

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS



Statement for the Record of Robert T. Smith
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**United States House of Representatives
Committee on Small Business**

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

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National Federation of Independent Business
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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.