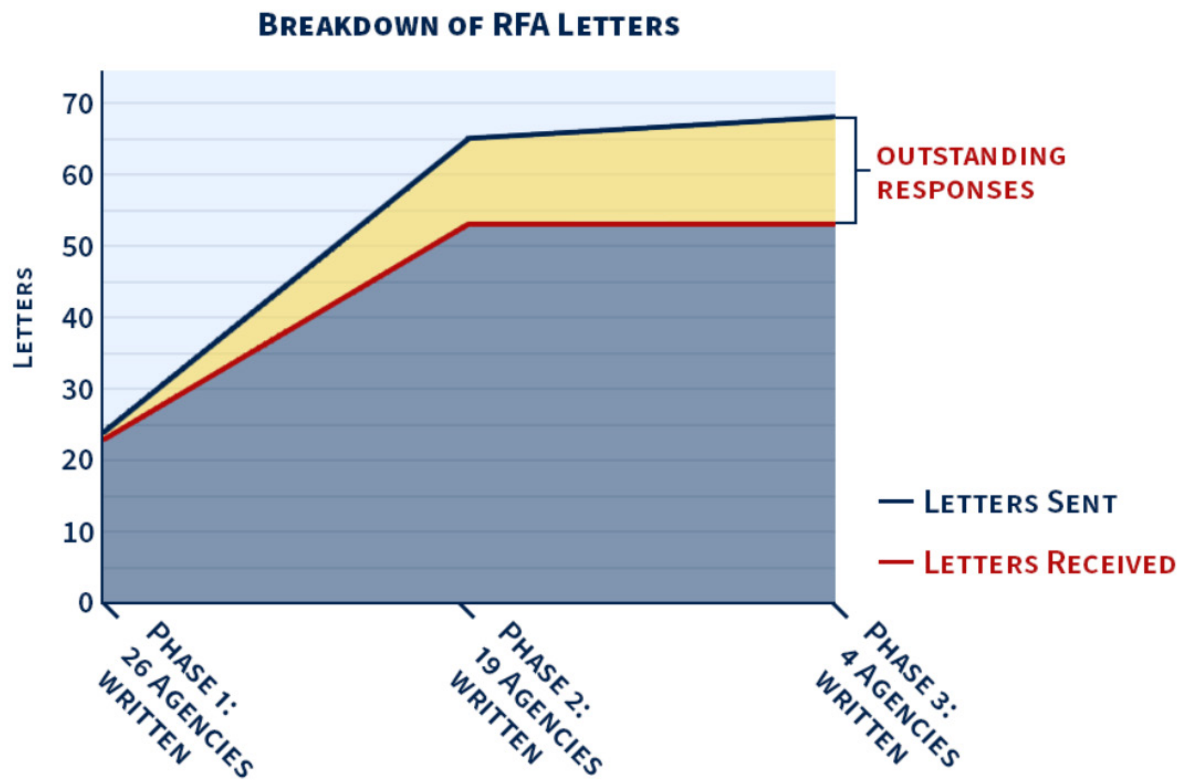
HOUSE COMMITTEE ON
SMALL BUSINESS
CHAIRMAN ROGER WILLIAMS
EST. 1941

Regulatory Flexibility Act (RFA) Report: Agencies' Noncompliance with the RFA

The House Committee on Small Business
Staff Report 2024

Table of Contents

I. Committee Action



II. Executive Summary

On February 22, 2023, the Committee on Small Business (Committee), under Chairman Roger Williams, launched an official investigation into federal agencies' compliance with the Regulatory Flexibility Act (RFA). These letters were a continuation of an investigation that began in October 2022 by then Committee Ranking Member Blaine Luetkemeyer. In the 118th Congress, the Committee conducted a comprehensive, three-phase investigation to identify the main compliance issues and find solutions to prevent agencies from overregulating small businesses. This included investigating federal agencies' rulemaking process, the adequacy of their RFA analysis, and the burden their regulations impose on small businesses. This report examines these processes and burdens by analyzing agencies' rules, responses to the Committee's letters, and findings from the hearings. Furthermore, this report examines potential legislative solutions resulting from these investigative findings.

Nearly every week, the Biden Administration finds new ways to hamper businesses across America by creating burdensome new regulations and mandates on small businesses. This Administration has repeatedly shown that they do not consider the best interests of business owners when making their rules and regulations. Since President Biden took office, his Administration has passed **891 final rules costing $1.47 trillion and 232.4 million paperwork hours**.[1] In a single week alone in April, the Biden Administration issued $875 billion in new costs from final rules.[2] This is an unfortunate reality that the small business owners must face every day; trying to run their businesses while battling against a mountain of ever-changing regulations.

During this investigation, the Committee reviewed more than 100 proposed and final rules, sent 66 letters to 34 different federal government agencies, and held 13 hearings on the regulatory burdens created by the Biden Administration. This work established the evidence to support four findings that show the main issues with the agencies' RFA compliance.

Finding 1: The RFA allows agencies to certify a rule if it does not have a significant impact on a substantial number of small entities. However, often, agencies improperly certify the rules in order to avoid conducting the RFA analysis, which means that rules are being finalized without adequately assessing the true impacts to small businesses.

Finding 2: Agencies often underestimate both the costs and the number of impacted small businesses when conducting an RFA analysis. This creates a disparity between what the agency claims and what the real-world impact of the rules are on small businesses. Furthermore, the agencies often fail to adequately consider less burdensome alternatives, or they choose to finalize a rule that is even more harmful to small businesses than other alternatives, without adequate justification.

Finding 3: Agencies repeatedly fail to appropriately assess if a rule is duplicative or conflicts with other rules, which causes small businesses to suffer from multiple overlapping regulations from both within the same agency and across the federal government.

Finding 4: Some agencies refused to comply with congressional oversight and provide Congress with requested information during their rulemaking process. This violates both the Constitution and Administrative Procedure Act and prevents this Committee from its duty to protect Main Street America.

Unfortunately, most agencies are failing to properly comply with the RFA's requirements—in fact many are treating it like a check the box exercise rather than actually analyzing the effects of their regulations. This is failing to live up to the spirit of letter of the law and is causing small businesses to suffer. Both the first and second phases of the Committee's investigation revealed that agencies often neglect to adequately assess how

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[1] *Regulation Rodeo*, Am. Action Forum, (last visited May 10, 2024), https://www.regrodeo.com.

[2] Dan Goldbeck, *The biggest week on record,* Am. Action Forum (Apr. 22, 2024).

their regulations would affect small businesses. The third phase showed that even after Congressional oversight, agencies still persistently refuse to comply with the RFA's requirements and to provide this Committee with the required information to conduct Constitutionally mandated oversight. The issues with the RFA compliance identified by this Committee harm American small businesses and require a cross-jurisdictional approach to be remedied.

In nearly every hearing held by the Committee this Congress, small businesses noted the increased burden and harms they face due to the Biden Administrations regulatory state. The Committee will continue evaluating federal agencies' RFA compliance and seek legislative solutions to better protect small businesses. The Committee's in-depth investigation uncovered a number of potential solutions to strengthen the protections for small entities, particularly in the Biden Administrations climate of over-regulation.

III. Introduction to the RFA

The massive number of regulations that federal agencies pass each year and the number of paperwork hours to comply are detrimental to a small business. Staying on top of this ever-changing regulatory system is no small undertaking, and often business owners must either take time away from their core duties to stay in compliance, or hire an employee solely dedicated to the task. Compliance diverts critical resources from being reinvested into a business, helping it to grow, innovate, and succeed.

The RFA was created to prevent excessive regulatory burdens from being imposed on small businesses.[3] The RFA was signed into law by President Jimmy Carter on September 19, 1980 with the aim of requiring federal agencies to consider the impact their regulations will have on small entities, who often are disproportionately impacted by federal bureaucracy.[4] The RFA requires agencies to analyze whether proposed regulations are expected to have a "significant economic impact on a substantial number of small entities."[5] However, this Committee's investigation shows that federal agencies are no longer following the law in a way that lives up to its intent when it was initially passed.

The agencies must take three steps to comply with the RFA in their rulemaking process. First, the agency must determine whether the RFA applies to a particular regulation. The RFA applies to rules subject to notice and comment rulemaking under the Administrative Procure Act (APA) or any other relevant law.[6] If the agency concludes that the RFA applies—which it does for almost all rules issued by agencies these days—they move onto the second step to provide further economic impact analyses. However, an agency can get around the intent of the law if it determines that a rule will not have a significant economic impact on a substantial number of small entities. This loophole allows agencies to pass burdensome regulations that are detrimental to small businesses without ever attempting to calculate the true cost of the regulation. This certification must include a factual basis analysis for this determination, which provides, at minimum, a description of the affected entities and the impacts that clearly justify the "no impact" certification.[7]

Second, if the agency determines that the RFA applies, agencies must conduct a front-end Initial Regulatory Flexibility Analysis (IRFA).[8] The IRFA is designed to "describe the impact of the proposed rule on small entities."[9] The agency must examine the costs and other economic implications for the different industries targeted by the

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[3] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

[4] *See* U.S. Small Bus. Admin. Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, 93 (Aug. 2017).

[5] 5 U.S.C. § 603(c).

[6] 5 U.S.C § 553(b); *see also* 5 U.S.C. § 601(2).

[7] 5 U.S.C. § 605(b).

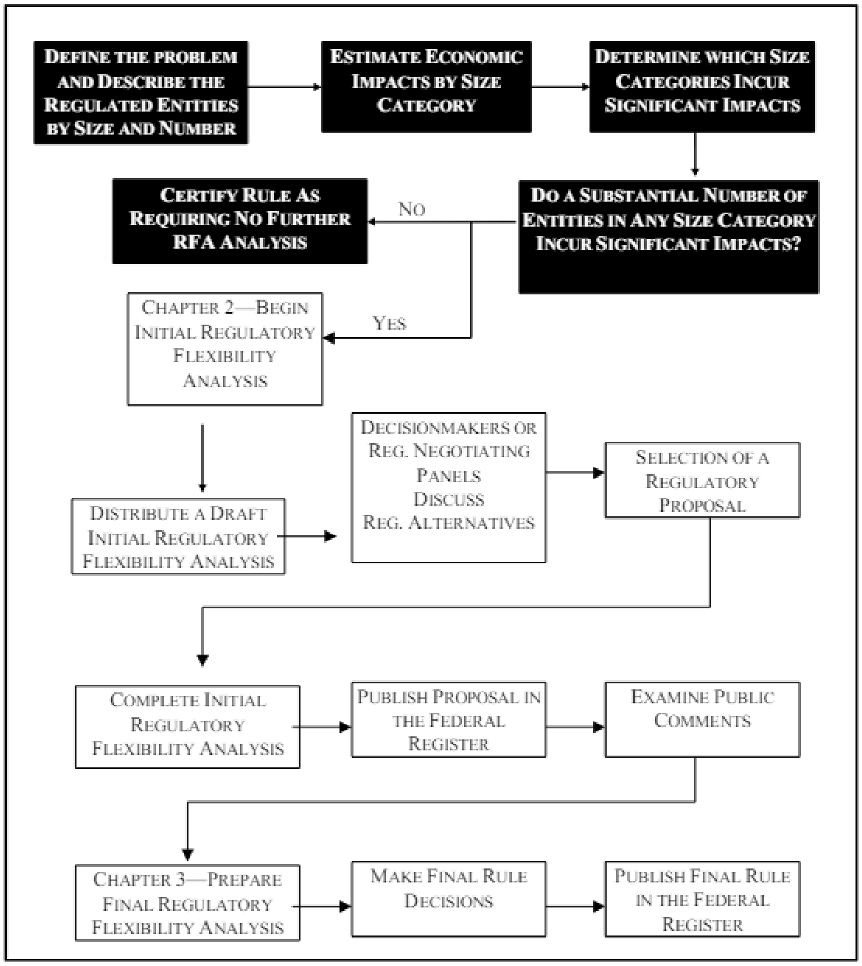
[8] *Id.* at § 603(a).

[9] *Id.*

rule.[10] The direct impacts of a rule include compliance costs and economic implications that derive from additional compliance costs, such as economic viability, competitiveness, productivity, and employment. Additionally, the agency must include a prescription of any significant alternatives to the proposed rule which minimizes any significant economic impact on small entities while still accomplishing the objectives of the rule.[11] This analysis must discuss these alternatives, such as exempting certain businesses from the rule or establishing different reporting requirements.[12]

Lastly, when finalizing a rule, agencies must conduct a back-end Final Regulatory Flexibility Analysis (FRFA). The FRFA must include the agency's responses to comments made by the SBA's Office of Advocacy's (Advocacy) Chief Counsel, incorporating a detailed statement of any changes made to the proposed rule in the final rule as a result of such comments.[13] The agencies also must revise the IRFA based on the public comments they received.

SBA Office of Advocacy, RFA Compliance Guide



[10] U.S. Small Bus. Admin. Off. of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, 32-34 (Aug. 2017).
[11] 5 U.S.C. § 603(c).
[12] *Id.*
[13] *Id.* at § 604(3).

In addition to the IFRA and FRFA, the RFA requires three agencies, the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), and Consumer Financial Protection Bureau (CFPB), to conduct Small Business Advocacy Review (SBAR) panels or "SBREFA panels."[14] These panels review proposed rules that will have a negative impact on small entities. They collect advice and recommendations from the representatives of affected small entities and also review relevant materials that the agency has collected. The panels must make a public report as a part of the rulemaking record. The agency then shall modify the proposed rule and the IFRA as appropriate.

IV. The Committee's Investigation

The Committee conducted a comprehensive, three-phase investigation into federal agencies' compliance with the RFA to identify the main issues and find solutions to prevent agencies from overregulating small businesses. The Committee found that most agencies are failing to properly comply with the RFA's requirements which, in turn, hurts small businesses. The investigation revealed four main areas in which the agencies mostly fail to properly consider small businesses: (1) improper certification; (2) underestimated overall impact (costs, number of small entities, and alternatives); (3) overlapping regulations; and (4) lack of compliance with Congressional oversight and the APA-issues.

During the first phase of the investigation, the Committee examined the resources agencies use during the rule-making process to ensure compliance with the RFA, the resources available to small businesses related to new regulations, recent regulations imposed, and the impact/burden they had on small businesses. The Committee sent a total of 25 letters to 25 agencies in this phase.[15] These letters specifically requested documents and communications related to rule certification, SBREFA panels (for those that are required to conduct them), factual basis analysis, and alternative rules considered. Unfortunately, many of the agencies were incredibly delayed in their responses to the Committee and when they did respond, they failed to provide many of the requested documents.

The second phase of the investigation focused on agency compliance with the RFA on a rolling case-by-case basis as proposed and final regulations were published. This review found that agencies often improperly certified that a rule would not have a significant impact on a substantial number of small entities or agencies downplayed the burden of the rule on small businesses, despite frequent evidence to the contrary. The Committee's 66 letters to 34 agencies in this phase focused on certification, overall impact of the rules, overlapping rules, and APA issues.[16]

The third phase of the investigation followed up with the agencies who failed to respond to, or adequately address, the issues noted during the first and second phases. During this last phase, the Committee sent letters to the Department of Energy (DOE), the Department of Labor (DOL)/ the OSHA, and the EPA. The Committee requested all communications relating to four separate DOE rules, six DOL/OSHA rules, and eight EPA rules. Even in instances where the agencies responded to the Committee's previous letters, they all failed to produce any requested communications, obstructing Congressional oversight.

A. Certification

The certification process is one of the primary obstacles to RFA compliance. Numerous agencies attest that the rule has no significant effect on a substantial number of small entities but fail to provide sufficient justification for their reasoning. The RFA states that the agencies can only certify if a substantial number of small entities are not significantly adversely affected by the rule.[17] In order to guarantee that the agencies thoroughly evaluate the possible certification and do not merely certify to avoid conducting the IRFA and FRFA, Advocacy—the independent voice for small businesses in the federal government—supplies guidelines to agencies on what a

[14] *Id.* at § 609(b).
[15] *See* Appendix 1.
[16] *See* Appendix 1.
[17] *See* 5 U.S.C. § 605(b).

proper certification should include.[18]

Advocacy provides factors agencies should consider to provide a sufficient factual basis when certifying a rule.[19] These factors include description of small entities affected, economic impacts on small entities, significant economic impact criteria, substantial number criteria, description of assumptions and uncertainties, and certification statement.[20] This threshold analysis must provide a factual basis for the determination of why the agency believes that rule will not have a significant economic impact on a substantial number of small entities.[21] According to Advocacy, the factual basis requirement means that "at a minimum, a certification should contain a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."[22]

The courts have clarified when and how the agencies can certify. In one of the landmark cases, *North Carolina Fisheries Ass'n v. Daley*, the court explained that a mere conclusory statement that there is no significant impact on small businesses is insufficient.[23] The court explained that "[w]hile the federal government cannot be expected to explore every possible contingency before certifying that there is no significant impact, the government must make some showing that it has at least considered the potential effects."[24]

During the first phase of the Committee's investigation into the agencies' compliance with the RFA, several agencies were asked to provide the name, docket number, and citation of all rules, proposed and final, that the agency certified as having no significant impact on a substantial number of small entities from 2020 to February 2023. None of the agencies provided an adequate response to this request. Throughout the course of this investigation, the Committee identified six agencies and at least 12 instances where these agencies improperly certified rules from 2020 to May 2024.[25] These agencies failed to provide a factual basis and instead used conclusory statements certifying the rules, against what the RFA, the Advocacy's guidelines, and the courts require. The biggest offenders were the EPA and DOL. Below are just five examples where agencies failed to provide adequate factual basis analysis and improperly certified rules.

1. EPA WOTUS Rule

The Committee held a hearing on EPA's Waters of the United States Proposed Rule (WOTUS Rule) on March 8, 2023.[26] The 141-page WOTUS Rule would, among other things: (1) impose burdensome and expensive obligations; (2) have a significant impact on many lands intensive industries such as farming, mining, and real estate development; and (3) cause unnecessary and expensive delays in the permitting process.[27] Importantly, the ambiguity of the rule failed to provide the certainty small businesses desperately needed on the definition of a waterway that is covered by the WOTUS Rule. In fact, the rule was so ambiguous and broad that the Supreme Court limited the scope of the definition of a waterway covered by the WOTUS rule.[28]

In an attempt to quickly finalize this rule, the EPA certified that the WOTUS rule would not have a significant impact on a substantial number of small entities, allowing the agency to skip the full RFA analysis process.

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[18] U.S. Small Bus. Admin., Off. of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, 12-13 (Aug. 2017).
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 13.
[23] North Carolina Fisheries Ass'n, Inc. v. Daley, 16 F. Supp. 2d 647 (E.D. Va. 1997).
[24] *Id.*
[25] *See e.g., Letters to Agencies*, U.S. Small Bus. Admin., Off. of Advocacy (last visited Apr. 14, 2024), https://advocacy.sba.gov/category/regulation/letters-to-agencies/.
[26] *See Small Business Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule: Hearing Before H. Comm. on Small Bus.*, 118th Cong. (Mar. 8, 2023).
[27] *Id.*
[28] *See* Sackett v. Env'r Prot. Agency, 598 U.S. 651 (2023).

However, as this Committee identified during the hearing, the EPA improperly certified the rule.[29] According to Chairman Williams, "the EPA … unilaterally decided that they do not need to conduct any further analysis on the rule. According to the SBA's Office of Advocacy, which is charged with speaking out against overly burdensome regulations, this determination by the EPA was not based on any factual analysis."[30] Specifically, the EPA overlooked direct, and significant cost on small businesses, when certifying the rule would lack such an impact.

According to testimony given in the Committee on Transportation and Infrastructure hearing, Missouri Farm Bureau President stated, "the process to arrive at a jurisdictional determination is tortuous and costly."[31] A jurisdictional determination could take between six months and a year to receive, and in the meantime a farmer or rancher is stuck in limbo.[32] Adding insult to injury, the use of case-by-case determinations threatens to create a seriously unequal playing field, where identical features may be viewed as jurisdictional or not depending upon where the property is located."[33] This rule would impose these uncertainties on all private landowners, not just farmers. However, the EPA still determined that the WOTUS rule would not affect small businesses and were able to skirt the requirements to calculate the cost of these delays on small business owners.

2. EPA Clean Power Plant Rule

The EPA also inadequately certified its Clean Power Plant Proposed Pule.[34] This rule would require power plants to implement carbon capture technology and/or integrate hydrogen into their fuel cycle; plants that do not implement these technologies and meet emissions goals could be shut down.[35] In addition to the letter sent inquiring into the certification that this rule would not have a significant impact on substantial number of small entities, on February 14, 2024, the Committee held a hearing titled "Burdensome regulations: Examining the Impact of EPA Regulations on Main Street."[36] Among other rules, this hearing examined the Clean Power Plant Rule, illustrating how the EPA's analysis was inadequate. The hearing exposed that rule would force plants to shut down, which would increase energy costs for small businesses and may deprive some small businesses of the energy needed to conduct its business, especially in rural communities.[37] Additionally, the cost of compliance for manufacturers under this rule ranges from an estimated $10 to $14 billion.[38] Unfortunately, the EPA finalized this rule without remedying the certification issue on May 9, 2024, despite objections from the Committee, Advocacy, and other relevant stakeholders.[39] Additionally, the EPA took two months to provide a surface level response to the Committee's inquiry.[40]

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[29] *See Small Business Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule: Hearing Before H. Comm. on Small Bus.*, 118th Cong. (Mar. 8, 2024).
[30] *See id.*
[31] Press Release, Comm. on Transp. and Infrastructure, Infrastructure Stakeholders Highlight Numerous Negative Impacts of Biden Administration's Flawed, Burdensome WOTUS Rule (Feb. 8, 2023).
[32] *Id.*
[33] *Id.*
[34] *See* New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (2023) (to be codified at 40 C.F.R. § 60).
[35] *See id.*
[36] *Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street*: *Hearing Before H. Comm. on Small Bus.,* 118th Cong. (Feb. 9, 2024).
[37] *Id.*
[38] *See* New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (2023) (to be codified at 40 CFR § 60); *See also NAM Fights Restrictive Power Plant Rule*, Nat'l Assoc. of Mfrs. (Nov. 29, 2023).
[39] *See id.*
[40] *See* Letter from Tim Del Monico, Assoc. Adm'r. U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).

The Committee discovered that the EPA, instead of conducting an IRFA, relied on historical data to make estimates to support its determination that no significant impact on a substantial number of small entities results from the proposed rule.[41] To adequately analyze whether certification is appropriate in the particular situation, the EPA should have used current instead of historical data, which is likely out of date given the constantly changing economic landscape. Specifically, the EPA did not fully consider the costs or the Best System of Emissions Reduction (BESR), relying instead "on promises by large businesses about future investments, which is an unreasonable standard by which to regulate small entities."[42] Promises by large entities are not an acceptable factual basis on which the EPA can argue they complied with the RFA.

Further, several assumptions in the EPA's analysis "are at a high level of generality and do not demonstrate recognition of the serious barriers that would face small entities under the proposed rule" and "based on optimistic projections and announced investment decisions by large businesses."[43] Thus, the EPA largely ignored the reality of how small businesses operate. This rule will likely result in "significant delay in any future investment" in the small entities operating in this space, "despite the need for greater investment due to the projected electrification of our economy."[44]

Additionally, the EPA did not provide a sufficient answer to this Committee's inquiry in identifying the rules it certified from 2020 to February 2023.[45] At a minimum, the EPA improperly certified five rules during this time period.[46] This is a very concerning trajectory for small businesses, and the regulatory burdens imposed on them by the EPA alone.

3. DOL / OSHA: Walkaround Rule

OSHA certified its Employee Representation During Workplace Inspections Proposed Rule (Walkaround Rule) which would expand the definition of what types of "third parties" may accompany the officers on OSHA inspections. Under the proposed rule, third parties, such as union representatives and community activists, would gain access to non-organized private businesses on private property, where unions normally would not have such access.[47] OSHA alleged that there are no costs of compliance for employers.[48] However, OSHA failed to provide a factual basis for that certification.

OSHA stated that if an entity has to implement safety policies and rules for third parties, any costs associated with these policies are not attributable to this proposed rule.[49] However, without the proposed rule, these safety procedures and other compliance costs would not be triggered during the inspection. Thus, OSHA failed to consider potential costs to employers. These costs could include additional screening and security, training employees on new third-party visitor protocols, providing additional protections for confidential business information, potential liability for injuries to third parties at the workplace and during the inspection, and providing additional personal protective and other safety and health equipment.[50]

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[41] *See* Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., to Michael S. Reagan, Adm'r, U.S. Env't Prot. Agency, 3 (Aug. 8, 2023). Importantly, this certification only covers the elements of this rule that apply to new sources.

[42] *Id*. at 4.

[43] *Id*.

[44] *Id*. at 7. Additionally, the EPA failed to consider that the small entities subject to the proposed rule that are prevented from making investments are also significantly impacted, even if their compliance costs appear to be zero.

[45] *See* Letter from Ron Pierce, Dir., Off. of Small and Disadvantaged Bus. Utilization, U.S. Dep't of Energy, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 12, 2023).

[46] *See* Rob Smith, *The Regulatory Flexibility Act: Turning a paper tiger into a legitimate constraint on one-size-fits-all agency rulemaking*, Nat'l Federation of Indep. Bus., 29-32 (May 2, 2023).

[47] Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825 (2023) (to be codified at 29 C.F.R. § 1903).

[48] *Id*.

[49] *Id*.

[50] *See* Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., to Douglas L. Parker, Assistant Sec'y of Labor for Occupational Health, U.S. Occupational Safety & Health Admin., 4-5 (Nov. 13, 2023).

This Committee wrote to OSHA requesting further information about this certification, however, OSHA failed to substantively answer the Committee's questions relating to potential costs and ambiguous terms used in the regulation.[51] On April 1, 2024, OSHA finalized the rule without conducting the proper RFA analysis and despite objections from the Committee, Advocacy, and other small businesses.[52] In the final rule, OSHA states that it "has determined that, while these revisions may impose societal costs and that some employers may decide to undertake actions not directly required to comply with any requirements in this rule, the revisions impose no new direct cost burden on employers."[53] This is fundamentally untrue. OSHA not only ignored stakeholder input but acknowledged that there would be costs to small entities and still did not conduct the proper analysis.

This is not the only time OSHA (as part of the DOL) failed to adequately certify its rule or provide this Committee with requested information. During this Committee's investigation, the DOL ignored the Committee's request to identify the rules it certified from 2020 to February 2023.[54] Nonetheless, the Committee found the DOL improperly certified at least three rules during this time period.[55]

4. CFPB: Credit Card Penalty Fees Rule (Regulation Z)

The Consumer Financial Protection Bureau's (CFPB) certified its Credit Card Penalty Fees Rule without providing sufficient factual basis analysis.[56] The rule change would lower the amount consumers may owe to crediting institutions to eight dollars for late payments, end the automatic annual inflation adjustment, and cap late fees at 25 percent of the required minimum payment.[57] This change will negatively impact small credit firms the most and restrict access to credit in local communities.[58] This is particularly concerning as small businesses' access to capital has become more strained under the Biden Administration. This Committee wrote to the CFPB requesting further information about their certification.[59] The CFPB, in response, assured the Committee of its commitment to "direct and meaningful engagement across the full range of businesses that are impacted by the agency's work, including small businesses and the financial institutions that serve them."[60] In the same letter, the CFPB noted the proposed Credit Card Penalty Fees Rule "would not have a significant economic impact on a substantial number of small entities," because

> . . . credit cards represent a very small fraction of both assets and revenue for small banks [and] for this reason and for most small banks, even a large reduction in credit card late fee revenue would represent well below one percent of bank revenue and, therefore, would not have a significant economic impact on those entities.

However, the Committee found that this assertion was not supported by an adequate factual basis as required by the RFA.[61] In the CFPB's analysis, small banks and credit unions were grouped together, seemingly to downplay

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[51] *See* Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Jan. 31, 2024).

[52] *See* Worker Walkaround Representative Designation Process, 39 Fed. Reg. 22558 (2024) (to be codified at 29 C.F.R. § 1903).

[53] *See Id*.

[54] *See* Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Mar. 10, 2023).

[55] *See* Rob Smith, *The Regulatory Flexibility Act: Turning a Paper Tiger into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, Nat'l Federation of Indep. Bus., 29-32 (May 2, 2023).

[56] *See* Credit Card Pentalty Fees (Regulation Z), 89 Fed. Reg. 19128 (2024) (to be codified at 12 C.F.R. § 1026).

[57] *Id.*

[58] Chelsey Cox, *Consumer Financial Protection Bureau targets excessive credit card fees in new rule proposal*, CNBC (Feb. 1, 2023).

[59] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Rohit Chopra, Dir., U.S. Consumer Fin. Prot. Bureau (May 17, 2023).

[60] Letter from Rohit Chopra, Dir., U.S. Consumer Fin. Prot. Bureau, to Roger Williams, Chairman, H. Comm. on Small Bus., 3 (Jun. 1, 2023).

[61] *See* Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., to Rohit Chopra, Dir., U.S. Consumer Fin. Prot. Bureau, 4 (May 5, 2023).

the burdens imposed by the proposed rule.[62] As a result, small banks and credit unions may experience impacts beyond the scope of what the CFPB addressed.[63] Several examples exist regarding the deficiency of the CFPB's analysis. For instance, the CFPB does not provide any information regarding whether some of the proposed fees cover the costs incurred by a small institution or whether the fees are sufficient to encourage on-time payments.[64] This information is important to address in the analysis to determine whether a significant impact on small entities results from the proposed rule.

Notably, in just the first year of the 118th Congress, the CFPB improperly certified at least three additional rules.[65]

5. FMC: Demurrage and Detention Billing Requirements Rule

The Federal Maritime Commission (FMC) failed to provide a sufficient factual basis when it certified its Demurrage and Detention Billing Requirements Rule. The rule increased billing costs by changing the manner in which ocean carriers, marine terminal operators, and non-vessel-operating common carriers invoice and collect demurrage or detention from others.[66] Based on the FMC's data, a shocking number of these impacted entities are small businesses—out of about 8,700 impacted entities 97 percent are small businesses. At a time of rising shipping costs, this additional regulatory burden makes matters worse for small businesses in the shipping industry.[67]

The FMC certified that the rule does not have a significant economic impact on a substantial number of small entities.[68] However, the certification did not include sufficient factual basis analysis as required by statute.[69] Instead the FMC's conclusory statement was solely based on presumptions. The FMC presumed that the large entities would bear most of the rulemaking costs and small entities would face only be minimal costs.[70] Conclusory statements and presumptions do not show that the agency "has at least considered the potential effects" of the rule on small entities.[71] To consider potential effects, agencies must conduct a proper certification analysis which shows how they came to an conclusion that the rule does not have a significant economic impact on a substantial number of small entities.

These are just five examples from rules proposed and passed during the 118th Congress. Agencies taking advantage of this loophole in the RFA is not a new problem. In Fiscal Year 2022, Advocacy noted at least six rules that were improperly certified as not affecting a significant number of small businesses.[72] NFIB noted at least 13 instances of improper certification between May 2021 and December 2022.[73] Reforms must be made to ensure that this check the box exercise comes to an end and agencies are held accountable to their legal obligations during their rulemaking.

B. Overall Impact

The agencies' rulemaking imposes widespread impacts on small businesses. This has been particularly true under the Biden Administration that has imposed final rules totaling nearly $1.5 trillion to date—with the number expected to increase before the end of this year. It is worth nothing that the Biden Administration's rules have

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[62] *See id.*
[63] *See id.*
[64] *See id.*
[65] *See* Rob Smith, *The Regulatory Flexibility Act: Turning a Paper Tiger into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, Nat'l Federation of Indep. Bus., 29-32 (May 2, 2023).
[66] Demurrage and Detention Billing Requirements, 89 Fed. Reg. § 14330 (2024) (to be codified at 46 C.F.R. 541).
[67] *See generally* Yan Carriere-Swallow, *et. al., How soaring shipping costs raise prices around the world,* IMF Blog (Mar. 28, 2022).
[68] Demurrage and Detention Billing Requirements, 89 Fed. Reg. § 14330 (2024) (to be codified at 46 C.F.R. 541).
[69] *See id.;* 5 U.S.C. § 605(b).
[70] *See* Demurrage and Detention Billing Requirements, 89 Fed. Reg. § 14330 (2024) (to be codified at 46 C.F.R. 541).
[71] N. C. Fisheries Ass'n, Inc. v. Daley*,* 16 F. Supp. 2d, 647 (E.D. Va. 1997).
[72] U.S Small Bus. Admin., Off. of Advocacy, Report on the Regulatory Flexibility Act, FY2022 (Apr. 2023).
[73] Rob Smith, *The Regulatory Flexibility Act: Turning a Paper Tiger Into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, Nat'l Fed. Of Independent Bus. (May 2023).

disproportionately cost a high amount compared to past Administrations. In a single week alone in April 2024, the Biden Administration added $875 billion in new costs—nearly as much in one week as the entire eight years of the Obama Presidency.[74]

TRACKING THE ADMINISTRATIONS

Regulatory Activity from Inauguration Day to May 3rd (Year 4)

	FINAL RULES	FINAL RULE COSTS	PAPERWORK HOURS
BIDEN 2021	891	$1.47T	232.4M
TRUMP 2017	978	-$159.4B	74.4M
OBAMA 2009	1235	$303.5B	238.9M

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[75]

The RFA requires agencies to assess the overall impact of a proposed rule, evaluating the compliance burden and costs, number of impacted small entities, and alternative rules. Furthermore, the analysis should be conducted with the backdrop of economic realities small businesses face. Several economic headwinds in the last couple of years have negatively impacted small businesses—supply chain disruptions, staffing shortages, and inflation.[76] Many small businesses continue to be challenged by labor shortages, with 20 percent of small businesses facing significant labor shortages, and another 25 percent facing a moderate shortage.[77]

Inflation remains an immense burden for small businesses, with 70 percent of small businesses reporting increased average selling prices due to inflation.[78] Complying with regulations further increases the inflationary pressure across the country. When a business is forced to spend more time and resources on compliance costs, they are forced to pass the associated costs along to consumers. To make matters worse, the Committee's investigation revealed that agencies either omit, or consciously ignore, the economic realities small businesses face when promulgating rules and conducting the RFA impact analyses.

Small businesses face various compliance costs caused by the agencies' rulemaking. They might need to hire additional employees or outside counsel to help familiarize and keep them in compliance with the ever-changing regulatory landscape. Rule changes that affect the small businesses' suppliers also cause downstream effects on a small entity that increase costs. Furthermore, the rules often impact more entities than the agencies estimate. This means that the effects are broader than agencies lead to believe in their RFA analyses.

This section highlights how the agencies downplay the compliance costs, underestimate the number of impacted small businesses, and fail to consider alternative rules—harming small businesses in the process.

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[74] Dan Goldbeck, *The biggest week on record,* Am. Action Forum (Apr. 22, 2024).

[75] *Regulation Rodeo*, Am. Action Forum, (last visited May 10, 2024), https://www.regrodeo.com.

[76] *Covid-19 Small Business Survey (23)*, Nat'l Federation of Indep. Bus., 2 (Jan. 5, 2023).

[77] *Id.*

[78] *Id.*

1. Underestimating Compliance Cost and Burden

Despite the requirements in the RFA, the Committee repeatedly found that the agencies underestimate the costs that compliance with the rules will impose on small entities. The agencies both downplay costs of compliance and understate number of affected entities.[79] These underestimations have serious implications for small businesses. By conducting inaccurate economic analysis, agencies are able to hide the true cost of their regulations and small businesses are forced to pick up the tab. This tactic circumvents the intent of the RFA and can force small businesses to deal with an onslaught of regulations that can be detrimental to their operations.

Not only do many regulations have direct monetary implications for small businesses, but they also have broader associated costs that agencies often fail to consider. The agencies must, as required by the RFA, take into account compliance costs and economic implications, such as economic viability, competitiveness, productivity, and employment.[80] According to the compliance guidance provided to agencies by Advocacy, the agencies should also identify cost burdens for both the affected industry sectors and the individual small entities.[81] These costs include, for example, engineering and hardware acquisition, maintenance and operation, employee skill and training, administrative practices, productivity, and promotion.[82] For the agency to develop a rational rule, it "will require the acquisition of data that describe the scope of the problem, the entities affected, and the extent of those effects on the entities and the problem being addressed."[83]

There are costs imposed by rules that might not be clear on their face, but in order to ensure small businesses interests are actually considered, agencies should include these costs in their RFA analysis. For instance, when a rule relates to privacy concerns the practical cost of implementing the rule should be considered, such as providing additional protections for confidential business information, training staff, or implementing additional screening and security. Even though some agencies have estimated the additional physical equipment that would need to be purchased or the extra manpower hours required to comply with the regulation, these estimations still tend to neglect other intangible costs, such as the amount of money necessary to conduct staff training or install necessary software. While the RFA does not explicitly require consideration of intangible costs, Advocacy guidance and training does.

Agencies also tend to underestimate the time it takes for small businesses to familiarize themselves with the rules. The majority of small businesses lack legal and compliance staff to assist them in comprehending the implications of the regulations. In addition to numerous stakeholders expressing concerns regarding the agencies' failure to account for the time required to fully understand how to comply with the rules, outside legal counsel costs are also often higher than the agencies' estimates. Consequently, the time and cost to become familiar with the rules are underestimated and the burden on small businesses is larger than the agencies lead on.

a. DOL: Davis-Bacon and Related Acts; Apprentice Rule; Non-Displacement Rule; Fiduciary Rule; and Joint Employer Rule

The Committee wrote to the DOL about multiple rules that could substantially harm small businesses. The Committee's investigation found that the DOL has been one of the worst offenders of underestimating compliance costs for small businesses. Furthermore, on October 19, 2023, the Committee held a hearing titled "Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators" that focused on the impacts of the DOL burdensome regulations and economic pressures on small businesses.[84] Among other things, the hearing examined the rules discussed below showing how the DOL has failed to consider the costs its regulations

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[79] "Compliance Costs" refers to costs small businesses incur *only* to be compliant with the Rule.

[80] U.S. Small Bus. Admin Off. of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, 32-34 (Aug. 2017).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators*, *Hearing before the H. Comm. On Small Bus.* 118th Cong. (Oct. 19, 2023).

impose on small businesses.

i. Davis-Bacon and Related Acts

Davis-Bacon and Related Acts final rule from the DOL makes two major changes to the methodology used to determine the prevailing wage for construction workers employed in federal and federally subsidized construction projects.[85] The rule implements the three-step method, known as "30 percent rule," to identify prevailing wage.[86] This method increases prevailing wages for approximately 32 percent of construction workers and revokes the separation of metro and rural wage data.[87] The revocation and separation of metropolitan and rural data sets will improperly skew the data towards the higher metropolitan cost of living prices rather than rural cost of living which is often lower.[88] The direct employer costs for small businesses are estimated to be an additional $39.3 million during the first year.[89]

This Committee wrote to the DOL concerned about these compliance costs and the number of small businesses impacted.[90] The DOL responded, after the deadline, without addressing any of the Committee's direct questions.[91] Especially concerning in the DOL's response was that they said the DOL "estimates that 67 percent of firms holding Davis-Bacon contracts are small businesses, which indicates small businesses are successfully competing for such contracts today."[92] The DOL's reasoning is flawed. The fact that small businesses are successfully competing in the contracts today does not support the DOL's reasoning that this rule change will not significantly burden small businesses. It will be very likely that the small businesses who have been successful until now will not be in the future once the full impact of the rule comes into effect. The massive compliance costs will jeopardize small entities' success and make it harder for them to compete against their larger counterparts. Unfortunately, despite objections from the Committee, Advocacy, and stakeholders, on October 23, 2023, this rule which clearly imposes exceptionally high costs and burden on small businesses, went into effect.[93]

ii. Apprentice Rule

Another example of the DOL ignoring compliance burden and cost is their proposed Apprentice Rule, which seeks to enhance the National Apprenticeship System by modernizing regulations for Registered Apprenticeships.[94] The Committee wrote to the DOL requesting more information, however, in its delayed response, the DOL failed to answer the Committee's questions but instead provided general information about the rule and its rulemaking process.[95] This Committee found that the rule would impose significant compliance costs for small businesses. The proposed rule would introduce significant changes to how training programs are structured, including prescribing minimum quality and content requirements to a program's standards and its apprenticeship agreements as well as establishing procedures concerning the registration, cancellation, and deregistration of apprenticeship programs.[96] The current apprenticeship program has adequate standards making these additions not only burdensome but also

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[85] *See* Updating the Davis-Bacon and Related Acts Regulations, 88 Fed. Reg. 57526 (2023) (to be codified at 29 CFR §§ 1, 3, 5).
[86] *See id.*
[87] *See id.*
[88] Isabella Hindley, *DOL's Davis-Bacon Final Rule Could Worsen Inflation*, Am. Action Forum (Aug. 16, 2023).
[89] *See* Updating the Davis-Bacon and Related Acts Regulations, 88 Fed. Reg. 57526 (2023) (to be codified at 29 CFR §§ 1, 3, 5).
[90] Letter from Roger Williams, *et. al.*, Chairman, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Dep't of Labor, (Sept. 28, 2023).
[91] *See* Letter from Liz Watson, Assistant Sec'y, Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).
[92] *See id.*
[93] *See* Updating the Davis-Bacon Rule & Related Acts Regulations, 88 Fed. Reg. 57526 (2023) (to be codified at 29 C.F.R. §§ 1, 2, 5).
[94] *See* National Apprenticeship System Enhancements, 89 Fed. Reg. 3118 (2024) (to be codified at 29 C.F.R. §§ 29, 30).
[95] Letter from Roger Williams, *et. al.,* Chairman, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Dep't of Labor, (Feb. 15, 2024); Letter from Liz Watson, Ass. Sec'y, Dep't of Labor, Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 29, 2024).
[96] *See* National Apprenticeship System Enhancements, 89 Fed. Reg. 3118 (2024) (to be codified at 29 C.F.R. §§ 29, 30).

duplicative.

Moreover, the proposed rule would require the adoption of a time-based model—effectively eliminating flexible competency-based approaches to workforce development—thereby discouraging employer participation in the government-registered apprenticeship programs.[97] The rule would place an especially high burden on small businesses by imposing unrealistic administrative requirements, including, requiring mandatory disclosures from training program sponsors, submitting an equitable recruitment plan, keeping records of employment decisions that affect apprentices, and providing details about the operation, performance, and advancement of the training program.[98] These new requirements will discourage small business participation in the apprenticeship programs. Discouraging participation in a program designed to bolster the American workforce is counterproductive. Especially given the labor shortage of skilled workers nationwide—nearly 90 percent of small business owners with job openings are struggling to find qualified applicants.[99]

Despite all of these compliance costs and burdens imposed by the rule, the DOL does not seem to believe they are significant enough. In the DOL's RFA analysis, while the DOL acknowledges the significant costs on small businesses, the DOL brushes over this burden and instead focuses on the alleged benefits of protecting "the safety and welfare of apprentices."[100]

iii. Non-Displacement Rule

In some cases, agencies have underestimated the familiarization and paperwork hour burdens. The DOL's Non-Displacement of Qualified Workers Under Service Contracts Rule is an example of this.[101] This rule implements and enforces the Executive Order 14055 to mandate the contractors and subcontractors who are engaged in federal service contracts to offer the right of first refusal for employment on the successor contracts to service employees previously employed under the predecessor contract.[102]

The Committee wrote to the DOL requesting more information about the DOL's justification for its time estimate for businesses to comply and familiarize themselves with the rule, however, the DOL's delayed response was very high level.[103] The DOL claimed, referring to the final rule, that "the Department believes that its average time estimate is appropriate based on a range of factors. These include the fact that many firms will familiarize themselves with the content of the rule in ways other than reading the final rule as published in the federal register."[104] The rule is 70 pages long and includes complex requirements—even if some firms would familiarize themselves with the content other ways, the DOL's estimate of 30 minutes to review and understand the rule is hardly enough for an average small business owner.

The DOL not only understated how long it would take to review the rule but also how long it would take to comply with the rule. The underestimation is clear—the DOL's explanation of how long it will take to complete various steps to comply with the rule does not match with their final time estimation.[105] The rule imposes time-consuming compliance burdens, such as notices to affected workers and their representatives, possible location-

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[97] Rebecca Rainey, *New apprenticeship proposal draws warning on scope of overhaul,* BL, (December 27, 2023).
[98] *See* National Apprenticeship System Enhancements, 89 Fed. Reg. 3118 (2024) (to be codified at 29 C.F.R. §§ 29, 30).
[99] NAT'L FED'N OF INDEP. BUS., SMALL BUS. OPTIMISM INDEX, 2 (Dec. 2023).
[100] *See* National Apprenticeship System Enhancements, 89 Fed. Reg. 3118 (2024) (to be codified at 29 C.F.R. §§ 29, 30).
[101] See Nondisplacement of Qualified Workers Under Service Contracts, 88 Fed. Reg. 86736 (2023) (to be codified at 29 C.F.R. § 9).
[102] *See id.*
[103] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Dep't of Labor (Feb. 1, 2024).
[104] *See* Letter from Julie Su, Acting Sec'y, Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Mar. 20, 2024).
[105] *See* Nondisplacement of Qualified Workers Under Service Contracts, 88 Fed. Reg. 86736 (2023) (to be codified at 29 C.F.R. § 9).

continuity notices, and successor contractor's mandatory offer letters.[106] Additionally, the final rule imposes additional far-reaching compliance costs for small entities that could result in inefficiencies in the procurement process since the contractor cannot bring its own uniquely qualified employees to the project.[107]

iv. Fiduciary Rule

The Committee wrote to the DOL about its proposed rule changes to the Retirement Security Rule and amendments to Prohibited Transaction Exemptions (Fiduciary Rule).[108] The Committee expressed concerns about the changes imposing considerable costs for small businesses—mainly in the form of lost income.[109] These changes would amend nearly 50-year-old standards and subject more small business financial professionals to the strictest fiduciary standards of conduct. This threatens the commission of many small entity broker-dealers and insurance agents selling IRAs and annuities to 401(k) participants rolling their savings out of an employer-sponsored plan.[110] The proposed changes would eliminate the exemption they have historically used to earn commissions on those sales.[111] The Committee is concerned that the increased burden and historic level of lost commission would lead these small financial professionals to go out of business or limit their services—negatively impacting both the business owners and the consumers. The direct costs are significant as well; during the first year alone, the estimated aggregate cost is $248 million on all small entities due to the proposed amendments, amounting to approximately $22,459 per entity.[112] Despite of these substantial impacts on small businesses, the DOL stated that it "believes the costs associated with the amendments are modest because the rulemaking was developed in consideration of other regulatory conduct standards."[113]

On April 25, 2024, the DOL finalized the rule against this Committee's, Advocacy's, and stakeholders' objections.[114] Even though the DOL made some changes and clarifications to this rule, the final rule still significantly hurts small businesses. The rule will require significant investment of both money and time to implement the compliance processes and supervision for incorporating the products to comply with this new fiduciary standard. According to the study conducted by Oxford Economics, the proposed rule would result in over $2.5 billion in costs, 120 million sheets of papers annually, and the industry startup costs are estimated to run almost $3.9 billion.[115] Since there were only minor changes in the final rule, the burden imposed is similar to these estimations by Oxford Economics about the proposed rule.[116]

v. Joint Employer Rule

The Committee wrote to the National Labor Relations Board (NLRB) about its costly and burdensome rule change to the Standard for Determining Joint Employer Status.[117] This change expands the joint-employer definition under the National Labor Relations Act (NLRA) by allowing a joint employer finding based solely on indirect and unexercised control.[118] In its response, the NLRB failed to adequately answer the Committee's

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[106] *See id.*

[107] *Id.*; *DOL issues nondisplacement of qualified workers under service contracts final rule, ABC disappointed,* ABC (Dec. 18, 2023).

[108] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Dep't of Labor (Dec. 7, 2023).

[109] *See id.*

[110] *Id.;* Austin R. Ramsey, *Biden touts 401(k) fiduciary rules as attack against 'junk fees',* Bloomberg Law (Oct. 31, 2023).

[111] *Id.*

[112] *See* Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (2023) (to be codified at 29 C.F.R. 2510).

[113] *See Id.*

[114] *See* Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32122 (2024) (to be codified at 29 C.F.R. 2510).

[115] *The economic consequences of the US Department of Labor's proposed new fiduciary standard*, Oxford Econ. (Aug. 18, 2015).

[116] *Id.*

[117] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Lauren McFerran, Chairman, Nat'l Labor Rel. Bd. (Dec. 7, 2023).

[118] *See* Standard for Determining Joint Emp'r Status, 88 Fed. Reg. 73946 (2023) (to be codified at 29 C.F.R. 103).

questions.[119] Instead of providing answers to the questions about the NLRB's reasoning and rationale related to the issues the Committee raised, such as costs and alternatives, the NLRB mostly just directed the Committee to the final rule which does not include the requested information.[120]

Despite the lack of appropriate response from the NLRB, the Committee found that this rule is significantly burdensome for small businesses. Removing the current clear and predictable joint employer standards prevents employers from predicting the risks and costs of their contracts with providers, vendors, subcontractors, and franchisees.[121] Beyond predictability, the rule expands liability to alleged joint employers which will almost certainly increase costs.

The rule changes rescind and replace the current joint employer rule adopted in 2020 that defines an entity as a joint employer only if it exercises actual and direct control over a specified and clearly defined essential terms and conditions of employment.[122] As such, the new rule deems entities as joint employers if they have authority or control over any essential term or condition of their employment, even they do not actually exercise such control.[123] The rule also expands the definition of "essential terms and conditions of employment," by including additional undefined terms.[124] Further, it extends the entities' bargaining responsibility to representatives of the other purported joint employer's employees.[125]

Several stakeholders raised the concern that the NLRB has underestimated the compliance costs for small entities. This is a reasonable concern, given that the estimated compliance costs are minimal, based only on the time estimate that it takes to become familiar with the new rule. The NLRB thereby dismisses legitimate concern about the costs for small entities if an entity is determined to be a joint-employer under this new rule contrary to its previous status. These costs include, for example, increased operational costs because the rule extends the entities' bargaining responsibility to representatives of the other purported joint-employer's employees. According to the rule, the joint-employer must participate in collective bargaining with the other employer's unionized employees.[126] Since the new rule significantly extends the definition of joint employer creating a large joint employer net, this will make bargaining responsibilities extremely burdensome for small businesses.

This rule was so outrageous that it was vacated by the U.S. District Court for the Eastern District of Texas before it could even go into effect on March 11, 2024.[127] The Court reasoned that the rule was overly broad in regard to common law and inconsistent with the National Labor Relations Act.[128] The court pointed out—the same concern that this Committee raised in its letter—that the rule "would treat virtually every entity that contracts for labor as a joint employer because virtually every contract for third-party labor has terms that impact, at least indirectly, at least one of the specified 'essential terms and conditions of employment.'"[129]

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[119] *See* Letter from Lauren McFerran, Chairman, Nat'l Labor Rel. Bd., to Roger Williams, Chairman, H. Comm. on Small Bus. (Feb. 15, 2024).
[120] *See id.*
[121] Mark G. Kisicki, *et al*., *NLRB casts wider joint-employer net with new final rule,* Ogletree Deakins (Oct. 27, 2023).
[122] *See* Standard for Determining Joint Emp'r Status, 88 Fed. Reg. 73946 (2023) (to be codified at 29 C.F.R. 103).
[123] *See id.*
[124] *See id.*
[125] *See id.*
[126] *See id.*
[127] *Chamber of Com. et. al. v. Nat'l Labor Rel. Bd., et. al.*, No. 6:23-cv-00553, Dkt. 44 (Mar. 8, 2024).
[128] *Chamber of Com. et. al. v. Nat'l Labor Rel. Bd., et. al.*, No. 6:23-cv-00553, Dkt. 44 (Mar. 8, 2024).
[129] *Id*. at 25.

b. CPSC: Residential Gas Furnaces and Boilers Rules

The Committee wrote to the Consumer Product Safety Commission's (CPSC) regarding their proposed rule that would create new product safety standards for residential furnaces and boilers.[130] The CPSC responded to the Committees' inquiry, however, it claims that the proposed rule will not have a significant impact on small importers.[131] However, this Committee found that the rule imposes a significant direct cost on small entities and is attempting to reiterate pursuing policy over the requirements of the law. These new standards laid out in the rule would require the small businesses that manufacture residential furnaces and boilers to abandon or redesign many of their product lines—an endeavor which could cost each small business up to $13.8 million.[132] $13.8 million compliance cost is clearly significant and will be extremely detrimental to small businesses. Even though the analysis showed an astronomical price tag, the CPSC continues to move forward with the regulation. This example demonstrates that even when the RFA analysis takes place, agencies are simply able to ignore the results of their work to move forward with their agenda, regardless of the small businesses that are harmed in the process.

c. DOE: Commercial Refrigeration and Distribution Transformers Rules

The Committee wrote to the DOE about multiple rules that could substantially harm small businesses. Furthermore, on November 3, 2023, the Committee held a hearing titled "Burdensome Regulations: Examining the Effects of Department of Energy Rulemaking on America's Job Creators."[133] This hearing examined the impacts of the DOE's burdensome regulations and economic pressures on small businesses and American consumers. The following rules were also discussed in the hearing and the Committee found them to be extremely burdensome on small entities.

i. Commercial Refrigeration Rule

The DOE's proposed rule change to the energy conservation standards for commercial refrigeration equipment imposed a significant compliance burden on small businesses.[134] The proposed rule would decrease the maximum estimated energy consumption permissible for commercial refrigeration equipment.[135] This rule would require the small businesses that manufacture commercial refrigeration equipment to abandon or redesign many of their product lines—an extremely costly endeavor.[136] This, in turn, will lead to extremely high compliance costs for small entities despite the fact that the DOE says that small entities would only incur "some conversion costs."[137] The Committee sent a letter to the DOE inquiring about the proposed rule's impact on small entities.[138] A month after the deadline for response, the DOE provided a high level response without adequately answering the Committee's questions.[139] Particularly, the Committee asked about the additional costs to comply with the updated standards, however, the DOE completely ignored the question.[140]

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130 *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Alexander Hoehn-Saric, Chairman, Consumer Prod. Safety Comm. (Nov. 9, 2023).

131 *See* Letter from Alexander Hoehn-Saric, Chairman, Consumer Prod. Safety Comm., to Roger Williams, Chairman, H. Comm. on Small Bus., (Nov. 9, 2023); Safety Standard for Residential Gas Furnaces and Boilers, 88 Fed. Reg. 73272 (2023) (to be codified at 16 C.F.R. § 1408).

132 *See id.*

133 *Burdensome Regulations: Examining the Effects of Department of Energy Rulemaking on America's Job Creators, Hearing Before H. Comm. on Small Bus.,* 118th Cong. (Nov. 3, 2023).

134 *See* Energy Conservation Program: Energy Conservation Standards for Commercial Refrigerators, Freezers, and Refrigerator-Freezers, 88 Fed. Reg. 70196 (2023) (to be codified at 10 C.F.R. § 431).

135 *Id.*

136 *Id*.

137 *Id*.

138 Letter from Roger Williams, *et. al*., Chairman, H. Comm. on Small Bus., to Jennifer Granholm, Sec'y, Dept. of Energy (Nov. 2, 2023).

139 Letter from Mandy Mahoney, Bldg. Technologies Off. Dir., Off. of Energy Efficiency and Renewable Energy, to Roger Williams, Chairman, H. Comm. on Small Bus. (Dec. 18, 2023).

140 *Id*.

ii. Distribution Transformers Rule

The Committee inquired about the DOE's rule change to energy conservation standards for distribution transformers. The rule amends the energy conservation standards for three categories of distribution transformers that are manufactured in, or imported into, the United States.[141] During this time of historically high energy prices, it appears this rule would have a substantial impact on small businesses nationwide. The rule fails to consider all direct economic impacts to small utilities who are required to purchase and use distribution transformers. Despite asserting this rule will not have a substantial impact on small entities, the DOE recognized "that distribution transformer manufacturers, including small businesses, will incur conversion costs to comply with standards."[142]

The Committee sent a letter to the DOE, raising concerns about the cost burdens of the proposed rule.[143] However, despite of the Committee's concerns that the DOE failed to consider small entities in its rulemaking process, the DOE finalized the rule on April 22, 2024.[144] Over two months after the deadline to respond had passed, the agency provided an inadequate response; the DOE explained its RFA policies and procedures yet failed to answer any questions about the proposed rule's impact on small businesses specifically.[145]

d. EPA: EtO Rule; Methane Rule; PFAS Rule; Air Quality Standards Rule; and Clean Power Plant Rules

The Committee has written to the EPA about multiple rules that could substantially harm small businesses.[146] The EPA took over two months to respond and provided an inadequate response to the Committee, simply alleging "the EPA starts considering small business impacts early in the rulemaking process."[147] Furthermore, on February 14, 2024, the Committee held a hearing titled "Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street." This hearing examined some of the EPA's most damaging rules illustrating how the EPA has overregulated American industries stifling innovation and making it hard for small businesses to function.[148] Since 2021, rules issued by the EPA are estimated to have cost the U.S. economy over $249.7 billion across all industries and increased paperwork hours for all businesses by nearly 6.5 million hours.[149] The rules discussed below, also covered in the hearing, will have a significant impact on a substantial number of small businesses, increasing costs and regulatory burdens.

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[141] *See* Energy Conservation Program: Energy Conservation Standards for Distribution Transformers, 88 Fed. Reg. 1722 (2023) (to be codified at 10 C.F.R § 431).

[142] *See* Energy Conservation Program: Energy Conservation Standards for Distribution Transformers, 89 Fed. Reg. 29834 (2024) (to be codified at 10 C.F.R § 431).

[143] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer Granholm, Sec'y, Dept. of Energy (May 16, 2023).

[144] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer Granholm, Sec'y, Dept. of Energy (May 16, 2023); *Energy Conservation Program:* Energy Conservation Standards for Distribution Transformers, 89 Fed. Reg. 29834 (2024) (to be codified at 10 C.F.R § 431).

[145] *See* Letter from Alejandro Moreno, Acting Assistant Sec'y, Dept. of Energy, to Roger Williams, Chairman, H. Comm. on Small Bus. (Aug. 2, 2023).

[146] *See* Letter to Michael Reagan, Adm'r, Env't Prot. Agency, from Roger Williams, Chairman, H. Comm. on Small Bus. (Feb. 14, 2024).

[147] *See* Letter from Tim Del Monico, Assoc. Adm'r. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).

[148] *Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street: Hearing Before H. Comm. on Small Bus.,* 118th Cong. (Feb. 14, 2024).

[149] *Regulation Rodeo*, Am. Action Forum, (last visited May 10, 2024), https://www.regrodeo.com.

i. EtO Rule

The Committee wrote to the EPA about its National Emission Standards for Hazardous Air Pollutants: Commercial Ethylene Oxide (EtO) Sterilization Technology Review (EtO) proposed rule's harmful impact on small businesses.[150] However, the EPA failed to address the Committee's concerns and finalized this rule on April 5, 2024.[151] In the EPA's response to the Committee's letter, it assured that "the EPA considered the latest data and science, while taking into account the importance of a safe and reliable supply of sterilized medical devices for patients and hospitals."[152] However, this is contrary to the Committee's findings. This rule would effectively ban the commercial use of Ethelyne Oxide (EtO).[153] EtO is an essential chemical used throughout numerous industries in the U.S., most notably in the sterilization of medical equipment.[154] Dr. Lishan Aklog, M.D., the Chairman and CEO of PAV Med Inc., testified before the Committee on February 14, 2024, that banning ethylene oxide leads to supply chain issues, patient suffering, and even death.[155] Eliminating EtO would require manufactures to change how they sterilize medical equipment, either adopting more costly or less effective solutions.[156] Further, Dr. Aklog said that "alternatives to sterilize medical devices are not appropriate" or do not work, and the only available technology is EtO.[157] Small medical device manufacturers may not be able to sterilize their equipment properly with alternatives to EtO, and it will be costly for these entities to receive new Food and Drug Administration (FDA) approval for the new sterilization techniques. While larger entities may be able to afford to comply with this rule, small businesses may not be able to shoulder the costs and could be forced to shut down.[158] Despite the EPA initially indicating this rule would cost companies only $86 million to comply with, industry estimates that the true total cost is over $220 million for all businesses.[159]

ii. Methane Rule

The EPA's Methane Rule implements unnecessary requirements that oil and gas companies must constantly and actively search for methane leaks in their facilities.[160] This undertaking would be costly, and incomplete compliance may result in businesses being fined. Oil and gas companies already have an incentive to monitor for and stop leaks, given that each leak is lost profit. Additionally, the rule could require businesses to capture excess methane that is currently being released or flared. This would require a costly retooling.[161] Industry has described this regulation as incoherent and indicated it would limit the ability of companies to innovate.[162] The Committee wrote to the EPA being concerned that nearly 90 percent of all oil and gas extractors are small businesses, these

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[150] *See* Letter to Michael Reagan, Adm'r. Env't Prot. Agency, from Roger Williams, Chairman, H. Comm. on Small Bus. (Feb. 14, 2024).

[151] *See* National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Emissions Standards for Sterilization Facilities Residual Risk and Technology Review, 89 Fed. Reg. 24090 (2024) (to be codified at 40 C.F.R. § 60, 63).

[152] *See* Letter from Tim Del Monico, Assoc. Adm'r. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).

[153] *NAM pushed back on restrictive chemical rule,* Nat'l Assoc. of Mfrs. (Nov. 15, 2023).

[154] *See* National Emission Standards for Hazardous Air Pollutants: Commercial Ethylene Oxide (EtO) Sterilization Technology Review, 88 Fed. Reg. 22790 (2023) (to be codified at 40 CFR § 63).

[155] *Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street Before H. Comm. on Small Bus.,* 118th Cong. (Feb. 14, 2024) (statement of Dr. Lishon Aklog, Chair & CEO PAVMed, Inc.).

[156] Letter from Cathy McMorris Rodgers, *et al*., Chair, H. Comm. on Energy & Com., to Lael Brainard, *et al*., Dir., U.S. Nat'l Econ. Council. (Sept. 28, 2023); *NAM Pushed Back on Restrictive Chemical Rule,* Nat'l Assoc. of Manufacturers (Nov. 15, 2023).

[157] *Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street Before H. Comm. on Small Bus.,* 118th Cong. (Feb. 14, 2024) (statement of Dr. Lishon Aklog, Chair & CEO PAVMed, Inc.).

[158] Katie Hobbins, *EtO Proposal Could Cost Companies More Than the $220 Million Estimated*, Medical Device & Diagnostic Indus. (Jun. 14, 2023).

[159] *Id*.; *Burdensome Regulations: Examining the Impact of EPA Regulations on Main Street Before H. Comm. on Small Bus.,* 118th Cong. (Feb. 14, 2024).

[160] *See* Standards of Performance for New, Reconstructed, and Modified Sources and Emissions, Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 87 Fed. Reg. 74702 (2023) (to be codified at 40 C.F.R. § 60).

[161] Jennifer Hijazi, *Popular EPA Methane Rule Comes with Cost, Monitoring Concerns,* BL (Dec. 8, 2023*); EPA Finalizes Methane Rule*, Nat'l Assoc. of Mfrs. (Dec. 6, 2023).

[162] News Release, Am, Petrolium Inst., API Calls on Congress to Repeal IRA's Methane Fee (Jan. 12, 2023).

rules will disproportionately increase costs for them, and may result in many small wells closing.[163] Yet, in its delayed response, the EPA claims it has evaluated "the economic impact of the proposed standards on small entities and appropriate steps that could be taken to minimize economic impacts in a final rule."[164]

iii. PFAS Rule

The Committee sent a letter to the EPA raising concerns that the small businesses that use perfluoroalkyl and polyfluoroalkyl substances (collectively "PFAS") may experience substantial disruptions to their operations when the PFAS National Primary Drinking Water Regulations are enforced.[165] Two months after the deadline to respond had past and only two days prior the EPA finalized the rule, the EPA finally responded the Committee. However, the response was high-level without addressing all the Committee's questions. Furthermore, unfortunately, the EPA failed to properly consider small entities and finalized the rule on April 26, 2024.[166]

In the final rulemaking, the EPA alleges it has "provided maximum flexibility for small systems."[167] The EPA's PFAS National Primary Drinking Water Rule would require treatment of PFAS used in manufacturing under certain circumstances.[168] These new standards are purportedly aimed at reducing the amount of PFAS in the water supply.[169] The EPA issued this rule despite concerns over whether this rule would actually improve health outcomes, and it is estimated to cost water systems, big and small, approximately $40 billion.[170] PFAS is used in the production of medical devices, cell phones, and numerous other products. Regulating its use will create additional regulatory burdens on water systems and manufacturers, and likely increase consumer costs on many goods.[171]

iv. Air Quality Standards Rule

The Committee wrote to the EPA regarding its proposed rule's Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (PM2.5).[172] The EPA responded to the Committee two months late and nearly two months after finalizing the rule without answering any of the Committee's questions. The Committee raised concerns that the rule would require the enactment of significant controls to mitigate the emission of particulate matter 2.5 micrometers or smaller—which is emitted when almost anything is burned, destroyed, or crushed.[173] This new rule will most heavily impact industries that must heat or burn raw materials and mining operations.[174] This will increase the regulatory burden for companies of all sizes, make the permitting process more difficult, and lead to increased outsourcing.[175] Small businesses would be faced with significant and costly operations adjustments, with the rule's projected costs between $162 and $197 billion for all companies to comply

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[163] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael Reagan, Adm'r. Env't Prot. Agency (Feb. 14, 2024).

[164] *See* Letter from Tim Del Monico, Assoc. Adm'r. U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).

[165] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael Reagan, Adm'r. Env't Prot. Agency (Feb. 14, 2024).

[166] PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32532 (2024) (to be codified at 40 CFR §§ 141, 142).

[167] *Id.*

[168] PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18638 (Mar. 29, 2023).

[169] *EPA Proposes PFAS Standards,* Nat'l Assoc. of Mfrs. (Mar. 16, 2023).

[170] *Id.*

[171] Pat Rizzuto, *PFAS Rule to Cost Many Millions More, EPA Analysis* Finds, Bloomberg Law (Nov. 23, 2023).

[172] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael Reagan, Adm'r. Env't Prot. Agency (Feb. 14, 2024); *See* Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 88 Fed. Reg. 5558 (2023) (to be codified at 40 CFR §§ 50, 53, 58).

[173] *See id.*

[174] *NAM pushed back on harmful new air regulations*, Nat'l Assoc. of Mfrs. (Feb. 9, 2023).

[175] *Id.*

with. It is also estimated that this rule could put nearly one million jobs at risk.[176] Despite of the Committee's objections and these heavy consequences, the EPA finalized the rule on March 6, 2024, certifying that the action will not have a significant economic impact on small entities because "it will not impose any requirements on small entities."[177]

v. Clean Power Plant Rule

The EPA's Clean Power Plant proposed rule would require power plants to implement carbon capture technology and/or integrate hydrogen into their fuel cycle; plants that do not implement these technologies and meet emissions goals could be shut down.[178] At the time of proposal, the EPA certified "that the proposed standards would not have a significant impact on a substantial number of small entities."[179] However, in its letter to the EPA, the Committee raised concerns that the process of integrating carbon capture or hydrogen technologies would be costly for manufacturers—estimates range from $10 to $14 billion across the industry.[180]

While the cost of this rule is substantial, it also relies on technology that is either unproven or has not been deployed on a large scale.[181] Implementing cutting edge, expensive technologies increases cost for small businesses. This would also have a knock-on effect of increasing energy costs for consumers.[182] Small businesses are reliant on the electric grid and this rule would increase the cost of energy, while also potentially creating energy scarcity in more rural communities. Additionally, such a large change could amount to a "generational shift" in technology, which the Supreme Court has previously ruled as an impermissible way to implement best practices in emission reduction standards.[183] The EPA took two months to provide a surface level response to the Committee's inquiry.[184] Unfortunately, despite objections from the Committee, on May 9, 2024, the EPA finalized the rule which clearly imposes exceptionally high costs and burden on small businesses.[185]

e. FDA: Tobacco Product Standard for Characterizing Flavors in Cigars Rule

The FDA's proposed a rule to create a product standard for cigars that would result in a product ban of all cigars with a "characterizing flavor" other than tobacco.[186] This Committee raised significant questions about downstream impacts on small business resulting from revenue losses—not just from sale of menthol products, but by secondary sales, such as someone purchasing a soda when purchasing menthol products—for convenience

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[176] Letter from Shelly Moore Capito, *et al*., Ranking Member, Sen. Comm. on Env't and Pub. Works, to Michael Reagan, *et al*., Adm'r, U.S. Env't Prot. Agency (Dec. 18, 2023); *U.S. Air Quality Standards and the Manufacturing Sector*, Nat'l Assoc. of Mfrs. (Apr. 2023).

[177] Letter from Tim Del Monico, Assoc. Adm'r. U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus., (Apr. 24, 2024); Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16202 (2024) (to be codified at 40 CFR §§ 50, 53, 58).

[178] *See* New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (2023) (to be codified at 40 CFR § 60).

[179] Letter from Tim Del Monico, Assoc. Adm'r. U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).

[180] *Id*., *See also NAM Fights Restrictive Power Plant Rule*, Nat'l Assoc. of Mfrs. (Nov. 29, 2023).

[181] Erin Kelly, *Thousands of Co-op Members Voice Opposition to EPA's Power Plant Rule*, NRECA (Aug. 22, 2023); *Id.*

[182] *The Biden Administration's Executive Overreach and Its Effect on American Energy Independence: Hearing Before H.Comm. on Natural Resources Subcomm. on Oversight and Investigations,* 118th Cong., 3 (May 11, 2023) (statement of Diana Furchtgott-Roth, Dir., Ctr. on Energy, Climate, & Env't, & The Herbert and Joyce Morgan Fellow in Energy & Env't Policy, The Heritage Found.).

[183] Letter from Shelly Moore Capito, *et al*., Ranking Member, Sen. Comm. on Env't & Pub. Works, to Michael Reagan, *et al*., Adm'r, U.S. Env't Prot. Agency (Dec. 18, 2023); *See also* W.V. v. EPA, 142 S. Ct. 2587 (2022).

[184] *See* Letter from Tim Del Monico, Assoc. Adm'r. U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus. (Apr. 24, 2024).

[185] *See* New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 39798 (2024) (to be codified at 40 CFR § 60).

[186] *See* Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26396 (2022) (to be codified at 21 C.F.R. § 1166).

stores and other small retailers nationwide.[187] The analysis indicated that more than 115,000 small business retailers of flavored tobacco products will be impacted by the proposed rule. The FDA acknowledged that "the proposed rule would have a significant economic impact on a substantial number of small entities," however, in its RFA analysis, the FDA failed to quantify the revenue loss that banning the products under the proposed rule would have on average small business retailers by category.[188]

Nearly four months after the Committee sent a letter to the FDA, the FDA finally responded. However, the FDA refused to answer any of the Committee's questions and stated that "because the rulemaking process is ongoing, FDA is unable to respond to many of the questions outlined in your letter at this time."[189] Fortunately, even though the FDA refused to answer any specific questions, after pressure from the Committee and other parties, the implementation of this rule was paused and the FDA continues to review the rule based on the comments.[190]

f. BOEM: Rice's Whale Rule

The Committee wrote to the Bureau of Ocean Energy Management (BOEM) about its proposed Rice's Whale Rule.[191] The rule would exclude nearly six million acres from Lease Sale 261 and create additional requirements for operators and vessels in the Gulf of Mexico.[192] Specifically, the BOEM added an additional term to the Gulf of Mexico Oil and Gas Lease Sale No. 261, and all future sales, which reduced the land available for purchase and what that land is permitted to be used for, requires operators and vessels adhere to a 10-knot speed limit during the day, and prohibits nighttime travel in the Rice's Whale's protective area.[193] This removes opportunities for small oil and gas producers to lease land to run and grow their businesses. The 10-knot speed limit restrictions on shipping will increase inefficiencies in the supply chain, which will in turn increase costs for consumers and create logjams at ports.[194] This cost will be felt disproportionately by small oil and gas operators in the Gulf, who are less able to take advantage of economies of scale. Together, these provisions have a substantial impact on a significant number of small businesses.

In its letter to the BOEM, the Committee expressed concerns that the BOEM inadequately considered the economic impacts of its rule.[195] Initially, the BOEM refused to answer any of the Committee's questions but finally six months after the deadline for response had passed, the BOEM provided a response to the Committee's inquiry answering a few of the questions.[196] Importantly, however, the BOEM failed to answer the Committee's inquiry about the costs the small businesses may incur to comply with the rule. Unfortunately, despite objections from the Committee, on April 24, 2024, the BOEM finalized the rule which clearly imposes exceptionally high costs and burden on small businesses.[197] In the final rule, the BOEM acknowledged that since 69 percent of affected

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[187] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Shalanda Young, Dir, Off. Mgmt. & Budget, *et al*. (June 28, 2023).

[188] *See* Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26396 (2022) (to be codified at 21 C.F.R. § 1166).

[189] Letter from Erin O'Quinn, Food and Drug Admin.to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).

[190] Alexander Tin, *Menthol cigarette ban delayed due to "immense" feedback, Biden administration says*, CBS News (Apr. 26, 2024).

[191] Letter from Roger Williams, *et. al*., Chairman, H. Comm. on Small Bus., to Liz Klein, Dir., Bureau of Ocean Energy Mgmt. (Oct. 12, 2023); Risk Management & Financial Assurance for OCS Lease & Grant Obligations, 88 Fed. Reg. 42136 (2023) (to be codified at 30 C.F.R. §§ 550, 556, 590).

[192] Bureau of Ocean Energy Mgmt, BOEM NTL No. 2023-G01, *Notice to Lessees and Operators of Federal Oil and Gas, and Sulphur Leases in the Gulf of Mexico Outer Continental Shelf*, 1 (Aug. 17, 2023).

[193] *Id.*

[194] Samuel Stettheimer, *Alabama Port Authority Rejects Possible Whale-Saving Rule*, The Ala. Pol. Reporter (Jul. 17, 2023); Nathan Cobb, *Council Says Proposed Rule on Rice's Whales could Cripple Ports, Including Panama City*, Panama City New Herald (Jul. 6, 2023).

[195] Letter from Roger Williams, *et. al*., Chairman, H. Comm. on Small Bus., to Liz Klein, Dir., Bureau of Ocean Energy Mgmt. (Oct. 12, 2023).

[196] Letter from Liz Klein, Dir., Bureau of Ocean Energy Mgmt., to. Roger Williams, Chairman, H. Comm. on Small Bus (Apr. 11, 2024).

[197] Risk Management & Financial Assurance for OCS Lease & Grant Obligations, 88 Fed. Reg. 31544 (2024) (to be codified at 30 C.F.R. 550, 556, 590).

companies are small businesses, "BOEM expects the rule will affect a substantial number of small entities."[198]

g. FTC: Non-Compete Clause Rule

The Committee wrote to inquire about the Federal Trade Commission's (FTC) Non-Compete Clause rule.[199] However, in its response, the FTC failed to adequately answer any of the Committee's questions but instead gave a general answer about considering various commenters concerns, including the Committee's.[200] This proposed rule would ban the use of non-compete clauses in employment contracts, impacting competition and legal liability.[201] This rule would impose significant costs on small businesses and pose a serious risk of loss and potential closures. This rule demonstrates the failure to consider the economic benefits of non-compete agreements for small businesses, and the impact the rule may have on competition and on the U.S. economy altogether.[202] Specifically, the FTC failed to consider that banning non-compete agreements could make it more challenging for small businesses to prevent their workers from being poached by large corporations with more resources, threatening the innovation small businesses contribute to the American economy.[203]

The Committee raised concerns that the FTC underestimated the costs and impact of this proposed rule on small businesses.[204] The FTC estimated that 2.94 million small firms will be impacted by the proposed rule, but maintains the costs are limited to updating contractual practices—only costing small businesses between $317.88 to $563.84 per entity.[205] However, the FTC has ignored significant implications for small businesses—failing to include the costs of hiring additional legal resources or hiring and retaining additional workers.[206] Additionally, this fails to recognize that small businesses have harder times attracting and retaining talented workers. As this Committee continually hears about the effects of labor shortages across the country, this will put small firms in a weaker position compared to their larger counterparts.

Despite of this Committee's objections, the FTC finalized the rule on April 23, 2024.[207] The main issues still remain: the rule removes a crucial tool to protect trade secrets, it stifles innovation coming from small businesses, and large corporations can easily poach talent from these small entities.[208] Furthermore, the rule has already led to lawsuits from interested parties. One of them accurately argued that "the sheer economic and political significance of a nationwide noncompete ban demonstrates that this is a question for Congress to decide, rather than an agency."[209]

2. Underestimating the Number of Small Entities Impacted

The RFA requires the agencies to estimate how many small entities will be impacted by any new rule. However, the Committee frequently discovered during the investigation that agencies underestimate the number of impacted small entities. Regulations have broader effects than agencies often account for, which will cause some small businesses to be excluded from these calculations. While a few agencies have asked interested parties to submit more information and data in public comments, not all agencies request data as they ought to in order to

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198 *Id.*

199 Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Lina M. Khan, Chair, Fed. Trade Comm'n (Mar. 14, 2024); *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (2023) (to be codified at 16 C.F.R. § 910).

200 Letter from April J. Tabor, Sec'y, Fed. Trade Comm'n, to Roger Williams, Chairman, H. Comm. on Small Bus. (Mar. 14, 2024).

201 *See id.*

202 Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Lina M. Khan, Chair, Fed. Trade Comm'n (Mar. 14, 2024).

203 *Id.*

204 *Id.*

205 *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (2023) (to be codified at 16 C.F.R. § 910).

206 *See* Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., *et al.*, to April Tabor, Acting Sec'y of the Comm'n, Fed. Trade Comm'n (Mar. 20, 2023).

207 *See* Press Release, Fed. Trade Comm'n, FTC announces rule banning noncompetes (Apr. 23, 2024).

208 Eric Rivell, *FTC votes to ban noncompete agreements,* Fox News (Apr. 23, 2024).

209 Chamber of Com. v. Fed. Trade Comm'n, Pl. Compl. for Declaratory & Injunctive Relief ¶ 20.

accurately estimate the number of small entities affected. Incorrect certifications and the enactment of excessively onerous regulations without triggering an RFA analyses are often the result of underestimating the number of affected small entities.

The agencies frequently restrict the proposed regulation costs to only the small entities that directly fall under the affected industry and leave the other affected small entities out of these calculations. However, the Committee found that small entities face financial hardships as a result of supplier regulations and other business-related regulations. These small businesses should be accounted for when estimating the number of impacted small entities. Agencies must carefully consider these downstream impacts and the actual number of impacted small entities during the rulemaking process to avoid further harm to small businesses down the supply chain.

Besides underestimating the number of impacted small businesses, the regulations often disproportionally impact small entities. Small businesses already have fewer resources than their larger counterparts and adding regulations that disproportionately impact small businesses is outrageous. Whether the issue is that the rule has a disproportional impact on small entities, or the agency has underestimated its impact, it has real world implications for small businesses making their operations harder. On some occasions, agencies might even do these calculations with willful ignorance. The Committee found that several agencies either omitted the number of small entities impacted by a proposed rule or appeared to manipulate existing guidelines to downplay the number of small entities impacted, as the following example demonstrates.

a. Federal Energy Regulatory Commission Rules

In response to the Committee's letter, the Federal Energy Regulatory Commission (FERC) produced documents regarding their RFA analysis that show just how far some agencies will go to avoid proper compliance with the RFA. The FERC's production included an email chain where the FERC career staff discussed what should be considered a "small entity" prior to publishing a Notice of Proposed Rulemaking (NPRM) to update its Standards for Business Practices of Interstate Natural Gas Pipelines in March 2021.[210] The emails show how the FERC career personnel applied the SBA's size regulations to minimize the number of small entities included in their initial RFA impact analysis, without regard for accuracy. At the outset of the emails, the Committee was alarmed by the lack of knowledge as to which small entities should be counted. The emails revealed that the FERC career employees did not know what small entities to include. Specifically, one career employee acknowledged they did not know how to "discern whether a company should be excluded from the list of small entities," and noted it "probably won't make a difference if we just bury this and not make a [big] deal out of it."[211]

[210] *See* Standards for Business Practices of Interstate Natural Gas Pipelines, 86 Fed. Reg. 12879 (2021) (to be codified at 18 C.F.R. § 284).

[211] E-mail from [redacted], Off. of the Gen. Counsel, Fed. Energy Reg. Comm'n, to [redacted], *et. al*., Economist, Fed. Energy Reg. Comm'n (Nov. 20, 2020, 10:34 am ET) (on file).

From: [redacted]
Sent: Friday, November 20, 2020 10:34 AM
To: [redacted]
Cc: [redacted]
Subject: RE: For your review by COB 11/10 - Draft NOPR for NAESB Gas Standards 3.2

Raton is like a two mile pipeline and [redacted] (so [redacted] you know how long ago that was) and I, back in the day, negotiated with them as to how they should comply with Commission regulations. We would not have given them an explicit waiver of GISB back then, because GISB did not exist. While technically, Raton should have filed an eTariff, I don't want to be the one to tell them they have to spend money on making an eTariff filing.

As to your ultimate question, I don't know how to answer that. My concern is that we begin to look silly, changing our small company enumeration for every rulemaking based on some different mode of analysis. However, it probably won't make a difference if we just bury this and not make a bid deal out of it.

From: [redacted]
Sent: Friday, November 20, 2020 10:03 AM
To: [redacted]
Cc: [redacted]
Subject: RE: For your review by COB 11/10 - Draft NOPR for NAESB Gas Standards 3.2

The list of eTariff pipelines that [redacted] as includes Raton. I can readily believe that Raton should not have to comply with NAESB, but exactly why? Did they ask for and receive a waiver of compliance with NAESB requirements? Did the Commission grant such a waiver sua sponte? Implicitly? How can one discern whether a company should be excluded from the list of small entities?

Additionally, the number and percentage of small entities substantially impacted by the NPRM varied significantly throughout the email chain, starting with an estimated 62 entities, or 35 percent, and ending with 11 entities, or 6.2 percent. The FERC was able to reduce this estimation by selectively interpreting the SBA's size standards and picking data that represents the lowest possible estimate of small businesses significantly impacted by the NPRM, not the most accurate estimation.

The FERC states in its published NPRM that "most of the natural gas pipelines regulated by the Commission do not fall within the RFA's definition of a small entity, which is currently defined for natural gas pipelines as a company that, in combination with its affiliates, has total annual receipts of $30 million or less."[212] The FERC settled on "only 11 companies [representing] six percent" of the total possible small businesses that may have a significant burden imposed on them by the proposed rule.[213] Yet, emails show the FERC career personnel explaining, with reference to the "SBA [size determination] regulation" that the total respondents should be 35 percent, approximately 62 entities, which is much higher than the 11 small entities the FERC ultimately reported in the NPRM.[214]

[212] Standards for Business Practices of Interstate Natural Gas Pipelines, 86 Fed. Reg. 12879 (2021) (to be codified at 18 C.F.R. § 284).
[213] Email from [redacted] Off. of Energy Market Regul., Fed. Energy Reg. Comm'n, to [redacted] *et. al*., Economist, Fed. Energy Reg. Comm'n, et. al. (Nov. 26, 2020, 2:37 am ET) (on file).
[214] Email from [redacted], Off. of Energy Market Regul., Fed. Energy Reg. Comm'n, to [redacted], Mgmt. Analyst, Fed. Energy Reg. Comm'n, et. al., (Nov. 20, 2020, 9:49 pm ET) (on file).

From: [redacted]
Sent: Monday, November 2, 2020 9:49 PM
To: [redacted]
Cc: [redacted]
Subject: RE: For your review by COB 10-22 - Draft NOPR for NAESB Gas Standards 3.2

Issue – Number/percentage of small pipelines significantly burdened by NAESB NOPR

Staff opinion – Reported number/percentage of small pipelines significantly burdened by NAESB NOPR too high

Staff recommendation – Out of the reported 62 small companies, how many small companies are *not affiliated with larger companies*? Reported number/percentage should be lower

Analysis

The 2018 NAESB NOPR stated that only 11 [small] companies *not affiliated with larger companies* could be considered a small entity under the Regulatory Flexibility Act (RFA). The 2018 NAESB NOPR further stated that this represents about seven percent of the total universe of potential respondents that may have a *significant burden* imposed on them.

However, the draft NOPR states that 62 companies not affiliated with larger companies could be considered a small entity under the RFA. The draft NOPR further states that this represents about 35 percent of the total universe of potential respondents that may have a significant burden imposed on them.

Going from 11 small companies reported in 2018 to 62 "small" companies reported in 2019 appears to be a big jump in the number of small companies that should be reflected in the NAESB NOPR. Further, stating that 35 percent of small companies may have a significant burden imposed on them appears to be a large percentage of small companies significantly burdened by the NAESB NOPR, particularly during COVID-19 when many small companies are facing economic hardship. I doubt 51 small pipelines were built and/or placed in-service from 2018 to 2019. I see what is currently written in the NOPR as ammunition for 63 small companies to argue, either via comments to the NOPR and/or their subsequent compliance filings to the final rule, that they cannot comply with the new cybersecurity related standards for a while because doing so would "significantly burden them." If this sounds over-analytical, please note that, based on my recent experience with other Commission orders, the 11th floor has even commented on citations and language in footnotes.

Accordingly, the question is ***whether the team thinks the 62 companies/35 percent is an <u>ok</u> number of small companies to be significantly burdened by the NOPR.*** If ok, then I stand on the minority who thinks those numbers are too high for small pipelines that may be significantly burdened by a NAESB NOPR and we can move on.

If not ok, then the question is ***how many small companies are *not affiliated with larger companies*?*** It reasons that number would be a lot lower than 62 companies/35 percent. My unscientific/estimated/ballpark/fabricated data calculations based on the number of compliance filings received the last round and the total number of pipelines subject to the rule show that number to be more around 16 companies/nine percent. Those numbers appear to be more in line with the 11 companies/seven percent numbers in the 2018 NAESB NOPR.

If the team does not want to rely on my "fabricated data/non-actual numbers," then I would suggest asking whoever came up with the numbers for small pipelines (which by the way, I never saw the analysis, just the results/findings), to recalculate the numbers based on 2020 data and narrow the small companies' calculation to the number of small companies *not affiliated with larger companies*, if possible and within reason, and revise the draft NOPR accordingly, if necessary.

What we should **NOT do** is simply change numbers just because I suggested doing so.

[redacted]

From: [redacted]
Sent: Friday, November 27, 2020 8:58 AM
To: [redacted]
Cc:
Subject: RE: For your review by COB 11/10 - Draft NOPR for NAESB Gas Standards 3.2

Thanks [redacted]

I think [redacted] revised table is ok. There were some other adjustments, but the primary difference between his table and the one I sent out on Tuesday is the addition of more entities that were affiliated, the sort of additional adjustments I invited in my Tuesday email accompanying the prior version of the table. [redacted] did not describe his methodology for finding additional affiliated entities, but I reviewed a few of them and looked at line 17 of their Form 2/2A and these adjustments were supported by the affiliation statements appearing there. I agree with [redacted] that it is time to move on. Unless I receive comments on his revised table by COB Monday 11/30, I plan to send the draft NOPR to senior staff on Tuesday, 12/1.

[redacted]

From: [redacted]
Sent: Thursday, November 26, 2020 2:37 AM
To: [redacted]
Cc:
Subject: RE: For your review by COB 11/10 - Draft NOPR for NAESB Gas Standards 3.2

See revised table (attached). Consistent with [redacted] robust guidance, **11 companies/six percent (i.e., 6.2 percent to be exact)** are the numbers that should be reported in the NOPR, which are in line with the 11 companies/seven percent reported in the 2018 NAESB NOPR. Reason for revised column H – See revised columns F and G. Glad to see excel spreadsheets still cannot replace work-related experience. In short, [redacted] OED's assessment/calculations (ok, perhaps in their head) was/were correct in 2018 and are factually supported for this NOPR (even with 2019 data). I think it is time to move on. Happy Thanksgiving.

From: [redacted]
Sent: Tuesday, November 24, 2020 11:36 AM
To: [redacted]
Cc: [redacted]
Subject: RE: For your review by COB 11/10 - Draft NOPR for NAESB Gas Standards 3.2

All

See the attached table, which is [redacted] table of 38 small pipelines, but which adds column F showing apparent affiliation or relation to larger companies, column G showing which companies filed in response to Order No. 587-Y, and column H showing those of the 38 that from my review of the elibary docket sheets filed in response to Order No. 587-Y less those that appear affiliated or related to larger pipelines or companies. This results in 20 pipelines in column H that appear

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subject to the new NAESB proposed rule. It's worth noting that a quick review of the companies that filed in response to 587-A appears to include quite a few small pipelines that do not show up on [redacted] table of 38 small pipelines. So the resulting 20 small pipes appears to be, if anything, a potentially significant underestimate of the small pipes who will be complying with an order on the proposed rule. Why this is greater than the 11 small pipelines thought in Order 587-Y to be potentially to be subject to that rule I don't know since it is unclear what methodology was used to come up with the 11 small pipelines referred to in that order. In any event, I am all ears if anyone believes that particular pipelines should not appear among the 20 remaining. Feel free to delete any of those pipelines but please provide a specific reason for deleting any pipeline you think should be deleted. Unless I hear from you all otherwise by COB Monday 11/30, I intend to use the 20 small pipeline figure in the draft NOPR and send that draft on to senior staff early next week.

Thanks

[redacted]

Internally, there were several questions about the FERC's reduced estimate. For instance, the FERC career personnel warned that the reported number "appears to be, if anything, a potentially significant underestimate of the small [pipeline companies] who will be complying with an order on the proposed rule."[215] Another email raises concerns that the career employee coming to this figure "did not describe his methodology," and noted the consensus among the FERC career personnel that it was "time to move on."[216] The FERC career personnel also noted the number appears to be the "unscientific/estimated/ballpark/fabricated data calculations based on the number of compliance filings received … for 2019."[217] This ballpark estimate was the number small businesses needed to rely on in issuing comments about the economic impact.

The FERC emails also revealed a motivation to publish an initial analysis with deflated figures. For example, one FERC career employee cautioned that including a larger number of small entities is "ammunition for 63 small companies to argue, either via comments to the NPRM and/or their subsequent compliance filings to the final rule, that they cannot comply . . . because it would 'significantly burden them.'"[218] Notably, the number in the NPRM

[215] Email from [redacted], Economist, Fed. Energy Reg. Comm'n, to [redacted], Off. of Energy Market Regulation, Fed. Energy Reg. Comm'n, et. al. (Nov. 24, 2020, 11:36 am ET) (on file). Additional emails reveal that the "lowest number of entities come to 22 percent [roughly 42 entities] for 2019." Email from [redacted], Mgmt. Analyst, Fed. Energy Reg. Comm'n, to [redacted] Off. of Energy Market Regul., Fed. Energy Reg. Comm'n (Nov. 5, 2020, 4:57 pm ET) (on file).
[216] Email from [redacted], Economist, Fed. Energy Reg. Comm'n, to [redacted], Off. of Energy Market Regul., Fed. Energy Reg. Comm'n, et. al. (Nov. 27, 2020, 8:58 am ET) (on file).
[217] Email from [redacted], Off. of Energy Market Regul., Fed. Energy Reg. Comm'n, to [redacted], Mgmt. Analyst, Fed. Energy Reg. Comm'n, et. al., (Nov. 20, 2020, 9:49 pm ET) (on file). FERC's burden estimate for the proposals in this NOPR are for one-time implementation of the information collection requirements of the NOPR, and estimated the one-time implementation cost of the proposals in the NOPR is $1,977,580 (or $11,110 per entity, regardless of entity size), and did not consider the estimated $11,110 impact per entity to be significant. *See* 86 Fed. Reg. at 12883, 12885.
[218] Email from [redacted], Off. of Energy Market Regul., Fed. Energy Reg. Comm'n, to [redacted], Mgmt. Analyst, Fed. Energy Reg. Comm'n, et. al., (Nov. 20, 2020, 9:49 pm ET) (on file).

aligned with the "unscientific/estimated/ ballpark/fabricated data calculations based on the number of compliance filings received the last round and the total numbers for 2019."[219] This ballpark estimate was the baseline small businesses had to rely on to make comments.

It is extremely concerning that an analysis of the number of impacted small businesses is conducted in this manner among the FERC career staff. The lack of knowledge, using inaccurate numbers, the mindset of "we just bury this," and selectively interpreting the SBA's size standards is shocking. Even after the career staff acknowledged that the number is potentially a significant underestimate—without being transparent about the methodology used—they chose to use the "unscientific/estimated/ ballpark/fabricated" data in the NPRM. What makes matters even worse, some career employees have been with the FERC for nearly thirty years. This shows a deep-rooted agency culture of evading the RFA's requirements and manipulating numbers for their own benefit. If this is happening at FERC it is certainly happening elsewhere—they are not unique.

b. DOL: Fiduciary Rule; Non-Displacement of Qualified Workers Rule; Davis-Bacon and Related Acts; Overtime Rule under Fair Labor Standards Act; and Independent Contractor Classification Rule

The Committee has written to the DOL about multiple rules that could substantially harm small businesses due to their inability to properly estimate impacted entities. Furthermore, on October 19, 2023, the Committee held a hearing titled "Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators" that focused on the impacts of the DOL burdensome regulations and economic pressures on small businesses.[220] Among other things, the hearing examined the rules discussed below showing how the DOL has failed accurately estimate the number of impacted small businesses and how its rules impact a disproportional number of small entities.

i. Fiduciary Rule

The Committee wrote to the DOL about its proposed rule changes to the Fiduciary Rule noting how the number of affected entities were disproportionally small entities.[221] While addressing some of the questions in its response, the DOL failed to substantively answer most of the Committee's questions.[222] The Committee found that nearly all the impacted entities are small businesses—over 97 percent of broker-dealers and 99 percent of registered investment advisors are small businesses.[223] While the DOL included the analysis of affected small entities, it did not acknowledge that such a large percentage of impacted entities for being small was an issue.[224] Furthermore, the DOL minimized this impact by claiming that "the costs associated with the amendments are modest."[225] Rule such as this, where the impacts of the rule are significant and almost all entities impacted are small businesses, is exactly what the RFA is attempting to prevent from being promulgated.

On April 25, 2024, the DOL finalized the rule against this Committee's objections.[226] Even though the DOL made some changes and clarifications to this rule, they did not make any changes to avoid the disproportional harm to small businesses.

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[219] *Id.*

[220] *Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators*, Hearing Before H. Comm. on Small Bus., 118th Cong. (Oct. 19, 2023).

[221] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Dep't of Labor (Dec. 7, 2023).

[222] Letter from Julie Su, Acting Sec'y, Dep't of Labor., to Roger Williams, Chairman, H. Comm. on Small Bus (Feb. 15, 2024).

[223] *See* Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 FR 75890 (2023) (to be codified at 29 CFR 2510).

[224] *See id.*

[225] *See id.*

[226] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32122 (2024) (to be codified at 29 C.F.R. 2510).

ii. Non-Displacement of Qualified Workers Rule

Similarly, the DOL's Non-Displacement of Qualified Workers under Service Contracts rule disproportionally impacts small entities. This rule implements and enforces the Executive Order 14055 to mandate the contractors and subcontractors who are engaged in federal service contracts to offer the right of first refusal for employment on the successor contracts to service employees previously employed under the predecessor contract.[227] The Committee wrote to the DOL expressing concerns about the rule impacting a disproportional number of small contractors and subcontractors, however, the DOL's delayed response was very high level.[228] The DOL barely answered any of the Committee's questions and gave empty assurances that it "recognizes the important role small businesses play in our economy."[229] This rule disproportionally impacts small entities—up to 74 percent of impacted entities are small contractors and subcontractors.[230] However, even majority of the impacted entities are small, the DOL did not address this disparity in the final rule.[231] This rule will likely discourage these small contractors and subcontractors from federal contracts, causing widespread impact on small businesses and the whole US economy.[232]

iii. Davis-Bacon and Related Acts

Another example in which the rule impacts a disproportional number of small entities and underestimates this number is the DOL's rule change entitled "Davis-Bacon and Related Acts."[233] This final rule from the DOL makes two major changes to the methodology used to determine the prevailing wage for construction workers employed in federal and federally subsidized construction projects.[234] The DOL estimates that majority of potentially affected entities are small businesses—ranging from 67 to 70 percent of all affected firms. Many stakeholders, including this Committee, wrote to the DOL noting that this number being an underestimation. Yet, when finalizing the rule, the DOL refused to significantly amend the rule to make it less burdensome for this disproportionately large number of small businesses.

The Committee wrote to the DOL expressing concern about the number of small businesses impacted and specifically asked about the likelihood that the DOL underestimated to the number of impacted small entities.[235] The DOL responded, after the deadline, without addressing any of the Committee's direct questions.[236] Neither did the DOL address the Committee's concern about the number of impacted small businesses or the potential underestimation of the number of entities.[237] Unfortunately, despite objections from the Committee and other relevant stakeholders, the rule went into effect on October 23.[238]

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[227] Nondisplacement of Qualified Workers Under Service Contracts, 88 FR 86736 (2023) (to be codified at 29 CFR 9).

[228] Letter from Roger Wiliams, Chairman, H. Comm. on Small Bus., to Liz Watson, Assistant Sec'y, Congressional and Intergovernmental Affairs, Dep't of Labor (Feb. 1, 2024); Letter from Liz Watson, Assistant Sec'y, Congressional and Intergovernmental Affairs, Dep't of Labor, to Roger Wiliams, Chairman, H. Comm. on Small Bus. (Mar. 20, 2024).

[229] Letter from Liz Watson, Assistant Sec'y, Congressional and Intergovernmental Affairs, Dep't of Labor, to Roger Wiliams, Chairman, H. Comm. on Small Bus. (Mar. 20, 2024).

[230] Nondisplacement of Qualified Workers Under Service Contracts, 88 Fed. Reg. 86736 (2023) (to be codified at 29 C.F.R. § 9).

[231] *Id.*

[232] *See id.*

[233] *See* Updating the Davis-Bacon and Related Acts Regulations, 88 Fed. Reg. 57526 (2023) (to be codified at 29 CFR §§ 1, 3, 5).

[234] *See id.*

[235] Letter from Roger Williams, Chairman, H. Comm. on Small Bus. to Julie Su, Acting Sec'y, Dep't of Labor (Sept. 28, 2023).

[236] Letter from Liz Watson, Assistant Sec'y for Congressional & Intergovernmental Affairs, Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).

[237] *Id.*

[238] *See* Updating the Davis-Bacon and Related Acts Regulations, 88 Fed. Reg. 57526 (2023) (to be codified at 29 CFR §§ 1, 3, 5).

iv. Overtime Rule under Fair Labor Standards Act

In addition to providing high estimates, agencies also provide unacceptably large ranges of the number of small entities that could be impacted. One example is the DOL's proposed Overtime Rule under the Fair Labor Standards Act (FLSA), where the DOL both provided an overly broad estimate of the number of small entities and imposed significant monetary impacts on those small businesses.[239] The Committee wrote to the DOL about this rule's disproportional impact on small businesses, however, the DOL refused to provide the Committee with any information.[240]

The proposed rule would expand eligibility for overtime pay for about three million workers under the FLSA.[241] It would raise the threshold for time-and-a-half overtime pay from $35,568 to $55,000.[242] The DOL estimates that the rule would affect 1.3 million workers who are employed by between 179,700 and 1.3 million small entities; comprising from 2.8 percent to 20.8 percent of all small entities.[243] This burdensome rule change will cost direct employers between $294.6 million to $356.0 million for affected small entities just during the first year.[244] As this Committee stated in its letter to the DOL, this is an unacceptably large range of businesses that may be impacted, because it obfuscates the real impact of the rule.[245] Despite of this Committee's pressure, the DOL finalized this rule on April, 26, 2024.[246] Contrary to the Committee's objections, the final rule impacts even more entities than the proposed rule estimated—the small businesses will comprise from 3.2 percent to 23.9 percent of all affected entities.[247]

v. Independent Contractor Classification Rule

The Committee wrote to the DOL about it finalizing the rule titled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" expressing concerns about the rule's extremely detrimental impact on small businesses and urging the DOL to delay the rule from coming into effect until DOL provides proper consideration of small entities.[248] However, in its response, the DOL claimed that it has "carefully considered the views and concerns of independent contractors and other small businesses in drafting its Classification Rule" and the DOL will not delay the rule's scheduled effective date of March 11, 2024.[249]

The Committee strongly disagreed with the DOL's stand because this rule disproportionally impacts small businesses—particularly in construction, trucking, and health care sectors.[250] It will make it harder for businesses

[239] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842 (2023) (to be codified at 29 CFR §541).
[240] Letter from Roger Williams, Chairman, H. Comm. on Small Bus. to Julie Su, Acting Sec'y, Dep't of Labor (Sept. 28, 2023); Letter from Liz Watson, Assist. Sec'y for Congressional & Intergovernmental Affairs, Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).
[241] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842 (2023) (to be codified at 29 CFR §541).
[242] *Id*.
[243] *Id*.
[244] *Id*.
[245] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Sept. 28, 2023).
[246] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842 (2024) (to be codified at 29 CFR §541).
[247] *Id.*
[248] Letter from Roger Williams, Chairman, H. Comm. on Small Bus. to Julie Su, Acting Sec'y, Dep't of Labor (Sept. 28, 2023); *See* Employee or Indep. Contractor Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (2024) (to be codified at 29 C.F.R. §§ 780, 788, 795).
[249] Letter from Liz Watson, Assist. Sec'y for Congressional and Intergovernmental Affairs, Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).
[250] Leah Shepherd, *DOL's Rule Narrows Scope of Independent Contractor Classification*, SHRM (Jan. 10, 2024); Chris Marr & Rebecca Rainey, *Labor Department Cements Rule Change on Gig Worker Status (1)*, BL (Jan. 9, 2024).

to classify workers as independent contractors (IC)—which in turn will decrease flexibility and employment opportunities resulting in lost earnings for millions of Americans.[251] This rule impacts over 22 million ICs and threaten their status.[252] Many ICs who will be forced to be classified as employees under the new rule would no longer be able to operate as their own small business. With that, they lose the unique freedom of being a small business and the ability to innovate, adapt, and improve to survive and grow. These factors could prevent small businesses from hiring employees if the costs are too prohibitive. Businesses utilizing ICs are concerned that the rule will make it harder to hire, which is particularly concerning given today's labor shortages.[253] In fact, according to Advocacy, the only way employers would have certainty is by classifying their workers as employees requiring additional costs for benefits and wages.[254] However, the DOL did not take these factors into consideration in their estimate. These consequences of the rule are so catastrophic that the rule has already triggered multiple lawsuits.[255]

3. Alternative Rules

In their rulemaking process, agencies must consider alternatives that may minimize any significant economic impact of the rules for small entities and include them in the IFRA.[256] This is a key provision of the RFA so that the agencies finalize a rule that will accomplish its goals while not disproportionately burdening small businesses. Advocacy recommends that the agencies address the costs, benefits, and other economic implications as part of the alternative rules' discussion. However, the Committee found that agencies often have inadequate consideration of alternatives, omit possible alternatives from the agency's published analysis, or the agency's assessment of alternative burdens in comparison to the rule is lacking. If anything, agencies have shown nothing to demonstrate they take the alternatives requirement seriously.

Over the course of the Committee's RFA investigation, the Committee wrote to several agencies about the consideration of alternatives for rules with especially burdensome compliance requirements. However, 79 percent of agencies failed to answer a single question asked by this Committee regarding alternatives.

a. DOL: Davis-Bacon and Related Acts and Overtime Rule under Fair Labor Standards Act

The Committee has written to the DOL on multiple occasions requiring information about its extremely burdensome rules, such as Davis-Bacon and Related Acts and Overtime Rule under the Fair Labor Standards Act.[257] The Committee inquired about the alternative rules that the DOL considered to lessen the rule's impact on small businesses. As discussed earlier in this report, these rules imposed burdensome and expensive compliance requirements, and are the exact type of rules the RFA requires agencies to consider alternatives for. Unfortunately for the Main Street, the DOL failed to answer a single question about alternatives it considered to imposing millions of dollars in costs and thousands of paperwork hours on small businesses. Furthermore, the alternatives the DOL discussed in the RFA analyses lack substance or in some instances are completely absent.

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[251] Chris Marr & Rebecca Rainey, *Labor Department Cements Rule Change on Gig Worker Status (1)*, BL (Jan. 9, 2024).

[252] *See* Employee or Indep. Contractor Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022) (comment from Major Clark, III, *et al.,* Deputy Chief Counsel, SBA Off. of Advocacy (Dec. 12, 2022)).

[253] *See* Employee or Indep. Contractor Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022) (comment from Michael Johnson, President, National Stone, Sand & Gravel Association (Dec. 13, 2022)).

[254] *See generally* Chris Marr & Rebecca Rainey, *Labor Department Cements Rule Change on Gig Worker Status (1)*, BL (Jan. 9, 2024); Employee or Indep. Contractor Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022) (comment from Major Clark, III, *et al.,* Deputy Chief Counsel, SBA Off. of Advocacy (Dec. 12, 2022)).

[255] Rebecca Rainey, *Challenges to DOL's Contractor Rule: Mounting Lawsuits Explained*, BL (Mar. 5, 2024).

[256] 4 U.S.C. §§ 601-612.

[257] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Sept. 28, 2023) (regarding the Fair Labor Standards Act); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Sept. 28, 2023) (regarding Davis Bacon & Related Acts).

b. ATF: Definition of "Engaged in the Business" as a Dealer in Firearms Rule

This Committee asked the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) questions relating to the alternatives it considered when changing the definition of "Engaged in the Business" as a dealer in firearms.[258] This proposed rule would require nearly 25,000 new individuals or entities to register as a Federally Licensed Firearm (FFL) Dealer, functionally turning them into small businesses.[259] This change creates an ambiguous standard that could cause an individual to be labeled as being "engaged in the business of selling firearms," requiring them to register with and pay a fee to the ATF.[260] The ATF, in response to the Committee's questions, merely stated it "did not find any suitable alternatives that would meet the objectives of this rule that would minimize the economic impact that this rule would have on small entities."[261] This demonstrated to the Committee that, so long as agencies cannot reconcile lowering compliance burdens with the policy objectives of the rule, considering alternatives is nothing more than a rubber stamp.

c. FDA: Tobacco Product Standard for Characterizing Flavors in Cigars Rule

The Committee found other concerning examples of agency considerations of alternatives. One situation is when agencies consider an alternative that does nothing to advance the objectives of the RFA. The FDA's Tobacco Product Standard for Characterizing Flavors in Cigars proposed rule fails to properly consider alternative rules and uses inadequate alternatives examples.[262] The Committee wrote to the FDA raising concerns about the rule's impact on small businesses and asking about the alternatives the FDA considered.[263] However, the FDA refused to answer any of the Committee's questions and did not provide any information about the alternatives in the response.[264]

This burdensome proposed rule creates a product standard for cigars that would result in a product ban of all cigars with a "characterizing flavor" other than tobacco.[265] The IRFA briefly details only three alternatives—a delayed effective date, prohibiting menthol as an intentional additive, and exemptions—to minimize the proposed rule's burden on small businesses.[266] However, a brief explanation of surface level alternatives is not sufficient. Furthermore, the delayed start date is not an acceptable alternative that would reduce its regulatory burden. After pressure from the Committee and other outside stakeholders, OMB paused the FDA's implementation of this rule, and the agency continues to review the rule based on the comments.[267]

C. Compounding Impact of Duplicative Regulations

Overlapping regulations are one of the main problems with agencies' RFA compliance. Many overlapping regulations from various agencies, or sometimes even from the same agency, burden small businesses. The RFA requires agencies to include in each IRFA an identification, to the extent practicable, of all relevant federal

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258 *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Steven M. Dettelbach, Dir., Bureau of Alcohol, Tobacco, Firearms, & Explosives (Oct. 12, 2023).

259 Definition of "Engaged in the Business" as a Dealer in Firearms, 88 FR 61993, 62017 (2023) (to be codified at 27 CFR 478).

260 *Id.*

261 Letter from Ann M. Vallandingham, Acting Assist. Dir. of Public and Gov't Affairs, Bureau of Alcohol, Tobacco, Firearms, & Explosives, to Roger Williams, Chairman, H. Comm. on Small Bus. (Dec. 4, 2023).

262 *See* Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26396 (2022) (to be codified at 21 C.F.R. § 1166).

263 Letter from Roger Williams, H. Comm. on Small Bus., to Robert Califf, Comm'r, Food & Drug Admin. (Jun. 28, 2023).

264 Letter from Erin O'Quinn, Acting Assoc. Comm'r for Legislative Affairs, to Roger Williams, H. Comm. on Small Bus. (Oct. 18, 2023).

265 *See* Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26396 (2022) (to be codified at 21 C.F.R. § 1166).

266 Dep't Of Health & Human Serv., Food & Drug Admin., Fda-2021-N-1309, Tobacco Product Standard For Characterizing Flavors In Cigars, 112 (May 2022).

267 Alexander Tin, *Menthol cigarette ban delayed due to "immense" feedback, Biden administration says*, CBS News (Apr. 26, 2024).

rules which may duplicate, overlap, or conflict with the proposed rule.[268] According to Advocacy, duplicative or overlapping rules "are based on the same or similar reasons for the regulation, the same or similar regulatory goals, and if they regulate the same classes of industry."[269] Additionally, rules are conflicting when they "impose two conflicting regulatory requirements on the same classes of industry."[270] The Advocacy's RFA Compliance Guide directs agencies to examine potential conflicting and duplicative rules that could add cumulative regulatory burdens on small entities without any gain in regulatory benefits.[271]

Some agencies have produced their own RFA compliance guides that include guidance on how to avoid duplicative regulations. Many times, the guides are similar to the Advocacy's RFA Compliance Guide, but not always. For example, the EPA produced its own RFA compliance guide to the Committee in April 2023. Significant differences exist between the Advocacy's RFA Compliance Guide and EPA's. Most notably, the EPA's guidance does not mention the requirement to *examine* potential conflicting and duplicative rules that could add cumulative regulatory burdens on small entities. The EPA RFA guidance states:

> Many EPA rules complement requirements imposed by other EPA rules or rules promulgated by other Federal Agencies. EPA's authority and responsibility intersect with those of many other Federal Agencies and Departments (e.g., OSHA, Transportation, Energy, Interior). In principle, these controls should all work together to create a comprehensive system of environmental management. Each agency should, therefore, coordinate its regulatory requirements with those already in place. The lead OGC attorney for your rulemaking can assist in identifying duplicate, overlapping, or conflicting rules.[272]

It is important for the agencies to consider overlapping regulations and include guidance on how to examine them in their internal guides. There are 439 federal government agencies that impose regulations on small businesses and there is often overlap between these rules.[273] Besides regulations by federal agencies, also state and local regulations add to the regulatory burden that drowns small businesses. Often there is overlap and conflict also between local, state, and federal regulations. Even though the RFA requires agencies to identify the duplicative, overlapping, or conflicting regulations among federal agencies, no comprehensive approach has been adopted concerning the myriad of regulations enforced by diverse agencies that small enterprises need to adhere to.

Unfortunately, agencies frequently fall short in properly identifying the regulations governing the same field and agencies often lose sight of what their counterparts are issuing. Take, for example, energy efficiency standards and resources across the federal government. One may think the only player would be the DOE. Unfortunately for small businesses, the requirements go far beyond that and include the EPA, the Department of Agriculture (USDA), the Department of the Treasury (Treasury), the Department of the Interior (Interior), the Department of Housing and Urban Development (HUD), the SBA, Fannie Mae, the Department of Health and Human Services (HHS), and the Department of Veterans Affairs (VA).[274]

Manufacturers are likewise heavily impacted by a flurry of regulations across the federal government. A study by the National Association of Manufacturers (NAM) found that regulatory costs have increased by 35 percent in

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[268] *See* 5 USC § 603(b)(5).
[269] U.S. Small Bus. Admin. Off. of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, 40 (Aug. 2017).
[270] *Id.*
[271] *Id.*
[272] U.S. Env't Prot. Agency, Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Fairness Act, 36 (Nov. 30, 2006) (on file).
[273] *Agencies Found*, Fed. Reg. (last visited Apr. 14, 2024), https://www.federalregister.gov/agencies.
[274] Lynn J. Cunningham, Cong. Research Serv., R40913, Renewable Energy and Energy Efficiency Incentives: A Summary of Federal Programs (Feb. 10, 2023).

the past decade and in 2022, regulations cost manufacturers $350 billion.[275] This meant that a small manufacturer's compliance costs was about $50,100 per employee. This burdensome impact of increased regulations was also brought up in the Committee's "Tax Day" hearing.[276] Mr. Charles Wetherington, a small business manufacturer, testified that his "regulatory expenses have gone up 460 percent in the last eight years and [the regulations have] not done anything to make the products better or safer."[277]

Requirements coming from all facets of the federal government are difficult for someone who is well versed in bureaucratic process to track – let alone a small business who should be more concerned about making payroll than complying with rules coming out of Washington.

The massive number of regulations that federal agencies pass each year and the number of paperwork hours it causes for businesses illustrate how the compounding impact of never-ending red tape is truly an issue for small businesses. Over the duration of President Biden's Administration, federal agencies have passed 891 final rules costing $1.47 trillion and 232.4 million paperwork hours.[278] The 2023 Federal Register is almost 20,000 pages longer than the 2021 edition.[279] The 2023 Federal Register sits at 90,402 pages, making it the second longest version of this document in US history.[280] It is not possible, let alone reasonable, to believe that individuals or small businesses have the ability to sift through over 90,000 pages to ensure compliance with each new—potentially overlapping, duplicative, or conflicting—rule. Additionally, as of May 10, 2023, in 2024 alone, the Federal Register includes 180 new final rules costing $1.2 trillion and 12.4 million paperwork hours.[281] $1.2 trillion additional costs in only in about four months are unacceptable.

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[275] NAT'L ASSOC. OF MFRS, THE COST OF FEDERAL REGULATION TO THE U.S. ECONOMY, MANUFACTURING AND SMALL BUSINESS, 2 (Oct. 2023).

[276] *Tax Day: Exploring the Adverse Effects of High Taxes and a Complex Tax Code*, *Hearing before the H. Comm. On Small Bus.* 118th Cong. (Apr. 19, 2024) (testimony of Mr. Charles Wetherington, President, BTE Technologies, LLC).

[277] *Id.*

[278] *Regulation Rodeo*, AM. ACTION FORUM, (last visited May 10, 2024), https://www.regrodeo.com.

[279Clyde] Wayne Crews Jr., *Biden's 2023 Federal Register Page Count Is The Second-Highest Ever,* FORBES (Dec. 29, 2023).

[280] *Id.*

[281] *Regulation Rodeo*, AM. ACTION FORUM, (last visited May 10, 2024), https://www.regrodeo.com.

Federal Register pages and numbers of rules: from George Bush to Joe Biden

Year	Federal Register Pages	Number of Rules	POTUS
1989	50,501	4,714	Bush I years
1990	49,795	4,334	
1991	57,973	4,416	
1992	57,003	4,155	
1993	61,166	4,369	Clinton years
1994	64,914	4,867	
1995	62,645	4,713	
1996	64,591	4,937	
1997	64,549	4,584	
1998	68,571	4,899	
1999	71,161	4,684	
2000	74,258	4,313	
2001	64,438	4,132	Bush II years
2002	75,606	4,167	
2003	71,269	4,148	
2004	75,675	4,101	
2005	73,870	3,943	
2006	74,937	3,718	
2007	72,090	3,595	
2008	79,435	3,830	
2009	68,598	3,503	Obama years
2010	81,405	3,573	
2011	81,247	3,807	
2012	78,961	3,708	
2013	79,311	3,659	
2014	77,687	3,554	
2015	80,260	3,410	
2016	95,894	3,853	
2017	61,308	3,281	Trump years
2018	67,225	3,368	
2019	72,436	2,964	
2020	86,356	3,038	
2021	73,771	4,429	Biden years
2022	80,756	3,168	
2023	90,402	3,018	

Federal Register pages and rules, 1989-present COMPILED BY THE AUTHOR FROM NATIONAL ARCHIVES AND RECORDS ADMINISTRATION [282]

This Committee has expressed concerns that regulations, and the cumulative effect of existing regulations, have a disproportionate, negative impact on small businesses. Regulations, especially duplicative regulations, often harm small businesses more than large and established businesses in at least three ways: (1) disproportionate cost burdens, (2) economies of scale in compliance, and (3) barriers to entry.[283] Small businesses have consistently said that unreasonable government regulations are one of the biggest issues that they face each year.[284]

Throughout the Committee's investigation, several examples of overlapping and duplicative regulations could have been identified with a thorough RFA analysis.

[282] Clyde Wayne Crews Jr., *Biden's 2023 Federal Register Page Count Is The Second-Highest Ever,* FORBES (Dec, 29, 2023).
[283] Chris Edwards, *Entrepreneurs and regulations: Removing state and local barriers to new businesses,* THE CATO INST. (May 5, 2021).
[284] William C. Dunkelberg and Holly Wade, *NFIB small business economic trends,* NASHVILLE: NAT'L FED'N OF INDEP. BUS., 18 (Dec. 2020).

1. DOL: Fiduciary Rule and Workplace Injury Rule

a. Fiduciary Rule

In this Committee's letter to the DOL about their Fiduciary Rule, the Committee asked about the DOL's justification to regulate an area that is already regulated by other agencies.[285] In its delayed response, the DOL explained this by claiming that it "seeks to address…gaps in existing regulations that currently leave some retirement investors vulnerable to advice that is not in their best interest."[286] However, the retirement-level securities, IRA and annuities sales, advice is already regulated by the US Securities and Exchange Commission's Regulation Best Interest standard, and 40 state-based annuity sales regulations that mirror best-interest policies.[287] The DOL attempted to augment other regulators' authority by adding its own regulations to already regulated space. By doing so, the DOL added unnecessary red tape to an area with an existing regulatory framework to protect consumers.

This rule both overlaps with other agencies' current regulations and exceeds Congressional intent. The rule package is very similar to the previous rule that was vacated by the U.S. Court of Appeals for the Fifth Circuit in 2018 for exceeding the DOL's legal authority by expanding the definition of "investment advice fiduciary" beyond the meaning that Congress intended.[288] One of the key failures of the prior rule was that the rule did not make a distinction between investment advice for a fee and sales activity, the same issue as the new proposed rule has.[289] Additionally, the new rule does not make it clear whether competitive bidding processes for investment managers might inadvertently trigger fiduciary status.[290] Despite a similar rule have already been overturned and the existing regulatory framework in place, the DOL still decided to push this new rule forward.

On April 25, 2024, the DOL finalized the rule against this Committee's objections.[291] Even though the DOL made some changes and clarifications to this rule, this rule still significantly hurts small businesses and adds additional red tape that overlaps with other agencies' regulations. This rule has already led to challenges and litigation.[292]

b. Workplace Injury Rule

The Committee's inquiry into the OSHA's proposed Workplace Injury Rule illustrates how issues with overlapping or duplicative regulations arise imposing costs and confusion for small businesses.[293] The OSHA responded to this Committee a month late without addressing the Committee's specific questions and dismissing the Committee's legitimate concerns about the rule's impact on small businesses stating that "[a]lthough OSHA's recent final rule revised [previous] provisions for clarity, it did not make any substantive changes to the requirements."[294] However, the new rule's requirements differ from the previous one, for example, the updated regulation requires organizations with over 100 employees in high-risk industries to electronically submit detailed, case-specific information for each recordable injury and illness, in addition to the annual summary that was previously required.[295]

The OSHA estimates that the total cost of the rule will be $7.7 million annually: $7.1 million cost to the

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[285] Letter from Roger Williams, H. Comm. on Small Bus., to Julie Su, Acting Sec'y, Department of Labor (Dec. 7, 2023).

[286] Letter from Julie Su, Acting Sec'y, Dep't of Labor., to Roger Williams, Chairman, H. Comm. on Small Bus (Feb. 15, 2024).

[287] Austin R. Ramsey, *Biden rolls legal dice by proposing fourth fiduciary 401(k) rule,* BL (Nov. 7, 2023).

[288] *See* Chamber of Com. of the U.S. v. U.S. Dep't of Labor, 885 F.3d 360 (5th Cir. 2018)

[289] *Id.*; *Retirement Security Rule: Definition of an Investment Advice Fiduciary*, 88 Fed. Reg. 75890 (2023) (to be codified at 29 C.F.R. 2510); Austin R. Ramsey, *Biden rolls legal dice by proposing fourth fiduciary 401(k) tule,* BL (Nov. 7, 2023).

[290] Austin R. Ramsey, *Biden rolls legal dice by proposing fourth fiduciary 401(k) rule,* BL (Nov. 7, 2023).

[291] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32122 (2024) (to be codified at 29 C.F.R. 2510).

[292] Ben Miller, *Insurer group files first suit over Biden 401(k) advice rule (1)*, BL (May 2, 2024).

[293] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor, et al. (Aug. 3, 2023).

[294] Letter from Liz Watson, Ass. Sec'y, U.S. Dep't of Labor., to Roger Williams, Chairman, H. Comm. on Small Bus. (Sept. 15, 2024).

[295] Improve Tracking of Workplace Injuries*,* 29 C.F.R. § 1904 (2023) (to be codified at 29 C.F.R. § 1904).

private sector to "become familiar with the rule's requirements, update software, and submit forms electronically," and $0.6 million cost to the government.[296] This rule is problematic not only for these burdensome compliance requirements, but because it regulates 66 different industries that are regulated also by other agencies.[297] Regulating so many industries that already need to comply with countless other regulations and agencies who are their main regulators, will create overlap. The OSHA rule is an example of a far-reaching rule where the OSHA seemingly did not consider the rules promulgated by other agencies directly regulating these specific sections of the economy.

2. DOE and FTC: Ceiling Fans Rules

An example of small businesses getting hit from all sides across agencies is the energy-related regulations for ceiling fans. The Committee wrote the DOE on August 24, 2023, about the regulatory burden of its proposed energy conservation standards for ceiling fans.[298] After more than two months, the DOE provided a high level response barely answering any of the Committee's questions.[299] This proposed rule would decrease the maximum estimated energy consumption permissible for large diameter and belt driven ceiling fans.[300] The rule would require numerous small business fan manufacturers to redesign their products and may put between 10 and 30 percent of small business ceiling fan manufacturers out of business.[301]

Ceiling fan manufacturers need to know several sets of regulations from several agencies at any given time, many of which incorporate and reference regulations only promulgated by the DOE. However, it is unlikely that a small ceiling fan manufacturer would know to check at least 6 other agencies—such as the DOE, EPA, OSHA, DOL, CPSC, and FTC—beyond the DOE's regulatory framework for energy-related regulations. For example, the FTC's proposed Energy Labeling Rule, directly impacts labeling requirements for a wide variety of home fixtures including ceiling fans and large appliances.[302] Further, under the Biden Administration, agencies that would not normally engage in energy or climate related rules are now expanding their reach. For instance, the CPSC has involved itself in regulating energy standards for certain consumer products. These kinds of overlaps add unnecessary red tape and confusion for small businesses.

3. OMB/FAR Council and SEC: Climate Disclosure Rule

Some of the strongest examples of duplicative regulations involve climate disclosure regulations. The Committee wrote to the Office of Management and Budget (OMB) regarding Federal Acquisition Regulatory Council's (FAR Council) proposed rule about climate disclosures.[303] In its response to the Committee's letter, OMB did not answer any of the Committee's questions but only stated that they have "shared [the Committee's] letter with the members of the FAR Council so that [the Committee's] comments may be taken under consideration as the FAR Council evaluates the public comment and makes revisions, as appropriate, before publishing a final rule."[304] This rule would require certain federal contractors to disclose greenhouse gas emissions and monetary climate-related risks, along with requiring them to create targets to reduce emissions.[305] This will burden recipients

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[296] *Id.*

[297] News Release, Dep't of Labor, Occupational Safety & Health Admin., Dep't of Labor Announces Rule Expanding Submission Requirements For Injury, Illness Data Provided By Employers In High-Hazard Industries (Jul. 17, 2023).

[298] *See* Energy Conservation Standards for Ceiling Fans, 88 Fed. Reg. 40932 (2023) (to be codified at 10 C.F.R. § 430); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer M. Granholm, Sec'y, Dep't. of Energy (Aug. 24, 2023).

[299] Letter from Amanda Mahoney, Bldg. Tech. Off. Dir., to Roger Williams, Chairman, H. Comm. on Small Bus. (Oct. 30, 2023).

[300] *See* Energy Conservation Standards for Ceiling Fans, 88 Fed. Reg. 40932 (2023) (to be codified at 10 C.F.R. § 430).

[301] 88 Fed. Reg. at 41007-08. (Table VI.1 shows that at least three of the ten large diameter ceiling fan manufactures will experience conversion costs greater than 20 percent of triennial revenues).

[302] *See Energy Labeling Rule*, 89 Fed. Reg. 7566 (Feb. 2, 2024) (to be codified at 16 C.F.R. § 305).

[303] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Mathew C. Blum, Acting Adm'r, Off. of Federal Procurement Policy (Jun. 9, 2023).

[304] Letter from Wintta M. Woldemariam, Ass. Dir., Off. of Federal Procurement Policy, to Roger Williams, Chairman, H. Comm. on Small Bus. (Jul. 21, 2023).

[305] *See* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68412 (2022) (to be codified at 48 C.F.R. §§ 1. 4, 9, 23, 52).

of federal contracts with substantial and unreasonable costs.[306] In fact, the proposed rule states, the "DOD, GSA, and NASA expect this rule may have a significant economic impact on a substantial number of small entities."[307] Additionally, the Securities and Exchange Commission (SEC) Climate Disclosure Rule already mandates entities to report their greenhouse gas emissions, climate-related risks that are likely to have a material impact on their business, and strategies to mitigate emissions.[308] For small businesses subject to both rules, requiring virtually the same disclosures, compliance burdens and costs are essentially doubled. This is the scenario the RFA was designed to prevent.

4. EPA and DOE: Electric Vehicles Rules

Another clear example of overlapping regulations is between the EPA and DOE regarding electric vehicles. This Committee wrote the EPA regarding its proposed rule change to the vehicle emissions standards for light duty passenger cars, light trucks, and medium-duty vehicles.[309] After three months, the EPA provided a high-level response to the Committee determining "the proposed standards would not have economic impacts sufficient to trigger the Regulatory Flexibility Act."[310] The Committee found this to be false. This rule would require that vehicles made after 2027 meet heightened tailpipe emissions standards, require batteries within electric vehicles meet certain durability requirements, and limit the number of non-electric vehicles that importers are permitted to import annually.[311] Thus, this proposed rule would require numerous small entities to re-engineer their vehicles to comply with these increased standards, limit the supply of vehicles for Independent Commercial Importers (ICI), and create new standards for battery longevity.[312]

Furthermore, the EPA asserts that this rule would have minimal effects on small businesses, in part, based on its claim that all small entity vehicle manufacturers in the United States specialize in electric vehicles. The Committee found this assertion to be false as well. Currently, Shelby Supercar Company makes the fastest domestic production vehicle in the United States, and Hennessey Special Vehicles makes the second fastest—both companies are small entities, and neither uses electric power units in its vehicles.[313] Unfortunately, on April 18, 2024, the EPA finalized this rule despite being made aware of this error by the Committee.[314]

While small businesses will need to revise their operations to comply with this costly and burdensome rule, they also must adhere to the DOE's recent final rule regulating the same area. On March 29, 2024, the DOE released an updated equation that determines how the petroleum-equivalent fuel economy is calculated.[315] The paradigm between these two stringent regulations—in an effort to advance the Biden Administration's EV policies—runs

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[306] Nat'l Council of Farmer Cooperatives, *Comments Regarding the DoD, GSA, and NASA proposed rule to* *implement* *certain GHG and climate-related financial disclosures; Docket ID#: FAR Case 2021-015, Docket No.* *FAR-2021-0015, Sequence No. 1.*, at 2 (FAR Case 2021-015) (Feb. 11, 2023).

[307] *See* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68412 (2022) (to be codified at 48 C.F.R. §§ 1. 4, 9, 23, 52).

[308] *See* Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (2024) (to be codified at 17 C.F.R. §§ 210, 229, 230, 232, 239, 249).

[309] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael S. Regan, Adm'r, U.S. Env't Prot. Agency (Aug. 3, 2023).

[310] *See* Letter from Tim Del Monico, Assoc. Adm'r, U.S. Env't Prot. Agency, to Roger Williams, Chairman, H. Comm. on Small Bus., (Oct. 17, 2023).

[311] *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 29184 (2023) (to be codified at 40 CFR §§ 85, 86, 600, 1036, 1037, 1066).

[312] *Id*.

[313] Dustin Hawley, *Worlds Fastest Production Vehicles*, J.D. Power (Last visited Jul. 14, 2023).

[314] *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 27842 (2024) (to be codified at 40 CFR §§ 85, 86, 600, 1036, 1037, 1066, 1068).

[315] *See* Petroleum-Equivalent Fuel Economy Calculation, 89 Fed. Reg. 22041 (2024) (to be codified at 10 C.F.R. § 474).

a serious risk where small business, in complying with one rule, may not be able to comply with the other. This is the danger of overlapping regulations the RFA considers and is another reason why agencies are required to ensure their regulations harmonize, not overlap, with other regulations from other agencies.

D. Congressional Oversight and Administrative Procedure Act

When Congress passes a law to create an agency, it typically gives the power to regulate certain matters to that agency.[316] However, agencies can only act within the authority granted by Congress and Congress maintains legislative oversight over rules.[317] The Constitution charges Congress with the responsibility and power to conduct oversight of the federal agencies.[318] Congress has undisputable capacity to oversee the performance of federal agencies, consistent with its constitutional authority.[319] Possession of relevant information is an essential precondition to the effective discharge of Congress's oversight duties. Congress "cannot conduct effective oversight of the federal government without detailed information about the operations of its departments and agencies."[320]

Agencies must also follow the requirements provided in the APA in the rulemaking process. The APA regulates the agencies' rulemaking when they are generating rules within the authority Congress has granted them. The APA requires agencies to provide the public with adequate notice of a proposed rule.[321] After they have provided notice, the agency then must provide "interested persons with a meaningful opportunity to comment on the proposed rule through the submission of written 'data, views, or arguments.'"[322] The APA does not determine how long the comment period must be, however, the courts have explained the agency must "provide an 'adequate' opportunity to comment—of which the length of the comment period represents only one factor for consideration."[323] These comments must be submitted through the formal process and *ex parte* communications (communications with outside entities) are prohibited in order to prevent undue influence from outside entities into the rulemaking process. Unfortunately, some agencies attempted to improperly apply this prohibition to Congress. It is clear from the case law and Congress' constitutional duty to conduct oversight that communications with Congress are not prohibited. After the comment period ends, agencies must consider the "relevant matter presented" and incorporate into the adopted rule a "concise general statement" of the "basis and purpose" of the final rule.[324]

1. The FDA, BOEM, and DOL: Policy not to Discuss Proposed Rules with Congress

As part of the Committee's investigation into how agencies comply with the RFA, the Committee sent the FDA, BOEM, and DOL letters seeking a deeper explanation of their proposed rules' impact on small businesses.[325] However, the FDA, BOEM, and DOL attempted to interfere with congressional oversight by refusing to provide any information to the Committee regarding some of their proposed rules claiming that it was against their policy or the APA. In response, the Committee wrote to the FDA, BOEM, and DOL regarding their policies to not

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316 Cong. Research Serv., R41546, A Brief Overview of Rulemaking & Judicial Review, at 17 (2017).; U.S. Gov't Accountability Off., GAO-24-105870, Legislative Branch Options for Enhancing Congressional Oversight of Rulemaking and Establishing & Office of Legal Counsel, at 4 (2023).

317 U.S. Const. art. 1, § 1; Cong. Research Serv., R41546, A Brief Overview of Rulemaking & Judicial Review, 1 (2017); 3 Admin. L. § 13.03; U.S. Gov't Accountability Off., GAO-24-105870, Legislative Branch Options for Enhancing Congressional Oversight of Rulemaking & Establishing & Office of Legal Counsel, at 1 (2023).

318 U.S. Const. art. 1, § 1.

319 *See* AT&T v. U.S., 117 F.3d 1368, 1369 (Fed. Cir. 1999).

320 Comm. on the Judiciary of the U.S. H.R. v. McGahn, 968 F.3d 755, 760 (D.C. Cir. 2020).

321 5 U.S.C. § 553(b).

322 Cong. Research Serv., R41546, A Brief Overview of Rulemaking & Judicial Review, at 2 (2017).

323 *See* N.C. Growers' Ass'n v. UFW, 702 F.3d 755, 770 (4th Cir. 2012); Cong. Research Serv., R41546, A Brief Overview of Rulemaking & Judicial Review, at 2 (2017).

324 Cong. Research Serv., R41546, A Brief Overview of Rulemaking & Judicial Review, at 3 (2017); 5 U.S.C. § 553(c).

325 Letter from Roger Williams, *et al.,* Chairman, H. Comm. on Small Bus., to Robert M. Califf, M.D., Comm'r, U.S. Food & Drug Admin. (Jun. 28, 2023).

discuss their proposed rules with Congress.

The FDA, BOEM, and DOL withholding requested information prevented the Committee from conducting proper oversight over these rules. As a general rule, *ex parte* communications between federal agencies and Congress are encouraged for Notice-and-Comment rulemakings.[326] Courts have found that better legislation and rules are created when agencies and Congress work together to create rules which implement legislation correctly.[327] This is valuable since agencies are tasked with implementing laws and have subject matter expertise in the relevant field, while Congress is responsible for passing the laws, thus having a better understanding of its intent and purpose.

In their responses to the Committee's inquire about the proposed rules, the agencies indicated that small businesses and their comments were being heard in this rulemaking process.[328] While it was reassuring the FDA, BOEM, and DOL claimed to have considered these interests, the purpose of this Committee's letters was to ensure that the agencies were, indeed, complying with their obligations to small businesses. Congress' authority to conduct oversight is inherent in Article I, sec. 1 which states: "All legislative powers herein granted shall be vested in a Congress of the United States." The United States Supreme Court has consistently affirmed Congress's authority to conduct oversight and investigations, holding that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[329] Rule X of the Rules of the United States House of Representatives delegates this responsibility to standing committees.[330]

Denying the Committee the requested information prevents it from upholding and acting in furtherance of its legislative function, namely reviewing regulatory burdens imposed on small businesses by federal agencies and determining how they may be alleviated.[331] This includes the ability of Congress to initiate investigations to inform itself about how existing laws function, whether new laws are necessary and if old laws should be repealed or altered.

2. The DOE, DOL, and SEC: Ramifications of Shortened Comment Period

This Committee also raised concerns about comment periods being shortened by the EPA, DOL, DOE, and SEC.[332] Each of these agencies either omitted an answer in their response for the length of their comment period or did not respond to the Committee's letters altogether. [333] The lack of responsiveness for this particular concern is apparent.

For instance, this Committee wrote the DOL raising this concern regarding their Fiduciary Rule.[334] In November 2023, 18 trade associations wrote a letter to the DOL noting "significant and unanticipated" regulatory

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326 Maeve P. Carey, *et al.*, Cong. Research Serv., IF12368, Communications Between Congress & Federal Agencies During the Rulemaking Process (Mar. 30, 2023).

327 Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981).

328 Letter from Erin O'Quinn, Acting Assoc. Comm'r for Legislative Affairs, U.S. Food & Drug Admin., to Roger Williams, *et al*., Chairman, H. Comm. on Small Bus. (Oct. 18, 2023).

329 McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

330 Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

331 Rules of the H.R., Rule X(1)(q)(1), 118th Cong. (2022).

332 Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer M. Granholm, Sec'y, U.S. Dep't of Energy (Nov. 2, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Dec. 7, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael S. Reagan, Adm'r, U.S. Env't Prot. Agency (Aug. 3, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Gary Gensler, Chairman, U.S. Sec. & Exch. Comm'n (July. 27, 2023).

333 Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer M. Granholm, Sec'y, U.S. Dep't of Energy (Nov. 2, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Dec. 7, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Michael S. Reagan, Adm'r, U.S. Env't Prot. Agency (Aug. 3, 2023); Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Gary Gensler, Chairman, U.S. Sec. and Exch. Comm'n (July. 27, 2023).

334 Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Dec. 7, 2023).

changes and highlighting the need for a 60-day extension to the comment period to provide meaningful feedback and comment.[335] Despite raising concerns about increased costs associated with providing financial advisory services, potential limitations on small firms' ability to offer holistic investment advice and recommendations, and potential barriers to entry into the profession, the DOL denied the request.[336]

This Committee asked the DOL whether it considered extending the comment period to 90 days, or longer, given the impacted entities sufficient time to respond.[337] Although the DOL has claimed to recognize "the important role small businesses play in our economy," the DOL ignored the Committee's question in their response.[338] Without a sufficient comment period, small businesses are not able to properly voice their concerns—defeating the purpose of the notice-and-comment framework and depriving small businesses the ability to advocate for themselves in the rulemaking process.

The DOE and SEC also avoided accountability by limiting opportunities for small businesses to engage in the regulatory process. This Committee asked the DOE why its comment period was 60 days for its Commercial Refrigeration Rule, 15 days shorter than the agency's own guidelines, but the DOE refused to answer the question.[339] Additionally, the Committee questioned why the SEC's comment period on proposed rules has drastically declined since 2021, and whether the SEC has considered the impact of a shortened comment period on small businesses.[340] The SEC ignored the question.[341]

V. Solutions

This Committee has developed several suggested reforms to overcome the issues found with agencies' RFA compliance and to strengthen the RFA. As discussed in this report, federal agencies constantly fail to comply with the RFA's requirements causing small businesses to suffer. The agencies are supposed to comply with the RFA's requirements to lessen the regulatory burden on small businesses; however, as illustrated in this report, the current regulatory framework is insufficient to protect American small businesses. Change is required. This section lays out four main areas of reform that the Committee believes will help relieve the regulatory burdens on small entities imposed by federal regulators.

A. Significant Impact on a Substantial Number of Small Entities Certification

When an agency is determining whether their proposed regulation will have a significant impact on a substantial number of small entities, they must either choose to conduct a full regulatory flexibility analysis or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. Most agencies merely choose the latter to avoid doing the work associated with an RFA analysis.

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[335] Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., to Lisa M. Gomez, Assistant Sec'y of Labor, Emp. Benefits Sec. Admin., U.S. Dep't of Labor (Dec. 20, 2023).

[336] Letter from Major L. Clark, III, Deputy Chief Counsel, Off. of Advocacy, U.S. Small Bus. Admin., to Lisa M. Gomez, Assistant Sec'y of Labor, Emp. Benefits Sec. Admin., U.S. Dep't of Labor (Jan. 2, 2024).

[337] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Julie A. Su, Acting Sec'y, U.S. Dep't of Labor (Dec. 7, 2023).

[338] Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Mar. 10. 2023). *See* Letter from Liz Watson, Assistant Sec'y, U.S. Dep't of Labor, to Roger Williams, Chairman, H. Comm. on Small Bus. (Feb. 15, 2024).

[339] *See* Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Jennifer M. Granholm, Sec'y, U.S. Dep't of Energy (Nov. 2, 2023); Letter from Mandy Mahoney, Bldg. Tech. Off. Dir., Off. Energy Efficiency & Renewable Energy, U.S. Dep't of Energy, to Roger Williams, Chairman, H. Comm. on Small Bus. (Dec. 18, 2023).

[340] Letter from Roger Williams, Chairman, H. Comm. on Small Bus., to Gary Gensler, Chairman, U.S. Sec. & Exch. Comm'n (July. 27, 2023).

[341] Letter from Gary Gensler, Chairman, U.S. Sec. & Exch. Comm'n, to Roger Williams, Chairman, H. Small Bus. Comm., *et al*. (Sep. 26, 2023).

To avoid the certification being merely a box checking exercise, the Committee concurs with Advocacy's recommendation that agencies should answer the following questions in their analysis:

- Which small entities will be affected?
- Has adequate economic data been obtained?
- What are the economic implications/impacts of the proposal or do the data reveal a significant economic impact on a substantial number of small entities?

Additionally, each agency seems to have a different definition of what a significant impact on a substantial number of small entities means. While the Committee understands that creating a uniform definition across the federal government of a significant impact on a substantial number of small entities is unrealistic, the Committee believes it would be beneficial for each agency to submit a report to Congress on the definition they use so that they can be held to that standard when submitting subsequent rules.

B. Regulatory Flexibility Act Reforms

Currently, the RFA only requires agencies to consider small entities that are directly impacted by a rule, not those who are affected by the downstream impacts. For example, when considering updated requirements for ceiling fans, the DOE is merely required to consider small entities which manufacture ceiling fans, not those who would have to purchase new ceiling fans to stay in compliance with new regulations. The Committee believes that agencies should be required to consider the indirect costs imposed on small entities when conducting an RFA analysis.

Further, the RFA uses language which makes it very flexible standard to rulemaking agencies, such as "when feasible" and "to the extent practicable." The Committee believes that the statute should be amended so that agencies are compelled to do this analysis and not merely get by with saying that additional analysis is not "practicable."

C. Rule Challenges

Advocacy is the chief, independent advocate for small entities within the federal government. Advocacy is the "watchdog" of the RFA and works to compel agencies to adhere to the requirements of the RFA. Unfortunately, their authority is often ignored because they lack enforcement mechanisms to urge agencies to comply with their guidance.

The Committee supports providing a pathway for small entities to petition Advocacy to review a rule, and if Advocacy believes that small entities were not accurately accounted for, Advocacy could then require the agency to reconsider the rule and conduct a full RFA analysis.

D. Periodic Review of Rules

The RFA requires agencies to review their rules that have a significant impact on a substantial number of small entities to be reviewed at least every 10 years. Agencies have the option to delay this review for a year up to five times. The Committee believes that if a rule is so important that it must still be in effect after 10 years, there is no rationale for why an agency would have to delay the review of a rule for five years. The Committee believes that an agency should be able to delay for one year and must give a valid rationale for why it is doing so.

Further, when the agency is reviewing the rule, they must again only consider the direct costs the rule has had on small entities. The Committee believes that agencies should be required to also consider the indirect costs imposed by the rule on Main Street.

E. Cumulative Economic Impact of the Rule

Given that many agencies fail to consider the economic reality when drafting new rules, the Committee believes that amending the current IRFA requirements to include stronger language and descriptions of the cumulative economic impact of the rule, any disproportionate impacts on small entities, and how the rule may impair their access to credit is necessary. Currently, the RFA's language provides an exceptional amount of flexibility to agencies, using language like "to the extent practicable" and "when feasible." The Committee believes this could be remedied by altering this language to require agencies to respond to the requirements within the RFA in all instances.

VI. Conclusion

The massive number of regulations that federal agencies pass each year and the resulting paperwork hours illustrate how detrimental an unchecked regulatory regime can be on small businesses. Under the Biden Administration, this regulatory state has gotten dramatically worse.

The investigation exposed several main problems, including how agencies pivot the RFA's requirements and get away with overregulating small businesses. First, agencies improperly certify the rules in order to avoid conducting the RFA analysis, which means that these burdensome regulations come into effect without adequately assessing the real impacts to small businesses. Second, agencies underestimate both the costs and the number of impacted small businesses which creates a disparity between what the agency claims and what the real-world impact of the rules are on small businesses. Third the agencies often do not adequately consider less burdensome alternatives, or they choose to finalize a rule that is even more harmful to small businesses than other alternatives would have been. Fourth, agencies repeatedly fail to appropriately assess if a rule overlaps, conflicts, or is duplicative of other rules, which causes small businesses to suffer from multiple overlapping regulations from both within same agency and across the federal government. Lastly, some agencies have refused to submit to congressional oversight and provide Congress with required information during their rulemaking process, which violates both the Constitution and the APA and prevents this Committee from its duty to protect Main Street America.

This Committee found that the RFA, as it is, fails to protect small business interests and agencies treat it like a "check the box" exercise rather than actually analyzing the effects of their regulations. This Committee has developed several reforms to overcome the issues with the RFA compliance and to strengthen the RFA. As discussed in this report, federal agencies constantly fail to comply with the RFA's requirements, hurting small businesses. The current regulatory framework is insufficient to protect American small businesses and change is required.

Appendix 1

Agency	Rule	Date Sent	Response Date (if applicable)
1. Army Corps	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023
2. CFPB	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023
3. CPSC	Implementation of RFA, SBREFA, and EO13272	2/22/2023	5/5/2023
4. USDA	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/30/2023
5. Commerce	Implementation of RFA, SBREFA, and EO13272	2/22/2023	5/19/2023
6. DOD	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023
7. ED	Implementation of RFA, SBREFA, and EO13272	2/22/2023	No Response
8. DOE	Implementation of RFA, SBREFA, and EO13272	2/22/2023	4/12/2023
9. DOI	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/14/2023
10. DOL	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023
11. DOT	Implementation of RFA, SBREFA, and EO13272	2/22/2023	4/20/2023
12. EPA	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/7/2023
13. FDIC	Implementation of RFA, SBREFA, and EO13272	2/22/2023	12/21/2022
14. Fed. Reserve	Implementation of RFA, SBREFA, and EO13272	2/22/2023	6/23/2023
15. FERC	Implementation of RFA, SBREFA, and EO13272	2/22/2023	4/26/2023
16. FTC	Implementation of RFA, SBREFA, and EO13272	2/22/2023	Retransmitted 117th cong. Response on 3/14
17. HHS	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023
18. HUD	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/16/2023
19. IRS	Implementation of RFA, SBREFA, and EO13272	2/22/2023	5/12/2023
20. NLRB	Implementation of RFA, SBREFA, and EO13272	2/22/2023	4/3/2023
21. OSHA	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/10/2023- same as DOL response
22. SBA	Implementation of RFA, SBREFA, and EO13272	2/22/2023	1/19/2023

23.	SEC	Implementation of RFA, SBREFA, and EO13272	2/22/2023	6/2/2023
24.	Treasury	Implementation of RFA, SBREFA, and EO13272	2/22/2023	3/17/2023 12/12/2022
25.	VA	Implementation of RFA, SBREFA, and EO13272	2/22/2023	4/18/2023
26.	FTC	Eyeglass Rule	5/15/2023	5/26/2023
27.	DOE	Energy Conservation Program: Energy Conservation Standards for Distribution Transformers	5/16/2023	8/2/2023
28.	CFPB	Credit Card Penalty Fees (Regulation Z)	5/17/2023	6/1/2023
29.	BLM	Conservation and Landscape Health	5/18/2023	8/7/2023
30.	Federal Acquisition Regulation Council (OMB)	Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk	6/9/2023	7/21/2023
31.	United States Citizen and Immigration Services	US Citizens and Immigration Servies Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements	6/9/2023	8/4/2023
32.	DOE	Energy Conservation Standards for Battery Chargers	6/22/2023	8/2/2023
33.	FDA	Tobacco Product Standard for Characterizing Flavors in Cigars	6/28/2023	10/18/2023
34.	EPA	Perchloroethylene (PCS); Regulation Under the Toxic Substances Control Act (TSCA)	6/29/2023	8/29/2023
35.	MSHA	Lowering Miners' Exposure to Respirable Crystalline Silica	7/20/2023	1/10/2024
36.	DOL	Lowering Miners' Exposure to Respirable Crystalline Silica	7/20/2023	1/10/2024
37.	EPA	Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles	7/20/2023	10/17/2023
38.	SEC	Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews	7/27/2023	9/26/2023
39.	BOEM	Risk Management and Financial Assurance for OCS Lease and Grant Obligations	8/3/2023	4/14/2023
40.	EPA	Lead Paint Standards	8/3/2023	No resp.
41.	OSHA	Improve Tracking of Workplace Injuries and Illnesses	8/3/2023	9/15/2023
42.	DOE	Energy Conservation Program: Energy Conservation Standards for Ceiling Fans	8/24/2023	10/30/2023
43.	DOL	Updating the Davis-Bacon and Related Acts and Regulation	9/28/2023	10/18/2023
44.	DOL	Fair Labor Standards Act	9/28/2023	10/18/2023

45. ATF	Change to Definition of "Engaged in the Business of Selling Firearms"	10/12/2023	12/4/2023
46. BOEM	Lease Sale 261 and Rice's Whale	10/12/2023	4/11/2024
47. DOL & MSHA	Lowering Miners' Exposure to Respirable Crystalline Silica – Insufficient Response	11/2/2023	11/21/23
48. DOE	Energy Conservation Program: Energy Conservation Standards for Commercial Refrigerators, Freezers, and Refrigerator-Freezers	11/2/2023	4/11/2024
49. CPSC	Safety Standard for Residential Gas Furnaces and Boilers; Correction	11/9/2023	1/5/2024
50. DOL OSHA	Worker Walkaround Representative Designation Process	11/15/2023	1/31/2024
51. OMB/ OIRA	Tobacco Product Standard for Menthol in Cigarettes	11/16/2023	2/1/2024
52. BOEM	Lease Sale 261 and Rice's Whale – Insufficient Response	11/20/2023	4/11/2023
53. FDA	Tobacco Product Standard for Characterizing Flavors in Cigars - Insufficient Response	11/20/2023	No resp.
54. BIS/ Commerce	Gun Export Pause	12/5/2023	3/8/2024
55. DOL	Retirement Security Rule: Definition of an Investment Advice Fiduciary	12/7/2023	2/15/2024
56. NLRB	Joint Employer Status Under the National Labor Relations Act	12/7/2023	1/4/2024
57. DOL	Employee or Independent Contractor Classification Under the Fair labor Standards Act	1/18/2024	2/6/2024
58. FTC	CARS Rule	1/25/24	2/8/2024
59. EPA	National Emission Standards for Hazardous Air Pollutants: Commercial Ethylene Oxide (EtO) Sterilization Technology Review Methane PFAS National Primary Drinking Water Regulation Rulemaking Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (Pm2.5) Clean Power Plant Rule	2/14/2024	4/24/2024
60. DOL	National Apprenticeship System Enhancements	2/15/2024	4/29/2024
61. DOL/ OSHA	RFA Follow Up	3/13/2024	No resp.

62. DOE	RFA Follow Up	3/13/2024	No resp.
63. EPA	RFA Follow Up	3/13/2024	No resp.
64. FTC	Non-Compete Clause Rule	3/14/2024	4/15/2024
65. FTC	RFA Fees	5/9/2024	No resp.
66. CFPB	RFA Fees	5/9/2024	No resp.