

CFPB-2020-0013-0009

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NFIB

**Redacted**

Via [www.regulations.gov](http://www.regulations.gov)  
and U.S. First Class Mail

April 3, 2020

Hon. Kathleen L. Kraninger, Director  
Bureau of Consumer Financial Protection  
Comment Intake (CFPB-2020-0013)  
1700 G Street NW  
Washington, DC 20552

Dear Madam Director:

RE: Bureau of Consumer Financial Protection (CFPB) Notice titled "Request for Information to Assist the Taskforce on Federal Consumer Financial Law,"  
Docket No. CFPB-2020-0013, 85 Fed. Reg. 18214 (April 1, 2020)

This letter presents comments of the National Federation of Independent Business (NFIB) in response to Question 21 from the CFPB Taskforce on Federal Consumer Financial Law: "21. How should the Bureau determine an appropriate remedy for a law violation, considering the need to correct and deter violations without creating adverse effects on competition and other unintended consequences?" In response, NFIB recommends that CFPB regulations provide for an enforcement action seeking fines or other penalties against a small business (50 or fewer employees) if and only if the violation was "willful." The proposed regulatory provision is set forth below (in bold).

NFIB is an incorporated nonprofit association with about 300,000 small and independent business members across America, including members who do business in markets regulated by CFPB. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies.

Small and independent businesses cannot afford the lawyers, accountants, and clerks that larger companies use to read and decipher complex regulations and implement costly business systems necessary to comply with such regulations. Small and independent business owners engage to a substantial extent in do-it-yourself compliance. They face challenges in learning of the existence

of regulations and in comprehending, complying with, and affording the costs of compliance with them.

Congress encourages agencies to accommodate the special challenges small businesses face. In subsection 2(a) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 nt.), 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 the Act 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."

To take appropriate account in regulatory enforcement and adjudication of the needs and limitations of small and independent businesses, NFIB recommends that CFPB include in its regulations on enforcement the following provision:

\_\_\_\_\_. CFPB Enforcement Actions Against Small Businesses.

(a) Unless otherwise required by the Constitution, a statute, or a treaty of the United States, in the enforcement of a rule or adjudication of a matter under a rule the Bureau of Consumer Financial Protection shall, with respect to the conduct of a business with 50 or fewer employees, refrain from seeking or imposing fines or other penalties unless the Bureau has demonstrated by a preponderance of the evidence the willful violation of the rule.

(b) For purposes of this section, conduct shall be deemed to be willful if:

(i) the person charged with violation of a rule knew that its conduct was prohibited by the rule; or

(ii) a reasonable person situated similarly to the person charged with violation of the rule would have known that its conduct was prohibited by the rule.

(c) For purposes of this section, mere demonstration of publication of a rule in the Federal Register or the Code of Federal Regulations shall not suffice to demonstrate that a person knew, or that a reasonable person would have known, of the existence or content of the rule.

(d) The demonstration required by subsection (a) shall be in addition to any other requirements imposed by law or rule.

Adoption of the provision recommended (1) places on the Bureau the burden of proof by a preponderance of the evidence that the person charged committed the violation, and (2) ensures that an agency will not punish a small business for failure to comply with rules of which the small business had no reason to know. Thank you for the opportunity submit comments to the Taskforce on Federal Consumer Financial Law.

Sincerely,

/s/ DSA

David S. Addington  
Executive Vice President  
and General Counsel