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Via www.regulations.gov
and U.S. First Class Mail

January 10, 2024

Hon. Gina M. Raimondo, Secretary of Commerce
c/o Information Technology Laboratory
ATTN: AI E.O. RFI Comments
National Institute of Standards and Technology
100 Bureau Drive, Mail Stop 8900
Gaithersburg, MD 20899-8900

Dear Madam Secretary:

RE: Department of Commerce/NIST Notice Titled "Request for Information (RFI)
Related to NIST's Assignments Under Sections 4.1, 4.5, and 11 of Executive
Order Concerning Artificial Intelligence (Sections 4.1, 4.5, and 11)," Docket
No. 231218-0309, 88 *Fed. Reg.* 88368 (December 21, 2023)

This letter presents comments of the National Federation of Independent Business (NFIB)¹ in response to the National Institute of Standards and Technology (NIST) notice cited above. Executive Order 14110² requires the Secretary of Commerce to undertake three basic tasks related to artificial intelligence (AI). First, she must establish guidelines for developing and deploying, and enabling AI developers to conduct red-teaming tests related to, secure, safe, and trustworthy AI systems (sec. 4.1(a)(i) and (ii)). Secondly, she must report on means to authenticate and track the provenance of content, prevent AI production of pornography, label, detect, audit, and maintain synthetic content, and test related software, and develop guidance on digital content authentication and synthetic content detection measures (sec. 4.5(a) and (b)). Finally, she must lead preparations for an international effort to drive the development and implementation of AI-related consensus standards, cooperation and coordination, and information sharing (sec. 11). NFIB asks that, in performing these tasks, the Department of Commerce accommodate the interests of small businesses.

Implementation of Executive Order 14110 will set policies for the development and use of artificial intelligence when artificial intelligence is in its infancy. Decisions the government makes at this early state of AI development and use will have a lasting impact on the American economy, including small businesses. As the Department

¹ NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that the governments of the United States and the fifty States hear the voice of small business as they formulate public policies. Many American small businesses generate or use artificial intelligence.

² Executive Order 14110, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" (October 30, 2023), 88 *Fed. Reg.* 75191 (November 1, 2023), secs. 4.1, 4.5, and 11.

performs its tasks under Executive Order 14110 and eventually issues regulations concerning AI, please bear in mind the following principles:

1. Remember the Small Business Half of the Economy when the Big Business Half Speaks. The Department of Commerce keeps the interests of large institutions, such as big businesses, easily in mind. Big institutions are visible in the economy because people see their brands, products, services, and advertising daily. Big institutions also can afford armies of lobbyists to watch every step the Department takes as it moves toward a decision and to bring their influence to bear at every stage of that process. As the Department hears from America's big businesses, please remember that the Department is hearing from half the economy. As the Department considers what the big institutions say, think also about what the other half of the economy -- America's small businesses -- needs, to continue to grow and create jobs.
2. One Size Does Not Fit All. Big businesses with large revenues and human resources and regulatory compliance departments often can afford to implement a regulation that a small business cannot. When the Department has decided that it will issue nationwide regulations, the Department should consider whether it can achieve its goal satisfactorily without imposing unneeded burdens on small businesses. Depending upon the nature of the regulation, an exemption of small businesses, an exemption of the smallest businesses (such as those with fewer than 50 employees), or a simpler and less costly alternative for small businesses than the Department requires of big businesses may be in order.³
3. Small Business Compliance is Largely Do-it-Yourself. Small businesses cannot afford the lawyers, accountants, and clerks that larger companies use to decipher complex regulations and implement costly business systems necessary to comply with the regulations. Small businesses mostly engage in do-it-yourself compliance, in which a business owner trying to keep the business afloat attempts to keep up with regulations as much as the owner can. Thus, the Department should focus its efforts on making its regulations concise and simple. Also, the Department's enforcement regulations and policies should protect small businesses owners who have done the best they can in good faith to understand and comply with the large, ever-growing, and ever-changing body of regulations.
4. Assistance with Compliance is More Valuable than Punishment through Enforcement. When the Department of Commerce helps small businesses to comply with regulations, the Department serves the goals of federal laws much better than when it imposes fines or refers for prosecution. Accordingly, the Department should emphasize efforts to educate small businesses about its regulations. Often a small business owner hears

³ Careful consideration of the interests of small business in rulemaking reflects statutory policy. Regulatory Flexibility Act (RFA), 5 U.S.C. 601 note. In paragraph 2(a)(4) of the RFA, Congress declared that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity" Congress also noted in paragraph 2(a)(6) of the RFA that "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation"

about a regulation for the first time when the government seeks to enforce it. When the Department writes regulations, the Department should provide for enforcement against small businesses only in cases of willful or repeated violations.

5. Pay Close Attention to the Degree of Federal Preemption of State Rules. State governments often have a closer familiarity with the situations of small businesses in their states than does the federal government. States often may have laws and regulations better tailored to the needs of the economies of those states than a federal rule would be. In rare situations, such as a rule preventing rather than imposing a burden on small businesses, a rule that is nationwide might better serve businesses because of its uniformity and clarity. Accordingly, the Department should give careful thought, when it develops regulations on a subject, to the extent to which the regulation should or should not preempt state regulations on the same subject. In particular, when the Department considers a federal regulation that imposes a burden on small businesses, the Department should consider specifying in the federal regulation that the federal regulation preempts state regulations that are more restrictive than the federal regulation but does not preempt state regulations that are less restrictive.

6. Listen to Small Business Before Issuing Commands. As a U.S. Court of Appeals has said: "Notice and comment are not mere formalities. They are basic to our system of administrative law. They serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking." *NRDC v. NHTSA*, 894 F. 3d 95, 115 (2d Cir. 2018). With respect to most regulations, the Department must provide an opportunity to comment to, and consider the comments of, small businesses and others because the Administrative Procedure Act (APA) (5 U.S.C. 553) requires it. But even in the rare cases in which the Department legally can issue a regulation without seeking the views of small businesses in advance, such as emergencies recognized by the APA, the Department should seek such views in advance formally or informally as a matter of good practice. The Department, small businesses, and the American economy benefit from such a cooperative approach to the development of regulations. The Department also should adhere carefully to the Regulatory Flexibility Act requirements to analyze carefully the effects of departmental regulations on small businesses and to give small businesses an opportunity to participate in the rulemaking process.

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NFIB appreciates the Department of Commerce effort to learn of the concerns of small businesses and others as the Department prepares to examine, report on, and regulate the development and use of artificial intelligence. We ask that you bear America's small businesses in mind as you go forward.

Sincerely,



David S. Addington

Executive Vice President and General Counsel