Rules

In their rulemaking process, agencies must consider alternatives that may minimize any significant economic impact of the rules for small entities and include them in the IFRA.[256] This is a key provision of the RFA so that the agencies finalize a rule that will accomplish its goals while not disproportionately burdening small businesses. Advocacy recommends that the agencies address the costs, benefits, and other economic implications as part of the alternative rules' discussion. However, the Committee found that agencies often have inadequate consideration of alternatives, omit possible alternatives from the agency's published analysis, or the agency's assessment of alternative burdens in comparison to the rule is lacking. If anything, agencies have shown nothing to demonstrate they take the alternatives requirement seriously.

Over the course of the Committee's RFA investigation, the Committee wrote to several agencies about the consideration of alternatives for rules with especially burdensome compliance requirements. However, 79 percent of agencies failed to answer a single question asked by this Committee regarding alternatives.

a. DOL: Davis-Bacon and Related Acts and Overtime Rule under Fair Labor Standards Act

The Committee has written to the DOL on multiple occasions requiring information about its extremely burdensome rules, such as Davis-Bacon and Related Acts and Overtime Rule under the Fair Labor Standards Act.[257] The Committee inquired about the alternative rules that the DOL considered to lessen the rule's impact on small businesses. As discussed earlier in this report, these rules imposed burdensome and expensive compliance requirements, and are the exact type of rules the RFA requires agencies to consider alternatives for. Unfortunately for the Main Street, the DOL failed to answer a single question about alternatives it considered to imposing millions of dollars in costs and thousands of paperwork hours on small businesses. Furthermore, the alternatives the DOL discussed in the RFA analyses lack substance or in some instances are completely absent.

---

[251] Chris Marr & Rebecca Rainey, *Labor Department Cements Rule Change on Gig Worker Status (1)*, BL (Jan. 9, 2024).
[252] *See* Employee or Indep. Contractor Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022) (comment from Major Clark, III, *et al.*, Deputy Chief Counsel, SBA Off. of Advocacy (Dec. 12, 2022)).
[253] *See* Employee or Indep. Contractor Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022) (comment from Michael Johnson, President, National Stone, Sand & Gravel Association (Dec. 13, 2022)).
[254] *See generally* Chris Marr & Rebecca Rainey, *Labor Department Cements Rule Change on Gig Worker Status (1)*, BL (Jan. 9, 2024); Employee or Indep. Contractor Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022) (comment from Major Clark, III, *et al.*, Deputy Chief Counsel, SBA Off. of Advocacy (Dec. 12, 2022)).
[255] Rebecca Rainey, *Challenges to DOL's Contractor Rule: Mounting Lawsuits Explained*, BL (Mar. 5, 2024).
[256] 4 U.S.C. §§ 601-612.
[257] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Sept. 28, 2023) (regarding the Fair Labor Standards Act); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Sept. 28, 2023) (regarding Davis Bacon & Related Acts).

b. ATF: Definition of "Engaged in the Business" as a Dealer in Firearms Rule

This Committee asked the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) questions relating to the alternatives it considered when changing the definition of "Engaged in the Business" as a dealer in firearms.[258] This proposed rule would require nearly 25,000 new individuals or entities to register as a Federally Licensed Firearm (FFL) Dealer, functionally turning them into small businesses.[259] This change creates an ambiguous standard that could cause an individual to be labeled as being "engaged in the business of selling firearms," requiring them to register with and pay a fee to the ATF.[260] The ATF, in response to the Committee's questions, merely stated it "did not find any suitable alternatives that would meet the objectives of this rule that would minimize the economic impact that this rule would have on small entities."[261] This demonstrated to the Committee that, so long as agencies cannot reconcile lowering compliance burdens with the policy objectives of the rule, considering alternatives is nothing more than a rubber stamp.

c. FDA: Tobacco Product Standard for Characterizing Flavors in Cigars Rule

The Committee found other concerning examples of agency considerations of alternatives. One situation is when agencies consider an alternative that does nothing to advance the objectives of the RFA. The FDA's Tobacco Product Standard for Characterizing Flavors in Cigars proposed rule fails to properly consider alternative rules and uses inadequate alternatives examples.[262] The Committee wrote to the FDA raising concerns about the rule's impact on small businesses and asking about the alternatives the FDA considered.[263] However, the FDA refused to answer any of the Committee's questions and did not provide any information about the alternatives in the response.[264]

This burdensome proposed rule creates a product standard for cigars that would result in a product ban of all cigars with a "characterizing flavor" other than tobacco.[265] The IRFA briefly details only three alternatives—a delayed effective date, prohibiting menthol as an intentional additive, and exemptions—to minimize the proposed rule's burden on small businesses.[266] However, a brief explanation of surface level alternatives is not sufficient. Furthermore, the delayed start date is not an acceptable alternative that would reduce its regulatory burden. After pressure from the Committee and other outside stakeholders, OMB paused the FDA's implementation of this rule, and the agency continues to review the rule based on the comments.[267]

C. Compounding Impact of Duplicative Regulations

Overlapping regulations are one of the main problems with agencies' RFA compliance. Many overlapping regulations from various agencies, or sometimes even from the same agency, burden small businesses. The RFA requires agencies to include in each IRFA an identification, to the extent practicable, of all relevant federal

---

[258] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Steven M. Dettelbach, Dir., Bureau of Alcohol, Tobacco, Firearms, & Explosives (Oct. 12, 2023).
[259] Definition of "Engaged in the Business" as a Dealer in Firearms, 88 FR 61993, 62017 (2023) (to be codified at 27 CFR 478).
[260] *Id.*
[261] Letter from Ann M. Vallandingham, Acting Assist. Dir. of Public and Gov't Affairs, Bureau of Alcohol, Tobacco, Firearms, & Explosives, to Roger Williams, Chairman, H. Comm. on Small Bus. (Dec. 4, 2023).
[262] *See* Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26396 (2022) (to be codified at 21 C.F.R. § 1166).
[263] Letter from Roger Williams, H. Comm. on Small Bus., to Robert Califf, Comm'r, Food & Drug Admin. (Jun. 28, 2023).
[264] Letter from Erin O'Quinn, Acting Assoc. Comm'r for Legislative Affairs, to Roger Williams, H. Comm. on Small Bus. (Oct. 18, 2023).
[265] *See* Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26396 (2022) (to be codified at 21 C.F.R. § 1166).
[266] DEP'T OF HEALTH & HUMAN SERV., FOOD & DRUG ADMIN., FDA-2021-N-1309, TOBACCO PRODUCT STANDARD FOR CHARACTERIZING FLAVORS IN CIGARS, 112 (May 2022).
[267] Alexander Tin, *Menthol cigarette ban delayed due to "immense" feedback, Biden administration says*, CBS NEWS (Apr. 26, 2024).

rules which may duplicate, overlap, or conflict with the proposed rule.[268] According to Advocacy, duplicative or overlapping rules "are based on the same or similar reasons for the regulation, the same or similar regulatory goals, and if they regulate the same classes of industry."[269] Additionally, rules are conflicting when they "impose two conflicting regulatory requirements on the same classes of industry."[270] The Advocacy's RFA Compliance Guide directs agencies to examine potential conflicting and duplicative rules that could add cumulative regulatory burdens on small entities without any gain in regulatory benefits.[271]

Some agencies have produced their own RFA compliance guides that include guidance on how to avoid duplicative regulations. Many times, the guides are similar to the Advocacy's RFA Compliance Guide, but not always. For example, the EPA produced its own RFA compliance guide to the Committee in April 2023. Significant differences exist between the Advocacy's RFA Compliance Guide and EPA's. Most notably, the EPA's guidance does not mention the requirement to *examine* potential conflicting and duplicative rules that could add cumulative regulatory burdens on small entities. The EPA RFA guidance states:

> Many EPA rules complement requirements imposed by other EPA rules or rules promulgated by other Federal Agencies. EPA's authority and responsibility intersect with those of many other Federal Agencies and Departments (e.g., OSHA, Transportation, Energy, Interior). In principle, these controls should all work together to create a comprehensive system of environmental management. Each agency should, therefore, coordinate its regulatory requirements with those already in place. The lead OGC attorney for your rulemaking can assist in identifying duplicate, overlapping, or conflicting rules.[272]

It is important for the agencies to consider overlapping regulations and include guidance on how to examine them in their internal guides. There are 439 federal government agencies that impose regulations on small businesses and there is often overlap between these rules.[273] Besides regulations by federal agencies, also state and local regulations add to the regulatory burden that drowns small businesses. Often there is overlap and conflict also between local, state, and federal regulations. Even though the RFA requires agencies to identify the duplicative, overlapping, or conflicting regulations among federal agencies, no comprehensive approach has been adopted concerning the myriad of regulations enforced by diverse agencies that small enterprises need to adhere to.

Unfortunately, agencies frequently fall short in properly identifying the regulations governing the same field and agencies often lose sight of what their counterparts are issuing. Take, for example, energy efficiency standards and resources across the federal government. One may think the only player would be the DOE. Unfortunately for small businesses, the requirements go far beyond that and include the EPA, the Department of Agriculture (USDA), the Department of the Treasury (Treasury), the Department of the Interior (Interior), the Department of Housing and Urban Development (HUD), the SBA, Fannie Mae, the Department of Health and Human Services (HHS), and the Department of Veterans Affairs (VA).[274]

Manufacturers are likewise heavily impacted by a flurry of regulations across the federal government. A study by the National Association of Manufacturers (NAM) found that regulatory costs have increased by 35 percent in

---

[268] *See* 5 USC § 603(b)(5).

[269] U.S. SMALL BUS. ADMIN. OFF. OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT, 40 (Aug. 2017).

[270] *Id.*

[271] *Id.*

[272] U.S. ENV'T PROT. AGENCY, FINAL GUIDANCE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT AS AMENDED BY THE SMALL BUSINESS REGULATORY FAIRNESS ACT, 36 (Nov. 30, 2006) (on file).

[273] *Agencies Found*, FED. REG. (last visited Apr. 14, 2024), https://www.federalregister.gov/agencies.

[274] LYNN J. CUNNINGHAM, CONG. RESEARCH SERV., R40913, RENEWABLE ENERGY AND ENERGY EFFICIENCY INCENTIVES: A SUMMARY OF FEDERAL PROGRAMS (Feb. 10, 2023).

the past decade and in 2022, regulations cost manufacturers $350 billion.[275] This meant that a small manufacturer's compliance costs was about $50,100 per employee. This burdensome impact of increased regulations was also brought up in the Committee's "Tax Day" hearing.[276] Mr. Charles Wetherington, a small business manufacturer, testified that his "regulatory expenses have gone up 460 percent in the last eight years and [the regulations have] not done anything to make the products better or safer."[277]

Requirements coming from all facets of the federal government are difficult for someone who is well versed in bureaucratic process to track – let alone a small business who should be more concerned about making payroll than complying with rules coming out of Washington.

The massive number of regulations that federal agencies pass each year and the number of paperwork hours it causes for businesses illustrate how the compounding impact of never-ending red tape is truly an issue for small businesses. Over the duration of President Biden's Administration, federal agencies have passed 891 final rules costing $1.47 trillion and 232.4 million paperwork hours.[278] The 2023 Federal Register is almost 20,000 pages longer than the 2021 edition.[279] The 2023 Federal Register sits at 90,402 pages, making it the second longest version of this document in US history.[280] It is not possible, let alone reasonable, to believe that individuals or small businesses have the ability to sift through over 90,000 pages to ensure compliance with each new—potentially overlapping, duplicative, or conflicting—rule. Additionally, as of May 10, 2023, in 2024 alone, the Federal Register includes 180 new final rules costing $1.2 trillion and 12.4 million paperwork hours.[281] $1.2 trillion additional costs in only in about four months are unacceptable.

[275] NAT'L ASSOC. OF MFRS, THE COST OF FEDERAL REGULATION TO THE U.S. ECONOMY, MANUFACTURING AND SMALL BUSINESS, 2 (Oct. 2023).

[276] *Tax Day: Exploring the Adverse Effects of High Taxes and a Complex Tax Code, Hearing before the H. Comm. On Small Bus.* 118th Cong. (Apr. 19, 2024) (testimony of Mr. Charles Wetherington, President, BTE Technologies, LLC).

[277] *Id.*

[278] *Regulation Rodeo*, AM. ACTION FORUM, (last visited May 10, 2024), https://www.regrodeo.com.

[279Clyde] Wayne Crews Jr., *Biden's 2023 Federal Register Page Count Is The Second-Highest Ever,* FORBES (Dec. 29, 2023).

[280] *Id.*

[281] *Regulation Rodeo*, AM. ACTION FORUM, (last visited May 10, 2024), https://www.regrodeo.com.

Federal Register pages and numbers of rules: from George Bush to Joe Biden

Year	Federal Register Pages	Number of Rules	POTUS
1989	50,501	4,714	Bush I years
1990	49,795	4,334	
1991	57,973	4,416	
1992	57,003	4,155	
1993	61,166	4,369	Clinton years
1994	64,914	4,867	
1995	62,645	4,713	
1996	64,591	4,937	
1997	64,549	4,584	
1998	68,571	4,899	
1999	71,161	4,684	
2000	74,258	4,313	
2001	64,438	4,132	Bush II years
2002	75,606	4,167	
2003	71,269	4,148	
2004	75,675	4,101	
2005	73,870	3,943	
2006	74,937	3,718	
2007	72,090	3,595	
2008	79,435	3,830	
2009	68,598	3,503	Obama years
2010	81,405	3,573	
2011	81,247	3,807	
2012	78,961	3,708	
2013	79,311	3,659	
2014	77,687	3,554	
2015	80,260	3,410	
2016	95,894	3,853	
2017	61,308	3,281	Trump years
2018	67,225	3,368	
2019	72,436	2,964	
2020	86,356	3,038	
2021	73,771	4,429	Biden years
2022	80,756	3,168	
2023	90,402	3,018	

Federal Register pages and rules, 1989–present COMPILED BY THE AUTHOR FROM NATIONAL ARCHIVES AND RECORDS ADMINISTRATION 282

This Committee has expressed concerns that regulations, and the cumulative effect of existing regulations, have a disproportionate, negative impact on small businesses. Regulations, especially duplicative regulations, often harm small businesses more than large and established businesses in at least three ways: (1) disproportionate cost burdens, (2) economies of scale in compliance, and (3) barriers to entry.[283] Small businesses have consistently said that unreasonable government regulations are one of the biggest issues that they face each year.[284]

Throughout the Committee's investigation, several examples of overlapping and duplicative regulations could have been identified with a thorough RFA analysis.

[282] Clyde Wayne Crews Jr., *Biden's 2023 Federal Register Page Count Is The Second-Highest Ever,* FORBES (Dec, 29, 2023).
[283] Chris Edwards, *Entrepreneurs and regulations: Removing state and local barriers to new businesses,* THE CATO INST. (May 5, 2021).
[284] William C. Dunkelberg and Holly Wade, *NFIB small business economic trends,* NASHVILLE: NAT'L FED'N OF INDEP. BUS., 18 (Dec. 2020).

1. DOL: Fiduciary Rule and Workplace Injury Rule

a. Fiduciary Rule

In this Committee's letter to the DOL about their Fiduciary Rule, the Committee asked about the DOL's justification to regulate an area that is already regulated by other agencies.[285] In its delayed response, the DOL explained this by claiming that it "seeks to address…gaps in existing regulations that currently leave some retirement investors vulnerable to advice that is not in their best interest."[286] However, the retirement-level securities, IRA and annuities sales, advice is already regulated by the US Securities and Exchange Commission's Regulation Best Interest standard, and 40 state-based annuity sales regulations that mirror best-interest policies.[287] The DOL attempted to augment other regulators' authority by adding its own regulations to already regulated space. By doing so, the DOL added unnecessary red tape to an area with an existing regulatory framework to protect consumers.

This rule both overlaps with other agencies' current regulations and exceeds Congressional intent. The rule package is very similar to the previous rule that was vacated by the U.S. Court of Appeals for the Fifth Circuit in 2018 for exceeding the DOL's legal authority by expanding the definition of "investment advice fiduciary" beyond the meaning that Congress intended.[288] One of the key failures of the prior rule was that the rule did not make a distinction between investment advice for a fee and sales activity, the same issue as the new proposed rule has.[289] Additionally, the new rule does not make it clear whether competitive bidding processes for investment managers might inadvertently trigger fiduciary status.[290] Despite a similar rule have already been overturned and the existing regulatory framework in place, the DOL still decided to push this new rule forward.

On April 25, 2024, the DOL finalized the rule against this Committee's objections.[291] Even though the DOL made some changes and clarifications to this rule, this rule still significantly hurts small businesses and adds additional red tape that overlaps with other agencies' regulations. This rule has already led to challenges and litigation.[292]

b. Workplace Injury Rule

The Committee's inquiry into the OSHA's proposed Workplace Injury Rule illustrates how issues with overlapping or duplicative regulations arise imposing costs and confusion for small businesses.[293] The OSHA responded to this Committee a month late without addressing the Committee's specific questions and dismissing the Committee's legitimate concerns about the rule's impact on small businesses stating that "[a]lthough OSHA's recent final rule revised [previous] provisions for clarity, it did not make any substantive changes to the requirements."[294] However, the new rule's requirements differ from the previous one, for example, the updated regulation requires organizations with over 100 employees in high-risk industries to electronically submit detailed, case-specific information for each recordable injury and illness, in addition to the annual summary that was previously required.[295]

The OSHA estimates that the total cost of the rule will be $7.7 million annually: $7.1 million cost to the

[285] Letter from Roger Williams, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Department of Labor (Dec. 7, 2023).
[286] Letter from Julie Su, Acting Sec'y, Dep't of Labor., to Roger Williams, Chairman, H. Comm. on Small Bus (Feb. 15, 2024).
[287] Austin R. Ramsey, *Biden rolls legal dice by proposing fourth fiduciary 401(k) rule,* BL (Nov. 7, 2023).
[288] *See* Chamber of Com. of the U.S. v. U.S. Dep't of Labor, 885 F.3d 360 (5th Cir. 2018)
[289] *Id.*; *Retirement Security Rule: Definition of an Investment Advice Fiduciary*, 88 Fed. Reg. 75890 (2023) (to be codified at 29 C.F.R. 2510); Austin R. Ramsey, *Biden rolls legal dice by proposing fourth fiduciary 401(k) tule,* BL (Nov. 7, 2023).
[290] Austin R. Ramsey, *Biden rolls legal dice by proposing fourth fiduciary 401(k) rule,* BL (Nov. 7, 2023).
[291] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32122 (2024) (to be codified at 29 C.F.R. 2510).
[292] Ben Miller, *Insurer group files first suit over Biden 401(k) advice rule (1)*, BL (May 2, 2024).
[293] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor, et al. (Aug. 3, 2023).
[294] Letter from Liz Watson, Ass. Sec'y, U.S. Dep't of Labor., to Roger Williams, Chairman, H. Comm. on Small Bus. (Sept. 15, 2024).
[295] Improve Tracking of Workplace Injuries, 29 C.F.R. § 1904 (2023) (to be codified at 29 C.F.R. § 1904).

private sector to "become familiar with the rule's requirements, update software, and submit forms electronically," and $0.6 million cost to the government.[296] This rule is problematic not only for these burdensome compliance requirements, but because it regulates 66 different industries that are regulated also by other agencies.[297] Regulating so many industries that already need to comply with countless other regulations and agencies who are their main regulators, will create overlap. The OSHA rule is an example of a far-reaching rule where the OSHA seemingly did not consider the rules promulgated by other agencies directly regulating these specific sections of the economy.

2. DOE and FTC: Ceiling Fans Rules

An example of small businesses getting hit from all sides across agencies is the energy-related regulations for ceiling fans. The Committee wrote the DOE on August 24, 2023, about the regulatory burden of its proposed energy conservation standards for ceiling fans.[298] After more than two months, the DOE provided a high level response barely answering any of the Committee's questions.[299] This proposed rule would decrease the maximum estimated energy consumption permissible for large diameter and belt driven ceiling fans.[300] The rule would require numerous small business fan manufacturers to redesign their products and may put between 10 and 30 percent of small business ceiling fan manufacturers out of business.[301]

Ceiling fan manufacturers need to know several sets of regulations from several agencies at any given time, many of which incorporate and reference regulations only promulgated by the DOE. However, it is unlikely that a small ceiling fan manufacturer would know to check at least 6 other agencies—such as the DOE, EPA, OSHA, DOL, CPSC, and FTC—beyond the DOE's regulatory framework for energy-related regulations. For example, the FTC's proposed Energy Labeling Rule, directly impacts labeling requirements for a wide variety of home fixtures including ceiling fans and large appliances.[302] Further, under the Biden Administration, agencies that would not normally engage in energy or climate related rules are now expanding their reach. For instance, the CPSC has involved itself in regulating energy standards for certain consumer products. These kinds of overlaps add unnecessary red tape and confusion for small businesses.

3. OMB/FAR Council and SEC: Climate Disclosure Rule

Some of the strongest examples of duplicative regulations involve climate disclosure regulations. The Committee wrote to the Office of Management and Budget (OMB) regarding Federal Acquisition Regulatory Council's (FAR Council) proposed rule about climate disclosures.[303] In its response to the Committee's letter, OMB did not answer any of the Committee's questions but only stated that they have "shared [the Committee's] letter with the members of the FAR Council so that [the Committee's] comments may be taken under consideration as the FAR Council evaluates the public comment and makes revisions, as appropriate, before publishing a final rule."[304] This rule would require certain federal contractors to disclose greenhouse gas emissions and monetary climate-related risks, along with requiring them to create targets to reduce emissions.[305] This will burden recipients

[296] *Id.*
[297] News Release, Dep't of Labor, Occupational Safety & Health Admin., Dep't of Labor Announces Rule Expanding Submission Requirements For Injury, Illness Data Provided By Employers In High-Hazard Industries (Jul. 17, 2023).
[298] *See* Energy Conservation Standards for Ceiling Fans, 88 Fed. Reg. 40932 (2023) (to be codified at 10 C.F.R. § 430); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer M. Granholm, Sec'y, Dep't. of Energy (Aug. 24, 2023).
[299] Letter from Amanda Mahoney, Bldg. Tech. Off. Dir., to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 30, 2023).
[300] *See* Energy Conservation Standards for Ceiling Fans, 88 Fed. Reg. 40932 (2023) (to be codified at 10 C.F.R. § 430).
[301] 88 Fed. Reg. at 41007-08. (Table VI.1 shows that at least three of the ten large diameter ceiling fan manufactures will experience conversion costs greater than 20 percent of triennial revenues).
[302] *See Energy Labeling Rule*, 89 Fed. Reg. 7566 (Feb. 2, 2024) (to be codified at 16 C.F.R. § 305).
[303] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Mathew C. Blum, Acting Adm'r, Off. of Federal Procurement Policy (Jun. 9, 2023).
[304] Letter from Wintta M. Woldemariam, Ass. Dir., Off. of Federal Procurement Policy, to Roger Williams, Chairman, H. Comm. on Small Bus. (Jul. 21, 2023).
[305] *See* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68412 (2022) (to be codified at 48 C.F.R. §§ 1. 4, 9, 23, 52).

of federal contracts with substantial and unreasonable costs.[306] In fact, the proposed rule states, the "DOD, GSA, and NASA expect this rule may have a significant economic impact on a substantial number of small entities."[307] Additionally, the Securities and Exchange Commission (SEC) Climate Disclosure Rule already mandates entities to report their greenhouse gas emissions, climate-related risks that are likely to have a material impact on their business, and strategies to mitigate emissions.[308] For small businesses subject to both rules, requiring virtually the same disclosures, compliance burdens and costs are essentially doubled. This is the scenario the RFA was designed to prevent.

4. EPA and DOE: Electric Vehicles Rules

Another clear example of overlapping regulations is between the EPA and DOE regarding electric vehicles. This Committee wrote the EPA regarding its proposed rule change to the vehicle emissions standards for light duty passenger cars, light trucks, and medium-duty vehicles.[309] After three months, the EPA provided a high-level response to the Committee determining "the proposed standards would not have economic impacts sufficient to trigger the Regulatory Flexibility Act."[310] The Committee found this to be false. This rule would require that vehicles made after 2027 meet heightened tailpipe emissions standards, require batteries within electric vehicles meet certain durability requirements, and limit the number of non-electric vehicles that importers are permitted to import annually.[311] Thus, this proposed rule would require numerous small entities to re-engineer their vehicles to comply with these increased standards, limit the supply of vehicles for Independent Commercial Importers (ICI), and create new standards for battery longevity.[312]

Furthermore, the EPA asserts that this rule would have minimal effects on small businesses, in part, based on its claim that all small entity vehicle manufacturers in the United States specialize in electric vehicles. The Committee found this assertion to be false as well. Currently, Shelby Supercar Company makes the fastest domestic production vehicle in the United States, and Hennessey Special Vehicles makes the second fastest—both companies are small entities, and neither uses electric power units in its vehicles.[313] Unfortunately, on April 18, 2024, the EPA finalized this rule despite being made aware of this error by the Committee.[314]

While small businesses will need to revise their operations to comply with this costly and burdensome rule, they also must adhere to the DOE's recent final rule regulating the same area. On March 29, 2024, the DOE released an updated equation that determines how the petroleum-equivalent fuel economy is calculated.[315] The paradigm between these two stringent regulations—in an effort to advance the Biden Administration's EV policies—runs

---

[306] Nat'l Council of Farmer Cooperatives, *Comments Regarding the DoD, GSA, and NASA proposed rule to implement certain GHG and climate-related financial disclosures; Docket ID#: FAR Case 2021-015, Docket No. FAR-2021-0015, Sequence No. 1.*, at 2 (FAR Case 2021-015) (Feb. 11, 2023).

[307] *See* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68412 (2022) (to be codified at 48 C.F.R. §§ 1. 4, 9, 23, 52).

[308] *See* Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (2024) (to be codified at 17 C.F.R. §§ 210, 229, 230, 232, 239, 249).

[309] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael S. Regan, Adm'r, U.S. Env't Prot. Agency (Aug. 3, 2023).

[310] *See* Letter from Tim Del Monico, Assoc. Adm'r, U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus., (Oct. 17, 2023).

[311] *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 29184 (2023) (to be codified at 40 CFR §§ 85, 86, 600, 1036, 1037, 1066).

[312] *Id.*

[313] Dustin Hawley, *Worlds Fastest Production Vehicles*, J.D. POWER (Last visited Jul. 14, 2023).

[314] *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 27842 (2024) (to be codified at 40 CFR §§ 85, 86, 600, 1036, 1037, 1066, 1068).

[315] *See* Petroleum-Equivalent Fuel Economy Calculation, 89 Fed. Reg. 22041 (2024) (to be codified at 10 C.F.R. § 474).

a serious risk where small business, in complying with one rule, may not be able to comply with the other. This is the danger of overlapping regulations the RFA considers and is another reason why agencies are required to ensure their regulations harmonize, not overlap, with other regulations from other agencies.

D. Congressional Oversight and Administrative Procedure Act

When Congress passes a law to create an agency, it typically gives the power to regulate certain matters to that agency.[316] However, agencies can only act within the authority granted by Congress and Congress maintains legislative oversight over rules.[317] The Constitution charges Congress with the responsibility and power to conduct oversight of the federal agencies.[318] Congress has undisputable capacity to oversee the performance of federal agencies, consistent with its constitutional authority.[319] Possession of relevant information is an essential precondition to the effective discharge of Congress's oversight duties. Congress "cannot conduct effective oversight of the federal government without detailed information about the operations of its departments and agencies."[320]

Agencies must also follow the requirements provided in the APA in the rulemaking process. The APA regulates the agencies' rulemaking when they are generating rules within the authority Congress has granted them. The APA requires agencies to provide the public with adequate notice of a proposed rule.[321] After they have provided notice, the agency then must provide "interested persons with a meaningful opportunity to comment on the proposed rule through the submission of written 'data, views, or arguments.'"[322] The APA does not determine how long the comment period must be, however, the courts have explained the agency must "provide an 'adequate' opportunity to comment—of which the length of the comment period represents only one factor for consideration."[323] These comments must be submitted through the formal process and *ex parte* communications (communications with outside entities) are prohibited in order to prevent undue influence from outside entities into the rulemaking process. Unfortunately, some agencies attempted to improperly apply this prohibition to Congress. It is clear from the case law and Congress' constitutional duty to conduct oversight that communications with Congress are not prohibited. After the comment period ends, agencies must consider the "relevant matter presented" and incorporate into the adopted rule a "concise general statement" of the "basis and purpose" of the final rule.[324]

1. The FDA, BOEM, and DOL: Policy not to Discuss Proposed Rules with Congress

As part of the Committee's investigation into how agencies comply with the RFA, the Committee sent the FDA, BOEM, and DOL letters seeking a deeper explanation of their proposed rules' impact on small businesses.[325] However, the FDA, BOEM, and DOL attempted to interfere with congressional oversight by refusing to provide any information to the Committee regarding some of their proposed rules claiming that it was against their policy or the APA. In response, the Committee wrote to the FDA, BOEM, and DOL regarding their policies to not

[316] CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING & JUDICIAL REVIEW, at 17 (2017).; U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-105870, LEGISLATIVE BRANCH OPTIONS FOR ENHANCING CONGRESSIONAL OVERSIGHT OF RULEMAKING AND ESTABLISHING & OFFICE OF LEGAL COUNSEL, at 4 (2023).

[317] U.S. Const. art. 1, § 1; CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING & JUDICIAL REVIEW, 1 (2017); 3 Admin. L. § 13.03; U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-105870, LEGISLATIVE BRANCH OPTIONS FOR ENHANCING CONGRESSIONAL OVERSIGHT OF RULEMAKING & ESTABLISHING & OFFICE OF LEGAL COUNSEL, at 1 (2023).

[318] U.S. CONST. art. 1, § 1.

[319] *See* AT&T v. U.S., 117 F.3d 1368, 1369 (Fed. Cir. 1999).

[320] Comm. on the Judiciary of the U.S. H.R. v. McGahn, 968 F.3d 755, 760 (D.C. Cir. 2020).

[321] 5 U.S.C. § 553(b).

[322] CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING & JUDICIAL REVIEW, at 2 (2017).

[323] *See* N.C. Growers' Ass'n v. UFW, 702 F.3d 755, 770 (4th Cir. 2012); CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING & JUDICIAL REVIEW, at 2 (2017).

[324] CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING & JUDICIAL REVIEW, at 3 (2017); 5 U.S.C. § 553(c).

[325] Letter from Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus., to Robert M. Califf, M.D., Comm'r, U.S. Food & Drug Admin. (Jun. 28, 2023).

discuss their proposed rules with Congress.

The FDA, BOEM, and DOL withholding requested information prevented the Committee from conducting proper oversight over these rules. As a general rule, *ex parte* communications between federal agencies and Congress are encouraged for Notice-and-Comment rulemakings.[326] Courts have found that better legislation and rules are created when agencies and Congress work together to create rules which implement legislation correctly.[327] 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 their responses to the Committee's inquire about the proposed rules, the agencies indicated that small businesses and their comments were being heard in this rulemaking process.[328] While it was reassuring the FDA, BOEM, and DOL claimed to have considered these interests, the purpose of this Committee's letters was to ensure that the agencies were, 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."[329] Rule X of the Rules of the United States House of Representatives delegates this responsibility to standing committees.[330]

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.[331] This includes the ability of Congress 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.

2. The DOE, DOL, and SEC: Ramifications of Shortened Comment Period

This Committee also raised concerns about comment periods being shortened by the EPA, DOL, DOE, and SEC.[332] Each of these agencies either omitted an answer in their response for the length of their comment period or did not respond to the Committee's letters altogether. [333] The lack of responsiveness for this particular concern is apparent.

For instance, this Committee wrote the DOL raising this concern regarding their Fiduciary Rule.[334] In November 2023, 18 trade associations wrote a letter to the DOL noting "significant and unanticipated" regulatory

---

[326] MAEVE P. CAREY, *ET AL.*, CONG. RESEARCH SERV., IF12368, COMMUNICATIONS BETWEEN CONGRESS & FEDERAL AGENCIES DURING THE RULEMAKING PROCESS (Mar. 30, 2023).

[327] Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981).

[328] Letter from Erin O'Quinn, Acting Assoc. Comm'r for Legislative Affairs, U.S. Food & Drug Admin., to Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).

[329] McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

[330] Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

[331] Rules of the H.R., Rule X(1)(q)(1), 118th Cong. (2022).

[332] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer M. Granholm, Sec'y, U.S. Dep't of Energy (Nov. 2, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Dec. 7, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael S. Reagan, Adm'r, U.S. Env't Prot. Agency (Aug. 3, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Gary Gensler, Chairman, U.S. Sec. & Exch. Comm'n (July. 27, 2023).

[333] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer M. Granholm, Sec'y, U.S. Dep't of Energy (Nov. 2, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Dec. 7, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael S. Reagan, Adm'r, U.S. Env't Prot. Agency (Aug. 3, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Gary Gensler, Chairman, U.S. Sec. and Exch. Comm'n (July. 27, 2023).

[334] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Dec. 7, 2023).

changes and highlighting the need for a 60-day extension to the comment period to provide meaningful feedback and comment.[335] Despite raising concerns about increased costs associated with providing financial advisory services, potential limitations on small firms' ability to offer holistic investment advice and recommendations, and potential barriers to entry into the profession, the DOL denied the request.[336]

This Committee asked the DOL whether it considered extending the comment period to 90 days, or longer, given the impacted entities sufficient time to respond.[337] Although the DOL has claimed to recognize "the important role small businesses play in our economy," the DOL ignored the Committee's question in their response.[338] Without a sufficient comment period, small businesses are not able to properly voice their concerns—defeating the purpose of the notice-and-comment framework and depriving small businesses the ability to advocate for themselves in the rulemaking process.

The DOE and SEC also avoided accountability by limiting opportunities for small businesses to engage in the regulatory process. This Committee asked the DOE why its comment period was 60 days for its Commercial Refrigeration Rule, 15 days shorter than the agency's own guidelines, but the DOE refused to answer the question.[339] Additionally, the Committee questioned why the SEC's comment period on proposed rules has drastically declined since 2021, and whether the SEC has considered the impact of a shortened comment period on small businesses.[340] The SEC ignored the question.[341]

V. Solutions

This Committee has developed several suggested reforms to overcome the issues found with agencies' RFA compliance and to strengthen the RFA. As discussed in this report, federal agencies constantly fail to comply with the RFA's requirements causing small businesses to suffer. The agencies are supposed to comply with the RFA's requirements to lessen the regulatory burden on small businesses; however, as illustrated in this report, the current regulatory framework is insufficient to protect American small businesses. Change is required. This section lays out four main areas of reform that the Committee believes will help relieve the regulatory burdens on small entities imposed by federal regulators.

A. Significant Impact on a Substantial Number of Small Entities Certification

When an agency is determining whether their proposed regulation will have a significant impact on a substantial number of small entities, they must either choose to conduct a full regulatory flexibility analysis or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. Most agencies merely choose the latter to avoid doing the work associated with an RFA analysis.

---

[335] Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., to Lisa M. Gomez, Assistant Sec'y of Labor, Emp. Benefits Sec. Admin., U.S. Dep't of Labor (Dec. 20, 2023).

[336] Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., to Lisa M. Gomez, Assistant Sec'y of Labor, Emp. Benefits Sec. Admin., U.S. Dep't of Labor (Jan. 2, 2024).

[337] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Dec. 7, 2023).

[338] Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Mar. 10. 2023). *See* Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Feb. 15, 2024).

[339] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer M. Granholm, Sec'y, U.S. Dep't of Energy (Nov. 2, 2023); Letter from Mandy Mahoney, Bldg. Tech. Off. Dir., Off. Energy Efficiency & Renewable Energy, U.S. Dep't of Energy, to Roger Williams, Chairman, H. Comm. on Small Bus. (Dec. 18, 2023).

[340] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Gary Gensler, Chairman, U.S. Sec. & Exch. Comm'n (July. 27, 2023).

[341] Letter from Gary Gensler, Chairman, U.S. Sec. & Exch. Comm'n, to Roger Williams, Chairman, H. Small Bus. Comm., *et al.* (Sep. 26, 2023).

To avoid the certification being merely a box checking exercise, the Committee concurs with Advocacy's recommendation that agencies should answer the following questions in their analysis:

- Which small entities will be affected?
- Has adequate economic data been obtained?
- What are the economic implications/impacts of the proposal or do the data reveal a significant economic impact on a substantial number of small entities?

Additionally, each agency seems to have a different definition of what a significant impact on a substantial number of small entities means. While the Committee understands that creating a uniform definition across the federal government of a significant impact on a substantial number of small entities is unrealistic, the Committee believes it would be beneficial for each agency to submit a report to Congress on the definition they use so that they can be held to that standard when submitting subsequent rules.

B. Regulatory Flexibility Act Reforms

Currently, the RFA only requires agencies to consider small entities that are directly impacted by a rule, not those who are affected by the downstream impacts. For example, when considering updated requirements for ceiling fans, the DOE is merely required to consider small entities which manufacture ceiling fans, not those who would have to purchase new ceiling fans to stay in compliance with new regulations. The Committee believes that agencies should be required to consider the indirect costs imposed on small entities when conducting an RFA analysis.

Further, the RFA uses language which makes it very flexible standard to rulemaking agencies, such as "when feasible" and "to the extent practicable." The Committee believes that the statute should be amended so that agencies are compelled to do this analysis and not merely get by with saying that additional analysis is not "practicable."

C. Rule Challenges

Advocacy is the chief, independent advocate for small entities within the federal government. Advocacy is the "watchdog" of the RFA and works to compel agencies to adhere to the requirements of the RFA. Unfortunately, their authority is often ignored because they lack enforcement mechanisms to urge agencies to comply with their guidance.

The Committee supports providing a pathway for small entities to petition Advocacy to review a rule, and if Advocacy believes that small entities were not accurately accounted for, Advocacy could then require the agency to reconsider the rule and conduct a full RFA analysis.

D. Periodic Review of Rules

The RFA requires agencies to review their rules that have a significant impact on a substantial number of small entities to be reviewed at least every 10 years. Agencies have the option to delay this review for a year up to five times. The Committee believes that if a rule is so important that it must still be in effect after 10 years, there is no rationale for why an agency would have to delay the review of a rule for five years. The Committee believes that an agency should be able to delay for one year and must give a valid rationale for why it is doing so.

Further, when the agency is reviewing the rule, they must again only consider the direct costs the rule has had on small entities. The Committee believes that agencies should be required to also consider the indirect costs imposed by the rule on Main Street.

E. Cumulative Economic Impact of the Rule

Given that many agencies fail to consider the economic reality when drafting new rules, the Committee believes that amending the current IRFA requirements to include stronger language and descriptions of the cumulative economic impact of the rule, any disproportionate impacts on small entities, and how the rule may impair their access to credit is necessary. Currently, the RFA's language provides an exceptional amount of flexibility to agencies, using language like "to the extent practicable" and "when feasible." The Committee believes this could be remedied by altering this language to require agencies to respond to the requirements within the RFA in all instances.

VI. Conclusion

The massive number of regulations that federal agencies pass each year and the resulting paperwork hours illustrate how detrimental an unchecked regulatory regime can be on small businesses. Under the Biden Administration, this regulatory state has gotten dramatically worse.

The investigation exposed several main problems, including how agencies pivot the RFA's requirements and get away with overregulating small businesses. First, agencies improperly certify the rules in order to avoid conducting the RFA analysis, which means that these burdensome regulations come into effect without adequately assessing the real impacts to small businesses. Second, agencies underestimate both the costs and the number of impacted small businesses which creates a disparity between what the agency claims and what the real-world impact of the rules are on small businesses. Third the agencies often do not adequately consider less burdensome alternatives, or they choose to finalize a rule that is even more harmful to small businesses than other alternatives would have been. Fourth, agencies repeatedly fail to appropriately assess if a rule overlaps, conflicts, or is duplicative of other rules, which causes small businesses to suffer from multiple overlapping regulations from both within same agency and across the federal government. Lastly, some agencies have refused to submit to congressional oversight and provide Congress with required information during their rulemaking process, which violates both the Constitution and the APA and prevents this Committee from its duty to protect Main Street America.

This Committee found that the RFA, as it is, fails to protect small business interests and agencies treat it like a "check the box" exercise rather than actually analyzing the effects of their regulations. This Committee has developed several reforms to overcome the issues with the RFA compliance and to strengthen the RFA. As discussed in this report, federal agencies constantly fail to comply with the RFA's requirements, hurting small businesses. The current regulatory framework is insufficient to protect American small businesses and change is required.

Appendix 1

Agency	Rule	Date Sent	Response Date (if applicable)
1. Army Corps	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023
2. CFPB	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023
3. CPSC	Implementation of RFA, SBREFA, and EO13272	2/22/2023	5/5/2023
4. USDA	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/30/2023
5. Commerce	Implementation of RFA, SBREFA, and EO13272	2/22/2023	5/19/2023
6. DOD	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023
7. ED	Implementation of RFA, SBREFA, and EO13272	2/22/2023	No Response
8. DOE	Implementation of RFA, SBREFA, and EO13272	2/22/2023	4/12/2023
9. DOI	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/14/2023
10. DOL	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023
11. DOT	Implementation of RFA, SBREFA, and EO13272	2/22/2023	4/20/2023
12. EPA	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/7/2023
13. FDIC	Implementation of RFA, SBREFA, and EO13272	2/22/2023	12/21/2022
14. Fed. Reserve	Implementation of RFA, SBREFA, and EO13272	2/22/2023	6/23/2023
15. FERC	Implementation of RFA, SBREFA, and EO13272	2/22/2023	4/26/2023
16. FTC	Implementation of RFA, SBREFA, and EO13272	2/22/2023	Retransmitted 117th cong. Response on 3/14
17. HHS	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023
18. HUD	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/16/2023
19. IRS	Implementation of RFA, SBREFA, and EO13272	2/22/2023	5/12/2023
20. NLRB	Implementation of RFA, SBREFA, and EO13272	2/22/2023	4/3/2023
21. OSHA	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023- same as DOL response
22. SBA	Implementation of RFA, SBREFA, and EO13272	2/22/2023	1/19/2023

23. SEC	Implementation of RFA, SBREFA, and EO13272	2/22/2023	6/2/2023
24. Treasury	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/17/2023 12/12/2022
25. VA	Implementation of RFA, SBREFA, and EO13272	2/22/2023	4/18/2023
26. FTC	Eyeglass Rule	5/15/2023	5/26/2023
27. DOE	Energy Conservation Program: Energy Conservation Standards for Distribution Transformers	5/16/2023	8/2/2023
28. CFPB	Credit Card Penalty Fees (Regulation Z)	5/17/2023	6/1/2023
29. BLM	Conservation and Landscape Health	5/18/2023	8/7/2023
30. Federal Acquisition Regulation Council (OMB)	Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk	6/9/2023	7/21/2023
31. United States Citizen and Immigration Services	US Citizens and Immigration Servies Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements	6/9/2023	8/4/2023
32. DOE	Energy Conservation Standards for Battery Chargers	6/22/2023	8/2/2023
33. FDA	Tobacco Product Standard for Characterizing Flavors in Cigars	6/28/2023	10/18/2023
34. EPA	Perchloroethylene (PCS); Regulation Under the Toxic Substances Control Act (TSCA)	6/29/2023	8/29/2023
35. MSHA	Lowering Miners' Exposure to Respirable Crystalline Silica	7/20/2023	1/10/2024
36. DOL	Lowering Miners' Exposure to Respirable Crystalline Silica	7/20/2023	1/10/2024
37. EPA	Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles	7/20/2023	10/17/2023
38. SEC	Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews	7/27/2023	9/26/2023
39. BOEM	Risk Management and Financial Assurance for OCS Lease and Grant Obligations	8/3/2023	4/14/2023
40. EPA	Lead Paint Standards	8/3/2023	No resp.
41. OSHA	Improve Tracking of Workplace Injuries and Illnesses	8/3/2023	9/15/2023
42. DOE	Energy Conservation Program: Energy Conservation Standards for Ceiling Fans	8/24/2023	10/30/2023
43. DOL	Updating the Davis-Bacon and Related Acts and Regulation	9/28/2023	10/18/2023
44. DOL	Fair Labor Standards Act	9/28/2023	10/18/2023

45. ATF	Change to Definition of "Engaged in the Business of Selling Firearms"	10/12/2023	12/4/2023
46. BOEM	Lease Sale 261 and Rice's Whale	10/12/2023	4/11/2024
47. DOL & MSHA	Lowering Miners' Exposure to Respirable Crystalline Silica – Insufficient Response	11/2/2023	11/21/23
48. DOE	Energy Conservation Program: Energy Conservation Standards for Commercial Refrigerators, Freezers, and Refrigerator-Freezers	11/2/2023	4/11/2024
49. CPSC	Safety Standard for Residential Gas Furnaces and Boilers; Correction	11/9/2023	1/5/2024
50. DOL OSHA	Worker Walkaround Representative Designation Process	11/15/2023	1/31/2024
51. OMB/ OIRA	Tobacco Product Standard for Menthol in Cigarettes	11/16/2023	2/1/2024
52. BOEM	Lease Sale 261 and Rice's Whale – Insufficient Response	11/20/2023	4/11/2023
53. FDA	Tobacco Product Standard for Characterizing Flavors in Cigars - Insufficient Response	11/20/2023	No resp.
54. BIS/ Commerce	Gun Export Pause	12/5/2023	3/8/2024
55. DOL	Retirement Security Rule: Definition of an Investment Advice Fiduciary	12/7/2023	2/15/2024
56. NLRB	Joint Employer Status Under the National Labor Relations Act	12/7/2023	1/4/2024
57. DOL	Employee or Independent Contractor Classification Under the Fair labor Standards Act	1/18/2024	2/6/2024
58. FTC	CARS Rule	1/25/24	2/8/2024
59. EPA	National Emission Standards for Hazardous Air Pollutants: Commercial Ethylene Oxide (EtO) Sterilization Technology Review Methane PFAS National Primary Drinking Water Regulation Rulemaking Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (Pm2.5) Clean Power Plant Rule	2/14/2024	4/24/2024
60. DOL	National Apprenticeship System Enhancements	2/15/2024	4/29/2024
61. DOL/ OSHA	RFA Follow Up	3/13/2024	No resp.

62. DOE	RFA Follow Up	3/13/2024	No resp.
63. EPA	RFA Follow Up	3/13/2024	No resp.
64. FTC	Non-Compete Clause Rule	3/14/2024	4/15/2024
65. FTC	RFA Fees	5/9/2024	No resp.
66. CFPB	RFA Fees	5/9/2024	No resp.

U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

May 22, 2024

The Honorable Roger Williams
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

The Honorable Nydia Velazquez
Ranking Member
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Williams and Ranking Member Velazquez:

Thank you for holding today's hearing, "Burdensome Regulations: Examining the Biden Administration's Failure to Consider Small Businesses." I am Traci Tapani, Co-President of Wyoming Machine in Stacy, Minnesota. My family-owned company specializes in sheet metal fabrication, and we offer a variety of services to clients from laser cutting to welding.

I serve on the Board of Directors for the U.S. Chamber of Commerce and recently became the Vice-Chair of the Chamber's Small Business Council. 96% of Chamber member companies have fewer than 100 employees and 75% have fewer than 10. The Small Business Council works to ensure the views of small businesses are integrated into the Chamber's policy-making process.

With the recent surge in costly and restrictive federal regulations[1], this hearing will help ensure that small businesses have a legitimate voice in federal rulemakings and builds on previous hearings that demonstrate how federal regulation can disproportionately harm small businesses like mine. I am hopeful that my statement, along with the testimony of other witnesses, can focus Congress's spotlight on ways to improve the effectiveness of small business in federal rulemakings, which was the foundational concept behind the Regulatory Flexibility Act.

Small Business and the Regulatory Flexibility Act

Small businesses are recognized as America's economic engine. The roughly 33.1 million small businesses make up over 99% of all U.S. businesses, represent 43.5% of America's GDP, and account for 62% of net job creation since 1995.[2] Despite the strength of small businesses' economic contributions, they are at a disadvantage when it comes to dealing with regulations. The Chamber's work with the Bradley Foundation showed that U.S. businesses shoulder $1.9 trillion in annual regulatory compliance costs.[3] For small businesses with 50 or fewer employees, the costs are nearly 20% higher than the average for all businesses. Small manufacturers incur costs of $34,671 per employee per year. This is more than three times the cost shouldered by average U.S. companies.[4]

---

[1] Forbes, *A Rush to Regulate*, Susan E. Dudley (May 7, 2024).
[2] U.S. Small Business Administration, Office of Advocacy, *Frequently Asked Questions About Small Business* (March, 2023).
[3] U.S. Chamber of Commerce Foundation, *The Regulatory Impact on Small Business: Complex.Cumbersome.Costly*, (March 2017).
[4] W. Mark Crain and Nicole V. Crain, A Report for the National Association of Manufacturers, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* (September 10, 2014).

A more recent study shows that regulatory costs on American businesses in 2022 totaled more than $3 trillion, which equals 12% of GDP and is larger than the entire economic output of U.S. Manufacturers.[5]

While we might be categorized as small, manufacturers like Wyoming Machine play a big role in supplying custom parts and components to some of the largest U.S. manufacturing companies. The pandemic's supply chain issues were a frightening and painful reminder of how important it is for our economy, safety, and security to have a strong domestic manufacturing supply chain. Manufacturing is a capital-intensive business, and ongoing investments in equipment, facilities, and people are the ways that we can increase productivity and remain competitive. Having worked in the manufacturing sector for 30 years, I know exactly how it feels to balance the cost burden of increasing regulations with a need to invest in my business while offering people in my community good jobs, competitive pay, and a stable place to work.

The Regulatory Flexibility Act (RFA), amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), was intended to rectify the disproportionate regulatory compliance costs and paperwork burdens faced by small business by incorporating their concerns into the regulatory process and by insisting that federal agencies find ways to meet their regulatory objectives while at the same time minimizing costs on small businesses.[6] The Small Business Administration's (SBA) Office of Advocacy is responsible for overseeing agency compliance with the RFA and acts as an independent voice within the Administration to ensure that agencies are sensitive to how their regulations impact small businesses.

Agency Failures to Abide by the RFA

Federal agencies have on numerous occasions failed to comply with requirements under the RFA. A recent example was when SBA's Office of Advocacy found the Department of Labor's analysis of the impact of its independent contractor rule "deficient" because it "severely underestimate[d]" the economic impacts of the rule on small business; and "failed to estimate any costs" for small businesses to reclassify independent contractors as employees.[7] When the Department of Labor ignored the Office of Advocacy's advice and finalized its rule earlier this year, the U.S. Chamber of Commerce joined with the National Federation of Independent Business (NFIB), Associated Builders and Contractors, American Trucking Associations, and other associations representing millions of small business owners to challenge the rule in court on this and other grounds.[8]

Inviting legal challenges after a rule is finalized does not seem to be an efficient or effective way for federal officials to resolve policy disagreements, especially when the RFA was created to bring small businesses and regulatory officials together for the purpose of finding ways to meet regulatory objectives while minimizing negative economic impacts on small businesses.

---

[5] Nicole V. Crain and W. Mark Crain, A Study Conducted for the National Association of Manufacturers, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* (October, 2023).
[6] Regulatory Flexibility Act, 501 U.S.C. Sec. 601 et seq. (1980).
[7] U.S. Small Business Administration, Office of Advocacy, Letter to U.S. Department of Labor re: Employee or Independent Contractor Under the Fair Labor Standards Act (FLSA) (December 12, 2022).
[8] *Coalition for Workforce Innovation v. Su*, No. 1:21-CV-130 (E.D. Tex. Mar. 5, 2024).

Loopholes in the RFA

Loopholes in the RFA have been used by federal regulators as an excuse to bypass the law's requirements and purpose and to misrepresent the costs of new mandates on small businesses because (a) regulators take the position that transparency requirements only apply to direct regulatory impacts on businesses and (b) gaps in the RFA's remedy provisions often deprive businesses of timely relief when agencies ignore small business concerns in violation of the RFA.

Lack of Transparency

Agency exploitation of interpretations of the RFA that limit it to requiring consideration of small business impacts only for directly regulated businesses is apparent in the ongoing Basel III Endgame rulemaking. Bank regulators published their perceived impact on large banks but did not disclose how new mandates will make small business loans more expensive.

Abuse of "Certification" under the RFA

Unfortunately, federal agencies often choose to circumvent small business input by incorrectly certifying that a rulemaking will not have a significant economic impact on a substantial number of small entities. Last year's RFA report, as well as RFA reports over the past 41-years, cites numerous examples of how agencies do not properly "certify" whether their proposals will impact small businesses.

One of the most egregious failures of federal agencies to consider small businesses is the series of Waters of the United States (WOTUS) rulemakings promulgated by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers. Rather than seek appropriate input from small businesses on how to manage wetlands permitting in a way that would be both environmentally protective and sensitive to impacts on small businesses, EPA and the Corps repeatedly insisted - in 2014, 2018, and in 2021 – that their proposed WOTUS rules did not impose additional costs on small businesses.

When each of these proposals was issued, SBA's Office of Advocacy correctly faulted EPA and the Corps for improperly "certifying" that their rulemaking would not harm small businesses. On each occasion, the Office of Advocacy faulted the agencies for not convening a panel of small businesses that is required under SBREFA to ensure that EPA, the Consumer Financial Protection Bureau, and the Occupational Safety and Health Administration specially consider small business recommendations for less burdensome alternatives in their rulemakings.[9] In this regard, it is worth noting that the Chamber's lawsuit challenging the 2023 WOTUS rule, which is now pending in the U.S. Court of Appeals for the Sixth Circuit, specifically challenges EPA's and the Corp's "certification" that the rule "will not have a significant economic impact on a substantial number of small entities under the RFA." As the Chamber's

[9] See SBA Office of Advocacy letter to Administrator Gina McCarthy and Maj. Gen. John Peabody re: Definition of "Waters of the United States" Under the Clean Water Act, (October 1, 2014) and SBA Office of Advocacy letter to Administrator Andrew Wheeler and Lieutenant General Todd T. Semonite re: Revised Definition of "Waters of the United States" (Docket No. EPA-HQ-OW-2018-0149), (April 11, 2019) and SBA Office of Advocacy Letter to Administrator Michael S. Regan and Michael L. Connor re: Comments on EPA and Army's proposed rule defining "Waters of the United States" under the Clean Water Act (EPA Docket EPA-HQ-OW-2021-0602 and Army Docket COE-2021-0001-0016), (February 7, 2022).

complaint in that case notes, this certification "is based on a description of the Final Rule that does not reflect reality," as "the Final Rule will impose significant costs on small businesses." The Sixth Circuit has issued a temporary injunction against enforcement of the 2023 rule, as have two other courts.

Even more recently, the Supreme Court's decision in Sackett v. EPA rejected the broad theory of regulatory jurisdiction that was central to the 2023 WOTUS rule. In its decision, the Supreme Court observed that "because the [Clean Water Act] can sweep broadly enough to criminalize mundane activities like moving dirt," "a staggering array of landowners" were "at risk of criminal prosecution or onerous civil penalties" under that broad theory of jurisdiction.

It is unfortunate that EPA and the Corps went to such great lengths to avoid ensuring appropriate small business input. The purpose of the RFA and SBREFA is to ensure that agencies receive constructive small business input that can help regulators meet their regulatory objectives while at the same time minimizing the burden on small businesses like mine.

Support for the PROVE It Act and Legislative Recommendations

H.R. 7198, the Prove It Act, was introduced in February by Representative Brad Finstad, Representative Nathanial Moran, and Representative Yadira Caraveo and helps close loopholes in the RFA and to shore up its effectiveness by:

I. Amending the "certification" requirements under Regulatory Flexibility Act to ensure that agencies take small business input seriously; and
II. Requiring agencies to be transparent about costs on small businesses by including all reasonably foreseeable impacts.

This bipartisan legislation passed the Judiciary Committee on March 21st and is now co-sponsored by Representative David Valadao, Representative Carol Miller, and Small Business Committee member, Representative Maria Salazar. More than 270 state and local chambers of commerce signed on to a letter to Congress this week requesting that the House pass H.R. 7198 and the U.S. Chamber of Commerce Small Business Council will wants to work with you to advance forward the Prove It Act through your committee and to the House floor for a vote."

Please do not hesitate to contact Tom Sullivan, the Chamber's Vice President for Small Business Policy, if you have questions or comments regarding the content of this statement for the record.

Sincerely,

Traci Tapani
Co-President, Wyoming Machine
Vice-Chair Small Business Council
U.S. Chamber of Commerce

Enclosure (1) Letter supporting H.R. 7198 from local and state chambers of commerce

cc: Members of the House Committee on Small Business