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August 23, 2023

The Honorable Ben Cardin  
Chairman  
Committee on Small Business  
& Entrepreneurship  
U.S. Senate  
Washington, D.C. 20510

The Honorable Joni Ernst  
Ranking Member  
Committee on Small Business  
& Entrepreneurship  
U.S. Senate  
Washington, D.C. 20510

Dear Chairman Cardin and Ranking Member Ernst,

On behalf of NFIB, the nation's leading small business advocacy organization, I write regarding the field hearing entitled, "One Size Does Not Fit All: Understanding the Importance of Rightsizing Regulations for Small Businesses." NFIB's nearly 300,000 small businesses appreciate the opportunity to discuss the impacts of burdensome regulations and ways Congress can reduce red tape for small businesses.

Small businesses are concerned with the unprecedented pace of regulations flowing out of Washington. According to one estimate, in a little over two and a half years, the Biden Administration has imposed more than \$403 billion in final rule costs and 232 million paperwork hours.<sup>1</sup> By contrast, over the same period of his presidency, President Obama's Administration imposed more than \$225 billion in final rule costs and 147 million paperwork hours.<sup>2</sup>

These staggering totals fall disproportionately on small businesses that do not have lawyers or compliance officers to navigate complex regulatory issues. They also demonstrate the urgent need for Congress to provide regulatory relief to small businesses.

We believe legislators should look to the example set by President Carter and the Democratic-led 96<sup>th</sup> Congress. In 1980, President Carter and Congress recognized the disproportionate impact of federal regulations on small businesses and unanimously approved the Regulatory Flexibility Act (RFA). Upon signing the RFA into law, President Carter stated, "[t]his bill adds

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<sup>1</sup> Dan Goldbeck, *Biden Administration Goes Past \$400 Billion in Final Rule Costs*, American Action Forum, August 14, 2023, <https://www.americanactionforum.org/week-in-regulation/biden-administration-goes-past-400-billion-in-final-rule-costs/>.

<sup>2</sup> *Id.*

another piece to the far-reaching regulatory reform record that we and the Congress are building.”<sup>3</sup> The President continued, “[s]mall businesses are crucial to a competitive, healthy, and productive economy. However, regulations often impose heavier burdens on small organizations than on big ones. The Regulatory Flexibility Act recognizes that regulations need not be uniform to be effective. It requires agencies, whenever appropriate, to tailor their rules to the size and resources of those affected.”<sup>4</sup>

As President Carter described, federal regulations disproportionately impacted small businesses and the RFA sought to remedy the increasing burdens on small businesses. However, in the 40-plus years since the RFA became law, agencies have found ways to disregard or bypass many of the requirements. NFIB’s recent white paper analyzed the Small Business Administration (SBA) Office of Advocacy’s comment letters to federal agencies from January 2021 to January 2023 and found significant noncompliance with the RFA.<sup>5</sup> In these letters, Advocacy highlighted 28 instances where agencies failed to adequately examine the economic costs of regulations.<sup>6</sup> Advocacy noted that agencies often improperly certify that rules will not have a significant economic impact on a substantial number of small entities.<sup>7</sup> By doing so, agencies disregard the intent of the law, leaving small businesses subject to the one-size-fits-all regulatory environment the RFA sought to correct.

One recent example of a federal agency’s questionable certification of a rule is the Environmental Protection Agency’s (EPA) and the Department of the Army’s expansive Waters of the United States (WOTUS) rule. In finalizing the rule, the EPA and Department of the Army certified it “will not have a significant economic impact on a substantial number of small entities.”<sup>8</sup>

This conclusion seems implausible. According to one estimate by the Attorney General of Iowa, as much as 97% of land in Iowa could now be subject to federal regulation under the final WOTUS rule.<sup>9</sup> In response, a farmer in Iowa will be forced to hire expensive consultants to determine whether their land is subject to the EPA and Department of the Army’s regulatory authority. And yet somehow, the EPA and the Department of the Army concluded that the millions of farmers, ranchers, developers, and small businesses across the country will not be significantly affected.

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<sup>3</sup> The American Presidency Project “*Regulatory Flexibility Act Statement on Signing S. 299 Into Law*,” UC Santa Barbara, <https://www.presidency.ucsb.edu/documents/regulatory-flexibility-act-statement-signing-s-299-into-law>.

<sup>4</sup> *Id.*

<sup>5</sup> Rob Smith, *The Regulatory Flexibility Act: Turning a Paper Tiger Into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, National Federation of Independent Business Small Business Legal Center, May 2023, <https://strgnfibcom.blob.core.windows.net/nfibcom/NFIB-RFA-White-paper.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 88 *Fed. Reg.* 3139, col. 3. <https://www.epa.gov/system/files/documents/2023-01/Revised%20Definition%20of%20Waters%20of%20the%20United%20States%20FRN%20January%202023.pdf>.

<sup>9</sup> Donnelle Eller, *Iowa joins states fighting Biden’s EPA ‘power grab’ to regulate waters of the US*, Yahoo! News, February 18, 2023, <https://news.yahoo.com/iowa-joins-states-fighting-bidens-114024507.html>.

Farmers and small businesses in Iowa know this conclusion is absurd. Thankfully, on May 25, 2023, the U.S. Supreme Court ruled the EPA and Department of the Army had overstepped their regulatory authority under the *Clean Water Act*. The agencies are expected to issue a revised definition by September 1, 2023.<sup>10</sup> Small businesses remain concerned that the agencies will issue a similarly burdensome regulation that does not consider the economic impacts on small businesses.

The WOTUS rule shows the creative ways that agencies often disregard or minimize the economic impacts of regulations. The result is a massive expansion of the regulatory costs and burdens facing small businesses. According to one estimate, President Biden has imposed a “historic regulatory burden” of more than \$10,000 in regulatory costs for each household.<sup>11</sup> These significant burdens will only continue to grow as burdensome pending rules are finalized or go into effect. The Securities and Exchange Commission’s (SEC) proposed rule on climate disclosures is just one example. The rule would require public companies to report the greenhouse gas emissions of the private companies with which they do business. Through the rule, millions of private, small businesses would fall under the SEC’s regulatory authority. However, the SEC estimated that only 1,004 small entities would be affected by the proposed rules.<sup>12</sup>

Additionally, on January 1, 2024, one of the most expansive small business regulations in history will go into effect. This substantial new reporting requirement, known as the Corporate Transparency Act, will affect 32.6 million small businesses in the first year and five to six million small businesses each year thereafter.<sup>13</sup> The cost of this regulation is a staggering \$22.7 billion in its first year and \$5.6 billion per year moving forward.<sup>14</sup> Failure to file completed and updated reports could result in civil penalties of up to \$10,000 and criminal penalties of up to 2 years in prison. In total, this burdensome regulation smothers the smallest businesses in America with more than \$73 billion in compliance costs and it only applies to small businesses with 20 or fewer employees and \$5 million or less in annual revenue.

The unprecedented burdens and the obvious understatement of the impacts of regulations highlight the need for Congress to address the regulatory burdens imposed on small businesses. Congress should consider the following proposals to reduce red tape and strengthen laws like the RFA:

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<sup>10</sup> Amendments to the 2023 Rule, Environmental Protection Agency, June 26, 2023, <https://www.epa.gov/wotus/amendments-2023-rule>.

<sup>11</sup> Casey Mulligan, *The Costs and Benefits of Biden's Regulation*, Wall Street Journal, August 18, 2023, <https://www.wsj.com/articles/biden-regulation-cost-benefit-analysis-7dcdb1ab>.

<sup>12</sup> 87 *Fed. Reg.* 21462, col. 3, <https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf>.

<sup>13</sup> Comments were submitted saying that FinCEN underestimated the compliance costs. NFIB agrees. See Comments of James Richards, Principal of RegTech Consulting LLC, FinCEN's Proposed Beneficial Ownership Information Reporting Form, FinCEN, January 18, 2023, <https://www.regulations.gov/comment/FINCEN-2023-0002-0003>.

<sup>14</sup> Beneficial Ownership Information Reporting Requirements, Final Rule, Financial Crimes Enforcement Network, September 30, 2022, <https://www.regulations.gov/document/FINCEN-2021-0005-0461>.

1. *Publish less burdensome alternative rules for small businesses. The RFA requires agencies to consider less burdensome alternative rules for small entities. Agencies have proven they are not seriously considering less burdensome alternatives for small businesses. By requiring agencies to publish less burdensome alternatives, rather than just simply considering them, agencies can help small employers who usually do not have dedicated compliance staff.*
2. *Impose statutory penalties on agencies for failing to conduct retrospective reviews, including a requirement that would make a rule cease to be effective if a review is not conducted promptly. Section 610 of the Regulatory Flexibility Act (RFA) requires that federal agencies review each rule that has or will have a significant economic impact on a substantial number of small entities within ten years of publication of the final rule. These periodic rule reviews are a mechanism for agencies to assess the impact of existing rules on small entities and to determine whether the rules should be continued without change, or should be amended or rescinded, consistent with the objectives of applicable statutes.*
3. *Require Advocacy to certify the economic analyses of agencies. By requiring Advocacy to review the analyses to determine a rule's economic impact, agencies will more accurately account for the effects on small entities.*
4. *Require agencies to consider the indirect or downstream effects of rules. When conducting rulemaking, agencies do not consider the indirect effects that regulations may have on small businesses. By requiring agencies to explore the indirect effects of regulations, agencies will more accurately assess the total economic impact on small businesses.*
5. *Require agencies to meet with a panel of affected small business owners before promulgating rules. These panels which are currently in use by EPA, OSHA, and the CFPB will help to give regulators a true understanding of the small companies they are attempting to regulate and will expose them to the potentially unforeseen effects of a regulatory proposal.*
6. *Repeal the proposed changes to OMB's Circular A-4 guidance. The proposed guidance would increase the requirement of significant regulatory action from a \$100 million annual economic impact to \$200 million and make changes to the ways agencies calculate the costs and benefits of regulations. By eliminating these changes, OMB can ensure agencies are accounting for the impacts of regulations on small businesses.*

In 2021, President Biden stated, “[s]mall businesses are the engines of our economic progress; they’re the glue and the heart and soul of our communities. But they’re getting crushed.”<sup>15</sup> We agree with President Biden—small businesses are the engines of economic progress, and they are getting crushed. However, it is the President’s unprecedented regulatory agenda that is

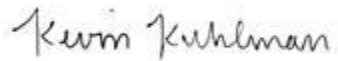
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<sup>15</sup> Remarks by President Biden on Helping Small Businesses, Feb. 21, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/22/remarks-by-president-biden-on-helping-small-businesses/>.

crushing small businesses with red tape and paperwork. Congress must come together to provide relief for small businesses across the country.

NFIB appreciates your leadership in creating an environment where small businesses can grow, invest, and flourish. We look forward to working with you on these critical issues facing small businesses during the 118<sup>th</sup> Congress.

Sincerely,

A handwritten signature in black ink that reads "Kevin Kuhlman". The signature is written in a cursive, slightly slanted style.

Kevin Kuhlman  
Vice President, Federal Government Relations  
NFIB