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

March 23, 2021

Hon. Thomas J. Vilsack, Secretary of Agriculture
c/o Seth Meyer, Chief Economist
Docket USDA-2021-0003
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, D.C. 20250

Dear Mr. Secretary:

This letter presents comments of the National Federation of Independent Business (NFIB)¹ on the U.S. Department of Agriculture (USDA) notice titled "Notice of Request for Public Comment on the Executive Order on Tackling the Climate Crisis at Home and Abroad."² Section 216(b) of the Executive Order³ directed the Secretary of Agriculture, by March 28, 2021, to "initiate efforts . . . to collect input from . . . stakeholders on how to best use Department of Agriculture programs, funding and financing capacities, and other authorities, and how to encourage the voluntary adoption of climate-smart agricultural and forestry practices that decrease wildfire risk fueled by climate change and result in additional, measurable, and verifiable carbon reductions and sequestration and that source sustainable bioproducts and fuels," and, by April 17, 2021, to "submit to the [Climate Change] Task Force . . . a report making recommendations for an agricultural and forestry climate strategy."

By letter of February 5, 2021, to the Acting Secretary of Agriculture, NFIB advised that, in carrying out section 216(b) of the Order, USDA "should analyze with great care the impact of its climate strategy recommendations on small agricultural businesses,

¹ NFIB is an incorporated nonprofit association representing small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty states hear the voice of small business as they formulate public policies. Many NFIB members and other small businesses participate in the agriculture and forest industries and all NFIB members and other small businesses bear the burdens of climate change and related government programs.

² Docket USDA-2021-0003, 86 *Fed. Reg.* 14403 (March 16, 2021).

³ Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad" (January 27, 2021), 86 *Fed. Reg.* 7619 (February 1, 2021).

including America's 1,789,439 family farms that account for 45% of direct-to-consumer sales (USDA 2017 data)." In addition, USDA should analyze the impact of its climate strategy recommendations on the long and wide trail of small businesses that, while they do not constitute agricultural or forestry businesses themselves, nevertheless provide many services to such businesses -- from the plumber who fixes the irrigation pump to the independent truck driver who picks up the produce or timber load for transport. NFIB asks also that USDA give great weight to the following small business regulatory principles in recommending an agricultural and forestry climate strategy:

1. Remember Small Agri-Business When Big Agri-Business Speaks. USDA keeps the interests of big businesses in agriculture and forestry easily in mind. Big businesses are visible in the economy because people see their brands, products, services, and advertising daily. Big businesses also can afford armies of lobbyists to watch every step USDA takes as it moves toward a decision and to bring their influence to bear at every stage of that process. As USDA hears from America's big businesses in agriculture and forestry, please remember that USDA is hearing from only one part of those industries. For example, in the U.S., family farms constitute 96% of all farms, 87% of the land in farms, and 82% of all agricultural products sold, and family farms that have an annual gross cash farm income of less than \$350,000 account for 88% of all U.S. farms, 46% of total land in farms, and 19% of the value of all agricultural products.⁴ Thus, when USDA hears from the big agricultural businesses, USDA needs to consider what family farms, and especially the small family farms, need so that they can grow their businesses 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 USDA has decided that it will issue a nationwide regulation, USDA should consider whether it can achieve its goal satisfactorily without imposing unneeded burdens on small businesses, such as family farms. 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 USDA requires of big businesses may be in order.
3. Small Business Compliance is Largely Do-it-Yourself. Small businesses such as family farms 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, USDA should focus its efforts on making any climate regulations concise and simple. Also, USDA's enforcement regulations and policies should protect small business owners

⁴ National Agricultural Statistics Service, USDA, "Family-owned Farms Account for 96% of U.S. Farms, According to the Census of Agriculture Typology Report," News Release (January 22, 2021) (available at <https://www.nass.usda.gov/Newsroom/2021/01-22-2021.php>).

who have done the best they can in good faith to understand and comply with the large, ever-growing, and ever-changing body of USDA regulations.

4. Assistance with Compliance is More Valuable than Punishment through Enforcement. Any agricultural and forestry climate strategy USDA recommends ultimately will result in regulations that govern the conduct of the agricultural and forestry industries. When USDA helps small businesses such as family farms to comply with regulations, USDA serves the goals of federal agricultural laws much better than when it imposes fines or refers for prosecution. Accordingly, USDA should emphasize efforts to educate small businesses about its regulations, including when it conducts inspections. Often, a small business owner hears of a regulation for the first time when a departmental inspector finds a violation. Small business owners acting in good faith should have an opportunity to correct such a violation and come into compliance, without fines or enforcement actions. Thus, when USDA writes regulations, USDA 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, such as family farms, in their states than does the federal government. Accordingly, states often may have agricultural laws and regulations better tailored to the needs of the economies of those states than a federal rule would be. In relatively 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, USDA should give careful thought in developing its regulations implementing a climate strategy to the extent to which the regulations should or should not preempt state regulations on the same subject. In particular, when USDA considers a federal regulation that imposes a burden on small businesses, USDA 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."⁵ With respect to most regulations, USDA must provide an opportunity to comment to, and consider the comments of, small businesses such as family farms and others because the Administrative Procedure Act (APA) (5 U.S.C. 553) requires it.⁶ But even in the rare cases in which USDA legally can issue a regulation without seeking the views of small businesses in advance, USDA should seek such views in

⁵ *NRDC v. NHTSA*, 894 F. 3d 95, 115 (2d Cir. 2018).

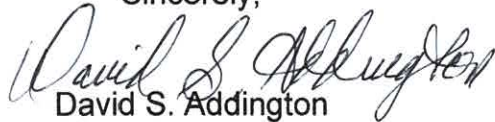
⁶ 5 U.S.C. 553.

advance formally or informally as a matter of good practice. USDA, small businesses, and the American economy benefit from such a cooperative approach to the development of regulations and other guidance to implement a climate strategy. The Department also should adhere carefully to the Regulatory Flexibility Act,⁷ which among other things requires the Department to analyze the effects of its regulations on small businesses and to give small businesses an opportunity to participate in the rulemaking process.

USDA observance of the above six small business regulatory principles in formulating recommendations for an agricultural and forestry climate strategy will serve the Nation, USDA, and small businesses well.

To succeed, an agricultural and forestry climate strategy must achieve its goals in cooperation with a robust free market economy. If the government were to choose instead the path of fighting the free market economy with costly and burdensome regulation, the strategy would fail. America's small businesses look forward to an agricultural and forestry climate strategy based on sound science, public health, and the needs of the American economy.

Sincerely,

A handwritten signature in cursive script, reading "David S. Addington".

David S. Addington

Executive Vice President and General Counsel

⁷ 5 U.S.C. 601 et seq.