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September 24, 2021

The Honorable John Yarmuth  
Budget Committee  
U.S. House of Representatives  
402 Cannon House Office Building  
Washington, D.C. 20515

The Honorable Jason Smith  
Budget Committee  
U.S. House of Representatives  
1118 Longworth House Office Building  
Washington, D.C. 20515

Dear Chairman Yarmuth and Ranking Member Smith:

As you consider legislation to comply with reconciliation instructions outlined in S. Con. Res. 14, the *Fiscal Year 2022 Budget Resolution*, I write to express opposition to multiple recommendations reported by House committees. Collectively, the *Build Back Better Act* will create significant problems for small business owners by imposing new mandates, substantially increasing taxes, and significantly increasing penalties on small business owners.

**NFIB opposes mandating small employers with more than 5 employees to provide “Automatic Contribution Plans and Arrangements” (ACPA) or pay excise taxes.** This mandate is opposed by small business owners, would increase administrative costs and responsibilities, and violate President Biden’s pledge to protect small business owners from tax increases. In a recent NFIB member ballot, 84% of small business owners opposed Congress passing legislation requiring businesses to automatically enroll employees in retirement plans funded by employee paycheck withholdings.<sup>1</sup> Passing a new benefit mandate, like the ACPAs contained in Subtitle B, could require small businesses who currently cannot afford to offer retirement plans to make difficult decisions that may include cutting employee benefits elsewhere, reducing employee hours or total number of employees, or increasing the price of their products or services. While there are tax credits for setting up ACPAs, they are temporary and limited.

Further, small business owners often engage in “do it yourself compliance” with 54% managing their own payroll without the aid of an outside payroll service or bookkeeper.<sup>2</sup> Offering an ACPA and complying with the bill’s complex provisions and compliance requirements will be a significant burden on many of our nation’s small businesses. These “hidden taxes” will require small businesses to demonstrate they offer qualified plans to qualified employees on a periodic basis, according to regulations that would be promulgated by the Secretary of Treasury.

Failure to offer an ACPA shall result in an excise tax of \$10 per employee per day, increasing annually with inflation. This excise tax is a tax increase that violates President Biden’s pledge that no small

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<sup>1</sup> *NFIB 2021 Tax Survey*, NFIB Research Center, August 2021, <https://assets.nfib.com/nfibcom/NFIB-Tax-Survey-Full-Report.pdf>.

<sup>2</sup> *Ibid.*

business earning below \$400,000 will pay higher taxes. A small business with 10 employees who does not offer an ACPA would owe \$9,000 or more in excise taxes per year. Given the significant resource advantage that larger businesses have in proper regulatory compliance, it is likely small businesses will be hit hard by this tax, which is essentially a significant enforcement penalty designed to comply with reconciliation rules.

**NFIB is also concerned about the impact of a government-run paid family and medical leave program may have on small employers.** Currently, small employers (fewer than 50 employees) are exempt from the Family and Medical Leave Act (FMLA). Congress wrote this exemption into law because they understood that a new employer mandate like the FMLA would be burdensome, and compliance would be difficult. Subtitle A of the *A/NS* creates a “Universal Paid Family and Medical Leave” program for all workers without regard to employer size. This program will be a significant change to small business owners who are currently not subject to FMLA. In a recent NFIB member ballot, 90% of small businesses believe that small employers should be exempt from paid sick and family leave mandates.<sup>3</sup>

The initial application requires a self-attestation that a worker’s employer was provided with seven-day notice of the need to be absent from work for qualified caregiving. This self-attestation provides little flexibility and notice for small business owners to adjust to the new program. Further, it provides less time than other proposed legislation for small employers to adjust schedules.<sup>4</sup> If an employer provides paid family and medical leave that meets all conditions of the “Universal Paid Family and Medical Leave,” they may be eligible for reimbursement. However, the program is complex, and, like the paid family and medical leave tax credit that was part of the Families First Coronavirus Response Act, is likely to be underutilized as a result.<sup>5</sup> Requiring small business participation in a federal paid family and medical leave program will take away the flexibility many small businesses need to be able to manage their workforce.

In addition to these mandates, Subtitle I includes several tax increases on small businesses. Each of these tax proposals is troubling; together, these tax increases are disruptive for Main Street businesses. After surviving health and economic crises related to the pandemic for the last 18 months, wary small business owners are cautiously looking ahead. Increasing taxes now would endanger their hopes for a robust recovery. Even prior to the pandemic, small business owners grappled with tax concerns. As NFIB Research Center’s recent *Small Business Problems & Priorities* survey notes, the most severely ranked tax problem for small business owners is “Federal Taxes on Business Income;” this topic ranks third out of 75 policy concerns. In fact, the top 10 most severe problems for small business owners are populated with four tax-related small business issues.<sup>6</sup> Further, in NFIB’s latest tax survey, small business owners shared that federal business income taxes were the most burdensome tax on both a financial and administrative basis.<sup>7</sup> NFIB’s August *Small Business Economic Trends* survey notes that “taxes” is the single most important problem facing small business owners after “quality of labor.”<sup>8</sup> In short, increasing taxes now on small businesses is the wrong move at the wrong time.

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<sup>3</sup> *NFIB Member Ballot*, Mandate, vol. 578, March 2021.

<sup>4</sup> See Sec. 4(a)(2)(A) of H.R. 5004, the *Schedules that Work Act* (116<sup>th</sup> Congress), <https://www.congress.gov/116/bills/hr5004/BILLS-116hr5004ih.pdf>. “... the employer shall provide the employee with the new work schedule of the employee not less than 14 days before the first day of the new work schedule.”

<sup>5</sup> *Covid-19 Small Business Survey (17)*, *Federal Small Business Programs, the Vaccine, Labor Shortage, and Supply Chain Disruptions*, NFIB Research Center, April 23-28, 2021, <https://assets.nfib.com/nfibcom/Covid-19-17-Questionnaire.pdf>. *About half (53%) of small employers have had an employee take Covid-19 related sick or family leave... Forty-three percent of small employers providing paid time off for Covid-19 related sick or family leave have claimed the tax credit.*

<sup>6</sup> Holly Wade, *Small Business Problems & Priorities: Tenth Edition*, NFIB Research Center, 2020, <https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf>.

<sup>7</sup> William C. Dunkelberg and Holly Wade, *NFIB 2021 Tax Survey*, NFIB Research Center, August 2021, <https://assets.nfib.com/nfibcom/NFIB-Tax-Survey-Full-Report.pdf>.

<sup>8</sup> William C. Dunkelberg and Holly Wade, *NFIB Small Business Economic Trends*, NFIB Research Center, August 2021, <https://assets.nfib.com/nfibcom/SBET-July-2021.pdf>.

**NFIB opposes efforts to raise taxes on small businesses.** The Small Business Deduction (Section 199A) provides tax relief for small businesses organized as pass-through entities (S-corporations, sole proprietorships, LLCs, and partnerships). Since three-quarters of small employers are organized as pass-throughs, it is unsurprising that 81% of small business owners said the Small Business Deduction was important for their business.<sup>9</sup> In the Tax Cuts and Jobs Act, Congress placed guardrails, like the W-2 wage test, on the deduction. In essence, to receive the deduction above qualified business income (QBI) statutory threshold, one must be a job creator. By arbitrarily curtailing the deduction, Congress is punishing a growing business that has invested in employees.

Unfortunately, Subtitle I increases multiple taxes on pass-through business owners. Curtailing the Small Business Deduction, increasing the top individual marginal tax rate from 37% to 39.6%, lowering the top rate threshold from \$523,601 (individual) and \$628,301 (joint) to \$400,001 (individual) and \$450,001 (joint), and imposing the 3.8% net investment income tax (NIIT) on pass-through business income earned amounts to a multi-prong tax blitz on small businesses. These tax changes create a potential 46.4% federal effective tax rate on pass-through business income before even considering state and local taxes. In comparison, publicly traded C corporations (C-corps) would see a comparatively smaller increase, from 21% to 26.5%. Cumulatively, these proposed changes present a disruptive combination for small businesses and an unfair attack on the pass-through business model.

**NFIB opposes increasing the top corporate tax rate from 21% to 26.5%.** Such an increase will negatively impact a substantial number of businesses structured as C-corps. However, NFIB appreciates that the proposal restores a graduated corporate rate structure, which would effectively lower the corporate rate for the smallest C-corps (those earning less than \$400,000 in taxable income) and maintain the current 21% rate for many small businesses organized as C-corps (those earning taxable income between \$400,001 to \$5 million).

**NFIB opposes changes to the estate tax and increasing the top capital gains tax rate.** In NFIB's latest tax survey, one-third of small business owners plan to pass their business to a family member.<sup>10</sup> Sunsetting estate tax thresholds prematurely increases complexity and uncertainty for small business owners. Nearly half of small business owners (48%) report the uncertainty of expiring tax provisions is impacting their current or future business plans, a dramatic increase from 16% of small business owners who reported the same in a 2019 NFIB tax survey.<sup>11</sup>

In considering the changes to the top capital gains rate, this will also affect small business owners' retirement. Many small business owners have reinvested in their businesses and employees for years, even decades, with the intent to sell the business to finance their retirement. By increasing the top capital gains rate and applying new surtaxes to the income, the small business owners would lose significantly more of their hard-earned retirement. In NFIB's most recent tax survey, more than half of the owners surveyed (52%) plan to sell their business when it is time to move on.<sup>12</sup>

Should Congress impose additional taxes now, this would further encumber small business owners, increase uncertainty moving forward and harm the fragile small business recovery.

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<sup>9</sup> William C. Dunkelberg and Holly Wade, *The Tax Cuts and Jobs Act: One Year Later, Part II*, NFIB Research Center, September 2019,

<https://strgnfibcom.blob.core.windows.net/nfibcom/2019-TCJA-One-Year-Later-final.pdf>.

<sup>10</sup> William C. Dunkelberg and Holly Wade, *NFIB 2021 Tax Survey*, NFIB Research Center, August 2021, <https://assets.nfib.com/nfibcom/NFIB-Tax-Survey-Full-Report.pdf>.

<sup>11</sup> *Ibid.*

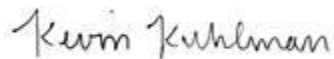
<sup>12</sup> *Ibid.*

NFIB opposes civil monetary penalties on small businesses who have isolated errors when trying to comply with thousands of pages of complicated federal employment law. The *Build Back Better Act* significantly increases the civil monetary penalties on small businesses who have isolated errors when trying to comply with thousands of pages of complicated federal employment law. Fair Labor Standard Act (FLSA) violations are exponentially increased. The maximum minimum wage and overtime violations are increased from \$1,100 to \$20,740 per violation, and the maximum tipped credit violation is increased from \$1,100 to \$11,620. FLSA violations currently operate under a strict liability standard, meaning employers who have an honest misinterpretation of the law or made an isolated mistake are not given leniency under the law. For example, a small employer who makes a single error and forgets that his or her employees' hours exceeded the overtime threshold and inadvertently forgets to pay overtime to 10 employees can now be subject to \$207,400 in fines. Small businesses do not have the operating revenue of larger businesses and cannot simply absorb these substantial fines, nor do they have legal counsel on retainer to negotiate lower fines with agency officials. This one-time error can ruin a small employer and permanently put them out of business.

NFIB is also concerned about substantial civil monetary penalty increases for violations under the Occupational, Safety, and Health Act (OSHA), as well as those under the National Labor Relations Act (NLRA). Similar to FLSA, one-time violations of these laws can put a small employer out of business permanently.

Small businesses are struggling with labor shortages, rising inflation, supply chain disruptions, and increasing threats from COVID-19 variants.<sup>13</sup> Congress should not impose unworkable mandates, substantial tax increases, and massive new civil monetary penalties on small businesses as it would only serve to compound these problems and damage the fragile small business recovery. **NFIB opposes the *Build Back Better Act* and urges the Budget Committee to reject the legislation.**

Sincerely,



Kevin Kuhlman  
Vice President, Federal Government Relations  
NFIB

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<sup>13</sup> NFIB Small Business Jobs Report, NFIB Research Center, September 2, 2021, <https://www.nfib.com/foundations/research-center/monthly-reports/jobs-report/>.