U.S. Chamber of Commerce

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June 22, 2023

The Honorable Roger Williams
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

The Honorable Nydia Velázquez
Ranking Member
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Williams and Ranking Member Velázquez:

Thank you for holding the hearing, "Reviewing the SBA's Office of Advocacy Report on the Regulatory Flexibility Act." The Chamber appreciates the opportunity to provide our feedback on this important office within SBA.

I am Natalie Kaddas, CEO of Kaddas Enterprises in Salt Lake City, Utah. My manufacturing company specializes in manufacturing thermoform plastic products for the energy, transportation, and aerospace industries. I serve as the Chair of the Small Business Council at the U.S. Chamber of Commerce. 96% of Chamber member companies have fewer than 100 employees and 75% have fewer than 10. The Small Business Council works to ensure the views of small businesses are integrated into the Chamber's policy-making process.

At a time when regulatory experts calculate the costs of federal rules last year at $10,000 per household,[1] the critical role that SBA's Office of Advocacy plays in protecting small businesses from costly federal red tape is especially important.

We hope that today's hearing will lead the way for Congress to bolster the ability of the Office of Advocacy to independently represent the views and interests of small business in federal rulemakings, as well as end the ability of enforcement agencies to ignore small business input prior to imposing new mandates.

Small Business and the Regulatory Flexibility Act

Small businesses have long been understood as America's economic engine. The roughly 32.5 million small businesses make up over 99% of all U.S. businesses, represent 43.5% of America's GDP, innovate at more than 12 times the rate of larger competitors, and account for 62% of net job creation since 1995.[2] Despite small businesses' strength in economic

[1] Testimony of Casey B. Mulligan, Professor of Economics at the University of Chicago, before the Committee on Oversight and Accountability hearing on "Death by a Thousand Regulations: The Biden Administration's Campaign to Bury America in Red Tape," U.S. House of Representatives, (June 14, 2023).
[2] U.S. Small Business Administration, Office of Advocacy, Frequently Asked Questions About Small Business, (December 2021).

contributions, they are at a disadvantage when it comes to dealing with regulations. The Chamber's work with the Bradley Foundation showed that U.S. businesses shoulder $1.9 trillion in annual regulatory compliance costs.[3] For small businesses with 50 or fewer employees, the costs are nearly 20% higher than the average for all businesses.

The Regulatory Flexibility Act (RFA), amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), was intended to rectify the disproportionate regulatory burden faced by small business by incorporating their concerns into the regulatory process and by insisting that federal agencies find ways to meet their regulatory objectives while at the same time minimizing costs on small businesses.[4] The Office of Advocacy is responsible for overseeing agency compliance with the RFA and acts as an independent voice within the Administration to ensure that agencies are sensitive to how their regulations impact small businesses.

Abuse of "Certification" under the RFA

Unfortunately, one way for federal agencies to avoid small business input is to incorrectly certify that a rulemaking will not have a significant economic impact on a substantial number of small entities. This year's RFA report, as well as RFA reports over the past 41-years, cites numerous examples of how agencies do not properly "certify" whether their proposals will impact small businesses. The most egregious multi-year / multi-administration failure to consider small business is the Waters of the United States (WOTUS) rulemaking promulgated by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers. Rather than seek input from small businesses on how to manage wetlands permitting in a way that would be both environmentally protective and sensitive to impacts on small businesses, EPA and the Corps repeatedly insisted - in 2014, 2019, and in 2023 – that their proposed WOTUS rules did not impose additional costs on small businesses.

When each of these proposals was issued, SBA's Office of Advocacy faulted EPA and the Corps for "certifying" that their rulemaking would not harm small businesses. On each occasion, SBA's Office of Advocacy faulted the agencies for not convening a panel of small businesses that is required under SBREFA to ensure that the agencies consider small business recommendations for less burdensome alternatives[5]. In this regard, it is worth noting that the Chamber's lawsuit

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[3] U.S. Chamber of Commerce Foundation, The Regulatory Impact on Small Business: Complex.Cumbersome.Costly., (March 2017).

[4] Regulatory Flexibility Act, 501 U.S.C. Sec. 601 et seq (1980).

[5] See, SBA Office of Advocacy letter to Administrator Gina McCarthy and Maj. Gen. John Peabody re: Definition of "Waters of the United States" Under the Clean Water Act, (October 1, 2014) and SBA Office of Advocacy letter to Administrator Andrew Wheeler and Lieutenant General Todd T. Semonite re: Revised Definition of "Waters of the United States" (Docket No. EPA-HQ-OW-2018-0149), (April 11, 2019) and SBA Office of Advocacy Letter to Administrator Michael S. Regan and Michael L. Connor re: Comments on EPA and Army's proposed rule defining "Waters of the United States" under the Clean Water Act (EPA Docket EPA-HQ-OW-2021-0602 and Army Docket COE-2021-0001-0016), (February 7, 2022).

challenging the 2023 WOTUS rule, which is now pending in the U.S. Court of Appeals for the Sixth Circuit, specifically challenges EPA's and the Corp's "certification" that the rule "will not have a significant economic impact on a substantial number of small entities under the RFA." As the Chamber's complaint in that case notes, this certification "is based on a description of the Final Rule that does not reflect reality," as "the Final Rule will impose significant costs on small businesses." The Sixth Circuit has since issued a temporary injunction against enforcement of the 2023 rule, as have two other courts.

Even more recently, the Supreme Court's decision in *Sackett v. EPA* rejected the broad theory of regulatory jurisdiction that was central to the 2023 WOTUS rule. In its decision, the Supreme Court observed that "because the [Clean Water Act] can sweep broadly enough to criminalize mundane activities like moving dirt," "a *staggering* array of landowners" were "at risk of criminal prosecution or onerous civil penalties" under that broad theory of jurisdiction. (Emphasis added.)

It is truly unfortunate that EPA and the Corps went to such great lengths to avoid ensuring appropriate small business input. The purpose of the RFA and SBREFA is to ensure that agencies receive constructive small business input that can help regulators meet their regulatory objectives while at the same time minimizing the burden on small businesses like mine. The trend is only expected to get worse as recent changes to the government's centralized regulatory review process and proposed concepts for cost-benefit analysis would further hide the true costs of regulations.

The concept of regulating while being sensitive to small business compliance costs makes sense and it is something I am personally passionate about. I am an advocate for protecting birds of prey and their environment. Our largest source of revenue at Kaddas Enterprises is our patented designs of BirdguarD™ products. They are designed to protect birds and other animals from electrocution. I take pride in the fact that our manufacturing contributes to energy resiliency by preventing wildlife caused power outages. My company is a good example of how industry, environmental protection, and small business growth can work together to provide economic growth and conservation. These ideals are not exclusive.

Legislative Recommendations

The Chamber applauds the Small Business Committee's letter to President Biden calling for a nominee who can effectively oversee the RFA as Chief Counsel for Advocacy and in addition to a strong and effective Chief Counsel who can be confirmed by the Senate, the Chamber requests that you consider the following updates to improve the RFA:

I. The "certification" under Regulatory Flexibility Act needs to be amended for agencies to take it seriously. The Chamber urges the Committee to consider approaches that will

close the RFA loophole that has allowed such flagrant disregard for small business input when agencies craft rulemakings.

II. Agencies need to be transparent about costs on small businesses. The RFA must be amended to include cost estimates for reasonably foreseeable indirect impacts. For example, a recent proposal by the Securities and Exchange Commission (SEC) may require small private companies to report their greenhouse gas emissions if they are part of the value chain of a publicly traded company under the SEC's jurisdiction. As the Office of Advocacy pointed out, the SEC did not disclose those costs and did not consider less burdensome alternatives for small businesses.[6]

III. There is a question whether all provisions of the RFA should be made expressly subject to judicial review. Modernizing the RFA should avail small businesses with a court review of whether agencies are meeting their legal obligations to adequately consider small business in the development of federal rulemaking. Making it clear that the judicial branch is the ultimate arbiter of the legal requirements governing how agencies treat small business will help convince regulators to seek out, receive, and follow the recommendations of the small business community when there is constructive input on how to meet regulatory objectives while at the same time minimizing the negative impact on small businesses.

Thank you again for holding this important hearing on the Office of Advocacy's RFA Report. The U.S. Chamber welcomes the opportunity to help the Committee highlight the Office of Advocacy's good work and to bolster the Office's ability to defend small business from overly burdensome federal mandates. Please do not hesitate to contact Tom Sullivan, the Chamber's Vice President for Small Business Policy, if you have questions or comments regarding the content of this statement for the record.

Sincerely,

Natalie Kaddas
CEO, Kaddas Enterprises, Inc.
Chair
Small Business Council
U.S. Chamber of Commerce

cc: Members of the House Committee on Small Business

[6] See, SBA Office of Advocacy letter to Secretary Vanessa A. Countryman re: The Enhancement and Standardization of Climate-Related Disclosures for Investors – File Number S7-10-22 (June 17, 2022).