REGULATION: THE HIDDEN SMALL BUSINESS TAX

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REGULATION: THE HIDDEN SMALL BUSINESS TAX

THURSDAY, APRIL 14, 2016

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building. Hon. Steve Chabot [chairman of the Committee] presiding.

Present: Representatives Chabot, Luetkemeyer, Hanna, Knight, Hardy, Kelly, Velázquez, and Adams.

Chairman CHABOT. Good morning. I call this hearing to order. We are here today to talk about small businesses and the hidden federal regulatory burden that is weighing them down.

Small businesses are a huge contributor to the American economy. They employ nearly 57 million employees, create 7 out of every 10 new jobs, and produce nearly half of private sector GDP. In my home state of Ohio, 2.1 million Americans go to work every day at a small business. In fact, almost 90 percent of U.S. employers have 20 employees or less.

The federal government should be doing everything it can to help these small but mighty job creators flourish. Unfortunately, federal regulators are doing the opposite oftentimes by layering on new red tape and hiding the real burden from the American public.

Too often, agencies do a poor job of assessing the impact of regulations on small businesses. However, we know small businesses shoulder a disproportionate share of the federal regulatory burden. A 2014 study found that small businesses with 50 employees or less spend 17 percent more to comply with federal regulations and that regulations cost the economy over $2 trillion annually.

The regulatory burden falls most heavily on small firms because they have fewer resources and do not have in-house lawyers and regulatory compliance staff to help them navigate complicated federal rules. That is why it is critical that federal agencies analyze the small business impacts of new regulations and reduce unnecessary and excessive burdens. Agencies have been required to do this for over 35 years but still avoid these requirements in many instances.

We need to lighten the massive regulatory burden and make it easier for small businesses to start, grow, thrive, and create new jobs. So we need to understand the problems that small businesses are facing and develop bold solutions.

One legislative solution that the Committee put forward last year is H.R. 527, the Small Business Regulatory Flexibility Improve-

ments Act, which passed the House with a bipartisan vote. The legislative window is closing, so I hope the Senate will act quickly to move this important bill.

I want to thank the witnesses for being here today, and I would now like to recognize our ranking member for her opening statement.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

Reducing the cost of regulations is an important issue for small businesses. Complicated rules and duplicative requirements can create burdens for small firms across a wide range of industries. Unchecked regulations can over time become out of date requiring companies to devote significant resources to compliance. This hurts their bottom line and their ability to hire new employees. For these very reasons, Congress enacted the Regulatory Flexibility Act in 1980. At its core, the act requires agencies to assess the impact of their regulations on small businesses. A panel process was also added in 1996 requiring the EPA and OSHA to hear directly from small businesses on the most potentially burdensome rules. CFPB was brought into the panel process in 2010 under the Dodd-Frank Act. Overall, the result of the Regulatory Flexibility Act has been impressive.

Since 1998, through its enforcement of the Act, the SBA's Office of Advocacy has reduced the burden of Federal rules on small businesses by almost $130 billion. The Regulatory Flexibility Act is making a real difference for entrepreneurs across the country. President Obama has built on this and taken further actions in this area. He has issued several broad-based executive orders on rulemaking. Most importantly, he instructed agencies to conduct retrospective review of their regulations. These reviews have resulted in near-term cost savings to the U.S. economy of $10 billion. He also has required agencies to estimate the costs and benefits of regulations, consider less burdensome alternatives, and incorporate those that are affected by regulations into the rulemaking process. Taken together, these efforts are helping to reign in regulatory costs, while ensuring that agencies can carry out their mission.

While it is important to reduce the unnecessary burden on small businesses, we have to be careful to not impede the economic benefits of regulation. Clean water and air regulations help ensure a healthy workforce and are critical to many companies, especially those engaged in travel and tourism. Safety rules keep our workers healthy and enhance productivity by reducing workplace accidents. Financial regulation has prevented individuals from being taken advantage of.

Earlier this month, we saw the CFPB close down a student loan debt management company that fleeced 3.6 million from 4,300 consumers through a 3-year scam, so we have to be careful to not use instances of regulatory burden to undo helpful rules. Reduce compliance costs? Yes. That is something we can all agree to, but neutralize critical environmental health and safety rules, no, that is too far. Too often this debate is framed in a strictly either/or context, meaning we must choose between harming small businesses and preserving important protections that keep workers and consumers safe. Perhaps a better option is to focus on regulating in a thoughtful manner that is sensitive to the burden imposed on

small companies while maintaining their underlying policies. The regulatory review process that Congress and the president have laid out is meant to achieve that goal, taking small firms' needs into account.

Today, I hope to learn more about how mechanisms like the Regulatory Flexibility Act are minimizing their regulatory impact on small companies. Likewise, there might be other ways that federal agencies can lessen small business compliance costs, whether it is through compliance assistance, legal advice, or other steps, it is my hope that this sort of proactive thinking can also be part of the discussion. All of us share the goals of protecting workers, preserving our environment, and keeping consumers safe. Likewise, none of us want these protections to hurt small companies or impede job growth. It is my hope that by working together, we can achieve both goals.

With that, I thank the witnesses for being here today, and I yield back.

Chairman CHABOT. Thank you. The gentlelady yields back.

If Committee members have an opening statement prepared, we ask that they submit them for the record.

I will now take just a moment to explain our timing and lighting system. It is pretty simple. Each of you gets 5 minutes. We will then get 5 minutes to question you back and forth from Republican and Democratic side. The lights, the green light will be on for 4 minutes, the yellow light will come on to let you know you have got a minute to wrap up, and then the red light comes on, and we would appreciate it if you would conclude by that time if at all possible. We will give you a little leeway but not a whole lot.

Now I would like to introduce our witness panel. I will introduce our first witness, and then I will turn it over to the ranking member to introduce our second witness, and I will introduce the others.

Our first witness is Karen Harned. Ms. Harned is the Executive Director of the NFIB, National Federation of Independent Business, Small Business Legal Center. The NFIB represents over 325,000 small and independent businesses. The Legal Center advocates for small business in the nation's courts and serves as a resource for small business owners across the country. Prior to joining the Legal Center, Ms. Harned worked at a law firm specializing in food and drug law.

I would now like to yield to the Ranking Member for our second introduction.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

It is my pleasure to introduce Mr. Frank Knapp, Jr., the Founder, President, and CEO of the South Carolina Small Business Chamber of Commerce, which has more than 5,000 members and has a goal of making South Carolina more small business friendly. He also serves as Vice Chair of the American Sustainable Business Council, which advocates for the growing universe of sustainable and socially responsible businesses and social enterprises. Mr. Knapp holds a master's degree in social psychology from the University of South Carolina and a bachelor's degree in psychology from Indiana University of Pennsylvania. Welcome.

Chairman CHABOT. Thank you very much.

Our third witness is Rosario Palmieri. Mr. Palmieri is the Vice President of Labor, Legal, and Regulatory Policy at the National Association of Manufacturers, or NAM. NAM represents manufacturers across the United States, the majority which are small businesses. Before joining NAM, Mr. Palmieri served as a staffer on several House Committees, including the Committee on Small Business, the most important Committee in Congress.

Our final witness is Tom Sullivan, an attorney with the law firm of Nelson Mullins. He leads the Coalition for Responsible Business Finance, a group of businesses that advocate for the value of nontraditional lending opportunities for small businesses. Previously, Mr. Sullivan served as Chief Counsel for Advocacy at the U.S. Small Business Administration from 2002 to 2008. We thank you all for being here today, and Ms. Harned, we will begin with you. You are recognized for 5 minutes.

STATEMENTS OF KAREN R. HARNED, EXECUTIVE DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, SMALL BUSINESS LEGAL CENTER; FRANK EARNEST KNAPP, JR., PRESIDENT AND CEO, SOUTH CAROLINA SMALL BUSINESS CHAMBER OF COMMERCE, TESTIFYING ON BEHALF OF THE AMERICAN SUSTAINABLE BUSINESS COUNCIL; ROSARIO PALMIERI, VICE PRESIDENT, LABOR, LEGAL AND REGULATORY POLICY, NATIONAL ASSOCIATION OF MANUFACTURERS; THOMAS M. SULLIVAN, OF COUNSEL, NELSON MULLINS RILEY & SCARBOROUGH

STATEMENT OF KAREN R. HARNED

Ms. HARNED. Thank you, Chairman Chabot and Ranking Member Velázquez, for inviting me here today. On behalf of the National Federation of Independent Business, I appreciate this opportunity to testify on the hidden tax that regulation represents on small business. According to our latest NFIB Small Business Economic Trends Survey, 21 percent of small business owners cited government regulations and red tape as their single-most important problem. Despite the devastating impact of regulation on small businesses, federal agencies continue to turn out approximately 10 new regulations a day with a stunning 3,297 federal regulations in the pipeline.

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden as compared to larger businesses. This is not surprising since it is the small business owner, not one of a team of compliance officers, who is charged with understanding new regulations, filling out the required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for her business, and every hour she spends understanding and complying with a federal regulation is 1 less hour she has to service customers and plan for future growth.

Today, I want to focus on a category of regulations that does not seem to get as much attention in Washington, and that is labor regulations. Small businesses can be found in virtually all industries. Whether you are a manufacturer, a baker, or a dry cleaner, the one thing you are going to have in common is employees. For

the small business NFIB represents, who on average have 10 employees or less, these regulations can be some of the most challenging. The small metal fabricator, for example, goes into business knowing how to finish metal products. He has a good sense of where he goes to get the supplies he needs and what kind of skills he is going to be needing in his workforce. But what he likely is not going to know is the best practices regarding wage and overtime calculation, compliance with various state and federal discrimination laws, and hiring.

On July 6, 2015, the Department of Labor published a proposed rule that would more than double the minimum salary a worker must receive to $970 per week, or $50,440 annually, in order to be considered exempt from overtime requirements. The nearly $750 million DOL's initial regulatory flexibility analysis estimates small businesses would face in new costs during the rule's first rule underestimates the true compliance costs for a small business. For example, DOL estimates it is going to take 1 hour for businesses to become familiar with the rule, but this assumption disregards a basic reality of regulatory compliance. It is the small business owner that will be wading through the rule's regulatory text, not compliance specialists like those working for large corporations. This rule will not require just a simple look at a salaried employee's weekly wages. If an employee is currently salaried and makes greater than the current threshold of $455 per week but less than the proposed $970 per week, the small business owner would spend a considerable amount of time calculating various scenarios.

NFIB member Robert Mayfield owns five Dairy Queens in and around Austin, Texas, and he believes this rule would be bad news for employers and employees. Currently, Mr. Mayfield employs exempt managers at all five of his locations, and these individuals earn, on average, about $30,000 per year, and work between 40 to 50 hours per week. The managers also receive bonuses, more flexible work arrangements including paid vacations and sick time, training opportunities, and promotions that Mayfield's hourly employees do not get. Under DOL's proposal, Mayfield predicted that he will need to move the managers back to hourly positions as there is simply no way he can afford to pay over 10 managers $50,000 each. Mayfield noted that rather than giving managers overtime, he is likely to hire a few more part-time employees. He says, "I feel most sorry for the many enthusiastic people who work for me, who have worked hard to advance into their dream of a salaried management position." He continues, "How can you be a manager and punch a time clock? The idea is to do a job, not to keep track of your hours. This is the antithesis of building a management mentality or in training someone to be a manager. It would also disrupt the workplace and lead to fewer management opportunities. It would hurt, not help, the people we claim that we want to help."

As I detail in my written statement, DOL's overtime rule is just one of many labor regulations, like OSHA's silica rule and the persuader rule out of Department of Labor, that are imposing a hidden tax on small business, and these hidden taxes are in addition to those found in significant environmental regulations, like the "waters of the U.S." rule and EPA's Power Plan rule.

Small businesses are the engine of our economy. Unfortunately, they also bear a disproportionate weight of government regulation. Complying with these and other regulations prevents small business owners from creating and growing new jobs.

Thank you so much for holding this important hearing on regulations as a hidden tax on small business, and we look forward to working with you on these important issues going forward.

Chairman CHABOT. Thank you very much.

Mr. Knapp, you are recognized for 5 minutes.

STATEMENT OF FRANK EARNEST KNAPP, JR.

Mr. KNAPP. Thank you, and I apologize in advance. I have a cold.

Thank you, Chairman Chabot, Ranking Member Velázquez, and members of the Committee. My name is Frank Knapp. I am the president and CEO of the South Carolina Small Business Chamber of Commerce. I am also the board co-chair of the American Sustainable Business Council, which through its network represents about 200,000 businesses. The American Sustainable Business Council advocates for policy change at the federal level and at the state level that supports a more sustainable economy.

Today's hearing topic is important for small business and the vitality of our economy. Good regulations tend to stimulate innovative and entrepreneurship in addition to limiting or preventing destructive forms of economic activity. Bad regulations, whether because they are not designed properly or simply not needed, will be a burden on small businesses, and thus, harm our economy. Everyone here would prefer the former and not the latter.

One example of what is working is the Regulatory Flexibility Act. In 2004, my South Carolina organization worked with our South Carolina Chamber and the NFIB to pass our Small Business Regulatory Flexibility Act modeled after the Federal law. Several years later, the then-chairman of the South Carolina Regulatory Review Committee told me that over the previous 7 years, his Committee had reviewed about 300 proposed regulations and identified only 10 that raised their concern. His Committee worked with the State agencies promulgating these new regulations and satisfactorily resolved the issues. The Regulatory Flexibility Act has created an effective process to protect small businesses even if the process itself needs some attention from time to time.

While some inside the Beltway claim that regulations are holding back our economic growth, the American Sustainable Business Council has a different view. Along with the other small business organizations, we released a poll of small business owners in February of 2012, which found that small businesses do not see regulations as a major concern. Our polling confirmed that small business owners value regulations if they are well constructed and fairly enforced. Eighty-six percent believe some regulation is necessary for a modern economy, and 93 percent of respondents believe their business can live with some regulation if it is fair and manageable. Seventy-eight percent of small employers agree regulations are important in protecting small businesses from unfair competition and to level the playing field with big business. Seventy-nine percent of small business owners support having clean air and water in their

community in order to keep the families, employees, and customers healthy. Sixty-one percent support standards that move our country towards energy efficiency and clean energy.

Recently, Republican pollster Frank Luntz surveyed CEOs and found similar results as the American Sustainable Business Council polled. Regulations were identified as the seventh concern behind more pressing issues like creating economic opportunity, keeping taxes affordable, raising the minimum wage, and reducing income inequality. So if small businesses are not self-identifying regulations as their top impediment to growth, and businesses in general are not citing regulations as a significant problem, who are pushing the anti-regulation bills really representing?

The answer is clear. Most of the complaints we hear in Washington are from only two industries. Those that are impacted by the Wall Street reform, Dodd-Frank, and new Environmental Protection Agency regulations. K Street lobbyists regaled Congress and the public about the dire economic consequences to small businesses of regulations that will prevent another Great Recession or protect the health and safety of our citizens or restrain the future wrath of uncontrolled climate change. In reality, the financial giants who drove our economy off a cliff and the powerful fossil fuel industry are driving the anti-regulation train using the name of small business to garner sympathetic ears.

In conclusion, the regulation promulgating process can produce good results and good rules while protecting small businesses from unnecessary burdens if we provide the resources for agencies to expeditiously carry out the requirements. Congress has already put in place those requirements, but the federal government's responsibility to impact small businesses should not stop there. Some small businesses will find compliance with federal regulations difficult. The answer is not to throw the baby out with the bathwater and invalidate existing rules. Instead, we believe the solution lies in expanding the capacity of the federal government to provide regulatory compliance assistance to small businesses.

Thank you for the opportunity to speak before you today, and I welcome any questions the Committee might have.

Chairman CHABOT. Thank you very much.

Mr. Palmieri, you are recognized for 5 minutes.

STATEMENT OF ROSARIO PALMIERI

Mr. PALMIERI. Thank you, Chairman Chabot, Ranking Member Velázquez, and members of the Committee, it is an honor to testify before you today about the impact of regulation on small business.

The U.S. is still the world's largest manufacturing economy, producing more than $2 trillion in value each year and directly employing nearly 12 million Americans and indirectly supporting 18 million jobs. Manufacturers provide good high-paying jobs. Unfortunately, manufacturers lost 2.3 million jobs during the most recent recession, and since then we have generated over 802,000 net new jobs. But to regain manufacturing momentum and to return to net manufacturing job gains, we need improved economic conditions and improved government policies.

The business community is often misunderstood about their views on regulation. Manufacturers believe regulation is critical to

the protection of workers' safety, public health, and our environment. We believe some critical objectives of government can only be achieved through regulation, but that does not mean that our regulatory system is not in need of considerable improvement and reform. Regulations are often unnecessarily complex, duplicative, and ineffectively achieve their benefits. Excessive regulatory changes and uncertainty impose high costs, especially on small businesses. Small businesses, as we know, bear a disproportionate burden of regulation because of the often high fixed cost of compliance not subject to economies of scale. That is why the work of this Committee and the implementation of the Regulatory Flexibility Act are so important.

Unfortunately, agencies are not anxious to analyze the impact of their regulations on small business. A recent study showed that between 1996 and 2012, fewer than 8 percent of rules were subject to the RFA's analytical requirements. Although we had hoped that was because agencies made excellent decisions about which rules had those impacts, let me share a quick list of some of the most expensive EPA rules. EPA's greenhouse gas limits on power plants, National Ambient Air Quality Standards for Ozone, Boiler MACT, the NESHAP 6X and the "Waters of the U.S." rule. EPA certified that each of them would not have a significant impact on a substantial number of small entities. I think most of us would find that hard to believe.

The reason it matters that these rules and thousands of others were not subject to the law is that the real businesses and real jobs are lost when small businesses are not considered. Last year, SBA's Office of Advocacy saved small businesses $1.6 billion in first-year regulatory cost savings, and as Ranking Member Velázquez noted, saved $130 billion since 1998. Imagine what could have been accomplished if fewer rules could evade these analytic requirements, and that is why a reform of the RFA is so urgent and why Chairman Chabot and this Committee's leadership in proposing H.R. 527 would help address these concerns.

Additionally, there are a number of powerful and potentially bipartisan regulatory reforms to choose from. One would be for Congress to confirm the authority of OMB's Office of Information and Regulatory Affairs to review the regulations issued by independent regulatory agencies and ensure their adherence to strong analytic requirements. Congress plays an important role within the regulatory process but does not have a group of analysts who develop their own cost estimates of proposed or final rules. Just like Congress has an independent CBO to check OMB budget assumptions, Congress should have a parallel office to OIRA and the agencies to review regulations and their impacts.

While we have appreciated the Administration's good efforts on retrospective review of regulations, they have not resulted in significant cost savings for our members or a change in culture in the federal agencies. To truly build a culture of continuous improvement and thoughtful retrospective review of regulations, different incentives are needed. To incentivize high quality reviews, existing regulations should automatically sunset unless they are affirmatively shown to have a strong continued justification. While the overwhelming majority of those regulations would be continued, a

cleanup of outdated or unnecessary regulatory accumulation would occur. The complexity of rulemaking and its reliance on highly technical scientific information has only increased since the passage of the Administrative Procedure Act. The APA is 70 years old, and it should be reformed by incorporating modern principles for sound rulemaking best embodied by President Clinton's executive order into the DNA of every rule.

In my written statement, I have included additional regulatory reform proposals for your consideration. I have outlined a number of challenging rules for small manufacturers.

I appreciate the opportunity to provide testimony today on behalf of manufacturers across the country. I applaud you for holding today's hearing, and I am happy to respond to any questions. Thank you.

Chairman CHABOT. Thank you very much.

Mr. Sullivan, you are recognized for 5 minutes.

STATEMENT OF THOMAS M. SULLIVAN

Mr. SULLIVAN. Thank you, Mr. Chairman, Congresswoman Velázquez, members of the Committee. I am pleased to present my views on how small businesses are impacted by federal regulation. The bulk of my testimony will actually cover how small businesses can impact federal rules, or at least how the Regulatory Flexibility Act is designed to ensure that small business has a voice in the process.

My testimony this morning is drawn from my two decades of work on small business regulatory issues and my overall desire to bolster the voice of small business in that process. I was confirmed to head the Office of Advocacy in 2002, and as you know, that office is responsible for overseeing the Regulatory Flexibility Act. I served until October 2008, and during my tenure, the Office of Advocacy issued approximately 300 public comment letters to 60 agencies, averaging about 38 per year. I have remained deeply interested in how small businesses are impacted by regulation and how small business involvement can benefit regulatory policy.

I would like to share just briefly some good news and bad news. The good news is that federal agencies work with SBA's Office of Advocacy, and EPA, and OSHA, and the CFPB, and they utilize SBREFA panels to explore how each agency can sensitize its regulatory approach to small business. The bad news is that there are still times when agency deadlines, whether they are judicial, statutory, or political, push folks at the agencies to approach the Reg Flex Act as a set of procedural hurdles. That concern is of utmost concern during this stage of the Administration when the clock is ticking down on when federal regulations will be finalized under President Obama. The end of administration phenomenon to cement its legacy through regulation is not unique to this presidency. There is plenty of data, research, and testimony on the subject of midnight regulations. One recent publication estimates 4,000 rules making their way through this Administration at a cost of more than $100 million.

Unfortunately, I have more bad news. The most obvious example of an agency purposely, in my opinion, of an agency purposely avoiding the Regulatory Flexibility Act was EPA's recent promulga-

tion of the "waters of the U.S." rule. The EPA and the Corps certified that the proposed rule would not have a significant economic impact on a substantial number of small businesses.

More good news. A set of policies that is good news is that states continue to experiment with ways to make their regulatory climate more hospitable to small business. Frank Knapp already mentioned South Carolina, and in my home state, Governor Charlie Baker led an initiative to review all of the Commonwealth's rules in a "spring cleaning" exercise last year designed to help small business. This is akin to my work as chief counsel when the Office of Advocacy worked with South Carolina, Massachusetts, and several other states to encourage state adoption of the Regulatory Flexibility Act at a state level, and it is good news that that effort continues.

Unfortunately, the bad news is that States and their experiments also stumble into situations where they want to help but unintentionally harm small businesses.

The coalition that I run, the Coalition of Responsible Business Finance, is monitoring a situation in Illinois and a situation in New York, up in Albany, where those legislators are considering small business lending provisions. It seems as though the goals of transparency and disclosure are good, but the other prescriptive underwriting standards and excessive regulatory mandates' civil and criminal penalties, unfortunately, could do more harm than good. I am hopeful that in Springfield, Albany, and other state capitals, as I am optimistic here in Washington, D.C., that legislators and regulators can, and should, incorporate the views of small business before moving forward. That is the same principle of the Regulatory Flexibility Act.

I am troubled by what happened with EPA's "waters of the U.S." rule and how its avoidance of the Regulatory Flexibility Act could not be challenged until the rulemaking was finalized, a year after they certified that it would not hurt small business. That certification part of the Reg Flex Act is truly the "fork in the road" when it comes to whether EPA should listen to small business and tailor its regulatory approach to accommodate small firms. H.R. 527, passed by this Committee, solves that problem, and I am hopeful that the Senate will look towards a similiar solution.

I commend this Committee's attention to the plight of small businesses that are trying to keep up with the flood of mandates emanating from our nation's capital. Agencies need to continually hear from you, from the Office of Advocacy, from small business stakeholders like my fellow panelists, and from small business owners themselves in order to affect positive regulatory change. Thank you.

Chairman CHABOT. Thank you very much. We appreciate the testimony of all the witnesses. Now the members on both sides will have an opportunity to ask a few questions, and I will begin with myself.

Ms. Harned, let me start with you, if I can. Mr. Palmieri and Mr. Sullivan and you all believe and testified, and we obviously read your statements, that the Regulatory Flexibility Act needs to be strengthened and that loopholes need to be closed. I agree, and many of the members of the Committee do, and I have introduced legislation to do so. This Committee has held numerous hearings

where we have heard about agencies bypassing the Regulatory Flexibility Act requirements or merely treating it as a "check the box" exercise. When agencies ignore the RFA's procedural requirements, the only option left is litigation. Are RFA compliance disputes being resolved favorably for small businesses in the courts? And if not, why not, in your opinion?

Ms. HARNED. Actually, in many instances they are being resolved favorably because, for example, the certification questions that even the "waters of the U.S." rule presents. You either complied with the law or you did not. Right? We have won in past cases on those issues. The problem is they are Pyrrhic victories, because that win is going to take place years after the rule has taken effect. That is why the legislation that you supported, that the House has passed and, that the Senate needs to pass, is so critical, because it will allow for judicial review in that critical process where the agency has decided not to certify a rule or has failed to properly comply with doing an appropriate RFA analysis as the rule requires.

Chairman CHABOT. Thank you very much.

Mr. Palmieri, let me turn to you next. Notice and comment rulemaking is a critical process and ensures affected parties and other members of the public have input on regulations as they are developed. In the notice and comment, is it working well, or are there problems, such as short comment periods for complex rules? Do those types of things prevent small businesses from participating in the rulemaking process? What are your thoughts in that area?

Mr. PALMIERI. Absolutely. When a rulemaking extends to hundreds of pages of extraordinarily complex and dense material that cannot be read by the average person, and then an agency, as in the case of the Department of Labor, gives a 30-day comment period, as they just did recently on a rule for federal contractors, it absolutely undermines the entire purpose of notice and comment. When asked for an extension of the comment period so that businesses could absorb the true impact of the rule and weigh in in a thoughtful way, they extended it for an additional 10 days. They could have just as easily refused if they had chosen to. There is really no excuse in the rulemaking process for agencies not to give sufficient time, especially if they have not done an advanced notice of proposed rulemaking or given an opportunity for early stakeholder input, like President Obama's executive order recommends to agencies.

Chairman CHABOT. Thank you very much.

Mr. Sullivan, you mentioned the "waters of the United States" rule as an example of agencies deliberately avoiding compliance with the RFA. By certifying the rule, EPA avoided conducting a small business advocacy review panel and doing an analysis of the rule's impacts. What can be done to address this kind of egregious behavior? Is the answer legislation or litigation or presidential leadership or some combination of those things?

Mr. SULLIVAN. I think it is some combination of those things, honestly, Mr. Chairman. I think that H.R. 527 really fixes this problem, and that is the certification problem. Really what we are getting at is process versus result. Small businesses just do not want to be shut out of the process. They want clean water, they

want clean air, but they do not want to be shut out of the process. At that critical decision point, when EPA or any other agency says it does or does not affect small business, I think there needs to be an independent assessment of that decision that happens before 7, 8, 12 years later when it makes it to the Supreme Court, because small businesses need regulatory certainty.

Chairman CHABOT. Let me squeeze in one quick question here, Mr. Palmieri. Ms. Harned had mentioned the silica rule in the $5.5 billion annual compliance cost as one of the top issues. I know you had it in your written testimony as well. Would you discuss that briefly, the compliance challenges that small manufacturers are facing when it comes to the silica rule?

Mr. PALMIERI. Sure. Manufacturers care deeply about the health of their employees and they are constantly, with or without the rules, able to address them. The real challenge of the silica rule is that OSHA will not allow businesses to prioritize personal protective equipment above costly engineering controls. Even in situations like in a foundry where it may not be feasible to implement the kinds of engineering controls OSHA has suggested, they are looking at extraordinarily costly measures when there are more efficient measures that will be just as protective. That is the real tragedy of this rule.

Chairman CHABOT. Thank you very much. My time is expired.

I would like to now recognize the gentlelady from North Carolina, Ms. Adams, who is the Ranking Member of the Investigations, Oversight, and Regulations Subcommittee, for 5 minutes.

Ms. ADAMS. Thank you, Mr. Chair, and thank you, Ranking Member Velázquez, for holding these hearings on tax implications for small businesses. It is of critical concern.

Ms. Harned, you note that regulations are extremely onerous for businesses. How burdensome are regulations here in the U.S. compared to regulations in other countries, particularly those with similar economic structures?

Ms. HARNED. Honestly, I would probably not be your person to answer that question. Our members really do primarily operate in the United States. They do not do much internationally.

Ms. ADAMS. Would other members of the panel like to respond?

Mr. PALMIERI. Sure, Ms. Adams. Part of the challenge for U.S. businesses is that often our compliance regimes are very different than in say some of our European allies and others where they may set a rulemaking standard but it is a goal as opposed to a floor or a threshold. Oftentimes you may even find similar regulatory standards internationally, and yet, their enforcement regimes have a different philosophy, and as a result, are far less costly to implement or they have a more cooperative relationship between businesses and regulators. What we certainly say, although they are not fantastic international quantitative comparisons, is that the U.S., when are business leaders operating in multiple jurisdictions surveyed, the U.S. is one of the most costly regulatory countries.

Ms. ADAMS. Thank you, sir.

Ms. Harned, many businesses are worried about duplicative regulations at both the federal and state levels. Can you discuss the extent to which firms face duplicative regulations?

Ms. HARNED. Thank you for that question, because that is a very important issue that I have seen in my 14 years at NFIB. A state will tell somebody to do one thing. You will see it with building codes, all sorts of things. The federal government will come in, or an inspector will come in and say, oh, no, you need to do it that way. Really what I think all regulators need to do, and we need to come up with a system to meet the small business owner where they are, they need to know once I have gone through this one inspection, whether it is a state inspection, a federal inspection, even an inspection by a workers' comp insurer, they have hit the marks that they need to hit, that they are good, because they want to meet the requirements that are asked of them. But, if the requirements are different for different people that are coming in at different times, it gets very confusing and challenging, and quite frankly, frustrating.

Ms. ADAMS. Thank you.

I have a concern about minority-owned businesses, and I wanted to ask if you had any thoughts on how red tape impacts minority-owned firms or disadvantaged businesses, and how the agencies can work with these firms specifically to provide technical assistance around compliance issues.

Ms. HARNED. I actually think all small business owners, regardless whether minority-owned or not, are in it together on this issue, if I may, because I think that is the biggest issue. None of them are able to really find out what is required. I talked to colleagues, friends, members in different industries, and they really are relying on the trade association newsletter to alert them to things. Really, the outreach that can come to all communities, minority included, to the small businesses, there cannot be enough communication, enough channels of communication, in my opinion, because I still think so much of this comes as a shock. "Oh, wait. We need to be doing that? I had no idea." I think that is particularly problematic if you are in a more insulated community or not as familiar with business, if, you are just new to business.

Ms. ADAMS. So what is the solution then?

Ms. HARNED. I have suggested to agencies before, partnering with small trades, getting the information, working with them to disseminate the information, get the information out. The same can be done with the minority communities. Bringing those organizations in to help them find their people, meet them, let them know what the rules are, and then also help them with compliance. Compliance assistance is key for everyone.

Ms. ADAMS. Great. Thank you very much.

Mr. Chair, I yield back.

Chairman CHABOT. Thank you. The gentlelady yields back.

The gentleman from Missouri, Mr. Luetkemeyer, who is the Vice Chairman of this Committee is recognized for 5 minutes.

Mr. LUETKEMEYER. Thank you, Mr. Chairman, and welcome to all the panelists today.

Ms. Harned, I serve on the Financial Services Committee as well and do a lot of work with regards to financial services issues, Dodd-Frank regulations, CFPB and, overreach. In fact, I am the author of the bill to stop Operation Chokepoint which affects lots and lots of small businesses. It is not based on whether they are doing

something illegal, but based on the political bent and/or value system of the agencies, DOJ and FDIC in particular, with regards to certain individual industries. What is your experience with your members with regards to Operation Chokepoint, and have you seen a decline since FDIC has changed their policy?

Ms. HARNED. We definitely are hearing more from members on this issue, and this was actually one of the regulatory, rules that has given us great concern. My Legal Center issued an underground regulation report last fall that highlighted the Operation Chokepoint and other mandates that have been coming out of agencies that have not gone through the process, have not had the benefit of Reg Flex. As a result, it seems it is targeted in different areas of the country, and so we are just seeing these complaints, if you will, come up through different industries, different parts of the country. But all of this is something that could have been foreseen had the agency gone through the requirements of the regulatory process instead of doing this through some DOJ memo or however this program unfolded.

Mr. LUETKEMEYER. According to their own emails, their own internal emails, there is a concerted effort and a culture within these agencies that allows this to happen. So my question also, is have you seen as a result of this a decrease in the access to capital for your members?

Ms. HARNED. Honestly, I cannot speak to that. I feel like that would be something for our research team, but I could get back to you.

Mr. LUETKEMEYER. Sure.

Mr. Sullivan, as an advocate for small businesses, I am sure you deal with a lot of different regulatory agencies. Have you seen the willingness of the agencies to work with you with regards to—I know a number of the panelists have made comments about concerns when rules are issued, nobody really does their analysis. I think it was 8 percent of the rules have basically a cost-benefit analysis done on it or any sort of other analysis, which is 92 percent short of the goal of what it should be. When you go back and talk to the bureaucracies, do they recognize this? Are they willing to work with you?

Mr. SULLIVAN. This is another one of the good news, bad news kind of responses to your question, Congressman. The good news is yes, there are pockets of really good practices. You are familiar, certainly, with your work on Financial Services with CFPB. The good news with CFPB is they let you and the small business stakeholders know right at the beginning of a rulemaking that they are going to do a SBREFA panel. I wish EPA would tell everybody that they were going to do it. The challenge then is that when CFPB does it, it does not seem as though they are really incorporating those views into how they approach the regulation. That is kind of a sole agency good news, bad news.

The Department of Transportation has a long history of working very well with SBA's Office of Advocacy. OSHA actually releases its interaction with small business in a report prior to——

Mr. LUETKEMEYER. My question, sir, they are working with you but do they listen? Because I can tell you from talking with folks who have gone to some of these agencies, the fiduciary rule

is a recent example. The QM rule with regards to qualified mortgages in CFPB, they ignored the discussion and the visits, because I had a group come to my office, and they said for the 42nd—we were the 42nd group to go in and talk to CFPB about the problems with QM and they said, well, we still know better than you what to do. It appears to me that even though you go talk to them, there is this attitude that we know better than you. Do you see that as prevalent, yes or no?

Mr. SULLIVAN. Congressman, yes, I do see that continue to be a prevalent attitude, unfortunately.

Mr. LUETKEMEYER. This is my concern because as I go home every week and I talk to my small business folks at home and I ask them, if you had one rule or regulation that you could get rid of, what would it be? They will tell me, you know what? It is not one particular one. It is this combination of all of them. It is the straw that finally breaks the camel's back. It is not knowing what is coming to us next that is a concern to us, and as a result, we are sitting on our cash. I have small businesses that are sitting on tons of cash. They want to expand, hire people, put a new line in their manufacturing plant, and cannot because they do not know what is coming down the pike next. It is this uncertainty that causes us to not have, I believe, the kind of economy we could have. When you look at creating fewer businesses in the last 7 years than we have lost, that is a problem, and I know it affects you, Ms. Harned.

I yield back the balance of my time. Thank you.

Chairman CHABOT. Thank you. The gentleman's time is expired.

The Ranking Member, Ms. Velázquez, is recognized for 5 minutes.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

Mr. Knapp, a lack of regulation or regulatory enforcement can often lead to catastrophic results. Environmental disasters, such as those in West Virginia recently, or the BP oil spill, have been devastating to local small businesses. What do you think happened there? Was it lack of regulations or lack of enforcement?

Mr. KNAPP. Thank you. In West Virginia, you are talking about the Elk River Spill. That was actually because, and I know this firsthand. As soon as that spill happened, I was in contact with the businesses there, which cost them, by the way, $19 million a day because they had to shut down their only source of clean drinking water. It was a matter that was not on the radar of anybody. You had this tank and nobody knew what was in it. Nobody was paying attention to it. It did not fall under any guidelines, any rules about how it had to be maintained. After that, the West Virginia legislature actually passed some very strict rules regarding aboveground storage and chemical storage. Unfortunately, the following year they turned around and gutted a lot of it. It is important. Regulations are important. They keep us safe. They protect our environment. They protect small businesses so that they do not have to be shut down when the drinking water is shut down, and they are important. I think everybody here recognizes that regulations do serve a purpose when they are done appropriately and are not too onerous.

I will go back to my statement. If we are talking about everybody thinks it is a good thing that agencies or the SBREFA process or everybody else has better outreach, we better fund it, because if we do not fund it, we are not going to be any better off than we are today. There is no sense in passing something and saying you will do this and then they go, "well, okay, we do not have time so we are going to still try to not do it". That is what I think goes on in these agencies with limited resources. It is funny. I was here nearly four years ago testifying before the same Committee, talking about the same thing.

Ms. VELAZQUEZ. Yeah, well, I guess budgets have consequences.

Mr. KNAPP. Yes, they do.

Ms. VELAZQUEZ. Mr. Sullivan, I see in your testimony that you are leading the Coalition for Responsible Business Finance, a group of nontraditional small business lenders. As you know, I also serve on the Financial Services Committee, and I have pushed Director Cordray to issue regulations under Section 1071 of Dodd-Frank that will help us determine whether women-owned and minority-owned businesses are being discriminated against when they are trying to get loans. I will continue to push the director to do what we told him to do when we passed the Dodd-Frank. However, I am curious, from your standpoint, about how the CFPB can get this information without harming small lenders. Do you have an opinion on that?

Mr. SULLIVAN. Thank you, Congresswoman, and thank you for being one of the first members of Congress to meet with the small businesses who are trying to provide capital to small businesses outside of the depository bank arena.

Grady Hedgespeth was just appointed as the head of Small Business at CFPB. He comes from a career at SBA. He is a good guy, and he approaches these issues very thoughtfully and carefully. CFPB has a good start and a good man to hire to do this, but he has a tough challenge ahead. The answer to your question is: CFPB can get it right if it truly meets, listens to, and reacts to small businesses in this space, and that is the principle of the Reg Flex Act. If they do it right, then they will come out with a good regulation.

Ms. VELÁZQUEZ. We will be watching for sure. Thank you.

Mr. Knapp, when agencies publish a proposed rule, the Reg Flex Act requires them to describe, and where feasible, estimate the number of small entities to which the proposed rule applies. Agencies often underestimate the number of small businesses impacted by proposed regulations, or simply say that the data is unavailable. Is it your experience that the burden is on small businesses to demonstrate that they will be affected? Mr. Sullivan, I would like to hear your comments on that.

Mr. KNAPP. I do not know how much outreach the EPA did regarding developing the "waters of the U.S." I have been told it was pretty extensive even though they did not go through the SBREFA process. Here is the problem. The problem is, when we even have advocacy and they have the panels, they are usually done in places where most small businesses are not. Okay? They are done in Washington, and that means trade associations are representing

them, and trade associations are not necessarily representing the rank and file out there. I do not remember any of them coming to South Carolina to hold anything.

I do not want to say it is the small businesses' responsibility to tell an agency that yes, we will be impacted. I think that if we are going to be doing this type of outreach, they need to have the resources to go out to the small businesses. Instead of putting the burden on small businesses to say they are going to be impacted, let's bring the two of them and let's educate them. Let's take them to where they are and then have those types of conversations.

Ms. VELAZQUEZ. Thank you.

Mr. Sullivan?

Mr. SULLIVAN. Thank you, Congresswoman Velázquez.

First of all, I disagree vehemently with Mr. Knapp's statement that trade associations do not represent their small businesses. I think that is absolutely false, and I think my tenure as chief counsel, my interaction with the trade associations was tremendously helpful to gauge where small businesses come from. They are busy running their businesses, and if they can afford $100 extra to join a trade association, they want the trade association to interact with the agencies so that they can put the lights on and turn the lights off at the end of the day to run their business.

Now, as far as whether or not agencies underestimate or overestimate or who is responsible for the data, agencies have the resources to do the type of economic analysis. They know when they can get help from small businesses through their trade associations. I think the burden under the law is on the agencies to get it right, and I think that should continue to be where the emphasis is for producing analysis that you can benefit from, as well as small business owners in the process.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Chairman CHABOT. Thank you very much. The gentlelady's time has expired.

The chair would just note for the record that whereas private companies can screw up as they did in the chemical spill in West Virginia, that the government can screw up royally as it did out in Colorado some time ago in the Animas River when the EPA allowed huge amounts to go into the river there. That was the EPA.

I would now like to recognize the gentleman from California, Mr. Knight, for 5 minutes.

Mr. KNIGHT. Thank you, Mr. Chair.

My question is for Mr. Palmieri. Mr. Hardy and I recently wrote a letter to Secretary Perez expressing similar concerns to the testimonies today. As you may know, Mr. Hardy and I are from two very different states—me from California, Mr. Hardy from Nevada—and we approach things quite differently in both of those states. Do your members bring up issues on how these proposed rules would affect them on top of the state regulations in different states?

Mr. PALMIERI. Absolutely. We often have deep sympathy with our members in certain states that have a very challenging regulatory philosophy. Some of our members live in states where the regulatory philosophy is to accomplish the objective but to also remain the most competitive state in the country to attract busi-

nesses and invest. Obviously, we also suffer the challenges of, as Ms. Harned mentioned, differing enforcement regimes where a business that might have a facility on two sides of a border, in the Midwest or otherwise, where one of their facilities is in compliance with State inspectors in the program and the other is not, despite doing the same thing and meeting federal standards. There are any number of challenges that they face, and obviously, for some, they have made decisions to leave certain states because of their regulatory regimes or decided not to invest that next dollar or that next job in states that are not as welcoming.

Mr. KNIGHT. Well put. Our job is to kind of get out of our way in California. I think Mr. Hardy's job is to then take our jobs. I asked this because California just passed a minimum wage of $15 an hour, and unfortunately, California sometimes leads, many times in the wrong direction. How do we see this $15 an hour minimum wage? Because it could be moving across the country. I know other states are talking about it and other states are considering this. How will this affect small business? This is for all four panelists. How much will this make the changes? I know that we had a good story about the five Dairy Queens and the change that will happen with the managers and now putting them back to salaried employees. Just the change in flexibility of not being able to allow your employees to have maybe a life instead of the things that the small business is going to have to go through with these huge changes from $8, $9, and $10 an hour, to now $15 an hour.

Ms. HARNED. If I may, this has been something that NFIB has really been on the front lines of in the various states fighting because of the Robert Mayfields of the world. The concern is what it does for the entire workforce because it is not just getting that first employee up to $15 an hour, an employee that you may be training that will eventually be making and truly producing that value for the business. It also means what do you do about Joe that prior to the increase was making $17 an hour or $16 an hour? You are not just raising the labor cost, it is not just the lowest person on the ladder; it is going to impact everyone. When you have the small business owners that we represent that are really sometimes netting $100,000 a year if they are lucky, there is not a lot of money to play with there. The pie is just not getting any bigger.

Mr. KNIGHT. I will use my last couple seconds here. We did a couple roundtables and one of them was with small restaurant owners, and that is the exact issue that they brought up. Look, our cooks do not make $15 an hour. They are making more than that. Now we hire somebody at $15 an hour and somebody is making $18 an hour. Are they going to just say, well, "that is fine by me; I will just continue to make $18 an hour"? Or are they going to say, "we would like a bump, too". It does have that ripple effect throughout the whole business that it is not just the $15 an hour basement, everyone is going to be bumped up. That comes off the bottom line of a small business. It makes it so there are less jobs. Not more jobs, less jobs.

I appreciate the time and I appreciate the panel here today. Thank you, Mr. Chair.

Chairman CHABOT. Thank you very much. The gentleman's time is expired. The chair would just note that like California, the

city of Cincinnati—and I happen to be a resident of the city of Cincinnati—they are also now considering enacting a $15 minimum wage, and I can assure you that they did not consult with the chairman of the House Small Business Committee before considering such action.

The gentleman from Nevada, Mr. Hardy, who is the chairman of the Subcommittee on Investigations, Oversight, and Regulations is recognized for 5 minutes.

Mr. HARDY. Thank you, Mr. Chairman, for the opportunity throughout this meeting and bring out some of these issues that are out there. As a former small business owner myself, I might disagree with many on the impact of regulations; I have seen the impact of what regulations do to small businesses. We talk a lot about the small business, but we also have to understand that through the regulation process, small businesses also hurt probably more than anybody else when it impacts big business. I just heard at a hearing this morning about the impact of the steel industry, the regulations on the steel industry and how we cannot compete, or how we have governments backing up things, but the government side does not have anything to do with regulations. It has something to do with what our responsibility is here.

The reason I bring this up, through regulations like "waters of the U.S.," the Clean Water Act, the sick leave rules, all these other little rules that get at it, too, we, as small businesses, feed off many of the big businesses. When it impacts big business, it devastates our market too, and they start to collapse or they start to decline. Things like "waters of the U.S." in Nevada. Really? Clean waters of the U.S. and Clean Water Act in Nevada? You literally could go for hundreds of miles and never find a stream. But because of mining impacts and the costs, it also costs maybe steel products, precious or other metals that help make good quality steel. When that impacts there, it drives costs up and drives the business out of business, so to speak, so we have problems on that end, too. We cannot ever leave out the big business impact. I would like to thank Mr. Knight for signing onto the letter with me for the overtime rule.

Ms. Harned, I would like you to address maybe a little further on what impact this overtime rule has had on small business. You brought it up a little bit but can you go into manufacturing costs of jobs or maybe what other issues might be harmed by this overtime rule?

Ms. HARNED. Right. I think the issue is the jobs. I think that Mr. Mayfield's story really demonstrates that. The other thing that I think is so important to focus on with regard to this rule, we live in a very expensive area, and $50,000 is not what it is in rural Texas. That is one of our biggest complaints with this rule, and we really were asking that the Department look at the fact that you have different markets all over the country. One size definitely does not fit all when it comes to this, and you are, as Mr. Mayfield suggests, punishing people that you are trying to build as managers; making them think as an hourly employee as opposed to doing what is good for the business. I really think, for the small business owners we represent, this rule is very much one of a job loss leader. Lack of sales may definitely come from that, too, be-

cause as people lose jobs, they have less money to spend. Our most recent report that was just issued on Tuesday shows now that lack of sales is coming back up as a big factor as to why small businesses are not expanding and doing poorly in this economy still today.

Mr. HARDY. You talk about the impact of the overtime rule, but we have many other impacts—the sick leave rule—that are coming forward. This joint employer rule, which is going to cause a major impact on industries because of the explanation that needs to be understood of where it is really going to stay with the smaller businesses that actually help build up that franchise, so to speak.

A question I can ask of Mr. Palmieri, last year there was 82,035 pages of regulations drafted from January 1 to December 30. Who has to read those pages? How many pages a day is that, by the way? How many employees do we have to have to take care of just to make sure we are not violating regulations?

Mr. PALMIERI. Absolutely. For some of our smallest businesses, it is absolutely impossible. They have to rely on outside expertise, they will pay consultants. They will join trade associations. They will join other groups to help figure out what is coming at them, both what to expect in the future and what is hitting them right now. But you point to a critical piece that is so often missed and that no agency does a good job of, which is to say, in what environment am I adding this new regulatory cost? What is the cumulative burden of the regulations from this agency and all others that have been imposed recently on this industry, this sector, or in the past, that they are still following? That they are still investing in capital equipment to comply with? That cumulative burden, even though this administration has asked agencies to look at it, is never analyzed, is never reviewed, and often is what makes a relatively small rule still very costly at the margin and critical for whether a business remains a profitable concern or not.

Chairman CHABOT. Thank you very much. Thank you. The gentleman's time has expired.

The gentleman from Mississippi, Mr. Kelly, is recognized for 5 minutes.

Mr. KELLY. Mr. Chairman, thank you for holding this hearing, and I thank all of you witnesses for being here. I thank you for your testimony today.

It is frustrating to me. I am new here, and so I still have friends back home that do not know anything about the legislative process, and quite frankly do not want to know anything about the legislative process, and I may join them one day. It is frustrating when you have agency after agency after agency that in the name of trying to help people are continuing to hurt not only the small businesses but also the end user, the customer, the consumer whose prices continue to go up. Whether we are talking about the CFPB or EPA or OSHA or NLRB, they continue to pile on regulations, quite frankly, even to the point that recently there are lobbying groups to support their rules on the front end, which is illegal in some cases. Even when you tell them it is illegal, and I have actually had this in the Ag hearing where they say, "well, I think they misinterpreted the law". I think the courts are wrong. The courts did not really mean that. They are wrong in the ruling that they

have. We are going to ignore that. We have agencies that are out of control. We need good regulation in government. I think everyone in the panel would agree with that. We need reasonable regulation, and we need regulation that prevents cheaters, but we do not need burdens on our backs. Fifty thousand dollars a year is a lot of money in Mississippi, where I live. We cannot afford $15 an hour, especially when it is a graduated scale where you are punishing your hard workers, people like my wife who works, who does not make New York wages, it is difficult. So how do we stop them? Because they put up comment periods. They pay groups to go and comment what they want to say what a great rule it is, either legally or illegally. Groups do that. The number of comments does not equal the number of people it affects, and quite frankly, most small businesses cannot read it, do not have the time to read it, or are not articulate enough to organize to put those right messages on there. How do we stop it in Congress? How do we stop the ridiculous regulations that keep coming? I will just start with you, Ms. Harned, and see, what can we do?

Ms. HARNED. That is the million-dollar question. I think one thing that can happen that would be helpful is, as we have seen with these big comprehensive bills, whether it is Obamacare or Dodd-Frank or whatever, there is way too much left unsaid in the statutory language, which means that the agencies get a clear path to fill in the blanks, if you will. Then you have years of jurisprudence in the courts that only give them the green light for that, saying we are going to defer to you, we are not going to second guess you. We have created, as an old professor Jonathan Turley said, the fourth branch of government now with these agencies. I really feel like starting in Congress, write clear, small, very direct legislation, and then aggressive oversight is also critical.

Mr. KELLY. That is one of the things that is really frustrating to me, if I vote wrong and I do things that are stupid, my folks will send me home. I am accountable. If I make too many of the wrong votes or do things the wrong way, I am accountable. I go home. The President is accountable to the people. He is elected by the people, and if he makes the wrong decisions, whoever our next president is, he/she, it does not matter. If they make enough of the wrong decisions, the people will send them home. The same with our Senate. The problem is, these regulatory agencies, they do not even go to jail for breaking the law. There is no accountability whatsoever. They are not elected, they do not care what the people think, and they do not care what the voters think because they do not answer to the voters. They do not answer to the President. They do not answer to the Congress. They do not answer to the courts. They think that they are untouchable, and we have to figure out a way. I do not think any rule or regulation, if it was up to me, none of them, unless they were approved by Congress, would ever be acted into regulation. I do not care the cost because I think we owe a duty, and I think we have to get away from regulators running this country. The fourth branch of government, which I would argue right now until we do something, is the most powerful branch of government in spite of that is not the best thing for this nation. I think there are some really good people who work there. I do not think they are all bad people, and I think people have really good mo-

tives. But at the end of the day, I think we have to rule on the amount of excessive regulation. I yield back.

Chairman CHABOT. Thank you. The gentleman yields back.

The chair was considering going into a second round and asking another question, but I cannot improve on what the gentleman from Mississippi just said. So I am going to end it there.

We want to thank all the witnesses for being here today. Today's hearing highlighted how regulations that are often created without assessing the real world consequences for small businesses can result in unnecessary and excessive regulatory burdens, especially on small businesses. At the core of this problem, I think to some degree, is the agency's failure to comply with the Regulatory Flexibility Act. This Committee will continue to closely monitor agencies' regulatory activities and work on solutions that will ensure full compliance with the law.

I would ask unanimous consent that members have 5 legislative days to submit statements and supporting materials for the record. If there is no further business to come before the Committee, we are adjourned. Thank you very much.

[Whereupon, at 11:15 a.m., the Committee was adjourned.]

APPENDIX

Statement for the Record of Karen Harned

Executive Director, NFIB Small Business Legal Center

Before the

U.S. House of Representatives Committee on Small Business

Hearing on: **"Regulation: The Hidden Small Business Tax"**

April 14, 2016

National Federation of Independent Business (NFIB)
1201 F Street, NW Suite 200
Washington, DC 20004

Chairman Chabot and Ranking Member Velazquez,

On behalf of the National Federation of Independent Business, I appreciate the opportunity to submit for the record this testimony for the House Small Business Committee's hearing entitled, "Regulation: The Hidden Small Business Tax."

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 325,000 independent business owners who are located throughout the United States.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

Impact of Regulation on Small Business

Overzealous regulation is a perennial concern for small business. The uncertainty caused by future regulation negatively affects a small-business owners' ability to plan for future growth. Since January 2009, "government regulations and red tape" have been listed as among the top-three problems for small business owners, according to the NFIB Research Foundation's monthly Small Business Economic Trends survey.[1] Not surprisingly then, the latest Small Business Economic Trends report analyzing March 2016 data had regulations as the top issue small business owners cite when asked why now is not a good time to expand.[2] Within the small business problem clusters identified by Small Business Problems and Priorities report, "regulations" rank second behind taxes.[3]

Despite the devastating impact of regulation on small business, federal agencies continue to churn out approximately 10 new regulations each day.[4] According to the Administration's fall 2015 regulatory agenda, there are 3,297 federal regulations in the pipeline, waiting for implementation.[5]

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden. Regulatory costs are now nearly $12,000 per employee per year, which is 30 percent higher than the regulatory cost burden larger businesses face.[6]

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[1] NFIB Research Foundation, *Small Business Economic Trends*, at p. 18, March 2016. http://www.nfib.com/research-foundation/surveys/small-business-economic-trends

[2] *Id.*

[3] Wade, Holly, *Small Business Problems and Priorities*, at p. 18, August 2012. https://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf

[4] Data generated from www.regulations.gov

[5] http://www.reginfo.gov/public/do/eAgendaMain

[6] Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, September 10, 2014.

This is not surprising, since it's the small business owner, not one of a team of "compliance officers" who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with a federal regulation is one less hour she has to service customers and plan for future growth.

During my fourteen years at NFIB I have heard countless stories from small business owners struggling with a new regulatory requirement. To them, the requirement came out of nowhere and they are frustrated that they had "no say" in its development. That is why early engagement in the regulatory process is key for the small business community. But small business owners are not roaming the halls of administrative agencies, reading the *Federal Register* or even *Inside EPA*. Early engagement in the rulemaking process is not easy for the small manufacturer in White Oak, Texas or Bismarck, North Dakota. As a result, small businesses rely heavily on the notice-and-comment rulemaking process, small business protections in the Regulatory Flexibility Act, and internal government checks like the Office of Advocacy at the Small Business Administration and Office of Information Regulatory Affairs to ensure agencies don't impose costly new mandates on small business when viable and less expensive alternatives to achieve regulatory objectives exist.

As we come to the end of President Obama's administration, small businesses are already wading through a number of new regulatory requirements with more mandates on the horizon.

While new environmental and financial regulations and regulatory proposals have definitely had a negative impact on small business over the last few years, today I want to focus on a category of regulations that doesn't seem to get as much attention from Washington – labor regulations. Small businesses can be found in virtually all industries. Whether you are a manufacturer, baker, or dry cleaner the one thing you have in common with other business owners is employees. And for the small businesses NFIB represents with, on average, ten or fewer employees, these regulations can be some of the most challenging. The small metal fabricator, for example, goes into business knowing how to finish metal products, he has a good sense of where he can get the supplies he needs, and what kind of skills he's looking for in a workforce. What he likely does not know are the best business practices regarding wage and overtime calculation, compliance with various state and federal discrimination laws, and hiring. Moreover, it is unlikely that the small metal fabricator has a human resources compliance manager to help him navigate those different rules.

Therefore, labor laws definitely represent a significant regulatory "tax" on small business that is likely to be much greater than the "tax" faced by bigger businesses with in-house HR departments.

With that as the backdrop, several new and proposed regulations out of the Department

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http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf

of Labor have been of particular concern to NFIB and its members.

Department of Labor "Overtime" Proposed Rule

On July 6, 2015, the Department of Labor published in the *Federal Register* a notice of proposed rulemaking regarding "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees."

The Fair Labor Standards Act (FLSA) generally requires covered employers to pay their employees overtime premium pay of one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek. However, there are a number of exemptions from the FLSA's minimum wage and overtime requirements. Section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), exempts from both minimum wage and overtime protection "any employee employed in a bona fide executive, administrative, or professional capacity...or in the capacity of outside salesman." The FLSA does not define the terms "executive," "administrative," "professional," or "outside salesman."

DOL has consistently used its rulemaking authority to define and clarify the section 13(a)(1) exemptions. Since 1940, the implementing regulations have generally required each of three tests to be met for the exemptions to apply. First, the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"). Second, the amount of salary paid must meet a minimum specified amount (the "salary level test"). Third, the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test").

In its proposed rule, DOL proposes changes only to the salary level test. Currently, the minimum salary that a worker must receive is $455 per week ($23,660 annually). The proposal seeks to more than double that amount to $970 per week ($50,440 annually). In addition, DOL seeks – for the first time – to automatically increase the salary threshold at either the 40th percentile of all salaried wage earners, or at a rate equivalent to the Consumer Price Index for All Urban Consumers (CPI-U). No timeframe for how frequently this increase will take place is proposed, however.

Increased labor and regulatory compliance costs

According to DOL's initial regulatory flexibility analysis (IRFA), small businesses will face nearly $750 million in new costs in the first year if the rule is finalized as proposed. These costs are made up of $186.6 million in costs associated with implementing the rule and $561.5 million in additional wages that will now be paid to workers.[7] Unfortunately, these estimates simultaneously underestimate the compliance costs to small businesses and overestimate the transfers to employees.

First, the IRFA underestimates compliance costs because it does not take into account business size when estimating the time it takes to read, comprehend and implement the proposed changes. As an example, DOL "estimates that each establishment will spend

[7] *Federal Register*, Vol. 80, No. 128, July6. Page 38606.

one hour of time for regulatory familiarization." This assumption erroneously disregards a basic reality of regulatory compliance – the smaller the business, the longer and more expensive it is to comply. As previously noted, numerous studies have identified that federal regulatory compliance disproportionately affects small businesses, as compared to larger ones. Primarily, this is because small companies typically lack specialized compliance personnel. Typically, the duty of compliance officer falls to the business owner or the primary manager. These individuals are generally not experts in wading through regulatory text, so familiarization time is greater than for large companies. Alternatively, a small business could hire an outside expert to devise a compliance plan, but this cost will also be significantly greater than what a firm with in-house compliance staff would endure.

In this case, complying with the rule requires far more than simply looking at a salaried employee's weekly wages. This is just one piece of the puzzle. If an employee is currently salaried and makes greater than the current threshold of $455 per week, but less than the proposed $970 per week, the small business owner must now spend a considerable amount of time calculating out varying scenarios – none of which is beneficial for anyone involved.

<u>One NFIB member's story</u>

The story of NFIB member, Robert Mayfield, is illustrative of the real and negative effects likely to occur if DOL promulgates a final rule similar to what has been proposed.

Mr. Mayfield owns five Dairy Queens in and around Austin, Texas and is very concerned about the impact that the proposal would have on his businesses and the individuals whom he employs. In his words, the rule would be "bad news" for both employers and employees.

Currently, Mr. Mayfield employs exempt managers at all five locations. These individuals earn, on average, about $30,000 per year and work between 40-50 hours per week. The managers also receive bonuses, more flexible work arrangements, including paid vacation and sick time, training opportunities, and promotions that Mayfield's hourly employees do not. Mayfield explained that, in his company, promotion to an exempt management position carries a great deal of status with employees (who upon promotion to a manager position) boast about no longer having to punch time clocks. In Mayfield's opinion, it would be demeaning to force managers to punch a clock. He also noted that his managers have more flexibility for things like doctors' appointments and kids' activities. Since they aren't punching in and out on a time clock, they are paid a weekly salary even if they're out for personal activities.

Under DOL's proposal, Mayfield predicted that he'll need to move the managers back to hourly positions as there is simply no way he can afford to pay over 10 managers $50,000 each. As a result, he predicted the skill level of his managers will decrease. Moreover, Mayfield noted that rather than giving managers overtime, he would likely hire a few more part-time employees. What he would not do would be to pay managers overtime; instead he would continue to strictly enforce a no-overtime policy. Overtime costs, he said, could not be passed on to customers nor could the business afford to

absorb added labor costs.

Overall, Mayfield said the effect would be lower-skilled managers and higher turnover, which would impact the quality of service offered at his restaurants.

"I feel most sorry for the many enthusiastic people who work for me who have worked hard to advance into their dream of a salaried management position," Mayfield said. "They will have their feelings hurt and be insulted to find out that their own government considers them to not be worthy of a salaried position that is eligible for a bonus based on profits that they would have helped to plan. It is a real source of pride and prestige to be on salary and not have to punch a time clock."

"How can you be a manager and punch a time clock? The idea is to do a job, not keep track of your hours. A manager's income is based on results and profits, not hours worked. This is the antithesis of building a management mentality or in training someone to be a manager. It would also disrupt the workplace and lead to fewer management opportunities. It would hurt, not help, the people they claim to want to help."

DOL Overtime Rule Demonstrates Need for Regulatory Reform

NFIB believes that this proposed rule demonstrates the need to reform the RFA and its amending laws. Currently, agencies are required to perform an IRFA prior to proposing a rule that would have a significant economic impact on a substantial number of small entities – as DOL has confirmed this proposed rule would. While these analyses are helpful for agencies to realize the cost and impact a proposed rule would have on small business, agencies would get additional benefit from convening a Small Business Advocacy Review panel for rules of significant impact.

These panels allow an agency to walk through a potential proposal with small business owners, either in person or via telephone, and receive feedback and other input from those who will be directly impacted by the regulation. These panels are currently required for the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau. NFIB believes all agencies – in particular the entire DOL – would achieve better regulatory outcomes if required to go through such a procedure.

OSHA Silica Rule

On March 25, 2016 OSHA published in the *Federal Register* its final rule regarding Occupational Exposure to Respirable Crystalline Silica.

Silica is a ubiquitous mineral that is naturally found in many materials that our economy and lives depend on every day. It is prevalent in the construction and manufacturing industries, though it is also found in dozens of other commercial applications. Given the widespread use of materials containing silica, this rule will have a substantial economic impact on small businesses in many sectors. OSHA estimates that about 533,000 businesses – most of which are small businesses – and 2.1 million workers are covered.

With this rule, OSHA is reducing the permissible exposure limit (PEL) for respirable crystalline silica by half for most industries, and by 80 percent for the construction industry. This is despite Centers for Disease Control and Prevention (CDC) data that shows that between 1968 and 2007 silicosis deaths dropped 93 percent – from 1,157 to about 1501.[8] This success comes even though OSHA has been unable to ensure compliance with the current PEL. OSHA's own compliance data shows that about 30 percent of covered businesses are not in compliance. Yet, rather than focus on helping those businesses attain compliance, OSHA is mandating a substantial reduction of the PEL that will require expensive measures that may be unnecessary – causing even more businesses to be out of compliance.

OSHA also failed to meet its obligations under the RFA and its amending law, the Small Business Regulatory Enforcement Fairness Act. The agency underpinned its legal obligation to conduct a small business impact analysis on a SBAR panel that is more than a decade old. Substantial changes in technology and work practices over the last ten years necessitate a new panel being convened before this proposal moves forward. Even disregarding this clear failure, OSHA ignores major recommendations of the 2003 panel, including a recommendation that OSHA withdraw the rulemaking because it was not clear that the rule would achieve OSHA's objectives.

Last but not least, NFIB's Research Foundation used OSHA's figures to calculate the true economic impact of this rule on the private sector and the broader economy. According to NFIB's research, OSHA's estimate of $637 million in compliance costs for employers will result in an average of $7.2 billion in lost real output per year.[9] NFIB's model calculates a net loss of 27,000 jobs over the ten-year analysis window.

NFIB is very concerned about the "small business tax" associated with the unnecessary silica rule with which compliance will be extraordinarily expensive. Moreover, NFIB is troubled by OSHA's failure to adequately consider the impact of the rule on small businesses and their employees.

Other Labor-Related Rules

Two other DOL rules are of particular concern to small business.

Paid Sick Leave for Federal Contractors

On February 26, 2016 the agency proposed a rule "Establishing Paid Sick Leave for Federal Contractors." If promulgated, small businesses that have contracts with the federal government would be required to provide employees up to seven days of paid sick leave a year, including leave taken to care for a family member. Among other things, NFIB is concerned that this proposed rule would be particularly burdensome on small federal contractors in one of two ways. For covered small businesses that do not have a paid sick leave program, they will have to implement one and figure out how they will pay for it. For covered small businesses that already have a paid leave

[8] http://www2a.cdc.gov/drds/worldreportdata/FigureTableDetails.asp?FigureTableID=2595&GroupRefNumber=F03-01
[9] Chow, Michael J., *Economic Impact Analysis of a Respirable Crystalline Silica Permissible Exposure Limit of 50 ug/m3 Using the Business Size Insight Module*, NFIB Research Foundation, January 16, 2014.

program, they will have to reconfigure the program to meet the highly prescriptive requirements of the proposed rule.

"Persuader Rule"

On March 24, 2016 DOL finalized a rule, "Interpreting the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, which will make it more difficult and expensive for small business owners to access labor and employment attorneys. The rule is an expansion of the federal "persuader rule," in which businesses must publicly disclose whenever they hire consultants and labor counsel to assist with anti-union efforts. Under the new rule, attorneys would also need to disclose the names of clients to whom labor information is provided. If either party (attorney or business) does not file or provides false information, it can mean jail time.

The rule would affect small businesses the most because they typically don't have in-house lawyers or in-house labor relations experts. Worse, the American Bar Association predicts the "persuader rule" will make it much harder for owners to get legal advice. Because the new rule conflicts with attorney-client confidentiality rules, the ABA forecasts that fewer lawyers will practice labor law.

Among other things, NFIB believes DOL is acting outside its authority under the LMRDA, the rule is in violation of the protections afforded all Americans under the First Amendment, and that the agency failed to properly consider small business impact as required under the RFA. As a result, on March 31, we challenged the rule in a federal district court in Texas.

Environmental Regulations of Concern to Small Business

In addition to the Administration's labor-related regulatory agenda, NFIB remains concerned about the tremendous costs small businesses face in light of two rules promulgated by EPA last year.

Waters of the U.S.

On June 29, 2015, EPA and the Army Corps of Engineers issued the "Waters of the U.S." rule, which changes the Clean Water Act's definition for "waters of the United States" to govern not just navigable waterways, as stated in the statute, but every place where water could possibly flow or pool. Under the rule, EPA and the Army Corps may now require homebuilders, farmers, and other property owners to spend tens of thousands of dollars on a permit before they can build or even do simple landscaping around seasonal streams, ponds, ditches, and depressions.

The moment this rule goes into effect small businesses will have to seek a federal permit from EPA to improve or develop any land that includes water no matter how incidental. That includes even the smallest project, like digging a post hole or laying mulch, as long as part of that land is wet. Nearly a decade ago, the average cost of a CWA permit was over $270,000. Altering land without a permit can lead to fines of up

to $37,500 per day.

Amazingly, EPA and the Army Corps failed to analyze the small business impact of the rule as required by the RFA. In early 2015, SBA's Office of Advocacy formally urged EPA to withdraw the WOTUS rule because of its potentially huge impact on small businesses. It cited the EPA's own estimate that the rule would cost the economy more than $100 million.

NFIB, joined by the U.S. Chamber of Commerce, challenged the rule in a federal court in Oklahoma arguing, among other things, that EPA is acting outside of its authority under the Clean Water Act and the rule is an unconstitutional infringement of state rights to regulate intrastate lands and waters.

On October 9, 2015, the 6th Circuit Court of Appeals stopped EPA and the Army Corps from moving forward in implementing the rule until the 6th Circuit can determine whether or not it is legal.

Clean Power Plan

On October 23, 2015, EPA issued the Clean Power Plan rule that requires states to reduce carbon emissions by shutting down many coal-fired power plants. The White House has stated that EPA's rule will "aggressively transform ... the domestic energy industry" and sweeps virtually all aspects of electricity production in America under the agency's control.

Under the rule, states are required to find a mix of alternative energy sources, like wind and solar, to make up for the shuttering of coal-fired power plants. Increased reliance on these alternative energy sources is expected to significantly raise the costs of electricity and also threatens its reliability.

Even the Administration expects its Clean Power Plan to drive up the cost of electricity, the impact of which will fall hard on small businesses that depend heavily on affordable energy. NFIB research shows that the cost of electricity is already a top concern among small business owners across the country. Small businesses will be squeezed between higher direct expenses and lower consumer demand resulting from higher home electric bills.

The day the rule was issued NFIB joined the Chamber of Commerce, the National Association of Manufacturers, and other industry groups in suing EPA. We argue that the rule is an unconstitutional infringement of State rights and outside of EPA's statutory authority under the Clean Air Act. On February 9, 2016, the Supreme Court stopped EPA and states from moving forward in implementing the rule until the courts, including the Supreme Court, can determine whether or not it is legal.

Our case is currently in the DC Circuit Court of Appeals. Briefing will occur through the spring. Oral argument is scheduled for June 2.

Conclusion

Small businesses are the engine of our economy. Unfortunately, they also bear a disproportionate weight of government regulation. The effects of overregulation require an enormous expense of money and time to remain in compliance. The effort required to follow these and other regulations prevent small business owners from growing and creating new jobs.

Thank you for holding this important hearing shining a light on the fact that regulations are a hidden "tax" on small businesses. I look forward to working with you on this and other issues important to small business.

Statement by Frank Knapp, Jr.

before the Small Business Committee

U.S. House of Representatives

For the hearing
"Regulation: The Hidden Small Business Tax"

April 14, 2016

Thank you, Chairman Chabot, Ranking Member Velázquez, and members of the committee. My name is Frank Knapp, Jr., I'm the President and CEO of the South Carolina Small Business Chamber of Commerce, a statewide, 5,000+ member advocacy organization working to make state government more small business friendly. I am also the board co-chair of the American Sustainable Business Council which through its network represents 200,000 businesses. ASBC advocates for policy change at the federal and state level that supports a more sustainable economy.

Today's hearing topic is important for small business and the vitality of our economy. Good regulations tend to stimulate innovation and entrepreneurship in addition to limiting or preventing destructive forms of economic activity. Bad regulations, whether because they are not designed properly or are simply not needed, will be a burden on small businesses and thus harm our economy. Everyone here would prefer the former and not the latter.

One example of what is working is the Regulatory Flexibility Act. In 2004 my South Carolina organization worked with our South Carolina Chamber and NFIB to pass our Small Business Regulatory Flexibility Act modeled after the federal law. Several years later, the then chairman of the South Carolina Small Business Regulatory Review Committee told me that over the previous seven years his committee had reviewed about 300 proposed regulations and identified only ten that raised their concern. His Committee worked with the state agency promulgating these new regulations and satisfactorily resolved the issues. The Regulatory Flexibility Act has created an effective process to protect small businesses even if the process itself needs some attention from time to time.

While some inside the Beltway claim that regulations are holding back our economic growth, ASBC has a different view. Along with other small business organizations, we

released a poll of small business owners in February 2012, which found that small businesses don't see regulations as a major concern.

Our polling confirmed that small business owners value regulations if they are well-constructed and fairly enforced.

86% believe some regulation is necessary for a modern economy, and 93% of respondents believe their business can live with some regulation if it is fair and manageable.

78% of small employers agree regulations are important in protecting small businesses from unfair competition and to level the playing field with big business.

79% of small business owners support having clean air and water in their community in order to keep their families, employees and customers healthy.

61% support standards that move the country towards energy efficiency and clean energy.

Republican pollster Frank Luntz recently surveyed CEOs[i] and found similar results to the ASBC poll. Regulations were identified as the 7th concern, behind more pressing issues like creating economic opportunity, keeping taxes affordable, raising the minimum wage and reducing income inequality

You said economic issues are most important. Which of the following economic issues do you care about the most?

Total	East	South	Midwest	West	
41%	47%	34%	33%	49%	Creating economic opportunity and good-paying jobs for everyone
29%	28%	25%	33%	31%	Keeping the cost of living and inflation down
25%	24%	24%	27%	23%	Keeping taxes affordable
18%	16%	19%	17%	23%	Balancing my state's budget
17%	15%	18%	26%	11%	Raising the minimum wage
16%	18%	16%	24%	6%	Reducing income inequality
16%	17%	18%	13%	17%	Reducing regulations on small businesses
14%	15%	17%	10%	14%	Fighting poverty
12%	14%	16%	6%	14%	Increasing take-home pay
11%	7%	13%	12%	13%	Reducing the deficit and addressing the national debt

So if small businesses aren't self-identifying regulations as their top impediment to growth and businesses in general are not citing regulations as a significant problem, who are the pushers of the anti-regulation bills really representing?

The answer is clear. Most of the complaints we hear in Washington are from only two industries -- those impacted by Wall Street reform (Dodd-Frank) and new Environmental Protection Agency regulations. K Street lobbyists regale Congress and the public about the dire economic consequences to small businesses of regulations that will prevent another Great Recession or protect the health and safety of our citizens or restrain the future wrath of uncontrolled climate change. In reality, the financial giants who drove our economy off a cliff and the powerful fossil fuel industry are driving the anti-regulation train using the name of small businesses to garner sympathetic ears.

In conclusion, the regulation promulgating process can produce good rules while protecting small businesses from unnecessary burdens if we provide the resources for agencies to expeditiously carry out the requirements Congress has already put in place. But the federal government's responsibility to impacted small businesses shouldn't stop here. Some small businesses will find compliance with federal regulations difficult. The answer is not to throw the baby out with the bathwater and invalidate existing rules. Instead we believe the solution lies in expanding the capacity of the federal government to provide regulatory compliance assistance to small businesses.

Thank you for the opportunity to speak before you today and I welcome any questions the committee may have.

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[1] https://www.washingtonpost.com/news/wonk/wp/2016/04/04/leaked-documents-show-strong-business-support-for-raising-the-minimum-wage/

NATIONAL ASSOCIATION OF
Manufacturers

Leading Innovation. Creating Opportunity. Pursuing Progress.

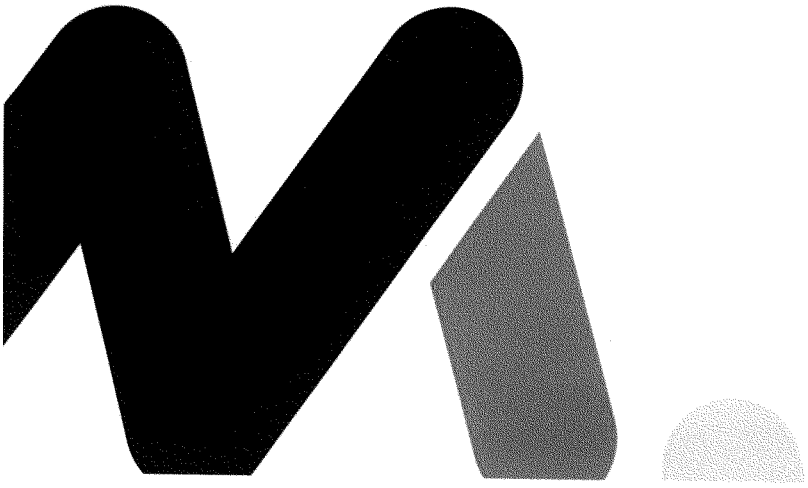
Testimony

of Rosario Palmieri
Vice President, Labor, Legal and Regulatory Policy
National Association of Manufacturers

before the Committee on Small Business
U.S. House of Representatives

on Regulation: The Hidden Small Business Tax

April 14, 2016



TESTIMONY OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE THE

COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

APRIL 14, 2016

Chairman Chabot, Ranking Member Velázquez and members of the Committee on Small Business, thank you for the opportunity to testify about federal regulations and how the rulemaking process impacts manufacturers in the United States.

My name is Rosario Palmieri, and I am the vice president of labor, legal and regulatory policy for the National Association of Manufacturers (NAM). The NAM is the nation's largest industrial trade association and voice for more than 12 million men and women who make things in America. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. Manufacturers very much appreciate your interest in and support of the manufacturing economy.

I. State of Manufacturing

In the most recent data, manufacturers in the United States contributed $2.17 trillion to the economy (or 12 percent of GDP). For every $1.00 spent in manufacturing, another $1.40 is added to the economy, the highest multiplier effect of any economic sector. Importantly, manufacturing supports an estimated 18.5 million jobs in the United States—about one in six private-sector jobs. In 2014, the average manufacturing worker in the United States earned $79,553 annually, including pay and benefits—24 percent more than the average worker.

Manufacturing in the United States lost 2.3 million jobs in the last recession. Since then, we have gained back 802,000 manufacturing jobs. To maintain manufacturing momentum and encourage hiring, the United States needs not only improved economic conditions but also government policies more attuned to the realities of global competition. Because of the significant challenges facing manufacturing in the United States, the NAM advocates federal policies that will ensure a robust and dynamic manufacturing sector that is ready to meet the needs of our economy and workers.

II. Regulatory Environment

Democrats and Republicans have much in common on their views on regulation, but the rhetoric often fails to match that consensus. Similarly, the business community is often misunderstood about their views on regulation. Manufacturers believe regulation is critical to the protection of worker safety, public health and our environment. We believe some critical objectives of government can only be achieved through regulation, but that does not mean our regulatory system is not in need of considerable improvement and reform. New regulations are too often poorly designed and analyzed and ineffectively achieve their benefits. They are often unnecessarily complex and duplicative of other mandates. Their critical inputs—scientific and other technical data—are sometimes unreliable and fail to account for significant uncertainties.

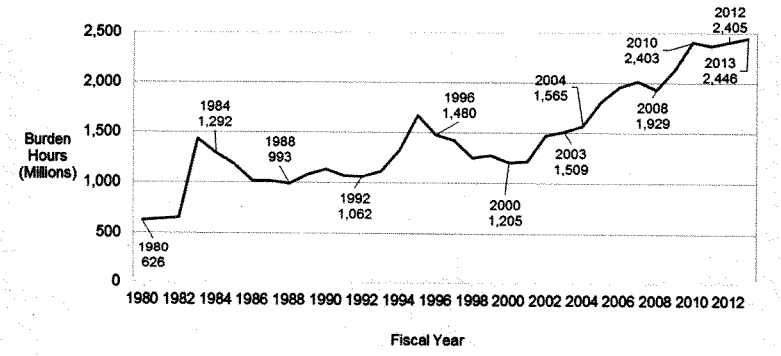
Regulations are allowed to accumulate with no real incentives to evaluate existing requirements and improve effectiveness. In addition, regulations many times are one-size-fits-all without the needed sensitivity to their impact on small businesses. We can do better.

Unnecessary regulatory burdens weigh heavily on the minds of manufacturers. In the NAM Manufacturers' Outlook Survey for the first quarter of 2016, 73 percent of respondents cited an unfavorable business climate due to government policies, including regulations and taxes, as a primary challenge facing businesses—up from 62.2 percent in March 2012.

The federal government's own data reflect these challenges. According to the annual information collection budget, the paperwork burden imposed by federal agencies, excluding the Department of Treasury,[1] increased from 1.509 billion hours in fiscal year (FY) 2003 to 2.446 billion hours in FY 2013, an increase of 62.1 percent (see Figure 1). In other words, federal agencies—excluding the Department of Treasury—imposed more than 279,000 years' worth of paperwork burden on the American public in FY 2013.[2]

These are challenges to prosperity, job growth and competitiveness that federal regulators are placing on manufacturers and other businesses in the United States. For the 10 years ending in FY 2013, which is the last year of available data, federal agencies (excluding the Department of Treasury) added almost 82 million hours in paperwork burden through their own discretion. This is on top of the 1.121 billion hours that non-Treasury agencies estimate was added because of new statutory requirements.

Figure 1: Government-Wide Paper Burden, Excluding the Department of Treasury



[1] The Department of Treasury's burden estimates include the burden imposed by the Internal Revenue Service and account for about 75 percent of the total federal burden imposed on the public. Treasury's burden has increased from 6.590 billion hours in FY 2003 to 7.007 billion hours (or 6.3 percent) in FY 2013. See Office of Information and Regulatory Affairs (OIRA), "Information Collection Budget of the United States Government" (2014), https://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2014.pdf.

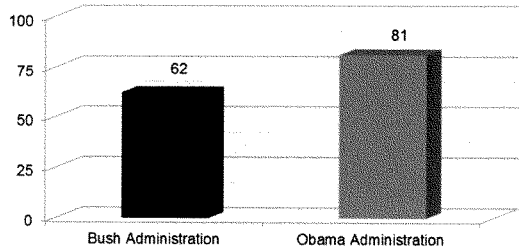
[2] In FY 2013, federal agencies excluding the Department of Treasury imposed the equivalent of 7.7 hours of regulatory burden for every person in the United States. In FY 2003, per-person regulatory burden was 5.2 hours annually. This demonstrates that the increase in regulatory burden is far outpacing population growth. Population estimates available from the U.S. Census Bureau, https://www.census.gov/popest/data/historical/2000s/index.html.

Manufacturers appreciate the need for recordkeeping and paperwork essential to ensuring compliance with important regulatory requirements, but government-imposed regulatory burdens continue to increase despite advancements in technology and both statutory and executive branch directives that federal agencies minimize unnecessary burdens. Government policies should support the global competitiveness of manufacturers and other businesses in the United States, not impose increasing burdens. Manufacturers in the United States confront challenges that our global competitors do not have.

The issue of an increasing federal regulatory burden is not unique to a particular presidency or political party. The non-Treasury paperwork burden increased 60 percent[3] during the eight years that President George W. Bush was in office. The NAM has welcomed efforts by President Barack Obama and his administration to reduce regulatory burdens. The president has signed executive orders, and the Office of Management and Budget (OMB) has issued memoranda on the principles of sound rulemaking, considering the cumulative effects of regulations, strengthening the retrospective review process and promoting international regulatory cooperation. Unfortunately, these initiatives have yet to provide real cost reductions for manufacturers or other regulated entities.

These directives are well-intentioned, but any benefits realized by these efforts have been subsumed by the unnecessarily burdensome regulations that federal agencies have been and are promulgating. Based on data from the Government Accountability Office,[4] 578 major new regulations—defined as having an annual effect on the economy of at least $100 million—have been issued by the current administration. A new major regulation has been issued by the current administration once every 4.55 days. Manufacturers and other regulated entities have confronted nearly 20 more major regulations per year from the Obama administration than during the Bush administration (see Figure 2). Regardless of the political party in charge, these regulations include significant burdens imposed on manufacturers in the United States and represent real compliance costs that affect our ability to expand and hire workers.

Figure 2: Major Regulations per Year, Through 2015

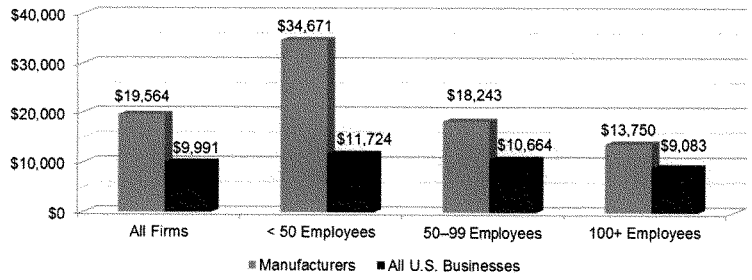


[3] Government-wide paperwork burden, excluding the Department of Treasury, was 1.205 billion hours in FY 2000 and 1.929 billion hours in FY 2008. See OIRA, "Information Collection Budget of the United States Government" (2009), https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/icb_2009.pdf.
[4] U.S. Government Accountability Office, Congressional Review Act Overview, http://www.gao.gov/legal/congressional-review-act/overview.

III. Regulatory Challenges Facing Manufacturers in the United States

Because manufacturing is such a dynamic process, involving the transformation of raw materials into finished products, it involves more environmental and safety regulations than in other businesses. In September 2014, the NAM issued a report[5] that shows the economic impact of federal regulations. The report found that manufacturers in 2012 spent on average $19,564 per employee to comply with regulations, nearly double the amount per employee for all U.S. businesses (see Figure 3). Small manufacturers—those with fewer than 50 employees—incur regulatory costs of $34,671 per employee per year. This is more than triple that of the average U.S. business.

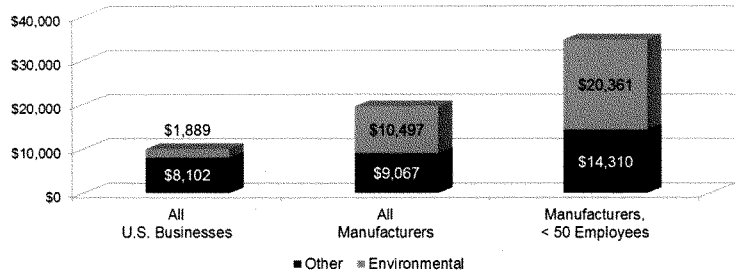
Figure 3: Regulatory Compliance Costs per Employee per Year, 2012 (in 2014 Dollars)



The burden of environmental regulation falls disproportionately on manufacturers, and it is heaviest on small manufacturers because their compliance costs often are not affected by economies of scale (see Figure 4). Manufacturers recognize that regulations are necessary to protect people's health and safety, but we need a regulatory system that effectively meets its objectives while supporting innovation and economic growth. In recent years, the scope and complexity of federal rules have made it harder to do business and compete in an ever-changing global economy. As a result, manufacturers are sensitive to regulatory measures that rely on inadequate benefit and cost justifications.

[5] NAM, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business" (September 2014), http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf.

Figure 4: Environmental Regulatory Compliance Costs per Employee per Year, 2012 (in 2014 Dollars)



In October 2013, the Manufacturers Alliance for Productivity and Innovation (MAPI) released an updated study[6] that highlighted the regulatory burdens placed on manufacturers. The study found that since 1981, the federal government has issued an average of just under 1.5 manufacturing-related regulations per week for more than 30 years. Individually and cumulatively, these regulations include significant burdens imposed on manufacturers in the United States and represent real compliance costs that affect our ability to expand and hire workers.

Manufacturers, particularly small manufacturers, know very well the importance of allocating scarce resources effectively to achieve continued success, which includes increased pay and benefits for employees. Every dollar that a company spends on complying with an unnecessary and ineffective regulatory requirement is one less dollar that can be allocated toward new equipment or to expand employee pay and benefits. Government-imposed inefficiencies are more than numbers in an annual report. They are manifested in real costs borne by the men and women who work hard to provide for their families.

Below are examples that highlight the regulatory challenges that manufacturers confront. The additional costs of these regulations are added to the already significant cumulative burdens of existing regulations imposed on manufacturers and other businesses. There is a failure within the federal government to truly understand the impact of regulatory requirements, such as paperwork and recordkeeping, on the public.

Agencies are failing in their responsibility to conduct analysis that would better assist them in understanding the true benefits and costs of their rules. Despite existing statutory requirements and clear directives from the president to improve the quality of regulations, manufacturers face an increasingly inefficient and complex myriad of regulations that place unnecessary costs on the public. Our regulatory system should be designed to promote coordination within and between agencies, and regulations should be designed to most effectively meet regulatory objectives to minimize unnecessary burdens.

[6] MAPI, *Growing Number of Federal Regulations Continue to Challenge Manufacturers* (October 2013), http://www.mapi.net/blog/2013/10/growing-number-federal-regulations-continue-challenge-manufacturers.

a. Existing Regulations

The Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA): Occupational Exposure to Crystalline Silica (78 Fed. Reg. 56274). OSHA finalized the crystalline silica rule on March 25, reducing by half the permissible exposure limits for crystalline silica and mandates extensive and costly engineering controls. It also will require employers to provide exposure monitoring, medical surveillance, work area restrictions, clean rooms and recordkeeping. The proposal is based on outdated data and would impact 534,000 businesses and 2.2 million workers. The costs of this proposal could far exceed its benefits. An analysis by engineering and economic consultants estimated that the silica rule would impose $5.5 billion in annualized compliance costs on affected industries. Silica is perhaps the most common construction and manufacturing material in the world; it is a critical component in many manufacturing, construction, transportation, defense and high-tech industries and is present in thousands of consumer products. Significant progress has been made in preventing silica-related diseases under existing regulations, making proposed changes unnecessary and overly burdensome.

The DOL's Office of Labor-Management Standards: Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act (Persuader Rule) (81 Fed. Reg. 15924). On March 23, the DOL published its final persuader rule, which provides sweeping changes to the rules that administer the Labor-Management Reporting and Disclosure Act. The agency drastically expanded the definition of "persuader" activity on how employers can seek advice regarding labor-organizing activities and when an entity will have to disclose information to the department. Under the old rules, only those entities that had direct contact with employees regarding labor-organizing campaigns would have to disclose their activity to the DOL. Under the new rule, however, even those consultants who have no face-to-face contact with employees and are educating employers on rights to organize and bargain collectively will have to report to the DOL as persuaders. The only exception to the new definition is if an entity or consultant is only giving advice to the employer (this would include lawyers). These changes would make it more difficult for manufacturers, especially smaller-sized manufacturers, to educate employees on union campaigns or to seek additional information on what is permitted for discussion under the law.

Environmental Protection Agency (EPA): Greenhouse Gas (GHG) Emission Limits for Existing Electric Utilities (80 Fed. Reg. 64510). The EPA finalized its much-publicized carbon pollution standard for existing power plants on October 23, 2015, setting first-of-their-kind performance standards for GHG emissions from existing power plants. The EPA's rule will fundamentally shift how electricity is generated and consumed in this country, effectively picking winners and losers in terms of both technologies and fuels. The rule also represents an attempt to vastly expand the EPA's traditional authority to regulate specific source categories by setting reduction requirements that reach into the entire electricity supply-and-demand chain. The requirements will be substantial, potentially costing billions of dollars per year to comply. Some studies estimate that compliance with the rule would cost well over $300 billion and cause double-digit electricity price increases for ratepayers in most states. Manufacturers are concerned about these potential costs and reliability challenges as electric power fleets are overhauled in compliance with the regulations. Manufacturers are also keenly aware that the EPA is using this regulation as a model for future direct regulations on other manufacturing sectors—meaning manufacturers could potentially be hit twice by GHG regulations. Interestingly, the EPA asserts that its final rule "will not have a significant economic impact on a substantial number of small entities." The regulation is currently stayed by the Supreme Court until litigation is resolved. Thirty-four senators and 171 members of the House filed a brief

pointing out the many legal and policy shortcomings of the EPA's rules on February 23, 2016, and currently 27 states are party to the legal challenge.

EPA: National Ambient Air Quality Standards (NAAQS) for Ozone (80 Fed. Reg. 65292). On October 1, 2015, the EPA finalized a more stringent NAAQS at 70 parts per billion (ppb), from the previous standard of 75 ppb. More than 60 percent of the controls and technologies needed to meet the rule's requirements are what the EPA called "unknown controls." Because controls are not known, the new standard may result in the closure of plants and the premature retirement of equipment used for manufacturing, construction and agriculture. The proposal could reduce GDP by $140 billion annually and eliminate 1.4 million job equivalents per year. In total, the costs of complying with the rule from 2017 through 2040 could top $1 trillion, making it the most expensive regulation ever issued by the U.S. government. The previous standard of 75 ppb—the most stringent standard ever—was never even fully implemented, while emissions are as low as they have been in decades and air quality continues to improve. The EPA itself admitted that implementation of the previous standard of 75 ppb, when combined with the dozens of other regulations on the books that will reduce ozone precursor emissions from stationary and mobile sources, will drive ozone reductions below 75 ppb (and close to 70 ppb) by 2025. The massive costs of a stricter standard—the most expensive regulation of all time, by a significant margin—was simply not necessary. As with GHG emission limits, the EPA states that the final rule "will not have a significant economic impact on a substantial number of small entities."

EPA: Emission Standards for Industrial, Commercial and Institutional Boilers and Process Heaters (Boiler MACT) (78 Fed. Reg. 7138). In January 2013, the EPA published its final Boiler MACT (maximum achievable control technology) rule. The NAM and business and environmental groups filed legal challenges in a federal appeals court, and the agency received 10 petitions for reconsideration, including one filed by the NAM that also requested reconsideration of related rules involving air pollutants for area sources (Boiler GACT, or generally available control technology) and commercial and solid waste incineration units. The EPA estimates that the MACT portion of the rule alone will impose capital costs of near $5 billion, plus $1.5 billion more in annual operating costs. The NAM will continue to advocate achievable and affordable Boiler MACT regulations. While the rule itself has improved over time, there are still flaws and unsettled legal and regulatory issues that impose significant costs and uncertainty for manufacturers. In the final rule notice, the EPA expressed concerns over "potential small entity impacts." However, the agency determined that, since it had conducted regulatory flexibility analysis for a different but related rule, it did not need to conduct similar analysis for this extremely costly rule.

EPA: National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Nine Metal Fabrication and Finishing Source Categories (NESHAP 6X) (73 Fed. Reg. 42978). The NESHAP 6X regulations became effective July 23, 2008, for new sources, and July 25, 2011, for existing sources. NESHAP 6X is an air toxics regulation on metal fabrication and finishing operations (i.e., welding). Among other requirements, NESHAP 6X requires ongoing, indefinite, quarterly visual emissions monitoring for welding operations and for abrasive blasting operations, even after months or years of "zero visible emissions" have been recorded. As one might expect, the EPA certified that the rule "will not have a significant economic impact on a substantial number of small entities."

EPA and the Army Corps of Engineers: Definition of "Waters of the United States" Under the Clean Water Act (80 Fed. Reg. 37054). On May 27, 2015, the EPA and Army Corps of Engineers finalized a rule to greatly extend federal jurisdiction of Clean Water Act programs

well beyond traditional navigable waters to tributaries, flood plains, adjacent waters and vaguely defined "other waters." The rule gives federal agencies direct authority over land-use decisions that Congress had intentionally reserved to the states. Its vague definitions subject countless ordinary commercial, industrial and even recreational and residential activities to new layers of federal requirements under the Clean Water Act. For manufacturers, the uncertainty of whether a pond, ditch or other low-lying or wet area near their property is now subject to federal Clean Water Act permitting requirements is a regulatory nightmare, which can introduce new upfront costs, project delays and threats of litigation. As of October 9, 2015, the rule has been stayed nationwide by the U.S. Court of Appeals for the Sixth Circuit, pending resolution of litigation. When one considers the number of small manufacturers and farmers that this rule will impact, it is confounding that the EPA certified that the rule will not have a significant economic impact on a substantial number of small entities.

Interagency Working Group on Social Cost of Carbon: Technical Support Document, Social Cost of Carbon for Regulatory Impact Analysis. In May 2013, the administration increased its estimates of the "social cost" of emitting carbon dioxide (CO_2) into the atmosphere (i.e., social cost of carbon). As a result, the new estimates allow agencies to greatly increase the value of benefits of regulations that target or reduce CO_2 emissions. The process for developing the social cost of carbon estimates was not transparent and failed to comply with OMB guidelines and information quality obligations. Many of the inputs to the models were not subject to peer review, and the interagency working group that developed the new estimates failed to disclose and quantify key uncertainties to inform decision makers and the public. Despite wide public concern over the new estimates, agencies are using them to justify the costs of many of the costliest federal regulations. The OMB public comment period initiated at the end of 2013 yielded significant concerns by stakeholders that have never been adequately addressed, and federal agencies continue to rely on the 2013 social cost of carbon estimates that were developed and finalized without any public participation.

National Labor Relations Board (NLRB): Ambush Elections (79 Fed. Reg. 74308). On April 14, 2015, the NLRB's "ambush elections" rule became effective. The new rule shortens the time in which a union election can take place to as little as 14 days and limits allowable evidence in pre-election hearings. The NLRB provided no evidence supporting the dramatic change in policy. Business owners would effectively be stripped of legal rights ensuring a fair election, and those who lack resources, or in-house legal expertise, will be left scrambling to hastily navigate and understand complex labor processes. The compressed time frame for elections could deny employees the opportunity to make fully informed decisions about unionization. The rule also requires all employers to turn over their employees' personal e-mail addresses, home and personal cell phone numbers, work locations, shifts and job classifications to union organizers. Employees have no say in whether their personal information can be disclosed, and the recipient of the personal information has no substantive legal responsibility to safeguard and protect workers' sensitive information. The rule also provides no restriction on how the private information can be used, and employees have no legal recourse to hold accountable an outside group that compromises this important private information.

NLRB: Joint-Employer Standard (Browning-Ferris Industries of California, Inc. (362 NLRB No. 186)). On August 27, 2015, the NLRB issued a decision in the Browning-Ferris Industries, Inc. case, which redefines the 30-year-old joint-employer standard, calling into question what type of relationship one employer has with another. The previous standard deemed businesses joint employers only when they share direct and immediate control over essential terms and conditions of employment, including hiring, firing, discipline, supervision and direction. Now, however, manufacturers who contract out for any product or service with another

company could find themselves in a joint-employer relationship triggering responsibility for collective bargaining agreements and other parts of the National Labor Relations Act. The previous standard is one that all industries understood and had been operating with for more than 30 years. Due to the fact that there has been no change in circumstance in the business community, the change in this standard is unjustified. Manufacturers will now have to reanalyze all business relationships and how they do business in the future.

b. Currently Proposed Regulations

U.S. Consumer Product Safety Commission (CPSC): Mandatory Standard for Recreational Off-Highway Vehicles (79 Fed. Reg. 68964). In October 2014, the CPSC proposed a mandatory standard for recreational off-highway vehicles (ROVs) despite admitting that it had no evidence showing its proposed changes would improve safety. The proposal violates statutory requirements that the agency defer to voluntary standards and, when issuing mandatory standards, to issue only performance-based criteria and not design mandates. The CPSC's insistence on a mandatory standard will compromise the mobility and utility of the vehicles in the off-highway setting for which they are intended, negatively impact safety by limiting research and innovation and harm consumer demand. The result of this agency action would be the loss of thousands of manufacturing and retail jobs. Industry analysis has shown that at least 90 percent of serious incidents with ROVs would not have been affected by the CPSC proposal, but were instead caused by operator actions. If the rule were to be finalized, the variety of products available to consumers would be greatly limited as many features would be illegal and consumer demand for new vehicles would significantly decrease. In the CPSC's initial regulatory flexibility analysis, the commission found that the proposed rule "will not likely have a significant direct impact on a substantial number of small firms." However, the agency's analysis fails to consider dealers, other than those that would be considered "importers."

CPSC: Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices (78 Fed. Reg. 69793). In November 2013, the CPSC issued a proposed rule that would place significant burdens on manufacturers and retailers of consumer products and negatively impact the highly successful voluntary recall process. The proposed rule would make voluntary corrective action plans and voluntary recalls legally binding, increasing enforcement jeopardy and legal consequences in product liability, other commercial contexts or in a civil penalty matter. The proposal would eliminate a company's ability to disclaim admission of a defect or potential hazard. The proposed rule would also empower CPSC staff to include compliance programs in corrective action plans. The CPSC lacks the statutory authority to proceed with binding regulations for voluntary programs. The success of our consumer product recall system is based on a strong cooperative relationship between the CPSC and the companies it regulates. The rule removes longstanding incentives for firms to proactively cooperate with the CPSC and could seriously threaten the Fast-Track recall program, which the CPSC itself highlights as a model of good governance and was implemented as a way to assist small firms to issue effective recalls. Small businesses that would be impacted by the proposed rule include manufacturers, importers, shippers, carriers, distributors and retailers. However, the CPSC failed to include an initial regulatory flexibility analysis in its proposed rule.

DOL: Contractor Blacklisting, Implementation of Executive Order 13673 (Fair Pay and Safe Workplaces). The executive order, proposed rule and guidance could bar federal contractors from new work if there has even been an allegation of a labor law violation in the past three years. It would apply to contracts valued at $500,000 or more and will be implemented by 2016. The DOL will issue guidance through notice and comment and OMB—through the Federal Acquisition Regulatory Council—will spearhead the issuance of a

regulation. First and foremost, the president does not have the legal authority to make the regulatory changes that will follow from this order. By directing the DOL to develop guidance that will establish degrees of violations not included in the underlying statutes, the executive order significantly amends the enforcement mechanisms Congress established for these laws. In addition, the order disregards existing enforcement powers the administration already has through federal acquisition regulations and labor laws as well as the longstanding process by which suspension and debarment actions are taken. This process is set forth in the Federal Acquisition Regulation (FAR) and specifically in FAR Part 9.4. Each agency has the ability to determine, through the agency's suspension and debarment official, whether the government should refrain from doing business with a particular contractor because the contractor is not "presently responsible." Factors taken into account for making such a determination include whether there has been a finding of fraud committed on the contract and/or willful and serious violations of other U.S. laws. Furthermore, the agency official may consider whether the contractor has taken measures to remediate past bad actions or eliminated systemic problems from the past. Rather than improving upon these existing processes, the executive order would unnecessarily create additional burdens on contractors and further complicate an already complex contracting process.

DOL: Federal Contractor Paid Sick Leave Proposed Rule (81 Fed. Reg. 9592). As directed by last year's Executive Order 13706, the DOL released a proposed rule requiring all federal contractors and subcontractors to provide to employees seven days of paid sick leave annually, which can be used for personal illness as well as leave allowing for family care. This will go into effect for every newly awarded contract starting January 1, 2017. This new mandate will apply to any contractors' or subcontractors' employees working "on" or "in connection with" any new contracts, and there is no dollar or employee threshold for the requirement to apply. Furthermore, the days accrued will also carry over into the following year. There is a lot of confusion about this new mandate and how it will affect leave programs already in place at certain contractors and subcontractors. Manufacturers that already provide paid time may have to start tracking time in hourly increments if an employee is taking leave under the Family Medical Leave Act.

DOL's OSHA: Improve Tracking Workplace Injuries and Illnesses (78 Fed. Reg. 67253 and 79 Fed. Reg. 47605). The proposed rule would change current reporting requirements for employer injury and illness logs and permit OSHA to publish the information on its website. While the agency has the statutory authority to collect the information, the statute does not authorize OSHA to make the information publicly available. The proposed rule presents privacy issues for employees as the information contained in injury and illness logs includes personally identifiable information, as well as other private information about individual employees. This information should not be available for public consumption. The employer reports also include information that is unrelated to work activity, which, without context, could mischaracterize a company's safety record. The NAM believes that the existing recordkeeping system is sufficient to allow employers to identify and address hazards in their workplaces. Finally, despite lacking statutory authority, OSHA issued an update to its proposal that would place companies in enforcement jeopardy if the agency determines that a requirement such as additional training or even reflective clothing is an "adverse action" in response to an employee injury report. Finally, in a supplement to the proposed rule, OSHA provided no regulatory text, but it suggests in the questions it posed that a mere posting of a company's safety record could be viewed by the agency as the company discouraging the reporting of incidents. These proposed updates would inject uncertainty and ambiguity into the workplace safety dynamic. Current protections for employees from retaliation in response to injury reports are comprehensive, well-established and support company initiatives to improve the health and well-being of employees.

DOL's Wage and Hour Division Proposed Rule Regarding Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (80 Fed. Reg. 38516). Last year, the DOL proposed to increase the minimum salary threshold from $23,440 to $50,660 for employees to be exempted from overtime pay pursuant to the Fair Labor Standards Act (FLSA). The proposal would also automatically tie future salary threshold increases to the Consumer Price Index, which could lead to another substantial increase in only a few short years. Under the FLSA, certain employees are exempt from overtime pay if they meet certain requirements. In 2004, the rules were amended to exempt employees if they made more than $23,440 ($455 per week) and performed duties in certain categories or in a managerial or professional role. This proposed dramatic increase will require manufacturers to reclassify certain salaried employees as hourly, making them eligible for overtime pay.

Equal Employment Opportunity Commission (EEOC) Employment Information Report (EEO-1) Form Change (81 Fed. Reg. 5113). The proposed form change would require all employers with 100 or more employees to submit an employee compensation based on sex, race and ethnicity, categorized in 12 pay bands and 10 job categories. The administration believes this will encourage compliance with equal pay laws, and agencies will be able to target enforcement more effectively by focusing efforts where there are grave discrepancies. The proposal and expanded recordkeeping (the EEO-1 Report would expand from 180 data cells to approximately 3,600) requirements would put a company at risk of publicly disclosing employees' private information, potentially exposing proprietary information of a company. Moreover, the proposal would violate the Paperwork Reduction Act—it is unnecessary and duplicative. The agency also failed to employ sound rulemaking principles that are outlined in Executive Order 13563. The proposal would fail to accomplish the stated regulatory objectives.

c. Anticipated Proposed Regulations

CPSC: Mandatory Standard for Table Saws (76 Fed. Reg. 62678). In October 2011, the CPSC initiated rulemaking procedures to establish mandatory safety standards for table saws. The rulemaking, in its current trajectory, would potentially seek to impose a standard that could only be achieved through the use of one claimed patented technology. Regulation should not be used to advantage one technology or one company over another. The Consumer Product Safety Act (CPSA) dictates when the Commission can issue a mandatory standard: only upon a finding that an existing voluntary standard would not prevent or adequately reduce the risk of injury in a manner less burdensome than the proposed CPSC mandatory standard. Data used by the CPSC on alleged table saw injuries is questionable and outdated and is not relevant to current voluntary standards. If the CPSC proceeds with a mandatory standard, such action would undermine the industry's incentive to develop new alternative table saw safety technology and would impose unnecessary and significantly increased costs on consumers. In issuing an advance notice of proposed rulemaking, the CPSC fails to even mention the costs to small businesses, such as carpenters and contractors, in its discussion on economic considerations. According to the Power Tool Institute, the CPSC's proposal would increase the cost of each benchtop table saw by approximately $1,000—4 times the average price and an $875 million impact only for the benchtop category of table saws. Such a burden is not justifiable for Do It Yourself or small contractor customers. Unfortunately, this rulemaking illustrates a trend at the agency where the CPSC has failed to conduct adequate cost-benefit analyses with its rulemakings and imposes prohibitive costs on manufacturers and consumers without accounting for the actual risks associated with the products.

IV. Reducing Regulatory Impediments

Manufacturing in America is gaining momentum, but it could be much stronger if federal policies did not impede growth. If we are to succeed in creating a more competitive economy, we must reform our regulatory system so that manufacturers can innovate and make better products instead of spending hours and resources complying with inefficient, duplicative and unnecessary regulations. Manufacturers are committed to commonsense regulatory reforms that protect the environment and public health and safety as well as prioritize economic growth and job creation.

Manufacturers support reform proposals that would fundamentally change the regulatory process with the goal of improving the quality of rules that agencies issue. Leaders in Washington must view regulatory reform as more than just a rule-by-rule process but instead as a system-by-system and objective-by-objective review. The NAM recommends a number of reforms outlined below that would improve the system through which modern rulemaking is conducted.

a. Increase Sensitivity to Small Business

The Regulatory Flexibility Act of 1980 (RFA) requires agencies to be sensitive to the needs of small businesses when drafting regulations. It has a number of procedural requirements, including that agencies consider less costly alternatives for small businesses and prepare a regulatory flexibility analysis when proposed and final rules are issued. In 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA), which requires the EPA and OSHA to empanel a group of small business representatives to help consider a rule before it is proposed. In recognizing the importance of the SBREFA panel process, the 111th Congress expanded this requirement to include the new Consumer Financial Protection Bureau when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Lawmakers have universally supported the RFA's provisions, but Congress needs to strengthen the law and close loopholes that agencies use to avoid its requirements. Unfortunately, agencies are able to avoid many important RFA requirements by simply asserting that a rule will not impact small businesses significantly. A recent analysis in the Administrative Law Review shows that agencies avoided the requirement of the RFA for more than 92 percent of rules issued between the fall regulatory agendas of 1996 and 2012.[7] Among the reasons for this small number of regulations requiring a regulatory flexibility analysis is the exclusion of "indirect effects." In addition, despite the success of the small business panel process, it only applies to three agencies. The RFA's requirements are especially important to improving the quality of regulations and have saved billions of dollars in regulatory costs for small businesses. In January 2016, the Small Business Administration's (SBA) Office of Advocacy—an independent office helping federal agencies implement the RFA's provisions—issued its annual report indicating that it helped save small businesses more than $1.6 billion in FY 2015 in first-year cost savings. Since 1998, the Office of Advocacy indicates that the RFA has yielded nearly $130 billion in savings for small businesses. Imagine the positive impact on regulations if agencies were not able to avoid the RFA's requirements so easily.

[7] See Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN.L. REV. 65, 69, 99 (2015) (identifying only 1,926 rules out of 24,787 as having completed RFA analyses).

The House has already passed legislation—the Small Business Regulatory Flexibility Improvements Act of 2015 (H.R. 527), introduced by House Small Business Committee Chairman Steve Chabot (R-OH)—which would close many of the loopholes that agencies exploit to avoid the RFA's requirements. The NAM supports H.R. 527 and urges Senate consideration. Agency adherence to the RFA's requirements is important if regulations are to be designed in a way that protect the public, workers and the environment without placing unnecessary burdens on small businesses. Through careful analysis and an understanding of both intended and unintended impacts on stakeholders, agencies can improve their rules for small entities, leading to improved regulations for everyone.

b. Streamline Regulations Through Sunsets and Retrospective Review

Our regulatory system is broken, unnecessarily complex and inefficient, and the public supports efforts to streamline and simplify regulations by removing outdated and duplicative rules. Through a thoughtful examination of existing regulations, we can improve the effectiveness of both existing and future regulations. Importantly, retrospective reviews could provide agencies an opportunity to analyze, revise and improve techniques and models used for predicting more accurate benefit and cost estimates for future regulations. As Michael Greenstone, former chief economist at the Council of Economic Advisers under President Obama, wrote in 2009, "The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. That is the point when the least is known, and any analysis must rest on many unverifiable and potentially controversial assumptions."[8] Retrospective review of existing regulations should include a careful and thoughtful analysis of regulatory requirements and their necessity as well as an estimation of their value to intended outcomes.

For an agency to truly understand the effectiveness of a regulation, it must define the problem that the rule seeks to modify and establish a method for measuring its effectiveness after implementation. In manufacturing, best practices include regular reprioritizations and organized abandonment of less useful methods, procedures and practices. The same mentality should apply to regulating agencies: the retrospective review process should be the beginning of a bottom-up analysis of how agencies use their regulations to accomplish their objectives. Agencies should look to the private sector and the concept of "lean manufacturing" as a model for how to improve our regulatory system. Many manufacturers have transformed their operations by adopting a principle called "lean thinking," where they identify everything in the organization that consumes resources but adds no value to the customer. They then look for a way to eliminate efforts that create no value.

In the government setting, agencies might identify anything that is not absolutely necessary to achieve the regulatory outcome and eliminate it. When considering a new regulation or reviewing existing requirements, agencies must first define the problem, which should include early participation by all stakeholders. They must engage in a bottom-up interagency analysis of how agencies use regulations, guidance and paperwork requirements to accomplish objectives. It is vital to identify all inefficiencies and determine how to eliminate efforts and processes that create no value or assist in meeting objectives. Finally, agencies must institutionalize these best practices.

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[8] Michael Greenstone, "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," in David Moss and John Cisternino, eds., *New Perspectives on Regulation*, The Tobin Project, 2009, p. 113, http://tobinproject.org/sites/tobinproject.org/files/assets/New_Perspectives_Ch5_Greenstone.pdf.

The administration strongly promotes the benefits of conducting retrospective reviews. Executive Order 13563 directs agencies to conduct "retrospective analysis of rules that may be outmoded, ineffective, insufficient or excessively burdensome, and to modify, streamline, expand or repeal them in accordance with what has been learned." Retrospective review of regulations is not a new concept, and there have been similar initiatives over the past 40 years. In 2005, the OMB, through the OIRA, issued a report, titled "Regulatory Reform of the U.S. Manufacturing Sector." That initiative identified 76 specific regulations that federal agencies and the OMB determined were in need of reform. In fact, the NAM submitted 26 of the regulations characterized as most in need of reform. Unfortunately, like previous reform initiatives, the 2005 initiative failed to live up to expectations, and despite efforts by federal agencies to cooperate with stakeholders, the promise of a significant burden reduction through the review of existing regulations never materialized.

To truly build a culture of continuous improvement, retrospective reviews must be institutionalized and made law. One of the best incentives for high-quality retrospective reviews of existing regulations is to sunset rules automatically that are not chosen affirmatively to be continued. The NAM supports the Regulatory Review and Sunset Act (H.R. 2010), introduced by Rep. Randy Hultgren (R-IL), which would implement a mandatory retrospective review of regulations to remove conflicting, outdated and often ineffective regulations that build up over time. If an outdated rule has no defender or continued need for existence or is shown to have decreased in effectiveness over time, it should be sunset.

Adopting lean thinking into the review of existing regulations could produce more robust and significant reductions in regulatory burdens while maximizing the benefits associated with protecting health, safety and the environment. If agencies were conducting this kind of review, we would see requests to Congress to change statutes to allow for greater flexibility in a number of regulatory programs. Rep. Hultgren's bill includes a provision directing agencies to report to Congress on needed legislative changes that would assist them as they implement regulatory changes as a result of their reviews. The necessity of legislative changes should be an opportunity, not a roadblock, to any proposal.

The power of inertia is very strong. Without an imperative to review old regulations, it will not be done, and we will end up with the same accumulation of conflicting, outdated and often ineffective regulations that build up over time. These types of systems need to be put in place throughout the government to ensure regulatory programs are thoughtful, intentional and meet the needs of our changing economy.

c. Strengthen and Codify Sound Regulatory Analysis

The complexity of rulemaking and its reliance on highly technical scientific information has only increased since the passage of the Administrative Procedure Act (APA) in 1946. Our administrative process has not kept up with those changes, and agency accountability is lacking without meaningful judicial review. Moreover, the process by which the government relies on complex, scientific information as the basis for rules should be improved and subject to judicial review. Efforts to encourage peer review of significant data and to create consistent standards for agency risk assessment should be part of that process. The NAM supports legislative reforms to the APA to incorporate the principles and procedures of President Clinton's 1993 Executive Order 12866 into the DNA of how every rule is developed. Manufacturers also support legislation that would improve the quality of information that agencies use to support their rulemakings. President Obama reaffirmed the principles of sound rulemaking when he issued Executive Order 13563, stating,

> Our regulatory system must protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. . . . It must measure, and seek to improve, the actual results of regulatory requirements.

Manufacturers and the general public agree with these principles and believe the regulatory system can be improved in a way that protects health and safety without compromising economic growth. Agencies should, among other things, use the best available science, better calculate the benefits and costs of their rules, improve public participation and transparency, use the least burdensome tools for achieving regulatory ends and specify performance objectives rather than a particular method of compliance to improve the effectiveness of regulatory measures.

Manufacturers and other businesses are often asked which regulation is the most burdensome. It is a difficult question to answer because the cumulative costs of federal, state and local regulations are extremely complex. Agencies must better consider the cumulative effects of their regulations and requirements. Important reform measures, such as Sen. Rob Portman's (R-OH) Regulatory Accountability Act, would require agencies to consider the cumulative costs of regulatory requirements. Executive Order 13563 and OMB guidance for agencies both articulate this principle. President Obama also issued Executive Order 13610, which directs agencies to consider "the cumulative effects of their own regulations, including cumulative burdens . . . and give priority to reforms that would make significant progress in reducing those burdens while protecting public health, welfare, safety and our environment." Agency adherence to each of these regulatory principles is vital if we are to implement fundamental change to our regulatory system that improves the effectiveness of rules in protecting health, safety and the environment while minimizing the unnecessary burdens imposed on regulated entities.

d. Improve Congressional Review and Analysis of Regulations

Congress is at the heart of the regulatory process and produces the authority for the agencies to issue rules, so it is also responsible, along with the executive branch, for the current state of our regulatory system. While Congress does consider some of its mandates' impacts on the private sector through regulatory authority it grants in law, it has less institutional capability for analysis of those mandates than the executive branch. Congress does not have a group of analysts who develop their own cost estimates of proposed or final regulations. Over the past two decades, members of Congress have proposed to create a congressional office of regulatory analysis. As the Congressional Budget Office parallels the OMB, so too should Congress have a parallel to OIRA.

This institutional change to the regulatory system could encourage more thoughtful analysis of the regulatory authority Congress grants in statutes, provide Congress with better tools in analyzing agency regulations and allow Congress to engage in more holistic reviews of the overlapping and duplicative statutory mandates that have accumulated over the years. The NAM supports legislative proposals that would provide Congress with an office to analyze the prospective impact of economically significant rules in addition to conducting retrospective reviews. Not only would this office give lawmakers better information about the potential impacts

of a proposed regulation, but it would also provide agencies with analysis conducted by an objective third party. This is an important rethinking of the institutional design of our regulatory system and could lead to regulations that more effectively meet policy objectives while reducing unnecessary burdens.

e. Support Centralized Review of Agencies' Regulatory Activities

Executive Order 12866 defines the OIRA's regulatory review responsibilities. The OIRA reviews significant rules issued by executive branch agencies and the analyses used to support those rules at both their draft and final stages. The office applies a critical screen to the contents of regulation, agencies' analytical rigor, legal requirements affecting the proposal and the president's priorities and philosophy. Nowhere else in the government does this take place. Single-mission agencies are frequently effective in accomplishing their objectives. This intense focus on a relatively narrow set of policies can weaken their peripheral vision, however, including their assessment of duplication between agencies, cumulative impacts of similar rules on the same sector of the economy or other broader considerations. The OIRA is the only agency that brings to bear a government- and economy-wide perspective. For that reason, the OIRA is a critical institution in our regulatory process for conducting a centralized review of the agencies' regulatory activities, facilitating interagency review, resolving conflicts and eliminating unnecessary duplication.

A key responsibility of the OIRA is to ensure that regulating agencies are meeting the requirements of Executive Order 12866 for a significant regulatory action. The executive order states, "Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Importantly, the OIRA facilitates public participation in the regulatory process and helps ensure that agencies' analyses, to the extent possible, are accurate. Without quality analysis, it is difficult to ensure that regulations are meeting health, safety and environmental objectives "while promoting economic growth, innovation, competitiveness and job creation," as stated in Executive Order 13563.

Despite its critical function, even as the size and scope of the government has increased, the OIRA has shrunk. As the OIRA's staff was reduced from a full-time equivalent ceiling of 90 to fewer than 40 employees today, the staff dedicated to writing, administering and enforcing regulations has increased from 146,000 in 1980 to 290,690 in 2013. To ensure that the OIRA can fulfill its current mission, additional staff and resources are necessary. Much has been made about the length of OIRA reviews, but additional resources would allow OIRA analysts to do their jobs more quickly.

By expanding the OIRA's ability to provide objective analysis, to conduct thoughtful regulatory review and to work with regulating agencies, federal regulations will meet health, safety and environmental objectives more effectively at a much lower cost to businesses. A modest investment in this institution will pay back significant returns to the entire economy.

f. Hold Independent Regulatory Agencies Accountable

The president does not exercise similar authority over independent regulatory agencies, such as the Federal Communications Commission, the NLRB, the Securities and Exchange Commission and the CPSC, as he does over other agencies within the executive branch. Independent agencies are not required to comply with the same regulatory principles as

executive branch agencies and often fail to conduct any analysis to determine expected benefits and costs.

The president's bipartisan Council on Jobs and Competitiveness made recommendations in its interim and final reports to encourage Congress to require independent regulatory agencies to conduct cost-benefit analyses of their significant rules and subject their analysis to third-party review through the OIRA or some other office. Congress should confirm the president's authority over these agencies. If there is consensus that this process makes executive branch rules better, why would we not want to similarly improve the rules issued by independent regulatory agencies? Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process. Independent regulatory agencies often dismiss sound regulatory analysis as a hindrance to their abilities to regulate. However, the case for the inclusion of independent regulatory agencies in a centralized review of regulations is clear, and Congress should act to make it certain.

g. Enhance the Abilities of Institutions to Improve the Quality of Regulations

As discussed above, the SBA's Office of Advocacy plays an important role in ensuring that agencies thoughtfully consider small entities when promulgating regulations. When Congress created the office in 1976, it recognized the need for an independent body within the federal government to advocate for those regulated entities most disproportionately impacted by federal rules. The office helps agencies write better, smarter and more effective regulations. We urge Congress to support this office and provide it with the resources it needs to carry out its important work.

The Office of Industry Analysis is within the Office of Manufacturing and Services at the Department of Commerce's International Trade Administration and was created to assess the cost competitiveness of American industry and the impact of proposed regulations on economic growth and job creation. The office was created in response to a 2003 executive branch initiative to improve the global competitiveness of the manufacturing sector in the United States and was included as a recommendation in a January 2004 report, titled "Manufacturing in America: A Comprehensive Strategy to Address the Challenges to U.S. Manufacturers." The report states the office should develop "the analytical tools and expertise . . . to assess the impact of proposed rules and regulations on economic growth and job creation before they are put into effect." This office has developed the analytical tools necessary to perform those functions and to provide the Department of Commerce with a strong, thoughtful voice within the interagency review of proposed regulations. The department must speak for manufacturing when rules are being considered. Unfortunately, the office no longer engages in the type of regulatory analysis for which it was established. The cost of regulatory compliance is an important factor influencing our competitive profile within the global economy. The Office of Industry Analysis was created to reduce the unnecessary regulatory burdens placed on domestic firms, and its role as a provider of objective, third-party analysis to regulators should be restored and strengthened.

V. Conclusion

Chairman Chabot, Ranking Member Velázquez and members of the committee, thank you for your attention to these issues and for holding this hearing. We can reform the regulatory system and improve analysis while enhancing our ability to protect health, safety and the environment. Manufacturers are committed to working toward policies that will restore common sense to our broken and inflexible regulatory system. The best way to meet regulatory

objectives while ensuring continued economic growth and employment is by enacting a comprehensive and consistent set of policies that improve regulatory analysis, enhance the quality and transparency of scientific and technical inputs, eliminate waste and duplication and support the institutions and policies that work. These policies must be applied to all agencies, and we must ensure that regulators are sensitive to the needs of small business.

Mr. Chairman and Members of Committee, I am pleased to present my views on how small businesses are impacted by federal regulation. The bulk of my testimony will actually cover how small businesses impact federal rules. Or, at least, how the Regulatory Flexibility Act is designed to ensure that small business has a voice in the process.[1]

I am an attorney with the law firm of Nelson Mullins Riley & Scarborough, LLP. I represent several businesses and run the Coalition for Responsible Business Finance – a group of small businesses that are trying to educate Congress and the federal government on how non-traditional lending provides tremendous value for small businesses and the economy.[2] The businesses I represent are concerned with how regulation impacts their bottom-lines, whether they will be treated fairly by regulators, and whether they will have a legitimate seat at the regulatory policy table. However, I am not presenting this testimony directly on my clients' behalf. Rather, my testimony this morning is drawn from my two decades of work on small business regulatory issues and my overall desire to bolster the voice of small business in the regulatory process.

My first job in Washington was with the EPA. I served under both Administrator Bill Reilly and Administrator Carol Browner. After learning about regulatory policy development from within government, I joined the Washington office of the National Federation of Independent Business (NFIB). One of my fondest memories was working on NFIB's campaign to prevent small businesses from being sued under the Superfund law just because they sent household garbage to their local landfill. That was the story of Barbara Williams of Gettysburg, Pennsylvania who I

[1] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980), amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857

[2] Coalition for Responsible Business Finance (CRBF). Accessible at: http://www.ResponsibleFinance.com.

was honored to be with when President George W. Bush signed the small business superfund bill on January 11, 2002.[3]

Later that month, I was unanimously confirmed to head the Office of Advocacy at the U.S. Small Business Administration (SBA). The Office of Advocacy is responsible for overseeing the Regulatory Flexibility Act.[4] I served as Chief Counsel for Advocacy until October 2008. During my tenure, the Office of Advocacy issued approximately 300 public comment letters to 60 agencies (averaging 38 per year).

I have remained deeply interested in how small businesses are impacted by regulation and how small business involvement in regulatory decision-making can benefit regulatory policy. I serve as an advisor for NFIB's Small Business Legal Center and for the SBE Council's Center for Regulatory Solutions and I am trying to create the Small Business Regulation Committee for the American Bar Association's Section on Administrative Law and Regulatory Practice. I also serve on the Board of Directors for the Public Forum Institute which is involved in the Policy Dialogue on Entrepreneurship, the Global Entrepreneurship Week initiative, and the Global Entrepreneurship Congress. The most recent congress was held last month in Medellin, Colombia and I was honored to participate.

History of the Regulatory Flexibility Act

One of the top five recommendations from the 1980 White House Conference on Small Business was for a law requiring regulatory impact analysis and a regular review of regulations. That recommendation became a reality when President Jimmy Carter signed the Regulatory Flexibility Act into law on September 19, 1980.

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[3] *Small Business Liability Relief and Brownfields Revitalization Act*, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

[4] *See* http://www.sba.gov/advocacy.

The rationale for passage of the Regulatory Flexibility Act in 1980 still exists today. That rationale is based on the critical role small businesses play in our economy and an understanding of how small firms are disproportionately impacted by regulation (research-based proof that "one-size-does-not-fit-all"). Recent data show that small firms create almost 2/3 of the net new jobs in this country and that small businesses lead America's innovation economy, producing 16 times more patents per employee than their larger business competitors.[5] At the same time, research shows that the $2.028 trillion cost of federal government regulations hits small businesses the hardest.[6] Small businesses with fewer than 50 employees shoulder $11,724 per employee per year to keep up with regulatory mandates.[7] That is more than twice the cost of healthcare.[8] Plus, the costs for small firms are 29 percent higher per employee than for firms with 100 or more employees. The disproportionate regulatory impact is even more pronounced for environmental regulations where small firms bear over 3 times the costs per employee than their larger business competitors.[9]

Those reasons led to the enactment of the Regulatory Flexibility Act in 1980. The Act directs all agencies that use notice and comment rulemaking to publicly disclose the impact of their regulatory actions on small entities and to consider less burdensome alternatives if a proposal is likely to impose a significant economic impact. The law authorizes SBA's Chief Counsel for Advocacy to appear as amicus curiae in Regulatory Flexibility Act challenges to rulemakings and it requires SBA's Office of Advocacy to report annually on agencies' compliance with the Regulatory Flexibility Act.

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[5] *Frequently Asked Questions,* SBA Office of Advocacy (updated March 2014).
[6] W. Mark Crain and Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* (September 10, 2014).
[7] *Id,* at page 2.
[8] ASPE Research Brief, U.S. Department of Health and Human Services, *Health Insurance Marketplaces 2016: Average Premiums After Advance Premium Tax Credits in the 38 States Using the Healthcare.gov Eligibility Platform,* at table 2 (estimating costs of $408 per month) (January 21, 2016).
[9] Crain & Crain at page 2 (annual costs per employee for firms with under 50 employees is $3,574 and costs per employee for firms with 100 or more employees is $1,014).

From the time of enactment up to 1995, agency attention to the Regulatory Flexibility Act was disappointing and committees in the U.S. House of Representatives held hearings and drafted amendments to strengthen the Regulatory Flexibility Act.[10] The Small Business Regulatory Enforcement Fairness Act (SBREFA) passed Congress and was signed into law by President Clinton in March of 1996.[11] Those amendments to the Regulatory Flexibility Act established formal procedures for the EPA and for the Occupational Safety and Health Administration (OSHA) to receive input from small entities prior to the agencies proposing rules.[12]

Early in my tenure as Chief Counsel, there was a realization that government could still do a better job incorporating small business considerations into rulemaking. We felt that in order to change the attitudes of regulators, direction had to come from the top. That led to President George W. Bush signing Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, in August of 2002.[13] The Executive Order directed SBA's Office of Advocacy to train regulatory agencies on how to comply with the Regulatory Flexibility Act and further instructed agencies to consider the Office of Advocacy's comments on proposed rules. More recently, the Small Business Jobs Act codified the Executive Order's requirements for agencies to respond to the Office of Advocacy's comments in final rules.[14]

The latest amendments to the Regulatory Flexibility Act were authored by Senators Olympia Snowe and Mark Pryor and were adopted as part of the Dodd-Frank financial regulatory reform law. That amendment requires the Consumer Financial Protection Bureau (CFPB) to conduct a

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[10] *See, e.g., Strengthening the Regulatory Flexibility Act: Hearing on H.R. 9 before H. Comm. On Small Business*, 104th Cong., Serial No. 104-5 (Jan. 23, 1995); *Job Creation and Wage Enhancement Act of 1995: Hearing on H.R. 9 Before the Subcomm. On Comm. And Admin. Law of the H. Comm. On the judiciary*, 104th Cong. Serial No. 104-3 (Feb. 3 & 6, 1995).

[11] *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. No. 104-121, 110 Stat. 857 (1996).

[12] *See*, 5 U.S.C. sec. 609.

[13] Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 Fed. Reg. 53461 (August 16, 2002).

[14] *Small Business Jobs Act of 2010*, Pub. L. No. 111-240, sec. 1601 (September 7, 2010).

small business panel process ("SBREFA panels") when issuing rules, the same requirement that EPA and OSHA have followed since SBREFA passed in 1996.[15]

What is required by the Regulatory Flexibility Act

The basic spirit of the Regulatory Flexibility Act is for government agencies to analyze the effects of their regulatory actions on small entities and for those agencies to consider alternatives that would allow agencies to achieve their regulatory objectives without unduly burdening small entities.

The Regulatory Flexibility Act covers all agencies that issue rules subject to the Administrative Procedure Act (APA). The Regulatory Flexibility Act requires agencies to publish an initial regulatory flexibility analysis (IRFA) unless the promulgating agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[16] The IRFA is supposed to be a transparent small business impact analysis that includes a discussion of alternatives designed to accomplish the stated objectives of the rule while minimizing impact on small entities. In the case of EPA, OSHA, and the CFPB, the SBREFA panels aid the agencies' analysis and discussion of alternatives. Each SBREFA panel produces a report that includes a small business economic analysis and a detailed exchange of information between the promulgating agency and small entities

The availability of an IRFA allows for a more informed notice and comment process that can guide an agency's formulation of its final rule. Under the Regulatory Flexibility Act, an agency's final rule must contain a final regulatory flexibility analysis (FRFA) if it published an IRFA with its proposal. The FRFA is basically a public response to issues raised in the IRFA.

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[15] *Dodd-Frank Wall Street Reform and Consumer Protection Act,* Pub. L. No. 111-203, sec. 1100G (July 21, 2010).

[16] *See,* 5 U.S.C. sec. 605(b).

Regulatory Flexibility Act in practice.

SBA's Office of Advocacy monitors implementation of the Regulatory Flexibility Act and a full accounting of how agencies are complying with the Act is published annually.[17] Every annual report contains a section on the Office of Advocacy's interaction with the EPA, which should be no surprise because of how much of the federal regulatory burden emanates from EPA. The National Association of Manufacturers study on regulatory burden reported that small manufacturers with 50 employees or less pay an estimated $34,671 per employee to comply with federal regulation.[18] Environmental regulatory costs account for $20,361 of the total (more than half of the total costs are from environmental regulation).

Good news/bad news

The good news is that federal agencies work with SBA's Office of Advocacy and EPA, OSHA, and the CFPB utilize SBREFA panels to explore how each agency can sensitize its regulatory approach to small business. It is encouraging that EPA is willing to hold "pre-panel" sessions with small business stakeholders in order to think through issues they may not have anticipated in developing a rulemaking. It is also good that the CFPB Director generally is public about the Bureau's decision to have a SBREFA panel early on in the regulatory development process. Finally, it is good that OSHA releases its SBREFA panel reports upon their completion (instead of waiting until the agency proposes its rule (EPA and CFPB keep their SBREFA panel reports secret until they publish their proposed rules)).

The bad news is that there are still times when agency deadlines, whether they are judicial, statutory, or political, push careerists to approach the Regulatory Flexibility Act as a set of bureaucratic procedural hurdles. That concern is of utmost concern during this stage of the

[17] *See,* Office of Advocacy annual reports on the Regulatory Flexibility Act, available at https://www.sba.gov/advocacy.
[18] Crain & Crain at page 2.

administration, when the clock is ticking down on when federal regulations will be finalized under President Obama. The end-of-administration phenomenon to cement its legacy through regulation is not unique to the Obama presidency. There are plenty of data, research, and testimony on the subject of "Midnight Regulations."[19] One recent publication estimates 4,000 regulations making their way through the administration at a cost of more than $100 million.[20]

The most obvious example of an agency purposely avoiding the Regulatory Flexibility Act was EPA's recent promulgation of the "Waters of the U.S." rule. The EPA and the U.S. Army Corps of Engineers (the "Corps") certified that the proposed rule would not have a significant economic impact on a substantial number of small businesses. EPA argued that their proposal would not expand jurisdiction, but would narrow the jurisdiction of the Clean Water Act.[21] To EPA's credit, the agency had worked with SBA's Office of Advocacy for several years and had engaged directly with small business stakeholders. According to testimony by Charles Maresca, who heads the Office of Advocacy's legal team, the Corps met with small entities well before issuing the proposed rule on April 21, 2014.[22]

Unfortunately, EPA did not seem to listen to those small business interests and instead concocted an argument that its rule would not impose additional costs on small businesses. Mr. Maresca pointed out that EPA's own economic analysis estimated a range of permit cost increases from $19.8 - $52 million dollars annually and that wetlands mitigation costs would rise between $59.7 - $113.5 million annually. That background suggests to me that EPA made a deliberate decision

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[19] *See, e.g., Midnight Regulations: Examining Executive Branch Overreach: Hearing before H. Comm. On Science, Space & Technology*, 114th Cong. (Feb. 10, 2016).
[20] Timothy Noah, *Obama pushing thousands of new regulations in Year 8, Politico* (Jan. 1, 1016). Available at: http://www.politico.com/agenda/agenda/story/2016/1/obama-regulations-2016.
[21] *Definition of Waters of the United States Under the Clean Water Act*, 79, Fed. Reg. 22188 (April 21, 2014).
[22] Testimony of Charles Maresca, Director of Interagency Affairs, Office of Advocacy, U.S. Small Business Administration, *An Examination of Proposed Environmental Regulation's Impacts on America's Small Businesses*, United States Senate Committee on Small Business and Entrepreneurship (May 19, 2015).

to avoid the transparent and constructive dialogue with small entities required by SBREFA when pushing forward with the Waters of the U.S. rulemaking.

Another set of policies that is good news is that states continue to experiment with ways to make their regulatory climate more hospitable for small business. In my home state, Governor Charlie Baker led an initiative to review all the Commonwealth's rules in a "spring cleaning" exercise designed to help small business.[23] This is akin to my work as Chief Counsel when the Office of Advocacy worked with several states to encourage the adoption of the Regulatory Flexibility Act at a state level.[24] It is good news that effort continues.

Unfortunately, the bad news is that states also stumble into situations where they want to help, but unintentionally harm small businesses. The Coalition of Responsible Business Finance is monitoring a situation in Illinois where the Senate Committee on Financial Institutions is considering the, "Small Business Lending Act."[25] While it seems as though the goals of transparency and disclosure in the bill are the same as my coalition's, the complex regulatory mandates, expansion of civil and criminal penalties, and prescriptive underwriting standards could actually prevent small businesses from responsibly accessing capital in Illinois. I am hopeful that in Springfield, and in Albany where a similar process started this week, that legislators and regulators will incorporate the views of small businesses before moving forward. That same principal is the foundation of the Regulatory Flexibility Act.

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[23] Massachusetts Governor Charlie Baker, *Executive Order No. 562 To Reduce Unnecessary Regulatory Burden* (March 31, 2015).

[24] U.S. Small Business Administration, Office of Advocacy, *The Small Business Economy 2008, A Report to the President,* pages 262-267 (Feb. 2009). Available at: https://www.sba.gov/sites/default/files/files/sb_econ2008.pdf.

[25] Illinois General Assembly, *Senate Bill 2865* (Introduced Feb. 17, 2016). More information is available at: http://goo.gl/hqAtDB.

How can the Regulatory Flexibility Act work better?

The Regulatory Flexibility Act requires agencies to analyze the direct impact a rule will have on small entities. Unfortunately, limiting the analysis to direct impacts does not accurately portray how small entities are affected by new EPA rules. For instance, when greenhouse gas regulations impose a direct cost on an electric utility, EPA should make public how its proposal will likely affect the cost of electricity for small businesses and include that analysis as part of its work to meet the goals of the Regulatory Flexibility Act. The process works when there is a transparent and candid exchange of views between small business stakeholders and regulators. That exchange works best when small business stakeholders have as much information as possible and I believe that not including analysis of reasonably foreseeable indirect impacts harms the process.

The SBREFA amendments to the Regulatory Flexibility Act in 1996 established the SBREFA panels and have helped force a dialogue between EPA and small business stakeholders. Unfortunately, the process lacks transparency because EPA does not release the SBREFA panel report that must be completed in 60 days, until EPA issues its proposed rule. The time between a completed SBREFA panel report and EPA's proposed rule can be several months or several years. Keeping the valuable small business input secret and hiding the candid exchange of information between EPA and business stakeholders is a disservice to the development of regulatory policy that depends on a robust public exchange of information, even before the formal notice and comment period. I am not promoting the release of confidential interagency information that is a necessary part of the rulemaking process. However, once a SBREFA panel report is finished it is no longer a deliberative process document that deserves to be kept confidential. Regulators should continue to think about ways to improve their proposed regulations, all the way up to publishing their proposed rules. Hiding part of an agency's exchange with the regulated community stifles EPA's ability to gain informed insight up to the date of a proposed rule's publication. OSHA is subject to the same SBREFA panel requirements

as EPA and OSHA releases their SBREFA panel reports as soon as they are completed. I think that if EPA changes its policy to mimic OSHA's, they will benefit from a more transparent SBREFA process.

Finally, I am troubled by what happened with EPA's Waters of the U.S. rule and how its avoidance of the Regulatory Flexibility Act (certification that the rule would not significantly impact a substantial number of small entities in April 2014) could not be challenged until the rulemaking was finalized a year later. EPA's decision on whether it should conduct a full examination of small business impacts and alternatives is a critical point in the rulemaking process. The "certification" part of the Regulatory Flexibility Act is truly the fork in the road when it comes to whether EPA should listen to small businesses and tailor its regulatory approach to accommodate small firms. The Small Business Regulatory Flexibility Improvements Act, passed by this Committee, solves that problem and I am hopeful that the Senate will similarly look towards a solution.

Conclusion:

I commend this Committee's attention to the plight of small businesses that are trying to keep up with the flood of regulatory mandates emanating from our nation's capital. Agencies need to continually hear from you, from the Office of Advocacy, from small business stakeholders like my fellow panelists from the National Association of Manufacturers (NAM) and the National Federation of Independent Business (NFIB), and from small business owners themselves in order to affect positive regulatory change.

Associated Builders and Contractors, Inc.

April 13, 2016

The Honorable Steve Chabot
Chairman
House Small Business Committee
Washington, D.C. 20515

The Honorable Nydia Velázquez
Ranking Member
House Small Business Committee
Washington, D.C. 20515

Dear Chairman Chabot and Ranking Member Velázquez:

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I am writing to applaud the committee for holding the hearing, "Regulation: The Hidden Small Business Tax." Additionally, I want to thank the committee for its work to pass H.R. 527, the "Small Business Regulatory Flexibility Improvements Act of 2015" last year. ABC continues to support this legislation and policies requiring federal agencies to examine economic impacts of proposed rules on small businesses.

For the last seven years, the White House has encouraged federal regulatory agencies to assert their power through rulemaking. These agencies operate relatively unchecked and unsupervised, especially during the early stages of the regulatory process. Many rulemakings are accompanied by poor or incomplete economic cost-benefit forecasting and other data analysis that could have helped to create practical and sustainable rules and regulations. At times, even the will of Congress and the American public are disregarded in order to issue regulations.

Small businesses are the backbone of our nation's economy, and their ability to operate efficiently and free of unnecessary regulatory burdens is critical for our country's economic recovery. Proposed and existing regulations need to be thoroughly examined from cost standpoints to ensure they do not encumber our country's primary job creators.

Requiring federal agencies to more closely examine regulatory impacts on small businesses is paramount to allow small businesses to thrive. Agencies should also conduct a retrospective analysis of existing rules to identify and modify rules in need of reform.

The need for regulatory reform is vital. We applaud the House Small Business Committee for addressing these regulations and the environment of uncertainty they create for America's job builders.

Sincerely,

Kristen Swearingen
Vice President, Legislative & Political Affairs

nacd
National Association of
Chemical Distributors

Advancing **Stewardship,** Creating **Connections**℠

April 14, 2016

The Honorable Steve Chabot
Chairman
Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515

The Honorable Nydia Velazquez
Ranking Member
Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chabot and Ranking Member Velazquez:

I am writing today in support of your effort underlying the hearing titled "Regulation: The Hidden Small Business Tax." The regulatory burden on small businesses in the United States is astounding. Small companies are spending too much time trying to comply with complex rules rather than focusing on how to grow their businesses. Accordingly, we applaud your effort to learn more about this issue and help chart a path forward to reduce this burden on small businesses.

National Association of Chemical Distributors (NACD) and its nearly 440 member companies are vital to the chemical supply chain providing products to over 750,000 diverse companies such as aerospace, agriculture, cosmetics, detergents, electronics, automotive, plastics, paints and coatings, pharmaceuticals, food ingredients, water treatment, and more. These member companies make a delivery every six seconds while maintaining a safety record that is more than twice as good as all manufacturing combined. NACD members, operating in all 50 states through nearly 1,800 facilities, are responsible for more than 155,000 direct and indirect jobs in the United States. NACD members are predominantly small regional businesses, many of which are multi-generational and family owned. The typical chemical distributor has 26 employees and operates under an extremely low margin.

In over 43 years of service to its members, NACD has placed its highest priority on the health, safety, and security of employees, communities, and the environment. In December 1991, the member companies of NACD undertook the association's most important mission ever -- the inception of Responsible Distribution, developed by NACD members for NACD members. Responsible Distribution is a mandatory third-party-verified environmental, health, safety and security program that lets members demonstrate their commitment to continuous performance improvement in every phase of chemical storage, handling, transportation, and disposal. Responsible Distribution also serves to demonstrate NACD members' sensitivity and responsiveness to public concerns and helps them be leaders in their communities, eager to work with local, state, and federal legislators.

Chemical distributors play a unique and integral role in the supply chain. Bulk quantity chemical manufacturers increasingly rely on chemical distributors to market and sell their products in a variety of packaging sizes (smaller quantities) to an incredibly varied customer base.

Because of this broad reach, the chemical distribution industry is highly regulated. A chemical distributor with 10-20 employees in many instances has to comply with hundreds of rules

enforced by dozens of agencies and sub-agencies. Oftentimes, the person charged with the daunting task of ensuring compliance with all of these regulations has other operational or administrative roles within the company. Accordingly, it is essential for agencies to appreciate the structure of a small business when promulgating costly regulations.

One way for agencies such as the Occupational Health and Safety Administration (OSHA) and the Environmental Protection Agency (EPA) to appreciate the impact of regulations on small businesses is through input from Small Business Advocacy Review (SBAR) panels. SBAR panels were created under the Small Business Regulatory Enforcement Fairness Act of 1996 and are designed to collect input on the impact of proposed rules on small businesses and recommend regulatory alternatives to accommodate small businesses. EPA and OSHA are required to review these recommendations and make appropriate revisions to the rule.

Unfortunately, this process has broken down in recent years. Agencies like EPA and OSHA set their sights on regulation and are intent on moving forward without properly considering the impact on small businesses. For example, EPA recently proposed a rule on the Risk Management Program (RMP). While EPA did convene an SBAR panel to review the RMP proposal before it was officially released, EPA sent the Proposed Rule to the Office of Management and Budget ***less than two weeks*** *after the deadline for the SBAR Small Entity Representatives to submit comments to the SBAR Panel and* ***two months before*** *the SBAR Panel submitted its recommendations to EPA*. The regulated community now has until May 13, 2016, to submit comments on RMP because EPA has refused to grant an extension to the deadline. This demonstrates EPA's mission to finalize a rule this year rather than to consider carefully the views and concerns of impacted small businesses.

Additionally, OSHA is currently convening an SBAR Panel to review comments on an extensive Process Safety Management proposal at the same time the regulated community has to provide comments to EPA for the proposed rule on RMP. So, not only are actual regulations an encumbrance on small businesses, but the process through which small businesses have a voice is becoming a burden as well. A small company does not have time to review hundreds of pages of proposed regulations from two separate agencies, provide comments on said regulations, and run its day-to-day operations at the same time.

This sort of reckless disregard for small businesses within the regulated community is dangerous. Agencies must not rush through the rulemaking process to meet an arbitrary or political deadline at the expense of America's small businesses. I encourage you to look closely and consider effective solutions to this important issue.

Sincerely,

Eric R. Byer
President

cc: U. S. House of Representatives Committee on Small Business Members

NSBA
National Small Business Association

April 14, 2016

Chairman Steve Chabot
House Small Business Committee
2371 Rayburn House Office Building
Washington, DC 20515

Ranking Member Nydia Velázquez
House Small Business Committee
2302 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chabot and Ranking Member Velázquez:

On behalf of the National Small Business Association (NSBA), the nation's first small-business advocacy organization, with more than 65,000 small-business members representing every state and every industry across the country, I write to commend your leadership on the committee for holding the hearing: "Regulation: The Hidden Small Business Tax" to examine the burden of federal regulations on small businesses, federal agencies' analyses of the effects of regulations on small businesses, and the need to improve those assessments.

The regulatory climate we find ourselves in today is not one easy or welcoming to small businesses and is why NSBA has been a strong supporter of the *Small Business Regulatory Flexibility Improvements Act of 2015* (*H.R. 527*) which passed the House last year and why we appreciate Chairman Chabot's involvement in Speaker Ryan's Task Force on Reducing Regulatory Burdens.

The total annual cost of the federal regulatory burden on the American public has ballooned to nearly $2 trillion and continues to grow each year. Unfortunately, small businesses disproportionally face higher annual regulatory costs of $10,585 per employee per year, which is 36 percent above the regulatory cost facing large firm. For this reason, our members consistently rank regulatory reform as one of our top ten priority issues for the 114th Congress.

Small businesses continue to struggle under the weight of a seemingly endless stream of federal regulations. The cumulative effect of which, significantly inhibit some small businesses from performing the core functions of their business. The Regulatory Flexibility Act (RFA) and Small Business Regulatory Enforcement Act of 1996 (SBREFA) were enacted in order to require agencies to identify and account for the potentially excessive costs and disproportionate impacts of regulations on small businesses and examine ways to reduce unnecessary regulatory burdens. However, each agency interprets important terms in the existing statute in widely diverse ways and is able to avoid the RFA's requirements as Congress intended.

This is most clearly demonstrated by the Environmental Protection Agency's (EPA's) finding that the Waters of the U.S. (WOTUS) rule would not have a significant impact on small entities. By simply certifying that there was no impact, the EPA was able to avoid the largest requirements placed upon it by these laws. The requirement needs to be streamlined and make uniform those determinations of when the RFA would apply to a rule.

NSBA members are concerned that currently, there does not seem to be any end to the new federal regulations – from the EPA or otherwise. Based on the most recent regulatory agenda, as indicated by the fall 2015 Unified Agenda of Regulatory Actions, there are currently more than 2,000 regulations being promulgated, and 144 of those are economically significant, meaning they will cost the economy more than $100 million each.

H.R. 527 improves and modernizes the RFA, coming at a time when the need for regulatory relief in the small-business community is real and immediate. Allowing small businesses to immediately challenge agencies actions with respect to the RFA will greatly reduce the uncertainty in the system and prevent America's smallest employers from waiting months or even years until rules are finalized to challenge them. Additionally, eliminating the ability of agencies to waive or delay the completion of regulatory flexibility analyses will ensure that agencies complete their requirements under the RFA in a timely manner. Furthermore, NSBA is pleased with the bill's directive requiring each department to convene a small business review panel to discuss any major new regulations before the rules can be implemented. To minimize any significant adverse impact, NSBA supports how it would also expand the scope of the required economic impact analysis to include indirect effects.

Regulatory costs for small businesses are constantly increasing and this impacts their ability to operate efficiently and free of unnecessary regulatory burdens, which is critical for a small business to successfully compete and create jobs. Regulations must be reviewed and old and duplicative regulations removed. Numerous executive orders and laws require these types of reviews; however they must be pursued more diligently.

As a result, NSBA played a critical role in developing the idea of a National Regulatory Budget and is an ardent supporter of its aim to ensure fairness and commonsense in the federal regulatory process. As one of the first supporters of Rep. Steve Scalise's National Regulatory Budget Act of 2014 (H.R. 5184), NSBA recognizes that a regulatory budget will help federal regulators to run their shops the way any small-business owner would—by prioritizing regulations that produce the most benefit for the lowest regulatory cost. Simply put: quality over quantity.

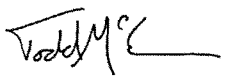
The Small Business Administration Office of Advocacy indicated in its most recent report on the RFA that agencies need to improve in their review of existing regulations. Over the past three

years, the Office of Advocacy has consistently reported that improper certification of no significant impact on small businesses and inadequate analysis of small business impacts are among the most common comments to agencies. This is troubling, because it means that agencies are continuously neglecting to fully consider the position of small businesses when promulgating regulations. This reality makes the work of the House Small Business Committee and of the Speaker's Task Force on Reducing Regulatory Burdens all the more important to the small-business community.

NSBA is a tireless advocate against unfair, unnecessary and disproportionately burdensome regulations. Leading efforts to bolster the SBA Office of Advocacy, NSBA has, for years, worked toward broad process improvements to simplify and streamline the federal regulatory process as well as the U.S. litigation system.

Thank you for your leadership in convening this timely hearing and I look forward to working with you on this important issue for small businesses throughout the country.

Sincerely,



Todd McCracken
President & CEO

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