



1201 F Street NW, Suite 200  
Washington, DC 20004

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

October 18, 2018

The Honorable Wilbur L. Ross, Jr.  
Secretary of Commerce  
c/o Jennifer Jessup  
Paperwork Clearance Officer  
Department of Commerce, Room 6616  
14<sup>th</sup> and Constitution Avenue NW  
Washington, DC 20230

Dear Mr. Secretary:

RE: Comments on Notice titled "Proposed Information Collection;  
Comment Request; Generic Clearance for Census Bureau Field Tests and  
Evaluations," Dkt. USBC-2018-0013, 83 *Fed. Reg.* 52190 (October 16, 2018)

This letter presents comments of the National Federation of Independent Business (NFIB) in response to the notice titled "Proposed Information Collection; Comment Request; Generic Clearance for Census Bureau Field Tests and Evaluations" and published by the Census Bureau in the *Federal Register* of October 16, 2018 ("Notice"). NFIB recommends and requests that the Department of Commerce withdraw the Notice because the Notice fails to comply with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

NFIB is an incorporated nonprofit association with approximately 300,000 members across America. 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. NFIB participates in the statutorily-mandated process that allows the public to comment on information collection proposed by the Census Bureau; NFIB and its members are subject to the Department's mandatory data-gathering; and NFIB and its members benefit when the Census Bureau complies with, and suffer when the Census Bureau does not comply with, the law.

The Notice states:

This information collection will operate as a generic clearance. The estimated number of respondents and annual reporting hours requested cover both the known and yet to be determined tests. A generic clearance is needed for these tests because though each share similar methodology, the exact number of tests and the explicit details of each test to be performed has yet to be determined. Once information collection plans are defined, they will be submitted on an individual basis in order to keep OMB informed as these tests progress. (83 *Fed. Reg.* at 52191, col. 1)

For three reasons, the law does not allow “generic” OMB approval in advance of Census Bureau information collections that are “yet to be determined.”

*First*, the Department of Commerce has a statutory obligation, before it submits a proposed collection of information to the Office of Management and Budget (OMB) for approval, to review, among other things, “a plan for the collection of the information” and “a specific, objectively supported estimate of burden” (44 U.S.C. 3506(c)(1)(A); 3502(2) (definition of burden)). Since the Notice covers information collections whose explicit details have, according to the Census Bureau, “yet to be determined,” the Department of Commerce cannot possibly have reviewed “a plan for the collection of the information” nor “a specific, objectively supported estimate of burden.” The Department therefore has not complied with the law.

*Second*, the Department of Commerce has a statutory obligation, before it submits a proposed collection of information to OMB for approval, to publish a notice of the proposed collection of information in the *Federal Register* to solicit comment to, among other things, “evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information” and “minimize the burden of the collection of information on those who are to respond” (44 U.S.C. 3506(c)(2)(A), with some exceptions not relevant to the Notice). The public cannot submit comments that “evaluate the agency’s estimate of the burden of the proposed collection of information” when the Census Bureau has not identified a proposed collection of information, which it says is “yet to be determined.” Similarly, the public cannot submit comments to “minimize the burden of the collection of information on those who are to respond” when the Census Bureau has not identified a proposed collection of information, which it says is “yet to be determined.” The Department therefore has not complied with the law.

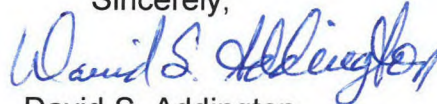
*Third*, the law prohibits the Department of Commerce from conducting a collection of information unless it has published a notice in the *Federal Register* containing, among other things, “a description of the likely respondents and proposed frequency of response to the collection of information” and “an estimate of the burden that shall result from the collection of information” (44 U.S.C. 3507(a)(1)(D)), which the Department cannot do on a rational basis for the “yet to be determined” information collections. Thus, whatever the “yet to be determined” collections of information may turn out to be, the law prohibits the Census Bureau from carrying them out, due to the failure to comply with the *Federal Register* notice requirement.

In the Notice, the Census Bureau remarked that, "[o]nce information collection plans are defined, they will be submitted on an individual basis in order to keep OMB informed as these tests progress." The role of OMB is not merely to be "*informed*" *later*; the role of OMB is to approve *in advance* the proposed information collection (a defined one, not a yet-to-be-determined one) (44 U.S.C. 3507(a)(2)). The Census Bureau's *Alice in Wonderland* ("Sentence first -- verdict afterward!") attempt to get approval first of an undefined activity from OMB, and then later inform OMB of what the subsequently-defined activity is, fails to comply with the Paperwork Reduction Act. Moreover, the Census Bureau's approach of publishing for public comment and obtaining OMB approval for undefined information collection activities, and then defining them only after OMB approval has occurred, essentially eliminates any chance for effective public comment.

The Census Bureau has a legal duty to withdraw the Notice for failure to comply with the law and to refrain from the yet-to-be-determined information collections. If the Census Bureau thereafter wishes to proceed with a replacement Notice, the Notice and the Census Bureau's conduct should comply with the legal requirements discussed above, unless the Census Bureau can obtain an exception to those requirements under the statutory provision for exceptions (44 U.S.C. 3507(j)).

NFIB encourages the Department of Commerce to ensure that the Census Bureau adheres carefully to statutes that apply to its functions, treats with respect statutory processes calling for public comment on Bureau proposals, and eliminates any unwarranted burdens imposed upon the public.

Sincerely,



David S. Addington  
Senior Vice President and General Counsel