

February 1, 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

The Honorable Jim Jordan
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: Small Business Input in Federal Rulemaking

Dear Chairman Williams, Chairman Jordan, Ranking Member Velazquez, and Ranking Member Nadler:

On behalf of millions of small businesses across the country, we urge legislative action to strengthen the meaningful input of small businesses in federal regulatory processes and ensure the intent of the Regulatory Flexibility Act is fulfilled.

The Regulatory Flexibility Act (RFA) of 1980 was signed into law after a bipartisan coalition of small businesses, community leaders, and elected representatives confronted the danger of imposing burdensome red tape on American small businesses. Upon signing the RFA into law, President Carter stated that “small businesses are vital to the growth and to the future of our country” and that regulations “can impose a disproportionate and unfair burden on small businesses.”

The RFA sought to correct this disproportionate burden on small businesses by encouraging federal regulatory agencies to transparently consider the impact of new mandates on small businesses and to minimize negative impacts without compromising the underlying regulatory objectives.

Unfortunately, loopholes in the RFA allow federal regulators to bypass the law’s requirements and misrepresent the costs of new mandates on small businesses because (a) transparency requirements only apply to businesses *directly* regulated and (b) judges may not punish agencies for ignoring small business concerns.

Federal agencies have on numerous occasions failed to comply with requirements under the RFA. In 2023, the National Federation of Independent Business (NFIB) reviewed comment letters from the Office of Advocacy at the U.S. Small Business Administration

(SBA), the independent office responsible for overseeing compliance with the RFA, from the 117th Congress and found 28 instances where SBA's Office of Advocacy cited agencies for lack of RFA compliance. SBA's Office of Advocacy found agencies often improperly certify that rules will not have a significant economic impact on a substantial number of small entities, only consider the direct costs on small businesses, or misrepresent the costs on small businesses from regulation.

For example, 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.

Agency exploitation of the loophole that only requires publishing small business impacts 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 publish how new mandates will make small business loans more expensive.

The Environmental Protection Agency/Army Corps of Engineers Waters of the United States (WOTUS) final rule is a case study in agency misrepresentation of a regulation's costs on small businesses. In their rule, the agencies certified the rule "will not have a significant economic impact on a substantial number of small entities." For decades, bipartisan administrations have claimed that revising the WOTUS definition will not harm small businesses. Yet the millions of farmers, homebuilders, and other industries heavily dominated by small businesses render such a "certification" implausible. Moreover, they highlight a major problem – small businesses lack the legal recourse to force regulators to take them seriously and judges' hands are tied when it comes to holding agencies accountable to small business concerns.

Unfortunately, the concerns raised in this letter are not new. In fact, SBA's Office of Advocacy has sought to close the loopholes over the past 40 years but has not been successful.

Our concern that small businesses are being shut out of the regulatory process are amplified by recent data showing the growth of federal red tape. The National Association of Manufacturers' most recent study on the cost of regulation shows that the cost per employee to comply with federal regulations is three times greater for small firms than the average costs for manufacturers. Former CBO Director, Douglas Holtz-Eakin recently testified before the Small Business Committee that the costs from regulatory mandates currently being issued are fifty percent greater than under any previous administration.

At a time when we are counting on small business growth to enrich communities and bolster America's economy, we cannot afford to bury free enterprise under red tape emanating from Washington.

We urge the Committee to prioritize legislation that strengthens and closes loopholes in the Regulatory Flexibility Act.

We thank you for your leadership to create an environment where small businesses can operate, invest and grow. We look forward to working with you on ways to reduce red tape and burdens for small businesses.

Sincerely,

Add associations and chambers of commerce

Job Creators Network [approved – Karen Harned]

National Federation of Independent Business [approved Josh McLeod]

U.S. Chamber of Commerce [approved Tom Sullivan]