

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

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¹ See Joseph Biden, 46th President of the United States, Remarks by President Biden on Helping Small Businesses (Feb. 22, 2021), <https://bit.ly/3SP1gqU> (“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/3CrnYsj> (“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. Alarming, 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.