

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2561 Rayburn House Office Building
Washington, DC 20515-6515

December 7, 2022

The Honorable Gene Dodaro
Comptroller General
U.S. Government Accountability Office
441 G. St, NW
Washington, DC 20548

Dear Comptroller General Dodaro:

As the Ranking Member on the U.S. House of Representative Committee on Small Business, I write to request that the U.S. Government Accountability Office (“GAO”) audit agencies’ implementation of the Regulatory Flexibility Act (“RFA”)¹, Small Business Regulatory Enforcement Fairness Act (“SBREFA”)², and Congressional Review Act (“CRA”).³

As I’m sure you are aware, these laws were designed to bring small businesses to the regulatory decision-making table. Specifically, these laws require agencies to give explicit notice of proposed rules to small businesses, provide small businesses with exceptional opportunities to raise concerns, and compel agencies to consider such concerns.⁴ These laws also provide for congressional review of promulgated rules that have a significant impact on a substantial number of small businesses.⁵ Despite the desired intent, there is ongoing concern that implementation of these measures have left small businesses wanting in the regulatory arena.

As inflation continues to impact the American economy, I seek updated information on the implementation of these laws to identify if agencies are inappropriately imposing preventable regulatory costs on small business owners. Recently, the Supreme Court in *West Virginia v. EPA* highlighted concerns about agencies exercising authority beyond express congressional authorization.⁶ As detailed below, the *West Virginia* case speaks to the Committee’s concern about the broad scope of discretion afforded to agencies to determine if the RFA and related laws apply to agency actions. Rising costs, whether through inflation or regulations, detrimentally

¹ 5 U.S.C. § 601-12.

² Pub. L. 104-121 (Mar. 29, 1996).

³ 5 U.S.C. § 801(a)(1)(A).

⁴ 5 U.S.C. §§ 601-612.

⁵ 5 U.S.C. § 801(a)(1)(A).

⁶ *West Virginia v. E.P.A.*, 142 S.Ct. 2587 (2022).

impact small businesses across the country. As inflation continues to plague the economy with no foreseeable relief in sight, it is imperative to minimize any inflationary impact burdensome regulatory costs may have on small businesses.

This type of assessment would not be new for the GAO. In the past, the GAO has identified unclear key terms and definitions, limited scope and coverage, and inconsistencies in implementation by agencies as impediments to the effective implementation of these laws.⁷ For example, key elements of the RFA's protections for small businesses apply if an agency determines that the proposed rule will have a "significant impact" on a "substantial number of small entities."⁸ In that respect, the GAO has previously identified inconsistent compliance with the RFA as agencies independently define and interpret the applicable terms in the act.⁹ This was highlighted in 2005, when the GAO noted the enactment of SBREFA "appeared to prompt a reduction in the number of rules" that agencies identified as affecting small entities.¹⁰ These concerns are compounded by a 2015 academic study identifying agencies exempt over 92% of rules from the RFA.¹¹

Additionally, I am further concerned about the role of adverse and beneficial impacts and indirect costs in an agency's interpretation of "significant impact." As early as 1998, the GAO warned that prospective economic assessments analyzing regulations "are often incomplete and inconsistent with general economic principles."¹² If an agency determines that the net impact of the proposed rule is not "significant," by the agency's standard, the agency may exempt the rule from the full RFA, SBREFA, or CRA analytical requirements. This means that proposed rules with identified adverse impacts on small businesses can take effect without any congressional notice, publication of SBREFA compliance guides, or the facilitation of SBREFA panels—leaving small businesses adversely impacted with no meaningful notice or ability to exercise their rights under the RFA, SBREFA, or CRA. To make matters worse, even if congressional notice is provided, the GAO noted that some agencies consistently failed to delay the effective date of major rules for 60 days as required by CRA.¹³

Furthermore, I am concerned about agencies consideration of indirect impacts in their economic impact analysis for small businesses. For example, if the EPA releases a regulation on gas additives and fuel blending, costs imposed on the entity that blends the fuel may be a direct impact. Alternatively, the consumer price of gas could be an indirect impact since consumers

⁷ Gov't Accountability Off., GAO-06-228T, *Federal Rulemaking Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention* 3-5 (Nov. 2005) (Statement of J. Christopher Mihm).

⁸ 5 U.S.C. § 605(b).

⁹ Gov't Accountability Off., GAO-02-491T, *Regulatory Flexibility Act Clarification of Key Terms Still Needed* 3 (Mar. 2002) (Statement of Victor Rezendes).

¹⁰ Gov't Accountability Off., *supra*, note 4 at 4.

¹¹ Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 Admin. L. Rev. 65, 101 (2015).

¹² Gov't Accountability Off., *supra*, note 4 at 5. See Gov't Accountability Off., GAO/RCED-98-142, *Regulatory Reform Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses* (May 1998).

¹³ 5 U.S.C. § 801(a)(3)(A).

aren't directly involved with the production of gas additives or fuel blending process. As such, it is important to know how agencies, like the EPA, consider indirect regulatory costs when determining if a regulation has a "significant impact" on small businesses.

Alongside ambiguity issues, I am also concerned about the potential for agencies to certify that a proposed rule lacks a significant impact on a substantial number of small entities, when in fact the opposite may be true. Agencies must provide a "statement of factual basis" to justify their certification, publish their factual basis in the Federal Register, and report their factual basis to the Chief Counsel for Advocacy of the Small Business Administration at the time the proposed or final rule is published for public comment.¹⁴ The Office of Advocacy interprets a factual basis to include a description of the number of affected entities, the size of the economic impacts, and why either the number of entities or the size of the impacts justifies the certification.¹⁵ Despite this being Advocacy's interpretation, the Committee seeks information to determine if this interpretation is adopted by other agencies, and to what extent agencies can change the factual basis standard.¹⁶

Finally, these deficiencies have also contributed to concerns about the implementation of Section 212 of SBREFA. Section 212 requires agencies to publish one or more small entity compliance guides for each rule or group of rules.¹⁷ The agency is also required to prepare a final regulatory flexibility analysis under the RFA.¹⁸ Under Section 212 of SBREFA, agencies are also required to report their compliance with the law on an annual basis to the House Committee on Small Business.¹⁹ My concerns stem from the recent annual Section 212 compliance reports received by the Committee. Of the limited number of annual SBREFA compliance reports received by the Committee in 2022, an even smaller amount include information about a rule promulgated that required a SBREFA compliance guide. For the reasons outlined in this letter, Section 212 appears to be an inadequate measure for this Committee to ensure small businesses are brought to the regulatory decision-making table and underscores several concerns about agency implementation of the RFA and related laws.

With these concerns in mind, I respectfully request the GAO assess the following:

1. How frequently agency rules are exempt from the RFA and related polices since the last GAO study on this matter was conducted.

¹⁴ 5 U.S.C. § 605(b).

¹⁵ U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., A GUIDE FOR GOVERNMENT AGENCIES HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 13 (Aug. 2017).

¹⁶ 5 U.S.C. § 605(b).

¹⁷ Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121, § 212 (as amended by the Small Business and Work Opportunity Act of 2007, Pub. L. 110-28 § 8302).

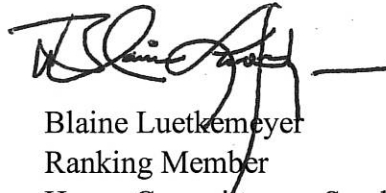
¹⁸ *Id.*

¹⁹ *Id.*, § 212(a)(6).

2. The analysis employed by agencies to determine whether a proposed rule has a significant impact on a substantial number of small entities, including:
 - a. How agencies weigh adverse and beneficial impacts to determine if a proposed rule lacks a significant impact.
 - b. How agencies consider and weigh indirect impacts to determine if a proposed rule lacks a significant impact on small entities
3. Whether agencies adopt the Office of Advocacy's standard in drafting a sufficient "statement of factual basis" to certify if a proposed rule lacks a significant impact on a substantial number of small entities.
4. Agency implementation of Section 212 of SBREFA to determine whether agencies have appropriately developed, published, and distributed small entity compliance guides for each covered rule.
5. Any other question or topic uncovered over the course of the GAO's audit which may be pertinent to the topic in this engagement request.

Should you have questions about this request, please contact Chris Esparza, Republican Chief Counsel, at 202-225-5821. Thank you in advance for your attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Blaine Luetkemeyer", with a horizontal line extending to the right.

Blaine Luetkemeyer
Ranking Member
House Committee on Small Business